No. 19-_____

**IN THE**

# Supreme Court of the United States

NEAL N. BROWDER, CITY OF SAN DIEGO, AND SHELLEY ZIMMERMAN,

*Petitioners,*

**v.**

S.R. NEHAD, K.R. NEHAD, AND ESTATE OF FRIDOON RAWSHAN NEHAD,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Shortly before midnight on April 29, 2015, a bookstore clerk saw Fridoon Rawshan Nehad in an alley. Nehad, who was incoherent, pulled a knife out of his backpack and said he was going to kill people. Nehad lunged at the clerk with the five-inch knife, but did not stab him. Nehad later went into the bookstore and said, at least five more times to the same bookstore clerk, that he was going to hurt or kill people. After Nehad left, the clerk called 911. A San Diego police dispatcher assigned this "hot call" the highest priority and informed officers there was a man threatening people with a knife.

San Diego Police Officer Neal Browder responded to the emergency call. Pulling into a nearby alley only minutes later, Officer Browder saw Nehad and confirmed the suspect's description from the call. Officer Browder got out of his patrol car and saw Nehad walking towards him with a metallic and shiny object held in a pointed fashion. As Nehad moved towards Officer Browder, Officer Browder fired his weapon. The total time from Officer Browder's arrival to the time he fired his weapon was 33 seconds. Nehad's parents and estate sued to recover damages for Nehad's death, but the District Court found that Officer Browder enjoyed qualified immunity from suit and granted the Defendants' motion for summary judgment. The United States Court of Appeals for the Ninth Circuit reversed the District Court's order.

Did the Ninth Circuit err in denying qualified immunity to a police officer who responded to a midnight emergency call about a suspect threatening

others with a knife, encountered that suspect in a dark alley walking towards him holding a metallic object within seconds upon arriving at the scene, and used deadly force?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit, whose judgment is sought to be reviewed, are Petitioners and Defendants below, the City of San Diego, a municipal corporation in the State of California, San Diego Police Department Officer Neal N. Browder, and former San Diego Chief of Police Shelley Zimmerman.

Respondents and Plaintiffs below are S.R. Nehad, K.R. Nehad, and the estate of Fridoon Rawshan Nehad.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All parties before this Court are individuals except the City of San Diego, which is a charter city in the State of California. No corporations are involved in this proceeding.

## RELATED PROCEEDINGS

*S.R. Nehad, et al. v. Neal N. Browder, et al.,* 3:15-cv-1386 (S.D. Cal.) – Judgment entered December 18, 2017

*S.R. Nehad, et al. v. Neal N. Browder, et al.,* No. 18-55035 (9th Cir.) - Judgment entered July 11, 2019

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Neal N. Browder, Shelley Zimmerman, and the City of San Diego respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The Ninth Circuit's decision is available at 929 F.3d 1125 (9th Cir. 2019). (Slip opinion, Appendix A, App.1-35.) The United States District Court for the Southern District of California's unreported order granting Defendants' motion for summary judgment can be found at 2017 WL 6453475. (Unreported District Court Order, Appendix B, App. 36-64.) The Ninth Circuit's order denying rehearing is unreported. (Unreported Order, Appendix C, App. 65-66.)

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion on July 11, 2019. (App. 1-35.) The Ninth Circuit denied Petitioners' petition for rehearing and rehearing en banc on October 2, 2019. (App. 65-66.) The Ninth Circuit issued its mandate on October 10, 2019. This Court has jurisdiction under 28 U.S.C. section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, Fourteenth Amendment to the United States Constitution, 42 U.S.C. section 1983, the Tom Bane Civil Rights Act, California Civil Code section 52.1, and California Civil Code section 52.3 are included in Appendix D. (App. 67-72.)

## INTRODUCTION

Officer Neal Browder faced the type of situation that every police officer fears when they report for duty at the beginning of a shift. Shortly after midnight, he heard a call come in over the radio asking for help. The police dispatcher assigned the call the highest priority possible and told all officers listening that a suspect was threatening people with a knife. The suspect's last known location was near Officer Browder.

Officer Browder responded to the call. He drove his patrol car to the area where the clerk reported he had been threatened and turned down a dark alley. The patrol car's headlights illuminated part of the alley and Officer Browder saw a man that matched the suspect's description walking toward him. Officer Browder stopped the car, got out, and drew his weapon. Officer Browder saw the suspect holding a metallic and shiny object in a pointed fashion and continuing to walk toward him. When the suspect moved within 17 feet, and within only seconds of reaching Officer Browder, Officer Browder was forced to fire.

