No. 19-1067

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MILLER BARONDESS, LLP
LOUIS R. MILLER
DANIEL S. MILLER
MIRA HASHMALL
Counsel of Record
SEAN G. MCKISSICK
1999 Avenue of the Stars, Suite 1000
Los Angeles, CA 90067
(310) 552-4400
mhashmall@millerbarondess.com
Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Tennessee v. Garner*, this Court held that a police officer may only use deadly force against a person who "poses a threat of serious physical harm, either to the officer or to others. . . ." 105 S. Ct. 1694, 1701 (1985). Here, Petitioner Neal Browder shot and killed Fridoon Nehad despite evidence in the record indicating that Nehad posed no threat to Browder or anyone else. The question presented here is thus whether a police officer is entitled to qualified immunity where the evidence, viewed in the light most favorable to the nonmoving party, shows that the officer used deadly force in the absence of a threat of serious physical harm to anyone.

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INTRODUCTION

San Diego Police Officer Neal Browder ("Browder") shot and killed Fridoon Nehad ("Nehad"). Nehad was unarmed, holding only a ballpoint pen. Browder did not see Nehad attack or threaten anyone. Browder did not identify himself as a police officer at any point during the encounter. He did not activate his body camera.

When Browder exited his vehicle to confront Nehad, Nehad appeared to slow down. Nevertheless, Browder pointed his firearm at Nehad. Browder did not warn Nehad that he would use lethal force. In fact, Browder does not recall giving Nehad any warnings or commands at all. Even though Nehad was 17 feet away, was unarmed and had not threatened or attacked anyone, Browder fired a single shot, which fatally struck Nehad in the chest. All of this is captured on surveillance video.

After the shooting, Browder was asked by police investigators if he saw any weapons, and he said no. Browder also did not mention that he feared for his own life. About five days after this initial interview, Browder spoke with his attorney and watched the surveillance video. When the investigation resumed, Browder changed his story and claimed that he thought Nehad had a knife and that he feared his life was in danger.

The district court held that Browder's use of deadly force was objectively reasonable as a matter of law and that Browder was entitled to qualified immunity, but the Ninth Circuit reversed, finding multiple

factual disputes that prevented summary judgment. That is what this appeal is all about. This appeal is not about this Court's recent qualified immunity cases where different panels of the Ninth Circuit and other circuits failed to follow this Court's instructions on how to conduct the qualified immunity analysis. The Ninth Circuit panel *in this case* closely adhered to this Court's precedent. The Ninth Circuit correctly held that the multiple factual disputes in the record cannot be resolved in the officer's favor on summary judgment. The Ninth Circuit also recognized that, for purposes of qualified immunity, it should not define the right at issue too broadly, but instead must focus on the particular facts and circumstances of the officer's use of force. That is exactly what the panel did here. The Ninth Circuit held that it was clearly established that deadly force could not be used on an unarmed person who did not pose a threat to an officer or anyone else, and that the Ninth Circuit's decision in *Deorle v. Rutherford* placed the constitutional question in this case "beyond debate."

The factual similarities between *Deorle* and this case are striking. Like the victim in *Deorle*, Nehad was unarmed and no officer saw him attack anyone. Browder, like the officer in *Deorle*, fired on a person who was walking towards him without giving any warning that he would use lethal force and without any attempt to use available, non-lethal methods to complete the arrest. In fact, the shooting in this case is less reasonable than the shooting in *Deorle* because the officer in *Deorle* used a less-lethal round (a

beanbag round) and testified that he feared the victim could break the perimeter and threaten other people. Here, Browder used *lethal force* to kill an unarmed person who did not pose a threat to anyone.

Petitioners argue that the evidence in the record shows that this was a justified shooting. But the Ninth Circuit correctly held that, for purposes of summary judgment, the issue is not whether there is some version of the facts that supports the moving party's case. The question is whether the evidence, viewed in the light most favorable to the non-moving party, shows that there is a *triable issue*. Once a triable issue is identified, summary judgment should be denied and the parties must submit their dispute to the trier of fact.

On the issue of whether summary judgment is appropriate on this record, this is not a close case. No judge on the panel dissented. The panel unanimously denied rehearing. And no Ninth Circuit judge voted to rehear the case en banc.

As set forth herein, the Petition fails to identify any conflict with this Court's precedents, any circuit split, or any other reason why this Court should grant certiorari. The Petition should be denied.

STATEMENT OF THE CASE

A. The Shooting

Just after midnight on April 30, 2015, Browder received a call from the dispatcher that there was a "417

with a knife."[1] (Petitioners' Appendix ("App.") 6.) The dispatcher said that a suspect was in the back lot of a bookstore, but did not say he had harmed or attacked anyone. (*Id.* 15-16.)

Browder accepted the call and drove to the bookstore. Upon arriving at the scene, Browder pulled into an alleyway and activated his car's high beams. (*Id.* 6.) He did not activate his car siren or police lights. (*Id.*) Browder saw Nehad walking down the alley and believed that Nehad matched the description he had been given. (*Id.*) Browder stopped his car and opened the driver's side door. (*Id.*) Nehad continued to walk down the alley toward Browder, but at a "relatively slow pace." (*Id.* 6, 15-16.) Browder did not see Nehad attack or threaten anyone, and he did not see Nehad make any aggressive movements or threatening gestures. (*Id.* 11 n.4, 15-16.) Nehad was unarmed. He held only a blue pen; there was no knife. (*Id.* 8.)

