No. 21-1247

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ABADE IRIZARRY,
Plaintiff-Appellant,

v.

AHMED YEHIA,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Colorado
No. 20-cv-02881-NYW (Magistrate Judge Nina Y. Wang)

REPLY BRIEF OF APPELLANT

Robert Reeves Anderson
David S. Jelsma
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 80202

Andrew T. Tutt
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

E. Milo Schwab
ASCEND COUNSEL, LLC
3000 Lawrence Street
Denver, CO 80205

Max Romanow
ARNOLD & PORTER
KAYE SCHOLER LLP
70 West Madison Street
Suite 4200
Chicago, IL 60602

Oral Argument Requested

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REPLY

Rather than engage with the merits of Mr. Irizarry's arguments on appeal, Officer Yehia sidesteps the critical constitutional questions at issue in this case and instead offers this Court a distorted vision of qualified immunity that has no basis in established doctrine. On the night of the events in this case, May 26, 2019, it was clearly established in this Circuit that individuals have a First Amendment right to film police officers in the discharge of their duties in a public space. And it was clearly established that engaging in a campaign of harassment and intimidation against an individual for exercising his constitutional rights—culminating in threatening him and his companions with deadly force—is unlawful retaliation. Those two propositions decide this case. Assuming the truth of the allegations in Abade Irizarry's complaint, which the Court must at the motion to dismiss stage, Officer Yehia violated clearly established law and cannot claim qualified immunity. The decision below should be reversed.

Officer Yehia does not attempt to dispute the facts or even many of the key legal arguments. As to the facts, Officer Yehia does not dispute allegations that he harassed and threatened Mr. Irizarry because Mr. Irizarry was filming the police: Officer Yehia does not dispute that after antagonizing and interfering with Mr. Irizarry's filming of the scene, Officer Yehia drove his police cruiser "right at" Mr. Irizarry and his companion Mr. Brandt, then drove away, turned around and gunned

his cruiser directly at Mr. Brandt, before swerving around him, stopping, and repeatedly blasting his air horn at the two journalists. *See* Appellee's Answer Br. ("Ans. Br.") at 2–3 & n.1. And Officer Yehia does not dispute that his actions were so egregious that other officers instructed him to leave the scene. *See id.*

Officer Yehia also does not dispute most of the key points of law at issue here. Officer Yehia does not dispute that Mr. Irizarry had an underlying First Amendment right to film the traffic stop that night, conceding the first step of the qualified immunity inquiry. *See id.* at 1–15. Nor does Officer Yehia dispute that this First Amendment right has been recognized by six other circuits and that none have reached the opposite conclusion. *See id.* Officer Yehia also does not dispute that his actions that night amounted to unconstitutional retaliation. *See id.* And Officer Yehia does not address the grave consequences that would result if conduct like his went unchecked.

The issue in this appeal thus has narrowed to one question: whether Officer Yehia violated "clearly established" law in May 2019. He did. At the time of the events in this case, the Supreme Court's precedents and the unanimous consensus of six other federal courts of appeals all clearly established that individuals have a right to film police in the discharge of their duties in public. The right in question was "settled law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018). It was then—and is now—"obvious"; "settled"; "beyond debate." *Id.* And every reasonable

official knew that harassing and threatening someone for exercising his constitutional rights—including by putting him in fear for his physical safety—is conduct sufficiently severe to constitute unlawful retaliation.

In response, Officer Yehia argues that Mr. Irizarry could not have had a clearly established right to film the traffic stop because no Tenth Circuit case has yet held that this right exists. But contrary to Officer Yehia's argument, a right can be clearly established even without a previous case on point in this Circuit. *Contra* Ans. Br. at 1, 5, 8; *see also id*. at 13–14. The touchstone of qualified immunity is *fair notice*. As a consequence, a right can be clearly established because it is "obvious" in light of existing precedent or because a consensus of persuasive authority from other jurisdictions makes it unmistakable that the right exists. Here, both are true. Indeed, there is perhaps no better evidence that the right Officer Yehia violated was "obvious" and "beyond debate" than the fact that Officer Yehia himself has abandoned any argument that his conduct was, in fact, lawful. *See* Ans. Br. at 5 n.2.