Despite this Court's repeated admonitions, the Ninth Circuit's opinion denies Officer Browder qualified immunity by over-generalizing its own precedent and only relying on selected facts. First, the Ninth Circuit concluded that qualified immunity was inappropriate because it was clearly established that deadly force could not be used on an unarmed suspect who presented no threat of harm to the officer or bystanders. But this legal abstraction defines the right at issue in only generalized terms with no relation to the facts of this case. Second, the Ninth Circuit did not examine the totality of facts known to Officer Browder, but instead relied only on the facts most favorable to the Plaintiffs and ignored the facts justifying Officer Browder's conduct.

This Court has been forced to correct the Ninth Circuit's decisions on qualified immunity on multiple occasions within the past five years. Yet again, the Ninth Circuit's holding in this case violates this Court's precedent and ignores this Court's admonitions. The Court should grant certiorari and reverse.

## STATEMENT OF THE CASE

### I. Facts

#### A. Nehad Threatens People with a Knife

Shortly before midnight on April 29, 2015, an adult bookstore clerk saw Fridoon Nehad in an alley and told Nehad not to loiter. (Excerpts of Record

(EOR) 759:4-9.)[1] Nehad was incoherent, pulled a knife out of his backpack, and said he was going to kill people. Nehad then lunged at the clerk with the five-inch knife, but did not stab him. (EOR 759:12-760:7; 765:4-8.)

The bookstore clerk returned to the bookstore and called a doorman at a nearby nightclub to report Nehad's threats. Nehad then showed up at the nightclub, and the doorman refused him entry. Nehad revealed the tip of a shiny and polished knife hidden in his jacket pocket. (Supplemental EOR (SEOR) at 140:5-22.)

Nehad later went to the bookstore and stated at least five more times to the clerk (who had seen Nehad earlier in the alley) that he was going to hurt or kill people. (EOR 760:14-761:9.) The clerk told Nehad to leave. (EOR 761:10-14.) After Nehad left, the clerk called 911. In response to the 911 call, a police dispatcher assigned this "hot call" the highest priority and informed nearby officers there was a man in a back lot threatening people with a knife. (EOR 110; 750:18-22; SEOR 208.) Because this was deemed a high-risk situation, dispatch also activated the emergency tone to limit radio traffic. (EOR 111.)

### B. Officer Browder Responds to the 911 Call

Defendant Neal Browder, a San Diego Police Officer in uniform and in a marked patrol car, responded to the hot call and arrived at a dark alley

[1] All references to the Excerpts of Record are to the appellate record on file with the Ninth Circuit in this case.

near the bookstore at 12:10 a.m. Officer Browder saw Nehad and confirmed the suspect's description. Browder saw a metallic and shiny object that Nehad held in a pointed fashion and thought the object was a knife. (SEOR 208; EOR 297:9-298:2; 738:3-10.)

It took Officer Browder 4.79 seconds to get out of his car. (EOR 693:24-25.) Nehad crossed from the left to the right side of the alley, approaching Officer Browder. (EOR 112.) When Nehad walked toward and focused on Officer Browder, Nehad appeared to Browder to have a menacing look. (EOR 742:6-20.) Browder would later testify, "I felt that he was walking—he was walking to stab me with the knife because that's what I saw. That's what I saw in his hand." (EOR 742:18-20.)

The uncontradicted testimony of Defendants' biomechanics expert was that Nehad could have physically reached Officer Browder in 1.35 to 1.91 seconds. (SEOR 149:6-9.) Plaintiffs did not engage a biomechanics expert in this case to offer a contrary opinion.

Before the shooting, the clerk heard Browder say, "Stop. Drop it." (EOR 763:22-764:9.) Another eyewitness heard Officer Browder state two to three times "stop" or "drop it." (EOR 724:12-725:6; 726:8-15; 727:13-16.) A United States Marine Sergeant saw Browder make a stop hand gesture after getting out of the patrol car and saw a shiny object in Nehad's hand that he testified could have been a gun or knife. (SEOR 200:4-19; 202:1-24; 204:7-21.)

When Nehad reached a distance of 15'4" to 17' from Officer Browder, Officer Browder shot Nehad. (EOR 693:19-23.) The total time from Officer Browder's arrival to the time he fired his weapon was only 33 seconds. (EOR 694:1-3.) Defendants'

biomechanics expert further testified that Browder would not have been able to perceive Nehad changing his pace in the split second before firing. (EOR 698:3-8.)

While administering CPR to Nehad, Browder learned that Nehad held a pen, not a knife. (EOR 310:15-19.) During a police investigation a few hours later, Officer Browder confirmed to investigators that there were no weapons at the scene. (EOR 319:1-21.)

Surveillance camera footage of the scene clearly depicts various conditions and levels of illumination present in the alley at the time of the incident. (SEOR 213; 215). The camera did not capture any sound. Officer Browder's patrol car is seen slowly entering the alley, stopping and then activating the high-beams. Nehad is seen walking on the left side of the alley emerging from the surrounding commercial buildings' shadows.

