No. 21-57

In The
Supreme Court of the United States

LEVI FRASIER,

Petitioner,

v.

CHRISTOPHER L. EVANS, et al.,

Respondents.

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

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF OF INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Institute for Justice (IJ) is a nonprofit public-interest law firm dedicated to defending this nation's constitutional structure and securing the foundations of a free society. IJ believes that it is critical that the courts enforce constitutional limits on governmental power and ensure that the public can hold officials accountable when they violate the Constitution.[1]

IJ urges this Court to grant certiorari and consider the Tenth Circuit's novel rule that categorically declares all executive branch training and guidance irrelevant for qualified immunity purposes. This rule prevents the executive from effectively training its own officers to respect the public's constitutional rights and makes it even harder to hold officials accountable when they flout their training and intentionally violate the Constitution.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Amicus obtained the consent of all parties to file this brief. All parties have been timely notified of the submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

For years, the Denver Police Department trained its officers that individuals have a First Amendment right to video record them performing their duties in public. Yet the Tenth Circuit granted Respondent-Officers qualified immunity for admittedly, and knowingly, interfering with that right. In so ruling, the Circuit Court declared a categorical rule of broad importance: "judicial decisions are the only valid interpretive source . . . of clearly established law." Pet. App. 28a. And therefore, under the decision below, all governmental trainings, policies, and regulations are expressly "irrelevant" to the qualified immunity analysis. *Id*.

At its core, the Tenth Circuit's categorical rule violates fundamental separation-of-powers principles. Under our system of government, the executive branch must supervise its officials to ensure that they wield their authority in accordance with the Constitution. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020). To that end, the executive branch sets policy and trains its officers to understand and respect the public's constitutional rights. It also puts officers on notice that certain conduct violates the Constitution and will not be tolerated. Yet under the Tenth Circuit's rule, the executive cannot make its officials accountable to the public for flouting their training. That, in turn, undermines the executive's ability to police its own officers.

Along with violating foundational principles, the Tenth Circuit's categorical rule is unworkable. Consider the result: In 2007, Denver trained its officers to respect the right-to-record; Respondent-Officers knowingly interfered with it in 2014; and in 2021, the Tenth Circuit declined to rule whether the right exists going forward.[2] Thus, despite fourteen years of training, officers can still claim qualified immunity for retaliating against a citizen-recorder today. That is an absurd result and it illustrates how far the qualified immunity doctrine has strayed and why this Court's guidance is badly needed.

ARGUMENT

The Tenth Circuit did far more than grant Respondent-Officers qualified immunity in this one case. Rather, the court declared a sweeping, categorical rule that markedly restricts the scope of clearly established constitutional rights. At its core, the decision below declared that "[j]udicial decisions are the only valid interpretive source of the content of clearly established law; whatever training the officers received concerning the First Amendment was irrelevant to the clearly-established-law inquiry." Pet. Appx. 28a.

[2] Pet. Appx. 30a, n.4.

I. THE TENTH CIRCUIT'S CATEGORICAL RULE DECLARING EXECUTIVE TRAINING IRRELEVANT TO QUALIFIED IMMUNITY VIOLATES FUNDAMENTAL SEPARATION-OF-POWERS PRINCIPLES.

The Tenth Circuit's categorical rule is inconsistent with fundamental separation-of-powers principles. Under our system, the executive is responsible for setting policies for, and overseeing, its subordinate officers. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 501 (2010). Those officers may "wield significant authority, but that authority remains subject to the ongoing supervision and control" of the executive. *Seila*, 140 S. Ct. at 2203. With that in mind, departmental training and policies are how the executive puts its officers on notice of their duties, and the public's rights, under the Constitution.

At the same time, the Tenth Circuit's categorical rule means that only the judiciary can inform executive branch officials about how they are expected to behave. That is not the court's constitutional role. *See*, *e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761, 1785 (2021); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). In fact, the Tenth Circuit's decision impairs the executive's duty to implement policy and police its own officers. At bottom, executive branch guidance and training is relevant to both the officers themselves, and to our system of government.