Officer Yehia's alternative argument also fails. He contends that the "contours" of the right to record were insufficiently clear to put him on notice that he was violating clearly established law that night by retaliating against Mr. Irizarry for filming the traffic stop. Ans. Br. at 5, 10–13. Nonsense. No reasonable officer could have thought, in May 2019, that Mr. Irizarry lacked a First Amendment right to stand unobtrusively in the public street holding up his cell phone to record a traffic

stop unfolding in a public place. Cases from the Supreme Court and six other circuits all notified every reasonable officer in this jurisdiction that Mr. Irizarry's recording was First Amendment protected activity. Every reasonable officer also knew, in May 2019, that harassing and intimidating someone to the point of driving a police cruiser "right at" him to try to intimidate him for exercising his constitutional rights is unlawful retaliation. Not only is that obvious, this Circuit has a case on point (*Van Deelen*) squarely holding that harassing and physically threatening someone for engaging in constitutionally protected conduct is unlawful.

Qualified immunity is a doctrine of fair notice, not a one-free-bite rule. Assuming the truth of the allegations in Mr. Irizarry's complaint, Officer Yehia violated clearly established law by retaliating against Mr. Irizarry for filming a traffic stop in a public place from a public street. The decision below should be reversed.

ARGUMENT

I. Mr. Irizarry Plausibly Alleged that Officer Yehia's Retaliation Violated Clearly Established Law

Defendant Yehia is incorrect that police officers lack clear notice of others' constitutional rights in this Circuit unless and until this Court specifically articulates them. That is not how qualified immunity works. The central question in a qualified immunity case is whether there was fair notice to the officer—whether the officer could not have made an honest mistake about the law because the right in question

is "obvious"; "beyond debate"; and "settled law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018). And as explained in Mr. Irizarry's opening brief, in a *retaliation* case, the relevant questions are whether (1) *the activity in question* was clearly constitutionally protected; and (2) it would be clear to every reasonable officer that his retaliatory conduct against a person exercising that right was more than trivial or *de minimis*. As Mr. Irizarry explained in his opening brief, Officer Yehia violated clearly established law under both prongs of the retaliation test. *First*, the right to record police in the discharge of their duties was clearly established in this Circuit in May 2019 because the existence of the right was, by then, obvious and settled. *Second*, this Court's cases clearly established as of May 2019 that harassing and intimidating a person, including by threatening them with deadly force, rises to the level of actionable retaliation.

A. Rights Are Clearly Established In this Circuit Both When They Are "Obvious" And When A Consensus of Persuasive Authority Places Their Existence "Beyond Debate"

The Supreme Court and this Court have repeatedly held that a right can be clearly established without an in-Circuit precedent directly on point. Officer Yehia is thus incorrect that a right cannot be clearly established in this Circuit unless there is a previous "case on point" "within this Circuit." *Contra* Ans. Br. at 1, 5, 8; *see also id*. at 13–14 (arguing there must be "binding precedent" "in the 10th Circuit").

As an initial matter, a constitutional right can be clearly established because it is *obvious*. "[T]here can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (citations omitted). The principle that obvious constitutional violations are unprotected by qualified immunity is possibly the most important safety valve against overbroad claims of qualified immunity. As this Court has said: "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Lowe v. Raemisch*, 864 F.3d 1205, 1211 (10th Cir. 2017) (quotation marks omitted). It is *because* "[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional" that "'[t]he easiest cases don't even arise.'" *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (quoting *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)). The Court applies this branch of qualified immunity doctrine in appropriate cases. *See Truman v. Orem City*, 1 F.4th 1227, 1235–36, 1240 (10th Cir. 2021) ("This is … an 'obvious case'"); *Colbruno v. Kessler*, 928 F.3d 1155, 1164–65 (10th Cir. 2019) ("All we need to take from these cases is a conclusion that was obvious without them"); *McCoy v. Meyers*, 887 F.3d 1034, 1052–53 (10th Cir. 2018) ("[O]urs is 'the rare obvious case'").

