

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**

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's Brief in Opposition fails to refute the existence of an important question that merits this Court's review. That question is whether combining general principles from two factually dissimilar cases conflicts with this Court's precedents requiring lower courts to define rights with specificity and use close factual analogues in determining whether a Fourth Amendment constitutional right is clearly established. See Supreme Court Rule 10 (noting lower appellate court's decision of an important federal question in a way that conflicts with relevant decisions of this Court is a compelling reason for which review may be granted).

First, Respondent's acknowledgment that no opinion by this Court has prohibited the analysis undertaken by the Ninth Circuit and inability to identify any case sanctioning the *same type of analysis* undertaken by the Ninth Circuit (Brief in Opposition, at 6-7), affirm the need for this Court to once again clarify the specificity with which a right must be clearly established in the Fourth Amendment context.

Second, Respondent does not refute the Ninth Circuit's failure to define the right at issue with the requisite specificity. Only by ignoring undisputed context-critical facts and applying *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), at a high level of generality, did the Ninth Circuit conclude that Officer Gomez's conduct violated the law. But neither *Nelson* nor *Deorle* "obviously" resolved whether discharging a single OC projectile at a noncompliant protestor 100 feet away, who was violating an emergency curfew, suspected of rioting, disobeying police commands, and committing or about to commit

criminal trespass as he attempted to climb over a fence into a residential yard, violates the Fourth Amendment. Although Respondent makes much ado about facts he “disputes,” none of the issues he raises remedy the Ninth Circuit’s reliance on two factually dissimilar cases to find the right clearly established. Even setting aside the alleged issues of fact raised by Respondent, Officer Gomez was *still* entitled to qualified immunity because neither Respondent nor the Ninth Circuit produced a case where an officer taking similar actions ***under similar circumstances*** was held to have violated the constitution.

Accordingly, Petitioner respectfully requests this Court grant review.

I. Respondent Has Not Identified Any Case Sanctioning the Type of Multiple-Case Analysis Employed by the Ninth Circuit.

Respondent’s Brief fails to identify any precedent (much less in the Fourth Amendment context) that sanctions the *same type* of multiple-case approach the Ninth Circuit employed in this case. (Brief in Opposition, at 6-7).

Contrary to Respondent’s insinuation otherwise, the Ninth Circuit’s analysis here is *not* like the analysis applied in *Hope v. Pelzer*, 536 U.S. 730 (2002), which Respondent cites as an example of a sanctioned multiple-case analysis.¹ (Brief in Opposition, at 7). In

¹ *Hope* is also distinguishable because it implicated the alleged violation of the Eighth Amendment, not the Fourth Amendment. As this Court has explained, specificity “is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.” *Rivas-*

Hope, an inmate was handcuffed to a hitching post on two separate occasions, for hours at a time. 536 U.S. at 733-35. The inmate experienced physical pain and discomfort from being cuffed to the hitching post. *Id.* at 734. Further, on the second occasion of cuffing, which lasted seven hours, the inmate was denied basic human necessities, such as water and bathroom breaks, was taunted by the guards, and was forced to remove his shirt and remain shirtless while the sun burned his skin. *Id.* at 234-35.

In deciding whether the corporal punishment violated the Eighth Amendment, this Court did *not* deconstruct the handcuffing to consider it out of context, nor did it find that one component of the conduct was governed by a dissimilar case and another by another dissimilar case. Instead, in determining whether precedent clearly established that it was a violation of the Eighth Amendment to handcuff the inmate “to a hitching post for an extended period apparently to inflict gratuitous pain or discomfort, with no justification in threatened harm or a continuing refusal to work,” this Court referred to cases involving similar corporal punishment of inmates in similar contexts. *Id.* at 736-37 & n.6. Specifically, it found the law clearly established by *Gates v. Collier*, 501 F.3d 1291 (5th Cir. 1974), in which the circuit court had ruled that handcuffing inmates to the fence and to cells for long periods of time violated the Eighth Amendment, and its own precedents prohibiting the gratuitous infliction of pain upon inmates (which circuit authority suggested would include depriving inmates of water when unnecessary to enforce on-the-

Villegas v. Cortesluna, 595 U.S. 1, 6 (2021) (per curiam) (citation omitted).

spot discipline). *Id.* at 736-37 & n.6 (citing *Gates*, 501 F.3d 1291, 1306).

