NO. 22-1107

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Elise Brown is an elderly woman who weighs about 117 pounds and stands a little over 5 feet tall. On July 7, 2019, officers in the Chino Police Department, including Petitioners Matthew Gregory and Madalyn Briley, mistakenly accused Ms. Brown of driving a stolen car—which she, in fact, owned. They pulled Ms. Brown over, told her to exit her car, and ordered her to show them her hands and her waistband so they could check for weapons. At that point, Petitioners could clearly observe that Ms. Brown was elderly, frail, unarmed, non-threatening, and fully compliant. Despite all this, they forced Ms. Brown onto her knees, stood over her with a gun aimed in her direction, and then handcuffed her. Ms. Brown was terrified, humiliated, and emotionally traumatized by Petitioners' needless mistreatment. Based on those facts, the Ninth Circuit concluded, in an unpublished, non-precedential order, that "a jury could find that it was not reasonable for Defendants to believe that [Ms.] Brown—an 83-year-old, 5'2", 117-pound, unarmed, completely compliant woman—posed any immediate threat."

The question presented is:

Whether this Court should second-guess the Ninth Circuit's highly fact-bound determination that Petitioners were not entitled to qualified immunity when they forced an elderly, compliant, unarmed, and non-threatening woman onto her knees, stood over her with a loaded gun aimed in her direction, and handcuffed her for no legitimate reason.

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INTRODUCTION

On the morning of July 7, 2019, Respondent Elise Brown was driving her dark blue Oldsmobile when she was suddenly pulled over by City of Chino police officers. The officers, including Petitioners Matthew Gregory and Madalyn Briley, believed that Ms. Brown had stolen the vehicle she was driving. They were wrong. Ms. Brown was the lawful owner of her car, and the vehicle that had been reported stolen (which also belonged to Ms. Brown) was a different year, model, and color.

Petitioners did not bother to reconcile that discrepancy. Instead, they treated Ms. Brown like a dangerous criminal. They instructed her to pull over, exit her vehicle, show them her hands and her waistband, and walk back toward them. Ms. Brown obeyed all their commands. She did not try to flee or resist arrest. She had no weapons. She made no threats. She was alone and outnumbered at least 7-to-1. She peacefully surrendered herself to the officers. And she was fully visible to Petitioners, who could easily see that she was a small, short, elderly woman.

Confronted with those facts, any reasonable officer would have known that Ms. Brown posed no threat to officer or public safety and would have concluded that any use of force was therefore unnecessary. But not Petitioners. They trained their guns on Ms. Brown at various times, they forced her to kneel for almost twenty seconds, and then one of the Petitioners handcuffed her while the other stood above her with his gun drawn and pointed down toward where Ms. Brown was kneeling.

That conduct was not reasonable; it was extraordinarily dangerous and flatly inconsistent with the Fourth Amendment's prohibition on excessive force. The Ninth Circuit agreed and held, in an unpublished order, that Petitioners were not entitled to qualified immunity for their patently unconstitutional conduct. That conclusion was correct and should not be disturbed.

Petitioners nevertheless urge this Court to review the decision below. But they fall far short of satisfying the usual criteria for certiorari. They do not allege any split among the federal appellate courts or state high courts. Nor do they identify an important or recurring question of federal law requiring this Court's intervention. Instead, Petitioners ask this Court to engage in highly fact-bound error correction of a narrow, non-precedential decision that is not infected by error. In service of that improper request, they misconstrue the summary judgment record, misstate the relevant law, and misdescribe the Ninth Circuit's ruling. Because Petitioners had fair notice that their conduct was unconstitutional, the Ninth Circuit correctly held that they were not entitled to qualified immunity on Ms. Brown's excessive force claim. The petition for certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

Viewing "the evidence … in the light most favorable to" Ms. Brown (the non-movant), a jury could find that the following events occurred on the morning Petitioners subjected her to excessive force.

Tolan v. Cotton, 572 U.S. 650, 657 (2014) (per curiam).

On July 7, 2019, Respondent Elise Brown—an 83-year-old woman with a small, "frail" frame—was driving through the City of Chino in her dark blue 1991 Oldsmobile Touring Sedan. *See* ER16-17, 19, 251. Ms. Brown also owned another car, a cream-colored 2001 Oldsmobile Aurora, which she had reported as stolen. Pet.App.19a; ER100-01, 104.

As Ms. Brown drove past a state prison in her dark blue Oldsmobile, an automated license plate reader mistakenly identified Ms. Brown's dark blue car as stolen. ER16-17, 104. Although the vehicle Ms. Brown had reported as stolen was a different color, year, and model than the car she was driving that day, Sergeant Joseph McArdle, Officer Madalyn Briley, and Officer Matthew Gregory made no attempt to reconcile that discrepancy. ER100-01, 104. Instead, the officers treated Ms. Brown as if she were a dangerous thief and decided to execute a "high-risk" stop of the dark blue car Ms. Brown was driving. *See* Pet.App.20a; ER19. Ms. Brown pulled over her car immediately, complied fully with the officers' commands, and never attempted to flee throughout the entire encounter. Pet.App.20a-22a.

Before initiating the stop, Sergeant McArdle observed that Ms. Brown was the only person in the car and transmitted that information to the other officers, including Petitioners, over the police radio. ER23, 104-05. After Ms. Brown stopped her car (as instructed), the officers exited their service vehicles, drew their firearms, and stood behind their car doors with their guns pointed at Ms. Brown's car while

they waited for backup. Pet.App.20a. The officers did not observe any movement in the car indicating the presence of other occupants. ER108-09.

