No. _____

In The
Supreme Court of the United States

RAMON CORTESLUNA,

Petitioner,

v.

DANIEL RIVAS-VILLEGAS,
MANUEL LEON, ROBERT KENSIC,

Respondents.

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

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Ninth Circuit depart from longstanding procedure and precedent and fail to view video and other evidence in the light most favorable to the plaintiff with respect to the central facts of the case and accept a version of facts that is a "visible fiction" when it "should have viewed the facts in the light depicted by the videotape" and other evidence? *Tolan v. Cotton*, 572 U.S. 650 (2014); *Scott v. Harris*, 550 U.S. 372 (2007).

Specifically, in light of all the video, audio and other evidence, are there genuine disputes of material fact about each *Graham* factor in this excessive force case, including: (1) whether a reasonable officer would have perceived an immediate threat or resistance because a subject lowered his hands toward his thighs and thus toward a knife in a side pocket of baggy sweatpants when the subject's hands were visibly empty and visibly not grasping for a weapon; (2) whether a reasonable officer would have assessed the alleged crime as severe after investigation at the scene with little indicia supporting the "911" caller's dire version of events; and (3) whether a reasonable officer would have intervened to calm down an officer stating in advance that he was going to shoot the subject with less lethal?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- Daniel Rivas-Villegas, an individual, defendant and appellee below and petitioner and cross-respondent here; and
- Ramon Cortesluna, an individual, plaintiff and appellant below and respondent and cross-petitioner here; and
- Manuel Leon, an individual, defendant and appellee below and cross-respondent here; and
- Robert Kensic, an individual, defendant and appellee below and cross-respondent here; and
- City of Union City, a California municipal entity, is a defendant in the District Court and appellee in the Ninth Circuit.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- *Ramon Cortesluna v. Manuel Leon; Robert Kensic; Daniel Rivas-Villegas; City of Union City, California*, United States Court of Appeals for the Ninth Circuit, Case No. 19-15105.
- *Ramon Cortesluna v. Manuel Leon; Robert Kensic; Daniel Rivas-Villegas, City of Union City, California*, United States District Court, Northern District of California, Case No. 17-cv-05133-JSC.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Ramon Cortesluna respectfully conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. This is a conditional cross- petition under Supreme Court Rule 12.5 related to the petition in No. 20-1539.

If this Court accepts the petition in No. 20-1539 and reviews the video, audio, and other documentary evidence regarding petitioner's contentions about the application of law to fact, cross-petitioner also requests review of the record, which discloses genuine disputes of material fact, in the light most favorable to the non-moving party (cross-petitioner) and a determination of whether the lower court's decision affirming summary judgment as to Rivas, Leon and Kensic was consistent summary judgment procedural requirements.

OPINIONS BELOW

December 21, 2018 Order of the United States District Court, Northern District of California, granting summary judgment to petitioner (and cross-respondents). Petitioner's Appendix, at 42-80.

October 27, 2020 Published Opinion of the United States Court of Appeal, Ninth Circuit, *Cortesluna v. Leon, et al.*, 979 F.2d 645 (9th Cir. 2020). Petitioner's Appendix, at 1-41.

December 3, 2020 Unpublished Order of the United States Court of Appeal, Ninth Circuit denying panel and en banc re-hearing. Petitioner's Appendix, at 81-82.

BASIS FOR JURISDICTION OF THIS COURT

This Court has jurisdiction to review the Ninth Circuit's October 27, 2020 decision on writ of certiorari under 28 U.S.C. § 1254(1). The cross-petition is timely filed per the Court's March 19, 2020 order extending time to file any petition to 150 days after denial of re-hearing, and Supreme Court Rule 12.5 allowing the filing of a conditional cross-petition 30 days after the filing of the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Constitution, Amend. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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

[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.

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].)

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

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[5] Cortesluna Decl., ¶5.

[6] Cortesluna Decl., ¶5.

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

[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.

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 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].)

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

[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.

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].)

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

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

[24] Rivas depo, 63:13-18.

