No. 19-___

Supreme Court of the United States

EUNICE J. WINZER

Cross-Petitioner

v.

KAUFMAN COUNTY, TEXAS
MATTHEW HINDS

Cross-Respondents

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

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. According to the Fifth Circuit, a reasonable *juror* could conclude that it was clearly unreasonable for a law-enforcement officer to fire multiple bullets at an unarmed, non-threatening suspect from 90 yards away—only seconds after first seeing him—but the law in this country is not "clearly established" enough for a reasonable *law-enforcement officer* to make the same conclusion. Is this absurd result mandated by this Court's holdings? And if so, do those holdings need to be re-examined?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all of the parties.

CORPORATE DISCLOSURE STATEMENT

No corporations are involved in this proceeding.

STATEMENT OF RELATED PROCEEDINGS

Other proceedings in other courts that are directly related to this proceeding include:

— *Winzer, et al. v. Kaufman County, et al.*, No. 15-cv-1284, United States District Court for the Northern District of Texas. Judgment entered October 4, 2016

— *Winzer v. Hinds, et al.*, No. 15-cv-1295, United States District Court for the Northern District of Texas. Judgment entered October 4, 2016.

— *Winzer, et al. v. Kaufman County, et al.*, 916 F.3d 464 (5th Cir. 2019), United States Court of Appeals for the Fifth Circuit. Judgment entered October 29, 2019.

— *Kaufman County, et. al. v. Winzer*, Case No. 19-889, which is pending in this Court.

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TABLE OF CITED AUTHORITIES

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OPINIONS AND ORDERS BELOW

The Fifth Circuit's order and dissenting opinions denying rehearing and rehearing en banc is reported at 940 F.3d 900 (5th Cir. 2019) and is reprinted in Petitioner/Cross-Respondent's Appendix at 3a—10a.

The Fifth Circuit's opinion and dissenting opinion affirming in part and reversing in part the district court's judgment is reported at 916 F.3d 464 (5th Cir. 2019) and is reprinted in the Petitioner/Cross-Respondent's Appendix at 11a— 47a.

The district court's order granting Kaufman County's motion for summary judgment has not been reported. It is reprinted in the Petitioner/Cross-Respondent's Appendix at 48a—54a.

The district court's order granting the individual defendants' motion to dismiss and for summary judgment has not been reported. It is reprinted in the Petitioner/Cross-Respondent's Appendix at 55a—74a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit had appellate jurisdiction over this dispute because the district court's orders granting the motions for summary judgment were final decisions under 28 U.S.C. § 1291. The Fifth Circuit denied en banc review on October 21, 2019. Petitioners filed a petition for writ of certiorari in this Court on January 16, 2020. Accordingly, this conditional cross-petition is timely under Supreme Court Rule 12.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment IV. Searches and Seizures; Warrants

> 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.

United States Code

42 U.S.C. § 1983. Civil action for deprivation of rights

> 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 laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On April 27, 2013, Gabriel Winzer was riding his bicycle in his neighborhood in Kaufman County, Texas. ROA.497. At the time, there were several Kaufman County sheriff's deputies and Texas Department of Public Safety state troopers in the neighborhood. ROA.497. Although there is evidence that Gabriel was unarmed, did not have anything in his hands, did not wave his hands in any way, and did not suggest that he was reaching for something, several deputies and one state trooper—all of whom were between 90 and 500 yards away—fired multiple shots at Gabriel, striking him in the chest, shoulder, and upper back. ROA.281, 286, 292, 298, 304, 498. After they shot him, the officers then tased him multiple times as well. ROA.499. Gabriel died as a result of multiple gunshot wounds. ROA.507.

Multiple civil-rights lawsuits were filed against the law enforcement officers and government agencies involved, which were ultimately consolidated into the underlying proceeding. ROA.130, 147. This conditional cross-petition arises out of excessive-force and failure-to-train claims brought by Gabriel's mother, Eunice Winzer, against one of the shooters, Matthew Hinds, and against his employer, Kaufman County, Texas.