Once backup arrived, Officer Briley began issuing a series of commands to Ms. Brown. Pet.App.20a. Officer Briley first instructed Ms. Brown "to turn off the vehicle; to throw the keys outside of the window; to stick both hands outside of the window; to open the car door from the outside of the vehicle with her left hand; and to step outside of the vehicle facing away with her hands up." Pet.App.20a-21a. Ms. Brown complied with these directives and peacefully exited the vehicle as instructed. ER105. She was in full view of Petitioners, who had ample opportunity to see that she was elderly, small in size, and frail. *See* ER52, 65, 105. Seeking to inject an officer-friendly gloss on the facts, Petitioners assert that Ms. Brown appeared to be "in her 50s or early 60s." Pet. at 4. But, as the District Court acknowledged, that fact was hotly contested—especially since Sergeant McArdle (who had the same vantage point as Petitioners) stated that the person who exited the car was an "old female." Pet.App.22a; *see also* ER30, 52, 65, 105.

Officer Briley next instructed Ms. Brown to "lift the collar of her shirt with her right hand to reveal her waistband[] and to turn around in a circle to reveal her entire waistband area." Pet.App.21a. Officer Briley also instructed Ms. Brown "to walk back toward the sound of her voice." *Id.* Again, Ms. Brown fully complied with Officer Briley's commands. Pet.App.22a. As she walked back toward Petitioners, none of the officers on the scene observed any indication that Ms. Brown was armed or dangerous. *See*

ER106. Sergeant McArdle testified that he told Brown, "obviously, you do not look like you were going to be a violent suspect." Pet.App.3a n.2. Despite this, Officer Briley kept her gun aimed at Ms. Brown. Pet.App.21a; ER31-32, 106. Meanwhile, another officer on the scene (Officer T. Scott) pointed a 40mm launcher, which resembled a shotgun, at Ms. Brown, ER106, and Officer Gregory kept his firearm in the low-ready position, Pet.App.21a. In total, there were at least seven police officers (including Petitioners) present at the scene during the police stop. Pet.App.22a.

As Officer Briley closed in on Ms. Brown, she holstered her gun and grabbed her handcuffs. Pet.App.21a. At this point, Officer Gregory started giving commands. *Id.* Officer Gregory initially "considered not ordering Plaintiff to get on her knees" because he understood that he was not required to do so and could have "safely [] taken" Ms. Brown "into custody" while she was standing. *See* Pet.App.21a-22a; ER107. Ultimately, however, Officer Gregory ordered Ms. Brown to get on her knees while Officer Briley handcuffed her. Pet.App.21a-22a.

Again, Ms. Brown complied and knelt on the ground for almost 20 seconds. *Id.* Officer Briley then proceeded to handcuff Ms. Brown while Officer Gregory stood over her with his gun aimed down in her direction. Pet.App.21a; ER33-34, 108. Petitioners kept Ms. Brown in handcuffs for "approximately three minutes," Pet.App.22a—even though Ms. Brown was not armed or violent, made no threats, committed no crime, and did not attempt to flee or resist, ER108-09. Eventually, other officers on the

scene realized that Ms. Brown had not stolen her own car and released her from custody. Pet.App.22a. But the damage had been done: Ms. Brown was terrified, humiliated, and emotionally traumatized by Petitioners' reckless conduct. ER109.

B. Procedural History

1. Ms. Brown sued the County of San Bernardino, the City of Chino, and Petitioners under 42 U.S.C. § 1983 in the United States District Court for the Central District of California.[1] Ms. Brown alleged (among other claims) that Petitioners violated her constitutional rights under the Fourth Amendment by (1) unlawfully seizing, detaining, and arresting her, and (2) deploying excessive force against her.

2. Petitioners moved to dismiss the unlawful arrest and excessive force claims. *Brown v. Cnty. of San Bernardino*, No. 5:20-cv-1116, 2021 WL 4497882, at *1 (C.D. Cal. May 21, 2021). The District Court denied the motion on those claims. *Id.* The court rejected Petitioners' qualified immunity defense at the pleadings stage, *id.* at *4, and further held that Ms. Brown alleged "a plausible claim that the officers unreasonably and unlawfully detained her," *id.* at *5.

At summary judgment, the District Court changed course and held that Petitioners were entitled to qualified immunity on both Fourth Amendment claims. Pet.App.18a-31a. The court

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[1] Ms. Brown and the County of San Bernardino entered a settlement in good faith, which the District Court approved. Pet.App.14a-17a. In addition, the District Court dismissed Ms. Brown's municipal liability claims against the City. Pet. at 6. The County and the City are not parties before this Court.

concluded that, even assuming Petitioners violated Ms. Brown's constitutional rights, existing law was not sufficiently "clearly established" to defeat qualified immunity. Pet.App.30a.

3. On appeal, the Ninth Circuit reversed the District Court's ruling that Petitioners deserved qualified immunity on Ms. Brown's excessive force claim. Pet.App.4a-5a.[2]

First, the Court of Appeals held that, under the well-established *Graham* factors, "a jury could find that it was not reasonable for [Petitioners] to force [Ms.] Brown to her knees and handcuff her." Pet.App.3a. The Ninth Circuit explained that, after Ms. Brown "complied immediately with all instructions, the officers confirmed she was not armed, and 'there was no indication at the scene that [she] posed an immediate threat to the safety of the officers or others.'" *Id.* (quoting *Green v. City & Cnty. of San Francisco*, 751 F.3d 1039, 1050 (9th Cir. 2014)). The Court acknowledged that "the crime at issue (stolen vehicle or plates)" was "arguably severe," but found that Ms. Brown "was not resisting arrest or attempting to evade arrest by flight." *Id.* Based on these facts, the Ninth Circuit reasoned that "a jury could find that it was not reasonable for [Petitioners] to believe that [Ms.] Brown—an 83-year-old, 5'2", 117-