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

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

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]; *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].)

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

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

[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.

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").

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]

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[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.

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 *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 Cortesluna 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

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

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

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

[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.

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 "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 Cortesluna 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

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

[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.

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 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

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

[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.

extremely anxious and frightened and confused by multiple, conflicting shouted orders from two 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

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[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.

shows that Leon and Rivas could see both of Cortesluna's hands when they were lowered even from 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*; *EOR173-74*[102]

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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.

and *EOR184-85*[103]; *EOR249*[104]; *EOR157-58*[105]; *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*

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

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

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

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

[107] Graetz depo, 62:4-5.

[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.

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 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].)

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

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

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

[116] Cortesluna Declaration, ¶8.

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

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

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

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 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

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

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

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

[123] Declaration of Roger Clark, ¶11.

Plaintiff up by his handcuffed hands and moved him away from the doorway. (*Id.*)

G. FAILURE TO INTERVENE/SUPERVISE

City of Union City Police Department Policy Manual, Section 300.2.1 describes the duty of an officer present and observing another officer using force that is clearly beyond that which is objectively reasonable, to intercede to prevent the use of unreasonable force and promptly report these observations to a supervisor. (*EOR291*[124].) Kensic could have intervened when Officer Leon announced his intent to shoot Cortesluna with less lethal while Cortesluna was still in the house and following the shooting but before the additional use of force in the takedown. *EOR275-278*[125].

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 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*.)

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[124] City of Union City Policy Manual, §300.2.1.

[125] Declaration of Roger Clark, ¶¶8-12.

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 IS WARRANTED

If the Petition in 20-1539 is granted to review factual inferences made by the lower court regarding petitioner's contentions, cross-petitioner Cortesluna contends that there are reasonable factual inferences that should have been interpreted in the light most favorable to him (as the non-moving party below) and disputed facts that should have been allowed to proceed to a jury. *Tolan v. Cotton*, 572 U.S. 650 (2014); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

In deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id*. The lower court here improperly "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Tolan*, 572 U.S. at 659, 660 ("at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party"). Specifically, Cross-petitioner Cortesluna contends that the video and other evidence support a finding, or at least create genuine disputes of material fact about:

1. Whether a reasonable officer would have perceived an immediate threat or active or

any resistance at the time Cortesluna lowered his hands in response to sudden and conflicting and confusing orders and no time to comply with a clear order. Cross-petitioner contends that the video shows that all of the officers, including the shooter (Leon), could see his hands and reasonably conclude that he was not reaching for a knife and therefore did not pose an immediate threat and was not resisting when he lowered his hands in confusion about how to comply with the various orders;

2. Whether a reasonable officer would have perceived a severe crime was certainly in progress given their surveillance of Cortesluna's home and indicia raising doubt about the veracity of the "911" call reported to them by their dispatch;

3. Whether the totality of the circumstances support a finding that the uses of force were excessive as the police had other options;

4. Whether a reasonable officer could have intervened after being put on notice that Leon "was going to hit him [Cortesluna] with less lethal" as well as when other officers were pushing and shoving Cortesluna.

I. REASONABLE INFERENCES MUST BE DRAWN IN FAVOR OF NON-MOVING PARTY ON SUMMARY JUDGMENT

On a motion for summary judgment, reasonable factual inferences that should have been interpreted in

the light most favorable to appellant (as the non-moving party below) and disputed facts that should have been allowed to proceed to a jury. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

This court will intervene when the opinion of the lower court "reflects a clear misapprehension of summary judgment standards in light of our precedents." *Tolan v. Cotton*, 572 U.S. 650, 659; *Cf. Salazar-Limon v. City of Houston*, ___ U.S. ___, 137 S.Ct. 1277 (2017), (plaintiff did not dispute central fact that he reached for waistband and there was no video evidence to contradict officer's reasonable perception that he posed an immediate threat).

