

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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BRAD MARTIN, in his individual capacity and as an  
employee of the Arizona Department of Public Safety;  
STATE OF ARIZONA,  
*Petitioners,*  
v.  
CARLOS CASTRO,  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

1. When a law enforcement officer reasonably deploys a police K9 to restrain a fleeing suspect known to have a history of violent crime and believed to be in possession of a deadly weapon and under the influence of an illegal stimulant, is the Fourth Amendment violated when the K9's handler commands the K9 to release the suspect within seconds after the suspect is handcuffed and ceases resisting arrest?

2. Did the Ninth Circuit err when it failed to consider the totality of the circumstances in assessing the reasonableness of force used to restrain a suspect with a known history of violent crime who is actively resisting arrest and is believed to be in possession of a deadly weapon and under the influence of an illegal stimulant?

3. Did the Ninth Circuit violate *City and County of San Francisco v. Sheehan* and other binding precedent when it denied a police officer qualified immunity by defining clearly established law at too high a level of generality?

## **PARTIES TO THE PROCEEDING**

The parties to the proceedings before the Ninth Circuit were Detective Brad Martin, the State of Arizona, and Carlos Castro. Detective Martin and the State of Arizona were defendants and appellants below and are the petitioners in this appeal. Mr. Castro was the plaintiff and appellee below and is the respondent to this petition.

There are no publicly held corporations involved in this proceeding.

## **STATEMENT OF RELATED PROCEEDINGS**

This case arises from the following proceedings:

- *Castro v. Martin, et al.*, No. 20-16009 (9th Cir.) (memorandum opinion issued May 10, 2021); and
- *Castro v. Arizona Department of Public Safety, et al.*, No. CV-18-00753-PHX-SRB (ESW) (order denying summary judgment filed April 30, 2020).

There are no other proceedings in state or federal trial or appellate courts directly related to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Plaintiff Carlos Castro (“Castro”) filed this lawsuit against Petitioners Brad Martin and the State of Arizona alleging that his Fourth Amendment right to freedom from excessive force was violated when he was bitten by a police K9 while resisting arrest. At the time the dog bite occurred, Castro was a known member of a dangerous gang, had a violent criminal record, had absconded from community supervision, had an outstanding warrant for his arrest, had successfully resisted a prior effort to arrest him, was wanted in connection with two violent crimes within the prior week, and was believed to be in possession of a deadly weapon while under the influence of methamphetamine. *See* Petitioner’s Appendix (“App.”) 12–15. Shortly after midnight, Castro fled from police when they attempted to execute a search warrant at a Glendale, Arizona home in order to locate and arrest him. App. 15.

To evade police, Castro ran through the backyards of numerous occupied residences and eventually climbed onto the roof of a home. App. 15–16. Castro did not comply when officers ordered him down from the roof and continued to resist officers’ efforts to arrest him when on the ground. App. 27. Officers attempted to detain Castro with alternate means, including a Taser and efforts to physically restrain him (all of which failed), and warned Castro that a police K9 would be deployed if he continued to resist arrest. App. 22–23. Castro disregarded officers’ warnings and continued to resist arrest, after which Detective Martin deployed Storm, his K9 companion, to help detain

Castro. App. 22–23, 27. Officers eventually maneuvered Castro’s hands behind his back and affixed flexible handcuffs, whereupon Storm complied with Detective Martin’s order to release Castro. App. 20–21, 23–24. Storm released Castro between twelve and twenty-six seconds after officers placed flexible handcuffs on him. App. 23–24.

In evaluating Detective Martin’s claim to qualified immunity, the Ninth Circuit determined that this case turned “solely on the 12 to 26 seconds that passed” between when Castro was handcuffed and Storm released him. App. 4. In doing so, the Ninth Circuit ignored this Court’s precedent requiring courts assessing claims of excessive force to look past the 20/20 vision of hindsight and evaluate the totality of the circumstances from the perspective of the officer responding to a tense, rapidly evolving situation. *See, e.g., Graham v. Connor*, 490 U.S. 386, 396 (1989). Had the Ninth Circuit adhered to this established framework, it would have concluded that Detective Martin’s response to a dangerous and rapidly evolving pursuit of Castro was reasonable and did not violate the Fourth Amendment. Indeed, the Fifth, Sixth, and Eighth Circuits have addressed similar claims of excessive force and concluded that no Fourth Amendment violation occurred under circumstances similar to those at issue here.

The Ninth Circuit also disregarded this Court’s binding precedent in concluding that the evidence “supports a violation of clearly established law.” App. 5. Despite this Court’s repeated admonitions, the Ninth Circuit *yet again* relied on inapposite cases to define a

“clearly established” right at an impermissibly high level of generality. *See, e.g., City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015) (“We have repeatedly told courts—and *the Ninth Circuit in particular*—not to define clearly established law at a high level of generality.” (emphasis added)). The Ninth Circuit’s decision is based on case law stating “that an officer cannot direct a police dog to continue biting a suspect who has fully surrendered and is under the officer’s control,” App. 4–5, but no officer directed Storm to continue biting Castro after he was handcuffed, which shows that the Ninth Circuit’s “clearly established right” is inapplicable here. Moreover, Ninth Circuit cases, including a case upon which the Ninth Circuit relied here, contradict the notion that the officers here violated a “clearly established” right. *See Hernandez v. Town of Gilbert*, 989 F.3d 739, 746–47 (2021) (concluding that the duration of a K9 bite did not violate a clearly established right when a suspect fled from police, resisted arrest, and failed to respond to warnings and escalating control techniques).

