No. _____

In The
Supreme Court of the United States

KYLE CARDENAS,

Petitioner,

v.

JOSIAH SALADEN and LARRY E. SINKS,

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

Regularizing qualified immunity. In 42 U.S.C. § 1983 excessive-force and unlawful-arrest litigation, should this Court regularize the process for using the qualified-immunity defense by adopting this two-step analysis:

First, did the police officer's conduct violate clearly established precedent?

Second, if not, was it an "obvious case" where it can be regarded as clearly established that a constitutional violation has occurred even without a body of relevant case law? *See Estate of Aguirre v. County of Riverside*, 29 F.4th 624, 629 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 426 (2022) (quoting *Rivas-Villegas v. Cortesluna*, 142 S.Ct. 4, 8 (2021)).

Would the public benefit by having this Court impose a consistent two-step analysis that maintains the defense of qualified immunity while allowing flexibility to deny qualified immunity in cases where it should have been obvious to any reasonable police officer that the conduct the police officer undertook violated the Fourth Amendment to the United States Constitution, even without clearly established precedent precisely fitting the unique facts of a particular case?

PARTIES TO THE PROCEEDING

In accordance with Supreme Court Rule 14(b), all parties to the proceeding are named in the caption.

STATEMENT OF RELATED CASES

Cardenas v. Saladen, United States District Court for the District of Arizona No. 2:17-cv-04749-SMM (Doc. 119). Memorandum of Decision and Order entered March 31, 2022.

Cardenas v. Saladen, United States Court of Appeals for the Ninth Circuit No. 22-15632 (Doc. 33-1). Memorandum entered March 2, 2023.

Cardenas v. Saladen, United States Court of Appeals for the Ninth Circuit No. 22-15632 (Doc. 35). Order entered April 11, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On March 2, 2023, the United States Court of Appeals for the Ninth Circuit filed its unreported opinion, entitled Memorandum (App. 1).

JURISDICTION

On March 2, 2023, the United States Court of Appeals for the Ninth Circuit filed its unreported opinion, entitled Memorandum (App. 1), affirming the March 31, 2022 Memorandum Decision and Order of the U.S. District Court for the District of Arizona (App. 6).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

> shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Introduction to qualified immunity's application in this case.

"Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *White v. Pauly*, 580 U.S. 73, 78-79 (2017) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)).

To obtain qualified immunity, the official need not rely on a case directly on point. A right will be regarded as "clearly established" if existing precedent has placed the particular "statutory or constitutional question beyond debate." *Mullenix*, 577 U.S. at 12. Qualified immunity is so strong that it will protect "all but the plainly incompetent or those who knowingly violate the law." *Id*.

Here, two police officers broke into the locked bedroom of combat veteran Kyle Cardenas and tasered him mercilessly. Kyle suffered from post-traumatic stress disorder. There was no emergency. He posed no immediate threat or danger to himself or others. The two police officers were plainly incompetent and must have known that they were violating the law. Indeed, their own police department determined that both police officers had failed to respect the combat veteran's constitutional right to be free from unreasonable force *and* his constitutional right to be free from unreasonable search and seizure. (App. 52). How many times does a police department clearly and publicly condemn the

acts of its police officers as not only wrong, but as unconstitutional? Almost never.

The issue before this Court is the lack of clearly established precedent saying that it is a violation of statutory or constitutional rights for police officers to break down the bedroom door of an unarmed combat veteran suffering from PTSD, attack, and taser him, when reasonable jurors could conclude he posed no immediate threat to himself or others and could conclude there was no emergency.

There is no case with *precisely* the same egregious facts. Because there was no case *precisely* on point, Kyle lost any chance to hold the police officers liable—despite the fact that their own police department thoroughly condemned what they had done as violating Kyle's constitutional rights. By the way, the district court itself ruled that the police department's condemnation was admissible evidence. (App. 10). But for the Ninth Circuit, that mattered not at all, since there was no case with *precisely* the same abysmal facts to warn the police officers that their brutal and obviously over-the-top tactics were unconstitutional.