In *Tolan*, this Court reexamined summary judgment procedure in the context of a case of excessive force arising from mistake of fact. An officer checking Tolan's license plate ran the wrong number and mistakenly concluded on that basis that Tolan's car was stolen, followed him and drew his gun ordering Tolan to lie down on the front porch of his home where he lived with his parents. *Id.*, at 651-52. Tolan's parents came out and tried to explain that the officer was mistaken and the car was not stolen. *Id.*, at 652. It was contended and disputed that the officer grabbed Tolan's mother by her arm and slammed her against the garage door with such force that she fell to the ground. *Id*., at 653 Photographs demonstrate that enough force was used to leave bruises. *Id.* Tolan testified that, in reaction he rose from his position on the porch to his knees, stating his objections. The officer contended he

rose to his feet. *Id*. The officer then shot Tolan three times, injuring him. *Id.*, at 653-54.

The Fifth Circuit affirmed summary judgment for the officer, relying on the purportedly "undisputed" fact that Tolan was "moving to intervene" and that the officer therefore could reasonably have feared for his life. *Id*., at 655. The Fifth Circuit also stated that the officer feared that Tolan "was reaching towards his waistband for a weapon." *Tolan v. Cotton*, 713 F.3d 299, 303 (5th Cir. 2013).

This Court unanimously reversed, explaining that the lower court "failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case." *Tolan*, 572 U.S. 650, 657. "By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party." *Id*., citing *Anderson*, 477 U.S. at 249, These facts included disputes regarding the officer's claims that the area was "dimly lit," that Tolan's mother was "very agitated," that Tolan was "verbally threatening," and that Tolan was "moving to intervene." *Id.*, at 657-58. "By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Id.*, at 660.

II. VIDEO EVIDENCE DOES NOT CHANGE THE PROCEDURAL REQUIREMENT TO CREDIT THE NON-MOVING PARTY'S EVIDENCE UNLESS IT "BLATANTLY CONTRADICTS" THAT EVIDENCE

Where, as here, the incident was captured on video with "no allegations or indications that this video was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened," the video can "speak for itself," and the facts are viewed "in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 378, 381 n.5 (2007). However, "[t]he mere existence of video footage of the incident does not foreclose a genuine factual dispute as to the reasonable inferences that can be drawn from that footage." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028 (9th Cir. 2018) (citing *Scott*, 550 U.S. at 380).

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, this evidence must not be interpreted in a manner that suppresses the existence of genuine disputes of material fact about whether the use of force was objectively reasonable.

In *Scott*, this Court held that, in light of the video, the non-moving party's attempt to create a dispute of facts based on "visible fiction" (that there was no threat to the public due to the plaintiff's dangerous driving) should not be credited, and so it held that summary judgment should have been granted in favor of the

moving party. (*Scott*, at 380.) Where a non-moving party is the one relying on video evidence to introduce a dispute of material facts, rather than foreclose one, the burden is even lower. *See Longoria v. Pinal Cty.*, 873 F.3d 699, 706-07 (9th Cir. 2017) ("This [video] evidence alone raises material questions of fact about the reasonableness of [the officer's] actions and the credibility of his post-hoc justification of his conduct" and "The real-time videos highlight these competing inferences rather than 'blatantly contradict[ing]' or 'utterly discredit[ing]' [Plaintiff's] version of events.")

In a case such as this, where critical events at issue have been captured on videotape, the Court is obliged to consider that videotape evidence in determining whether there is any genuine dispute as to material facts. *Scott v. Harris*, 550 U.S. 372, 380-81. The video and audio evidence record here contradicts, or at least creates genuine disputes as to material facts underlying the elements of an excessive force case and intervention claim, including whether a reasonable officer would have perceived an immediate threat, resistance, or a severe crime, as well as the feasibility of a warning or intervention, or alternative means of resolution.

III. ELEMENTS OF EXCESSIVE FORCE

A cause of action for violation of the Constitution by a person acting under color of state law is brought under 42 U.S.C. § 1983. *Gomez v. Toledo*, 446 U.S. 635, 639 (1980). All excessive force cases involving an

arrest, investigative stop, or any other "seizure" of a person at liberty are governed under the objective reasonableness standard of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388, 398 (1989). Force is excessive when it is greater than is reasonable under the circumstances." *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002). To assess objective reasonableness, the Court weighs "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, at 396.

