No. 21-57

IN THE

Supreme Court of the United States

LEVI FRASIER,

Petitioner,

v.

CHRISTOPHER EVANS ET AL.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' rhetoric notwithstanding, petitioner makes no "extreme" argument here. BIO 24. Nor does he ask this Court to "overrule decades of precedent." *Id.* at 2. Rather, he raises two issues over which the federal courts of appeals are divided and asks the Court to resolve those issues in his favor. The issues are recurring and manifestly important, and none of respondents' objections to this Court's intervention has merit. Certiorari should be granted.

I. The Court should resolve whether law enforcement policies and training can be relevant to the qualified immunity inquiry.

There is no serious doubt that the circuits are split over whether law enforcement policies and training are relevant to the qualified immunity analysis. This case squarely presents that issue. And insofar as respondents point to cross-cutting precedent from this Court on the matter, that simply reinforces the need for certiorari.

A. *Split.* Respondents say there is merely "some mild tension" among the circuits regarding whether law enforcement policies and training can be relevant to whether officers are entitled to qualified immunity. BIO 24. But the conflict could hardly be sharper. The Tenth Circuit held below that law enforcement policies and training are always "irrelevant" to whether officers are entitled to qualified immunity. Pet. App. 20a; *accord id.* 23a, 29a. As the petition explains, several other circuits, in direct contrast, hold that such policies and training are "relevant" to the inquiry. Pet. 12-13 (citing cases from the First, Second, Sixth, and Ninth Circuits). And after the petition was filed, the Eleventh Circuit issued a similar decision, holding

that the First Amendment right to record officers in public was "clearly established" partly because "it was department policy 'that the public has a right to record' officers." *Khoury v. Miami-Dade Cnty. Sch. Bd.*, 4 F.4th 1118, 1129 & n.8 (11th Cir. 2021).

That leaves respondents to argue that none of the courts of appeals that deems policies and training relevant has found in any particular case that such things were "outcome-determinative." BIO 24. This framing misapprehends what it means for something to be "relevant." In decision after decision, courts of appeals besides the Tenth Circuit have rejected assertions of qualified immunity in part because officers acted contrary to their training and local policies. Pet. 12-13. Under such an approach, there is no need to ask—as respondents would have it—whether any particular item is decisive. In the circuits in which training and policies are relevant, all that matters is whether those things, *combined with* judicial precedent, show that the law is clearly established. And that is the test petitioner argues is satisfied here.

B. *Vehicle.* Respondents do not dispute that, when the events here occurred, departmental policy was that "citizens have a right under the First Amendment to videotape the actions of police officers in public places." Pet. 4 (quoting A_391, 1031); *see also* Pet. App. 13a. Nor do respondents dispute that they had been trained in that regard and thus "understood the First Amendment protected citizens' right to record them." Pet. App. 66a; *see also id.* 13a (same); 70a (officers "believed [departmental] policy was consistent with that constitutional imperative"). They nevertheless argue this case is a poor vehicle for

considering the relevance of policies and training because it is not clear whether the officers' actions constituted actionable retaliation under *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). BIO 26-27.

Respondents are off-base. A First Amendment retaliation claim requires a plaintiff to show: (1) he engaged in constitutionally protected activity; (2) the defendants took actions against him that discouraged continuing to engage in that activity; and (3) the defendant's actions constituted actionable retaliation. *Nieves*, 139 S. Ct. at 1721; *see also VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1172 (10th Cir. 2021). The Tenth Circuit held that respondents were entitled to qualified immunity on the first ground—that is, because judicial precedent did not clearly establish "a First Amendment right to record [officers] performing their duties in public spaces." Pet. App. 38a. That holding says nothing about whether petitioner has sufficiently shown that respondents' actions constituted actionable retaliation. Neither the district court nor the Tenth Circuit has addressed that issue. If respondents wish to seek qualified immunity on that distinct legal ground, they may do so on remand.

In any event, there is no *Nieves* problem here. *Nieves* holds that a "retaliatory arrest claim" generally fails if there was probable cause to support the arrest. 139 S. Ct. at 1728. Even assuming this rule encompasses not just arrests but all detentions, petitioner alleges more than a retaliatory detention here. Petitioner also claims respondents retaliated against him by "unlawfully searching his property"—that is, rummaging through his tablet. A_21 ¶ 90 (operative complaint); *see also* Pet. App. 11a.