As the Ninth Circuit put it, Kyle did not "identify any controlling or persuasive case law clearly establishing that the Officers' entry into his home and bedroom was unlawful, and we are not aware of any such case." (App. 3). And as the Ninth Circuit added, Kyle had not "identified any case holding that police officers violated the Fourth Amendment by making an arrest under similar circumstances, and we are not aware of

any such case." (App. 4). And as for being tasered, the Ninth Circuit ignored or downplayed the many non-Ninth Circuit cases that Kyle had identified on the improper and excessive use of tasers and asserted that the Ninth Circuit cases on tasers that Kyle had identified did not squarely govern the specific facts at issue in the appeal because they were supposedly "distinct in legally significant ways." That is, they were again not *precisely* on point. (App. 4).

Constitutional rights should not hinge on pettifoggery. That is why Kyle advocates for adoption of a two-step analytical process: First, did the police officer's conduct violate any clearly established precedent?

Second, if not, was it an "obvious case" where it can be regarded as clearly established that a constitutional violation has occurred even without a body of relevant case law?

After all, for over two decades, this Court has made it "clear that officials can be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). What we propose is also consistent with and implements such authorities as *Brosseau v. Haugen*, where this Court acknowledged that, "in an obvious case," the Fourth Amendment's standards for the reasonableness of official conduct "can 'clearly establish'" that official conduct was unconstitutional, "even without a body of relevant case law." 543 U.S. 194, 199 (2004).

There is widespread scholarly and public dissatisfaction with mechanistic application of the clearly-established-precedent approach as a get-out-of-jail-free card for police officers who may not have traversed any precisely on-point precedent, but whose acts obviously violated the Fourth Amendment's guarantee of freedom from unreasonable search and seizure. The two-part test we propose will let district courts identify those "obvious" cases where the police officers have apparently gone too far and let juries then sift the facts and, as the trier of fact and conscience of their community, determine whether there was, indeed, an unjustified arrest or use of excessive force.

This may be an opportune time for change. In November 2020, this Court reversed a lower court's decision to grant qualified immunity to detention officers who kept a prisoner in a cell "covered, nearly floor to ceiling, in 'massive amounts' of feces." *Taylor v. Riojas*, 141 S.Ct. 52, 53 (2020). This Court held that "any reasonable officer should have realized that [the plaintiff's] conditions of confinement offended the Constitution." *Id.* at 54. *Taylor* indicated that qualified immunity can be denied when there is a clear constitutional violation, even if the fact pattern in the case at issue is distinct from any brought before.

This Court later relied on *Taylo*r in *McCoy v. Alamu*, where a corrections officer sprayed an inmate in the face with mace "for no reason at all," much as the Officers in our case, for no reason at all, broke through Kyle's closed and locked bedroom door when there was no emergency, when Kyle posed no threat to

himself or to anyone else, and when all he wanted was to hide from them after they had invaded his home without his consent. 950 F.3d 226, 229 (5th Cir. 2020), *cert. granted*, 141 S.Ct. 1364 (2021). While the Fifth Circuit held that the officer's conduct did not violate clearly established law, this Court remanded the case in light of *Taylor*.

"While *Riojas* and *McCoy* are not a sea change, trial courts could use them to evaluate qualified immunity claims with greater scrutiny and paint more actions as so 'obvious' that no reasonable officer acting in good faith could lack fair warning their conduct violates the Constitution. Both *Riojas* and *McCoy* provide an 'essential gloss' on qualified immunity: factually analogous case law may not always be necessary." Jack Nelson, Hope *Emerges from the Shadows:* Riojas *and* McCoy *Offer New Tool for Exonerees*, 67 Vill. L. Rev. Tolle Lege 1, 21 (2022).

2. Factual background.

a. Kyle Cardenas suffered from anxiety on September 12, 2015, and needed psychological help, not a police assault.

