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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KYLE CARDENAS, Plaintiff-Appellant, v. JOSIAH SALADEN; et al., Defendants-Appellees.	No. 22-15632 D.C. No. 2:17-cv-04749-SMM MEMORANDUM* (Filed Mar. 2, 2023)

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted February 8, 2023
Phoenix, Arizona

Before: GRABER, CLIFTON, and CHRISTEN, Circuit Judges.

Plaintiff Kyle Cardenas appeals the district court's order granting summary judgment for Gilbert Police Department (GPD) Officers Josiah Saladen and Larry Sinks in Cardenas' 42 U.S.C. § 1983 action alleging unlawful entry, unlawful arrest, and excessive force. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We review de novo a district court's order granting summary judgment on the basis of qualified immunity. *Evans v. Skolnik*, 997 F.3d 1060, 1064 (9th Cir. 2021). "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*, 137 S. Ct. 548, 551 (2017) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)).

1. The Officers are entitled to qualified immunity on Cardenas' unlawful-entry claim. The Officers' initial warrantless entry into the home was justified pursuant to the emergency doctrine because, considering the information the Officers had received from GPD dispatch, they "had an objectively reasonable basis for concluding there was an immediate need to protect others . . . from serious harm." *United States v. Snipe*, 515 F.3d 947, 951–52 (9th Cir. 2008). Dispatch had told the Officers that Cardenas was "feeding the dog poison," that Cardenas and his mother were in the same residence, that Cardenas was "extremely irate" and had "t[aken] the phone away from [his] mother and wasn't allowing her to speak," that he was suffering from PTSD, and that he was complaining of childhood abuse and demanding to speak to Child Protective Services (CPS). This information provided an objectively reasonable basis for the Officers to believe Cardenas posed a threat to others who were in the family residence with him.

Though Cardenas' parents arguably were no longer in immediate danger once Cardenas entered his bedroom, the Officers' warrantless entry into the bedroom was also justified by an emergency because the Officers had an objectively reasonable basis to believe Cardenas may have been a danger to himself. The Officers had heard from dispatch that Cardenas "was not himself," believed his parents were trying to kill him, had PTSD, was claiming that he had been abused since childhood, and was demanding to speak to CPS despite being an adult man in his thirties. The Officers' personal observations of Cardenas' erratic and volatile behavior and his mother's reaction to his conduct also supported their reasonable belief that he was having a mental health crisis and posed a danger to himself.

Cardenas has not attempted to 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.

2. The Officers also are entitled to qualified immunity on Cardenas' unlawful-arrest claim. "An officer who makes an arrest without probable cause . . . may still be entitled to qualified immunity if he reasonably *believed* there to have been probable cause." *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1076 (9th Cir. 2011). An officer is therefore entitled to qualified immunity if "it is *reasonably arguable* that there was probable cause for arrest—that is, whether reasonable officers could disagree as to the legality of the arrest." *Id.* Accepting Cardenas' factual account as true for purposes of summary judgment, we assume he was not violent toward his parents, did not poison the family dog, and did not order the dog to attack the Officers.

But based on the information the Officers had at the time, we conclude they could have reasonably believed that there was probable cause to arrest Cardenas for animal cruelty. *See* Ariz. Rev. Stat. § 13-2910(A)(3). Similarly, given the information the Officers had received from dispatch and their personal observations, it was reasonable for them to suspect that Cardenas had engaged in some form of disorderly conduct. *See* Ariz. Rev. Stat. § 13-2904. Cardenas has 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.

3. Last, the Officers are entitled to qualified immunity on Cardenas' excessive-force claim. The Ninth Circuit cases Cardenas identifies do not "'squarely govern[ ]' the specific facts at issue" in his appeal because they are distinct in legally significant ways. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting *Mullenix*, 577 U.S. at 15). In *Mattos v. Agarano*, the plaintiff had been pulled over for a minor traffic infraction, was pregnant, did not pose "even a *potential* threat to the officers' or others' safety," and was tased in drive-stun mode three times in rapid succession. 661 F.3d 433, 436–37, 445–46 (9th Cir. 2011) (en banc). And in *Bryan v. MacPherson*, the plaintiff was also pulled over for a minor traffic infraction, was standing twenty to twenty-five feet away from the officer, did not resist arrest "at all," and was tased from behind without warning. 630 F.3d 805, 822, 826–31 (9th Cir. 2010). By contrast, the Officers suspected Cardenas had committed more serious and violent crimes,

he was belligerent, the Officers warned Cardenas that they would tase him if he continued resisting their attempts to handcuff him, and Officer Sinks deployed his taser only once. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (providing that relevant considerations for the excessive-force analysis include the severity of the crime at issue, whether the suspect poses an immediate threat to the officers or others, and whether the suspect is actively resisting arrest).

The remaining cases Cardenas cites are not controlling authority and are similarly distinguishable because they involved the gratuitous use of a taser, tasing a suspect who was already subdued, or tasing a suspect who was not resisting arrest or was at most simply noncompliant with an order. *See, e.g.*, *Fils v. City of Aventura*, 647 F.3d 1272, 1288–89 (11th Cir. 2011); *Lewis v. Downy*, 581 F.3d 467, 477–78 (7th Cir. 2009); *Orem v. Rephann*, 523 F.3d 442, 444, 446–47, 449 (4th Cir. 2008), *abrogated on other grounds by Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010). Because there is neither controlling authority nor a "robust 'consensus of cases of persuasive authority'" establishing that the Officers violated Cardenas' Fourth Amendment rights by tasing him, we conclude that the Officers are entitled to qualified immunity. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Kyle Cardenas, Plaintiff, v. Josiah Saladen, et al., Defendants.	No. CV-17-04749-PHX-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed Mar. 31, 2022)

On September 12, 2015, Defendant Officers Josiah Saladen and Larry Sinks were dispatched to the home where Plaintiff Kyle Cardenas was living. Cardenas claims that the actions of the officers that night violated his Fourth Amendment rights.

Currently before the Court is the Defendants' Motion for Summary Judgment (Doc. 97), in which Defendants argue that they are entitled to qualified immunity, and alternatively that their actions did not violate the Fourth Amendment. For the reasons that follow, the Court finds that the officers are entitled to qualified immunity on all claims.[1]

I. BACKGROUND

Cardenas is a military veteran with Post Traumatic Stress Disorder ("PTSD"). (Docs. 98 at 2, 105 at

[1] The Plaintiff also requests oral argument. However, the Court finds that oral argument is unnecessary to decide the motion and will deny the request.

2). On September 12, 2015, Cardenas's mother called the VA Crisis Hotline, concerned for Cardenas, who believed that his parents were feeding him poison, so he fed the food to the dog. (Docs. 98 at 2, 105 at 2). During the call, the VA Crisis hotline patched in the Gilbert Police Department. (Docs. 98 at 2, 105 at 2). The Department then dispatched Officers Saladen and Sinks to the Cardenas residence. (Docs. 98 at 2, 105 at 3). They were provided with the following 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 are trying to kill him . . . 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.

(Docs. 98 at 3, 105 at 3). On arrival, Officer Saladen approached the door, and Cardenas answered, telling the officers that he asked for CPS (Child Protective Services) and then he closed the door. (Docs. 98 at 4, 105 at 4). Cardenas's parents then opened the door and the officers entered. (Docs. 98 at 4, 105 at 5). The officers see Cardenas and Officer Saladen calls out for him to "come on out here man" and attempts to grab Cardenas, who continues into his bedroom, and the officers follow him further into the hallway. (Docs. 98 at 5, 105 at 5). Cardenas then comes out of his room and stands in the hallway with the family dog. (Docs. 98 at 5, 105 at 5).

The officers allege that Cardenas commanded the dog to attack them by saying " get 'em ", but Cardenas argues that he wanted his mom to take the dog outside and said, "get her." (Docs. 98 at 5, 105 at 7). The video evidence is not clear either way. The dog then moved past the police officers to Cardenas's parents. (Doc. 105 at 7).

After, Cardenas walks back into his room and closes the door, telling the officers that he is going to get his phone camera, while Officer Sinks tells Cardenas to not go. Id. at 8. Officer Sinks then kicks a hole in the door, enters, and Officer Saladen follows. Id. Cardenas sits down in a chair with his phone in his hands in between his legs, and the officers attempt to grab his arms. Id. While attempting to grab his hands, one of the officers tell Cardenas, "You're going to get tazed." Id. Officer Sinks then draws and deploys his tazer as Cardenas stands up and then tackles Officer Sinks. Id. at 9.

After these events, Cardenas brought a § 1983 suit before this Court, alleging that the police officers violated his Fourth Amendment rights. (Doc. 1). The officers then moved for summary judgment. (Doc. 97).

II. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense or the part of each claim or defense on which summary judgment is sought." Fed. R. Civ. P. 56(a). A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, show "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Id.; see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger v. Nev. Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine if it is "such that a reasonable jury could return a verdict for the non-moving party." Id.; see Jesinger, 24 F.3d at 1130.

A principal purpose of summary judgment is " to isolate and dispose of factually unsupported claims." Celotex, 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial; instead, the moving party may identify the absence of evidence in support of the opposing party's claims. See Celotex, 477 U.S. at 317, 323-24.

III. MOTION TO STRIKE

The officers argue that the conclusions in the Gilbert Police Department's internal review are inadmissible under both Rule 403 and 407 of the Federal Rules of Evidence. Rule 407 states in part "When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction." In this case, the internal review is simply an investigation not a disciplinary proceeding or another subsequent remedial measure. See, e.g, Aguilar v. City of Los Angeles, 853 F. App'x 92, 95 (9th Cir. 2021) (finding that an in-custody death investigation was admissible under Rule 407). Nor do the officers claim that this internal review led to policy changes or disciplinary action that would indicate the internal review was part of subsequent remedial measures.

The officers also argue that the internal review is inadmissible under Rule 403 because its relevance is outweighed by a danger of unfair prejudice. The officers argue that the Police Department's internal policies do not count as "clearly established" legal precedent. However, though it is possible that a jury might find the difference confusing and afford the internal review undue weight, the Court is well-aware of the meaning of "clearly established" legal precedent; therefore, there is little danger of confusion in this instance. Thus, for the purposes of the Motion for Summary Judgment, the internal review is admissible under both Rules.[2]

[2] The internal review may not be admissible under other Rules of evidence, but they were not cited to the Court.

IV. MOTION FOR SUMMARY JUDGMENT ANALYSIS

The officers argue that they are entitled to qualified immunity, and alternatively, that there was no Fourth Amendment violation. Because the Court finds that the defendant officers are entitled to qualified immunity on all claims, it will not reach the question of whether there was a Fourth Amendment violation.

"Qualified immunity is an affirmative defense that shields public officials facing liability under 42 U.S.C. § 1983 unless '(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time' of the violation." Nunes v. Arata, Swingle, Van Egmond & Goodwin (PLC), 983 F.3d 1108, 1112 (9th Cir. 2020) (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018)). Once the public official pleads qualified immunity, plaintiffs bear the burden to prove both prongs are met. Isayeva v. Sacramento Sheriff's Dep't, 872 F.3d 938, 946 (2017). Courts can exercise discretion in deciding which prong to analyze first. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

A right is clearly established when "the right's contours were sufficiently definite 7 that any reasonable official in the defendant's shoes would have understood that he was violating it." Plumhoff v. Rickard, 572 U.S. 765, 778-79 (2014). Though there need not be a prior " 'case directly on point' for a right to be clearly established," there must be precedent that places the constitutionality of the officers' actions "beyond debate."

White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam) (quoting Mullenix v. Luna, 577 U.S. 7, 12 (2015)). Thus, courts must analyze "whether the violative nature of the particular conduct is clearly established," taken "in light of the specific context of the case." Mullenix, 577 U.S. at 12 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2015) then Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam)). If officers violate a constitutional right, they will still be entitled to qualified immunity if their mistake was one that a reasonable officer would make. See Pearson, 555 U.S. at 231 ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'" and it "applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, (1982) then Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting))).

A. Search

Cardenas first claims that the officers violated his Fourth Amendment rights by entering his home without a warrant. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Warrantless searches inside a home are presumptively unreasonable. Kentucky v. King, 563 U.S. 452, 459 (2011).

However, the presumption is not irrebuttable. Officers can lawfully enter without a warrant with consent, in an emergency, or under exigent circumstances. Mendez v. County of Los Angeles, 897 F.3d 1067, 1075 (9th Cir. 2018).

The officers first claim that entry was reasonable because they had consent, or alternatively that the entry was lawful because Cardenas posed a danger to himself and others. The Court finds that the officers lawfully entered under the emergency exception and consequently, also finds that the officers are entitled to qualified immunity on the entrance claim because the first prong of the qualified immunity test is not met.

1. Consent

The defendant officers first argue that they had consent from Cardenas's parents to enter the home. But it was not Cardenas's parents who initially answered the door it was Cardenas. And after the police officers identified themselves, he locked the front door and stated that he only wanted to talk to CPS. His actions seemed to indicate a lack of consent which could override any consent given by his parents. See Bonivert v. City of Clarkston, 883 F.3d 865, 875 (9th Cir. 2018) (finding that the plaintiff "expressly refused entry when he locked the side door to his house"). Additionally, it is unclear whether Kyle's parents had the authority or apparent authority to give consent for the officers to enter Kyle's room. See United States v. Arreguin, 735 F.3d 1168, 1176-77 (9th Cir. 2013) (finding that it was not objectively reasonable for law enforcement to assume that a co-occupant had authority to consent to a room when the limited facts available indicated that another person occupied the room). Both the express refusal and the authority questions are further complicated by the specific type of relationship in this case: parents and adult child. See A.G. v. County of Los Angeles, 2021 WL 4350500, at *11-15 (C.D. Cal. July 20, 2021) (discussing unsettled law regarding Fourth Amendment consent and relationships between parents and adult children and ultimately concluding that "the state of the law as to this issue is currently unsettled"). Because these issues have not been discussed by either party and because the Court can otherwise resolve the unlawful entry claim, the court declines to address whether the officers had consent to enter.

2. Emergency

The officers next argue that they lawfully entered to because Cardenas posed a danger to himself and others.[3] Under the emergency doctrine, officers may enter homes without a warrant in the interest of the

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[3] The defendant officers erroneously argue that the "specific and articulable facts" standard, set out in Terry v. Ohio, 392 U.S. 1, 21 (1967), is used in determining whether the entry is lawful. As Cardenas pointed out, the Ninth Circuit has repeatedly stated that the Terry standard does not apply to warrantless entries into the home. See, e.g., United States v. Struckman, 603 F.3d 731, 738 (9th Cir. 2010) ("[T]he Terry exception to the warrant requirement does not apply to in-home searches and seizures."). The Court will apply the correct standard.

safety of others or themselves. United States v. Snipe, 515 F.3d 947, 952 (9th Cir. 2008). An entry is permissible if "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." Id.

To determine whether officers can enter a home under the emergency doctrine, courts "assess officers' actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" Sandoval v. Las Vegas Metro. Police Dep't, 756 F.3d 1154, 1163 (9th Cir. 2014) (quoting Ryburn v. Huff, 565 U.S. 469, 477 (2012)). Courts must consider that officers must often make split-second judgements in tense and uncertain circumstances. Ryburn, 565 U.S. at 477.