A. As this Court Has Already Held, Executive Branch Training is Critical to What It Means for a Constitutional Right to Be Clearly Established.

Nearly 20 years ago, this Court in *Hope v. Pelzer* held that executive branch regulations, policies, and trainings are relevant when evaluating the scope of clearly established law for qualified immunity purposes. 536 U.S. 730, 744–46 (2002). That is as it should be, because these types of training and oversight provide "fair and clear warning" and help "put a reasonable officer on notice" that their conduct is unlawful. *Id*. at 745–46.

In *Hope*, this Court determined that punishing an inmate by handcuffing them to a "hitching post" or restraining bar for seven hours clearly violated the Eighth Amendment. 536 U.S. at 741–42. In denying qualified immunity, the Court did not limit itself to considering analogous cases. *Id*. at 743. Instead, it expressly held that the caselaw it considered was "buttressed by the fact that the DOJ specifically advised the ADOC [Alabama Department of Corrections] of the unconstitutionality of its practices." *Id*. at 744. And even more specifically, that the "DOJ report condemning the practice" was relevant to the qualified-immunity-analysis. *Id*. at 745.

Just this year, the Court reaffirmed the importance of an officer's training and guidance in determining whether their conduct violates the Constitution. In *Lombardo v. City of St. Louis*, this Court explained that

the way a city trains its officers as well as "well-known police guidance" are relevant factors for determining whether an officer violated the Constitution and whether the violation was clearly established. 141 S. Ct. 2239, 2241–42 (2021) (per curiam).

Indeed, executive branch training and guidance are critical: they are how that branch of government puts its officers on notice about, and teaches respect for, constitutional rights. For example, departmental training teaches police officers how much force is—and is not—acceptable to use when arresting someone.[3] It is how corrections officers learn the constitutional limits when dealing with, often difficult, prisoners.[4] And it is even how police officers are taught to respectfully and carefully investigate claims of domestic violence.[5]

Absent that training, the only way to put officers on notice about their constitutional obligations would be for one officer to go too far, get sued, and for the Circuit Court to publish an opinion explaining why the conduct was wrong. That is not the role of the judiciary, but it is what the Tenth Circuit's rule requires. And it prevents the executive from putting its officials on notice and ensuring that they "wield [their] significant

---

[3] *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004); *Raiche v. Pietroski*, 623 F.3d 30, 39 (1st Cir. 2010).

[4] *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017); *Furnace v. Sullivan*, 705 F.3d 1021, 1027–28 (9th Cir. 2013).

[5] *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 437 (2d Cir. 2009).

authority" in accordance with the Constitution. *Seila*, 140 S. Ct. at 2203.

That is why the Tenth Circuit's hard-and-fast rule is such a marked departure from the law everywhere else. In fact, as the Petition notes, every other Circuit that has ruled on it considers executive branch training, guidance, policies, and the like when evaluating a claim for qualified immunity. Pet. 12–14. Conversely, the Tenth Circuit was unable to cite a single other decision that held as it did. *See* Pet. Appx. 28a–29a.

B. Both the State and Federal Executive Branches Went to Great Lengths to Ensure That Officers Respect the Public's Constitutional Right-to-Record.

Consider the depth of executive branch guidance that the Tenth Circuit declared irrelevant in this case. First, Denver had instituted an "official policy which clearly affirmed citizens' First Amendment rights to record the police in the public discharge of their duties." Pet. Appx. 13a. The police department then began training its officers on that policy in February 2007. *Id*. That is more than seven years of training—not just about departmental policy, but about the underlying constitutional right that policy was meant to protect—before the August 2014 incident in this case. *Id*.

