No. _____

In The
Supreme Court of the United States

SEAN GARNAND AND DAIN SALISBURY,

Petitioners,

v.

GREG MOORE AND PATRICIA MOORE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Can a Circuit Court of Appeals simply elect not to decide purely legal qualified immunity questions over which it has interlocutory appellate jurisdiction?

Can a Circuit Court of Appeals invent a jurisdictional limitation to avoid deciding purely legal qualified immunity questions over which it has interlocutory appellate jurisdiction?

In an interlocutory qualified immunity appeal, can a Circuit Court of Appeals manufacture a claim that is not pled in the Complaint and then, solely based on that manufactured claim, deny qualified immunity for a legally distinct claim that *is* in the Complaint?

PARTIES TO THE PROCEEDING

Sean Garnand and Dain Salisbury, Petitioners on review, were the Defendants-Appellants below.

Greg Moore and Patricia Moore, Respondents on review, were the Plaintiffs-Appellees below. All other parties listed in the case caption were dismissed on October 30, 2019.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All parties before this Court are individuals, although Sean Garnand and Dain Salisbury were both employed by the City of Tucson, a charter city in the State of Arizona, when this lawsuit was filed. No corporations are involved in this proceeding.

RELATED PROCEEDINGS

- *Moore et al. v. Garnand et al.,* No. CV-19-00290, U.S. District Court for the District of Arizona. Order denying motion for summary judgment based on qualified immunity filed August 1, 2022.
- *Moore et al. v. Garnand et al*., No. 22-16236, U.S. Court of Appeals for the Ninth Circuit. Opinion and Memorandum Decisions on interlocutory appeal issued September 29, 2023. Petition for rehearing or rehearing en banc denied November 21, 2023.

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PETITION FOR WRIT OF CERTIORARI

Sean Garnand and Dain Salisbury respectfully petition for a writ of certiorari to review the Memorandum Decision issued by the United States Court of Appeals for the Ninth Circuit in response to Petitioners' interlocutory appeal from the summary judgment denial of qualified immunity.

OPINIONS BELOW

The Ninth Circuit's Memorandum Decision (App. 1-9), which is the subject of this Petition, is not reported but is available at 2023 WL 6372972.

The Ninth Circuit's concurrently issued published Opinion (App. 32-51) is reported at 83 F.4th 743 (9th Cir. 2023).

The district court's order filed August 1, 2022 (App. 10-29), denying Sean Garnand and Dain Salisbury's motion for summary judgment based on qualified immunity, is not reported but is available at 2022 WL 302800.

The district court magistrate judge's order filed March 9, 2022 (App. 52-63), objections to which were resolved by the district court's order filed August 1, 2022, is not reported but is available at 2022 WL 708388.

JURISDICTION

The Ninth Circuit filed its Memorandum Decision and Published Opinion on September 29, 2023 (App. 1-9; App. 32-51).

As to the Memorandum Decision only, Sean Garnand and Dain Salisbury filed a timely petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied on November 21, 2023. (App. 30-31).

Sean Garnand and Dain Salisbury are timely filing this Petition for Writ of Certiorari, directed to the Memorandum Decision only, on February 16, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1983 of Title 42, United States Code (in pertinent part):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ***.

Section 2106 of Title 28, United States Code (in pertinent part):

The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Section 1254(1) of Title 28, United States Code. (App. 85).

Section 1291 of Title 28, United States Code. (App. 85).

Section 1651(a) of Title 28, United States Code. (App. 85).

Section 1331 of Title 28, United States Code. (App. 85).

STATEMENT OF THE CASE

Facts

On May 24, 2019, Greg Moore ("Moore") and Patricia Moore ("Mrs. Moore") filed a 42 U.S.C. Section 1983 lawsuit challenging the constitutionality of actions taken by police as part of an arson and criminal fraud investigation.[1]

The subject investigation began following an arson fire on June 8, 2017. Firefighters responded to a 911 call, encountered a locked building, made forcible entry, put out the fire, and discovered incendiary devices inside.

Moore appeared at the arson scene and spoke to Tucson Fire Investigator Jorge Loya. Moore told Loya that he owned the building through a partnership. Moore stated that the last time he was in the building was "a couple of days ago" to check on some remodeling work. Moore declined to provide Loya with his date of birth. Moore asked for and received a case number, then left the scene without talking to police. Moore told Loya that he had to call his insurance company.

Sean Garnand ("Garnand" or "Petitioner"), a certified Fire Investigator and arson Detective with the Tucson Police Department, was assigned to the case. When he arrived at the scene, Garnand was briefed by

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[1] The Moores alleged, testified to, or otherwise conceded the following facts, all of which Petitioners treated as undisputed for the limited purpose of resolving whether they are entitled to qualified immunity as a matter of law.

Loya. Garnand then applied telephonically for a search warrant to: (1) permit entry into the crime scene to search for and seize evidence; and (2) obtain Moore's DNA, fingerprints, and cellphone.