"[S]ituations involving domestic violence [are] particularly well-suited for an application of the emergency doctrine." United States v. Martinez, 406 F.3d 1160, 1164 (9th Cir. 2005). In Martinez, an officer responded to an interrupted emergency call regarding domestic violence. Id. at 1165. When he arrived, he noticed a woman crying in the front yard and yelling from inside the house. Id. The officer entered the house, then entered the bedroom where a man was located. Id. The court held that the officer's entry was justified under the emergency doctrine, finding that the officer "reasonably believed there was an emergency at hand." Id.

This case is similar in many respects to Martinez. Like Martinez, here, the officers were responding to a potential domestic disturbance that was reported through an interrupted call to emergency services and on arrival, officers made observations that confirmed an emergency could be at hand. The officers were told by dispatch that Kyle had taken the phone away from his mother and was irate. They were also told (albeit incorrectly) that Kyle had poisoned the family dog. When they arrived, Kyle was acting belligerently, and continued to demand CPS, which confirmed some of the facts they were given on dispatch. And when the parents opened the door, Kyle's mother was visibly upset. After the officers stepped inside, Kyle continued to act belligerently and hid inside of his room, and the officers followed. Although the record here does not definitively establish an emergency situation, these facts, taken together, give the police officers an objectively reasonable basis to conclude that there was such a situation. See Michigan v. Fisher, 558 U.S. 45, 49 (2009) ("Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception."). Additionally, the officers only entered areas that were reasonable to address the emergency needs. Thus, the officers lawfully entered under the emergency exception.

And even if the entry was not lawful, Cardenas has not cited to, nor has the Court found, any precedent which "'squarely governs' the specific facts at issue." Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (quoting Mullenix, 577 U.S. at 15).

Because qualified immunity can be established under either prong, the officers are entitled to qualified immunity on the Fourth Amendment search claim.

B. Seizure

Cardenas argues that he was improperly seized in violation of the Fourth Amendment. Cardenas first argues that he was arrested not detained. For the purposes of this order, the Court assumes that Cardenas was arrested.

1. Probable Cause

Cardenas argues that the officers did not have probable cause to arrest him. After the events of September 12, Kyle was charged with assault, aggravated assault, and animal cruelty. Additionally, in his deposition, Officer Saladen stated that he believed domestic violence and disorderly conduct were afoot based on the dispatch information.

"[A]n arrest without probable cause violates the Fourth Amendment." Borunda v. Richmond, 885 F.2d 1384, 1391 (9th Cir. 1988). Officers have probable cause where "officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." United States v. Lopez, 482 F.3d 1067, 1072 (9th Cir. 2007). Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Wesby, 138 S. Ct. at 586 (quoting Illinois v. Gates, 462 U. S. 213, 243 n.13 (1983)).

However, under the second prong of the qualified immunity test, an officer may still be entitled to qualified immunity if it was "reasonably arguable that there was probable cause for arrest that is, whether reasonable officers could disagree as to the legality of the arrest." Rosembaum v. Washoe County, 663 F.3d 1071, 1076 (9th Cir. 2011). In other words, "the question in determining whether qualified immunity applies is whether all reasonable officers would agree that there was no probable cause in this instance." Id. at 1078. The Supreme Court has "stressed the need to 'identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment,'" except in obvious cases, "where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." Wesby, 138 S. Ct. at 590. (quoting Pauly, 137 S. Ct. at 552).

First, courts must start by defining the circumstances faced by the officers. Wesby, 138 S. Ct. at 590. Then, they look to the reasonableness of the actions and whether there is precedent that finds "a Fourth Amendment violation 'under similar circumstances'" Id. at 591 (quoting Pauly, 137 S. Ct. at 552).

In this case, the legality of the arrest was arguable. Here, officers were told by dispatch that Cardenas had fed poison to his dog, was irate, and had taken the phone away from his mother. On arrival, the officers also observed suspicious circumstances. Cardenas was belligerent, and his mother was upset. Cardenas also stated something, and afterwards, a large mastiff came towards the police officers.

None of the cases cited by Cardenas find that there was a Fourth Amendment violation for any of the possible charges namely, disorderly conduct, domestic violence, animal cruelty, and aggravated assaulted in similar circumstances. Nor has Cardenas cited any cases that found that someone was not guilty of the statutes in similar circumstances. Nor has this Court found any. Thus, by the Supreme Court's standard, the officers are entitled to qualified immunity on the probable cause claim.

2. Arizona Statutory Authority

Cardenas also alleges that the officers violated their statutory authority for performing an arrest. First, under A.R.S. § 13-3888, when making an arrest, officers must inform the arrestee for the reasons for their arrest. However, this does not apply when the person "flees or forcibly resists before the officer has opportunity so to inform him." Id. It is possible that Cardenas's actions could be interpreted as fleeing or resisting. Cardenas has not provided any case that clarifies what flee or resist means in the statute, and the Court has found none that is instructive in this case. So in evaluating the face of the statute, the officers may not have violated this law. And even if they did, there is no "clearly established" law that would indicate otherwise.

Second, under A.R.S. § 13-3891, "*in order to* make an arrest", an officer " may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if the officer is refused admittance after he has announced his authority and purpose." (emphasis added). But in this case, as explained above, the officer's entry was justified by emergency circumstances. The entry was not simply *in order to* make an arrest. Additionally, Cardenas does not cite, and the Court has not found, any clearly established law that indicates that the entry was a Fourth Amendment Violation.

C. Proximate Cause

Cardenas argues that the officers' unlawful entry and unlawful arrest created the circumstance that caused violent altercations with Cardenas and the officers are therefore liable for the consequences of those actions. However, because the Court has found that the officers are entitled to qualified immunity on both the unlawful entry and unlawful arrest claims, these actions cannot serve as the basis of liability. See County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1549 (2017) (finding that the Ninth Circuit's analysis "appears to focus solely on the risks foreseeably associated with the failure to knock and announce, which could not serve as the basis for liability since the Court of

Appeals concluded that the officers had qualified immunity on that claim").

D. Excessive Force

Cardenas also alleges that the officers used excessive force. From Cardenas's Response to the Motion for Summary Judgment, it is not immediately clear what actions by the officers Cardenas deems are excessive. But even if the officers used excessive force, they would still be entitled to qualified immunity under the "clearly established" prong on the excessive force claim. In an obvious case, excessive force factors can clearly establish a violation of a right; however, in a nonobvious case—such as this one—a plaintiff must identify a case that would put the officer "on notice that his specific conduct was unlawful." Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8 (2021). And Cardenas has not cited to, nor has the Court found, any case that puts the constitutionality of the officers' use of force beyond debate.

Plaintiff describes two cases as support. In Abdullahi v. City of Madison, 423 F.3d 763 (7th Cir. 2005), a man was having a PTSD episode on a roadside. Id. at 764. A police officer received dispatches regarding an altercation between the man and a nurse who had stopped to him. Id. at 765. When the officer arrived, the man began to swing his belt over his head. Id. Two other officers arrived, and all three officers attempted to subdue the man and took him to the ground on his stomach. Id. The man continued to kick and arch his back while the officers attempted to handcuff him. Id. An additional officer arrived on the scene, and one of the officers knelt on the back of the man's shoulder. Id. The man died about two and a half minutes after the officers took him to the ground. Id. at 766. The court found that there was an issue of material fact as to whether the kneeling officer used an unreasonable amount of force. Id. at 775.

In Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003), IRS agents were investigating a woman for tax fraud, and after obtaining a search warrant, they entered her building. Id. at 1060. When the woman asked to see the search warrant, one agent grabbed and twisted her arms, threw her to the ground, and placed handcuffs tightly on her wrists, which caused bruising. Id. The court found that the agent was not entitled to qualified immunity because a reasonable jury could find that the amount of forced used in handcuffing was unreasonable. Id. at 1061.

But here, the officers did not take Cardenas to the ground and kneel on his shoulder to handcuff him—which was the conduct the court found could be unreasonable in Abdullahi—Cardenas was standing or sitting, and at no point did an officer kneel on his back. And unlike in Meredith, where the officers were on the scene to perform an investigatory search regarding a possible violation of tax law, here, the officers were on the scene not for a search but because dispatch had informed the officers that Cardenas was irate, feeding a dog poison, and that he had taken the phone away from his mother. Additionally, the officers in Meredith were able to take the woman to the ground and tightly place handcuffs on her, while in this case, again, Cardenas remained seated, and the officers could not move his arms and therefore did not handcuff him.

Because neither of these cases are sufficient to delineate Cardenas's Fourth Amendment right such that "any reasonable officer in [the officers'] shoes would have understood that he was violating it," Reese v. County of Sacramento, 888 F.3d 1030, 1038 (9th Cir. 2018), and because the Court has found no other case that would do so, the Court finds that Cardenas has not satisfied his burden to prove that the Fourth Amendment right was clearly established at the time of the incident. Thus, Officers Sinks and Saladen are both entitled to qualified immunity on the excessive force claim.

V. CONCLUSION

For the above reasons, the Defendants are entitled to qualified immunity on all claims. Accordingly,

IT IS ORDERED granting the Defendants' Motion for Summary Judgment. (Doc. 97).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter judgment for Defendants and terminate this action.

IT IS FURTHER ORDERED denying Plaintiff's request for oral argument. Dated this 31st day of March, 2022.

/s/ Stephen M. McNamee
Honorable
Stephen M. McNamee
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Kyle Cardenas, Plaintiff, v. Josiah Saladen, et al., Defendants.	**NO. CV-17-04749-PHX-SMM** **JUDGMENT IN A CIVIL CASE** (Filed Mar. 31, 2022)

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order filed March 31, 2022, which granted Defendants' Motion for Summary Judgment, judgment is entered in favor of defendants. Plaintiff to take nothing, and the complaint and action are dismissed.

Debra D. Lucas
District Court Executive/
Clerk of Court

March 31, 2022

s/ D. Draper
By Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KYLE CARDENAS, Plaintiff - Appellant, v. JOSIAH SALADEN; et al., Defendants - Appellees.	No. 22-15632 D.C. No. 2:17-cv-04749-SMM U.S. District Court for Arizona, Phoenix **MANDATE** (Filed Apr. 19, 2023)

The judgment of this Court, entered March 02, 2023, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Howard Hom
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KYLE CARDENAS, Plaintiff - Appellant, v. JOSIAH SALADEN; et al., Defendants - Appellees.	No. 22-15632 D.C. No. 2:17-cv-04749-SMM District of Arizona, Phoenix ORDER (Filed Apr. 11, 2023)

Before: GRABER, CLIFTON, and CHRISTEN, Circuit Judges.

The panel has unanimously voted to deny Plaintiff-Appellant's petition for panel rehearing. Judge Christen has voted to deny the petition for rehearing en banc, and Judges Graber and Clifton have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

No. 22-15632

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KYLE CARDENAS, Plaintiff-Appellant, v. JOSIAH SALADEN; LARRY E. SINKS; MIKEL J. CURTIS; GREG THOMAS; JASON M. ROMAN; KERRY SANGUIGNI; RYAN SHEPPARD; et al., Defendants-Appellees.	**No. 22-15632** D.C. No. 2:17-cv-04749-SMM U.S. District Court for Arizona, Phoenix **OPENING BRIEF** (Filed Aug. 5, 2022)

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[2] **Corporate Disclosure Statement**

In accordance with Fed. R. App. Proc. 26.1(a) and 28(a)(1), Plaintiff-Appellant Kyle Cardenas certifies that neither he, nor Defendants-Appellees, nor any other parties, are parents, subsidiaries, or affiliates of any publicly-owned corporation.

DATED this 5th day of August, 2022.

/s/ David L. Abney, Esq.
David L. Abney
Attorney for Plaintiff/Appellant

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[9] **Introduction: Summary of Argument**

Gilbert Police Department Officers Josiah Saladen and Larry Sinks bullied their way into Kyle Cardenas's home and then broke down his bedroom door and viciously tasered him. There was no emergency to justify the invasion of Kyle's bedroom; there was no probable cause to arrest him; and there was no justification for tasering him.

Jurisdictional Statement

This Court has jurisdiction over this timely appeal under 28 U.S.C. § 1291.

Statement of the Issues Presented for Review

The emergency doctrine. Did any emergency legally justify the police officers' intrusion into the home and bedroom of Kyle Cardenas, when he posed no realistic threat to the police officers, to others, or to himself?

Standard of Review

This Court reviews orders granting summary judgment de novo. *Cal. River Watch v. City of Vacaville*, 39 F.4th 624, 628 (9th Cir. 2022).

When reviewing the grant of summary judgment, this Court views "the facts in the light most favorable to the nonmoving party." *Rice v. Morehouse*, 989 F.3d 1112, 1120 (9th Cir. 2021). The reviewing court must draw all justifiable inferences in favor of the nonmoving party, "including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker* [10] *Magazine, Inc.*, 501 U.S. 496, 520 (1991).

"Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Grand Canyon Trust v. Provencio*, 26 F.4th 815, 820 (9th Cir. 2022). "Summary judgment is inappropriate if a reasonable juror, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Hill v. Walmart, Inc.*, 32 F.4th 811, 816 (9th Cir. 2022).

The conflicting testimony about what happened at Kyle Cardenas's home "underscores the inappropriateness of a grant of summary judgment." *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 381 (9th Cir. 1992). After all, the Court "may not make credibility determinations or weigh conflicting evidence." *Bator v. Hawaii*, 39 F.3d 1021, 1026 (9th Cir. 1994).

Statement of the Case

This case concerns two Arizona municipal police officers who bullied their way into a home. They broke down the bedroom door of an honorably discharged combat veteran (suffering from post-traumatic stress disorder) who was trying to shelter from their invasion of his home in his own bedroom. The police officers then tasered that combat veteran mercilessly when he posed no threat to them, to others, or to himself. The case asks whether the rule of law in our nation can [11] tolerate that lawlessness from law enforcement officers disciplined by their own police department for their revolting misconduct.

Statement of Facts

1. Kyle Cardenas was an honorably discharged combat veteran suffering from post-traumatic stress disorder.

Kyle is a combat veteran of the United States Army's legendary 82nd Airborne Division. (**ER-091, ¶ 1**). He served two tours in Iraq between 2003 and 2006, and received an honorable discharge. (**ER-091, ¶ 1**). As a result of his nerve-wrenching military service, Kyle suffers from symptoms of Post-Traumatic Stress Disorder (PTSD). (**ER-091, ¶ 2**). But despite the PTSD, Kyle had never been physically threatening or violent. (**ER-091, ¶ 2**).

2. Kyle suffered severe anxiety on September 12, 2015. His parents sought psychological help. Instead of help, two Rambo police officers arrived.

At about 9:47 p.m. on September 12, 2015, Kyle's mother called the VA Crisis Hotline because Kyle was not acting like himself. Kyle supposedly believed his mom was serving him a poisoned salad, so he had fed the supposedly poisoned salad to the family dog. (**ER-091, ¶ 3**). Although Kyle's mother solely wanted to get psychological help for Kyle, neither of Kyle's parents were afraid of him. They were just concerned about his mental health. (**ER-091, ¶ 4**).

