

No. 25-1314

IN THE
Supreme Court of the United States

ERIC GOMEZ,
Petitioner,

v.

DAVID SACCOCCIO,
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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QUESTION PRESENTED

Whether the court of appeals correctly held that Petitioner was not entitled to qualified immunity, where he used munition that could (and did) cause serious injury against an individual who was breaking curfew, but who was not suspected of having committed any violent crime, was not in a crowd, and did not pose any immediate threat to others.

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INTRODUCTION

Petitioner Eric Gomez shot Respondent David Saccoccio with a 40-mm round containing oleoresin capsicum (OC) powder as Mr. Saccoccio tried to find his way home from a civil rights protest in downtown Phoenix in the hours after a mandatory curfew set in. Officer Gomez shot Mr. Saccoccio even though he did not have reason to suspect Mr. Saccoccio of having committed a violent crime and did not fear for his own or his fellow officers' safety. The OC round fractured Mr. Saccoccio's arm, requiring surgery.

Mr. Saccoccio brought an excessive force claim against Officer Gomez. The district court granted summary judgment for Officer Gomez, holding that he was entitled to qualified immunity. On appeal, the Ninth Circuit reversed, explaining that prior caselaw clearly established "the right of an individual breaking curfew, but not in a crowd, nor posing any immediate threat to others, nor having committed any violent crime, and only briefly failing to comply with police, not to be shot with a munition that can cause serious injury." Pet. App. 4a–5a.

Seeking this Court's review, Officer Gomez suggests that the court of appeals erred in stating, in its qualified immunity analysis, that "[m]ultiple cases can be read together to clearly establish a constitutional violation." *Id.* at 5a. Where precedent makes the unlawfulness of action apparent, however, the law is clearly established, regardless of whether the precedent consists of one, two, or many cases. Indeed, Officer Gomez himself concedes that there could be cases in which the inquiry into whether a right is clearly established warrants consideration of different precedents. Pet. 11. In any event, the court

of appeals did not need to read multiple cases together to conclude that Mr. Saccoccio's right was clearly established here.

Officer Gomez also argues that the court of appeals defined the right at issue at too high a level of generality and relied on factually dissimilar cases. But the distinctions on which he relies are either issues addressed in the pre-existing caselaw or depend on disputed facts that must, at this stage, be viewed in Mr. Saccoccio's favor. Based on the precedent, it should have been clear to Officer Gomez that his action was unlawful.

The court of appeals' determination that Officer Gomez violated Mr. Saccoccio's clearly established rights is unremarkable and correct. The petition for review should be denied.

STATEMENT OF THE CASE

Factual Background

On May 31, 2020, Respondent David Saccoccio attended a civil rights protest in downtown Phoenix with his friend Rebekah Young. Mr. Saccoccio and Ms. Young's plan for the evening was "to be peaceful and use our voice." Ninth Cir. Excerpts of Record (ER) 533. They marched throughout the early evening, including after the 8:00 p.m. curfew, which had been imposed for the first time that night. Pet. App. 15a–16a.

About an hour after curfew, police threw tear gas on people marching ahead of Mr. Saccoccio and Ms. Young. ER 511. The two friends turned away to avoid confrontation and wended their way through the streets, trying to find a way home, but found that paths to the west, where Mr. Saccoccio lived, were

blocked by police blockades. They headed in the only direction they could go, ending up in an unfamiliar neighborhood. *Id.* at 715.

Meanwhile, Eric Gomez—a member of the Phoenix Police Department’s Tactical Response Unit—was deployed downtown as part of a four-man “Grenadier” team. Pet. App. 9a, 17a. He was armed with a launcher that could shoot 40-mm rounds containing OC powder, an irritant also found in tear gas. *Id.* at 9a–10a. Officer Gomez knew that an improperly fired OC round could cause serious injury and death. *Id.* at 3a.

