No. 20-1539

In The
Supreme Court of the United States

DANIEL RIVAS-VILLEGAS,

Petitioner,

v.

RAMON CORTESLUNA,

Respondent.

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

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

I. BACKGROUND OF THE ACTION

A. CIRCUMSTANCES PRIOR TO POLICE ARRIVAL

Cortesluna lived with his girlfriend, Maritza Ramos, and her daughters at 34877 Starling Drive, Union City, California. (*EOR0259*[1].) On the evening of November 6, 2016, Cortesluna was locked out of his bedroom and was using various household items (a knife from his kitchen) and tools from his gardening business (a hedgetrimmer and a bit from a jackhammer) to regain access to his bedroom so he could go to sleep. (*EOR0260*[2].) His girlfriend and her daughters were sleeping in the daughters' room directly across the hall. (*EOR0260*[3]; *EOR092*[4].) He did not touch any other door. (*EOR0260*[5].) He heard nothing from Ramos or the girls or sounds of distress from that bedroom while he was trying to regain access to his bedroom. (*EOR0260*[6]; *EOR0100-101*[7].)

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[1] References to excerpts from the record in the lower court are marked "EOR." Footnotes describe the evidence in more detail. EOR0259 is Cortesluna Decl., ¶2.

[2] Cortesluna Decl., ¶4.

[3] Cortesluna Decl., ¶5.

[4] Cortesluna depo, 17:1-14.

[5] Cortesluna Decl., ¶5.

[6] Cortesluna Decl., ¶5.

[7] Cortesluna depo, 28:6-9, 29:10-20.

B. POLICE DISPATCH REPORTS

Ms. Ramos's daughters, aged 12 and 15, called "911" after hearing the sound of the hedgetrimmer. At 22:48:24 PST, the Union City Police Dispatch requested a unit to break for an "ascertain the problem" call at 34877 Starling Drive. (*EOR0082*[8].) At 22:49:23, Dispatch advised: "We have an Xray on '911.' She's crying and saying that her mom's boyfriend is trying to hurt them, he has a chain saw. The reporting party and her 15 year old sister and the mom are in a room. Mom is holding the door so he doesn't open it. I need a third unit as well." (*EOR0082*[9].) At 22:51:10, Dispatch identified Cortesluna as the boyfriend and that the reporting party was 12 years of age and that there was a possibly related call from a reporting party crying. (*EOR0082*[10].) At 22:52:47, Dispatch advised that the reporting party advised that the male had a chainsaw and was using it to break things in the house, that he is 10-51, and "always drinking." (*EOR0082*[11].)

C. POLICE INVESTIGATION TO ASCERTAIN PROBLEM

Defendants Leon, Rivas-Villegas, and Kensic, along with two other police officers, responded to the scene. (*Pet. App. at 6.*) Officer Rivas-Villegas and two other police arrived together at 34877 Starling Drive at the

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[8] CAD Detailed History for Police Event; Pet. App. 5.

[9] CAD Detailed History for Police Event; Pet. App. 5.

[10] CAD Detailed History for Police Event; Pet. App. 5

[11] CAD Detailed History for Police Event; Pet. App. 5.

same time. (*EOR120*[12].) The police then clandestinely surveilled Cortesluna through a window alone in his kitchen for at least five minutes during which time he was not observed to be holding anything other than a beer. (*EOR082*[13]; *Pet. App. 6*; *EOR123*[14]); *EOR152-56*[15]; *EOR166-67*[16]; *EOR173*[17].) During this time the police heard no chainsaw noise, noise of distress, or any other noise from the house. (*EOR199*[18]; *EOR202*[19]; *EOR124-24*[20]; *EOR226*[21]; *EOR163-164*[22].) The police were concerned that it might be a "swatting" call in which a person fakes an emergency in order to summon a violent and upsetting police response. (*EOR125*[23]; *EOR137*[24].) The police even felt the need to confirm with Dispatch that they had the correct address. (*EOR125*[25].)

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[12] Rivas depo, 18:24-19:1.

[13] CAD Detailed History for Police Event.

[14] Rivas depo, 27:10-12.

[15] Bellotti depo, 16:8-10, 16:15-16; 17:6-8; 19:12-17; 22:10-15; 24:1-25.

[16] Graetz depo, 27:4-12; 29:1-14.

[17] Graetz depo, 42: 15-16.

[18] Kensic depo, 28:7-22.

[19] Kensic depo, 35:15-17.

[20] Rivas depo, 30:3-31:8.

[21] Leon depo, 38:1-25.

[22] Graetz depo, 23:23-24:25.

[23] Rivas depo, 31:9-15.

[24] Rivas depo, 31:9-15.

[25] Rivas depo, 31:13-20.

At the scene, the police determined through Dispatch and the "911" call-taker that the reporting party and others in the bedroom were not able to exit the house through a bedroom window. (*EOR083*[26]; *Pet. App. 6.*) Dispatch also reported that the call-taker could hear a "sawing" noise in the background "like someone trying to saw the door" but were in the process of determining whether it was a manual or motor saw. (*Pet. App. 6*.) Defendant Leon arrived at the scene later and might have heard the radioed conversation with the dispatcher. (*Pet. App. 6*.) When Leon arrived, another officer told him, "so, he's standing right here drinking a beer. What do you think [about] just giving him commands, having him come out, and do a protective sweep?" (*Id.*) The officers formulated a plan to approach the house and "breach it with less lethal, if we need to," a reference to Leon's beanbag shotgun. (*Id.*) A beanbag shotgun is a twelve-gauge shotgun loaded with beanbag rounds, consisting of lead shot contained in a cloth sack designed to cause serious injury rather than death, although death can result. (*Pet. App. 6-7, n.2.*)

The officers were repeatedly advised by Dispatch that Ramos and her daughters were in a locked or barricaded bedroom inside the house. (*EOR82*[27]; *EOR241*[28];

[26] CAD Detailed History for Police Event at 22:56:40.

[27] CAD Detailed History for Police Event at 22:50:35 and 23:02:25.

[28] Leon depo, 59:4-15.

EOR198-99[29]; *EOR165*[30].) Dispatch confirmed that Cortesluna was free of warrants and clear in AFS. (*EOR83*[31].) None of the responding officers were familiar with Cortesluna or the residence from any prior law enforcement interaction. (*EOR172*[32]; *EOR227*[33]; *EOR125-26*[34] and *EOR139*[35]; *EOR201*[36].) They observed Cortesluna was wearing a red shirt and conveyed this information to Dispatch. (*EOR0083*[37].) Dispatch confirmed of a description of Cortesluna as a "Hispanic male, 5'7", skinny build, wearing red sweatpants." (*EOR83*[38].)

