No. 21-____

IN THE

Supreme Court of the United States

LEVI FRASIER,

Petitioner,

v.

CHRISTOPHER EVANS ET AL.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether training or law enforcement policies can be relevant to whether a police officer is entitled to qualified immunity.

2. Whether it has been "clearly established" since at least 2014 that the First Amendment protects the right of individuals to record police officers carrying out their duties in public.

PARTIES TO THE PROCEEDING

The petitioner, plaintiff below, is Levi Frasier.

Respondents, defendants below, are Christopher L. Evans, Charles C. Jones, John H. Bauer, Russell Bothwell, and John Robledo.

The City of Denver was also a defendant in the district court. But the court dismissed the claim against the City, and petitioner did not appeal that holding.

RELATED PROCEEDINGS

Frasier v. Evans, D.C. No. 1:15-CV-01759-REB-KLM (D. Colo. 2018)

Frasier v. Evans, No. 19-1015 (10th Cir. 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Levi Frasier respectfully seeks a writ of certiorari in this case to the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-63a) is published at 992 F.3d 1003. The relevant order of the district court (Pet. App. 64a-72a) is unpublished but available at 2018 WL 6102828.

JURISDICTION

The court of appeals entered its judgment on March 29, 2021. Pet. App. 1a. On March 19, 2020, this Court entered a standing order that extends the time to file a petition for a writ of certiorari in this case to August 26, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

INTRODUCTION

In recent years, some Justices have called for a reexamination of the qualified-immunity doctrine. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) (expressing "strong doubts" about doctrine); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (doctrine "sends an alarming signal to law enforcement officers and the public"). Several lower court judges have echoed these calls, expressing "unease" with the doctrine and urging "recalibration of contemporary immunity jurisprudence." *Zadeh v. Robinson*, 928 F.3d 457, 479-80 (5th Cir. 2019) (Willett, J., concurring); *see also, e.g.*, *Jackson v. City of Cleveland*, 925 F.3d 793, 822 (6th Cir. 2019) ("Qualified immunity has outgrown its original justifications."); *Tucker v. City of Shreveport*, 998 F.3d 165, 186 (5th Cir. 2021) (Higginson, C.J., dissenting) ("highlight[ing] the importance of recent attention given to the issue of qualified immunity"). Prominent academics also have explained how qualified immunity has become increasingly unmoored from any statutory text or historical practice—and, indeed, is threatening to undermine the rule of law itself. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018).

Regardless of whether this Court might wish to reconsider qualified immunity as a whole, this case presents a timely opportunity to resolve two divisions of authority and to curb an unjustified distortion of the doctrine. At the time of the remarkable incident in this case, the respondent police officers' training and

departmental policies expressly advised them that the First Amendment protects the right of citizens to record officers performing their duties in public. All four federal court of appeals decisions on the issue said the same thing, consistent with this Court's precedent. Yet the Tenth Circuit granted the respondents immunity for doing exactly what they had been told was unconstitutional. The Tenth Circuit reasoned (1) that the training and law enforcement policies are "irrelevant" to the qualified-immunity analysis and (2) that existing legal precedent was insufficient on its own to make the right here clearly established. Pet. App. 29a; *see also id.* 19a-38a.

Both of these holdings conflict with the law in other circuits. Several courts of appeals have held that training and policies are relevant in the qualified-immunity analysis. And the First Circuit concluded a decade ago that case law clearly established that the First Amendment protects the "right to videotape police carrying out their duties in public." *Glik v. Cunniffe*, 655 F.3d 78, 82-85 (1st Cir. 2011).

Furthermore, as the district court observed, it "makes no sense" under the circumstances here to confer qualified immunity. Pet. App. 66a. The qualified-immunity doctrine was created to prevent officers from being held unexpectedly liable based on constitutional rules they "neither knew nor should have known" existed. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). The officers here all testified that they knew they were violating petitioner's rights. Their training, department policies, and precedent all underscored that reality. Whatever the outer boundaries of qualified immunity may be, this case is far beyond them. Certiorari should be granted.

STATEMENT OF THE CASE

A. Factual background

1. Since as early as 2007, the City of Denver has trained its police officers "that the public has the right to record them performing their official duties in public spaces." Pet. App. 13a. The training bulletin issued that year also "had the force and effect of official policy." A_1033.[1] Starting in 2010, the Denver Police Department also provided a mandatory course for supervisors entitled Perspectives on Policing, which reiterated that citizens have a First Amendment right to record officers. A_1031; *see also* A_370. An additional course that commenced in 2012 included a slide to the same effect: "[C]itizens have a First Amendment right to videotape the actions of police officers in public places." A_391, 1031.

These directives and recognitions are of a piece with others from around the country. In 2012, the U.S. Department of Justice issued guidance on the issue, recognizing "individuals' First Amendment right to observe and record police officers engaged in the public discharge of their duties." U.S. Dep't of Justice, Civil Rights Div., *Re: Christopher Sharp v. Baltimore City Police Dep't* at 1 (May 14, 2012). Other major police departments have likewise long had policies "advising officers not to interfere with a private citizen's recording of police activity because it [i]s protected by the First Amendment." *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017) (Philadelphia Police Department memorandum issued in 2011); *see also*

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[1] Citations to "A_" are to the Appellants' Appendix in the Tenth Circuit. "SA_" refers to the Appellant's Supplemental Appendix.

