NO. 21-57

In the
Supreme Court of the United States

LEVI FRASIER,

Petitioner,

v.

CHRISTOPHER EVANS, et al,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

For nearly 40 years, this Court has repeatedly held that police officers are entitled to qualified immunity unless every reasonable officer would understand that the conduct in question violated clearly established law. The Court has always relied on judicial authorities to determine the scope and content of clearly established federal law. Petitioner claims that Denver police officers violated his First Amendment rights by trying to get him to share with them video footage that he repeatedly falsely denied having recorded of them conducting a narcotics arrest. The district court concluded that the officers' conduct did not violate clearly established law, but nonetheless concluded that they are not entitled to qualified immunity because they concededly were trained that the public has a right to record the police carrying out their duties in public. A unanimous Tenth Circuit panel reversed that decision as squarely foreclosed by this Court's repeated holdings that an officer's subjective knowledge is irrelevant to the objective reasonable-officer test. The panel further agreed with the district court that the officers' conduct did not violate any clearly established law.

Petitioner's questions presented are:

1. Whether localized police training manuals or law enforcement policies alone can suffice to deprive an officer of qualified immunity even if the officer's conduct did not violate any clearly established law.

2. Whether the assumed right to record police officers carrying out their duties in public was clearly established in the Tenth Circuit in 2014.

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INTRODUCTION

This case presents a straightforward and fact-bound application of settled principles of qualified immunity. Under this Court's cases, a police officer is entitled to qualified immunity unless it is clearly established that his conduct violated a statutory or constitutional right. Here, petitioner video recorded Denver police officers using force to arrest a suspected drug trafficker who was trying to swallow a sock full of what they (correctly) believed to be narcotics. The officers then asked petitioner for the video, which could be important evidence in the narcotics case and in the investigation that typically occurs when officers must use force to detain a suspect. Yet rather than provide the recording, or even admit that he had taken one but decline to share it, petitioner lied—repeatedly. Eventually, he admitted that he had recorded the encounter after multiple officers told him they had seen him do so. Even then, however, he never supplied them with the video, and he ultimately left the scene of the arrest within about 20 minutes, after the officers shook his hand and thanked him for his help.

Petitioner proceeded to release the recording that he had falsely denied taking to the media—even as he falsely claimed that the officers had deleted it—and to sue the officers for, among other things, purportedly retaliating against him for exercising his claimed First Amendment right to record them. The district court initially concluded that the officers are entitled to qualified immunity because their actions did not violate any clearly established law. But the court then changed its mind and determined that it did not matter if the officers violated any clearly established

law because they acknowledged knowing that the public has a right to record the police in public. The Tenth Circuit then reversed that conclusion as foreclosed by this Court's repeated holdings that an officer's subjective knowledge is irrelevant to the qualified-immunity analysis. That decision is correct and does not warrant this Court's review.

As for the first question presented, whatever role (if any) officer training may have to play in qualified-immunity analysis, it is well-settled that it cannot play either of the roles petitioner urges—*i.e.*, supplanting the need for clearly established *law* or displacing the objective reasonable-officer test entirely. To conclude otherwise would require this Court to overrule decades of precedent, a step that petitioner does not even try to demonstrate would be appropriate. As for the second question presented, no circuit has embraced (and both courts below rejected) petitioner's contention that "[b]asic First Amendment principles" render the right to record police in public sufficiently "obvious" to be clearly established. Even if they did, moreover, that would not change the bottom line here, for the qualified-immunity analysis focuses on whether it was clearly established that an officer's conduct *violated* the law at the time. After this Court's decision in *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019), it is exceedingly unlikely that petitioner has even stated a viable First Amendment retaliation claim, but he certainly has not identified any clearly established First Amendment violation. All of that makes this an exceptionally poor vehicle for exploring the various contours of qualified-immunity doctrine that petitioner invites the Court to (re)examine. The Court should deny the petition in its entirety.

STATEMENT OF THE CASE

A. Factual Background[1]

On August 14, 2014, Detective John Bauer was surveilling a parking lot in plain clothes in Denver, Colorado, when he observed what appeared to be a drug deal involving the driver of a sedan. Pet.App.8a; A225-26. Drug deals were common in that parking lot, so Bauer "call[ed] … out" the suspected transaction on his radio. A225. He then engaged the suspect, announced "police," and attempted to arrest the suspect with the aid of Sergeant Bothwell, who had arrived at the scene. A225-26. The suspect resisted directives to get out of his car, reached for his waistband, and, after Bauer pulled him from his car, attempted to swallow a sock that the officers believed contained contraband and posed a threat to his life. Pet.App.8a; A227. The officers ordered him to spit out the sock, but he refused, and a struggle ensued. Pet.App.8a; A227.