D. PRE-SHOOTING INTERACTIONS

The following events are depicted in a video admitted as evidence, and posted to the Ninth Circuit's public website at https://cdn.ca9.uscourts.gov/datastore/opinions/media/19-15105-Cortesluna-Videotape.mp4 (in the record below at *EOR261-62* and hereinafter referred to as "Security Video").

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[29] Kensic depo, 27:24-28:6.

[30] Graetz depo, 25:7-11.

[31] CAD Detailed History for Police Event at 22:55:12, 22:57:28.

[32] Graetz depo, 36: 7-16.

[33] Graetz depo, 36: 7-16.

[34] Rivas depo, 31:24-32:3.

[35] Rivas depo, 65:23-25.

[36] Kensic depo, 33:19-22.

[37] CAD Detailed History for Police Event at 22:57:25.

[38] CAD Detailed History for Police Event.

The officers entered plaintiff's patio at 23:01:23. (*Security Video*.) Cortesluna was compliant with ten orders issued by the police but became confused by conflicting shouted orders and assumed a submissive position with his hands flat on the front of his thighs and bowed his head. (*Security Video, at 23:02:01-23:02:36*; *EOR0231*[39]; *EOR233-36*[40]; *EOR240*[41]; *EOR129-31*[42]; *EOR208-09*[43]; *EOR211-12*[44]; *EOR175-77*[45]; *EOR260*[46].) Cortesluna made no verbal threats or objections to and used no confrontational language with the officers. (*EOR280-83*[47]; *EOR129*[48]; *EOR134*[49]; *EOR230*[50] and *EOR245*[51]; *EOR212*[52].) He made no attempt to retreat or evade the officers. (*Security Video at 23:02:01-23:02:36*; *EOR181*[53] and

[39] Leon depo, 47:2-16.

[40] Leon depo, 49:25-52:13.

[41] Leon depo, 58:23-25.

[42] Rivas depo, 40:21-42:20.

[43] Kensic depo, 44:18-45:5.

[44] Kensic depo, 54:10-11 and 55:5-7.

[45] Graetz depo, 50:22-52:25).

[46] Cortesluna Decl., ¶6.

[47] Rivas BWC (Body Worn Camera) at 8:00-8:36.

[48] Rivas depo, 40:13-15.

[49] Rivas depo, 50:9-10.

[50] Leon depo, 46:22-23.

[51] Leon depo, 67:1-6.

[52] Kensic depo, 55:2-4.

[53] Graetz depo, 59:18-25.

EOR185[54]; *EOR212*[55]; *EOR241*[56].) He did not aggress toward the officers, assume a fighting stance, brandish or hold any weapon, or engage in confrontational or menacing conduct. (*Security Video, at 23:02:01-23:02:36*; *EOR129*[57]; *EOR134*[58]; *EOR205-07*[59]; *EOR211*[60]; *EOR229-30*[61]; *EOR182*[62].)

At 23:02:01-08, Rivas knocked on a window next to the kitchen sliding glass doors to the home and ordered Corteslunа to come to the door. (*Security Video, at 23:02:01-08*.) Cortesluna responded to the sliding glass door to the kitchen adjacent to the window. (*Security Video at 23:02:13-15*.) When he came to the door, Cortesluna was still holding the jackhammer bit ("pick") which he had been using to try to open the locked door to his room inside the home. (*Pet. App. 31*; *EOR100-03*[63].) Kensic said, "He's coming . . . he's got a weapon in his hand" that looks "like a crowbar." (*Pet. App. 6*.) Leon stated, "I'm going to hit him with less lethal" and told another officer to get out of his way. (*Pet. App. 7, 23*; *EOR232-33*[64].) Rivas ordered Cortesluna to

[54] Graetz depo, 62:14-19.

[55] Kensic depo, 55:5-15.

[56] Leon depo, 59:1-3.

[57] Rivas depo, 40:18-19.

[58] Rivas depo, 50:16-17.

[59] Kensic depo, 40:22-42:14.

[60] Kensic depo, 54:22-25.

[61] Leon depo, 45:10-46:21.

[62] Graetz depo, 59:18-21.

[63] Cortesluna depo, 28:17-29:9; 31:14-24, 32:21-23.

[64] Leon depo, 48: 8-13, 49:15-21.

"drop it" and he complied with this order immediately by placing the bar on the kitchen counter next to the door. (*EOR261-62*[65]; *EOR102*[66]; *EOR127-29*[67]; *EOR204-07*[68].)

Rivas issued the additional orders ("Come out," "Put your hands up," "Walk out towards me," "Come out," "Walk towards me," "Keep coming," "Stop,") and Corteslуna complied with those orders. (*Security Video, at 23:02:20-23:02:36*; *EOR231*[69]; *EOR233-36*[70]; *EOR240*[71]; *EOR129-31*[72]; *EOR209*[73]; *211-12*[74]; *EOR175-77*[75].) Cortesluna even started raising his hands before he was ordered to do so by Officer Rivas. (*EOR280-83*[76].) Cortesluna stopped ten to eleven feet from the officers. (*Pet. App. 7*.)

Rivas then ordered Cortesluna to "get on your knees." (*EOR131*[77].) While Rivas was speaking, Kensic interrupted him, shouting "He's got a knife in his left

[65] Security Video, at 23:02:15-22 (bar can be seen in shadow).

[66] Cortesluna depo, 31:14-24.

[67] Rivas depo, 37:4-12, 39:8-12, and 16-19, 40:18-41:2.

[68] Kensic depo, 39:19-42:14.

[69] Leon depo, 47:2-16.

[70] Leon depo, 49:25-52:13.

[71] Leon depo, 58:23-25.

[72] Rivas depo, 40:21-42:20.

[73] Kensic depo, 45:3-5.

[74] Kensic depo, 54:10-12 and 55:5-7.

[75] Graetz depo, 50:22-52:25.

[76] Rivas BWC, 8:21.

[77] Rivas depo, 42:17-18.

pocket. Knife . . . don't . . . don't put your hands down." (*EOR345-48*[78]; *EOR280-83*[79]; *Pet. App. 7.*) Cortesluna then looked over toward Kensic and hesitantly lowered his hands to the front of his thighs and bowed his head and made no other movement. (*Security Video, at 23:02:36*; *EOR345-48*[80]; *EOR280-83*[81]; *Pet. App. 7.*)

The officers knew that having one officer issuing orders is recommended in order to avoid confusion. (*EOR178-79*[82]; *EOR210*[83]; *EOR228*[84].) The officers knew that people can be anxious and frightened when confronted by law enforcement and that slight delays, hesitations, or misunderstandings are not necessarily noncompliance. (*EOR212-15*[85]; *EOR249-51*[86]; *EOR138*[87].) English is not Cortesluna's first language and he was extremely anxious and frightened and confused by multiple, conflicting shouted orders from two

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[78] Kensic BWC, 3:16-3:19.

