No. 24-1310

IN THE

Supreme Court of the United States

DAVID ENGSTROM; JANE DOE ENGSTROM; CHRISTOPHER LAPRE; JANE DOE LAPRE; JACOB H. ROBINSON; JANE DOE ROBINSON; RORY SKEDEL; JANE DOE SKEDEL; BRIAN GRAGG; JANE DOE GRAGG,

Petitioners,

v.

JAMES W. DENBY,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Court's intervention is needed to clarify the law on destruction of property and theories regarding intervention. Plaintiff's Response attempts to avoid these critical issues by focusing almost entirely on facts, rather than rebutting the substance of the Petition itself. Petitions for Certiorari, however, are limited in scope. *See* Supreme Court Rule 10. Should this Court accept jurisdiction, the parties may then argue about what the record says or how this Court should fashion any relevant test. But at this juncture, what matters is whether the Petition sufficiently raised important questions that merit this Court's review. Plaintiff's Response failed to meaningfully dispute that review is warranted. Specifically, what is missing from Plaintiff's Response is authority demonstrating that Defendants' characterization of the underlying case law and circuit approaches is incorrect. The fact that Plaintiff *disagrees* with Defendants' characterization is not a reason for this Court to deny review—on the contrary, in a case like this involving qualified immunity, that disagreement only highlights *why* review is needed. Moreover, because this Court has never clarified those issues, the Officers in this case are entitled to qualified immunity. Accordingly, Defendants respectfully request this Court grant review.

I. PLAINTIFF IMPROPERLY FOCUSES ON THE FACTS.

Defendants' Petition presented clear and specific legal issues for this Court. From the onset of his Response, however, Plaintiff focuses on the district court's characterization of the property damage in this

case.[1] In so doing, he makes no attempt to address the various uses of force at issue and, instead, groups the Officers together in order to focus on the final condition of the property. This approach appears throughout the Response, however, despite a brief attempt to name each Officer in the fact section. This Court has cautioned against such an approach in the past. *See, e.g.*, *County of Los Angeles v. Mendez*, 581 U.S. 420, 429–31 (2017). Indeed, Plaintiff avoids Defendants' clear arguments regarding the lower courts' failures to treat each of these uses of force differently, and simply argues that Defendants fail to identify any facts that the Ninth Circuit *ignored*. (Resp. at 1). That is exactly the point, though. The Ninth Circuit came to the wrong legal conclusion on what was an undisputed factual record.

This Court's intervention is thus needed on the legal frameworks involved in that decision, specifically: (1) how a court should analyze claims involving destruction of property and (2) whether any of the theories of liability such as failure to intervene, failure to intercede, or integral participant comport with the Fourth Amendment and this Court's precedent.[2]

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[1] Neither the district court nor the Ninth Circuit is the ultimate fact finder in this case, however, and review is *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Moreover, the Petition involves the parameters of the legal test, *not* the factual basis in this case.

[2] Plaintiff attempts to simplify this argument by literally rewriting Defendants' language. (*See* Resp. at 18 (quoting the Petition but editing its language to reference a singular theory as opposed to multiple theories)).

II. THIS COURT'S INTERVENTION IS NEEDED TO DEFINE THE CONTOURS OF PROPERTY DAMAGE CASES.

A. This Court Has Never Articulated A Test For Property Damage And The Circuits Are Split.

There is no dispute that this Court has not properly outlined a constitutional test for police who cause property damage. The only real dispute is whether the Circuits are split on the tests they are applying in the wake of this Court's silence. The Response incorrectly argues there is no split amongst the circuits in analyzing property damage claims under the Fourth Amendment.

Defendants proposed three separate categories of circuit courts that address property damage claims: (1) circuits that use the test from *Graham v. Connor*, 490 U.S. 386, 396 (1989); (2) circuits that rely on the warrant requirement framework in *Soldal v. Cook County*, 506 U.S. 56, 71 (1992); and (3) circuits that refer to a circuit consensus of authority. Plaintiff takes issue with these categorizations but critically *fails* to provide any authority that demonstrates Defendants' identified circuit splits are incorrect.