At about 9:15 p.m., Officer Gomez and other officers were arresting people in a pickup truck. The occupants of the car were all compliant and on the ground. At the same time, Mr. Saccoccio proceeded through a nearby alley with three to five other people. *Id.* at 17a–18a. An officer yelled at the group and began shooting pepper balls at them. *Id.* at 18a. Mr. Saccoccio came to a fence, put his hands on it, then let go when he heard an officer call out and turned the other way. ER 547–48.

Officer Gomez, who was around 100 feet away, then turned away from the pickup truck and shot Mr. Saccoccio with a 40-mm OC impact round. Pet. App. 18a. As Officer Gomez later admitted, he did not fear for his or his fellow officers’ safety when he shot Mr. Saccoccio. *Id.* at 3a. He did not see Mr. Saccoccio engage in any violence. *Id.* at 18a. He did not see Mr. Saccoccio with any weapons. *Id.* He did not hear Mr. Saccoccio make any threats. *Id.* He did not suspect Mr. Saccoccio of rioting at the time. *Id.* at 3a. And Mr. Saccoccio “was not in or near a violent crowd.” *Id.* at 5a.

Officer Gomez hit Mr. Saccoccio in the right arm, fracturing a bone and causing bleeding. Medical records indicate that Mr. Saccoccio suffered a 1.5-cm-wide open wound that probed to the bone, causing an “undisplaced fracture of the radial shaft.” *Id.* at 22a (citation omitted). The following day, a surgeon performed open reduction and internal fixation surgery and inserted a metal plate in his forearm to heal the fractured bone. *Id.*

Proceedings Below

Mr. Saccoccio filed suit under 42 U.S.C. § 1983, asserting Fourth Amendment excessive use of force and state law claims against Officer Gomez, Phoenix Police Chief Jeri Williams, and the City of Phoenix. Pet. App. 7a. After the parties stipulated to the dismissal of all claims except the Fourth Amendment excessive force claim against Officer Gomez, the district court granted summary judgment to Officer Gomez. *Id.* at 7a–55a.

The court of appeals reversed in a unanimous, non-precedential, unpublished opinion. *Id.* at 1a–5a.

First, the court of appeals determined that “a reasonable juror could find that the use of the OC round against a fleeing, non-dangerous, Saccoccio violated his Fourth Amendment right.” *Id.* at 4a. The court explained that the deployment of the OC round amounted to “‘force which has the capability of causing serious injury’ that is ‘permissible only when a strong governmental interest compels the employment of such force.’” *Id.* at 2a (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001)). Considering the factors set forth in *Graham v. Connor*, 490 U.S. 386, 396 (1989), along with the totality of the circumstances, the court then determined that the

governmental interests at stake “did not justify the indiscriminate use of serious force against” Mr. Saccoccio. *Id.* at 4a. “Saccoccio’s crimes were not severe,” the court explained. *Id.* at 3a. “Gomez only had reason to suspect Saccoccio of committing nonviolent misdemeanors.” *Id.* Moreover, “Saccoccio was not posing an immediate threat,” and any attempt at evasion was “brief and not particularly bellicose.” *Id.* at 3a–4a (quotation omitted).

Moving to the second prong of the qualified immunity analysis, the court held that Mr. Saccoccio’s right was clearly established at the time of the incident. *Id.* at 4a. The court first explained that “[t]he right at issue here is the right of an individual breaking curfew, but not in a crowd, nor posing any immediate threat to others, nor having committed any violent crime, and only briefly failing to comply with police, not to be shot with a munition that can cause serious injury.” *Id.* at 4a–5a.

