No. _____

In The
Supreme Court of the United States

COUNTY OF RIVERSIDE; DAN PONDER,

Petitioners,

v.

ESTATE OF CLEMENTE NAJERA-AGUIRRE; J.S.; A.S.; Y.S.,

Respondents.

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

Sergeant Dan Ponder responded to radio reports that a male suspect was hitting mailboxes, breaking car windows and threatening a woman and her baby. At the scene, Clemente Najera-Aguirre was standing outside a house's wrought-iron fence armed with a wooden club in his right hand that was pointed toward the ground. The side door to the house was shattered, broken glass was scattered, and one of the residents may have been bleeding. Sergeant Ponder drew his gun in a low-ready position and ordered Najera to drop the club. Najera ignored commands to drop the club and Sergeant Ponder deployed pepper spray, which had no effect on Najera. Sergeant Ponder sprayed Najera with pepper spray a second time, after which Najera held the club in his hand pointed up or in a "batter's stance," facing Sergeant Ponder about fifteen feet away. Sergeant Ponder fired six shots at Najera, who died at the scene.

The questions presented are:

1. Did the Ninth Circuit's panel decision denying qualified immunity contravene this Court's mandate that courts should not hold officers to a standard of clearly established law at too high a level of generality and must give particularized consideration to the facts and circumstances of the case, which here involved undisputed facts that, *after* the officer's pepper spray deployments failed to overcome Najera's threats or gain his compliance, and

QUESTIONS PRESENTED—Continued

just before shots were fired, Najera was holding a club in an upright position within striking range, facing the officer and posing an immediate threat not only to the officer, but also to bystanders present at the scene in the moments preceding the shooting?

2. Can qualified immunity be denied where no Supreme Court precedent supports the panel decision; and, even assuming circuit precedent may be relied upon in the absence of such precedent, Ninth Circuit precedent exists where that circuit granted qualified immunity and found no constitutional violation involving substantially similar facts (e.g., a sword held upright from a non-advancing subject)? *See Blanford v. Sacramento Cnty.*, 406 F.3d 1110 (9th Cir. 2005).

PARTIES TO THE PROCEEDINGS

Petitioners the County of Riverside and Sergeant Dan Ponder were defendants in the district court and appellants in the Ninth Circuit.

Respondents the Estate of Clemente Najera-Aguirre, J.S., A.S., and Y.S. were plaintiffs in the district court and appellees in the Ninth Circuit.

There are no publicly held corporations involved in this proceeding.

RELATED CASES

1. *The Estate of Clemente Najera-Aguirre, et al. v. County of Riverside, et al.*, No. ED CV 18-762-DMG (SPx), U.S. District Court for the Central District of California. Order denying petitioners' motion for summary judgment entered November 15, 2019.

2. *The Estate of Clemente Najera-Aguirre, et al. v. County of Riverside, et al.*, No. 19-56462, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 24, 2022.

3. *The Estate of Clemente Najera-Aguirre, et al. v. County of Riverside, et al.*, No. 19-56462, U.S. Court of Appeals for the Ninth Circuit. Order denying panel rehearing and rehearing en banc entered June 10, 2022.

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INTRODUCTION

Over the past two years, the amount of violent crimes committed throughout the United States has increased dramatically in the categories of homicides and gun violence. Currently, the homicide rate for the first half of 2022 is thirty-nine percent higher than the rate during the first half of 2019 before the COVID-19 pandemic struck.[1] While the cause of this deeply concerning trend is highly debated, whether it be disruptions and desperation from the ongoing pandemic, efforts to reduce policing, changes in pretrial detention laws and practices, or access to firearms, to name a few, one constant emerges: police officers are more and more frequently encountering dangerous and volatile situations in the field, which require them to determine the level of threat a suspect poses, and the proper amount of force to employ against that suspect, while under intense pressure.

Police officers are the first line of defense in ensuring the safety of our communities, and qualified immunity, in turn, ensures an officer's ability to do his or her job on a daily basis, by limiting civil liability for reasonable mistakes an officer may make in the field

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[1] Richard Rosenfeld et al., *Pandemic, Social Unrest, and Crime in U.S. Cities: Mid-Year 2022 Update*, Council on Criminal Justice (July 22, 2022), at 6, https://secure.counciloncj.org/np/viewDocument?orgId=counciloncj&id=2c918083823e4147018241b683430050; Ames Grawert & Noah Kim, *Myths and Realities: Understanding Recent Trends in Violent Crime*, Brennan Center for Justice (July 12, 2022), https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime.

while responding to "circumstances that are tense, uncertain, and rapidly evolving." *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

Without qualified immunity, government officials would not have "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* The qualified immunity inquiry serves to safeguard the rights of suspects while enabling officers to use force when necessary with the knowledge that they will not later be subjected to civil penalties. Qualified immunity is thus "important to 'society as a whole.'" *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam).

In order to lend much needed clarity and a modicum of predictability to the inquiry, this Court has articulated standards for applying qualified immunity that repeatedly reject the highly generalized approach used in this case, as to whether the officer's use of force was excessive under the Fourth Amendment, in favor of examining the specific context of the case. *Ashcroft*, 563 U.S. at 742. Consequently, this Court has held the "objectively reasonable" *Graham v. Connor*, 490 U.S. 386, 397 (1989) test—without more—is far too general in most cases. *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015).