About 28 seconds after arriving in the alley, Browder exited his vehicle and pointed his firearm at Nehad. Browder did not activate his body camera. He was carrying a Taser, mace, and a collapsible baton, but he did not consider using them. (*Id.* 25.) Two witnesses recall Browder instructing Nehad to "Stop, drop it." (*Id.* 7.) But a third witness testified that Browder did not give any type of warning or say anything at all. (*Id.*) Browder does not recall if he gave any warnings or

[1] California Penal Code § 417 provides that anyone who draws or exhibits a deadly weapon, other than a firearm, "in a rude, angry, or threatening manner" is guilty of a misdemeanor. Cal. Penal Code § 417(a)(1).

commands. (*Id.*) Browder did not identify himself as a police officer. (*Id.* 24.)

When Browder exited his vehicle, Nehad appeared to slow down. (*Id.* 7-8.) Nevertheless, five seconds after exiting his vehicle, Browder fired one shot at Nehad, which fatally struck him in the chest. (*Id.* 8.) Browder did not warn Nehad that he would shoot before firing his weapon. (*Id.* 23.)

Security cameras owned by a nearby business captured video of the alleyway on the night of the shooting. Respondents respectfully request that the Court view the video evidence in the record and pay particular attention to 0:51-1:31 of the footage that captures the shooting. (Respondents' Appendix ("Resp. App.") Ex. A.) This video footage is critically important evidence in this case.

Police investigators arrived at the scene shortly after the shooting. The investigators asked Browder whether he saw any weapons. (App. 8.) Browder told the investigators that he had not seen any weapons. (*Id.*) Browder made no mention that he feared for his own safety when he shot Nehad. (*Id.* 8-9, 12.) Browder's attorney ended the interview and prohibited Browder from answering any further questions. (*Id.* 8.)

Browder was interviewed again by police investigators five days after the shooting. (*Id.*) He was allowed to consult with his attorney and watch the video of the shooting prior to this interview. (*Id.*) This time, Browder said he thought that Nehad was holding a knife when he shot him and that he feared for his

own safety. (*Id.* 8-9.) Browder also said that he thought Nehad was "aggressing" the car and "walking at a fast pace . . . right towards [the] car." (*Id.* 8.) The video directly refutes this claim, and instead shows that Nehad slowed down and turned away from Browder as he walked down the alleyway. (Resp. App. Ex. A at 1:20-1:28.)

Browder was allowed to return to his duties and was not disciplined in any way for the shooting. (App. 42.) Indeed, the SDPD's Chief Zimmerman explicitly affirmed that the shooting "was the right thing to do." (*Id.* 32.) SDPD policy requires officers to turn on their body cameras prior to confronting a suspect, but Browder was not disciplined for violating this policy. (EOR 327:21-328:22, 365:21-366:3, 367:20-369:2, 385 ¶ I.1.a., 605 ¶ 42, 606 ¶ 46.[2])

B. Relevant Expert Testimony

To oppose summary judgment, Respondents offered the testimony of police tactics and procedures expert Roger A. Clark. Mr. Clark has nearly three decades of experience as a police officer with the Los Angeles County Sheriff's Department. (EOR 599 ¶ 1.)

Mr. Clark testified that Browder had plenty of room and time to retreat and stay safe. (*Id.* 602-603 ¶¶ 21-23.) Moving back to a safer position, called "tactical repositioning," is standard police procedure that

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

allows the officer to stay in cover, wait for backup, and use time to make an accurate assessment of any perceived threat. (*Id.*)

Mr. Clark also testified that police officers receive training to recognize weapons and differentiate them from ordinary objects. (*Id.* 604 ¶ 27.) Though ordinary civilians may have mistaken a ballpoint pen for a knife, a reasonable police officer should be able to distinguish the two. (*Id.*)

Mr. Clark further testified that Browder himself created any urgency he may have felt. As the Ninth Circuit observed, "Appellants' expert emphasized that Browder had 'a lot of time' to determine what to do before shooting Nehad, but 'squandered all the opportunities tactically.' Appellants' expert further elaborated, 'It is not a five second decision[,]' and, '[Browder] had all the time he wanted to take. . . .' " (App. 18.)

Finally, Mr. Clark testified that the Taser and mace that Browder carried on his belt were "obvious" alternatives to deadly force. (EOR 603 ¶¶ 23-24.) Tasers are effective at a distance of up to 21 feet—Petitioners contend that Nehad was approximately 17 feet away from Browder when Browder fired. (*Id.* 603 ¶ 24; App. 8.)

To support summary judgment, Petitioners offered the testimony of biomechanics expert Geoffrey Desmoulin. In relevant part, Mr. Desmoulin testified that, at the time he was shot, Nehad could have reached Browder in 1.35 to 1.91 seconds. (Pet. 5.) Mr. Desmoulin acknowledged, however, that Nehad could

only have done so had he broken into a sprint. (EOR 509:2-510:4.) Mr. Desmoulin admitted that Nehad was not sprinting when Browder shot him, but rather was walking at a "relatively slow" pace. (*Id.* 501:3-13, 502:17-20; App. 15-16.) In fact, Mr. Desmoulin testified that Nehad was actually slowing down when he was shot. (EOR 503:11-25.)