Respondents do not contend (nor plausibly could they) that *Nieves* applies to that kind of retaliatory action.

Even as to the detention itself, respondents say they had probable cause because they believed petitioner had "just lied about being in possession of" a recording of the officers' forceful encounter with the suspect. BIO 30. Yet it has long been settled that the probable-cause test depends on "the facts known to the arresting officer *at the time of the arrest*." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (emphasis added). When the officers detained petitioner (at the latest, when they confiscated his identification, thus depriving him of the ability to leave the scene), petitioner had not yet said anything at all about whether he possessed a video. *See* Pet. App. 9a. So no "false report" could possibly have supported petitioner's initial detention.

C. *Merits.* The purpose of the qualified immunity doctrine is to ensure that officers are not subjected to suit unless they "had fair notice that [their] conduct was unlawful." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). It is striking, therefore, that respondents offer no theory of why law enforcement policies and training cannot ever provide notice of illegality. Nor do respondents advance any historical support for the Tenth Circuit's rule categorically excluding such factors from the qualified-immunity equation. Instead, they argue simply that this Court's "settled" precedent forecloses any consideration of policies or training. BIO 18. Respondents are wrong.

Respondents first point to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), claiming it rejected the notion

that "an officer's subjective understanding of the law can be used to deprive the officer of qualified immunity." BIO 17. There are two problems with this assertion. First, policies and training are *objective facts*, no different from the existence of judicial precedent. *See* Pet. 18-19. While respondents suggest petitioner failed to press this point below, BIO 19-20, the Tenth Circuit plainly understood petitioner to maintain that policies and training are relevant to the "objective reasonable-officier test," *id.* 19. The Tenth Circuit considered the issue at length and held in categorical terms 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 rights was irrelevant to the clearly established law inquiry." Pet. App. 20a (emphasis added); *see also id.* 28a-29a.

Second, respondents overstate *Harlow*'s holding. *Harlow* held that officers should not be held liable for actions that they "neither [1] *knew* nor [2] should have known" were illegal. 457 U.S. at 819 (emphasis added). *Harlow* deemed subjective knowledge irrelevant to only the latter of those two inquiries—that is, the "clearly established law" inquiry. *Id.* at 818. Lest there be any doubt, the Court has continued to recite *Harlow*'s "knew or should have known" formulation as the governing standard, *see, e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998), as well as the formulation from *Malley v. Briggs*, 475 U.S. 335 (1986), stating that qualified immunity does not shield "incompetent" officers "or those who knowingly violate the law." *Id.* at 341; *see also Kisela*, 138 S. Ct. at 1152; *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015) (per

curiam); *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (per curiam). There is no way to determine whether an officer "knew" his actions were illegal without inquiring into subjective knowledge of illegality.

Respondents object that "it is simply too easy to allege that an officer knew her conduct was unlawful." BIO 24. But that is precisely why on-point written policies, training manuals and the like should be relevant. They are concrete indicia of an officer's knowledge. At any rate, under the Tenth Circuit's holding, officers may take the stand and openly admit that they understood (based on training or even a direct conversation with in-house counsel) that their actions were unconstitutional, and the officers would still be no less entitled to qualified immunity. That cannot be right.

Finally, respondents note that the Court reasoned in *City and County of San Francisco v. Sheehan*, 575 U.S. 600 (2015), that training did not affect the qualified-immunity analysis in that case. BIO 19. The training and policies there, however, concerned general best practices. *Sheehan*, 575 U.S. at 616. They did not instruct the officers that *the law prohibited or required* certain conduct. It is the latter type of policy and training that this case concerns and that can be particularly probative.

Respondents' suggestion that *Sheehan* controls here also fails to account for the Court's decisions in *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Wilson v. Layne*, 526 U.S. 603 (1999). Those decisions deemed internal regulations and policies "[r]elevant" to qualified immunity analyses. *Hope*, 536 U.S. at 743; *see also* Pet. 16-17 (discussing these cases). The Court likewise denied qualified immunity in *Groh v.*

Ramirez, 540 U.S. 551 (2004), in part because "the guidelines of [the officer's] own department placed him on notice" that his conduct could give rise to liability. *Id.* at 564. Respondents try to minimize those decisions. BIO 20-21. But they say what they say, and *Sheehan* did not disavow them. At the very most, therefore, respondents have shown this Court itself may have divergent lines of authority. That would be further reason to grant the petition, not cause to deny it.

