No. 21-1204

In The
Supreme Court of the United States

CITY OF CHICO, CALIFORNIA, *et al.*,

Petitioners,

v.

ESTATE OF TYLER S. RUSHING, *et al.*,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

This is an interlocutory appeal of the district court's grant of summary judgment denying plaintiffs relief in an excessive force and wrongful death case against law enforcement officers. In reversing that judgment, the court of appeals below found: "If the jury concluded factually that [decedent] Rushing did not pose an immediate threat because after being shot three times he laid still, face down, with his hands visible, in a pool of his own blood, any reasonable officer should have known that repeated tasings of Rushing violated clearly established law on excessive force." Pet. App. 8-9.

The question thus presented to this Court is: Whether the court of appeals correctly determined that a reasonable jury could find that, in these circumstances, the officers used excessive force causing death, and thus that the officers are not entitled to summary judgment?

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INTRODUCTION

This case does not merit certiorari. The petitioners present an extraordinarily narrow question for review. Petitioners argue that the court of appeals misapplied the doctrine of *Graham v. Connor*, 490 U.S. 386 (1989), to the unique and tragic facts of this case.

Even if that were true, it would not merit this Court's review. The unanimous panel of the court of appeals issued an unpublished disposition that is non-precedential and does not create "clearly established law" for future cases. This case will proceed to trial on state law claims regardless of the Fourth Amendment claim, so there is no need for this Court to determine the latter as part of this interlocutory appeal—and it would be especially difficult to do so given the undeveloped state of the record.

Moreover, the court of appeals issued a factbound and case-specific ruling that hewed closely to prior precedent. It ruled in the officers' favor on many critical questions, and it held that their initial uses of force were justified. But the court then applied the common-sense proposition that once a suspect is subdued and a threat has terminated, additional uses of potentially lethal force can be excessive. That proposition is not inconsistent with this Court's precedent—indeed, it is undeniably true. Petitioners disagree with the court of appeals' *application* of that proposition to the unique facts of this case. That disagreement does not warrant this Court's attention.

The petition should be denied.

STATEMENT OF THE CASE

Respondents sued petitioners—Chico police officers and their employers—after the officers killed Tyler Rushing. They alleged excessive force in violation of the Fourth Amendment, as well as other state and federal claims. Prior to trial, the district court granted summary judgment to all defendants on all claims. Pet. App. 32. The court of appeals affirmed in part and reversed in part. It reinstated certain claims against certain defendants and remanded those claims for trial. Pet. App. 3.

1. a. When Chico police officers encountered Mr. Rushing, he had already been shot once by a private security guard investigating a nighttime burglary at an office building. Pet. App. 13-15. After being shot, Mr. Rushing barricaded himself inside a bathroom in the office building. Officers secured the area. As the office building was closed for the day, no civilians were present. Mr. Rushing was contained.

Over the next forty-five minutes, officers waited outside the bathroom and tried to coax Mr. Rushing out. Pet. App. 16-18. They could hear him inside moaning in pain, occasionally talking back, and speaking gibberish. As officers admitted in their depositions, they had reason to believe he was suffering a mental health crisis of some sort. Res. C.A. Reply Br. 15-18.

Officers did not call a crisis negotiator or any mental health specialist. Instead, they called the Butte County Sheriff's Department and requested assistance of a canine unit. When the canine unit arrived, the officers made the decision to barge into the bathroom. Several officers went in with the dog, a ballistic shield, and numerous weapons. Pet. App. 17-19.

b. Mr. Rushing flailed and resisted arrest. He struck one officer in the head with a piece of broken toilet. Pet. App. 19-20. He screamed and panicked as the dog began to bite his legs. He wrestled with the officers, who were unable to subdue him immediately. At one point, he had a ballpoint pen in his hand, and he attempted to strike Chico Sergeant Ruppel with it. Pet. App. 20.

Sergeant Ruppel pulled out his pistol and shot Mr. Rushing once in the upper chest area. Pet. App. 20-21. Struck by that round, Mr. Rushing spun and turn away from the officers. Officer Ruppel fired a second shot in the back of Mr. Rushing's neck, at the base of his head. Mr. Rushing fell to the floor.

c. Mr. Rushing lay prone and motionless on the floor for nearly a minute after being shot. Pet. App. 4. His pants were down around his knees, and he was badly bleeding from the three gunshot wounds. Despite these wounds, however, a medical expert testified that he could have been saved if officers had rendered medical assistance. Res. C.A. Br. 33.

