No. 18-695

IN THE

Supreme Court of the United States

CHRISTOPHER CHUNG, *et al.*,

Petitioners,

v.

GULSTAN E. SILVA, JR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHELDON PAUL HALECK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

ERIC A. SEITZ
Counsel of Record
DELLA A. BELATTI
GINA SZETO-WONG
JONATHAN M.F. LOO
KEVIN A. YOLKEN
LAW OFFICES OF ERIC A. SEITZ
820 Mililani Street, Suite 714
Honolulu, Hawaii 96813
(808) 533-7434
eseitzatty@yahoo.com

Counsel for Respondents

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285514

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit properly denied the officers qualified immunity by applying clearly established excessive force law to the facts and circumstances of this case?

2. Whether the Court of Appeals for the Ninth Circuit, having found that the officers were serving in a caretaking function, properly applied the excessive force law in its analysis and constrained its review to reasonableness of the seizure based on the facts and circumstances of this case?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner police officers Christopher Chung, Samantha Critchlow, and Stephen Kardash ("Petitioners") assert that they were entitled to deploy their Tasers multiple times and employ pepper spray a total of at least fourteen times, without warnings and within a span of just a few minutes, against Sheldon Paul Haleck ("Sheldon"), a defenseless man who was incapable of understanding and complying with their directions to get out of a public roadway. None of the Petitioners claims to have been physically assaulted or threatened by Sheldon, who was unarmed. He did not pose an imminent threat of harm to the officers or to any member of the public. He was not trying to run away. Because of the drugs in his system, combined with severe mental illness, Sheldon could not respond appropriately to Petitioners' commands, so they continued to shoot and spray him until he finally fell to the pavement and died. Sheldon's death was officially ruled a "homicide" by the Honolulu medical examiner. "Autopsy Report," Christopher Happy, M.D., 06/24/2015.

Nowithstanding many decades and generations of court decisions determining the objective criteria for the use of deadly and/or "intermediate" levels of force – as employed here – the Petitioners assert that the distinguished senior district judge, a unanimous panel of the United States Court of Appeals, and the entire Ninth Circuit Court – in which not a single judge voted to rehear their appeal *en banc*[1] – that all of these judges were wrong

1. In its Order denying rehearing or rehearing *en banc*, the Ninth Circuit panel noted that all three judges, Judges W.

when they ruled that Respondents' claims of excessive force must be tried to a jury. Instead, Petitioners would have this Court determine, under the most troubling and, indeed, outrageous facts presented here, that because the Petitioner/Defendant police officers were engaged in some form of "community policing," the Petitioners are entitled to qualified immunity and their actions should be excused. No court has ever issued any such opinion or decision – in any district or circuit court throughout the United States. Petitioners' attempt to bootstrap and apply the community caretaking doctrine to an excessive force case would improperly expand the reach of the community caretaking doctrine and undermine long-established standards governing the proper use of force by law enforcement officers.

COUNTERSTATEMENT OF THE CASE

A. Counterstatement of the Facts

Contrary to Petitioners' blatant attempt to misstate the facts before the Ninth Circuit and the District Court as largely undisputed, this is a *hotly disputed* case involving the unfortunate, unnecessary, and tragic death of Sheldon Paul Haleck, an unarmed, defenseless man who was posing no imminent threat of harm to Petitioners or to any members of the public.

Fletcher, Hurwitz, and Tashima "voted to deny the petition for rehearing." The Ninth Circuit further noted that "[t]he full court has been advised of the petition for rehearing *en banc* and no judge of the court has requested a vote on whether to rehear the matter *en banc*." Order Denying Petition for Rehearing or Rehearing *En Banc*, reprinted at Appendix C to the Petition for Writ of Certiorari ("Appx. C") at p.80a (emphasis added).

Respondents agree with some of the facts set forth in the District Court's June 28, 2017 Order,[2] but there are *significant* disputed material facts – some correctly identified by the District Court and others that the District Court overlooked but that the Ninth Circuit correctly considered in the light most favorable to the Respondents as the non-moving party. These facts bear upon the Ninth Circuit Court of Appeals' analysis and correct conclusion that Petitioners were not entitled to qualified immunity.

