No. _____

In the Supreme Court of the United States

OFFICER MATTHEW GREGORY AND
OFFICER MADALYN BRILEY,

Petitioners,

v.

ELISE BROWN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A unanimous Ninth Circuit panel upheld qualified immunity for two police officers who followed department policies and training when they ordered the driver of a suspected stolen vehicle to exit, to show her waistband, and then to walk backwards towards them. However, the panel majority denied qualified immunity for having the driver kneel for no more than twenty seconds, placing her in handcuffs, and then escorting her behind the line of police vehicles—even though these actions also were consistent with department policies and training. Was the law clearly established at the time of the incident that following department policies and training under similar circumstances would result in individual officer liability?

2. The panel majority denied qualified immunity based upon facts not known to the officers at the time of the incident, finding that the driver "posed no threat" before concluding the law was clearly established that no force could be used on someone who "posed no threat." Did the panel majority err by using facts not known to the officers at the time, and then applying the clearly established prong at too high a level of generality?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows.

Petitioners and Defendants-Appellees Below

- Officer Matthew Gregory
- Officer Madalyn Briley

Collectively, the "Officers"

Respondent and Plaintiff-Appellant below

- Elise Brown

Parties Below Dismissed from the Case

- County of San Bernadino
- City of Chino

Note: Although the County of San Bernadino has been dismissed from the case, Petitioners will nonetheless serve counsel of record. The City of Chino was represented by Petitioners' counsel.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Officer Matthew Gregory and Officer Madalyn Briley are individuals and no corporate disclosure is required.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 21-56357

Elise Brown, *Plaintiff-Appellant*, v.
County of San Bernardino, City of Chino, Matthew Gregory, Madalyn Briley, *Defendants-Appellees*.

Date of Final Opinion: February 7, 2023

Date of Rehearing Denial: March 17, 2023

United States District Court, Central District of California

No. 5:20-cv-01116-MCS-SP

Elise Brown, *Plaintiff*, v.
County of San Bernardino, City of Chino, Matthew Gregory, Madalyn Briley, *Defendants*.

Date of Judgment: December 15, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Officer Matthew Gregory and Officer Madalyn Briley respectfully petition this Court for a writ of certiorari to review the opinion of a split panel of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the divided 2-1 panel of the United States Court of Appeals for the Ninth Circuit is not reported, and is reproduced along with the dissent in Petitioners' Appendix (App.) at App.1a-11a.

JURISDICTION

The District Court for the Central District of California has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 1367. The District Court entered summary judgment in favor of Petitioners. (App.18a-31a). A split panel of the Ninth Circuit affirmed in part and reversed in part, issuing its opinion on February 7, 2023. (App.1a-11a). The Ninth Circuit denied rehearing on March 17, 2023. (App.32a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

The Ninth Circuit split panel majority decision to deny the Petitioners qualified immunity with respect to Respondent's excessive force claim has a chilling effect on police enforcement and investigation in serious cases involving suspected vehicle thefts. This is especially true in light of the fact that Petitioners conducted the stop at issue in accordance with Chino Police Department policies, which were consistent with State of California guidelines. Hence, the panel majority decision threatens to upend police departments' established policies, which police officers such as Petitioners are trained to know, for conducting high-risk vehicle stops.

The panel majority found—after a unanimous decision upheld qualified immunity for unlawful arrest

—that the law was clearly established that police cannot use any force against a person who "poses no threat," despite frequent Supreme Court admonitions "to the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (*per curiam*). The majority panel further erred by failing to recognize that the use of force is a fact-dependent area of law, *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (*per curiam*), and that differences in fact patterns separate constitutional from unconstitutional conduct in qualified immunity cases. Moreover, the majority panel relied upon several key facts that the Petitioners did not know at the time, but rather, only learned after the fact. Thus, the majority panel did not comport its ruling with the requirements of *Graham v. Connor* 490 U.S. 386, 396 (1989) to judge reasonableness "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The panel majority then used those unknown facts in support of only one of the *Graham* factors.

