No. _____

In The
Supreme Court of the United States

ROBERT MASSIE,

Petitioner,

v.

BASILEA MENA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In the early morning of June 22, 2016, Respondent Basilea Mena and her boyfriend, Jacob Tellez, both admittedly intoxicated, got into a domestic argument on their way home from an evening of beer drinking. They ended up by a palm tree on a traffic median in the middle of Speedway Boulevard, a six-lane arterial street in central Tucson, where they continued arguing.

Officer Robert Massie, Petitioner here, contacted Mena and Tellez. Massie wanted Tellez and Mena off the traffic median, and separated, as soon as possible, for their own, officer, and public safety, and to allow investigation through individual interviews.

After Mena was uncooperative for about three minutes, repeatedly refusing to provide identification or to move away from Tellez, Massie decided to detain her in handcuffs and move her off the median.

When Massie attempted to handcuff Mena using only his own physical strength, Mena resisted by jerking her arm, and Massie's body weight pushed or pressed her forward into the palm tree. Mena suffered superficial scrapes and abrasions.

Both the district court and the Ninth Circuit denied Massie qualified immunity regarding Mena's excessive force claim brought under 42 U.S.C. § 1983. Massie therefore presents the following questions for review:

(1) Under the particular facts and circumstances of this case, did the Ninth Circuit err in finding

QUESTIONS PRESENTED FOR REVIEW—
Continued

that Massie's actions constitute an excessive use of force in violation of the Fourth Amendment?

(2) Regardless of the answer to Number (1), did the district court and Ninth Circuit nonetheless err in denying qualified immunity to Massie when it was not clearly established at the time of the incident (or now) that his actions constituted an excessive use of force in violation of the Fourth Amendment?

PARTIES TO THE PROCEEDING

Robert Massie, Petitioner on review, was the Defendant-Appellant below.

Basilea Mena, Respondent on review, was the Plaintiff-Appellee below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All parties before this Court are individuals, although Robert Massie is an employee of the City of Tucson, a charter city in the State of Arizona. No corporations are involved in this proceeding.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *Mena v. Massie*, No. CV-17-00368-TUC-DCB (D. Ariz. Jan. 8, 2019) (available at 2019 WL 132355), *reconsideration denied*, No. CV-17-00368-TUC-DCB (D. Ariz. Feb. 6, 2019) (available at 2019 WL 467591), *aff'd*, No. 19-15214 (9th Cir. Feb. 26, 2020) (Mem.) (available at 795 F. App'x 539 or 2020 WL 917316), *reh'g denied* (April 22, 2020).

RELATED PROCEEDINGS—Continued

The following proceedings are indirectly related to this petition in making parallel arguments, albeit on different facts, highlighting the Ninth Circuit's consistent, continuing misapplication of this Court's qualified immunity doctrine:

Browder v. Nehad, Supreme Court of the United States, No. 19-1067, Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed February 25, 2020 (available at 2020 WL 1166484).

Deasey v. Slater, et al., Supreme Court of the United States, No. 19-1085, Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed March 2, 2020 (available at 2020 WL 1391916).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Officer Robert Massie respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's memorandum decision (Pet. App. 1a-3a) is not reported, but is available at 795 F. App'x 539 or 2020 WL 917316.

The District Court's order dated January 8, 2019, granting in part and denying in part Robert Massie's motion for summary judgment (Pet. App. 12a-21a) is not reported, but is available at 2019 WL 132355. The District Court's order dated February 6, 2019, denying Robert Massie's Motion for Reconsideration (Pet. App. 4a-11a) is not reported, but is available at 2019 WL 467591. The Ninth Circuit's order denying panel rehearing and rehearing en banc (Pet. App. 22a) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on February 26, 2020 (Pet. App. 1a-3a). Massie filed a timely petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied on April 22, 2020 (Pet. App. 22a). By its Order dated March 19, 2020, this Court has extended the time for filing petitions for certiorari to 150 days from the date of the lower court judgment,

order denying discretionary review, or order denying a timely petition for rehearing. Massie is timely filing his petition on August 18, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution:

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.

Section 1983 of Title 42, United States Code (in pertinent part):

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 law, 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

A. Factual Background

In the very early morning hours of June 22, 2016, Respondent Basilea Mena ("Mena") and her boyfriend, Jacob Tellez ("Tellez"), were walking home from an evening of beer drinking, and got into a domestic argument. (ER016:15-19;[1] ER109:101-112; ER134:23-26 [¶ 4]).

Mena and Tellez, both admittedly intoxicated (ER095 at 25:10-16;[2] ER101 at 13:14-19; ER111:199-203), eventually ended up in a traffic median in the middle of Speedway Boulevard, a six-lane, heavily traveled arterial street in central Tucson.[3] (ER016:19:20; ER043:20-ER044:5; ER080:462-464; ER109:126-129; ER110:136-142; ER134:23-26 [¶ 4]; *see also* aerial photo at ER113).

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[1] Where the relevant page of the Excerpts of Record has line numbers, the specific reference will be indicated by "ER[page number]:[line number(s)]." Where the reference includes more than one such page, the reference will be given as "ER[beginning page number]:[line number]-ER[ending page number]:[line number]."

[2] Where the relevant page of the Excerpts of Record reproduces four deposition pages, the specific reference will be indicated by "ER[page number] at [specific page of deposition]:[line number(s)]." Where the reference includes material contained on more than one such deposition page, the beginning deposition page and line reference will be separated from the ending deposition page and line reference by a hyphen.

[3] The Speedway median divides three lanes of eastbound traffic from three lanes of westbound traffic. (*See* aerial photo at ER113).

Specifically, Mena and Tellez placed themselves near a palm tree located on the median approximately 25 yards east of the Speedway and Swan intersection. (ER074:64:76; ER075:93-94; ER101 at 15:19-24; *see* photographs at ER036-038, ER113). Tellez was sitting down, leaning against the palm tree; Mena was standing next to Tellez. (ER036 [photo of Tellez sitting by palm tree]; ER074:83-87; ER104 at 30:14-31:6-7; ER135, ¶¶ 6, 8).