Additionally, just like in *Hope*, the Department of Justice had issued guidance directly on point: Individuals have a "First Amendment right to observe

and record police officers engaged in the public discharge of their duties." U.S. Dep't of Justice, Civil Rights Division, Re: *Christopher Sharp v. Baltimore City Police Dep't, et al.*, at 2 (May 14, 2012) ("2012 DOJ Guidance").[6] In fact, the DOJ had even stated that "the justification for this right is firmly rooted in long-standing First Amendment principles." *Id*. at 3. It also concluded that "[c]omprehensive policies and effective training are critical" to protecting individuals' right-to-record. *Id*. at 11.

Denver then explicitly incorporated the 2012 DOJ Guidance into its training starting in 2013. Pet. Appx. 70a. In fact, the city "advised officers that 'The Civil Rights Divisions of the Justice department . . . declar[ed] that citizens have a First Amendment Right to videotape the actions of police officers in public places and that seizure or destruction of such recordings violates constitutional rights.'" *Id* (alterations in original).

If anything, the executive branch training in this case is clearer than in *Hope*. In *Hope*, "the DOJ advised the ADOC to cease use of the hitching post in order to meet constitutional standards." 536 U.S. at 745. The

---

[6] This was not the only time the DOJ affirmed that the First Amendment protects the right-to-record the police. *See*, *e.g.*, Statement of Interest at 1, *Garcia v. Montgomery County*, No. 8:12-cv-03592 (D. Md. Mar. 4, 2013), ECF No. 15-1; Agreement for Effective & Constitutional Policing at 20–21, *United States v. Town of E. Haven*, No. 3:12-cv-01652, (D. Conn. Dec. 20, 2012), ECF No. 11; Consent Decree at 44–45, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (E.D. La. 2013), ECF No. 2-1.

ADOC disagreed with the DOJ's policy and tried to push back. *Id.* But the federal executive was undeterred and directed the state to stop its practice. *Id*. Here, there was no such disagreement: Denver trained its officers for years to respect the right-to-record, the DOJ declared the same, and the state incorporated the DOJ's policy into its own. Pet. Appx. 13a, 70a. Further, unlike the officers in *Hope*—who likely were never told about the DOJ's guidance, 536 U.S. at 745—the Respondent-Officers here all testified that they had attended trainings on, knew about, and understood both the state and federal policies and guidance. Pet. Appx. 70a.

In short, if the contested DOJ guidance in *Hope* "buttressed" this Court's conclusion that the violation there was clearly established, 536 U.S. at 744, it cannot be that the DOJ's uncontroverted guidance that individuals have a right-to-record is "irrelevant" to whether that exact right exists and is clearly established. Pet. Appx. 28a.

C. Declaring its Training Irrelevant Impairs the Executive Branch's Ability to Police Its Own Officers.

It would be bad enough if the Tenth Circuit had merely ignored executive branch guidance in this case. But its categorical ruling also acts prospectively, effectively prohibiting the executive from putting its own officers on notice about the constitutional rights it wants them to respect.

It is not controversial to say that the executive must supervise its officials. *Siela*, 140 S. Ct. at 2203; *Free Enter. Fund*, 561 U.S. at 501. And as the previous section makes clear, the executive went to great lengths to ensure that officers were aware of, and respected, the First Amendment right-to-record.

However, by declaring that all irrelevant, the Tenth Circuit substituted its own policy choices for the executive's. Simply put, that is not its constitutional role. "Courts are not well-suited to weigh the relative importance of the regulatory and enforcement" decisions built into executive policy. *Collins*, 141 S. Ct. at 1785. Nor is the judiciary "constitutionally entitled to weigh the costs and benefits of different approaches and make the necessary policy judgment." *Azar*, 139 S. Ct. at 1816. Courts are to interpret the law as it exists. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). And, "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied," nor limit an existing one, *Lexmark Intern., Inc. v. Static Control Comps., Inc.*, 572 U.S. 118, 128 (2014), neither should courts ignore how the executive trains and supervises its officers.