1. Lack of Imminent Danger from Oncoming Traffic

Petitioners deceptively assert that the events of March 16, 2015, occurred while Sheldon and Petitioners were "on the busiest thoroughfare in downtown Honolulu" and on "a busy six-lane road in downtown Honolulu." Petition at p.9. This is *contrary* to Petitioner Chung's deposition testimony that "[a]t the time of [the] incident, cars were stopped" and "no vehicles approached or came close to hitting Sheldon while he was in the middle of the street." Respondents' Supplemental Excerpts of Record before the Ninth Circuit ("Respondents' Excerpts") at SER002-003, & 042. The Ninth Circuit's memorandum opinion explicitly rejects Petitioner's insinuation that the events of March 16, 2015, occurred on "a busy six-lane road in downtown Honolulu" and states that there "was no threat to traffic

2. Petitioners' attempt to mask the significant factual disputes before the District Court and the Ninth Circuit is intellectually dishonest and disingenous. This outrageous attempt to misrepresent and misstate the facts, as determined by the District Court and the Ninth Circuit Court of Appeals, should be summarily rejected by this Court.

during the encounter" and Respondents "offered evidence that traffic was stopped." Memorandum Opinion of the Ninth Circuit reprinted at Appendix A to the Petition for a Writ of Certiorari ("Appx.A") at p.5a.

The District Court underscored the importance of this disputed issue when it noted Sheldon's "presence in a busy street, at night, is central to the question of danger to the officers and others" and correctly pointed out that "the disputes of fact as to the severity of the threat"—i.e. whether the street was in fact so busy as to warrant the repeated and numerous application of pepper spray, and repeated use of the Taser by Petitioner Chung—"prevent summary judgment for any of the Parties on this claim." Order Granting, in Part, and Denying, in Part, the parties' cross-motions for summary judgment reprinted in Appendix B to the Petition for a Writ of Certiorari ("Appx. B") at p.42a.

2. Petitioners' Failure to Warn Sheldon About Their Use of Pepper Spray and the Taser

Petitioners deliberately ignore the disputed facts as to whether they warned Sheldon about their use of pepper spray and the Taser and flatly state that "[t]hey warned [Sheldon] that they would use pepper spray if he did not comply" and that Petitioner "Chung warned [Sheldon] that he would use taser if he did not get on the sidewalk." Petition at p.9. Petitioners' citation to the District Court's finding that Petitioners warned Sheldon about their impending use of pepper spray and the Taser are founded solely upon the self-serving depositions of Petitioners Critchlow and Chung. Appx.B at p.21a. The record before the District Court and in the Ninth

Circuit is replete with numerous inconsistencies between Petitioners' written reports and their depositions that call into serious question any claims by Petitioners that they warned Sheldon before they ever used either pepper spray or the Taser. Respondents' Excerpts at SER002-003, & 040-042. Hence, the Ninth Circuit's factual determination that Petitioners "pepper sprayed [Sheldon] multiple times without warnings" and Petitioner Chung tased Sheldon multiple times "without warning" is grounded in the record and comports with the directive that all facts in dispute must be viewed "in the light most favorable to the nonmoving party." *Glenn v. Washington County*, 673 F.3d 864, 870 (9th Cir. 2011)(citing *Mena v. City of Simi Valley*, 226 F.3d 1031, 1036 (9th Cir. 2000)).

3. No Threat or Danger to Petitioner Officers

The District Court properly pointed out the existence of "disputes of fact as to the level of resistance made by [Sheldon]." Appx.B at p.44a. In arguments before the District Court, Petitioners attempted to depict Sheldon as an "immediate threat to safety" by arguing, in part, that Sheldon "refused to comply with their commands," "he was significantly larger than [Petitioners] Chung and Critchlow," and "there was a risk that [Sheldon] would be hit by a passing car." Petitioners' Opening Brief before the Ninth Circuit at p.31. Despite Petitioners' attempts to argue otherwise, the record before the District Court substantially supported the factual determination that Sheldon never presented a threat or danger to Petitioners or the public and that there were no risks due to oncoming traffic – conclusions that the Ninth Circuit appropriately reached in its Memorandum Opinion. Appx.A at p.5a.