The area of the median near the palm tree is not only dangerous because Speedway is a very busy street, but also because it is uneven, and contains river rocks and vegetation, making movement on it inherently hazardous as well. (ER072:699-712; ER074:67-73; ER 080:462-464).

Mena and Tellez were "speaking in raised voices" and "yelling at each other," i.e., arguing about whether she was cheating on him. (ER016:17-18; ER075:108-116 and 124-125; ER076:137-144; ER094 at 16:25-17:24; ER095 at 24:6-25:9; ER100 at 11:9 to ER101 at 13:13; ER134:23-26).

Petitioner, Tucson Police Officer Robert Massie ("Massie"), and Tucson Police Sergeant Lauren Pettey ("Pettey") happened to be parked at the Chase Bank on Speedway, north of and directly across the street from the median, when they heard yelling and screaming coming from the direction of the median. (ER043:20-ER044:5; ER060:35-44; ER061:74-79; ER073:37-41; ER087:5-8; ER089:9-11; ER090:14-18). They drove to the median in separate patrol cars, with their

emergency lights on, parking their cars on Speedway's westbound traffic lane closest to the median, to investigate what was going on. (ER043:25-044:5; ER061:46-48 and 60-72; ER091:7-23). They saw a male crying near a palm tree in the traffic median, and a female (later identified as Mena) standing next to him holding his arm. (ER046:22-24; ER061:84-87; ER073:37-41; ER074:67-76 and 83-87; ER075:90-91; ER075:132-ER076:133; ER 076:143-144; ER084:9-10). The male was crying and yelling, "she is cheating on me!" (ER046:8-10, 15-16, and 22-24, ER075:108-113 and 124-128; ER084:4-8).

At the time, the officers reasonably believed they were investigating a potential domestic violence crime in violation of A.R.S. § 13-3601(A), which could encompass many types of offenses, possibly including assault, that could be either a felony or misdemeanor depending on the particular offense. *See* A.R.S. § 13-3601(M) ("An offense that is included in domestic violence carries the classification prescribed in the section of this title in which the offense is classified."). (ER018:1-7; ER045:12-20; ER075:111-113; ER084:4-19; *see also* ER059:2-4). They wanted to separate the parties to facilitate such an investigation. (ER049:3-10; ER062:150-154; ER064:265-267; ER064:270-ER065:271; ER086:21-ER087:4; ER087:16-21).

They also noticed that Mena appeared to be extremely intoxicated. (ER056:19-ER057:1; ER077:187-191; ER081:502-504; ER090:1-3). She had watery and bloodshot eyes, slurred speech, a strong odor of intoxicants, and she appeared to be under the legal drinking

age of twenty-one. (ER049:18-ER50:23; ER063:194-215; ER077:182-185 and 187-191, ER081; ER088:13-18; ER090:21-23). So along with possible domestic violence, officers also were investigating the possibility of underage drinking by Mena.[4] (ER049:22-ER050:23; ER089:23-25).

The police officers asked both parties for identification. (ER028:16; ER058:6-13; ER062:148). The male (Tellez) gave them his driver's license which identified him as "Jacob Tellez", but Mena did not identify herself, despite repeated requests. (ER028:2; ER048:5-12; ER058:6-11; ER062:154-155 and 161-179; ER077:178-181; ER088:19-ER089:1; ER096 at 28:5-9; ER098 at 63:3-14). Pettey also repeatedly asked Mena to step away from Tellez but she also refused to do that. (ER049:3-11; ER062:154-159 and 174-175; ER064:265-267; ER065:273-274; ER072:714-720; ER076:156-168; ER078:227-230 and 236-240; ER087:18-21; ER103 at 24:9-10 and 18; ER104 at 30:13-16).

Approximately three minutes passed, while the two officers repeatedly asked Mena to identify herself and move away from Tellez. (ER103 at 25:24-25 and 26:4-12; ER115:22 to ER116:16). During that time, Mena concedes that she: (1) did not give the officers her identification; (2) did not give her name; and (3) did not step away from Tellez. (ER056:11-13; ER058:6-13; ER064:235-242; ER065:263-270; ER076:156-168; ER081:495-498; ER098 at 63:3-14; ER103 at 26:4-10;

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[4] A.R.S. § 4-244(9) makes it a violation for a person under twenty-one to consume liquor.

ER127 at 30:9-16). Instead, she was uncooperative and antagonistic and only kept asking, "what did we do wrong?" (ER054:13-17; ER056:16-18; ER063:182-183; ER077:178-182; ER096 at 28:21-29; ER103 at 25:5-10 and 25:19-25; ER104 at 29:22-30:19).

During that time, Massie's concern focused on the safety of everyone on the busy median because of the potential to be hit by a drunk or inattentive driver. (ER055:10-21; ER080:462-464). Massie was especially concerned about somebody running out into the east-bound traffic lanes, which were not blocked by their patrol cars, or someone falling into the lane of traffic during a scuffle. (ER066:333-334; ER067:429-431).

Massie saw Mena pull her wallet out, and unzip her wallet, and then zip her wallet up. (ER065:300-ER066:331; *see also* ER052:10-14). He then made the decision to detain her in handcuffs because she refused to step away from Tellez or identify herself, and also based on his concern that she would run into the street and get hit by a car. (ER052:25-ER053:14; ER059:1-9; ER066:333-357).

According to Mena, Massie grabbed her and turned her around facing the palm tree and got one handcuff on her, and then tried to handcuff her other hand *when her arm suddenly jerked*. (ER103 at 26:25-27:22) (emphasis added). She testified, " . . . *I think that's when I hurt him, I didn't know at the time that I hurt him*, but that's when I felt pressure on my back,

and that's when I was being shoved against the tree."[5] (ER103 at 27:18-22) (emphasis added).

