No.

IN THE

Supreme Court of the United States

CITY OF SANDPOINT, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO; ET AL,
PETITIONERS

v.

DANA MADDOX, ON BEHALF OF D.M. AND D.M., MINOR CHILDREN AND HEIRS OF JEANETTA RILEY, DECEASED; ET AL.,

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

PETITION FOR WRIT OF CERTIORARI

JENNIFER H. FEGERT
Counsel of Record

Peter C. Erbland
Lake City Law Group PLLC
435 W. Hanley Ave., Suite 101
Coeur d'Alene, ID 83815
jfegert@lclattorneys.com
(208) 664-8115

CURRY & TAYLOR ♦ 202-350-9073

QUESTION(S) PRESENTED

1. Does the Ninth Circuit Panel's refusal to hear these petitioning police officers' interlocutory appeal on their claim of qualified immunity deny them the appellate remedy to which they are entitled under the decisions of this Court and does this refusal constitute a denial of due process?

2. Is the Panel's inexplicable, arbitrary resort to waiver and forfeiture to deny jurisdiction to hear this interlocutory appeal at odds with its duty to carry out a *de novo* review of the summary judgment record, causing a jurisdictional ambush which without notice unfairly denies petitioners their right to a timely review of their claim of qualified immunity?

PARTIES TO THE PROCEEDING

City of Sandpoint, Idaho; City of Sandpoint Police Department; Skylar Carl Ziegler, in his individual and official capacity; Michael Henry Valenzuela, in his individual and official capacity; and Garrett L. Johnson, in his individual and official capacity, *Petitioners*,

Dana Maddox, on behalf of D. M. and D. M., and Raymond Foster on behalf of H. F., minor children and heirs of Jeanetta Riley, deceased; and Shane Riley, individually and as the personal representative, heir and husband of Jeanetta Riley, deceased, and on behalf of their unborn child

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OPINIONS BELOW

The unpublished Memorandum Decision of the United States Court of Appeals for the Ninth Circuit in *Dana Maddox et al. v. City of Sandpoint* (C.A. No. 17-35875), decided July 25, 2018, and reported at 732 Fed. Appx. 609 (9th Cir. 2018), dismissing for lack of appellate jurisdiction petitioners' interlocutory appeal from the denial of their motion for summary judgment based on their claim of qualified immunity from respondents' civil rights suit claiming their unreasonable use of excessive force, is set forth in the Appendix hereto (App. 1-5).

The unpublished Memorandum Decision and interlocutory Order of the United States District Court for the District of Idaho, in *Dana Maddox et al. v. City of Sandpoint* (Civil Action No. 2:16-CV-00162-BLW), decided September 29, 2017, and reported at 2017 WL 4343031 (D. Idaho 9/29/2017), denying petitioners' summary judgment motion on the grounds of their qualified immunity in respondents' civil rights action for their alleged unreasonable use of excessive force, is set forth in the Appendix hereto (App. 6-38).

The unpublished order of the United States Court of Appeals for the Ninth Circuit in *Dana Maddox et al. v. City of Sandpoint* (C.A. No. 17-35875), filed on August 31, 2018, denying petitioners' timely filed petition for rehearing *en banc*, is set forth in the Appendix hereto (App. 39-40).

JURISDICTION

The decision of the Circuit Court of Appeals for the Ninth Circuit dismissing for lack of appellate jurisdiction petitioners' interlocutory appeal from the denial of their motion for summary judgment based on their claim of qualified immunity was entered on July 25, 2018; and its order denying petitioners' timely filed petition for rehearing *en banc* was filed on August 31, 2018 (App. 1-5;39-40).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of petitioners' timely filed petition for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

nited States Constitution, Amendment XIV, § 1:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §§ 1343(a)(3) & (4):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
...
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Idaho Code § 18-4011.

Justifiable homicide by officer. Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either:

1. In obedience to any judgment of a competent court; or
2. When reasonably necessary in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty including suppression of riot or keeping and preserving the peace. Use of deadly force shall not be justified in overcoming actual resistance unless the officer has probable cause to believe that the resistance poses a threat of death or serious physical injury to the officer or to other persons; or
3. When reasonably necessary in preventing rescue or escape or in retaking inmates who have been rescued or have escaped from any jail, or when reasonably necessary in order to prevent the escape of any person charged with or suspected of having committed a felony, provided the officer has probable cause to believe that the inmate, or persons assisting his escape, or the person suspected of or charged with the commission of a felony poses a threat of death or serious physical injury to the officer or other persons.

STATEMENT

At about 9:10 p.m. on July 8, 2014, respondent Shane Riley ("Shane") drove his wife, Jeanetta Riley ("Jeanetta"), to the Bonner General Hospital in Sandpoint, Idaho. Shane parked their white Astro van and entered the nearby hospital's emergency room entrance, leaving Jeanetta sitting in the van outside the entrance. Once inside, Shane approached a hospital worker, later identified as Rosie Brinkmeier, and told her that he had an emergency, i.e., his wife Jeanetta was outside the emergency room with "a knife and she is talking all kinds of crazy shit" and threatening to kill people. Shane asked Brinkmeier to call 911 and then went back outside.