STATEMENT OF THE CASE

A. Underlying Facts

On July 7, 2019, Respondent was pulled over in the City of Chino near the California Institution for Men ("CIM"), a state prison, following a match of a stolen vehicle picked up by an automated license plate reader ("ALPR"). Non-party Chino Police Department ("CPD") Sergeant McArdle initiated the stop of

Respondent's vehicle after receiving confirmation of its stolen vehicle status from CPD dispatch, based on a complete license plate match and other confirming information from the California Law Enforcement Telecommunications System ("CLETS"). The vehicle had been reported stolen days prior to the stop.

A traffic stop for a potentially stolen vehicle is considered a felony/high-risk stop under Chino Police Department ("CPD") policies, California Commission on Peace Officer Standards and Training ("POST") learning domains, and sound national principles of policing. Petitioners CPD Officers Madalyn Briley and Matthew Gregory responded after Sgt. McCardle initiated the stop. At the time, Officer Briley was in her third week of training as a CPD officer, and her first week of live field training. Officer Gregory was Officer Briley's Field Training Officer. After the arrival of several more officers, as called for in CPD polices, Petitioners "called" the stop under the supervision of Sergeant McArdle.

Petitioners deployed firearms in states of readiness consistent with their responsibilities on the scene of a high risk stop. They initially pointed their weapons in the direction of the stopped vehicle. At the direction of Officer Gregory, Officer Briley gave instructions to the occupant(s) of the vehicle—a four-door sedan with dark tinted windows—to exit so that they could be detained if necessary, and the car could be cleared of potential threats, allowing for the follow up investigation to continue. Respondent, who appeared to Officers Gregory and Briley to be in her 50s or early 60s and who appeared not to need any accommodation due to health or frailty, complied with all commands given.

Officer Briley pointed her firearm at Respondent after she exited her vehicle and faced away from the officers, through Respondent showing the entirety of her waistband area, and through her instructions for Respondent to walk backwards towards her voice. Respondent did not appear to be armed. At that point, Officer Gregory took over commands with Officer Briley holstering her firearm, preparing to detain Respondent in handcuffs. Officer Gregory kept his sidearm in a "low-ready" position. While Officer Briley provided direct coverage, Officer Gregory maintained the "low-ready" position.

Once at the line of patrol vehicles, Officer Gregory instructed Respondent to kneel, which she did for approximately twenty seconds, and Officer Briley placed Respondent in handcuffs. Respondent was walked back through the line of patrol vehicles while the stopped stolen vehicle was cleared. Neither Petitioner had control over Respondent's release from handcuffs, but Respondent remained in handcuffs for approximately three minutes while the investigation continued. She was never placed in the back of a police vehicle.

Other CPD officers cleared the stopped vehicle and received additional information that an error had occurred when the vehicle was reported stolen. The San Bernardino County Sheriff's Department took the stolen vehicle report. Instead of entering the license plate of the vehicle actually stolen—also owned by Respondent, and of the same make and similar model, but different color and year—the Sheriff's Department entered the license plate of Respondent's other vehicle —the one she was driving during this underlying incident. Upon discovering this error committed by the

Sheriff's Department, CPD Officers informed Respondent of the error, assisted her by removing the incorrectly reported vehicle from the statewide database, and provided her information on how to follow up with the Sheriff's Department to have the correct vehicle reported.

B. Proceedings in the District Court

This action was filed on May 29, 2020, asserting twelve claims arising out of Appellant's detention against the County of San Bernardino and the City of Chino ("City"). After various motions, Appellant filed her Third Amended Complaint on February 22, 2021 ("TAC"). The TAC contained nine claims for (1) excessive force under § 1983; (2) unlawful/unreasonable seizure-detention-arrest under § 1983; (3) violation of right to equal protection under § 1983; (4) *Monell* liability for ratification, inadequate training, and unconstitutional custom, practice, and policy; (5) battery/assault under state law; (6) violation of the Ralph Act; (7) violation of the Bane Act; (8) negligent entrustment, hiring, supervision, and/or retention under state law, and (9) intentional infliction of emotional distress under state law. The TAC also added Officers Gregory and Briley as defendants for the first time.