C. Relevant Procedural History

Respondents brought a claim against Browder under 42 U.S.C. § 1983 for violating Nehad's Fourth Amendment rights by using excessive force, among other claims. (App. 9, 37.) Browder moved for summary judgment, primarily arguing that his use of force was objectively reasonable and that he was entitled to qualified immunity as a matter of law. The district court granted Browder's motion, holding that his use of force was objectively reasonable as a matter of law and that, in any event, Browder was entitled to qualified immunity.

The Ninth Circuit reversed. In its ruling, the Ninth Circuit identified a number of disputed factual issues bearing on the reasonableness of Browder's use of force that prevented summary judgment:

> At a broad level, a triable issue remains regarding the reasonableness of Browder's use of deadly force. More specifically, there are genuine disputes about: (1) Browder's credibility; (2) whether Nehad posed a significant,

> if any, danger to anyone; (3) whether the severity of Nehad's alleged crime warranted the use of deadly force; (4) whether Browder gave or Nehad resisted any commands; (5) the significance of Browder's failure to identify himself as a police officer or warn Nehad of the impending use of force; and (6) the availability of less intrusive means of subduing Nehad.

(*Id.* 34-35.) The Ninth Circuit further held that these disputed factual issues "also preclude a grant of summary judgment on qualified immunity grounds, as it was well-established at the time of the shooting that the use of deadly force under the circumstances here, viewed in the light most favorable to [Respondents], was objectively unreasonable."[3] (*Id.* 35.)

Petitioners filed a petition for panel rehearing and for rehearing en banc. The panel unanimously denied rehearing, and no Ninth Circuit judge voted to rehear the case en banc. (*Id.* 65-66.)

[3] In addition to faulting the district court for resolving disputed factual issues against the non-moving party, the Ninth Circuit also held the district court failed to provide Respondents with due process when the district court granted summary judgment *sua sponte* on claims that Petitioners did not include in their motion. (App. 34.)

REASONS TO DENY THE PETITION

I. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS

Petitioners argue that certiorari is warranted because the Ninth Circuit departed from Supreme Court precedent in denying qualified immunity to Browder. Not so. As shown below, the Ninth Circuit's decision closely adhered to this Court's precedents.

Under this Court's precedents, a police officer is not entitled to qualified immunity if the evidence shows the officer violated a constitutional right that was "clearly established" at the time of the challenged conduct. *See*, *e.g.*, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011). In assessing whether a right was clearly established, "the Court considers only the facts that were knowable to the defendant officers." *White v. Pauly*, 137 S. Ct. 548, 550 (2017). A constitutional right can be "clearly established" even if there is no "case directly on point," so long as existing precedent places the constitutional question "beyond debate." *Id.* at 551 (internal quotation marks omitted).

This Court recently confirmed that where a police officer moves for summary judgment on the issue of qualified immunity, " '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' " *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). "This is not a rule specific to qualified immunity; it is simply an application of the more

general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' " *Id.* at 656 (quoting *Anderson*, 477 U.S. at 249).

This is true even when a court evaluates whether a right was "clearly established." *Tolan*, 572 U.S. at 657 ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard."). This is particularly important in cases involving unreasonable searches and seizures because courts must "define the clearly established right at issue on the basis of the specific context of the case." *Id.* (quotations omitted). In doing so, courts cannot "define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Id.* (quoting *Brusseau v. Haugen*, 543 U.S. 194, 195, 198 (2004)).

Here, the Ninth Circuit did what precedent required it to do. It reviewed the summary judgment record and recognized that there were multiple factual disputes relevant to the qualified immunity analysis. (App. 29-31.) The Ninth Circuit resolved those factual disputes in Nehad's favor, as it was required to do under Supreme Court precedent, and put this case in its proper context:

> Under [Respondents'] version of the facts, Browder responded to a misdemeanor call, pulled his car into a well-lit alley with his

> 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, was not threatening anyone, and posed little to no danger to Browder or anyone else.

(*Id.* 30.)

Petitioners argue that, even under Respondents' version of the facts, the Ninth Circuit erred because Nehad's Fourth Amendment rights were not clearly established when Browder shot and killed him. This argument fails for two separate and independent reasons. First, based on this Court's decision in *Tennessee v. Garner*, 105 S. Ct. 1694 (1985), it should have been obvious to Browder that he could not use deadly force to kill an unarmed person who posed no threat of serious injury to Browder or anyone else. Second, this Court has held that a right is "clearly established" where circuit precedent is sufficiently similar to the present facts at issue to place the constitutional question "beyond debate." The Ninth Circuit correctly adhered to precedent by finding that its *Deorle* decision squarely established that police officers cannot even use less-lethal force (a beanbag round) on an unarmed suspect who poses no threat of serious bodily injury to anyone, even if the suspect is behaving erratically, has threatened to kill people and starts walking towards a police officer.

A. This Court's Precedents Establish That It Is An "Obvious" Constitutional Violation For An Officer To Kill An Unarmed Person Who Posed No Threat To The Officer Or Anyone Else.

In *Tennessee v. Garner*, this Court held over three decades ago that the Fourth Amendment prohibits a police officer from using deadly force where "the suspect poses no immediate threat to the officer and no threat to others." 105 S. Ct. at 1701 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."). This Court has recognized that the general statement of Fourth Amendment law in *Garner* can give fair and clear warning to officers in an "obvious case." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (citing *White v. Pauly*, 137 S. Ct. 548, 552 (2017)).