Several of the officers were wearing body cameras during the encounter. Though some of the footage of

the initial encounter is less than pellucid given the frenetic encounter between the officers and Mr. Rushing, the footage after the shooting is perfectly clear. Several officers stood around Mr. Rushing with guns drawn, laser sites visible on his back. Mr. Rushing lay face down and motionless in an expanding pool of blood.

Chico Officer Fliehr then deployed his taser. He subsequently claimed that he feared Mr. Rushing was merely feigning injuries, and that he might jump up and attack officers with some weapon. He claimed that Rushing was still moving—but the body camera footage does not support that claim. Pet. App. 4. Fliehr also claimed that he could not see one of Mr. Rushing's hands—but the body camera footage shows both of Mr. Rushing's arms extending out from under his body. Pet. App. 4, 8-9.

2. a. Respondents—Mr. Rushing's estate and his parents—filed suit in the Eastern District of California. D.C. Doc. 1 (June 8, 2018). The lawsuit named as defendants several Chico Police Officers, a Butte County Sheriff's Deputy, the private security guard, and their respective employers. The lawsuit alleged various state and federal claims. It alleged, inter alia, that the public defendants violated Mr. Rushing's Fourth Amendment rights by using unreasonable and excessive force. The lawsuit also alleged various torts arising under California state law, including negligence and battery.

On July 22, 2020, the district court granted summary judgment to all defendants on all claims. Pet.

App. 32. It held that all defendants acted reasonably throughout their encounter with Mr. Rushing.

b. Respondents timely appealed.

In an unpublished disposition, the Ninth Circuit Court of Appeals affirmed in part and reversed in part. It affirmed the grant of summary judgment to the Butte Sheriff's Deputy, the security guard, and their employers. Pet. App. 9-10. It also held that the Chico Police officers acted reasonably in several respects. It held, for example, that Sergeant Ruppel did not use excessive force when he twice shot Mr. Rushing. Pet. App. 5.

But it held that there was a genuine issue of material fact regarding Officer Fliehr's use of the taser. It held that a reasonable jury could find that Fliehr's use of the taser was unreasonable because, by that time, Mr. Rushing was "rendered helpless" and was "adequately subdued," and therefore "no longer posed a risk." Pet. App. 6 (internal quotation marks omitted). It also held that Fliehr's use of the taser violated clearly established law. In so ruling, the court of appeals relied on several of its prior published cases holding that officers can violate the Fourth Amendment by continuing to use force after a suspect has been subdued and rendered helpless. Pet. App. 8-9.

The court of appeals concluded: "If the jury concluded factually that Rushing did not pose an immediate threat because after being shot three times he laid still, face down, with his hands visible, in a pool of his own blood, any reasonable officer should have known

that repeated tasings of Rushing violated clearly established law on excessive force." *Ibid*.

Accordingly, the court of appeals held that Fliehr and his employers were not entitled to summary judgment and reversed. It also reversed summary judgment on the related state law claims. As to certain other claims against other officers, the court of appeals held that the record was insufficiently developed to make a determination, and thus remanded for further proceedings, including possible further summary judgment proceedings. Pet. App. 9.

ARGUMENT

Petitioners argue that they acted reasonably when they deployed a taser on Tyler Rushing, even after he had been shot three times and lay face down on the floor—unmoving and unresponsive—for a minute. They argue that the court of appeals erred when it found that a reasonable jury could find in respondents' favor.

But petitioners admit that this factually unique situation presents a question of "first impression." Pet. i. The court of appeals carefully considered the various claims presented in this case, ruling in the officers' favor on many and in the respondents' favor on some. Its unanimous ruling was factbound and case-specific—and it was unpublished, so it neither creates precedent nor establishes new "clearly established law" for future qualified immunity cases. At trial, moreover, most of

the focus will be on the state law claims, which would proceed regardless of the resolution of the federal claim.

In short, there is no reason for this Court to use its limited resources to review the court of appeals' fact-bound consideration of the record or its narrow, non-precedential disposition.

1. a. Before turning to the merits of petitioners' argument, it is worth noting the simple and obvious reasons why certiorari is not warranted here.