In the district court, Hinds filed a motion for summary judgment in which he argued that he was entitled to qualified immunity because his actions were reasonable under "clearly established law." ROA.241–273. The district court agreed and granted Hinds's motion. ROA.639–643. And because the

district court concluded that no constitutional violation had occurred, the district court also granted Kaufman County's motion for summary judgment on Winzer's failure-to-train claim. ROA.645–655.

A majority of the judges on the Fifth Circuit, however, concluded that the district court made "myriad" and "multifarious" errors in its analysis of the summary-judgment record. Pet.Appx. at 28a, 31a. Following a thorough discussion of the evidence and the well-established standard of review, the majority concluded that "a jury could find that the use of deadly force was unreasonable if it credited and drew reasonable inferences from the Winzer's account." *Id.* at 32a.

But unlike its detailed review of the evidence addressing the reasonableness of Hinds's actions, the majority devoted only a single paragraph to the consequential issue of whether his conduct was prohibited by "clearly established law." Without discussing any case law or statutory authorities, it summarily concluded that, under this Court's "exacting standard," the law at the time did not place the unreasonableness of Hinds's conduct "beyond debate." *Id.* at 33a.

As a result, the Fifth Circuit affirmed the district court's summary judgment on Winzer's excessive-force claim against Hinds, but reversed and remanded Winzer's failure-to-train claim against Kaufman County. *Id.* at 33a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's cursory analysis of the "clearly established law" prong of the qualified-immunity doctrine sets dangerous precedent for the vitality of the Civil Rights Act, and exposes a serious flaw in this Court's qualified-immunity jurisprudence.

According to the Fifth Circuit, a reasonable *juror* could conclude that it was clearly unreasonable for a law-enforcement officer to fire multiple bullets at an unarmed, non-threatening suspect from 90 yards away—only seconds after first seeing him—but the law in this country is not "clearly established" enough for a reasonable *law-enforcement officer* to make the same conclusion. Although this dichotomy makes absolutely no sense, it is now binding precedent in Texas, Louisiana, and Mississippi. Absent intervention from this Court, law-enforcement officers in these states are now presumed to know *less* about the law than the people on the juries whom they are employed to serve.

But worse still is the Fifth Circuit's reliance on this Court's recent holdings to justify such an absurd result. If the learned judges on the court below cannot conclude that existing law clearly prohibits such abhorrent conduct, the proper scope of this prong of the qualified-immunity doctrine is not "clearly established" either. This case, therefore, provides an excellent vehicle for this Court to clarify its scope, thereby preventing the creation of similarly irrational—and dangerous—precedent in courts throughout the country.

A. This Court must clarify how law can be "clearly established" without "a case directly on point."

Although the Fifth Circuit purported to rely on this Court's precedent in its analysis of "clearly established law," a thorough review of these cases reveals that they provide very little guidance. For example, as recently as last year, this Court reiterated that "there does not have to be a case directly on point" for the law to be "clearly established." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 504, (2019). This clearly makes sense, as this Court poignantly stated in its 1997 holding in *United States v. Lanier*:

> There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability.

520 U.S. 259, 271 (1997). The problem, of course, is that welfare officials *never* sell foster children into slavery, but law-enforcement officers *often* shoot unarmed suspects without reasonable justification. Unfortunately, this Court's opinions do not provide a navigable path across the gaping chasm between these two scenarios.

In *Harlow v. Fitzgerald*, this Court announced the rule that defendants are immune from liability under section 1983 unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). This test was intended to define qualified

immunity in "objective terms," in that the defense would turn on the "objective" state of the law, rather than the "subjective good faith" of the defendant. *Id.* at 816, 819. But the "clearly established law" standard announced in *Harlow* has proven hopelessly malleable and indefinite, because there is simply no objective way to define the level of generality at which it should be applied.

Since *Harlow* was decided, this Court has issued dozens of substantive qualified immunity decisions that attempt to hammer out a workable understanding of "clearly established law," but with little practical success. On the one hand, the Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality," and stated that "clearly established law *must* be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (emphasis added); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). But on the other hand, it has said that "general statements of the law are *not* inherently incapable of giving fair and clear warning.'" *White*, 137 S. Ct. at 552 (emphasis added).

