No. 19-1085

In The
Supreme Court of the United States

DEPUTY SHANNON DEASEY, DEPUTY PETER GENTRY, DEPUTY GARY BRANDT, SGT. MIKE RUDE, AND COUNTY OF SAN BERNARDINO,

Petitioners,

v.

DANIELLA SLATER AND DAMIEN SLATER (individually and as successors in interest, by and through their guardian ad litem Sandra Salazar), TINA SLATER AND DAVID BOUCHARD,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THE NINTH CIRCUIT'S EXPLICIT REJECTION OF THE "CLOSELY ANALOGOUS" STANDARD FOR DETERMINING WHETHER THE LAW IS "CLEARLY ESTABLISHED" PUTS IT IN CONFLICT WITH ALL OTHER CIRCUITS.

The question Petitioners asked this Court to decide was "whether, for purposes of qualified immunity, a merely 'sufficiently analogous' case is enough to show that the law is 'clearly established', or if something more is required, i.e. a 'closely analogous' case finding the alleged violation unlawful?" [Pet. i]. Respondents counter that there is no conflict between the circuits on this point. They argue that in various Circuit Courts of Appeals, and even in this Court, "these formulations . . . are used by the courts interchangeably. There surely is no conflict between these circuits regarding the applicable standard." [Brief in Opposition ("BIO") 13]. Respondents assert that the Ninth Circuit "has not established a 'sufficiently analogous' test as distinct from 'closely analogous'" [BIO 12]; that it "has used 'sufficiently analogous' and 'closely analogous' interchangeably." [BIO 2].

If, as Respondents contend, circuits across the country – including the Ninth Circuit – use "sufficiently analogous" and "closely analogous" interchangeably, then each of those circuits is taking the position that in order to find that a law is clearly established, there must be "closely analogous" case law

on the issue. But that is not the Ninth Circuit's position.

Petitioners noted in their opening petition that "prior Ninth Circuit case law . . . has held that '[c]losely analogous preexisting case law is not required to show that a right was clearly established. [Citations].' [Citations]." [Pet. 25-26]. The Ninth Circuit has reiterated this position in case after case for at least two decades[1] (which may explain why this Court has had to repeatedly remind the Ninth Circuit of the proper standard to be applied in evaluating the issue of qualified immunity). No other circuit has rejected the "closely analogous" standard for showing a law is clearly established, thus placing the Ninth Circuit at odds with the rest of the federal judiciary.

This is not merely a matter of semantics, as Respondents contend, because the panel below did not simply use the phrase "sufficiently analogous" "in passing." [BIO 10]. The panel used a formulation

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[1] See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000); *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000); *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir. 2001); *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002); *Bull v. City & County of San Francisco*, 539 F.3d 1193, 1201 (9th Cir. 2008); *Robinson v. York*, 566 F.3d 817, 826 (9th Cir. 2009); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011); *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1073 (9th Cir. 2012); *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013); *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013).

repeatedly used by the Ninth Circuit in determining whether law is clearly established.[2]

Respondents cite *Sharp v. County of Orange*, 871 F.3d 901 (9th Cir. 2017) as an example of the Ninth Circuit's use of both formulations. [BIO 12]. But upon closer examination, the panel in *Sharp* was not suggesting that a "closely analogous" standard was applicable in the Ninth Circuit. All the panel stated was "we require a specific precedent or principle that would have alerted Deputies Anderson and Flores that their specific conduct, or at least conduct ***more closely analogous*** to their own, was unlawful." *Id.* at 912 (emphasis added). In contrast, the panel in *Sharp* unambiguously applied the "sufficiently analogous" standard in concluding that "[t]hese facts are ***sufficiently analogous*** to the case before us to conclude that Deputy Anderson was on notice that his particular conduct was unconstitutional." *Id.* at 920 (emphasis added).

Thus, the circuit conflict here is not simply between the Ninth and the Seventh Circuits, but between the Ninth Circuit and every other circuit, which

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[2] See, e.g., *Lewis v. Sacramento County*, 98 F.3d 434, 443 (9th Cir. 1996) (*rev'd sub nom. County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed. 2d 1043 (1997)); *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1114 (9th Cir. 2010); *S. B. v. County of San Diego*, 864 F.3d 1010, 1016 & n.5 (9th Cir. 2017); *Sharp v. County of Orange*, 871 F.3d 901, 920 (9th Cir. 2017); *Reese v. County of Sacramento*, 888 F.3d 1030, 1038 (9th Cir. 2018).

provides ample justification for this Court to agree to decide this case.