Brinkmeier immediately instructed a co-worker to press the hospital's "panic button" which put the hospital on lockdown. She then called 911, a call Bonner Communication Police Dispatch received at about 9:13 p.m. Brinkmeier reported that "there is a gentleman who came into the waiting room and said his wife was outside the waiting room with a knife and wants to kill people." Dispatch then radioed petitioner Sandpoint Police Department ("SPD" or "petitioner") and advised that it should respond to the hospital because "there is a female outside in a white Astro van with a knife threatening to kill people."

Petitioners Skylar Ziegler ("Ziegler" or "petitioner"), Michael Valenzuela ("Valenzuela" or "petitioner") and Garrett Johnson ("Johnson" or "petitioner"), all police officers for SPD ("the police officers"), were on duty at the time of this dispatch call and all three responded by driving to the hospital

approximately fourteen (14) city blocks away. Officer Johnson, training with his Field Training Officer Valenzuela, rode together in one police vehicle while Ziegler rode alone in another police vehicle. Each vehicle was clearly marked with the SPD insignia; and each of the police officers was fully dressed in his police uniform with the SPD logo and insignia clearly displayed.

As they drove to the hospital with their lights and sirens activated, the police officers heard dispatch report to them that the hospital's "panic button" had been pushed, it was now on lockdown, and that "[i]t looks like the offender, the suspect, is a female, [and] the male reported her as having a knife and wanting to kill people." Valenzuela radioed back wanting to know the suspect's exact location; and he was told that she was outside the hospital's emergency room entrance in a white Astro van. This reported information about the hospital's lockdown status, the suspect's location and that she "wanted to kill people" was the only information known either to dispatch or to the police officers at that time.

Some of the ensuing events were recorded on dash camera video recorders of the police vehicles driven by Ziegler and Valenzuela as well as by Ziegler's body camera. Those video recordings show that Ziegler arrived first on the scene at about 9:15:16 with Valenzuela and Johnson arriving 30 seconds thereafter. Ziegler parked his vehicle across the street from and to the front of the white Astro van, about twenty (20) feet away; Johnson parked his patrol car across from and slightly behind Ziegler's vehicle.

As Ziegler stepped out of his vehicle, Shane Riley walked quickly away from the white Astro van parked in front of the emergency, proceeded directly in front of Ziegler and pointed back toward the van so that the police officers would know where Jeanetta was located. She was then seated in the passenger seat of the van with the door open. No other communication to the officers was forthcoming from Shane as he walked away. Jeanetta then immediately exited the vehicle and began to walk at a quick pace on the grass between the sidewalk and the curb with her hands outstretched toward Johnson who was now standing with his sidearm drawn to the left of Valenzuela and Ziegler on the sidewalk across from the emergency room.

As Jeanetta approached Johnson, both Ziegler (who had his sidearm drawn) and Valenzuela (who had his assault rifle drawn) yelled to her to "walk over here" and "show me your hands"' in an effort to distract her attention from Johnson, draw her out from behind the van and see if she had any weapons in her hands. She yelled "Fuck you!" as she continued to walk towards Johnson and as Johnson approached her along the sidewalk. As she did so, she lifted her hands, allowing Ziegler for the first time to see she had a knife in her right hand, a fillet-type knife measuring about nine (9) inches long with a 4.5-inch metal blade typically used to gut fish.

Ziegler and Valenzuela approached Jeanetta and again yelled at her to "show me your hands" and "drop the knife," to which she responded "No!" as she continued to walk toward Johnson. At this point, Ziegler re-holstered his sidearm and drew his taser. He and Valenzuela continued to approach Jeanetta and

once again told her to "drop the knife!" as Ziegler pointed his taser at Jeanetta. She then yelled at the officers to "Bring it on!" and changed her course so that she was now walking towards Ziegler and Valenzuela.

Ziegler still had his taser pointed at Jeanetta. They again yelled for her to "drop the knife" and she again responded "No!" A *fourth* command to "drop the knife" was met with a louder, more emphatic "No!" With Jeanetta still approaching the police officers, showing no intention to stop or to change her course and holding the knife low in her outstretched right hand, Ziegler and Valenzuela reversed course and began to back away with Ziegler lowering his taser and raising his service weapon.

Believing their lives were in imminent danger and fearing for the safety of Johnson, both Ziegler and Valenzuela discharged their service weapons, just *fifteen seconds* from the time when Jeanetta exited the van and began to interact with them. Ziegler estimated that Jeanetta was within twelve (12) to fifteen (15) feet from him—and still approaching—when he fired his weapon; Valenzuela thought that she was about ten (10) feet from him—and still approaching—when he discharged his service weapon. Ziegler and Valenzuela fired a total of five (5) shots in less than one second and three of those bullets struck Jeanetta.

After the shots were fired, the knife fell away from Jeanetta and onto the ground directly in front of the police officers, showing that she was in very close proximity to the officers when the shots were fired. Upon approaching Jeanetta, Valenzuela kicked the knife behind him to clear it from Jeanetta's reach.

Johnson then kicked the knife further away from the scene. Ziegler immediately began life saving measures on Jeanetta and continued to do so until the scene was cleared and hospital workers could attend to her. She was taken into the emergency room for further treatment but eventually succumbed to her injuries.