Accepting Mena's version of the facts, as courts have been instructed to do for the purpose of deciding a summary judgment motion, during the course of handcuffing her, Massie also was "shoving [her] into" (ER108:42) or "pushing [her] against" (ER109:120-121) a palm tree, causing superficial abrasions to her face and shoulders. (ER039-ER041; *see also* ER107 at 44:22-45:7 ("[s]crapes . . . [and] really light scarring"); ER108:42-43 ("I have a bunch of scrapes on my body."); ER111:183-187 (" . . . [I] sustained scrapes . . . all over my face and shoulders")). As Mena later testified at various points in her deposition:

> I felt a pressure on my back, and that's when I was being shoved against the tree. (ER103 at 27:20-21). . . . I felt [the push] on my upper body. (ER104 at 28:6-7). . . . The tree was—both the trees were right in front of me, and I was being pushed, my head was going through the gap, and so, the palm trees were scratching my shoulders . . . and my face. (ER104 at 28:9-15). . . . [T]he way he was, like, holding me and handcuffing me it, like, pushed my body forward, my upper body forward towards the tree. (ER104 at 28:18-21). . . . It seemed—I didn't see him, but it seemed like he was doing it with his own body weight. (ER104 at

[5] As stated, for purposes of this Petition, the City accepts and utilizes Mena's version of the facts. Mena's boyfriend, Jacob Tellez, also admitted that "she . . . jerked her arm a little bit and resisted." (ER096 at 29:23-24).

> 28:24-25). . . . I just felt like I was being pushed into [the tree]. I felt pressure. (ER105 at 34:12-16).

Once handcuffed and detained, Mena was walked off the median by Tucson Police Officer Christopher Little and placed in Massie's patrol car. (ER071:615-627; ER072:681-683; ER121:22-2). The police officers were not immediately aware that Mena had any injuries. (ER125:3-5). But once Mena was in the patrol car and Little shined a flashlight on her face, he noticed scrapes on her shoulders and face. (ER121:22-ER122:3; ER125:3-8). Little asked Mena if she needed medical attention, and Mena said she did not. (ER125:9-11). He subsequently photographed her injuries. (ER125:23-ER126:2; *see also* ER081:506-508; ER107 at 44:22-46:1).

It was only after Massie handcuffed Mena, removed her from the median, and separated Mena from Tellez, that the officers were able to determine that in fact no domestic violence had occurred. (ER051:14-24; ER059:8-9; ER079:400-407).

The district court held that Massie had reasonable suspicion to handcuff and detain Mena "to investigate the cause of the disturbance occurring in the middle of the street, including whether it involved illegal underage consumption of alcohol, domestic violence, or some public safety issue." (Pet. App. 17a-18a; ER018:4-22). This decision was not appealed and is not before this Court.

Mena did not seek medical treatment until the next day, when she saw a nurse practitioner who noted "multiple abrasions: superficial" and told Mena to apply ointment. (ER031; *see also* ER107 at 45:10-12). That is the only medical treatment Mena sought or received. (ER107 at 45:20-46:1).

B. Procedural History

Mena filed a 42 U.S.C. § 1983 complaint alleging two civil rights violations: (1) illegal seizure/false arrest and (2) excessive force. (ER134-136). The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Massie filed a motion for summary judgment seeking qualified immunity on both claims. Specifically, for the excessive force claim, Massie argued that he did not shove Mena into the palm tree. In the alternative, he argued that, based on Mena's version of the facts, the alleged "shove" against the palm tree was not a constitutional violation, not unreasonable, and that he did not violate clearly established law as there was no case "squarely governing" the specific facts at issue that put him on notice that such conduct was a constitutional violation. (ER133 [excerpt]).

To defeat qualified immunity on the excessive force claim, Mena had the burden of demonstrating that under her version of the facts: (1) Massie's conduct violated a federal statutory or constitutional right, and (2) the unlawfulness of the conduct was "clearly established at the time." *D.C. v. Wesby*, ___U.S. ___, 138 S.Ct.

577, 589 (2018), *quoting Reichle v. Howards*, 566 U.S. 658, 664 (2012).

Mena did not cite to any precedent at any point in the district court litigation, and thus did not meet her burden. Mena merely stated, "[t]he Defendant finally argues that he was not 'on notice' that he shouldn't push Plaintiff into a tree . . . [t]he Plaintiff disagrees." (ER030:20-21).

In its Order dated January 8, 2019, the district court held Massie was entitled to qualified immunity on the illegal seizure/false arrest claim finding: (1) he had reasonable suspicion to detain Mena and investigate the disturbance in the median, including whether it involved illegal underage consumption of alcohol, domestic violence, or a public safety issue; and, (2) he reasonably, but mistakenly, believed Mena violated A.R.S. § 13-2412(A) by refusing to produce her identification. (Pet. App. 16a-18a; ER017:4-ER018:22).

However, the district court denied qualified immunity on the excessive force claim. Initially, the court said it could not assess whether Massie used excessive force in violation of the Fourth Amendment because of disputed facts that needed to be determined. The court identified the factual disputes as questions, as follows:

1. Did Plaintiff resist arrest?
2. Did she jerk away or did Defendant Massie jerk her about?
3. Was she inebriated and a danger to herself and/or others if not quickly subdued?

> 4. Could Defendants simply have asked her to turn around and put her hands behind her back?

(Pet. App. 19a; ER018:23 to ER019:19).

Then the district court went on to assess the second prong of qualified immunity, or whether precedent exists "squarely governing" the specific facts of the case, based on Mena's version of the facts, stating:

> If pressed to determine qualified immunity, now, based on the facts as alleged by Plaintiff and construed in her favor, the Court would look to cases which are black and white, *regardless of differing factual predict[a]t[e]s, where any force used is constitutionally unreasonable, if there is no need for any use of force*.

(Pet. App. 20a; ER019:19-22) (emphasis added).

The district court relied on three cases—*P.B. v. Koch*, 96 F.3d 1298, 1302-03 (9th Cir. 1996), *Felix v. McCarthy*, 939 F.2d 699 (9th Cir. 1991), and *Meredith v. State of Arizona*, 523 F.2d 481, 482 (9th Cir. 1975)—to support its ruling. (Pet. App. 20a; ER019:22 to ER020:2).