[79] Rivas BWC, 8:32-8:35.

[80] Kensic BWC at 3:16-3:19.

[81] Rivas BWC at 8:32-8:35.

[82] Graetz depo, 55:18-56:4.

[83] Kensic depo, 51:21-25.

[84] Leon depo, 41:7-9.

[85] Kensic depo, 55:18-58:23.

[86] Leon depo, 79:21-81:3.

[87] Rivas depo, 64:22-24.

different sources. (*EOR102-03*[88]; *EOR105-06*[89]; *EOR109-10*[90]; *EOR260*[91].)

Kensic then shouted "Hands up, away from the knife. Away from the knife." (*Pet. App. 7*.) A split second later, Leon shot Cortesluna twice in quick succession with the less lethal shotgun. (*Pet. App. 7-8*; *Security Video, at 23:02:36-37*; *EOR280-83*[92]; *EOR345-48*[93].)

The police acknowledge that Cortesluna was not holding the knife, did not touch the knife, and his hand never went into the pocket where the knife was located. (*Security Video, at 23:02:30-23:02:40*; *EOR211*[94]; *Pet. App. 28*.) The knife was blade-up in a low-hanging side pocket on the left side of his pajama bottoms such that it would not have been possible for Cortesluna to grab it and attack anyone. (*Pet. App. 15, 23, 28*; *Security Video, at 23:02:30-23:02:40*.) Cortesluna did not make a reaching or grasping motion with his hands as if reaching for the knife. His hands remained open with fingers extended. He lowered both hands down together to the front of his thighs. (*Security Video, at 23:02:30-23:02:40*.) The security video shows that Leon and Rivas could see both of Cortesluna's hands when they were lowered even from

[88] Cortesluna depo, 31:14-32:5.

[89] Cortesluna depo, 35:6-36:20.

[90] Cortesluna depo, 57:7-59:8.

[91] Cortesluna Declaration, ¶6

[92] Rivas BWC, 8:35-8:36.

[93] Kensic BWC, 3:19-3:20.

[94] Kensic depo, 54:10-20.

their position to his right. (*Security Video, at 23:02:30-23:02:40*); *Pet. App. 28* (*screenshot photographs from Security Video*); *EOR237-38*[95]; *EOR132-33*[96]; *EOR211*[97]; *EOR182-83*[98].) Police officers are trained to carefully watch a subject's hands. (*EOR256*[99]; *EOR275*[100].)

Cortesluna is 5'6" or 5'7" and 149 pounds and wearing a red t-shirt, red plaid pajama bottoms and no shoes. (*EOR126*[101]; *EOR261-62*; *Security Video, at 23:02:30-23:02:40*.)

The closest officer to Cortesluna at the time he lowered his hands was ten to eleven feet away. (*Pet. App. 7*; *Security Video.*) There were five uniformed officers of the Union City Police Department armed with lethal force at the time when Cortesluna lowered his hands. (*Pet. App. 23*; *Security Video*.) Per Lt. Graetz, Watch Commander, at that point "he was controlled." (*Security Video, at 23:01:30-23:02:37*; *EOR 173-74*[102] and *EOR184-85*[103]; *EOR249*[104]; *EOR157-58*[105];

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[95] Leon depo, 55:16-56:22.

[96] Rivas depo, 44:21-45:4.

[97] Kensic depo, 54:14-20.

[98] Graetz depo, 58:7-59:16.

[99] Defense expert Papenfuhs deposition, 76:5-13.

[100] Clark Decl., ¶8, 10:21.

[101] Rivas depo, 32:16-33:8.

[102] Graetz depo, 42:18-43:21.

[103] Graetz depo, 61:8-62:19, 62:20-24.

[104] Leon depo, 79:10-16.

[105] Bellotti depo, 27:23-28:14.

EOR202-03[106].) Each of these officers had a line of retreat or repositioning. (*Security Video, at 23:01:30-23:02:37*; *EOR185*[107].)

The police knew that the only other persons in the house were behind closed and locked or barricaded doors inside the home. (*EOR82*[108]; *EOR83*[109]; *EOR241*[110]; *EOR198-99*[111]; *EOR165*[112].) There were no other members of the public in the area. (*Security Video.*)

E. LESS LETHAL SHOTGUN USE OF FORCE

A fraction of a second after Kensic ordered "Hands up," Leon shot Cortesluna without warning with a less lethal shotgun (870 Remington with a Super Sock round), and a second later shot again. (*Security Video, at 23:02:36-37*; *EOR349-52*[113]; *EOR280-83*[114]; *EOR345-48*[115]; *Pet. App. at 7-8*.) The first shot hit Cortesluna in his lower stomach/groin and he

[106] Kensic depo, 35:21-36:20.

[107] Kensic depo, 35:21-36:20.

[108] CAD Detailed History for Police Event at 22:50:35.

[109] CAD Detailed History for Police Event at 23:02:25.

[110] Leon depo, 59:4-15.

[111] Kensic depo, 27:24-28:6.

[112] Graetz depo, 25:7-11.

[113] Leon BWC at 2:45-2:46 (order and first shot), 2:47 (second shot).

[114] Rivas BWC at 8:35-8:36 (order and first shot), 8:37 (second shot).

[115] Kensic BWC at 3:19-3:20 (order and first shot), 3:21 (second shot).

instinctively clutched the area of the injury, on the opposite side of his body from the knife, because of the pain and turned away to his left from the cause of the injury. (*Security Video, at 23:02:36-23:02:37*.) He did not immediately raise his hands in compliance with the orders from the police after the first shot, but his hands were not near his waistline when Leon shot him a second time. (*Security Video, at 23:02:36-23:02:39*; *Pet. App. 28* (*screenshot photographs from Security Video*).) The immediate second shot hit Cortesluna in his right hip. (*Pet. App. 8*; *EOR261*[116].)

The manufacturer's minimum recommended range to target when deploying a Remington 870 super sock less lethal shotgun round is 15-60 feet. (*EOR257*[117].) Leon testified he was 7 to 10 feet from Cortesluna, the rifle was 26 inches long, and that he believed that the minimum recommended range to target was one to three feet. (*EOR236*[118]; *EOR244*[119].)

