No. _____

In The
Supreme Court of the United States

HEATH RANKIN,

Petitioner,

v.

CHRISTIAN LONGORIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Manuel Longoria led police on a high-speed chase for more than an hour, through residential areas and school zones. He attempted to ram patrol cars and run over police officers and told the officers that he had a gun and threatened to shoot them. After police disabled his vehicle, Longoria exited, concealed his hand behind his back, refused commands to show his hands, and then made a sudden, threatening movement – with a shiny black object in his hand – toward Pinal County Sheriff Deputy Heath Rankin. In that split-second, fearing for his life, the lives of his fellow officers, and the bystanders that had gathered, Deputy Rankin fired two deadly shots. Everything was captured on videotape. The Ninth Circuit denied qualified immunity, holding that deadly force was unreasonable in these circumstances and violated a clearly established right. The questions presented are:

1. In finding the use of deadly force unreasonable against a fleeing suspect, who was known to be armed and threatened and attempted to kill officers, did the Ninth Circuit err in rejecting uncontroverted video evidence – depicting the suspect reaching for his waistband and then quickly raising his arms up, chest high, and extending them out in the officers' direction while holding a shiny black object – and instead relying on facts unknown to the officer-defendant and speculation of the suspect's subjective intent to manufacture disputes regarding the threat of immediate harm?

QUESTIONS PRESENTED – Continued

2. Did the Ninth Circuit err in concluding that *Tennessee v. Garner*, 471 U.S. 1 (1985), put every reasonable officer on notice that deadly force under these particular circumstances is a clearly established constitutional violation, where this Court has said repeatedly that *Garner* does not clearly establish the law in excessive force cases and a consensus of cases across several circuits have affirmed the use of deadly force by officers in similar circumstances?

PARTIES TO THE PROCEEDING

The Petitioner is Heath Rankin, a defendant-appellee in the proceeding below.

The Respondents, plaintiffs-appellants below, are Christian Longoria, on behalf of himself and all statutory beneficiaries of Manuel O. Longoria; Joshua R. Wallace, as the personal representative of the Estate of Manuel O. Longoria; Manuel Longoria, Jr.; Lynnette Longoria; P. C. L.; T. A. L.; K. R. L.; Sanisya Lott; T. L.; and A. L.

Other parties to the proceeding below are defendants-appellees Pinal County, a political subdivision of the State of Arizona; and Paul R. Babeu, in his official capacity as Sheriff of Pinal County, Arizona.

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PETITION FOR WRIT OF CERTIORARI

Over the last few years, this Court has carefully refined the standard for qualified immunity, particularly in law enforcement cases involving the use of deadly force. The resulting test has made it more difficult to find that an officer violated "clearly established" law and, thus, subject him to suit. A court can only deny an officer immunity if it was "beyond debate" that using deadly force in the "particular circumstances" was unconstitutional. *D.C. v. Wesby*, 138 S. Ct. 577, 589-90 (2018).

In the wake of that transformation, a trend has emerged in the Ninth Circuit that circumvents that stringent test altogether: find factual disputes that cast doubt on the officer's perception of the risk of harm; use those disputed facts to preclude a legal determination on the reasonableness of the force; and then rely on those same factual disputes to avoid addressing whether the asserted constitutional violation was clearly established. *See Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017); *Hughes v. Kisela*, 862 F.3d 775 (9th Cir. 2017).

The Ninth Circuit in this case followed that script. But to dispute the officer's perception, it shirked several basic Fourth Amendment precepts. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). It employed a subjective standard and considered what the suspect may have intended. It engaged in 20/20 hindsight and considered the fact that the suspect was actually unarmed. It looked outside the perspective of the

defendant-officer and considered facts unknown to him. It ignored material facts actually known to the defendant-officer, including reports the suspect was armed and threatened officers. Most troubling of all, it refused to defer to uncontroverted video evidence, which shows the suspect make a sudden, threatening gesture toward the officer a second before he responded with deadly force. *See Scott v. Harris*, 550 U.S. 372, 378-80 (2007).

The Ninth Circuit then continued its recalcitrance of the Court's standard for "clearly established" law and held that one case – *Tennessee v. Garner*, 471 U.S. 1 (1985) – was enough to clearly establish the constitutional violation. The Court should take this opportunity to blunt the Ninth Circuit's counter-offensive on the reasonableness inquiry and reclaim the upper-hand on the standard for qualified immunity and its "clearly established" prong.

OPINIONS BELOW

The Ninth Circuit's opinion (Appendix A) is reported at 873 F.3d 699 (9th Cir. 2017). The district court's order (Appendix B) is unreported but available on Westlaw at 2016 WL 10637122.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its opinion on October 10, 2017, and denied a timely petition for rehearing and rehearing en banc on November 21, 2017. (Appendix C.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. Constitution and 42 U.S.C. § 1983 are set forth verbatim at Appendix D.

STATEMENT OF THE CASE

I. Facts.

A. The High-Speed Pursuit.

On January 14, 2014, a City of Eloy police officer attempted to stop a stolen vehicle. (ER 112.)[1] The suspect driving the stolen vehicle, Manuel Longoria, did not stop; instead, he fled, leading police on a dangerous high-speed chase for over 70 minutes. (ER 112; Appendix ("App.") E-1 at 12:24:32-13:34:04.) The pursuit, involving more than 20 law enforcement officers from both the Eloy Police Department ("EPD") and the Pinal

[1] "ER" refers to Respondents' Excerpts of Record in the Ninth Circuit. "SER" refers to Petitioner's Supplemental Excerpts of Record in the Ninth Circuit.

County Sheriff's Office ("PCSO"), started at approximately 12:24 p.m. (ER 106-153, 358-380, 386-450; App. E-1 at 12:24:32.) An EPD vehicle's dash camera captured the pursuit on video. (App. E-1.)

Longoria drove in circles around the city, through residential neighborhoods, school zones, alley ways, and parking lots, reaching speeds of up to 80 miles-per-hour. (ER 112, 122-133, 147, 497; App. E-1.) He drove "extremely erratic," "with extreme disregard for the lives of fellow motorists and bystanders," blowing through every stop sign and intersection and driving on the wrong side of the road and on sidewalks. (ER 117, 369, 497, 662; App. E-1.) He almost hit a bystander and nearly collided with at least three civilian vehicles. (ER 112, 125, 130, 141; App. E-1.)