The City and Petitioners filed a motion to dismiss the TAC, which was decided on May 21, 2021. In its ruling, the District Court granted the motion in part, and the only remaining claims were the first and second claims for excessive force and unreasonable seizure and detention against Petitioners.

On July 2, 2021, the City filed a Motion for Summary Judgment/Partial Summary Judgment ("MSJ").

With respect to the first claim for excessive force, Petitioners asserted that any use of force used against Respondent was not excessive, but objectively reasonable. Petitioners also asserted that, assuming *arguendo* a constitutional violation occurred, they were entitled to qualified immunity, as the law was not clearly established at the time of the incident under the particular circumstances of the case.

Oral arguments were heard on August 9, 2021, and the MSJ was taken under submission. On October 14, 2021, the District Court entered an Order Granting in Part Defendants' Motion for Summary Judgment. (App.18a) The District Court elected to begin its analysis with the second prong of qualified immunity. The District Court assumed *arguendo* that Officers Gregory and Briley violated Respondent's constitutional rights by unlawfully seizing and detaining her or by using excessive force, but determined they were still entitled to qualified immunity. The District Court disagreed with Respondent's primary two points raised in opposition to the MSJ based on *Green v. City & County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014): (1) the facts in the instant case and the *Green* case were not " 'materially indistinguishable,'" and (2) Respondent was wrong in asserting that the Ninth Circuit " 'found that the rights at issue in the *Green* case were clearly established at the time of the 2009 incident giving rise to the case.'"

The District Court noted that Respondent experienced an unfortunate encounter with police officers on July 7, 2019, but the law was not clearly established at the time of the incident that Petitioners' actions were unlawful; thus, the District Court granted quali-

fied immunity and declined to analyze whether Appellant suffered any constitutional violations.

On December 15, 2021, judgment was entered in favor of Petitioners and against Respondent. (App.12a).

C. Proceedings in the Ninth Circuit

Respondent appealed the grant of summary judgment. On February 7, 2023, split panel of the Ninth Circuit affirmed in part and reversed in part, unanimously finding qualified immunity applied to the unlawful arrest claim, but splitting 2-1 regarding application of qualified immunity for the excessive force claim. (App.1a, 6a).

On February 21, 2023, Petitioners petitioned the Ninth Circuit for a rehearing en banc, or in the alternative, panel rehearing. The request for a rehearing was denied on March 17, 2023. (App.32a).

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 states that the Supreme Court may grant a petition for writ of certiorari when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Here, the Ninth Circuit panel's split decision deviated from the usual course of judicial proceedings by disregarding Supreme Court precedent, disregarding previous admonitions to the Ninth Circuit, and misconstruing the Ninth Circuit's own precedent.

The panel majority cited and relied upon several facts that Petitioners did not know until after the incident, rather than what they knew and believed at the time. The panel majority stated that a jury could find that it was not reasonable for Defendants to believe that Respondent posed any immediate threat, because Respondent was "an 83-year-old, 5'2", 117-pound, unarmed, completely complaint woman." In support, the majority panel also cited a statement from non-party Sgt. McArdle that Respondent "obviously . . . [did] not look like . . . a violent suspect." However, Petitioners believed they were dealing with a middle-aged woman in her 50s or early 60s, with no obvious physical or mental impairments, who had only received a visual inspection for weapons, entering a location known for stolen vehicles and contraband. Petitioners did not know Respondent's age, height and weight, or that she actually was unarmed, until after she was detained. Moreover, Sgt. McCardle's statement was made after the incident, and he is not a party to the action.

The majority panel erred by using facts in this case not known to the Petitioners at the time, and then used those facts to support only one factor from *Graham*, 490 U.S. 386 at 396.