Seconds after entering the alley, the video shows a witness pointing down the alley causing Officer Browder to advance his patrol car forward. At this point, Nehad is seen on the right side of the alley approaching Officer Browder's open driver-side door. Nehad does not shield his eyes or make any effort to block the vehicle's light while looking directly at Officer Browder, who by that time had exited the vehicle. The video evidence then shows Officer Browder activating his gun-mounted flashlight milliseconds before discharging his weapon. After Nehad was shot, Officer Browder immediately administered CPR to Nehad, which was unsuccessful.

## II. Proceedings

### A. District Court

#### *1. The Underlying Action*

The estate of Fridoon Nehad and his parents, S.R. Nehad and K. R. Nehad, sued the City of San Diego, Officer Neal N. Browder, and then-Police Chief Shelley Zimmerman. They asserted Section 1983 claims for Fourth and Fourteenth Amendment violations and associated state law claims, including wrongful death.

#### *2. The District Court Granted Defendants' Motion for Summary Judgment on Qualified Immunity Grounds*

Defendants filed their motion for summary judgment on all but the negligence and wrongful death claims. Officer Browder filed a motion for summary judgment on two grounds: 1) the undisputed facts showed that he reasonably believed that he faced an immediate threat of bodily injury or death, and that his use of force was reasonable under the circumstances; and 2) the undisputed facts established that he is entitled to qualified immunity. The City of San Diego and Police Chief Shelley Zimmerman contended there was no *Monell*[2] liability and no supervisor liability because there was no

[2] *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978)

violation of Plaintiffs' civil rights and no facts to support supervisor liability. On the qualified immunity issue, Plaintiffs contended that Officer Browder was not entitled to qualified immunity because he violated a clearly established right set forth in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001).

The District Court granted summary judgment in favor of Defendants. (App. 36-64.) The District Court recounted the undisputed facts and found, viewing the evidence in the light most favorable to Plaintiffs, that there was no Fourth Amendment violation by Browder. The District Court's objective reasonableness analysis under *Graham v. Connor*, 490 U.S. 386 (1989), led it to conclude Officer Browder acted reasonably because he confirmed the description of the suspect matched the person approaching him with a shiny metallic object in his hand, he had reason to believe the suspect was armed with a knife and had threatened persons a few minutes earlier, he had warned the suspect to "stop" and "drop it," he was forced to make a quick decision with the suspect only fifteen to twenty feet away, and the entire incident took 33 seconds. (App. 53.) The District Court also found no Fourteenth Amendment violation by Browder because there were also no facts to show Officer Browder acted with a purpose to harm unrelated to legitimate law enforcement purposes. (App. 55.)

The District Court also held Officer Browder was entitled to qualified immunity. The District Court reasoned that even if there was a constitutional violation, there were no cases holding that conduct closely analogous to Officer Browder's conduct

violated constitutional rights and Browder's conduct was not obviously unlawful. (App. 62.)

The District Court found that Plaintiffs' reliance on the Ninth Circuit's *Deorle* decision was misplaced because that decision dealt with significantly different facts that did not place Officer Browder on fair notice that it was objectively unreasonable to use deadly force under the facts of this case. (App. 60.)

Having found no liability by Browder for a constitutional violation, the District Court also granted summary judgment in favor of the City and Chief Zimmerman on the *Monell* and supervisory liability Section 1983 claims. (App. 62-63.) The District Court reasoned that based on the undisputed facts, there was no basis to find a custom or practice by the San Diego Police Department caused the shooting. Last, the District Court granted summary judgment for all three Defendants on the state law claims because the use of force was reasonable. (App. 63.)

### B. Ninth Circuit Court of Appeals

Plaintiffs appealed to the Ninth Circuit. The Ninth Circuit partially affirmed and partially reversed the District Court.

The Ninth Circuit affirmed the District Court's finding that there was no Fourteenth Amendment violation by Officer Browder because there were no facts indicating he acted with a purpose to harm unrelated to legitimate law enforcement purposes. The opinion states in pertinent part, "Here, there is no evidence that Browder fired on Nehad for any purpose other than self-defense…." (App. 27.)

The Ninth Circuit reversed the District Court's other findings. The Ninth Circuit held that a rational trier of fact could find Officer Browder's use of deadly force was objectively unreasonable. Among the reasons given for this holding were: 1) a reasonable trier of fact could find that Nehad did not pose a significant threat to Browder's safety; 2) a reasonable trier of fact could conclude Browder's perception that the pen was a knife was an unreasonable mistake of fact; 3) a reasonable trier of fact could conclude Nehad did not pose a danger to anyone; 4) a reasonable trier of fact could conclude Browder acted with undue haste; 5) the police dispatcher records noted the emergency call was a "417 offense"—a reference to California Penal Code section 417, which makes it only a misdemeanor to brandish a knife; 6) whether Nehad resisted arrest by ignoring Browder's command to "Stop, drop it" is disputed[3]; 7) Assuming Browder did command Nehad to "Stop, drop it," Browder did not warn Nehad that failure to comply would result in use of force; 8) Browder did not verbally identify himself as a police officer to Nehad; and 9) Browder did not use less-lethal force options, such as a taser, mace, or a collapsible baton. (App. 25.)

