No. 17-1176

# In The Supreme Court of the United States

HEATH RANKIN,

*Petitioner,*

v.

CHRISTIAN LONGORIA,

*Respondent.*

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

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REPLY BRIEF FOR PETITIONER

The Petition highlights a trend in the Ninth Circuit that effectively circumvents qualified immunity on deadly force claims using a formula that manufactures factual disputes about the officer's perception of a threatened harm. That formula disregards a host of well-established constitutional precepts and summary judgment principles. The Response hardly defends the Ninth Circuit's application of that formula in this case. Instead, it relies on the same smoke screen of "disputed facts" and *Tennessee v. Garner*, 471 U.S. 1 (1985), to deny immunity. (Resp. at 1-2.)

When the smoke is cleared, the Ninth Circuit's legal errors are evident and aplenty, and the undisputed material facts undeniably show that Manuel Longoria posed an imminent threat of harm. At a minimum, no case (and especially not *Garner*) clearly prohibited the use of deadly force by an officer under similar circumstances. This Court cannot allow the Ninth Circuit to continue to erode its Fourth Amendment and qualified-immunity jurisprudence and wrongly subject law enforcement officers, and the agencies that employ them, to suit.

## ARGUMENT

### I. CERTIORARI IS WARRANTED TO RECTIFY THE NINTH CIRCUIT'S GROSS DEPARTURE FROM THIS COURT'S JURISPRUDENCE.

Respondent[1] contends that certiorari is inappropriate because Deputy Rankin simply "disagrees with the Ninth Circuit's interpretation of the facts in this case." (Resp. at 6.) Not so. The Petition challenges the Ninth Circuit's failure to apply governing Fourth Amendment, qualified immunity, and summary judgment principles, all legitimate grounds for certiorari. *See Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari) ("We may grant review if the lower court conspicuously failed to apply a governing legal rule."). For instance:

1. The Ninth Circuit failed to assess the reasonableness of force from the perspective of an officer on the scene or consider only those facts known to the defendant-officer. Instead, it evaluated reasonableness from the *suspect's* perspective, relying on (a) *his* subjective intent, and (b) facts *un*known by the defendant-officer, to diminish the threat the suspect objectively posed. That flawed calculus violates *D.C. v. Wesby*, 138 S. Ct. 577, 588 (2018); *White v. Pauly*, 137 S. Ct. 548, 550 (2017); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020

[1] Only Christian Longoria has asked the Court to deny the Petition. (Resp. at 2, 15.)

(2014); *Ryburn v. Huff*, 565 U.S. 469, 476-77 (2012); and *Graham v. Connor*, 490 U.S. 386, 396-97 (1989), among others. (Pet. at 22-28.)

2. The Ninth Circuit refused to (a) credit video evidence that contradicted the plaintiffs' version of events, contrary to this Court's directive in *Scott v. Harris*, 550 U.S. 372, 378-80 (2007), or (b) consider other evidence favorable to the defendant-officer, in contravention of *Wesby*, 138 S. Ct. at 588; *Ryburn*, 565 U.S. at 476; and *Mullenix v. Luna*, 136 S. Ct. 305, 310 (2015), but then (c) relied on "metaphysical doubt" to defeat summary judgment, in violation of *Scott*, 550 U.S. at 380, and *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). (Pet. at 17-20, 29-31.)

3. The Ninth Circuit deemed the deadly force objectively unreasonable because the defendant-officer never saw the gun the suspect claimed he had and threatened to use, an argument this Court squarely rejected in *Mullenix*, 136 S. Ct. at 310. (Pet. at 27-28.)

4. The Ninth Circuit failed to consider two of the three *Graham* factors, yet considered other "factors" rejected by this Court in *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776-77 (2015). (Pet. at 31-32.)

5. The Ninth Circuit did not apply this Court's exacting test for qualified immunity—an officer can only be denied immunity if there exists a case in which an officer acting under "similar circumstances" was held to have violated the Fourth Amendment. *See*

*White*, 137 S. Ct. at 552. Instead, it relied exclusively on the broad proposition in *Garner*—that an officer cannot shoot an unarmed, non-dangerous suspect, 471 U.S. at 11—to deny immunity, despite this Court's repeated instruction not to. *See id*.; *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). (Pet. at 33-34.)