Contrary to this Court's directives, the Ninth Circuit denied petitioners Sergeant Dan Ponder and County of Riverside (collectively, "petitioners")

summary judgment on the ground of qualified immunity based on an overly generalized and broad analysis that deemed the use of force to be obviously excessive. Further, the Ninth Circuit erroneously ruled the law was clearly established that Sergeant Ponder's use of force under these circumstances violated the law. In doing so, the Ninth Circuit improperly relied upon its own dissimilar precedent, despite the existence of contrary applicable precedent, and upon this Court's broad holding in *Tennessee v. Garner*, 471 U.S. 1 (1985), which may only be invoked in "obvious cases" under circumstances not present here. Thus, the Ninth Circuit held it was a triable issue as to whether petitioner Sergeant Ponder used excessive force in violation of Clemente Najera-Aguirre's ("Najera") Fourth Amendment rights when Sergeant Ponder shot Najera six times after facing off against Najera, who was armed with a club, vandalized a neighborhood and threatened a family with his weapon, was unaffected by pepper spray, and refused to stand-down in a manner witnesses viewed as threatening.

When Najera was fired upon, he presented an immediate threat of death or serious bodily injury to Sergeant Ponder. All eyewitnesses to the shooting portion of the incident testified that *after* Sergeant Ponder deployed pepper spray to subdue Najera, which had no effect, Najera held at least one bat-like object in his hand upright (or in a batter's stance) and was less than fifteen feet away from and facing Sergeant Ponder. (1-ER-9; 2-ER-132–40, 182.) All of the eyewitnesses to the shooting further testified Najera held the bat-like

object in a threatening manner. (*Id.*) These are critical and undisputed facts. Yet, the Ninth Circuit determined that not only was there precedent on point demonstrating Sergeant Ponder's conduct was potentially unlawful, but also this was the type of "obvious case" under *Garner*, 471 U.S. 1, 11, where the Sergeant should have known his specific conduct was unlawful even without resort to relevant precedent.

The court's holding, which primarily relied upon *Garner*, 471 U.S. 1, and *Graham*, 490 U.S. 386, undermines the highly particularized qualified immunity inquiry favored by this Court and erodes an officer in the field's ability to predict the appropriate level of force to employ during a life-threatening altercation with a suspect armed with a makeshift weapon.

The issue here is thus profoundly important to society as a whole, due to rising violent crime rates, which bring an increased risk of altercations between suspects and law enforcement, and the need for a clearly delineated qualified immunity inquiry.

This Court's review is urgently needed to clarify that the qualified immunity inquiry must be rooted in the specifics of a particular case and not left to broad generalizations as to the acceptable amount of force an officer may employ when responding to reports of an individual armed with a club who is destroying property and threatening a family. By relying on respondents' unsupported, out-of-context assertions and immaterial factual disputes to deny qualified immunity, the Ninth Circuit's decision reflects a

disturbing circuit trend of focusing on irrelevant or overly generalized facts to deny immunity to deserving law enforcement officers and erroneously compels cases to be tried so as to undermine the protections our civil society relies upon through vigorous law enforcement. This Court should thus grant review now to conclusively bring circuit precedent in line with this Court's precedent in resolving the important question of qualified immunity in excessive force cases.

This Court should also grant review to clarify that Supreme Court precedent, not circuit court precedent, provides the framework for prong two of the qualified immunity analysis involving clearly established law. Confusion on this issue is rampant in the lower courts and it results in unpredictable precedent that erodes the qualified immunity doctrine, as well as the public's confidence in law enforcement and the legal system. Indeed, all too often, the Ninth Circuit relies upon its own, often dissimilar, precedent to determine whether an officer is entitled to qualified immunity. The Ninth Circuit's qualified immunity inquiry should look to whether the precedent of this Court has addressed the specific factual scenario before the circuit—and that inquiry is not satisfied by relying on the highly generalized holdings of *Garner* and *Graham* alone.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion is reported at 29 F.4th 624 and reproduced at App. 1–11. The district court's

order denying petitioners' motion for summary judgment is unreported as set forth at *Estate of Clemente Najera-Aguirre v. County of Riverside*, No. ED CV 18-762-DMG (SPx), 2019 U.S. Dist. LEXIS 229033, 2019 WL 8198273 (C.D. Cal. Nov. 15, 2019) and reproduced at App. 12–38. The Ninth Circuit's order denying panel rehearing and rehearing en banc is unreported and reproduced at App. 39.

JURISDICTION

The district court's order denying summary judgment based on a claim of qualified immunity is a final and appealable decision within the meaning of 28 U.S.C. § 1291. *Plumhoff v. Rickard*, 572 U.S. 765, 771–72 (2014). (App. 12–38.) The Ninth Circuit entered judgment on March 24, 2022, and denied panel rehearing and rehearing en banc on June 10, 2022. (App. 1–11, 39.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in relevant part:

> 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 . . . person . . . 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. . . .

The Fourth Amendment to United States Constitution, which is applicable to the states through the Fourteenth Amendment, provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,. . . .

STATEMENT OF THE CASE

A. Factual Background.

On April 15, 2016, Sergeant Ponder responded to radio reports that a male suspect was hitting mailboxes, breaking car windows and threatening a woman and her baby. (1-ER-7; 2-ER-107–08.) Dispatch described the suspect as wearing tan shorts with a gray sweatshirt wrapped around his neck and carrying a large stick. (1-ER-7–8; 2-ER-111–12.)