The panel below issued an unpublished memorandum disposition. The Ninth Circuit rules require panels to publish opinions if their disposition of the case "[e]stablishes, alters, modifies or clarifies a rule of federal law." Ninth Circuit Rule 36-2. The panel's ruling broke no new legal ground. Rather, it simply applied well-settled legal principles to the unique facts of this case. Consequently, the panel did not publish its disposition—and its ruling is therefore nonprecedential.

The courts of appeals are error-correcting courts; this Court is not. *See Halbert v. Michigan*, 545 U.S. 605, 611 (2005). Precisely for that reason, this Court rarely grants certiorari to review unpublished dispositions. Even if the unpublished ruling below were erroneous in some respects, it would not be worth this Court's time to correct those errors.

Moreover, in the context of qualified immunity, unpublished lower court dispositions do not create "clearly established law" governing future Fourth

Amendment cases. *See Wilson v. Layne*, 526 U.S. 603, 616 (1999); *see also Carrillo v. County of Los Angeles*, 798 F.3d 1210, 1221 (9th Cir. 2015) (stating that "controlling authority" and "binding precedent" create clearly established law). Consequently, even if the panel's ruling was incorrect, it will not affect future cases or broaden the scope of liability for officers in the future. The panel's ruling merely disposed of this individual case.

b. Petitioners contend that the panel misapplied prior Ninth Circuit holdings on excessive force. Pet. 17-19. But that is an argument that should have been raised in a rehearing petition—which, tellingly, petitioners did not file.[1] It is not an argument that merits certiorari.

This Court does not grant review to settle intra-circuit conflicts. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). That is especially true where the question presented is whether a panel (in an unpublished opinion) merely misapplied prior circuit law.

2. a. This case is also a poor vehicle to review petitioners' claims because the case will proceed to trial on state law claims regardless of whether the Fourth Amendment claim proceeds. Respondents' lawsuit against petitioners raised numerous state law claims

[1] The panel disposition was also unanimous. Ninth Circuit judges have sua sponte authority to suggest en banc review, but no Ninth Circuit judge requested en banc consideration of this case.

in addition to the federal claims. The state law claims are raised under California tort law, including the common-law torts of negligence and battery.

California state law is broader than federal law in two important respects. First, California law has never recognized a doctrine of qualified immunity. Thus, officers can be held liable for their torts if they acted unreasonably, regardless of whether they violated clearly established law. *Johnson v. Bay Area Rapid Transit*, 724 F.3d 1159, 1171 (9th Cir. 2013); *see Venegas v. County of Los Angeles*, 153 Cal. App. 4th 1230, 1243 (2007) ("[T]he doctrine of qualified governmental immunity is a federal doctrine that does not extend to state tort claims against government employees.").

Second, California law requires juries to examine the totality of officers' conduct, including preshooting conduct, as part of an overall determination of reasonableness. *Hayes v. County of San Diego*, 305 P.3d 252, 262-64 (Cal. 2013). California does not, for example, follow the doctrine of *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017). While federal law requires juries to determine solely whether a discrete Fourth Amendment seizure was reasonable, California law requires juries to examine officers' overall conduct to see if it was unreasonable in any respect. As the California Supreme Court put it in *Hayes*, "state negligence law . . . is broader than federal Fourth Amendment law." 305 P.3d at 263.

b. As a result, respondents can prevail on their state law claims against petitioners even if the federal

claims fail. The court of appeals below reinstated respondents' California state law claims against petitioners. Pet. App. 9. Those state law claims will proceed to trial regardless of the resolution of this petition. *Cf. Florida v. Powell*, 559 U.S. 50, 57 (2010) (noting that this Court does not generally review rulings that rest on independent state grounds).

Qualified immunity is designed to avoid unnecessarily subjecting public officials to the expense and inconvenience of a trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Granting certiorari and reversing here would not avoid those burdens because trial will proceed anyway. Since trial will proceed anyway, it would be preferable to review petitioners' claims *after* trial, on a fully developed factual record, rather than on interlocutory appeal. The procedural posture of this case makes this case a poor vehicle to review petitioners' claims.

In sum, even if petitioners' claims were the sort that merited certiorari, this case is a poor vehicle since the disposition below was unpublished and the state law claims will proceed anyway. And—for reasons detailed below—petitioners' claims are not the sort that merit certiorari.