Detective Martin and the State of Arizona respectfully petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Court should grant this petition on all three questions presented, or, alternatively, summarily reverse the Ninth Circuit’s decision.

## **OPINIONS BELOW**

The memorandum decision of the United States Court of Appeals for the Ninth Circuit, reproduced at App. 1–5, was not published but is available at 854 F. App'x 888 (9th Cir. 2021). The order of the United States District Court for the District of Arizona denying Petitioners' motion for summary judgment was not published, but is reproduced at App. 6–37 and is available at 2020 WL 9600817.

## **JURISDICTION**

The Ninth Circuit issued its memorandum decision on May 10, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Castro brought the underlying action pursuant to 42 U.S.C. § 1983, which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall

not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Castro alleges that the acts in question violated his right to be free from excessive force under the Fourth Amendment to the United States Constitution, which provides:

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.

## STATEMENT OF THE CASE

### A. Factual Background

In March 2017, Castro was a known member of street gang called “Dog Town.” App. 12.<sup>1</sup> He had multiple felony convictions, including convictions for aggravated assault on a law enforcement officer, theft

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<sup>1</sup> These facts are taken from the district court’s Order. Where the parties’ versions of the events differed, the district court properly accepted Castro’s version of the facts as true for purposes of summary judgment, except where Castro’s version of the facts conflicted with video evidence. App. 10–11; *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

of means of transportation, theft, and possession of drug paraphernalia. *Id.* After Castro's release from prison in 2016, he absconded from community supervision, resulting in a warrant for his arrest. *Id.* In December 2016, Castro resisted arrest and successfully fled from police as they attempted to pull him over. *Id.* After that incident, Castro was also wanted for resisting arrest, a Class 6 felony. *Id.*

On March 3, 2017, Castro was at the home of his then-girlfriend's parents when an argument ensued. *Id.* Castro, though prohibited by law from possessing a firearm, fired a total of four shots into the air from a handgun as a result of the argument. *Id.* Police were called to the scene following the shooting, and Castro became wanted for three additional felonies: aggravated assault with a deadly weapon, misconduct involving weapons, and endangerment. App. 12–13. Castro later pleaded guilty to aggravated assault with a deadly weapon. App. 13.

On March 10, 2017, the Arizona Department of Public Safety's Gang & Immigration Intelligence Team Enforcement Mission (GIITEM) was informed that Castro committed a strong-arm robbery and assaulted a store employee at a department store in Glendale, Arizona earlier that same day. *Id.* Based on the March 3, 2017 aggravated assault and the March 10, 2017 robbery and assault, police obtained a search warrant to locate Castro by means of his cell phone. *Id.* Officers tracked Castro's phone to a home in Glendale, Arizona, and Glendale police officers confirmed that Castro was at that home. App. 13–14. Detectives then obtained a warrant to search the home. App. 14.

In light of Castro's history of violent crime and the nature of the crimes he was suspected of committing, and also because Castro was believed to be armed, the Department of Public Safety's Special Weapons and Tactics (SWAT) team led the way in executing the warrant. *Id.* A GIITEM detective briefed officers, including Detective Martin, about Castro's history and the potential for violence. *Id.* Martin was informed that Castro was a documented gang member, had prior felony convictions including aggravated assault, had absconded from community supervision after being released from prison, had an outstanding arrest warrant, was suspected of committing aggravated assault with a firearm the week prior, and was suspected of committing strong-arm robbery and assault earlier that day. *Id.*

Police executed the search warrant shortly after midnight on March 11, 2017. App. 15. Castro's girlfriend warned him that police were coming. *Id.* Castro looked out the window and saw SWAT officers throw flash grenades. *Id.* He then fled out of the back door of the house. *Id.* Castro climbed over several fences into neighboring yards, where he ultimately hid in a shed. *Id.* Castro could hear police walking past the shed and the sound of a helicopter. *Id.*

Officers set up a perimeter to prevent Castro's escape. *Id.* Martin and his K9 companion, Storm, searched the house and the backyards of nearby homes. *Id.* At each location, Martin gave a warning that he was deploying a K9, stating "Come to the sound of my voice now. If you do not, a K9 will be deployed and he

will bite you.” *Id.* Martin gave this warning eight times. *Id.*

Martin was informed that suspected methamphetamines, a stimulant, were found inside the house from which Castro fled. *Id.* Accordingly, Martin believed that Castro might be under the influence of methamphetamines. *Id.*

After about ten minutes hiding in the shed, Castro climbed a nearby ladder onto the roof of a house. App. 15–16. The parties disputed what happened after Castro climbed onto the roof, but the district court observed the following from body camera video footage provided by the parties. In the video, Castro is first seen sitting on the roof with his legs hanging over the edge. App. 22–23. Officers ordered Castro to come down from the roof. App. 23. Castro said “I’m done” while pulling his knees and feet onto the roof and holding his hands out, but did not move to come down. *Id.* Officers fired a Taser, which hit Castro. *Id.* Castro again screamed “I’m done.” *Id.* Someone yelled “come down and get on your face or you’re gonna get bit.” *Id.* Castro did not comply. *Id.*