Nothing in Petitioner Chung's initial Incident Report or his Use of Force Report, or in Petitioner Critchlow's initial incident reports, mentions any aggressive behavior on Sheldon's part. Respondents' Excerpts at SER178-185. Petitioner Critchlow's Use of Force Report and subsequent deposition testimony are replete with inconsistencies that present conflicting evidence that weigh against her credibility and the credibility of other Petitioners, including Petitioner Chung. As an example, one section of Petitioner Critchlow's Use of Force Report is completely silent on whether Sheldon "took aggressive action," while in another section of the report she checks off that Sheldon engaged in "Active Aggression" and "at one time took a fighting stands towards Officer Chung." *Id.* at SER192. This report is contradicted by Petitioner Critchlow's deposition testimony where she plainly states that Sheldon never "assume[d] a fighting stance" "like a boxer in a ring" or in a "crouching position like he wanted to fight" any officer. *Id.* at SER099. Petitioner Critchlow further testified during her deposition that she did not see Sheldon take a swing at any Officer, make any effort to strike Officer Chung, and that Sheldon never was physically aggressive toward her or any other of the officers at the scene. *Id.* at SER106 & SER108.

Based on the internally conflicting documents and deposition testimony created solely by Petitioners, the District Court established that "at no time [before being sprayed or tasered] did Sheldon attack, strike, verbally or physically threaten any officer or other person" and both the District Court and the Ninth Circuit properly concluded that Sheldon was not "an immediate threat to himself or others," including Petitioners and members of the public. *Id.* at SER003, 043, 106, 108 and Appx.A at p.5a.

B. Proceedings Below

Respondents brought suit, in part, against Petitioners Chung, Critcholow, and Kardash for violations of their Fourth and Fourteenth Amendment rights based on the officers' excessive use of pepper spray and tasering of Sheldon. The District Court granted summary judgment to Petitioners on some, but not all, of Respondents' claims.[3] On their Fourth Amendment excessive force claim for the tasing and deployment of pepper spray, the District Court concluded that there were "material disputes of fact [that] do not permit a finding of summary judgment as to the issue of qualified immunity." Appx.B at p.47a. These material questions of fact included, in part, "the extent that [Sheldon] posed a threat to the Officers and others" and "the immediacy and level of threat the traffic on South King Street posed during the incident." *Id.*

Petitioners filed an interlocutory appeal challenging the denial of their claims to qualified immunity. A unanimous panel of the Ninth Circuit, after extensive briefing and oral arguments by the parties and inclusion

3. Pre-trial litigation in this matter was complex with multiple and interrelated motions and conflicting concise statements of fact considered by the District Court. While the interlocutory appeal is solely focused on review of whether qualified immunity was properly denied to Petitioners, this issue was just one of many issues raised and considered in the following four dispositive motions: (1) Defendant Louis M. Kealoha's Motion for Summary Judgment (ECF No. 193); (2) Respondents' Amended Motion for Summary Judgment (ECF No. 195); (3) Defendant City and County of Honolulu's Amended Motion for Summary Judgment (ECF No. 199) ; and (4) Petitioners' Amended Motion for Summary Judgment (ECF No. 200).

of an amicus brief by the International Municipal Lawyers Association, "affirm[ed] the District Court's denial of qualified immunity and remand[ed] for futher proceedings consistent with the [Ninth Circuit's] disposition." Appx.A at p.8a. Since remanded by the Ninth Circuit, the District Court has set this matter for trial on May 21, 2019, and no stay of the District Court proceedings has been granted. Minute Order, Civ. No. 15-00436., *Silva, et al. v. Chung, et al.* (D.Haw.), 9/26/2018.

On November 19, 2018, Petitioners filed a Petition for Writ of Certiorari seeking review of the Ninth Circuit's ruling on the grounds that the Ninth Circuit improperly defined clearly established law too generally and failed to extend qualified immunity based on the community caretaking functions exercised by Petitioners when they, without warning, unleashed numerous pepper sprays and taserings upon Sheldon, an unarmed, defenseless individual posing no threat to Petitoners or the public. This petition was docketed on November 27, 2018.