3. a. Petitioners admit that their claim presents a question of "first impression." Pet. i.[2] By definition,

[2] The petition nominally raises three separate questions for review. But all three simply restate the same basic argument: that the court of appeals misapplied the doctrine of *Graham v. Connor*, 490 U.S. 386 (1989).

that means that the question presented here has never been resolved by this Court or by any other federal circuit. Consequently, the court of appeals' handling of this question of first impression does not conflict with the holding of any other case.

Nor is the question of first impression presented here a broad question of general applicability. The question presented here is not, for example: "Whether officers may deploy a taser to subdue a suspect?" The answer to such a question could only be: It depends, sometimes yes and sometimes no, depending on the particular facts of the case.

The question presented here is so narrow and specific that it is difficult to state it accurately in fewer than fifty words. The question presented here is: May officers deploy a taser against a suspect who previously resisted arrest, but who no longer posed an immediate threat because, after being shot three times, he lay motionless, face down, with his hands visible, in a pool of his own blood?

Perhaps reasonable people can disagree about the answer to that question. But, as petitioners admit, it has never arisen before this case. (One would hope that it will never arise again.) It is not worth this Court's time to determine whether the court of appeals answered such a unique, fact-specific question correctly.

b. The court of appeals' decision below was correspondingly case-specific and factbound. It broke no new ground. Rather, it simply handled the numerous

claims before it, ruling in petitioners' favor on some and in the officers' favor on others.

This lawsuit was not, after all, simply about the officers' use of the taser. To the contrary, this lawsuit involved dozens of both state and federal claims against both the petitioners and other defendants, such as the Butte County Sheriff's Department. The court of appeals disposed of those claims in a mixed ruling. For example, it affirmed the dismissal of all claims against Butte County, because it held that the Sheriff's Deputy had acted reasonably in using a police canine to subdue Mr. Rushing. It also affirmed the dismissal of several claims against petitioners. For example, it held that Officer Ruppel did not violate the Fourth Amendment when he twice shot Mr. Rushing.

Suffice it say, respondents very much disagree with that ruling in Officer Ruppel's favor. Nonetheless, respondents recognize that the court of appeals' handling of that particular claim was narrow and factbound—it is not remotely the sort of ruling that merits review by this Court. And by the same token, the court of appeals' ruling in respondents' favor on some claims is similarly narrow and factbound, also not worthy of certiorari.

c. Petitioners also suggest that the court of appeals confined its analysis to the minute prior to the tasing, rather than analyzing the totality of the circumstances. Pet. 27. That argument badly misreads the court of appeals' opinion.

In fact, all the court of appeals did was closely follow this Court's ruling in *Mendez*, 137 S. Ct. 1539. In *Mendez*, this Court held that a court must examine each alleged Fourth Amendment violation separately: "the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." *Id*. at 1547. Each seizure is analyzed against the background circumstances, but each is analyzed separately.

That is exactly what the court of appeals did. This case presented four separate Fourth Amendment seizures. The court of appeals analyzed them sequentially. It held that the first three seizures—the use of the canine, the first shot, and the second shot—were reasonable. Pet. App. 5. It then analyzed the fourth seizure—the taser—and found that it was unreasonable. Pet. App. 6-7. Petitioners' argument that the court of appeals only analyzed one segment of the encounter is false.[3]

d. The court of appeals thus distinguished the fourth use of force from the first three. That distinction rested on a common-sense legal proposition: Once a suspect is subdued, rendered helpless, and no longer resisting, the justification for using force dissipates. Pet. App. 6-7.

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[3] Conversely, if this Court were to grant review and analyze the totality of the circumstances, as petitioners suggest, it would have to review not just the officers' deployment of the taser but also the other uses of force.