While attempting to get the suspect to release the sock, Bauer saw petitioner Levi Frasier, who was standing nearby trying (initially unsuccessfully) to record the struggle, and asked him for help. Pet.App.8a; A228. Frasier ignored the request at first, but after Bauer asked a second time, Frasier asked if they were police, and, once Bauer confirmed that they were, aided the officers by grabbing ahold of the sock. Pet.App.8a; A228. Officers Charles Jones and Christopher Evans soon arrived to assist, however,

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[1] This case arises in a summary-judgment posture, so the facts are construed in the light most favorable to petitioner. *See City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 603 (2015).

and instructed Frasier to step back. *Id.* At that point, Frasier stepped back about ten feet and began recording with his tablet. Pet.App.8a.

Meanwhile, the suspect continued to refuse the officers' repeated commands to spit out the sock, so Officer Jones rapidly struck him in the face six times to try to get him to release it, which he finally did. Pet.App.8a. At some point, Sergeant Bothwell noticed Frasier recording and announced "camera." Pet.App.9a. As the officers continued to struggle with the suspect, a pregnant woman who had been in the car with him approached the group screaming and tried to insert herself between him and the officers. A1012. Jones reached out and pushed her back by the shoulder as Evans took her ankle and pulled her to the ground. A1012. Eventually, the officers were able to handcuff the suspect, at which point Frasier stopped recording, returned to his nearby van, and stashed the tablet in the back seat. Pet.App.9a.

Having finally subdued the suspect, Officer Evans approached Frasier and asked him to bring his identification and the video he had just recorded to the squad car to make a witness statement. Pet.App.9a; A243-44. Frasier did not follow Evans immediately, but rather sat down in his van to smoke a cigarette. A490. Frasier later explained that he saw no need to follow right away because "[i]t wasn't like I was under arrest. He didn't—you know, I mean, he just asked me to come up to the car." A490-91. Frasier eventually came over to Evans' car with his driver's license, but not his tablet. Pet.App.9a. Evans asked where the video was, but Frasier did not respond. A491. Evans then told Frasier that he needed to get a

witness statement from him and, after retrieving the requisite paperwork from his car, asked Frasier about the video again. A1013. According to Frasier, when he again did not respond, Evans then said, "Well, we could do this the easy way or we could do this the hard way." A491. Frasier still did not respond. A491.

After Frasier completed a witness statement, Officer Evans wrote down some additional questions for him to answer. A258-60. One was whether Frasier saw any officers do anything inappropriate, to which Frasier responded "no." A258. Another was whether the officers stopped using force as soon as they had the suspect in custody, to which Frasier responded "yes." A260. The final question was whether he had taken any video footage, to which Frasier (falsely) answered "a Snapchat." A260. Officer Evans, who was not familiar with Snapchat, asked Frasier questions about it, and Frasier told him (again, falsely) that he had taken only a photograph that had disappeared as soon as he sent it to "Ali Quinn, Snapchat name Trashman 555." Pet.App.10a; A260. While Frasier attested that everything in his witness statement was "true, to the best of [his] knowledge and belief," he later conceded that these (and other) statements he provided were lies. Pet.App.10a; A260.

After Frasier completed the witness statement, another officer whose identity he cannot recall asked him for the video. Pet.App.10a. Frasier lied again, but the officer responded that they had seen him recording the encounter. Pet.App.10a. At that point, Officer Evans told Frasier to get his cell phone. Pet.App.10a. Frasier did so, but another officer indicated that the recording device had been larger

than a cell phone. Pet.App.10a. Frasier then lied yet again, claiming that he did not have any other device. Pet.App.10a.

Some other officers joined the conversation, and Frasier ultimately admitted that he did indeed have a tablet, which he agreed to retrieve from his van. Pet.App.11a; A251. Instead of showing the officers the video he had recorded, however, he first showed Officer Evans a recording of Frasier engaging in a cage-fighting match. Pet.App.11a; A251. The officers' body cameras captured this exchange, showing Frasier holding a tablet while Evans looked over his shoulder. A1015-16. The footage shows Evans raise a piece of paper to try to shield the tablet from glare and then move with Frasier to the rear hatch of a nearby truck for more shade. A1016. Evans and Frasier then stood behind the truck for about four minutes, during which time they were mostly hidden from the view of the video. A1016.

According to Frasier, at some point during those four minutes, Evans took the tablet from him without his permission and began to review it, looking for the video. Pet.App.11a; A253. Frasier claims that he told Evans he could not look at his tablet without a warrant, but that Evans continued to scroll through the tablet anyway until ultimately "holler[ing] over his shoulder" that he could not find any video. Pet.App.11a; A253. According to Frasier, an unidentified officer responded, "[a]s long as there's no video, it's okay," at which point Evans returned his tablet. Pet.App.11a; A253. Evans then asked Frasier whether he had anything to add to his witness statement. Frasier asked if he could leave and was

told yes. Pet.App.11a. Evans returned his identification, thanked him for his help, and shook his hand. Pet.App.11a; A255. Frasier left, ending his interaction with the officers 23 minutes after it began, and without ever sharing with them the video footage of the arrest that he had falsely denied recording. Pet.App.11a-12a.