Rather than relying on similar cases as this Court did in *Hope*, the Ninth Circuit disregarded undisputed context-critical facts, broadly defined the right, and then applied two starkly dissimilar cases at a high level of generality to find the right clearly established. (See Petition, at 10-11). This Court's precedents require otherwise.

II. *Nelson* And *Deorle* Did Not Put Officer Gomez on Notice That His Specific Conduct Was Unlawful.

Both Respondent and the Ninth Circuit defined the right at issue with far too much generality, in violation of this Court's precedent. Regardless, neither *Nelson* nor *Deorle* clearly define the right at issue here.

Respondent concedes that the Ninth Circuit defined the right at issue as 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." (Response, at 8). That definition ignores critical context, which the Ninth Circuit was required to consider in defining the right at issue. (See App. 11a-18a; Petition, at 10-11). See *Zorn v. Linton*, 607 U.S. 568, 572 (2026) (per curiam) ("The relevant precedent must define the right with a 'high degree of specificity,' so that 'every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.'") (citation omitted); see also *Barnes v. Felix*, 605 U.S. 73, 83 (2025) (noting a court cannot "'narrow' the totality-of-the-circumstances inquiry, to focus on only a single moment. It must look too, in this

and all excessive-force cases, at any relevant events coming before”).

Respondent does not refute that the Ninth Circuit failed to consider important contextual facts in defining the right at issue. Applying *Nelson* and *Deorle* to the facts of this case makes it clear that the Ninth Circuit did not consider the rapidly evolving encounter that occurred over a matter of seconds in the context of escalating riots, a traffic stop involving multiple *unsearched* individuals who were violating the law and who outnumbered the responding officers, the rapid approach of several additional individuals (including Saccoccio) who were actively evading police and actively disobeying police commands, and an individual who was reasonably suspected of committing multiple offenses, including criminal trespass, and who was scaling a fence into a residential yard. (See Petition, at 13; App. 11-18a, 33a). Because these contextual facts are not genuinely disputed, a proper analysis required the Ninth Circuit to have considered them in defining the right at issue.² See *Kisela v. Hughes*, 584 U.S. 100, 106 (2018) (per curiam) (citing *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 614-16 (2015)).

The Ninth Circuit’s decision to ignore this critical context necessarily impacted its ability to identify precedent holding that an officer acting under similar circumstances violated the Constitution. See *Zorn*,

² *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam), which Respondent cites, does not hold otherwise and instead affirms that the Ninth Circuit defined the right at issue at too high a level of generality by failing to consider critical uncontroverted facts regarding the factual context of the use of force. (Response, at 10-11).

607 U.S. at 572 (citations omitted). Sanitizing and deconstructing the encounter into *broad, general* principles was the only way the Ninth Circuit could hold that *Nelson* and *Deorle*, ***taken together***, were similar to the use of force at issue here. This Court need look no further than the Ninth Circuit’s own analysis to affirm this point. The Ninth Circuit read the two cases together—rather than either on its own—when it held that *Nelson* “established that officers must distinguish peaceful individuals from a violent crowd, even when using force to restore order, when the distinction is apparent,” and that “*Deorle* established that it is unlawful to use serious force against a person not posing an immediate threat to others.” (App. 5a). It then combined *those general principles* to find that the right was clearly established. But neither *Nelson* nor *Deorle* “clearly” establish or put it “beyond debate,” *Kisela*, 584 U.S. at 103, that Officer Gomez would violate the Fourth Amendment by firing a single *permissibly targeted* less-lethal round at the torso of a person roughly 100 feet away to stop and arrest him, when the officer was simultaneously detaining several other suspected rioters, during a rapidly evolving encounter lasting a matter of seconds and during which the person, who was violating curfew, ran toward the officer with a group of protestors, ignored officer commands to stop, then tried to climb over a fence into a residential yard in an area that had experienced several days of rioting.

