No. 24-1310

IN THE

Supreme Court of the United States

DAVID ENGSTROM, *et al.*,
Petitioners,

v.

JAMES W. DENBY,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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October 2025

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that Petitioners were not entitled to qualified immunity where, in the course of searching Respondent's house for a suspect who was not there, they engaged in excessive destructive force, unnecessary to effectively effectuate the search warrant, including destroying numerous objects too small to hide a person.

2. Whether the court of appeals correctly held that Petitioners could be liable for the unconstitutional use of force in the search and denied qualified immunity where all of the Petitioners were integral participants in the search and had the opportunity to intercede in their fellow officers' violations of Respondent's Fourth Amendment rights but failed to do so.

SUPPLEMENTAL STATEMENT OF RELATED PROCEEDINGS

In addition to the proceedings identified by Petitioners, Pet. at ii, the following appeal decided by the U.S. Court of Appeals for the Ninth Circuit is related to this case within the meaning of this Court's Rule 14(b)(iii):

> *Denby v. City of Casa Grande*, No. 19-15936 (9th Cir.) (appeal dismissed for lack of jurisdiction, June 26, 2019)

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INTRODUCTION

Petitioners engaged in what the district court called the "near total-destruction" of Respondent James Denby's house while searching for an unarmed suspect in a nearby domestic disturbance. Pet. App. 49a. Over the course of seven hours, Petitioners used a vehicle as a battering ram at the front door, fired so many chemical munitions that the home became uninhabitable, caused water damage that ruined the foundation, and destroyed numerous belongings that were far too small to hide a person. In the course of the search, Petitioners destroyed the front door, all exterior windows in the house, two vehicles, "all furniture in the home, the appliances, televisions, cushions, pillows, window coverings, shower doors, bathroom mirrors, a toilet, artwork, heirlooms, family pictures, clothes, and antiques." *Id.* 13a.

Mr. Denby brought this case, seeking recompense for the destruction of his home. Petitioners moved for summary judgment on the basis of qualified immunity. The district court denied the motion, and the Ninth Circuit affirmed in an unpublished, non-precedential opinion.

Petitioners seek review, asserting a need for further guidance on when the destruction of property in the course of executing a warrant is unreasonable under the Fourth Amendment. But they do not demonstrate that the courts below ignored facts that were relevant to the reasonableness of the officers' actions or considered facts that were not relevant. Petitioners also fail to identify any disagreement among the circuits or show that this case would have come out differently in another circuit. And although Petitioners contend that it was not clearly established that the officers' actions violated the constitution, the

decision below cites case law "specifically and clearly establish[ing] that similarly destructive force used in a home during the execution of a search warrant amounts to a constitutional violation." *Id.* 17a. Indeed, the court noted, "the force used here went above and beyond the force used in those cases." *Id.*

In denying qualified immunity, the court of appeals concluded that each Petitioner "was at least an integral participant in the search of Denby's residence," *id.* 14a–15a (cleaned up), and that each had the opportunity to intercede in the violation of Mr. Denby's rights but failed to do so. Petitioners also ask this Court to hold that liability under 42 U.S.C. § 1983 cannot be imposed on these bases. Below, however, Petitioners conceded—consistent with the law across the circuits—that officers can be held liable based on a failure to intervene. Petitioners provide no reason to disrupt this circuit consensus. And although Petitioners accuse the court of appeals of failing to conduct a full qualified immunity analysis, the court explained that Petitioners' duty to intervene was clearly established.

The petition should be denied.

STATEMENT OF THE CASE

Factual Background

On December 17, 2014, the Casa Grande Police Department responded to a domestic disturbance complaint at a house down the street from James Denby's home. Pet. App. 23a. When they arrived, the officers learned that the incident had involved Abram Ochoa, who had an outstanding arrest warrant for failure to appear in a case involving non-violent charges. *Id.* 23a, 32a. The officers learned that Mr. Ochoa might have fled to Mr. Denby's home and

proceeded to search for him there. When the officers arrived at Mr. Denby's home, they declined offers from Mr. Ochoa's girlfriend and from Mr. Denby's son to assist in finding Mr. Ochoa and convincing him to surrender. *Id.* 23a.