Dain Salisbury ("Salisbury" or "Petitioner"), a Tucson Police Department Sergeant, witnessed Garnand's telephonic search warrant application. (App. 73-80).

After hearing Garnand's telephonic affidavit, a neutral, detached magistrate judge found probable cause and issued Search Warrant 17 SW 1017 (the "First Search Warrant"). (App. 81-85).

The Moores' Complaint alleges the following as to the First Search Warrant:

> Garnand and Salisbury, who actively participated in the warrant application, failed to use reasonable professional judgment in seeking it, and lacked probable cause to conclude that Greg Moore had directed, or caused, the arson. Any reasonably well-trained police officer in similar circumstances would have known any warrant issued on the evidence Defendants possessed would be invalid. Defendants, in the application, made material misrepresentations and omissions, to convince the issuing judge that Greg Moore had probably engaged in a pattern of arsons[.]

The Moores subsequently stipulated that Garnand and Salisbury had probable cause for the First Search Warrant to the extent it sought permission to enter the crime scene, search for and seize evidence. The Moores

continue to claim, however, that Petitioners lacked probable cause for the seizure of Moore's DNA, fingerprints, and cell phone.

Because Moore left the scene without speaking to police, police contacted him by telephone. Moore told them he did not wish to speak to them then, but that he would be available the following afternoon at his business office.

When Garnand and Salisbury arrived, they were met by Moore and an attorney, James Wadleigh. Wadleigh informed Garnand and Salisbury that he had advised Moore not to answer any questions. Garnand told Moore and Wadleigh that he had a search warrant for Moore's cell phone, fingerprints, and DNA. When Wadleigh informed Garnand and Salisbury that Moore would not be handing over the cell phone, Garnand took the cell phone from Moore's hand, handcuffed Moore, transported him to the police station where mug shots, buccal swabs and fingerprints were obtained, and then released him.

Moore claims that by handcuffing and thereby "seizing" him, Garnand twisted Moore's wrists and caused "extreme discomfort" in violation of his Fourth Amendment rights. Moore's wrists were sore for a couple of days; he never sought medical attention.

On June 14, 2017, Garnand applied for another search warrant, this time directed to items located in Moore's office and the residence he shared with Mrs. Moore. (App. 64-69). The second search warrant application explained, among numerous other facts, that

Garnand was now aware of a 2011 arson fire that, like the June 8, 2017 fire, involved use of a red gasoline container filled with accelerants that had been placed on top of a stove. The 2011 arson fire occurred at another property associated with Moore and was owned by an entity located at Moore's office address. Both fires were followed by insurance claims.

The same neutral, detached magistrate judge who issued the First Search Warrant found probable cause and, on June 14, 2017, issued Search Warrant 17 SW 1037 (the "Second Search Warrant"). (App. 70-72).

The Second Search Warrant authorized the search and seizure of specified categories of evidence at Moore's office and home, *e.g.*, documents pertinent to the two fires, the properties at which the arson fires occurred, and the LLC owners of those properties; financial information related to Moore and his associated businesses; and electronics, including computers.

The Moores allege that the Second Search Warrant lacked probable cause and that "any reasonably well-trained police officer in similar circumstances would have known any warrant issued on the evidence Defendants possessed would be invalid." The Moores alleged that the Second Search Warrant, too, was obtained by means of judicial deception.

Mrs. Moore was home alone when police arrived, rang the doorbell, and served her with the Second Search Warrant. She saw "four military-type officers" who "had their Kevlar vests on," and "guns." Garnand told Mrs. Moore that she was not under arrest. He told

her that "typically we have people stand outside their house," and that if she stayed, she would need to stay off her computer and phone. She elected to stay.

After conducting a safety sweep, Garnand and three other officers then systematically searched the home and seized documents, computers, and other electronic devices.

Mrs. Moore testified that while the search was ongoing, she moved between her kitchen, laundry room, living room, and patio. She was allowed to send an "out of office" email from her computer under police officer supervision, and she was allowed to, and did, use her cell phone.

Neither Garnand nor any other officer present ever told Mrs. Moore that she was not free to leave, and Mrs. Moore never asked if she could leave.

At one point, Garnand asked that Mrs. Moore move to the living room while execution of the Second Search Warrant continued. The Complaint alleges: "Mrs. Moore was confined to the living room of the home during those hours of the search, at most times being monitored by the SWAT officer armed with an assault rifle."

Mrs. Moore testified that the rifle was never pointed at her and that the officer did not threaten her with it. She nonetheless concluded that she was "absolutely" not free to leave, and alleges that her "detention" "escalated into a seizure and arrest."

Mrs. Moore also complains that her work computer was seized from inside the home.

The Second Search Warrant was simultaneously executed at Moore's office. The Moores allege that officers "seized property without probable cause, and beyond the scope of the warrant, in violation of Plaintiffs' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States[.]"