In addition, a rule can be *settled law* because a consensus of persuasive authority makes it so. *Wesby*, 138 S. Ct. at 589–90. A rule is "settled law" when it "is dictated by controlling authority or *a robust consensus of cases of persuasive authority*." *Id.* (emphasis added) (citations and quotation marks omitted). Officer Yehia's own Answering Brief concedes that a consensus of persuasive authority is enough to create settled law in this Circuit. *See* Ans. Br. at 11 (quoting *Washington v. Unified Gov't of Wyandotte Cnty.*, 847 F.3d 1192, 1197 (10th Cir. 2017)). "Persuasive authority" means "decisions from other circuits[.]" *Ullery v. Bradley*, 949 F.3d 1282, 1292 (10th Cir. 2020). This Court in *Ullery* expressly rejected the notion that in-Circuit precedent is a necessary prerequisite to overcome qualified immunity. *See id.* at 1291–92. The Court held that requiring an on-point case in this Circuit before a right is clearly established would "conflict[ ] with Supreme Court authority, our precedents, and the decisions of our sister circuits." *Id.* at 1292. "Such a restriction would transform qualified immunity into an absolute bar to constitutional claims in most cases—thereby skewing the intended balance of holding public officials accountable while allowing them to perform their duties reasonably without fear of personal liability and harassing litigation." *Id.*

As Mr. Irizarry explained in his Opening Brief, the question in a qualified immunity case is whether reasonable officials had "fair and clear warning" that particular conduct was constitutionally protected. Op. Br. at 14. Officer Yehia had

more than fair warning. As of May 2019, it was clear to every reasonable law enforcement officer that individuals have a First Amendment right to film police in the discharge of their duties in public subject only to reasonable time, place, and manner restrictions. Officer Yehia's cabined description of qualified immunity is contrary to the law of this Court.

1. The Right to Record Police In the Discharge of Their Duties in Public Was Clearly Established On the Basis of Obviousness and Circuit Consensus

In his Opening Brief, Mr. Irizarry explained why the right to record police officers in public was clearly established in this Circuit in May 2019. The right was obvious in light of existing Supreme Court precedent. Op. Br. at 16–24. Indeed, three other Circuits—the First, Ninth, and Eleventh—had found the right was obvious many years ago. *Id.* at 16–17. Mr. Irizarry also explained that a robust consensus of persuasive authority established the existence of the right. *Id.* at 24–27. By May 2019, six federal courts of appeals had held that there is a right to film police officers in the discharge of their duties in public, and not one Circuit had reached a contrary conclusion. *Id.* at 33. As further evidence of the pre-existing right, the Department of Justice has taken the view, since 2012, that individuals have the right to record police officers in public. *Id*. at 23–24. The United States has now filed an *amicus* brief in this case reiterating its long-settled view.

The right's clarity and importance are also evidenced by the numerous *amici* who have support Mr. Irizarry in this case. *See* Brief of *Amici Curiae* First Amendment Scholars (Doc. 10873740); Brief of *Amicus Curiae* National Police Accountability Project (Doc. 10874267); Brief of *Amicus Curiae* The Cato Institute (Doc. 10874802); Brief of *Amicus Curiae* Electronic Frontier Foundation (Doc. 10874855).

In response, Officer Yehia offers *no defense at all* that his conduct that night was lawful. He does not argue that Mr. Irizarry in fact lacked a First Amendment right to film the traffic stop that night. He does not contend that it was lawful for him to drive his police cruiser right at Mr. Irizarry in retaliation for filming the stop. Sometimes the best evidence that a question is "beyond debate" is that the offending party refuses to debate it.

The responses Officer Yehia marshals are meritless. Officer Yehia claims that because "the right [to record police] has yet to be recognized in this Circuit," that means it does not yet "exist[ ]" in this Circuit. Ans. Br. at 8. He asks: "If this is *THE* case that establishes the right in the 10th circuit, how would a reasonable officer in this case know that he was violating said right?" *Id.* at 9. The answer is simple: because it was *obvious* in light of controlling Supreme Court precedent and because it was settled law given the uniform and robust consensus of persuasive authority

from six other circuits. That is what Mr. Irizarry argued in his opening brief, and that is what the district court below recognized. Officer Yehia offers no response.