Cortesluna was not provided with any warning or notice of intent to deploy or fire. (*Pet. App. 8*; *EOR241-42*[120].) City of Union City Police Department policy dictates that a subject must be warned, when feasible, before firing a less lethal weapon. (*EOR305*[121].) A

[116] Rivas BWC at 8:35-8:36 (order and first shot), 8:37 (second shot).

[117] Defense expert Papenfuhs depo, 84:3-16.

[118] Leon depo, 52:4-6.

[119] Leon depo, 63:1-25.

[120] Leon depo, 59:24-60:9.

[121] City of Union City Policy Manual, §308.9.2, p. 58.

warning was feasible prior to the shooting. (*EOR275-77*[122].) It would have been feasible and less intrusive to talk to him calmly and without confusion in order to obtain his compliance while the police ascertained the problem. (*EOR277*[123].)

F. SHOVE AND KNEEL USE OF FORCE

After the second shot, Plaintiff again raised his hands over his head. (*Pet. App. 8*; *Security Video, at 22:03:39-23:03:10*.) The officers ordered him to "[G]et down." (*Id.*) As Plaintiff was lowering himself to the ground, the video shows that his hands were not concealed and were on the ground visibly away from his pajama pants pocket and the knife located therein. (*Id.*) Rivas-Villegas used his foot to forcefully push Plaintiff to the ground. (*Id.*) Rivas-Villegas then pressed his knee into Plaintiff's back and pulled Plaintiff's arms behind his back. (*Id.*) Leon handcuffed Plaintiff's hands while Rivas-Villegas held his position. (*Id.*) A few moments later, Rivas-Villegas lifted Plaintiff up by his handcuffed hands and moved him away from the doorway. (*Id.*)

II. THE LAWSUIT

Plaintiff Ramon Cortesluna filed a complaint asserting (a) a claim under 42 U.S.C. § 1983 against Leon and Rivas-Villegas for excessive force; (b) a § 1983

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[122] Declaration of Roger Clark, ¶¶8-10.

[123] Declaration of Roger Clark, ¶11.

claim against Kensic for failing to intervene and stop the excessive force; (c) a claim against the City under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), for the officers' actions; and (d) several state-law claims. Plaintiff claims that he suffers physical, emotional, and economic injuries as a result of the officers' conduct. (*Pet. App. 8*.)

The district court granted summary judgment to the individual Defendants on the federal claims. (*Id*. at 8-9.) As to Leon and Rivas-Villegas, the court ruled both that the force used was objectively reasonable in the circumstances and that they were entitled to qualified immunity. (*Id.*) As to Kensic, the court ruled that he had no reasonable opportunity to intervene and therefore could not be liable. (*Id.* at 9.) With summary judgment granted in favor of the individual Defendants, the court dismissed Plaintiff's claim against the City. (*Id.*) The court then declined to exercise supplemental jurisdiction over Plaintiff's state-law claims and dismissed them without prejudice. (*Id.*)

III. THE APPEAL

On appeal, the Ninth Circuit affirmed in part and vacated in part. The majority held that Petitioner Rivas-Villegas used excessive force against Respondent Cortesluna by pushing plaintiff down with his foot and pressing his knee against plaintiff's back while he was being handcuffed, and that qualified immunity did not apply to this conduct, citing clearly established law in

LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000). (*Pet. App. 5-21.*) The concurrence would have also found excessive force against Officer Leon for the shooting. (*Id.* at 22-28.) The dissent would have found no excessive force and would have applied qualified immunity. (*Id*. at 29-41.) The grant of summary judgment as to petitioner Rivas-Villegas was reversed and remanded to the district court for consideration of other elements of Plaintiff's *Monell* claim and reinstatement of Plaintiff's state-law claims relating to petitioner. (*Id.* at 21.)

REASONS WHY CERTIORARI SHOULD BE DENIED

Qualified immunity was properly denied to petitioner consistent with this Court's guiding precedent and clearly established precedent cited by the lower court

1. No Conflict Among Circuit Courts

There is no conflict among the Circuit courts and all other Circuits have not "universally held that it is not excessive force for an officer to place a knee against a suspect's back with mild or moderate force in the course of handcuffing" as petitioner contends. Every Circuit court has clearly established law that "an officer cannot place his knee on the back of a prone, unresisting suspect." In addition, the cited case law does not reveal a conflict among the Circuit courts or support the propositions that (1) a plaintiff is required to

document the extent of his injury to show excessive force or that (2) de-escalation of circumstances is an "artificial construct."

2. No Error in Denial of Qualified Immunity Because Applicable Law Clearly Established And Thrust of Claim Here is That Lower Court Erred In Applying Law to Fact

The clearly established law cited by the lower court squarely and specifically governs the facts of this case and provided notice to law enforcement that forcefully pushing and kneeing a compliant and non-resistant subject is unconstitutional excessive force. Petitioner's hyper-specific definition of "clearly established law" would define away all potential claims. Precedent cited by the lower court is sufficiently specific to put law enforcement officers on notice that police may not kneel on a prone and non-resisting person's back so hard as to cause injury. The thrust of the petitioner's claim is that the lower court erred in applying settled rule of law to the facts of this case and should have adapted the application of law to facts set forth in the dissent.

3. No Federal Question or Issue of National Importance

The lower court's decision does not implicate a federal issue of national importance relating to police and policing as it is consistent with and analogous to law

that has been clearly established for over 20 years with no evidence of detriment to police or policing.

I. NO CONFLICT AMONG CIRCUIT COURTS

A. NO CONFLICT THAT KNEE-TO-BACK USE OF FORCE ON A NON-RESISTING AND/OR COMPLIANT SUBJECT IS EXCESSIVE

Petitioner's contention that *Cortesluna* "stands alone and conflicts with other Circuit court decisions" (*Pet. Brief 21*) is contradicted by clearly established law in every circuit court supporting the proposition that "an officer cannot place his knee on the back of a prone, unresisting suspect."