But instead of providing any psychological help for Kyle, the VA Crisis Hotline Operator patched in the Gilbert Police Department and spoke to one of its [12] operators. (**ER-091, ¶ 5**). At that point, the Gilbert Police Department issued a dispatch to send one or more officers to Kyle's home. (**ER-091, ¶ 5**). The police officers the Gilbert Police Department dispatched to Kyle's home that night were Officer Josiah Saladen and Officer Larry Sinks. (**ER-091, ¶ 6**).

Office Saladen and Officer Sinks got the following garbled, incomplete, and inaccurate information in the dispatch call:

> "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."

(**ER-092, ¶ 7**).

3. The police officers failed to investigate and understand the facts.

When they arrived at Kyle's home, the police officers knew Kyle was a veteran with PTSD. (**ER-092, ¶ 8**). Because of that, they knew Kyle—as a veteran suffering from PTSD—was not a child, although, despite that, he was asking for Child Protective Services ("CPS"). (**ER-092, ¶ 9**).

Thus, when they arrived at Kyle's home, the police officers knew Kyle was suffering from a mental health condition (PTSD), knew that he was not himself, knew that (inexplicably) he wanted to speak with CPS, and knew that he thought (oddly) that his parents were trying to poison him. (**ER-092, ¶ 11**).

[13] When they got to Kyle's home, the police officers did not ask for—and did not receive—any information indicating that Kyle was or had been physically abusive to anyone in the home. (**ER-092, ¶ 11**).

Upon arrival at Kyle's home, the officers did not ask for—and did not receive—any information indicating Kyle had made any threats to anyone in the home.

(**ER-092, ¶ 12**). When they got to Kyle's home, the police officers received no information indicating that Kyle had any weapons in the home. (**ER-093, ¶ 13**).

But when they arrived at Kyle's home, they did know "GPD [Gilbert Police Department] Policy or Procedure 807," entitled "Handling Mentally Ill/Intoxicated persons, section D.1, D.2, D.3." (**ER-093, ¶ 14**). GPD Policy or Procedure 807 mandated that the police officers were:

> "Take steps to calm the situation. . . . Where violence or destructive acts have not occurred, avoid physical contact and take time to assess the situation. . . . Move slowly; provide reassurance that the police are there to help. . . . Relate your concern and allow them to vent their feelings. Where possible, gather information on the subject from . . . family members."

(**ER-093, ¶ 14**).

The police officers took none of those measures.

4. The police officers pushed into Kyle's home without any good reason to do that and without learning the nature of the situation.

Officer Saladen arrived at Kyle's home first and rang the doorbell, after which Kyle opened the front door and asked if he was CPS. (**ER-093, ¶ 15**).

[14] When Officer Saladen stated that he was not CPS, Kyle told Officer Saladen that he had requested

CPS and did not want to speak with Officer Saladen. (**ER-093, ¶ 16**). At that point, Kyle closed the door as Officer Saladen was hurrying to the door in an effort to prevent the door from closing. (**ER-093, ¶ 16**). Both the video evidence and Officer Sink's statements confirm Officer Saladen had tried to prevent Kyle from closing the door. **(ER-094, ¶ 17**). Officer Sinks, who was walking up to the door, admitted that "Saladen kind of like threw himself into [the door]." (**ER-094, ¶ 17**).

In a bit of understatement, the district court acknowledged that Kyle's "actions seemed to indicate a lack of consent which could override any consent given by his parents." (**ER-013 at 6:9-12**).

At that time, other than a dog barking after the doorbell rang, there was no yelling, commotion, or any other noise coming from inside the home. (**ER-094, ¶ 18**). Officer Saladen called for Kyle through the closed front door, at which point Shana Cardenas (Kyle's mother) opened the door, with her husband behind her. (**ER-094, ¶ 19**). Officer Saladen and Officer Sinks, who had just arrived at Kyle's home, both immediately entered the home. (**ER-094, ¶ 19**).

Office Sinks and Officer Saladen had determined—even before Kyle's parents opened the door—that they were going to enter Kyle's home. (**ER-094, ¶ 20**). That prejudgment of the facts was evidenced by: (1) Officer Saladen's efforts [15] to prevent Kyle from closing the door, (2) Officer Sinks's statement that Officer Saladen "threw himself into" the door, and (3)

Officer Sinks's recorded statement later that evening that "we got to get in there." (**ER-094, ¶ 20**).

Neither police officer asked for permission to enter the home. (**ER-094, ¶ 21**). Saladen and Sinks claim that Ruben Cardenas (Kyle's father) had invited them into the family home. (**ER-196, ¶ 19**). But the body-camera video indicates that neither parent invited the officers into their home. (**ER-094, ¶ 22**). That evidence must be viewed in the light most favorable to Cardenas.

Significantly, the district court acknowledged that the consent issues had not been discussed by either party—and then "decline[d] to address whether the officers had consent to enter" Kyle's home. (**ER-013 at 6:22-24**).

Without question, neither police office showed the slightest interest in learning what was really going on at Kyle's home:

- Neither police officer asked if the home's occupants were safe. (**ER-094, ¶ 23**).
- Neither police officer asked to see the allegedly poisoned family dog or asked if the allegedly poisoned officer was okay. (**ER-094, ¶ 24**).
- Neither police officer asked if there was anybody else in the home. (**ER-095, ¶ 25**).
- Neither police officer asked if anyone was hurt. (**ER-096, ¶ 26**).

- Neither police officer asked Kyle's parents if Kyle was dangerous. (**ER-097, ¶ 27**).

[16] - Neither police officer asked Kyle's parents if they were afraid. (**ER-095, ¶ 28**).

Kyle's parents were standing right in front of the police officers. (**ER-095, ¶ 29**). If the police officers had bothered to ask any of the questions listed above, they would have learned that Kyle's parents were <u>concerned</u> about him—not <u>afraid</u> of him. (**ER-095, ¶ 29**). After all, Kyle's mother (Shauna Cardenas) had called the VA not from any sort of fear for herself or anyone else, but because she wanted someone to help her son. **(ER-095, ¶ 29**).

Indeed, just after opening the front door, as the police officers began entering her home, Shauna Cardenas began crying, while she was saying "he's having an acute psychiatric episode. The police, the police are going to make it worse." (**ER-095, ¶ 30**).

5. With no justification, the police officers badgered and pressured Kyle.

After the police officers had entered Kyle's home, Officer Saladen saw Kyle walking in the background past his parents to go down the hall. (**ER-095, ¶ 31**). At that point, Officer Saladen called for Kyle to "come on out here man"—and tried to grab Kyle, who continued down the hall to his bedroom. (**ER-095, ¶ 31**).

Kyle then briefly came out of his bedroom and stood in the hallway with the family dog. (**ER-009 at**

2:16-16). Officer Saladen asked Shana Cardenas if her son, Kyle, had any weapons, to which Shana responds "No, none whatsoever." [17] (**ER-095, ¶ 32**). The police officers then continued down the hall after Kyle and demanded that he come out of his room. (**ER-095, ¶ 33**).

6. The family dog's attack on the police officers—that never happened.

As Kyle exited his bedroom room, the family dog trotted past the police officers. (**ER-096, ¶ 34**). The family dog was barking and wagging its tail. (**ER-096, ¶ 34**). Officer Sinks claimed that Kyle had "sicced" the family dog on the police officers. (**ER-096, ¶ 34**). But that version of reality cannot be taken as true for three reasons:

- First, the family dog trotted, tail wagging, past the police officers and to Kyle's mom. (**ER-096, ¶ 35**).
- <u>Second,</u> nothing in the record indicates in any way that the dog vicious or dangerous.
- <u>Third,</u> Officer Sinks's claim that Kyle sicced the family dog on the police officer directly conflicts with Kyle's testimony that when Kyle walked out of the room and the dog was near him, Kyle did not want his dog to get hurt and asked his mother to "get her" [the dog] so she could take the dog outside. (**ER-096, ¶ 35**).

- Officer Sinks's claim that Kyle sicced the family dog on him also directly conflicted with Shauna Cardenas's testimony that Kyle had indeed simply asked Shauna to "get her"—that is, to get the family [18] dog. (**ER-096, ¶ 35**).

The district court itself admitted 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. (**ER-009 at 17-19**).

Moreover, because there is a direct conflict between the police testimony on the one hand and the testimony of Kyle and his mother on the other hand, neither this Court not the district court may prefer the police testimony. Instead, the testimony of Kyle and his mother must be accepted as true and viewed in the light most favorable to Kyle—and the testimony of the police about the family dog being sicced on him must receive no credit whatsoever.

After all, when deciding whether a genuine issue of material fact exists for trial, where the "evidence is genuinely disputed on a particular issue—such as by conflicting testimony—that issue is inappropriate for resolution on summary judgment." *Zetwick v. County of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017). Thus, a district court cannot evaluate the persuasiveness of conflicting testimony and cannot decide which testimony is more likely true. *Minidoka Irrigation Dist. v. Dept. of Interior*, 406 F.3d 567, 575 (9th Cir. 2005). And so, when "ruling on a summary judgment motion, the district court is not empowered to make credibility determinations or weigh conflicting evidence." *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1113 n. 5 (9th Cir. 2004).

[19] **7. The police officers grabbed and tasered Kyle with no justification.**

Kyle entered the hallway. (**ER-096, ¶ 36**). Officer Sinks falsely accused Kyle of telling his dog to attack the police officers, and told Kyle to put his hands on his head and turn around. (**ER-096, ¶ 36**). Kyle responded, "why, what have I done, what have I done" as Officer Sinks says, "You just tried to tell your dog to attack us." (**ER-096, ¶ 37**). Kyle responded by saying "No, I didn't." (**ER-096, ¶ 37**). Kyle's version of the facts must be taken as true.

The comments about the dog were a fig leaf to cover the police misconduct. Officer Sinks later 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." (**ER-096, ¶ 38**). "Getting ready to kick" a harmless dog epitomizes the police officers' aggression at Kyle's home.

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 weapon with the red-dot pointed on Kyle's back, quickly followed Kyle, and said "do not go" as Kyle walked to his bedroom and closed his bedroom door. (**ER-097, ¶ 41**).

Although Kyle posed no threat to anyone, Officer Sinks kicked a hole in Kyle's bedroom door, forced the door open, and entered Kyle's bedroom with [20] Officer Saladen following. (**ER-097, ¶ 42**). The police were in a trumped-up and fake "hot pursuit" of a helpless, hapless combat veteran suffering from PTSD.

As the police officers blasted into Kyle's room, he was not threatening them. Instead, he was standing up with his cell phone and telling the officers, "I'm recording you like I told you I was going to do." (**ER-097, ¶ 43**).

The officers then told Kyle to put his phone down. (**ER-097, ¶ 44**). Kyle said no, and sat down in a chair with his telephone in his hands between his legs as the police officers grabbed his arms in an effort to "detain" him—as he repeated "Why?" (**ER-097, ¶ 44**). The officers then said that "you're going to get tased" and demanded that he give them his hands, as Kyle repeated "Why?" while the officers struggled to try to grab his hands. (**ER-097, ¶ 45**).

Officer Sinks then stepped back, drew his taser, shouted "taser, taser, taser", and tased Kyle as Kyle was standing up out of his chair. (**ER-098, ¶ 46**). Nothing in the record indicates that, when Officer Sinks attacked Kyle with a taser, Kyle posed any immediate threat of harm to himself, to the police officers, or to anyone else.

At that point, as was his right under Arizona's unique law on the subject, Kyle acted to defend himself from the unjustified taser and physical attack, tackled Officer Sinks, and a fight broke out. (**ER-098, ¶ 47**). *See* A.R.S. § 13-404(B)(2) (The use of physical force against a peace officer to resist an arrest is justified if [21] "the physical force used by the peace officer exceeds that allowed by law.").

Tasing a suspect who was no threat to himself, to the police, or to others is the epitome of the unjust and unjustified use of excessive physical force. Arizona law will not tolerate that sort of abuse of the police power. *See Dugan v. State*, 54 Ariz. 247, 250 (1939) (A "person illegally arrested may resist the arrest, using such force as may be reasonably necessary, short of killing the arresting officer.").

Kyle was charged with aggravated assault, disrupting the peace, and animal cruelty, of all things. Those bogus charges, however, were dismissed. (**ER-098, ¶ 50**). Indeed, as the Gilbert Police Department Internal Investigation made clear, the police officers had no reasonable basis to believe Kyle assaulted them with his dog or otherwise. (**ER-098, ¶ 50**).

8. The Gilbert Police Department's Internal Affairs division condemned Officer Sinks's conduct.

The district court specifically held that the conclusions of the Gilbert Police Department's internal review were admissible under both Fed. R. Evid. 403 and

407. (**ER-010 at 3:23 to 4:13**). Those internal-review conclusions were therefore evidence creating genuine issues of material fact on the impropriety of the entry into Kyle's room and on the impropriety of the force used against him that the jury should have been allowed to consider.

As for Officer Sinks, Gilbert Police Department Internal Affairs found as follows:

[22] 1. Sustained: Respect for Constitutional Rights: Unreasonable Force

2. Sustained: Respect for Constitutional Rights: Search and Seizure

- The initial entry into the home appeared to be consensual. However, the forced entry into the bedroom was not based on a search warrant or any other appropriate exception to the search warrant rule.
- There was no probable cause for the alleged act of aggravated assault involving the dog. As such the subsequent use of force and entry into the bedroom was not within current general orders.
- Although Cardenas may have committed a misdemeanor crime prior to their arrival, the situation was not properly investigated or assessed prior to the bedroom (#1) entry.
- The level of urgency/type of contact with Cardenas was not supported by known facts (deescalation was appropriate).

- Based on the totality of the circumstances, the use of force and entry into the bedroom was not within current general orders.

(**ER-099, ¶ 52**).

9. The Gilbert Police Department's Internal Affairs division condemned Officer Saladen's conduct.

The district court specifically held that the conclusions of the Gilbert Police Department's internal review were admissible under both Fed. R. Evid. 403 and 407. (**ER-010 at 3:23 to 4:13**). Those internal-review conclusions were therefore evidence creating genuine issues of material fact on the impropriety of the entry into Kyle's room and on the impropriety of the force used against him that the jury should have been allowed to consider.

[23] As for Officer Saleden, Gilbert Police Department Internal Affairs found as follows:

1. Sustained: Respect for Constitutional Rights: Unreasonable Force
2. Sustained: Respect for Constitutional Rights: Search and Seizure

- The initial entry into the home appeared to be consensual. However, the forced entry into the bedroom was not based on a search warrant or any other appropriate exception to the search warrant rule.

- There was no probable cause for the alleged act of aggravated assault involving the dog.
- Although Cardenas may have committed a misdemeanor crime prior to their arrival, the situation was not properly investigated or assessed prior to the bedroom (#1) entry.
- The level of urgency/type of contact with [Kyle] was not supported by known facts (deescalation was appropriate).
- Although Officer Saladen did not make the initial forced entry into the bedroom, he did follow Officer Sinks and initiated contact/use of force with Cardenas.
- Based on the totality of the circumstances, the use of force and entry into the bedroom was not within current general orders.