Further, the panel majority overgeneralized clearly established law, which threatens to abrogate qualified immunity for all officers who comply with department policies and state standards, inevitably leading to increased individual liability. This is exactly the kind of case for which qualified immunity exists: Petitioners made a mistake of fact based on incorrect information—verified, but ultimately incorrect—but in all respects acted consistently with their training, CPD policies,

California Commission on Peace Officer Standards and Training ("POST") training and guidelines, and sound national police practices.

The importance is heightened in light of the Supreme Court's specific direction to the Ninth Circuit to stop defining "clearly established law at a high level of generality." *Kisela*, 138 S. Ct. 1148 at 1152.

Moreover, the majority panel overly generalized the facts of this case and those discussed in *Green*, 751 F.3d 1039 at 1049, holding the force used here was clearly established as unconstitutional and denying Petitioners qualified immunity. The majority's holding ignores that the use of excessive force is a specific fact-dependent area of law, *Mullenix*, 577 U.S. at 13, and that differences in fact patterns separate constitutional from unconstitutional conduct. The distinctions between *Green* and this case perfectly show why it did not put Petitioners "on notice" that their actions could violate Appellant's rights. App.11a-12a. At most, *Green* only established that the crime of vehicular theft alone did not support the level of force used in that case where the suspect was "outnumbered, unarmed, and compliant." App.8a. However, *Green* did not find that any force would have been unjustified. App.8a. Thus, the question was not put "beyond debate," and the majority panel should not have denied application of qualified immunity. *Kisela*, 138 S. Ct. at 1152; *see also Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

Only this Court can correct the Ninth Circuit's overgeneralization and ensure the protection of qualified immunity for police officers who follow their training and protocols. This is a matter of extreme nationwide importance.

I. THE MAJORITY PANEL DECISION DEFIES THIS COURT'S SPECIFIC INSTRUCTION TO NOT DEFINE CLEARLY ESTABLISHED LAW AT A HIGH LEVEL OF GENERALITY.

Here, the question of whether Petitioners' use of force was excessive must be clearly established and placed "beyond debate" by existing precedent. *See Kisela,* 138 S. Ct. 1148 at 1152 (*per curiam*). The majority panel's holding that it was clearly established that police cannot use any force against a person who poses no threat mischaracterizes precedent in overly generalized terms. *Id*. at 1152. 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." *Ibid*.

To find that the Petitioners' use of force was excessive here, the majority panel's decision unduly fixated on the idea that the Appellant did not pose a physical threat to the Petitioners, while neglecting to substantively analyze the two other factors under the seminal *Graham*, 490 U.S. 386 at 396 test. Thus, the majority panel's decision ignored existing Ninth Circuit precedent in *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010): "These [*Graham*] factors are not exclusive; 'we examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.'" Additionally, the majority panel's decision failed to do any substantive "totality of the circumstances" analysis, as is required under *MacPherson*, here.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory

or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When a court is presented with a qualified immunity defense, the central questions are: (1) whether the facts alleged, taken in the light most favorable to the plaintiff, demonstrate that the defendant's conduct violated a statutory or constitutional right; and (2) whether the right at issue was "clearly established" at the time. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *accord Pearson v. Callahan*, 555 U.S. 223, 236-42 (2009) (holding that district courts need not analyze the two prongs of the analysis in any particular order); *see also Lal v. California*, 756 F.3d 1112, 1116 (9th Cir. 2014).

Qualified immunity can only be denied if "a reasonable officer would have understood her conduct to be unlawful in that situation." *Torres*, 648 F.3d 1119 at 1123. To determine whether a right was clearly established, the "relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. 194 at 202. The allegedly violated right must be defined at the appropriate level of specificity before a court can determine if it was clearly established. *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

As a general, broad principle, force is only justified when there is a "need for force." *Green*, 751 F.3d 1039 at 1049; *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 (9th Cir. 2007). Here, the majority quickly concluded that Respondent, an 83-year-old woman of small stature, apparently unarmed, who complied with police direction, "posed no threat" and, therefore, no force

could be justified. App.2a-3a. The dissent acknowledges that handcuffing a compliant 83-year-old woman "may violate the standards of societal decorum" and may seem unnecessary in hindsight, but stood firm that this is not the standard for establishing a constitutional violation. App.6a-7a. The dissent is correct in this regard, and the majority erred.