Shane Riley later recounted the events leading to his drive to the hospital with Jeanetta , i.e., her threats while in the van to kill herself, her statements that she was going to "cut up" anyone who tried to take her or to stop her, and his decision that the hospital was the best destination in the circumstances. He also described Jeanetta as walking towards the officers "like a gangster" with the knife in her right hand, "like she was walking into her own grave," concluding that "she wanted this to happen this way."

SPD's policy about the use of force, including the use of deadly force, is such that its police officers are not required to retreat or be exposed to physical injury before applying reasonable force. Instead, SPD Policy E-603.05 authorizes the use of deadly force in order for a police officer to protect him or herself or others from what he or she reasonably believes would be an imminent threat of death or serious bodily injury, all in accordance with Idaho Code § 18-4011. During their deadly force training at the Idaho Police Standards and Training Academy, these police officers were taught the "21-Foot Rule," also known as the "Tueller Rule," which addresses their response to a short-range knife attack.

The Rule instructs that in the time it takes an officer to recognize a threat, draw his firearm and fire

two rounds, an average subject charging at the officer with a knife or other cutting weapon can cover a distance of twenty-one (21) feet. Stated another way, an attacker wielding a knife and rushing at an officer presents a clear and deadly threat to an armed officer if the attacker is within twenty-one (21) feet of that officer. Outside of their training at the Idaho Police Standards and Training Academy, both Ziegler (70+ hours) and Valenzuela (30+ hours) had received extensive training which addressed this Rule as well as SPD's policies about the use of deadly force and the use of firearms.

In the aftermath of these events, respondents Dana Maddox and Raymond Foster, on behalf of Jeanetta's minor children, and Shane Riley, individually and as Jeanetta's husband, personal representative and on behalf of their unborn child ("respondents"), brought this civil action in federal district court for the District of Idaho against petitioners City of Sandpoint, SPD, Ziegler, Valenzuela and Johnson ("petitioners"), among others, known and unknown, seeking damages under 42 U.S.C. § 1983, because of the objectively unreasonable and excessive use of deadly force which resulted in Jeanetta's death, violating her rights under the Fourth and Fourteenth Amendments. Jurisdiction of the district court was posited on 28 U.S.C. §§ 1331 and 1343(a)(3) & (4).

Petitioners moved for summary judgment on all of respondents' claims and by stipulation they agreed to first resolve the question of whether police officers Ziegler, Valenzuela and Johnson were entitled to qualified immunity from these claims (App. 6-38). The district court, Winmill, J., heard oral argument on

March 9, 2017, and issued its Memorandum Decision and Order on September 29, 2017 (App. 6-38). Applying the "totality of the circumstances" test of *County of Los Angeles v. Mendez*, 581 U.S. ___, ___; 137 S. Ct. 1539, 1547 (2017) and *Graham v. Connor*, 490 U.S. 386, 396 (1989) to determine whether this particular seizure was objectively reasonable and therefore could support a qualified immunity defense, the motion judge concluded that there were unresolved factual questions about whether Jeanetta posed an immediate threat of harm to the officers so as to justify their use of deadly force (App. 31-33). Because there was a material dispute of fact about whether Jeanetta presented an immediate threat of harm to the officers, "the Court must make the reasonable inference that [she] did not pose [such a] threat to the officers, and thus her right to be free from the use of deadly force was clearly established" (App. 35-36 citing *Tolan v. Cotton*, 572 U.S.___, ___; 134 S. Ct. 1861, 1868 (2014)).

Petitioners contended that Ziegler and Valenzuela could have reasonably concluded that Jeanetta posed an imminent threat of harm because of her known prior statements that she wanted "to kill people," her verbal aggression, her persistent refusals to drop the knife, her aggressive and continued approach towards the officers with the knife clearly displayed and her close physical proximity to them at the time they used their firearms (App. 16). However, the district judge, concluded that she presented no threat to the officers when they first arrived; that her prior known threats "to kill people" did not carry with it an intention to immediately act upon those threats; and that her intense verbal aggression towards the officers, e.g., "Fuck you!" and "Bring it on!", was *not*

spoken with an intent to harm the officers but rather was "an invitation for the officers to harm Jeanetta" (App. 16-18).

While the motion judge thought that Jeanetta's ongoing refusal to comply with the officers' four separate commands to "drop the knife" weighed in favor their reasonable belief that she posed an imminent threat to them, he relied upon Shane Riley's statement on summary judgment that Jeanetta's demeanor as she confronted the officers was not threatening and that she did not place the knife in a position which threatened them (App. 18-21). As such, "[t]hese findings do not support a reasonable belief that [she] posed an immediate threat" to the officers (App. 21).

As for the 10-12 feet of proximity between her and the officers at the culmination of their confrontation, the lower court discounted as unreasonable any reliance on the "21-Foot Rule" which presumptively applies to a short-range knife attack such as this one (App. 22-23). Because Ziegler had time to holster his sidearm, draw his taser, and then re-draw his gun before he fired on Jeanetta from twelve feet away, this Rule did not support the idea that a suspect posed a threat to an officer based solely on a particular distance from the officer (*Id.*). In addition, the proximity between Jeanetta and the officers was a by-product of the fact that Jeanetta and the officers were both approaching each other; and there was a jury question whether a reasonable police officer would disregard other options like seeking cover and instead advance towards a knife-wielding suspect if he believed

that she would pose an immediate threat of harm at a closer proximity (App. 25-26).