Officers fired a second Taser and Castro fell from the roof. *Id.* Four or five officers surrounded Castro, and two officers with K9 units rushed in as well. *Id.* Approximately forty-three seconds into the video, Castro is seen face down on the ground with his right arm outstretched and his left arm under his torso. *Id.* A few seconds later, a K9 unit bit Castro’s leg. *Id.* Officers told Castro to “stop resisting” and “stop fighting.” *Id.* Approximately thirty-four seconds after the K9 unit bit Castro, someone announced that Castro



was handcuffed, at which point Castro appeared to be lying still. App. 23–24. The K9 is seen biting Castro twelve seconds after the announcement that Castro was handcuffed. App. 24. The K9 is subsequently obscured from view until approximately twenty-six seconds after the announcement that Castro was handcuffed, at which point the K9 was no longer biting Castro. *Id.*

### **B. Proceedings Below**

Castro sued Detective Martin and the State of Arizona (together, Defendants) in the United States District Court for the District of Arizona in relation to the injuries sustained as a result of the dog bite. Castro asserted a Fourth Amendment excessive force claim against Detective Martin pursuant to 42 U.S.C. § 1983. App. 6–7.<sup>2</sup> Castro asserted vicarious liability state law claims against the State of Arizona for battery, intentional infliction of emotional distress, and gross negligence. App. 7. Defendants moved for summary judgment, asserting qualified immunity.

The district court denied Defendants’ motion. It determined that no reasonable jury could find that Castro was attempting to comply with police orders to come down from the roof, and that the video footage demonstrated that Castro continued to resist officers before the K9 was deployed. App. 27. But because the video showed that the K9 continued to bite Castro’s leg for at least twelve seconds after Castro was handcuffed, the district court determined that there was “a genuine

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<sup>2</sup> The district court had jurisdiction over Castro’s § 1983 claim pursuant to 28 U.S.C. § 1331.

issue of material fact whether the force used was greater than reasonable under the circumstances.” App. 28. The district court also determined that, at the time of the events in question, it was “clearly established that using unnecessary force against a handcuffed, non-resistant arrestee could amount to excessive force.” App. 30.

The Ninth Circuit affirmed. In a short memorandum decision, it held that this case turned “solely on the 12 to 26 seconds that passed between when Castro was ‘handcuffed and subdued’ and when the K9 released its bite.” App. 4. With no elaboration or consideration of the events preceding the dog bite, the Ninth Circuit summarily concluded that the evidence, viewed in Castro’s favor, supported a violation of clearly established law. App. 5. As support, the Ninth Circuit cited *Hernandez v. Town of Gilbert*, 989 F.3d 739, 745 (9th Cir. 2021), for the proposition that “an officer cannot direct a police dog to continue biting a suspect who has fully surrendered and is under the officer’s control.” App. 4–5. The Ninth Circuit also cited *Watkins v. City of Oakland*, 145 F.3d 1087, 1090, 1093 (9th Cir. 1988), for the proposition that an “excessive duration of [a K9] bite . . . could constitute excessive force.” App. 5.

### **REASONS FOR GRANTING THE PETITION**

The doctrine of qualified immunity protects government officials, such as police officers, from liability for civil damages when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Messerschmidt v. Millender*, 565 U.S. 535, 546

(2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). This Court has made clear that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Messerschmidt*, 565 U.S. at 546 (holding that qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments”).

In assessing a claim of qualified immunity, courts consider (1) whether the official violated a statutory or constitutional right, and (2) whether that right was “clearly established” at the time the challenged conduct occurred. *Ashcroft*, 563 U.S. at 735 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Because qualified immunity is an immunity from suit and not merely a defense to liability, this Court has “repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” *Pearson*, 555 U.S. at 231–32, 237 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). To this end, courts may consider the two prongs in any order, and immunity must be granted where the challenged conduct does not amount to a violation of any statutory or constitutional right or where the right alleged to be violated is not clearly established. *Id.* at 236; *Plumhoff v. Rickard*, 572 U.S. 765, 778–79 (2014).

Review of the Ninth Circuit’s decision is necessary to compel compliance with clear precedent from this Court holding that whether an officer’s actions are objectively reasonable depends on the totality of the circumstances assessed from the perspective of an

officer responding to dangerous and evolving situations. In concluding that this appeal turned “solely on the 12 to 26 seconds that passed” between when Castro was handcuffed and Storm released his bite, the Ninth Circuit ignored clear precedent prohibiting courts from examining facts in isolation and through the lens of hindsight. *E.g.*, *Graham*, 490 U.S. at 396.

Review is also necessary because the Ninth Circuit once again flouted repeated direction from this Court to not define the “clearly established” right too generally. Detective Martin is entitled to qualified immunity because no “existing precedent ‘squarely governs’ the specific facts at issue” in this case. *E.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018).

