No. _______

In The

Supreme Court of the United States

DESIREE MARTINEZ,

Petitioner,

v.

CHANNON HIGH, OFFICER,
SUED IN HER INDIVIDUAL CAPACITY,

Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kennedy* v. *City of Ridgefield*, the Ninth Circuit held that a police officer violates the Constitution when he discloses a police complaint to its subject and places the complainant "in danger that she otherwise would not have faced." 439 F.3d 1055, 1063 (9th Cir. 2006).

In this case, a police officer disclosed a domestic violence police complaint to its subject over the phone, even though the police officer knew that the complainant was in a room alone with the subject and could not escape.

Applying a rigid standard that does not consider the circumstances faced by the officer, the Ninth Circuit concluded that *Kennedy* was not specific enough to fairly warn the officer in this case about the unconstitutionality of her conduct. Pet.App. 22a. This standard contrasts with the flexible fair-warning standard applied in the Fifth and Tenth Circuits, where, in cases outside of time-pressured decisions to use force, strict specificity is not necessary. *Hughes* v. *Garcia*, 100 F.4th 611, 620 n.1 (5th Cir. 2024); *A.N.* v. *Syling*, 928 F.3d 1191, 1199 (10th Cir. 2019).

The question presented is, in a situation not involving a time-pressured decision to use force:

Whether an officer can be fairly warned about the unconstitutionality of her conduct even when the facts of previous cases are not materially identical to the facts the officer confronts.

PARTIES TO THE PROCEEDING

Petitioner Desiree Martinez was the plaintiff in the district court and the appellant in the Ninth Circuit.

Respondent Channon High was an individual defendant in the district court and the appellee in the Ninth Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Martinez* v. *High*, No. 22-16335 (9th Cir. Mar. 6, 2024) (denying rehearing en banc);
- *Martinez* v. *High*, No. 22-16335 (9th Cir. Jan. 26, 2024) (affirming grant of High's motion for summary judgment);
- *Martinez* v. *High*, No. 2:15-cv-00683 (E.D. Cal. Jan. 10, 2022) (granting High's motion for summary judgment);
- *Martinez* v. *City of Clovis*, *et al.*, No. 17-17492 (9th Cir. Dec. 4, 2019) (affirming grant of summary judgment in an interlocutory appeal on related issues but not involving High);
- *Martinez* v. *Pennington*, *et al.*, No. 2:15-cv-00683 (E.D. Cal. Oct. 17, 2017) (denying High's motion for summary judgment on due process claim).

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PETITION FOR A WRIT OF CERTIORARI

Desiree Martinez petitions for a writ of certiorari to review the Ninth Circuit's judgment in this case.

OPINIONS BELOW

The Ninth Circuit's opinion and the dissenting opinion are reported and available at 91 F.4th 1022. Pet.App. 2a–25a. The opinion of the United States District Court for the Eastern District of California is unreported but available at 2022 WL 96148. Pet.App. 27a–29a.

JURISDICTION

The Ninth Circuit's opinion was filed on January 26, 2024. Pet.App. 2a. On March 6, 2024, the court denied rehearing and rehearing en banc. Pet.App. 36a. Petitioner timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1871 provides: "Every person who, under color of [law] * * * 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 * * * ." 42 U.S.C. 1983.

INTRODUCTION

Fair notice is the lodestar of qualified immunity. The question is whether a reasonable official in the defendant's shoes would have been fairly warned by relevant judicial precedent that her actions violated the plaintiff's constitutional rights. *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002); see also *Saucier* v. *Katz*, 533 U.S. 194, 201–202 (2001) (for the first time discussing the fair notice standard in the context of excessive force claims), overruled in part by *Pearson* v. *Callahan*, 555 U.S. 223 (2009).

But what's fair in one set of circumstances (for example, when an officer is making a time-pressured decision to use force) is different from what's fair in another set of circumstances (for example, when a low-level official has time and opportunity to deliberate).

Despite this common-sense notion, the circuits are split on whether the fair notice standard of qualified immunity allows for such flexibility—or any at all.

According to the Fifth and Tenth Circuits, fair notice is a flexible standard. If the defendant is a police officer accused of excessive force, "the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately." *Morrow* v. *Meachum*, 917 F.3d 870, 876 (5th Cir. 2019). But if the "case does not involve excessive force, or split-second decisions," the level of specificity needed to provide fair warning lessens, just as the official's opportunity for reasoned reflection increases. *Hughes* v.

Garcia, 100 F.4th 611, 620 n.1 (5th Cir. 2024); see also *A.N.* v. *Syling*, 928 F.3d 1191, 1199 (10th Cir. 2019).

According to the Eighth, Ninth, and Eleventh Circuits, on the other hand, fair notice is a rigid, inflexible standard: Courts must assess the fairness of the notice with the same level of specificity, no matter the type of the constitutional violation and no matter the speed and circumstances under which the defendant acts. Pet.App. 19a; *Benning* v. *Comm'r, Ga. Dep't of Corr.*, 71 F.4th 1324, 1334 (11th Cir. 2023); *Dillard* v. *O'Kelley*, 961 F.3d 1048, 1055 (8th Cir. 2020) (en banc) ("*Dillard II*"). That's why, in this case, the Ninth Circuit granted qualified immunity to a police officer who, while working at the records department, disclosed over the phone a confidential domestic-violence complaint *to the subject of the complaint*. Pet.App. 22a. This subject—the officer knew—was in the room with the complainant. *Ibid.* The Ninth Circuit did so, despite already announcing that disclosing such complaints to subjects of these complaints is unconstitutional and despite the fact that the officer had ample time to consider her actions.

The Ninth Circuit's backwards understanding of qualified immunity runs contrary to this Court's precedent and is inconsistent with the purpose behind qualified immunity.

Precedent. This Court has decided ten cases involving the interplay of the fair warning standard with an officer's time-pressured decision to use force. In all of them, the Court stressed that, outside of "an obvious case," a high level of generality is inappropriate. *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1, 6 (2021)

(per curiam). "Use of excessive force is an area of the law in which the result depends very much on the facts of each case." *Kisela* v. *Hughes*, 584 U.S. 100, 104–105 (2018) (per curiam) (internal quotation marks omitted). So existing precedent must "squarely govern[]" the specific facts at issue. *Brosseau* v. *Haugen*, 543 U.S. 194, 201 (2004) (per curiam).

Outside of time-pressured cases, on the other hand, the Court has articulated a flexible standard. In a case involving a strip search by public school officials, this Court stated that "even as to action less than an outrage, 'officials can still be on notice that their conduct violates established law in . . . novel factual circumstances.'" *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377–378 (2009) (quoting *Hope*, 536 U.S. at 741).[1] In a case involving a deficient warrant, the Court explained that "the basic rule, well established by our cases, that absent consent or

[1] *Hope* is often cited for the proposition that, where the conduct at issue is "extreme," the "egregious facts" of the case "provide[] officers 'with some notice that their alleged conduct'" is unconstitutional. *Taylor* v. *Riojas*, 592 U.S. 7, 8–9 (2020) (per curiam) (internal quotation marks omitted) (citing *Hope*, 536 U.S. at 741). In such cases, even when there isn't a case on point, qualified immunity will be denied. In this case, however, there is no need to reach for this obviousness exception to qualified immunity. After all, Ms. Martinez did point to an on-point case. See *Kennedy*, 493 F.3d at 1063 (holding that disclosing a confidential complaint to its subject violates the complainant's constitutional rights when this disclosure exposes the complainant to foreseeable danger that she otherwise would not have faced). That said, a summary reversal like the one issued in *Taylor* would be appropriate here; it is obvious to any reasonable official that disclosing confidential abuse complaints to subjects of these complaints is unconstitutional. See *Taylor*, 592 U.S. at 9 n.2.

exigency, a warrantless search of the home is presumptively unconstitutional" can be sufficient—and in fact was sufficient—to provide fair warning. *Groh* v. *Ramirez*, 540 U.S. 551, 564 (2004). And in a case involving officers stopping a woman from praying, the Court reversed a grant of qualified immunity, *Sause* v. *Bauer*, 585 U.S. 957, 960 (2018) (per curiam), after the Tenth Circuit faulted the woman for not "identify[ing] a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here[,]" 859 F.3d 1270, 1275 (10th Cir. 2017).[2]

Purpose. The Court's stated purpose in creating qualified immunity is to prevent chilling government action. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). The risk of chilling is greatest when a police officer is making a time-pressured decision to use force under uncertain and constantly evolving circumstances. The same concerns do not attach to slowly unfolding schemes, where government officials know what they are doing is wrong.

Right now, qualified immunity is turned on its head. Counterintuitively, "[g]overnment defendants challenging a district court loss fully prevailed in 34%

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[2] There are three more cases—separate from the use of force cases—where the Supreme Court has uniformly applied the strictest level of specificity. Those are *Ashcroft* v. *al-Kidd*, 563 U.S. 731 (2011); *Lane* v. *Franks*, 573 U.S. 228 (2014); and *Ziglar* v. *Abbasi*, 582 U.S. 120 (2017). All three involved claims against high-level executive officials responsible for making decisions with the broadest levels of discretion. This petition focuses on the split between the circuits on how to treat lower-level officials.

of appeals with First Amendment claims but in only 23% of appeals with excessive force claims."[3] This trend is in part due to circuits like the Ninth, which require the same rigid standard for specificity in cases *not* involving excessive force as they do in cases involving excessive force.

The Court should grant this petition and set the record straight. The Fifth and Tenth Circuits correctly approach fair warning as an inherently flexible inquiry. What's fair for a police officer acting under uncertain and rapidly evolving circumstances is different than what's fair for someone whose decision-making is unaffected by such constraints.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Desiree Martinez began dating Kyle Pennington, a police officer with the Clovis Police Department ("Clovis PD"), in February 2013. Pet.App. 6a. In April 2013, soon after the two moved in together, Officer Pennington started to regularly assault Ms. Martinez, including through sexual and physical violence. *Ibid*. On May 29, 2013, Ms. Martinez made a confidential call to the Clovis PD, reporting Officer Pennington's abuse. *Ibid*.

At the time of these events, Respondent Officer Channon High worked at Clovis PD's records office.

[3] Jason Tiezzi, *et al.*, *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, 25, Institute for Justice (Feb. 2024), https://ij.org/report/unaccountable/.

Pet.App. 7a. She and Officer Pennington had been friendly for many years, starting with their days at the police academy in 2007. *Id*. at 48a. Officer High knew that Officer Pennington was on administrative leave, pending a domestic violence investigation against an ex-girlfriend. *Id*. at 49a–51a; see also *id*. at 16a–17a.

On September 7, 2013, at around three in the morning, Ms. Martinez and Officer Pennington were having an argument. Pet.App. 44a; see also *id*. at 8a. Ms. Martinez told Officer Pennington that if he didn't stop abusing her, she was going to report him. *Id*. at 44a. In response, at 3:23 a.m., Officer Pennington called Officer High and put her on speakerphone:

"So you're telling the cops what * * * I * * * did to you?" asked Officer Pennington of Ms. Martinez, with Officer High listening in.

Ms. Martinez responded: "No."

That's when Officer High chimed in: "Yes, she did. I see a report right here."