B. Proceedings Below

1. A few months after the incident, Frasier took to the press, claiming that the officers had deleted the video from his tablet to try to cover up a purportedly improper use of force. A1017. Notwithstanding this claim, however, Frasier managed to locate the allegedly deleted video and supply it to the media. Pet.8. Troubled by Frasier's serious accusations, the Denver Police Department Internal Affairs Bureau launched an investigation. A1017. Frasier agreed to surrender his tablet for forensic analysis as part of the investigation, and the analysis revealed that the video was not and had not ever been deleted from the device. A1017.

Meanwhile, Frasier decided to sue the City and County of Denver and the five officers involved in the events of August 14 under 42 U.S.C. §1983, claiming, among other things, that they unlawfully retaliated against him for exercising his First Amendment right to record the arrest and unlawfully seized him and searched his tablet. A20-30. Frasier claims to have suffered emotional distress and seeks compensatory and punitive damages.

As relevant here, the officers moved to dismiss Frasier's retaliation claim, arguing that they did not violate any clearly established law by trying to obtain

video evidence of an arrest from an eyewitness who repeatedly falsely denied having taken it. A36-37; A40-42. The district court initially agreed. A174; Pet.App.13a-14a. After noting that the Tenth Circuit had not weighed in on whether the First Amendment protects a right to record the police engaged in their official duties in public, that several circuits had held that such a right was not "clearly established" by reference to general First Amendment principles, and that cases in which a violation of such a right had been found were factually distinguishable, the court concluded that existing case law in August 2014 was insufficient "to have put the individual officer defendants on notice that their conduct with respect to plaintiff violated a clearly established First Amendment right." A174-75; A177.

2. Certain other claims went forward, and the case proceeded to discovery. During the course of that discovery, both Frasier and the officers were deposed. During his deposition, Frasier testified that his interactions with the officers that day had been "friendly"; that the officers repeatedly thanked him for his help; that no one ever threatened him, restrained him, or told him he could not leave; and that he never asked the officers if he could leave until the very end of the encounter, at which point they said yes. A494; 496, 501.

The officers, for their part, readily acknowledged and defended the force they had used to try to get the suspect to release his hold on the sock full of narcotics. A228; A266-67; A281. They also readily acknowledged that they had been trained that members of the public have a right to record the police. Pet.App.13a; A228-

29; A264; A279. But contrary to petitioner's claims, no officer ever "testified that they knew they were violating petitioner's rights." Pet.3. The officers instead testified that they were simply trying to determine whether any video footage existed and, if so, obtain it because it could be "evidence to a potential narcotics arrest and also part of a use-of-force investigation." A280.

3. After the close of discovery, the officers filed a motion for partial summary judgment. A187.[2] The district court granted summary judgment to the officers on Frasier's unlawful detention claim, finding that even if the officers detained Frasier—a conclusion that the district court did not reach—they engaged in a permissible investigatory detention because there was reasonable suspicion that Frasier made a false report to the police in violation of Colorado law when he repeatedly denied having taken any recording. A1022-25 (citing C.R.S. §18-8-111(1)(a)(III)).[3]

Meanwhile, Frasier asked the district court to reconsider its holding that respondents are entitled to qualified immunity on his retaliation claim, arguing that even if it was not clearly established law that their conduct violated the First Amendment, they subjectively knew that it did because of their training. Pet.App.64a. In a memorandum order issued on the same day that it granted partial summary judgment to the officers, the district court agreed with Frasier

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[2] The officers moved for summary judgment as to all remaining claims except for the unlawful search and seizure claim against Officer Evans with respect to Frasier's tablet. A187 n.1.

[3] The district court also granted summary judgment to the City and County of Denver on all remaining claims against it. A1036.

and reinstated his First Amendment retaliation claim. Pet.App.64a-65a. The court reiterated its conclusion that respondents did not violate any law that was clearly established in 2014, but nevertheless determined that they are not entitled to qualified immunity based solely on their acknowledgements that they had been told during training courses that people have a right to record police officers performing their official duties in public. Pet.App.65a, 67a. The court did not engage in any analysis of whether it was clearly established law that anything respondents did on August 14 actually violated Frasier's First Amendment rights.

Respondents moved for summary judgment on the reinstated retaliation claim, arguing (among other things) that the claim failed as a matter of law because Frasier's repeated false statements to the officers about potentially relevant evidence provided an objectively reasonable basis for any potential detention. A1049-55. And while respondents continued to take issue with the district court's conclusion that training materials sufficed to render the claimed right to record police clearly established, they also argued that they are entitled to qualified immunity even assuming that right was clearly established because "it cannot be said that any reasonable officer would know that this right somehow prohibited them from attempting to obtain evidence for purposes of investigating a crime and for a subsequent investigation into the force the officers used to arrest the suspect." A1059-60.

In a decision issued before this Court's decision in *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019), the district

court denied the motion for summary judgment. A1121. The court did not disturb its earlier finding and conclusion that any "seizure was a permissible investigatory detention because Officer Evans had reasonable suspicion based on articulable facts that Mr. Frasier made a false report to the police." A1022-23. But the court concluded that the claim could go forward based on that same "permissible investigatory detention" because there "are genuine disputes of material fact regarding whether defendants' actions were substantially motivated by a desire to retaliate against Mr. Frasier for recording the arrest." A1127. The court once again did not address whether any clearly established law would have put the officers on notice that their specific actions, in the context of an eyewitness who repeatedly lied to them about being in possession of important video evidence of an arrest, actually violated the First Amendment.