II. THE IMPACT OF THE NINTH CIRCUIT'S REJECTION OF THE "CLOSELY ANALOGOUS" STANDARD FOR DETERMINING WHETHER THE LAW IS "CLEARLY ESTABLISHED" IS REFLECTED IN ITS RELIANCE ON *DRUMMOND* IN DECIDING THIS CASE.

Respondents assert "[n]o error occurred below" [BIO 10] and "[i]n-circuit precedent gave officers fair warning that their conduct was lawful [*sic*]." [BIO 2]. Specifically, Respondents contend "[t]he panel correctly concluded that *Drummond*[3] sufficed to clearly establish the right at issue", asserting that "[t]he parallels are clear." [BIO 16]. While there are similarities between *Drummond* and this case, they do not rise to the level of "closely analogous", even though the panel found those similarities enough to conclude *Drummond* was "sufficiently analogous."

A. *Drummond* Solely Addressed The Issue Of Compression Asphyxia, Not Positional Asphyxia.

Respondents claim that Slater "died of positional asphyxiation – while *hogtied* in the rear of a police cruiser." [BIO 1; italics in original]. But *Drummond*

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[3] *Drummond ex. rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003).

solely addressed the issue of compression asphyxia. The phrase "positional asphyxia" never appears in the opinion, while the phrase "compression asphyxia" is used six times. (See 343 F.3d at 1056, 1059, 1061, 1062, 1063). In fact, every use of the word "asphyxia" in *Drummond* is part of the phrase "compression asphyxia." So on its face, *Drummond* does not clearly establish the law applicable to the factual situation presented in this case.

Further, as discussed in the opening petition, and the lengthy dissent of four Ninth Circuit judges from the denial of the petition for rehearing *en banc*, a critical element in *Drummond* was the suspect explicitly stating he could not breathe. Respondents categorically reject this interpretation of *Drummond*, asserting that "no reasonable officer could have concluded that *Drummond's* constitutional holding turned on whether Slater said the magic words, 'I can't breathe,'. . . ." [BIO 17]. But a review of the *Drummond* opinion makes clear that any reasonable officer reading that case would conclude that the fact the suspect communicated his inability to breathe was indeed critical to the decision.

Drummond telling the officers that he could not breathe was not merely a passing comment in *Drummond*. *Drummond* referenced this fact seven separate times in its opinion, and in ways that made clear this was a very important point for the Court in reaching their decision that qualified immunity was not

appropriate.[4] Here, Respondents, like the panel, simply removes this inconvenient language from all but one of their quotations from *Drummond*, hoping to make the problem, like the words, disappear. This is a clear example of how the lesser standard of "sufficiently analogous" can be used to evade standards established by this Court for determining whether the applicable law is clearly established.

B. There Are Additional Significant Factual Differences Between *Drummond* And This Case.

It is not simply the lack of pleas for air and compression vs. positional asphyxia that differentiates *Drummond* and the present case. In *Drummond*, an officer knocked Drummond to the ground and onto his stomach in order to cuff his arms behind his back. Drummond was not resisting, but one officer "put his knees into Mr. Drummond's back and placed the weight of his body" on Drummond. 343 F.3d at 1054, 1058. At the same time, a second officer "also put his knees and placed the weight of his body" on Drummond, "with one of his knees on Drummond's neck." *Id*. at 1054. Drummond repeatedly told the officers that he

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[4] See 343 F.3d at 1056 ("begged for air"), 1059 (two references to "pleas for air"), 1060 n.7 ("Furthermore, in neither of the above cases did the court find that the police were actually put on notice of the detainee's respiratory distress. Here, Drummond offers evidence that he repeatedly told the officers that he could not breathe – indeed, that he begged for air."), 1061 ("cries for air"), 1062 ("he complained that he was choking and in need of air"), and 1063 ("ignoring his pleas for air").

could not breathe and they were choking him. Yet the officers kept their full body weight on Drummond's back and neck while Drummond was on the ground for over twenty minutes. *Id.* at 1054-1055.

