No. 06-605

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY, CALIFORNIA, ET AL.,

Petitioners,

v.

MAX RETTELE, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Ninth Circuit's unpublished opinion holding (1) that issues of fact preclude summary judgment as to whether the petitioner law enforcement officers violated the Fourth Amendment by forcing respondents to leave their beds, naked and at gunpoint, under circumstances where petitioners knew they were seizing the wrong people, and (2) that if those issues of fact are ultimately resolved in respondents' favor, petitioners are not entitled to qualified immunity because it was clearly established that such conduct violates the Fourth Amendment.

2. Whether this Court should establish a per se rule, contrary to its own precedents, that a dissenting opinion in a court of appeals on whether a constitutional violation has occurred necessarily means that the law is not "clearly established" for qualified immunity purposes.

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INTRODUCTION

At 7:00 a.m. on December 19, 2001, respondents Max Rettele and Judy Sadler were awakened in their bedroom by Los Angeles County Sheriff's Department deputies serving a search warrant. Even though the deputies knew respondents were not the suspects for whom they were looking, they forced respondents out of bed, at gunpoint, in the nude.

The warrant was based on stale information that members of an identity theft ring at one time made use of respondents' address on Loneoak Avenue in Lancaster, California. Respondents, who are white, had purchased the home three months before the search. None of the identity thieves, each of whom is black, had anything to do with the residence after that time.

Mr. Rettele and Ms. Sadler brought suit under 42 U.S.C. § 1983, alleging that the deputies executed the warrant in a manner that caused an undue invasion of privacy and was unnecessarily degrading. In an unpublished ruling reversing a grant of summary judgment, a Ninth Circuit panel, considering the entirety of the record in the light most favorable to respondents, concluded there were genuine issues of material fact as to whether the deputies' conduct violated the Fourth Amendment, and denied qualified immunity because, assuming the facts were resolved in respondents' favor, petitioners violated clearly established law when subjecting respondents to an undue invasion of privacy.

The Ninth Circuit's factbound and nonprecedential ruling does not merit review by this Court. The court correctly stated and followed the procedural and substantive standards for addressing qualified immunity claims set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). It first considered whether the record supported a claim that the Constitution had been violated, and, after doing so, then determined whether the law was clearly established such that a reasonable officer would have understood the conduct to be unlawful.

Consistent with this Court's statements that a court of appeals should consider its own prior holdings in determining whether the law is clearly established, *see Elder v. Holloway*, 510 U.S. 510, 516 (1994), the court identified specific circuit precedent placing defendants on notice that a search and seizure that unnecessarily exposed naked non-suspects could constitute an undue invasion of privacy in violation of the Fourth Amendment. The panel's application of established legal principles to the specific and unusual facts of this case presents no issue necessitating review by this Court.

In their attempt to identify an issue meriting this Court's attention, petitioners seriously misrepresent the opinion below. Petitioners state as the first question presented whether it is clearly established that a police officer "must immediately call off a valid warrant calling for the arrest of African-Americans because he observes one or more Caucasians in the house," and as the second whether it is clearly established that it violates the Fourth Amendment for officers "to order people—who are in bed and who claim to be naked—to show their hands and get out of bed." Pet. i. The court of appeals' opinion contains no such holdings. The deputies observed *only* white residents in the house, and *all* their suspects were African American. The panel's conclusion that respondents have a triable Fourth Amendment claim was based on the totality of the evidence indicating that the officers knew when they ordered respondents out of bed naked that they had the wrong people. There was never any issue presented regarding whether respondents could be ordered to "show their hands," nor whether under other circumstances, where the officers might actually be facing a risk of harm, the Fourth Amendment allows police to order from bed someone claiming to be naked.

Petitioners' third question asks this Court to hold that the law was not clearly established and that they are entitled to qualified immunity solely because a panel member dissented from the holding that there may have been a constitutional

violation. Petitioners' assertion that a dissent on the merits of a constitutional claim necessarily means that the law is not clearly decided for qualified immunity purposes is flatly contrary to this Court's precedent. Specifically, in *Groh v. Ramirez*, 540 U.S. 551 (2004), this Court held that law enforcement officers were not entitled to qualified immunity against a claim that they had violated the Fourth Amendment in executing a search, *even though two members of this Court joined a dissent that would have held that the search was not unconstitutional. See id.* at 576-77 (Thomas, J., joined by Scalia, J., dissenting). If a dissent on the merits by members of this Court does not preclude a finding that the law was clearly established, a dissent by a single circuit judge can hardly do so.