REASONS FOR DENYING THE WRIT

This Court should deny Petitioners' request for certiorari because Petitioners' request abounds with misstatements of significant facts that essentially reflect disagreement with the tests long ago adopted in *Graham v. Connor* and its progeny. The Ninth Circuit's opinion in no way conflicts with the long-standing decisions applying *Graham v. Connor, supra,* when determining whether multiple uses of a Taser and multiple deployments of pepper spray in fact-specific circumstances constitutes excessive force in violation of the Fourth Amendment. Finally, the Petition for a Writ of Certiorari should be

denied because the Ninth Circuit's Memorandum Opinion does not raise or leave unsettled any important question of federal law, and the Petitioners' blatant attempt to broadly expand the reach of the community caretaking doctrine to excessive force cases should be rejected by this Court.

A. Petitioners' Arguments in Favor of Certiorari Misstate the Facts as Relied Upon and Determined by the Ninth Circuit Pursuant to the Proper Standard of Review Upon a Motion for Summary Judgment

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, U.S. Supreme Court Rules. This Court would be well within its discretion to deny certiorari in this case insofar as Petitioners' request abounds with significant misstatements of fact. Petitioners argue deceptively in their Petition that the events of March 16, 2015, occurred on "the busiest thoroughfare in downtown Honolulu." Petition at p.9. Petitioners would have this Court believe that the incident involving Sheldon and Petitioners was extremely dangerous to the public because the events occurred on "a busy downtown thoroughfare" where cars were actively "attempt[ing] to go around him." *Id.* at p.23. Petitioners also maintain that they clearly and plainly warned Sheldon about their use of pepper spray and the Taser. *Id.* at p.9.

These assertions directly contradict the Ninth Circuit's succinct characterization of the facts, based upon reasonable inferences drawn in favor of Respondents as the non-moving party, as follows:

> "Here, there was no serious crime at issue. [Petitioners] were responding to a dispatch call about a man walking in the middle of the road. Nor was [Sheldon] an immediate threat to himself or others. [Sheldon] made neither physical nor verbal threats. There also was no threat to traffic during the encounter. [Respondents] offered evidence that traffic was stopped, and he never actively attempted to evade arrest by flight."

Appx.A at 5a. In this context, where there was no threat or imminent harm to the Petitioners or the public, the Ninth Circuit further found that Petitioners "pepper sprayed [Sheldon] multiple times without warnings" and tased Sheldon multiple times "without warning," including the release of a "third electric current" into Sheldon, following which Sheldon "fell face-forward to the ground." *Id.* at p.3a.

These significantly different versions of the facts simply do not warrant review by this Court at this juncture in the proceedings simply because Petitioners disagree with the Ninth Circuit's findings and conclusions on an interlocutory appeal.

B. The Ninth Circuit's Decision Correctly Applies the *Graham v. Connor* Multi-Factor Test to Whether Use of Tasers and the Deployment of Pepper Spray Constitutes Excessive Force, is Not an Incorrect Statement of Law, and Does Not Conflict with Long-Standing, Clearly Established Precedents Related to Excessive Force

1. Correct Application of *Graham v. Connor*

As both the District Court and the Ninth Circuit recognized, the lawfulness of Petitioners' use of force against Sheldon was governed by a straightforward multi-factor test established by this Court in *Graham v. Connor*, 490 U.S. 386 (1989), *supra*. Appx.A at pp.4a-5a, 7a; and Appx.B at pp.38a-44a. Petitioners do not argue that the Ninth Circuit incorrectly misstated or misapplied this test. Instead, Petitioners misstate the facts adopted by the Ninth Circuit, disagree with the factual analysis, attempt to create confusion about clearly established law concerning the proper use of force by law enforcement officers when encountering an unarmed, non-threatening individual who is not resisting arrest or attempting to flee, and then attempt to invoke the community caretaking doctrine to empower police officers to use any level of force without appropriate adherence to well-established constitutional dictates set forth in *Graham*. *See State v. Vargas*, 63 A.3d 175, 191, 213 N.J. 301, 328 (2013)(explaining that "[p]olice officers perform both law enforcement and community-caretaking funcitons. When they are engaged in either activity, they must conform to the dictates of the Constitution….The community-caretaking doctrine is 'not a roving commission[.]'").