In analyzing the countervailing governmental interests at stake, the court looks to the non-exhaustive list of factors enumerated in *Graham*, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Beyond these factors, the Ninth Circuit instructs courts to "examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." *Bryan v. McPherson*, 630 F.3d 805, 826 (9th Cir. 2010). This analysis allows courts to "determine objectively the amount of force that is necessary in a particular situation." *Id*.; *see* also *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc).

A claim of excessive force "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."

Graham v. Connor, 490 U.S. 386, 396 (1989) (cleaned up). "[T]he question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.*, at 397 (cleaned up). A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. *Graham*, 490 U.S. at 396.

Excessive force cases are necessarily fact-intensive; whether the force used is 'excessive' or 'unreasonable' depends on the "facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Glenn v. Washington County*, 673 F.3d 864, 871 (9th Cir. 2011); *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002); *see* also *Liston v. County of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir. 1997) (as amended).

A. EVIDENCE DISCLOSES GENUINE DISPUTE WHETHER A REASONABLE OFFICER WOULD VIEW LOWERING HANDS TOWARD BLADE-UP KNIFE IN PAJAMA PANTS POCKET AS AN "IMMEDIATE THREAT" UNDER TOTALITY OF CIRCUMSTANCES

The Ninth Circuit found that "Leon faced an immediate threat" because

> "Although Plaintiff did not have a chainsaw when the officers arrived, Plaintiff emerged from the house holding a large metal object. Plaintiff dropped the object when ordered to do so, but he still had a knife in the left pocket of his pants. Leon, who was standing diagonally to Plaintiff's right, could not see the knife from his position. Kensic announced that Plaintiff had a knife and ordered Plaintiff to put his hands up. Plaintiff instead lowered his hands toward his thighs – and thus toward the knife – after which Leon fired the beanbag shotgun."

However, video and other evidence reveal the following additional facts creating a genuine dispute of material fact about whether a reasonable officer would have perceived an immediate threat at the time of the use of force:

> 1. Video evidence shows Cortesluna's empty hands were visible to Leon. When he lowered his hands, they went down to the *front* of his thighs, in the sight line of all the officers. Even if Leon could not see the knife,

the video shows he had a line of sight to Cortesluna's (empty) hands prior to both the first and second shot. Before the second shot, Cortesluna's hands were raised away from his waistband, and *away* from the knife, which was again clearly visible to each of the officers, including Leon. Police officers are trained to watch a suspect's hands and the police officers in this case all testified to "seeing" him reach for the knife so their attention was clearly not directed elsewhere at the time. They could not have missed the facts which were captured on the video.

2. Video evidence shows officers could see Cortesluna was not making a reaching movement. Cortesluna's hands were not were open, with fingers extended down and not curled in a reaching or grasping motion. Cortesluna lowered *both* hands whereas if he was reaching he would have naturally just lowered one hand. When an officer's use of force is based on a mistake of fact, the question is whether the mistake was reasonable is a triable issue. *Nehad v. Browder*, 929 F.3d 1125, 1133-34 (9th Cir. 2019) (mistaking pen for gun).

3. Video and audio evidence shows that Cortesluna readily followed multiple clear orders but that competing and overlapping orders from two different sources produced confusion, not resistance or an immediate threat.

4. The clear order "hands up" was only issued a split second before the use of force.

5. Video and audio evidence shows Cortesluna was not physically or verbally aggressive but hesitant and confused. Before the first shot, Cortesluna's raised hands slowly were lowered to shoulder level as he looked around for clear direction, and then lowered to the front of his thighs.