- 1st Circuit: *Lachance v. Town of Charlton*, 2021 U.S. App. LEXIS 6189, *4-5, *26-29 (1st Cir. 2021) (placing knee on back of subject during handcuffing leading to visible bruising and possible compression fracture was excessive use of force)

- 2nd Circuit: *Dancy v. McGinley*, 843 F.3d 93, 102 (2nd Cir. 2016) (affirming reasonableness of award for nonpermanent injuries arising from excessive force including application of knee to back during handcuffing after takedown of semi-resistant teenaged suspect)

- 3rd Circuit: *Couden v. Duffy*, 446 F.3d 483, 496-98 (3rd Cir. 2006) (use of force including knee to back during handcuffing was excessive)

- 4th Circuit: *Smith v. Ray*, 781 F.3d 95, 103, 104-05 (4th Cir. 2015) (finding excessive force when compliant but questioning subject slammed to ground and knee ground into her back pre-handcuffing)
- 5th Circuit: *Peterson v. City of Fort Worth*, 588 F.3d 838, 846-47 (5th Cir. 2009) (There were unresolved triable facts given that "Officer Ballard testified that Peterson resisted, but only minimally, such that a knee strike would have been unnecessary.")
- 6th Circuit: *Harris v. Langley*, 647 Fed. Appx. 585, 591-92 (6th Cir. 2016) (excessive force when officers responding to welfare check call encountered subject at door, were invited in, declined to enter, and when subject started to close door, then pulled him out, slammed him to the ground and knelt on his back while handcuffing him); *Laury v. Rodriguez*, 659 Fed. Appx. 837, 845-46 (6th Cir. 2016) (triable issue where video showed the officer using his body weight and knee to hold the unhandcuffed arrestee on the ground despite the fact that he did not appear to be struggling); *Cole v. City of Dearborn*, 448 Fed. Appx. 571, 575 (6th Cir. 2011) (use of force including driving a knee into prone and passive subject's back was excessive); *Bennett v. Krakowski*, 671 F.3d 553, 562 (6th Cir. 2011) (genuine dispute of material fact whether use of force, including knee to back, was excessive)
- 7th Circuit: *Alicea v. Thomas*, 815 F.3d 283, 287, 291 (7th Cir. 2016) (genuine disputes of

material fact regarding pre-handcuffing uses of force including application of knee to back); *Abdullahi v. City of Madison*, 423 F.3d 763, 765 (7th Cir. 2005) (no grant of qualified immunity at summary judgment where an officer had "placed his right knee and shin on the back of [a person's] shoulder area and applied his weight to keep [the person] from squirming or flailing")

- 8th Circuit: *Perry v. Woodruff Cty. Sheriff Dep't,* 858 F.3d 1141 (8th Cir. 2017) (deputy's forcible use of knee to restrain compliant plaintiff pre-handcuffing was excessive and not entitled to qualified immunity); *Ziesmer v. Hagen*, 785 F.3d 1233, 1236 (8th Cir. 2015) (extent of force, including application of knee to back pre-handcuffing, was a jury question); *Smith v. Kansas City, Mo Police Dep't*, 586 F.3d 576, 579, 581-82 (8th Cir. 2009) (nonresisting plaintiff had no time to comply with commands before being knocked down and kneed during handcuffing)

- 9th Circuit: *LaLonde v. County of Riverside*, 204 F.3d 947, 952, 959 (9th Cir. 2000) (during handcuffing officer put knee on plaintiff's back forcefully causing him significant pain – jury could conclude was excessive force)

- 10th Circuit: *Herrera v. Bernalillo County Bd. of County Comm'rs*, 361 Fed. Appx. 924, 926 (10th Cir. 2010) (unpublished) (knee to back, knee to left knee, twisting ankle of nonresisting subject pre-handcuffing created triable issue of excessive force)

- 11th Circuit: *Scott v. City of Red Bay*, 686 Fed. Appx. 631, 632-33 (11th Cir. 2017) (unpublished) (shoving plaintiff to the ground, kneeling on his back, pressing his face into the ground, and ignoring his assertions that he could not produce his arm for handcuffing and could not breathe was excessive)
- D.C. Circuit: *Hall v. District of Columbia*, 867 F.3d 138, 158, 160 (D.C. Cir. 2017) (triable issue as to excessive force regarding level of subject's resistance during application of knee to back, among other uses of force, during arrest)

There are relatively few mild to moderate "knee on back" use of force cases given that the subject of such a use of force is often unable to identify which law enforcement officer applied pressure to his or her back (*see, e.g., Williams v. City of York*, 967 F.3d 252, 261 (3rd Cir. 2020); *Crawford v. Geiger*, 656 Fed. Appx. 190, 208 n.9 (6th Cir. 2016); *Cole v. City of Dearborn*, 448 Fed. Appx. 571, 575 (6th Cir. 2011)) or the excessive force is combined with or eclipsed by other uses of force which become the focus of the inquiry. (*See, e.g., McAllister v. Price*, 615 F.3d 877, 879 (7th Cir. 2010); *Blankenhorn v. City of Orange*, 485 F.3d 463, 480-81 (9th Cir. 2004).)

This clearly established constitutional rule regarding knee-to-back use of force is consistent with the many cases finding use of force to be excessive in other formats when a subject is compliant, submissive, or surrendering. *See, e.g., Rohrbough v. Hall*, 586 F.3d 582, 587 (8th Cir. 2009) (punching subject in the face,

taking him to the ground face down, landing on top of him and thereby causing him serious injury was illegal); *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002) (nonresistant, nonaggressive subject forced against his truck, arm twisted and raised high behind his back, injuring his collar bone, shoulder, neck, and wrist, and tight handcuffs); *Glasscox v. Argo*, 903 F.3d 1207 (11th Cir. 2018) (repeated taser shocks after subject subdued); *Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008) ("gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force"); *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000) (siccing canine on subject complying with orders to get on ground; other officer had duty to intervene).

Respondent's case law from the various circuit courts is directly on point, limited to brief and mild to moderate application of knee to back prior to or during handcuffing (and not including the many cases involving prolonged and/or overwhelming, asphyxiating force applied by law enforcement's knee to a subject's back, often after handcuffing or other restraint). In contrast, case law cited by petitioner as conflicting is factually distinguishable from Cortesluna's case.

In most of the cases cited by petitioner as conflicting, the subject of the use of force was resisting and non-compliant or exigent circumstances presented hazards to the subject, bystanders, or the police. Law enforcement in the instant case did not confront the resistance or kinds of hazards at the time of the application of force which were faced by the law

enforcement officers in the case authorities cited by petitioner. *Lowth v. Town of Cheekatowaga*, 82 F.3d 563, 567, 573 (2nd Cir. 1996) (resistant subject removed from driver's seat of police vehicle and kneed during handcuffing); *Griggs v. Brewer*, 841 F.3d 308, 311, 313-15 (5th Cir. 2016) (resistant, non-compliant and drunk subject attempting to conceal his hands from officer was sat upon and punched during handcuffing); *Jones by Jones v. Walsh*, 45 F.3d 178, 181, 184 (7th Cir. 1995) (resistant, non-compliant subject kneed as he continued struggling after handcuffed); *White v. Jackson*, 865 F.3d 1064, 1079-80 (8th Cir. 2017) (non-compliant subject reasonably assumed to be part of crowd pelting police with bottles, rocks, and explosives approached police line and was pulled down and kneed during handcuffing); *Croom v. Balkwill*, 645 F.3d 1240, 1252-53 (11th Cir. 2011) (subject was an older woman visitor and not suspected of crime but detained by being pushed with a knee into a crouch during drug house raid); *Nolin v. Isbell*, 207 F.3d 1253, 1255, 1257 (11th Cir. 2000) (subject involved in violent fistfight grabbed from behind, thrown and held against van and head held while kneed in the back and searched before handcuffs applied); *Scott v. District of Columbia*, 101 F.3d 748, 752, 758-59 (D.C. Cir. 1996) (subject in custody exited police vehicle during transport and walked off, behaving erratically, and was then pinned during handcuffing).