When Sergeant Ponder arrived at the scene, the side door to the house was shattered, broken glass was scattered, and one of the residents may have been bleeding. (1-ER-8; 2-ER-98–100, 115–16, 118.) Najera was standing outside the house's wrought-iron fence armed with a wooden club in his right hand that was pointed toward the ground. (1-ER-8; 2-ER-112–14, 116–18, 124–25.) Because Najera was wearing tan shorts with a gray sweatshirt wrapped around his

neck, Sergeant Ponder believed he matched the description of the suspect. (1-ER-8; 2-ER-114.) Sergeant Ponder drew his gun in a low-ready position and ordered Najera to drop the bat-like object. (1-ER-8; 2-ER-114–15, 118–21.)

When Najera did not drop the bat-like object, Sergeant Ponder deployed pepper spray. The pepper spray had no effect on Najera and he did not comply with Sergeant Ponder's commands to drop the club. All eyewitnesses to the next portion of the incident agreed that *after* Sergeant Ponder sprayed Najera with pepper spray a second time Najera held a bat-like object in his hand pointed up or in a "batter's stance." (1-ER-9; 2-ER-132–36, 182.) All witnesses to this part of the incident also agreed that at that point in the sequence of events, Najera appeared to be threatening Sergeant Ponder with the club, facing the Sergeant about fifteen feet away. (1-ER-9; 2-ER-132–34, 149, 151–53.) Believing in that split-second moment that Najera was going to assault and potentially kill him with the bat-like object, Sergeant Ponder fired six shots at Najera; he did not issue a verbal warning. (1-ER-9; 2-ER-142–49, 170, 182–84.)

Although all of the eyewitnesses to the shooting part of the incident testified that Najera was facing Sergeant Ponder and on his feet when *all* of the shots were fired, and although Sergeant Ponder testified that he *aimed* all of his shots at Najera's front center mass, and although at least one shot entered Najera's front chest, some of the shots fired struck Najera in his back, at an angle, as he fell. (1-ER-9–10; 2-ER-146–49,

170, 181–84.) Najera later died from his wounds. (1-ER-10; 2-ER-153–54.)

B. Procedural Background.

Respondents the Estate of Clemente Najera-Aguirre, J.S., A.S., and Y.S. (collectively, "respondents") filed this action in the United States District Court for the Central District of California, alleging two claims under 42 U.S.C. § 1983 against Sergeant Ponder for alleged violations of the Fourth and Fourteenth Amendments and a *Monell* claim against the County of Riverside. Respondents alleged that on or about April 15, 2016, Sergeant Ponder shot and killed Najera in Lake Elsinore, California. Respondents alleged deadly force was not justified because Najera did not display any behavior or take any physical action that would lead a reasonable officer to believe that his or her life, or the life of another, was in danger or in threat of imminent harm at the time Najera was shot. (3-ER-297.) Petitioners moved for summary judgment, which the honorable district court granted in part and denied in part. (App. 12–38.)

The district court granted summary judgment in favor of the County as to respondents' *Monell* claim and in favor of Sergeant Ponder as to respondents' 42 U.S.C. § 1983 claim for intentional interference with familial relations in violation of the Fourteenth Amendment. (1-ER-19, 23; App. 32, 38.) However, the district court denied summary judgment on the ground of qualified immunity as to respondents' 42 U.S.C.

§ 1983 claim against Sergeant Ponder for use of excessive force in violation of Najera's Fourth Amendment rights. (1-ER-17, 23; App. 30, 38.)

Following the district court's partial denial of petitioners' summary judgment motion and qualified immunity defense, petitioners filed a timely interlocutory appeal with the United States Court of Appeals for the Ninth Circuit. The three-judge panel affirmed the district court's order partially denying summary judgment. As a threshold matter, the panel ruled it had jurisdiction over the interlocutory appeal and there was no waiver of Sergeant Ponder's qualified immunity defense. (App. 1–5.)

However, the panel also ruled that several disputed facts existed regarding the level of threat Najera posed before he was shot. According to the panel, it was disputed whether Najera was facing Sergeant Ponder and coming "on the attack" or whether Najera was turned away. (App. 7.) The panel relied on the coroner's report as evidence that Najera was turned away from Sergeant Ponder at the time of the shooting. The coroner's report also purportedly found Najera died from two shots to his back. The manner in which Najera was holding a bat-like object at the time he was shot was also reportedly disputed, according to the circuit court. While the panel did not indicate what evidence it relied upon to reach this finding, the panel ruled there was a dispute as to whether Najera was holding the bat-like object up or down at the time he was shot. (*Id.* at 8.) According to the panel, these disputes of fact demonstrated Najera did not present a threat to Sergeant

Ponder, or any of the bystanders, at the time he was shot. Thus, relying on *Graham*, 490 U.S. 386, the panel held Sergeant Ponder's conduct was not objectively reasonable and his use of excessive force violated the Fourth Amendment. (*Id.*) Analyzing the second prong of the qualified immunity standard—whether the law is clearly established—the panel further held Sergeant Ponder was on notice his conduct was unlawful based on Ninth Circuit precedent and that this was an "obvious case" of a constitutional violation under *Garner*, 471 U.S. 1. (*Id.* at 9.)

