No. 23-_____

In The
Supreme Court of the United States

CITY OF LOS ANGELES, et al.,

Petitioners,

v.

M.A.R., a minor by and through his Guardian ad Litem Elisabeth Barragan, individually, and as a successor in interest to Daniel Rivera; SILVIA IMELDA RIVERA, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In ruling on a claim for qualified immunity raised in a motion for summary judgment, does a court's obligation to view the evidence in the light most favorable to the plaintiff allow that court to ignore undisputed clear video evidence which, if considered, would require the court to draw the inference that the force used by the defendants was not excessive, and the further inference that the unlawfulness of the defendants' conduct was not clearly established?

PARTIES

Petitioners are the City of Los Angeles, Officer Brett Beckstrom, Officer Angel Romero, Officer Michael Lopez, and Officer Tyler Moser. Each Petitioner was a defendant in the district court and an appellee in the Ninth Circuit Court of Appeals from which this petition is taken.

M.A.R., a minor by and through his Guardian ad Litem Elisabeth Barragan, individually, and Silvia Imelda Rivera, Respondents on this petition, were the plaintiffs in the district court and the appellants in the Ninth Circuit.

RELATED PROCEEDINGS

M.A.R., et al. v. City of Los Angeles, et al., United States District Court, Central District of California, Case No. CV 21-2957-JFW-MARx, summary judgment granted in part and denied in part on March 28, 2022.

M.A.R., et al. v. City of Los Angeles, et al., United States Court of Appeals for the Ninth Circuit, Case No. 22-55415, judgment entered on July 17, 2023, rehearing and rehearing *en banc* denied on September 25, 2023.

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2. The Ninth Circuit's unpublished Memorandum reversing and remanding (Pet. App. 3-7) is at 2023 U.S. App. LEXIS 18078.

3. The district court's unpublished order granting in part Petitioners' motion for summary judgment (Pet. App. 8-62) is at 2022 U.S. Dist. LEXIS 108444.

JURISDICTION

The Ninth Circuit Court of Appeals issued its Memorandum reversing and remanding on July 17, 2023. The Ninth Circuit issued its order denying rehearing and rehearing *en banc* on September 25, 2023.

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit by petition for writ of certiorari. 28 U.S.C. § 1254(1).

This petition is being timely filed within 90 days after the denial of the order denying hearing and rehearing *en banc* in the Ninth Circuit, pursuant to United States Supreme Court Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents' claims are under the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

The Fourth Amendment states:

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

Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

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

INTRODUCTION

In *Scott v. Harris*, 550 U.S. 372 (2007), this Court was presented with a situation in which a plaintiff in a civil rights case told a version of a story which was contradicted by the video evidence in the case. Under plaintiff's view, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty." *Id.* at 378. However, the video evidence showed something entirely different. Scott was shown "racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see multiple red lights and travel for considerable periods of time in the occasional left-turn-only

lane, chased by numerous police cars forced to engage in some hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort. . . ." *Id.* at 379-380.

Based on the presence of the video evidence, Justice Scalia, writing for the majority of this Court, stated, "When opposing parties tell different stories, one of which is blatantly contradicted by the record so that no reasonable jury could believe it, a court should not adopt that version of facts for the purposes of ruling on a motion for summary judgment." *Id.* at 380. In so ruling, Justice Scalia reasoned, "[Plaintiff's] version of events is so utterly discredited by the record that no reasonable jury could have believed him. **The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape**." *Id.* at 380-381 (emphasis added).

Justice Scalia's insight was prescient. In the intervening sixteen years, cell phones with video-recording capability have become ubiquitous and the vast majority of law enforcement agencies are moving toward the use of body-worn cameras. These two changes have resulted in more transparency and an increased accountability for law enforcement, and have fostered an enhanced sense of trust between the law enforcement community and the citizenry as a whole.

However, in recent years, courts of inferior jurisdiction have started to drift further and further away from Justice Scalia's sage reasoning. In summarizing the facts of the case, some circuit courts will cherry pick certain facts while ignoring the vast amount of other undisputed evidence (shown on video) which puts the facts recited by the panel in context. Once these additional uncontroverted facts are considered, there is only one inference that can be drawn: that the use of force was not excessive and the unique circumstances of this incident make clear that the law was not clearly established.

This dilution of the uncontroverted facts is readily apparent in this case. Here, the district court's discussion of the facts spans 14 pages, plus three pages of additional facts, and an analysis which resulted in a finding of qualified immunity. In contrast, the Ninth Circuit's factual recitation in an unpublished memorandum opinion takes up a mere two pages and, as a result, the court issued an order reversing the detailed finding of qualified immunity.

The proper resolution of issues of qualified immunity, however, cannot be based on an artificial and selective recitation of the facts; rather, it requires a deep dive into the particularized facts of the case. *White v. Pauly*, 580 U.S. 73, 79 (2017) ("clearly established law" should not be defined "at a high level of generality" but must be "particularized" to the facts of the case). In limiting the appropriate factual analysis, panels are using unpublished memorandum decisions to evade binding Supreme Court authority which

outlines not only the substantive law, but also the proper use of uncontroverted and dispositive video evidence.