Finally, the Moores claim that the "seizure" of Greg Moore, obtaining and executing the Second Search Warrant, and every investigative act that followed was in retaliation for Moore's refusal to speak to police on June 8, 2017 and/or for the Moores' subsequent filing of three lawsuits and an internal complaint against Garnand and Salisbury. This alleged retaliation, the Moores claim, was in violation of their First Amendment rights.

District Court Proceedings

On February 3, 2022, Petitioners Garnand and Salisbury filed a motion for summary judgment on all the above-described claims, based on qualified immunity ("QI"). In a Rule 56(d) motion, the Moores claimed to need additional discovery before responding to the QI motion.

On March 9, 2022, the magistrate judge ordered Petitioners to produce photographs of the incendiary devices found on June 8, 2017, but otherwise denied further discovery to the Moores and ordered them to

respond to the QI motion within 60 days of receipt. (App. 52-63). Subject to production of the photographs, the magistrate judge granted Garnand and Salisbury's motion to stay discovery until the QI motion was resolved. (App. 62-63). The photographs were promptly produced.

On August 1, 2022, in response to Objections filed by the Moores, the district court reversed the magistrate judge's March 9, 2022 rulings. (App. 27-28). Thus, discovery was allowed to proceed without limitation, the motion to stay discovery pending resolution of QI was denied, and the pending QI motion was "**denied without prejudice and with leave to re-file** after the completion of discovery." (App. 29) (bold emphasis in original).

On August 10, 2022, Petitioners appealed the district court's August 1, 2022 denial of their QI motion.

The Appeal

For reasons it did not explain, the Ninth Circuit divided its decision on Petitioners' interlocutory QI appeal into two parts: (1) a published Opinion directed to the Moores' three First Amendment retaliation claims (App. 32-51); and (2) an unpublished "Memorandum Decision" directed to the Moores' remaining claims. (App. 1-9).

In its published Opinion, the Ninth Circuit reversed the district court's denial of the QI motion as to all three of the Moores' First Amendment retaliation

claims, holding that the Moores "fail[ed] to show that Defendants' conduct violated clearly established law." (App. 34). No party challenged the published portion of the Ninth Circuit's ruling, so First Amendment retaliation claims are no longer part of the case.

This Petition seeks relief from the Ninth Circuit's separate, unpublished Memorandum Decision, which contained **no decisions** regarding any of the other purely legal QI questions presented. Thus, the Ninth Circuit left unresolved, and purports to have "remanded" to the district court, the following purely legal QI questions:

1. Could officers reasonably have believed they had probable cause to apply for and execute the First Search Warrant directed to Moore's fingerprints, DNA and cell phone?

2. Could officers reasonably have believed that their use of force in handcuffing Moore was not excessive, and thus not in violation of Moore's Fourth Amendment rights?

3. Could officers reasonably have believed they had probable cause to apply for and execute the Second Search Warrant?

4. Could officers reasonably have believed they had authority under the Second Search Warrant to hold Mrs. Moore in her living room, with an armed officer present, while conducting a search of the home?

5. Could officers reasonably have believed that the items seized were within the scope of the Second Search Warrant?

QI Question 1: First Search Warrant/no probable cause

The Ninth Circuit **made no ruling** on the first QI question.

Instead, it focused solely on the First Search Warrant judicial deception claim that the Moores abandoned during the appeal. The Ninth Circuit pointed to Petitioners' supposed "failure" to "accept as true" the (abandoned) allegations of judicial deception to announce that it lacked *jurisdiction* to resolve Petitioners' assertion of QI for obtaining the First Search Warrant. The Ninth Circuit:

> By failing to take as true the alleged false statement and omissions, Defendants implicitly ask us to consider the correctness of Plaintiffs' version of the facts, which we cannot do. *See Cunningham v. City of Wenatchee*, 345 F.3d 802, 806-07 (9th Cir. 2003). Given Defendants' failure to present the facts in the light most favorable to Plaintiffs, **we lack jurisdiction** and dismiss Defendants' claim of qualified immunity as to the judicial deception claim.

(App. 4) (bold emphasis supplied). This jurisdictional limitation on QI appeals involving both search warrant and judicial deception claims was new.

QI Question 2: Excessive Force

The Ninth Circuit **made no ruling** on the second QI question: whether Petitioners were entitled to QI on Moore's excessive force claim. Instead, it stated as follows: "Because the outcome of the judicial deception claim affects the remaining Fourth Amendment claims based on the First Search Warrant, we decline to address and remand Fourth Amendment claims based on the First Search Warrant." (App. 4).

QI Question 3: Second Search Warrant/no probable cause

The Ninth Circuit **made no ruling** on the third QI question: whether officers could reasonably have believed they had probable cause to apply for and execute the Second Search Warrant.

Instead, the Ninth Circuit focused on a claim not asserted in the Moores' Complaint at all: the Second Search Warrant was overbroad. (App. 6-8). The Ninth Circuit declared unequivocally: "the Second Search Warrant was unconstitutionally overbroad." (App. 8).