For these reasons, as explained further below, respondents urge the Court to deny the petition for certiorari.

STATEMENT OF THE CASE

The Facts

This case arises from the Los Angeles Sheriff's Department's investigation into a nonviolent, financial fraud scheme perpetrated by five African Americans. AER 73-81.[1] In September 2001 the lead investigating officer, Detective Dennis Watters, focused on a house on Butterscotch Lane in Lancaster, California, whose address had been used by one of the suspects to open a fraudulent bank account. *Id.* at 81. Deputy Watters repeatedly drove by the Butterscotch Lane address and saw a car belonging to a suspect parked nearby. *Id.* at 81-84. Detective Watters also located outdated information indicating some of the suspects at one time used an address on Loneoak Avenue in Lancaster. *Id.* at 85-87. Detective Watters did nothing, however, to determine who currently lived in the Loneoak Avenue house; he did not check

[1] "AER" refers to Appellants' Excerpts of Record filed in the Ninth Circuit.

ownership records, utilities, or who received mail at the house. *Id.* at 91-93.

If Detective Watters had taken any of these steps, he would have learned that respondents Max Rettele and Judy Sadler had bought and moved into the house in September 2001 with Ms. Sadler's teenage son, Chase Hall. *Id.* at 24. Mr. Sadler, a civilian Defense Department employee with a security clearance, and Ms. Sadler, a real estate property manager, had no criminal history, were not associated in any way with any of the suspects in the fraud ring, and did not match the descriptions of any of the suspects (all of whom were known to be African American, while Mr. Rettele, Ms. Sadler and Mr. Hall are white). *Id.* at 18-24. The house was vacant when Mr. Rettele and Ms. Sadler moved in, so if the suspects ever used the house, it was at some time in the past. *Id.* at 19.

Detective Watters claimed that he had driven by the Loneoak Avenue house repeatedly. He saw nothing there to indicate the presence of any of the suspects, but he also claims he saw no signs that Mr. Rettele and Ms. Sadler lived there, even though they testified that they were constantly working outside their new home. *Id.* at 87-91, 19, 24, 62-66. Indeed, Ms. Sadler recalled having seen Detective Watters drive by. *Id.* at 19-20.[2]

Despite the deficiencies in his investigation of the Loneoak Avenue address, Detective Watters obtained warrants to search not only the Butterscotch Lane address, but also the Rettele-Sadler residence on Loneoak Avenue. Al-

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[2] Detective Watters claims to have been told by another detective that once he saw a black man on the porch of the Loneoak Avenue house—apparently a friend visiting Mr. Rettele and Ms. Sadler, a 350-pound man who did not fit the description of any of the suspects. *Id.* at 114, 19. There is nothing in the record, aside from the visitor's race, to support petitioners' claim (at Pet. 5) that the visitor matched the descriptions of the suspects.

though there were no exigencies associated with either search and no indication that the suspects were involved in any violent crimes or illegal weapons activities,[3] Detective Watters assembled a large team of armed officers for the searches and carried out both simultaneously at 7:00 a.m., *id.* at 20, 24—the earliest possible time for a search without a nighttime endorsement on the warrant.[4]

Chase Hall answered the door to find five deputies pointing guns at him, who forced him to lie face down on the ground with his arms spread. *Id.* at 56-59. Meanwhile, deputies spread out in the house, with three bursting into the bedroom where Mr. Rettele and Ms. Sadler were in bed, naked. *Id.* at 104, 20, 24. Although the deputies immediately realized that Mr. Rettele and Ms. Sadler were not among the suspects they were looking for, *id.* at 50-51, the officers ordered them out of bed at gunpoint. *Id.* at 20, 24. Both Mr. Rettele and Ms. Sadler were exposed, fully naked, to the officers' view before they were allowed to partially clothe themselves. *Id.* at 20, 24.[5]

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[3] One suspect was the *registered* owner of a handgun. AER 114.

[4] There is nothing in the record to support petitioners' claim (at Pet. 3) that the warrant service was "high risk." The suspects were involved in white-collar crimes, not violence. AER 102-03.

[5] Petitioners claim that Ms. Sadler "stood up but kept herself unexposed with a blanket," Pet. 7, and that deputies furnished respondents with additional clothing immediately. Pet. 22. The record is to the contrary:

> Utterly humiliated, I got out of bed, trying to cover up as best I could with a sheet. After Max returned to my bedroom with the robe, the deputies finally allowed me to put it on. The two male deputies, including Deputy Campbell, saw me naked while I was in the process of getting out of bed and putting on the robe. The female was not even present. It was humiliating. *I was totally frontally nude* in front of these male deputies, and Deputy Campbell was staring at me, still pointing his gun.