[2] The Ninth Circuit affirmed the District Court's determination that Petitioners were entitled qualified immunity on Ms. Brown's unlawful arrest claim. Pet.App.4a. That claim is not at issue here.

pound, unarmed, completely compliant woman—posed any immediate threat." *Id.*

Second, the Ninth Circuit concluded that Petitioners violated Ms. Brown's "clearly established" rights. *Id.* In reaching that conclusion, the Court of Appeals identified two clearly established legal principles based on existing Supreme Court and Ninth Circuit precedent: (1) "When the *Graham* factors 'do not support a need for force, *any* force used is unconstitutionally unreasonable,'" *id.* (quoting *Green*, 751 F.3d at 1049); and (2) "'the crime of vehicular theft … without more, does not support a finding that the suspect pose[s] a threat' justifying the use of force when the suspect is outnumbered, unarmed, and compliant," *id.* (quoting *Green*, 751 F.3d at 1049-51). Because Petitioners contravened those clearly established principles, the Court of Appeals held that the District Court erred in granting qualified immunity to Petitioners on Ms. Brown's excessive force claim. Pet.App.3a-4a. Judge Nelson dissented. Pet.App.6a-11a.

4. Petitioners requested panel rehearing and rehearing *en banc*—raising the same exact arguments they now advance in their petition. Pet. at 8. That request was denied, with only a single judge (Judge Nelson) voting to grant rehearing. Pet.App.32a-33a.

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAIL TO IDENTIFY ANY BASIS TO GRANT CERTIORARI

Petitioners offer no compelling reason for this Court to review the Ninth Circuit's non-precedential ruling. They fail to allege a conflict among the federal Circuits or state courts of last resort. (Tellingly, the petition does not cite a single decision from any state court or any federal Court of Appeals other than the Ninth Circuit.) They fail to identify any important or recurring question of federal law in need of this Court's resolution. And they fail to show that the decision below was so egregiously wrong that it warrants "the extraordinary remedy of summary reversal." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 512-13 (2001) (Stevens, J., dissenting).

Instead, Petitioners expressly ask this Court to correct purported errors in the Ninth Circuit's unpublished order. Pet. at 1-3. In particular, Petitioners present two questions for this Court's review: (1) whether the Ninth Circuit erred in holding that the law was "clearly established at the time of the incident," and (2) whether the Ninth Circuit "err[ed] 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." *Id.* at i.

This Court routinely denies similar requests for fact-bound error correction, including in cases involving the denial of qualified immunity in excessive force cases.[3] For good reason: "this Court is not

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[3] *See, e.g.*, *Fox v. Campbell*, No. 22-848, 2023 WL 6377793 (U.S. Oct. 2, 2023) (denying petition seeking fact-bound error correc-

equipped to correct every perceived error coming from the lower federal courts." *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring); *see also* Stephen M. Shapiro et al., Supreme Court Practice § 5.12(c)(3), at 352 (10th ed. 2013) (observing that "error correction … is outside the mainstream of the Court's functions and … not among the 'compelling reasons' … that govern the grant of certiorari"). Petitioners offer no good reason to depart from that settled practice in this case.

In a strained effort to cobble together a certworthy question, Petitioners claim that the decision below jeopardizes "qualified immunity for

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tion of Sixth Circuit's denial of qualified immunity in excessive force case); *Jones v. Kalbaugh*, No. 20-83, 141 S. Ct. 2464 (U.S. Apr. 5, 2021) (denying petition arguing that Tenth Circuit applied clearly established law at too high a level of generality in excessive force case); *Stair v. Jackson*, No. 20-183, 141 S. Ct. 1263 (U.S. Jan. 25, 2021) (denying petition seeking error correction of Eighth Circuit's denial of qualified immunity in excessive force case); *Deasey v. Slater*, No. 19-1085, 141 S. Ct. 550 (U.S. Oct. 13, 2020) (denying petition seeking summary reversal of Ninth Circuit's denial of qualified immunity in excessive force case); *Hunter v. Cole*, No. 19-753, 141 S. Ct. 111 (U.S. June 15, 2020) (denying petition seeking error correction of Fifth Circuit's denial of qualified immunity in excessive force case); *Chung v. Silva*, No. 18-695, 139 S. Ct. 1172 (U.S. Feb. 19, 2019) (denying petition arguing that Ninth Circuit erred by defining clearly established law at too high a level of generality in excessive force case); *Plummer v. Hopper*, No. 18-150, 139 S. Ct. 567 (U.S. Nov. 19, 2018) (denying petition arguing that Sixth Circuit defined constitutional rights at too high a level of generality in excessive force case); *Miller v. Stamm*, No. 16-1155, 582 U.S. 915 (U.S. June 19, 2017) (denying petition seeking error correction of Sixth Circuit's denial of qualified immunity in excessive force case).

police officers who follow their training and protocols." Pet. at 10. Correcting the Ninth Circuit's erroneous decision (they declare) "is a matter of extreme nationwide importance." *Id.* Petitioners exaggerate.

For one thing, the Ninth Circuit's order does not mark a sea change in qualified immunity jurisprudence: the panel faithfully applied Supreme Court and Circuit precedent in concluding that Petitioners' reckless mistreatment of an elderly, frail woman who was unarmed, outnumbered, compliant, and posed no safety threat violated clearly established law. Petitioners merely quibble with the panel's application of settled law to the facts of this case. *See infra* Parts II & III.