Chestnut v. Wallace, 2018 WL 5831260, at *3 (E.D. Mo. 2018) (St. Louis Metropolitan Police Department special order issued in 2009 recognizing this "unambiguous First Amendment right"); Montgomery County Police, *Citizen Videotaping Interactions* 1-2 (January 2013) (same).

2. On August 14, 2014, respondent John Bauer, a detective in the Denver Police Department, saw what he thought was a drug transaction involving a silver car. He radioed for backup and followed the car to a parking lot. Exiting his vehicle, Detective Bauer then announced "police." Pet. App. 8a. When the driver of the car, David Flores, did not immediately show his hands, Bauer "pulled him from the car and pinned him against it." *Id.*

As respondent Sergeant Russell Bothwell arrived to assist, Flores "removed a sock from his waistband and stuffed it in his mouth." Pet. App. 8a. There was no indication that Flores was armed or dangerous. But the officers assumed the sock contained drugs, so they ordered him to "spit it out." *Id.* The officers then "fell to the ground" with Flores as they tried to remove the sock. *Id.*

Petitioner Levi Frasier was observing this tussle from nearby in the parking lot. Detective Bauer initially "asked him for help" getting the sock out of Flores's mouth. Pet. App. 8a. Petitioner briefly assented. But as other officers arrived, they asked petitioner to step back. Petitioner "moved about ten feet away and started video-recording the event using his tablet computer." *Id.* Nothing he did interfered with the officers' actions. SA_101, 111; A_268.

What petitioner recorded was dramatic. While Flores refused to release the sock from his mouth, one

of the officers pinned his forearm on Flores's head. Another officer pinned Flores's arms behind his back. Respondent Officer Charles Jones then punched Flores "in the face six times in rapid succession," Pet. App. 8a; SA_75. As petitioner later described it: "[T]he punches were punishing, but what must have hurt even more was the cement hitting Mr. Flores back in the face. . . . [I]t seemed like after one strike, [Officer Jones] could have stopped and, . . . manually pulled out the sock." SA_75. "There wasn't a need for the second or the third, for sure the fourth, fifth, or sixth. Each one seemed to get more violent and powerful." *Id.*

Flores's girlfriend, Mayra Lazos-Guerrero, who was seven-and-one-half-months' pregnant, began screaming and approached the officers. "Officer Jones pushed her away, and then Officer Evans grabbed her ankle and pulled her off her feet." Pet. App. 9a. She fell onto her stomach and face, hitting the pavement.

As petitioner recorded the violent interaction, Sergeant Bothwell called out, "Camera!" Pet. App. 9a. All of the officers had attended the Denver Police Department's trainings explaining that citizens have a First Amendment right to record the police while performing their duties in public. *Id.* 66a, 70a. And they all were aware that this constitutional rule "protected [Frasier's] right to record them." *Id.* 13a, 66a, 70a. Nevertheless, as petitioner stopped filming and returned to his parked car, Officer Evans followed him "and asked him to bring his identification and the video of the arrest to the officer's patrol car." *Id.* 9a.

Petitioner brought his driver's license, but not his computer tablet, over to the patrol car. He was afraid that if he let the officers have access to the video, they would make it "disappear." *Id.* 9a. As petitioner

explained, "I had just witnessed an officer that I didn't feel had the power to be able to strike somebody in the face, and I was the only one with video evidence of his wrongs." SA_33, 78. Officer Evans continued to ask for the video. Gesturing to the back seat of his patrol car, he told petitioner, "Well, we could do this the easy way or we could do this the hard way." Pet. App. 9a. When petitioner still did not respond, Officer Evans asked him to fill out a witness statement form. Upon further prodding from Officer Evans to disclose whether he filmed the incident, petitioner wrote (falsely) in his statement that "he took only a Snapchat photo of the arrest." *Id.* 10a. He added that he "no longer had a copy" of the photo on his "phone" because "Snapchat removes [footage] as soon as you send [it]." *Id.* (alterations in court of appeals opinion).

Officer Evans told petitioner to go get his phone. As petitioner returned from his car, another officer said, "That's not it" and indicated that his recording device had been larger. A_1014-15. At that point, all five of the officers encircled petitioner and demanded the video. Believing he would be taken to jail if he refused any longer, petitioner retrieved his tablet. Pet. App. 11a. Officer Evans then "grabbed the tablet out of [petitioner's] hands" and began searching for the video of the arrest. Petitioner objected that this was improper without a warrant, but Officer Evans continued to scan files on the tablet. *Id.* He then announced to the other officers, "I don't see the video in here. I can't find it." *Id.* Another officer responded, "As long as there's no video, it's okay. . . . [I]f there's just a photo, that's fine, as long as there's no video." *Id.*; SA_89, 96. The officers then gave petitioner back his tablet and his driver's license, and he left.

Mr. Flores was taken away in an ambulance, bleeding from the back of his head. The record does not disclose the extent of his injuries.

3. After the incident, petitioner provided a copy of his video to the Denver Police Department and Fox31 News Denver. The media outlet aired an investigative report on the officers' use of force and produced several follow-up reports.[2] After the incident was publicized, the Department changed its use-of-force policy to prohibit officers from using "physical force solely to stop a person from swallowing a substance or to retrieve evidence from the person's mouth." A_1098 (DPD Ops. Manual § 116.06(3)(b), rev. March 2016).