Longoria successfully rammed into several police cars and attempted to collide head-on with even more, causing them to swerve off the road. (ER 112, 119, 124-127, 366, 376; App. E-1.) Longoria was "aiming at" police, "trying to hit" them and pointing his hand at them in the shape of a gun. (ER 151, 584.) On at least one occasion, Longoria saw an officer standing on the side of the road and tried running over him. (ER 398, 584.)

During the pursuit, police learned that Longoria had a "falling out" with his children's mother and kept circling back to a house Longoria believed she was in. (ER 113, 147, 638-639.) Family members told police that Longoria "was in possession of a gun." (ER 147, 151.)

At 12:42 p.m., EPD contacted PCSO and requested its assistance "with a pursuit involving a male subject in a stolen vehicle." (ER 249, 365-366.) Several PCSO deputies responded. (ER 363-398.) PCSO Deputies Heath Rankin and John Rice, who were patrolling in the nearby City of Casa Grande, also responded to the call. (ER 729-738.)

The PCSO dispatcher broadcasted information to its deputies over its own radio channel. (ER 156-181.) Deputy Rankin listened to that broadcast on his radio as they drove to Eloy. (ER 737.) Deputy Rankin also monitored EPD's radio traffic to the extent he could, but that information was difficult to hear. (ER 256, 261, 269-270.)

Meanwhile, at 12:49 p.m., Longoria stopped in the middle of the road and yelled out to police that "he was not going to stop and that [they were] going to have to kill him." (ER 112, 120, 127, 369, 496, 500-502, 584, 636, 668; App. E-1 at 12:49:05.) Longoria drove off, but a few moments later he stopped again in the middle of the road. (App. E-1 at 12:52:32.) A civilian ran up to the vehicle and attempted to stop Longoria. (ER 113; App. E-1 at 12:52:49.) Longoria sped off with the civilian clinging to the door, dragging him 50 feet until he fell to the pavement. (ER 399; App. E-1 at 12:52:49-12:52:59.)

At 1:09 p.m., Longoria stopped in the road a third time and exited the vehicle. (App. E-1 at 13:09:29.) Longoria "kept his right hand behind [his] back, giving the impression that he was concealing a gun," and

yelled, "I have a gun, don't get any closer. You're going to have to shot [sic] me, I'm not going in alive, I want to die." (ER 115, 118, 120, 378, 434, 671.) Longoria also threatened to shoot the officers. (ER 398-399, 441, 497, 668.)

The officers ordered Longoria to show his hands and get on the ground, but Longoria refused and continued to yell, "I have a gun and you're not going to take me in alive." (ER 113, 115-116, 395-396, 668-669.) Longoria ignored the officers' orders to "put the gun down," got back into the car, and sped off. (ER 116; App. E-1 at 13:11:20.)

At about 1:11 p.m., Deputy Rankin arrived on the scene, just as Longoria drove away. (ER 253, 287, 739.) Up to that point, PCSO had dispatched – and Deputy Rankin heard – that "the driver has a weapon," "the driver is armed," the driver is "hiding his right hand," and the driver is "high risk – high risk." (ER 157-162, 252, 273, 282, 737.)

Deputies Rankin and Rice were driving through a residential neighborhood, when suddenly the pursuit was heading directly toward them. (ER 250-251; App. E-1 at 13:12:40.) The deputies pulled over to the side of the road, and Deputy Rankin got out of the vehicle. (ER 254, 740-742.) As Longoria drove by, he pointed something at Deputy Rankin "in a one-handed shooting grip with an object in his hand," and said, "I'm going to kill you." (ER 254-256, 743.) Deputy Rankin ducked behind his patrol car, fearing he was going to be shot. (ER 255, 743-744; App. E-1 at 13:12:42.)

Deputy Rankin reported this encounter over the PCSO radio. (ER 163.)

The pursuit continued, with PCSO dispatch reporting – and Deputy Rankin hearing – that Longoria was hitting or attempting to ram law enforcement vehicles. (ER 164, 168, 251, 366.) By this time, large crowds of bystanders began lining the streets to watch the pursuit unfold. (ER 117, 137, 171-173.)

At 1:30 p.m., PCSO deputies were ordered to stop their pursuit because of the risk to bystanders, but they were directed to remain in the area to assist EPD with taking the suspect into custody once the pursuit ended. (ER 291, 376, 379.) Deputy Rankin's supervisor ordered Deputies Rankin and Rice to help provide a perimeter and assist EPD with whatever they needed. (ER 292-293, 745.) The deputies complied with that order and set up near the high school to assist with a crowd that had gathered. (ER 295-296.)

At 1:33 p.m., an EPD officer employed a pit maneuver that sent the stolen vehicle into a spin. (App. E-1 at 13:33:52.) When the vehicle finally came to rest, Longoria exited and stood with his back against the side of the car and his right hand concealed behind his back; he again yelled to officers that he had a gun. (ER 133-139, 435; App. E-1 at 13:34-04.) Officers rushed toward Longoria from all directions, repeatedly yelling orders to show his hands and get on the ground. (ER 133-136, 150-153, 440, 570, 574, 596, 681.) Longoria did not comply, and kept his right hand concealed behind his back. (Id.)

B. The Stand-Off.

Deputy Rankin had been waiting in his vehicle just northeast around the corner where the stolen vehicle came to rest. (ER 535, 537, 752.) Deputies Rankin and Rice heard the collision and ran toward the scene. (ER 302, 367, 752.) Longoria was standing on the south side of the vehicle facing south; Deputy Rankin ran from his position northeast of the vehicle in a southwesterly direction. (ER 311, 535, 537, 753; App. E-1 at 13:34:15-13:34:23.) As he ran, he could hear a "roar of police officers" yelling commands at Longoria. (ER 303, 757-758.)

Deputy Rankin took his position approximately 30-40 feet southwest of Longoria. (ER 311, 754, 763.) He did not have any protection (cover) in front of him. (ER 767, 773-774.) From Deputy Rankin's vantage point, he could see that Longoria was concealing his right hand behind his back, but could not see below Longoria's waist because the open car door obstructed his view. (ER 316-318, 761, 825.)