In some instances, petitioner's "conflicting" case law does not stand for the proposition cited. In *Shreve v. Jessamine County Fiscal Court*, 453 F.3d 681, 687

(6th Cir. 2006), the non-compliant subject was hiding from police executing a warrant in a closet in her house. After police entered the home, she was dragged out of the closet and subjected to various uses of force, including being hit in the face, struck with a stick, jumped on and kneed in the back over the course of about fifteen minutes as she was being handcuffed. *Shreve*, 453 F.3d at 685-87. The police contended that they needed to use force to get the subject to release her hands for handcuffing. However, the court held "[t]he deputies' interest in an expeditious arrest, however, included no officer safety component" and "Shreve did nothing after she was placed on the floor that would cause a reasonable officer to fear for anyone's safety" and "these alleged actions go so far beyond forcing Shreve to produce her hands that no reasonable policeman could see them as nonexcessive, not even in the heat of the situation." *Shreve*, 453 F.3d at 687. In *Smith v. Mattox*, 127 F.3d 1416, 1418-20 (11th Cir. 1997), the officer placed a knee on the compliant subject's back and pulled his arm back hard, breaking his arm. Qualified immunity was denied because "this case falls within the slender category of cases in which the unlawfulness of the conduct is readily apparent even without clarifying caselaw." *Id.* at 1420. Contrary to petitioner's brief, the court did not conclude that knee-to-back use of force when he was on the ground preparatory to handcuffing was "reasonable" but merely that "it was not unreasonable for [the officer] to think that he was entitled to use some force to put Smith into cuffing posture" given that Smith had just confronted the officer with a baseball bat *Id.* at 1419-20.

In another instance, petitioner's "conflicting" case law is completely inapposite. In *Hunt v. Massi*, 773 F.3d 361, 365, 370 (1st Cir. 2014), the subject requested that his hands be cuffed in front instead of in back due to recent stomach surgery and scuffled with officers when this request was denied. During the fifteen second melee which followed, the subject was kneed in the back in the course of being handcuffed. The *Hunt* court held that a reasonable officer would not have known that it was excessive force to handcuff behind the subject's back. No determination was made regarding whether the knee to back use of force was excessive, or not.

The only case cited by petitioner that appears somewhat analogous to the facts in *Cortesluna* is *Cavataio v. City of Bella Vista*, 570 F.3d 1015 (8th Cir. 2009). In *Cavataio*, a non-resisting 75-year-old man was arrested at his home by the Chief of Police for violation of a city ordinance against storing property in the driveway. He was kneed in the back after handcuffing as he was being placed in the police vehicle and later complained of resulting back pain and injury. *Cavataio*, 570 F.3d at 1017, 1020. This case appears to be an outlier given the Eighth Circuit's subsequent cases establishing that forcible use of a knee to restrain a compliant plaintiff was excessive and not entitled to qualified immunity and that resultant injuries from application of knee to back was a jury question. *Perry v. Woodruff Cty. Sheriff Dep't,* 858 F.3d 1141 (8th Cir. 2017); *Ziesmer v. Hagen*, 785 F.3d 1233, 1236 (8th Cir. 2015); *Smith v. Kansas City, Mo Police Dep't*, 586 F.3d 576, 579, 581-82 (8th Cir. 2009).

B. NO CONFLICT THAT USE OF FORCE MUST BE APPROPRIATE TO DE-ESCALATED CIRCUMSTANCES

Petitioner next contends that the lower court's observation that circumstances can "de-escalate" as fast as they can escalate (*Pet. Brief 9*) is an "artificial construct" rejected by other Circuits. Once again, the cited cases do not support the proposition and are factually distinguishable from *Cortesluna* in that circumstances in those cases had not de-escalated. *Crosby v. Monroe County*, 394 F.3d 1328, 1334-35 (11th Cir. 2004) (non-cooperative subject); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 588-90, 593 (7th Cir. 1997) (erratic and resistant subject pinned).

The lower court's observation that circumstances can de-escalate quickly and concomitant force must be reasonable for the de-escalated circumstances is based on logic and is also supported by case law in other circuits. *See, e.g., Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005). In *Waterman*, the court found "[i]t is established in this circuit that the reasonableness of an officer's actions is determined based on the information possessed by the officer at the moment that force is employed. . . . To simply view all of the force employed in light of only the information possessed by the officer when he began to employ force would limit, for no good reason, the relevant circumstances to be considered in judging the constitutionality of the officer's actions. We therefore hold that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has

been eliminated." *Id*. (internal citations omitted); *see also Lamont v. New Jersey*, 637 F.3d 177, 184 (3rd Cir. 2011); *Dean v. Jones*, 984 F.3d 295, 305 (4th Cir. 2021); *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 413 (5th Cir. 2009); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993); *Cole v. Hutchins*, 959 F.3d 1127, 1135-36 (8th Cir. 2020); *Estate of Smart v. City of Wichita*, 951 F.3d 1161, 1176 (10th Cir. 2020).

C. NO CONFLICT THAT A PLAINTIFF IN AN EXCESSIVE FORCE CASE NEED NOT SHOW SIGNIFICANT INJURY

Lastly, petitioner contends that a plaintiff is required to come up with "physical evidence" that the "quantum of force" applied resulted in injury. None of the cases cited supports this proposition. Once again, the cited cases merely support the proposition that a certain amount of force is reasonable to subdue a resistant subject. *Abdullahi v. City of Madison*, 423 F.3d 763, 771 (7th Cir. 2005); *Blazek v. City of Iowa City*, 761 F.3d 920, 923-24 (8th Cir. 2014); *Wertish v. Krueger*, 433 F.3d 1062 (8th Cir. 2006) (subject knelt upon while resisting handcuffing). The last case has no reference to injury at all. *Durruthy v. Pastor*, 351 F.3d 1080, 1085, 1094 (11th Cir. 2003) ("de minimus" [sic] *force* used to arrest plaintiff). A plaintiff in an excessive force case is not required to show a significant injury. *Wilks v. Reyes*, 5 F.3d 412, 416 (9th Cir. 1993); *Morales v. Fry*, 873 F.3d 817, 820-21 (9th Cir. 2017). There is no "de minimis" injury threshold for an excessive force case. *Wilkins v. Gaddy*, 559 U.S. 34, 39-40 (2010).