B. Procedural history

1. Petitioner sued the respondent officers and the City and County of Denver under 42 U.S.C. § 1983. Petitioner claimed, as relevant here, that the officers violated the First Amendment by retaliating against him for filming them while performing their duties in public. Petitioner also alleged that the City and County were liable for this violation because they failed to train the officers adequately about the public's First Amendment rights.[3]

The district court initially granted the officers' motion to dismiss on qualified immunity grounds,

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[2] The initial report, as well as petitioner's video itself, can be found here: https://kdvr.com/news/problem-solvers/denver-police-accused-of-excessive-force-illegal-search/.

[3] Petitioner also advanced Fourth Amendment claims based on the officers' detention of him and their search of his computer tablet. His unlawful search claim against Officer Evans remains pending for trial; other such claims were dismissed and are not at issue here. Pet. App. 12a, 63a.

holding that the right to record officers' performance of their official duties in public places "was not clearly established" at the time of the incident here. Pet. App. 12a-13a. After a period of discovery, in which the City and County "presented evidence that the Denver Police Department had been training its officers since February 2007 that the public has the right to record them performing their official duties in public spaces," the district court granted summary judgment against petitioner on his failure-to-train claims. *Id.* 13a.

In light of the latter ruling, the district court elected to reconsider its qualified immunity order, and it reinstated petitioner's First Amendment claims against the officers. The district court reasoned that it would "make[] no sense" to allow the City and County to avoid liability on the ground that it had a "policy in place" that the First Amendment protects citizens' right to record police officers, while also granting the officers qualified immunity on the ground that the law was not sufficiently clear to put them on notice of the illegality of their actions. Pet. App. 66a. "Although qualified immunity 'leaves ample room for mistaken judgments,'" the district court explained, "it does not protect 'the plainly incompetent *or those who knowingly violate the law.*'" *Id.* 67a (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (emphasis added)).

The officers later moved for summary judgment, and the district court denied that motion. The court reasoned that the officers knew that the First Amendment protected petitioner's filming of their actions and that "the record supported a finding that they had retaliated against [petitioner]" for doing so. Pet. App. 15a.

2. The officers appealed the denial of qualified immunity on petitioner's First Amendment claim, and the Tenth Circuit reversed.

As an initial matter, the court of appeals held that the district court had erred in considering the officers' training and law enforcement policies. The Tenth Circuit gave two reasons for that holding. First, it reasoned that "[j]udicial decisions are the *only* valid interpretive source of the content of clearly established law." Pet. App. 28a (emphasis added). Second, the Tenth Circuit asserted that the qualified-immunity doctrine is concerned exclusively with the objective reasonableness of an officer's actions. It is therefore "irrelevant," the court of appeals concluded, whether "the officers [in this case] subjectively knew—based on their training or from municipal policies—that their conduct violated Mr. Frasier's First Amendment rights." *Id.* 29a.

Having set aside the law enforcement training and policies indicating that the officers' conduct here was unconstitutional, the Tenth Circuit asked whether judicial opinions had clearly established by 2014 that the First Amendment protects the right to record officers performing their official duties in public places. The Tenth Circuit expressly recognized that there is a "circuit split" on that issue: The First Circuit held over a decade ago that this right is clearly established, while the Third and Fifth Circuits have held in cases like this that the right was not clearly established. Pet. App. 37a; *see also Glik v. Cunniffe*, 655 F.3d 78, 82-85 (1st Cir. 2011); *Fields*, 862 F.3d at 362; *Turner v. Lieutenant Driver*, 848 F.3d 678, 687 (5th Cir. 2017). The Tenth Circuit then sided with the latter circuits.

Citing precedent from this Court, the Tenth Circuit acknowledged that the First Amendment protects "the creation and dissemination of information," particularly when individuals are engaged in "[n]ews gathering." Pet. App. 31a (citations omitted). But the court of appeals believed that those principles operate at too high a "level of generality" to give the requisite notice to police officers that their conduct was unlawful. *Id.* 33a. The Tenth Circuit also accepted that all four federal courts of appeals to address the underlying constitutional issue before the events at issue here had uniformly held "that there is a First Amendment right to record the police performing their duties in public spaces." *Id.* at 35a (citing *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik*, 655 F.3d at 82-84; *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995)). But the Tenth Circuit held that the lower court consensus on the constitutional question was not enough to clearly establish that rule. *Id.* 36a.

Finally, the Tenth Circuit refused to decide whether the First Amendment in fact guarantees a right to record the police in public spaces. Pet. App. 30a n.4. While every court of appeals to address the issue has held that it does, the issue is now expressly unresolved as a matter of Tenth Circuit law. *Id.*

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision creates one circuit split and deepens another. At a minimum, this Court should review the Tenth Circuit's holding that officer training and law enforcement policies are categorically irrelevant to whether an officer is entitled to qualified immunity. The Tenth Circuit's

rule—which applies across all Section 1983 claims—directly contravenes this Court's precedent and is deeply misguided. In addition, the Tenth Circuit's ultimate qualified-immunity holding also warrants review. In a decision denying qualified immunity that the Tenth Circuit expressly rejected, the First Circuit held a decade ago that the right "to videotape police carrying out their duties in public" is "a basic, vital, and well established liberty safeguarded by the First Amendment." *Glik v. Cunniffe*, 655 F.3d 78, 82-85 (1st Cir. 2011). The right is too important for its enforceability against individual officers under Section 1983 to wax and wane depending on geography.