Subsequently, petitioners requested panel rehearing and rehearing en banc and urged the panel to reverse the district court's order. The Ninth Circuit denied the petition. (App. 39.)

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Improperly Relied on a High Level of Factual Generality and Did Not Examine the Qualified Immunity Defense in Light of the Specific Context of This Case As This Court Requires.

The Ninth Circuit employed an overly generalized qualified immunity analysis in this case, which is contrary to this Court's decisions in *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam), *Ashcroft*, 563 U.S. 731, 741–42 and *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam), and a "clear misapprehension" of the qualified immunity standard. An officer

will be entitled to qualified immunity when his or her "conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *White*, 580 U.S. at 78–79 (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 577 at 11. "While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *White*, 580 U.S. at 79 (alteration in original). As this Court has frequently admonished the lower courts, and particularly the Ninth Circuit, "'clearly established law' should not be defined 'at a high level of generality.'" *Id.* (quoting *Ashcroft*, 563 U.S. at 742).

Initially, "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 396–97 (defining excessive force as dependent on "the facts and circumstances of each particular case, including 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"); *Garner*, 471 U.S. at 11 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical

harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."). In the decades since *Garner* and *Graham*, the inquiry has evolved and become more particularized. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (per curiam); *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 n.2 (2021) (per curiam).

This Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Ashcroft*, 563 U.S. at 742 (citation omitted). "[T]he clearly established law must be 'particularized' to the facts of the case." *White*, 580 U.S. at 79 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Otherwise, the lower court's reliance on general principles of objective reasonableness enables plaintiffs "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639.

In *Rivas-Villegas*, 142 S. Ct. 4, 8, this Court recently addressed the continued need for specificity when determining whether an officer is entitled to qualified immunity. The officer responded to a 911 call that a woman and her two children were hiding in a room because the woman's boyfriend, who was armed with a chainsaw, was threatening them and trying to saw down the door. The suspect, who was also armed with a knife, eventually left the home of his own volition and was arrested. During the suspect's arrest, the officer briefly placed his knee on the suspect's back. The suspect sued for violation of his Fourth

Amendment rights contending the officer used excessive force. *Id.* at 6–7. The Ninth Circuit held the officer was not entitled to qualified immunity because precedent would have warned him that placing a knee on a cooperating suspect's back during arrest constituted excessive force. *Id.* at 7. This Court granted review and reversed.

In reversing, this Court held that since there was no Supreme Court case on point, the officer was *not* on notice that his "specific conduct" violated the law. *Id.* at 8. A court's inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Brosseau*, 543 U.S. at 198). Indeed, "[s]pecificity is especially important in the Fourth Amendment context" because it may be difficult for an officer in the field to determine how excessive force will apply to the officer's circumstances. *Rivas-Villegas*, 142 S. Ct. at 8. "Precedent involving similar facts can help move a case beyond the otherwise hazy borders between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful." *Id.* at 9 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam)). By emphasizing the need for specificity when evaluating whether an officer's conduct rose to the level of excessive force, this Court rejected the "objectively reasonable" test as the be-all and end-all of the qualified immunity inquiry. Consequently, the "objectively reasonable" test established by *Graham*, 490 U.S. 386, and *Garner*, 471 U.S. 1—*without more*—is an insufficient basis upon

which to deny an officer the defense of qualified immunity. *Brosseau*, 543 U.S. at 199.

Time and again this Court has admonished lower courts that a more particularized inquiry into the specific facts of the case is essential when determining whether qualified immunity attaches. *Rivas-Villegas*, 142 S. Ct. at 8; *Ashcroft*, 563 U.S. at 741–42; *Brosseau*, 543 U.S. at 198; *Saucier*, 533 U.S. at 201. Yet, that is precisely what the Ninth Circuit did *not* do when it decided this was an "obvious case" based on the broad proposition in *Garner*. (App. 9.) The Ninth Circuit applied *Garner*'s "general constitutional rule" to conclude Sergeant Ponder's decision to shoot Najera was objectively unreasonable because Najera posed "no threat" to the officer or to others. *Estate of Aguirre v. Cnty. of Riverside*, 29 F.4th 624, 629 (9th Cir. 2022). (App. 8–9.) The circuit court relied on the very broad statement from *Garner* that "[d]eadly force is not justified '[w]here the suspect poses no immediate threat to the officer and no threat to others.'" (App. 9.) Additionally, the Ninth Circuit relied upon its own precedent rather than that of the Supreme Court to rule it was "'clear to a reasonable officer' that a police officer may not use deadly force against a non-threatening individual, even if the individual is armed, and even if the situation is volatile." (*Id.*) As such, the Ninth Circuit did what it was *not* permitted to do, which was rely on "*Graham*, *Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level." *White*, 580 U.S. at 79.

The Supreme Court has repeatedly reversed or vacated Ninth Circuit opinions that employ this type of erroneous and overly general qualified immunity analysis. *See*, *e.g.*, *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 376–79 (2009); *City & Cnty. of San Francisco v. Rodis*, 555 U.S. 1151 (2009); *Rivas-Villegas*, 142 S. Ct. at 7; *Brosseau*, 543 U.S. at 198. In each case, the Ninth Circuit denied qualified immunity despite the lack of analogous precedent putting the officer on notice that the officer's use of force was unlawful. The Supreme Court has gone so far as to correct the Ninth Circuit's error even where the officer failed to cite to a circuit precedent directly on point. *Redding*, 557 U.S. at 376–79; *Rivas-Villegas*, 142 S. Ct. at 9.