Collapsing overbreadth (never pled) with no probable cause for the Second Search Warrant (legally distinct from overbreadth), the Ninth Circuit reasoned that because the Second Search Warrant was unconstitutionally overbroad – "list[ing] entire categories of documents to be seized, encompassing essentially all documents on the premises" (also not alleged) – "the

Second Search Warrant was so facially invalid that no reasonable officer could have relied on it." (App. 8-9).

The Court then veered back to the QI claim actually before it, but not analyzed at all: "We therefore affirm the district court's denial of QI on Plaintiff's claim that the Second Search Warrant **lacked probable cause**." (App. 9) (bold emphasis supplied).

QI Question 4: Second Search Warrant/holding Mrs. Moore in living room

The Ninth Circuit **made no ruling** on the Fourth QI question: whether officers were entitled to QI for holding Mrs. Moore in her living room, with an armed officer present, while the search of her home was ongoing.

Instead, the Court stated as follows: "Given our determination that at least portions of the Second Search Warrant were invalid for lack of probable cause, we decline to address the remaining Fourth Amendment claims, all of which depend on the validity of the Second Search Warrant. Thus, we remand the remaining Fourth Amendment claims based on the Second Seach Warrant." (App. 9).

QI Question 5: Second Search Warrant/items seized beyond the scope

The Ninth Circuit **made no ruling** on the fifth QI question: whether officers were entitled to QI on the Moores' claim that they seized more than was

authorized by the Second Search Warrant. Again, the Court stated only as follows: "Given our determination that at least portions of the Second Search Warrant were invalid for lack of probable cause, we decline to address the remaining Fourth Amendment claims, all of which depend on the validity of the Second Search Warrant. Thus, we remand the remaining Fourth Amendment claims based on the Second Seach Warrant." (App. 9).

Subsequent Proceedings

Petitioners timely filed a Petition for Rehearing or Rehearing En Banc. Both requests were denied. (App. 30-31).

On receipt of the Ninth Circuit's "remand," the district court ordered the parties to proceed with discovery. The district court denied Petitioners' post-remand motion to stay discovery until such time as their "remanded" summary judgment QI motion is resolved. Now, in an attempt to shoehorn the Ninth Circuit's made up "overbreadth" claim permanently into the case, without ever having pled it, the Moores have filed a motion for partial summary judgment seeking a ruling on the merits of that unpled claim.

REASONS FOR GRANTING THIS PETITION

Introductory Statement

The Ninth Circuit has introduced a new, under-the-radar methodology for limiting the availability of QI in an interlocutory QI appeal: the procedural free-for-all. Hiding behind an unpublished Memorandum Decision, the Court capriciously refused to rule on any of the purely legal QI issues over which it had jurisdiction. Thus, the Court unilaterally resurrected an abandoned claim, eliminated the plaintiff's burden of proof, then disclaimed jurisdiction to decide QI. It also purported to rule on a constitutional issue never pled or briefed (and over which it had no jurisdiction), only to deny QI for a *different* claim based on the extra-jurisdictional ruling it made on the non-pled claim. Finally, it simply ignored certain QI claims altogether.

The effect of the Ninth Circuit's actions is to untether the interlocutory QI appeal process from this Court's long-recognized legal principles to such an extreme that the pursuit of QI through the interlocutory appeal process may become a pointless exercise in the Ninth Circuit. That Court's free-for-all approach compromises QI by forcing those entitled to QI at the interlocutory appeal stage to bear the burdens of *suit*, including discovery and trial, before the Court of Appeals will address the merits of any purely legal QI arguments at all. But under this Court's jurisprudence, QI is to be decided at the earliest possible juncture, not the latest. *Anderson v. Creighton*, 483 U.S. 635, 646, n.6 (1987) ("we have emphasized that qualified

immunity questions should be resolved at the earliest possible stage of a litigation").

Relief, whether denominated certiorari, mandamus, or otherwise, is crucial here to both "confine an inferior court to a lawful exercise of its prescribed jurisdiction" and "compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

As regards the Ninth Circuit's ignoring, or refusing to rule on purely legal QI issues over which it had jurisdiction, Petitioners' case is "within the appellate jurisdiction of [this Court]," and that jurisdiction is being "defeated by the unauthorized action of the court below." *McClellan v. Carland*, 217 U.S. 268, 280 (1910). "[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends." *Chicot Cnty. v. Sherwood*, 148 U.S. 529, 534 (1893). Accordingly, this Court can "direct a subordinate Federal court to decide a pending cause." *Knickerbocker Ins. Co. of Chicago v. Comstock*, 83 U.S. 258, 270 (1872). That is, "compel the circuit courts to proceed to final judgment in order that this court may exercise the jurisdiction of review given by law." *McClellan*, 217 U.S. at 280. Accordingly, Petitioners request that this Court reverse or vacate the Memorandum Decision and require the Ninth Circuit to rule on QI regarding all five of the QI questions raised, but left undecided, on appeal.