That proposition does not conflict with this Court's precedent. Indeed, it has been accepted by every circuit. *See*, *e.g.*, *Masters v. City of Independence*, 998 F.3d 827, 837 (8th Cir. 2021) ("An officer may not continue to tase a person who is no longer resisting, threatening, or fleeing."); *Jones v. Truebig*, 963 F.3d 214, 225 (2d Cir. 2020) ("[I]t is a Fourth Amendment violation for a police officer to use significant force against an arrestee who is no longer resisting and poses no threat to the safety of officers or others."); *Piazza v. Jefferson County*, 923 F.3d 947, 953 (11th Cir. 2019) (stating that once a person has stopped resisting, "the use of force thereafter is disproportionate to the need") (internal quotation marks omitted); *Clark v. Massengill*, 641 Fed. Appx. 418, 420 (5th Cir. 2016) (citing several cases and reiterating that tasing a suspect when he is "lying on the ground, injured" and "no longer resisting" is "clearly excessive and objectively unreasonable"); *Brown v. Lewis*, 779 Fed. Appx. 401, 419 (6th Cir. 2015) ("This circuit has further concluded that, since at least 2009, the use of violence against a subdued and non-resisting individual has been clearly established as excessive, regardless of whether the individual had been placed in handcuffs."); *Estate of Booker v. Gomez*, 745 F.3d 405, 424-25 (10th Cir. 2014) (holding that officers violated clearly established law when they used a taser on a suspect who was no longer resisting); *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010) (holding that though a suspect initially resisted arrest, officers' subsequent use of a taser was unreasonable once the suspect was lying "face down . . . with his

hands underneath him and having already been shocked twice with the Taser").

Petitioners do not contest that legal proposition—really, who could? Instead, they argue, *as a factual matter*, that officers reasonably believed Mr. Rushing still posed a threat—even though he lay still, with his hands visible, in a pool of his own blood, after being shot three times and mauled by a police dog.

Petitioners are free to press that factual argument (however implausible) with the jury. It is not an argument that merits this Court's review.

4. a. Petitioners' argument is fact-intensive, and the petition repeatedly suggests that this Court should make factual findings in its favor. But this Court does not make factual findings—especially at the summary judgment stage, especially in an interlocutory appeal. In fact, this Court has held that interlocutory appeals in qualified immunity cases should be limited to "cases presenting more abstract issues of law." *Johnson v. Jones*, 515 U.S. 304, 317 (1995). This Court generally lacks jurisdiction to review which factual questions are disputed and which are not. *See id*. at 313-18; *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

The lingering factual disputes in this case make it a particularly bad vehicle to address the questions presented by petitioners.

b. Petitioners fixate on one particular factual issue that, according to them, demonstrates the court of appeals' error. The factual issue is whether one of

Mr. Rushing's hands was concealed under his body at the time Officer Fliehr deployed his taser. According to petitioners, because one hand was concealed, Fliehr reasonably believed that Mr. Rushing had a weapon, and was feigning injury, preparing to jump up and attack the officers with the hidden weapon (even though he had just been shot in the chest and back of the head).

This Court ordinarily does not grant review to resolve factual questions of that sort. But even setting issues of reviewability aside, petitioners' argument is deeply confused. In fact, petitioners *contradict their own prior arguments* regarding which hand was concealed.

In his post shooting interview with investigators, Officer Fliehr stated that when Mr. Rushing was on the floor, he "still could not see the suspect's right hand" and "had to assume the suspect" had a weapon in that hand. D.C. Doc. 49-5, at 5 (Dec. 5, 2019). Fliehr also stated that Mr. Rushing was still moving. In their motion for summary judgment, petitioners relied on that statement and said "Fliehr deployed his TASER because . . . he could not see one of Rushing's hands." D.C. Doc. 37 at 13 (Nov. 11, 2019). Petitioners argued that the decision to use force was reasonable, justified in part by the possible lingering threat from a weapon in that concealed hand.

The district court repeated that statement in its order granting summary judgment. It stated: "Decedent fell to the floor facing away from the officers with

one hand outstretched and one hand concealed under his body." Pet. App. 12. The district court did not cite to anything in particular in the record to support this factual statement, but was apparently relying on Officer Fliehr's statements.

c. The problem with those statements, however, is that they are flatly contradicted by the body camera footage. Multiple officers had their body cameras recording while Mr. Rushing was lying face down, and contrary to Fliehr's stated justifications, Mr. Rushing was motionless. Moreover, those recordings show *both* of Mr. Rushing's arms as clearly visible—extending out from the left side of his body as he lay prone.

A reasonable jury could discount or reject Officer Fliehr's stated justification since it is contradicted by the body camera footage. Based on the video evidence, the court of appeals sensibly ruled that a genuine issue of material fact exists. To wit: "A genuine issue of material fact exists concerning the location of Rushing's right hand and his motionlessness after falling to the floor. The video shows that after Rushing was shot twice by Ruppel and fell to the floor, Rushing's right hand was extended away from his torso. At most, his right hand was partially concealed by a bathroom furnishing, which contradicts [Officer] Fliehr's claim. . . ." Pet. App. 4.

d. The court of appeals' conclusion that there exists a disputed factual question is unassailable. But petitioners now assert that the court of appeals was somehow focused on the wrong hand. They assert that

it was actually Mr. Rushing's *left* hand that was concealed.