The altercation at issue here involved particularized facts and undisputed evidence that were specific and individualized to this case. The Ninth Circuit erred by deeming this an "obvious case" of unlawful conduct violating the Fourth Amendment. (App. 9.) While it is true that there was a dispute as to whether or not Najera held the club upright *before* the pepper spray, *after* the failed pepper spray and just before shots were fired, among the witnesses who were watching that portion of the event, there was no dispute in the evidence that: (1) Najera held the club upright, in a batter's stance; (2) in a manner the *witnesses* all perceived as threatening to the Sergeant; (3) while standing on his feet and facing Sergeant Ponder; and (4) from a distance of no more than about fifteen feet. (1-ER-9; 2-ER-132–36, 149, 151–53, 182.) The Ninth Circuit's continued use of the highly generalized

"objectively reasonable" test is contrary to the evolution of qualified immunity precedent and warrants review.

B. The Ninth Circuit's Denial of Qualified Immunity Is Wrong and Reflects a Seriously Disturbing Trend to Rely on Imagined Factual Disputes to Deny Summary Disposition.

According to the Ninth Circuit, Najera "presented no threat at all to the officer—or anyone else—in that moment." *Estate of Aguirre*, 29 F.4th at 628. (App. 8.) From this conclusion flowed first the panel's determination that petitioners violated the Fourth Amendment and, second, that this was an "obvious case" ripe for application of the highly generalized *Garner* and *Graham* standards. (*Id.* at 9.)

However, even viewing the evidence in the light most favorable to respondents, it is undisputed that *after* the failed pepper spray, Najera posed a threat to Sergeant Ponder and the family gathered at the scene because Najera held the bat upright and in a threatening manner in the moments *immediately* preceding the shooting. (1-ER-9; 2-ER-132–40, 182.) The panel's conclusion ignored this unanimous eyewitness testimony and instead relied upon respondents' unsupported arguments that were contrary to the evidentiary record in this case, including respondents' reliance on witnesses who had stopped watching the events leading up to and during shots being fired.

"When confronted with a claim of qualified immunity, a court must ask first the following question: 'Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'" *Brosseau*, 543 U.S. at 197 (quoting *Saucier*, 533 U.S. at 201). "Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (quoting Fed. R. Civ. P. 56(a)). Thus, when determining whether to grant summary judgment, the court views the evidence "in the light most favorable to the opposing party." *Id.* at 657. By relying on immaterial and imagined factual disputes, the Ninth Circuit exceeded this directive.

Here, the undisputed *material* facts demonstrated Sergeant Ponder's use of deadly force did not violate the Fourth Amendment as Najera posed an immediate threat not only to Sergeant Ponder, but also to bystanders present at the scene, in the moments immediately preceding the shooting. Sergeant Ponder received dispatch reports of a suspect destroying property and threatening a woman and her baby. (1-ER-7, 107–08.) When Sergeant Ponder arrived at the scene, the side door to a private residence had been shattered and broken glass was scattered throughout the scene. (1-ER-8; 2-ER-98–100, 115–16, 118.) Najera, who matched the description of the suspect, was standing outside the house's fence armed with a wooden club in his right hand that was pointed toward the ground.

(1-ER-8; 2-ER-112–14, 116–18, 124–25.) At that time, Sergeant Ponder drew his gun in a low-ready position and ordered Najera to drop the bat-like object. (1-ER-8; 2-ER-114–15, 118–21.)

Najera did not drop the bat-like object in response to Sergeant Ponder's commands, which caused Sergeant Ponder to deploy pepper spray. (1-ER-8; 2-ER-122–23.) However, the pepper spray had no effect on Najera. (1-ER-8; 2-ER-127–28.) All witnesses to the shooting part of the incident agreed that *after* Sergeant Ponder sprayed Najera with pepper spray a second time, and *immediately before* shots were fired, Najera held the bat-like object in his hand pointed up or in a batter's stance, from no more than fifteen feet away, in a manner the witnesses all viewed as threatening, while standing facing Sergeant Ponder. (1-ER-9; 2-ER-132–36, 182.) It was also undisputed that at least one of the gunshot wounds Najera received was to the front of his chest. (1-ER-9–10; 2-ER-146–49, 170, 181–84.)

Yet, despite this undisputed evidence, apparently in erroneous reliance on witnesses who were not watching the shooting part of the incident, or on forensic evidence showing that some of the shots indisputably *aimed* at Najera's front managed to strike him in his back as he fell in the split-seconds post-firing, the Ninth Circuit concluded that no evidence in the record demonstrated Najera posed a threat at the time he was shot. The court reasoned it was disputed: (1) whether Najera was facing Sergeant Ponder and "on the attack," or was turned away and (2) whether Najera was

holding the bat-like object up or down at the time he was shot. *Estate of Aguirre*, 29 F.4th at 628. (App. 7–8.)

Notably, the Ninth Circuit did not describe the evidence upon which it relied to determine there was a dispute about how Najera held the bat-like object in the moments just *before* shots were fired, nor could it since there was no such evidence.