As regards the Ninth Circuit's attempt to deny QI based on a claim not pled, not briefed, and beyond its

jurisdiction, this Court can also reverse or vacate that ruling. 28 U.S.C. § 2106; *see Camreta v. Greene*, 563 U.S. 692 (2011). Petitioners request that relief as well. "Every act of a court beyond its jurisdiction is void." *Ex parte Reed*, 100 U.S. 13, 23 (1879). *Accord Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) ("A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators.").

The Ninth Circuit has so far departed from the accepted and usual course of QI judicial proceedings as to call for an exercise of this Court's supervisory power.

In its Memorandum Decision, the Ninth Circuit departed completely from this Court's interlocutory QI appeal jurisprudence by refusing to rule on any of the five purely legal QI questions over which it had jurisdiction, purporting instead to decide a phantom (unpled) claim over which it had none. Such conduct has never been recognized as an appropriate response to an interlocutory QI appeal raising purely legal questions. *See*, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("we hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."); *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014) ("deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an

undue burden."); *White by White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986) (court of appeals must decide issues "on summary judgment where qualified immunity is at issue.").

Equally unprecedented was the Ninth Circuit's "remand" to the district court of all five QI issues that it capriciously chose not to decide. There, Garnand and Salisbury now find themselves facing discovery after what turned out to be *no* interlocutory QI appellate review. This is the exact opposite of the way QI is supposed to work. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Behrens v. Pelletier*, 516 U.S. 299 (1996) (recognizing the importance of interlocutory QI appeal rights and allowing for possibility of more than one such appeal before trial); *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) ("Once a defendant pleads a defense of qualified immunity, '[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . Until this threshold immunity question is resolved, discovery should not be allowed.' "), *quoting Harlow*, 457 U.S. at 818. "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.

Beyond not ruling on the five QI issues before it, the Ninth Circuit unilaterally resurrected a judicial deception claim that Plaintiffs had abandoned during the appeal, eliminated the judicial deception plaintiff's burden of proof, and announced a new *jurisdictional*

limitation on interlocutory summary judgment QI appeals where claims of judicial deception are alleged but supported by no evidence. Under the Ninth Circuit's new construct, baseless judicial deception claims can now evade QI to linger through trial.

Given the Ninth Circuit's refusal to correct the Memorandum Decision on its own, and given the extra-jurisdictional and unprecedented actions that occurred to deprive Petitioners of their right to an interlocutory QI appeal and due process, this is the "compelling case" for which review on a writ of certiorari should be granted. U.S. Supreme Court Rule 10(a) and (c).

Accordingly, Petitioners seek an Order directing the Ninth Circuit to make substantive rulings, compliant with this Court's and the Ninth Circuit's legal precedents, on all QI questions that the Ninth Circuit left undecided. Petitioners also seek an Order of *vacatur* directed to the Memorandum Decision itself. *See Camreta* 563 U.S. at 712-13.

A. The Ninth Circuit's disclaimer of jurisdiction undermines QI, generally, and the right to interlocutory appellate review in QI cases involving a claim of judicial deception, specifically.

In its Memorandum Decision, the Ninth Circuit introduced an entirely new framework, inconsistent with its own precedent, that avoids any decision on

interlocutory QI appeals where allegations of judicial deception are made, but supported by no evidence.

1. The Ninth Circuit eliminated judicial deception plaintiffs' burden of proof.

Until now, a **plaintiff's** burden of proof was clear in cases involving both the assertion of QI and a claim by plaintiff that a challenged warrant was obtained by means of judicial deception:

> a plaintiff can only survive summary judgment on a defense claim of qualified immunity if **the plaintiff can *both* establish** a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant. Put another way, **the plaintiff must establish** that the remaining information in the affidavit is insufficient to establish probable cause.

Hervey v. Estes, 65 F.3d 784, 789 (9th Cir. 1995), *as amended on denial of reh'g* (bold emphasis supplied; italics in original). *See also KRL v. Moore*, 384 F.3d 1105, 1117-18 (9th Cir. 2004) ("[t]o support a § 1983 claim of judicial deception, **a plaintiff must show** that the defendant deliberately or recklessly made false statements or omissions that were material to the finding of probable cause") (bold emphasis supplied).

Here, Petitioners asserted QI over the First Search Warrant. In their Answering Brief on appeal,

the Plaintiffs made no argument and pointed to no evidence in support of their First Search Warrant judicial deception claim. Accordingly, Petitioners made no argument to the Ninth Circuit regarding the First Warrant judicial claim other than to point out in their Reply that Plaintiffs had abandoned the claim by failing to raise it in their Answering Brief. *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (we "review only issues which are argued specifically and distinctly in a party's opening brief.").

That should have been the end of the judicial deception issue for the First Search Warrant, and the Ninth Circuit should have gone on to decide whether Petitioners could reasonably have believed they had probable cause to obtain the warrant for Moore's personal characteristics and cell phone. Without judicial deception, Plaintiffs' only remaining "probable cause" claim was that, on the evidence existing at the time, no reasonable officer would have sought the First Search Warrant *at all*.