4. The Tenth Circuit reversed the district court's summary judgment order. Writing for a unanimous panel, Judge Holmes explained the governing legal standard: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pet.App.17a-18a (quoting *City of Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019) (per curiam)). The "contours of a right" must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Pet.App.17a (alterations omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). In the Tenth Circuit, to show clearly established law, a plaintiff "must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established

weight of authority from other courts must have found the law to be as the plaintiff maintains." Pet.App.18a (quoting *Cox v. Wilson*, 971 F.3d 1159, 1171 (10th Cir. 2020)). Only in "'extreme circumstances'" do "general constitutional principles" suffice to "give reasonable government officials fair warning that their conduct is constitutionally or statutorily unlawful." Pet.App.19a (quoting *Taylor v. Riojas*, 141 S.Ct. 52, 53 (2020) (per curiam)).

Applying those black-letter legal principles, the panel concluded that "the district court erred in concluding that the officers were not entitled to qualified immunity because they actually knew from their training that such a First Amendment right purportedly existed—even though the court had determined that they did not violate any clearly established right." Pet.App.20a.

Two principles guided the court's analysis. First, and "most significantly," the panel reiterated that qualified immunity is "judged by an objective standard and, therefore, what the officer defendants subjectively understood or believed the law to be was irrelevant with respect to the clearly-established-law question." Pet.App.20a. As this Court explained in *Anderson v. Creighton*, "an officer's 'subjective beliefs about [whether his conduct was lawful] are irrelevant.'" Pet.App.22a-23a (quoting 483 U.S. 635, 641 (1987)). The panel expressly "reject[ed] the idea that *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] permits an exception to its objective standard based on an official's subjective understanding or knowledge of the law." Pet.App.24a. The panel accordingly concluded that the district court erred by denying

respondents qualified immunity based solely on "their subjective knowledge" of Frasier's "purported First Amendment right." Pet.App.23a.

Second, relying on this Court's decision in *District of Columbia v. Wesby*, 138 S.Ct. 577 (2018), the panel observed that "judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of Mr. Frasier's First Amendment rights was irrelevant to the clearly-established-law inquiry." Pet.App.20a. As the panel explained, "judicial decisions concretely and authoritatively define the boundaries of permissible conduct in a way that government-employer training never can." Pet.App.28a. The district court thus erred doubly by "denying the officers qualified immunity based on the actual knowledge that they purportedly gained from such non-judicial sources." Pet.App.29a.[4]

Finally, the Tenth Circuit agreed with the district court that any First Amendment right to record the police performing their official duties in public was not clearly established, noting that "Frasier does not assert that any on-point Tenth Circuit authority provided clearly established law in August 2014 concerning his First Amendment retaliation claim, and we are not aware of any." Pet.App.31a. The court rejected "Frasier's attempt to distill a clearly established right applicable here from the general First Amendment principles protecting the creation of

[4] The panel went on to hold that the district court erred in denying qualified immunity to the officers with respect to petitioner's First-Amendment conspiracy-to-retaliate and Fourth-Amendment conspiracy claims. *See* Pet.App.63a.

speech and the gathering of news" as "run[ning] headfirst into the Supreme Court's prohibition against defining clearly established rights at a high level of generality." Pet.App.33a. The court further rejected the notion that "these general constitutional principles apply to these facts 'with obvious clarity,' … such that reasonable officers in the defendants' positions would have known that their conduct was unlawful." Pet.App.33a.

REASONS FOR DENYING THE PETITION

The Tenth Circuit applied straightforward and long-settled principles, taken directly from this Court's precedents, to conclude that respondents are entitled to qualified immunity because no clearly established law prohibited the conduct of which they are accused. That conclusion is correct, it does not conflict with any decision of this Court or any other court of appeals, and it does not warrant this Court's review.

Petitioner first asks this Court to decide "[w]hether training or law enforcement policies can be relevant to whether a police officer is entitled to qualified immunity." Pet.i. That highly general framing artfully elides the critical question: Relevant for what purpose? In the lower courts, petitioner argued that the courts should consider such materials to assess whether respondents subjectively *knew* that their conduct was unlawful. But as the Tenth Circuit correctly recognized, that argument is squarely foreclosed by nearly four decades of this Court's cases expressly rejecting the notion that subjective knowledge is relevant to the qualified-immunity inquiry. Petitioner is thus forced to retreat to the (at

least somewhat) more modest claim that courts should consider training to determine whether the law was clearly established. But that argument is foreclosed by this Court's cases too, which have reiterated repeatedly that the clearly established law inquiry actually requires clearly established *law*.

