No. 24-130

In The
Supreme Court of the United States

DESIREE MARTINEZ,

Petitioner,

v.

CHANNON HIGH, OFFICER,
SUED IN HER INDIVIDUAL CAPACITY

Respondent.

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

REPLY IN SUPPORT OF CERTIORARI

KEVIN G. LITTLE
LAW OFFICE OF
KEVIN G. LITTLE
P.O. Box 8656
Fresno, CA 93747
(559) 342-5800
kevin@kevinglittle.com

ANYA BIDWELL
Counsel of Record
PATRICK JAICOMO
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.
Ste. 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

REPLY IN SUPPORT OF CERTIORARI

In the Ninth Circuit (as well as the Eighth and Eleventh), a plaintiff can only escape qualified immunity with factually identical precedent or with conduct that in effect shocks the conscience. Pet. 15-21. That's different from the Fifth Circuit (as well as the Tenth), where a plaintiff can escape qualified immunity with less identical precedent for cases outside the split-second context, even if the conduct is merely wrongful, not astonishingly egregious. *Id.* at 11-14; see also *id.* at 4 n.1.

Instead of engaging with cases like *Sampson* v. *County of Los Angeles*, 974 F.3d 1012 (9th Cir. 2020), and *Morrow* v. *Meachum*, 917 F.3d 870 (5th Cir. 2019), that illustrate the contrasting approaches adopted by the Ninth and Fifth Circuits, respondent attempts to misdirect this Court with three arguments, each of them a red herring.

First, respondent downplays the disagreement between the circuits by arguing that every circuit applies step two of qualified immunity with some degree of flexibility because every circuit, including the Ninth, recognizes the obviousness exception to this defense as a tool for deciding how close the facts of a previous case have to be. BIO 13. But as petitioner explained, "[i]n this case * * * there is no need to reach for [the] obviousness exception to qualified immunity." Pet. 4 n.1. The split here is not on whether the obviousness exception applies, but on whether, outside of the obviousness context, there is a way for a plaintiff to present a case that's similar—but not identical—on facts and still meet the clearly-established requirement.

It should go unsaid that in non-obvious cases "officials can still be on notice that their conduct violated established law * * * in novel factual circumstances." *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377-378 (2009) (quoting *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002)). Even *Hope*, the decision often credited with creating the obviousness exception, makes clear that the two approaches are distinct. Pet. 26.

Second, respondent argues that this Court would have to address the state-created-danger doctrine in order to then address whether the Ninth Circuit properly ignored the precedent with extremely similar facts. BIO 23. This again misses the mark. The question presented deals with the disagreement between the courts on the general application of the clearly-established-law standard—step two of qualified-immunity; and it does so on the facts that do not expand the constitutional right recognized in the previous precedent. See Pet. 16. The resolution of this disagreement is entirely independent of the substantive right at issue in step one.

Again, it should go unsaid that this Court has treated these two questions as completely distinct. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819-820 (1982) ("defining the limits of qualified immunity essentially in objective terms" and "remand[ing] the case to the District Court" to determine whether, given this new objective rule, plaintiff survives the motion for summary judgment). Moreover, as a general matter, the Court does not shy away from using cases to clarify procedural standards without applying those standards to the facts of said cases. See, *e.g.*, *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron* and remanding cases "for further proceedings consistent with

this opinion"); *Gonzalez* v. *Trevino*, 602 U.S. 653, 659 (2024) (per curiam) (clarifying "the *Nieves* exception" and "remand[ing] the case for the lower courts to assess whether Gonzalez's evidence suffices to satisfy [it]"). In this case too, the Court could simply state that step two of qualified immunity does not require materially identical facts outside the context of split-second decisions and remand the application to the Ninth Circuit.

Third, respondent argues that the potential existence of alternative state remedies mitigates the harm created by an overly rigid application of qualified immunity. BIO 31-32. Setting aside that Section 1983 exists independent of any state remedy, respondent's argument is beside the point. The focus of the circuit split here is on the application of the clearly-established step to situations not involving a time-pressured decision to use force. As the Institute for Justice's latest study on qualified immunity shows, the rigid approach adhered to by some circuits ends up disproportionally benefiting those government officials not tasked with difficult decisions on using force. Pet. 30. This rigidity turns qualified immunity on its head and warrants the Court's review.