(**ER-099 and ER-100, ¶ 53**).

10. The police officers violated departmental policies.

Objectively, the officers had no reasonable basis to feel threatened or to believe a crime had occurred, and lacked probable cause to arrest, or even detain, Kyle in his own home. (**ER-097, ¶ 39**).

[24] At the Cardenas home, neither Officer Saladen not Officer Sinks took any of the steps outlined in the Gilbert Police Department policy and procedure "Handling Mentally Ill/Intoxicated Persons," Sections D.1, D.2, D.3, in that:

- The police officers took no steps calm the situation.
- Although no violence or destructive acts had occurred, the police officers did not avoid physical contact and took no time to assess the situation.
- The police officers did not move slowly.
- The police officers did not provide reassurance that they were there to help.
- The police officers did not relate their concern for Kyle.
- The police officers did not allow Kyle to vent his feelings.
- Although it was possible to do so, the police officers did not even gather information about Kyle from his parents.

(**ER-093, ¶ 14**) (**ER-098, ¶¶ 48-49**).

Gilbert Police Department Internal Affairs determined that Officer Sinks and Officer Saladen failed to respect Kyle's constitutional rights to be free from unreasonable force and unreasonable search and seizure. (**ER-097, ¶ 40**).

11. Uncontradicted expert testimony confirmed the misconduct.

Greg Meyer, Kyle's police-practices expert, opined that:

1. The entry into the residence by Officer Saladen and Officer Sinks upon arrival was not appropriate under the circumstances, and the entry did not conform to contemporary police procedure and [25] training.

2. Officer Sinks's and Officer Saladen's decision to detain the Plaintiff when there was no crime, no emergency, and no one was in danger did not conform to contemporary police procedure and training; reasonable officers would not have attempted this detention.

3. Officer Sinks's forced entry into Plaintiff's bedroom and Officer Saladen's following Officer Sinks into the bedroom to confront the Plaintiff did not conform to contemporary law enforcement procedure and training; a reasonable officer would not have entered under these circumstances.

4. Officer Sinks's forced entry into Plaintiff's bedroom and Officer Saladen's following Officer Sinks into the bedroom resulted in officer-created jeopardy that led to the unnecessary, protracted series of use-of-force applications by Officer Sinks, Officer Saladen, several other officers.

5. The uses of force by the other Defendant officers (Curtis, Thomas, Sanguigni, Sheppard, Roman) that occurred in this case at the home and at the hospital were the result of the bad choices and tactical errors detailed above (in

> Opinions No. 1-4) made by Officers Saladen and Sinks.

(**ER-098 to ER-099, ¶ 51**).

Procedural History

On September 7, 2017, Kyle Cardenas sued Josiah Saladen, Larry E. Sinks, Mikel J. Curtis, Greg Thomas, Jason M. Roman, Kerry Sanguigni, and Ryan Sheppard in their individual capacities in Maricopa County Superior Court. (**Doc. 1-2**). The Complaint alleged the Defendants had violated Kyle's constitutional and civil rights under 42 U.S.C. § 1983. (**Doc. 1-2**).

On December 12, 2017, the Defendants filed a notice of removal to the [26] United States District Court for the District of Arizona. (**Doc. 1**). On December 29, 2017, the Defendants filed a joint Answer. (**Doc. 4**).

On October 23, 2019, the parties filed a stipulation for dismissal with prejudice of Defendants Curtis, Thomas, Roman, Sanguigni, and Sheppard. (**Doc. 71**). On October 24, 2019, the district court approved the stipulation and dismissed with prejudice all claims against those five defendants. (**Doc. 72**). After the dismissal of those five Defendants, the sole remaining Defendants were Officer Saladen and Officer Sinks.

On March 19, 2021, Officers Saladen and Sinks filed a motion for summary judgment, claiming that they had qualified immunity (**ER-181 to ER-191**) and a supporting statement of facts with exhibits (**ER-193 to ER-241**).

On May 19, 2021, Kyle filed a response to the defense motion for summary judgment (**ER-055 to ER-088**), a separate statement of facts in support of the response (**ER-090 to ER-101**), and objections to the defense statement of facts (**ER-103 to ER-114**).

On July 16, 2021, Officers Saladen and Sinks filed a reply in support of their separate statement of facts (**ER-047 to ER-053**). On August 9, 2021, the police officers filed an amended reply in support of their motion for summary judgment. (**ER-029 to ER-045**) and an amended response and objections to Kyle's separate statement of facts. (**ER-022 to ER-027**).

[27] Although Kyle had asked for oral argument concerning the summary-judgment motion, the district court did not grant it. On March 31, 2022, the district court filed a "Memorandum of Decision and Order" granting the motion for summary judgment because: (1) there supposedly was an injury letting the police officers barge into Kyle's room, (2) there supposedly was probable cause to arrest Kyle, and (3) the police officers supposedly did not use excessive force when they grabbed Kyle with no justification and attacked him with no justification with a taser in his own bedroom. (**ER-008 to ER-020**).

Also on March 31, 2022, the clerk of the district court filed a "Judgment in a Civil Case." (**ER-006**). On April 26, 2022, Kyle filed a timely notice of appeal. (**ER-243**).

Legal Argument

1. No emergency justified the police officers' unreasoning intrusion into the home and bedroom of Kyle Cardenas.

The district court noted that the police officers argued "that they lawfully entered [Kyle's home and bedroom] because [Kyle] posed a danger to himself and others." (**ER-013 at 6:26-27**). "Under the emergency doctrine," the district court wrote, police "officers may enter homes without a warrant in the interest of the safety of others or themselves." (**ER-013 at 6:27 to 7:2**) (citing *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008).

Snipe explained that the emergency exception to the Fourth Amendment [28] only exists if "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *Snipe*, 515 F.3d at 952.

Genuine, disputed issues of material fact prevent summary judgment on the issues of whether the emergency exception to the Fourth Amendment applies. This is a situation where the district court should have refused to grant summary judgment and should have given to the jury this Circuit's model civil jury instruction on the emergency exception to the Fourth Amendment. That model civil jury instruction provides that:

> In general, a search of a [person] [residence] [vehicle] [property] is unreasonable under the Fourth Amendment if the search is not conducted pursuant to a search warrant. [A "search warrant" is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required, and a search is reasonable if, under all of the circumstances:
>
> 1. the police officer[s] had objectively reasonable grounds at the time of the entry or the search to believe that there was an emergency at hand and there was an immediate need to protect others or themselves from serious harm; and
>
> 2. the search's scope and manner were reasonable to meet the need.
>
> In order to prove the search in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply.

"Particular Rights—Fourth Amendment—Unreasonable Search—Exception to [29] Warrant Requirement—Emergency Aid," Ninth Circuit Jury Instructions Comm., *Manual of Model Civil Jury Instructions*, No. 9.17 at 166 (rev. June 2018).

The model civil jury instruction provides a roadmap to whether there was any emergency sufficient to justify breaking down the door to Kyle's bedroom after Kyle had locked the bedroom door and refused entry to the police officers.

First, there was no emergency. Kyle had withdrawn to his bedroom, had locked its door, and was just asking to be left alone.

Second, there was no "objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm." *Snipe*, 515 F.3d at 952. Kyle was in his bedroom behind a locked door. He had made no threat of harming himself. He had made no threat against his parents. He had made no threat against the police officers.

As for the allegedly salad-poisoned family dog, it was evidently healthy, unpoisoned, and frisky. There was only a garbled, incomplete claim that Kyle was poisoning the dog by feeding it some salad that his mother had fed to him. (**ER-091, ¶ 3**) (**ER-092, ¶¶ 7, 11**). Reasonable jurors could conclude that no one would objectively take that salad-poisoning nonsense seriously. Moreover, the family dog had trotted right past the invading police officers, wagging its tail, without bothering the police officers in any way, and without anyone noting that it was displaying any poisoning symptoms. (**ER-096, ¶ 35**).

[30] The district court acknowledged that the police officers only had a secondhand report that "Kyle had taken the phone away from his mother and was irate." (**ER-014 at 7:23-24**). That is hardly justification for breaking down Kyle's locked bedroom door, ignoring

his pleas to be left alone, grabbing him, and tasering him.

As for supposedly poisoning the family dog with his mom's salad, the police officers could see for themselves that the family dog looked fine. Let's not leave the land of objective reality. Reasonable jurors could conclude that protecting the family dog did not require breaking down Kyle's locked bedroom door, ignoring his pleas to be left alone, grabbing him, and tasering him. It is hard to imagine how reasonable jurors could conclude otherwise.

The district court emphasized that, when the police officers suddenly arrived (without any request or invitation by the parents or by Kyle), "Kyle was acting belligerently" and continued to demand Child Protective Services. (**ER-015 at 8:1-2**). And, of course, Kyle's mother was, indeed, "visibly upset." (**ER-015 at 8:3-4**). Many people would be "visibly upset" and belligerent when, with no invitation or request from them, police officers arrive at their homes and demand entrance despite an initial refusal.

As for Kyle's request for Child Protective Services, that was odd, but reasonable jurors could conclude that Kyle's confusing demand to speak with Child Protective Services required psychological patience and counseling, and did [31] not require breaking down Kyle's locked bedroom door, ignoring his pleas to be left alone, grabbing him, and tasering him.

Even the district court acknowledged that, although Kyle had supposedly "continued to act belligerently" he actually only "hid inside of his room." (**ER-015 at 8:4-5**). Supposed belligerence that ends in no overt aggressive acts of any sort and that actually ends in a PTSD-shattered combat veteran hiding in his room creates no emergency situation. Reasonable jurors could conclude that Kyle's supposed belligerence and his choice to meekly hide in his room did not require breaking down Kyle's locked bedroom door, ignoring his pleas to be left alone, grabbing him, and tasering him.

Even the district court admitted that "the record here does not definitively establish an emergency situation." (**ER-015 at 8:5-6**). Despite that, the district court concluded that the "facts, taken together, [gave] the police officers an objectively reasonable basis to conclude" that there was an emergency situation," that the police "officers only entered areas that were reasonable to address the emergency needs," and that the officers lawfully entered under the emergency exception." That is incorrect. Reasonable jurors could easily conclude that there was no objectively reasonable basis for breaking down Kyle's locked bedroom door, ignoring his pleas to be left alone, grabbing him, and tasering him.

Then, to support using the emergency exception to the Fourth Amendment, [32] the district court exited the emergency-exception jurisprudence entirely and stated that, even if the entry was unlawful, Kyle "has not cited to, nor has the Court found, any precedent which 'squarely governs' the specific facts at issue." (**ER-015 at 8:12-14**) (quoting *Kisela v. Hughes*, 138

S.Ct. 1148, 1153 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 15 (2015)).

But *Kisela* and *Mullenix* were not emergency-exception cases. They solely focused on the reasonableness of use of force, not on whether there was any sort of emergency that allowed ignoring the Fourth Amendment's warrant requirement. They do not discuss the emergency exception at all. In later sections, this Opening Brief analyzes in detail some of the many cases proving that it was clearly established law by September 12, 2015 that the police officers who broke into Kyle's locked bedroom used excessive force when they tasered him.

But the emergency exception to the Fourth Amendment is not an exception that focuses on excessive force, as did *Kisela* and *Mullenix*. When determining if the emergency exception to the Fourth Amendment applies, a citizen does not have to cite to precedent that "squarely governs" the specific facts at issue.

All that is needed in a civil case where there are genuine issues of material fact concerning applying the emergency exception is to establish to the jury's satisfaction the existence of the factual elements described in this Court's own model civil jury instruction on the emergency exception. *See* "Particular Rights—[33] Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Emergency Aid," Ninth Circuit Jury Instructions Comm., *Manual of*

Model Civil Jury Instructions, No. 9.17 at 166 (rev. June 2018).

Third, refusing to honor Kyle's request to be left alone in his room and beating down his locked bedroom door to attack him with a taser was so obviously over-the-top, wrong, and unreasonable that the Gilbert Police Department, through its Office of Professional Standards, itself sustained investigative findings that both of the invading police officers had failed to respect Kyle's right to be free from unreasonable force and from unreasonable search and seizure. (**ER-097, ¶ 40**) (**ER-117 and ER-118**).

In fact, for both police officers, the Gilbert Police Department, through its Office of Professional Standards, sustained the specific finding that "the forced entry into the bedroom was not based on a search warrant or any other appropriate exception to the search warrant rule." (**ER-121**).

The district court ruled that those police-department findings were indeed admissible evidence. (**ER-011 at 4:12-13**). The findings were therefore powerful and direct evidence in Kyle's favor that the police officers had no exception to the warrant rule—meaning, of course, that there was no emergency exception.

Those admissible, right-on-point findings by the Gilbert Police Department, combined with the disputed issues of material fact, required denial of the motion [34] for summary judgment on the emergency exception to the warrant requirement. Indeed, those facts and circumstances required submission of the emergency exception to the jury under this Circuit's own model civil jury instruction, which exists precisely for cases such as this one. That is, the model civil jury instruction exists because—as here—there can be cases where the district court cannot take the "emergency exception" issue from the jury.

2. There was no probable cause to arrest Kyle Cardenas.

What probable cause existed to let the police officers chase Kyle into his own bedroom in his own home, break down the door to his bedroom, and then grab, taser, and arrest him? None. "In this case," even the district court admitted that "the legality of the arrest was arguable." (**ER-016 at 9:21**). It was much more than "arguable."

There were genuine issues of material fact preventing the entry of summary judgment and requiring that the existence of probable cause be submitted to the jury for its consideration under this Circuit's own model civil jury instruction telling the jury how to evaluate whether probable cause to arrest existed in cases where there are genuine issued of material fact concerning probable cause:

> In general, a seizure of a person by arrest without a warrant is reasonable if the arresting officer[s] had probable cause to believe the plaintiff has committed or was committing a crime.

> In order to prove the seizure in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that [he] [she] [35] was arrested without probable cause.
>
> "Probable cause" exists when, under all of the circumstances known to the officer[s] at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.
>
> Although the facts known to the officer are relevant to your inquiry, the officer's intent or motive is not relevant to your inquiry.
>
> Under [federal] [state] law, it is a crime to [*insert elements or description of applicable crime for which probable cause must have existed*].

"Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Probable Cause Arrest," Ninth Circuit Jury Instructions Comm., *Manual of Model Civil Jury Instructions*, No. 9.23 at 182 (rev. Sep. 2020).

That model civil jury instruction exists for cases such as this, where there are genuine issues of material fact whether there were any sort of "crimes" that could support probable cause to arrest Kyle before the police officers used excessive force in breaking down the door to his bedroom, used excessive force to grab him, and, most egregiously, used excessive force to taser him.

3. Tasers are deadly weapons that police officers must only deploy when absolutely necessary.

Tasers are deadly. *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1177 (9th Cir. 2013). They can kill. *See* Jared Strote & H. Range Hutson, *Taser Use in Restraint-Related Deaths*, 10(4) Prehospital Emergency Care 447, 448-49 (2006) (Authors highlight results of medical study concluding that "sudden deaths [36] can and do occur after Taser use."); Douglas P. Zipes, *TASER Electronic Control Devices Can Cause Cardiac Arrest in Humans*, 129(1) Circulation 101 (2014). *See also Peña v. City of Rio Grande City, Texas*, 816 Fed. Appx. 966, 972 n.8 (5th Cir. 2020) (A "taser can cause death or serious injury.").