The Ninth Circuit elected not to address that QI question.

2. The Ninth Circuit unilaterally resurrected the judicial deception claim that Plaintiffs abandoned during the appeal.

It should go without saying that resurrecting abandoned claims is not the role of a Court of Appeals. This has specifically been the rule in the Ninth Circuit.

Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived."); *In re Grand Jury Subpoena,* 747 F. App'x 575, 576 n.1 (9th Cir. 2018) ("Although Doe also raised claims of privilege . . . before the district court, these arguments were not raised on appeal and are therefore waived."); *Navickas v. Conroy*, 575 F. App'x 758, 759 (9th Cir. 2014) ("the Forest Service has not raised this argument and we will not manufacture arguments for the parties"), *citing Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009).

That is especially true where appellate jurisdiction is already limited under 28 U.S.C. § 1291 to resolving whether QI applies. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("[A] court must decide whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right [that] was 'clearly established' at the time of defendant's alleged misconduct.").

Yet here, the Ninth Circuit unilaterally resurrected Plaintiffs' abandoned judicial deception claim, ignored Plaintiffs' failure to present any evidence or argument in support of the claim, and then blamed Petitioners for somehow causing the Court to lose jurisdiction over an entire portion of this interlocutory QI appeal:

> By failing to take as true the alleged false statements and omissions, Defendants implicitly ask us to consider the correctness of

> Plaintiffs' version of the facts, which we cannot do. *See Cunningham v. City of Wenatchee*, 345 F.3d 802, 806-07 (9th Cir. 2003). Given Defendants' failure to present the facts in the light most favorable to Plaintiffs, we lack jurisdiction and dismiss Defendants' claim of qualified immunity as to the judicial deception claim.

(App. 4).

This twisted logic resulted in Plaintiffs being allowed to present **no evidence** of judicial deception in this summary judgment QI appeal, yet *avoid* an adverse QI ruling because the Ninth Circuit can now just declare "no jurisdiction" when a plaintiff makes no evidentiary showing.

3. There was no jurisdictional reason not to analyze the judicial deception claim properly.

Even assuming *arguendo* that the Ninth Circuit could legitimately resurrect and consider an abandoned judicial deception claim, there was still no jurisdictional reason for it not to analyze that claim in accordance with legal standards the Ninth Circuit has consistently defined for itself in other QI/judicial deception cases. Appellate review of QI dispositions must be conducted in light of all relevant precedents. *Elder v. Holloway*, 510 U.S. 510 (1994). That did not occur here.

Until now, when presented with a plaintiff's asserted evidence of judicial deception in an interlocutory QI summary judgment appeal, the Ninth Circuit has analyzed such claims and decided QI as a matter of law. *See*, *e.g.*, *KRL*, 384 F.3d 1105, 1117-18 (9th Cir. 2004); *Advanced Bldg. & Fabrication, Inc. v. California Highway Patrol*, 781 F. App'x 608, 610 (9th Cir. 2019).

Even where a disputed fact exists – though none did here – the proper response is not for the Court of Appeals to disclaim jurisdiction and dismiss the QI appeal. *Est. of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1053 (9th Cir. 2002) (In a QI case, "[c]ourts may not simply stop with a determination that a triable issue of fact exists."). Rather, "[w]here disputed facts exist . . . we can determine whether the denial of [QI] was appropriate by assuming that the version of the material facts asserted by the non-moving party is correct." *Jeffers v. Gomez*, 267 F.3d 895, 904 (9th Cir. 2001); *KRL*, 384 F.3d at 1105, 1110, 1117-18 (standard applied in judicial deception/QI context). Per the Ninth Circuit itself, the applicable analytical steps to follow in a QI/judicial deception case, specifically, are these:

Step 1: Assume the truth of a plaintiff's deposition testimony regarding the challenged statements/omissions. *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1314 (9th Cir. 2000) ("For purposes of summary judgment on the question of qualified immunity . . . we must presume the facts to be those most favorable to the non-moving party"); *KRL*, 384 F.3d 15 at 1118 (same).

Step 2: Determine "the materiality of alleged false statements or omissions" as a question of law. *KRL*, 384 F.3d at 1117. "Assuming the warrant affidavit was revised as the [plaintiffs] urge, we ask whether the revised application establishes probable cause as a matter of law." *Beltran v. Santa Clara County*, 389 F. App'x 679, 680 (9th Cir. 2010); *Ewing v. City of Stockton*, 588 F.3d 1218, 1223-24 (9th Cir. 2009) ("If an officer submitted false statements, the court purges those statements and determines whether what is left justifies issuance of the warrant . . . If the officer omitted facts required to prevent technically true statements in the affidavit from being misleading, the court determines whether the affidavit, once corrected and supplemented, establishes probable cause.").