For another thing, the Ninth Circuit's narrow decision was highly fact-bound and unpublished. Contrary to Petitioners' suggestion, the decision below did not announce a sweeping new rule governing excessive force claims against all officers in all future cases; rather, the Ninth Circuit rested its holding on the specific circumstances confronting Petitioners when they forced Ms. Brown onto her knees and handcuffed her for no legitimate reason. *See* Pet.App.2a-3a. Thus, any purported errors committed by the panel in reaching that conclusion will not set a dangerous precedent, open the floodgates to relentless litigation against officers, or otherwise "threaten[] to upend police departments' established policies." Pet. at 2. In fact, the Ninth Circuit has already agreed with that assessment of the downstream consequences of the decision below: when Petitioners tried to obtain rehearing *en banc* based on the same

arguments presented in the petition, no Ninth Circuit judge requested an *en banc* vote, and the Court of Appeals denied further review. *See* Pet.App.32a-33a. This Court should do the same.

At bottom, Petitioners invite this Court to engage in splitless, fact-bound error correction where (as explained further below) there is no error—much less manifest error—apparent in the Ninth Circuit's unpublished decision. *See infra* Part III. This Court should reject Petitioners' misguided invitation and deny certiorari.

II. PETITIONERS MISCONSTRUE THE SUMMARY JUDGMENT RECORD

Petitioners' failure to satisfy the traditional criteria for certiorari is reason alone to deny the petition. But Petitioners also commit the cardinal sin of summary judgment: they construe the evidence and draw multiple inferences in favor of themselves (instead of Ms. Brown). As *Tolan v. Cotton* teaches, at summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Tolan*, 572 U.S. at 651 (cleaned up); *see also id.* at 655-56. Petitioners flout this directive throughout the petition, many times over.

First, and most saliently, Petitioners repeatedly assert that Ms. Brown was "in her 50s or early 60s." Pet. at 4; *id.* at 9 ("Petitioners believed they were dealing with a middle-aged woman in her 50s or early 60s … ."); *id.* at 13 ("Petitioners did not know that Respondent was 83 at the time; they believed that she was in her 50s to early 60s." (emphasis in

original)). But the record—viewed in the light most favorable to Ms. Brown—paints a far different picture. As the District Court rightly acknowledged, Ms. Brown "dispute[d]" that Petitioners believed she "was in her fifties or sixties … because Sergeant McArdle, [who was] standing in close proximity to Defendants while [Ms. Brown] got out of her car, stated [she] was an 'old female.'" Pet.App.22a (citing ER34, 52). In addition, the record establishes that, based on her physical appearance as she exited her car, Petitioners knew or should have known that Ms. Brown was not (as Petitioners put it) "middle aged" because she "clearly presented as an older woman." ER63; *see also* ER52, 65, 105, 251-53.

Second, Petitioners claim that "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." Pet. at 4. But the record belies Petitioners' suggestion that they reasonably believed multiple people were in Ms. Brown's car. Properly construed, the evidence shows that, even before Officer Briley started giving commands, Sergeant McArdle was able to see inside the vehicle, ascertain that Ms. Brown was the *only* occupant, and broadcast this information over the radio to Petitioners. *See* ER 23, 104-05. And officer testimony in the record further confirms that Petitioners did not observe any movement in the car indicating the presence of other occupants. ER108-09 (citing deposition of Officer Gregory).

Third, Petitioners try to justify their conduct by claiming that they had a "confirmed stolen vehicle match." Pet. at 16-17; *see also id.* at 3-4, 13. But they

conveniently omit the fact that the year, color, and model of the reported stolen vehicle (a 2001 cream-colored Oldsmobile Aurora) differed significantly from the year, color, and model of the car Ms. Brown drove on July 7, 2019. *See* Pet.App.19a; ER21, 25-27, 100-01. And Petitioners further elide the fact that none of the officers, including Officers Gregory and Briley, made any attempt to reconcile or investigate these obvious discrepancies before stopping Ms. Brown, pointing guns at her, forcing her onto the ground, and handcuffing her. *See* ER100-01, 104. Nor do Petitioners grapple with the fact that, when they forced Ms. Brown to kneel on the ground and handcuffed her while a gun was aimed down in her direction, they knew she was alone, unarmed, outnumbered, and elderly. All these facts undermine Petitioners' preferred narrative that they reasonably believed Ms. Brown was a potentially dangerous thief who presented a potential threat to their safety.

Fourth, in attempting to portray their conduct as objectively reasonable, Petitioners insist (over and over again) that they "in all respects acted consistently with their training, CPD policies," and other protocols. Pet. at 9-10; *see also id.* at i (claiming that Petitioners' "actions also were consistent with department policies and training"); *id.* at 2 (similar); *id.* at 4 (similar); *id.* at 10 (arguing that review is needed to "ensure the protection of qualified immunity for police officers who follow their training and protocols"). But that conclusory assertion is also hotly contested. Evidence in the record demonstrates that Petitioners' actions were not "consistent with Chino PD practices and protocols," which require officers to (1) employ de-escalation alternatives,

(2) holster their weapons when individuals like Ms. Brown pose no threat to safety, (3) consider the demeanor, behavior, age, and health of the suspect in calibrating their conduct, and (4) utilize less intrusive tactics during arrests and seizures. ER66-77 (citing documentary evidence and testimony undermining Petitioners' claim that their conduct complied with training, policies, and protocols); *see* ER25-27 (disputing whether Petitioners' behavior comports with policies and protocols). Petitioners failed to follow those guidelines. *See infra* Part III.