Shortly after taking his position, other officers fired several beanbag shotgun rounds and deployed a taser to try to get Longoria to submit, but they had no effect on him. (ER 121, 136, 150, 304, 364, 567, 684-685.) In an interview taken just hours after the incident, Deputy Rankin described what he perceived happened next:

> [W]hat he did do after the less lethal rounds hit him and I had him at gun point – giving him commands – I don't know if he heard me

> or a split second his right hand came from his center waist area. I can't say that it was in a pocket or pants – came from this area 'cause he was behind the open driver door. . . . He made a movement here. From the movement there he started swinging towards me with his hand – with his right hand extended. When he extended it at the time of the day there was something – I'm gonna say it was silver but black or silver with the sun hitting it at [sic] shine will look silver. . . . It's the same glare. I could not readily discern what it was. At that point and time he was said to have a weapon. I heard on Eloy's channel he had a weapon, um, our channel he had a weapon. He threatened to fucking kill me down there. I thought he had a gun and I thought he was pointing it at me to kill me.

(ER 402-406, 761-762.) In that instant, Deputy Rankin fired two shots. (ER 350, 353, 762-763.) The shots struck Longoria in the back and killed him. (ER 448-449, 618.)

After the shooting, police recovered from the scene (near Longoria's body) a black and white beaded rosary. (ER 146.) No gun was found.

C. The Dash Camera Video.

In addition to the entire pursuit, the dash camera video shows Longoria exiting the vehicle with the rosary beads in his hand and holding them as he swings his arms toward Deputy Rankin. (App. E-1

at 13:34:06-13:34:08, 13:34:31-13:34:34; App. E-2, images 16h36m48s51 through 16h37m07s53.) The dash camera video also shows the rosary beads flashing/shining in the sun (App. E-2, images 16h18m36s34 & 16h19m41s41), and Longoria's hand in the shape of a "trigger finger" as he punches them out in Deputy Rankin's direction (App. E-2, images 16h24m49s45 through 16h24m52s45). The dash camera also captured the moment Deputy Rankin ducked for cover earlier in the pursuit, when he said Longoria drove past him, pointed something out the window, and threatened to kill him. (App. E-1 at 13:12:42.)

D. The iPhone Video.

Two days after the shooting, police recovered a video recorded by a bystander on his iPhone. (ER 392-393.) The video begins just before police initiated the pit maneuver that stopped the vehicle. (App. E-3.) The video was taken about 200 feet away from Longoria, but from an angle (south of Longoria) that shows everything that transpired from the moment he exited the vehicle without visual obstruction. (ER 382; App. E-3.)

In real-time, this video shows the following: Longoria exits the vehicle, hides his right hand behind his back with his backside against the vehicle, and slides toward the rear of the vehicle; Longoria keeps his right hand behind his back as officers surround him; officers deploy less-lethal force; in response, Longoria turns and takes a few steps toward his open car door (and Deputy Rankin's position); as he moves in that

direction, his body and arms flinch defensively to the less-lethal rounds; Longoria then drops both hands (together) below his waist, slightly leaning forward as if pulling something from his waistband, brings both hands back up (together) chest high, and punches them out (together) in Deputy Rankin's direction; Longoria then drops both hands down (unclasped), turns toward the vehicle, raises his arms up in the air, then falls to the ground. (App. E-3, 20s-51s.)

Only 31 seconds elapsed between the moment Longoria exits the vehicle and the moment he is shot. (App. E-3, 20s-51s.) In the video, Deputy Rankin can be seen running in the background 15 seconds after Longoria exits the vehicle. (App. E-3, 35s.) He takes his position southwest of Longoria (off screen left) just 8 seconds before his first shot. (App. E-3, 43s.) The less-lethal rounds are deployed about 3 seconds after he takes his position. (App. E-3, 47s.) Only 4 seconds elapsed from the first less-lethal round to Deputy Rankin's first shot. (App. E-3, 47s-51s.) Longoria reached for his waistband, punched his hands out toward Deputy Rankin, dropped his hands, turned, and raised his hands in the air all in about 1 second. (App. E-3, 49s-51s.)

The iPhone video also captures two officers in the same area as Deputy Rankin (screen left) ducking in response to Longoria reaching for his waistband and springing his arms toward them. (SER 8; App. E-3, 51s.)

E. The Stabilized iPhone Video.

As part of its investigation, PCSO retained an expert, Paris Ward, to stabilize the iPhone video to "remove camera shake" and synchronize the sound with the images.[2] (ER 382, 384, 447.) The stabilized video confirms Deputy Rankin's perception of Longoria's actions and everything captured on the original iPhone video, albeit zoomed in and stabilized: *after* reacting to the less-lethal rounds, Longoria reaches for his waistband, then brings both hands back up together, chest high, and punches them out in Deputy Rankin's direction. (App. E-4.) Ward opined: "Approximately 1 second before the first shot, Mr. Longoria can be seen bringing his hands up from his waist in a manner consistent with pointing a gun in a two-handed grip." (ER 384, 447.)

F. Deputy Rankin's Perception-Reaction Time.

PCSO also retained Dr. William Lewinski. (ER 447-449.) Dr. Lewinski opined that it takes a suspect only .92 seconds to "point a gun and turn 180 degrees." (Id.) He reviewed the stabilized iPhone video and noted that it took Longoria only .30 seconds to turn away and raise his hands after he punched his arms out toward Deputy Rankin. (Id.) He also opined that it would have taken Deputy Rankin at least 1.02 seconds to perceive,

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[2] Because of the distance between the camera and Longoria, the sound on the iPhone video is delayed at least .17 seconds. (ER 382.)

process, and react to Longoria's threatening movement, which explains why the shots are heard after Longoria already turned away. (Id.)

G. Deputy Rankin's Deposition Testimony.

Deputy Rankin testified at his deposition consistent with his initial statements and the video evidence. He testified that Longoria

> raised his hands from that . . . position where his hands are down by his waist and . . . he starts coming up, he extends his arms in a shooting stance and lowers his hands as if you were looking through sights to shoot and kill. . . . When he did that, there was a metallic flash with his hands that came up. I can't say if it was black or silver. It was the same shine that metal would have in the sunlight consistent with a gun. Based off all of the information that I knew from the beginning of the call to that point, yes, I believe he had a gun by the way he was acting.