Instead, the officers used a loudspeaker to call into the house. *Id.* When they received no response, the officers called in the Pinal County Regional SWAT team. *Id.* Although Mr. Denby had provided the officers with keys to the house, *id.* 34a, the SWAT team opted to use a "Bearcat" armored vehicle as a battering ram to gain access to the home. *Id.* 23a.[1] They drove the Bearcat over Mr. Denby's fence and into the front of the home, breaking the windows and front door. *Id.* 23a. The SWAT team attempted to communicate with Mr. Ochoa through the Bearcat's speaker system and a phone thrown through a broken window, but received no response. *Id.* 23a–24a.

After a judge signed a warrant permitting the officers to enter Mr. Denby's home for the sole purpose of arresting Mr. Ochoa, the officers sent a robot into the house. *Id.* 24a, 36a. It found no signs of Mr. Ochoa. *Id.* 24a. At around this time, Officer David Engstrom advised other officers that there was movement under a tarp covering a car in the property's backyard. Pet. App. 16a n.4; 9th Cir. ER 343. The officers did not check under the tarp, Pet. App. 16a n.4, where Mr. Ochoa was in fact hiding, *id.* 24a.

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[1] The house keys were on a key chain with Mr. Denby's car keys. *See* 9th Cir. Excerpts of Record (ER) 42. Although Petitioners claim that Mr. Denby offered the house keys "to some unidentified officer," and that the officers who breached his house "were not aware of this fact," Pet. 7 n.5, they concede that the car keys were given to the SWAT team, *id.* at 5.

Instead, the officers fired twenty-two canisters of chemical munitions into Mr. Denby's home—far more than would be reasonably necessary to flush a person out of the 1,300 square foot space. *Id.* 15a n.4, 24a. They also sent in an additional robot, which again found no indication that Mr. Ochoa was in the house. *Id.* 36a; 9th Cir. ER 162.

As the hours passed, the officers "wandered casually through the yard and deemed it safe to approach the house's windows and doors," suggesting that their "perceived immediacy of the threat Ochoa posed [had] decreased." Pet. App. 14a n.3. Despite that lack of concern, and although they did not see any signs of Mr. Ochoa in the house, *id.* 24a, the SWAT team continued to fire chemical munitions into the home.

Nearly seven hours into the incident, the SWAT team fired multiple flash grenades into the house, destroying a toilet and causing a significant leak. *Id.* 42a. They then entered the house. During the search of the house, the SWAT team and police "destroyed several items in the Residence, including furniture, cushions, pillows, windows, window coverings, bathroom mirrors, shower doors, toilets, televisions, artwork, and antiques," *id.* 24a, including "numerous objects far too small for Mr. Ochoa to be hiding in," *id.* 39a.

Only after ransacking Mr. Denby's home did the officers search the backyard and discover Mr. Ochoa hiding under the tarp where Officer Engstrom had seen movement hours before and where Mr. Ochoa had been hiding throughout the entire incident. *Id.* 24a; 9th Cir. ER 48.

Although the Pinal County Sheriff's Office SWAT Manual requires officers to decontaminate properties

of residual tear gas and pepper spray, the officers left without doing so, and without providing Mr. Denby with information about the dangers posed by the chemical munitions. Pet. App. 13a. When Mr. Denby entered his home, he found it uninhabitable and was injured by the chemical contamination. *Id.* 13a–14a, 30a–31a. In addition, the leak from the destroyed toilet caused water to run unchecked, significantly damaging the home's foundation. *Id.* 30a–31a. As the district court noted, "Defendants' actions resulted in near complete destruction of Plaintiff's home and numerous pieces of Plaintiff's personal property." *Id.* 30a.