Id. at 44a; see also *id*. at 54a (call log with cursor hovering over record for 3 a.m. call to Officer High).

At 3:43 a.m., Officer Pennington hung up. Pet.App. 45a. Officer Pennington then physically and sexually violated Ms. Martinez, inflicting on her "'horrific, severe additional abuse.'" *Id*. at 8a.

B. Procedural History

1. On May 4, 2015, Ms. Martinez sued Officer High, in addition to Officer Pennington, his parents, five other police officers, and the cities of Hanger and Clovis. Pet.App. 8a–9a.[4] As relevant here, Ms. Martinez's complaint included a claim against Officer High for disclosing her confidential complaint to Officer Pennington, which led to instant, severe abuse. Ms. Martinez argued that Officer High's actions violated her substantive due process rights under the Fourteenth Amendment. *Id*. at 9a.

After Officer High moved for summary judgment based on qualified immunity, the district court ruled against her, stating "it was clearly established that an officer sharing a domestic violence victim's confidential information to the alleged abuser would be a violation of the victim's substantive due process rights." Pet.App. 9a; see also *id*. at 40a–41a (ruling announced from the bench). The district court similarly denied the immunity defense to other officers. *Id.* at 9a. These other officers, but not Officer High, appealed the qualified immunity determination to the Ninth Circuit. The Ninth Circuit reversed, holding that two of these officers, through their separate actions,[5]

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[4] There were other instances of abuse inflicted on Ms. Martinez by Officer Pennington that are not the subject of this petition. An earlier Ninth Circuit opinion provides a comprehensive review of these additional facts and claims against additional defendants. See *Martinez* v. *City of Clovis*, 943 F.3d 1260 (9th Cir. 2019) ("*Martinez I*").

[5] For example, one of the officers, Kristina Hershberger, disparaged Ms. Martinez in front of Officer Pennington, when she

violated Ms. Martinez's substantive due process rights but that those rights were not clearly established. *Martinez I*, 943 F.3d at 1275–1276. Officer High, in light of that ruling, asked for and received leave to file a successive summary judgment motion on her qualified immunity defense. The district court subsequently ruled that Officer High, like the other officers, was entitled to qualified immunity. Pet.App. 28a.

2. Ms. Martinez asked the Ninth Circuit to reverse that determination. The Ninth Circuit refused. It first held that "Officer High violated Ms. Martinez's due process rights by knowingly placing her in greater danger of Mr. Pennington's assaults." Pet.App. 19a. Officer High not only knew Officer Pennington was on leave because of alleged domestic violence against an ex-girlfriend, she also knew that Ms. Martinez was in the room with Officer Pennington when she contradicted Ms. Martinez's attempts to save herself by denying that she had filed a complaint against Officer Pennington. Pet.App. 16a, 18a.

The Ninth Circuit nonetheless held that this right was not clearly established, despite having already held in *Kennedy* v. *City of Ridgefield* that officers

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showed up on the scene in May 2013 to respond to Ms. Martinez's 911 call, and disclosed the contents of their conversation. *Martinez I*, 943 F.3d at 1266–1267. The other officer, Fred Sanders, called Kyle Pennington and his parents "good people," after responding to a June 2013 911 call, this time made by Ms. Martinez's neighbors. *Id*. at 1268, 1269. Officer Sanders also told another officer who wanted to arrest Officer Pennington: "We're not going to arrest him. We're just going to turn it over to Clovis PD." *Id*. at 1273.

violate due process by disclosing police complaints to their subjects, thereby placing the complainants "in danger that [they] otherwise would not have faced." 439 F.3d at 1063.

Relying on this Court's excessive force precedent, the Ninth Circuit held that, even though "*Kennedy* involved a police officer disclosing a report to an alleged perpetrator, it did not involve sufficiently 'similar circumstances' to put the constitutional violation 'beyond debate' here." Pet.App. 22a (citing this Court's excessive force cases). This was because *Kennedy* included "an additional aggravating factor," namely that the officers "misrepresented the level of danger by assuring [the victim] they would patrol the neighborhood." *Ibid.* In reliance on these assurances, the victim did not leave her home immediately to protect herself and her husband.

The court did not explain how that aggravating factor interacted with an additional aggravating factor present only in this case: At the time Officer High disclosed the report to Officer Pennington, there was no opportunity for Ms. Martinez to escape. As Officer High knew, Ms. Martinez was already in the room with Officer Pennington and, at three in the morning, would not stand a chance of fleeing his wrath. Ms. Martinez had even less of a chance to escape than the victim in *Kennedy*. But the Ninth Circuit did not so much as acknowledge—let alone credit—this distinction.

Judge Bumatay concurred in the judgment. Pet.App. 23a. He wrote separately because he believed that the majority did not need to reach the

constitutional question at all. It would have been enough to hold that the constitutional violation was not clearly established. *Id*. at 24a.

The court denied Ms. Martinez's petition for en banc review. Pet.App. 36a.

3. This petition for certiorari follows. The question before this Court is whether, in a situation not involving a time-pressured decision to use force, an officer can be fairly warned about the unconstitutionality of her conduct even when the facts of previous cases are not materially identical to the facts the officer confronts. Because the Fifth and Tenth Circuits, unlike the Eighth, Ninth, and Eleventh Circuits, answer this question in the affirmative, the Court should grant certiorari to resolve the split.

REASONS FOR GRANTING THE PETITION

I. The circuits are split on whether the clearly-established-law test requires the same level of exacting specificity in all cases.

The clearly-established-law standard of the qualified immunity analysis is "neither clear nor established among our Nation's lower courts." *Zadeh* v. *Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante). One issue that has persistently confused the circuits is whether—outside of the excessive-force context—a nearly identical case is necessary to provide fair notice for qualified immunity. Courts have struggled with whether they have the flexibility to approach fair notice as a dynamic inquiry

rather than a one-size-fits-all affair that searches only for virtually identical caselaw.

In the Fifth and Tenth Circuits, courts have flexibility. In cases not involving time-pressured decisions to use force, both have acknowledged that officials can be fairly warned, even in novel factual circumstances, including in cases not involving obvious constitutional violations.

In the Eighth, Ninth, and Eleventh Circuits, on the other hand, fair warning is a rigid standard that is applied uniformly across the board to desk-bound bureaucrats, first responders, and everyone in between. The Court should weigh in and resolve this circuit split.

A. In the Fifth and Tenth Circuits, when the case doesn't involve time-pressured calls to use force, courts dial down the level of specificity required to clearly establish the law.

Both the Fifth and Tenth Circuits recognize that when this Court requires extreme specificity in cases like *Mullenix* and *Kisela*, see Part IIA, *infra* at 22, 23 & n.8, it is driven by the high-pressure nature of excessive force claims. When considerations inherent to evaluating the reasonableness of split-second decision-making are not present, these courts acknowledge that less specific cases can still provide fair warning.

1. *Hughes* v. *Garcia* is one of the Fifth Circuit's most recent statements on clearly established law. The case involved police officers obtaining a warrant

to arrest a man for impersonating an officer after the man performed a citizen arrest of a swerving drunk driver who crashed on a highway at 2:30 a.m. *Hughes*, 100 F.4th at 614. The problem with the warrant was that it was based on an affidavit riddled with "misstatements, omissions, and inconsistencies." *Id*. at 617. So the man sued, claiming that the officers violated his clearly established Fourth Amendment rights. *Id*. at 618.

The Fifth Circuit agreed—without even trying to identify a case with similar facts. *Id*. at 620. Writing for the unanimous panel, Judge Oldham explained that the "violation has been clearly established since *Franks* [v. *Delaware*, 438 U.S. 154 (1978)]" because of the "simple, clearly established rule that all officers should know at all times under *Franks* and *Winfrey* [v. *Rogers*, 901 F.3d 483 (5th Cir. 2018)]: Do not lie." *Id*. at 620 & n.1.

The court acknowledged that "[i]n the context of split-second excessive force cases, the Supreme Court has 'repeatedly told courts not to define clearly established law at too high a level of generality.'" *Id*. at 620 n.1 (quoting *City of Tahlequah* v. *Bond*, 595 U.S. 9, 12 (2021) (per curiam)). "That is so because in the typical excessive-force case * * * 'the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately.'" *Ibid*. (quoting *Morrow*, 917 F.3d at 876). In cases not involving time-pressured decisions to use force, however, such specificity is not necessary to fairly warn an officer about the constitutionality of the conduct. *Ibid*.; see also *Morrow*, 917

F.3d at 876 (stating that "overcoming qualified immunity is especially difficult in excessive force cases").

2. The Tenth Circuit is similarly nimble in its application of the fair warning standard to cases not involving time-pressured decisions to use force.

In *A.N.* v. *Syling*, for example, the mother of a minor sued police for publicly releasing confidential information disclosing the arrest record of her 16-year-old daughter. 928 F.3d at 1193–1194. The mother argued that officials violated her daughter's clearly established equal protection rights by treating her differently than other similarly situated juveniles. *Id.* at 1195.

The Tenth Circuit agreed, holding that precedent need not be defined with a high degree of specificity there, because "the clearly established standard for determining whether an official has violated a plaintiff's right to equal protection under the law * * * is relatively straightforward and not difficult to apply." *Id.* at 1199. This contrasts with the "'imprecise nature' of the relevant legal standards and the fact-intensive assessment" in cases involving use of force. *Ibid.* As the court explained elsewhere, fair notice looks different when the facts "involve[] more an egregious trespass into constitutionally well-marked terrain than an accidental inching across some vaguely-defined legal border." *Janny* v. *Gamez*, 8 F.4th 883, 915–916 (10th Cir. 2021) (citation and quotation marks omitted) (comparing a Fourth Amendment challenge to an officer's split-second assessment with a free exercise claim).

B. The Ninth Circuit has a rigid approach to fair warning.

1. This case is stronger than either *Hughes* or *A.N*. Here, Ms. Martinez had something that the plaintiffs in those two cases did not have—a precedent with strikingly similar facts. But because the Ninth Circuit departs from the Tenth and the Fifth on the nature of the fair warning inquiry, it still held that Ms. Martinez's rights were not clearly established.

Like in this case, *Kennedy* v. *City of Ridgefield* involved a police officer who disclosed a confidential police complaint to its subject. 439 F.3d at 1058. This subject—again, like here, a person with a history of violence of which the officer was fully aware—then went on to shoot the complainant and murder her husband. *Ibid*. When the complainant sued, the Ninth Circuit allowed her suit to proceed despite the officer's claims of immunity. *Ibid*. In the process, the court held that the complainant alleged a violation of a constitutional right because by disclosing the confidential complaint, the officer put her in a dangerous situation that she otherwise would not have faced, and—given that the officer knew of the murderer's history of violence—that this danger was foreseeable. *Id*. at 1062–1064.