It is little surprise, then, that petitioner cannot identify any court of appeals decision that considered training material either to demonstrate an officer's subjective knowledge or to obviate the need for on-point cases. Instead, all he offers are cases in which a court pointed to such evidence to buttress its bottom-line conclusion after assessing what judicial precedent did or did not establish (as this Court occasionally has too). Not one of those cases deemed such materials outcome-determinative, as the district court did here. In the absence of any disagreement over whether training can clearly establish the law or override the objective reasonable-officer test, little would be accomplished by resolving the rather abstract question of whether courts would be better served not to consider such materials at all. And even if this Court were inclined to accept petitioner's invitation to overhaul these bedrock principles of its qualified-immunity jurisprudence, the Court would be far better served to wait for a case in which the officers did in fact "testif[y] that they knew they were violating [the plaintiff's] rights," Pet.3, which most certainly did not happen here.

Petitioner's second question asks whether the right to record police officers carrying out their duties in public was clearly established in August 2014. But every court of appeals to consider the issue has agreed

with the Tenth Circuit and the district court that this right cannot be deemed clearly established by resort to "[b]asic First Amendment principles" or the so-called "obviousness" doctrine. Indeed, the only court of appeals that has ever held such a right to be clearly established did so because, unlike the four other circuits that have considered the issue, it already had precedent recognizing a right to record the police.

Moreover, determining whether the right to record the police was (or is) clearly established is unlikely to have any impact on this case because what matters for qualified-immunity purposes is whether it was clearly established that the conduct alleged actually violates the First Amendment. And as the Tenth Circuit correctly recognized, even if reasonable officers could be expected to derive the right petitioner asserts from "[b]asic First Amendment principles," those principles certainly would not suffice to clearly establish that anything respondents did *violated* the First Amendment. Indeed, petitioner likely does not even have a viable First Amendment retaliation claim in the first place after this Court's decision in *Nieves*, as the district court explicitly found that respondents had an objectively permissible basis for detaining him, which renders any dispute over their subjective motivations irrelevant under *Nieves*. But at a bare minimum, *Nieves* plainly forecloses any argument that it was clearly established that respondents' alleged conduct violated the First Amendment. That makes this an exceedingly poor vehicle for considering either question presented, as respondents would still be entitled to qualified immunity even if the Court embraced both of petitioner's arguments. The Court should deny the petition in its entirety.

I. The First Question Presented Does Not Warrant This Court's Review.

A. The Decision Below Faithfully Followed Settled Supreme Court Precedent.

"'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *City of Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019) (per curiam) (quoting *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018) (per curiam), and collecting cases). Under this Court's precedents, police officers "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). "'Clearly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful." *Id.* An officer's "subjective beliefs" are "irrelevant" to that inquiry because the question is whether "a *reasonable* officer could have believed" that the conduct "was lawful." *Anderson*, 483 U.S. at 641 (emphasis added).

Indeed, this Court expressly abandoned nearly four decades ago the notion that an officer's subjective understanding of the law can be used to deprive the officer of qualified immunity. *See Harlow*, 457 U.S. at 815-18. As the Court explained in *Harlow*, earlier cases had indicated that "qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of

official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury[.]'" *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). But "the subjective element of" that test "frequently ha[d] proved incompatible with [the Court's] admonition … that insubstantial claims should not proceed to trial," as "questions of subjective intent so rarely can be decided by summary judgment." *Id.* at 815-16. The Court accordingly abandoned the subjective element in favor of an inquiry that looks solely to "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Id.* at 818.

Consistent with those settled principles, the Tenth Circuit began its qualified-immunity analysis by canvassing existing law to determine whether the right that respondents allegedly violated was clearly established in either this Court or the Tenth Circuit as of August 2014. After concluding that it was not, the court declined to consider evidence of what respondents were trained because, under *Harlow*, "what the officer defendants subjectively understood or believed the law to be was irrelevant with respect to the clearly-established-law question." Pet.App.20a. The court accordingly rejected petitioner's contention (and the district court's determination) that respondents are not entitled to qualified immunity even if their conduct did not violate clearly established law because they were trained that the public has a right to record the police.

Far from conflicting with this Court's precedents, that conclusion is compelled by them. Indeed, the Court yet again explicitly rejected the argument that actual knowledge can obviate the need for clearly established law as recently as *City and County of San Francisco v. Sheehan*, 575 U.S. 600 (2015). Just like petitioner argued below, the plaintiff there argued that the defendants were not entitled to qualified immunity because they departed from their training. *Id.* at 616. The Court rejected that argument out of hand, explaining that "[e]ven if an officer acts contrary to her training, ... that does not itself negate qualified immunity where it would otherwise be warranted." *Id.* Petitioner does not even cite, let alone try to distinguish, *Sheehan*.

Instead, petitioner retreats to an exceedingly high level of generality, framing the question as "[w]hether training or law enforcement policies can be *relevant* to whether a police officer is entitled to qualified immunity." Pet.i (emphasis added). But petitioner did not argue below that such evidence is relevant to the clearly-established inquiry or any other aspect of the objective reasonable-officer test. He did not try, for instance, to use some robust body of training across multiple jurisdictions to demonstrate that the right he claims is common knowledge among law enforcement officers. To the contrary, he admitted that "it may be true" that "departmental policies and training cannot clearly establish" the law, and argued that they should be considered here only because they purportedly establish that respondents actually "knew" that their conduct was unlawful. CA10 Resp. Br. 36-37. And the Tenth Circuit, in turn, did not declare such materials "categorically irrelevant to the qualified-immunity

analysis." Pet.15. It instead said only what petitioner himself admitted: Such materials cannot be the source of clearly established law. Pet.App.20a.