Massie moved the district court to reconsider its denial of qualified immunity on the excessive force claim based upon this Court's decision in *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500 (2019) (per curiam) decided on January 9, 2019, one day after the district court's ruling. (ER008-ER013). Massie pointed out that the court did not define clearly established law with specificity and none of the purported precedent the

court cited *sua sponte* was particularized to the facts of the case, as *Emmons* requires. *Id*.

On reconsideration, the district court correctly acknowledged *Emmons*' requirements (Pet. App. 6a; ER003:15-ER004:11), and that *Koch*, *Felix*, and *Meredith v. State of Arizona* did not support the denial of qualified immunity on the excessive force claim. (Pet. App. 5a-6a; ER003:10-17). The district court said, "[t]he Court agrees that generally diversity of facts would preclude a finding that there is clearly established law and would warrant summary judgment under the doctrine of qualified immunity." (Pet. App. 6a; ER003:15-17).

But the district court then, *sua sponte* and in violation of the *Emmons* requirements, cited two other cases equally unrelated to the facts of our case—*Gravelet-Blondin v. Shelton*, 728 F.3d 1086 (9th Cir. 2013) and *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003)—incorrectly finding that those cases clearly establish the following rights: (1) that "any degree of force is unconstitutional, if there is no need for any use of force at all," and, (2) "that it is excessive use of force to use nontrivial force (handcuffing) when there is only passive resistance." (Pet. App. 7a-11a; ER004:12 to ER006:28).

Massie appealed to the Ninth Circuit the district court's denial of qualified immunity on the excessive force claim.[6] (ER001). Massie argued that based on

[6] Mena did not appeal the district court's grant of summary judgment to Massie on Mena's illegal seizure/false arrest claim,

Mena's version of the event: (1) his conduct amounted to a *de minimis* use of force, which was insufficient to support an excessive use of force claim under the Fourth Amendment; and (2) the alleged unlawfulness of his conduct was not "clearly established" at the time. Massie Opening Brief [Ninth Circuit DktEntry 12] at 5.

After Massie submitted a 41-page Opening Brief and a 16-page Reply Brief, and presented approximately 12 minutes of oral argument in San Francisco on January 22, 2020, the Ninth Circuit issued a four-paragraph Memorandum Decision on February 26, 2020, affirming the district court's denial of qualified immunity on the excessive force claim. The Ninth Circuit held that: "viewing evidence in the light most favorable to Mena, a reasonable factfinder could conclude that Massie's use of force was objectively unreasonable and therefore constitutionally impermissible." (Pet. App. 2a). The Ninth Circuit denied qualified immunity under the second prong of the analysis. In a one-paragraph analysis, using its own incorrect version of the "facts," which were not supported by the record, the Ninth Circuit held Massie violated "clearly established law":

> On June 22, 2016 there was a body of clearly established law that put Massie on notice that it would be excessive force to use violence that is foreseeably likely to cause more than de minimis amounts of pain and injury against

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based on qualified immunity, and that issue is not before this Court.

> an arrestee where the crime is a non-violent misdemeanor and the arrestee (1) was not a threat to the officers or anyone else, (2) was not a flight risk, (3) did not resist (or at most passively resisted) being handcuffed, and (4) was not warned that the officer was going to use violent force before it was applied. *Gravelet-Blondin*, 728 F.3d at 1089-93; *Barnard v. Theobald*, 721 F.3d 1069, 1073 (9th Cir. 2013); *Young v. Cty. of Los Angeles*, 655 F.3d 1156, 1166-67 (9th Cir. 2011); *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003).

(Pet. App. 3a).

Massie filed a timely Petition for Rehearing or for Rehearing En Banc, in which he argued that the Ninth Circuit had: (1) violated *Emmons* and other decisions of this Court by defining clearly established law at a high level of generality, citing cases that did not squarely govern the specific facts at issue; (2) failed to properly analyze the minimal level of force Massie had actually used; and (3) relied on inaccurate factual findings, inconsistent with Mena's own admitted version of the facts in the record, that led to incorrect application of the legal standards. Massie Petition for Rehearing or Rehearing En Banc [Ninth Circuit DktEntry 42].

Massie's Petitions were denied by the Ninth Circuit on April 22, 2020. (Pet. App. 22a). Massie has now filed this timely petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. Correction of the Ninth Circuit's mistaken qualified immunity analysis and decision in this case is important precisely because the relatively undramatic facts, and the low level of force used, reflect an arrest scenario that plays itself out on a routine basis, day in and day out, for many thousands of police officers, in hundreds if not thousands of police agencies, throughout the Ninth Circuit.

Relative to other qualified immunity cases this Court sees, the facts Massie presents to this Court likely appear commonplace, rather than dramatic. But for police officers like Massie, and their employing jurisdictions, the comparatively routine, commonplace nature of the events here is precisely the reason why this Court's correction of the Ninth Circuit's mistaken qualified immunity analysis and decision in Massie's case *is* so important.

Fortunately for all involved, this case does not involve a suspect being killed by police, unlike other petitions where, as of this writing, other police officers or agencies currently are seeking certiorari from this Court to review Ninth Circuit judgments on the issue of qualified immunity. *E.g.*, *Browder v. Nehad*, No. 19-1067, Petition filed February 25, 2020 (available at 2020 WL 1166484); *Deasey v. Slater, et al.*, No. 19-1085, Petition filed March 2, 2020 (available at 2020 WL 1391916).

This case does not even involve a nonfatal shooting. Or guns. Or tasers. Or batons, or other weapons. Or pepper spray. Or punching. Or kicking. Or knee strikes. Put another way, the types and escalated levels of force that *weren't* used here, and the list of things that *didn't* happen here, is endless. Again, that is precisely the point.

Rather than any escalated force, here Massie utilized the most basic, routine, lowest possible level of force he could to enforce his arrest against an intoxicated, uncooperative arrestee. He used his own physical strength and body weight, plus handcuffs.