How then should lower courts navigate between these abstract instructions? This Court's attempts at specific guidance has been no more concrete—it has stated simply that "the dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 742). But this instruction is circular—how to identify clearly established law depends on whether the illegality of the conduct was clearly established. As Fifth Circuit Judge Don Willett noted in his concurring opinion last

year in *Cole v. Carson*—another police-shooting case that is also pending before this Court—the current standard for "clearly established law" effectively transforms the concept of qualified immunity into "unqualified impunity," because it "lets public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly." 935 F.3d 444, 471 (2019) (Willett, J., concurring) (emphasis original).

The practical effect of the absence of clarity in this Court's holdings is that litigants whose constitutional rights have been violated in previously unlitigated ways will have no incentive to expend the resources to seek the relief that section 1983 was designed to provide in the first place. And absent the willingness to litigate constitutional violations, there will also be less incentive for law-enforcement officers to abstain from unconstitutional conduct. Because such a result defies Congress's obvious intent when enacting section 1983, Winzer respectfully submits that additional guidance from this Court is desperately necessary.

B. Inconsistency in the application of this Court's existing standard among and within the circuit courts demonstrates the need for this Court's intervention on this issue.

The problems discussed above are not peculiar to the Fifth Circuit's application of the law in this case. Rather, the circuits are divided among and within themselves about how to approach the "clearly established" question. Although the Fifth Circuit's opinion did not directly state, "we could not find another case exactly like this one," its brief discussion

clearly reveals this tacit conclusion. Such an analysis conflicts with the decisions of several other circuits, all of which reject such a hair-splitting approach. *See, e.g., Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2018) (denying qualified immunity although "no other court decisions directly have addressed circumstances like those presented here"); *McKenney v. Mangino*, 873 F.3d 75, 82 (1st Cir. 2017) (declining to require "a case presenting a nearly identical alignment of facts" to deny qualified immunity (citation and internal quotation marks omitted)); *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012) (denying qualified immunity to officer who used a taser on "nonviolent, nonfleeing misdemeanant" even though "we had not yet had an opportunity" to address a case involving such facts); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004) (no qualified immunity for school officials who punished a student for silently raising a fist during daily flag salute; court refused to "distinguish, on constitutional grounds, between a student with his hands in his pockets or at his sides…and a student with his hand in the air").

Conflict concerning the "clearly established" inquiry has led to conflicts in its application. For instance, the Second and Seventh Circuits have held that the constitutional limits on the use of new weaponry can be "clearly established" even if courts have not previously considered those specific weapons. *See Edrei v. Maguire*, 892 F.3d 525, 542 (2d Cir. 2018) (denying qualified immunity to officers who employed long-range acoustic device despite absence of cases about that specific weapon because "novel technology, without more, does not entitle an officer to qualified immunity"); *Phillips v. Community Ins. Corp.*, 678

F.3d 513, 528 (7th Cir. 2012) (denying immunity for excessive force claim for using a device akin to a bean-bag shotgun, even though no prior case held the use of that weapon unconstitutional). But in *Mattos v. Agarano*, the Ninth Circuit took the opposite approach, granting immunity to an officer who deployed a taser on a non-threatening victim of a domestic dispute, because "there was no Supreme Court decision or decision of our court addressing the use of a taser in dart mode." 661 F.3d 433, 452 (9th Cir. 2011) (en banc)

Indeed, the "clearly established" standard is so murky that it has engendered many conflicts *within* the circuits. For example, in *Baynes v. Cleland*, the Sixth Circuit considered whether a district court had erred in granting qualified immunity to an officer sued for handcuffing a suspect too tightly, where no case addressed the specific circumstances presented—the plaintiff complained only once, and the police-car ride during which he was handcuffed was only 20 minutes long. 799 F.3d 600, 615 (6th Cir. 2015),. The court of appeals reversed the grant of immunity because circuit precedent holding that "excessively forceful or unduly tight handcuffing is a constitutional violation" established the law at the requisite level of specificity. *Id*. at 614. "Requiring any more particularity than this," the court explained, "would contravene the Supreme Court's explicit rulings that neither a 'materially similar,' 'fundamentally similar,' or 'case directly on point'— let alone a factually identical case—is required." *Id*.