The court then identified “precedent placing the statutory or constitutional question beyond debate.” *Id.* at 4a (quoting *S.R. Nehad v. Browder*, 929 F.3d 1125, 1140–41 (9th Cir. 2019)). In doing so, the court noted that “[m]ultiple cases can be read together to clearly establish a constitutional violation.” *Id.* at 5a (citing *Sanderlin v. Dwyer*, 116 F.4th 905, 917 (9th Cir. 2024)). First, the court explained, *Nelson v. City of Davis*, 685 F.3d 867, 883 (9th Cir. 2012), “established that officers must distinguish peaceful individuals from a violent crowd, even when using force to restore order, when the distinction is apparent.” *Id.* at 5a. That case clearly applied here, given that “Saccoccio was not in or near a violent crowd when Gomez shot him with the OC round.” *Id.* Additionally, *Deorle*, 272 F.3d at 1284–85, made clear

“that it is unlawful to use serious force against a person not posing an immediate threat to others.” *Id.* at 5a. Because Officer Gomez’s constitutional violation was clearly established, the court held that he was not entitled to qualified immunity. *Id.*

The Ninth Circuit denied Officer Gomez’s petition for rehearing en banc, with no judge of the court requesting a vote. *Id.* at 6a.

REASONS FOR DENYING THE WRIT

I. The court of appeals’ determination that cases can be read together to clearly establish a right does not warrant review.

The petition criticizes the court of appeals for reading two cases together to determine that Mr. Saccoccio’s rights were clearly established. *See, e.g.,* Pet. 3, 8. Notably, however, the petition does not claim that the courts of appeals disagree about whether courts may read two or more cases together to identify clearly established rights. Likewise, it does not identify any opinion by this Court holding that courts may not do so.

The petition’s failure to identify such cases is unsurprising given the meaning of “clearly established law.” “A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (cleaned up). Where, in “light of pre-existing law the unlawfulness” of the official’s actions is “apparent,” the right is clearly established. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). That is true regardless of whether one prior case makes the unlawfulness of the

official's actions apparent, or whether the rules established by two cases together place the lawlessness of the official's actions "beyond debate." *al-Kidd*, 563 U.S. at 741; *see, e.g., Hope v. Pelzer*, 536 U.S. 730, 733 (2002) (in holding that officials violated clearly established law by handcuffing an inmate to a hitching post when it was unnecessary to enforce on-the-spot discipline, discussing one case establishing that handcuffing inmates to fences and cells for long periods of time runs afoul of the Eighth Amendment and another establishing that officials may not inflict gratuitous pain on an inmate if it is unnecessary to enforce immediate discipline).

Indeed, despite criticizing the Ninth Circuit for "deconstruct[ing] [the encounter] into individual components for analysis," Pet. 10, the petition concedes that there "could be a case where the duration or sequencing of an incident involving a single use of force might warrant consideration of different components of an encounter, each governed by different precedent." *Id.* at 11. Although the petition asserts that "that is not *this* case," *id.*, that assertion relies on disputed facts that must be viewed, at this stage in the case, in the light most favorable to Mr. Saccoccio. For example, the petition states that Officer Gomez "had mere seconds to assess whether Saccoccio was a 'peaceful individual[]' and posed an immediate threat to officers," *id.*, but Officer Gomez admitted that Mr. Saccoccio was not moving towards the police when Officer Gomez shot him, *see* ER 388, and that he did not pose a threat to police officers at that time, *see id.* at 371. At the least, the petition's concession highlights the case-specific nature of Officer Gomez's objections to the Ninth Circuit's decision.

In any event, the court of appeals' statement that multiple cases can be read together to clearly establish rights was not necessary to the court's holding. Although the court cited *Deorle*, 272 F.3d at 1284–85, for the proposition that it “is unlawful to use serious force against a person not posing an immediate threat to others,” Pet. App. 5a, *Nelson* also makes that proposition clear. See *Nelson*, 685 F.3d at 886 (explaining that a reasonable officer would know that “firing projectiles ... in the direction of individuals suspected of, at most, minor crimes, who posed no threat to the officers or others, and who engaged in only passive resistance, was unreasonable”). For this reason, as well, the petition does not present an issue warranting this Court's review.

II. The court of appeals conducted a proper qualified immunity analysis and correctly held that Officer Gomez violated David Saccoccio's clearly established rights.