6. Video evidence shows that the mere presence of the knife blade-up in a pocket did not present an objective, credible immediate threat to the police. Cortesluna was ten to eleven feet from the nearest officer and the knife was point up in his pocket, not being carried in his hand. The police here acknowledged, and the security video confirms, that Cortesluna did not touch the knife or put his hand in his pocket at all. *Cf. Glenn v. Washington County*, 673 F.3d 864, 867-69 (9th Cir. 2011) (plaintiff holding knife within six to twelve feet of police); *Deorle v. Rutherford*, 272 F.3d 1272, 1277-78 (9th Cir. 2001) (plaintiff carrying a bottle of lighter fluid). A blade-up knife is more difficult to access and wield than one which is readily graspable by its handle.

7. Video evidence shows that Cortesluna did not "emerge from the house holding a large metal object." There was a jackhammer bit in his hand when he answered the door, and he put it down inside immediately when ordered to do so.

8. Video, audio and other evidence put the serious nature of the crime in doubt. This was an "ascertain the problem" call based on

a dire and emotional "911" report from teenagers. After five minutes at the scene, the police had knowledge that the reporting party's story was possibly not credible, having heard no "chainsaw" noise nor noise of distress from the house and having observed Cortesluna behaving peacefully in his own kitchen for at least five minutes. Given the tranquil suburban scene, the police had considered the possibilities that it was a "swatting" call or that they were at the wrong address.

9. Evidence about the totality of the circumstances also put the police on notice that Cortesluna did not constitute an immediate threat, and was not resisting and cast doubt on the "severity of the crime." Evidence shows that the police knew that Cortesluna had no prior criminal offenses and was a resident, not an intruder, at the premises. Cortesluna did not present a physical threat to the police or anyone as he is 5'6" or 5'7" and 149 pounds and was in his pajamas with no shoes. In contrast, there were five uniformed police officers armed with lethal force on his patio with guns pointed at him. *Smith v. City of Hemet*, 394 F.3d 689, 693-94 (9th Cir. 2005) (plaintiff in pajamas on his own porch surrounded by four police officers and police canine officer). The closest officer to Cortesluna at the time he lowered his hands was 10 to 11 feet away. The police concede that in this position, "[h]e was controlled." Each of the officers had a line of retreat or repositioning. *Glenn v. Washington County*, 673 F.3d 864, 869 (9th Cir. 2011)

(officers could have repositioned themselves to avoid danger posed by plaintiff).

10. Evidence supports that there were alternative means of resolving the situation. The availability of alternative methods to resolve the situation is another factor in determining whether or not the force used was reasonable. *Nelson v. City of Davis*, 685 F.3d 867, 882 (9th Cir. 2011); *Glenn*, 673 F.3d 864, 878; *Deorle*, 272 F.3d at 1282. Alternative means were available to resolve this situation without force including a warning, clear notice of the nature of the concern both to other officers and to Cortesluna, use of clear commands, and repositioning. The police knew that having one officer issuing orders is recommended in order to avoid confusion. In addition, instead of shouting and escalating the tension, Kensic or Rivas could have spoken clearly in a normal tone of voice to convey their intent clearly to Cortesluna. The police that people can be anxious and frightened when confronted by law enforcement and that slight delays, hesitations, or misunderstandings are not necessarily noncompliance. Alternatively, if the appellee officers were actually apprehensive about the knife, they could have repositioned to a safe distance and still maintained control over appellant. Shouting out confusing and contradictory orders can unnecessarily escalate a situation. *Liston v. County of Riverside*, 120 F.3d 965, 971, 977.

In contrast, in the case referenced by lower court (*Pet. App. 13*) in support of the finding an immediate

threat here, the court found there was a triable issue whether the plaintiff represented an immediate threat after he was told to put his hands up and drop the gun but instead raised it. *C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1255-56 (9th Cir. 2016). The lower court appears to have made a judgment call on disputed facts viewing the evidence in the light most favorable to the moving party to find an immediate threat. This conflicts with a multitude of other Circuit court cases finding that the *Scott* exception to the requirement to view facts in the light most favorable to the non-moving party does not apply unless the moving party's evidence blatantly contradicts that of the non-moving party.