Nor did the lower court think it clear on this record that Jeanetta had the requisite intent or ability to do violence to the officers, or that she took any action to assault them; and while she refused to drop the knife and continued to be verbally bellicose with the officers, Jeanetta did not physically engage or resist them or attempt to flee (App. 26-29). The officers also failed to warn Jeanetta of the their use of deadly force or to resort to the less intrusive alternative of tasing her (App. 29-31). Thus the district judge concluded that when balanced against Jeanetta's failure to comply with the officers' serial commands to drop her knife, the totality of the other circumstances did not justify a reasonable belief on the officers' part that she posed an immediate threat of harm to them (App. 31-33).

Petitioners appealed this interlocutory ruling denying summary judgment, arguing in both their Opening and Reply Briefs that even if the facts alleged by respondents were true, they acted as any reasonable police officers would have acted given all the facts known to them at the time of their use of deadly force. With meticulous reference to the record, at least seven (7) times in their Opening Brief and six (6) times in their Reply Brief, petitioners contended that the facts adduced on summary judgment, even when read in the light most favorable to respondents, demonstrated a tense, unpredictable and rapidly evolving encounter which occurred within seconds upon their arrival at the hospital: a woman known to have expressed a desire "to kill people" immediately approached them wielding a knife, was verbally aggressive and confrontational

while emphatically refusing four times to obey their commands to drop her weapon while advancing towards them at the same time.

When viewed from the perspective of a reasonable police officer on the scene---rather than with the benefit of 20/20 hindsight---petitioners claimed that these *undisputed facts* would have led a reasonable police officer in their position to believe that Jeanetta posed an immediate threat of harm to them. As the district court found, it was *undisputed* that just before their simultaneous use of deadly force, Ziegler and Valenzuela, both perceiving imminent danger at the same precise moment, had "reversed course and began to back away" from the oncoming Jeanetta who continued to refuse to drop the knife she was brandishing or to halt her advance (App. 9). For these reasons, petitioners argued that "even if the facts alleged by [respondents] were true, the officers acted as any reasonable officer would have acted given all the facts known to him at the time of the incident" and therefore no violation of Jeanetta's Fourth Amendment rights occurred (Petitioners' Opening Brief at pp. ii; 22-37; Reply Brief at pp. 9-18).

Petitioners further argued throughout seven (7) pages of their Opening Brief and nine (9) pages of their Reply Brief that even when read in the light most favorable to respondents, the *undisputed* facts did not demonstrate that they had violated a clearly established constitutional right by acting as they did because Jeanetta had no clearly established constitutional right to aggressively advance upon uniformed police officers with a knife clearly displayed in her hands, verbally challenging the officers to "Bring

it on!" while at the same time adamantly refusing to drop her weapon despite four commands to do so; and there was no clearly established case law which prohibited petitioners from using deadly force in responding to this particular situation in the mere seconds they had to do so.

On July 25, 2018, the court of appeals issued its Memorandum of Decision unanimously dismissing petitioners' appeal for lack of appellate jurisdiction without deciding whether they were entitled to qualified immunity (App. 1-5). According to the court, where the motion judge has found triable issues of fact for trial regarding the defense of qualified immunity, its appellate jurisdiction is confined only to "the legal question of whether the facts, taken in the light most favorable to the non-moving party, show a violation of a clearly established constitutional right" (App. 2-3).

Because it believed that petitioners in their briefs and oral argument had failed to present the facts in a light most favorable to respondents, they forfeited the legal argument that, based on those facts, they were entitled to qualified immunity (App. 3). As the court wrote, petitioners "merely dispute the circumstances attendant to Jeanetta's encounter with [them] and contend that she posed an immediate threat to the officers based on their version of the facts"; and citing *Johnson v. Jones*, 515 U.S. 304, 319-320 (1995), it ruled that petitioners may not appeal a district judge's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial (*Id.*).

On August 31, 2018, the court of appeals denied petitioners' timely filed petition for rehearing *en banc* (App. 39-40).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit Panel's Refusal To Hear These Petitioning Police Officers' Interlocutory Appeal On Their Claim Of Qualified Immunity Denies Them The Appellate Remedy To Which They Are Entitled Under The Decisions Of This Court And Constitutes A Denial Of Due Process.

Under this Court's well developed decisional law beginning with *Mitchell v. Forsyth*, 472 U.S. 511 (1985) and continuing through *Plumhoff v. Rickard*, 572 U.S. ___; 134 S. Ct. 2012 (2014), those parties like the petitioning police officers who claim qualified immunity from a civil rights lawsuit but denied summary judgment on that ground have the right to seek immediate appellate review of that ruling when the lower court determines that their conduct violated a constitutional right of the plaintiff and that, in any event, they violated a clearly established constitutional right by acting as they did. Upon such an appeal, the issue is purely one of law with the police officers asserting that even if the facts alleged by the plaintiff were true, they still did not violate the Fourth Amendment and that, in any event, their conduct did not violate a clearly established constitutional right.