Tasering causes "an uncontrollable contraction of skeletal muscle tissue, overriding the motor nervous system," and resulting in "complete incapacitation." Shaun K. Kedir, *Stunning Trends in Shocking Crimes: A Comprehensive Analysis of Taser Weapons*, 20 J.L. & Health 357, 361 (2007).

"When faced with a mentally ill individual," as here, this Court has held that "a reasonable police officer should make a " 'greater effort to take control of the situation through less intrusive means.' " *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010). The facts prove that the police officers who blustered and barged into Kyle's home and then broke down the door to enter his private room despite his please to be left alone, made no effort to take control of the situation through less intrusive news, despite knowing that Kyle was suffering from PTSD.

Since their adoption as implements of coercion and restraint, police officers have deployed tasers against untold numbers of persons across America. Many people who have suffered those taser deployments have sued, alleging that use of the tasers was excessive force. As in any category of excessive-force cases, of course, with the law of qualified immunity tilting so heavily in their favor, police [37] authorities win excessive-force taser cases more often than they lose.

4. By September 12, 2015, it was clearly established law that police officers used constitutionally excessive force when they tased suspects who posed a risk of harm to themselves, to the police, or to others.

In cases where police authorities have been held liable for using tasers against suspects, there is one constant. If there is no violent suspect posing an immediate threat to themselves, to others, or to the police officers themselves, police officers know they are not allowed to use the brutally painful force that tasers are designed to inflict—and with the severe bodily injury or death that they sometimes cause.

That was clearly established law by September 12, 2015, when the police officers unjustifiably tasered Kyle. *See De Boise v. Taser International, Inc.*, 760 F.3d 892, 897 (8th Cir. 2014) (It is the rule that "non-violent, non-fleeing subjects have a clearly established right to be free from the use of tasers.").

Because taser excessive-force cases before September 12, 2015 are the ones that matter, these are just some of the clearly-established-law, published, well-known taser cases from the era before the police officers in the present case had intentionally attacked Kyle with a taser:

2007: In *Casey v. City of Federal Heights*, 509 F.3d 1278, 1286 (10th Cir. 2007), the Tenth Circuit stated there was no qualified immunity in a tasering case, because it did "not know of any circuit that has upheld the use of a Taser [38] immediately and without warning against a misdemeanant" who was not fleeing, was not resisting arrest, and was nonviolent. [As of the date of filing this brief, Westlaw indicates that 577 separate cases have cited *Casey*.]

2009: In *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009), the Eighth Circuit held that, when the police officer had deployed his taser and arrested a suspect, "the law was sufficiently clear to inform a reasonable officer that it was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders to end her phone call to a 911 operator."

Here, Kyle had committed no wrong. The Kyle-told-his-dog-to-attack-the-police fantasy was false, if you accept the version of the facts that Kyle and his parents presented and that is evident from the video and from what the Gilbert Police Department itself admitted was true. Take away the false claim that Kyle told his pacificist dog to attack the police, and there is no pretext of any sort for arresting, detaining, and tasering a non-aggressive combat veteran suffering from PTSD in his own bedroom and in his own home.

Remember that Kyle had retreated to his bedroom after the police officers had burst into his home. Kyle was simply attempting to keep possession of the phone on which he was trying to record the ongoing assault on his home and on [39] himself, including showing the police batter into his room through its locked door. Under those circumstances, Kyle had a clearly established right to be free from a taser attack. [As of the date of filing this brief, Westlaw indicates that 530 separate cases have cited *Brown*.]

2010: In *Kijowski v. City of Niles*, 372 Fed. Appx. 595, 601 (6th Cir. 2010), the Sixth Circuit held that a police officer "could not reasonably have believed that use of a Taser on a non-resistant subject was lawful." Likewise, in our case, where Kyle's offense was refusing to surrender the phone he was using to record the terrifying encounter with the berserk police officers who had barged into his home and had then broken down his bedroom door and burst into his room, Kyle had a clearly established right to be free from a taser attack. [As of the date of filing this brief, Westlaw indicates that 125 separate cases have cited *Kijowski*.]

<u>2010</u>: In *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 662-63 (10th Cir. 2010), the Tenth Circuit confronted a situation where, in response to a domestic disturbance call police officers arrived at a home where the husband told them that he and his wife had had a fight in which his wife had tried to put him in a closet, that she had drunk alcohol and taken pain medication, and that she had left the home with a kitchen knife.

The wife walked back with nothing in her hands, which "were clearly visible by her side," and got "within several feet" of one of the officers who had "exited [40] the house and began walking down the driveway." *Id*. at 663. Walking quickly, the wife veered away from the police officer "towards the front door, cutting across the lawn," but "was neither actively resisting nor fleeing arrest." *Id.* at 663, 665.

The officer "gently placed his flashlight and clipboard on the ground and followed her," "removed his Taser, and discharged the Taser into [the wife's] back without warning." *Id*. at 663. The Tenth Circuit found that use of force was a constitutional violation under clearly established law. *Id*. at 666-67.

In our case, Kyle was passively resisting, but not fleeing. He had not attacked the police directly or through his milquetoast dog. Kyle posed no threat to anyone. He had a clearly established right not to be assaulted by a deadly weapon at that point in his one-sided encounter with the two police officers who had broken into his room and swarmed him. [As of the date of filing this brief, Westlaw indicates that 173 separate cases have cited *Cavanaugh*.]

<u>2010</u>: In *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010), the Ninth Circuit considered the use of a taser in a police stop. On July 24, 2005, a police officer stopped a car because its driver was not wearing a seat belt. *Id*. at 822. Once outside the car, the driver became upset and frustrated and began to yell and hit his own thighs, but did not direct any yelling at the police officer. The driver maintained a distance of from 20 to 25 feet from the police officer. Indeed, the driver was facing away from the police officer when the police officer, without any [41] warning, shot the driver in the back with a taser. *Id*.

The Ninth Circuit held that, under the totality of the circumstances, use of the taser on the driver was excessive force that violated the Fourth Amendment. *Id*. at 832. But the Ninth Circuit held that the back-shooting police officer was still entitled to qualified immunity because the driver's right not to be shot in the back by a police officer when the driver posed no danger to himself, to the police officer, or to anyone else was supposedly not clearly established at the time of the attack. *Id*. at 833.

Despite acknowledging that the Supreme Court's Fourth Amendment cases placed the police officer on fair notice that using the taser was not justified, the Ninth Circuit nevertheless concluded that "a reasonable officer in [the police officer's] position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances." *Id*. at 832-33. But after *Bryan*, no reasonable police officer could think that tasing a suspect who posed no risk of harm to himself, to the police, or to others was constitutional. [As of the date of filing this brief, Westlaw indicates that 805 separate cases have cited *Bryan*.]

2011: In *Mattos v. Agarano*, 661 F.3d 433, 445-46 (9th Cir. 2011), *cert. denied*, 566 U.S. 1021 (2012), the Ninth Circuit held that tasing a pregnant woman in 2006 was excessive although she had "actively resisted arrest insofar as she [42] refused to get out of her car when instructed to do so and stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car." Here, the tasing was excessive as well, since Kyle's crime was refusing to give to the police officers the phone on which he had captured some of their misconduct.

The importance of *Mattos* and *Bryan* for federal courts in the Ninth Circuit and elsewhere was the recognition that using a taser was constitutionally excessive force when the suspect was not violent but had resisted arrest. The Ninth Circuit concluded that the right not to be tased under such circumstances was not a clearly established right as of 2006. *Id*. at 446-48.). [As of the date of filing this brief, Westlaw indicates that 828 separate cases have cited *Mattos*.]

After *Mattos* and *Bryan* there was a clearly established right to be free from unjustified tasering. Indeed, as a federal district court in this Circuit acknowledged, by 2010 use of a taser on a suspect who was neither a flight risk nor an immediate threat to officers was clearly established as an instance of the use of excessive force. *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F.Supp.3d 1169, 1183-84 (S.D. Cal. 2014).

2012: In *Shekleton v. Eichenberger*, 677 F.3d 361, 366-67 (8th Cir. 2012), the Eighth Circuit held that it was clearly established as of 2008 that tasing "an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the [43] officer, did not attempt to run from him, and did not behave aggressively towards him" was excessive. [As of the date of filing this brief, Westlaw indicates that 89 separate cases have cited *Shekleton*.]

5. There are many other pre-September 12, 2015 cases holding that it was clearly established law that a suspect has a right not to be tasered by police officers unless the suspect poses an immediate risk of harm to himself or herself, to the police, or to others.

We do not want to overburden this brief with an endless discussion of cases all supporting the proposition that it was clearly established law by September 12, 2015, that suspects have a right not to be tasered by police officers unless the suspects pose an actual risk of harm to themselves, to the police, or to others. In chronological order by date of decision, these are some of those many additional, published supporting cases:

Landis v. Baker, 297 Fed. Appx. 453, 463 (6th Cir. 2008) ("The district court correctly concluded that the officers should have known that the gratuitous or excessive use of a taser would violate a clearly established constitutional right.").

Orem v. Rephann, 523 F.3d 442, 448-49 (4th Cir. 2008) (Use of a taser to punish or intimidate a restrained pretrial detainee who did not present a risk to officer safety violated the established right to be free from excessive force.).

Michaels v. City of Vermillion, 539 F. Supp. 2d 975, 990 (N.D. Ohio 2008) (It was clearly established that use of a taser on a subdued suspect who was not a safety or flight risk was excessive force.).

[44] *Lewis v. Downey*, 581 F.3d 467, 477-79 (7th Cir. 2009) (A reasonable police officer would understand that employing a laser against a suspect who posed no threat and merely failed to comply with an order to stand up violated clearly established constitutional rights.).

Oliver v. Fiorino, 586 F.3d 898, 906-08 (11th Cir. 2009) (It was clearly established as of 2004 that it was a use of excessive force to tase multiple times an individual who had engaged in a brief physical struggle with a police officer, because, after the first tasing, the individual was immobilized.).

Asten v. City of Boulder, 652 F.Supp.2d 1188, 1205 (D. Colo. 2009) (The unwarned "tasing of a mentally unstable woman [who was not under arrest] in her own home" violated clearly established law, as of October 2006.).

Orsak v. Metropolitan Airports Comm'n Airport Police Dept., 675 F.Supp.2d 944 (D. Minn. 2009) (Police officers who pulled cyclist from a bike, stood him up, and shot him with a taser may have violated clearly established law, as of September 2006).

Borton v. City of Dothan, 734 F.Supp.2d 1237 (M.D. Ala. 2010) (As of August 2006, tasing a mentally disturbed patient three times when the patient was under arrest, and was secured to a gurney with handcuffs and restraints, was a violation of clearly established law.)

Fils v. City of Aventura, 647 F.3d 1272, 1292 (11th Cir. 2011) (It was [45] obviously clear in 2003 that shooting a taser into a suspect who showed no hostility and did not threaten anyone violated clearly established law.).

Austin v. Redford Township Police Dept., 690 F.3d 490, 496-97 (6th Cir. 2012) (The law is clear that use of a taser on a subdued suspect violated the suspect's clearly established rights, even if some level of passive resistance is present.).

Thomas v. Plummer, 489 Fed. Appx. 116, 126 (6th Cir. 2012) (A "suspect not resisting arrest had a clearly established right not to be tased, as of October 28, 2006.").

Abbott v. Sangamon County, Illinois, 705 F.3d 706, 732 (7th Cir. 2013) ("Turning to the present case, we conclude that it was clearly established on June 25, 2007, that it is unlawful to deploy a taser in dart mode against a nonviolent misdemeanant who had just been tased in dart mode and made no movement when, after the first tasing, the officer instructed her to turn over.").

Meyers v. Baltimore County, Maryland, 713 F.3d 723, 726 (4th Cir. 2013) (A reasonable person in the police officer's position would have known that the repeated use of a taser when the suspect was no threat violated clearly established constitutional rights.).

Ramirez v. Martinez, 716 F.3d 369 (5th Cir. 2013) (It was clearly established law that tasering a suspect twice, including once after the suspect was in handcuffs [46] and subdued, was an excessive use of force.).

Brown v. Weber, 555 Fed. Appx. 550, 551 (6th Cir. 2014) (A suspect had a clearly established constitutional right to be free from repeated use of a taser when the suspect was not armed or threatening, was committing no crime, and was not fleeing from the police officers.).

Shreve v. Franklin County, Ohio, 743 F.3d 126, 149 (6th Cir. 2014) ("In light of this right, it was objectively unreasonable for the officers to tase [the suspect] repeatedly when he needed medical attention and was not actively resisting.").

Estate of Booker v. Gomez, 745 F.3d 405, 424-25 (10th Cir. 2014) (It is clearly established that using a taser to control a suspect is an excessive use of force when there is reason to believe that a lesser amount of force or a verbal command would suffice.).

Garcia v. Dutchess County, 43 F.Supp.3d 281, 296 (S.D.N.Y. 2014) (It was clearly established on March 10, 2010 that, in effectuating a lawful arrest, an officer would use excessive force by firing a taser in stun mode against an individual not suspected of a crime and who no longer actively resisted arrest.).

Conclusion

Their own police department unsparingly condemned these two violent and aggressive police officers for violating the constitutional right of Kyle Cardenas to [47] be free from excessive force and to be free from unreasonable seizure.

There was no emergency justifying bursting into Kyle's locked bedroom over his pleas and protests, there was no probable cause for arresting Kyle, and, by September 12, 2015, it was clearly established law across the United States that it was an excessive use of police force to taser a citizen when that citizen was not an immediate threat to himself or herself, to the police, or to others.

Kyle Cardenas asks the Court to vacate the verdict and judgment entered against him and to remand this matter for further proceedings in light of this Court's decision.

DATED this 5th day of August, 2022.

/s/ David L. Abney, Esq.
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[48] **Form 17. Statement of Related Cases Pursuant to Cir. Rule 28-2.6 9th Cir. Case No. 22-15632**

The undersigned attorney or self-represented party states the following:

[**X**] I am unaware of any related cases currently pending in this Court.

Signature: /s/ David L. Abney **Date:** August 5, 2022

Form 8. Certificate of Compliance for Brief 9th Cir. Case No. 22-15632

I am the attorney or self-represented party.

This brief contains 9,331 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief:

[**X**] Complies with the word limit of Cir. R. 32-1.