Officer Yehia claims that *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021)—in a footnote—held that there was no right to record police in the discharge of their duties as of the date of that decision, March 29, 2021. *See* Ans. Br. at 8–9 (quoting *Frasier*, 992 F.3d at 1020 n.4). That too is incorrect. The footnote—which speaks for itself—states that the *Frasier* Court was declining to recognize the right to record police because any statement recognizing the right would be dictum. *See Frasier*, 992 F.3d at 1020 n.4. The *Frasier* Court explained that it was wary of announcing that the right existed in that case because "neither party disputed that such a right exists (nor did the district court question its existence)." *Id.* If the *Frasier* footnote stands for any proposition, it stands for the proposition that the right to film police was so obvious and well-established by the time *Frasier* was litigated that the defendants in that case *did not even dispute its existence* (just as Officer Yehia has not disputed it in this case). That the defendants in two separate qualified immunity cases in this Circuit have now declined to defend the merits of restricting the recording of police activities in public is powerful evidence that this right is clearly established.

2. The Right to Be Free from Threats of Deadly Force In Retaliation for Engaging in Constitutionally-Protected Conduct Was Also Clearly Established

Officer Yehia also does not dispute that every reasonable officer would have known that Officer Yehia's conduct in response to Mr. Irizarry's filming amounted to unlawful retaliation. As Mr. Irizarry explained in his Opening Brief, actions that would chill a person of ordinary firmness from engaging in constitutionally protected conduct are actionable. Op. Br. at 34, 36 (citing *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)). The standard requires only that the retaliatory actions be more than trivial or de minimis. *Eaton v. Meneley*, 379 F.3d 949, 954–55 (10th Cir. 2004). At minimum, it would have been clear to every reasonable officer that driving a police cruiser right at someone—that is, threatening them with deadly force—would chill a person of ordinary firmness. *See Van Deelen v. Johnson*, 497 F.3d 1151, 1157 (10th Cir. 2007) (Gorsuch, J.).

B. The Right to Record Was Established With Sufficient "Clarity" to Put Officer Yehia On Notice That Mr. Irizarry Was Engaged in First Amendment Protected Conduct

Officer Yehia claims the "contours of the right" were not "sufficiently clear" for a reasonable official to understand that Officer Yehia's decision to retaliate against Mr. Irizarry for recording the stop violated clearly established law. *Contra* Ans. Br. at 10–11 (quoting *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013)). But as Mr. Irizarry explained in his Opening Brief, Officer Yehia's argument relies

on the wrong qualified immunity cases, Op. Br. at 3, 12—namely, on cases outside of the First Amendment retaliation context. *See* Ans. Br. at 10–13. For his claim that reasonable officials must understand that their specific conduct violates a specific right, Officer Yehia cites cases involving the *direct violation* of rights, not cases involving *retaliation* for engaging in constitutionally protected conduct. *See id.* (citing Fourth Amendment cases almost exclusively). In his recitation of the qualified immunity standard, Officer Yehia does not cite or engage with a single retaliation case. *See id.*

In a retaliation case like this one, the court undertakes two separate inquiries: first, it determines whether a constitutional right is clearly established, and, second, whether retaliation occurred to chill the exercise of that right. *See Van Deelen*, 497 F.3d at 1155–56; *Worrell*, 219 F.3d at 1213. The Court does *not* collapse those inquiries into a single question. Indeed, doing so would be perverse—it would make officials almost impossible to hold accountable for retaliation because the methods by which retaliation can be accomplished are nearly infinite. *See Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1333–34 (10th Cir. 2007) (discussing that in order to deny qualified immunity for First Amendment retaliatory claims the court must "ask whether the right [] was clearly established law such that it put defendants on notice of the impropriety of their alleged retaliation"); *Van Deelen*, 497 F.3d at 1158 (holding that Deputy Flory was not entitled to qualified immunity as his

infringement upon Plaintiff's First Amendment rights were clearly established despite no prior retaliation cases dealing with intimidation and name-calling in response to filing multiple tax appeals).