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

A. The courts of appeals are divided over this question.

The Tenth Circuit's decision splits with other circuits over whether law enforcement training and policies (reflected in manuals, internal directives, and the like) can be relevant to whether an officer is entitled to qualified immunity.

1. The First, Second, Sixth, and Ninth Circuits all hold that, in addition to judicial decisions, "[t]raining materials" and law enforcement policies "are also relevant" in the qualified-immunity analysis. *Vazquez v. City of Kern*, 949 F.3d 1153, 1164 (9th Cir. 2020); *see also Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) ("training materials" were "relevant" to finding law clearly established); *Raiche v. Pietroski*, 623 F.3d 30, 39 (1st Cir. 2010) (denying qualified immunity in part based on departure from

"officer's training"); *Okin v. Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 436-37 (2d Cir. 2009) (officers' defiance of "extensive professional training" and state law provided "strong support" for denying qualified immunity); *Booker v. South Carolina Dep't of Corrections*, 855 F.3d 533, 546 (4th Cir. 2017) (denying qualified immunity in part based on "internal policies"); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) (denying qualified immunity in part based on "the training these Officers received"); *Maye v. Klee*, 915 F.3d 1076, 1087 (6th Cir. 2019) (same regarding internal "policy").

The Ninth Circuit's recent decision in *Vazquez* is illustrative. The plaintiff claimed that a corrections officer violated her Fourteenth Amendment right to bodily integrity by spying on her while she was undressing and showering in a juvenile detention facility. This Court has no case law directly speaking to this legal issue. The Ninth Circuit nonetheless held that the officer was not entitled to qualified immunity, relying on case law in the lower courts as well as the "the Juvenile Hall administrative policies" prohibiting the officer's actions "and the training [the officer] likely attended." *Vazquez*, 949 F.3d at 1165.

2. Three circuits (two of those just mentioned above, plus one more) have similarly held that administrative regulations are "relevant in determining whether an inmate's right was clearly established." *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002); *see also Okin*, 577 F.3d at 433-34 (Second Circuit: "administrative provisions" also relevant); *Booker*, 855 F.3d at 546 (Fourth Circuit: regulations are "relevant in determining whether an inmate's

right was clearly established") (citation omitted). These decisions also conflict with the Tenth Circuit's holding here that "[j]udicial decisions are the *only* valid interpretive source of the content of clearly established law." Pet. App. 28a (emphasis added).

B. The question is recurring and important.

As the array of cases in the previous section indicates, the question whether police officers' training and law enforcement policies are relevant to the qualified-immunity inquiry is a frequently recurring issue. The issue also raises a basic methodological question regarding the doctrine. The issue can arise in a broad sweep of Section 1983 cases—from police search-and-seizure practices, to retaliation for engaging in free speech or expression, to alleged cruel and unusual treatment of prisoners.

Needless to say, the qualified immunity doctrine itself is also immensely consequential. The doctrine not only determines whether those who suffer constitutional injuries can be compensated; it affects the degree to which "[t]he public interest in deter[ing] of unlawful conduct" in the first place is served. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). The qualified-immunity doctrine further influences the public's perception of the law itself. When our legal system fails to deliver justice to those who suffer mistreatment at the hands of governmental agents, the citizenry may wonder why those agents are not held to account. And when those agents violated their own training and policies, the public may wonder all the more. This Court should not allow indeterminacy in this respect to persist.

C. This case is an excellent vehicle for the Court to address the issue.

This case provides an optimal opportunity to resolve whether training and law enforcement policies are, as the Tenth Circuit held here, categorically irrelevant to qualified-immunity analyses.

To begin, the Tenth Circuit directly and expressly framed this issue in its opinion and gave it extended treatment. Pet. App. 19a-29a. The court of appeals also held in absolute terms that training and law enforcement policies are always "irrelevant" to qualified-immunity analyses. *Id.* 20a, 23a, 29a. In fact, the court of appeals held that such training and policies must be ignored "even if the officers [in this case] subjectively knew—based on their training or from municipal policies—that their conduct violated Mr. Frasier's First Amendment rights." *Id.* 29a.

This case is also the best possible scenario to test the court of appeals' categorical rule. The training and departmental policies that applied here did not simply proscribe certain behavior as a matter of police "best practices" or the like. They specifically instructed the officers regarding the dictates of the Constitution, explaining that *the First Amendment* gives people a "right[] to record the police in the public discharge of their official duties." Pet. App. 13a. The record also demonstrates unambiguously that the officers here had attended these trainings and knew that they violated petitioner's rights. *Id.*

Nor was this local training and policy somehow idiosyncratic; it tracked direct guidance from the federal government. In 2012, the Department of Justice expressly recognized "individuals' First Amendment right to observe and record police officers

engaged in the public discharge of their duties." U.S. Dep't of Justice, Civil Rights Div., *Re: Christopher Sharp v. Baltimore City Police Dep't* at 2 (May 14, 2012). In the two years preceding the events here, the Government had reiterated that position in particular cases. *See* Statement of Interest of the United States, *Garcia v. Montgomery County*, No. 8:12-cv-03592 (D. Md. March 4, 2013); Consent Decree at 44-45, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (E.D. La. 2013); Settlement Agreement at 20-21, *United States v. Town of E. Haven*, No. 3:12-cv-01652 (D. Conn. Dec. 20, 2012). After the events here, the Government again reiterated this view. *See* Br. for United States as Amicus Curiae, No. 16-1650, *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017).