AER 20 (Sadler Declaration) (emphasis added).

Eventually, the officers acknowledged the obvious: The white family they found in the house had nothing to do with the black suspects identified in the warrant. They thanked Mr. Rettele and Ms. Sadler for not being more upset, apologized, and left. *Id.* at 20, 24.

Procedural History

Mr. Rettele and Ms. Sadler filed this § 1983 action in the U.S. District Court for the Central District of California. The district court granted the defendants' motion for summary judgment on the ground that the search and seizure did not violate the Fourth Amendment and that even if it did, the defendants were entitled to qualified immunity.

The Ninth Circuit reversed in an unpublished, nonprecedential opinion. Following this Court's decision in *Saucier v. Katz*, *supra*, the court engaged in a two-stage analysis, first addressing whether Mr. Rettele and Ms. Sadler had made out a triable claim that their constitutional rights were violated, and then considering whether the rights in question were clearly established, such that a reasonable officer would have known that the conduct violated the Constitution.

As to the first issue, the court noted that a search or seizure may violate the Constitution if it is carried out in a way that is "unnecessarily painful, degrading or prolonged," or "involved 'an undue invasion of privacy,'" Pet. App. 3 (citing *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994))—a proposition that the defendants did not contest. Considering the summary judgment record in the light most favorable to the non-moving parties, the court concluded that Mr. Rettele and Ms. Sadler had raised genuine issues of material fact as to whether, in light of all the circumstances described above, the officers violated the Fourth Amendment by subjecting Mr. Rettele and Ms. Sadler to an unreasonably prolonged, humiliating and intrusive search and seizure under circumstances where they knew or should have known that there was no justification for doing so.

Turning to qualified immunity, the court then held that, assuming the material fact issues were resolved in favor of Mr. Rettele and Ms. Sadler, the law was clearly established that such a search and seizure was unconstitutional. Pet. App. 3. The court identified specific Ninth Circuit precedent on point: *Franklin v. Foxworth*, *supra*, which held that officers who exposed the genitalia of a non-suspect during the execution of a search warrant violated the Fourth Amendment, as their conduct "involve[d] an undue invasion of privacy." 31 F.3d at 876. The court concluded that a reasonable officer would have known it was unlawful to force Mr. Rettele and Ms. Sadler out of bed naked and hold them at gunpoint under circumstances where it was obvious that the house and its occupants had nothing to do with the suspects who were the object of the search. Pet. App. 4.

Petitioners sought panel rehearing and rehearing en banc, which were denied with no Ninth Circuit judge dissenting.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit Did Not Announce the Per Se Rules That the Petition Challenges, and the Holding Below Does Not Conflict with Decisions of This Court or the Other Courts of Appeals.

Petitioners cite no decisions from any court, at any level, that conflict with the Ninth Circuit's unpublished ruling that the facts here support respondents' claim of a Fourth Amendment violation. Nor do petitioners assert that other courts disagree with *Franklin v. Foxworth*, *supra*, the leading Ninth Circuit precedent on which the panel relied.[6] Petitioners also

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[6] *Franklin*'s holding that a search and seizure that is *unnecessarily* painful, degrading or prolonged or that constitutes an *undue* invasion of privacy violates the Fourth Amendment is an application of the well settled principle that "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental

(*Footnote continued*)

do not contest that the court's consideration of *Franklin v. Foxworth* comported with this Court's holding in *Elder v. Holloway*, 510 U.S. at 516, that a reviewing court should examine its own precedents as well as this Court's to determine whether the law is clearly established.

Instead, petitioners argue (still without citation of any cases addressing similar circumstances) that the Ninth Circuit erred in supposedly holding that it was clearly established law that (1) "an officer must immediately call off a valid warrant calling for the arrest of African American individuals merely because he observes one or more Caucasian individuals in the house to be searched," and (2) it is "unnecessarily painful and/or degrading and/or undue invasion of privacy for peace officers to order people—who are in bed and under the covers and who claim to be naked—to show their hands and get out of bed." Pet. 12; *see also id.* at 17-20.

