No. 21-1204

In The
Supreme Court of the United States

CITY OF CHICO, CHICO POLICE DEPARTMENT, SCOTT RUPPEL, CEDRIC SCHWYZER, ALEX FLIEHR, and JEREMY GAGNEBIN,

Petitioners,

v.

ESTATE OF TYLER S. RUSHING, SCOTT K. RUSHING, and PAULA L. RUSHING,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Constant within the body of law surrounding claims of excessive force under the Fourth Amendment is the notion that it is not the function of the courts to second-guess the conduct of law enforcement officers who are confronted with tense, rapidly-evolving circumstances. Instead, their actions must be evaluated from the perspective of a reasonable officer at the scene, taking into account the totality of the circumstances.

This case presents an important opportunity for this Court to decide the constitutionality of the use of an intermediate level of force designed to ensure officer safety and the safety of members of the public with whom law enforcement come in contact. The need for clarity in the law with respect to the propriety of such force is critical where the suspect has demonstrated an undisputed pattern of attempting to ambush authorities. A corollary issue to be settled by this Court is the reasonableness of the belief that such a suspect continues to pose a threat to officer safety despite the fact the suspect is lying face-down, unhandcuffed when the force is deployed. This Court has not addressed this issue, and the Ninth Circuit applied materially dissimilar

case law to reverse summary judgment in favor of the Chico Defendants. Absent review by this Court, the Ninth Circuit's ruling will have the manifestly unfortunate consequence of forcing law enforcement to assume the risk that the threat posed by the suspect has been sufficiently averted and preventing the use of an intermediate level of force to ensure officer safety and dispense of the need for deadly force.

ARGUMENT

I. THE FACT THAT THE NINTH CIRCUIT'S DECISION IS UNPUBLISHED IS ENTIRELY IRRELEVANT TO THE QUESTION OF WHETHER TO GRANT CERTIORARI

The fact that the Ninth Circuit elected not to publish the decision below is not an impediment to the Court's ability to grant certiorari. "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case. *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987); *see also Smith v. United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant."). This

Court regularly grants certiorari to review unpublished decisions.[1]

Equally important, "[a]n unpublished opinion may have a lingering effect in the Circuit … ." *Smith v. United States, supra,* at 1020 (Blackmun, J., dissenting from denial of certiorari). While not constituting *binding* authority, unpublished Ninth Circuit decisions issued in or after 2007 are citable without restriction as persuasive authority. Indeed, both litigants and federal courts of appeals frequently cite to unpublished opinions as persuasive authority in subsequent opinions.

As explained in the petition, the Ninth Circuit applied legal authority that is so factually dissimilar

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[1] *See, e.g., Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61, (2000) (granting certiorari to review unpublished Fourth Circuit decision); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (granting certiorari to resolve a conflict between a Tenth Circuit case and an unpublished order by the Eleventh Circuit); *Old Chief v. United States*, 519 U.S. 172, 177 (1997) (granting certiorari where an unpublished Ninth Circuit opinion became part of a divide among the courts of appeals); *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari "to end the division of authority" between published and unpublished Court of Appeals opinions, including an unpublished Ninth Circuit decision); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993) (granting certiorari "to resolve a conflict among the circuits" and an unpublished Sixth Circuit decision); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452-54 (1993) (granting certiorari to "resolve [a] conflict among the Circuits' and the unpublished Ninth Circuit decision below).

the events that transpired in this case so as to not constitute "authority" for purposes of this case in the first instance. Instances where a suspect had been handcuffed or affirmatively demonstrated an intent to surrender are not relevant to whether the use of the Taser was unreasonable in light of Rushing's repeated efforts to ambush security/law enforcement. Absent clarification from this Court as to the proper legal analysis, the Ninth Circuit's decision herein can and likely will continue to shape Ninth Circuit jurisprudence on the question of whether law enforcement officers can deploy a Taser in the interest of officer safety where a violent suspect has not been clearly subdued. In other words, clarity in the law is no less critical merely because the decision below is unpublished. A decision need not carry the label "precedent" in order to impact the law by setting forth rules that affect how courts will adjudicate future cases. Certiorari is warranted.

II. THE EXISTENCE OF RESPONDENTS' STATE LAW CLAIMS DOES NOT SUPPORT DENIAL OF CERTIORARI

Respondents are incorrect in their view that certiorari is not warranted because the state law claims will purportedly be the focus of any trial

herein. While state law liability for negligence claims involving deadly force takes into account pre-shooting conduct, it does not broaden liability beyond federal Fourth Amendment law in the context of this case.