**I. The Ninth Circuit Ignored Established Supreme Court Precedent Prohibiting Courts from Examining Facts in Isolation and Through the Lens of Hindsight When Evaluating Whether an Officer’s Conduct Violates the Fourth Amendment.**

**A. The Ninth Circuit Failed to Evaluate the Totality of the Circumstances from Detective Martin’s Perspective.**

The Ninth Circuit’s decision is flatly wrong because it disregards this Court’s established framework for analyzing claims of excessive force under the Fourth Amendment. A claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment’s “objective reasonableness” standard, which “requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s

Fourth Amendment interests’ against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)); *Plumhoff*, 572 U.S. at 774. The objective reasonableness test “is not capable of precise definition or mechanical application,” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), and “its proper application requires careful attention to the facts and circumstances of each particular case,” *Graham*, 490 U.S. at 396. This includes consideration of “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.*

Two key aspects of the objective reasonableness standard protect against judicial second-guessing of heat-of-the-moment police-work in the tranquility of a courtroom. First, “[t]he inquiry requires analyzing the totality of the circumstances,” *Plumhoff*, 572 U.S. at 774, rather than evaluating “factors in isolation,” *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Second, the conduct in question “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396. This “allow[s] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 397; *accord*, e.g., *Plumhoff*, 572 U.S. at 775 (same).

At the summary judgment stage, once the court has “determined the relevant set of facts and drawn all

inferences in favor of the nonmoving party to the extent supportable by the record,” whether an officer’s actions were objectively reasonable is a pure question of law. *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007); *see also Plumhoff*, 572 U.S. at 773 (holding that whether officers’ conduct violated the Fourth Amendment was a question of law). The following are either undisputed facts or findings of fact the district court made after reviewing the body camera video of the incident:

- Castro was a known member of a street gang and had multiple prior felony convictions, including a conviction for an aggravated assault on a law enforcement officer. App. 12, 14.
- Castro absconded from community supervision following his release from prison in 2016, resulting in a warrant for his arrest. App. 12.
- Castro previously resisted arrest and successfully fled from police in December 2016. *Id.*
- Castro was wanted for an aggravated assault with a deadly weapon involving firing a handgun several times just one week prior to the events in question. App. 12–13.
- Castro was suspected of committing a strong-arm robbery and assaulting an employee at a department store within twenty-four hours prior to the events in question. App. 13.
- Castro was suspected of being under the influence of methamphetamines during the events in question. App. 15.

- When police executed the residential search warrant just after midnight on March 11, 2021, Castro fled from the house and began evading police by climbing fences into neighboring yards, where he hid from police in a shed. *Id.*
- After leaving the shed, Castro climbed onto the roof of a house and sat down on the roof's edge. App. 15–16. The district court found that, based on the video footage, no reasonable jury could conclude that Castro was attempting to comply with police orders to come down from the roof. App. 27.
- Castro continued to resist officers after falling down from the roof but before Detective Martin deployed Storm. *Id.*
- Storm released his bite within twelve to twenty-six seconds after Castro was handcuffed. App. 23–24.

Because courts must analyze the totality of circumstances, each of the foregoing facts is relevant to whether the use of force against Castro was reasonable. *See Graham*, 490 U.S. at 396 (holding that the objective reasonableness standard requires examining the severity of the crime at issue, the threat the suspect poses, and whether the suspect is actively resisting arrest or attempting to flee). The Ninth Circuit disregarded all but one of these facts, however, and concluded that “this appeal turns *solely* on the 12 to 26 seconds that passed between when Castro was ‘handcuffed and subdued’ and when the K9 released its bite.” App. 4 (emphasis added). The Ninth Circuit also

stated that it did not “consider [the] parties’ arguments regarding whether the initiation of the K9 bite constituted excessive force,” App. 4 n.3, which underscores that its singular focus did not take into account the “totality of the circumstances,” *Plumhoff*, 572 U.S. at 774. The Ninth Circuit then concluded, in cursory fashion, that “[t]he evidence . . . supports a violation of clearly established law.” App. 5.

The objective reasonableness inquiry requires viewing *all* relevant factors from Detective Martin’s perspective at the time of the incident. *See, e.g., Kingsley v. Hendrickson*, 576 U.S. 389, 399 (2015) (“[W]e have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer.”); *see also Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir. 2004) (“In analyzing whether excessive force was used, courts must look at the totality of the circumstances: not just a small slice of the acts that happened at the tail of the story.”). Viewing the totality of the circumstances, Detective Martin’s use of force was reasonable to ensure that Castro was fully subdued and that any potential threat to officers or bystanders was eliminated before Storm disengaged. At the time he ordered Storm to engage Castro, Detective Martin knew that Castro was a member of a violent gang, had a history of violent felony convictions, had absconded from community supervision, was suspected of two recent violent assaults including one that involved firing a handgun, had a history of fleeing police, and was at that moment actively resisting arrest. He was also informed that Castro may be armed and under the influence of illegal stimulants. Once



Detective Martin was sure that Castro was subdued—mere seconds after Castro was handcuffed—he ordered Strom to release Castro. App. 20–21. The twelve to twenty-six second window between when Castro was handcuffed and when Storm disengaged is well within the time a reasonable officer in Detective Martin’s position would need to properly evaluate and react to the rapidly changing circumstances.