The Ninth Circuit properly followed *Garner* by recognizing, upon viewing the evidence in Nehad's favor, that this could be an obvious case. (App. 30 ("[Petitioners] cannot credibly argue that the prohibition on the use of deadly force under these circumstances was not clearly established in 2015." (citing *Garner*, 105 S. Ct. at 1701)).) It is undisputed that Nehad was unarmed when Browder shot him. (*Id.* 8.) It is also undisputed that Nehad did not pose a threat to any bystanders. (*Id.* 11 n.4 ("Although two bystanders were present in a parking lot adjoining the alley, Browder testified that he did not believe that anyone else was under threat of immediate bodily harm when he shot Nehad, and there is no evidence that either bystander

was or felt threatened.").) Thus, for Browder to justifiably use deadly force under *Garner*, he must have feared for his own safety, 105 S. Ct. at 1701, but there is a genuine factual dispute on this issue. When Browder was questioned by police investigators a few hours after the shooting, "Browder told the investigators that he had not seen any weapons." (*Id.* 8.) Browder also "made no mention of feeling threatened by Nehad." (*Id.* 12.) Browder's attorney then stopped the interview and prevented Browder from answering any more questions that night. (*Id.* 8.)

Petitioners do not argue—nor could they argue—that Browder could have justifiably used deadly force if Nehad posed no threat to Browder or anyone else. Instead, Petitioners argue that Nehad posed a threat to Browder based on Browder's testimony that "he thought Nehad was going to stab him." (Pet. 28.) But Browder's testimony conflicts with his own statements to investigators on the night of the shooting. (App. 8.) When a police officer's credibility is genuinely in dispute, as is the case here, summary judgment is inappropriate. *See Tolan*, 572 U.S. at 660 (holding that the circuit court of appeals improperly granted summary judgment by crediting the officer's testimony and failing "to acknowledge key evidence offered by the party opposing that motion"); *see also Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016) ("summary judgment is not appropriate in § 1983 deadly force cases that turn on the officer's credibility that is genuinely in doubt"); *Fogarty v. Gallegos*, 523 F.3d 1147, 1166 (10th Cir. 2008) (affirming the denial of

qualified immunity on summary judgment because there was a "material *question* regarding the officer's credibility") (emphasis in original); *Tarver v. City of Edna*, 410 F.3d 745, 753 (5th Cir. 2005) (holding that the officer was not entitled to qualified immunity because "[a]ny credibility determination made between the officers' and Tarver's version of events is inappropriate for summary judgment"); *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002) (because "there are internal contradictions within one of the officers' testimony" and "some physical evidence inconsistent with the defendants' account of the incident, and the expert testimony of the police-procedure expert," "we agree with the District Court that summary judgment on the basis of qualified immunity is inappropriate"); *Weyant v. Okst*, 101 F.3d 845, 858 (2d Cir. 1996) ("[t]he matter of whether it was reasonable for the officers to believe their actions met the standards set by those principles depends on whether one believes their version of the facts. That version is sharply disputed, and the matter of the officers' qualified immunity therefore cannot be resolved as a matter of law").

Here, the Ninth Circuit correctly noted that Browder's credibility is in question on multiple fronts. As it observed:

> [A]pproximately three hours after the shooting, Browder told homicide investigators that he did not see any weapons, and made no mention of feeling threatened by Nehad. Five days later, however, after consulting with his

> attorney and reviewing surveillance footage inside a police station, Browder claimed that he thought Nehad had a knife, that Nehad was "aggressing" the car, and that he thought Nehad was going to stab him. These possible inconsistencies, along with video, eyewitness, and expert evidence that belies Browder's claim that Nehad was "aggressing," are sufficient to give rise to genuine doubts about Browder's credibility.

(App. 12.) Per this Court's decisions in *Garner* and *Tolan*, the Ninth Circuit correctly held that Browder was not entitled to qualified immunity on summary judgment.

B. The Ninth Circuit Followed This Court's Precedents To Find That *Deorle* Placed The Constitutional Question In This Case Beyond Debate.

The Ninth Circuit did not rely on *Garner* alone. Even beyond the broad context of an obvious violation, this Court has recognized that a constitutional right is "clearly established" even if there is no "case directly on point," so long as there is sufficiently similar precedent that places the constitutional question "beyond debate." *White*, 137 S. Ct. at 551 (internal quotation marks omitted). The Ninth Circuit followed this Court's guidance by focusing on the specific circumstances of the shooting in this case, and analyzed whether there was sufficiently analogous precedent that served to put Browder on notice that he could not

use deadly force. (App. 29-31.) The court found such precedent in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 2660 (2002). (*Id.* 30-31.)

In *Deorle*, the Ninth Circuit held that it was unreasonable for an officer to shoot a beanbag round in the face of an unarmed suspect outside of his house. Richard Deorle (Deorle) began behaving erratically after consuming a half-pint of vodka and prescribed medication. *Id.* at 1275-76. His wife called 911 because Deorle "lost control of himself." *Id.* at 1276. Thirteen officers responded and set up roadblocks to prevent escape. *Id.* Deorle was verbally abusive and, at one point, he brandished a hatchet at a police officer. *Id.* But Deorle generally followed the officer's instructions and the officers on the scene did not see Deorle touch, let alone attack, anyone. *Id.* at 1276-77. Officer Rutherford observed Deorle for about five to ten minutes from the cover of some trees on the side of the house, and saw Deorle holding an unloaded plastic crossbow and what looked like a bottle of lighter fluid. *Id.* at 1277. Rutherford held a 12-gauge shotgun loaded with beanbag rounds, which Rutherford admitted could be lethal if fired at a range of up to 50 feet. *Id.* Deorle started walking directly toward Rutherford at a "steady gait." *Id.* When Deorle reached a predetermined point, Rutherford shot him with a beanbag round, which knocked Deorle off his feet and lodged out part of his eye. *Id.* at 1278. Rutherford "did not warn Deorle that he was going to shoot him. He did not ask him to drop the bottle or can. Nor did he order him to halt." *Id.* Rutherford

had the ability to retreat instead of using potentially lethal force, but did not do so because Rutherford believed that Deorle could have breached the perimeter and harmed other officers.