The court of appeals, however, did not announce either of the per se rules petitioners challenge. Nowhere did the court suggest that officers must call off a search if they find a white person at a location being searched for African Americans. Indeed, the opinion below does not even mention Chase Hall, or refer to the fact that a white teenager opened the door for the deputies, much less hold that the deputies should have called off the search after encountering him. Nor did the court hold that officers executing a search warrant may never order persons who are in bed to "show their hands." There is no issue in this case as to whether it was lawful to order respondents to show their hands. Indeed, if respondents had merely been ordered to show their hands, any conceivable safety concerns of the deputies would have been satisfied without the invasion of privacy that led to this lawsuit. Moreover, the court did not announce any categorical rule

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interests alleged to justify the intrusion.'" *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (citation omitted)

about ordering people out of bed. One can easily envision circumstances where ordering someone out of bed, clothed or not, would be justified by concerns for officer safety, and nothing in the Ninth Circuit's opinion suggests otherwise.

What the court of appeals actually held was that a reasonable jury could find that petitioners' search and seizure exceeded reasonable bounds based on all the circumstances, including the facts that "(1) no African-Americans lived in Plaintiffs' home; (2) Plaintiffs, a Caucasian couple, purchased the residence several months before the search and the deputies did not conduct an ownership inquiry; (3) the African American suspects were not accused of a crime that required an emergency search; and (4) Plaintiffs were ordered out of bed naked and held at gunpoint while the deputies searched their bedroom for the suspects and a gun." Pet. App. 3. The court did not suggest, as petitioners posit, that any single factor was dispositive, but rather concluded that the totality of the circumstances could support a finding that a reasonable officer immediately "should have realized that Plaintiffs were not the subject of the search warrant and did not pose a threat to the deputies' safety" and that the treatment to which Mr. Rettele and Ms. Sadler were subjected was thus unnecessarily degrading and "and clearly an undue invasion of Plaintiffs' privacy." *Id.* at 4.

Petitioners cite no case law contradicting the Ninth Circuit's holding that it violates the Fourth Amendment for officers to subject naked homeowners not suspected of any criminal activity to a frightening and humiliating gunpoint seizure when the officers know or should know that they have the wrong people. Nor do they cite any authority that conflicts with the Ninth Circuit's conclusion that the law is clearly established that such an excessive and unjustified seizure is unconstitutional and that a reasonable officer would

know that he should not order a naked person out of bed under such circumstances.[7]

Instead, petitioners content themselves with trotting out a parade of horribles that they say could result from the Ninth Circuit's ruling, including the fanciful predictions that "a savvy criminal organization … could circumvent a valid search warrant by employing individuals of multiple races, or by having its operatives wander about in a state of undress or, at the very least, claim a state of undress," and that "savvy criminals may forestall a warrant by sleeping naked and may also hide weapons under pillows and bedding, knowing that officers cannot order them from a bed." Pet. 12, 29. A rule that officers could never continue a search if they saw a person of a race different from their suspects or that they could never order a person who claimed to be naked to get out of bed might conceivably create such risks. But even assuming that criminal enterprises monitor the Ninth Circuit's nonprecedential opinions and tailor their conduct (and sleeping habits) accordingly, the rule actually applied by the Ninth Circuit here—that officers cannot engage in an unnecessarily intrusive and humiliating search and seizure when they know or should know that they are, due to their own ineptitude, in the wrong place seizing the wrong people—does not remotely threaten such consequences.

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[7] Although the point is not related to any of their specific questions presented, petitioners halfheartedly suggest at one point that the decision below is inconsistent with this Court's decision in *Muehler v. Mena*, 544 U.S. 93 (2005). *See* Pet. 26-27. *Muehler*, however, did not hold that the degree of intrusiveness and degrading treatment associated with a search and seizure cannot rise to the level of a Fourth Amendment violation; indeed, it acknowledged that they can. 544 U.S. at 100. Nor did *Muehler* consider the legitimacy of continuing a seizure associated with a search when it was or should have been readily apparent that the search was an unjustified mistake. Rather, in *Muehler* this Court relied on the existence of continuing safety concerns throughout the search and seizure, which were absent here. *See id.*

II. Petitioners' Claim That a Dissent on the Merits of a Constitutional Claim Necessarily Means the Law Is Not Clearly Established Is Unfounded.

In addition to asking this Court to review rules the Ninth Circuit never actually announced, petitioners advance the novel claim that an appellate dissent on the merits of a plaintiff's constitutional claim necessarily means that the law on the point is not clearly established and thus automatically entitles the defendant to qualified immunity. None of the handful of precedents petitioners cite, however, supports such a ruling or substantiates their claim that there is a conflict among the circuits on this point (Pet. 15-16).