(ER 314-315, 319.) He further testified that he "made the conscientious decision to shoot" Longoria in the "[s]plit second" Longoria assumed that "shooting stance." (ER 336, 349-350, 351-352.)

II. Litigation.

A. District Court.

Longoria's family sued Deputy Rankin, the Pinal County Sheriff (in his official capacity), and Pinal

County, alleging excessive force, in violation of the Fourth Amendment, and wrongful death under Arizona law.

Deputy Rankin moved for summary judgment based on qualified immunity, relying primarily on his interview statements and the iPhone videos. In opposition, Respondents submitted, in part: the dash camera video; a series of still shots of the dash camera video; an expert report; and the EPD and PCSO departmental reports, which included the written reports of all officers involved. The PCSO departmental report also included the opinions of Ward and Dr. Lewinski. (ER 381-384, 447-491.) Respondents did not contest the admissibility of the stabilized iPhone video, nor did they rebut Dr. Lewinski's perception-reaction opinions. (App. 32 n.2.)

The district court concluded that Deputy Rankin's use of force was objectively reasonable. (App. 29-36.) The court easily found that the first (severity of the crime) and third (attempting to evade arrest) *Graham* factors were satisfied. (App. 30-31, 35-36.) Regarding the second *Graham* factor (immediate threat of harm), the court concluded that the "uncontroverted video evidence shows that Mr. Longoria came up with both hands in front of him facing Defendant Rankin's direction." (App. 33.) That conclusion was based on the district court judge's own review of the dash camera and iPhone videos. (App. 32-33.) The district court judge recounted what she saw on the videos:

> The dash camera video shows Mr. Longoria exiting his vehicle with one hand behind his back with some object in it. Mr. Longoria goes out of frame but is visible in the car reflection when Defendant Rankin runs onto the scene. Mr. Longoria reenters the frame facing Defendant Rankin with both arms up and slightly bent. Mr. Longoria's hands go down again and come up from his waist with him holding something in one of his hands. Though Mr. Longoria goes out of frame again you can see a reflection of his hands in the air followed by one hand sliding down the side of the car. A stabilized iPhone recording of the incident shows Mr. Longoria with one hand behind his back. He turns toward Defendant Rankin after two loud pops. His arms swing bent, go down toward his waist, and then come back up to about chest height. Mr. Longoria then turns with his hands above his head and is shot twice. The time stamp shows that only a few seconds elapsed between Mr. Longoria raising his hands to chest height and him turning around and being shot.

(Id., internal citations and footnote omitted.)[3]

B. Court of Appeals.

The Ninth Circuit reversed. Regarding the first prong of the qualified-immunity analysis – whether

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[3] The district court's reasonableness determination resulted in the dismissal of all claims. (App. 36-39.)

Deputy Rankin violated Longoria's Fourth Amendment rights – the panel held there were several factual issues precluding a determination that Longoria posed any threat to Deputy Rankin. It first rejected the video evidence and held that "the moment Rankin describes as a 'shooter's stance' is not perceptible" on the videos. (App. 12-14, 16.) The panel then concluded that other evidence in the record raised questions as to whether Deputy Rankin knew or should have known that Longoria was unarmed or harmless, for example, his 20/20 vision and the fact that Longoria was actually unarmed in retrospect. (App. 14-18.)

On the second prong of the qualified-immunity analysis – whether the constitutional violation was clearly established – the panel concluded that this Court's decision in *Garner* was dispositive:

> The law governing this case is clearly established: "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."

(App. 20, quoting *Garner*, 471 U.S. at 11.) The panel also reiterated the purported fact issues related to the reasonableness of the use of force and concluded that a "jury . . . could thus find that Rankin violated Longoria's clearly established right." (App. 21-23.)

In denying immunity, the Ninth Circuit did not mention or address the many circuit court decisions upholding the reasonableness of deadly force when an officer mistakenly believed the suspect brandished a

weapon and made a split-second judgment to end that perceived threat.

REASONS TO GRANT THE PETITION

I. THE NINTH CIRCUIT ABANDONED DECADES OF SUPREME COURT PRECEDENT TO DENY YET ANOTHER LAW ENFORCEMENT OFFICER QUALIFIED IMMUNITY.

A. In Concluding That Deputy Rankin's Use of Deadly Force Was Unreasonable, the Ninth Circuit Disregarded Nearly Every Pertinent Legal Principle.

1. The Ninth Circuit refused to acknowledge the video evidence, which clearly depicts Longoria making a threatening gesture in Deputy Rankin's direction.

Even the Ninth Circuit has recognized the universal proposition that deadly force is "unquestionably reasonable" if a suspect "reaches for" his waistband or makes a "similar threatening gesture." *Cruz v. City of Anaheim*, 765 F.3d 1076, 1078-79 (9th Cir. 2014); *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) ("If the person is . . . reasonably suspected of being armed . . . a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat.").

Here, the video evidence shows Longoria reach for his waistband and then spring his arms up – chest high, arms extended, and hands together – with a

shiny black object in his hand, all in Deputy Rankin's direction. "[T]he videotape . . . speak[s] for itself." *Scott*, 550 U.S. at 379 n.5. When video evidence "clearly contradicts the version of the story told by respondent," *Scott* instructs that the video is dispositive. 550 U.S. at 378-80. Respondents' version – that Longoria did not make a threatening gesture – is clearly contradicted by the video evidence. The Ninth Circuit did not adhere to *Scott*'s directive.

Instead, the Ninth Circuit skirted *Scott* and bluntly pronounced that a "shooter's stance" is not perceptible. (App. 12-14, 16.) But whether you can make out a "shooter's stance," which implies Longoria's subjective intent to strike that particular pose, is irrelevant. Reasonableness is an objective standard – "judged from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. Through that lens, Longoria's sudden, threatening movement – in combination with reports that he was armed and had threatened to kill the officers – is enough to respond with deadly force. *See Cruz*, 765 F.3d at 1078-79.

To minimize the district court judge's independent conclusion that Longoria's threatening gesture is both perceptible and uncontroverted, the Ninth Circuit criticized her for "rel[ying] on a single frozen frame from one of the videos." (App. 11.) But she did not rely on a single frozen frame. The district court judge reviewed and relied on *all* the video evidence, including the dash camera and stabilized iPhone videos, in real-time. (App. 32-33.)