In view of Castro’s history of violence, fleeing police, and resisting arrest (which Castro replicated on the night in question), and considering the rapidly developing circumstances surrounding his pursuit, it was reasonable that Storm remained engaged with Castro for no longer (and likely shorter) than twenty-six seconds after Castro was handcuffed. The Ninth Circuit erred in concluding otherwise.

**B. The Ninth Circuit’s Decision Is Inconsistent with Decisions from the Fifth, Sixth, and Eighth Circuits.**

The Ninth Circuit failed to evaluate the totality of the circumstances in assessing whether Detective Martin’s actions would constitute a violation of the Fourth Amendment. In doing so, the Ninth Circuit parted ways not only with clear precedent from this Court, but also with decisions in the Fifth, Sixth, and Eighth Circuits addressing analogous claims and concluding that no Fourth Amendment violation occurred. In each of the cases described below, the court rejected a claim that the duration of a K9 bite amounted to an excessive use of force based on the totality of the circumstances surrounding the bite.

**Fifth Circuit.** In *Escobar v. Montee*, the Fifth Circuit concluded that no Fourth Amendment violation occurred when police deployed a K9 to arrest a suspect who assaulted his wife and fled from police through a residential neighborhood. 895 F.3d 387, 390–91 (5th Cir. 2018). As with Castro here, the suspect in *Escobar* claimed he was not resisting arrest and challenged both the initiation and the duration of the bite, which lasted approximately one minute. *Id.* at 391, 394. The district court ruled that a reasonable jury could find that the officer allowed the K9 to continue biting the suspect “after it would have been apparent ‘that [the suspect] was no longer armed and was not resisting arrest.’” *Id.* at 394. Disagreeing, the Fifth Circuit concluded that the K9’s bite did not violate the Fourth Amendment and rejected the district court’s ruling because it “overlook[ed] several key facts.” *Id.* Central to the Fifth Circuit’s conclusion was the fact that, as with Castro here, the suspect actively fled from police at night and hid from police in a residential backyard, and officers had been warned that the plaintiff had a weapon and would resist arrest. *Id.*

**Sixth Circuit.** In *Zuress v. City of Newark*, the Sixth Circuit concluded that no Fourth Amendment violation occurred when a K9 bit and held a suspect who failed to comply with officers’ commands during her arrest. 815 F. App’x 1, 3–4, 5 (6th Cir. 2020). The suspect challenged both the bite and its duration, which lasted for over twenty seconds after she had been subdued. *Id.* at 4. The Sixth Circuit affirmed the district court’s grant of qualified immunity to the K9’s handler, concluding that no Fourth Amendment violation occurred in light of the fact that the suspect

fled from police in a car and disobeyed officers' commands, and officers were uncertain whether the suspect was armed. *Id.* at 5, 7–8. The court reasoned that although the officer waited eleven seconds after the suspect was subdued before directing the K9 to release its bite, “[s]uch a short amount of time . . . was not the kind of delay that ‘rise[s] to the level of an unreasonable seizure.’” *Id.* at 7 (alteration in original) (citation omitted). Moreover, the court concluded that no Fourth Amendment violation occurred even though an additional twenty-four seconds elapsed while the officer struggled to remove the K9 from the suspect after the K9 disregarded the officer’s command to release the bite. *Id.* at 7–8. Because the court found no Fourth Amendment violation, it concluded that the district court correctly granted summary judgment to the officer. *Id.* at 8.; *see also Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020) (rejecting a claim that a short delay in removing a K9 constituted a Fourth Amendment violation; “At most, one could argue that [the officer] could have called the dog off a second or two sooner. But that kind of fine-sliced judgment call amid ‘tense, uncertain, and rapidly evolving’ circumstances just isn’t the stuff of a Fourth Amendment violation.”).

***Eighth Circuit.*** In *Kuha v. City of Minnetonka*, the Eighth Circuit concluded that there was no Fourth Amendment violation when police deployed a K9 to help seize a suspect who fled during an early morning traffic stop for a minor violation. 365 F.3d 590, 600–01 (8th Cir. 2003), *abrogated on other grounds by Szabla v. City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007). The K9’s bite lasted approximately ten to fifteen

seconds while officers searched the area to ensure the suspect was not armed. *Id.* at 601. Even though officers had not seen a gun, the court concluded that, “given the totality of the circumstances, [officers] were reasonably wary of what they might encounter when they found [the suspect], and reasonably concerned for their safety.” *Id.* at 600–01. In rejecting the suspect’s argument that officers should have realized he did not pose a threat, the court emphasized that this was “not a case where the officers [were] accused of siccing a police dog on a manifestly unarmed and compliant suspect.” *Id.*

Viewing the circumstances surrounding Castro’s flight and subsequent arrest through the lens of the foregoing cases, it is beyond dispute that the quantum of force Detective Martin used to seize Castro was objectively reasonable. Castro—a member of a violent gang with a documented history of violent crime and fleeing police—fled from police in the middle of the night by running through the yards of occupied homes, repeatedly disobeyed officers’ commands, and disregarded warnings that police would deploy a K9 if he continued to resist arrest. Given Castro’s history of violent felony convictions and prior efforts to resist arrest, and in view of the ineffectiveness of officers’ escalating measures to subdue Castro, Detective Martin reasonably believed that Castro may be armed and was a threat to the safety of officers and other bystanders. As for the bite’s duration, considering Castro’s failure to comply with commands, the potential threat Castro posed to officers and others, his proximity to occupied residences, and the fact that Castro had successfully evaded police just a few

months prior, it was reasonable that Storm remained engaged with Castro for a short period of time after Castro was handcuffed while Detective Martin evaluated the rapidly changing circumstances and ordered Storm to disengage.