Consistent with this law, petitioners argued on appeal that "even if the facts alleged by [respondents] were true, the officers acted as any reasonable officer would have acted given all the facts known to him at

the time of the incident" and therefore no violation of Jeanetta's Fourth Amendment rights took place (Petitioners' Opening Brief at pp. ii; 22-37; Reply Brief at pp. 9-18); and that, in any event, even when read in the light most favorable to respondents, these *undisputed* facts did not demonstrate that they had violated any clearly established constitutional right possessed by Jeanetta (Petitioners' Opening Brief at pp. 38-44; Reply Brief at pp. 18-26).

Meticulously referencing the record, petitioners at least seven (7) times in their Opening Brief and six (6) times in their Reply Brief contended that the facts adduced on summary judgment, *even when read in the light most favorable to respondents*, demonstrated a tense, unpredictable and rapidly evolving encounter which occurred within seconds upon their arrival at the hospital: a woman known to have expressed a desire "to kill people" immediately approached them wielding a knife, was verbally aggressive and confrontational while emphatically refusing four times to obey their commands to drop her weapon while advancing towards them at the same time. Moreover, as the district judge himself found (App. 9), it was *undisputed* that just before their simultaneous use of deadly force, Ziegler and Valenzuela, both perceiving imminent danger at the same precise moment, had "reversed course and began to back away" from the oncoming Jeanetta who continued to refuse to drop the knife she was brandishing or to halt her advance.

The legal issues of whether on this record petitioners violated Jeanetta's Fourth Amendment rights and whether, in any event, their conduct violated a clearly established constitutional right were therefore

clearly and unarguably before the court of appeals for its resolution. Yet this Panel of the Ninth Circuit misread *Johnson v. Jones*, 515 U.S. 304 (1995) to mean it barred its interlocutory review of petitioners' claims, employed unfair notions of waiver and forfeiture to withhold its unquestioned jurisdiction to hear this appeal, and decided that petitioners had impermissively relied on "their [own] version of the facts" in asserting their right to qualified immunity from this lawsuit.

This reasoning by the Ninth Circuit misapprehends what facts are"genuine" in deciding the issue of qualified immunity on summary judgment; it is at odds with *Mitchell* and its progeny, controlling precedent of this Court about how the defense of qualified immunity should be assessed on appeal; and its reliance on waiver and forfeiture is unfair, inexplicable and contrary to its obligation to carry out a *de novo* review of the record upon an interlocutory appeal from the denial of summary judgment based on qualified immunity.

This result denies these police officers the appellate remedy to which they are entitled under the decisions of this Court, a denial of due process which raises the important question of whether this decision will cause further erosion of the appellate rights of government officials, including police officers, who claim qualified immunity in the Ninth Circuit and beyond.

A. From Mitchell to Plumhoff—Petitioners' Right to Interlocutory Appellate Review.

The value of an interlocutory appeal in qualified immunity cases was recognized in *Harlow v. Fitzgerald*,457 U.S. 800, 818 (1982), where this Court held that the qualified-immunity defense "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* *Harlow* adopted this criterion of "objective legal reasonableness," rather than good faith, in order to "permit the defeat of insubstantial claims without resort to trial.," *id.* at 819, because if a case is erroneously permitted to go to trial despite a valid claim of qualified immunity, this immunity defense is irretrievably lost. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

The denial of a qualified immunity defense upon summary judgment accordingly possesses the dimensions of a collateral order within the rubric of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) because it falls within that small class of orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*

Petitioners' claim of qualified immunity is therefore conceptually distinct from respondents' claim that Jeanetta's constitutional rights were violated. As the Court wrote in *Mitchell*,

> [a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court had denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

472 U.S. at 528 (footnote omitted). In *Mitchell*, the Court held that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291, notwithstanding the absence of a final judgment. *Id.* at 530.

In *Johnson v. Jones*, 515 U.S. 304 (1995), the Court decided that *Mitchell's* holding that an order denying summary judgment on the grounds of qualified immunity is immediately appealable does *not* obtain when all that was decided by the lower court in its ruling was a question of "evidence sufficiency," i.e., when that order simply determines whether or not the pretrial record sets forth a "genuine"issue of fact for trial. There the police officers accused of beating the plaintiff claimed that there was no evidence that they had done so or that they were even present while others did so; and the district court denied summary

judgment because there was "sufficient circumstantial evidence supporting [the plaintiff's] theory of the case." *Id.* at 307-308.

Thus the summary judgment record was insufficient to support a finding that any particular conduct on the part of the police officers had occurred; and the question decided by the district court on summary judgment was not truly separable from the plaintiff's claim and therefore could not amount to a "final decision"under *Cohen* and *Mitchell*. *Id.* at 311-315. However, *Johnson* reaffirmed the rule that summary-judgment determinations *are* appealable when they resolve a dispute concerning an abstract issue of law relating to qualified immunity, e.g., whether the police officers violated a constitutional right of the plaintiff or whether the federal right allegedly infringed was "clearly established." *Id.* at 312;317;320.