Despite this very close precedent, the Ninth Circuit here held that the law was not clearly established to put a reasonable officer in Officer High's shoes on notice. Pet.App. 22a. That's because the Ninth Circuit (in contrast to the Fifth or Tenth) applied the same level of specificity in this case as it would have in an excessive force case. According to the court, "[i]t is

* * * the facts of particular cases that clearly establish what the law is.'" Pet.App. 21a (quoting *Isayeva* v. *Sacramento Sheriff's Dep't*, 872 F.3d 938, 951 (9th Cir. 2017)). And because in *Kennedy* there was "an additional aggravating factor," namely that "[t]he officers in *Kennedy* * * * misrepresented the level of danger by assuring [the widow] they would patrol the neighborhood," "no existing authority gave Officer High sufficient notice in 2013 that her conduct violated due process." Pet.App. 22a.

But this case too had "an additional aggravating factor" that makes the constitutional violation here even more apparent. Unlike in *Kennedy*, where the confidential report was disclosed while the victim was at a relatively safe distance, Officer High knew that Ms. Martinez was already in the room with the perpetrator, desperately denying that she ever filed the complaint. Pet.App. 16a. Officer High, on speakerphone, then contradicted the victim. *Ibid*. After Ms. Martinez told Pennington that she did not file the report, Officer High responded: "Yes, she did. I see a report right here." *Id*. at 8a. Following this disclosure, Officer Pennington hung up, physically and sexually abusing Ms. Martinez. *Ibid*. If the officer in *Kennedy* violated the victim's constitutional rights by foreseeably placing the widow and her husband in non-immediate danger through disclosing a confidential report, then the officer in this case surely violated Ms. Martinez's constitutional rights by foreseeably placing her in immediate danger through that same action. It defies common sense to hold that a reasonable officer in Officer High's shoes would not have been fairly warned of her actions' unconstitutionality by *Kennedy*.

2. Ironically, this Court has repeatedly reversed the Ninth Circuit for being too loose with its qualified immunity standard in excessive-force cases.[6] See *Rivas-Villegas*, 595 U.S. at 8; *City & County of San Francisco* v. *Sheehan*, 575 U.S. 600, 617 (2015); *Brosseau*, 543 U.S. at 195. In *Sheehan*, the Court even called out the Ninth Circuit by name for failing to analyze these types of cases with a higher level of specificity. 575 U.S. at 613 ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality."). But when it comes to cases not involving split-second decisions to use force, the Ninth Circuit has overcorrected. In this context, it consistently asks plaintiffs to present cases factually identical to their

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[6] While reading a court's mind is folly, we suspect that this backwards dynamic flows from the Ninth Circuit's understanding that "the test for qualified immunity in excessive force cases is the same as the test on the merits." *LaLonde* v. *County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000); see also David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 59 (1989) ("A strong argument can be made that the use of more force than is necessary preempts an immunity defense."). But this Court has long ago denounced this idea, making it clear that the two prongs of the qualified immunity analysis do not collapse on each other merely because *Graham* v. *Connor*, 490 U.S. 386 (1989), announced that excessive force cases are to be analyzed under the Fourth Amendment standards of reasonableness. See Part IIA, *infra* at 22–23. If anything, as this Court explained, "[a]n officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Saucier* v. *Katz*, 533 U.S. 201, 205 (2001). Given that "those circumstances" are often dangerous and rapidly evolving, the Court has been generous in its interpretation of fair warning in this particular context.

own. See Pet.App. 22a. For example, it held in another recent case that a reasonable public official would not have been fairly warned that sexually harassing a person receiving social services constitutes an equal protection violation even though there is Ninth Circuit caselaw holding that if a public official sexually harasses a "coworker, supervisor, classmate, or teacher," that constitutes an equal protection violation. After all, the clearly established test is an "impossibly high bar." *Sampson* v. *County of Los Angeles*, 974 F.3d 1012, 1023–1024 (9th Cir. 2020).

The Ninth Circuit is wrong to apply the same approach in both contexts. Government officials who have the luxury of making considered judgments may have fair warning when an official under the gun (figuratively or literally) may not. The Ninth Circuit's approach does not acknowledge this common-sense reality.

C. The Eighth and Eleventh Circuits now similarly utilize the rigid framework for fair warning.

Some circuits used to be in line with the Fifth and Tenth but have recently changed sides in the split, adopting the Ninth Circuit's rigid approach.

1. Just in 2020, for example, a unanimous Eighth Circuit panel held that government officials who publicly released a confidential complaint identifying plaintiffs as victims of childhood sexual abuse did not have qualified immunity because the law, while "[i]nexact," provided "fair notice to the appellants that releasing details of minors' sexual abuse * * * was not

only unadvisable, but also unlawful." *Dillard* v. *City of Springdale*, 930 F.3d 935, 944 (8th Cir. 2019). "Where, as here, we are not reviewing split-second, life-or-death decisions characteristic of excessive force cases, the range of reasonable judgments naturally narrows by virtue of the officials' increased opportunity for reasoned reflection." *Id.* at 945 (citing *Brown* v. *City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009)).

The court acknowledged that in the only relevant precedent, "we have repeatedly declined to deny qualified immunity for disclosures involving anything short of 'the most intimate aspects of human affairs.'" *Id.* at 941. The court reasoned that "[t]he content and circumstances of these disclosures do not just meet [this standard], they illustrate them." *Id.* at 944. As a result, even without nearly identical precedent, "[t]his is a case in which general standards clearly established the answer." *Ibid.* (cleaned up).

This decision, however, was soon vacated by the Eighth Circuit sitting en banc, holding that "the alleged constitutional right to informational privacy is not 'beyond debate' in the Eighth Circuit." *Dillard II*, 961 F.3d at 1054.

2. The Eleventh Circuit has similarly drifted to this rigid approach. In its recent decision involving screening of outgoing emails sent from prisoners, it held that even though prisoners have a clearly established liberty interest in their outgoing *mail*, prison officials are not fairly warned of a corresponding liberty interest in the prisoners' outgoing *email*. *Benning*, 71 F.4th at 1338. For the articulation of the fair

warning standard, the Eleventh Circuit relied on this Court's latest excessive-force qualified-immunity decision, *Rivas-Villegas*. *Id*. at 1333–1334.

This was a marked change from the Eleventh Circuit's historical approach. For example, in 2004, the court considered a case involving a student being punished for raising his fist in the air during the recitation of the pledge of allegiance and held that his right to raise a fist (which is separate from the right to remain silent during the pledge of allegiance) was clearly established. *Holloman* v. *Harland*, 370 F.3d 1252 (11th Cir. 2004). It did so despite the lack of clear precedent on point. The only cases it could point to involved expressions occurring outside of the classroom, in an environment where teachers have less compelling interest to establish order. The Court said that the right to raise a fist "would even be 'clearly established' under [*West Virginia Bd. of Educ.* v.] *Barnette* [, 319 U.S. 624 (1943)]." *Id*. at 1279. "First Amendment protections are not lost that easily." *Ibid*.

* * *

In sum, the circuits are split over the appropriate standard for assessing fair warning under qualified immunity. Some circuits, like the Fifth and Tenth, approach the test as a flexible inquiry: what is fair for a first responder making a decision about the use of force is different than what is fair for an official—even a police officer—who's had time for reasoned reflection. Other circuits, like the Eighth, Ninth, and Eleventh, disagree. With more circuits drifting away from the flexible approach, it is imperative for this Court to step in and clarify that officials "who have time to make calculated choices" should not be entitled to the

same level of protection as "a police officer who makes a split-second decision to use force in a dangerous setting." *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari).

II. This Court's precedent confirms that, contrary to the Ninth Circuit's holding below, the clearly-established-law test does not always require the same level of exacting specificity.

Unlike the Ninth Circuit, this Court does not approach qualified immunity as a rigid inquiry. In cases involving excessive force, it uniformly requires plaintiffs to produce precedent with a high level of specificity. In other cases, it is much more flexible.

The strict-specificity standard in excessive force cases was borne out of the need to ensure that lower courts do not just use the broad rule in *Graham* v. *Connor* as clearly established law. Because the border between excessive and reasonable force is often hazy, and because decision-making in stressful situations is impaired, it was important that the notice an officer would receive would be more specific, not less.

In situations not involving excessive force, on the other hand, this Court has allowed plaintiffs to rely on cases without materially identical facts to show fair warning. Even in cases that do not involve obvious violations, an official who has time to deliberate before making a decision can be on notice in novel factual circumstances.

The Fifth and Tenth Circuits understand this throughline in the Court's jurisprudence. The Eighth, Ninth, and Eleventh Circuits do not.

A. The strict specificity requirement for use of force cases was a result of the lower courts' insistence on using *Graham* v. *Connor* as precedent clearly establishing the law.

1. Before the Court took on qualified immunity in the context of excessive force, many lower courts saw *Graham* v. *Connor* as generally providing officers with fair notice that their actions violate the Fourth Amendment anytime force was deemed excessive.[7] To break the habit, this Court took on the interplay between the fair-warning standard and excessive force ten times in twenty-three years.[8] In the process, it

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[7] *Graham* v. *Connor* made it explicit for the first time that all excessive force claims must be analyzed under the Fourth Amendment, and not the Fifth Amendment, focusing on whether a reasonable officer could have believed that the force used was necessary under the circumstances. 490 U.S. at 395. Many lower courts latched onto that precedent as the clearly established law for all excessive force cases, collapsing the qualified immunity inquiry into the inquiry made on the merits of the constitutional claim. See *LaLonde*, 204 F.3d at 959; *McNair* v. *Coffey*, 234 F.3d 352, 355 (7th Cir. 2000); *Scott* v. *District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996); *Rowland* v. *Perry*, 41 F.3d 167, 172–173 (4th Cir. 1994); *Jackson* v. *Hoylman*, 933 F.2d 401, 402–403 (6th Cir. 1991); *Street* v. *Parham*, 929 F.2d 537, 540 (10th Cir. 1991).

[8] *Rivas-Villegas*, 595 U.S. at 7–8; *Bond*, 595 U.S. at 12–13; *City of Escondido* v. *Emmons*, 586 U.S. 38, 42 (2019) (per curiam); *Kisela*, 584 U.S. at 104–105; *White* v. *Pauly*, 580 U.S. 73, 79–80 (2017) (per curiam); *Sheehan*, 575 U.S. at 617; *Mullenix* v.

emphasized that excessive force claims are particularly difficult because of the hazy border between an appropriate use of force and an excessive one and because officers in those cases are often making decisions under pressure. *Mullenix* v. *Luna*, 577 U.S. 7, 12 (2015) (per curiam). These constraints made it difficult "for an officer to determine how the relevant legal doctrine * * * will apply to the factual situation the officer confronts." *Ibid*. As a result, the Court required that fair notice is grounded in "the specific facts at issue." *Kisela*, 584 U.S. at 104–105.

2. This Court first dealt with the fair-notice requirement in the context of excessive force cases in *Saucier* v. *Katz*, explaining why the general principles announced in *Graham* were insufficient to provide fair warning.