Kyle is a combat veteran of the United States Army's legendary 82nd Airborne Division. He served two tours in Iraq and received an honorable discharge. Because of his military service, Kyle suffers from post-traumatic stress disorder—but had never been physically threatening or violent. (App. 37).

At about 9:47 p.m. on September 12, 2015, Kyle's mother called the VA Crisis Hotline because Kyle was acting oddly. He supposedly thought his mom was serving him a poisoned salad that he then gave to the family dog. Kyle's mom just wanted to get psychological help for her son; neither of his parents feared him; both were just concerned about his mental well-being. (App. 38).

But instead of getting psychological help for Kyle, the VA Crisis Hotline Operator called the Gilbert Police Department ("GPD") and spoke to one of its operators. Unfortunately, GPD dispatched Officers Josiah Saladen and Larry Sinks. GPD's dispatcher gave the Officers the following garbled information:

> "Crisis line saying they are in a call from a mother, advising her son was not himself, was feeding the dog poison because he believes his parents were trying to kill him. The mom is Shauna, the son is a Kyle Cardenas born in eight . . . [call cuts out]. Mom and son are in the same residence, saying the son is extremely irate, also took the phone away from the mother and wasn't allowing her to speak, son is a veteran with PTSD, and is also claiming he's been abused since he was a child, and was demanding to speak with CPS [Child Protective Services]."

(App. 39-40).

b. The invading police officers stormed into Kyle's home and bullied him and his parents.

When they arrived at Kyle's home, the Officers knew Kyle was a veteran with PTSD, knew that he was not himself, knew that (inexplicably) he wanted to speak with CPS, and knew that Kyle thought (oddly) that his parents were trying to poison him. After they got to Kyle's home, the Officers neither asked for nor received any information indicating Kyle was or had been physically abusive to anyone, that he had threatened anyone, or that he had any weapons. (App. 39-40).

When the Officers arrived, they knew that it was GPD policy for them to take steps to calm the situation, to avoid physical contact, to take time to assess the situation, to provide reassurance that they were there to help, to relate their concern, to let others vent their feelings, and to gather information from family members. The Officers did not do a single one of those things. (App. 40).

Officer Saladen arrived at Kyle's home first and rang the doorbell, Kyle opened the front door and asked if he was CPS. Officer Saladen said no. Kyle told Officer Saladen that he had requested CPS and did not want to speak with Officer Saladen. Kyle then closed the door as Officer Saladen was hurrying to the door in an effort to prevent it from closing. Both the video evidence and Officer Sinks confirm that Officer Saladen had tried to block Kyle from closing the door. In fact,

Officer Sinks admitted that "Saladen kind of like threw himself into [the door]." (App. 40-41).

Even the district court ruled that Kyle's "actions seemed to indicate a lack of consent which could override any consent given by his parents." (App. 41).

At that time, a dog was barking after the doorbell rang, but there was no yelling, commotion, or any other noise coming from the home. Officer Saladen called for Kyle through the closed front door, at which point Kyle's mother opened the door, with her husband behind her. The Officers, who had already decided they were going to enter the home no matter what, then immediately barged inside. (App. 41).

Although they claimed Kyle's father invited them into the home, the body-camera indicates no invitation. (App. 42).

Most important, the district court acknowledged that no party had discussed any consent issues and therefore "decline[d] to address whether the officers had consent to enter" Kyle's home. (App. 42). As a result, we have a nonconsensual and warrantless police home invasion.

Neither Officer asked (1) if the home's occupants were safe or hurt; (2) to see the allegedly poisoned family dog; (3) if the dog was okay; (4) if anyone else was in the home; or even (5) if Kyle's parents were afraid of him. (App. 42-43).

Kyle's parents were concerned about Kyle—not afraid of him—and had simply called the VA Crisis

Hotline (*in New York*) to get help for him. (App. 43, 109). The fact that they called a VA Crisis Hotline located in New York for counseling help indicates that local police help was neither sought nor needed.