Each Petitioner played a central role in the destruction of Mr. Denby's home and belongings. Officer Engstrom spotted but failed to investigate the suspicious movement under the tarp under which Mr. Ochoa was hiding, helped plan the entry and destructive search of Mr. Denby's home, supported Officer Rory Skedel while he fired the flash grenades into the home, and participated as a member of the team that entered Mr. Denby's home and destroyed his belongings. *Id.* 15a–16a. Officer Christopher Lapre was a SWAT team leader who fired some or all of the twenty-two canisters of chemical munitions into the house, helped plan the entry and search of Mr. Denby's home, supported Officer Skedel while he fired the flash grenades into the home, and participated as a member of the team that entered Mr. Denby's home and destroyed his belongings. *Id.* Officer Skedel was also a SWAT team leader, supported Officer Lapre while he repeatedly fired chemical munitions into the house, helped plan the entry and search of Mr. Denby's home, fired flash grenades into the house, and participated as a member of the team that

entered Mr. Denby's home and destroyed his belongings. *Id.* Officer Jacob Robinson supported Officer Lapre while he repeatedly fired chemical munitions into the house and "cleared the scene" after SWAT personnel took Mr. Ochoa into custody—indicating that he failed to ensure that the SWAT team followed the SWAT Manual decontamination procedures. *Id.* 17a. And Sergeant Brian Gragg was the Assistant SWAT Team Commander, directed the SWAT team, had knowledge of all the significant decisions relating to the entry and search of the house, and had responsibility for the scene throughout the incident, including responsibility for ensuring that the home was decontaminated. *Id.* 16a.

Proceedings Below

On December 16, 2016, Mr. Denby and two other plaintiffs filed this action in Maricopa County Superior Court, alleging violations of 42 U.S.C. § 1983. Pet. App. 24a, 63a. After the defendants removed the case to federal court, the plaintiffs amended their complaint. The operative complaint included claims against thirteen police officers and their spouses, the municipalities that employed the officers, and Mr. Ochoa. *See id.* 22a–24a, 63a, 79a–80a, 9th Cir. ER 466.[2]

The municipalities and officers moved to dismiss, and the district court granted dismissal as to the claims brought by the two other plaintiffs and all claims against the municipalities. Pet App. 59a–66a; *see id.* 24a n.4. However, it denied the motion to

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[2] Petitioners' spouses are included in the caption of the petition, but the petition does not identify them as parties to the proceeding, *see* Pet. ii, or purport to be filed on their behalf, *see id*. at 2.

dismiss as to the officer defendants. *Id.* 57a–59a. Because the district court's order did not examine the allegations as to each individual defendant, on appeal, the Ninth Circuit vacated in part and remanded so that the district court could "make an individualized determination as to the alleged actions of each Defendant to determine whether dismissal based on qualified immunity may be proper." *Id.* 68a–69a.

On remand, the district court dismissed all claims against eight of the thirteen officer defendants on the basis of qualified immunity and dismissed one of the three claims against three other officers, Petitioners Engstrom, Lapre, and Gregg. *Id.* 76a–80a. However, describing the allegations against each officer in detail, it denied qualified immunity on two other claims as to five officers—the five Petitioners here. *Id.* 74a–78a. The five officers appealed again, and the Ninth Circuit affirmed that decision. *Id.* 83a–88a. As a result, the only relevant claims are those against the five Petitioners for (1) violation of Mr. Denby's Fourth and Fourteenth Amendment rights against unreasonable searches and seizures, and (2) failure to intervene with respect to the constitutional violations committed by other officers. *Id.* 74a–76a.

Petitioners moved for summary judgment on the two remaining claims, asserting that they were entitled to qualified immunity. The district court denied the motion.

As to the unreasonable seizure claim, the court walked through the culpable conduct of each Petitioner and explained "that the evidence put forth by the parties—viewed in the light most favorable to [Mr. Denby]—demonstrates that the authority to search for and arrest Ochoa did not justify the level of intrusion and excessive property damage that

occurred during the search of [Mr. Denby's] Residence." *Id.* 43a (cleaned up); *see id.* 39a–43a (discussing the constitutional violations committed by each Petitioner). In particular, the court noted that the officers had unnecessarily destroyed items far too small to hide Mr. Ochoa. *Id.* 38a–39a. It also explained that there remain "numerous factual disputes that have a direct bearing on the reasonableness of [Petitioners'] tactics and escalating use of force," including disputes about the "viability" of alternatives and about whether Petitioners' "use of at least twenty-two canisters of chemical munitions was unnecessary and unreasonable because the Residence was just 1,300 square feet." *Id.* 36a–38a. Because Petitioners' conduct "was undoubtedly *more* destructive and took place during a search with a *narrower* purpose" than the conduct in prior Ninth Circuit cases that "clearly established that unnecessarily destructive behavior during the execution of a search warrant amounts to a constitutional violation," the court concluded that Petitioners "had fair notice that their own conduct … violated [Mr. Denby's] constitutional rights." *Id.* 51a.