In *Behrens v. Pelletier*, 516 U.S. 299, 313-314 (1996), Justice Scalia's majority opinion once more reaffirmed *Johnson's* principle that where all that is decided on summary judgment is "nothing more than whether the evidence could support a finding that particular conduct occurred," the ruling is not separable from the plaintiff's claim and cannot be a "final decision" under *Cohen* and *Mitchell*; but if the ruling decides an abstract issue of law relating to qualified immunity, such summary-judgment determinations are appealable. *Id.*

In *Behrens*, the denial of petitioner's summary judgment motion based on qualified immunity necessarily determined that certain conduct attributed

to him (which was disputed) constituted a violation of clearly established law. *Id.* at 313. In these circumstances, Justice Scalia wrote:

> *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of "objective legal reasonableness." This argument was presented by petitioner in the trial court, and there is no apparent impediments to its being raised on appeal....

Id.

Similarly in *Plumhoff v. Rickard*, 572 U.S. at ___; 134 S. Ct. at 2018-2019, the district court denied the police officers' summary judgment motion on the basis of qualified immunity and ruled that triable issues of fact existed about whether defendant police officers violated the Fourth Amendment and acted contrary to law that was clearly established when they shot a fleeing motorist, causing him and his passenger to die from a combination of gunshot wounds and injuries suffered in the crash that ended the chase. *Id.* As in *Behrens*, the motion necessarily determined that certain conduct attributed to the officers was a violation of clearly established law.

Reversing the Sixth Circuit court of appeals which had affirmed this ruling after initially refusing jurisdiction to hear the officers' appeal on the basis of *Johnson*, Justice Alito, writing for a near majority of the Court, wrote:

> The District Court order in this case is nothing like the order in *Johnson*. *Petitioners do not claim that other officers were responsible for shooting [the fleeing motorist]; rather, they contend their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law.* Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.
>
> The...order here is not materially distinguishable from the District Court order in *Scott v. Harris* [550 U.S. 372, 381 n. 8 (2007), where a videotape of the car chase left no factual dispute about the officers' conduct in response to a dangerous car chase], and in that case we expressed no doubts about the jurisdiction of the Court of Appeals under § 1291. Accordingly, here, as in *Scott*, we hold that the Court of Appeals properly exercised jurisdiction....

Id. at ___; 2019-2020 (emphasis supplied). Addressing the merits, the *Plumhoff* Court ruled that the Fourth Amendment did not prohibit the police officers from resorting to deadly force to end this dangerous car chase. *Id.* at ___; 2024.

As in *Plumhoff*, the district court's order here is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for using deadly force in this situation. Rather, like the police

officers in *Plumhoff* and *Harris* as well as the petitioner in *Behrens*, they contend that, viewing all the relevant, genuine and material facts in respondents' favor, their admitted conduct was objectively reasonable, did not violate the Fourth Amendment and, in any event, did not violate any clearly established law. The motion judge concluded otherwise and determined that there were triable fact questions about whether petitioners had violated Jeanetta's Fourth Amendment rights as well as her clearly established her right to be free from the use of deadly force (App.31-33;35-36).

With the contentions of the police officers in this posture, deciding this appeal does *not* require any more factfinding because it is *undisputed* how the police officers acted; and it is *undisputed* what they knew at the moment when both Ziegler and Valenzuela decided to use deadly force. After all, when deciding whether the police officers' defense of qualified immunity should prevail on summary judgment, "the Court considers only the facts that were knowable to the defendant officers." *White v. Pauly*, 580 U.S. ___, ___; 137 S. Ct. 548, 550 (2017) citing *Kingsley v. Hendrickson*, 576 U.S. ___,___; 135 S. Ct. 2466, 2474 (2015). Like the police officers in *Plumhoff*, petitioners' appeal raised purely legal issues, quite different from any factual issues that the trial court might confront if the case were tried.

As the *Plumhoff* Court wrote, "deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden." 572 U.S. at ___; 134 S. Ct. at 2019-2020. Indeed, the federal courts have a "virtually unflagging obligation...to exercise the jurisdiction given them." *Quackenbush v. Allstate*

Insurance Co., 517 U.S. 706, 716 (1996). *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976). *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). Because this Court in *Mitchell*, *Johnson*, *Behrens*, *Harris* and *Plumhoff*, has consistently provided the courts of appeals with the jurisdiction necessary to decide these kinds of interlocutory appeals, the Ninth Circuit Panel unquestionably possessed the jurisdiction to do so here. Any other conclusion nullifies these important decisions and denies petitioners the process due them under law.

B. The Panel's Inexplicable and Unfair Resort to Waiver and Forfeiture To Deny Its Appellate Jurisdiction.

The Panel's reliance on petitioners' supposed waiver or forfeiture to deny its appellate jurisdiction is unfair, inexplicable and contrary to its obligation to carry out a *de novo* review of the record upon an interlocutory appeal from the denial of summary judgment based on qualified immunity. First, there is *no* foundation in the appellate record for concluding that petitioners have not adequately briefed the purely legal issues of whether they violated Jeanetta's Fourth Amendment rights and whether they had violated any clearly established constitutional right possessed by Jeanetta.