Finally, the question whether the training and policies are relevant was outcome-determinative below. The district court held that the Denver Police Department's training and policies tipped the balance in the qualified-immunity inquiry. *See* Pet. App. 65a-71a. The Tenth Circuit did not dispute that these features of the case would require the denial of qualified immunity. Instead, it deemed them legally "irrelevant." *Id.* 29a.

D. The Tenth Circuit's holding that officer training and law enforcement policies are categorically irrelevant is wrong.

1. This Court's precedent dictates that training and law enforcement policies are relevant to the qualified-immunity inquiry.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court considered whether it was clearly established, as a matter of Eighth Amendment law, that prison guards could not handcuff prisoners to a "hitching post" as a

sanction for disruptive conduct. Partly "in light of . . . an Alabama Department of Corrections (ADOC) regulation, and a DOJ report" stating that the hitching post could not be used in the manner at issue, the Court held that the guards were not entitled to qualified immunity. *Id.* at 741-42. Lest there be any doubt that the regulations and DOJ report mattered, the Court expressly stated that they were "[r]elevant" and that they "len[t] support to" and "buttressed" the view "that reasonable officials in the ADOC should have realized that the use of the hitching post . . . violated the Eighth Amendment." *Id.* at 743-45. The dissenting Justices disagreed with the majority's ultimate determination that the guards were not entitled to qualified immunity, but they accepted the legitimacy of "rel[ying] on" non-judicial materials to reach that holding. *Id.* at 759 (Thomas, J., dissenting).

Similarly, in *Wilson v. Layne*, 526 U.S. 603 (1999), the Court considered whether it was clearly established that the Fourth Amendment prohibited police officers from allowing members of the media to accompany them while executing warrants in people's homes. "[I]mportant to [the Court's] conclusion" that the law was not clearly established in this regard was "a Marshals Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests." *Id.* at 617. As in *Hope*, the dissent disagreed with the majority's qualified immunity holding, but it accepted that officers and courts could look to "such a document for guidance." *Wilson*, 526 U.S. at 625 (Stevens, J., dissenting).

The Tenth Circuit cited *Hope* nine times. Pet. App. 19a, 31a, 33a, 34a, 38a, 61a. It cited *Wilson* as well. *Id.* 36a. Yet the Tenth Circuit never mentioned those cases' express reliance on training and policies. Once the full reasoning in those cases is properly taken into account, the court of appeals' holding cannot stand.

2. Instead of engaging with the pertinent analyses in *Hope* and *Wilson*, the Tenth Circuit gave two reasons for holding that training and law enforcement policies are "irrelevant" to the qualified-immunity analysis. First, the Tenth Circuit opined that "[j]udicial decisions are the *only* valid interpretive source of the content of clearly established law." Pet. App. 28a (emphasis added). Second, the Tenth Circuit asserted that a court's qualified-immunity analysis turns exclusively on the clearly-established-law inquiry—that is, "on the objective reasonableness of an official's conduct"—and never "on whether he subjective[ly] belie[ved] his conduct was lawful." *Id.* 22a (internal quotation marks and citations omitted). Neither of these assertions affords license to disregard this Court's on-point precedent. But even on their own terms, the assertions are misguided.

a. The "clearly established law" inquiry is designed to determine whether a "reasonable officer" in the situation at issue would have known that his conduct was unlawful. *Anderson v. Creighton*, 483 U.S. 635, 639-41 (1987). As the Tenth Circuit observed, this inquiry is an objective one. Pet. App. 22a.

But it does not follow that judicial opinions are the only thing that can be relevant to whether the law is clearly established. Past training or the existence of a

policy is also an *objective* fact, no different from the existence of judicial precedent. That is, it requires no assessment of an officer's mind to determine whether he was instructed that the conduct at issue was unconstitutional or otherwise impermissible. It simply requires taking testimony about the training that was provided or reading the pertinent policy.

The Tenth Circuit also emphasized that only judicial decisions can "authoritatively define the boundaries of permissible conduct." Pet. App. 28a. That may be so, but it is a red herring. The qualified-immunity doctrine deals with *remedies*, not rights themselves. And there is nothing that restricts courts from considering legal prescriptions in training manuals and the like in determining whether to hold a defendant liable for damages. To the contrary, it is commonplace in the realm of remedies to consider things like whether a defendant followed a "stated policy" prohibiting sexual harassment, *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), or—for purposes of the Fourth Amendment's exclusionary rule—whether a police officer's conduct complied with an existing statute, *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987), or regulation, *United States v. Ross*, 32 F.3d 1411, 1415 (9th Cir. 1994).