Signature: /s/ David L. Abney **Date:** August 5, 2022

Form 15. Certificate of Service for Electronic Filing 9th Cir. Case No. 22-15632

I hereby certify I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Signature: /s/ David L. Abney **Date:** August 5, 2022

No. 22-15632

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KYLE CARDENAS, Plaintiff - Appellant, v. JOSIAH SALADEN; LARRY E. SINKS; MIKEL J. CURTIS; GREG THOMAS; JASON M. ROMAN; KERRY SANGUIGNI; RYAN SHEPPARD; et al., Defendants - Appellees.	**No. 22-15632** D.C. No. 2:17-cv-04749-SMM U.S. District Court for Arizona, Phoenix **REPLY BRIEF** (Filed Nov. 28, 2022)

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[6] **Legal Argument**

1. This case shows why federal courts grant qualified immunity sparingly.

This Court's "touchstone in evaluating an officer's use of force is objective reasonableness." *Estate of Aguirre v. County of Riverside*, 29 F.4th 624, 627 (9thh Cir.2022). Deciding if a law-enforcement officer's use of force was reasonable or excessive requires carefully evaluating each case's facts and circumstances and carefully balancing a person's liberty with the government's interest in applying force. *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

"Because such balancing 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." *Id*. Cases concerning the alleged misconduct of police officers "almost always turn on a jury's credibility determinations." *Id*.

Even the Gilbert Police Department condemned the conduct of Officers Josiah Saladen and Larry Sinks in browbeating their way into the home of combat veteran Kyle Cardenas, smashing through the locked door of his private bedroom in which he was hiding from their invasion of his home, and tasering him when he was unarmed and presented no danger to himself, the police, or others. This is a case where disputed facts prevent a court from finding qualified immunity.

[7] 2. The emergency-aid doctrine provides no justification for barging into Kyle's home and then breaking into Kyle Cardenas's locked bedroom.

Defendants glide over the facts and argue that the police officers "only entered areas of the home that were reasonable to address the emergency needs." *AB* at 15. But all that happened was that Kyle had taken a phone away from his mother, who was mad at him about that. No one at the home had called the police. Instead, Kyle's mother had called VA Crisis Hotline to obtain mental-health aid for Kyle because he was laboring under the misimpression that his mother had fed him a poisoned salad that he had then given to the family dog. (The family dog never showed any symptom of poisoning and trotted past the police officers.) Kyle wanted to speak with someone with Child Protective Services, not with the police.

When Officer Saladen arrived at Kyle's home and stated to Kyle that he was not CPS, Kyle told Officer Saladen that he had requested CPS and did not want to speak with Officer Saladen. (**ER-093, ¶ 16**). At that point, Kyle closed the door as Officer Saladen was hurrying to the door in an effort to prevent the door from closing. (**ER-093, ¶ 16**). Both the video evidence and Officer Sink's statements confirm Officer Saladen had tried to prevent Kyle from closing the door. (**ER-094, ¶ 17**). Closing the door in a police officer's face is objective evidence that there is no invitation to enter the home. Indeed, even the district court acknowledged that Kyle's "actions seemed to indicate a lack of consent which could override any consent given by his parents." (**ER-013 at 6:9-12**).

[8] At that time, other than a dog barking after the doorbell rang, there was no yelling, commotion, or any other noise coming from inside the home. (**ER-094, ¶ 18**). Officer Saladen called for Kyle through the closed front door, at which point Shana Cardenas (Kyle's mother) opened the door, with her husband behind her. (**ER-094, ¶ 19**). Officer Saladen and Officer Sinks, who had just arrived at Kyle's home, both immediately entered the home. (**ER-094, ¶ 19**).

Neither police officer asked for permission to enter the home. (**ER-094, ¶ 21**). Saladen and Sinks claim that Ruben Cardenas (Kyle's father) had invited them inside the family home. (**ER-196, ¶ 19**). But the body-camera video indicates that neither parent invited the officers into their home. (**ER-094, ¶ 22**). That evidence must be viewed in the light most favorable to Kyle Cardenas.

Significantly, the district court acknowledged that the consent issues had not been discussed by either party—and "decline[d] to address whether the officers had consent to enter" Kyle's home. (**ER-013 at 6:22-24**). Whether a consent to search was voluntarily given is a question of fact " 'to be determined from the totality of all the circumstances.' " *United States v. Brown*, 563 F.3d 410, 415 (9th Cir. 2009) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). The crucial fact of consent remains for the trier of fact to resolve at a trial on the merits.

Notably, *Georgia v. Randolph*, 547 U.S. 103, 106 (2006), stated that: "The Fourth Amendment recognizes a valid warrantless entry and search of premises [9] when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." The Supreme Court, however, also held that, as between a wife's consent to a search of the family residence and her husband's refusal to consent, "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." *Id.* Here, the refusal of consent by the physically present co-occupant Kyle Cardenas renders the warrantless search of his home—and of his private, locked bedroom—unreasonable and invalid as to him.

Kyle did not want to have anything to do with the police officers who had invaded his home. So he retreated to hide in his private bedroom, and locked the door in an effort to prevent the police officers from disturbing and upsetting him.

In full-on assault mode, although Kyle was unarmed and posed no threat to anyone, Officer Sinks kicked a hole in Kyle's bedroom door, forced the door open, and entered Kyle's bedroom with Officer Saladen right behind. (**ER-097, ¶ 42**). As the police officers burst into Kyle's locked bedroom, he was not threatening them. Instead, he was standing up with his cell phone and telling the police officers, "I'm recording you like I told you I was going to do." (**ER-097, ¶ 43**).

The police officers then told Kyle to put his phone down. (**ER-097, ¶ 44**). Kyle said no, and sat down in a chair with his telephone in his hands between his [10] legs as the police officers grabbed his arms in an effort to "detain" him—as he repeated "Why?" (**ER-097, ¶ 44**). The officers then said that "you're going to get tased" and demanded that he give them his hands, as Kyle repeated "Why?" while the officers struggled to try to grab his hands. (**ER-097, ¶ 45**).

Officer Sinks stepped back, drew his taser, shouted "taser, taser, taser", and tased Kyle as he was standing up out of his chair. (**ER-098, ¶ 46**). Nothing in the record indicates that, when Officer Sinks attacked Kyle with a taser, Kyle posed any immediate threat of harm to himself, to the police officers, or to anyone else.

There was never any hint that Kyle had any access to weapons or was armed or that he posed any immediate danger to himself or to others. It was your typical hot Saturday night in a Phoenix summer with typical family nonsense. Even the district court admitted that "the record here does not definitively establish an emergency situation." (**ER-015 at 8:5-6**).

The police officers turned a hot Saturday night domestic squabble into a SWAT episode. They pushed into Kyle's home, broke through the locked door to Kyle's private bedroom, threatened him with physical violence, and then tased him with no self-defense or defense-of-others justification whatsoever.

That conduct does not comport with the emergency-aid exception to the Fourth Amendment search-warrant requirement. The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, [11] papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV.

"Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, [the Supreme] Court has inferred that a warrant must generally be secured." *Kentucky v. King*, 563 U.S. 452, 459 (2011). It has held that the " 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Payton v. New York*, 445 U.S. 573, 585-86 (1980) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

For "'the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Retreat into his own home was just what Kyle Cardenas did. In addition, it remains a "'basic principle of Fourth Amendment law' that *searches and seizures inside a home without a warrant are presumptively unreasonable*.'" *Payton*, 445 U.S. at 586 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971) (emphasis added). The search and seizure that the two police officers violently conducted inside Kyle's home was thus presumptively unreasonable.

[12] Still, a well-recognized exception to the warrant requirement arises when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. at 460 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

The emergency-aid doctrine allows for instance, "the warrantless entry of private property when there is a need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence." *Birchfield v. North Dakota*, 579 U.S. 438, 456 (2016). Here, there was no need to provide emergency aid to anyone inside Kyle's home and the police had no fear for the imminent destruction of any evidence.

Moreover, the police officers were not in "hot pursuit" of anyone, since Kyle was hiding in his own private bedroom behind a door he had closed and locked to keep the pestiferous police officers out. Application of the hot-pursuit doctrine requires a chase. *See United States v. Struckman*, 603 F.3d 731, 744 (9th Cir. 2010) (Hot pursuit means there was some sort of chase.). This exception "only applies when officers are in 'immediate' and 'continuous' pursuit of a suspect from the scene of the crime." *United States v. Johnson*, 256 F.3d 895, 907 (9th Cir. 2001) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984)). Here, there was no crime scene and no pursuit that a reasonable person would call immediate or continuous.

[13] As the Supreme Court held in 2021, a suspect's "flight" into a home "does not always justify a warrantless entry" into that home, because a police "officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency" and, if "the officer has time to get a warrant, he must do so." *Lange v. California*, 141 S.Ct. 2011, 2024 (2021). Here, there was no police emergency—other than the one that the police themselves had conjured into existence—and there was apparently time to get a warrant, if a rational magistrate could have been convinced that one was needed to deal with this kerfuffle.

Nor does the emergency-aid exception to the warrant requirement apply. That exception allows police officers to handle true "emergencies," which are "situations presenting a 'compelling need for official action and no time to secure a warrant.'" *Lange*, 141 S.Ct.. at 2017 (quoting *Riley v. California*, 573 U.S. 373, 402 (2014); *Missouri v. McNeely*, 569 U.S. 141, 149 (2013)). Here, there was no compelling need to barge into Kyle's home, to break down his locked bedroom door, or to taser him into helpless insensibility.

"One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). Thus, 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." *Id*. (citing *Mincey*, 437 U.S. at 392). [14] But in our case, there was no injured occupant and there was no occupant that needed protection from imminent injury.

"To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, [courts look] to the totality of circumstances." *Missouri v. McNeely*, 569 U.S. at 149. But the "'emergency aid exception' does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises." *Michigan v. Fisher*, 558 U.S. 45, 47 (2009). Instead, it requires "an objectively reasonable basis for believing that a person within the house is in need of immediate aid." *Id*. (cleaned up). Indeed, "the fact-specific nature of the reasonableness inquiry . . . demands that [a court] evaluate each case of alleged exigency based on its own facts and circumstances." *McNeely*, 569 U.S. at 150 (internal quotations and citations omitted).

The police "bear a heavy burden" when trying to demonstrate an urgent need that could justify a warrantless search or arrest "because the emergency exception is narrow and rigorously guarded." *Bonivert v. City of Clarkson*, 883 F.3d 865, 877 (9th Cir. 2018) (citations and internal quotation marks omitted) .

Defendants have not met that heavy burden. There was no emergency-aid-exception situation that could support rushing into Kyle's home, breaking into his locked, private bedroom, and tasering him with no mercy, especially if a person looks at the situation "'from the perspective of a *reasonable* officer on the scene.'" [15] *Sandoval v. Las Vegas Metro. Police Dept.*, 756 F.3d 1154, 1163 (9th Cir. 2014) (emphasis added).

In addition, there is an "exception to the exigent circumstances rule, the so-called 'police-created exigency' doctrine." *Kentucky v. King*, 563 U.S. 452, 461 (2011). Under the police-created exigency doctrine, for "'a warrantless search to stand, law enforcement officers must be responding to an unanticipated exigency rather than simply creating the exigency for themselves'" *Id*. (quoting *United States v. Chambers*, 395 F.3d 563, 566 (9th Cir. 2005)).

Here, the police created their own exigent circumstances by barging into Kyle's home and creating a needless and avoidable disturbance that compelled

Kyle to retreat from the police-created commotion and try to hide in his private bedroom. The police officers themselves created any exigent circumstances and now improperly seek to justify their own misconduct as support for an emergency-aid exception to the search-warrant requirement. That is not allowed. *Id*. (citing *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004)).

Further, despite the Defendants' strained and strenuous efforts to paint this spat as a domestic-violence situation, there was no "domestic violence." In Arizona, "domestic violence" is generally defined as "attempting to cause or causing bodily injury to a family or household member or placing a family or household member by threat of force in fear of imminent physical harm." A.R.S. § [16]36-3001(2). Or as a respected legal dictionary explains, "domestic violence" consists of violence that is "between members of a household or between romantic of sexual partners [or] an assault or other violent act committed by one member of a household on another or by a person on the person's romantic or sexual partner." *Black's Law Dictionary* 1881 (11th ed. 2019).

Here, there was no domestic violence. A mom got mad at her son for taking a phone from her. Kyle hit no one and made no threat of physical harm against anyone. No one from the home called the police to report any sort of domestic violence. No one in the family wanted the police to enter the home. And Kyle definitely did not want the police to enter his locked, private bedroom. The assorted violent and hazardous domestic-violence cases the defense relies on are thus all inapposite.

To determine if the emergency-aid exception applies, this Court applies a two-part test asking whether: "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008).

Here, the two police officers who barged into Kyle's home and broke into his private and locked bedroom had no objectively reasonable basis for concluding [17] there was an immediate need to protect from serious harm Kyle, his parents, themselves, or anyone else. Moreover, the search's scope and manner—which featured barging into Kyle's home and explosively breaking into his locked and private bedroom were not reasonable to meet any emergency need confronting the two police officers.

3. The police misconduct was plainly illegal and unconstitutional.

Defendants argue the two police officers deserve qualified immunity since those police officers could not have possibly thought they did anything wrong in barging into Kyle's home, breaking down Kyle's locked bedroom door, swarming into his private bedroom, and then tasering him for the terrible offense of not standing up in his private bedroom after they imperiously ordered him to stand up. *AB* at 19-22.

Kyle had a reasonable expectation of privacy in the bedroom assigned to him at his parents' home. A person can acquire a reasonable expectation of privacy in an area within another person's property, whether that area is a separate living unit or merely a guest room in a single-family home. *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001). Even overnight guests in another's home acquire privacy rights that the Fourth Amendment protects. *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990).

According to the Defendants, there was no clearly established law that it was [18] improper to barge into a home and then violently break into a locked, private bedroom where a man was hiding to protect himself from the rampaging police officers—when that unarmed man posed no objective risk of harm to himself, to his parents, to the police officers, or to anyone else. Frankly, that is absurd. The police officers must have known that what they were doing violated Kyle's right to be free from a police invasion of his room and the use of extreme force against him, when he posed no objective, immediate threat of harm to anyone.

Common sense does not vanish when the police decide to search a home and a private, locked bedroom within it. In fact, when "determining whether a search is reasonable," this Court will "examine the 'totality of the circumstances' in a 'common-sense' manner." *United States v. Mayer*, 560 F.3d 948, 958 (9th Cir.

2009) (quoting *United States v. Diaz*, 491 F.3d 1074, 1078 (9th Cir. 2007)).

Indeed, "general statements of the law are not inherently incapable of giving fair and clear warning to officers, but in the light of pre-existing law the unlawfulness must be apparent." *White v. Pauly*, 137 S.Ct. 548, 552 (2017) (citations and internal quotation marks omitted).

A constitutional right is clearly established if "the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765, 778- 79 (2014). The clearly-established-law " 'standard protects all but the plainly [19] incompetent or those who knowingly violate the law.' " *Evans v. Skolnik*, 997 F.3d 1060, 1066 (9th Cir. 202 1) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)). The two police officers in our case satisfy both conditions—they were plainly incompetent (as their own police department concluded) and must have known that they were knowingly violating the law when they smashed Kyle's locked bedroom door, invaded that private bedroom, and tasered him.