Their Opening and Reply Briefs were articulate and straightforward: even when all the genuine, material and relevant facts were taken in the light most favorable to respondents, those facts showed objective reasonableness in their response to a rapidly escalating dangerous situation which Jeanetta's aggressive, confrontational conduct caused in a mere fifteen

seconds; and that, in any event, Jeanetta had no clearly established constitutional right to aggressively advance upon uniformed police officers with a knife clearly displayed in her hands, verbally challenging the officers to "Bring it on!" while at the same time adamantly refusing to drop her weapon despite four commands to do so; and there was no clearly established case law which prohibited petitioners from using deadly force in responding to this very dangerous situation in the mere seconds they had to do so.

Second, contrary to the Panel's description, petitioners in their Briefs were not "disputing the circumstances attendant to Jeanetta's encounter" or "disputing [her] version of the facts" (App. 3). They were relying upon their own perceptions, as reasonable police officers on the scene, of the imminent harm and danger Jeanetta presented to them in the 15-second time window they had to respond to her conduct. These were the only *genuine*, material facts which were relevant to their summary judgment motion. It bears repeating that in deciding whether petitioners' defense of qualified immunity is valid, the court "considers only the facts that were knowable to the defendant officers." *White v. Pauly*, 580 U.S. at ___; 137 S. Ct. at 550 citing *Kingsley v. Hendrickson*, 576 U.S. at ___; 135 S. Ct. at 2474. As the *Plumhoff* Court wrote:

> We analyze this question [of objective reasonableness] from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."
>
> We thus "allo[w] 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."

572 U.S. at ___; 134 S. Ct. at 2020, quoting *Graham v. Connor*, 490 U.S. 386, 396-397 (1989). Accord, *Kisela v. Hughes*, 584 U.S. ___, ___; 138 S. Ct. 1148, 1152 (2018) (*per curiam*); *County of Los Angeles, Calif. v. Mendez*, 581 U.S. ___, ___; 137 S. Ct. 1539, 1546 (2017); *San Francisco v. Sheehan*, 575 U.S. ___, ___; 135 S. Ct. 1765, 1777 (2015).

Indeed, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot avoid summary judgment even by showing through experts that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *San Francisco v. Sheehan*, *supra*, quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002), and citing *Saucier v. Katz*, 533 U.S. 194, 216 n. 6 (2001) (Ginsburg,, J., concurring in judgment) ("[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could have been handled differently.").

Thus from the perspective of these police officers, the only knowable facts were that a woman who expressed a desire "to kill people" immediately approached them wielding a knife; she was verbally aggressive and confrontational with them while emphatically refusing four times to obey their commands to drop her weapon while advancing towards them at the same time. Moreover, even after reversing

course and backing away from Jeanetta, she continued to refuse to drop the knife or to halt her advance, telling the officers to "Bring it on!"Ziegler and Valenzuela, both perceiving imminent danger to themselves and to others at the same moment, simultaneously used deadly force to end this imminent threat. These facts and no others were the "genuine" material facts upon which their use of deadly force hinged and upon which their claim for qualified immunity depended.

None of these genuine material facts is diluted by the district judge's inferences from the record that Jeanetta presented no threat to the officers when they first arrived; that her prior known threats "to kill people" did not carry with it an intention to immediately act upon those threats; or that her intense verbal aggression towards the officers, e.g., "Fuck you!" and "Bring it on!", was *not* spoken with an intent to harm the officers but rather was "an invitation for the officers to harm Jeanetta" (App. 16-18). *None* of these facts have anything to do with *the officers' own perceptions* of these critical events and those perceptions were the only genuine and material ones for assessing their right to qualified immunity.

Similarly, that Shane Riley thought that Jeanetta's demeanor as she confronted the officers was not threatening and that she did not place the knife in a position which threatened them (App. 18-21) is not a "genuine" issue of material fact for the purposes of summary judgment. Not only does this statement contradict his earlier description of Jeanetta's behavior as "gangster-like" as she approached the officers, it also is an irrelevant, immaterial and non-genuine issue of

fact because it has nothing to do with the real danger and imminent threat of harm which these police officers perceived when Jeanetta confronted them. In the same sense, that the lower court doubted that Jeanetta had the requisite intent or ability to do violence to the officers, or that she took any action to assault them or to physically engage or resist them or attempt to flee (App. 26-29) does not detract from the real danger and imminent threat *the police officers themselves perceived* from Jeanetta during this escalating confrontation.

Furthermore, that the officers failed to warn Jeanetta of their use of deadly force or to resort to the less intrusive alternative of tasing her (App. 29-31) cannot in these circumstances undermine the police officers' belief that at the moment they used deadly force, they believed that Jeanetta posed an immediate threat of harm to them. Even after reversing course and backing away from Jeanetta, she continued to refuse to drop the knife or to halt her advance, telling the officers to "Bring it on!"Ziegler and Valenzuela, both perceiving imminent danger to themselves and to others at the same precise moment, simultaneously used deadly force to end this imminent threat. That Ziegler reached for his handgun instead of a taser in the split second before this event cannot amount to a Fourth Amendment violation. Even if he had misjudged the situation (belied by Valenzuela's own use of deadly force), courts must not judge police officers with " 20/20 hindsight;" and there can be no constitutional violation "based merely on bad tactics that result in a deadly confrontation that could have been avoided." *San Francisco v. Sheehan*, 575 U.S. at ___; 135 S. Ct. at 1777, quoting *Graham v. Connor*, *supra*, and *Billington v. Smith*, 292 F.3d at 1190.