To begin, the Fourth, Fifth, Seventh, and Ninth Circuits all purport to apply *Graham*. (*See* Pet. at 13). There is no meaningful dispute between the parties that is the case, but Plaintiff's Response ignores the fact that these circuits have difficulty in applying the *Graham* standard to property damage claims. A proper *Graham* analysis involves an assessment of reasonableness under the totality of the circumstances, balancing the nature and quality of the intrusion against the government's interest, which

includes the severity of the crime at issue, whether the suspect posed a threat to the officers, and whether the suspect is actively evading arrest or attempting to evade arrest by flight. 490 U.S. at 396. The Ninth Circuit, despite purportedly applying *Graham* in these scenarios, decided this case on a completely different ground: "the degree of force and resulting property damage far exceeds that in cases in which we have affirmed a trial court's denial of qualified immunity." (Pet. App. 12a). The Ninth Circuit's approach is thus to measure once and cut twice.

This issue is not limited to this case. The cases Plaintiff and the Ninth Circuit relied upon below—*Mena* and *Hell's Angels*—similarly depart from *Graham* despite the Ninth Circuit's stated approach. *See Mena v. City of Simi Valley,* 226 F.3d 1031, 1041 (9th Cir. 2000); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005).

In *Mena,* when actually conducting the applicable analysis for the officers' destruction of properly during the search, the court departed from *Graham* and instead assessed whether the defendant officers "damaged Plaintiffs' property in a way that was not reasonably necessary to execute the search warrant." 226 F.3d at 1041 (cleaned up).

In *Hells Angels*, the court had to modify the "governmental interest" factors. 402 F.3d at 975–76. Rather than analyzing (1) the severity of the crime at issue, (2) whether the suspect is attempting to evade arrest, or (3) whether the suspect poses a threat of harm to the officers or others, the Ninth Circuit analyzed "(1) the law enforcement interests in accomplishing the goals of the search warrant, *i.e.,* seeking evidence of a murder; (2) the need for stealth and speed, coupled with the fact that the searches were simultaneous

(in order to avoid one subject informing others); and (3) the safety of the officers." *Id.* at 976. Whatever the wisdom of such a test may be (and indeed, the parties are free to argue about it if this Court accepts review), it is *not Graham*; the factors had to be modified in order to analyze the issue. Finally, *Hells Angels* also involved use of force against a dog. *Id*. at 975. Even the Ninth Circuit understood the limitations of this analysis: "We have recognized that dogs are more than just a personal effect. The emotional attachment to a family's dog is not comparable to a possessory interest in furniture." *Id.* (internal citation omitted).[3]

Of course, that is only *one* set of circuits that Defendants identified. As to the second category (cases that rely on *Soldal*), (*see* Pet. at 14), Plaintiff argues that Defendants' cases from the Third, Sixth, and Tenth Circuits are inapposite because they involved warrantless seizures of property. (Resp. at 11–12). But Plaintiff provides no cases from the Third, Sixth, or Tenth Circuits analyzing property damage under any other standard—which was exactly Defendants' point.[4]

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[3] Moreover, this approach turns the qualified immunity doctrine and *Graham* on its head. *Graham* is a totality-of-the-circumstances test. The Ninth Circuit's approach eviscerates *Graham* and leaves only the question of damages. Under its approach, it is free to base its decisions solely on a post-hoc calculus of the extent of the property damage.