To convince this Court that *Drummond* is sufficiently analogous to the facts of this case and to show that the law was clearly established, Respondents characterize each time Petitioners touched Slater as an application of "body weight." Respondents ignore the uncontroverted evidence as to the amount of pressure applied each time Petitioners touched Slater, how the pressure was applied, how long the pressure was applied, and the elapsed time between touchings where no pressure was applied. As Respondents' expert acknowledges, for someone to die by asphyxia of any kind, that person must suffer a complete deprivation of oxygen intake for at least two continuous minutes. [Dkt. 82, pp. 5-6]. And while Respondents' expert identified the officers' pressure on Slater during the application of the second and third hobbles as an additional factor in Slater's asphyxia, it was only in combination with the asserted breathing difficulties created by his prone and hobbled position. [App. 59-60, 72].[5]

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[5] To the extent Petitioners reallege facts with evidentiary support in this reply, Petitioners cite to their opening petition where that fact also appears. References to the appellate record were inadvertently omitted from the opening petition, for which Petitioners' counsel apologize. However, contrary to Respondents' counsel's accusation that the Petitioners "invented" "a sequence of events . . . to suit their interests", there is support in the record

No evidence supports Respondents' claims that "[i]mmediately prior, three officers had knelt on Slater, pinning his chest to the ground" [BIO 7], and that Slater was "under the weight of one to three deputies for nearly three minutes." [BIO 12].

Deasey held Slater's left shoulder as Slater came out of the vehicle and both went to the ground. Deasey held Slater's left shoulder, using his body weight to restrain Slater while Slater was on his right hip and shoulder. [Dkt. 85, 19:28-20:03; Dkt. 137, 19-20; App. 14; Pet. 9].

Slater continued resisting by kicking his feet and yelling random words. [Dkt. 85, 19:33-20:03; App. 23-24].[6] Deasey used pepper spray as he attempted to restrain Slater on the ground, and a knee strike to get Slater to stop resisting. [Dkt. 85, 19:33-20:03; App. 55; Pet. 9].

When Gentry arrived, he grabbed Slater's feet and moved up toward Slater's waist while Deasey went to get a hobble. Slater was on his side with his chest still up off the ground. [Dkt. 85, 20:26-20:50; App. 24, 55; Pet. 10; Dkt. 137, at 31]. When Deasey returned, Gentry shifted and ended up with his knee across Slater's shoulder blades for about 40 seconds while Slater was on his stomach on the ground. [Dkt. 85, 20:50-21:08; App. 24, 55; Pet. 10]. Gentry was above and behind

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for each and every fact included in the opening petition's Statement of the Facts.

[6] No evidence supports Respondents' claim that Slater was calling out his mother's telephone number. [BIO 12].

Slater's left shoulder and neck; Deasey was above Slater's right leg with his hand on Slater's left shoulder. [Dkt. 85, 21:19-21:30; Dkt. 137, at 35].

When Rude arrived, he helped attach the hobble to Slater's legs and handcuffs, positioning himself on Slater's left side toward Slater's feet. [Dkt. 85, 21:30-22:06; Dkt. 137, at 35; App. 14, 24, 55; Pet. 10].

When Gentry removed his knee, Slater was on the ground on his right side. [Dkt. 85, 22:06-25:29; App. 55; Pet. 10]. Once the hobble was attached, the officers stepped back, and Slater sat upright on the ground. [Dkt. 85, 22:27-25:29; App. 14, 24, 55; Pet. 11]. Slater remained sitting up until paramedics arrived. [Dkt. 85, 25:29-27:30; App. 55; Pet. 11].

No evidence supports Respondents' claim that Deasey put his knee on Slater's neck. [BIO 10, n.4]. Respondents deny Slater was kicking at Deasey [BIO 10, ns.3, 5], but the uncontroverted evidence is Slater landed a kick on Deasey's shin. [Dkt. 85, 18:52-19:14; Dkt. 137, at 11-16, 18-19; Pet. 8].

No evidence supports Respondents' claim that Slater was immobilized with prolonged applications of body weight. [BIO 8; App. 37].

After decontaminating Slater, Brandt and Gentry carried Slater back to Deasey's vehicle, whose rear driver door was still open. [Dkt. 85, 31:38-32:52; App. 56; Pet. 11]. They attempted to place Slater head-first and chest-down into the vehicle, as Slater was flailing. [Dkt. 85, 32:52-33:16; App. 56; Pet. 12-13]. Rude went

to the other side of the vehicle, opened the rear passenger door, and pulled Slater in while Brandt and Gentry slid Slater into the vehicle's backseat from the driver's side. [Dkt. 85, 33:16-33:33; App. 24-25; App. 56; Pet. 13].[7,8] Slater was chest/stomach down for a few seconds; but before officers closed the rear driver door, Slater was on his right side with the front of his body facing the cage. [App. 24-25; Pet. 13, Dkt. 137, at 56]. Slater could move around freely, and after a few seconds was in an upright seated position. [Dkt. 85, 33:33-34:04; App. 24-25; App. 56; Pet. 13]. Slater struggled and thrashed in the backseat for about two minutes. [Dkt. 85, 33:33-34:04; App. 24-25; Pet. 13].