The Ninth Circuit also concluded that frozen frames of the videos illustrating a "shooter's stance" simply create fact issues "about the reasonableness of Rankin's actions and the credibility of his post-hoc justification of his conduct." (App. 12.) That cynicism, however, presumes Deputy Rankin recounted his perception *after* reviewing the frozen frames. But Deputy Rankin had not seen any of the videos when he gave his initial statement four hours after the shooting. PCSO did not have the iPhone video until two days *after* his interview.

If, as the Ninth Circuit believes, Longoria's "shooter's stance" is not evident from the videos in real-time, but apparent from the frozen frames, then the frozen frames *corroborate* Deputy Rankin's initial account. They are completely consistent with his statement. His ability to perceive – in real-time, in a split-second – what the Ninth Circuit purports to only see in a frozen frame, is remarkable, not an issue of fact. The frozen frames do not impugn his credibility; they bolster it. *Cf. Dooley v. Tharp*, 856 F.3d 1177, 1182-84 (8th Cir. 2017) (affirming objective reasonableness of officer's deadly force despite the fact that frozen frames of video contradicted officer's description of events).

Instead of applying *Scott* and "view[ing] the facts in the light depicted by the videotape," 550 U.S. at 381, the Ninth Circuit applied its own rule: in deadly force cases, "we must examine 'whether the officers' accounts are 'consistent with other known facts.'" (App. 16, quoting *Cruz*, 765 F.3d at 1080 n.3.) But that circuit

rule contravenes *Scott*, which held that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' " 550 U.S. at 382. *Scott* also instructs that video evidence controls when it is clear. *Id.* at 378. The Ninth Circuit erred in mining the record for anything that cast doubt on what Deputy Rankin said he perceived. The inquiry should have ended with the videos.

Nonetheless, none of the Ninth Circuit's purported evidence contradicts or undermines what the videos show: Longoria's sudden, threatening gesture. The Ninth Circuit placed considerable weight on its assertion that "[n]o other officers saw Longoria assume a 'shooter's stance.' " (App. 13.) That assertion is deceiving because none of the other officers were expressly asked during their interviews whether they saw Longoria assume a "shooter's stance." Of course, they each perceived different things depending on their position and recounted their perceptions in their own words. But what they perceived does not contradict Deputy Rankin's perception or the threatening gesture that can be seen on the videos.[4]

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[4] For instance, as the Ninth Circuit points out, different officers stated it appeared to them that: "Longoria was moving towards his car after being shot by non-lethal rounds"; Longoria was "flailing in response to the impact of the bean bags and taser"; Longoria was "moving his hands to his chest as if checking whether he had been shot"; and Longoria "reach[ed] behind his back and it appeared he was attempting to return inside the vehicle." (ER 367; App. 14.) All of this *is* evident from the videos. However, it all occurred *before* Longoria's threatening gesture.

Deputy Rankin's perception that Longoria posed an immediate threat of harm is confirmed not only by the videos themselves but the reaction of *two* officers standing near him, which is also captured on the iPhone video. When Longoria springs his arms up and punches them out, those two officers duck for cover. (SER 8; App. E-3, 51s.) The Ninth Circuit casts this aside because one of the two officers purportedly stated that "he cannot remember responding in such a manner to such a threat." (App. 14.) But whether the officer remembers ducking or not is irrelevant. He clearly did on the video.

Finally, the Ninth Circuit credited Respondents' expert's opinion that he could not discern a "shooter's stance" from the videos. But his perception is no more persuasive or convincing than the Ninth Circuit panel's perception. Moreover, their expert admits that Longoria's "hands appear to go above his waist toward his chest." (ER 716.) That is all that matters (a threatening gesture).

2. The Ninth Circuit did not account for the tense, uncertain, and rapidly-evolving circumstances that escalated in a matter of seconds.

The Ninth Circuit's emphasis on whether a "shooter's stance" is perceptible also ignores the touchstone of the reasonableness inquiry: a court must "allow for the fact that police officers are often forced to make split-second judgments – in circumstances

that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014).

The situation confronting Deputy Rankin could not have been more tense or uncertain. And it unfolded rapidly. Only four seconds elapsed from the first less-lethal round to the first fatal shot. Longoria's threatening gesture happened in an instant, and Deputy Rankin had to make a split-second decision to stop what he perceived was an imminent threat.

The Ninth Circuit had the luxury of armchair reflection, watching the events unfold on a screen, far removed from the dangerous scene and "[w]ith the benefit of hindsight and calm deliberation." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). From that position, it "confidently concluded that [Deputy Rankin] really had no reason to fear for [his] safety or that of anyone else." *Id*. at 475. The court did not factor in the tense, uncertain, and rapidly-evolving situation, nor did it heed this Court's directive "that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Id*.

3. The Ninth Circuit relied on facts that Deputy Rankin did not know.

Because this case involved deadly force, the Ninth Circuit searched for any "known facts" in the record that were inconsistent with Deputy Rankin's account.

(App. 16, quoting *Cruz*, 765 F.3d at 1080 n.3). But that too violates the Fourth Amendment's reasonableness standard. A court must determine reasonableness "from the perspective of a reasonable officer on the scene, including what *the officer* knew at the time, not with the 20/20 vision of hindsight." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (emphasis added); *see also White v. Pauly*, 137 S. Ct. 548, 550 (2017) (court considers only facts known to the "defendant officers").

The Ninth Circuit ignored this directive and considered facts unknown to Deputy Rankin to find material disputes as to whether he knew or should have known that Longoria did not pose a risk of harm. For example, when Longoria exited the vehicle during the pursuit and concealed his right hand behind his back, EPD Officer Salazar reported that he saw Longoria holding a brown wallet in his hand and yelled out, "It's a wallet. It's not a gun." (ER 129, 497-498.) He further reported that he mentioned over the EPD radio, "He has a wallet." (ER 509.)