In *Saucier*, a military police officer was accused of using excessive force to arrest a protester during Vice President Al Gore's visit to the Presidio Army Base in San Francisco. 533 U.S. at 197. The Ninth Circuit denied qualified immunity to the officer, holding that *Graham* clearly established the excessive force violation. *Id*. at 199. This Court reversed, explaining that while "*Graham* v. *Connor* * * * clearly establishes the general proposition that [excessive] use of force is contrary to the Fourth Amendment," "[t]he relevant,

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Luna, 577 U.S. 7, 11–13 (2015) (per curiam); *Plumhoff* v. *Rickard*, 572 U.S. 765, 779–781 (2014); *Brosseau*, 543 U.S. at 197–199; *Saucier*, 533 U.S. at 201. While *Hernandez* v. *Mesa*, 582 U.S. 548 (2017), and *Tolan* v. *Cotton*, 572 U.S. 650 (2014), also involved excessive force, they did not address the level of specificity required to assess fair warning, so we do not include them in the overall count.

dispositive inquiry in determining whether the right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. at 201–202. That's because *Graham*'s test "accommodate[s] limitless factual circumstances." *Id*. at 205. For officers who perform their duties "with considerable uncertainty," this will not be enough. *Id*. at 203. The officers might "correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id*. at 205. If the governing legal principle is not established with specificity, then the legal mistake is reasonable, entitling the officer to qualified immunity. *Ibid*.[9]

Applying this principle to the facts in *Saucier*, the Court concluded that "[i]n the circumstances presented to this officer, which included the duty to protect the safety and security of the Vice President of the United States from persons unknown in number, neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer" from using, what respondent described as a "gratuitously violent shove" when placing him into a van. *Id*. at 208–209. Without such a case, the officer was not "on notice that [his] conduct [was] unlawful." *Id*. at 206.

3. In nine subsequent decisions involving the interplay between qualified immunity and excessive

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[9] *Saucier* also, for the first time, required courts to sequence their qualified immunity analyses into two particularly ordered steps. This holding since had been reversed. *Pearson*, 555 U.S. at 227.

force, the Court held the line. It continued to insist that *Graham* is not enough to accommodate the "limitless factual circumstances" that result in reasonable uncertainty for officers in difficult, time-pressured situations that have a potential to threaten the life of the officer or the public. To fairly warn the officer of the unconstitutionality of the conduct, the law must be so clearly established that even in the blink of an eye he would know it immediately.

B. Outside of the excessive force context, this Court acknowledges that officials can be on notice that their conduct violates clearly established law in novel factual circumstances.

1. *Saucier*'s reasoning is not a blank check for courts to require factually identical caselaw in all circumstances, especially outside of the excessive-force context. While the Court has consistently required an exacting level of specificity in cases involving excessive force, it has allowed a much greater degree of flexibility when it comes to other constitutional violations.

In *Hope* v. *Pelzer*, the Court explained that "officials can still be on notice that their conduct violates clearly established law even in novel factual circumstances." 536 U.S. at 741. "[F]undamentally similar facts" and "materially similar facts" are not necessary. *Ibid*. (internal quotation marks omitted). What matters is whether "the state of the law [at the time] gave respondents fair warning that their [actions were] unconstitutional." *Ibid*.

Hope is often only identified as a case involving obvious constitutional violations. But *Hope* is so much more than that. Before getting to the obviousness point, *Hope* explained that the key to figuring out notice is to focus on "the state of the law" at the time of the conduct. 536 U.S. at 741. That state of the law, first and foremost, is precedent in this Court and the relevant circuit. *Id*. at 741–742. While the Court acknowledged that "[t]he obvious cruelty" can "provide respondents with some notice," *id*. at 745, it held that cases can provide reasonable officials with fair notice even when they are not identical on the facts. So, for example, a case announcing that "physical abuse directed at a prisoner after he terminates his resistance to authority would constitute an actionable eighth amendment violation" would provide fair warning that handcuffing a prisoner to a hitching post for seven hours would constitute an actionable Eighth Amendment violation. *Id*. at 743 (cleaned up).

2. The Court has embraced this principle even in cases involving Fourth Amendment claims against police. In *Groh* v. *Ramirez*, the Court denied qualified immunity to an officer who executed a search pursuant to a deficient warrant (*i.e.*, the officer omitted key facts, while still including them in the warrant affidavit). 540 U.S. at 564–565. The Court was satisfied that the law was sufficiently clear to put a reasonable officer on notice, even though the relevant precedent was easily distinguishable. *Ibid*.

For example, one of the cases relied on by the Court was about neither searches nor deficient warrants. Instead, it concerned an unconstitutional statute authorizing warrantless entries into homes to

make routine felony arrests. *Id*. at 565 (citing *Payton* v. *New York*, 445 U.S. 573 (1980)). The other two cases the Court cited were exclusionary rule cases. The first one specifically declined to rule on whether there was a violation of the Fourth Amendment. *Id.* at 557 (citing *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 (1984)). The second one involved an officer knowing about an error in the warrant and relying on it, as opposed to being unaware that there was an error in the first place. *Groh*, 540 U.S. at 570 (Kennedy, J., dissenting) (distinguishing *United States* v. *Leon*, 468 U.S. 897 (1984)).

Still, the Court held that "the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional" would have put a reasonable officer on notice that failing to include the information on a warrant would violate the Fourth Amendment. *Groh*, 540 U.S. at 564.

Importantly, the Court emphasized that the officer did not "contend that any sort of exigency existed when he drafted the affidavit, the warrant application, and the warrant, or when he conducted the search." *Id*. at 565 n.9. "This is not the situation * * * in which we have recognized that 'officers in the dangerous and difficult process of making arrests and executing search warrants' require 'some latitude.'" *Ibid*. (quoting *Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987)).

3. *Sause* v. *Bauer* and *Safford Unified School District No. 1* v. *Redding*—cases not involving Fourth Amendment claims against police—also show that

precedent distinguishable on facts can still provide fair warning.

In *Sause*, the Court reversed the Tenth Circuit's grant of qualified immunity to officers who stopped a woman from praying as they broke into her apartment in response to a noise complaint. 585 U.S. at 960. The Tenth Circuit ruled for the officers because the woman failed to "identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." *Sause*, 859 F.3d at 1275. This Court sent the case back, explaining that "[p]rayer unquestionably constitutes the 'exercise' of religion" and that the officers may have violated the Constitution by interfering, even though there was no existing caselaw addressing the unique facts at hand. *Sause*, 585 U.S. at 959–960.

In *Safford*—a case involving a strip search of a teenage girl by a public school official—the Court did grant qualified immunity, but it acknowledged that "even as to action less than an outrage, officials can still be on notice that their conduct violates established law . . . in novel factual circumstances." 557 U.S. at 377–378 (cleaned up).

In light of this Court's clear direction, the Ninth Circuit erred here when it held that the precedent that Ms. Martinez presented was not enough to put a reasonable official on notice. Any reasonable officer in Officer High's shoes would have known that, per *Kennedy*, disclosing a domestic violence report to its subject is unconstitutional, even assuming arguendo that

an officer in a time-pressured situation may not have reached the same conclusion. The Ninth Circuit thus failed to account for the flexible nature of what constitutes fair warning and is inconsistent with cases like *Hope*, *Groh*, *Safford*, and *Sause* that do not require the clearly established law to be grounded in "the specific facts at issue." *Kisela,* 584 U.S. at 104–105.

C. The rigid approach adopted by the Ninth Circuit is inconsistent with the reasoning behind qualified immunity.

The Court articulated the modern-day qualified-immunity standard in *Harlow* v. *Fitzgerald*. This standard is rooted in the "balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813. One evil is the "dampen[ing] [of] the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Id.* at 814 (third alteration in the original). The other evil is that some wrongs suffered by victims of unconstitutional conduct would go unaddressed. *Id.* at 817–818.

This balancing of evils, as the term suggests, depends on what is being balanced. Sometimes one side of the scale holds the need to protect a police officer who made a split-second decision in response to an uncertain and dangerous situation confronting him and the public. In such a case, the potential chilling effect on the officer's conduct could be destabilizing and come with a high cost to society, outweighing the evil of denying a remedy.

But when that side of the scale contains conduct that—like here—is far from the frontlines, a potential chilling effect might actually benefit society (it's a good idea to stop and think before disclosing a confidential domestic violence complaint to the subject of the complaint), making the price of denying a remedy unacceptable. Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 325–327 (1980).

Because the Ninth Circuit's decision is inconsistent with the reasoning behind qualified immunity, as well as this Court's precedent, it must be reversed.

III. The case presents an important question and is a suitable vehicle for resolving it.

1. In practice, the failure to properly calibrate the fair-warning test to the situation a government officer confronts leads to results that turn qualified immunity on its head. According to the Institute for Justice's 2024 study on qualified immunity, police officers appealing the denial of qualified immunity in cases involving excessive force claims prevailed only in 23 percent of appeals. Tiezzi, *et al.*, *supra* note 3, at 25. In contrast, government defendants who appealed the denial of qualified immunity on First Amendment claims were able to overturn those denials 34 percent of the time. *Ibid.* As IJ's report suggests, one possible explanation is that First Amendment claims are more factually diverse than excessive force claims, making it harder for plaintiffs to "pinpoint a prior case with sufficiently similar facts." *Ibid.*

But that's exactly why the rigid approach adopted by the Ninth Circuit does not work. If the only requirement, outside of an obvious case, is close factual similarity, then police officers sued for making time-pressured decisions to use force will have less protection than desk-bound bureaucrats making calls in the comfort of their air-conditioned offices. If, on the other hand, courts evaluate fair warning in light of the officer's actual circumstances—as is the case in the Fifth and Tenth Circuits—a greater degree of protection will go to where it belongs: with first responders tasked with risking their lives to protect the public.

2. This case is a suitable vehicle to answer the question presented. The Ninth Circuit resolved the existence of the right in an earlier case and then applied an extremely demanding qualified immunity standard in this one. The outcome-determinative question, therefore, is what is the nature of prong two of qualified immunity.

In the Ninth Circuit (as well as the Eighth and Eleventh), fair warning is a rigid inquiry that does not adjust for the circumstances confronting the officer. In the Fifth and Tenth Circuits, fair warning is a flexible inquiry, resulting in a more protective standard for time-pressured decisions to use force. This Court should resolve the circuit split. In the process, it should explain that government officials with time to

make reasoned choices should not have the same level of protection as those without.[10]

CONCLUSION

This Court should grant the petition to resolve the split.

Respectfully submitted,

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AUGUST 2, 2024

[10] This case is also a great candidate for a GVR. See *McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021) (reversing the grant of qualified immunity to a prison guard who pepper-sprayed a prisoner even though the prisoner only pointed to "the general principle that prison officers can't act maliciously and sadistically to cause harm," 950 F.3d 226, 234 (5th Cir. 2020) (cleaned up)).

APPENDIX

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Appendix A

Opinion from the United States Court of Appeals for the Ninth Circuit

January 26, 2024

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DESIREE MARTINEZ, *Plaintiff-Appellant*, v. CHANNON HIGH, *Defendant-Appellee*.	No. 22-16335 D.C. No. 1:15-cv-00683-DAD-SKO OPINION

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Argued and Submitted August 22, 2023
San Francisco, California

Filed January 26, 2024

Before: Patrick J. Bumatay, Lucy H. Koh, and
Roopali H. Desai, Circuit Judges.