A. In holding that Officer Gomez violated Mr. Saccoccio's clearly established rights, the court of appeals correctly defined the right at issue and identified “precedent placing the statutory or constitutional question beyond debate.” Pet. App. 4a (citation omitted). As the court of appeals explained, “[t]he right at issue here is the right of an individual breaking curfew, but not in a crowd, nor posing any immediate threat to others, nor having committed any violent crime, and only briefly failing to comply with police, not to be shot with a munition that can cause serious injury.” *Id.* at 4a–5a. This “right was clearly established at the time of the incident,” *id.* at 4a, most

particularly by *Nelson*, 685 F.3d 867, and *Deorle*, 272 F.3d 1272.

In *Nelson*, police officers attempted to disperse the crowd at a gathering in which people were engaging in underage drinking, parking illegally, and throwing bottles at police officers. When the crowd failed to disperse, officers fired OC rounds at a group standing in a breezeway on the first floor, striking the plaintiff, who later required surgery. 685 F.3d. at 873–74. The court of appeals held that the officers were not entitled to qualified immunity. As the court held, “a reasonable officer would have been on notice that ... the firing of a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors ... would constitute unreasonable force in violation of the Fourth Amendment.” *Id.* at 886. Importantly, the chaotic atmosphere of the gathering did not change the outcome, because the plaintiff posed no immediate threat. *See id.* at 881 (“[T]he general disorder of the complex cannot be used to legitimize the use of pepperball projectiles against non-threatening individuals.”); *see also Ciminillo v. Streicher*, 434 F.3d 461, 466–69 (6th Cir. 2006) (finding an officer should have known it was unlawful to shoot a projectile at an individual who posed no risk to officer safety, even when the shooting occurred during the course of a riot). Moreover, the court explained that even if the plaintiff had failed to comply with the officers’ orders to disperse, that failure would not have justified the use of force. *Nelson*, 685 F.3d at 882.

Nelson is closely analogous to this case. In both cases, the plaintiffs had been involved in chaotic gatherings, were suspected of misdemeanors at most, did not pose an immediate threat, and were “not

particularly bellicose” in any attempt to evade, yet were seriously injured by OC projectiles. *Id.* (cleaned up). Officer Gomez “could have read [this] relevant precedent beforehand and known that it proscribed [his] specific conduct.” *Zorn v. Linton*, 146 S. Ct. 926, 930 (2026) (cleaned up).

Nelson’s analysis of clearly established law relied in part on the court’s previous decision in *Deorle*. In *Deorle*, the Ninth Circuit held that a police officer was not entitled to qualified immunity where he shot an emotionally disturbed individual who posed no immediate threat to others with a less-lethal round that was “capable of causing serious injury.” 272 F.3d at 1284. In light of *Deorle*, the court explained in *Nelson*, “a reasonable officer would have known that firing projectiles ... in the direction of individuals suspected of, at most, minor crimes, who posed no threat to the officers or others, and who engaged in only passive resistance, was unreasonable.” *Nelson*, 685 F.3d at 886.

In short, *Nelson* and *Deorle* place the unlawfulness of Officer Gomez’s conduct “beyond debate.” *al-Kidd*, 563 U.S. at 741. Based on these cases and the cases they cite, “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.” *Dist. of Col. v. Wesby*, 583 U.S. 48, 63 (2018) (cleaned up).

B. The petition’s contentions that *Nelson* and *Deorle* did not provide Officer Gomez with notice that his actions were unlawful rely on distinctions without a difference and on disputed facts that must, at this stage, be resolved in Mr. Saccoccio’s favor. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (cautioning courts

against “defin[ing] a case’s ‘context’ in a manner that imports genuinely disputed factual propositions”).

First, the petition states that *Nelson* and *Deorle* “did not involve a protester violating an emergency curfew.” Pet. 3. True, but *Nelson* specifically addressed the possibility that the plaintiff there was engaging in trespass—which is also a misdemeanor—and explained that the fact that the plaintiff committed “at most, a misdemeanor, weighs heavily against the defendants’ use of force.” 685 F.3d at 880. Thus, *Nelson* put officers on notice that a person’s commission of a misdemeanor does not justify the use of serious force against him.