II. DENIAL OF QUALIFIED IMMUNITY AS TO THE PUSH AND SHOVE WAS APPROPRIATE BECAUSE APPLICABLE CASE LAW CLEARLY ESTABLISHES A CONSTITUTIONAL VIOLATION

Qualified immunity shields government officials from damages in a civil suit unless the plaintiff can make the showing that the official's actions violated a constitutional right, and that the right was "clearly established" at the time of the violative conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The evidence is viewed in favor of the nonmoving party. *Tolan v. Cotton,* 572 U.S. 650, 657 (2014) (per curiam) (overturning grant of qualified immunity as the lower court did not view the evidence in favor of the nonmoving party).

A constitutional right is not "clearly established" by general constitutional principles or general prohibitions against constitutional violations. The U.S. Supreme Court has repeatedly signaled that courts should not "define clearly established law at a high level of generality." *White v. Pauly*, 137 S.Ct. 548, 552 (2017) (qualified immunity applied because reliance on general principles of *Graham* and *Garner* which lay out excessive-force principles at only a general level was not clearly established precedent and there was no specific precedent where an officer's conduct under similar circumstances was held unconstitutional); *City of San Francisco v. Sheehan*, ___ U.S. ___, 135 S.Ct. 1765, 1776 (2015); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (clearly established precedent not found in a broad review of the history and purpose of the Fourth

Amendment with no specific precedent that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (*Garner*'s holding that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" was too general a proposition); *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001) (*Graham v. Connor*'s "general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness" is not specific enough to be clearly established law); *City of Escondido v. Emmons*, ___ U.S. ___, 139 S.Ct. 500 (2019) (citation to case law describing the right to be "free from the application of non-trivial force for engaging in mere passive resistance" where facts were not analogous is not clearly established law).

"The dispositive question is 'whether the violative nature of particular conduct is clearly established' in the specific context of the case." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). The precedent need not be directly on point but must place the statutory or constitutional question beyond debate. *al-Kidd*, 563 U.S. 731, 741; *Kisela v. Hughes*, ___ U.S. ___, 138 S.Ct. 1148, 1152 (2018). "Precedent involving *similar* facts can help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful." *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (emphasis added). "The contours of the right

must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citations omitted). "A right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances." *Ford v. City of Yakima*, 706 F.3d 1188, 1195 (9th Cir. 2013). "The relevant inquiry is whether, at the time of the officers' action, the state of the law gave the officers fair warning that their conduct was unconstitutional." *Id*. While this inquiry must be case specific, it is not so narrowly defined that it "allow[s] [government officials] to define away all potential claims." *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995).

The *LaLonde* case, cited by the majority in the lower court, squarely and specifically governs the facts of this case and provided clearly established notice to police that forcefully pushing and kneeing a compliant and non-resistant subject is unconstitutional excessive force. *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000). As in the instant case, officers went to a residence in response to a complaint about the homeowner. *Id.* at 951. As here, there was reason to be wary. Officers were warned in advance that the plaintiff there possessed a deadly weapon and that they "should

be careful because he might be willing to use the rifle." *Id.* Unlike in the instant case, the officers in *LaLonde* talked to the plaintiff and explained why they were there and the plaintiff was overtly hostile and expressly non-compliant and non-cooperative with them. *Id.* at 951-52. As in the instant case, an officer knocked the plaintiff to the ground and applied force to his back during handcuffing after resistance had concluded (per the non-moving party). *LaLonde*, 204 F.3d at 952, 959 n.17. LaLonde admits he was resistant until the officer pepper sprayed him, after which point resistance ceased. *LaLonde*, 204 F.3d at 959 n.17. As in the instant case, "[w]hile performing the handcuffing, Officer Horton forcefully put his knee into LaLonde's back, causing him significant pain." *Id.*

As in the instant case, LaLonde had been injured by an earlier, very recent, use of force. *Id.* at 952. The use of force in the instant case, two beanbag rounds from a shotgun, was much greater than the pepper spray to which *LaLonde* was subjected. As in the instant case, the situation in *LaLonde* quickly de-escalated from earlier circumstances. *Id*. "Considering the facts in the light most favorable to him, LaLonde had the right to have the jury assess the evidence supporting this claim of excessive force." *Id.* at 959.

LaLonde clearly establishes the violative nature of particular conduct in the specific context of the case. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742. The violative conduct is the same (knee to back during handcuffing), as are the circumstances in which the conduct was applied (after resistance had ended and circumstances

had de-escalated). *LaLonde* does not just set forth general constitutional principles or general prohibitions against constitutional violations, nor define the constitutional violation at a "high level of generality" or set forth a "general proposition" that does not meet the level of specificity required for clearly established law. *LaLonde* is based on facts so similar that it easily moves the case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provides an officer notice that a specific use of force is unlawful. *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018).

Petitioner contends that there are relevant factual distinctions because the police in *LaLonde* were responding only to a noise complaint and because LaLonde was not "armed." This analysis ignores the fact that, as in *LaLonde*, the earlier deployment of force de-escalated the situation (even further) and Cortesluna was indisputably compliant and non-resistant at the time of the knee-to-back use of force. As discussed *supra,* in Part I.B, force that might have been justified at the beginning of an encounter is not justified *even seconds later* if the justification for the initial force has been eliminated. In addition, there were facts in *LaLonde* such as the warning to police that the plaintiff possessed and might use a gun, and the plaintiff's express and open hostility to the police, as well as the lesser use of de-escalating force, that even out the exigent circumstances, if indeed there is any discrepancy. If police could justify their use of force based only on the initial information provided, or by characterizing household

and other innocent but accessible items as "weapons," and contend that a subject is "armed" due to their arguable accessibility, this would provide limitless excuses for excessive force and also likely encourage underreporting or misreporting of dispatch information. Clearly established law must be case specific but it should not be so narrowly defined that it allows government officials to "define away all potential claims." *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995).