Petitioners did not know that Respondent was 83 at the time; they believed that she was in her 50s to early 60s. Sergeant McCardle's comment that Respondent, "obviously," did not "look like you were going to be a violent suspect," was made after the fact, by a non-defendant officer. The majority provides no precedent imputing knowledge from a non-party to a party in the context of qualified immunity. Further, Respondent showed no objective symptoms of frailty or physical or mental impairment. She did not complain of any physical conditions—such as bad knees—preventing her from complying. She complied with all commands, demonstrating at least some need for Petitioners' caution. Petitioners only had a visual confirmation that Respondent was unarmed. More importantly, Respondent was driving a reportedly stolen vehicle into a state prison—an area known for vehicle thefts and contraband. The totality of the circumstances known to the Officers at the time objectively did not point to a requirement to use less force than what was used herein, much less no force.

Critically, whether there is a "need" for force goes beyond the physicality of the person and must also consider "the severity of the crime at issue" and "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S.

386 at 396. Respondent did not actively resist arrest or attempt to evade arrest by flight.

But the majority panel waved away the other primary (and non-exclusive) *Graham* factor, stating that "the most important factor" in evaluating a Fourth Amendment claim of excessive force is whether the suspect posed an immediate threat to the safety of the officers or others. *Thomas v. Dillard*, 818 F.3d 864, 889 (9th Cir. 2016). The majority ignored *Thomas*, *Graham* itself, and *Bryan*, 630 F.3d 805 at 826: "These factors are not exclusive; 'we examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." App.2a. Indeed, "the facts underlying the seizure are pertinent in judging the overall reasonableness of the seizure for Fourth Amendment purposes . . ." *Thomas*, 818 F.3d at 890.

The majority acknowledged that the severity of the crime—grand theft auto—is "arguably severe," citing to *Green*, which cites *Lolli v. County of Orange*, 351 F.3d 410, 417 (9th Cir. 2003). App.2a. Accordingly, at least one of the *Graham* factors supported at least some use of force during the investigation of the stolen vehicle.

The overgeneralized use of *Graham* is not disguised by the majority's selective and contradictory citation to *Green*. The majority cites *Green* for the proposition that a stolen vehicle alone was insufficient to make the degree of force used in that case constitutional. However, as the dissent notes, the *Green* Court did not find that any type of force would have been unjustified. Rather, the *Green* Court suggested lower degrees of force the officers could have utilized, including holding their firearms at a "low ready"

position such as the officers did here. It goes against established precedent to hold Petitioners, who followed the direction provided by the court in *Green* on this issue, to have knowingly violated Appellant's constitutional rights and deny them qualified immunity. App.6a.

II. THE MAJORITY PANEL'S DECISION MISCONSTRUED AND MISAPPLIED *GREEN*, WHICH DID NOT CLEARLY ESTABLISH THE UNCONSTITUTIONALITY OF PETITIONERS' ACTIONS IN BRIEFLY DETAINING RESPONDENT

The Ninth Circuit in *Green* did not hold the law was clearly established at the time of the incident. "The burden is on the party contesting qualified immunity to show that a law was clearly established at the time of an alleged violation." *Olivier v. Baca*, 913 F.3d 852, 860 (citing *Davis v. Scherer*, 468 U.S. 183, 197-98 (1984)). Assuming a constitutional violation occurred, Respondent still must demonstrate that the law was "clearly established" at the time. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The law must be established such that "the statutory or constitutional question [is] beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "[W]hether the violative nature of <u>particular</u> conduct is clearly established" must be "undertaken in light of the specific context of the case." *Mullenix*, 577 U.S. at 12 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 194) (italics in original). The correct inquiry is whether the law was clearly established, prohibiting a defendant's conduct <u>in the situation with which they were confronted</u>. *Mullenix*, 577 U.S. at 577; *Brosseau*, 543 U.S. at 201.