Indeed, as the Officers barged in, Kyle's mother began weeping and saying that "he's having an acute psychiatric episode. The police, the police are going to make it worse." (App. 43).

After the Officers invaded Kyle's home, Officer Saladen saw Kyle walking in the background past his parents to go down the hall. Officer Saladen called for Kyle to "come on out here man"—and tried to grab Kyle, who continued down the hall to his bedroom. Kyle then briefly came out of his bedroom and stood in the hallway with the family dog. (App. 43).

Officer Saladen asked Kyle's mother if Kyle had any weapons. She said: "No, none whatsoever." The Officers then went down the hall after Kyle and demanded that he come out of his bedroom. (App. 44).

After Kyle went into his bedroom, the family dog trotted past the Officers without bothering them one bit. Officer Sinks falsely claimed Kyle had "sicced" the family dog on the Officers. But with tail wagging, the dog had simply trotted past the Officers and to Kyle's mom. Nothing in the record indicates that the dog was vicious or dangerous. Kyle had not wanted his dog to get hurt and had merely asked his mother to "get her" [the dog] so she could take the dog outside. Kyle's mother confirmed that was what had happened. (App. 44).

Even the district court acknowledged that the "video evidence is not clear either way" whether Kyle commanded the dog to attack the police officers or whether Kyle simply wanted his mother to take the dog outside. (App. 45). Because of the conflict in the video and testimonial evidence, at summary judgment it would be improper to infer that Kyle had commanded a canine attack on the invading Officers.

c. After unlawfully invading the home, the police officers broke into Kyle's locked bedroom and unlawfully attacked and arrested him.

Kyle re-entered the hallway. Officer Sinks falsely accused Kyle of telling his dog to attack the Officers and told Kyle to put his hands on his head and turn around. Kyle responded, "why, what have I done, what have I done" as Officer Sinks said, "You just tried to tell your dog to attack us." Kyle responded by saying "No, I didn't." (App. 46). Because of the evidentiary conflict, Kyle's version of the facts *must* be accepted as true.

It is critical to note that Officer Sinks was not accusing Kyle of committing any crime by supposedly poisoning the family dog. Reasonable jurors could conclude that Officer Sinks was using the trumped-up (and false) accusation of an attack command to the family dog as a pretext to arrest Kyle.

Officer Sinks himself later finally admitted that, on that night, he did not feel threatened by the dog, conceding that "but the dog didn't really run at us with,

you know, like it was going to attack us or something, but I was getting ready to kick it or something. But it went right past me, um to the parents that were in the kitchen behind me." (App. 46).

Kyle turned around and walked down the hall, saying that he was going to go get his phone camera while Officer Sinks pulled out a firearm with the red dot pointed at Kyle's back, quickly followed Kyle, and said "do not go" as Kyle walked into his bedroom, closing and locking its door. (App. 46-47).

Although Kyle posed no threat to anyone, Officer Sinks kicked a hole in Kyle's locked bedroom door, forced the door open, and entered Kyle's bedroom with Officer Saladen following. Kyle was not threatening them. Instead, he was standing up with his cell phone and telling the Officers that "I'm recording you like I told you I was going to do." The Officers told Kyle to put his phone down. Kyle said no, and sat down in a chair with his telephone in his hands between his legs as the Officers grabbed his arms in an effort to "detain" him—as Kyle repeated asking "Why?" (App. 47).

The Officers said, "you're going to get tased," and demanded that he give them his hands. Kyle repeated "Why?" while the Officers struggled to try to grab his hands. Officer Sinks then stepped back, drew his taser, shouted "taser, taser, taser," and tased Kyle as he was standing up out of his chair. No evidence indicates that, when Kyle was tasered, he posed any immediate threat of harm to himself, to the Officers, or to anyone else. (App. 47). The act of tasering Kyle under these

circumstances violates all known published judicial decisions and opinions on the police use of tasers. (App. 65-76).