Fifth, Petitioners emphasize that, as Officer Briley handcuffed Ms. Brown, "Officer Gregory kept his sidearm in a 'low-ready' position," Pet. at 5, and further note that both officers "did not point their firearms at [Ms. Brown] while she was handcuffed," *id.* at 17. But the record shows that, as she was handcuffed, "Officer Gregory stood over [Ms. Brown] and brandished his weapon in close proximity to her face, and at a downward angle in the direction of where she was kneeling." ER33-34 (citing bodycam footage and deposition testimony). From that evidence, a jury could easily infer that at least one of the officers was pointing a gun at Ms. Brown during the handcuffing.

Petitioners' persistent attempt to proffer an officer-friendly view of the facts at the summary judgment stage is yet another reason to reject their fact-driven challenge to the decision below. If anything, the factual disputes outlined above further confirm that the Ninth Circuit correctly concluded that Petitioners were not entitled to summary judgment. *See Tolan*, 572 U.S. at 657-60 (vacating

Fifth Circuit's grant of qualified immunity because the court "improperly weigh[ed] the evidence and resolved disputed issues in favor of the moving party" at summary judgment (quotation marks omitted)); *see also Torres v. City of Madera*, 648 F.3d 1119, 1125 (9th Cir. 2011) ("Because the reasonableness standard nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." (cleaned up)).

III. THE DECISION BELOW IS CORRECT

Even if this Court deviated from its ordinary practice and entertained Petitioners' improper request for error correction, the result would be the same. The Ninth Circuit correctly held that a reasonable jury could find that Petitioners violated clearly established law when they forced Ms. Brown onto her knees for approximately twenty seconds, stood over her with a gun aimed where she was kneeling, and handcuffed her for nearly three minutes—even though Petitioners knew (or should have known based on observable facts) that Ms. Brown was elderly and frail, did not have any weapons, was heavily outnumbered, posed no threat to officer safety, was not trying to flee, and fully complied with every officer command. Petitioners offer no convincing basis to disturb that well-reasoned determination.

A. The Ninth Circuit Correctly Held that Petitioners Violated the Fourth Amendment.

As a threshold matter, Petitioners do not meaningfully attack the Ninth Circuit's determination (at the first step of the qualified immunity analysis) that their actions violated the Fourth Amendment. *See* Pet. at i (questions presented focusing exclusively on the "clearly established" prong of qualified immunity); *id.* at 13-18. Rightly so. Viewing the evidence in the light most favorable to Ms. Brown, a jury could easily find that it was unreasonable under the circumstances for Petitioners to force Ms. Brown onto her knees and handcuff her with a loaded gun aimed in her direction. *See* Pet.App.3a.

Ms. Brown's excessive force claim is governed by this Court's multifactor test in *Graham v. Connor*, 490 U.S. 386 (1989). Under *Graham*, courts must ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." 490 U.S. at 397. In conducting that inquiry, courts consider all relevant factors, including (1) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight," (2) "whether [she] poses an immediate threat to the safety of the officers or others," and (3) "the severity of the crime at issue." *Id.* at 396. On balance, these (and other) factors strongly support the Ninth Circuit's conclusion that a jury could find that Petitioners' use of force was objectively unreasonable under the circumstances.

First, it is undisputed that Ms. Brown "was not resisting arrest or attempting to evade arrest by

flight." Pet.App.2a n.1. As soon as she was instructed to stop her car, she complied. Pet.App.20a. As soon as Petitioners ordered her to exit the vehicle, she complied. Pet.App.20a-22a. As soon as Petitioners directed Ms. Brown to show her hands, reveal her waistband, and walk back toward them, she complied. Pet.App.21a-22a. And as soon as Petitioners ordered her to get on her knees, she complied. *Id.* As the Court of Appeals rightly observed, Ms. Brown "was completely compliant with the officers' instructions" and never attempted to resist or flee. Pet.App.2a n.1.

Second, Ms. Brown posed no threat to the officers or others. *See* Pet.App.3a ("[A] jury could find that it was not reasonable for [Petitioners] to believe that [Ms.] Brown … posed any immediate threat."). By the time that Petitioners forced Ms. Brown onto her knees and handcuffed her while one of them aimed a gun in her direction, the officers already knew the following facts:

- Ms. Brown was unarmed. Pet.App.3a.
- Ms. Brown was an elderly woman with a small frame and frail stature. *Id.*; Pet.App.22a; ER52, 65, 105.
- Ms. Brown had peacefully exited her vehicle and followed all officer instructions. Pet.App.20a-22a.
- Ms. Brown was alone, there were no other individuals in the car, and the officers at the scene outnumbered her by (at least) 7-to-1. Pet.App.22a; ER23, 104-05, 108-09.

- Ms. Brown did not make any verbal or physical threats. Pet.App.22a; ER254-55.
- Ms. Brown did "not look like [she was] going to be a violent suspect." Pet.App.3a n.2 (citing testimony of Sergeant McArdle).

In sum, the evidentiary record confirms beyond doubt that "there was no indication at the scene that [Ms. Brown] posed an immediate threat to the safety of the officers or others." *Green*, 751 F.3d at 1050.

Third, even assuming "the crime at issue"—a potential stolen vehicle—has sometimes been treated as "arguably severe," *id.*, Petitioners in this case had ample reason to doubt that Ms. Brown was a dangerous criminal at the time they subjected her to unreasonable force. In fact, Petitioners themselves admit that they "made a mistake of fact" before they decided to execute a "high-risk" stop and treat Ms. Brown as if she were a thief. Pet. at 9, 17. Even though the vehicle Ms. Brown had reported as stolen was a different color, year, and model than the one she was driving on July 7, Petitioners did not even bother trying to probe that discrepancy. ER101-04. And as explained above, by the time they eventually forced Ms. Brown to kneel on the ground and handcuffed her with at least one gun drawn, any conceivable threat had dissipated, since Petitioners knew that she was a small elderly woman who was alone in the car and had complied with their instructions—not a violent, armed, and dangerous criminal. In any event, "[t]he fact that [Ms. Brown] was stopped on suspicion of a stolen vehicle does not by itself demonstrate that she presented a danger to the officers," especially given

the other facts known to Petitioners. *Green*, 751 F.3d at 1048.