As of 2017, the Supreme Court noted a unified history stretching back to 2012 of "reversing federal

courts in qualified immunity cases" for failing to do this. *White v. Pauley*, 137 S.Ct. 548, 551 (2017). In *White*, the Supreme Court again noted the proper qualified immunity analysis involved an understanding of the specific factual circumstances, not general principles of law like citation to one *Graham* factor. *White*, 137 S.Ct. at 551-52. The Supreme Court held that the Tenth Circuit erred because "[i]t failed to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *Id.* at 552 (emphasis added).

Myriad differences exist between *Green*, 751 F.3d 1039 at 1049, a case where the Court refused to grant qualified immunity, and the factual scenario in this case. Unlike the Plaintiff in *Green*, there was no evidence that Respondent had knee problems or difficulty kneeling. While the Plaintiff in *Green* was handcuffed for up to ten minutes, Respondent was only handcuffed for about three minutes. Additionally, unlike in *Green*, the Petitioners here had a confirmed stolen vehicle match and the stop occurred outside of a state prison, a location known for stolen vehicles, weapons, and contraband. App.10a-App.11a. Because of a plethora of factual differences between this factual scenario and *Green*, *Green* does not "squarely govern" the specific facts here. As a result, the majority's decision clearly erred by misapplying *Green* and failing to engage in the required factual analysis.

The specific factual distinctions between this case and *Green* are important because "[u]se of excessive force is an area of law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts

at issue." *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam)). The majority erred by misapplying *Green* and failed to engage in the required factual analysis.

Other than the fact that both cases involve mistaken ALPR hits and mistaken high-risk stops, the cases bear little resemblance to one another. The dissent notes at least three key factual differences: No evidence that Respondent had knee problems or difficulty kneeling; Petitioners did not point their firearms at Respondent while she was handcuffed, but kept them at "low ready," a mitigating degree of intrusion approved of in *Green*; and Respondent was only handcuffed for about three minutes, while the plaintiff in *Green* was handcuffed for up to ten minutes. Thus, the force used in *Green* was "far more intrusive than the force used against" Respondent. App.9a.

The panel dissent also notes key differences between the two stops: Here, the officers had a confirmed stolen vehicle match, and the stop occurred outside of a state prison, a location known for stolen vehicles, weapons, and contraband. App.10a-11a. Moreover, Petitioners did not observe or believe that Respondent had any mental or physical issues requiring an accommodation; she assumed a kneeling position without incident; and did not need assistance standing up.

Because of these clear differences, *Green* does not "squarely govern" the specific facts here, so *Green* did not clearly establish that the Petitioners' use of force against Respondent was unlawful. *Kisela*, 138 S. Ct. at 1153; *Mullenix*, 577 U.S. at 13.

Finally, notwithstanding the foregoing, the Ninth Circuit in *Green* never held that the law in those specific circumstances (distinguishable from those here) was clearly established at the time of the incident. The *Green* Court initially held the question of whether the officer violated plaintiff's rights was an open question, so that the officer could not be granted qualified immunity at summary judgment. *Green*, 751 F.3d at 1052. The *Green* Court then proceeded to the second prong of the inquiry, holding "[i]t was established at the time of the incident that individuals may not be subjected to seizure or arrest without reasonable suspicion or probable cause, especially when the stop includes detention and interrogation at gunpoint, and that highly intrusive measures may not be used absent extraordinary circumstances." *Id.* However, the *Green* Court held there were disputed facts in that case that prevented it from determining whether the officer, "given the specific facts at issue, 'could have reasonably believed at the time that the force actually used was lawful under the circumstances.'" *Id.* (citation omitted). Accordingly, if *Green* itself did not find the law clearly established, then *Green* cannot be relied upon to establish such a principle.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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