In fact, municipal liability under Section 1983 itself turns not just on whether the defendant violated the Constitution, but also on whether the violation stemmed from a "policy" or practice. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). As the district court below observed, it "makes no sense" to enable a municipal defendant to avoid liability on the ground that it had a "policy in place" prohibiting the conduct at issue, and then to turn around and ignore the

individual defendants' violation of that policy when assessing their own liability. Pet. App. 66a; *see also id.* 69a-70a. The same policies that absolve the police department here of liability put the officers unambiguously on notice that their conduct was unconstitutional—and thus properly subjected them to individual liability.

That leaves the Tenth Circuit's invocation of *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803), and *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Pet. App. 28a. It is, no doubt, "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch.) at 177; *see also McCullough*, 17 U.S. (4 Wheat.) at 401 (similar). But there is considerable irony in invoking that concept in a decision that expressly *declines* to say what the law is. *See* Pet. App. 30a n.4. More fundamentally, the notion that *Marbury* and *McCullough* prevent courts from holding officials accountable for violating constitutional rules of which they had unambiguous notice reinforces that the qualified-immunity doctrine has become so disoriented that this Court's attention is required. If anything, the pertinent lesson from *Marbury* should be that the United States is "a government of laws, and not of men," and "[i]t will certainly cease to deserve that high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch.) at 163; *see also Zadeh v. Robinson*, 928 F.3d 457, 481 (5th Cir. 2019) (Willett, J., concurring).

b. Even if evidence of training and law enforcement policies were instructive only as to an officer's subjective state of mind, they would still be relevant to the qualified-immunity inquiry. The

qualified-immunity doctrine is designed to prevent officers from being held liable based on constitutional rules they "neither *knew* nor should have known" existed. *Harlow*, 457 U.S. at 819 (emphasis added); *see also Butz v. Economou*, 438 U.S. 478, 506 (1978) ("[I]t is not unfair to hold liable the official who *knows* or should know he is acting outside the law." (emphasis added). As noted above, the clearly-established-law inquiry implements the "should have known" prong of this test by identifying when any reasonable officer must have known she was acting illegally. But that analysis is unnecessary when the officer already *knew* from her training and binding departmental policies that she was acting illegally.

The Court stated as much in *Malley v. Briggs*, 475 U.S. 335 (1986), explaining that qualified immunity does not shield "incompetent" officers "*or* those who knowingly violate the law." *Id.* at 341 (emphasis added). The Court has reaffirmed this formulation numerous times since, indicating time and again that officers who know that their conduct is unconstitutional are not entitled to qualified immunity. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015) (per curiam); *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (per curiam).[4]

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[4] As the Tenth Circuit noted, Justice Brennan made a similar point in his concurrence in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *See* Pet. App. 24a-25a. The Tenth Circuit reasoned that Justice Brennan's concurrence is "not binding." *Id.* 24a (citation omitted). But the actual-knowledge prong of qualified-immunity analysis derives from *Harlow*'s majority opinion, and has been reaffirmed in *Malley* and numerous other decisions.

Ignoring all of this recent precedent, the Tenth Circuit contended that *Anderson v. Creighton* rendered "an officer's 'subjective beliefs'" categorically "irrelevant." Pet. App. 22a-23a (quoting *Anderson*, 483 U.S. at 641). But the officer in *Anderson* had no subjective belief that his conduct was unlawful. Nor did the Court's opinion otherwise bar consideration of subjective knowledge. To the contrary, the Court explained that qualified immunity "*generally* turns on the 'objective legal reasonableness' of the action." *Anderson*, 483 U.S. at 639 (emphasis added) (quoting *Harlow*, 457 U.S. at 819). And the Court reaffirmed *Malley*'s proviso that qualified immunity is not available to officers "who knowingly violate the law." *Id.* at 638 (quoting *Malley*, 475 U.S. at 341).

The *Malley* proviso also makes sense. "[T]he focus" of the qualified-immunity inquiry "is on whether the officer had fair notice that her conduct was unlawful." *Kisela*, 138 S. Ct. at 1152 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)); *see also Hope*, 536 U.S. at 739 (qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful" (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001))). The "clearly established" inquiry is one way to establish the requisite notice, by way of a legal rule that a reasonable officer is presumed to know clearly established law. But when an officer *actually knew* her conduct was unlawful, the fair-notice requirement is even more plainly satisfied.

Indeed, it would turn the qualified-immunity doctrine's fair-notice concept upside down to say that officers may testify that they "knew—based on their training or from municipal policies"—that their

conduct was unlawful, and then shield themselves from liability on qualified-immunity grounds. Pet. App. 29a. The fact that the Tenth Circuit held otherwise here shows just how far some modern qualified-immunity case law has strayed from the doctrine's origins. There may be some historical support for granting qualified immunity where an officer acted *in accordance* with local policy or training. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari). But there is zero historical support for immunizing an officer where his unconstitutional conduct *flouted* his training and local policy. *Id.*

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

The first question presented is certworthy in its own right. The second question presented here—whether the First Amendment clearly establishes that individuals may record police officers carrying out their duties in public—is also worthy of review.