Review is therefore necessary because the Ninth Circuit's decision puts officers such as Detective Martin in an untenable position. Determining whether to engage a police dog requires officers to evaluate dangerous and quickly escalating circumstances. Officers must decide, under tense and uncertain circumstances, what threat a suspect poses to officers and bystanders and how to best alleviate that threat. *Graham*, 490 U.S. at 396–97. The decisions in the Fifth, Sixth, and Eighth Circuits recognize the circumstances under which officers must make these judgment calls, but the Ninth Circuit's decision subjects officers to liability if a court concludes, with the benefit of 20/20 hindsight, that a properly initiated K9 bite lasted a few seconds longer than the court would have preferred. That standard fails to afford officers the "breathing room" needed to carry out their jobs safely. *See Messerschmidt*, 565 U.S. at 546. This Court should grant review to correct the Ninth Circuit's departure from clearly established precedent and the decisions of other circuits.

**II. The Ninth Circuit’s Conclusion that the Purported Right at Issue is “Clearly Established” Conflicts with this Court’s Precedent, including *City and County of San Francisco v. Sheehan*, that Prohibits Defining Clearly Established Rights at Too High a Level of Generality.**

**A. This Court Has Repeatedly Held that Clearly Established Rights Must Not Be Defined Too Generally.**

The Ninth Circuit erred in disregarding this Court’s repeated admonitions against rejecting claims of qualified immunity when no case law squarely puts the unconstitutionality of an officer’s actions beyond debate. “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.” *Kisela*, 138 S. Ct. at 1152 (citation omitted). Although there does not need to be “a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* (citation omitted). Thus, “immunity protects all but the plainly incompetent or those who knowingly violate the law.” *Id.* (citation omitted).

The dispositive question in this aspect of the qualified immunity analysis is “whether the violative nature of *particular* conduct is clearly established.” *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (citation omitted); *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam) (“[E]xisting precedent must place the lawfulness of the particular [action]

beyond debate.” (second alteration in original) (citation omitted)). Consequently, the Supreme Court has “repeatedly told courts—and *the Ninth Circuit in particular*—not to define clearly established law at a high level of generality.” *Sheehan*, 575 U.S. at 613 (emphasis added) (quoting *Ashcroft*, 563 U.S. at 742); *see also Kisela*, 138 S. Ct. at 1152 (repeating the admonishment directed at the Ninth Circuit in *Sheehan*).

This Court’s admonition toward “[s]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.” *Kisela*, 138 S. Ct. at 1152 (quoting *Mullenix*, 577 U.S. at 13). The result in an excessive force case “depends very much on the facts of each case,” and therefore, “officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.” *Id.* (quoting *Mullenix*, 577 U.S. at 13). Indeed, because “[t]he Constitution is not blind to ‘the fact that police officers are often forced to make split-second judgments,’” *Sheehan*, 575 U.S. at 612 (quoting *Plumhoff*, 572 U.S. at 775), what matters is whether the police “had sufficient reason to believe that their conduct was justified,” *id.* at 617.

“Qualified immunity is no immunity at all if ‘clearly established’ law can simply be defined as the right to be free from unreasonable searches and seizures.” *Id.* at 613. Accordingly, an officer does not “violate[] 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." *Plumhoff*, 572 U.S. at 778–79; *see also Kisela*, 138 S. Ct. at 1153. In other words, the officer must have notice that a "specific use of force is unlawful," which requires precedent based on "similar facts" that "help[s] move a case beyond the otherwise hazy border between excessive and acceptable force." *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 577 U.S. at 19). This is an "*exacting standard* [that] gives government officials breathing room to make reasonable but mistaken judgments." *Sheehan*, 575 U.S. at 611 (cleaned up) (quoting *Ashcroft*, 563 U.S. at 743).

The Ninth Circuit disregarded these principles, and this Court's review is necessary to achieve a result that aligns with established precedent and recognizes—as the Constitution does—that "police officers are often forced to make split-second judgments." *Id.* at 612 (quoting *Plumhoff*, 572 U.S. at 775). Indeed, this Court "often corrects lower courts when they wrongly subject individual officers to liability." *Id.* at 611 n.3 (collecting cases); *see also Wearry v. Cain*, 577 U.S. 385, 394–95 (2016) (per curiam) ("[T]he Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law."). Contrary to the Ninth Circuit's conclusion, summary judgment should be granted in Detective Martin's favor because no case demonstrates that he violated clearly established law.