Unfortunately, the Ninth Circuit's dilution of *Scott v. Harris* in this matter is no isolated incident. Recently, in *Wright v. City of San Bernardino*, 2023 U.S. Dist. LEXIS 192897 (C.D. Cal. 2023), a California district court rejected an argument based on *Scott v. Harris*, sneering:

> Whatever else might be said about the majority opinion in *Scott*, with the rise of 'deep fake' videos and other manipulated media, the Court questions whether the decision's approach should have long-term affect [sic]. No party in this litigation has argued that any of the video evidence has been manipulated to show something that did not actually occur on the evening in question.

Id. at *34-35, n. 15.

As these cases aptly demonstrate, the various district and circuit courts are in desperate need of guidance. Is *Scott v. Harris* no longer binding precedent? How should *Scott* be applied when there are no allegations or evidence of video tampering, and no reason to question the validity of the undisputed video evidence? And what should happen when – as was the case here – the reviewing court evades a comprehensive review of all relevant facts and video evidence to offer a facially plausible reason for overturning a grant of

qualified immunity in an unpublished memorandum opinion?

Petitioners, therefore, ask that this Court grant the petition for a writ of certiorari to provide the much needed instruction and advice on this critical issue. Alternatively, Petitioners request that this Court grant the petition and reverse the Ninth Circuit's judgment by way of summary disposition. See *Los Angeles County v. Rettele*, 550 U.S. 609 (2007).

STATEMENT OF THE CASE

On August 14, 2020, members of the Los Angeles Police Department were dispatched after receiving multiple 911 calls that Daniel Rivera was attempting to forcibly enter several residences. These residents reported observing Rivera banging on doors and windows, attempting to remove window screens to forcibly enter, and vandalizing homes while the residents were inside. According to these reports, Rivera seemed to be confused and appeared to be under the influence of drugs and alcohol. Multiple officers responded – including Defendant Officers Beckstrom, Romero, Lopez and Moser (collectively "the Officers") – who activated their Body Worn Cameras ("BWC") during the incident. What transpired next was captured on video[1],

[1] Six videos were submitted in support of the motion for summary judgment, which were transferred to the Ninth Circuit. Dkt. 17, 31. For the convenience of the court and the parties, hypertext

rendering these facts undisputed. *Scott v. Harris*, 550 U.S. at 380 ("When opposing parties tell different stories, one of which is blatantly contradicted by the record so that no reasonable jury could believe it, a court should not adopt that version of facts for the purposes of ruling on a motion for summary judgment.").

The undisputed facts – as demonstrated by the clear BWC evidence – demonstrated that as the officers approached Rivera, they repeatedly instructed him

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links to these videos are provided below and throughout this petition:

- Exhibit 5 – Moser Car Video (6-ER-1200); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EQaHAkOivTpJnyORoFKK71kBdLMnjL081XlM0OepFofYeQ?e=UYpe21
- Exhibit 7 – Beckstrom BWC (6-ER-1202); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EbGYim-ZSKNJns6Ie2jDIwABliIGL6MvdWk_X8gFyt76dQ?e=4b42WD
- Exhibit 8 – Lopez BWC (6-ER-1203); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EUJHfhVoNqROtXPzhIZlI1QBwWcy-9t8pgksuu_cZGmFBg?e=3yrfGE
- Exhibit 9 – Romero BWC (6-ER-1204); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EeLesW89CF1LvcJ9KVvQAK0BoY6fvfCCO6b6Fl351f4hmw?e=YHgRVS
- Exhibit 10 – Moser BWC (6-ER-1205); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EZbVksWfSr5AryJaNdH56HgBSqxmTX5eWKl-uDGkm5tofw?e=9JcWQR
- Exhibit 11 – Whitelaw BWC (6-ER-1206); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EQxnGNlck95NhPiW7qXXgVQBWj73sjH1fSHZgArlUGeSDg?e=29odou

to get on the ground. In response, Rivera turned, climbed over a chain-linked fence, and ran down a steep embankment toward a wash area of the Los Angeles River.

As the officers approached Rivera, they observed him lying on his side at the bottom on the embankment. Rivera's hands were obscured, and the officers repeatedly instructed him in both English and Spanish to show his hands. Rivera did not respond. A brief struggle ensued in which the officers attempted to control Rivera, who resisted and attempted to "buck" officers off of him. Ultimately, the officers deployed their TASER to Rivera's leg; however, the TASER appeared to have no effect on Rivera, who continued to struggle. Although Rivera continuously struggled, the officers were eventually able to apply handcuffs and a hobble restraint. Thereafter, Rivera was briefly placed in a prone position, where he continued to struggle.