The Ninth Circuit correctly found that the facts of this case are sufficiently analogous to those in *Deorle*. Deorle and Nehad were both unarmed and walking towards a police officer when they were shot. They were not in striking distance of any police officer or bystander. Like Officer Rutherford, Browder did not see Nehad touch, let alone attack, anyone; he shot Nehad without any warning[4] when Nehad reached a predetermined point, and he could have retreated but did not do so. In fact, the conduct of Browder was more egregious. Unlike Officer Rutherford, Browder used *lethal force* without actually fearing for his own safety or the safety of others. And Browder, unlike Officer Rutherford, never identified himself as a police officer.

Petitioners argue that there are three material facts in this case that differ from *Deorle*. (Pet. at 20.) None of these arguments have merit.

First, Petitioners claim that there were no bystanders nearby in *Deorle* but that there were bystanders here. (*Id.*) That is not a material difference—the bystanders were well behind Browder at the time of the shooting, and Browder admitted at his deposition that "he did not believe that anyone else was under threat of immediate bodily harm when he shot Nehad."

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[4] It is undisputed that Browder did not *warn* Nehad he would shoot before firing his weapon. (App. 23.)

(EOR 325:2-7; App. 11 n.4.) The Ninth Circuit also recognized that "there is no evidence that either bystander was or felt threatened." (App. 11 n.4.)

Second, Petitioners claim that the suspect in *Deorle* was physically compliant with the officer's instructions, unlike Nehad. (Pet. at 20.) But there are genuine factual disputes on this issue. Petitioners claim that Browder told Nehad to "Stop, Drop it," but at least one witness did not recall any such instruction. Even if this Court were to assume that such instruction was given (which it cannot do on a summary judgment motion), the video shows Nehad began to slow down as he approached Browder. (Resp. App. Ex. A at 1:20-1:28.) Thus, even if Browder instructed Nehad to stop, Nehad was complying with that instruction when Browder shot him.

Third, Petitioners claim that the suspect in *Deorle* was under police surveillance for 30-40 minutes, but Browder was forced to act in a matter of seconds. (Pet. at 20.) The Ninth Circuit correctly held that this difference actually weighed *against* qualified immunity given the factual circumstances of this shooting. (App. 31.) The fact that Browder fired his weapon shortly after exiting his car is particularly unreasonable given that Nehad was unarmed, "there is no evidence that any eyewitness to the shooting considered Nehad to be a threat," and Respondents submitted evidence from a police practices expert who testified that Browder had many non-lethal options to choose from and could have taken more time to evaluate the situation. (*Id.*; EOR 603 ¶¶ 23-24); *see Smith v. City of Hemet*, 394 F.3d 689,

700 (9th Cir. 2005) ("the availability of alternative methods of capturing or subduing a suspect may be a factor to consider" in considering the reasonableness of force); *Retz v. Seaton*, 741 F.3d 913, 917-18 (8th Cir. 2014) (courts may consider "availability of alternative methods of capturing or subduing a suspect" in evaluating a use of force, including whether an officer "could have just left the scene"). As the Ninth Circuit acknowledged, Respondents' expert opined that Browder could have taken more time to make a decision, but he unreasonably squandered the opportunity to do so. (App. 18.)

In sum, even though this is an obvious case where deadly force could not have been used, the Ninth Circuit's decision in *Deorle* placed the constitutional question in this case "beyond debate." Browder knew or should have known that he could not use deadly force on an unarmed person 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.

C. The Ninth Circuit's Decision Does Not Conflict With This Court's Recent Qualified Immunity Decisions.

Petitioners argue that certiorari is necessary because the decision below conflicts with four of this

Court's recent qualified immunity decisions. (Pet. 14-19.) Not so.

First, Petitioners claim that the decision below conflicts with *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015). (*Id.* 14-15.) This argument fails because *Sheehan* involved an officer shooting under far different circumstances. There, the suspect lived in a group home and had threatened a social worker with a knife. When two officers entered the suspect's room, she picked up a five-inch knife, approached the officers and threatened to kill them. The officers left the room, but they feared that the suspect could escape through her window out onto the street with a deadly weapon. To prevent harm to innocent bystanders on the street, the officers made a tactical decision to reenter the room. They first tried pepper spray, but that did not subdue the suspect or cause her to drop the knife. When pepper spray failed, the officers shot the suspect multiple times and finally subdued her.

The differences between *Sheehan* and this case are stark. Indeed, the district court, the Ninth Circuit and this Court all agreed that it was *reasonable* for the officers to use deadly force against the suspect in *Sheehan*.[5] The suspect was *armed*, had threatened the lives of a social worker and police officers with a deadly weapon, and the officers attempted to complete the

[5] The qualified immunity issue in *Sheehan* was whether it was reasonable for the officers to *reenter* the room. That issue has no bearing here given the far different factual circumstances of the officer shooting in this case.

arrest using non-lethal methods which proved ineffective. Here, Nehad was *unarmed*, had not threatened anyone, did not pose a threat to Browder or anyone else, and Browder did not attempt to use non-lethal methods to complete the arrest.