I. Respondent's Focus on the Obviousness Exception to Qualified Immunity is a Red Herring.

The circuits are divided on the approach to step two of qualified immunity. Consistent with this Court's precedent, Pet. 21-22, the Fifth and Tenth Circuits acknowledge that with time-pressured decisions to use force, "the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—

every reasonable officer would know it immediately." *Morrow*, 917 F.3d at 876; see also *A.N.* v. *Syling*, 928 F.3d 1191, 1199 (10th Cir. 2019) (discussing the need for specificity in the Fourth Amendment context involving excessive force). Outside of this context, on the other hand, "simple, clearly established rule[s]," as outlined in precedent, can provide an official—including a police officer—with fair warning that her actions are unlawful. *Hughes* v. *Garcia*, 100 F.4th 611, 620 & n.1 (5th Cir. 2024) (relying on *Terwilliger* v. *Reyna*, 4 F.4th 270 (5th Cir. 2021)). The Eighth, Ninth, and Eleventh Circuits, on the other hand, utilize a one-size-fits-all framework to any constitutional violation regardless of whether it involved a hard call on the beat or a calculated decision in the office or, in this case, at home. Pet. 15-20.

1. Respondent mischaracterizes *Hughes* and *A.N.* as implicating obvious violations. BIO 13-16. With this move, she attempts to reframe the qualified immunity analysis and argue that circuits are not divided. But this misstates the law.

Under respondent's telling, all circuits utilize the same rigid approach to qualified immunity (requiring plaintiffs to produce identical or nearly identical caselaw), unless the violation is astonishingly egregious and therefore obvious. BIO 13 (stating that "[w]here the contours of the right claimed to be violated are obvious, less specificity is required to determine the conduct violated clearly established law"). In other words, according to respondent, "obviousness" is a way of ratcheting up or down the level of specificity needed in the caselaw.

But obviousness is not an alternative method for determining the clearly established law. It is an exception

to the need for clearly established law at all, *see Taylor* v. *Riojas*, 592 U.S. 7, 8–9 (2020) (per curiam), and a rare exception at that, *District of Columbia* v. *Wesby*, 583 U.S. 48, 64 (2018) (describing the obviousness exception as "the rare 'obvious' case where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances").

Even in cases that are not "obviously * * * unconstitutional," "officials can still be on notice that their conduct violates clearly established law. . . in novel factual circumstances." *Safford*, 557 U.S. at 377-378; see Pet. 26 (discussing *Hope*'s distinction between obvious cases and those that don't need identical precedent). It is those cases—which are not obviously unconstitutional and don't have exact precedent on point but still provide a reasonable officer with fair warning—that divide circuit courts.[1]

[1] This is why respondent's citations to the two Ninth Circuit's cases applying the obviousness exception are unavailing. BIO 18. Continuing on the wrong trajectory that's separating it from circuits like the Fifth and Tenth, the Ninth Circuit in both of these cases explained that it applies the same level of specificity to all cases, *outside of those that are obvious*. See *Penton* v. *Johnson*, 2023 WL 7121404, at *1 (9th Cir. Oct. 30, 2023) (explaining that the only cases that have a different level of scrutiny are "the rare obvious case[s], where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances"); *Sandoval* v. *County of San Diego*, 985 F.3d 657, 679-680 (9th Cir. 2021) (refusing qualified immunity to prison nurses who denied "live-saving measures to an inmate in obvious need").

2. Compare how the Ninth and Tenth Circuits determine whether a particular equal protection precedent rises to the level of clearly established law.

In *Sampson*, the Ninth Circuit held that an equal protection right to be free from sexual harassment was not clearly established, even though the court admitted that "[t]he only difference with prior cases is that [the plaintiff's] harassment was at the hands of a social worker assigned to her case, rather than a coworker, supervisor, classmate, or teacher." 974 F.3d at 1023. The court acknowledged that it reached this conclusion "reluctantly," but said it was forced to analyze the facts of the case with such an exacting degree of specificity because of "the Supreme Court's impossibly high bar." *Id.* at 1024.