The Ninth Circuit correctly considered the various governmental interest factors at stake including "the severity of the crime[,]" "whether 'the suspect posed an intermediate threat to the safety of the officers or others[,]" and "whether [Sheldon] was actively resisting arrest or attempting to evade arrest by flight." Appx.A at pp.4a-5a (quoting and citing to *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). Applying these factors, the Ninth Circuit correctly concluded (1) "there was no serious crime at issue"; (2) Sheldon was not "an immediate threat to himself or others" inasmuch as "he made neither physical nor verbal threats"; (3) there "also was no threat to traffic during the encounter"; and (4) Sheldon "never actively attempted to evade arrest by flight." Appx.A at p.5a.

2. No Conflict with Long-Standing, Clearly Established Precedents Related to Excessive Force

In addition to the proper application of the well-established *Graham v. Connor* test to the specific facts in this case, the Ninth Circuit's decision does not conflict with long-standing, clearly established precedents related to the proper use of force by law enforcement officers when encountering an unarmed, non-threatening individual who is not resisting arrest or attempting to flee and the officers fail to warn that individual about their impending use of force.

In attacking the Ninth Circuit's decision, Petitioners create confusion and dishonestly set forth arguments that there is no clearly established law regarding the use of Tasers or pepper spray by misstating the facts that are

operable in this case and misstating and misinterpreting holdings in cases that actually support Respondents' position that the law regarding use of force is clearly established.

Throughout their arguments to undermine the decisions relied upon by the Ninth Circuit as not clearly establishing that Petitioners' conduct was unlawful, Petitioners recite over and over that these cases could not have "squarely governed" Petitioners' encounter with Sheldon or that the "facts…are not even 'roughly comparable'" because the incident with Sheldon occurred in a "busy downtown thoroughfare" or "busy downtown street" where "blocked" or "halted" traffic was an issue, and Sheldon was deliberately ignoring or disregarding "warnings" that force would be used. Petition at pp.14, 16, 18, & 20. Clearly, the obvious flaw with this analysis is that Petitioners are *deliberately* using the *wrong* set of particularized facts to determine whether particular cases and their progeny set forth clearly established law that governed the conduct of Petitioners on that fateful night of March 16, 2015.

Using the correct set of particularized facts applicable to this case – that the intermediate use of force in the form of multiple deployments of a Taser and a total of fourteen pepper sprays was used by law enforcement officers who provided no warnings of their impending use on an unarmed individual in the middle of a street where traffic presented no threats, who was not committing a serious crime, presented no immediate threat to Petitioners or any member of the public, and was not actively attempting to evade arrest by flight – it becomes quite obvious that the panoply of cases cited to by the Ninth Circuit was clearly

established law that applied to the conduct of Petitioners on March 16, 2015, and that the Ninth Circuit's denial of qualified immunity is correct.

In its Memorandum Opinion, the Ninth Circuit specifically cites to *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010)(motorist stop and taser case), *Brooks v. City of Seattle*, as cited to in *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011)(motorist stop and taser case), *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012)(pepper spray case), and *Young v. City of L.A.*, 655 F.3d 1156 (9th Cir. 2011) (pepper spray case) as clearly established law that governs Petitioners' conduct in this case. In *Bryan*, as described by Petitioners in their Petition, "Bryan was a motorist… who was not attempting to flee" and "was tasered without warning, early on a Sunday morning, with no pedestrians or traffic." Petition at p.18. The *Bryan* court described the factual circumstances as follows: "Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle….Bryan was neither a flight risk, a dangerous felon, nor an immediate threat." The *Bryan* court also notes that the Defendant officer, "[w]ithout giving any warning…shot Bryan with his taser gun." *Bryan*, 630 F.3d at pp.618-619, 628. Similarly, in *Brooks*, the Ninth Circuit determined that Brooks's "alleged offenses were minor. She did not pose an immediate threat to the safety of the officers or others. She actively resisted arrest insofar as she refused to get out of her car when instructed to do so and stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car. Brooks did not evade arrest by flight, and no other exigent circumstances existed at that time." 661 F.3d 433. In both *Bryan* and *Brooks*, the Ninth Circuit concluded

that the officers' use of the Taser "was unreasonable and therefore constitutionally excessive." *Mattos*, 661 F.3d at 446; & *Bryan*, 608 F.3d at 629 (concluding "for the purposes of summary judgment, that Officer MacPherson used unconstitutionally excessive force").