Kyle was arrested and charged with aggravated assault, disrupting the peace, and animal cruelty. All of those bogus charges, however, were dismissed. As the GPD internal investigation later made clear, the Officers had no reasonable basis to believe Kyle assaulted them with his dog or otherwise. (App. 48).

The Gilbert Police Department concluded that: (1) the forced entry into the bedroom was not based on a search warrant or on any appropriate exception to the search-warrant rule; (2) the use of force and the entry into the bedroom were not within the general orders governing proper police conduct; (3) de-escalation was the proper thing to have done since the known facts did not support any level of urgency or the type of contact the Officers committed; and (4) both Officers had failed to show respect for Kyle's constitutional right to be free from unreasonable force and to be free from unreasonable search and seizure. (App. 49-51).

The GPD's findings are critically important for evaluating the obvious violations of the Fourth Amendment because the district court held that the findings were admissible under Fed. R. Evid. 403 and 407, and thus helped create genuine issues of material fact on the constitutional violations. (App. 48-49, 52).

Notably, neither the district court nor the Ninth Circuit even mentioned the uncontradicted testimony from Greg Meyer, Kyle's police-practices expert that

soundly condemned the Officers' conduct. Among other points, Expert Meyer explained that the Officers had not conformed to contemporary police procedure and training when: (1) the Officers entered the home; (2) decided to detain Kyle when there was no crime, no emergency, and no one was in danger; and (3) made a forced entry into Kyle's bedroom to confront him. (App. 52-55).

REASONS FOR GRANTING THE PETITION

1. The lower federal courts need a standardized, two-part analysis to deal with alleged police misconduct where no clearly established precedent applies—but a violation of the Fourth Amendment is "obvious."

This case highlights the flaw in qualified-immunity defense cases. The flaw is a search for precedent so clearly established that the particular "statutory or constitutional question" is "beyond debate." *Mullenix*, 577 U.S. at 12. Lawyers, district courts, and circuit courts constantly debate whether police conduct violated clearly established precedent. The debate is useful and necessary, but should not end the search for justice when there is no clearly established precedent, but the violation of the Fourth Amendment is "obvious."

This case is a good example. Viewing the facts in the light most favorable to Kyle, taking all reasonable inferences in his favor, and resolving all fact disputes

in his favor—as all federal courts must do in a summary-judgment proceeding—Kyle was the obvious victim of an unconstitutional arrest and of an unconstitutionally excessive use of force.

After all, acting on a distorted report, two police officers pushed into a home without consent or permission and chased an unarmed, anxious, confused, and defenseless combat veteran into his bedroom. He just wanted to be left alone. He was no threat to himself or to anyone else—as evidenced by what the police officers knew and by the fact that they never evacuated the parents from the zone of danger (because there was no zone of danger), never got a warrant, and never called for tactical support to deal with the danger (because it did not exist).

The take-no-prisoners, hard-charging police officers then kicked in the locked bedroom door and demanded that the combat veteran hiding from them in his bedroom stop trying to film them with his cell phone camera. When he declined to cooperate, they physically attacked and tasered him.

The violation of Kyle's Fourth Amendment right to be free from unreasonable search and seizure is obvious. Barging into a private home with no invitation, consent, or warrant, and breaking down a locked bedroom door to arrest and attack a combat veteran who posed no immediate threat to himself, to the officers, or to others, is conduct practiced by pre-Revolutionary War customs agents and military officers of Great Britain.

This Court's "cases have recognized that the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself." *Riley v. California*, 573 U.S. 373, 402 (2014).

It is a historical fact that the constitutional right against unreasonable searches and seizures "arose from the harsh experience of householders having their doors hammered open by magistrates and writ-bearing agents of the crown. Indeed, the Fourth Amendment is explainable only by the history and memory of such abuse." William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 Wm. & Mary Q. 371, 372 (1980). Yet here we are centuries later with uncontrolled public officers still hammering down a door in a private home with no right, no justification, and no warrant. Under the Fourth Amendment, which was designed and adopted to end forever the sort of practices that the Officers used against Kyle, the unconstitutionality of their conduct is both historically and factually obvious.