In *A.N.*, by contrast, the Tenth Circuit held that a minor's equal protection right to be free from having an arrest record publicly disclosed was clearly established, even though the closest precedent involved an unconstitutional statute that "allow[ed] females the benefits of juvenile court proceedings under the age of 18 years while limiting those same benefits to males under the age of 16 years." 928 F.3d at 1198-1199 & n.7 (citing to *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972)).

The gap between these two circuits' approaches can hardly be wider, and it has nothing to do with whether a violation is obvious. Instead, one court applies the clearly established law standard commonsensically, providing more breathing room to on the beat officers who need it and less to desk-bound bureaucrats who don't, see Pet. 14, and the other one applies the rigid

approach to everyone across the board, while acknowledging its reluctance to do so, *Sampson*, 974 F.3d at 1024.

3. Although it was discussed in the petition, Pet. 18, respondent conspicuously avoids mentioning *Sampson*. This is perhaps because dealing with the Ninth Circuit's refusal to declare an equal protection right clearly established would make it more difficult for respondent to discount the Tenth Circuit's decision in *A.N.* as merely an equal-protection-obviousness case. BIO 16. After all, it is hard to argue that a constitutional violation is obviously egregious when a sister circuit does not see it that way.

Respondent also fails to deal with the Fifth Circuit's clear contrast, in *Hughes*, between cases that "do[] not involve excessive force, or split-second decisions, or the chaos of a chase" and those that do. 100 F.4th at 620 n.1. In the Fifth Circuit, like the Tenth, "there can be notable factual distinctions between the precedents relied on" to establish the existence of a clearly established right "so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Banks* v. *Herbrich*, 90 F.4th 407, 416 (5th Cir. 2024). That is, unless the case involves an excessive force claim, which requires a plaintiff to overcome "[t]he hurdle [that's] higher," in order to accommodate pressures the officer faces in a variety of fast-moving factual scenarios. *Henderson* v. *Harris County*, 51 F.4th 125, 132-133 (5th Cir. 2022); see also *Janny* v. *Gamez*, 8 F.4th 883, 915-916 (10th Cir. 2021).

Her failure to acknowledge the flexibility in the Fifth and Tenth Circuits' approaches leaves respondent stuck

having to defend a case like *Benning* v. *Patterson*, 71 F.4th 1324, 1338 (11th Cir. 2023), where the Eleventh Circuit granted qualified immunity to a prison official who screened outgoing electronic mail because prisoners only had a clearly established liberty interest in an outgoing snail mail. BIO 22 ("The Eleventh Circuit's analysis was not as 'rigid' as petitioner would have this Court believe."). But *Benning* fits squarely with the case below as an illustration of the circuit split. Unlike the Fifth and Tenth Circuits, the Ninth, Eighth, and Eleventh Circuits believe that—outside of an obvious constitutional violation—the Supreme Court has set an "impossibly high bar." *Sampson*, 974 F.3d at 1024. This Court should use this opportunity clarify that the Fifth and Tenth Circuits have it right.[2]

II. Respondent's Focus on Step One of Qualified Immunity is a Red Herring.

Respondent next tries to deflect the Court's attention from the question presented by trying to blur the lines between steps one and two of qualified immunity.

---

[2] Respondent's conclusory statement that the question presented was not raised or briefed below, BIO 33, has no support. The Ninth Circuit held that respondent violated petitioner's constitutional right, but that this right was not clearly established. Pet.App. 22a. That's because *Kennedy* v. *City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006)—a Ninth Circuit precedent that declared that it's unconstitutional to disclose confidential complaints to subject of these complaints—did not give respondent "sufficient notice in 2013 that her conduct [disclosing a confidential complaint to the subject of this complaint] violated due process." Pet.App. 21a-22a. This exacting level of specificity across all constitutional violations is not required in the Fifth and Tenth Circuits, but is required in the Ninth, Eighth, and Eleventh. That's an outcome-determinative split, and it's at the heart of this petition.

In her telling, this Court has no choice but to wade into the treacherous waters of the state-created-danger doctrine to decide this case. After all, how else to determine whether the Ninth Circuit properly required a case with identical facts as a measure of whether the law was clearly established? BIO 23.