Any one of these errors satisfies the criteria for certiorari. *See* Sup. Ct. R. 10(c).[2] Indeed, this Court granted certiorari in many of the above-mentioned cases to correct the very errors that Deputy Rankin raises in his Petition. Collectively, these legal errors are an affront to this Court's jurisprudence. Intervention is necessary not only to restore order but to afford the immunity Deputy Rankin deserves. *See Salazar-Limon*, 137 S. Ct. at 1282 (Sotomayor, J., dissenting from denial of certiorari) ("We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force."); *Sheehan*, 135 S. Ct. at 1774 n.3 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)) ("Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability.") (Internal citation omitted).

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[2] The Petition also highlights that the Ninth Circuit's opinion conflicts with several other circuit court decisions. (Pet. at 19, 27, 35, 37-38.) That is yet another basis for certiorari. *See* Sup. Ct. R. 10(a).

## II. SUMMARY REVERSAL IS APPROPRIATE IN LIGHT OF THIS COURT'S DECISION IN *KISELA V. HUGHES*.

As discussed in the Petition, the Ninth Circuit's faulty analysis is part of a trend that denies immunity based on purported factual disputes about the officer's perception of the threatened harm. (Pet. at 1.) First was *Hughes v. Kisela*, 862 F.3d 775, 780 (9th Cir. 2017), and then *Lopez v. Gelhaus*, 871 F.3d 998, 1006-1010 (9th Cir. 2017). The Ninth Circuit in this case relied on both *Hughes* and *Lopez* to deny Deputy Rankin immunity. (App. 10, 14, 17, 23.) Last month, this Court recognized the Ninth Circuit's flawed analysis in *Hughes*, granted certiorari, and reversed. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018). The Court's opinion in *Kisela* amplifies the Ninth Circuit's errors in this case and is further grounds for summary reversal.[3]

In *Kisela*, officers responded to a report that a woman was hacking a tree with a kitchen knife. 138 S. Ct. at 1151. When officers arrived, they saw a woman (Chadwick) standing in the driveway; then they saw another woman (Hughes) emerge from the house carrying a knife at her side. *Id*. Hughes walked toward Chadwick and stopped about six feet from her. *Id*. The officers, with guns drawn, ordered Hughes to

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[3] The defendant-officer in *Lopez* has also filed a petition for writ of certiorari. *See Gelhaus v. Lopez*, No. 17-1354 (filed March 22, 2018). Like this case, the Ninth Circuit in *Lopez* denied immunity to an officer who shot an unarmed suspect based on purported fact issues surrounding the officer's perception of a threat. 871 F.3d at 1021-22.

drop the knife, but she did not comply. *Id*. One of the officers then shot her four times, believing she posed a threat to Chadwick. *Id*. Chadwick, however, stated that she did not feel endangered. *Id*. Like this case, the district court granted the officer immunity, but the Ninth Circuit reversed, finding the use of force both unreasonable and a violation of clearly established law. *Id*.

This Court reversed the Ninth Circuit, holding that the officer did not violate a clearly established right in light of the particular circumstances he faced. *Id*. at 1153. Those circumstances included:

> Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife.

*Id*.

The Court afforded immunity despite evidence that Hughes never "made any aggressive or threatening movements" or verbally threatened anyone and instead appeared "composed and content"; Hughes had not committed a crime and the officers did not observe

any illegal activity; Hughes did not resist or evade arrest; Chadwick averred that she was "not the least bit threatened by the fact that Hughes had a knife in her hand"; and the other officers on the scene held their fire. *Id*. at 1156-57 (Sotomayor, J., dissenting).

If, under those particular facts, it was "far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment," *id*. at 1153, it was even *less* obvious that any reasonable officer would have known that shooting Longoria in the circumstances confronting Deputy Rankin violated the Fourth Amendment. Like the suspect and officer in *Kisela*, Longoria refused commands to submit (ER 121, 136, 150, 303-304, 364, 567, 684-685, 757-758); Deputy Rankin was in close proximity to Longoria and had no cover in front of him (ER 311, 754, 763, 767, 773-774); and Deputy Rankin shot Longoria because he feared for his own life, the lives of his fellow officers, and the bystanders that had gathered (ER 314-315, 319, 402-406, 761-762).