[4] Defendants apologize that they did not identify the opinion in *Thomas v. Cohen* as the separate opinion of Judge Clay in their Petition. (*See* Resp. at 12 n.5). But even the court's opinion in *Thomas* cited to *Soldal* and stated that it might be applicable in other circumstances. *Thomas v. Cohen*, 304 F.3d 563, 583 (6th Cir. 2002) (Gilman, J., concurring in part and dissenting in part). (citing *Soldal* and distinguishing it on the basis that it involved a physical act of seizure). Moreover, the Sixth Circuit's opinion argued that no seizure had occurred, and thus the officers had not

That also makes sense, because this Court has never addressed property damage outside of *Soldal* (or *United States v. Ramirez*, 523 U.S. 65, 71–72 (1998)). And *Soldal* is an incredibly poor fit because it only analyzes whether a seizure occurred and states that reasonableness is still the ultimate standard, regardless of whether there is a warrant. 506 U.S. at 71–72. It is not a framework for assessing the reasonableness in *every* property damage case. Indeed, as Defendants noted in their Petition, reasonableness, too, is the standard for use-of-force claims, but this Court had to further define how to assess whether a use of force against an individual was reasonable in *Graham*. (*See* Pet. at 16). It should do the same here, for property.

Finally, Plaintiff only briefly addresses the third category, (Pet. at 15 (citing cases from the First and Eighth Circuits)), regarding a consensus of authority to argue that the law *must* be settled. *Cf. City & County of San Francisco v. Sheehan*, 575 U.S. 600, 617 (2015) (questioning whether a robust consensus of persuasive authority could clearly establish law). Given the fact that the circuits themselves do not agree, these courts have essentially created a common law of cases they think are reasonable or are not reasonable, without any mooring in this Court's precedent.

In sum, there is a clear split amongst the circuits in how to address property damage claims, each of which has their own flawed reasoning. This Court's guidance is necessary to address this split of authority and provide a cohesive test for property damage claims.

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violated the Fourth Amendment. *Id.* ("But I am hard-pressed to conclude that the eviction in this case was a seizure of property at all, much less that precedent made it clear to the officers that their conduct in fact constituted such a seizure.").

B. The Law Was Not Clearly Established In This Case.

Plaintiff also argues that review should be denied because Defendants are not entitled to qualified immunity. This argument reiterates the same flawed approach applied by the Ninth Circuit panel by relying on *Mena* and *Hells Angels* without meaningfully analyzing each separate use of force. Defendants highlighted these issues at length in their Petition. (*See* Pet. at 18–20).

Plaintiff also attempts to skirt *his* burden to cite a case that is directly on point to defeat Defendants' qualified immunity. *See Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021) (plaintiff has the burden to identify a case that clearly establishes the right at issue). And even if his attempt to distinguish Defendants' cases were correct (a point Defendants do not concede),[5] it is of no consequence because *Plaintiff* still has the burden to identify a case on point clearly establishing the law—which Defendants maintain Plaintiff entirely failed to do. (*See* Pet. at 16–20).

Finally, Plaintiff misapplies this Court's language in *Ziglar v. Abbasi*, 582 U.S. 120 (2017). In *Ziglar*, this Court acknowledged that "[i]t is not necessary, of course, that the very action in question has previously been held unlawful" and that "an officer might lose qualified immunity even if there is no reported case directly on point." *Id.* at 151 (cleaned up). That language appears to be related to this Court's obvious case exception which is not at issue here. Moreover,

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[5] Defendants laid out case law on each separate, individual use of force in their Petition. (*See* Pet. at 17–18). Defendants refer this Court back to the Petition for a substantive analysis of each separate use of force.

Plaintiff ignores that *Ziglar* went on to state in its very next sentence that the unlawfulness of the officers' conduct must be "*apparent*" through pre-existing law. *Id.* (emphasis added).

But more importantly, since *Ziglar*, this Court has repeatedly stated in its recent qualified immunity decisions that case law must have "put [the officer] on notice that his specific conduct was unlawful." *See, e.g.*, *Rivas-Villegas*, 595 U.S. at 6; *see also City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) ("It is not enough that a rule be suggested by then-existing precedent; the rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." (cleaned up)). And although *Ziglar* was cited in *District of Columbia v. Wesby*, this Court went on to explain "we have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." 583 U.S. 48, 64 (2018) (cleaned up). Thus, if there is no case directly on point, then "existing precedent must place the lawfulness of the particular arrest beyond debate." *Id.* (cleaned up).