But in *Latits v. Philips*, the same court required just such particularity in prior precedent. 878 F.3d

541 (6th Cir. 2017). There, officers chased a motorist and momentarily subdued him; when the motorist then attempted to drive off, one of the officers, standing at the side of the car, shot him. *Id.* at 546. The driver, according to the court, "did not present an imminent or ongoing danger." *Id.* at 552. Notwithstanding circuit precedent that "had clearly established that shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat," the court granted qualified immunity. *Id.* at 553 (citation and internal quotation marks omitted). It explained that prior circuit cases establishing the law had involved drivers who "attempted to initiate flight" whereas in *Latits*, the officer pulled the trigger as the driver attempted to re-initiate flight after he had already been stopped. *Id.* Thus, as the Fifth Circuit apparently did in the decision below, *Latits* granted qualified immunity based on minute factual distinctions of the type the Sixth Circuit disavowed in *Baynes* and this Court abjured in *Lanier*.

Qualified immunity jurisprudence is equally muddled in other circuits. Just two years after the Ninth Circuit granted immunity to the taser-firing officer in *Mattos*, a panel from that circuit endorsed the opposite approach to excessive force claims involving new technologies. See *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013) ("it does not matter that no case of this court directly addresses the use of [a particular weapon]; we have held that an officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." (citation

and internal quotation marks omitted) (second and third alteration in original)).

The Tenth Circuit's qualified immunity jurisprudence is similarly fractured. *Compare Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) ("we need not have decided a case involving similar facts to say that no reasonable officer could believe that he was entitled to behave as Officer Sweet allegedly did" when he tackled and used a taser on a "nonviolent misdemeanant."), *with Morris v. Noe*, 672 F.3d 1185, 1197–98 (10th Cir. 2012) (denying qualified immunity even though court "found no cases addressing the type of force used here"), with *Lowe v. Raemisch*, 864 F.3d 1205, 1209- 10 & n.9 (10th Cir. 2017), *cert. denied sub nom. Apodaca v. Raemisch*, 139 S. Ct. 5 (2018) (granting qualified immunity for prisoner's 25-month deprivation of outdoor exercise, despite circuit precedent holding that a 36-month deprivation of outdoor exercise stated an Eighth Amendment claim, because prior case focused on whether 36-month deprivation could imply deliberate indifference to Eighth Amendment rights rather than whether such a deprivation was "sufficiently serious" to constitute an Eighth Amendment violation).

Unlike a typical intra-circuit conflict that might be resolved through en banc rehearings, these conflicts involve an inquiry that has defied consistent application across and within circuits and over time, so the difficulties are likely to persist. For instance, as discussed above, the Ninth Circuit's opinion in *Mattos* was contradicted in that circuit's *Gravelet-Blondin* decision just two years later, even though *Mattos* was decided en banc.

In sum, the disarray among the courts of appeals regarding the factual similarity required to establish the law "leaves the 'clearly established' standard neither clear nor established among our Nation's lower courts." *Zadeh v. Robinson*, 928 F.3d 457, 479 (Willett, J., concurring dubitante). By granting this conditional cross-petition, this Court can correct that problem.