Petitioner tries to paint that conclusion as at odds with this Court's opinions in *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Wilson v. Layne*, 526 U.S. 603 (1999). *See* Pet.16-17. But neither of those opinions remotely suggests that training materials can clearly establish the law, let alone be used to deprive an officer of qualified immunity based on his subjective knowledge. Nor could they have since this Court has time and again admonished that, "[t]o be clearly established, a legal principle must have a sufficiently clear foundation in *then-existing precedent*." *Wesby*, 138 S.Ct. at 590 (emphasis added); *see also, e.g.*, *al-Kidd*, 563 U.S. at 741 ("We do not require a case directly on point, but *existing precedent* must have placed the statutory or constitutional question beyond debate." (emphasis added)).[5] Consistent with that settled law, *Hope* concluded that the conduct at issue *did* violate clearly established circuit (and likely Supreme Court) precedent. *See Hope*, 536 U.S. at 741-42. The Court merely observed after doing so that training materials "buttressed" its conclusion that "Respondents violated clearly established law." *Id.* at 744. That is a far cry from embracing petitioner's view that training alone can be "outcome-determinative." Pet.16.

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[5] In fact, this Court has not even said that the *courts of appeals* can definitively state the contours of "clearly established law." *See Emmons*, 139 S.Ct. at 503 ("Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity ...." (citing *Sheehan*, 575 U.S. at 614)).

Wilson is even less helpful to petitioner. There, the Court determined that U.S. Marshals and local police officers were entitled to qualified immunity because no clearly established law forbid them from bringing ride-along media correspondents into a home during a search. In reaching the conclusion that the officers' conduct "was not unreasonable," the Court found it "important" that the nationwide ride-along policy for Marshals effectively *authorized* the complained-of conduct, and the local police ride-along policy did not forbid it. 526 U.S. at 617. But the Court explicitly observed that "[s]uch a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law." *Id.* In other words, the Court made clear that law enforcement policies cannot override clearly established law (or the absence thereof) because focusing on what a defendant was actually trained would be at irreconcilable odds with the objective reasonable-officer test. The Tenth Circuit thus followed this Court's precedent to a tee.

B. The Decision Below Does Not Conflict With Any Decision Of Any Other Courts Of Appeals.

Unsurprisingly given this Court's repeated and unambiguous holdings, petitioner fails to identify any court of appeals that has embraced his view that training materials alone can be used to deprive an officer of qualified immunity. Instead, all he identifies are cases that, like *Hope* and *Wilson*, invoked training materials to buttress a bottom-line qualified-immunity conclusion that was grounded in case law.

For example, in *Vasquez v. County of Kern*, 949 F.3d 1153 (9th Cir. 2020), a corrections officer at a

juvenile detention facility repeatedly sexually harassed a young woman detained there, including by watching her shower. *Id*. at 1157. The Ninth Circuit concluded that the officer's conduct violated clearly established law because, "[i]n this circuit, '[i]t is clearly established that the Fourteenth Amendment protects a sphere of privacy, and the most 'basic subject of privacy ... the naked body.'" *Id.* at 1165. To be sure, the court went on to observe that the officer "likely attended" training at which he was informed that such conduct was prohibited. *Id.* But the court nowhere suggested that the training alone could have deprived him of qualified immunity even if the law was *not* clearly established. Likewise, while the Ninth Circuit maintained in *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (2003), that "training materials are relevant not only to whether the force employed in this case was objectively unreasonable, but also to whether reasonable officers would have been on notice that the force employed was objectively unreasonable," it actually *used* those materials only to buttress its conclusion that "kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law." *Id.* at 1062 (citation and emphasis omitted).

The Eighth Circuit's decision in *Treats v. Morgan*, 308 F.3d 868 (8th Cir. 2002), is much the same. While the court posited that "[p]rison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established," it considered those materials only after determining that "[i]t is well-established that a

malicious and sadistic use of force by a prison official against a prisoner, done with the intent to injure and causing actual injury," violates the Eighth Amendment, and it emphasized that those regulations tracked "cases warning against unreasonable or punitive use of force." *Id.* at 875. The court nowhere suggested that training materials could obviate the need for clearly established law or supplant the reasonable-officer test.

Nor did any of the other cases petitioner cites. *See* Pet.16. Each instead invoked training materials only to reinforce a conclusion about what every reasonable officer should have known from existing precedent. *See Raiche v. Pietroski*, 623 F.3d 30, 38-39 (1st Cir. 2010) (finding that "existing case law or general Fourth Amendment principles gave [the officer] notice that" "tackling [plaintiff] from his motorcycle and slamming him into the pavement would violate his constitutional right to be free from excessive force," and then noting that officer's conduct "depart[ed] from" his "training"); *Okin v. Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 436-37 (2d Cir. 2009) (observing, after detailing circuit precedent clearly establishing that officers' conduct was unlawful, that officers also failed to comply with "extensive professional training"); *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 544, 546 (4th Cir. 2017) (finding bottom-line conclusion "buttressed" by internal policies after detailing "robust" body of cases); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) (similar); *Maye v. Klee*, 915 F.3d 1076, 1087 (6th Cir. 2019) (finding that department policy "[a]dditionally" supported conclusion that law

was clearly established where defendants had already been enjoined from engaging in same conduct).