Petitioners rely principally on *Roe v. Texas Department of Protective & Regulatory Services*, 299 F.3d 395, 409-10 (5th Cir. 2002), which held that the Fourth Amendment standard applicable to a social worker's visual inspection of a child's body cavities was not clearly established. But the court in *Roe* did not rest this conclusion on the existence of dissenting opinions, let alone a solitary dissenter on a single appellate panel. Rather, the court pointed to a substantial conflict among *majority opinions* of various courts of appeals, which had reached a number of irreconcilable conclusions on the issue. *See id.* at 403-04 & nn.7-8; 409-10. *Roe* thus stands for no more than the unremarkable proposition that a significant disagreement among the *holdings* of the federal appellate courts is a signal that a point of law is not clearly established. Nothing in *Roe* supports petitioner's claim that a *dissent* by a single appellate judge *by itself* establishes that the law is not clearly established.

The two district court cases petitioners cite are no more helpful to them. In *Wilson v. City of Fountain Valley*, 372 F. Supp. 2d 1178, 1196-97 (C.D. Cal. 2004), the court held that the law regarding the Fourth Amendment rights of parolees was not clearly established, but not on the basis of a dissent by a single appellate judge. Rather, the court noted that the issue had been deemed so unsettled by the judges of the

Ninth Circuit that it had been the subject of an en banc rehearing. And in *Golthy v. Alabama*, 287 F. Supp. 2d 1259, 1266-67 (D. Ala. 2003), *aff'd mem.*, 104 Fed. Appx. 153 (11th Cir. 2004), the court's holding that the right in question was not clearly established was based not on an appellate dissent, but on appellate majority holdings that rejected the claim.

It is hardly surprising that petitioners cannot muster cases supporting their contention that a lone dissent on the merits means that the majority cannot hold a point to be clearly established because that position is directly contrary to this Court's precedent. Only three years ago, in *Groh v. Ramirez*, *supra*, this Court necessarily rejected that view when it held that police officers who carried out an unconstitutional search violated clearly established law, even though two members of this Court not only disputed that the law was clearly established, but also disagreed with the majority's holding that there was a constitutional violation in the first place.

In *Groh*, the issue was whether a search of a ranch violated the Fourth Amendment because the warrant did not particularly describe the persons or things to be seized. The Court held that this deficiency rendered the resulting search unconstitutional, and that the defendants were not entitled to qualified immunity because the law clearly established the unlawfulness of such a search and no reasonable officer could think the warrant purporting to authorize it was valid. *Id.* at 563-65. Justices Thomas, joined by Justice Scalia, dissented from the holdings that the law was clearly established at the time of the search, *and* that the search was unreasonable and violated the Constitution. *Id.* at 576 (Thomas, J., dissenting).[8] That two Justices of this Court did not think the

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[8] Justice Kennedy, joined by Chief Justice Rehnquist, also dissented, but only on whether the law was clearly established, *see id.* at 566; Chief Justice Rehnquist also joined that part of Justice Thomas' dissent that

(*Footnote continued*)

search unconstitutional, however, did not compel the majority to hold that a reasonable police officer would not have known it was unlawful. Given *Groh*'s holding, petitioners' assertion that the dissenting views of a single circuit judge necessarily mean that the law is not clearly established is untenable. *See also Hope v. Pelzer*, 536 U.S. 730 (2002) (holding that defendants' use of a "hitching post" to punish a prisoner violated clearly established law even though the dissenting Justice argued that extant case law did not support that holding).

Petitioners' proposed rule not only runs counter to this Court's precedent, but it would have the paradoxical effect of giving a dissenting judge the power to veto the majority's disposition of a case. No matter how convinced the members of a panel majority might be that clearly established law supported their conclusion that a constitutional violation had occurred, petitioners would require them to grant a defendant qualified immunity whenever there was a dissent on the merits of the constitutional issue.[9] Petitioners point to no authority from any court supporting this departure from normal jurisprudential principles. Their unprecedented request that this Court recognize a dissenter's veto in qualified immunity cases does not merit consideration by this Court.

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addressed whether the law was clearly established, but not the part that discussed the merits of the Fourth Amendment claim.

[9] Indeed, petitioners go so far as to suggest that even a *district* judge's conclusion that no constitutional violation has occurred should be treated as proof that the law was not clearly established, rendering a district court judgment in favor of a defendant theoretically appeal-proof. *See* Pet. 27 (giving the district judge's view equal weight with that of the Ninth Circuit judges and stating that "four federal judges were equally divided on whether a constitutional violation occurred").

CONCLUSION

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

Respectfully submitted,

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