This is also the basic level of force that the overwhelming majority of officers will apply in the overwhelming majority of their cases as they carry out their day-to-day police work. By comparison, shootings are relatively, if not extremely, rare. So are uses of other higher levels of force.

But now the Ninth Circuit essentially tells Massie, and potentially many, many other police officers throughout the Ninth Circuit, as well as their employing jurisdictions, that every time they choose to use this most basic, routine, lowest level of force in enforcing an arrest—even against an intoxicated, uncooperative suspect who is standing in a busy street's traffic median, posing a safety hazard to the suspect, the officers, and the public—that an ensuing lawsuit by the suspect claiming excessive force based on the slightest injury will mean that, after a full trial, a jury will have to decide if their choice was constitutional.

This is *exactly* the situation the qualified immunity doctrine is designed to *prevent*, something the Ninth Circuit did not grasp here. At the Ninth Circuit's Oral Argument in this case, the Presiding Judge made the following comment to Massie's appellate counsel:

> It seems to me that this is an example as to the waste of the interlocutory appeal. This would have taken you, what, a day's trial and you would have won. You're likely to win on . . . if we send it back.
>
> Meanwhile, we've got delay. We've got appellate briefing. We've got a whole panoply of stuff we're doing. And you could have just tried this darn case. That's just a comment.

https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016877 (Video at 10:00-10:35); *see also id.* at 7:45-8:09 (Judge Molloy: "Why not try the case—because—how does the level of specificity get established in the absence of trials?").

The quoted comments show that the Ninth Circuit is looking through the wrong end of the telescope. Qualified immunity is important precisely because it protects States and municipalities from having to try cases unnecessarily where either no constitutional violation occurred or the law at the time did not clearly establish that the conduct was a constitutional violation. As well stated by Judge Gruender of the Eighth Circuit in dissenting from a denial of qualified immunity:

> In recent years, the Supreme Court has issued several decisions reversing denials of qualified immunity by the courts of appeals. *The Court found those reversals necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.* We should hew closely to the wisdom of this instruction and to the counsel of our own precedent which emphasizes that officers in the line of duty are not participating in a law school seminar. It is thus worth emphasizing again that police officers are not—and should not be—expected to parse fine distinctions between statutory and constitutional law in split-second decisions. [¶] Because there is no authority that would have given Officer Wallace notice that it was a Fourth Amendment violation to conduct an investigative stop in the manner he did under the circumstances presented in this case, I respectfully dissent.

Chestnut v. Wallace, 947 F.3d 1085, 1099 (8th Cir. 2020) (Gruender, J., dissenting) (emphasis supplied; internal quotation marks and citations omitted).

For all these reasons, this case both complements, and is just as potentially significant as, "higher level of force" cases for officers and employing jurisdictions seeking the protection of the qualified immunity doctrine. Indeed, from the statistical and financial perspective, this kind of case may be more significant, because it may produce many more lawsuits. It is in precisely Massie's situation that qualified immunity

must be correctly applied. States and municipalities must not be forced to try endless variations of claims arising from the most routine arrests by their police officers that involve any level of physical force.

And as will now be demonstrated, the Ninth Circuit most definitely did not correctly apply the qualified immunity doctrine here.

II. The Ninth Circuit Has Again Defined "Clearly Established" Law At Too High A Level Of Generality, and Without Regard for the Specific Facts at Issue.

In *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500 (2019), this Court explained that qualified immunity can only be denied based on the existence of a "clearly established right," that is "defined with specificity":

> As we have explained many times: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." . . . Under our cases, the clearly established right must be defined with specificity. "This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality."

Id. at 503 (citations omitted).

In *D.C. v. Wesby*, 138 S.Ct. 577 (2018), this Court provided a detailed description of what is meant and

intended by the "demanding standard" of "clearly established":

> "Clearly established" means that, at the time of the officer's conduct, the law was " 'sufficiently clear' that every 'reasonable official would understand that what he is doing' " is unlawful. . . . In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." . . . This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." . . . To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," . . . which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority[.]' " . . . It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. . . . Otherwise, the rule is not one that "every reasonable official" would know.

Id. at 589-90 (citations omitted).

The "clearly established right" must also be "defined with specificity," and not at too high a level of generality:

> "[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question

> of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it."

Emmons, 139 S.Ct. at 503 (2019) (*quoting Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (summarily reversing Ninth Circuit's denial of qualified immunity)).

According to this Court, such specificity in defining the clearly established right is "particularly important in excessive force cases," where this Court "has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity *unless existing precedent squarely governs the specific facts at issue*. . . ." *Emmons*, 139 S.Ct. at 503, *quoting Kisela*, 138 S.Ct. at 1152-53 (emphasis supplied). "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . ." *Emmons*, 139 S.Ct. at 504, *quoting Wesby*, 138 S.Ct. at 581.

The Ninth Circuit's one-paragraph decision denying qualified immunity here directly conflicts with all

this Court's precedent and principles set forth above. The Ninth Circuit defined "clearly established" law at a high level of generality, which *Emmons* prohibits. It failed to cite any precedent specifically defining the clearly established right that Massie allegedly violated, or that squarely governs the specific facts at issue here. Massie used low-level physical force to handcuff an intoxicated, uncooperative Mena as she stood in a median of a busy intersection, arguing with officers and posing a possible danger to herself, her companion, responding officers, and passing drivers.

A. The Ninth Circuit failed to cite any precedent specifically defining a clearly established right that Massie allegedly violated.

1. *Gravelet-Blondin*, *Barnard*, and *Meredith* are bystander cases with different facts and police conduct that would have given no guidance to Massie.