B. EVIDENCE DISCLOSES GENUINE DISPUTE WHETHER A REASONABLE OFFICER WOULD VIEW LOWERING HANDS TO FRONT OF THIGHS AS "RESISTANCE" UNDER TOTALITY OF CIRCUMSTANCES

The Ninth Circuit found that Cortesluna resisted because:

> "Before the first shot was fired, Plaintiff put his hands down, and closer to the knife in his pocket, after police repeatedly told him to put his hands up. Plaintiff's hands remained near the knife in his pocket at the time of the second shot."

However, video, audio and other evidence referenced above (Part III.A) create a genuine dispute of

material fact about whether a reasonable officer would have perceived resistance at the time of the use of force.

In contrast, in *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) the nature of resistance exhibited by "an individual who continually ignored officer commands to remove his hands from his pockets and to not re-enter his home," and who "physically resisted" for a brief time (*Smith*, 394 F.3d at 703) though "not perfectly passive," was not "particularly bellicose" and as a result offered little support for the use of significant force against him. *Smith*, at 703. *See* also *Deorle v. Rutherford*, 272 F.3d at 1275-77 (9th Cir. 2001) (resistance included screaming, banging on walls, brandishing a board and hatchet at the police, agitated roaming, verbal threats, and ongoing failure to comply with police orders).

Here, as in *Nelson v. City of Davis*, the "resistance" in failing to comply with the orders issued by the police was due to the fact that those orders were not clearly conveyed. *Nelson v. City of Davis*, 685 F.3d 867, 872-74, 882-83 (9th Cir. 2011); *see also Liston v. County of Riverside*, 120 F.3d 965, 971, 977 (9th Cir. 1997) (excessive force found when police burst into home yelling contradictory commands and threw subject forcefully down when he failed to immediately comply); *Coles v. Eagle*, 704 F.3d 624, 626, 629-30 (9th Cir. 2012) (triable issue regarding resistance where police issued contradictory orders to both keep hands visible and to exit a locked vehicle).

The lower court appears to have made a judgment call on disputed facts viewing the evidence in the light most favorable to the moving party to find resistance. This conflicts with a multitude of other Circuit court cases finding that the *Scott* exception to the requirement to view facts in the light most favorable to the non-moving party does not apply unless the moving party's evidence blatantly contradicts that of the non-moving party.

C. EVIDENCE DISCLOSES GENUINE DISPUTE WHETHER A REASONABLE OFFICER WOULD HAVE PERCEIVED A "SEVERE CRIME" BY TIME OF USES OF FORCE UNDER TOTALITY OF CIRCUMSTANCES

The Ninth Circuit found that "the alleged crime was severe" because:

> "[a] twelve year old girl told a 911 dispatcher that Plaintiff had threatened his girlfriend and her daughters with a chainsaw. The threat was just as great even if Plaintiff had been using the saw manually."

However, video, audio and other evidence referenced above (Part III.A) create a genuine dispute of material fact about whether a reasonable officer would have perceived the alleged crime was severe at the time of use of force. (*Cf. Smith v. City of Hemet*, 394 F.3d 689 (plaintiff's wife claimed he physically beat her but even and despite "the seriousness and

reprehensibility of domestic abuse, the circumstances are not such in this case as to warrant the conclusion" that he "was a particularly dangerous criminal or that his offense was especially egregious.")

The lower court appears to have made a judgment call on disputed facts viewing the evidence in the light most favorable to the moving party to find the alleged crime was severe. This conflicts with a multitude of other Circuit court cases finding that the *Scott* exception to the requirement to view facts in the light most favorable to the non-moving party does not apply unless the moving party's evidence blatantly contradicts that of the non-moving party. In addition, the lower court based its analysis of "the alleged crime" entirely on the "911" report, which was excerpted in the "facts" (*Pet. App. 5*) rather than focusing on information conveyed to the police, and did not include any analysis of subsequent information obtained by the police at the scene. *Cf. Nehad v. Browder*, 929 F.3d 1125, 1136 (9th Cir. 2019) ("Even if Nehad had made felonious threats or committed a serious crime prior to Browder's arrival, he was indisputably not engaged in any such conduct when Browder arrived, let alone when Browder fired his weapon. A jury could, therefore, conclude that the severity of Nehad's crimes, whether characterized as a misdemeanor or an already completed felony, did not render Browder's use of deadly force reasonable.")