C. The Fifth Circuit failed to acknowledge its *own* "clearly established law" when addressing this issue.

Finally, Winzer's complaints about the vagueness of this Court's jurisprudence on this issue is not purely academic, because the Fifth Circuit clearly erred in its analysis of its *own* "clearly established" precedent. Only one year before it issued its opinion in this case, the same court held in *Darden v. City of Fort Worth, Texas* that it is clearly established that law-enforcement officers cannot use deadly force on suspects "whose behavior did not rise to the level of active resistance." 880 F.3d 722 (5th Cir. 2018), *cert denied*, 139 S. Ct. 69 (2018) (citing *Cooper v. Brown*, 844 F.3d 517, 524–25 (5th Cir. 2016); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012); *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008)). The majority opinion's discussion of the facts of this case plainly reveal that this "clearly established" rule should have applied. According to the majority:

> Hinds responded to a 911 call of a man with a gun. The suspect was a black male, afoot and wearing a brown shirt. Upon Hinds's arrival, the suspect fired a shot at Hinds and [another

> officer]. Hinds then lost sight of the suspect. The officers encountered numerous civilians along the road as they searched for the suspect. The officers eventually set up a defensive barrier complete with three vehicles, five officers, four semiautomatic rifles, and a shotgun on a road in the vicinity of the suspect's last known location. Minutes later, Gabriel, on his bike and dressed in blue, not brown, appeared on the same street as the last known location of the suspect. Gabriel was riding his bicycle more than 100 yards away. Further, Gabriel did not have anything in his hands, had both hands on the handlebar of his bike, did not reach for anything, did not point anything towards the deputies, and was unarmed. Nonetheless, an officer stated that Gabriel "had that gun," while another screamed "put that down!" Hinds opened fire on Gabriel within seconds of spotting him.

Pet.Appx. at 31a–32a. But notwithstanding this accurate recantation of the record, the majority summarily concluded that, "we cannot conclude that Gabriel's right to be free from excessive force was clearly established here." *Id.* at 33a.

But the only authorities that the Fifth Circuit cited in support of its holding were plainly inapposite. It first relied on this Court's opinion in *al-Kidd*, a case in which it rejected a plaintiff's argument that it was "clearly unreasonable" for an officer to violate a statute that had never been previously interpreted. 563 U.S. 731, 741 (2011). Obviously, this case does not involve the application of a new statute. It then quoted *Mullenix*, a case in which this Court rejected a plaintiff's argument that it was "clearly established"

that police were not allowed to use deadly force on an intoxicated fugitive, who was attempting to avoid capture through high-speed vehicular flight, had twice threatened to shoot police officers, and was *moments* away from encountering another officer while driving towards him at over 100 miles per hour. 136 S. Ct. at 309. Not only was the law "clearly established" on this issue, nothing in the facts of *this* case is even remotely similar to the circumstances there.

Indeed, the Fifth Circuit's majority's failure to follow the holding in *Darden*, preferring instead to base its decision in this case on this Court's "exacting standards," is particularly concerning in light of the facts of the *Darden* case. There, the same court held that "clearly established law" would prohibit an officer from using a taser on a compliant suspect who was *in the same room*. 880 F.3d at 732–33. In light of the majority's acknowledgment that there was evidence in the summary-judgment record that could establish that Hinds and his suspect were *90 yards apart*, its refusal to apply its *own* precedent on this issue only further illustrates the need for this Court's intervention and guidance on this issue.

II. This case is one of several currently pending before this Court that address the "clearly established law" issue.

There can be no dispute that Winzer preserved her arguments on the "clearly established law" issue in the court below. Should this Court grant Kaufman County's petition and address the merits of its arguments regarding the evidence of the reasonableness of Hinds's conduct, Winzer

respectfully requests the Court to grant this conditional cross-petition, so that she might be subject to relief should this Court address the "clearly established law" issue in another pending case. Presently, Winzer is aware of seven others:

— *Baxter v. Bracey*, No. 18-1287
— *Brennan v. Dawson*, No. 18-913
— *Corbitt v. Vickers*, No. 19-679
— *Hunter v. Cole*, No. 19-753
— *Kelsay v. Ernst*, No. 19-682
— *West v. Winfield*, No. 19-899
— *Zadeh v. Robinson*, No. 19-676

Because this Court's decision in any one (or more) of these cases could allow it to grant, vacate, and remand the Fifth Circuit's judgment in this case, Winzer respectfully requests this Court to grant the appropriate relief.

CONCLUSION

Should this Court grant Kaufman County's petition for writ of certiorari, it should grant this cross-petition as well.

Respectfully submitted,

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