Three of the Ninth Circuit's cited cases are "bystander" cases and cannot possibly justify its ruling. In *Gravelet-Blondin v. Shelton*, 728 F.3d 1086 (9th Cir. 2013), *Barnard*, and *Meredith*, the individuals against whom officers had used force, and who then sued, were all bystanders, not suspected of the crime or involved in the incident the officers were there to investigate. *Gravelet-Blondin*, 728 F.3d at 1089-90; *Barnard*, 721 F.3d at 1071-73; *Meredith*, 342 F.3d at 1059. And in all

three cases, there was also much more egregious police conduct alleged than anything that occurred here.

Gravelet-Blondin was a neighbor who posed no threat to anyone, did not resist officers, and was nonetheless tased as he stood frozen some 37 feet away, *after* the police already had the person they had actually come to contact secured on the ground. *Gravelet-Blondin*, 728 F.3d at 1089-91. *Gravelet-Blondin* was thus a classic passive bystander case where much greater force was used than here.

Likewise, Barnard was the brother of the suspect whom officers were looking for. The officers immediately pointed guns at him. Barnard complied with the officer's orders to turn around and put his arms up and did not resist when the officers attempted to handcuff him. After officers piled on top of him, he was placed in a chokehold, sat on, pepper sprayed, and had the officers' knees pressed into his back, neck, and shoulders. *Barnard*, 721 F.3d at 1072-74. Again, a bystander case where the use of multiple types of force, including pepper spray, was alleged.

Finally, in *Meredith*, plaintiff Bybee was the tenant of Meredith, the actual target of the investigation, whose building was to be searched pursuant to a warrant for evidence of Meredith's possible tax violations. According to Bybee's allegations, when she asserted the search was illegal and twice asked to see the warrant—which had been left in a car outside—she was grabbed by her arms, forcibly thrown to the ground, had her arm twisted, and was then handcuffed too

tightly, suffering pain and extensive bruising. *Meredith*, 342 F.3d at 1059-61. The court did note that Bybee "objected vociferously to the search and she 'passively resisted' the handcuffing but the need for force, if any, was minimal at best." *Id.* at 1061. In contrast to the substantial force allegedly used against bystander Bybee while in her own residence merely complaining about a search for which she had not been shown a warrant, the force used against an intoxicated, uncooperative Mena in a volatile situation on a traffic median was both minimal and reasonable.

As *Gravelet-Blondin* itself makes clear, the Ninth Circuit analyzes bystander qualified immunity cases differently from those where the police act against a person, like Mena, "integrally involved in the volatile situation to which officers were responding," *Gravelet-Blondin*, 728 F.3d at 1092, especially if—as was true here—it is a potential "domestic violence call" involving unpredictable dynamics between two people. *Id.*, *citing Mattos v. Agarano*, 661 F.3d 433, 444-45, 450 (9th Cir. 2011) (en banc) ("'[t]he volatility of situations involving domestic violence' makes them particularly dangerous . . . 'When officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning. Indeed, more officers are killed or injured on domestic violence calls than on any other type of call.'").

2. *Young* likewise involved different facts and much greater force. It also authorizes what Massie did here: handcuff the suspect.

Young, the last of the four cited cases, also does not justify the Ninth Circuit's ruling here. The individual in *Young* was suspected of a minor traffic violation. *Young*, 655 F.3d at 1159. Young was peppered sprayed because he failed to obey the officer's order to return to his truck, and instead remained seated on the curb. *Id.* Additionally, he was hit with a baton, handcuffed tightly, had a knee pushed against his back, and struck again with the baton. *Id.* at 1160. Young posed no threat to anyone and the Ninth Circuit deemed that an intermediate level of force was used. *Id.* at 1158, 1163. This case does not involve such a minimal failure to obey in a relatively safe, calm incident location; such a lack of threat to officers or the public; or such an intermediate level of force.

Moreover, in *Young* itself, the Ninth Circuit noted that rather than take the actions he did, the officer "could have simply begun to effect Young's arrest by attempting to handcuff him." *Id.* at 1165-66. But that is exactly the lower level of force Massie used here in the much more dangerous situation of trying to detain Mena and get her off the very unsafe traffic median. *Young* specifically says Massie's action was permissible. It cannot therefore provide a basis for claiming a violation by Massie. But that is exactly what has happened here. The Ninth Circuit cited to *Young* as a basis for allowing Mena to sue Massie for precisely the

action the Ninth Circuit in *Young* told officers that they should take to control a suspect. This is absurd.

Note finally, that along with everything else, the unpredictable dynamic of two intoxicated, arguing domestic partners who have placed themselves in a very dangerous location has to be taken into account in judging Massie's actions, and distinguishes this case from anything the Ninth Circuit cited as justification for its decision.

3. Massie was not required to warn Mena before using the minimal and reasonable force at issue here.

The Ninth Circuit also denied qualified immunity because Mena "was not warned that the officer was going to use violent force before it was applied." (Pet. App. 3a). This was also not a valid basis to deny qualified immunity here, for the following reasons.

First, no such absolute standard actually exists under this Court's or the Ninth Circuit's precedent. If it did, another panel of the Ninth Circuit Court could not have just made the following statement last year: "We recognize, of course, that it may not always be feasible for an officer to warn a suspect prior to deploying force." *S.R. Nehad v. Browder*, 929 F.3d 1125, 1137 (9th Cir. 2019). In turn, if that is the case, then, as already noted above, *Emmons* requires that there be specific precedent providing clear law on our specific fact pattern before Massie can be denied qualified immunity

for a failure to warn. The Ninth Circuit cited no such clear, specific precedent relating to our facts.

The only case cited in the Memorandum Decision that the Ninth Circuit could have been relying on in finding a warning was needed is *Young*, because in *Gravelet-Blondin* the officer gave a warning, albeit too late, and whether a warning was given was not discussed in *Barnard* or *Meredith*. The panel's reliance on *Young*, however, is flawed since that case created no such standard applicable to the *de minimis* use of force used here.