As to the failure to intervene claim, the district court quoted Ninth Circuit precedent recognizing the clearly established duty for "[p]olice officers … to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." *Id.* 52a (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000)). Because Petitioners "were each integral participants in the search of [Mr. Denby's] Residence rather than mere bystanders," and because they "had reason to be aware of the constitutional violations occurring and realistic opportunities to intercede, but failed to take any action to stop or

impede the violations," the court concluded that they violated that clearly established duty. *Id.* 52a.

Petitioners appealed, and the Ninth Circuit affirmed in an unpublished opinion. *Id.* 10a–19a. The court explained that "[s]ome of the progressively escalating tactics Defendants used to apprehend Ochoa may have been reasonable at the outset." *Id.* 14a n.3. But, it continued, "a jury could conclude that at some point over the seven-hour incident (with no response from, or sighting of, Ochoa), the continued and escalating use of force became unreasonable." *Id.* Moreover, the court noted, "a jury could decide the use of force was unreasonable because Defendants' tactics caused the destruction of numerous objects too small to hide Ochoa, and were therefore outside the scope of the warrant." *Id.* 13a.

Like the district court, the Ninth Circuit also concluded that Petitioners' conduct was more egregious than the conduct in prior cases that clearly established the right to be free from unreasonably destructive searches. *Id.* 17a. It further noted that, because the police officers' actions violated the county's SWAT Manual, Petitioners had further reason to "question" whether their actions were unreasonable. *Id.* 18a.

Finally, the court of appeals explained that police officers have a clearly established duty to intercede when they observe constitutional violations and have an opportunity to intercede. The court held that Mr. Denby's failure to intercede claim could proceed "[f]or the same reasons a jury could find each Defendant was at least an integral participant" in the Fourth Amendment violations. *Id.* 18a.

Petitioners petitioned for rehearing and rehearing en banc. The court denied the petition without any judge calling for a vote. *Id.* 20–21a.[3]

REASONS FOR DENYING THE WRIT

I. The court of appeals' determination that Petitioners violated Mr. Denby's clearly established constitutional rights does not warrant review.

A. There is no conflict among the circuits on the standard for analyzing Fourth Amendment destruction of property claims.

The Fourth Amendment provides a right against "unreasonable searches and seizures." U.S. Const. amend. IV. As this Court has explained, whether a search or seizure is "unreasonable" is an objective inquiry that applies both "in an excessive force case" and "in other Fourth Amendment contexts." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Because police "on occasion must damage property in order to perform their duty," *Dalia v. United States*, 441 U.S. 238, 258 (1979), in Fourth Amendment cases challenging police officers' "destruction of property in the course of a search," the objective reasonableness inquiry focuses on whether the destruction was "[e]xcessive or unnecessary." *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

Engaging in this analysis, the court of appeals held that a jury could conclude that Petitioners' use of force was unreasonable, involving destructive behavior

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[3] The Ninth Circuit panel issued an amended opinion with minor revisions alongside the order denying rehearing. *See id.* 10a–19a.

"beyond that necessary to execute [the] warrant effectively." Pet. App. 12a (cleaned up). Petitioners claim that the decision implicates a circuit split over the standard that applies in Fourth Amendment property damage cases. They identify no meaningful difference, however, in the courts of appeals' approaches to analyzing such claims.

Petitioners first state that the Fourth, Fifth, Seventh, and Ninth Circuits "use the *Graham*" test, determining whether the officers' behavior was objectively reasonable, though "without necessarily applying the factors [discussed in *Graham*] as written." Pet. 13. Petitioners identify no disagreement among these circuits. And the lack of a mechanical application of the specific factors discussed in *Graham* demonstrates neither a circuit split nor a departure from *Graham*. Indeed, *Graham* expressly recognized that the "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Rather, the test "requires careful attention to the facts and circumstances of each particular case." *Id.*[4]

Petitioners next claim that three other circuits—the Third, Sixth, and Tenth—"look to this Court's framework regarding warrant requirements for searches and seizures." Pet. 14. The cases they cite,