In fact, the circumstances confronting Deputy Rankin were *more* dangerous, uncertain, and rapidly-evolving than those facing the officer in *Kisela*. Longoria acted erratically (App. E-1, E-3); Hughes was composed. It was reported (and Deputy Rankin believed) that Longoria had a gun and he threatened to shoot the officers (ER 113, 115-116, 118, 120, 133-139, 147, 151, 157-162, 164, 168, 251-252, 254-256, 273, 282, 314-315, 319, 366, 378, 395-399, 402-406, 434-435, 441, 497, 668-669, 671, 737, 743-744, 761-762); Hughes

had a knife and did not threaten anyone. Longoria committed several crimes, including stealing a vehicle and threatening police (App. 30-31); Hughes committed no crime. Longoria evaded arrest for about 70 minutes (App. E-1); Hughes did not. Deputy Rankin was on scene, and therefore only able to assess the situation, for 8 seconds (App. E-3, 47s); Hughes had a minute. Longoria made a sudden, threatening movement toward Deputy Rankin, while holding a black shiny object, leaving Deputy Rankin only a second to react (App. E-1, at 13:34:06-13:34:08, 13:34:31-13:34:34; App. E-2, images 16h18m36s34, 16h19m41s41, and 16h36m48s51 through 16h37m07s53; App. E-3, 49s-51s; App. E-4; ER 384, 447-449); though holding a knife, Hughes made no such movement.

The Court in *Kisela* also rejected several legal arguments urged by Respondent below and adopted by the Ninth Circuit in this case. It affirmed that the reasonableness analysis, including the threat of any perceived harm, must be viewed from the perspective *of the officer*. *Kisela*, 138 S. Ct. at 1151-52. That Chadwick did not feel threatened because of facts she knew (but not the officer) did not diminish the officer's belief that Hughes posed a threat. Thus, the Ninth Circuit erred in relying on Longoria's subjective intentions and other evidence unknown to Deputy Rankin to dilute the objective threat he posed.

The Court also did not discount the objective threat of harm simply because "the officers themselves were in no apparent danger" or because no other officer on the scene used force. *Id*. Thus, the Ninth Circuit's

20/20 hindsight that Longoria did not actually have a gun and its reliance on the fact that no other officer on the scene used force were erroneous.

Finally, and importantly, the Court reaffirmed that "the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an 'obvious case,'" and that an officer is entitled to immunity unless existing precedent "involving similar facts" "squarely governs" the "specific facts at issue." *Id*. at 1153 (quoting *White*, 137 S. Ct. at 552; *Mullenix*, 136 S. Ct. at 309). It then rejected as insufficiently similar three circuit court cases relied on by the Ninth Circuit to deny immunity, and concluded that one circuit court case was similar enough to afford immunity. *Id*. at 1153-54. Here, the Ninth Circuit relied exclusively on the broad proposition in *Garner*, and it did not even mention, much less distinguish, the six circuit court cases that afforded immunity to officers in similar situations.

## III. THE UNDISPUTED MATERIAL FACTS ESTABLISH THAT DEPUTY RANKIN'S DEADLY FORCE WAS REASONABLE UNDER THE CIRCUMSTANCES.

Respondent does not rebut or respond to any of the legal errors discussed in the Petition. He simply recites the same improper, incorrect, and/or immaterial facts relied on by the Ninth Circuit[4] and contends

[4] For example, he asserts Longoria never *intended* to ram his car into police (he only "toyed with the officers"); Officer Salazar

it "correctly found that factual disputes precluded summary judgment as to whether Rankin's claim of his perception was accurate or reasonable."[5] (Resp. at 8.) The Petition—and *Kisela*—dispel that conclusion. Respondent adds that the Ninth Circuit correctly applied *Tolan v. Cotton*, 134 S. Ct. 1861 (2014), but the panel never even cited that decision. Moreover, the events in *Tolan* were not captured on video and there were conflicting versions of material facts given by the officer, the suspect, and several eye witnesses. 134 U.S. at 1866-68.