When Gentry and Brandt returned Slater to the backseat the second time, Slater was face down with his head pointing towards the driver side of the vehicle. [Dkt. 85, 35:45-36:25; App. 25, 56-57; Pet. 14]. Slater continued to struggle and thrash about. [Dkt. 85, 36:26-37:33; App. 25, 57; Pet. 14]. When Slater started kicking the window, Gentry suggested putting another hobble on Slater. [App. 25, 57; Pet. 15].

Gentry opened the rear driver door, put his left foot on the rear car floor, leaned over Slater, and applied a second hobble to Slater's ankles as Slater

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[7] No evidence supports Respondents' claim that when Slater was out of the open car door Gentry kicked him multiple times. [BIO 12].

[8] No admissible evidence supports Respondents' claim that Deasey's vehicle was contaminated with pepper spray. [BIO 12; Dkt. 137, at 249]. The rear driver door of Deasey's vehicle was open. [App. 56; Pet. 11].

continued to resist. [Dkt. 85, 37:32-37:41; App. 25, 57; Pet. 15]. Gentry was positioned over Slater while attaching the hobble, but never used his body weight to control Slater. [App. 25; Pet. 15]. At most, Gentry's right knee applied pressure to Slater's left rib area for about 45 seconds. [Dkt. 85, 37:41-38:27; App. 25, 38, 57, 71; Pet. 15].

While Gentry and Deasey secured the second and third hobbles, Brandt, who was standing near the open rear driver door, extended his right foot into the car and against the top of Slater's left shoulder blade for about 70 seconds, to prevent Slater from pushing his way out of the vehicle again. [Dkt. 85, 37:42-38:52; App. 25, 57, 17; Pet. 16-17]. It took about 86 seconds to secure the second and third hobbles. [Dkt. 85, 37:41-39:07; App. 57-58; Pet. 17].

Finally, Respondents assert Petitioners were warned about the dangers of positional asphyxia. [BIO 22]. However, the training materials cited by Respondents referred to the risk of positional asphyxiation when a suspect is restrained in a chest/stomach down position and officers place their body weight on top of a suspect. [App. 39-40].

III. THE FACT THAT CONCERNS HAVE BEEN EXPRESSED ABOUT HOW QUALIFIED IMMUNITY IS APPLIED MAKES IT ESSENTIAL THAT THE COURT DECIDE THIS CASE.

Respondents assert that "[t]here is yet more reason to deny the petition. While the court of appeals

properly applied this Court's qualified immunity precedents, it is imperative that this Court revisit that law, reversing or amending it, so as to substantially cut back on the scope of the qualified immunity doctrine. . . . [P]rior to any embrace of a qualified immunity defense, the Court must first wrestle with the sustained – and correct – criticism of the doctrine." [BIO 3].

Respondents ask this Court to ignore any issues that may arise in the application of the qualified immunity doctrine until such time as this Court abandons the doctrine – which Respondents apparently think is a foregone conclusion. Respondents express no concern that this could lead to utter chaos as the nation's courts go off in multiple directions as they try to apply the doctrine – which, of course, they must, since it is still the law of the land.

The very fact that there are those who question the doctrine makes it that much clearer that review of the Ninth Circuit's decision in this case is necessary. Petitioners contend that the issue here is not the existence of qualified immunity – which this Court has described as important "to society as a whole"[9] – or its scope [see BIO 3]. The issue is the inconsistency in the manner in which the doctrine is being applied by the lower courts, both in the granting of qualified

[9] "Because of the importance of qualified immunity 'to society as a whole,' [citation], the Court often corrects lower courts when they wrongly subject individual officers to liability." *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 135 S.Ct. 1765, 1774 n.3, 191 L.Ed. 2d 856 (2014).

immunity ***and its denial.*** This case offers an opportunity to address ***that*** problem, by providing more clarity to the lower courts as to when the doctrine should, and should not, be applied.

CONCLUSION

For all of these reasons, Petitioners urge this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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