On the qualified immunity issue, the Ninth Circuit held existing case law clearly established deadly force was unconstitutional under the circumstances in this case. The Ninth Circuit

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[3] The panel's decision states, "[A]lthough two witnesses heard Browder give a command a few seconds before firing, neither Nelson [the third eyewitness] nor Browder himself had any such recollection. Thus, whether Nehad resisted arrest by ignoring Browder's command is, at best, a disputed issue of fact." (App. 21.)

assumed as true the Plaintiffs' version of facts as follows: "…Browder responded to a misdemeanor call, pulled his car into a well-lit alley with high beam headlights shining into Nehad's face, never identified himself as a police officer, gave no commands or warnings, and then shot Nehad within a matter of seconds, even though Nehad was unarmed, had not said anything, and posed little to no danger to Browder or anyone else." (App. 30.) Based on this version of the facts, the Ninth Circuit concluded the Defendants could not "credibly argue" the prohibition on the use of deadly force under these circumstances was not clearly established in 2015. (App. 30.)

In its legal analysis, the Ninth Circuit cited to the general proposition that an officer may not use deadly force against an unarmed, non-dangerous suspect without "probable cause to believe that the suspect poses a threat of serious physical harm" citing to *Torres v. City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011) and *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). (App. 30.)

The panel also held that the facts of *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001) clearly established that the force used by Officer Browder violated a constitutional right under these circumstances because *Deorle* found deadly force could not be used on "an unarmed man who: has committed no serious offense, …has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." *Deorle*, 272 F.3d at 1285. (App. 30-31.)

The Ninth Circuit also reversed the District Court's summary judgment ruling on *Monell* and

supervisory liability, holding Plaintiffs submitted sufficient expert testimony on those issues to create a triable issue of material fact. Finally, the Ninth Circuit reversed the District Court's summary judgment ruling on two state law claims, negligence and wrongful death, because it was disputed whether Browder's use of force was objectively reasonable, and Defendants' motion for summary judgment did not include those claims. (App. 34.)

After the panel's decision, Defendants filed a petition for rehearing and rehearing en banc. In their joint petition, they contended the panel decision conflicts with the following Supreme Court precedents: *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *White v. Pauly*, 137 S. Ct. 548 (2017); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); and *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019). Several of those cases caution appellate courts not to read *Deorle* too broadly in deciding whether a new set of facts is governed by clearly established law. The petition also argued that the panel overlooked key uncontradicted material facts, including the uncontradicted testimony of a biomechanics expert that Nehad could have physically reached Officer Browder in 1.35 to 1.91 seconds. On October 2, 2019, the Ninth Circuit denied the petition for rehearing and rehearing en banc. (App. 65-66.)

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit Ignored Supreme Court Precedent by Denying Qualified Immunity While Assessing Officer Browder's Conduct at a Highly Generalized Level

The Ninth Circuit improperly defines the right at issue in overly general terms: whether an officer can use deadly force against an unarmed person who poses little to no risk of danger to an officer or others. That broadly-defined right ignores both the facts of this case and this Court's repeated admonitions. Here, Officer Browder responded to a midnight call for help where the caller reported being threatened with a deadly weapon. As the only officer at the scene, Officer Browder drove into a dark alley and saw a man walking towards him who matched the suspect's description. In the seconds that followed, Officer Browder had to make a quick and potentially life-saving decision. As the suspect walked towards him, within two seconds of making physical contact with Officer Browder and near bystanders, Officer Browder used deadly force.

In deciding whether an officer in these circumstances has qualified immunity, courts consider two prongs: 1) whether there has been a violation of a constitutional right; and 2) whether that right was clearly established at the time of the officer's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223 (2009).

This Court articulated stringent requirements before a court may deny a police officer qualified immunity. In applying the second prong of this test—

whether a right was "clearly established" at the time of the officer's actions—the Ninth Circuit's opinion conflicts with no less than four Supreme Court decisions because it defines the right at issue with a high degree of generality. No existing precedent squarely governs the specific facts at issue in this case, and qualified immunity applies.

### A. The Ninth Circuit's Opinion Conflicts with This Court's Holding in *City and County of San Francisco v. Sheehan*

The Ninth Circuit's opinion conflicts with *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) which held that before a constitutional right is considered clearly established, case law must give "fair and clear warning" to officers that their conduct violates a plaintiff's constitutional rights.