The petition also attempts to distinguish *Nelson* and *Deorle* by asserting that Mr. Saccoccio was “climbing over a fence into a residential yard” when Officer Gomez shot him. Pet. 3; *see also id.* at 16 (stating that Mr. Saccoccio was “committing or about to commit criminal trespass”). As an initial matter, whether Mr. Saccoccio was climbing a fence when Mr. Saccoccio shot him is in dispute. *See* ER 547. In any event, *Nelson* made clear that trespassing “is a minor infraction that justifies, at most, only a minimal use of force.” 685 F.3d at 880. And any argument that Officer Gomez acted out of fear that Mr. Saccoccio “would endanger the public if permitted to climb over the residential fence and escape,” Pet. 15, is “not rooted in information particular to Saccoccio and [is] contradicted by Gomez’s own testimony that he thought Saccoccio was scaling the fence to flee, not to harm someone.” Pet. App. 3a–4a.

The petition’s attempts to distinguish the precedent by contending that Mr. Saccoccio was “disobeying police commands,” Pet. 16, likewise rely

on a factual dispute: Viewed in Mr. Saccoccio's favor, the evidence shows that, upon hearing a policeman's voice, Mr. Saccoccio let go of the fence and turned around. ER 547. And, regardless, *Nelson* put officers on notice that a brief failure to follow an officer's command does not justify use of serious force. In *Nelson*, the officers claimed that they had given orders to the crowd to disperse. The court stated that, even if it were to accept the officers' version of events, "a failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force." 685 F.3d at 881 (citing cases). Thus, even if Mr. Saccoccio "heard and was in non-compliance with the officers' orders" to stop, Officer Gomez should have known that "this single act of non-compliance, without any attempt to threaten the officers or place them at risk, would not rise to the level of active resistance ... [or provide] justification for the use of force." *Id.* at 882.

The petition likewise fails in arguing that pre-existing caselaw did not put Officer Gomez on notice that "properly deploying a single OC impact round, accurately targeted at an area of the body that was not known to cause serious injury, was unconstitutional." Pet. 14. To begin with, Officer Gomez did not, in fact, accurately shoot the area he targeted; shooting at night from approximately 100 feet away, Officer Gomez aimed at Mr. Saccoccio's torso, ER-402, but hit his arm instead, Pet. App. 2a. Moreover, *Nelson* specifically instructed that "the potential for injury must not be evaluated on the presumption that the 'shot ... will hit the precise part of the body at which it is aimed by the shooter,' but rather based on its *capacity* for causing serious harm." 685 F.3d at 885

(quoting *Deorle*, 272 F.3d at 1285 n.23). Officer Gomez knew that a single OC impact round had the capacity to cause serious harm or even death. See Pet. App. 3a; ER 231.

Finally, the petition claims that Mr. Saccoccio “was suspected of rioting.” Pet. 16. As the court of appeals explained, however, “[t]he evidence, including Gomez’s own testimony that he had not seen Saccoccio engage in violence, and that he did not suspect Saccoccio of rioting at the time, creates a genuine dispute as to whether Gomez suspected Saccoccio of rioting in violation of Arizona Revised Statute § 13-2903.” Pet. App. 3a. Thus, the petition’s attempt to distinguish Mr. Saccoccio from the plaintiffs in *Nelson* and *Deorle* on this basis falls flat.

As this Court has explained, to hold that an officer violated clearly established rights, “[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 preexisting law, the unlawfulness of the officer’s conduct must be apparent.” *Id.* (cleaned up). Here, in light of pre-existing precedent, and particularly when the evidence is construed in the light most favorable to Mr. Saccoccio, the unlawfulness of Officer Gomez’s conduct should have been apparent. Further review of the court of appeals’ decision is unwarranted.

CONCLUSION

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

Respectfully submitted,

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