Opinion by Judge Desai;
Concurrence in Judgment by Judge Bumatay

SUMMARY*

Qualified Immunity/State-Created Danger Doctrine

The panel affirmed the district court's summary judgment order granting qualified immunity to Channon High, a City of Clovis police officer, in an action brought pursuant to 42 U.S.C. § 1983 by Desiree Martinez, alleging that Officer High violated her due process rights under the state-created danger doctrine when she disclosed Martinez's confidential domestic violence report to Martinez's abuser Kyle Pennington, another Clovis police officer.

The panel first determined that the district court did not abuse its discretion by entertaining Officer High's successive summary judgment motion on remand from this court's decision in Martinez's prior interlocutory appeal.

Addressing the merits, the panel held that Officer High violated Martinez's due process rights. Although state actors generally are not liable for failing to prevent the acts of private parties, an exception to this rule—the "state-created danger" exception—applies where the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger. Here, Officer High's

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

affirmative conduct of disclosing Martinez's confidential complaint to Pennington, whom Officer High knew was an alleged abuser, placed Martinez in actual, foreseeable danger. Officer High also acted with deliberate indifference toward the risk of future abuse, given that she knew Pennington was violent and under investigation for domestic violence.

The panel nevertheless held that Officer High was entitled to qualified immunity because it was not clearly established in 2013 that Officer High's conduct violated Martinez's substantive due process rights. The panel clarified that going forward, an officer is liable under the state-created danger doctrine when the officer discloses a victim's confidential report to a violent perpetrator in a manner that increases the risk of retaliation against the victim.

Concurring in the judgment, Judge Bumatay agreed with the majority's conclusion that Officer High was properly afforded an opportunity to file a successive summary judgment motion and that she was entitled to qualified immunity based on the lack of any clearly established law. Because no clearly established law existed at the time of the incident, it was unnecessary to reach whether Martinez's allegations against Officer High amount to a claim under the state-created danger doctrine.

COUNSEL

Kevin G. Little (argued), Law Office of Kevin G. Little, Fresno, California, for Plaintiff-Appellant.

Suzanne M. Nicholson (argued), Suzanne M. Nicholson Attorney at Law, Sacramento, California; Bruce D. Praet, Ferguson Praet & Sherman, Santa Ana, California; for Defendant-Appellee.

OPINION

DESAI, Circuit Judge:

Plaintiff Desiree Martinez appeals the district court's summary judgment order granting qualified immunity to Channon High, a City of Clovis police officer. Ms. Martinez survived brutal domestic violence at the hands of Kyle Pennington, another Clovis police officer with whom Ms. Martinez was in a relationship. She sued Officer High under 42 U.S.C. § 1983 for disclosing her confidential domestic violence report to her abuser, one of Officer High's colleagues. We hold that Officer High violated Ms. Martinez's due process rights under the state-created danger doctrine, but that right was not yet "clearly established" at the time of the violation. We thus affirm.

BACKGROUND[1]

In February 2013, Ms. Martinez started a romantic relationship with Clovis police officer Kyle Pennington. The couple moved in together early in their relationship, and Mr. Pennington soon became violent. He first physically and sexually assaulted Ms. Martinez in April 2013, and a cycle of abuse escalated over the next several months.

Ms. Martinez called the police to report Mr. Pennington's abuse on May 2, 2013. Clovis police officers responded. One of the responding officers, Officer Kristina Hershberger, questioned Ms. Martinez at the scene. Ms. Martinez told Officer Hershberger about Mr. Pennington's prior abuse at a hotel in Dublin, California. Before leaving the scene, Officer Hershberger brought up the Dublin incident in front of Mr. Pennington, and Ms. Martinez recanted. Officer Hershberger also asked Mr. Pennington "what [he] was doing dating a girl like Desiree Martinez" and told him "she didn't think [Ms. Martinez] was necessarily a good fit for [him]." The officers left without arresting Mr. Pennington. He assaulted Ms. Martinez again that night.

On May 29, 2013, Ms. Martinez made an anonymous call to the Clovis Police Department to report that Mr. Pennington was still abusing her and to seek information about her legal rights. Ms. Martinez made this report confidentially due to

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[1] We construe any disputed facts in Ms. Martinez's favor. *See Scott v. Harris*, 550 U.S. 372, 378 (2007).

Mr. Pennington's threats, which made her "fear[] great bodily harm or death." Shortly after, Mr. Pennington moved Ms. Martinez to Sanger, a nearby city, to "avoid further possible reports to the Clovis Police Department."

Just days after the move, neighbors called 911 after witnessing Mr. Pennington physically and sexually assault Ms. Martinez, leading Sanger police officers to respond to the incident at Mr. Pennington's home. Despite Ms. Martinez's obvious injuries, the responding officers did not arrest Mr. Pennington or issue a protective order until the next day. As the officers left, one remarked that Mr. Pennington's family were "good people." Mr. Pennington again abused Ms. Martinez that night.

In early September 2013, Officer High had two phone calls with Mr. Pennington. At the time, Officer High worked in the Clovis Police Department's records unit. Phone records show that Officer High called Mr. Pennington on his cell phone on September 3, and Mr. Pennington called Officer High on her cell phone on September 7. Ms. Martinez overheard only one of those calls. It is unclear which call she overheard, but her testimony supports an inference that she overheard the September 7 call.[2]

Ms. Martinez likely did not hear the phone call between Officer High and Mr. Pennington on September 3. However, the September 3 call happened the

[2] Whether Ms. Martinez overheard the call on September 3 or 7 does not affect our analysis.

morning Ms. Martinez "was supposed to testify as a witness in his criminal preliminary hearing." After the call, Ms. Martinez suffered "abuse and intimidation," which stopped her from testifying.

A few days later on September 7, Mr. Pennington called Officer High again. He spoke to Officer High on speakerphone in front of Ms. Martinez. During the call, Mr. Pennington asked Ms. Martinez if she was "telling the cops" about his abuse, and she responded "no." Officer High interjected: "Yes, she did. I see a report right here." Officer High also told Mr. Pennington that another Clovis police officer was under investigation for lying about a "romantic relationship" he had with Ms. Martinez.

Immediately after the call, Mr. Pennington inflicted "horrific, severe additional abuse" on Ms. Martinez, "including both physical and sexual abuse." Officer High's "contacts on September 3 and 7" provoked Mr. Pennington to continue abusing Ms. Martinez until he was arrested after a final, "especially brutal beating" on September 18.

PROCEDURAL HISTORY

Ms. Martinez sued in 2015. The operative complaint asserted claims against Mr. Pennington, his parents, several police officers, and the cities of Clovis and Sanger. Ms. Martinez's complaint included a § 1983 claim against Officer High and other officers

for violating her substantive due process rights.[3] She alleged that Officer High put her in greater danger when Officer High disclosed Ms. Martinez's confidential report to Mr. Pennington. Ms. Martinez also alleged that the other officers put her in danger when they responded to 911 calls, including by failing to advise her about her rights, failing to separate her from Mr. Pennington, engaging in small talk with Mr. Pennington, and failing to arrest him.

All the officers moved for summary judgment on qualified immunity grounds. The district court granted qualified immunity to every officer except Officer High. As for Officer High, the court found that "it was clearly established that an officer sharing a domestic violence victim's confidential information to the alleged abuser would be a violation of the victim's substantive due process rights." Officer High did not appeal, but Ms. Martinez appealed the order granting qualified immunity to the other officers.

This court affirmed the district court's grant of qualified immunity to the other officers, holding that (1) the officers violated Ms. Martinez's substantive due process right, but (2) the right was not "clearly established" in 2013. *Martinez v. City of Clovis*, 943 F.3d 1260, 1276–77 (9th Cir. 2019) ("*Martinez I*"). Relevant here, the court analyzed the conduct of Officer Hershberger, one of the responding officers, which the district court had not focused on. This court held that

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[3] Ms. Martinez also brought an equal protection claim against Officer High, which the district court dismissed in 2017. Ms. Martinez did not appeal that dismissal.

Officer Hershberger violated Ms. Martinez's due process rights by emboldening Mr. Pennington to "further abuse Martinez . . . with impunity" when Officer Hershberger "told Pennington about Martinez's testimony relating to his prior abuse" and said that "Martinez was not 'the right girl' for him." *Id.* at 1272. But the court nonetheless granted Officer Hershberger qualified immunity because the constitutional violation in "this context was not apparent to every reasonable officer at the time the conduct occurred." *Id.* at 1276.

On remand, the district court granted Officer High leave to file a successive summary judgment motion on her qualified immunity defense "[i]n light of the Ninth Circuit's ruling" in *Martinez I*. Officer High's new summary judgment motion argued that she too was entitled to summary judgment based on this court's analysis of Officer Hershberger's conduct in *Martinez I*. The district court granted the motion and held that, based on *Martinez I*, Officer High was "entitled to qualified immunity [because] it was not clearly established in 2013 that [Officer High]'s conduct violated due process." Ms. Martinez timely appealed.

STANDARD OF REVIEW

We review a district court's decision to accept a successive motion for summary judgment for an abuse of discretion. *Hoffman v. Tonnemacher*, 593 F.3d 908, 911–12 (9th Cir. 2010). We review de novo the district court's grant of qualified immunity on summary judgment. *Martinez I*, 943 F.3d at 1269–70.

"In doing so, we view the evidence in the light most favorable to" the nonmoving party. *Id.* at 1270.

DISCUSSION

I. The district court did not abuse its discretion by entertaining Officer High's successive summary judgment motion.

Ms. Martinez first argues that Officer High "waived her qualified immunity defense by failing to raise it in the prior appeal" and thus could not file a new summary judgment motion. We disagree.

First, the "prior appeal" was *Ms. Martinez's* appeal challenging the other officers' qualified immunity—Officer High did not appeal. *Martinez I*, 943 F.3d at 1269 n.13 ("The claims against High are not before us."). Officer High "could have taken an interlocutory appeal" from the district court's denial of her summary judgment motion. *Rivero v. City and County of San Francisco*, 316 F.3d 857, 863 (9th Cir. 2002). "But 'could have' is not 'should have.'" *Id.* This court has "made clear that the rule permitting a defendant to take an interlocutory appeal after a denial of a motion based on qualified immunity is not a rule *requiring* the defendant to take that appeal." *Id.* (emphasis added) (citing *DeNieva v. Reyes*, 996 F.2d 480, 484 (9th Cir. 1992)). Officer High's decision not to appeal the denial of her first summary judgment motion thus does not bar her from re-raising her qualified immunity defense in a subsequent summary judgment motion.

Nor was Officer High barred from filing a second summary judgment motion. Nothing in Rule 56 prohibits successive motions. Fed. R. Civ. P. 56(b) (allowing parties to "file a motion for summary judgment *at any time* until 30 days after the close of all discovery" unless the court or local rule says otherwise (emphasis added)). And "a district court may permit successive motions for summary judgment on qualified immunity." *Hoffman*, 593 F.3d at 910; *see also Behrens v. Pelletier*, 516 U.S. 299, 306–11 (1996) (holding that a defendant could immediately appeal the denial of his successive motion asserting qualified immunity).