The Ninth Circuit determined that this evidence created an issue of fact (App. 4, 18), but it was undisputed that Deputy Rankin had not yet arrived at the scene (ER 739). Deputy Rankin also testified that he did not hear a transmission about a wallet over EPD's radio broadcast (ER 257), *and* the audio recording of the EPD dispatch reveals that Officer Salazar reported only that "he's got a wallet in his back" (ER 260; App. E-5). The EPD dispatcher did not broadcast that Longoria "was holding a wallet, *not a gun*, behind his back"

or that Longoria "was unarmed," as the Ninth Circuit contends. (App. 4, 18, emphasis added.) Thus, the Ninth Circuit improperly imputed Officer Salazar's knowledge to Deputy Rankin.

The Ninth Circuit also held there is an issue of fact as to whether Deputy Rankin heard EPD Sergeant Tarango yell, "less lethal, less lethal," as officers rushed toward Longoria after they immobilized his vehicle, despite Deputy Rankin's testimony that he did not hear this. (ER 136, 336, 567; App. 5, 15, 18.) Again, the video evidence "blatantly contradict[s] the Ninth Circuit's suggestion that he did. *Scott*, 550 U.S. at 380. The iPhone video shows Deputy Rankin arrive on the scene (in the background) *after* Sergeant Tarango yells "less lethal, less lethal." (ER 535; App. E-3, 33s-35s.)

Finally, the Ninth Circuit held that there is an issue of fact as to whether Deputy Rankin heard other officers shout that Longoria "had only a wallet behind his back" during the stand-off. (App. 5, 15, 18.) This is presumably based on PCSO Deputy Carnes' statement that he heard "voices" say "something to the effect" of, "It's a wallet." (ER 683.) Deputy Carnes' statement, however, does not support the Ninth Circuit's assertion that officers shouted out that Longoria was "only" holding a wallet and/or "was unarmed." And nothing to that effect can be heard on the iPhone video. (App. E-3.) It is also undisputed that Longoria was not holding a wallet; he was holding rosary beads.

Deputy Rankin did not know any of these facts. But even if he did, none of them diminish the threat of

harm Longoria posed. All three statements were allegedly made *before* Longoria's threatening gesture. Even if Longoria was holding a wallet during the prior stop, nothing foreclosed the possibility that he had a gun in his car or in his waistband. And even if Longoria was holding a wallet, or was unarmed, at the moment when Deputy Carnes heard other officers say, "It's a wallet," it was Longoria's *subsequent* action – reaching down as if he was pulling a gun from his waistband or the car door – that caused Deputy Rankin to fear for his life and shoot. (ER 153, 396, 441, 683-687.)

The same is true of Sergeant Tarango's calls for "less lethal, less lethal." That order (which was not an order to use only less-lethal force or to not use deadly force) and the ensuing less-lethal force occurred *before* Longoria threatened the officers by reaching for his waistband and punching his arms out with a black object in his hand as if aiming a gun. Once he did, Deputy Rankin was justified in using deadly force.

4. The Ninth Circuit relied on Longoria's subjective intentions to negate the threat of harm he objectively posed.

The Ninth Circuit also speculated that "Longoria was either surrendering in response to the non-lethal force of the bean bag rounds and taser or reacting in some manner to their effects upon him." (App. 9, 15-16.) No one will ever know Longoria's true intentions. But his intentions do not matter. *United States v.*

Banks, 540 U.S. 31, 39 (2003). As noted above, reasonableness is an objective standard. *Graham*, 490 U.S. at 396. The video evidence depicts Longoria making a sudden, threatening gesture in Deputy Rankin's direction. That movement and gesture was after Longoria's reaction to the less-lethal rounds and before he drops his hands, turns, and raises them in the air. And up to that point, Longoria had repeatedly told officers that he would *not* surrender. No reasonable officer would have believed otherwise.

The Ninth Circuit's speculation about what Longoria may have intended not only contravenes *Graham*'s objective standard, but it makes the same mistake this Court has corrected at least twice. For instance, in *Ryburn*, the circuit court discredited the officers' perceived threat because the suspect's conduct was not, technically, unlawful. 565 U.S. at 476. This Court rejected that argument, holding: "It should go without saying, however, that there are many circumstances in which lawful conduct may portend imminent violence." *Id*.

And just this term, this Court criticized a circuit court for refusing to consider any circumstances that were "susceptible of innocent explanation." *Wesby*, 138 S. Ct. at 588. Objective inquiries, it held, do "not require officers to rule out a suspect's innocent explanation of suspicious facts." *Id*. The Ninth Circuit's speculation as to Longoria's subjective intent contravenes these cases and others, including *its own precedent*. *See*, *e.g.*, *Reynolds v. County of San Diego*, 84 F.3d 1162, 1169 (9th Cir. 1996) ("[C]onclusions about why

[decedent] moved are nothing more than speculation and fail to raise an issue of fact about the reasonableness of [the officer's] conduct."); *Wilson v. Meeks*, 52 F.3d 1547, 1553 (10th Cir. 1995) ("Qualified immunity does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat.").

5. The Ninth Circuit heightened the standard for deadly force and relied on 20/20 hindsight to rebuke Deputy Rankin's use of force.

In concluding Longoria did not pose an immediate risk of harm, the Ninth Circuit credited the fact that "Longoria neither brandished a gun nor shot at anyone." (App. 18.) But gun confirmation is not a prerequisite to using deadly force. *See Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) ("A reasonable officer need not await the glint of steel before taking self-protective action; by then, it is often too late to take safety precautions.") (Internal quotation marks and citation omitted); *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996) ("The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists."); *see generally Scott*, 550 U.S. at 385 ("We think the police need not have taken that chance and hoped for the best."); *Graham*, 490 U.S. at 553 ("[T]he Fourth Amendment does not require omniscience and absolute certainty of harm need not precede an act of self-protection.").

This Court recently rejected this exact argument in *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015): "The court below noted that no weapon was ever seen, but surely in these circumstances the police were justified in taking Leija at his word when he twice told the dispatcher he had a gun and was prepared to use it." (Internal quotation marks and citation omitted). Like the suspect in *Mullenix*, Longoria repeatedly told police that he had a gun and was going to shoot them. Even then, Deputy Rankin did not shoot until Longoria made a threatening gesture and pointed a shiny black object (glaring in the sun) directly at him.