For all these reasons, petitioners on their appeal were not "disputing the circumstances attendant to Jeanetta's encounter" or "disputing [her] version of the facts," as the Panel believed (App. 3). They were relying upon their own summary judgment materials which described their own perceptions, as reasonable police officers on the scene, of the imminent harm and danger Jeanetta presented to them in the 15-second time window they had to respond to her conduct. These were the only *genuine* material facts which were relevant to their summary judgment motion on the basis of qualified immunity. While factual inferences from the record are to be made in respondents' favor, this rule applies only "to the extent supportable by the record" *Scott v. Harris*, 550 U.S. at 381 n.8.; and while there may be support for some of the above-described inferences gleaned by the district court, *none* of them constitutes *genuine* or *material* facts which could disturb or dilute the undisputed factual scenario which the police officers adduced describing their own perceptions about this encounter, the threat of imminent harm which they perceived, the ensuing use of deadly force and their right to qualified immunity. See *Chappell v. City of Cleveland*, 585 F.3d 901, 910-916 (6th Cir. 2009).

Third, waiver is the intentional relinquishment or abandonment of a known right while forfeiture is the failure to make the timely assertion of a right. *Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. ___, ___ n.1; 138 S. Ct. 13, 18 n.1 (2017). *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 895-895 n. 2 (1991) (Scalia, concurring in part and concurring in judgment). *United States v. Olano*, 507 U.S. 725, 733 (1993) quoting *Johnson v. Zerbst*, 304 U.S.

458, 464 (1938). Neither of these legal principles applies here. Petitioners' extensive briefing of the crucial legal issues attendant to their qualified immunity claim in both their Opening and Reply Briefs—all consistent with the facts they adduced in the district court in support of their summary judgment motion—belies any intention on their part to relinquish or abandon their right to pursue this claim on appeal.

For the same reasons, petitioners have not forfeited their right to claim qualified immunity on appeal by failing, inadvertently or otherwise, to timely assert that right in the court of appeals. That the Panel misapprehended petitioners' argument as "disputing the circumstances attendant to Jeanetta's encounter" or "disputing [her] version of the facts," a misapprehension founded on the Panel's mistaken view of the genuine material issues for deciding petitioners' qualified immunity on summary judgment, does not add up to a forfeiture on their part. Petitioners extensively raised in the district court every issue briefed and argued in the court of appeals; there is no unfair surprise; the issues raised are all pure legal issues; the public interest would be better served by addressing the issue; and manifest injustice would result should the court of appeals, as it has done here, refuse to consider petitioners' claims. See *Hormel v. Helvering*, 312 U.S. 552, 557-558 (1941); *Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist.*, 877 F.3d 136, 147-149 (3rd Cir. 2017) (appellate court reviews legal issue of qualified immunity even though overlooked in the district court).

Finally, employing waiver or forfeiture in these circumstances is unfair, arbitrary and a denial of due

process. In *Exxon Shipping v. Baker*, 554 U.S. 471 (2008), Justice Souter observed that waiver and forfeiture rules seek to narrow issues rather than generate them with the hope that litigation remains, to the extent possible, an orderly progression. That is, "[t]he reason for these rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players....Rather, litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." *Id.* at 487-488 n.6 quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993) (Boudin, J.) (citations omitted).

But here the Panel's imposition of these rules upon petitioners has no foundation in the summary judgment record, one which reflects that petitioners made these same arguments in the district court. It also conflicts with the Panel's own duty to review *de novo* the summary judgment record, an analysis which assumes that Jeanetta's version of the facts is true and asks whether these officers were still entitled to qualified immunity because there was no constitutional injury and there was no clearly established constitutional right to confront these police officers as she did. By nevertheless resorting to waiver and forfeiture to deny its power to decide this appeal, the Panel has imposed arbitrary rules, as in golf, upon these police officers to test their skill to anticipate this jurisdictional ambush, denying them the appellate remedy to which they were otherwise entitled. These police officers deserved better.

This unfairness reaches the proportions of a denial of due process. Petitioners' right to have their

claims on appeal heard and decided by the Panel----to have their day in court, even on appeal----is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). The actions of the federal courts including its judicial officers acting in their official capacities as an appellate tribunal is encompassed by the Fifth Amendment's due process clause. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984). The Panel's unanticipated adoption of this never-briefed or even raised issue of waiver and forfeiture without giving petitioners any opportunity to be heard is a denial of due process

CONCLUSION

For all of the reasons stated herein, the Court should grant petitioners' writ of certiorari, vacate the decision of the court of appeals and decide whether petitioners' claim of qualified immunity warrants the entry of summary judgment in their favor; or remand the matter to the court of appeals with instructions to exercise its appellate jurisdiction to decide petitioners' appeal; or provide petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Jennifer H. Fegert
Counsel of Record
Peter C. Erbland
Lake City Law Group PLLC
435 W. Hanley Ave., Suite 101
Coeur d'Alene, ID 83815
(208) 664-8115
jfegert@lclattorneys.com