In opposing petitioners' summary judgment motion, respondents argued that one eyewitness, Monique Tolentino, testified that Najera was not holding anything during the first volley of shots she observed. (1-SER-211–13, 216–17.) However, such argument was unsupported by the evidence: Tolentino's testimony was that she did not observe the relevant events during *any* of the shots fired. Instead, Tolentino only observed Najera standing empty-handed *after* she heard all of the shots had ended. (1-SER-211–12, 299.)

As this Court has noted, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting Fed. R. Civ. P. 56(c)). However, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (footnote omitted)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* "[T]he mere existence of *some*

alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Scott*, 550 U.S. at 380 (emphasis in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)). Therefore, if "opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 550 U.S. at 380.

Even viewing the facts in the light most favorable to respondents, there was no *evidence* showing an actual dispute as to whether the bat was upraised or threatening *at the time the shots were fired*. Put simply, if the Ninth Circuit relied upon Ms. Tolentino to support its finding that there was a factual dispute regarding this moment of the incident, then the court erred. A genuine factual dispute about what happened during a specific moment cannot be based on the testimony of a witness who was not watching that specific moment. Further, there was no evidence showing Najera had turned away from Sergeant Ponder while *all* of the shots were being fired. Rather, the shooting witnesses all testified that Najera was facing Sergeant Ponder and standing upright for *all* of the shots fired, a fact that was corroborated by there being at least one gunshot wound to Najera's chest. (1-ER-9–10; 2-ER-132–34, 146–49, 151–53, 170, 181–84.)

It is thus immaterial that, in a split-second moment after the shots began, *unbeknownst to Sergeant*

Ponder or any other shooting eyewitness, that Najera began to turn away and fall, so as to cause some of the shots aimed at his front to strike his back. This is because it is undisputed in the record that, for all of the shots fired, Sergeant Ponder was aiming at Najera's front center mass, and that Sergeant Ponder and all of the shooting eyewitnesses perceived all of the shots to occur while Najera was still standing and facing the Sergeant, and within seconds. Further, it was undisputed that Sergeant Ponder was unaware of any such turn-away or fall before he ended his trigger pulls.

The evidentiary record thus clearly contradicts the Ninth Circuit's view of the circumstances under which Sergeant Ponder used force against Najera. The purported factual disputes the Ninth Circuit relied upon were unsubstantiated and went far beyond viewing the record in the light most favorable to respondents. *L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020) ("But a court's obligation at the summary judgment stage to view the evidence in the light most favorable to the non-movant does not require that it ignore undisputed evidence produced by the movant.").

Moreover, the Ninth Circuit's recent decisions reflect a disturbing and continued trend of inventing metaphysical doubts as to the material facts of a dispute so as to avoid summary judgment on the ground of qualified immunity. *See*, *e.g.*, *Green v. City & Cnty. of San Francisco*, 751 F.3d 1039, 1049–50 (9th Cir. 2014) (holding summary judgment on excessive force claim not warranted because triable questions remained

regarding: (1) whether the investigatory stop was lawful and (2) even if reasonable suspicion existed, whether the officer's tactics were overly intrusive since the suspect did not pose an immediate threat to the safety of the officers or others); *Glenn v. Washington Cnty.*, 673 F.3d 864, 872–78 (9th Cir. 2011) (holding questions of fact regarding reasonableness of officers' actions precluded summary judgment on excessive force issues); *Smith v. City of Hemet*, 394 F.3d 689, 701–04 (9th Cir. 2005) (reversing summary judgment on excessive force claim because questions of fact allegedly existed whether severity and extent of force was reasonable), *disapproved on other grounds in Lemos v. Cnty. of Sonoma*, 40 F.4th 1002, 1009 (9th Cir. 2022); *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003) (affirming order denying summary judgment on excessive force claim where whether officers made a mistake of fact in shooting undercover officer was disputed).

Review is warranted to reverse and grant summary judgment, where, as is the case here, there are no *genuine* disputes of *material* fact and the factual disputes relied upon by the lower court were conjured from irrelevant and unsubstantiated allegations.

C. This Exceptionally Important Question Is Frequently Recurring and a Source of Confusion in the Lower Courts, Warranting Reliance Only on Supreme Court Precedent.

In her dissent to *Garner*, Justice O'Connor wrote "[t]he Court's silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances." *Garner*, 471 U.S. at 32 (O'Connor, J., dissenting). Justice O'Connor found the majority opinion failed to provide officers with "guidance for determining which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force." *Id.* The dissent was also critical of the majority's refusal to "outline the additional factors necessary to provide 'probable cause' for believing that a suspect 'poses a significant threat of death or serious physical injury,' when the officer has probable cause to arrest and the suspect refuses to obey an order to halt." *Id.* (Citation omitted). Accordingly, Justice O'Connor made the prescient observation that "[the Court] can expect an escalating volume of litigation as the lower courts struggle to determine if a police officer's split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime." *Id.* The reality Justice O'Connor portended in her dissent to *Garner* has come to pass. Whether a suspect holding a bat-like weapon in an upright position poses a threat justifying an officer's use of deadly force is a frequent and recurring question spawned by

the circuits' continued overbroad reliance on *Garner*, which this Court has not weighed in upon.