A. The circuits are openly split over this issue.

As the Tenth Circuit acknowledged, the circuits are "split on the clearly-established-law question" in this case—namely, whether the First Amendment clearly establishes that individuals may record police officers carrying out their duties in public. Pet. App. 37a; *see also ACLU of Illinois v. Alvarez*, 679 F.3d 583, 601 & n.10 (7th Cir. 2012) (likewise noting "circuit split" over whether the "right to record police" was clearly established).

The first decision in this regard was issued in 2010. In that case, the Third Circuit held that there

was no clearly established right to record the police while carrying out official duties in public. *Kelly v. Borough of Carslisle*, 622 F.3d 248, 262 (3d Cir. 2010). In a subsequent case involving events occurring just months before the events here, the Third Circuit reaffirmed this view, holding that officers who retaliated against individuals for filming them were entitled to qualified immunity. *Fields v. City of Philadelphia*, 862 F.3d 353, 362 (3d Cir. 2017). About the same time, the Fifth Circuit issued a decision to the same effect, *Turner v. Lieutenant Driver*, 848 F.3d 678, 687 (5th Cir. 2017), and the Tenth Circuit followed those decisions here. Pet. App. 36a-38a.

The First Circuit, by contrast, held shortly after the Third Circuit initially staked out its position on the issue that the First Amendment right "to videotape police carrying out their duties in public" is clearly established. *Glik v. Cunniffe*, 655 F.3d 78, 82-85 (1st Cir. 2011). In *Glik*, an individual, "[c]oncerned that the officers were employing excessive force to effect [an] arrest," stood roughly ten feet away and "record[ed] video footage of the arrest on his cell phone." *Id.* at 79-80. After the officers retaliated against him, he filed suit under Section 1983 claiming a violation of the First Amendment. The First Circuit rejected the officers' assertion of qualified immunity, stressing that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." *Id.* at 85; *see also Gericke v. Begin*, 753 F.3d 1, 9-10 (1st Cir. 2014) (applying this holding in context of recording a traffic stop).

In short, if this case had arisen in New England instead of the Mountain West, the officers would not have been entitled to qualified immunity. Only this Court can resolve this conflict.

B. The issue is vitally significant.

The question whether individuals have a clearly established right to film police officers performing their duties in public is vitally significant. Such recordings play a central role in facilitating the public's awareness and scrutiny of police tactics. Sometimes such recordings build public trust. They may also evoke sympathy for the difficult and dangerous tasks officers can be required to perform.

Other times recordings reveal abuses of authority and produce public outcry that leads to reform. The recent recording of the killing of George Floyd—which emerged shortly after the Minneapolis Police Department characterized the killing as a "medical incident during police interaction"[5]—is one prominent example. The 1991 recording of the beating in Los Angeles of Rodney King is another. Though less explosive, the recording in this case is still another. Like those other recordings, the recording here aired on the local news. After that publicity, the Denver Police Department changed its policy regarding when officers may use physical force on persons suspected of holding potential evidence in their mouths. SA_92; A_1098. Yet so long as the right to record uniformed police officers in public spaces is not protected and enforceable, this method of participating in self-government and instigating policy change is at risk.

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[5] https://www.famous-trials.com/george-floyd/2720-original-mpd-statement-on-floyd-a-medical-incident.

C. This case is an ideal vehicle for resolving the conflict.

As with the first question presented, this case is an excellent vehicle for resolving whether individuals have a clearly established right to film police officers performing their duties in public spaces. The facts of this case cleanly present the issue. There is no contention, for instance, that petitioner somehow interfered with the officers' ability to perform their duties or that the officers were carrying out those duties in nonpublic spaces. The Tenth Circuit also considered the legal issue at length.

The Tenth Circuit framed its analysis in terms of whether the asserted First Amendment right was clearly established "in August 2014." Pet. App. 29a. But specific framing poses no difficulty. An inherent feature of *every* qualified-immunity case is that it involves looking backwards to decide whether the law was clearly established "at the time of the conduct" at issue. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). And there has been no legal development since the events here that undercut the relevancy of the judicial precedent that then existed. Accordingly, answering the question whether the First Amendment right at stake here was clearly established by 2014 will not only resolve the circuit split over this issue but should also resolve the question whether the law is clearly established right now.

D. The Tenth Circuit incorrectly held that the First Amendment right here is not clearly established.

The robust consensus of federal appellate decisions demonstrates that the underlying right of individuals to record police officers performing their

duties in public spaces has been clearly established since before the events at issue here. This Court's First Amendment precedent confirms that reality.

1. The clearly-established-law inquiry does not require a case from this Court that is "directly on point," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), or even "materially similar" to the situation at hand, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). A "robust 'consensus of cases of persuasive authority'" can also clearly establish a legal rule. *al-Kidd*, 563 U.S. at 742 (quoting *Wilson v. Layne*. 526 U.S. 603, 617 (1999)). Put another way, the "weight of authority from other courts" can itself create clearly established law. Pet. App. 37a (citation omitted).

When the events here occurred, all four federal courts of appeals to have considered the constitutional issue had held that "there is a First Amendment right to record the police performing their duties in public spaces." Pet. App. 35a (citing *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995)).[6] But, citing

[6] More recently the Third and Fifth Circuits have agreed with this conclusion, although they held that the right had not previously been "clearly establish[ed]." *See Fields*, 862 F.3d at 362; *Turner*, 848 F.3d at 687. That brings the circuit tally on the underlying constitutional issue to six, with none opposed. District courts in several circuits that have not yet addressed the issue also have recognized the right. *See Garcia v. Montgomery County*, 145 F. Supp. 3d 492, 506-07 (D. Md. 2015); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015); *Lambert v. Polk County*, 723 F. Supp. 128, 133 (S.D. Iowa 1989); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972).