District courts may "weed out frivolous or simply repetitive motions." *Knox v. Sw. Airlines*, 124 F.3d 1103, 1106 (9th Cir. 1997). But Officer High's second motion was neither frivolous nor simply repetitive, and the district court was free to entertain it. *Hoffman*, 593 F.3d at 911. Officer High filed her second motion after she hired new counsel and after this court decided Ms. Martinez's prior appeal challenging other officers' qualified immunity. The second motion relied heavily on this court's opinion in *Martinez I*, a decision unavailable to Officer High when she filed her first motion.

All told, the district court did not abuse its discretion by considering Officer High's second summary judgment motion.

II. The qualified immunity framework.

Now we turn to the merits. An officer is entitled to qualified immunity unless the plaintiff shows that (1) the officer violated the plaintiff's constitutional right and (2) the "right was clearly established at the time of the incident." *Martinez I*, 943 F.3d at 1270. Because this court may consider either prong first, it need not decide the first prong if the second is dispositive. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). But deciding both prongs is "often beneficial" because it "promotes the development of constitutional precedent." *Id.* That is true here.

For one thing, the constitutional question is "in an area where this court's guidance is needed." *Martinez I*, 943 F.3d at 1270 (alteration omitted) (quoting *Horton ex rel. Horton v. City of Santa Maria*, 915 F.3d 592, 602 (9th Cir. 2019)). Indeed, our application of *Martinez I* in this case will guide future courts when addressing due process questions in similar contexts. What's more, the parties have repeatedly briefed the constitutional question in the district court and this court. Thus, we address both prongs to "best facilitate the fair and efficient disposition of [this] case." *Pearson*, 555 U.S. at 242.

A. Officer High violated Ms. Martinez's due process rights.

Ms. Martinez's § 1983 claim stems from the Due Process Clause of the Fourteenth Amendment. Because the Due Process Clause is a "limitation on state action," state actors generally are not liable for failing

"to prevent acts of private parties." *Murguia v. Langdon*, 61 F.4th 1096, 1106 (9th Cir. 2023) (emphasis omitted), *cert. denied*, No. 23-270, 2024 WL 71941 (Jan. 8, 2024). But one exception to this rule applies "when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger." *Id.* (quoting *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971–72 (9th Cir. 2011)). Ms. Martinez invokes that exception here.[4]

To establish the "state-created danger" exception, a plaintiff must prove two things. The officer's "affirmative conduct" must expose the plaintiff to a foreseeable danger that she would not otherwise have faced. *Id.* at 1111; *see also Martinez I*, 943 F.3d at 1271. And the officer must act "with 'deliberate indifference' to a 'known or obvious danger.'" *Murguia*, 61 F.4th at 1111 (quoting *Patel*, 648 F.3d at 974); *Martinez I*, 943 F.3d at 1271. Both requirements are met here.

[4] In her supplemental brief, Ms. Martinez raises for the first time several other constitutional arguments. Dkt. 48 at 4–6. We decline to consider those arguments because Ms. Martinez failed to make them below. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("As a general rule, we will not consider arguments that are raised for the first time on appeal."). We thus deny as moot Officer High's motion for leave to file objections to Ms. Martinez's supplemental brief, Dkt. 51.

1. Officer High's affirmative conduct placed Ms. Martinez in actual, foreseeable danger.

First, Officer High's affirmative conduct increased Ms. Martinez's risk of abuse by Mr. Pennington. An officer's statements about a victim to a violent perpetrator can increase the risk of retaliation. In *Martinez I*, for example, this court held that Officer Hershberger's disclosure of Ms. Martinez's reported abuse "provoked" Mr. Pennington, and her "disparaging comments" about Ms. Martinez emboldened Mr. Pennington "to believe that he could further abuse Martinez, including by retaliating against her for her testimony, with impunity." *Martinez I*, 943 F.3d at 1272. Likewise in *Okin v. Village of Cornwall-On-Hudson Police Department*, the Second Circuit held that officers who "openly expressed camaraderie with [an abuser] and contempt for [the victim]" increased the danger to the victim "because they conveyed to [the abuser] that he could continue to engage in domestic violence with impunity." 577 F.3d 415, 430–31 (2d Cir. 2009). And in *Kennedy v. City of Ridgefield*, this court held that officers "affirmatively created a danger to" the plaintiff that "she otherwise would not have faced" when they notified an alleged perpetrator about the plaintiff's allegations against him "before the [plaintiff and her family] had the opportunity to protect themselves from his violent response to the news." 439 F.3d 1055, 1063 (9th Cir. 2006).

So too here. Officer High told Mr. Pennington about Ms. Martinez's confidential domestic violence report. She did so after hearing Ms. Martinez answer "no" when Mr. Pennington—the alleged abuser—asked her whether she was "telling the cops" about his abuse. Officer High also shared other information endangering Ms. Martinez, including that Ms. Martinez had a romantic relationship with another police officer. In other words, Officer High's disclosure was coupled with comments that Ms. Martinez was lying and also had a relationship with Mr. Pennington's colleague. A reasonable jury could find that Officer High's comments put Ms. Martinez at risk of violent retaliation.

The risk was also foreseeable. Officer High obviously knew that Mr. Pennington was an alleged abuser because the information she disclosed to him was a domestic violence report against him. And when Officer High spoke with Mr. Pennington, he had been arrested for domestic violence and was subject to a restraining order. Officer High also admitted in her deposition that she knew the Clovis Police Department put Mr. Pennington on leave because of "something involving a female." Worse, Officer High knew Ms. Martinez was in the room with Mr. Pennington when Officer High disclosed the report. The danger was obvious. Shortly after learning from Officer High that Ms. Martinez reported his abuse to the police, Mr. Pennington brutally sexually and physically assaulted Ms. Martinez. The assaults Ms. Martinez suffered after Officer High's disclosure "were objectively

foreseeable" as "a matter of common sense." *Martinez I*, 943 F.3d at 1274.[6]

Construing the facts in Ms. Martinez's favor, Officer High placed her "in greater danger" by disclosing her confidential complaint to Mr. Pennington while conveying contempt for Ms. Martinez. *Martinez I*, 943 F.3d at 1272; *see also Okin*, 577 F.3d at 429–30 (holding that reasonable jurors could find that police officers' conduct "implicitly but affirmatively encouraged [the perpetrator's] domestic violence").

2. Officer High was deliberately indifferent to a known or obvious risk.

Second, Officer High "acted with deliberate indifference toward the risk of future abuse." *Martinez I*, 943 F.3d at 1274. In non-detainee cases like this one, the deliberate indifference standard is subjective: The officer must "know that something is going to happen but ignore the risk and expose the plaintiff to it." *Murguia*, 61 F.4th at 1111 (cleaned up); *see Martinez I*, 943 F.3d at 1274. That does not mean the officer must "know with certainty that the risk will materialize or intend for the plaintiff to face the risk." *Murguia*, 61 F.4th at 1117 n.16. The officer need only "take an intentional action with knowledge that his actions will expose the plaintiff to an unreasonable risk." *Id.*

This court has held that knowledge about an abuser's history of violence constitutes deliberate

[6] In fact, Officer High's counsel conceded at oral argument that the harm was foreseeable.

indifference. For example, in *Kennedy*, the officers knew that an alleged perpetrator "had a predilection for violence and was capable of the attack he in fact perpetrated" on the plaintiff's family. 439 F.3d at 1064. The officers thus "knew that telling [the perpetrator] about the allegations against him without forewarning the [plaintiff's family] would place them in a danger they otherwise would not have faced." *Id*. So too in *Martinez I*, this court held that—given Mr. Pennington's "violent tendencies"—"a reasonable jury could find that disclosing a report of abuse while engaging in disparaging small talk with Pennington . . . constitutes deliberate indifference." *Martinez I*, 943 F.3d at 1274. And most recently in *Murguia*, this court held that a state official "was aware of the obvious risk of harm [a mother] presented" to her children because the official knew about the mother's "history of abuse." 61 F.4th at 1116.

Like the officials in *Kennedy*, *Martinez I*, and *Murguia*, Officer High knew Mr. Pennington was violent. She knew Mr. Pennington was under investigation for domestic violence. She worked in the Clovis Police Department's records unit and saw Ms. Martinez's report of Mr. Pennington's abuse. Not only was the department already investigating Mr. Pennington for domestic violence against an ex-girlfriend, *Martinez I*, 943 F.3d at 1274, but there was an active criminal case against him for assaulting *Ms. Martinez*. Officer High had also completed domestic violence training and understood that a victim's confidential reports should not be disclosed to the abuser. Yet she took Mr. Pennington's call and told him about

Ms. Martinez's confidential report for no apparent reason other than to discredit Ms. Martinez. And she knew Ms. Martinez was in the room with Mr. Pennington and would thus be exposed to his violent reaction. These facts no doubt show "deliberate indifference to a known or obvious danger." *Martinez I*, 943 F.3d at 1274.

* * *

In sum, taking the facts in Ms. Martinez's favor, Officer High violated Ms. Martinez's due process rights by knowingly placing her in greater danger of Mr. Pennington's assaults.

B. Ms. Martinez's constitutional right was not "clearly established" when Officer High engaged in the challenged conduct.

Though Ms. Martinez established a constitutional violation, Officer High is entitled to qualified immunity because existing case law in 2013 did not make clear that Officer High's conduct violated Ms. Martinez's substantive due process rights. "There need not be a case directly on point" to defeat an officer's qualified immunity defense, but existing case law must have put "every reasonable official" on notice that their conduct was unconstitutional. *Martinez I*, 943 F.3d at 1275. The case law also "must be 'controlling'—from the Ninth Circuit or the Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." *Id.* (quoting *Sharp v. County of Orange*, 871 F.3d 901, 911 (9th Cir. 2017)). No such controlling authority existed in 2013.

The district court relied on *Okin* when it first denied Officer High qualified immunity. And Ms. Martinez relied on *Okin* again on remand. In that case, the Second Circuit held that police officers violated a domestic violence victim's due process rights when they emboldened the abuser "by fostering the belief that his intentionally violent behavior will not be confronted by arrest, punishment, or police interference." *Okin*, 577 F.3d at 437. But we held in *Martinez I* that *Okin* did not clearly establish Ms. Martinez's due process rights because it had not "been 'embraced by a "consensus" of courts.'" 943 F.3d at 1276 (quoting *Sharp*, 871 F.3d at 911). *Martinez I* established only "[g]oing forward"—but not in 2013—that an officer violates a victim's due process rights when the officer engages in affirmative conduct much like Officer High's. *Id.* at 1276–77. Like Officer High, Officer Hershberger told Mr. Pennington about Ms. Martinez's confidential report of his prior abuse while also disparaging Ms. Martinez. *Id.* at 1272. We held that this conduct violated Ms. Martinez's due process rights by provoking and emboldening Mr. Pennington to retaliate against her later that day, but we granted Officer Hershberger qualified immunity because the constitutional violation in "this context was not apparent to every reasonable officer at the time the conduct occurred." *Id.* at 1276. That holding applies equally to Officer High.