The Ninth Circuit also credited the "fact that Longoria was actually unarmed." (App. 9, 17.) This is 20/20 hindsight and strictly forbidden. By relying on the fact that a suspect was actually unarmed, the Ninth Circuit superimposed a new requirement onto the reasonableness analysis for deadly force: an officer must first rule out the possibility that a suspect is unarmed. But deadly force is justified so long as the officer has "probable cause to believe that the suspect poses a threat of serious physical harm." *Garner*, 471 U.S. at 11-12. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 245 n.13 (1983).

6. The Ninth Circuit relied on metaphysical doubt to create issues of fact.

To cast doubt on Deputy Rankin's perception of an immediate threat of harm, the Ninth Circuit posited several other purported material disputes, including: "whether Rankin, who has 20/20 vision, reasonably perceived a weapon in Longoria's hands"; "whether, as a matter of fact, Rankin could have had enough time to perceive the alleged 'shooter's stance' at the moment he claims to have done so"; and whether Deputy Rankin had enough time to "hold his fire" once Longoria started his turn. (App. 15.)

These queries are simply rhetorical questions, not genuine disputes of fact. To defeat summary judgment, a non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Scott*, 550 U.S. at 380 (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986)). They also ignore the tense, uncertain, and rapidly-evolving circumstances confronting Deputy Rankin. *See Graham*, 490 U.S. at 396-97. None of them render Deputy Rankin's use of force objectively unreasonable.

7. The Ninth Circuit ignored facts that prove Longoria posed an immediate threat of harm.

In recounting the facts, the Ninth Circuit likens the pursuit to a parade – Longoria was merely "driving

around the city," where he "joked with officers pursuing him," "waved his hand out of the car," and "laughed, pointed, waved, and even flashed a peace sign at civilians on the streets." (App. 3-4.) It completely disregarded Longoria's reckless driving and the various assaults on law enforcement officers and bystanders. It also made no mention of Longoria's threats to shoot police (only that he "spoke with" them) (App. 3); his protestations that he would not stop; or the fact that he was holding a set of black rosary beads during the stand-off (App. 6, 11, 20 n.9).

This Court has admonished reviewing courts from selectively omitting or sanitizing material facts that weigh in favor of finding reasonableness to deny qualified immunity. *See Ryburn*, 565 U.S. at 473-74 (criticizing Ninth Circuit for "reciting a sanitized account of this event"); *Scott*, 550 U.S. at 378-79 ("[R]eading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test.").

It has also directed courts to consider "the whole picture," not view each fact in isolation. *Wesby*, 138 S. Ct. at 588; *see also Ryburn*, 565 U.S. at 476-77 ("[I]t is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture."). That includes a suspect's conduct leading up to the deadly force. *See Mullenix*, 136 S. Ct. at 310 ("By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing

towards an officer's location."). The Ninth Circuit should not have ignored these facts.

8. The Ninth Circuit disregarded two of the three *Graham* factors and relied on other "circumstances" that have no bearing on the reasonableness of force.

Completely absent from the Ninth Circuit's opinion is any acknowledgment or consideration of the first and third *Graham* factors: the severity of the crimes at issue and whether the suspect actively resisted arrest. 490 U.S. at 396. The district court concluded that both factors weighed in favor of finding reasonableness. (App. 30-31.) The Ninth Circuit, however, did not add these to the "governmental interests" side of the scale in balancing "the nature and quality of the intrusion on" Longoria's constitutional rights. *Graham*, 490 U.S. at 396. Thus, it employed a flawed analysis from the start.

Further tipping the scale in Longoria's favor was the Ninth Circuit's improper consideration of other factors. For example, the Ninth Circuit held that Longoria's "emotionally disturbed" status "diminish[ed] the governmental interest in using deadly force." (App. 17, relying on *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001).) But the Ninth Circuit merely presumed that Longoria had a mental illness and there is no evidence that Deputy Rankin was aware of any such illness. This Court has also cast serious doubt on *Deorle*

and its consideration of a suspect's mental health. *See City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015). Though it did not expressly overrule *Deorle*, it refused to consider the mental health of a suspect who was "dangerous, recalcitrant, law-breaking, and out of sight." *Id*. Longoria similarly does not qualify. Deputy Rankin was more than justified to use deadly force once he had probable cause to believe Longoria was about to shoot him.

The Ninth Circuit also claimed that Deputy Rankin "disobeyed orders to maintain a perimeter and sprinted towards the scene," as evidenced by the fact that no other PCSO deputies "abandoned the perimeter and followed Rankin in his pursuit of Longoria." (App. 5 n.3, 18, 21.) This is simply not true. At least five other PCSO deputies rushed toward Longoria after he exited his vehicle. (ER 367, 369-370, 574, 678, 695; App. E-3.) Regardless, this Court in *Sheehan* held that an officer's "bad tactics" or failure to follow training "does not itself negate qualified immunity where it would otherwise be warranted." 135 S. Ct. at 1777. Neither of these allegations should have been considered.

B. In Concluding that a Constitutional Violation Was Clearly Established, the Ninth Circuit Once Again Applied the Wrong Test.

1. The Ninth Circuit relied solely on *Garner*, despite this Court's repeated warning that *Garner* does not clearly establish the law in every use-of-force circumstance.

"'Clearly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful." *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The "existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Id*. "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id*. (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The "clearly established" standard "requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Wesby*, 138 S. Ct. at 590. "This requires a high 'degree of specificity.'" *Id*. (quoting *Mullenix*, 136 S. Ct. at 309). A court cannot simply define the constitutional right "at a high level of generality," *Sheehan*, 135 S. Ct. at 1776, or rely on "a broad general proposition," *Mullenix*, 136 S. Ct. at 308. Rather, the inquiry "must be undertaken in light of the specific context of the case." *Id*.

This Court has "stressed that the 'specificity' of the rule is 'especially important in the Fourth Amendment context.'" *Wesby*, 138 S. Ct at 590 (quoting *Mullenix*, 136 S. Ct. at 308). Accordingly, it has repeatedly held that neither *Graham* nor *Garner* is enough to clearly establish the law. *See White*, 137 S. Ct. at 552; *Mullenix*, 136 S. Ct. at 308-09; *Plumhoff*, 134 S. Ct. at 2023; *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Instead, a court must "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *Wesby*, 138 S. Ct. at 590 (quoting *White*, 137 S. Ct. at 552).