Step 3: Decide whether QI applies. If probable cause remains after the affidavit is corrected by removing allegedly false statements and adding allegedly omitted information, "no constitutional error has occurred" and QI applies. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1084 (9th Cir. 2011); *Advanced Bldg. & Fabrication, Inc.*, 781 F. App'x at 610 ("the district court erred in denying qualified immunity to Officer Wilson because, as a matter of law, the alleged misrepresentation was immaterial to the issuance of the warrant.").

If, on the other hand, there is no probable cause remaining after the affidavit is corrected as urged by plaintiff(s), QI does not apply. *Liston v. Cnty. of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997), *as amended* (Oct. 9, 1997).

The Ninth Circuit failed to follow any of the required steps.

4. The Ninth Circuit flouted this Court's QI requirements.

By disclaiming jurisdiction and refusing to rule on *any* First Search Warrant QI issues, the Ninth Circuit flouted this Court's requirement that QI be decided at the earliest possible juncture. *Anderson*, 483 U.S. at 646, n.6; *Mitchell*, 472 U.S. at 526 ("[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial).

Petitioners could find no other Circuit Court of Appeals decision that disclaimed interlocutory appellate jurisdiction over the denial of QI for a search warrant where, as here, a judicial deception claim is overtly abandoned or otherwise supported by no evidence.

5. The Ninth Circuit was required to decide the purely legal QI question presented to it regarding excessive force.

The Ninth Circuit next refused to decide QI as to the Moores' excessive force claim, stating: "Because the outcome of the judicial deception claim affects the remaining Fourth Amendment claims based on the First Search Warrant, we decline to address and remand the

remaining Fourth Amendment claims based on the First Search Warrant." (App. 4).

But the excessive force claim is freestanding, not "based on First Search Warrant." *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322 (9th Cir. 1995) ("The question of whether the officers are entitled to qualified immunity for any use of excessive force in effecting the arrest is separate and distinct from whether they are entitled to qualified immunity for the alleged arrest without probable cause."). *See generally Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921-22 (9th Cir. 2001) (use of force may be reasonable even in the absence of probable cause: "The absence of probable cause does not grant an individual the right to offer resistance.").

The "outcome of the judicial deception claim" thus had no effect on the excessive force claim. The Ninth Circuit had jurisdiction and was required to rule on whether Petitioners were entitled to QI regarding that claim. It failed to do so.

B. The Court invented an "overbreadth" claim.

The Ninth Circuit also purported to deny Petitioners QI for obtaining the Second Search Warrant by focusing on an "overbreadth" claim never pled, and over which it had no jurisdiction.

"Federal Rule of Civil Procedure 8(a)(2) requires that the allegations in the complaint 'give the

defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006). As regards QI specifically, it is the "allegations" in "the plaintiff's complaint" that must "state a claim of violation of clearly established law." *Behrens*, 516 U.S. at 306; *see also Elder*, 510 U.S. at 515 (explaining that to defeat QI, the "clearly established right" must "be the federal right **on which the claim for relief is based**") (bold emphasis supplied).

The Moores' Complaint does not expressly allege "overbreadth," does not include the words "overbroad" or "overbreadth" anywhere in it, and does not make any factual allegations that could be construed as raising that issue. What the Moores alleged, and what Petitioners sought QI regarding, was that Petitioners allegedly lacked any probable cause and, because of that, should have exercised reasonable professional judgment by not seeking the Second Search Warrant at all. The Moores also alleged that "Defendants searched the locations and seized property beyond the scope of the warrant."

The Moores' no probable cause claim, then, was the only claim over which QI was asserted by Petitioners and denied by the district court. It was only that denial that Petitioners appealed pursuant to 28 U.S.C. § 1291, so it was, by definition, solely the "no probable cause" claim over which the Ninth Circuit had jurisdiction. *Giebel v. Sylvester*, 244 F.3d 1182, 1186 (9th Cir. 2001); *Ganwich v. Knapp*, 319 F.3d 1115, 1119 (9th Cir. 2003).

But as is clear from reading the Memorandum Decision, the Ninth Circuit undertook no analysis of the probable cause claim or Petitioners' QI argument regarding same. Instead, the Court unilaterally introduced the subject of overbreadth (never pled), purported to analyze the Second Search Warrant for that infirmity (never briefed), and then announced that the Second Search Warrant "was unconstitutionally overbroad." (App. 8). From there, the Court leapfrogged to this *non-sequitur*: "We therefore affirm the district court's denial of qualified immunity on Plaintiffs' claim that the Second Search Warrant lacked probable cause." (App. 9).

The Ninth Circuit's mode of proceeding cannot be allowed to stand for several reasons.

First, the Ninth Circuit was required to refrain from manufacturing an overbreadth claim where none was pled. *Navickas*, 575 F. App'x at 759 ("we will not manufacture arguments for the parties"); *Lopez v. Candaele*, 630 F.3d 775, 794 (9th Cir. 2010) (same).