Kennedy does not require a different result. There, the plaintiff told police that her teenage neighbor molested her nine-year-old daughter. *Kennedy*, 439 F.3d at 1057. The plaintiff also reported that the neighbor

was violent and unstable, so the police assured her they would notify her before "any police contact with the [neighbor's] family about her allegations." *Id.* at 1057–58. The officers later told the neighbor about the plaintiff's allegations without first warning the plaintiff. *Id.* at 1058. When police told the plaintiff they had just spoken to the neighbor about the allegations, she "became upset" and asked why they didn't warn her. *Id.* The police assured her they "would patrol the area around both her house and the [neighbor's] house that night to keep an eye on [the neighbor]." *Id.* Because it was late and based on the officers' assurances, the plaintiff locked her doors and planned to leave town the next day. *Id.* But early the next morning, the neighbor broke in and shot the plaintiff and shot and killed her husband. *Id.*

This court held that the officers were not entitled to qualified immunity because "it was clearly established that state officials could be held liable where they affirmatively and with deliberate indifference placed an individual in danger she would not otherwise have faced." *Id.* at 1066. That broad statement applies equally to this case. But since *Kennedy*, this court and the Supreme Court have explained that "'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 580 U.S. 73, 79 (2017) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 742 (2011)). It is instead "the facts of particular cases that clearly establish what the law is." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 951 (9th Cir. 2017).

Although *Kennedy* involved a police officer disclosing a report to an alleged perpetrator, it did not involve sufficiently "similar circumstances" to put the constitutional violation "beyond debate" here. *White*, 580 U.S. at 79 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). The officers in *Kennedy* not only told a violent perpetrator about the plaintiff's allegations without giving her "a reasonable opportunity to protect her family" despite promising to do so, but they also misrepresented the level of danger by assuring her they would patrol the neighborhood. 439 F.3d at 1063. This "was an additional and aggravating factor" that made the plaintiff and her family "more vulnerable to the danger." *Id.* Given the officers' specific false assurances that affected the plaintiff's choices, we cannot say that "every reasonable official would have understood" from *Kennedy* that an officer violates the constitution by disclosing a report to a violent perpetrator. *See Martinez I*, 943 F.3d at 1275. Indeed, this court relied on *Kennedy* in *Martinez I*, yet it did not hold that *Kennedy* clearly established Ms. Martinez's due process rights. *See id.* at 1271–74.

At bottom, our precedent dictates that no existing authority gave Officer High sufficient notice in 2013 that her conduct violated due process.

CONCLUSION

We affirm the district court's summary judgment granting Officer High qualified immunity because Ms. Martinez's constitutional right was not clearly established in 2013. But we now clarify that right going forward. An officer is liable under the state-created

danger doctrine when the officer discloses a victim's confidential report to a violent perpetrator in a manner that increases the risk of retaliation against the victim.

Officer High's motion for leave to file objections to Ms. Martinez's supplemental brief, Dkt. 51, is **DENIED** as moot.

AFFIRMED.

Bumatay, J., concurring in the judgment:

It cannot be seriously disputed that the judicially crafted "state-created danger exception finds no support in the text of the Constitution, the historical understanding of the 'due process of law,' or even Supreme Court precedent." *Murguia v. Langdon*, 73 F.4th 1103, 1104 (9th Cir. 2023) (Bumatay, J., dissenting from the denial of rehearing en banc). From the earliest time, it was understood that the due process right was "intended to secure the individual from the arbitrary exercise of the *powers of government*." *Hurtado v. California*, 110 U.S. 516, 527 (1884) (emphasis added). But not good enough for us, we've expanded due process to protect individuals from danger by private parties, so long as a government actor does something, somewhere in the chain of events.

As I've said previously, it's a Frankenstein's monster-like doctrine, "cobbl[ing] together bits and pieces of standards from other contexts to try to breathe new life into substantive due process." *Murguia*, 73 F.4th

at 1114. And unfortunately, it's a monster that "roams menacingly among our circuit courts," especially the Ninth Circuit. *Id.* at 1115. But because expanding substantive due process feels more like "freewheeling judicial policymaking" than exercising judgment, we should be reluctant to preside over its growth. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 240 (2022).

While I agree with the majority's conclusion that Officer Channon High was properly afforded an opportunity to file a successive summary judgment motion and that she was entitled to qualified immunity based on the lack of any clearly established law in this context, it was simply unnecessary to reach whether Desiree Martinez's allegations against Officer High amount to a claim under the state-created danger doctrine. To decide this case, it is sufficient that *everyone* agrees that no clearly established law existed at the time of the incident between Martinez, Officer High, and her abuser. As the majority admits, we need not decide the first prong of qualified immunity if the second prong is dispositive. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

And here, the district court did not rule on the first prong of whether there's a constitutional violation. No party argued that there was a constitutional violation in their initial briefing. It wasn't until prodded at oral argument by our court and forced to file supplemental briefing did the parties raise any arguments about a constitutional violation. It was unwise to reach the

constitutional violation question under these circumstances.

For these reasons, I concur only in the judgment of the court.

Appendix B

Order from the United States District Court Eastern District of California

January 10, 2022

Appendix B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DESIREE MARTINEZ, Plaintiff, v. KYLE PENNINGTON, et al., Defendant.	No. 2:15-cv-00683-JAM **ORDER GRANTING DEFENDANT HIGH'S MOTION FOR SUMMARY JUDGMENT**

Before this Court is Defendant Channon High's motion for summary judgment on Plaintiff's § 1983 claim for violation of due process, the sole remaining claim against her. Def.'s Mot. for Summary J., ("Mot."), ECF No. 206. The parties are familiar with the facts and posture of this case, so the Court does not repeat them here.

Despite Plaintiff's objections, the Court finds the motion to be procedurally proper. See Opp'n at 7. Defendant was under no obligation to appeal this Court's previous denial of summary judgment on the issue of qualified immunity and the defense would be available to her at trial. See Arrington v. City of Los Angeles, CV 15-03759-BRO (RAOx), 2017 WL 10543403, at *6 (C.D. Cal. June 30, 2017) (noting both the

Supreme Court and Ninth Circuit have recognized that qualified immunity may be decided at trial). The Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Pearson v. Callahan, 555 U.S. 223, 232 (2009) (internal quotation marks and citation omitted). This is because an officer should be permitted to avoid the expense and burden of trial if her conduct is protected by the doctrine. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Accordingly, the Court may resolve the issue now.

In light of the Ninth Circuit's recent decision in this case, see Martinez v. City of Clovis, 943 F.3d 1260 (9th Cir. 2019), the Court finds Defendant is entitled to qualified immunity as it was not clearly established in 2013 that Defendant's conduct violated due process. This Court previously relied on Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415 (2d Cir. 2009) in denying Defendant's motion for summary judgment on qualified immunity. However, the Ninth Circuit in Martinez found that Okin could not be relied upon as it had not been embraced by a consensus of courts. 943 F.3d at 1276. Plaintiff's reliance on Kennedy v. Ridgefield City, 439 F.3d 1055 (9th Cir. 2006) is also unpersuasive as it is factually distinguishable and existed when the Ninth Circuit decided Martinez. Likewise, Plaintiff's citations to equal protection cases, Opp'n at 17, do not advance her theory that it was clearly established that Defendant's conduct violated due process.

The Court finds Plaintiff has failed to demonstrate Defendant's conduct violated clearly established law at the time of her conduct. See Romero v. Kitsap Cnty., 931 F.2d 624, 627 (9th Cir. 1991) ("The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct."). Accordingly, Defendant Channon High is entitled to qualified immunity and her request for summary judgment is GRANTED. The hearing set for January 11, 2022 is hereby vacated.

IT IS SO ORDERED.

Dated: January 10, 2022

s/ John A. Mendez
JOHN A. MENDEZ,
UNITED STATES
DISTRICT JUDGE

Appendix C

Order from the United States District Court
Eastern District of California

November 3, 2017

Appendix C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DESIREE MARTINEZ, Plaintiff, vs. KYLE PENNINGTON; KIM PENNINGTON; CONNIE PENNING-TON; KRISTINA HERHBER-GER; JESUS SANTILLAN; CHAN-NON HIGH; THE CITY OF CLOVIS; ANGELA YAMBUPAH; RALPH SALAZAR; FRED SAND-ERS; THE CITY OF SANGER; and DOES 1 through 20, Defendants.	No. 1:15-cv-00683-JAM MJS **ORDER** **DATE: October 17, 2017** **TIME: 1:30 p.m.** **CTRM: 14, 6th floor**

Defendants' Motion for Summary Judgment came on regularly for hearing on October 18, 2017 at 1:56 p.m. before the Honorable John A. Mendez. Plaintiff was present in court and appeared by and through her counsel of record.

KRISTINA HERHBERGER; JESUS SANTILLAN; CHANNON HIGH; THE CITY OF CLOVIS; ANGELA YAMBUPAH; RALPH SALAZAR; FRED SANDERS; THE CITY OF SANGER ("the City Defendants"), appeared by and through their counsel of record G. Craig Smith of the Law Offices of Ferguson, Praet & Sherman, APC. Defendants Kim Pennington and Connie Pennington appeared through their counsel of record, John W. Phillips, of Wild, Carter and Tipton APC. Defendant Kyle Pennington did not appear.

After consideration of the moving, opposing, and reply papers, any arguments of counsel, and with GOOD CAUSE SHOWING,

IT IS HEREBY ORDERED:

1. City Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.

2. City Defendants' Motion for Summary [Judgment] is GRANTED for all Claims for Relief contained in the Second Amended Complaint brought against Defendants City of Clovis, City of Sanger, Kristina Hersberger, Angela Yambupah and Fred Sanders.

3. Judgment is entered in favor of City of Clovis, City of Sanger, Kristina Hersberger, Angela Yambupah and Fred Sanders as to all claims for Relief contained in Second Amended

Complaint brought against them. Defendants are ordered to prepare a proposed judgment.

4. Defendant Channon High's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.

5. Defendant Channon High's Motion for Summary [Judgment] is GRANTED for any and all Equal Protection Violations alleged against her in the Second Claim for Relief contained in the Second Amended Complaint.

6. Judgment is entered in favor of Channon High for any and all Equal Protection Violations alleged against her in the Second Claim for Relief contained in the Second Amended Complaint. Defendant Channon High is ordered to prepare a proposed judgment.

7. Defendant Channon High's Motion for Summary [Judgment] is DENIED for the violations of Plaintiff's Substantive Due Process Rights as alleged against her in the Second Claim for Relief contained in the Second Amended Complaint.

8. Defendants Kim and Connie Pennington Motion for Summary Judgment is GRANTED as to Plaintiff's Third Claim for Relief for Conspiracy to Intimidate a Witness in the Second Amended Complaint. Judgment is hereby entered thereon in favor of said Defendants.

Defendants Kim and Connie Pennington are ordered to prepare a proposed judgment.

9. Defendants Kim and Connie Pennington Motion for Summary Judgment is DENIED as to Plaintiff's Eighth Claim for Relief for Conspiracy to Commit Battery in the Second Amended Complaint.

10. Defendants Kim and Connie Pennington Motion for Summary Judgment is GRANTED as to Plaintiff's Ninth Claim for Relief for Negligence in the Second Amended Complaint. Judgment is hereby entered thereon in favor of Defendants. Defendants Kim and Connie Pennington are ordered to prepare a proposed judgment.

IT IS SO ORDERED.