Tellingly, even the police officers' own police department could not tolerate the two police officers' conduct. The Gilbert Police Department Internal Affairs Division expressly found that the "forced entry into the bedroom was not based on a search warrant or any other appropriate exception to the search warrant rule," that the "use of force and entry into the bedroom was not within current general orders," that "the contact" the police officers had with Kyle "was not supported by known facts (de-escalation was appropriate)," and based on the "totality of the circumstances, the use of force and entry into the bedroom was not within current general orders." (**ER-099, ¶ 52**) (**ER-099 and ER-100, ¶ 53**). The Internal Affairs Department also concluded that the two police officers had violated Kyle's right to be free from excessive force and to be free from unreasonable search and seizure. (**ER-099, ¶ 52**) (**ER-099 and ER-100, ¶ 53**).

Historically, that police-department admission of police-officer wrong-doing is rare. Here, is it not only rare, but has an evidentiary wallop, since the district [20] court specifically held that the conclusions of the Gilbert Police Department's internal review were admissible under both Fed. R. Evid. 403 and 407. (**ER-010 at 3:23 to 4:13**). Those internal-review conclusions were therefore evidence creating genuine issues of material fact on the impropriety of the entry into Kyle's room and on the impropriety of the excessive force used against him. That fact prevents the entry of summary judgment against Kyle.

There is no need to find "clearly established precedent" to place the two police officers on notice that what they were doing was wrong. The sort of out-of-control police conduct they committed is normal in occupied Ukraine, the Russian Federation, North Korea, and Iran, but no rational, competent American police office with even a minimal acquaintance with the Fourth Amendment could think that the Fourth

Amendment lets police officers barge into a home, break into a locked, private bedroom, and taser an unarmed man seeking to hide from police violence in his own bedroom where he posed no immediate risk of harm to himself, to his parents, to the police officers, or to anyone else.

4. There was no probable cause to arrest Kyle Cardenas.

Defendants assert that the two police officers "had probable cause to detain or arrest" Kyle Cardenas. *AB* at 22. In this appeal, detainment is not in play. As the district court explained, Kyle argued "he was arrested—not detained. For purposes of this order, the Court assumes that Cardenas was arrested." (**ER-015 at 8:19-20**). [21] Then, even the district court found that "the legality of the arrest was arguable." (**ER-015 at 9:21**).

But the argument for the district court was simple. The police officers had a report [false information from the dispatcher] that Kyle had poisoned his dog, that he had taken a phone from his mother, that he was "belligerent" when the police had arrived, that the mother was upset, and that, after Kyle has said "something," a "large mastiff came towards the police officers" and then trotted past them.

The dog-poisoning and dog-attack basis for probable cause is insufficient, and not just because no one in the household ever accused Kyle of poisoning the dog and not just because the dog was obviously healthy and harmless, but also because the Gilbert Police Department Internal Affairs Division itself found that there "was no probable cause for the alleged act of aggravated assault involving the dog." (**ER-099, ¶ 52**) (**ER-099 and ER-100, ¶ 53**). As noted, the Gilbert Police Department's internal review was admissible evidence under Fed. R. Evid. 403 and 407. (**ER-010 at 3:23 to 4:13**).

The internal-review conclusions were evidence creating genuine issues of material fact on the supposed dog-related aggravated assault as a basis for finding any probable cause. Take the dog out of the equation, and all that is left is a son taking a phone from his mother, an upset mother, and a son who was belligerent when the police unexpectedly arrived at his home. That is not the stuff of probable [22] cause to arrest anyone.

Probable cause is determined under an objective standard. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause."). When the facts underlying immunity inquiries are in dispute, as here, it is for the jury to resolve the factual dispute so that the district court may decide "whether those facts support an objective belief that probable cause . . . existed." *United States v. Greene*, 783 F.2d 1364, 1367 (9th Cir. 1986). The district court therefore erred in unilaterally deciding that there was probable cause.

Moreover, context is determinative. Although it is indeed a settled rule that warrantless arrests in public places are valid, absent another exception, such as exigent circumstances, police officers may not enter a home to make an arrest without a warrant, even when they have probable cause. *Collins v. Virginia*, 138 S.Ct. 1663, 1672 (2018). After all, "being arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home." *Id*. Here, as discussed in detail above, there were no exigent circumstances justifying breaking down the locked door to Kyle's private bedroom to arrest him. Thus, even if a jury decided there was probable cause, the arrest was improper.

5. No qualified immunity supports tasering Kyle Cardenas.

On the use of excessive force, under the district court's own description of [23] the facts, the force that the police officers used against Kyle was excessive. We pick up the district's court's narrative with Kyle going into his own room:

> After, Cardenas walks back into his room and closes the door, telling the officers that he is going to get his phone camera, while Officer Sinks tells Cardenas to not go. Officer Sinks then kicks a hole in the door, enters, and Officer Saladen follows. Cardenas sits down in a chair with his phone in his hands in between his legs, and the officers attempt to grab his arms. While attempting to grab his hands, one

> of the officers tell Cardenas, "You're going to get tazed." Officer Sinks then draws and deploys his tazer as Cardenas stands up and then tackles Officer Sinks.

(**ER-009 at 2:20-27**) (citations omitted).

The district court also acknowledged that Kyle had locked the front door to prevent the police officers from entering his home at all. Then, when that did not work to keep then away from him, Kyle "hid inside of his room." (**ER-008 at 8:4-5**). And so, Kyle walked—not ran, just walked—back to his private room to hide from the two police officers who had bullied their way into his home. (**ER-008 at 6:8-9**).

Under the district court's description, after the police officers kicked a hole in the door to Kyle's private bedroom he simply sat down with his telephone in his hands between his legs. The police officers then tried to grab his hands, and one of them told Kyle that he was going to get tazed and draws and deploys the taser as Kyle stands up. Under those conditions, use of the taser was excessive force.

The Opening Brief cited and discussed some 26 published cases supporting [24] the proposition that, by the September 12, 2015 date of the taser attack on Kyle, it was clearly-established law that police officer cannot use a taser against a person who poses no immediate threat of harm to himself or herself, to the taser-wielding police officers, or to anyone else. *OB* at 37-46. *See, e.g.*, *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 897 (8th Cir. 2014) (The "non-violent, non-fleeing subjects have a clearly established right to be free from the use of tasers."); *Mattos v. Agarano*, 661 F.3d 433, 446 (9th Cir. 2011), *cert. denied*, 566 U.S. 1021 (2012) (Use of taser in drive stun mode was unreasonable and constitutionally excessive.); *United States v. Bryan*, 630 F.3d 805, 832 (9th Cir. 2010) (Plaintiff alleged a constitutional violation where he was tased in dart mode.).

Those 26 published cases satisfy any requirement to prove there was clearly-established law that using a taser is excessive force if that taser is used against a person who poses no threat of immediate harm to himself or herself, to police officers, or to others.

Conclusion

This Court's *Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit* has jury instructions for the emergency-aid exception to the probable-cause warrant requirement and for excessive use of force:

- "Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Emergency Aid," Ninth Circuit Jury Instructions Comm., Manual of Model Civil Jury Instructions, No. 9.17 at 166 (rev. June 2018).

[25] • "Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Probable Cause Arrest," Ninth Circuit Jury Instructions Comm., *Manual of Model*

Civil Jury Instructions, No. 9.23 at 182 (rev. Sep. 2020).

Those jury instructions exist because there are cases where there are genuine disputes of material fact on whether there was probable cause for an arrest when an emergency is alleged and whether use of force was excessive. This is not one of those cases. Kyle Cardenas therefore asks the Court to vacate the verdict and judgment entered against him and to remand this matter for further proceedings in light of this Court's decision.

DATED this 28th day of November, 2022.

/s/ David L. Abney, Esq.
David L. Abney
Attorney for Plaintiff/Appellant

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[26] **Form 8. Certificate of Compliance for Brief**
9th Cir. Case No. 22-15632

I am the attorney or self-represented party.

This brief contains 4,853 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief:

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No. 22-15632

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KYLE CARDENAS, Plaintiff-Appellant, v. JOSIAH SALADEN; LARRY E. SINKS; MIKEL J. CURTIS; GREG THOMAS; JASON M. ROMAN; KERRY SANGUIGNI; RYAN SHEPPARD; et al., Defendants-Appellees.	**No. 22-15632** D.C. No. 2:17-cv-04749-SMM U.S. District Court for Arizona, Phoenix **PETITION FOR PANEL REHEARING ◀AND▶ PETITION FOR REHEARING EN BANC** (Filed Mar. 16, 2023)

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[2] **Table of Contents**

[3] **Table of Authorities**

Constitutional Provisions and Statutes

Other Authorities

[5] **Statement of Counsel**

In counsel's judgment, four of the situations described in the March 2, 2023 "Information Regarding Judgment and Post-Judgment Proceedings" exist:

- ➢ First, the decision overlooked material points of fact and law.
- ➢ Second, a conflict exists between the decision and *Estate of Aguirre v. County of Riverside*, 29 F.4th 624 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 426 (Nov. 14, 2022).
- ➢ Third, consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions.
- ➢ Fourth, this proceeding involves questions of exceptional importance.

The Material Facts

Because the appeal concerns the grant of summary judgment against Kyle Cardenas, this Petition states the material facts and all reasonable inferences from them in the light most favorable to him. *Gordon v. County of Orange*, 6 F.4th 961, 967 (9th Cir. 2021).

Kyle is a combat veteran of the 82nd Airborne Division. He served two tours in Iraq, between 2003 and 2006, and received an honorable discharge. (**ER-091-¶1**). Kyle suffers from Post-Traumatic Stress Disorder and lives with his parents in the family home in Gilbert, Arizona. (**ER-091-¶2**).

At about 9:47 p.m. on September 12, 2015, Kyle's mother called a VA [6] Crisis Hotline (in New York) because Kyle was not acting like himself and falsely believed his mom was serving him a poisoned salad that he was then giving to the family dog. (**ER-091-¶3**). Kyle's mother only wanted to get help for Kyle; neither of his parents feared him. Both were simply worried about his mental health. (**ER-091-¶4**). Kyle was never physically threatening or violent. (**ER-091-¶2**).

But instead of providing help, the VA Crisis Hotline Operator called the Gilbert Police Department. (**ER-091-¶5**). GPD garbled the facts and sent Officers Josiah Saladen and Larry Sinks to Kyle's home. (**ER-091-¶¶5-6**).

The dispatcher gave the officers a mangled report that Kyle: (1) was feeding the family dog poison (false) because he believed his parents were trying to kill him, (2) had taken the phone from his mother and was not letting her speak, (3) was a veteran with PTSD, (4) was claiming abuse since he was a child, and (5) demanded to speak with child-protective services. (**ER-092-¶7**).

So, when the officers arrived at Kyle's home, they had information that Kyle had PTSD, was not himself, inexplicably wanted to speak with child-protective services and thought (falsely) that his parents were trying to poison him. They also had a false report that Kyle was supposedly poisoning his dog by giving the dog food that Kyle had gotten from his mother. (**ER-092-¶11**).

When the officers got to Kyle's home, they did not ask for or get any sort of facts that: (1) Kyle was or had been physically abusive to anyone, (2) had made [7] any threats against anyone, or (3) had any weapons. (**ER-093-¶11-13**). Moreover, the officers utterly ignored GPD's policy for dealing with mentally-ill persons, which was to calm the situation, gather information from family members, and, when there were no destructive acts or violence, to avoid physical contact and take time to assess the situation. (**ER-093-¶14**)..

After Officer Saladen rang the doorbell, Kyle opened the front door and asked if he was with child-protective services. (**ER-093-¶15**). Officer Saladen said no. Kyle told him he had requested child-protective services, did not want to speak with him, and closed the door. (**ER-093-¶16**).

Officer Sinks admitted "Saladen [then] kind of like threw himself into [the door]." (**ER-094-¶17**). The district court opined that Kyle's "actions seemed to indicate a lack of consent which could override any consent given by his parents." (**ER-013-6:9-12**). Other than a dog barking, there was no other noise. (**ER-094- ¶18**). Kyle's mother opened the door, with her husband behind her. (**ER-094-¶19**). The officers then pushed into the home. (**ER-094-¶19**).

Neither officer asked for permission to enter, although they claimed Kyle's father invited them inside. (**ER-196, ¶19-21**). The body-camera video discloses no invited entry. (**ER-094-¶22**). In any event, the district court held that no one had discussed the consent-to-enter-the-home issue—and "decline[d] to address whether the officers had consent to enter" Kyle's home. (**ER-013-6:22-24**).

[8] Neither officer asked: (1) if the home's occupants were safe; (2) if the allegedly poisoned family dog was ill; (3) if there was anyone else in the home; (4) if anyone was hurt; (5) if Kyle was dangerous; or (6) if Kyle's parents were afraid. (**ER-095-¶¶23-28**).

If the officers had asked, they would have learned Kyle's parents were <u>concerned</u> for Kyle and not <u>afraid</u> of him. After all, Kyle's mother had called the VA not from fear, but because she wanted help for her son. **(ER-095-¶29**). Just as the officers barged in, the mother began saying "he's having an acute psychiatric episode. The police, the police are going to make it worse." (**ER-095-¶30**).

Once inside, Officer Saladen saw Kyle walking in the background past his parents to go down the hall. He called for Kyle to "come on out here man"—and tried to grab Kyle, who continued down the hall to his bedroom and locked the door. (**ER-095-¶31**). Kyle then briefly came out of his bedroom and stood in the hallway with the family dog. (**ER-009-2**). When Officer Saladen asked Kyle's mother if he had any weapons, she responded: "No, none whatsoever." (**ER-095- ¶32**). The officers then went down the hall after Kyle and demanded he come out of his bedroom. (**ER-095-¶33**).

As Kyle was at his bedroom room, the healthy and not-poisoned family dog trotted past the police officers, barking and wagging its tail. Officer Sinks claimed

Kyle had "sicced" the dog on them. (**ER-096-¶34**). But that story lacks merit at [9] summary judgment since Kyle testified that when he walked out of the bedroom, he did not want his dog to get hurt and asked his mother to "get her" [the dog] so she could take the dog outside. (**ER-096-¶35**). Moreover, Kyle's mother's avowed that Kyle had simply asked her to "get her"—[the dog]. (**ER-096-¶35**).

Even the district court admitted the "video evidence is not clear either way" whether Kyle commanded the dog to attack the officers or whether Kyle simply wanted his mother to take the dog outside. (**ER-009-at-17-19**).

Kyle entered the hallway. Officer Sinks falsely accused Kyle of telling his dog to attack the officers and then told Kyle to put his hands on his head and turn around. (**ER-096-¶36**). 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." (**ER-096-¶37**). Kyle responded: "No, I didn't." (**ER-096-¶37**).

Officer Sinks later admitted he did not feel threatened by the dog, conceding that "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, to the parents that were in the kitchen behind me." (**ER-096-¶38**).

Kyle turned around and walked down the hall, saying he was going to get his phone camera while Officer Sinks pulled out a weapon with the red-dot pointed on Kyle's back, quickly followed Kyle, and said "do not go" as Kyle walked to his bedroom and closed and locked the bedroom door. (**ER-097-¶41**).

[10] Although Kyle posed no immediate threat to himself or anyone else, Officer Sinks kicked a hole in Kyle's bedroom door, forced the door open, and entered Kyle's bedroom with Officer Saladen. (**ER-097-¶42**). As the officers broke into the bedroom, Kyle was not threatening them. Instead, he was standing up with his cell phone and telling the officers, "I'm recording you like I told you I was going to do." (**ER-097-¶43**).