As much as Respondent insists factual disputes prevent this Court from reviewing the pure legal issue before it, they do not. Respondent was not passive or compliant like the students in *Nelson*, nor had he been obeying police commands for approximately 40 minutes like the plaintiff in *Deorle*. Although Saccoccio disagrees that he was disobeying police commands

when Officer Gomez deployed the single less-lethal round just seconds later (Response, at 11-12), viewing the encounter *in its context*, the undisputed facts in the record (which includes Respondent’s own Complaint) demonstrate otherwise. *See Barnes*, 605 U.S. at 83.

Saccoccio actively disobeyed multiple audible police commands during a rapidly evolving encounter which occurred over a matter of *seconds* and then tried to scale the fence into the residential yard. (ER 640 (Third. Am. Complaint), ¶ 72 (alleging “Mr. Saccoccio attempted to scale the fence”)). Moreover, Saccoccio did not commit a “single act of non-compliance” as he now argues (Response, at 12). Instead, he committed *multiple* acts over the course of the encounter which undisputedly lasted, in its entirety, a matter of seconds—not hours or minutes, but seconds. (App. 18a, 20a-21a, 29a, 40a; *see generally* Response).

Further, Respondent’s suggestion that the “chaotic atmosphere of the gathering” in *Nelson* (a college party) renders it sufficiently similar to the circumstances here (Response, at 9) is unavailing.³ In

³ Respondent cites *Ciminillo v. Streicher*, 434 F.3d 461, 466–69 (6th Cir. 2006), to support his contention that the rioting did not alter the factual context in which the Court had to determine whether the right was clearly established. (Response, at 9). “[E]ven if ‘a controlling circuit precedent could constitute clearly established federal law in these circumstances,’” *Sheehan*, 575 U.S. at 614, that argument is meritless. The Ninth Circuit did not cite *Ciminillo* as clearly establishing the right at issue, nor could it because *Ciminillo* is similarly distinguishable. There, the plaintiff was present at, but not participating in a riot, and was slowly walking towards officers with his hands above his head when he was shot, at point blank range, in the chin and chest with a beanbag propellant. *Id.* at 463.

Even setting aside Officer Gomez’s suspicion that Saccoccio had been participating in the riots that evening, Saccoccio was

Nelson, the chaotic atmosphere of the gathering mattered because when responding officers entered the apartment complex and “issued a verbal order to disperse,” they did so without any means of amplifying their voices above the raucous noise of the party, such that “the majority of the crowd neither heard the order nor dispersed.” 685 F.3d at 873. That is *not* what happened here under any version of the facts.

While running towards the officers, Saccoccio was given numerous, clear, audible directives to stop. He chose not to. While attempting to scale the fence, he was also given clear directives to stop. Thus, Officer Gomez had every reason to believe that Saccoccio was *knowingly* disobeying repeated police commands—a context that did not exist in *Nelson*, where the officers indiscriminately shot *multiple* pepper balls into a group of students who were attempting to leave the party as ordered, whose egress was blocked by the responding officers, and who had asked the officers to inform them what they wanted the students to do and “repeatedly raised their hands to show their willingness to comply.” *Id.* at 873-74. That is not what occurred here.