Second, Petitioners claim that the decision below conflicts with *White v. Pauly*, 137 S. Ct. 548 (2017) because the Ninth Circuit defined the right at a "high level of generality" and failed to "particularize the facts of this case to the case law. . . ." (*Id.* 15-16.) Wrong. The Ninth Circuit stated in its opinion that the qualified immunity "analysis must be made '*in light of the specific context of the case*, not as a broad general proposition.' " (App. 30 (emphasis added) (quoting *S.B. v. Cty. of San Diego*, 864 F.3d 1010 (9th Cir. 2017)).) The court then identified the material facts at issue in this case, and analyzed the similarities and differences in this case with respect to the shooting in *Deorle*. (*Id.* 30-31.) Thus, the four corners of the opinion below show that the court followed this Court's instructions for how to properly analyze qualified immunity in excessive force cases.[6]

Third, Petitioners claim that the decision below conflicts with *Kisela v. Hughes*, 138 S. Ct. 1148 (2018). (Pet. 16-18.) But the shooting in that case involved materially different facts. In *Kisela*, officers responded to

[6] Petitioners do not claim that this case is factually similar to *White*, and for good reason. In *White*, the suspect pointed a loaded gun at a police officer during a shootout, and the officer, fearing for his own life, shot and killed the suspect. Of course, the shooting in this case involved far different circumstances.

a 911 report of a woman hacking a tree with a knife. When the officers arrived, they observed the suspect with a large kitchen knife walk towards her neighbor. The officers could not physically intervene or use non-lethal methods such as pepper spray because they were behind a chain link fence. When the suspect got within "striking distance" of the neighbor (within six feet), one of the officers fired four shots and subdued the suspect.

The differences between this case and *Kisela* are numerous: (1) the suspect in *Kisela* was armed with a knife, whereas Nehad was *unarmed*; (2) the suspect in *Kisela* was within striking distance of her neighbor, whereas Nehad did not pose a threat to Browder or anyone else; (3) the officers in *Kisela* subjectively believed that the neighbor's life was in danger and the officers' credibility was not in dispute, whereas Browder's credibility is in question; (4) the officers in *Kisela* could not retreat because the suspect was within striking distance of her neighbor, whereas Browder had many options to retreat (i.e., "tactical repositioning"); (5) the officers in *Kisela* could not use non-lethal methods to complete the arrest because they were behind a chain link fence, whereas Browder could have used his Taser or other non-lethal methods; and (6) the officers in *Kisela* told the suspect to drop the knife but she refused, whereas it is unclear whether Browder gave any instructions and, even if he did, it appeared that Nehad was complying with Browder's instructions when Browder shot him.

In *Kisela*, this Court held that *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), was the "most analogous" precedent to the facts of that case, and Petitioners make that same claim here. (*Id.* 18.) But *Blanford* is inapposite because the officers in that case subjectively believed that the suspect posed an immediate threat to others because he was armed with a deadly weapon (a sword), was walking through a residential neighborhood in an erratic manner and did not comply with the officers' instructions to drop the weapon. *Blanford*, 406 F.3d at 1112-13. Unlike the suspect in *Blanford*, Nehad was unarmed and did not pose a threat to anyone, and there is a genuine factual dispute as to whether Browder actually believed his life was in danger.

Fourth, Petitioners claim that the decision below conflicts with *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500 (2019), because the Ninth Circuit did not "cite a single case in which an officer acting under similar circumstances as Browder was held to violate the Fourth Amendment." (*Id.* 19.) Wrong, for the reasons stated above. *Deorle* is such a case.

II. THE NINTH CIRCUIT'S DECISION DOES NOT CREATE A CIRCUIT SPLIT ON ANY ISSUE

This Court grants certiorari only for compelling reasons, such as whether a federal circuit court of appeals decides an important issue in conflict with the decision of another circuit. Sup. Ct. R. 10(a). But

Petitioners do not claim that the decision below conflicts with out-of-circuit precedent on any issue. Indeed, the circuit courts all agree that, in excessive force cases, qualified immunity cannot be granted on a summary judgment motion when there are genuine issues of fact as to whether the suspect posed a threat to the officer or others.

For example, in *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150 (10th Cir. 2010), the Tenth Circuit affirmed a denial of summary judgment on qualified immunity grounds after finding genuine disputes of fact over whether the victim posed a threat to the shooting officer or anyone else. In that case, officers were called to the scene of a domestic dispute and learned that there were firearms present. *Id.* at 1153. The victim, however, was sitting in the front seat of a van, unarmed, and parked 15 feet away from the shooting officer. *Id.* at 1555. The officer shot without warning claiming that he was afraid of being hit by the van, but there was evidence contradicting the officer's testimony, including witness testimony that the van was stuck on a pile of rocks. *Id.* The Tenth Circuit held that qualified immunity was inappropriate where "plaintiffs' version of events, a version which a jury may later reject," indicated that the officer may have violated clearly established law in using deadly force. *Id.*

Similarly, in *Curley v. Klem*, 298 F.3d 271 (3d Cir. 2002), the Third Circuit reversed the district court's grant of qualified immunity at summary judgment because there were disputed issues of fact. There, the shooting officer shot a man who, according to the

officer, was in a three-point stance, pointed a gun at the officer, and made threatening gestures with his arms. *Id.* at 282. But an eyewitness contradicted the shooting officer's testimony. *Id.* The witness testified that the victim never got into a three-point stance or made the threatening arm gestures, and that his gun had been down by his side. *Id.* The Third Circuit held that "a decision on qualified immunity will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis." *Id.* at 278 (observing that "[o]ur sister circuits agree upon this general prohibition against deciding qualified immunity questions in the face of disputed historical facts," citing cases from the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits).