In sum, the Officers in this case could not have understood that their conduct would violate Plaintiff's rights given that this Court's guidance is sorely needed to describe the parameters of property damage claims. But even under the Ninth Circuit's precedent, no case put them on notice that each individual action would violate Plaintiff's constitutional rights. Thus, review is also warranted to ensure lower courts are properly applying this Court's qualified immunity standard.

III. THIS COURT'S JURISPRUDENCE DOES NOT SUPPORT FAILURE TO INTERVENE THEORIES.

Plaintiff's failure to intervene section begins by stating that this is an issue for the jury. The case cannot, however, go to the jury if the court does not know how to properly instruct it. And if failure to intervene theories are themselves fundamentally flawed, as Defendants posit, the issue should not go to a jury at all. Thus, this Court's guidance is also necessary for this additional reason.[6]

The Ninth Circuit recognizes—and applied in this case—two separate theories for when an officer may be held liable for another officer's actions. The first theory is a failure to intercede, which requires a showing that a fellow officer violated the Constitution and that the officer had the opportunity to intercede. (*See* Pet. App. 18a). The second theory is the integral participant theory, which also requires that the officers had a "realistic opportunity to intercede" and they participated in a "meaningful way." (*Id.*); *Hughes v. Rodriguez*, 31 F.4th 1211, 1223 (9th Cir. 2022). The Ninth Circuit combined both theories in this case as it has in the past, despite the fact that they are two separate claims. (Pet. App. 18a). This Court has *never* recognized either theory. The closest it has come is to hold that an officer has *no* duty to intervene when a private

[6] Plaintiff claims that Defendants did not raise this issue below. (Resp. at 17–18). Not so. Defendants cited the Ninth Circuit's jurisprudence on failure to intervene and integral participant (quoted by Plaintiff in his Response), but went on to explain "[t]he 'integral participation' attaches constitutional liability in a different, and much broader, way than [§ 1983] precedent allows." Br. of Appellant, *Denby v. Engstrom*, No. 23-15658, at 47–48 (9th Cir. Dec. 26, 2023).

citizen harms someone. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989).

Instead of engaging with this argument, Plaintiff argues all circuits have some form of failure to intervene theory—a proposition with which Defendants do not disagree. Rather, this issue involves a dramatic expansion of liability that circumvents § 1983's causation requirements and seeks to hold any officer liable regardless of their participation or lack thereof, and all without any reference to this Court's precedent or a constitutional underpinning.[7] Plaintiff's only and best citations for his argument are a pair of cases from the Second and Seventh Circuits and not a single case from this Court. (Resp. at 19). But simply because circuit courts have recognized these theories of liability does not mean this Court must accept their reasoning whole cloth. Indeed, that is the entire point of this Court's review.

This Court should also not accept Plaintiff's invitation to avoid or truncate this issue. Plaintiff argues that there is only one theory of liability for these claims, even though the Ninth Circuit itself recognized two different theories. Defendants also explained the inconsistency between various circuit courts in how they handle the prongs of qualified immunity, and whether supervisory liability exists or is part of such a theory. (Pet. at 24–25). Courts have called these theories "failure to intervene," "failure to

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[7] For example, Plaintiff now argues that "Officer Engstrom spotted but failed to investigate the suspicious movement under the tarp under which Mr. Ochoa was hiding." (Resp. at 5). That appears to be an attempt to hold Sgt. Engstrom liable under the Constitution for what amounts to a negligent investigation. But it is well established that Due Process Clause is not implicated by negligence. *Daniels v. Williams*, 474 U.S. 327, 333 (1986).

intercede," "bystander liability," and "integral participant." But not a *single* one of these circuit courts—nor Plaintiff's Response—is capable of pinpointing the foundation of these theories. Indeed, the Sixth Circuit is not even sure why it recognizes the claim. *See Chaney-Snell v. Young*, 98 F.4th 699, 722 (6th Cir. 2024).

This Court's intervention is thus needed to clarify this issue and provide guidance on whether these theories of liability violate well-established causation standards, and if not, the parameters upon which they are measured.

CONCLUSION

For the reasons stated above and all of those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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