Finally, the record indicates that Petitioners could have, but failed to, use less intrusive means to detain Ms. Brown. *See Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010) (holding that use of force was excessive where "there were clear, reasonable, and less intrusive alternatives"); *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (*en banc*) (noting that "an additional factor that [courts] may consider in [the] *Graham* analysis is the availability of alternative methods of capturing or subduing a suspect"). Officer Gregory knew he could have "safely [] taken" Ms. Brown "into custody" while she was standing. Pet.App.21a-22a; ER107. And because Ms. Brown was not resisting arrest and fully complied with all officer commands, there was no legitimate reason to force her onto her knees and handcuff her (while one of them stood over her while aiming a gun down toward where she was kneeling) when far less invasive means were readily available to Petitioners.

Taken together, the relevant facts confirm beyond doubt that a jury could find that Petitioners' use of force against Ms. Brown was objectively unreasonable under the circumstances. *See* Pet.App.3a.

B. The Ninth Circuit Correctly Held that the Unlawfulness of Petitioners' Conduct Was Clearly Established.

Tacitly acknowledging that they cannot credibly defend the constitutionality of their reckless conduct, Petitioners contend that the law was not "clearly

established." *See* Pet. at 11-18. But their arguments miss the mark.

Qualified immunity shields law enforcement officials from liability only when their conduct "does not violate clearly established statutory or constitutional [law]." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (cleaned up). The law is "clearly established" if it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (cleaned up). The clearly established standard does "not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (holding that "cases involving 'fundamentally similar' facts … are not necessary" to meet the clearly established requirement). Nor does the clearly established requirement mean that "official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, to be clearly established, existing precedent need only supply officers with "fair notice that [their] conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

As the Ninth Circuit found, that standard has been met here. *See* Pet.App.3a-4a. Existing precedent clearly established that it was unconstitutional for Petitioners to force an elderly, unarmed, and non-threatening woman to her knees, stand over her with a gun aimed down toward her, and handcuff her after she had exited her car and fully complied with officer commands. *See id.*

The Ninth Circuit's decision in *Green* is instructive. In that case, a police officer pulled over the plaintiff, Denise Green, after her car was mistakenly identified as stolen. 751 F.3d at 1041-43. After backup arrived, the officer performed a "high-risk" stop and directed Green to pull over. *Id.* at 1043. Green "immediately complied." *Id.* As Green exited the vehicle, she saw at least four officers with guns drawn (including one officer who pointed a shotgun at her). *Id.* One of the officers ordered Green "to lower to her knees where he proceeded to handcuff her" while other officers aimed their guns at her. *Id.* Green had some difficulty lowering to the ground and standing back up. *Id.*

On those facts, the Ninth Circuit held that the officer who forced Green to kneel and then handcuffed her was not entitled to summary judgment on Green's excessive force claim. *Id.* at 1049-53. Applying the *Graham* analysis, the court observed that (1) Green "was compliant with the directions of law enforcement" and did not "actively resist[]" arrest; (2) she posed no danger or threat to the officers; (3) she was "considerably outnumbered"; (4) the suspected crime of vehicular theft, though "arguably severe," was not "enough in itself to support a finding that Green posed an immediate threat"; and (5) officers could have used "less intrusive alternatives." *Id.* at 1049-50. Based on these considerations, the Ninth Circuit concluded that "a rational jury could find that the [officer's] tactics amounted to excessive force." *Id.* at 1051. When the *Graham* factors "do not support a need for force," the court made clear, "'*any* force used is constitutionally unreasonable.'" *Id.* at 1049 (quoting

Lolli v. Cnty. of Orange, 351 F.3d 410, 417 (9th Cir. 2003)).

Green should have put Petitioners on notice that their actions were unconstitutional. Like the plaintiff in *Green*, Ms. Brown complied with officer commands, posed no danger to officers, was outnumbered 7-to-1, and was pulled over on suspicion of vehicular theft. Pet.App.2a-3a, 22a. Given Ms. Brown's elderly age, the jury could infer that Petitioners knew she had difficulty kneeling (similar to the plaintiff in *Green*). *See* ER252. And like the officer in *Green*, Petitioners here eschewed less intrusive means and forced Ms. Brown onto her knees and handcuffed her while one of them aimed his gun downward where she was kneeling. Under these circumstances, Petitioners should have adhered to the clearly established principle that when the *Graham* factors do not support the use of force, "*any* force used is unconstitutionally unreasonable." *Green*, 751 F.3d at 1049 (internal quotation marks omitted).

Despite these stark similarities, Petitioners claim (at 16) that there are "[m]yriad differences" between this case and *Green*. But many of those supposed "differences" are premised on Petitioners' preferred version of the facts. For instance, Petitioners assert (at 17) that none of the officers pointed their guns at her and that she had no difficulty kneeling. Construed in Ms. Brown's favor, however, the record shows otherwise. The jury could find that Ms. Brown, as an elderly and frail woman, found it difficult to kneel. And the jury could also infer from the testimony and video footage in the record that at

least Officer Gregory pointed his gun at Ms. Brown when he "stood over [her] and brandished his weapon in close proximity to her face, and at a downward angle in the direction of where she was kneeling." ER33-34. In addition, the record shows that other officers pointed their guns at Ms. Brown while she was in custody. ER106-07.