In *Young*, the Ninth Circuit noted "that it is rarely necessary, if ever, for a police officer to employ *substantial* force without warning against an individual who is suspected only of minor offenses, is not resisting arrest, and, most important, does not pose any apparent threat to officer or public safety." *Young*, 655 F.3d at 1166-67 (emphasis supplied). The facts in *Young* are not similar to this case. Young was pulled over for an unfastened seatbelt. He was pepper sprayed—what this Court deemed a *substantial* or *intermediate* level of force—as he sat on a curb facing away from the officer. He was then repeatedly hit with a baton, handcuffed tightly, and had the officer's knee in his back. *Id.*, 655 F.3d at 1158, 1159-60.

Here, there has been no factual or legal finding that the force used was "substantial" or intermediate. Further, Mena was intoxicated and uncooperative, and she was suspected of domestic violence assault or disorderly conduct. The encounter occurred on the median

of a busy nighttime intersection, which posed an immediate, ongoing threat to her own safety, as well as to officer and public safety, including that of passing drivers.

In *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), the Ninth Circuit discussed the consideration to be given to whether an officer gave a warning before the use of force, and specifically stated that it was not holding "that warnings are required whenever less than deadly force is employed. Rather, we simply determine that such warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test." *Id.* at 1284.

Mena described the force Massie used as grabbing or jerking of her arm to turn her around, followed by being pushed or shoved against or into the gap of the palm trees. This level of force did not result "in serious injury," and no reasonable police officer would be inclined to believe it would. Mena suffered superficial scrapes to her face and shoulders.

This particular Ninth Circuit panel's unilateral imposition of a nonexistent absolute "warning requirement" is also flawed for a second reason. It equates to holding that Massie loses when any individual panel of the Ninth Circuit concludes there was a less intrusive means of responding to an exigent situation. But that is not how the Ninth Circuit analyzes qualified

immunity cases. Rather, the Ninth Circuit itself holds that "[o]fficers need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); *accord S.R. Nehad*, 929 F.3d at 1138 ("Police need not employ the least intrusive means available; they need only act within the range of reasonable conduct."). Massie acted within the range of reasonable conduct here.

Because neither Mena nor the Ninth Circuit has shown that Massie's conduct constituted a violation of clearly established law, Massie is entitled to qualified immunity here.[7]

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[7] Ironically, in view of its own violation of *Emmons* and this Court's other precedent, lower courts in the Ninth Circuit are already relying on this case to support a more generalized finding of "clearly established," further illustrating the need for this Court to grant Massie's petition. *E.g.*, *Eatherton v. County of Riverside*, 2020 WL 3881605, at 10 (C.D. Cal. 2020).

B. The Ninth Circuit's failure to analyze the level of force Massie used, and its reliance on incorrect facts, also nullifies its conclusions that: (1) Massie used excessive force; and (2) clearly established law prohibited Massie's conduct. Applying proper analysis to the actual facts, Massie is entitled to qualified immunity.

Repeating what was said above, "police officers are entitled to qualified immunity *unless existing precedent squarely governs the specific facts at issue*. . . . " *Emmons*, 139 S.Ct. at 503, *quoting Kisela*, 138 S.Ct. at 1152-53 (emphasis supplied). Or, as this Court put it in *Wesby*: "[T]he 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Wesby*, 138 S.Ct. at 590.

Here, in addition to citing no relevant "existing precedent," the Ninth Circuit also did not properly consider either "the officer's conduct in the particular circumstances before him" or the actual "specific facts at issue" as admitted by Mena in the record.

1. Massie used a lower level of force than in the cases cited by the Ninth Circuit.

An officer's use of force must be analyzed under the *Graham* factors. *Graham v. Connor*, 490 U.S. 386, 394-98 (1989). In doing so, the Court must weigh "the nature and quality of the intrusion on the individuals' Fourth Amendment interests" against "the countervailing government interest at stake." *Id.* In other words, the Court must evaluate the type and amount of force used, and then weigh it against the government's interest at stake by evaluating: 1) the severity of the crime at issue; 2) whether the suspect posed an immediate threat to the safety of the officers or others; and 3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *Id.*

Here, the Ninth Circuit provided no factual or legal analysis of the type or amount of force actually used. It merely generalized that Massie used "violence that is foreseeably likely to cause more than de minimis amounts of pain and injury" with no explanation. (Pet. App. 3a).

Mena testified about the force Massie used to handcuff her. According to Mena, Massie was "shoving [her] into" (ER108:42) or "pushing [her] against" (ER109:120-121) a palm tree. According to her later deposition testimony:

> I felt a pressure on my back, and that's when I was being shoved against the tree. (ER103 at 27:20-21). . . . I felt [the push] on my upper

> body. (ER104 at 28:6-7). . . . The tree was—both the trees were right in front of me, and I was being pushed, my head was going through the gap, and so, the palm trees were scratching my shoulders . . . and my face. (ER104 at 28:9-15). . . . [T]he way he was, like, holding me and handcuffing me it, like, pushed my body forward, my upper body forward towards the tree. (ER104 at 28:18-21). . . . It seemed—I didn't see him, but it seemed like he was doing it with his own body weight. (ER104 at 28:24-25). . . . I just felt like I was being pushed into [the tree]. I felt pressure. (ER105 at 34:12-16).

The only injuries Mena suffered were superficial abrasions to her face and shoulders. (ER039-ER041; *see also* ER107 at 44:22-45:7 ("[s]crapes . . . [and] really light scarring"); ER108:42-43 ("I have a bunch of scrapes on my body."); ER111:183-187 (" . . . [I] sustained scrapes . . . all over my face and shoulders")).

The levels of force and injuries suffered in *Gravelet-Blondin, Barnard, Young,* and *Meredith*, are significantly greater, yet the Ninth Circuit in a conclusory manner relied on those cases to deny Massie qualified immunity protection. (Pet. App. 3a).

2. In considering the government's interest, the Ninth Circuit relied on unsupported "facts," inconsistent with the facts in the record admitted or not disputed by Mena.

The Ninth Circuit's denial of qualified immunity in this case was also based on finding that the clearly established law—which Massie has just shown does not in fact exist—applied based on the following non-existent "facts":

(1) that the crime Mena was suspected of was "a non-violent misdemeanor";

(2) that she was not a threat to the officers or anyone else; and

(3) that she did not resist (or at most passively resisted) being handcuffed.