First, the state law liability analysis is identical to the excessive force analysis under *Graham v. Connor*, 490 U.S. 386 (1989). For their assault/battery, negligence, and wrongful death claims under California law, Respondents must show that the force utilized by the Officers was unreasonable.[2] Claims of excessive force under California law are analyzed under the same standard of objective reasonableness used in Fourth Amendment Claims. See *In re Joseph F.*, 85 Cal.App. 4th 975, 989 (2000) (citing *Martinez v. Cnty. of Los Angeles*, 47 Cal.App. 4th 334, 343 (1996); *Brown v. Ransweiler*, 171 Cal.App. 4th 516, 527 n. 11 (2009) ("Because federal civil rights claims of excessive use of force are the federal counterpart to state battery

[2] With respect to the claim for excessive force under the California Constitution, it has specifically been held in the Eastern District of California that Article 1, Section 13 of the California Constitution does not itself provide a private cause of action for civil litigants such as Plaintiffs. *Hoch v. Tarkenton*, 2013 WL 1004847 (ED Cal. 2013), citing *Wigfall v. City & County of San Francisco,* 2007 WL 174434, *4-5 (N.D. Cal. 2007).

and wrongful death claims, federal cases are instructive in this area."); *Bowoto v. Chevron Corp.* 621 F.3d 1116, 1129 (9th Cir. 2010) ("Under California law, a plaintiff bringing a battery claim against a law enforcement official has the burden of proving the officer used unreasonable force."); *Hayes v. County of San Diego*, 57 Cal.4th 622, 632 (2013) (relying on the *Graham* reasonableness test when assessing a negligence claim against police officers); *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1272-73 (1998) ["a prima facie battery is not established unless and until plaintiff proves unreasonable force was used"]; *Finley v. City of Oakland*, 2006 WL 269950, *14 (N.D. Cal. Feb 2, 2006) ["the reasoning used by [the *Edson*] court to find that a plaintiff must show unreasonable force when alleging battery against a police officer applies equally to an assault claim."].) Likewise, the elements of an excessive force claim under the Bane Act are the same as under Section 1983. *Cameron v. Craig*, 713 F.3d 1012, 1022 (9th Cir. 2013). Thus, the reasonableness inquiry on the state law claims is the same as and will be governed by the *Graham* analysis on Plaintiff's Fourth Amendment excessive force claim. The assertion that the state law claims

will become of paramount importance if this matter proceeds to trial is, therefore, untrue.

Additionally, *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013), does not extend state law liability for excessive force beyond what is provided for under federal law, as Respondents assert. *Hayes* involved a situation where Sheriff's Deputies shot and killed a suspect who approached them with a knife. A Taser was not deployed. With respect to the negligent wrongful death claim brought under state law, the Court of Appeal determined that the duty to act reasonably *when using deadly force* extends to *pre-shooting* conduct. "Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability." *Id.* at 639. By its plain terms, that determination has no bearing where, as here, less lethal force is at issue. The use of a Taser in dart mode constitutes an "intermediate" level of force. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). Had *Hayes* intended the reasonableness standard to apply to *all* officer conduct preceding *all* uses of force, it could have said as much. It did not. Thus, while *Hayes*

may have been relevant if the shots fired by Ruppel were still at issue in this case, it is irrelevant to whether the decision to deploy the Taser violated state negligence law. Even then, the holding of *Hayes* would be limited to Respondents' negligence claim. As the Court specifically noted, "state *negligence* law … is broader than federal Fourth Amendment law." *Hayes v. County of San Diego, supra,* at 639, emphasis added.

Lastly, the absence of qualified immunity as an affirmative defense to the state law causes of action does not serve to broaden liability under state law, as Respondents further contend. Indeed, various state law immunities could apply in this context, separate and apart from qualified immunity. For example, an officer's decision to pursue a suspect may not be actionable negligence because, under California Penal Code Section 835a, the officers have a statutory privilege to immediately make a lawful arrest and use force to do so, if necessary. The statute and case law further provide that officers have no obligation to wait or retreat. *Id.* at 518-519; *see also J.A.L. by & through Valdez v. Santos*, 724 F. App'x 531, 534 (9th Cir. 2018) (denying negligence claim premised on

pre-shooting tactics where officers allegedly disregarded training regarding dealing with emotionally disturbed subjects and noting that the California Supreme Court in *Hayes* specifically warned against "divid[ing a] plaintiff's cause of action artificially into a series of decisional moments); Cal.Gov.Code, § 820.4 (a public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law); Cal.Gov.Code, § 815.2(b) (a public entity is not liable for an injury if the employee is immune from liability; Cal.Gov.Code, § 820.2 (public employee is immune from liability if the act or omission resulting in injury was the result of the exercise of the discretion vested in the employee, whether or not such discretion was abused). Thus, separate and additional state law immunities remain at play irrespective of qualified immunity. The scope of liability is no greater under state law.