The other distinctions cited by Petitioners make no difference. They say Ms. Brown was handcuffed for three minutes (instead of ten minutes like the *Green* plaintiff). Pet. at 5. But *Green* did not purport to limit its holding to circumstances in which a compliant, non-threatening plaintiff is forced to kneel and then handcuffed for ten minutes or more. 751 F.3d at 1050. The same holds true for Petitioners' passing (and immaterial) observation that the events in *Green* unfolded in a city rather than near a prison. Pet. at 17. By the time Petitioners gratuitously forced Ms. Brown onto her knees and handcuffed her while a loaded gun was pointed toward where she was kneeling, they knew Ms. Brown posed no immediate danger—she was alone, elderly, small, unarmed, and fully compliant. In the end, Petitioners' efforts to distinguish *Green* based on minor factual variations fall flat. For as this Court has stressed, "cases involving 'fundamentally similar' facts … are not necessary" to meet the clearly established requirement. *Hope*, 536 U.S. at 741.[4]

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[4] Petitioners also contend (at 18) that *Green* did not "clearly establish" any law because the court in *Green* simply concluded that a jury must ultimately decide whether the officer engaged in excessive force. But that is true for *any* decision in which summary judgment is denied based on disputed material facts.

Even if *Green* alone did not clearly establish the unconstitutionality of Petitioners' actions, many other Ninth Circuit cases confirm that Petitioners' use of force was objectively unreasonable.

Take, for starters, the Ninth Circuit's decision in *Liberal v. Estrada*. 632 F.3d 1064 (9th Cir. 2011), *abrogated on other grounds by Hampton v. California*, 83 F.4th 754 (9th Cir. 2023). In *Liberal*, the officers stopped and frisked the plaintiff, used force to extract him from his car, and handcuffed him. *Id.* at 1079. Although the officers had "legitimate safety and security concerns" and believed the plaintiff was acting evasively "to cover up criminal activity," the Ninth Circuit held that the officers' use of force violated clearly established law where (as here) the plaintiff "was not 'actively' attempting to evade arrest by flight," there "was no evidence to suggest that [the] [p]laintiff was either armed or dangerous," and the plaintiff "was complying with the officer's" commands. *Id.* at 1078-79.

Robinson v. Solano County provided Petitioners with further notice that their conduct exceeded the

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Petitioners cite no authority whatsoever for the sweeping proposition that such decisions do not count as clearly established precedent for purposes of qualified immunity. *Green* concluded in no uncertain terms that "a rational jury could find that the tactics [employed by the officer] amounted to excessive force." 751 F.3d at 1051. Petitioners do not (and cannot) explain why that conclusion failed to afford them with fair notice that their conduct was unlawful. Beyond that, *Green* cited other clearly established Ninth Circuit precedent finding "excessive force under similar circumstances." *Id.* at 1050 (citing cases).

bounds of the Fourth Amendment. 278 F.3d 1007 (9th Cir. 2002) (*en banc*). In that case, the Ninth Circuit clearly established that "pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger." *Id.* at 1015. Although the court recognized that the "plaintiff had earlier been armed with a shotgun that he used to shoot [a] neighbor's dogs," it nevertheless found that plaintiff alleged a viable excessive force claim where (as here) "the suspect was apparently unarmed and approaching the officers in a peaceful way," "[t]here were no dangerous or exigent circumstances apparent at the time of the detention, and the officers outnumbered the plaintiff." *Id.* at 1014.

Relying on *Robinson* as clearly established precedent, the Ninth Circuit in *Hopkins v. Bonvicino* held that officers engaged in excessive force when they barged into the home of the plaintiff (who was reportedly intoxicated) with their guns drawn and handcuffed the plaintiff. 573 F.3d 752, 760-62, 773, 776 (9th Cir. 2009). In support of that conclusion, the court explained that the officers outnumbered the plaintiff (by 2-to-1) and knew that plaintiff "was unarmed" and "did not pose a threat to anyone." *Id.* at 777.

These cases provided Petitioners with sufficient notice that their use of force against Ms. Brown was objectively unreasonable. In each of those cases (as in this one), the officers outnumbered an unarmed, compliant suspect who posed no immediate threat to the safety of officers or the public. And in each case

(as in this one), the officers nevertheless deployed force by handcuffing and/or pointing a gun toward the non-threatening individual. If anything, this case presents an easier call than *Liberal*, *Robinson*, and *Hopkins*. Unlike the plaintiff in *Liberal*, Petitioners did not have "legitimate safety and security concerns" or believe Ms. Brown was acting evasively to cover up criminal activity. *Liberal*, 632 F.3d at 1078-79. Unlike the plaintiff in *Robinson*, Ms. Brown (who was clearly unarmed) did not brandish a shotgun or shoot at animals. *Robinson*, 278 F.3d at 1014. And unlike the plaintiff in *Hopkins*, Ms. Brown was outnumbered by at least 7-to-1 and was forced to kneel on the ground (in addition to being handcuffed while one of the Petitioners stood over her with a gun drawn). *See Hopkins*, 573 F.3d at 759-60, 777.

If the officers in *Liberal*, *Robinson*, and *Hopkins* acted unreasonably, it follows *a fortiori* that Petitioners here acted unreasonably when they forced the compliant, unarmed Ms. Brown onto her knees and handcuffed her as one of them aimed a gun in her direction. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 481 (9th Cir. 2007) (stating the clearly established principle "that force is only justified where there is a need for force"); *Orr v. Brame*, 727 F. App'x 265, 267 (9th Cir. 2018) (holding that officer's use of non-deadly force against a 76-year-old man was excessive where the man "posed no immediate threat to the officers or anyone else" and "pleaded with the officers not to handcuff him," even though he "passively resisted" arrest (cleaned up)).