(*See* Pet. App. 3a).

The Ninth Circuit's Memorandum Decision is completely devoid of any supporting citations to the record or explanation for its factual findings. In fact, its findings are inaccurate in all of the following respects, which further contributed to an incorrect application of the legal standards.

a. The existence and severity of any crime(s) was unknown to Massie when he arrested Mena, precisely because her lack of cooperation had prevented him from investigating the situation.

The Ninth Circuit erroneously concluded that at the time he handcuffed Mena, Massie was dealing with "an arrestee where the crime is a non-violent misdemeanor." (Pet. App. 3a). But the record does not support any such conclusion. Prior to Massie's decision to use force to detain Mena, the officers had not yet determined what, if any, crimes had been committed. At the time, the officers reasonably believed they were investigating, among other things, a potential domestic violence crime in violation of A.R.S. § 13-3601(A), which could encompass many types of offenses, possibly including assault, that could be either a felony or misdemeanor depending on the particular offense. *See* A.R.S. § 13-3601(M). They wanted to separate the parties to facilitate such an investigation.

The district court, in granting Massie's partial summary judgment, specifically held "that there was reasonable suspicion to detain the Plaintiff under *Terry* to investigate the cause of the disturbance occurring in the middle of the street, including whether it involved illegal underage consumption of alcohol, domestic violence, or some public safety issue." (Pet. App. 17a; ER018:4-7).

As described in detail in the "Factual Background" above, Mena's own uncooperative conduct, specifically including, but not limited to, refusing to move away from her boyfriend, stymied any such separation, investigation, or determination until Mena could be forcibly detained, removed from her dangerous position on the median, and questioned separately.

The Ninth Circuit misapprehended the facts and drew its own unilateral and incorrect conclusion when it found that prior to detaining Mena, Massie somehow knew that "the crime [was] a non-violent misdemeanor." (Pet. App. 3a). To the contrary, the actual facts in the record clearly reflect that Massie was investigating a suspected violent crime—assault—and he did not, and could not possibly have known, whether the only potential crime was "a non-violent misdemeanor" until well after Mena was handcuffed, separated from her boyfriend, and separately interviewed.

b. Mena posed a threat to her own safety, as well as the safety of both the officers and the public.

Under the Ninth Circuit's own standards, the most important single element of the governmental interests at stake is whether the suspect poses an immediate threat to the safety of the officers or others. *Mattos*, 661 F.3d at 444-45, *citing Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005). Yet the Ninth Circuit ignored the relevant facts and misapplied this very standard.

Mena and her boyfriend were admittedly under the influence of alcohol and arguing loudly when the officers approached. Her boyfriend was crying and upset. This incident occurred " . . . very late, so early in the morning," on a narrow traffic median located in the middle of a busy six-lane arterial street.

When contacted by police officers, Mena's boyfriend was cooperative, but Mena was not. Instead, she continued to insist they had done nothing wrong, and would not provide her identification or allow the officers to separate them.

Massie justifiably believed he was in a dangerous nighttime situation by virtue of the fact that he was on a median, in the middle of a heavily traveled arterial street, dealing with an intoxicated, uncooperative suspect. Three minutes had already passed. He was concerned that someone could be hit by a drunk or inattentive driver; run into the eastbound traffic lanes, which were not blocked by their patrol cars; or fall into a lane of traffic during a scuffle. When Massie decided to handcuff Mena, he was quite justifiably concerned about the imposed threat and the safety risk to everyone.

The Ninth Circuit's finding that Mena, or the situation she caused, posed no threat to the officers or anyone else is incorrect and, indeed, on our facts simply incredible.

c. Mena resisted arrest.

The Ninth Circuit held Mena "did not resist (or at most passively resisted) being handcuffed." (Pet. App. 3a). But Mena herself testified to active resistance to the arrest as follows:

> Q. Okay. And what happened next.
>
> A. He grabbed me and turned me around and tried to handcuff me.
>
> Q. Okay. And what did you do.
>
> A. Well, it happened so suddenly my body jerked and—well, that's when, I guess, he got hurt with the handcuff, because of the sudden movement.
>
> Q. So when you say your body jerked, are you talking about your whole body? Can you—
>
> A. I felt like it was, like, my arm because that's where they grabbed me, so, like, my arm was jerked behind me.
>
> Q. And what were you doing?
>
> A. I still had my hand in my wallet, they were handcuffing me, and after they got one handcuff on me I think that's when I hurt him. I didn't know at the time that I hurt him, but

> that's when I felt a pressure on my back, and that's when I was being shoved against the tree.

(ER103, 26:25-27:22).[8]

Based on Mena's own description, the Ninth Circuit had no basis to conclude that Mena "did not resist (or at most passively resisted) being handcuffed."

Just as the Ninth Circuit failed to show a violation of clearly established law, so it also did not properly consider either "the officer's conduct in the particular circumstances before him" or the actual "specific facts at issue" as admitted by Mena in the record. Whether Massie's conduct is simply considered in light of the actual situation he faced, or tested against the lack of any prior, clearly established law making his conduct a constitutional violation, Massie is clearly entitled to qualified immunity under both prongs of the applicable standard.

CONCLUSION

In summary, the Ninth Circuit's ruling improperly defined "clearly established law" at a high level of generality by relying on cases with no explanation or analysis as to how they prohibit Massie's minimal use of force. These cases also do not "squarely govern" the

[8] According to the testimony of her boyfriend, Jacob Tellez, Mena "jerked her arm a little bit and resisted." ER096 at 29:23-30:6.

actual facts here, as admitted and not disputed by Mena, rather than the incorrect "facts" formulated by the Ninth Circuit. The facts show no constitutional violation here, and even if one could argue that they did, no precedent exists that could possibly clearly establish that Massie should have known he was using excessive force under the particular circumstances surrounding his encounter with Mena. Accordingly, this Court should grant the City's petition for certiorari.

Respectfully submitted,

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