III. THE PETITION PRESENTS COMPELLING CONSTITUTIONAL QUESTIONS AND DOES NOT MERELY PRESENT A FACT-SPECIFIC INQUIRY

A. Review is Warranted To Settle The Reasonableness of Force Where A Suspect Has Not Been Clearly Subdued

As an initial matter, Petitioners' characterization of the merits of the Petition as involving a question of first impression is not a basis for denying certiorari. To the contrary, it is a basis for granting it. As Respondents are aware, the decision whether or not to grant certiorari is a matter of judicial discretion, and certiorari will be granted "for compelling reasons." S.Ct. Rules, Rule 10. More specifically, the Rules of the Supreme Court of the United States include among the reasons for exercising discretion in favor of granting certiorari situations where, "a United States court of appeals has decided an important question of federal law *that has not been, but should be, settled by this Court*, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. S.Ct. Rules, Rule 10(c), emphasis added. The Petition presents a matter of first impression in the sense

that *this* Court has not settled whether law enforcement may use an intermediate level of force to arrest a violent suspect who has not been clearly subdued. The need for review of the Ninth Circuit's decision is particularly compelling because it reinstates litigation against Petitioners based on legal authorities that do not address that issue. That is precisely the type of inquiry and lack of clarity in the law that warrants granting certiorari.

B. Review Is Warranted Where The Law Is Not Clearly Established For Purposes Of Qualified Immunity

Moreover, the issues presented by the Petition are not narrowly defined, fact-specific questions as Respondents attempt to portray them. Petitioners are not asking this Court to resolve factual disputes between the parties or to make a factual determination contrary to those contained in the Ninth Circuit's decision. Rather, the Petition demonstrates that the Ninth Circuit applied wholly inapposite law and asks this Court to settle whether any existing legal precedent "squarely governs" the situation confronted by the Chico officers on July 23, 2017, so as to have imparted notice on Fliehr that deployment of the Taser would amount to excessive

force under the Fourth Amendment. Respondents submit there is not. There is no way for anyone to know if Rushing in fact was incapacitated prior to the Taser being deployed. The Ninth Circuit, nevertheless, assumed that was the case, applied case law based on that assumption, and reversed summary judgment based on that assumption. Petitioners submit that review should be granted to settle the question of whether the Ninth Circuit's cited authorities control the issue of whether Rushing's right to be free from the use of a Taser in this situation was clearly established.

C. Review Is Warranted To Resolve A Conflict With *Graham*

A separate legal issue that should be decided is whether the Ninth Circuit disregarded the well-settled rule set forth in *Graham* the reasonableness of force is to be evaluated under the totality of the circumstances confronting law enforcement. The fact that courts separately analyze each use of force does not mean that the force is analyzed in a vacuum; the reasonableness of the force always takes into consideration the totality of the circumstances. As Respondents concede, "each

seizure is analyzed against the background circumstances." Opp., p. 13.

Rushing's previous attempts to ambush the private security guard and law enforcement officers must be taken into account in determining whether the decision to deploy the Taser in the interest of officer safety was reasonable. None of the legal authorities relied upon by the Ninth Circuit engaged in such an analysis, and the decision itself is devoid of any such consideration. Petitioners did not misread the Ninth Circuit's decision with respect to the manner in which the Court limited its analysis to the minute preceding deployment of the Taser. The Court focused its decision on Rushing's position after he fell to the floor. (Pet.App. 4.)

Moreover, the fact that the Ninth Circuit analyzed the two shots fired by Ruppel individually and separate from the use of the Taser does not render the Court's Taser analysis proper if it ignored the totality of the circumstances. Again, the legal authorities relied upon by Respondents all involve situations where the suspect was clearly subdued and no longer posed a threat. (Pet.App. 6-7.) Those cases do not involve a suspect who repeatedly

attempted to catch law enforcement off-guard and ambush them or whether it is reasonable for law enforcement to believe that the suspect continues to pose a threat with that context in mind. In disregarding those factors, the Ninth Circuit department from *Graham* and review is, therefore, warranted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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