At most, then, petitioner identifies some mild tension in the lower courts over whether training materials have any role to play in the qualified-immunity analysis. But *no* court has embraced petitioner's extreme position that such materials can be outcome-determinative or supplant the reasonable-officer test, and none of the cases petitioner invokes even hints at the notion that the court would have come out differently had it not considered them. Accordingly, unless this Court intends to revisit the rule that training cannot "negate qualified immunity where it would otherwise be warranted," *Sheehan*, 575 U.S. at 616, opining on whether the better part of discretion is to not consider such materials at all is likely to have little, if any, practical impact.

C. There Is No Good Reason To Overrule Decades Of Precedent And Embrace Petitioner's Unworkable Rule.

Petitioner closes with a broad-scale attack on the reasonable-officer test, effectively asking the Court to jettison 40 years of precedent and resurrect a subjective inquiry into whether an officer actually *knew* that the alleged conduct was unlawful. Pet.20-23. The Court should decline that invitation. As the Court explained in *Harlow*, the basic problem is that a subjective inquiry far too often "prove[s] incompatible with [the Court's] admonition … that insubstantial claims should not proceed to trial," as it is simply too easy to allege that an officer knew her conduct was unlawful. 457 U.S. at 815-16. Petitioner offers no reason to think that dynamic has changed in

the intervening decades. In fact, the Court reiterated the same concern just a few Terms ago, observing that "[b]ecause a state of mind is 'easy to allege and hard to disprove,' a subjective inquiry would threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence.'" *Nieves*, 139 S.Ct. at 1725 (citation omitted).

Even petitioner's more modest effort to convert training policies into "clearly established law" raises many of the same concerns. In effect, petitioner would supplant the "reasonable officer" test with a novel "reasonable officer who received specific training" or "reasonable officer who is subject to specific law enforcement policies" test. Applying that highly fact-specific standard would undermine the entire point of the qualified-immunity doctrine, which is to avoid societal costs such as "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. If every lawsuit triggered an obligation on the part of law enforcement to produce reams of training documents and sit for depositions about law enforcement policy, that would thwart the goal of ensuring that "insubstantial lawsuits" are "quickly terminated." *Id.* (alterations omitted). Just as problematic, it would "Balkanize the rule of qualified immunity" in precisely the way that Justice Scalia warned of (and rejected) in *Anderson*. *See* 483 U.S. at 645-46.

In all events, even if this Court were inclined to consider overhauling its entire qualified-immunity jurisprudence, this would be an exceedingly poor vehicle for doing so, as this case does not actually

present an instance of "officers who know that their conduct is unconstitutional." Pet.21. Contrary to petitioner's claims, respondents never "testified that they knew they were violating petitioner's rights." Pet.3. They simply explained that they understood that the public has a right to record the police, and that they wanted the footage petitioner recorded because it could be important evidence. *Compare, e.g.*, A228-29 (Detective Bauer: "I learned early on that you can film the police, and there's nothing against that as long they don't interfere with an investigation.") *with* A231 (Detective Bauer Dep.) (Q: "Why did you want to know what device Levi Frasier had been using to film?" A: "To use for against [sic] the case on Mr. Flores." Q: "And how would it have been evidence in the case against Mr. Flores?" A: "Him filming with the sock being in his mouth."). Merely knowing that there is a right to record the police is manifestly not the same thing as knowing that particular conduct violates the First Amendment. Petitioner's attempt to conflate those two distinct inquiries flouts this Court's repeated admonition that "the clearly established right must be defined with specificity." *Emmons*, 139 S.Ct. at 503.

The "crucial question," then, is "whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). As the Tenth Circuit correctly recognized, *see* Pet.App.33a, 38a, the answer to that crucial question is plainly yes. In fact, it is highly doubtful that petitioner has even alleged a viable First Amendment claim after this Court's decision in *Nieves*, which came down after the district court denied respondents' motion for summary

judgment. *See infra* p.29-30. At the very least, *Nieves* should foreclose any argument that petitioner has alleged a *violation* of clearly established law. All of that makes this an exceptionally poor for reconsidering this Court's long-standing rule that an officer's subjective knowledge is not relevant to the qualified-immunity analysis, as abandoning that rule is unlikely to have any ultimate impact on this case.