D. EVIDENCE DISCLOSES A GENUINE DISPUTE WHETHER WARNING WAS FEASIBLE BEFORE DEPLOYMENT OF LESS LETHAL FORCE

It is undisputed that there was no warning was given before Cortesluna was shot twice. Cortesluna was not even clearly advised of the ostensible concern of the police (the knife in his pocket) nor given any clear indication of what the police wanted him to do. There was a split second between the clear order "hands up" and the first shot. After the first shot, Cortesluna's hands were nowhere near the knife as he was doubled over in pain from the first shot. The second shot came about a second later, again without any warning. Union City's Policy Manual, Part 308.9.2 requires a verbal warning prior to deployment unless impracticable or it would endanger officer safety. Neither exception is applicable here for the reasons discussed *supra*. "The absence of a warning of the imminent use of force, when giving such a warning is plausible, weighs in favor of finding a constitutional violation." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1092 (9th Cir. 2013).

E. EVIDENCE DISCLOSES GENUINE DISPUTE WHETHER IT WAS FEASIBLE TO INTERVENE

"A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for

conduct that showed a reckless or callous indifference to the rights of others." *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998). "The requisite causal connection can be established . . . by setting in motion a series of acts by others," *id.* (alteration in original; internal quotation marks omitted), or by "knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury," *Dubner v. City & Cnty. of San Francisco*, 266 F.3d 959, 968 (9th Cir. 2001).

"Police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000); *United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 81 (1996). In addition, the City of Union City Policy Manual requires officers to intercede to stop an unreasonable use of force and report that unreasonable use of force.

There are triable issues of fact supporting supervisory liability and a failure of the duty to intercede. Sergeant Kensic not only escalated the situation and set events in motion by providing incomplete information about the knife and issuing a garbled and unclear command, he and Rivas failed to intercede when Leon indicated an intent to "hit him with less lethal," and again when Leon shot Cortesluna twice, and again when Leon were forcefully pushing and kneeling on Cortesluna and Rivas was moving him by his handcuffs cuffed behind his back. The video evidence

shows that twenty seconds passed between Leon's announcement of his intent to shoot Cortesluna and the actual shooting, during which time Leon moved to a point that was clearly inconsistent with the less lethal shotgun manufacturer's range to target distance. The video evidence shows that Rivas and Kensic were both present and witness to this announcement and conduct.

IV. DISPUTED FACTS PREVENT CONSIDERATION OF QUALIFIED IMMUNITY

Qualified immunity is an issue of law, *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993), *unless* immunity depends on an ultimate fact to be determined by the jury. *Tolan v. Cotton*, 572 U.S. 650, 656; *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997). Where there was a disputed material fact issue concerning what the shooting officers saw and what they thought, the court lacks jurisdiction to review the shooting officers' qualified immunity claims. *Cunningham v. Gates*, 229 F.3d 1271, 1288 (9th Cir. 2000). In *Cunningham*, the shooting officer believed that the individual was an escaped robber and claimed he shot only after the individual moved his hand towards his waistband as if reaching for a gun whereas the individual, as here, claimed he made no threatening movements. *Cunningham*, 229 F.3d at 1289. "Given this factual dispute, the shooting officers are not entitled to qualified immunity." *Cunningham*, 229 F.3d at 1279, 1288-89. Similarly in the instant

case, there are disputed facts preventing application of qualified immunity.

CONCLUSION

For the foregoing reasons, cross-petitioner respectfully submits that if the petition for writ of certiorari in No. 20-1539 is granted, and the record reviewed, the Court should also grant this conditional cross-petition and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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