In *Nelson*, the firing of pepperball projectiles by law enforcement officers, without warning, into a group of "party-goers posing no visible threat" to "officers or other persons," who "engaged in passive resistance, at most, by failing to immediately disperse" and "who had committed at most minor misdemeanors" was found by the Ninth Circuit to be "in violation of Nelson's clearly established Fourth Amendment right." 685 F.3d at 883, 886-887,

In *Young*, the combination of pepper spray and baton strikes, without warnings, by a police officer against an individual whose "crimes involved in [a] traffic stop were non-violent misdemeanors," who presented no "immediate threat to [the] safety of the officer or others" and "was not actively resisting arrest or attempting to flee" was found to be "excessive in violation of the Fourth Amendment." 655 F.3d at 1166.

In addition to these cases, the Ninth Circuit's citations to the following cases also create the plethora of caselaw from which Petitioners cannot escape: *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011), and *Headwaters Forest Def. v. Cty. of Humboldt*, 240 F.3d 1185 (9th Cir. 2011). *Deorle* involved a police officer who shot "an unarmed man" who had "committed no serious offense, [was] mentally or emotionally disturbed, [had] been given no warning of the imminent use of such a significant

degree of force, pose[d] no risk of flight, and present[ed] no objectively reasonable threat to the safety of the officer or other individuals." 272 F.3d at 1285. *Mattos* involved the tasing of a female suspect "who the officers [had] ostensibly come to protect," whose offense was "minimal at most," who "posed no threat to the officers" and who was provided no warning that the officer would tase her. 661 F.3d at 450-451. In *Headwaters Forest Def.*, law enforcement officers applied pepper spray directly to the eyes and faces of nonviolent "protestors [who] posed no safety threat to anyone," whose only crimes were "trespass," and who "could not 'evade arrest by flight.'" 240 F.3d at 1205. In all three of these cases, the conduct of the law enforcement officers were held to be unreasonable uses of force in violation of the Fourth Amendment. In *Mattos* and *Headwaters Forest Def.*, the Ninth Circuit panels concluded that "reasonable fact finders could conclude that the officers' use of force…,as alleged, was constitutionally excessive in violation of the Fourth Amendment." *Mattos*, 661 F.3d at 451; see also *Headwaters*, 240 F.3d at 1206 ("a rational juror could easily conclude that there was sufficient evidence for a verdict in favor of plaintiffs" that that the force used to effect an arrest was unreasonable under the Fourth Amendment).

Analyzing the Ninth Circuit's decision in this case against the backdrop of cases discussed above, it is clear that the Ninth Circuit's denial of Petitioners' qualified immunity was well grounded in clearly established law concerning the proper use of force by law enforcement officers when encountering an unarmed, non-threatening individual who is not resisting arrest or attempting to flee.

C. The Ninth Circuit's Memorandum Opinion Does Not Raise or Leave An Important Question of Federal Law Unsettled

Petitioners' request for certiorari is a thinly veiled attempt to: (1) undermine the long-standing well-established constitutional doctrines governing excessive force and qualified immunity, and (2) expand the commuinty caretaking doctrine to empower police officers to use any level of force in seeking compliance from a member of the public without appropriate adherence to well-established constitutional dictates set forth in *Graham v. Connors*.

As discussed *supra*, Petitioners' deliberate mischaracterization of the operative facts in this case as determined by both the District Court and the Ninth Circuit is a strategy deployed by Petitioners to confuse and lead this Court down the rabbit hole of addressing whether the Ninth Circuit erred in defining "existing precedent at a high level of generality" using the wrong set of operative facts for that comparative exercise. Petition at p.15. Petitioners' arguments about clearly established law and looking for a case squarely on point with an incorrect set of facts for this case ignores the substance of the Ninth Circuit's opinion and analysis which was the proper application of the *Graham v. Connor* multi-factor test in determining that the multiple uses of pepper spray and the Taser on Sheldon was unconstitutionally excessive in violation of the Fourth Amendment.