But because the district court and the Ninth Circuit found no precedent precisely on point, these Officers might never be held accountable—other than by their own police department which, in an almost unprecedented act, found that *both* Officers had violated

Kyle's constitutional right to be free from unreasonable search and seizure and to be free from excessive force.

We confront precisely the sort of technicality that confuses the victims of police misconduct and enrages the public. There are many cases where clearly established precedent will either exonerate or condemn police conduct. On the other hand, there are cases involving police misconduct with no established case law—but the violation of the Fourth Amendment is painfully obvious.

That is why we advocate for a simple, easy-to-apply, two-step analysis. First, did the police officer's conduct violate clearly established precedent? That will surely resolve almost all cases. Second, if not, was this an "obvious case" where it can be regarded as clearly established that a constitutional violation has occurred even without a body of relevant case law?

That will give the district and circuit courts enough flexibility to ensure that obviously unconstitutional conduct is not rewarded because there is no prior case right on point. In obvious cases of wrongdoing, the two-step analysis will not, by any means, result in an automatic victory for the claimant. It will simply let juries in the communities where the alleged police misconduct took place determine from the facts whether their own police officers violated a fellow citizen's right to be free from excessive force and from unlawful search and seizure.

2. This remains a case for the jury.

At the pinnacle of federal appellate review, this Court does not resolve factual disputes, but resolves legal questions arising from the grant of summary judgment and therefore "must take the evidence in petitioner['s] favor." *United States ex rel. Schutte v. SuperValu Inc.*, 143 S.Ct. 1391, 1397 n.2 (2023). "As is appropriate at the summary-judgment stage, facts that are subject to genuine dispute are viewed in the light most favorable to [a petitioner's] claim." *Taylor v. Rojas*, 141 S.Ct. 52, 53 n.1 (2020).

Taking and viewing the evidence in the light most favorable to Kyle, as this Court must, would result in reversal and remand for a jury trial.

Indeed, because summary judgment deprives the jury of its common-law and procedural role in deciding factual disputes and in drawing factual inferences from the evidence, summary judgment is only proper "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, 656-657 (2014) (quoting Fed. R. Civ. Proc. 56(a)). Here, the police officers never did that.

In assessing if summary judgment is warranted, "a court must view the evidence in the light most favorable to the opposing party" and "adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan*, 572 U.S. at 657 (internal quotation marks omitted). That ensures that a

jury—not a judge relying on a paper record—will determine which story is credible.

The jury's role is particularly important in qualified-immunity cases, where the stakes are not just about the particular parties involved in one case, but whether there will be accountability when public officials violate the Constitution. *Cf. Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (The jury represents the "judgment of the community.").

Viewed in the light most favorable to Kyle, and with all reasonable inferences taken in his favor, the facts do not allow for a summary judgment.

Legality of arrest? First, the district court admitted that "the legality of [Kyle's] arrest was arguable." (App. 63). Whether the arguable arrest was proper was something for the jury to resolve.

Consent to enter home and locked bedroom? Second, there was strong evidence that Kyle and his parents refused consent for the Officers to enter the home, and incontrovertible evidence that Kyle refused consent to the Officers to enter his bedroom before and after he closed and locked his bedroom door to keep them out. Moreover, the district court specifically refused to make any finding on consent—leaving consent as an undeniable jury issue. (App. 13-14).

Without consent, the unconsented entry into the home and the unconsented entry into the closed and locked bedroom were unlawful, precluding summary

judgment for the Officers on their unlawful search and seizure and excessive use of force.

Emergency aid exception? Third, the district court admitted that "the record here does not definitively establish an emergency situation." (App. 16, 60). The Ninth Circuit opined that the Officers' warrantless invasion of the Kyle's locked bedroom was supposedly justified by an "emergency" because the Officers supposedly had an "objectively reasonable basis" to think that Kyle was a danger to himself—although there was not a shred of evidence that he was going to hurt himself in any way whatsoever. (App. 3).