If those Ninth Circuit cases were not enough, analogous authority from other Circuits further

confirms that Petitioners' actions were unconstitutional. *See District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (noting that courts may look to persuasive authority in conducting clearly established inquiry). For instance, the Tenth Circuit denied qualified immunity to an officer who deployed non-deadly force against a "large man" who was suspected of assault but "posed little immediate threat to the safety of the officers," "carried no weapon, made no overt threats," and "was neither resisting arrest nor attempting to flee." *Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir. 2012). And in 2016, the First Circuit held that "the state of the law was clear such that a reasonable officer … would have understood that pointing [a] loaded assault rifle at the head of a prone, non-resistant, innocent person who presents no danger, with the safety off and a finger on the trigger, constituted excessive force in violation of that person's Fourth Amendment rights." *Stamps v. Town of Framingham*, 813 F.3d 27, 39-40 (1st Cir. 2016); *accord Baird v. Renbarger*, 576 F.3d 340, 347 (7th Cir. 2009) (denying qualified immunity where "a reasonable jury could find that [an officer] violated the plaintiffs' clearly established right to be free from excessive force when he seized and held them by pointing his firearm at them when there was no hint of danger").

In the face of this mountain of on-point precedent, Petitioners offer nothing—not a single case from this Court or any Circuit that would justify or otherwise support the constitutionality of Petitioners' specific actions. That silence speaks volumes and firmly demonstrates that further review would be wholly inappropriate in this case. Because existing

precedent made clear that Petitioners' conduct was objectively unreasonable, the Ninth Circuit's decision was correct.

Lastly, even if prior case law did not clearly establish the constitutional violation here, Petitioners' reckless actions make this the "'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 583 U.S. at 64; *see Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam). A reasonable officer would have known (and found it obvious) that it was unconstitutional to force an elderly, unarmed, and outnumbered woman to kneel on the ground for almost half a minute, to stand over her with a gun aimed in her direction, and to handcuff her—even after she had peacefully exited her vehicle, promptly complied with officer commands, and demonstrated to the officers that she did not present an immediate danger or flight risk.

C. Petitioners' Remaining Arguments Are Unavailing.

In a last-ditch effort to shore up their request for fact-bound error correction, Petitioners accuse the Ninth Circuit of making three mistakes. Those accusations are baseless.

First, Petitioners contend (at 11) that the Ninth Circuit flouted this Court's admonition "not to define clearly established law at a high level of generality." But the Ninth Circuit did no such thing. Consonant with this Court's guidance, the decision below addressed the specific facts and context surrounding

Petitioners actions and concluded that existing precedent made it clear that those actions fell beyond the constitutional pale. *See* Pet.App.2a-4a.

Petitioners' contrary argument ultimately boils down to a single faulty premise: that this case is not identical to any prior one. But that has never been the law. As this Court has emphasized, time and again, the touchstone of qualified immunity is "fair notice." *Brosseau*, 543 U.S. at 198. That is why plaintiffs need not identify "a case directly on point" to defeat qualified immunity. *al-Kidd*, 563 U.S. at 741; *Hope*, 536 U.S. at 741; *Anderson*, 483 U.S. at 640; *accord Peroza-Benitez v. Smith*, 994 F.3d 157, 166 (3d Cir. 2021) (noting that excessive force violation may be clearly established "even without a precise factual correspondence between the case at issue and a previous case" (internal quotation marks omitted)); *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019) (explaining that police officers "can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two").

Second, Petitioners contend (at 11) that the Ninth Circuit only addressed one of the *Graham* factors, "while neglecting to substantively analyze the <u>two</u> other factors." That is demonstrably false. Footnote 1 of the Ninth Circuit's order expressly addresses the other *Graham* factors. Pet.App.2a n.1. Because those factors "[were] not disputed," *id.*, the panel (understandably) devoted the balance of its analysis to whether Ms. Brown posed a threat to officer safety, Pet.App.2a-3a. At any rate, if this Court were to conduct the *Graham* analysis in the first instance, the relevant factors would overwhelmingly support

the conclusion that Petitioners' use of force against Ms. Brown was objectively unreasonable. *See supra* Part III.A.

Finally, Petitioners fault the Ninth Circuit for "using facts ... not known to the Petitioners at the time" they deployed force against Ms. Brown. Pet. at 9. Wrong again. To be sure, Petitioners insist that they did not know Ms. Brown was elderly and instead believed she was "in her 50s to early 60s." *Id.* at 13. But that factual assertion is disputed. Pet.App.22a; *see also, e.g.*, ER52 (disputing that Ms. Brown appeared to be in her 50s or 60s). The evidentiary record shows that Sergeant McArdle described Ms. Brown as an "old female" and that Ms. Brown "clearly presented as an older woman." ER52, 63. At summary judgment, all inferences must be drawn in Ms. Brown's favor (and against Petitioners). Thus, the Ninth Circuit committed no error when it viewed the evidentiary record in the light most favorable to Ms. Brown with respect to what Petitioners knew (or should have known) about her age and appearance after they had observed her on the scene.

* * *

In sum, clearly established precedent gave the Petitioners fair notice that their careless mistreatment of Ms. Brown violated the Fourth Amendment. But even if this Court harbored some lingering doubt about the correctness of the decision below, that would not justify the harsh and extraordinary remedy of summary reversal. "A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law

is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) ("Summary reversals of courts of appeals are unusual under any circumstances."). This case does not clear that high bar.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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