Wilson, the Tenth Circuit held that respondents were entitled to qualified immunity because the circuits have "disagreed regarding whether this purported First Amendment right to record [i]s clearly established." Pet. App. 36a.

The Tenth Circuit misread *Wilson*. That case holds that qualified immunity is generally appropriate where courts "disagree *on a constitutional question*." *Wilson*, 526 U.S. at 618 (emphasis added); *see also Stanton v. Sims*, 571 U.S. 3, 10 (2014) (per curiam) (same). But that is not the situation in this case. Here, every circuit to consider the underlying constitutional question has *agreed* on that question. The Tenth Circuit simply confused the relevance of a split on the issue of qualified immunity with a split on the underlying constitutional question. Because there is no disagreement on the underlying constitutional question, qualified immunity is inappropriate here.

2. Even if the consensus in the courts of appeals alone were not enough to establish that the right to record the police in performance of their official duties in public is clearly established, the Tenth Circuit's holding would still be erroneous. "Basic First Amendment principles" long recognized by this Court fortify the lower court consensus. *Glik*, 655 F.3d at 82.

In particular, "the First Amendment goes beyond protection of the press and the self-expression of individuals." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). It also protects "the creation and dissemination of information." *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 570 (2011). This right to capture and disseminate information "has particular significance" with respect to promoting the discussion of governmental affairs. *Bellotti*, 435 U.S. at 777 n.11;

accord Mills v. Alabama, 384 U.S. 214, 218 (1966). "[I]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." *Bellotti*, 435 U.S. at 777 n.11.

"An important corollary" to the right to contribute to the stock of public information about governmental operations is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972)). This is especially true with respect to police activity in public places. Given the vast discretion accorded police officers in their day-to-day undertakings, "[t]he public has an interest in [the] responsible exercise" of police authority. *Gentile v. State Bar*, 501 U.S. 1030, 1035-36 (1991); *see also City of Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."). Gathering and "disseminat[ing] of information relating to alleged governmental misconduct" in this respect helps to deter abuses of power and to formulate policy responses when abuses occur. *Gentile*, 501 U.S. at 1034-35 (internal quotation marks omitted).

The Tenth Circuit acknowledged that where "general precedent applies 'with obvious clarity,' the right can be clearly established notwithstanding the absence of binding authority involving materially similar facts." Pet. App. 34a (discussing *Hope*, 536 U.S. at 741 (citations omitted)); *accord Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam). But the Tenth Circuit reasoned that the "First Amendment principles protecting the creation of speech and the

gathering of news" that exist this Court's case law are not clear enough to "put the unconstitutionality of the officers' allegedly retaliatory conduct 'beyond debate.'" Pet. App. 35a (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)). The Tenth Circuit did not elaborate on this contention; that is, it offered no reason *why* the First Amendment might not protect the right to record officers performing their duties in public. But the Tenth Circuit apparently believed that the absence of any precedent from this Court involving expressive responses to *police activity* in the field was fatal to petitioner's claim. *See id.* 36a-37a (citing *Turner*, 848 F.3d at 686).

This reasoning is mistaken. For one thing, it improperly ignores the robust body of lower court jurisprudence that *is* directly on point. The clearly-established-law inquiry is not a game of divide-and-conquer. It is a holistic inquiry. *See, e.g.*, *Hope*, 536 U.S. at 736-46. And here, the *combination* of precedent from this Court and the lower courts (plus the officers' training and departmental policies, *see supra* at 16-23) renders the law clearly established.

Even so, the Tenth Circuit overlooked the salience of this Court's decisions in *Hill* and *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). In *Hill*, a bystander observed police officers questioning someone holding up traffic and shouted, "Why don't you pick on someone your own size?" 482 U.S. at 453-54. In *Lewis*, a passenger in a car shouted obscenities at an officer who asked to see her husband's driver's license. The Court held in these cases that the First Amendment guarantees citizens the right to direct "verbal criticism" or "opprobrious" language at police officers who are performing their duties in public. *See Hill*, 482

U.S. at 461; *Lewis*, 415 U.S. at 132. This is so even if the individual's speech "interrupt[s]" officers, making it more difficult for them to conduct their duties. *Hill*, 482 U.S. at 462.

The First Amendment right here follows *a fortiori*. Recording officers performing official duties in public is expressive activity, equivalent to speaking to them or disseminating a documentary regarding their actions. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."). And peacefully undertaking such expressive activity here does not interfere with law enforcement operations in any way. What's more, filming police conduct such as the conduct here contributes to "the free discussion of governmental affairs," *Mills*, 384 U.S. at 218, far *more* than hurling sarcastic or foul language at the police. In light of these precepts, any reasonable officer would have understood that the First Amendment protected the conduct at issue in this case—and the officers here had been trained to respect that conduct. The Tenth Circuit, therefore, had no justification to cloak the officers in qualified immunity.

CONCLUSION

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

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