Second, under its own precedent, the Ninth Circuit could not interpret the Moores' allegation that no warrant should have issued at all for lack of probable cause, as a claim that the Second Search Warrant was overbroad. These are distinct claims and not interchangeable. *Ortiz v. Van Auken*, 887 F.2d 1366, 1371 (9th Cir. 1989) ("[d]etermining whether certain facts constitute probable cause differs from ascertaining whether a warrant is so facially overbroad that it precludes reasonable reliance"); *United States v.*

Contreras, 116 F.3d 486 (9th Cir. 1997) (table) ("we reject the contention that overbreadth is a subset of probable cause").

The Eighth Circuit has likewise rejected attempts to equate the two claims. In *Wendt v. Iowa*, 971 F.3d 816, 821 (8th Cir. 2020), a case precisely on point, the Eighth Circuit held that defendants had no notice of an "overbreadth" claim where, as here, the complaint alleged only "no probable cause." *See also United States v. Neumann*, 887 F.2d 880, 886 (8th Cir. 1989) (en banc), *cert. denied* 495 U.S. 949 (1990) (claim on appeal waived because argument that warrant was overbroad differed from his argument below – that the warrant was deficient in probable cause).

Third, no valid "overbreadth" allegation ever having been made in the Complaint, the district court could not have addressed or decided it in denying QI. In turn, given the purposely narrow scope of interlocutory QI appeals under 28 U.S.C. § 1291, the Ninth Circuit had no jurisdiction to invent and consider such an allegation as part of Petitioners' appeal of that QI denial. "Because [the Moores'] complaint did not raise [an overbreadth] claim, it was not properly before the district court." *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011). Accordingly, no overbreadth claim could even arguably have been before the Ninth Circuit, especially on a QI appeal. *Alers v. JPMorgan Chase Bank, Nat'l Ass'n*, 2021 WL 5860888, at 1 (9th Cir. 2021) (where a claim "[was] not properly raised in the district court," the Ninth Circuit does not consider it); *Galvan v. Duffie*, 807 F. App'x 696, 697 (9th Cir.

2020) (in QI appeal, the Ninth Circuit "declines to entertain an argument not presented to the district court").

Fourth, in acting without jurisdiction to decide QI based on its made-up "overbreadth" claim, the Ninth Circuit violated Petitioners' due process rights. Petitioners had no notice of this phantom claim, and no opportunity to brief it. It was first raised by Judge Bennett in oral argument months after briefing closed.

Fifth, by fixating on overbreadth, the Court did not analyze at all the narrow QI question(s) before it regarding the Second Search Warrant: (a) were Petitioners "entitled to immunity from damages, even assuming that the warrant should not have issued"; and (b) did the Magistrate "so obviously err" in believing there was sufficient probable cause to support the scope of the warrant he issued "that any reasonable officer would have recognized the error." *Messerschmidt v. Millender*, 565 U.S. 535, 546, 566 (2012).

In other words, "[e]ven if the warrant in this case were invalid," was it "so obviously lacking in probable cause that the officers can be considered 'plainly incompetent' for concluding otherwise[?]" *Id.* at 556, *citing Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Ninth Circuit wholly failed to face the probable cause issue at all, much less analyze and answer these questions.

C. The Ninth Circuit ignored two other QI issues related to the Second Search Warrant.

While focusing exclusively on the "overbreadth" claim it invented, the Ninth Circuit ignored, and so never decided, two other QI issues arising from the Second Search Warrant: Patricia Moore's allegation that Garnand's detention of her during the search of the Moores' home violated her Fourth Amendment rights, and the Moores' allegation that even if the Second Search Warrant was valid, Petitioners wrongfully seized items outside the warrant's scope.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari; issue an Order directing the Ninth Circuit to make substantive rulings, compliant with this Court's and the Ninth Circuit's legal precedents on all QI questions that it left undecided; and reverse or vacate the Memorandum Decision *in toto*. *See Knickerbocker Ins. Co.*, 83 U.S. at 270 ("direct a subordinate Federal court to decide a pending cause."); *McClellan*, 217 U.S. at 280 ("compel the circuit courts to proceed to final judgment in order that this court may exercise the jurisdiction of review given by law"); *Camreta*, 563 U.S. at 712 ("The equitable remedy of vacatur ensures that those who have been prevented from obtaining the review to which they are entitled [are] not treated as if there had been a review").

The relief requested will both "confine [the Ninth Circuit] to a lawful exercise of its prescribed jurisdiction" and "compel it to exercise its authority when it is its duty to do so." *Roche*, 319 U.S. at 26. Such intervention is particularly important here because the improper actions overturn this Court's carefully developed substantive and procedural jurisprudence regarding how and when QI issues are to be decided. *Behrens*, 516 U.S. at 308 ("*Harlow* and *Mitchell* make clear that the defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery . . . , as "[i]nquiries of this kind can be peculiarly disruptive of effective government."'"); *Anderson*, 483 U.S. at 646, n.6 ("we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation").

Respectfully submitted,

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