Easily. *First*, this Court is well accustomed to deciding qualified immunity cases on step two alone, adhering to this practice in two-thirds of its decisions granting qualified immunity. Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of* Butz v. Economou, 126 Dick. L. Rev. 719, 751 n. 187 (2022); see also *Harlow*, 457 U.S. at 819-820.

Second, the Court can—and does—take cases to clarify procedural or threshold standards of all kinds, remanding to lower courts to apply these standards in the first instance. See, *e.g.*, *Loper Bright Enters.*, 144 S. Ct. at 2273; *Gonzalez*, 602 U.S. 653 at 659.

Third, the facts in this case (putting a person in a foreseeable immediate danger) do not expand the constitutional right recognized in the previous Ninth Circuit precedent (putting a person in a foreseeable non-immediate danger). See *Kennedy*, 439 F.3d at 1062-1064. The entire premise of this case is that petitioner's rights are subsumed in the rights clearly established in *Kennedy*. See Pet. 16. As such, the resolution of this disagreement over step two is entirely independent of the substantive right at issue in step one.

Most fundamentally, the only question before the Court is whether the Ninth Circuit's approach to step two of qualified immunity is on the wrong side of the

split because it is inconsistent with *Hope*, *Safford*, *Groh* v. *Ramirez*, 540 U.S. 551 (2004), and *Sause* v. *Bauer*, 585 U.S. 957 (2018), all of which make it clear that a government official can be fairly warned about the unconstitutionality of her conduct even when the facts of previous cases are not materially identical to the facts the officer confronts. Pet. 25-29. To answer this question, the Court could just say, "Qualified immunity asks what a reasonable official would have done, and, outside the context of a split-second decision, a reasonable official can be expected to extrapolate from earlier cases, even if they are not jot-for-jot identical." With the holding that material identity is unnecessary, the Court could leave everything else for the Ninth Circuit to decide in the first instance.

The Ninth Circuit could of course choose, on its own time and as Judge Bumatay urges, to overturn cases like *Kennedy* and "confine[] the 'state-created danger' doctrine to only encompass affirmative acts by a State actor that constitute the use of the government's coercive power to restrain the liberty of another." *Murguia* v. *Langdon*, 73 F.4th 1103, 1104 (9th Cir. 2023) (Bumatay, J., dissenting from the denial of rehearing en banc); Pet.App. 23a. It's just that such an analysis has no place at step two of qualified immunity.

III. Respondent's Focus on Potential State Remedies is a Red Herring.

Respondent's final attempt to undermine this petition focuses on trying to reassure the Court that, even if step two of qualified immunity is limited to precedent involving materially identical facts—thereby gutting whatever remains of plaintiffs' options to try to

overcome this defense—plaintiffs can still pursue an alternative path to a remedy in state courts. BIO 31-32 (stating that "in response to Petitioner's claimed crisis in qualified immunity jurisprudence, several states have addressed the issue either through legislation or the judicial process").

The whole point of Section 1983 was to ensure that civil rights plaintiffs would not have to rely on state courts to provide accountability for state officers' violations of their federal constitutional rights. That states, in some instances, provide alternative remedies to victims of constitutional abuse is immaterial. The only question is which courts get the qualified immunity analysis right: those that apply a one-size-fits-all approach or those that—consistently with this Court's jurisprudence—recognize that in situations outside of time-pressured decisions to use force, an official can still be fairly warned that her conduct violates established constitutional law, even without a nearly identical factual precedent.

The Court should grant the petition and reaffirm the latter view. Fair warning is an inherently flexible standard. Pet. 2. Without this flexibility, those officials accused of violating the First Amendment end up with the same, if not greater, protections than on-the-beat first responders accused of excessive force violations. See Pet. 30 (discussing results of IJ study); *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of certiorari) (questioning whether government officials "who have time to make calculated choices" should "receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting").

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should grant a writ of certiorari in this case.

Respectfully submitted,

KEVIN G. LITTLE
LAW OFFICE OF
KEVIN G. LITTLE
P.O. Box 8656
Fresno, CA 93747
(559) 342-5800
kevin@kevinglittle.com

ANYA BIDWELL
Counsel of Record
PATRICK JAICOMO
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.
Ste. 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org

Counsel for Petitioner

OCTOBER 18, 2024