In *Sheehan*, police were dispatched to a group home where a mentally ill woman was threatening to kill her social worker. When officers entered the woman's room, she threatened to kill them with a knife. After the officers retreated and reentered the room, the plaintiff confronted them with a knife in hand. The plaintiff refused to drop the knife after she was pepper-sprayed, so the officers shot the plaintiff multiple times from a few feet away. The plaintiff sued, claiming excessive force.

The Ninth Circuit held the officers did not have qualified immunity based on *Graham v. Connor*, 490 U.S. 386 (1989) and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001). This Court reversed, reasoning that the officers enjoyed qualified immunity because *Graham* holds only that the "objective

reasonableness" test applies to excessive force claims under the Fourth Amendment – "far too general a proposition to control this case." *Sheehan*, 135 S. Ct. at 1775.

This Court also held that the Ninth Circuit's decision in *Deorle* was factually distinguishable because, in that case, the officer shot the plaintiff in the face with a beanbag gun despite the fact the plaintiff was unarmed, compliant, had committed no serious offenses, had not attacked anyone, and was observed for five to ten minutes before he was shot. This Court concluded that the facts at issue in *Graham* and *Deorle* failed to give the officers "fair and clear warning" their conduct violated the Plaintiff's constitutional rights. This Court reiterated that public officials are immune from Section 1983 lawsuits unless they violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. "Clearly established" means "'the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it…meaning that 'existing precedent…placed the statutory or constitutional question beyond debate.'" 135 S. Ct. at 1774 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

### B. The Ninth Circuit's Opinion Conflicts with This Court's Holding in *White v. Pauly*

The Ninth Circuit's opinion conflicts with *White v. Pauly*, 137 S. Ct. 548 (2017) because the panel, in denying qualified immunity, failed to properly apply to the "clearly established law" notice

requirement. In *White v. Pauly*, this Court reiterated the "clearly established law" notice requirement necessary to defeat qualified immunity should not be defined "at a high level of generality." 137 S. Ct. 548, 552 (2017) (quoting *Ashcroft*, 563 U.S. at 742). The clearly established law must be "particularized" to the facts of the case. *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The Ninth Circuit's opinion, however, did not particularize the facts of the case to the case law relied upon in denying qualified immunity.

### C. The Ninth Circuit's Opinion Conflicts with This Court's Holding in *Kisela v. Hughes*

Third, the opinion also conflicts with *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam) because it disregarded this Court's admonition that the Ninth Circuit should not read its prior precedent too broadly in denying qualified immunity.

In *Kisela*, police received a 911 report of a woman hacking a tree with a knife. The 911 caller flagged down the responding officers, and investigation led the officers to the plaintiff, Hughes, who the officers saw exiting a house with a large knife at her side. The officers saw Hughes walk toward another woman (Chadwick). After Hughes stopped within six feet of Chadwick, officers drew their weapons and repeatedly ordered her to drop the knife, but Hughes failed to acknowledge these commands. The defendant officer believed Hughes threatened Chadwick and shot Hughes four times, resulting in non-life-threatening injuries. The shooting occurred

less than a minute after the officer first saw Chadwick.

In *Kisela*, the Ninth Circuit reversed the District Court's summary judgment order that found the officer immune from suit based on qualified immunity. This Court held that even assuming there was a Fourth Amendment violation, the defendant police officer had qualified immunity, which "protects all but the plainly incompetent or those who knowingly violate the law" and reiterated that "clearly established law" should not be defined with a high degree of generality. *Kisela*, 138 S. Ct. at 1152 (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) and *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775-76 (2015)).

This Court also reiterated that whether force is excessive depends on the facts of each case and, therefore, police officers have qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)). In applying these principles, the Court found that the Ninth Circuit panel decision erroneously relied on four Ninth Circuit decisions, including *Deorle*, in finding that the officer did not have qualified immunity. Regarding *Deorle*, this Court stated:

> As for *Deorle*, this Court has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law. *Sheehan*, 135 S. Ct. at 1775-77. *Deorle* involved a police officer who shot an

> unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been "physically compliant and generally followed all the officers' instructions"; and he had been under police observation for roughly 40 minutes. 272 F.3d. at 1276, 1281-82. In this case [*Kisela*], by contrast, Hughes was armed with a large knife; was within striking distance of Chadwick; ignored the officers' orders to drop the weapon; and the situation unfolded in less than a minute. "Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page." *Sheehan*, 135 S. Ct. at 1776.

*Kisela*, 138 S. Ct. at 1154.