II. The Second Question Presented Does Not Warrant This Court's Review.

Both the unanimous Tenth Circuit panel and the district court concluded that any right to record the police in public was not clearly established in August 2014. *See* Pet.App.13a-14a; Pet.App.31a-38a. That conclusion is correct and does not conflict with the decisions of any other court. To be sure, every court of appeals to opine on the question has held that such a right exists, subject to reasonable time, place, and manner restrictions. *See Glik v. Cunniffe*, 655 F.3d 78, 82-85 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 688-89 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). But every circuit presented with the question of whether that right was *already* clearly established *before* the court expressly recognized it concluded that it was not. *See Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010); *Fields*, 862 F.3d at 362; *Szymecki v. Houck*, 353 F.App'x 852, 853 (4th Cir.

2009) (per curiam); *Turner v. Driver*, 848 F.3d 678, 687 (5th Cir. 2017).[6]

Petitioner tries to gin up a circuit split by pointing to the First Circuit's decision in *Glik v. Cunniffe*, 655 F.3d 78 (2011). But *Glik* held that arresting someone for recording the police violated clearly established law because, unlike those other circuits, the First Circuit had "previously recognized" in an earlier case "that the videotaping of public officials is an exercise of First Amendment liberties." *Id.* at 83. That is not a circuit split; it is just the inevitable consequence of a test that (at least under the law of most lower courts) looks to both Supreme Court and circuit precedent to assess whether the law was clearly established. There is no reason to think the First Circuit would have reached the same conclusion if, like the Tenth Circuit, *see* Pet.App.35a-36a, it did *not* have any precedent on point when it decided *Glik*. Indeed, several of petitioner's amici appear to agree that the right to record police performing their official duties in public is not clearly established even today, for they urge this Court to recognize it in this case. *See, e.g.*, First Amendment Scholars Amicus Br. 2-3; Cato Amicus Br. 21-22.

Petitioner insists that all of these courts have been wrong to look for some precedent actually dealing with whether the public has the right to record the police because "[b]asic First Amendment principles" suffice to render that right clearly established. Pet.28-

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[6] In *Kelly v. Borough of Carlisle*, the Third Circuit declined to determine whether such a right exists so when the court decided *Fields v. City of Philadelphia*, there was still no clearly established law. *See* 862 F.3d at 357.

31. But no court of appeals has embraced that argument, and with good reason. To be sure, this Court has found in "extreme circumstances" that "general constitutional principles established in the caselaw may give reasonable government officials fair warning that their conduct is constitutionally or statutorily unlawful." Pet.App.19a. But the rare cases in which it has done so did not involve efforts to recognize a constitutional right for the first time. They involved egregious violations of a long-settled right, such as handcuffing a shirtless inmate to a hitching post in the blazing sun all day as punishment, *Hope*, 536 U.S. at 741, or intentionally housing an inmate in "deplorably unsanitary conditions" for nearly a week, *Taylor v. Riojas*, 141 S.Ct. 52, 53 (2020) (per curiam). Even taking the facts in the light most favorable to petitioner, his allegations come nowhere close to "the level of blatantly unconstitutional conduct necessary to satisfy the obviousness principle." *O'Doan v. Sanford*, 991 F.3d 1027, 1044 (9th Cir. 2021) (Bress, J.).

Indeed, if anything should be obvious at this point, it is that petitioner has not even stated a viable First Amendment retaliation claim after this Court's decision in *Nieves*. Considering the question before *Nieves* was decided, the district court concluded that the retaliation claim could go forward because there "are genuine disputes of material fact regarding whether defendants' actions were substantially motivated by a desire to retaliate against Mr. Frasier for recording the arrest." A1127. But the purportedly retaliatory "actions" the court identified all involved the officers' alleged detention of petitioner while they attempted to obtain the footage that he falsely denied

recording. A1126. Yet the court expressly (and correctly) "f[ou]nd and conclude[d]" that any "seizure was a permissible investigatory detention because Officer Evans had reasonable suspicion based on articulable facts that Mr. Frasier made a false report to the police." A1022-23. Under a straightforward application of *Nieves*, a retaliation claim plainly cannot go forward on the basis of an officer's subjective motivation for a constitutionally permissible seizure. *See Nieves*, 139 S.Ct. at 1725 (holding that a "particular officer's state of mind is simply 'irrelevant,' and … provides 'no basis for invalidating an arrest'" supported by probable cause).

At the very least, respondents would remain entitled to qualified immunity on the ground that it was not clearly established law that anything they did actually *violated* the First Amendment. As the Tenth Circuit correctly recognized, *see* Pet.App.33a, the ultimate question in the qualified-immunity analysis is not just whether an abstract constitutional right was clearly established, but whether "the law was 'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful." *Wesby*, 138 S.Ct. at 589-90. Perhaps petitioner's question presented might suffice to answer that question in a case like *Glik*, where the plaintiff concededly was arrested for the offense of "unlawful audio recording in violation of Massachusetts's wiretap statute." 655 F.3d at 80. But petitioner has never even tried to identify any case that would put all but the "plainly incompetent," *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015), on notice that briefly detaining an eyewitness who has just lied about being in possession of important video evidence and telling him that "'we

could do this the easy way or the hard way' while gesturing toward the back of a police car," A1126, is forbidden First Amendment retaliation. Accordingly, there is little reason to think that resolution of the second question presented would have any impact on the ultimate resolution of this case, which is all the more reason to deny the petition in its entirety.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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