There is no dispute that the use of force in this case occurred in the context of escalating riots and a traffic stop involving multiple unsearched individuals (App. 11a-18a; *see generally* Response). There is no dispute that on the night in question, Saccoccio was actively

not obeying police commands (he was actively disobeying them), he was not slowly walking toward the officers with hands raised (he was scaling a fence into a private residential yard), and he was not shot at point-blank range or in an impermissible area of his body by the officer (he was struck by a single less-lethal round deployed from approximately 100 feet away, that was targeted at and struck permissible target areas).

violating a curfew that had been imposed following days of rioting, while accompanied by other individuals. (App. 16a-17a; Response, at 2-3). There is no dispute that during the span of seconds over which the encounter occurred: (1) Officer Gomez and his fellow officers were conducting a traffic stop of suspected rioters, while outnumbered (App. 20a-21a); (2) that while the traffic stop was being conducted, Saccoccio approached the officers *at a run*, accompanied by a group of individuals who, like him, were evading police and violating curfew (App. 4a, App. 17a-18a); and (3) that before he turned to observe Saccoccio, Officer Gomez heard another officer give the approaching group several commands to stop, which Saccoccio did not obey. (App. 18a, 21a). In the brief moment he took his eyes off the individuals involved in the traffic stop, Officer Gomez undisputedly saw Saccoccio disobeying police commands to stop and scaling a fence into a residential yard while carrying a backpack. (App. 18a.) There is also no dispute that Officer Gomez deployed a single less-lethal projectile, from 100 feet away, at what is undisputedly a permissible target area that was only known to cause pain or bruising.⁴ (App. 10a-11a, 27a).

Thus, *Nelson* did not put Officer Gomez on notice that *in this context*, it was unlawful to discharge a single less-lethal round (consistent with manufacturer specifications), toward an individual suspected of committing multiple offenses on an evening of escalating riots, who was actively disobeying police com-

⁴ That the officer's less-lethal round struck Saccoccio's arm (another permissible target area) and not his torso (Response, at 12) does not negate the uncontroverted facts about the targeted deployment of a single less-lethal round, consistent with the manufacturer's specifications. (App. 26a).

mands, and unlawfully attempting entry into a residential yard.

Likewise, Respondent does not refute *Deorle's* dissimilar facts.⁵ It is only by defining the right at too high a level of generality that a court could find *Deorle* clearly defined the right at issue here. Indeed, Respondent implicitly acknowledges this by arguing *Deorle* stands for the proposition that it is unlawful to use serious force against a person not posing an immediate threat to others. (Resp., at 5-6, 8, 10). What Respondent ignores, however, is that *Deorle* involved a police officer who used a shotgun to fire a lead-filled beanbag round at the face of a suicidal individual who had been under police observation for approximately 40 minutes and was on his own property, generally obeying police officers' instructions. 272 F.3d at 1276-77, 1285-86. Yet here, Respondent was evading police in the context of days of escalating riots, was attempting to flee, and was not physically constrained from entering someone else's private yard fenced by the wall he was trying to scale because (unlike *Deorle*) officers had not placed roadblocks around Respondent to prevent his escape.

⁵ Respondent's citation to *Deorle's* discussion of the *reasonableness* of the force used (*i.e.* its capacity to cause serious injury) is irrelevant because that issue is not before this Court. (Response, 10, 12-13). At any rate, the use of force here is also distinguishable from *Deorle*, where the officer discharged the round into a potentially lethal target area (the suspect's face) from a distance that he knew was potentially lethal. 272 F.3d at 1279. In contrast, Officer Gomez shot a less-lethal round from 100 feet away at a distance and towards a target area that was not known to cause any serious injury. (App. 10a, 18a-19a, 21a-22a, 27a, 41a, 44a, 53a).

On the uncontroverted facts of this case, neither *Nelson* nor *Deorle* are sufficiently similar, even read together as the Ninth Circuit did, such that they put Officer Gomez on notice that his specific conduct under these circumstances was unlawful. Because *Nelson* and *Deorle*, whether read separately or together, do not obviously resolve whether discharging a single OC projectile at a noncompliant protestor 100 feet away, who was violating an emergency curfew, suspected of rioting, disobeying police commands, and committing or about to commit criminal trespass as he attempted to climb over a fence into a residential yard, violates the Fourth Amendment, Officer Gomez is entitled to qualified immunity.

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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