The officers told Kyle to put his phone down. (**ER-097-¶44**). Kyle said no, and sat down in a chair holding his telephone between his legs as the officers grabbed his arms to "detain" him—as he repeatedly asked "Why?" (**ER-097-¶44**). The officers then said that "you're going to get tased" and demanded he give them his hands, as Kyle repeated "Why?" while the officers struggled to try to grab his hands. (**ER-097-¶45**).

Officer Sinks stepped back, drew his taser, shouted "taser, taser, taser", and tased Kyle as he was standing up out of his chair. (**ER-098-¶46**). At that point, as was his right under unique Arizona law, Kyle defended himself, tackled Officer Sinks, and a brawl broke out. (**ER-098-¶47**). A.R.S. § 13-404(B)(2) (Use of physical force against a peace officer to resist an arrest is justified if "the physical force used by the peace officer exceeds that allowed by law.").

Kyle was charged with aggravated assault, disrupting the peace, and animal cruelty. Naturally, tho charges were dismissed. (**ER-098-¶50**). Indeed, as the

[11] GPD's Internal Investigation made clear, the officers had no reasonable basis to believe Kyle assaulted them with his dog or otherwise. (**ER-098-¶50**). The district court held that the conclusions of the GPD's internal review were admissible under Fed. R. Evid. 403 & 407, but did not act on them. (**ER-010-3:23-4:13**).

For both officers, GPD Internal Affairs found: (1) the forced entry into the bedroom was not based on a search warrant or any other proper exception to the search-warrant rule; (2) there was no probable cause to believe there was any aggravated assault involving the dog; (3) use of force and entry into the bedroom was not within general orders; (4) the situation was not properly investigated or assessed before the bedroom entry; (5) the level of urgency/type of contact with Kyle had no support in the known facts; (6) the use of force and entry into the bedroom were not within current general orders; (7) the officers had violated Kyle's constitutional rights concerning unreasonable use of force and search and seizure. (**ER-099-¶¶ 52-53-ER-100**). The district court held that the conclusions of the GPD's internal review were admissible under Fed. R. Evid. 403 and 407, but again did not act on them. (**ER-010-3:23-4:13**).

Objectively, the officers had no reasonable basis to feel threatened or to believe a crime had occurred, and lacked probable cause to arrest, or even detain, Kyle in his own home. (**ER-097-¶39**).

Greg Meyer, Kyle's police-practices expert, opined—with no contradiction [12] whatsoever from any defense expert—that the officers had not conformed with contemporary law-enforcement procedures and training when they: (1) entered the home; (2) detained Kyle although he had committed no crime, there was no emergency, and no one was in danger; (3) broke into Kyle's bedroom; (4) created a false jeopardy situation that led to unnecessary use of force; and (5) made bad choices and tactical errors. (**ER-098-099,¶51**).

Still, the district court found the officers had qualified immunity because, under these facts, there supposedly was no clearly-established Fourth Amendment right to be free of police: (1) breaking down a locked bedroom door; (2) attacking an unarmed citizen who had been hiding in his locked bedroom, and (3) arresting him on promptly-dismissed charges when, in an astonishing event as rare as the Hope Diamond, their own police department condemned the officers for violating Kyle's constitutional rights. (**ER-019**). The district court made its ruling although it admitted Kyle had "hid inside of his room" and "the record here does not definitively establish an emergency situation." (**ER-015-8:5-6**).

Memorandum of Points and Authorities

1. The decision overlooked material points of fact and law.

The decision found an "objectively reasonable basis" for concluding there was an "immediate" need to protect other <u>persons</u> from "serious harm" based on supposedly feeding poison to a dog (a dog is not a person) and based on Kyle [13] supposedly being extremely irate, taking a phone from his mother and not letting her speak (although she had spoken with the crisis hotline and was freely speaking with the officers), based on PTSD, based on Kyle's complaints of childhood abuse, and based on his demand to speak with child-protective services. (*Mem.Dec.*-2).

Those facts indicated a need for calm engagement and unruffled mental-health help—not Rambo door-breaking, threats, and violence. The facts did not indicate any need to break down a locked door to a private bedroom, assault a distraught combat veteran hiding there, and then arrest that combat veteran.

The decision acknowledged that Kyle's parents "arguably were no longer in immediate danger once [Kyle] entered his bedroom," but found that the officers had an "objectively reasonable basis to believe [Kyle] may have been a danger to himself." (*Mem.Dec.*-3). But nothing in the record creates a reasonable inference that Kyle posed any danger to himself or to anyone else. Indeed, all reasonable inferences from the facts had to be taken in Kyle's favor—which did not happen.

The present decision held that Kyle identified no controlling or persuasive case law clearly establishing that the officers' entry into his home was unlawful. (*Mem.Dec.*-3). But the decision overlooks the fact that the district court itself had declined "to address whether the officers had consent to enter" Kyle's home. (**ER-013-6:22-24**). On appeal, there simply was no consent-to-enter-the-home issue to resolve.

[14] The decision also concludes that Kyle identified no controlling or persuasive case law clearly establishing that the officers' breaking down Kyle's bedroom door and bursting into his locked private bedroom without consent was unlawful. (*Mem.Dec.*-3). But no rational police officer think that was constitutional conduct.

The Fourth Amendment was adopted, after all, with the memory of British officials breaking down doors of private homes without justification or lawful warrant. *Riley v. California*, 573 U.S. 373, 402 (2014) ("Our 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.").

Protecting the security of private homes was one of the Framers' priorities. It is an 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 with public officers still hammering [15] down a door at a private home with no right, no justification, and no warrant.

The decision overlooked controlling precedent from this Court and from the Supreme Court that, in an " 'obvious case' " it can be regarded as clearly established that a constitutional violation has occurred " 'even without a body of relevant case law.' " *Estate of Aguirre v. County of Riverside*, 29 F.4th 624, 629 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 426 (Nov. 14, 2022) (quoting *Rivas-Villegas v. Cortesluna*, 142 S.Ct. 4, 8 (2021)). "This is one of those obvious cases." *Id*.

Kyle never threatened to injure himself or any other person. Despite that, the present decision claimed that he had committed disorderly conduct in his own home, and could therefore be arrested there for "some form of disorderly conduct" under A.R.S. § 13-2904. (*Mem.Dec.*-4). But that statute requires an intent to disturb the peace or quiet of a neighborhood, family, or person. Here, there was no evidence of such an intent.

The dog—not a person in any event—looked, acted, and sounded fine. Garbled hearsay piled on jumbled hearsay created no probable cause that any animal cruelty had occurred. Still, the present decision claims Kyle had committed animal cruelty under A.R.S. § 13-2910(A)(3). (*Mem.Dec.*-4). That law criminalizes intentionally, knowingly, or recklessly inflicting unnecessary physical injury to any animal. But there was no proof Kyle had intentionally, knowingly, or recklessly inflicted any physical injury to the family dog, which looked and acted normal, and [16] did not even try to take a bite out of the louts who had invaded the family home..

Since Kyle "posed no immediate threat to [the officers] or others," the general constitutional rule applied and made the officer's decisions to break down the bedroom door and attack Kyle objectively unreasonable. *Estate of Aguirre*, 29 F.4th at 629. The present decision overlooked these material points of fact and law.

2. An apparent conflict exists between the decision and *Estate of Aguirre*.

In *Estate of Aguirre*, a published 2022 Opinion where the Supreme Court denied the petition for writ of certiorari, this Court followed the principle that the facts in an "obvious case" can, by themselves, "clearly establish" that a constitutional violation has occurred, even if there is no body of relevant case law. 29 F.4th at 629.

The present decision, however, ignores *Estate of Aguirre*'s "obvious case" principle, and insists that Kyle had to find a case involving police officers so brazen, careless, or clueless that they thought it was constitutionally proper to break down a locked door to a private bedroom although the occupant sheltering from them there posed no immediate threat of harm to himself, the police, or any other person. Their irrational violence and incompetence were so breathtaking that their own department censured them for violating Kyle's constitutional rights.

Federal circuit and district courts are bound to follow the rigorous doctrine of qualified immunity that the Supreme Court has devised. As a result of that, [17] thousands of cases of brought by people who suffered from police misconduct have been dismissed from the federal courts because there was no earlier case right on point. But in *Rivas-Villegas v. Cortesluna*, 142 S.Ct. 4, 8 (2021), the Supreme Court held that in an 'obvious" case courts can find that a constitutional violation has occurred "even without a body of relevant case law."

Then, in the published *Estate of Aguirre* opinion, this Court applied that rule by holding that, when a suspect poses no immediate threat to police or anyone else, that is an "obvious case" when the general constitutional rule against unreasonable searches and seizures applies "with obvious clarity" and makes a decision to use force against that suspect "objectively unreasonable." 29 F.4th at 629. Under *Estate of Aguirre* and *Rivas-Villegas* there are few cases as "obvious" as this one.

3. Consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions.

Estate of Aguirre and the present decision are incompatible. Judges at all levels in the Ninth Circuit can follow the old path of demanding that plaintiffs asserting police misconduct must always find a case factually identical to their cases or have their cases extinguished—even if the constitutional violation was utterly "obvious" to any reasonable police officer. That is the old path the present decision followed.

On the other hand, judges at all levels in the Ninth Circuit could and should follow *Estate of Aguirre*, and, when there is an "obvious case" where a [18] constitutional violation has occurred, they could and should let the jury do its job of deciding the factual issues of: (1) justification, (2) excessiveness of force, and (3) whether the plaintiff actually posed an immediate threat to self, the police, or others. As *Estate of Aguirre's* last paragraph says: "We cannot assume the jury's role to resolve the disputed question whether [the plaintiff] presented an immediate threat." 29 F.4th at 630.

We need look no further than the latest news reports of unjustified, uncaring, and brutal police violence to recognize the hard truth of many "obvious cases" where officers have committed wrenchingly obvious constitutional violations, even without a body of relevant and identical case law to tell us so. Consideration en banc is necessary to secure and maintain the uniformity of this Court's decisions in following the more equitable, workable, and realistic approach pioneered for this Circuit in *Estate of Aguirre*. Kyle therefore asks for an en banc rehearing.

4. This proceeding involves questions of exceptional importance.

The proper standard to follow in deciding whether police officers are entitled to qualified immunity is a question of exceptional importance to judges, lawyers, and the public throughout the Ninth Circuit.

There is strong, broad criticism of the pre-*Estate of Aguirre* qualified-immunity system of demanding that *all* plaintiffs in *all* cases must find clearly established case law that is essentially factually identical to the plaintiffs' situation [19] before qualified immunity can be defeated—even if the facts present an "obvious case" where plaintiffs can clearly establish that a constitutional violation has occurred, even without a body of relevant case law.

"After a series of highly publicized incidents of police violence," in fact, "a growing number of courts, scholars, and politicians have demanded the abolition of qualified immunity. . . . Scholars argue that the doctrine forecloses compensation and vindication for victims and stands in the way of deterring constitutional violations in the future." Nathan S. Chapman, *Fair Notice, the Rule of Law, and Reforming Qualified Immunity*, 75 Fla. L. Rev. 1, 1 (Jan. 2023).

A big part of the problem is that, under the pre-*Estate of Aguirre* approach, qualified immunity "effectively raises the bar for plaintiffs in constitutional civil suits, meaning that even in cases where officers may have violated the Constitution, they will be granted immunity as long as they did not violate 'clearly established law,' " which "effectively forecloses a merits-based analysis of police conduct in some instances." Steven Arrigg Koh, *Policing & The Problem of Physical Restraint*, 64 B.C. L. Rev. 309, 371-72 (Feb. 2023).

In criminal prosecutions seeking to hold police officers liable for injuring or killing suspects, the officers remain "notoriously hard to convict for myriad reasons, including prosecutorial discretion, the 'blue wall of silence,' and pro-police bias in jury pools," while, in civil cases, "qualified immunity prevents courts [20] from holding officers civilly liable for constitutional violations unless they violate 'clearly established' law—an astonishingly high standard." Casenote, *Pessimistic Police Abolition*, 136 Harv. L. Rev. 1156, 1173 (Feb. 2023).

"There is so much that is wrong with qualified immunity. Even without this defense, prevailing in civil-rights actions is no small feat. The avenues for relief are narrow, practical obstacles abound, and the claims themselves can be difficult to prove. Qualified immunity makes matters worse. Courts often require—and fail to find—a highly analogous prior case for the law to be clearly established. Failure to find such a case can mean that no recourse exists under federal law for egregious constitutional violations. And even when immunity does not result in the dismissal of a suit, it makes litigation more complicated, adds expense, and can delay any recovery for injured plaintiffs." Bryan Lammon, *Reforming Qualified-Immunity Appeals*, 87 Mo. L. Rev. 1137, 1141 (Fall 2022).

"To some observers," including the author of this brief, "qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer. Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current [21] 'yes harm, no foul' imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Don R. Willett, C.J., *concurring in part, dissenting in part*) (emphasis in original), *cert. denied*, 141 S.Ct. 110 (2020).

Applying *Estate of Aguirre* to the present case, and to all other cases in the Ninth Circuit where it is obvious that a constitutional violation has occurred, even if there is no body of relevant case law, is important. That would temper the most unjust, unfair, and unpalatable aspects of the qualified-immunity doctrine. In our case, the officers who broke through the locked door of the bedroom where Kyle was hiding for his own protection, and who then attacked him, surely knew, as even their own police department admitted, that what they were doing violated Kyle's constitutional right to freedom from unreasonable search and seizure.

Estate of Aguirre is an essential safeguard that will let litigants such as Kyle seek justice from a jury when police officers obviously caused a constitutional violation in a way that is new, unexpected, or judicially unreported. Whether to apply *Estate of Aguirre* in the present case, and in all other similar cases across the

Ninth Circuit, is an issue of exceptional importance. Kyle thus asks the Court to grant en banc review.

Conclusion

Kyle Cardenas asks the panel—and if not the panel, this Court ~to grant [22] rehearing, to vacate the present Memorandum Decision and the Judgment, and to remand this matter for proceedings on the merits, where a jury can determine whether there was an emergency and probable cause justifying breaking into a private bedroom and attacking Kyle. The needed jury instructions are drafted, tested, and regularly used. *See* Ninth Circuit Manual of Model Civil Jury Instructions Nos. 9.17 and 9.23 (Sep. 2020 rev.).

DATED this 16th day of March, 2023.

/s/ David L. Abney, Esq.
David L. Abney
Attorney for Plaintiff/Appellant Kyle Cardenas

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[23] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form:
http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 22-15632

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words: <u>4.158</u>.**

(Petitions and responses must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/ **<u>David L. Abney</u>** **Date: <u>March 16, 2023</u>**

(use "s/[typed name]" *to sign electronically-filed documents)*

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[24] **UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Form 15. Certificate of Service for Electronic Filing

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9th Cir. Case Number(s) <u>22-15632</u>

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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[ ] I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) *(required for all documents)***:**

PETITION FOR PANEL REHEARING ◄AND► PETITION FOR REHEARING EN BANC

Signature /s/ **David L. Abney** **Date: March 16, 2023**

[Exhibit 1 Omitted]