As discussed *supra* the application of this multi-factor, reasonableness test is the appropriate measure for analyzing Fourth Amendment excessive force cases and the appropriate "guidance" for officers who deploy

force in the attempt to seize an individual in accordance with the Fourth Amendment. The community caretaking doctrine is of limited applicability in this case, and Petitioners' use of it to attack the District Court and the Ninth Circuit's denial of qualified immunity is utterly misplaced, improperly expands the reach of the doctrine, and if adopted would create a "roving commission" or excuse for police officers to use any level of force in seeking compliance from a member of the public without appropriate adherence to well-established constitutional dictates. *See State v. Vargas*, 63 A.3d 175, 191, 213 N.J. 301 (2013).

The community caretaking doctrine originated in *Cady v. Dombrowski*, 43 U.S. 433 (1973), which involved the warrantless search and inventory of an impounded vehicle that had been towed and stored at the direction of the police. The warrantless search and inventory was upheld in order to protect the vehicle owner from property loss and the police department from false claims. 413 U.S. at 447. Also known as the emergency aid doctrine, the community caretaking doctrine now allows police, in limited circumstances, to conduct warrantless searches and seizures in response to situations involving imminent threats of danger to a subject or the public. *Id.* It has only been modified to extend to searches of homes and residences.

In *Ames v. King County*, 846 F.3d 340 (9th Cir. 2017), the Ninth Circuit considered the community caretaking doctrine where police were responding to a situation involving a potential suicide and overdose. The subject was drifting in and out of consciousness. *Id.* at 344. The subject's mother would let emergency medical service

providers into the residence, but not deputy sheriffs. *Id.* After law enforcement and emergency medical service personnel withdrew from the residence, the mother attempted to take her son to the hospital. *Id.* Officers stopped her and she resisted. *Id.* at 345. Officers then entered the mother's vehicle without a warrant and searched for and seized the son's prescription medicine on which he overdosed and the suicide note he had written. *Id.* at 345-346. The mother sued the officers alleging excessive force and Fourth Amendment search and seizure violations. *Id.* at 346. *Ames* applied the community caretaking doctrine in determining whether the Fourth Amendment search and seizure violations for restraining the mother and entering her vehicle without a warrant. *Id.* at 348-349. In evaluating the excessive force claim, the Ninth Circuit still applied *Graham v. Connor* to determine whether the level of force applied to the mother was appropriate. *Id.* at 348-350. To the extent that the Ninth Circuit used the community caretaking doctrine to inform its evaluation of the government's justification of the intrusion and the immediate danger posed to the son by his mother's actions, *Ames* is factually distinguishable from this case. In this case, there was no imminent threat to the public, to Sheldon, or to Petitioners that would have required Petitioners to use the significant level of force – namely multiple deployments of pepper spray and uses of the Taser – they used to arrest him. *Compare Ames*, 846 F.3d at 349-350 *to* Appx.A at p.5a.

Thus, Petitioners' attempt to use and stretch the community caretaking doctrine as broad authority to seize and restrain individuals who are not presenting any threat is extremely troubling, especially in light of

the publicized police killings that have occurred in the past two to three years. It is alarming that, under the expansion of the community caretaking doctrine, law enforcement would be given "a roving commission" to engage in seizing and restraining people without regard fo the guidance currently provided under long-standing clearly established law applicable to the proper use of force by law enforcement officers.

CONCLUSION

For all the foregoing reasons, Respondents Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, Jessica Y. Haleck, Individually and as Guardian *Ad Litem* of Jeremiah M. V. Haleck, William E. Haleck, and Verdell B. Haleck respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Eric A. Seitz
Counsel of Record
Della A. Belatti
Gina Szeto-Wong
Jonathan M.F. Loo
Kevin A. Yolken
Law Offices of Eric A. Seitz
820 Mililani Street, Suite 714
Honolulu, Hawaii 96813
(808) 533-7434
eseitzatty@yahoo.com

Counsel for Respondents

December 27, 2018