Thus, only Mr. Irizarry's First Amendment right to film the traffic stop needed to be clearly established in this case. And every reasonable official at the time of the events in this case would have understood that he was doing just that. Taking the allegations in the complaint as true, every reasonable police officer would have known that Mr. Irizarry was engaged in First Amendment protected conduct. Mr. Irizarry was plainly using a cell phone to record the traffic stop; indeed, other officers on the scene advised Officer Yehia that "four males had arrived on the scene and were video recording their D.U.I. traffic stop." AA93.[1]

Those facts—taken in the light most favorable to Mr. Irizarry—establish that every reasonable police officer would have understood that Mr. Irizarry was engaged in First Amendment protected activity. Every Circuit that has passed on the question presented in this case has announced a rule under which Mr. Irizarry's conduct was protected by the First Amendment. *See Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)) (there is a clearly established right to "photograph and record" "law

[1] "AA#" denotes the page(s) in Appellant's Appendix, which comprises a single volume.

enforcement officers engaged in the exercise of their official duties in public places"); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) ("[T]he public has the . . . right to record—photograph, film, or audio record—police officers conducting official police activity in public areas"); *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) ("[T]he First Amendment protects the right to record the police."); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012) (First Amendment right to "openly audio record the audible communications of law-enforcement officers . . . when the officers are engaged in their official duties in public places"); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (the First Amendment protects "the filming of government officials in public spaces"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (individuals have "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"). Mr. Irizarry also explained in his Opening Brief that, given the Supreme Court's holding in *United States v. Stevens*, 559 U.S. 460, 469–70 (2010), it should have been obvious to every police officer that it is unlawful to prohibit the "creation" of "depictions" on the basis of their content. *See* Op. Br. at 32.

The importance of these holdings cannot be overstated at the intersection of First Amendment rights that involve free speech and the freedom of the press. "When wrongdoing is underway, officials have great incentive to blindfold the

watchful eyes of the Fourth Estate." *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). If officials could harass those who peacefully film traffic stops with impunity, the First Amendment's guarantees would be hollow. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

As to whether Officer Yehia's specific retaliatory conduct was clearly unlawful, *Van Deelen v. Johnson*, 497 F.3d 1151, 1157 (10th Cir. 2007), put every reasonable officer on notice that threatening a person with deadly force for engaging in constitutionally protected conduct constitutes unlawful retaliation. *See* Op. Br. at 41–42.

In sum, the right to record police and the right against retaliatory intimidation were both clearly established at the time of the events in this case. The Court should therefore reject Officer Yehia's claim that the "contours" of the right were so unclear that he was not on notice that his actions in this case violated Mr. Irizarry's constitutional rights.

II. In the Alternative, Mr. Irizarry Should Be Permitted to Amend His Complaint

If the Court holds that Mr. Irizarry's complaint fails because it contains insufficient factual allegations, Mr. Irizarry should be given the opportunity to amend his complaint. Officer Yehia argues that amendment would be futile because there is no set of facts under which Officer Yehia would have violated clearly

established law. *See* Ans. Br. at 13–14. That depends on how the Court decides the case. But if, for any reason, the Court holds that Mr. Irizarry's complaint fails because the factual allegations are insufficient, the Court should remand the case with instructions to permit Mr. Irizarry to amend his complaint.

CONCLUSION

Mr. Irizarry respectfully asks the Court to reverse the decision below, reinstate his complaint, and remand for further proceedings. Alternatively, the Court should reverse with instructions to permit Mr. Irizarry to amend his complaint.

Respectfully submitted,

s/ Andrew Tutt

Andrew T. Tutt
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

Robert Reeves Anderson
David S. Jelsma
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 80202

E. Milo Schwab
ASCEND COUNSEL, LLC
3000 Lawrence Street
Denver, CO 80205

Max Romanow
ARNOLD & PORTER
KAYE SCHOLER LLP
70 West Madison Street
Suite 4200
Chicago, IL 60602

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) because the brief contains 3,826 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

Dated: February 8, 2022

s/ Andrew Tutt
Andrew T. Tutt

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that all required privacy redactions have been made in this brief pursuant to 10th Cir. R. 25.5. I further certify that the hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically and that the electronic submission of this brief was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Dated: February 8, 2022

s/ Andrew Tutt
Andrew T. Tutt

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022, I electronically filed the foregoing brief with the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users.

Dated: February 8, 2022

s/ Andrew Tutt
Andrew T. Tutt