DATED: November 3, 2017

/s/ **JOHN A. MENDEZ**
John A. Mendez
United States District
Court Judge

Appendix D

Order from the United States Court of Appeals for the Ninth Circuit Denying Rehearing

March 6, 2024

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DESIREE MARTINEZ, *Plaintiff-Appellant*, v. CHANNON HIGH, *Defendant-Appellee*.	No. 22-16335 D.C. No. 1:15-cv-00683-DAD-SKO Eastern District of California, Fresno ORDER

Before: BUMATAY, KOH, and DESAI, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are **DENIED**.

Appendix E

Excerpt from Transcript of the October 17, 2017 Hearing in the United States District Court for the Eastern District of California

(ECF 91, pp. 63–64)

Appendix E

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DESIREE MARTINEZ,

Plaintiff,

vs.

KYLE PENNINGTON, et al.,

Defendants.
/

Sacramento, California
No. 1:15-cv-00683-JAM
Tuesday, October [17], 2017
1:56 p.m

TRANSCRIPT OF HEARING ON MOTION FOR SUMMARY JUDGMENT BEFORE THE HONORABLE JOHN A. MENDEZ, DISTRICT JUDGE

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APPEARANCES:

For the Plaintiff:	Law Office of Kevin G. Little P.O. Box 8656 Fresno, CA 93747 By: Kevin G. Little Attorney at Law
For the Defendant City of Clovis, et al.:	Ferguson, Praet & Sherman 1631 E. 18th Street Santa Ana, CA 92705 By: G. Craig Smith Attorney at Law
For the Defendants Kim and Connie Pennington:	Wild, Carter & Tipton 246 W. Shaw Avenue Fresno, CA 93704 By: John William Phillip Attorney at Law
Official Court Reporter:	Kacy Parker Barajas CSR, RMR, CRR, CRC 501 I Street Sacramento, California 95814 (916) 426-7640

As to Channon High, C-h-a-n-n-o-n, the Court denies the motion for summary judgment as to Ms. High. The Court finds that there [are] genuine issues of material fact that need to be resolved by way of trial as to the issue of whether she acted under color of state law.

And in terms of qualified immunity, the Court finds that under the facts most favorable to the plaintiff, that in 2013 it was clearly established that an officer sharing a domestic violence victim's confidential information to the alleged abuser would be a violation of the victim's substantive due process rights because it would fall, in this case and in the facts of this specific case, under the state-created danger exception. There are facts that give rise to inferences that would allow the plaintiff to demonstrate to a jury that Ms. High's actions here did in fact create a danger to her.

Okin again is a case which under these facts is similar and would in effect put Ms. High on notice if in fact the plaintiff can prove the allegations against her that Ms. High's acts contributed to the vulnerability of a known victim, that she engaged in conduct that embolden[ed] in this case the abuser, and that that violated [the] due process clause.

Ms. Martinez did testify in her deposition that Ms. High told Kyle Pennington about Ms. Martinez's police reports and that consequently Ms. Martinez suffered additional abuse and intimidation. The Court finds that a reasonable officer, if these facts are true, in Ms. High's position should have known that her phone call would and could [] embolden the

alleged abuser, Mr. Pennington, would embolden him to continue to abuse Ms. Martinez, thus falling within the state-created danger exception. Therefore, the Court finds that Channon High would not be entitled to qualified immunity on the substantive due process theory.

Appendix F

Excerpt from Desiree Martinez Deposition Transcript pp. 307–309

Reformatted from No. 22-cv-16335, ECF 15-4, p. 82

Appendix F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA,
FRESNO DIVISION

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DESIREE MARTINEZ, PLAINTIFF, --vs-- KYLE PENNINGTON; KIM PENNINGTON; CONNIE PENNINGTON; KRISTINA HERSHBERGER; JESUS SANTILLAN; CHANNON HIGH; THE CITY OF CLOVIS; ANGELA YAMBUPAH; RALPH SALAZAR; FRED SANDERS; THE CITY OF SANGER; DOES 1-20, DEFENDANTS.	NO. 1:15-CV-00683

---o0o---

Fresno, California April 27, 2017

The deposition of DESIREE MARTINEZ was taken in the above-entitled matter pursuant to all of the provisions of law pertaining to the taking and use of depositions before Stacy Banks, CSR, with offices at Fresno, California, commencing at the hour of 9:18 a.m. at the law offices of Wild, Carter & Tipton, 246 W. Shaw Avenue, Fresno, California.

Page 307

Q. So let's go into that allegation. When was it that you thought that – when was it that Kyle first told you somebody was contacting him from Clovis Police Department?

A. I knew that he was finding out from someone at Clovis. He says he has friends that work there so he knows what's going on at Clovis at the police department, that they were telling him.

And then I knew for sure about Channon when he was on the phone with her, and him and I had gotten into a fight and I had like – I don't remember what exactly what had happened, but I told him that I was going to report him and he, I guess he had called Channon to make sure that I didn't make any police reports because he had asked me if I had made any police reports in regards to what had happened between him and I and I had told him no. And he had Channon on the

Page 308

phone and he had told me that, he had said, "So you're telling the cops what, you're telling the cops [what] I [] did to you? And I had said, "No." And Channon was on the speaker phone, because she didn't know that she was on speaker and she's like, "Yes, she did. I see the report right here." She was referring to a report from June or something. I don't remember what, exactly which report it was, but she had told him that she had saw a report that I was making and that I

was calling in there anonymously and – and then what else did she say?

And then she mentioned that Gary Taylor was under IA and that he wasn't working. And Kyle was asking why is he under IA and I guess it's because he, she had said to him that he had lied about the romantic relationship that him and I had so he was under IA. So I remember she was giving him all that information and then when she had told him about me calling he had said, "Okay. Well, I'll call you back." And he hung up on the phone with her and he had hit me and beat me up because she told him that I had, I was calling and making reports against him.

Q. How do you know this was Channon High?

A. I recognized her voice when she was talking at the deposition, but the reason why I knew is because when he had the phone he had it on speaker and I saw her name on the call and it said "Channon High" on his phone and he had her on

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speaker phone. It was from her personal cell phone.

Appendix G

Excerpt from Channon High Deposition Transcript pp. 6, 12, and 17

Reformatted from No. 22-cv-16335 ECF 15-4, pp. 91, 93–94

Appendix G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA,
FRESNO DIVISION

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DESIREE MARTINEZ, PLAINTIFF, --vs-- KYLE PENNINGTON; KIM PENNINGTON; CONNIE PENNINGTON; KRISTINA HERSHBERGER; JESUS SANTILLAN; CHANNON HIGH; THE CITY OF CLOVIS; ANGELA YAMBUPAH; RALPH SALAZAR; FRED SANDERS; THE CITY OF SANGER; DOES 1-20, DEFENDANTS.	)	NO. 1:15-CV-00683

---o0o---

Fresno, California April 25, 2017

The deposition of CHANNON HIGH was taken in the above-entitled matter pursuant to all of the provisions of law pertaining to the taking and use of depositions before Stacy Banks, CSR, with offices at Fresno, California, commencing at the hour of 2:43 p.m. at the law offices of Kevin G. Little, 1225 East Divisadero, Fresno, California.

Page 6

A. Yes.

Q. Okay. Is he a friend of yours?

A. Yes.

Q. How long have the two of you been friends?

A. Since we started the academy in 2007.

Q. All right. Do you socialize outside of work with him?

A. Occasionally, yes.

Q. What are – Do you socialize together one-on-one or in groups?

A. Mostly groups.

Q. Okay. How frequently would you say if you had to average it out, let's say in the last two years how frequently do you socialize with Mr. Pennington?

A. I would say maybe a dozen times.

Q. Okay. So once a month or every other month?

A. Somewhere around there, yes.

Q. Okay.

MR. SMITH: Within the last two years.

MR. LITTLE: Q. Within the last two years twelve times approximately?

A. Correct.

Q. So that would be once every other month, right?

A. Roughly.

Page 12

Q. Okay. You were not a dispatcher, though?

A. No.

Q. Can you recall any specific occasion where you called Kyle Pennington very early in the morning and spoke with him for approximately thirty minutes? Regardless of the year, I'm just asking, at any time do you recall calling him around 6:30 in the morning and speaking with him for half an hour?

A. I don't ever recall calling him.

Q. Okay.

A. But if we worked a shift together that could be, but I'm not sure, I couldn't guarantee that.

Q. Well, I'm going to make another representation, and I don't think this is disputed. Back in September of 2013 Kyle was on administrative leave because there was a pending investigation regarding him so he wasn't working during that time period.

Do you recall the general time frame when Kyle was on leave and not working?

A. No.

Q. Okay. Do you recall that at some point shortly before his separation from the police department he was on leave and there was some sort of an IA or something pending?

A. Yes

Page 17

Q. So I'm assuming that if he called at what most people consider –

A. Ungodly hour.

Q. – a highly unusual or even ungodly hour –

A. Yes.

Q. – that might be something that you'd recall?

A. Most likely, but that was a lot of years ago.

Q. All right. So you don't remember one way or the other whether you had phone conversation, a phone conversation at 3:23 a.m. with Mr. Pennington on the 7th of September?

A. No.

Q. Okay. Did you know why Kyle was on administrative leave?

A. I knew it was something involving a female, but honestly I thought it was a blond female. I don't know her name.

Q. All right. Did he ever discuss with you that he was on administrative leave because of allegations related to a domestic violence situation?

A. No.

Appendix H

Excerpt of Kyle Pennington Call Log

Reformatted from No. 22-cv-16335, ECF 15-3, p. 11

Appendix H

IN THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

DESIREE MARTINEZ Plaintiff-Appellant, v. CITY OF CLOVIS, et al. Defendants-Appellees.	No. 22-16335 D.C. No. 1:15-cv-00683-DAD-SKO Eastern District of California, Sacramento

APPELLANT'S EXCERPTS OF RECORD VOL. II

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Appendix H

Individual Usage Details for:
Kyle Pennington | 559-805-2082

Change billing period: **Current Billed Usage**
Aug 09, 2013-Sep 08, 2013

View details by: Talk

Show: ● Nicknames ○ Numbers

Date/Time		Contact	Location	Call Type	Minutes
09/07/2013	07:33AM	559-790-2974	Fresno, CA	CN9N	1
09/07/2013	07:33AM	559-908-4241	CALL WAIT	CN9N	1
09/07/2013	07:31AM	559-908-4241	Fresno, CA	CN9N	1
09/07/2013	07:30AM	559-322-7485	Incoming, CL	CN9N	1
09/07/2013	06:41AM	559-322-7485	Clovis, CA	CN9N	6
09/07/2013	05:00AM	559-322-7485	Incoming, CL	CN9N	2
09/07/2013	04:58AM	Kohens mom	Incoming, CL	CN9N	2
09/07/2013	04:56AM	Kohens mom	Fresno, CA	CN9N	1
09/07/2013	04:56AM	Kohens mom	Fresno, CA	CN9N	1
09/07/2013	03:23AM	559-907-1009	Fresno, CA	CN9N	20
09/07/2013	02:53AM	559-287-4318	Incoming, CL	CN9N	4
09/07/2013	02:39AM	<3 My Love	Fresno, CA	CN9N	1
09/07/2013	02:34AM	<3 My Love	Incoming, CL	CN9N	4