Some lower courts throughout the United States continue to employ the highly generalized *Graham* and *Garner* standards while others employ the more particularized analysis mandated by this Court. As a court's overly broad and general evaluation of the use of force leads to different results than when the force is evaluated in light of the specific circumstances of the case, inconsistent rulings abound even when lower courts consider facts similar to those at issue here, thus underscoring the necessity of looking only to Supreme Court precedent in evaluating the application of qualified immunity. The issue of whether only Supreme Court precedent can clearly establish law for purposes of 42 U.S.C. § 1983 has not been resolved by this Court. This case, which involves a factual scenario the Supreme Court has not yet ruled upon, is the ideal vehicle to do so.

In a recent decision, this Court left that question open. In *Rivas-Villegas*, 142 S. Ct. 4, 7, this Court stated, "*[e]ven assuming* that controlling Circuit precedent clearly establishes law for purposes of §1983 [sic], *LaLonde* did not give fair notice to Rivas-Villegas." (Emphasis added.) The Court observed that "[n]either [respondent] nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here." *Id.* at 8. Instead, the Court of Appeals relied on its own precedent. The Court reiterated it was "assuming" that circuit precedent can clearly establish law, but did not decide that it can. *Id.*

Existing jurisprudence on clearly established law is conflicting and confusing. The circuit courts have taken increasingly different approaches in their clearly established law analysis, both with respect to the appropriate sources of precedent and the degree of factual similarity required, resulting in vastly different outcomes depending on which circuit the case arises from. This Court's guidance is needed to provide uniformity to the qualified immunity inquiry.

For instance, in *Meyers v. Baltimore County*, 713 F.3d 723 (4th Cir. 2013), the Fourth Circuit reversed summary judgment on the ground of qualified immunity where a mentally ill suspect who had recently engaged in a fight with his brother was pacing inside a house carrying a baseball bat when the officer arrived. Upon entering the house, officers ordered the suspect to drop the baseball bat, but he did not comply, causing the officers to deploy their tasers multiple times. Based on *Graham* and its progeny, the court ruled that since the suspect "did not pose a threat to the officers' safety and was not actively resisting arrest, a reasonable officer . . . would have understood that his delivery of some, if not all, of the seven additional taser shocks" violated the suspect's Fourth Amendment right to be free of excessive force. *Id.* at 735.

But, in *Buchanan v. Gulfport Police Department*, 530 F. App'x 307 (5th Cir. 2013), the Fifth Circuit affirmed summary judgment in favor of the officers, city officials and entities, on the ground of qualified immunity where a suspect was swinging a baseball bat at vehicles, was ordered by officers to drop the bat or

be tased, eventually placed the bat on the ground, but refused to step away from the bat and instead leaned towards the bat. Officers tased the suspect twice. The suspect picked up the bat, raised it above his head and charged an officer, which prompted two officers to shoot the suspect. *Id.* at 309. Pursuant to *Graham*, the court ruled the plaintiff-suspect did not create a genuine dispute of material fact "whether [the officer] was not justified in believing [the suspect] posed a threat of serious harm and for whether his use of deadly force was unreasonable" when "viewing the situation from the requisite perspective of a reasonable officer at the scene, forced to make a split-second decision." *Id.* at 315.

The Tenth Circuit in *Hastings v. Barnes*, 252 F. App'x 197 (10th Cir. 2007) and *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019), denied summary judgment on the ground of qualified immunity where officers shot and killed emotionally distraught individuals who were armed with a Samurai sword and a baseball bat, respectively. In both cases, the court ruled the officers escalated the situation resulting in the employment of deadly force against the unstable individuals. 252 F. App'x at 203; 919 F.3d at 1215. In *Hastings*, the court ruled broadly that "[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment they used force but also on whether the officers' own conduct during the seizure unreasonably created the need to use such force." 252 F. App'x at 203. However, the court acknowledged the case was not an obvious one

warranting application of the *Graham* standard alone and examined relevant, analogous precedent. *Id.* at 204–05. Likewise, in *Ceballos*, the court employed the *Ashcroft* standard that "the clearly established law must be 'particularized' to the facts of the case" and examined analogous precedent. 919 F.3d at 1214–15.

But in *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234 (11th Cir. 2003), the Eleventh Circuit affirmed summary judgment in favor of the City and the officer on the ground of qualified immunity where the suspect did not react to being pepper sprayed, advanced towards the officer "pumping or swinging the stick" above the officer's head, and the officer shot the suspect while falling after tripping. Under *Garner*, the court ruled "[b]ecause the Constitution permits the use of deadly force to prevent a violent suspect from escaping, the Constitution must also permit the use of deadly force against a suspect who poses not merely an escape risk (because he is not yet in police control), but also an imminent threat of danger to a police officer or others." *Id.* at 1246.

Furthermore, the Fifth and Eighth Circuits require a strict similarity in precedent to affirm that an officer's actions constitute a clearly established constitutional violation. *See Morrow v. Meachum*, 917 F.3d 870, 874–75 (5th Cir. 2019); *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019), *vacated sub nom. Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020); *Kelsay v. Ernst*, 933 F.3d 975, 980, 982 (8th Cir. 2019) (quoting *Kisela*, 138 S. Ct. at 1153).

Conversely, the Ninth Circuit employs a broad-ranging reliance on various sources of decisional law to determine whether the law is clearly established for qualified immunity purposes, "including decisions of state courts, other circuits, and district courts" in the absence of binding precedent. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003) (quoting *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995)); *see Jessop v. City of Fresno*, 936 F.3d 937, 941 (9th Cir. 2019) ("[W]e may look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent.").