**B. No Clearly Established Law Put Detective Martin on Notice that His Use of Force May Violate the Fourth Amendment.**

At issue is whether Detective Martin violated clearly established law when he ordered Storm to disengage mere seconds after officers handcuffed Castro—a non-compliant, dangerous suspect whom Martin reasonably suspected was armed and under the influence of methamphetamine. App. 12–15; *Sheehan*, 575 U.S. at 617 (reversing the denial of qualified immunity when, “[c]onsidering the specific situation confronting [police] they had sufficient reason to believe that their conduct was justified”). The Ninth Circuit did not analyze the specific factual context with which Detective Martin was confronted in evaluating whether he violated clearly established law. App. 4–5. Instead, the court cited two of its decisions for the proposition that “an officer cannot direct a police dog to continue biting a suspect who has fully surrendered” or allow a bite to continue for an excessive duration when the suspect is “obviously helpless.” *Id.* It then concluded, in cursory fashion, that the evidence “supports a violation of clearly established law.” App. 5.

As a threshold matter, the Ninth Circuit disregarded its obligation to define the clearly established right at issue, opting instead to cite inapposite cases that do not address the specific circumstances at issue here. App. 5. Properly defining the right at issue is critical because an “officer ‘cannot be said to have violated a clearly established right unless the right’s contours [are] sufficiently definite.’”

*Sheehan*, 575 U.S. at 611 (quoting *Plumhoff*, 572 U.S. at 778–79); *Kisela*, 138 S. Ct. at 1153 (“[P]olice officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.”). The Ninth Circuit did not, however, provide any case that squarely governs the issue at hand—whether a police K9 must simultaneously disengage the very moment a violent, resistant, and formerly fleeing suspect is handcuffed.

To support its conclusion, the Ninth Circuit cited *Hernandez v. Town of Gilbert*, 898 F.3d 739 (9th Cir. 2021), and *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998). Assuming circuit-level case law is relevant in assessing whether the law was clearly established for purposes of qualified immunity,<sup>3</sup> neither *Hernandez* nor *Watkins* place the constitutionality of Detective Martin’s actions “beyond debate.” *Hernandez* is readily distinguishable from the present case and did not put Detective Martin on notice that his actions violated the Fourth Amendment.<sup>4</sup> There, officers

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<sup>3</sup> This Court has not yet decided what precedents, aside from its own, qualify as controlling authority for purposes of qualified immunity. *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018); *Emmons*, 139 S. Ct. at 503.

<sup>4</sup> Of course, *Hernandez* itself could not have put Detective Martin on notice that his actions may have violated the Fourth Amendment because it was issued in 2021—years after the events at issue. See *Kisela*, 138 S. Ct. at 1154 (“[A] reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious.”). The Ninth Circuit appears to have relied on *Hernandez* to the extent it purports to describe the law as of 2016. App. 5. As described herein, however, neither *Hernandez* nor

directed a K9 to bite a criminal suspect following a police chase when the suspect refused to exit his car and resisted lesser force employed by officers to arrest him. *Hernandez*, 989 F.3d at 741. The Ninth Circuit affirmed the district court’s grant of qualified immunity because “no clearly established law governed the reasonableness of using a canine to subdue a noncompliant suspect who resisted other types of force and refused to surrender.” *Id.* Far from putting Detective Martin on notice that his conduct was illegal, *Hernandez* supports a finding that the use of force against Castro was reasonable because he also resisted other types of force and refused to surrender.

Ignoring the factual context in *Hernandez*, the Ninth Circuit concluded that the case placed the constitutionality of Detective Martin’s actions beyond debate based on one sentence in that opinion stating that “an officer cannot direct a police dog to continue biting a suspect who has fully surrendered and is under the officer’s control.” App. 4–5. Clearly established law cannot be based on a general proposition such as this one. Rather, the plaintiff must “identify a case where an officer acting under similar circumstances as Officer [Martin] was held to have violated the Fourth Amendment.” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). Thus, *Hernandez* is simply unhelpful here because the court in that case determined that the officer did *not* violate clearly established law. 989 F.3d at 745–47.

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the cases cited therein address the factual circumstances at issue here. *Hernandez* is therefore inapposite.

Not only is the broad proposition that an officer “cannot direct a police dog to continue biting a suspect who has fully surrendered” too general to put Detective Martin on notice that his conduct may have violated the Fourth Amendment, it is counterfactual to what occurred in this case. Detective Martin did not direct Storm to bite a suspect who had fully surrendered. He directed Storm to bite a suspect that the district court determined had not yet surrendered, and ordered Storm to release his bite after he determined that Castro was subdued. The broad statement that an officer “cannot direct a police dog to continue biting a suspect who has fully surrendered” sheds no light on whether the timeframe in which Detective Martin removed Storm was reasonable. *Hernandez* does not support a conclusion that Detective Martin should have released Storm any sooner than he did.<sup>5</sup>

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<sup>5</sup> In *Hernandez*, the Ninth Circuit cited *Mendoza v. Block*, 27 F.3d 1357 (9th Cir. 1994), a case relied on by the district court. App. 30. *Mendoza* offers no help to Castro. The court there merely stated that the use of a dog *could* constitute excessive force—a general proposition that gave Detective Martin no notice that *this* dog bite may constitute excessive force. *Mendoza*, 27 F.3d at 1362. The Ninth Circuit subsequently explained the limitation in *Mendoza*’s holding that use of a dog could constitute excessive force, explaining that it is “limited to the proposition that some uses of dogs will in *particular* instances violate clearly established law.” *Chew v. Gates*, 27 F.3d 1432, 1448 (9th Cir. 1994) (emphasis added). Moreover, in *Mendoza* the court concluded that the use of a police dog *was* reasonable when the dog was engaged after a suspect fled from police following a bank robbery, officers believed the suspect was armed, the suspect hid from officers on private property, and the suspect ignored warnings that he would be bitten if he did not surrender *Id.* at 1362–63. Accordingly, *Mendoza* does not supply any clearly established law that Detective Martin