These decisions are consistent with this Court's holding in *Tolan* that courts must resolve factual disputes in favor of the non-moving party on a motion for summary judgment, even when the motion is brought on qualified immunity grounds in an excessive force case. Thus, there is no important federal question that warrants this Court's review.[7]

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[7] The amicus brief filed by the California State Association of Counties and the League of California Cities argues that this Court should grant certiorari because the Ninth Circuit fails to follow this Court's precedent as a general matter. The Ninth Circuit's decisions in other cases, however, are immaterial to whether the Court should grant certiorari because the panel *in this case* adhered to this Court's precedents. [*See supra* Section I.]

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR SUPREME COURT REVIEW

Petitioners contend that certiorari is warranted here to resolve whether qualified immunity is appropriate in a very specific set of circumstances, including where an officer used deadly force in response to a suspect that had made threats of violence to others, and where the officer believed that he was being "aggressed." But this case is not the appropriate vehicle to resolve this question, because the "circumstances" alleged by Petitioners here are premised on matters as to which there exist disputes of fact, or on facts which may not be considered at all for the purposes of this analysis.

Petitioners' argument is premised upon a version of the facts that is in stark contrast with that considered by the Ninth Circuit. It is undisputed, however, that Petitioners filed a *summary judgment motion* and therefore all factual disputes and reasonable inferences must be resolved *against them* at this stage in the case. *See Tolan*, 572 U.S. at 657. The Ninth Circuit did not act as the trier of fact. The court merely held, as it was required to do on this record, that there are triable issues of fact that prevent summary judgment.

For example, as set forth above, Browder's claim that he was in fear for his life (the central justification for the use of deadly force) is in dispute here. Not only has Browder's contradictory testimony over his supposed belief that Nehad was armed put his credibility in doubt (App. 8), but even if Browder genuinely

believed Nehad had a knife, there is a genuine dispute whether that belief was reasonable. As the Ninth Circuit correctly observed:

> Appellants' police practices expert opined that officers are trained to recognize what suspects are carrying and to distinguish pens from knives, and that Browder had "very sufficient time to determine that it was not a knife in Nehad's hand and, in fact was a pen. . . ." Furthermore, one of the homicide investigators testified that the lighting in the alley was sufficient to enable an observer to identify the color blue in the pen, even taking into account the distance between Browder and Nehad. Whether Browder reasonably mistook the pen for a knife is therefore a triable question of fact.

(*Id.* 14.)

Similarly, there is a dispute about whether Browder ever warned Nehad to drop the "knife." Petitioners claim it is undisputed that Browder told Nehad to drop the object because two witnesses heard Browder say that and because the third witness merely had a "passive lack of recall." (Pet. 26-27.) But Petitioners misstate the record. The third witness (Nelson) affirmatively testified that Browder did not issue any warnings:

> Q. Did you ever hear the officer say anything, "Drop your weapon," "Drop the knife," anything like that?
>
> A. No.

> Q. And did you ever hear the officer say, "This is your final warning. I have a gun. I'm going to shoot," anything like that?
>
> A. No.

(EOR 279:12-19.) There is nothing equivocal about Nelson's testimony. It is more than sufficient to support the Ninth Circuit's holding that there is a genuine factual dispute as to whether Browder gave any warnings or instructions to Nehad.[8]

Petitioners also claim that the Ninth Circuit ignored "undisputed" facts in downplaying the emergency. (Pet. 27-28.) In support, Petitioners claim that Browder had less than two seconds to react based on the "uncontradicted" testimony of Petitioners' biomechanics expert that Nehad could have reached Browder in 1.35 to 1.91 seconds. (*Id.*) But the testimony of Petitioners' biomechanics expert is contradicted by his own testimony and is further undermined by the video of the shooting. The expert conceded at deposition that Nehad could only reach Browder in less than two seconds if Nehad ran at a sprint. (EOR 509:2-510:4.) But Nehad was not sprinting towards Browder, as the video shows, and Petitioners' expert conceded that it appeared from the video that Nehad was walking at a "relatively slow" pace and was slowing down. (*Id.* 501:3-13, 502:17-20, 503:11-25.) In addition, the Ninth Circuit properly recognized that Browder had more time to react because he had already exited his

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[8] Notably, Browder did not recall giving any warnings or instructions. (App. 7, 21.)

vehicle, unholstered his weapon and was pointing it at Nehad.[9] (App. 18 n.9.) The Ninth Circuit also noted that Respondents' police practices expert contradicted the claim that Browder was in an emergency situation, as Browder could have tactically repositioned, found cover, or engaged in other well-established police tactics to give himself more time to assess the threat.[10] (*Id.* 11 n.4, 18.)