In examining Ninth Circuit precedent, this Court noted that the Ninth Circuit's decision in *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005) was more analogous to the facts in *Kisela*. The police in *Blanford* shot a man, perhaps mistakenly, when he was seen carrying a sword and acting erratically in a residential neighborhood, and after he refused police commands to drop the sword. The man may not have heard the police commands. Because this Court held in *Blanford* that the deadly force did not violate the Fourth Amendment, a reasonable officer could have believed the same in the factual scenario presented in the *Kisela* case. *Kisela*, 138 S. Ct. at 1153-54.

### D. The Ninth Circuit's Opinion Conflicts with This Court's Holding in *City of Escondido v. Emmons*

Just last year, this Court again reversed a Ninth Circuit decision involving qualified immunity for two officers in *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019). Denial of qualified immunity requires a court to cite to existing precedent where an officer acting under similar circumstances was held to violate the Fourth Amendment; moreover, the existing precedent, although it does not have to be directly on point, must place the lawfulness of the action beyond debate. *Id.* at 504 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 581 (2018)). In our case, the Ninth Circuit panel failed to cite a single case in which an officer acting under similar circumstances as Officer Browder was held to violate the Fourth Amendment.

### E. The Ninth Circuit's Denial of Qualified Immunity Based on Its Prior Precedent Was Clearly Erroneous

The Ninth Circuit's opinion in this case cites *Deorle* and *Torres v. City of Madera*, 648 F.3d 1119, 1128 (2011), as the basis for concluding that the District Court erred in finding Browder was entitled to qualified immunity. In reversing the District Court's summary judgment ruling, the panel overlooked the above-cited conflicting Supreme Court precedent. The *White v. Pauly* decision instructs that the operative inquiry in a qualified immunity analysis

is whether there is a case where an officer violated the Constitution while acting under *similar circumstances*.

As the District Court noted in its summary judgment ruling, many of the facts present in the *Deorle* case, which this Court in *Kisela* highlighted as distinguishing factors, do not exist here. Distinguishing facts noted in *Kisela* include the following: 1) that there were no bystanders nearby; 2) the suspect had been "physically compliant and generally followed all the officers' instructions;" and 3) the suspect had been under police observation for roughly 40 minutes.

The panel noted that in its *Torres* opinion, it quoted this Court's holding in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), for the proposition that it is clearly established that an officer may not seize an unarmed, nondangerous suspect by fatally shooting him. The *Torres* case, however, is even more dissimilar than those facing Officer Browder. A handcuffed arrestee in the back of a patrol car became belligerent after waking up. A police officer, who intended to tase the suspect, mistakenly pulled her gun instead of a taser and fatally shot the suspect. In short, *Deorle* and *Torres* did not put a reasonable officer in 2015 on notice that the circumstances Officer Browder faced were not sufficiently threatening to call for the use of deadly force.

The facts in this case are more similar to the following facts in *Kisela*: the plaintiff was armed with a large knife; she was within striking distance of the officer; she ignored the officers' orders to drop the weapon; and the situation unfolded in less than a minute. Just like the officer in *Kisela*, Officer Browder responded to a report of a suspect armed with a knife.

Two eyewitnesses heard Officer Browder tell Nehad to "stop" and "drop it." The third witness saw Nehad had an object that looked like a knife or gun, and Nehad was only ten walking steps away. Officer Browder used force less than two seconds before Nehad could have reached Browder. The entire incident from Browder's arrival to the shooting happened in only 33 seconds.

In sum, no existing precedent "squarely governs" the specific facts at issue in this case. *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)). The cases that the Ninth Circuit relies on, *Torres* and *Deorle*, involve starkly different factual circumstances. Here, Officer Browder had to make a split-second decision at midnight in a dark alley after responding to a call reporting threats with a deadly weapon. Qualified immunity bars liability on these facts because no case squarely governs the facts of this case.

The Ninth Circuit's opinion disregards this Court's repeated warnings to appellate circuits, and especially to the Ninth Circuit, against defining "clearly established" constitutional rights too generally. Unless reversed, lower courts will deny qualified immunity to police officers responding to emergency calls involving armed suspects who are threatening to hurt or kill citizens, who use deadly force in self-defense after being forced to make a split-second decision.

## II. The Panel Opinion Also Improperly Denies Qualified Immunity by Considering a "Version of Facts" That Ignores the Totality of Undisputed Facts Found by the District Court

The Ninth Circuit considered only selected facts in its qualified immunity analysis by essentially adopting Plaintiffs' "version of the facts." The Ninth Circuit's approach was fundamentally flawed: instead of looking at all of the facts in their totality, the Ninth Circuit culled unfavorable facts and chose to only highlight facts favorable to Plaintiffs. But this analysis ignores undisputed material facts that the District Court acknowledged were dispositive.