The district court and Ninth Circuit ignored the substance and content of the "emergency aid exception" to the Fourth Amendment warrant requirement. "Under the 'emergency aid' exception," police "'officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).

Police need one of three things to invoke the emergency aid exception: (1) a reasonable belief that a suspect has hurt himself and needed treatment (no evidence of that here); (2) a reasonable belief that the suspect was about to hurt someone else (no evidence of that here); or (3) a reasonable belief that the suspect had already hurt someone else (also no evidence of that here). *Michigan v. Fisher*, 558 U.S. 45, 49 (2009).

There was no injured occupant at Kyle's home until *after* the Officers tasered and attacked Kyle. And no occupant in Kyle's home—not even the dog that was frisky, happy, and obviously un-poisoned—needed protection from any imminent injury. The emergency aid exception does not apply, no matter how hard the Officers bend the facts.

Kyle may have acted belligerently after the Officers ignored his directive to stay out of his home, ignored his request to leave once they barged inside his home, and then broke into his locked bedroom. But that is no proof that he was a danger to himself or anyone else. When, as here, the record does not definitively establish an "emergency" to the point where reasonable minds could not differ, there is a question for the jury, and summary judgment is improper.

Exceptions to the Fourth Amendment's warrant rule should be applied with great care, because "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967).

The canine attack command? Fourth, the district court admitted that the video evidence was unclear whether Kyle commanded his dog to attack the police officers—and both Kyle and his mother said it had never happened—thus removing the purported dog attack as any basis for breaking into Kyle's locked bedroom and arresting and attacking Kyle. (App. 8).

The rare police-department condemnation? Fifth, the police-department condemnation of the Officers' conduct was powerful evidence that the district court found was admissible—but then ignored. (App. 9-10, 62).

Threat to self or others? Sixth, the district court noted that, although Kyle had acted "belligerently" at some points, in the end he "hid inside of his room." (App. 60). Cowering in his bedroom, Kyle posed no threat to anyone requiring breaking into the locked bedroom and assaulting him.

Kyle had never stated or indicated he was going to hurt himself. He had never stated or indicated he wanted to hurt his parents. The dog was obviously frisky and healthy and was in no present danger since it was away from Kyle. And Kyle tried to avoid and then fled from the police. Retreating and hiding are the opposite of threatening.

Kyle was no threat to anyone. Once Kyle was hiding in his locked bedroom, there was ample time to evacuate the parents and the dog, get a warrant (if a magistrate could be convinced to do that on such flimsy facts), and to de-escalate the situation. At most, whether Kyle was a threat was an issue of fact for the jury to decide.

We are not proposing analysis at a high level of generality. In this case, there were genuine issues of material fact on the propriety of the arrest, on consent, on existence of any real emergency requiring barging into a home and bursting into a closed and locked

bedroom, on the supposed command to the dog to attack, on the police department's own evaluation of the warrantless entry and on the use of force, and on whether Kyle posed any threat to himself, the public, and especially to the violent police officers who relentlessly pursued him into a closed and locked bedroom. This was never a case to take from the jury.

If nothing else, as the highest court in the federal judicial system, with plenary authority over all aspects of its operations—even if this Court does not draft an opinion or hold oral argument—this Court should grant the petition, vacate the Court of Appeals Memorandum and the district court's judgment, and remand this matter for a jury trial on its merits.

CONCLUSION

Many qualified-immunity cases are heartbreaking and distressing. This one is worse than most. The Officers' own department condemned them. Plus, we are dealing with a combat veteran hiding from out-of-control police officers who burst into his home and then broke through the door to his locked bedroom where he had sought refuge from their rampage. There was no emergency. Kyle posed no threat to anyone, least of all to himself. This is a case where the constitutional wrongdoing is obvious.

For the reasons set forth above, Kyle Cardenas asks the Court to grant his petition for writ of certiorari.

Respectfully submitted,

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