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[4] Although they identify the Ninth Circuit as a circuit that applies *Graham* to property destruction cases, Petitioners claim that, in fact, the court "failed even [to] do so here." Pet. 16. Petitioners' assertion is inconsistent with their first question presented, which is based on the premise that the court below applied *Graham*. *See id.* at i (asking whether "the Ninth Circuit err[ed] in applying the *Graham v. Connor*, 490 U.S. 386 (1989), reasonableness standard … to a destruction of property claim").

however, discuss the standards for warrantless seizures because, unlike this case, those cases involved warrantless seizures of property (or possible seizures of property). *See Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3d Cir. 2001); *Thomas v. Cohen*, 304 F.3d 563, 574 (6th Cir. 2002) (opinion of Clay, J.);[5] *Mayfield v. Bethards*, 826 F.3d 1252, 1256 (10th Cir. 2016). That courts cite and discuss the standards for warrantless seizures in cases that involve warrantless seizures but not in cases that do not involve warrantless seizures does not establish a circuit split.

Finally, Petitioners claim that a "third group of circuits rely on a consensus of circuit authority" to assess reasonableness. Pet. 15. But neither of the cases they cite—*Maldonado v. Fontanes*, 568 F.3d 263, 271 (1st Cir. 2009), and *Bloodworth v. Kansas City Board of Police Commissioners*, 89 F.4th 614, 626 (8th Cir. 2023)—demonstrates any disagreement among the circuits on when damage to property is unreasonable under the Fourth Amendment. To the contrary, that those decisions cite decisions from other circuits to bolster their conclusions demonstrates agreement among the circuits on the issues presented in those cases. And to the extent Petitioners are arguing that those courts are not following the *Graham* analysis because they are looking at other circuits' views of objective reasonableness, rather than applying only the factors specifically mentioned in *Graham*, that contention is wrong. *Graham* makes clear that reasonableness is context-dependent and

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[5] The part of *Thomas* that Petitioners cite is the opinion only of Judge Clay. The other two judges on the panel held that it was not clearly established that the acts in question constituted a seizure at all. *See id.* at 583 (Gilman, J., concurring in part and dissenting in part).

that the factors it specifically discusses are non-exhaustive. *See Graham*, 490 U.S. at 396.

Notably, although they contend that the circuits disagree on how to analyze reasonableness in the property destruction context, Petitioners do not identify any cases in which different circuits, when faced with similar facts and circumstances, considered different factors to be relevant in determining whether officers' destruction of property was reasonable. They also do not suggest that similar cases would come out differently in different circuits, let alone that *this* case would come out differently in any other circuit.

Likewise, although they assert that this Court should grant review to provide "a clear standard for constitutional claims based on property damage," Pet. 9, Petitioners do not proffer a standard under which they would prevail under the facts of this case. They do not claim that the Ninth Circuit considered facts irrelevant to the reasonableness of the destruction of Mr. Denby's home, and they do not claim that the court failed to consider facts necessary to assessing that reasonableness. Simply put, they do not demonstrate that further delineation of when property damage in the course of a search is reasonable is necessary for the lower courts to properly analyze such claims.

B. The courts below correctly held that Petitioners are not entitled to qualified immunity.

The courts below correctly determined both that Petitioners violated Mr. Denby's Fourth Amendment rights by using unnecessary force when executing a search warrant and that those rights were clearly established at the time of the search. During the

search, "all exterior windows were broken, and the chain-link fence and front door were destroyed, as were Denby's PT Cruiser and another vehicle, all furniture in the home, the appliances, televisions, cushions, pillows, window coverings, shower doors, bathroom mirrors, a toilet, artwork, heirlooms, family pictures, clothes, and antiques." Pet. App. 13a. As the court of appeals explained, "a jury could decide the use of force was unreasonable because Defendants' tactics caused the destruction of numerous objects too small to hide Ochoa, and were therefore outside the scope of the warrant." *Id.*

Moreover, Mr. Denby's "Fourth Amendment right to be free from unreasonably destructive searches was clearly established at the time of the search." *Id.* 17a (citation omitted). That rule "appl[ies] with obvious clarity to the specific conduct in question." *Id.* (quoting *Taylor v. Riojas*, 592 U.S. 7, 9 (2020)). And prior cases "specifically and clearly establish that similarly destructive force used in a home during the execution of a search warrant amounts to a constitutional violation." *Id.* (citing *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000), and *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974 (9th Cir. 2005)); *see also id.* 13a (citing *Maryland v. Buie*, 494 U.S. 325, 334–35 (1990)). Indeed, as the court of appeals noted, "the force used here went above and beyond the force used in those cases." *Id.* 17a.