The District Court granted summary judgment on Plaintiffs' Fourth Amendment claim based on the following undisputed material facts: 1) Officer Browder acted reasonably because he confirmed the description of the suspect matched the person approaching him with a shiny metallic object in his hand; 2) he had reason to believe the suspect was armed with a knife and had threatened persons a few minutes earlier; 3) he had warned the suspect to "stop" and "drop it"; 4) he was forced to make a quick decision with the suspect only 15 to 20 feet away; and 5) the entire incident took 33 seconds. (App. 58.)

For its qualified immunity analysis, the District Court concluded that even if there was a constitutional violation, there were no cases holding that conduct closely analogous to Officer Browder's conduct violated constitutional rights, and Browder's conduct was not obviously unlawful. (App. 62.)

### A. Plaintiffs' Incomplete "Version of Facts"

In contrast, the panel opinion summarized Plaintiffs' version of facts as: 1) Browder responded to a misdemeanor call; 2) Browder pulled his car into a well-lit alley with high beam headlights shining into Nehad's face; 3) Browder never identified himself as a police officer; 4) Browder gave no commands or warnings; and 5) Browder then shot Nehad within a matter of seconds, even though Nehad was unarmed, had not said anything, was not threatening anyone, and posed little to no danger to Browder or anyone else. (App. 30.) The opinion found that these facts were sufficient to create disputed factual issues that are necessary to a qualified immunity issue, and must first be determined by the jury before a court ruling on qualified immunity. (App. 29.)

A careful review of the summary judgment record demonstrates that Plaintiffs' version of the facts is based on Plaintiffs' arguments that are not substantially supported by the summary judgment record, were taken out of context, or were not even asserted by Plaintiffs. Each factual "version" is discussed below.

#### *1. The Claim That Officer Browder "Responded to a Misdemeanor Call" Did Not Mean the Situation Was Not Dangerous*

When the bookstore clerk first encountered Nehad in an alley, Nehad pulled a knife out of his backpack, stated he was going to kill people, and then

lunged at the clerk with a five-inch knife. Upon later entering the bookstore where the clerk worked, he told the clerk at least five more times he was going to hurt or kill people. After Nehad left the bookstore, the clerk called 911, and the police dispatcher classified the call as a "hot call" warranting the highest priority among other calls, and informed nearby officers there was a male in a back lot threatening people with a knife. The dispatcher also activated an emergency tone to limit radio traffic because the situation was deemed a high-risk situation.

The dispatcher noted the emergency call was a "417 offense"—a reference to California Penal Code section 417, which makes it a misdemeanor to brandish a knife. Plaintiffs spin this one fact into a scenario where Officer Browder was only responding to a misdemeanor call, suggesting the situation was not dangerous. But the summary judgment record indisputably shows Officer Browder was responding to an emergency call, designated as a "hot call," in which the bookstore clerk's 911 call was viewed as a high-risk situation involving a man threatening others with a knife. The fact the dispatcher, who was not present at the scene, notated the call as a "417 offense" does not in itself provide a basis to infer that a reasonable officer in Officer Browder's situation would not reasonably believe there was significant threat of death or serious injury posed by the suspect.

### *2. The Claim That Officer Browder "Pulled His Car into a Well-lit Alley with High Beam Headlights Shining into Nehad's Face" Is Not Supported by the Surveillance Video Footage*

Plaintiffs' version that Officer Browder pulled his patrol car into a "well-lit" alley with high beam headlights shining into Nehad's face is not depicted in the surveillance video and is speculative. The alley, in which Nehad emerges out of the shadows holding a metallic object, cannot fairly be described as "well-lit." Also, the inference that the patrol car's high beam headlights blinded Nehad is belied by the video showing that Nehad was not stationary and continued to advance towards the officer. Moreover, Nehad made no movements to indicate that he was affected by the headlights, such as shielding his eyes or lowering his head.

### *3. The Fact Officer Browder Never Identified Himself as a Police Officer Was Improperly Considered by the Ninth Circuit on the Qualified Immunity Issue*

Officer Browder, who was in his police uniform, and arrived at the alley in a marked police car, did not go the extra step of informing the approaching suspect he was a police officer. Before discussing the qualified immunity issue, the Ninth Circuit found this omission significant in determining whether the

District Court erred in finding Officer Browder's use of deadly force was objectively reasonable. Regarding the Fourth Amendment violation issue, the panel opinion stated, "Although not specifically discussed by the parties, we have also considered as relevant a police officer's failure to identify himself as such." (App. 23-24.) The panel then concluded that the jury could consider Officer Browder's failure to identify himself as a police officer in deciding whether Officer Browder's use of force was reasonable. (App. 24.)

Curiously, having acknowledged that Plaintiffs did not specifically discuss Officer Browder's failure to identify himself as a police officer, the panel then recharacterized this same omission as part of Plaintiffs' version of the facts for the qualified immunity issue. Plaintiffs' failure to assert this argument constituted a waiver, and it was error for the panel to list this fact as a basis for denying qualified immunity.