Unlike in *Tolan*, the material facts here are not in dispute. Longoria was reportedly armed.[6] He led

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saw Longoria holding a wallet when he exited the car during the pursuit (before Deputy Rankin was there); Officer Salazar thought he saw Longoria holding a wallet during the stand-off (even though he was not holding a wallet); Deputy Carnes heard someone yell, "It's a wallet," before the less-lethal shots were fired; Sgt. Tarango ordered officers to fire bean bag rounds; Longoria's movements were involuntary, not intentional; no other officer saw Longoria assume a "shooter's stance" or fired shots; Deputy Rankin has 20/20 vision; Longoria never brandished or discharged a gun; and Longoria was actually unarmed. Each one of these assertions is debunked in the Petition, legally and/or factually.

[5] Respondent claims the Petition "misstates facts" (Resp. at 12) but then fails to point out any misstatements.

[6] Respondent contends that Deputy Rankin was not privy to the conversation between Longoria's family members and EPD when they told officers that Longoria "was in possession of a gun." (ER 147, 151.) But Respondent does not dispute that PCSO dispatch told Deputy Rankin (based, in part, on that report) that "the driver has a weapon" and "the driver is armed." (ER 157-162, 252, 273, 282, 737.) Moreover, the fact that Longoria's own family reported he was armed made the report credible. Respondent also still relies on the EPD CAD entry that says "wallet in his back *not*

officers on a dangerous, high-speed car chase for more than 70 minutes and told officers he was not going to stop.[7] He told officers he had a gun and threatened to shoot them. He concealed his right hand. After officers deployed less-lethal force, he turned toward Deputy Rankin, reached both hands below his waistband, and then made a sudden, threatening movement—springing both hands up together, chest high, and punching them out while holding a black shiny object. That gesture was captured on video and can be seen in real-time. Two other officers ducked for cover in response to that gesture. (SER 8; App. E-3, 51s.) Deputy Rankin believed Longoria was pulling a gun out to shoot him and, in less than a second, made the decision to end that perceived threat. Any reasonable officer would agree there was at least "probable cause to believe that [Longoria] pose[d] a threat of serious physical harm." *See Garner*, 471 U.S. at 11-12. That is enough to deploy deadly force. *Id.*

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*a gun*" (ER 531, emphasis added) and argues Deputy Rankin therefore heard and knew Longoria was not armed. As discussed in the Petition, the audio recording of the EPD dispatch (ER 260; App. E-5) clearly contradicts the CAD entry. EPD dispatch did not report over the radio that Longoria did not have a gun. (Id.)

[7] Details of the pursuit prior to Deputy Rankin's arrival were broadcasted over the radio and Deputy Rankin knew that Longoria had "hit one deputy's car" and "almost hit six police cars intentionally." (ER 164, 168, 251, 287, 366.)

## IV. *GARNER* DID NOT CLEARLY PROHIBIT THE USE OF DEPUTY RANKIN'S DEADLY FORCE.

The Response is completely silent on Deputy Rankin's challenge to the Ninth Circuit's "clearly established" conclusion. In fact, Respondent doubles down on *Garner* with *Graham* as being sufficient to deny immunity. (Resp. at i, 11.) But he does not acknowledge *Kisela* on this point, or even cite *White*, *Mullenix*, *Brosseau*, or *Saucier*, all of which have held that *Garner* and *Graham* are generally not enough. And he makes no attempt to distinguish the six circuit court cases that afforded immunity to officers in cases with similar facts. (Pet. at 36-38.)

Respondent cites two cases to support his conclusion that Deputy Rankin "was not entitled to qualified immunity as a matter of law." (Resp. at 11-12.) But in the first case, the (likely) unconscious suspect "sat behind the wheel of his [crashed] vehicle the entire time and did not make any threatening movements" before officers shot him 14 times. *See Thompson v. City of Lebanon*, 831 F.3d 366, 369 (6th Cir. 2016). And in the second case, the officer shot the suspect "without provocation" and the officers did not have probable cause to believe the suspects posed a threat of harm. *See Green v. Taylor*, 239 F. App'x 952, 954, 958 (6th Cir. 2007).

These two cases are clearly distinguishable but, in any event, in light of the many similar cases that *have* afforded immunity, it still cannot be said that the constitutional question is "beyond debate." *Stanton v.*

*Sims*, 571 U.S. 3, 10 (2013). For that reason alone, Deputy Rankin should be granted immunity.

## CONCLUSION

The Petition should be granted.

Respectfully submitted,

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