Petitioners claim that the Ninth Circuit erroneously found that Nehad was in a "well-lit alley" at the time of the shooting. (Pet. 25.) However, "one of the homicide investigators testified that the lighting in the

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[9] These facts are critically relevant here, as Respondents' expert testified, because they undermine Petitioners' claim that Browder had to react quickly since Nehad was within 21 feet. (App. 18 n.9 (explaining the "21-foot rule" and how its applicability in this case is in dispute).)

[10] It is generally accepted that an officer's tactical mistakes which create or increase the perceived danger are relevant for purposes of the Fourth Amendment, and thus the Ninth Circuit did not err in holding that Browder's tactical errors further supported the denial of summary judgment. *See*, *e.g.*, *Torres v. City of Madera*, 648 F.3d 1119, 1125 (9th Cir. 2011) (a jury could find that the officer's "split-second" decision to use force was unreasonable because it was necessitated not by unavoidable circumstances, but by the officer's "own poor judgment and lack of preparedness"); *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) (holding that an officer's leaving cover to engage an armed suspect could be considered in evaluating the reasonableness of a shooting); *Allen v. Muskogee, Okl.*, 119 F.3d 837, 840 (10th Cir. 1997) ("the reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.").

alley was sufficient to enable an observer to identify the color blue in the pen, even taking into account the distance between Browder and Nehad." (App. 14, *see also* 30, 38 (noting that Browder turned on his high beams when he drove into the alley).)

Petitioners also attempt to cloud the issues by introducing facts that, as a matter of law, may not be considered for purposes of qualified immunity. It is well-established that "[e]xcessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546-47 (2017) (citation omitted); *Saucier v. Katz*, 121 U.S. 2151, 2159 (2001) (same). Nevertheless, Petitioners premise their arguments on facts *that were unknown to Browder*. (Pet. 23-24.) Petitioners claim that Browder responded to a "dangerous situation" because Nehad had threatened others with a knife, including that Nehad lunged at a bookstore clerk with a five-inch knife. (*Id.*) But Browder did not know about the alleged incident with the bookstore clerk. The only information Browder received was from the 911 dispatcher, who put out a "Priority 1" call for a "417 (Threatening w[ith] weapon)." (App. 6.) When Browder arrived, he did not see Nehad threaten anyone with a knife. All he saw was Nehad walking by himself slowly down the alleyway with an object in his hand. (*Id.* at 8, 17, 20.)

Moreover, the Ninth Circuit gave Petitioners the benefit of the doubt and explained why its analysis would not be different even if "Nehad had made

felonious threats or committed a serious crime prior to Browder's arrival." (*Id.* 20.) The Ninth Circuit explained that, regardless of whether brandishing a knife is a misdemeanor or felony under California law, Nehad "was indisputably not engaged in any such conduct when Browder arrived, let alone when Browder fired his weapon." (*Id.*); *see George v. Morris*, 736 F.3d 829, 839 (9th Cir. 2013) (deadly force was not justified because the victim's threatening conduct, even if it had occurred, was not occurring by the time the officers arrived); *Glasscox v. City of Argo*, 903 F.3d 1207, 1215-16 (11th Cir. 2018) (use of force is not justified by dangerous or violent behavior that ceased before the force was used).

Finally, in addition to introducing facts that may not be considered under the law, Petitioners also attempt to exclude facts that *must* be considered here. Petitioners claim that it was error for the Ninth Circuit to consider that Penal Code section 417 is a misdemeanor, but Petitioners ignore the fact that this Court's Fourth Amendment precedents *require* consideration of the severity of the crime. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (holding that proper application of the Fourth Amendment test for reasonableness "requires careful attention to the facts and circumstances of each particular case, *including the severity of the crime at issue* . . . ") (emphasis added).

Similarly, Petitioners argue that the Ninth Circuit *sua sponte* considered a fact—that Browder failed to identify himself as an officer—which, according to Petitioners, was error because Respondents waived this

argument. (Pet. 25-26.) Not so. In their Opening Brief to the Ninth Circuit, Respondents raised Browder's failure to identify himself as a police officer *three times*. (*See* Appellants' Opening Brief at 15, 37, 46.) Respondents explicitly argued that "the evidence is sufficient for a jury to find that Browder acted unreasonably" in part because "Browder never identified himself as a police officer." (*Id.* at 46.) Petitioners' waiver argument is thus not supported by the record. *See Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579, 1586 (2000) (the preservation of argument "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue").[11]

Simply put, this case encompasses too many disputes of fact to warrant the Court's consideration at this time. This Court should not decide whether qualified immunity is merited in given circumstances when it is disputed what those circumstances actually were.

[11] Even if Respondents had failed to raise this issue (which did not happen), the Ninth Circuit has discretion to consider issues not raised by the parties to conduct an independent review of the record. *See U.S. Nat. Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2177-79 (1993) (proper for Court of Appeals to consider whether an allegedly controlling statute had been repealed, despite parties' failure, upon invitation, to assert the point); *Davis v. United States*, 114 S. Ct. 2350, 2358 (1994) ("the refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary.") (Scalia, J., concurring).

CONCLUSION

The Petition should be denied.

Respectfully submitted,

Miller Barondess, LLP
Louis R. Miller
Daniel S. Miller
Mira Hashmall
Counsel of Record
Sean G. McKissick
1999 Avenue of the Stars,
Suite 1000
Los Angeles, CA 90067
(310) 552-4400
mhashmall@millerbarondess.com
Counsel for Respondents