The Ninth Circuit's reliance on *Watkins* (a case cited in *Hernandez*) is similarly misplaced. There, the defendant officer used a canine to locate a suspect while responding to a silent alarm at a warehouse. *Watkins*, 145 F.3d at 1090. Prior to releasing the dog, the officer yelled that he would release the dog and that it would bite the suspect if he did not surrender, but the suspect indicated he did not hear the warning. *Id.* After finding the suspect, the canine bit him, and the officer “did not call [the dog] off” but instead “ordered [the suspect] to show his hands.” *Id.* The suspect explained that he could not comply because he “was recoiling from the dog’s bite,” but the officer did not call off the dog until the suspect complied, which was estimated to be at least ten to fifteen seconds. *Id.* The court determined that clearly established law prohibited the “excessive duration of the bite and improper *encouragement* of a continuation of the attack” against a suspect whom the officer had no reason to suspect was armed or otherwise dangerous. *Id.* (emphasis added).

The factual distinctions between this case and *Watkins* “leap from the page.” *Sheehan*, 575 U.S. at 614. In *Watkins*, there was no evidence that the suspect was armed or dangerous, and the officer knew nothing about the suspect. 145 F.3d at 1090. In contrast, here, Detective Martin knew Castro had a lengthy criminal history—which included an armed assault a week before, a prior conviction for assaulting a police officer,

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is alleged to have violated; rather, it supports a finding that Detective Martin’s actions were reasonable under the circumstances.

membership in a violent gang, and allegations that he committed a strong-arm robbery *just hours before* the incident. App. 12–13. Detective Martin reasonably suspected that Castro was armed and dangerous. He believed Castro was high on methamphetamine such that Tasers and other police weapons “c[ould] be less effective,” and he observed Castro continue to resist arrest even after officers attempted to subdue him with Tasers and physical restraint. App. 18, 27. Significantly, even Castro admitted that he refused to obey repeated commands, *see id.*, whereas the suspect in *Watkins* did not surrender prior to release of the dog because he purportedly did not hear the officer’s command and only failed to comply after the dog began biting him because he was “recoiling from the dog’s bite.” *See Watkins*, 145 F.3d at 1090. And no facts here suggest that Detective Martin encouraged the dog to continue biting Castro, unlike the officer in *Watkins*. *Watkins* provided no notice to Detective Martin that the duration of the dog bite under *these* circumstances—namely in subduing a non-compliant, dangerous, and potentially armed suspect—violated the Constitution. *See Kisela*, 138 S. Ct. at 1154; *Sheehan*, 575 U.S. at 614, 616.

The Ninth Circuit also ignored one of its own prior opinions that contradicts its conclusion here. In *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003), the Ninth Circuit rejected a claim of excessive force when an officer ordered a police dog to bite a suspect for forty-five to sixty seconds. *Id.* at 961, 968. There, as here, the suspect fled from police, was wanted for a prior effort to flee from police, failed to comply with police commands, and ignored warnings that a police

dog would be released. *Id.* at 965. The court concluded that, under those circumstances, the officer was “entitled to assume that [the suspect] posed an immediate threat to his and to the other deputy’s safety.” *Id.* The Ninth Circuit’s holding in *Miller* undermines the proposition that Detective Martin’s conduct, which occurred under similar circumstances, constituted excessive force. *Miller* also refutes the notion that Detective Martin’s conduct violated “clearly established law.” See *Kisela*, 138 S. Ct. at 1153–54 (holding that the Ninth Circuit erred in rejecting a claim to qualified immunity where a reasonable officer could have believed his actions comported with the Fourth Amendment based on analogous Ninth Circuit case law).

At bottom, the Ninth Circuit’s determination that Detective Martin is not entitled to qualified immunity boils down to reliance on the general principle that a prolonged dog bite *may* constitute excessive force in *some* instances. But nothing put Detective Martin on notice that the short duration of *this* dog bite may have been excessive because no case purports to define how quickly after a suspect is handcuffed an officer must remove a K9, especially when the suspect actively resists arrest, fails to respond to lesser force, and is believed to be armed. To the contrary, case law in the Ninth Circuit and other circuits would lead a reasonable officer to conclude that the duration of Storm’s bite was reasonable under the circumstances. See *Miller*, 340 F.3d at 968; *Escobar*, 895 F.3d at 394; *Zuress*, 815 F. App’x. at 7–8; *Ashford*, 951 F.3d at 804; *Kuha*, 365 F.3d at 600–01.

The Ninth Circuit “failed to identify a case where an officer acting under similar circumstances as Officer [Martin] was held to have violated the Fourth Amendment.” *White*, 137 S. Ct. at 552; *see also Emmons*, 139 S. Ct. at 504 (reversing where the court of appeals relied on distinguishable case law in evaluating clearly established law). Detective Martin is therefore shielded by qualified immunity. This Court should grant review to compel compliance with established precedent and enforce the public policies served by qualified immunity.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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