In their statement of the case, petitioners state: "Upon being shot a second time, Rushing fell to the floor facing away from Officers *with his right hand outstretched and his left hand concealed* from the Officers' view under his body." Pet. 7-8, emphasis added. For this, petitioners simply cite to the district court order. But as noted above, the district court's order simply said that "one hand" was concealed. It did not say which. Petitioners go on to suggest that the court of appeals inappropriately focused on the visibility of Mr. Rushing's right hand when in fact it was left hand that was concealed. Pet. 28, 30.

The problems with this new argument are manifold. First, petitioners' latest argument contradicts Officer Fliehr's contemporaneous statement that he perceived a threat because he could not see Mr. Rushing's *right* hand. Second, petitioners' argument contradicts the body camera footage, which shows *both* of Mr. Rushing's arms extended out from under his body. A reasonable jury could find, based on the video evidence, that both hands were visible. Third, even if the evidence were ambiguous, a court cannot make a factual finding in petitioners' favor at the summary judgment stage. *See Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014).

Fourth, petitioners are asking this Court to make a new finding of fact on an interlocutory appeal. Petitioners are not asking this Court to review an "abstract issue of law" regarding whether the federal right

allegedly infringed was clearly established. *Behrens*, 516 U.S. at 313. They are asking Court to review whether the court of appeals focused on the wrong hand. That is not the sort of question that merits this Court's time.

e. It is telling in this regard that petitioners do not mention the body camera footage. Although this entire incident was recorded by the officers' body cameras, petitioners barely acknowledge that the footage exists. Instead, in their statement of the case, petitioners only cite to the district court order. Pet. 3-8. Those portions of the district court order did not make clear findings of undisputed fact; rather, they largely repeated the justifications offered by officers.

Of course, when determining whether summary judgment is appropriate, courts must recognize that jurors might disbelieve the testimony of the moving party—especially where it is contradicted by other evidence. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 256 (1986). The court of appeals in this case sensibly determined that a jury might disbelieve officers' claim that Mr. Rushing's hand was concealed under his body—especially because the video evidence shows that Mr. Rushing's hands were not, in fact, concealed under his body.

That factual dispute is one of the core disputes that led the court of appeals to reverse the grant of summary judgment. And the resolution of that dispute depends critically on the body camera footage. Yet petitioners ignore that key piece of evidence, and they

appear to request that this Court do the same in order to reach a result contrary to the court of appeals. There is no basis for doing so.

More generally, none of the factual disputes in this case can be easily resolved without reference to the body camera footage. That footage is breathtakingly brutal. It shows, in high definition, the violent death of Tyler Rushing. It is painful to watch even for those who have no personal connection to Mr. Rushing. The court of appeals engaged in an onerous and painstaking review of the record in this case, including a careful review of the emotionally charged video evidence. There is no need for this Court to do the same.

5. Video footage aside, the state of the record in this case makes it poorly suited for this Court's review. The trial court proceedings were litigated during the pandemic, and the district court issued its order granting summary judgment without holding a hearing. The district court did not make clear findings of undisputed fact, and the district court issued its order without ruling on several outstanding evidentiary objections. On appeal, the parties disputed which portions of the record were properly before the court. *See* Res. C.A. Reply Br. 6-14 (responding to appellees' claims that several portions of the record were not properly before the court). The court of appeals did not resolve all those disputes, but it did grant respondents' opposed motion to supplement the record on appeal. *See* Pet. App. 3 n.3.

And as noted above, the Ninth Circuit determined that, given the state of the record, it could not

definitively rule on all claims. It affirmed the district court's ruling as to some claims, reversed others, but then merely vacated several others and remanded those claims for further development of the record. Pet. App. 3. In short, in addition to the usual problems with reviewing cases on interlocutory appeal, this case presents additional problems due to the unsettled nature of the appellate record.

This case—in its current procedural posture, and with the current state of the record—is a particularly poor vehicle to review the narrow question of first impression presented by the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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