The Ninth Circuit ignored that exacting standard and committed the exact same error as those cases before it. The court identified *Garner* as clearly establishing the constitutional right: "[A] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." (App. 20.) It did not identify any other case, much less a "robust 'consensus of cases of persuasive authority,'" *al-Kidd*, 563 U.S. at 742 (citation omitted), that have held an officer's use of deadly force in similar circumstances was unreasonable. That directly contravenes *White*, *Mullenix*, *Plumhoff*, *Brosseau*, *Saucier*, and all of the Court's cases that have refined the "clearly established" standard. It is a basis for summary reversal. *See McKnight v. Petersen*, 137 S. Ct. 2241 (2017) (vacating Ninth Circuit's denial of qualified immunity – based on *Garner* – to an officer who used deadly force on a suspect he mistakenly believed had a knife).

The Ninth Circuit seemed to suggest that the exacting "clearly established" standard applies only "in cases presenting novel factual circumstances involving car chases," not cases, like this one, where "the shooting occurred after the pursuit ended." (App. 8.) That is an alarming – and definitively wrong – interpretation. *See*, *e.g.*, *Wesby*, 138 S. Ct. at 591 (warrantless arrest); *White*, 137 S. Ct. at 552 (use of deadly force on suspect inside his house).

The Ninth Circuit buttressed its reliance on *Garner* by recycling its previous purported issues of fact and concluding that immunity is not available because there "is a material issue of fact as to whether [the deputy] violated Longoria's clearly established right." (App. 21-23.) In doing so, it further bungled the qualified-immunity analysis. The "clearly established" prong concerns the reasonableness of the officer's mistake of law, not fact. *Saucier*, 533 U.S. at 205.

Moreover, whether a right is clearly established is a legal question for the court to decide, not a jury. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (holding the "clearly established" prong is an "abstract issue of law"). And "[t]he First, Second, Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits take the view that whether a right is clearly established is a legal issue for the judge to decide." *Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017). So does the Ninth Circuit. *See id*. The panel's opinion is in direct conflict with all of them.

2. A consensus of circuit court cases absolving officers who deployed deadly force under similar circumstances demonstrates the lack of clearly established law.

Applying the correct standard, the alleged constitutional violation should be defined as: the use of deadly force by an officer against a suspect, who – after leading police on a high-speed chase for more than an hour, ramming patrol cars, telling officers he had a gun, threatening to shoot them, and warning he would not be taken alive – exited his vehicle with one hand concealed behind his back, refused commands to show his hands, and then made a sudden, threatening movement toward the officer with a shiny black object in his hand.

No case has held that the use of deadly force in those or similar circumstances is unconstitutional. To the contrary, a consensus of cases has held that deadly force in nearly identical situations is reasonable. *See Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (cases granting immunity in similar circumstances demonstrate that law is not clearly established). The Ninth Circuit ignored all of them, including its own.

For example, in *Dague v. Dumesic*, 286 F. App'x 395, 396 (9th Cir. 2008), the suspect "kept his left hand concealed during the standoff," told officers that he "had something that would make the officers do what he could not," and "made a threatening movement with the hand he kept concealed." The Ninth Circuit held

that the officer's perception, whether or not correct, was reasonable and one "we cannot second-guess." *Id*.

In *Hudspeth v. City of Shreveport*, 270 F. App'x 332, 333 (5th Cir. 2008), a suspect, following a high-speed pursuit, exited his vehicle, holding a cell phone, and walked away from the officers. The suspect then "turned rapidly toward one of the Officers, and pointed his cell phone at him . . . with two hands and arms outstretched, as if he was aiming a handgun." *Id*. The officers crouched and then shot the suspect in the back. *Id*. The Fifth Circuit held that the deadly force was reasonable even though the suspect "was unarmed" and "had his back to the Officers." *Id*. at 337. The court also rejected purported fact issues such as "whether [the suspect] was aiming *at* [the officers], or just pointing the cell phone in his general direction," and "whether any of the Officers truly thought: [the suspect] had a gun[.]" *Id*. at 337. And just because the suspect appeared to be talking on a cell phone earlier, that fact "did not preclude his having a weapon on exiting his vehicle." *Id*.

Cases decided after the incident confirm that the law was not clearly established at the time. For example, in *Bowles v. City of Porterville*, 571 F. App'x 538, 538 (9th Cir. 2014), an officer was pursuing a suspect on foot, when the suspect turned and pointed a metallic object at him (a cologne bottle with a metallic top). The officer shot and killed the suspect. *Id*. The Ninth Circuit held that the use of deadly force was reasonable because the officer "reasonably feared that [the suspect] was about to shoot him." *Id*.

In *Pollard v. City of Columbus, Ohio*, 780 F.3d 395, 398 (6th Cir. 2015), a suspect led officers on a car chase until he crashed. Officers surrounded the car and fatally shot the suspect when he reached down toward the floorboard and, despite the officers' commands to "show his hands," he "extended his arms and clasped his hands into a shooting posture, pointed at the officers." *Id*. at 399-400. No gun was found in the vehicle. *Id*. The Sixth Circuit affirmed the use of deadly force, even though the suspect was "actually unarmed," because the officers had reports that he was "potentially armed" and the suspect was "determined to avoid arrest." *Id*.

In *Arian v. City of Los Angeles*, 2013 WL 12081081, at **1-2 (C.D. Cal. Apr. 30, 2013), a suspect, following a dangerous chase, exited his car, holding a black cell phone, and pointed it, in both hands, at the officers. The officers shot and killed him. *Id*. The Ninth Circuit affirmed the use of deadly force in these circumstances. *Arian v. City of Los Angeles*, 622 F. App'x 692 (9th Cir. 2015).

In *Corrales v. Impastato*, 650 F. App'x 540, 541 (9th Cir.), *cert. denied*, 137 S. Ct. 571 (2016), a suspect "rushed toward [an officer] while pulling his previously concealed hand from his waistband and forming it into a fist with a single, hooked finger extended." *Id*. The officer quickly fired and killed the suspect, shooting him in the back. *Id*. The entire incident spanned only 3.3 seconds. *Id*. The Ninth Circuit held that the officer was justified in firing "to end the perceived threat." *Id.* at 542.

In light of this legal landscape, it cannot be said that Deputy Rankin was "plainly incompetent" or that the constitutional question was "beyond debate." *Wesby*, 138 S. Ct. at 589.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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