#### *4. The Claim That Officer Browder "Gave No Commands or Warnings" Is an Inaccurate Version of the Facts*

Before the shooting, the bookstore clerk heard Browder say, "Stop. Drop it." Another eyewitness heard Officer Browder state two to three times "stop" or "drop it." Although a United States Marine Sergeant saw Browder saw a shiny object in Nehad's hand that he testified could have been a gun or knife, neither he nor Officer Browder recalled hearing such commands or warnings. The Ninth Circuit panel opinion agreed with Plaintiff's argument that this lack of recollection by two witnesses of the commands

and warnings recalled by two other witnesses created a material dispute of fact. Even if Officer Browder and the third eyewitness did not recall these warnings or commands, their passive lack of recall does not affirmatively contradict the testimony of the other two eyewitness that the warnings and commands were in fact given. *See, e.g.*, *Posey v. Skyline Corp.*, 702 F.2d 102, 106 (7th Cir. 1983) (holding one witness's inability to recall a sign did not create a disputed material fact when affidavits affirmatively indicated the sign was present); and *Lousararian v. Royal Caribbean Corp.*, 951 F.2d 7, 9-10 (1st Cir. 1991) (holding the absence of a recollection in contrast to another witness's affirmative indication does not create a dispute of fact).

***5. The Claim That Officer Browder "Then Shot Nehad Within a Matter of Seconds, Even Though Nehad Was Unarmed, Had Not Said Anything, Was Not Threatening Anyone, and Posed Little to No Danger to Browder or Anyone Else" Disregards the Underlying Undisputed Facts Establishing the Emergency Context***

Nehad reached a distance of 15'4" to 17' from Officer Browder at the time Officer Browder shot Nehad. Officer Browder later testified that Nehad had a menacing look and, "I felt that he [Nehad] was walking—he was walking to stab me with the knife because that's what I saw. That's what I saw in his

hand." The total time from Officer Browder's arrival to the time he fired his weapon was only 33 seconds.

The Ninth Circuit's panel opinion states that under Plaintiffs' version of the facts, the shooting took place within a matter of seconds, Nehad was unarmed, had not said anything, was not threatening anyone, and posed little danger to Browder on anyone else. The opinion ignores the underlying undisputed facts providing context to the situation Officer Browder faced. Officer Browder, who was responding to an emergency "hot call" that a man was threatening others with a knife and saw the suspect holding a shiny metallic object that at least one other witness thought was a weapon, testified that he thought Nehad was going to stab him. The uncontradicted testimony of the Defendants' biomechanics expert was that Nehad could have physically reached Officer Browder in 1.35 to 1.91 seconds.

### B. The Ninth Circuit Ignored the Undisputed Facts in Their Totality

The fundamental flaw in the Ninth Circuit's analysis is that it declined to look at Officer Browder's conduct in its totality—the reported knife threats, Officer Browder located and then confirmed the suspect matched the reported description, the suspect approaching in a dark alley with a metallic object, another witness thought the suspect had a weapon, the suspect's refusal to halt, and the few seconds Officer Browder had to decide whether to use deadly force—and cite a case where a constitutional violation was clearly established based on substantially similar facts. Instead of looking at *all* the facts in the light

most favorable to Plaintiffs, the Ninth Circuit culled out unfavorable facts and looked only at facts that favored Plaintiffs.

But this Court's precedent makes it clear that a court must consider the totality of facts in assessing whether an officer's conduct is reasonable and whether a prior case found a constitutional violation based on substantially similar facts. If the Ninth Circuit had looked at the totality of facts, and not only the facts favorable to Plaintiff, it would have found that qualified immunity applied because, as the District Court concluded, there are no cases finding a constitutional violation based on similar facts.

Qualified immunity, this Court has held, operates to "protect officers from the sometimes 'hazy border between excessive and acceptable force'"and shields an officer for a decision that is constitutionally deficient, but reasonably misapprehends the circumstances the officer confronted. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citing and quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). This Court should grant review because the Ninth Circuit's qualified immunity analysis, unless reversed, will result in courts improperly denying public officials qualified immunity in many more cases. Police officers confronted with threatening behavior, from a suspect reported to have threatened others with a weapon, are at risk of being denied qualified immunity even though they had to make split-second judgments about using deadly force in tense, uncertain, and rapidly evolving circumstances.

## CONCLUSION

Officer Browder was forced to make a split-second decision in a dark alley while facing an approaching suspect who was reportedly armed with a deadly weapon. No clearly established precedent would put an officer on notice that his conduct was unconstitutional, and the Ninth Circuit's decision commits the same error that this Court has repeatedly sought to correct. The Court should grant certiorari.

Respectfully submitted,

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