III. NO FEDERAL QUESTION OR ISSUE OF NATIONAL IMPORTANCE

Petitioner contends that the lower court's decision finding excessive force and interpreting clearly established law will "jeopardize officer safety by inviting litigation over a basic handcuffing technique involving minimal force, designed to protect police officers, that is employed by law enforcement throughout the country." This effort to create an issue of national import or a federal question fails for several reasons.

It has been clearly established law for over 20 years, since 2000, that forcefully pushing and kneeing a compliant and non-resistant subject is unconstitutional excessive force but petitioner does not note any evidence of jeopardy to police or policing resulting therefrom. *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000). This clearly established law exists in all Circuit courts. It is the interest of law enforcement to identify and clearly establish as

unconstitutional this type of gratuitous use of force that chips away at public trust in law enforcement.

Second, citing to "standard" or "basic" procedure does not immunize excessive force when the standard, basic procedure is executed with excessive force or is executed unnecessarily. *See, e.g., Smith v. Kansas City, Mo Police Dep't*, 586 F.3d 576, 581-82 (8th Cir. 2009); *Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) ("under section 1983 the issue is whether the government official violated the Constitution or federal law, not whether he violated the policies of a state agency").

Third, the public interest is jeopardized by any excessive use of force, including excessive use of standard or basic uses of force or "minimal" use of force. Excessive use of force by law enforcement is unconstitutional even where there is no severe physical injury (*Ketcham v. City of Mt. Vernon*, 992 F.3d 144, 150 (2nd Cir. 2021); *Hill v. Crum*, 727 F.3d 312, 315-16 (4th Cir. 2013); *Hinson v. Martin*, 2021 U.S. App. LEXIS 12775, *14-15 (5th Cir. 2021) (unpublished); *Johnson v. Heins*, 2021 U.S. App. LEXIS 3559, *5-6 (9th Cir. 2021) (unpublished); *Tribble v. Gardner*, 860 F.2d 321, 325 & n.6 (9th Cir. 1988)) and even where there is no physical injury at all. *Baird v. Renbarger*, 576 F.3d 340, 346 (7th Cir. 2009) (emotional injury due to officer pointing gun at subject). Knee-to-back use of force, even fleeting use of this force, can result in serious injury or death. *See, e.g., Kulpa v. Cantea*, 708 Fed. Appx. 846, 852 (6th Cir. 2017) (even brief knee-on-back use of force was excessive after subject ceased moving; subject later died).

IV. THRUST OF PETITION IS A REQUEST FOR REVIEW OF THE APPELLATE COURT'S APPLICATION OF SETTLED RULE OF LAW TO PARTICULAR FACTS

The general thrust of petitioner's claim, after clearing away illusory contentions about circuit court conflicts and important federal issues, is that the lower court erred in applying the settled rule of law to the facts of this case and instead should have adapted the application of law to facts set forth in the dissent in the lower court which conveniently coincides with petitioner's view of the facts. Petitioner contends that Cortesluna was continuing to resist or somehow otherwise pose a danger justifying the push-and-kneel use of force by law enforcement as he complied with their commands to get on the ground. Petitioner thereby requests that this Court "compel compliance" with the *Graham* standards. However, "[r]egardless of whether the petitioner is an officer or an alleged victim of police misconduct, we rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. City of Houston*, 137 S.Ct. 1277, 1278 (2017) (citing Supreme Court Rule 10).

Petitioner contends that the lower court "was not free to ignore salient facts relevant to assessing the reasonableness of petitioner's conduct" and that, accordingly, petitioner is "entitled" to summary judgment. (*Pet. 15*.) The petition then lists a number of facts that the lower court specifically referenced in its opinion, and therefore clearly did not "ignore,"

including that the police were called to the scene of a potentially serious crime, that when they first saw Cortesluna he was carrying what appeared to be a crowbar, that he had a knife in a pocket, and that events took place over a short period of time. (*Pet. App. 18 n.7*, indicating videotape was reviewed by the lower court.)

Petitioner cites to this Court's case law holding that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott v. Harris*, 550 U.S. 372, 386 (2007); *Plumhoff v. Rickard*, 572 U.S. 765, 776-77 (2014). Video/digital evidence was available in both *Scott* and *Plumhoff* which contradicted the plaintiffs' contentions that "there was little, if any, actual threat to pedestrians or other motorists." *Scott*, 550 U.S. at 378-80; *Plumhoff*, 572 U.S. at 776-77. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380. Accordingly, even though facts at summary judgment must be viewed in the light most favorable to the non-moving party, the court need not accept a "visible fiction" as when the record conclusively disproves and blatantly contradicts the non-moving party's claims such that no reasonable jury would believe them. *Scott*, 550 U.S. at 380-81; *Plumhoff*, 572 U.S. at 776-77 (pedestrians and

other motorists were clearly at risk due to plaintiffs' high speed driving while fleeing from police).

In contrast, here, the video evidence does not blatantly contradict or conclusively disprove Cortesluna's claim that he posed no danger to the police (or anyone else) as he lowered himself to the ground in compliance with their commands, having just been shot twice with a less lethal shotgun. The earlier (and arguably unreasonable) "immediate threat" and "resistance" perceived by the lower court when Cortesluna hesitantly lowered his hands in confusion to a location closer to the point-up knife in the left side pocket of his pajama bottoms was over after he was shot twice and raised his hands, which were visibly nowhere near the knife as he lowered himself to the ground and was immediately swarmed, and forcefully pushed and knelt upon by police. The lower court reasonably concluded, viewing the evidence in Cortesluna's favor, that the "objective situation altered dramatically," that circumstances had de-escalated, and the danger was past such that the push and kneel was excessive.

As technology advances and excessive force cases increasingly involve audio, video, digital and other forms of evidence capable of clarifying the existence of questions of fact, courts should not decide disputed facts unless audio, visual, or other evidence does, in fact, "blatantly contradict" the opposing party's evidence such that it is a "visible fiction" that no reasonable jury would believe. *Scott v. Harris*, 550 U.S. 372 (2007). Where there is no such "visible fiction," reasonable factual inferences must be interpreted in the light

most favorable to the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Here, there is no such blatant contradiction and the lower court reasonably inferred the objective facts in the light most favorable to the plaintiff. In essence, petitioner suggests not only that this Court revise the application of settled rule of law to the facts of this particular case, but also view the facts in the light most favorable to the petitioner (moving party below) by accepting the contention that the blade-up knife in Cortesluna's pajama bottoms pocket as he lowered himself and lay on the ground with his hands visible, having just been shot twice with beanbags, presented a danger justifying the push and kneel.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petitioner's writ of certiorari should be denied.

Respectfully submitted,

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