Ultimately, the Tenth Circuit's categorical rule prevents the executive from making its officers accountable to the public for constitutional violations that they were specifically trained to avoid. And that "impair[s]" the executive's constitutional duties of "appointing, overseeing, and controlling" its own officials. *Free Enter. Fund*, 561 U.S. at 500–01 (citations omitted).

II. THE TENTH CIRCUIT'S CATEGORICAL RULE NARROWS THE MEANING OF CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS TO AN UNWORKABLE DEGREE.

In addition to violating fundamental separation-of-powers principles, the Tenth Circuit's categorical rule is unworkable.

Qualified immunity was never meant to protect the "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Instead, the doctrine was intended to protect officials who "neither *knew* nor should have known of the relevant legal standard." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added). Yet the Tenth Circuit granted immunity despite testimony that Respondent-Officers knew of the right-to-record from their training and violated it anyway, simply because there was no Tenth Circuit case directly on point. Pet. Appx. 13a, 31a.

This highlights the "danger of a rigid, overreliance on factual similarity." *Hope*, 536 U.S. at 742. And the Tenth Circuit is far from the only court to make this mistake. Indeed, this past term in *Taylor v. Riojas*, this Court vacated a Fifth Circuit decision because "no reasonable correctional officer could have concluded" that it was constitutional to confine an inmate in cells teeming with human waste for six days. 141 S. Ct. 52, 53 (2020) (per curiam) (citing *Hope*, 536 U.S. at 741). Simply put, some constitutional rights exist with such

"obvious clarity" that they can be clearly established even without a case directly on point. *Id*. at 53–54; *see also McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (GVR'ing a grant of qualified immunity to a correctional officer for pepper spraying an inmate without provocation); *Lombardo*, 141 S. Ct. at 2241–42.

If anything, the Tenth Circuit's decision compounds an error that this Court sought to fix in *Taylor*. 141 S. Ct. at 53. Worse than ignoring an obvious violation of which an officer *should have known*, here officers were granted qualified immunity for violations that they *knew*, and were specifically trained, not to commit. Pet. Appx. 13a. Considering the purpose of qualified immunity is to ensure that "officers are on notice their conduct is unlawful," *Hope*, 536 U.S. at 739, this case shows just how far the doctrine has strayed and why this Court's guidance is needed.

Indeed, by ignoring the executive branch's constitutional training and insisting on a factually similar case, the Tenth Circuit's ruling also exacerbates what Judge Willett of the Fifth Circuit recently called "constitutional stagnation" and a "[h]eads government wins, tails plaintiff loses" approach to qualified immunity. *Zadeh v. Robinson*, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring). As Judge Willett noted, under qualified immunity, governmental officials too often can "duck consequences for bad behavior" unless plaintiffs can "cite functionally identical precedent" that already "held such misconduct unlawful." *Id.* at 479. Without that precedent, "many courts grant immunity without first determining whether the

challenged behavior violates the Constitution." *Id.* In turn, that failure to clarify the law leaves the next plaintiff without precedent to cite. And so, "[i]mportant constitutional questions go unanswered precisely because no one's answered them before." *Id*; *see also* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 12 (2015) (explaining how even obvious constitutional rights "might *never* be clearly established" under this current framework).

This case illustrates Judge Willett's point perfectly. More than finding that the right-to-record was not clearly established in 2014, the Tenth Circuit also declined to "consider, [ ]or opine on" whether the right exists *going forward*. Pet. Appx. 30a, n.4. As a result, in 2021 officers in Denver may still claim qualified immunity when they interfere with a citizen-recorder, even though the city has been training them not to do that since 2007. *Id*. at 13a. As the petition notes, "there is considerable irony" in the Tenth Circuit declaring a hard-and-fast rule that judicial decisions are the only interpretative source of clearly established law, and then declining to establish any clear law. Pet. 20.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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

Counsel for Amicus Curiae

AUGUST 16, 2021