In *Mena*, for example, officers were held to have violated the plaintiffs' rights when they broke down doors that were unlocked and kicked an open door in the course of searching the house of the primary suspect in a gang-related drive-by shooting. 226 F.3d at 1041. Here, in the course of searching for the

suspect in a domestic disturbance, the officers not only broke down doors to which they had been given the keys, they proceeded to "unnecessarily destroy[] [Mr. Denby's] furniture, appliances, televisions, PT Cruiser, artwork, heirlooms, clothes, family pictures, and antiques," Pet. App. 48a, and left the home uninhabitable due to chemical contamination. *Id.*13a.

And in *Hells Angels*, officers were held to have violated the Fourth Amendment when they cut a mailbox off its post, jackhammered a sidewalk, and broke a refrigerator in the course of executing a search warrant for evidence of affiliation with the Hells Angels. *See* 402 F.3d at 974. Likewise, here, "the officers caused extensive, unnecessary destruction that was not justified by the purpose of their search." Pet. App. 49a. But while in *Hells Angels* they damaged "three items of personal property," here they "caused near total-destruction of Plaintiff's *entire Residence* and destroyed a litany of items of personal property." *Id.*

Attempting to downplay the egregiousness of the "near total-destruction" of Mr. Denby's home, Petitioners fault the court of appeals for not looking at each of their tactics in isolation. But Petitioners did not engage in each tactic in isolation. And, as the district court noted, "the excessive damage sustained by [Mr. Denby's] Residence and personal property also included damages having no apparent relation to [the] tactics" on which Petitioners focus. *Id.* 38a. In any event, Petitioners' arguments about specific tactics are unavailing.

For example, Petitioners claim that this Court "has found that breaking a window while executing a warrant does *not* violate the Fourth Amendment." Pet. 17. But the case they cite, *Ramirez*, 523 U.S. at

71, does not provide carte blanche for police officers to break windows. *Ramirez* holds that breaking a window was not unreasonable on the facts of that case, where the police broke a single window in a garage to discourage an escaped convict or other occupants of the house from rushing to grab weapons that an informant had told the police might be there. *Id*. at 71–72.

Similarly flawed is Petitioners' contention that the Ninth Circuit has "recognized that there is no clearly established law regarding the use of chemical agents." Pet. 18. Petitioners cite *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), for that proposition. But *West* holds only that there was no clearly established case law establishing that use of tear gas was unreasonable under the "unusual circumstances" of that case, where the suspect "was a gang member with outstanding felony arrest warrants for violent crimes" who had "aggressively tried to run down a patrol car during a recent high-speed chase," and the officers "reasonably believed that [the suspect] was in the house," that he "was high on meth," that he possessed a weapon, and that he was suicidal. *Id.* at 986–87. "Unlike *West*, the force used here clearly went beyond that necessary to execute the warrant effectively." Pet. App. 17a n.5.

With respect to breaking doors and use of flashbangs, Pet. 18, Petitioners fare no better. Petitioners assert that prior cases do not clearly establish that use of those tactics is prohibited. As discussed above, however, prior cases, including *Mena*, which involved the breaking of doors, clearly establish that force "similarly destructive" to the force used in this case "amounts to a constitutional violation." Pet. App. 17a.

Although Petitioners seem to be arguing that rights cannot be clearly established unless prior cases have addressed the use of the exact same tactics under the exact same circumstances, "[i]t is not necessary, of course, that the very action in question has previously been held unlawful." *Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017) (cleaned up). Rather, "in the light of pre-existing law, the unlawfulness of the officer's conduct must be apparent." *Id.* (cleaned up). Here, it should have been apparent to the officers that their "near complete destruction" of Mr. Denby's home, Pet. App. 30a, including their destruction of furniture and belongings too small to hide Mr. Ochoa, was unnecessary to effectuate the search warrant and unlawful. Further review is unwarranted.