II. The Court should resolve whether the First Amendment clearly establishes that individuals may record police officers carrying out their duties in public.

Respondents' argument against granting certiorari on the second question presented is no more persuasive. There is a clear conflict on the question, this case is an excellent vehicle for resolving it, and the Tenth Circuit's decision is incorrect.

A. *Split.* Even though the Tenth Circuit acknowledged that the federal courts of appeals are "split" over whether the First Amendment clearly establishes that individuals may record police officers carrying out their duties in public, Pet. App. 37a, respondents contend there is no conflict at all. According to respondents, "[t]here is no reason to think" the First Circuit would have held in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), that the right here was clearly established if it did not have prior precedent on the point. BIO 28. Respondents are doubly incorrect.

First, the First Circuit's decision in *Glik* did not depend on that court's previous decision in *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999). Instead, the

First Circuit focused primarily on *this Court's* precedent and stressed the "virtually self-evident nature of the First Amendment's protections in this area." *See Glik,* 655 F.3d at 82-85. True, the First Circuit noted that it had previously observed in *Iacobucci* "that the videotaping of public officials is an exercise of First Amendment liberties." *Id.* at 83. But the First Circuit conceded that the journalist in that case who filmed commissioners of an historical district (not police officers) in conjunction with a public meeting "did not [bring] a First Amendment claim." *Id.* Lacking any previous holding of its own that was "directly on point," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), the First Circuit emphasized that decisions from "*other* circuit[s]" confirmed its assessment of more general First Amendment principles. *Glik*, 655 F.3d at 85 (emphasis added); *see also id.* at 83 (citing *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000), and *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995)).

Second and more fundamentally, it is immaterial whether the First Circuit's analysis in *Glik* relied on prior circuit precedent. A conflict in the circuits exists when the same case would have been decided differently in another court of appeals. And if this exact same police-citizen encounter had occurred in a parking lot in Boston instead of Denver and petitioner had sued in federal court there, respondents would not have been entitled to qualified immunity. (In light of the Tenth Circuit's refusal to recognize the constitutional right involved, the same remains true today.) That divergence on a matter of great importance demands resolution.

What is more, the split over the second question presented has deepened since the filing of the petition for certiorari. As referenced above, in *Khoury v. Miami-Dade County School Board*, 4 F.4th 1118 (11th Cir. 2021), an individual claimed that a police officer retaliated against her for recording him while he was performing duties in public. The Eleventh Circuit held that the First Amendment right to record officers in public was "clearly established" and denied the officer's request for qualified immunity. *See id.* at 1129. The entrenched conflict here warrants this Court's attention.

B. *Vehicle.* Reprising their "no actionable retaliatory conduct" argument, respondents next assert that holding that the right to record police officers in public is clearly established may not affect "the ultimate resolution of this case." BIO 31. But as noted above, neither the district court nor the Tenth Circuit has addressed the "retaliatory conduct" element of petitioner's claim. As respondents implicitly recognize by their adjective "ultimate," that issue is for remand. And for the reasons set forth above, *Nieves* is unlikely to block petitioner's ability to prove actionable retaliation anyway.

C. *Merits.* Respondents have relatively little to say in defense of the Tenth Circuit's holding that the right to record police officers in public is not clearly established. Respondents do not dispute that a "robust consensus" of persuasive lower court authority can clearly establish a right. Pet. 27 (quoting *al-Kidd*, 563 U.S. at 742). Nor do respondents contest that such a consensus existed when the events here took place. *Id.* Those postulates alone are enough to require reversal.

Respondents suggest that this Court's First Amendment case law does not make the right here sufficiently clear. But again, petitioner does not rely solely on this Court's precedent. His contention is that this Court's precedent, *combined with* lower court case law (and the officers' policies and training), clearly established the right involved. Even so, it is telling that—like the Tenth Circuit—respondents do not even attempt to explain "*why* the First Amendment might not protect the right to record officers performing their duties in public." Pet. 30. If there is no good response to petitioner's explanation that basic First Amendment principles demand such protection, *see* Pet. 28-31, then the Tenth Circuit's refusal to recognize the right even on a forward-looking basis is all the more troubling—and makes certiorari all the more warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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