The Third, Fourth, Seventh, Tenth, and Eleventh Circuits have found that a case with the same facts is *not* required for the law to be clearly established. *See Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) ("sufficiently analogous" but not directly mirroring facts is all that is required); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) (can consider general constitutional principles or a consensus of persuasive authority in absence of directly on-point authority); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) (case involving particular new weapon not required); *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) (prior cases with precisely the same facts not required); *Vinyard v. Wilson*, 311 F.3d 1340, 1351 (11th Cir. 2002) (broad statements of principles can clearly establish law applicable to different sets of detailed facts).

But, as noted by Fifth Circuit Justice Willett in *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019), the circuits "are divided—intractably—over precisely

what degree of factual similarity must exist." This Court should grant certiorari to clarify that its precedent must be looked to for what constitutes clearly established law. Doing so will provide uniformity of the application of the clearly established law rule and eliminate the unpredictability of circuit court decisions, which erodes the policy reasons for granting qualified immunity in the first instance and negatively impacts the public's view of our legal system. Having a uniform source of clearly established law—Supreme Court precedent—will provide the clear rules this Court has emphasized are needed by law enforcement officers operating in the field under stressful conditions.

D. The Law Could Not Have Been Clearly Established to Support Denial of Qualified Immunity Where a Substantially Similar Case from the Same Circuit Found Reasonable Force Had Been Exercised.

Even assuming Ninth Circuit precedent offers a means to decide whether the law is clearly established, the clearly established law in the Ninth Circuit required application of qualified immunity. In *Blanford*, 406 F.3d 1110, the Court of Appeals affirmed summary judgment in favor of the officers on plaintiff's excessive force claim on the ground of qualified immunity. In that case, the suspect was holding a sword, did not comply with commands from the officers to drop the sword, and was turned away from the officers at the time he was shot. Prior to being shot, the suspect

appeared to taunt the officers' commands to drop his weapon by raising the sword, growling, and continuing to hold the sword. The suspect also appeared intent on accessing a private residence, or its backyard, armed with the sword. Thus, the suspect posed an immediate threat to others. *Id.* at 1116.

The circumstances Sergeant Ponder faced are directly analogous to *Blanford*. Sergeant Ponder's use of force to shoot Najera was lawful under *Blanford*. Sergeant Ponder was responding to a call and dispatch reports that a suspect was engaged in vandalism throughout the neighborhood and had threatened a woman with a baby at a home. It was undisputed that Sergeant Ponder: (1) observed shattered glass outside the private residence and Najera armed with a deadly weapon, (2) issued multiple commands to drop the weapon (while Sergeant Ponder had his gun drawn), (3) employed pepper spray, which did not affect Najera, and (4) faced Najera who was holding a bat-like object in an upright or batter's stance within striking distance and in a threatening manner. (1-ER-9; 2-ER-132–40, 182.)

The Ninth Circuit erred when it held that clearly established law put Sergeant Ponder on notice that his use of deadly force during the incident may be unconstitutional in the face of the circuit's own precedent that determined such force was reasonable on substantially similar facts.

As the foregoing demonstrates, this Court's guidance is necessary to resolve confusion among the lower

courts and establish under the particularized inquiry set forth in *Ashcroft*, 563 U.S. 731, and *Brosseau*, 543 U.S. 194, whether an officer's use of deadly force violates the Fourth Amendment when an individual, who is not suspected of being mentally ill or under the influence, is suspected of vandalizing property throughout a neighborhood with a bat-like object and threatening a family, while holding the bat-like object upright in a threatening manner during portions of his altercation with an officer, refuses to comply with commands to lower his weapon and is shot multiple times.

The Ninth Circuit's reliance on the factually disparate cases of *Hayes v. County of San Diego*, 736 F.3d 1223, 1227–28 (9th Cir. 2013) and *George v. Morris*, 736 F.3d 829, 832–33, 839 (9th Cir. 2013), which involved suspects who were holding a knife in a non-threatening manner and a pistol that was pointed downwards, was misplaced and contrary to the undisputed post-pepper-spray evidence that Najera held the bat in an upright and threatening manner and refused to comply with the officer's commands. The Ninth Circuit's decision to deny qualified immunity, just as in *White*, 580 U.S. 73, 79, "misunderstood the 'clearly established' analysis: it failed to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment."

The Ninth Circuit's decision also contravenes its holding in *Blanford*, 406 F.3d 1110, and in doing so, demonstrates the need for guidance from the Supreme Court to promote uniformity in the Ninth Circuit and others throughout the country. *Gonzalez v.*

City of Anaheim, 747 F.3d 789, 801 (9th Cir. 2014) (Trott, J., dissenting) (noting in the context of excessive force claims "[f]air warning is sine qua non of a rule when it applies to officers who must react quickly in tense situations"). By issuing contradictory decisions within the same circuit, the Court of Appeals erode the fair warning provided to officers when circuit decisions harmonize what is deemed a lawful exercise of force, versus an unlawful one, under the Fourth Amendment. Review should be granted to resolve this important question, ensure officers in the field are on notice of what conduct is lawful and protect the rights of individuals during police interactions.

CONCLUSION

This Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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