II. This Court should not grant review of the court of appeals' determination that Petitioners can be held liable for the violation of Mr. Denby's constitutional rights, where Petitioners were all integral participants in and failed to intervene in that constitutional violation.

Based on a careful review of the facts, the courts below concluded that a jury could find that each Petitioner was at least an integral participant in the search of Mr. Denby's house and that each had the opportunity to intervene in the violation of Mr. Denby's constitutional rights, but failed to do so. Pet. App. 18a. Petitioners argue that this Court should grant review to hold that officers may not be held liable based on being an integral participant in or failing to intervene in a constitutional violation. As an initial matter, however, Petitioners conceded below that officers can be held liable based on a failure to intervene. "An officer who fails to intervene when his

fellow officers use excessive force to effect a seizure," they told the court of appeals, "would be responsible, like his colleagues, for violating the Fourth Amendment." Br. of Appellant, *Denby v. Engstrom*, No. 23-15658, at 44 (9th Cir. filed December 26, 2023). This Court "normally decline[s] to entertain" arguments that the parties "failed to raise … in the courts below." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016). It should not grant review to consider an issue that was not in dispute in the court of appeals.

Moreover, the circuits agree that officers may be held liable under section 1983 when they observe another officer violating a person's constitutional rights, have an opportunity to intervene, and fail to do so. *See, e.g.*, *Davis v. Rennie*, 264 F.3d 86, 97–98 (1st Cir. 2001); *Figueroa v. Mazza*, 825 F.3d 89, 106 (2d Cir. 2016); *Smith v. Mensinger*, 293 F.3d 641, 650 (3d Cir. 2002); *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 417 (4th Cir. 2014); *Whitley v. Hanna*, 726 F.3d 631, 646 (5th Cir. 2013); *Goodwin v. City of Painesville*, 781 F.3d 314, 328 (6th Cir. 2015); *Sanchez v. City of Chicago*, 700 F.3d 919, 926 (7th Cir. 2012); *Nance v. Sammis*, 586 F.3d 604, 612 (8th Cir. 2009); *Cunningham*, 229 F.3d at 1289; *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008); *Helm v. Rainbow City*, 989 F.3d 1265, 1278 (11th Cir. 2021). And here, Petitioners not only failed to intervene to stop the constitutional violations committed by other officers, they affirmatively acted as integral participants in the constitutional violations.

Petitioners' request to overrule the circuit consensus on failure to intervene rests on the proposition that the "failure to intervene theor[y] seek[s] to hold officers liable for acts of *other* officers,"

thereby "bypassing the requirements of causation." Pet. 22. Courts have long recognized, however that a "law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers." *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988); *see*, *e.g.*, *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972) (finding it "clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence"). Officers held liable for failure to intervene are not being held liable for the acts of other officers, but for their violation of their own duty and the role that violation played in the constitutional violation.

Petitioners assert that the courts of appeals have inconsistent approaches to evaluating qualified immunity when considering whether an officer should be held liable for being an integral participant in or failing to intervene in a constitutional violation. *See* Pet. 24–25. Petitioners do not identify where the Ninth Circuit falls in their perceived split or demonstrate that this case would come out any differently under the "approaches" of other circuits. And although Petitioners contend that some circuits do not analyze the second qualified immunity prong in failure to intervene cases, all the cases they cite in which the courts denied qualified immunity to defendants who failed to intervene cite case law clearly establishing the defendants' duty to do so.

Moreover, while the main thrust of Petitioners' argument is that courts must consider whether the law was clearly established when ruling on qualified immunity, Petitioners disregard that the Ninth

Circuit *did* discuss clearly established law requiring Petitioners to intervene. *See* Pet. App. 18a. Each Petitioner played a critical role in the violation of Mr. Denby's clearly established rights, and on-point precedent should have made it apparent to Petitioners both that they could not actively participate in those violations and that they had to intervene to prevent the violations committed by their fellow officers. No further review is necessary.

CONCLUSION

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

Respectfully submitted,

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October 2025