After a few minutes, Rivera's condition began to deteriorate, and he appeared to be unconscious while experiencing labored breathing. LAFD Firefighter/Paramedics, who were already on scene, noted that Rivera was breathing and appeared to track them with his eyes. However, before they could transport him, the Paramedics determined that Rivera was in cardiac arrest and began CPR. Unfortunately, these results were unsuccessful, and Rivera was pronounced dead at the scene.

The officers filed a motion for summary judgment asserting that the undisputed facts demonstrated that the force used was not excessive under *Graham v. Connor*, 490 U.S. 386 (1989), and that they were entitled to qualified immunity, as they did not knowingly violate any clearly established law. After reviewing all the documentary and video evidence, District Judge John Walter issued a detailed, 24-page order granting the motion for summary judgment. App. 8-62.

On appeal, the Ninth Circuit issued a five-page, unpublished, Memorandum Opinion (App. 3-7) which stated that, viewing the evidence in the light most favorable to Rivera, the officers used excessive force and did so in violation of clearly established law. The Ninth Circuit's opinion, however, did not address the uncontroverted nature of the video evidence, pursuant to *Scott v. Harris*' mandate. In addition, the Ninth Circuit's opinion did not address the fact that officers are entitled to qualified immunity, as the district court correctly concluded, even where there is a reasonable mistake of fact. *Pearson v. Callahan*, 555 U.S. 223, 230 (2009).

Petitioners filed a timely Petition for Rehearing and Petition for Rehearing *En Banc.* On September 25, 2023, this Petition was denied. App. 1-2.

ARGUMENT

A. A Court's Obligation to View the Evidence in the Light Most Favorable to the Plaintiff Does Not Allow the Court to Ignore Undisputed Video Evidence Which, if Considered, Would Require the Court to Draw the Inference that the Force Used by the Defendants Was Not Excessive, and the Further Inference that the Unlawfulness of the Defendants' Conduct Was Not Clearly Established

1. Applicable Law

In *Graham v. Connor*, 490 U.S. at 388, this Court held that an excessive force claim is properly analyzed under the Fourth Amendment's objective reasonableness standard. *Graham v. Connor* set forth a non-exhaustive list of factors to be considered in evaluating whether the force used to affect a particular seizure is reasonable: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resists detention or attempts to escape. *Id*. at 394-395. The test is an objective one, viewed from the vantage of a reasonable officers at the scene, and is highly deferential to the police officer's need to protect himself or others. *Id*. at 396-397.

This Court has also indicated that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 565 U.S. 469,

477 (2012). Moreover, the most important single element of the three specified factors is whether the suspect poses an immediate threat to the safety of the officers or others. *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005).

In analyzing the use of force in this case, the district court divided the use of force into three distinct segments: (1) the "controlling force" used to apply the handcuffs; (2) the use of a TASER device; and (3) placing Rivera in a prone position. In addressing the controlling force issue, the District Court concluded:

> In light of the nature of Decedent's resistance **captured by the body camera videos** when the Individual Officers attempted to handcuff him, the amount of force used by the Individual Officers amounted to nothing more than the controlling force necessary to physically direct Decedent's arms into a position to be handcuffed. . . .
>
> Similarly, in this case, it was not unreasonable for the Individual Officers to allow Decedent to remain on his stomach for approximately two minutes in light of Decedent's resistance of the Individual Officers' attempts to handcuff him and an additional one minute to hobble him as he continued to resist the Individual Officers' efforts to take him into custody. . . .

App. 45-46 (emphasis added).

Thereafter, in concluding that the force used was not constitutionally excessive, the District Court reasoned:

> It is undisputed that at no point during this struggle did any of the Individual Officers threaten to use lethal force or kick or punch Decedent. Instead, the Individual Officers simply used the amount of force necessary and reasonable in order to handcuff Decedent, who was actively resisting the Individual Officers' efforts to take him into custody. . . . In light of the undisputed facts of this case, the Court concludes that the Individual Officers' use of controlling force was objectively reasonable.

App. 46-47.

Although the district court concluded that the facts could establish an excessive force claim with respect to the use of the TASER (but that such force was entitled to qualified immunity), the court was convinced that the officers did not use excessive force in placing Rivera in a prone position and that, even if it were, they would be entitled to qualified immunity. App. 56-61. These facts are also borne out by the unconverted – and incontrovertible – video evidence.

2. Factual Analysis

In order to properly analyze this case, the Court must look to the nature of the factual record. In this case, however, the Ninth Circuit Opinion's recitation of

the facts is fatally flawed and leads to an incorrect result which is not in compliance with this Court's mandates. Specifically:

- The Ninth Circuit's opinion found that Rivera's hands were visible at the time the officers arrived. App. 5. However, the BWC video clearly demonstrates two officers asking to see Rivera's hands in Spanish and an officer in English saying, "Can you guys see his hand on that side?" – to which another officer replies: "No." Exhibit 9 – Romero BWC[2] at 10:45.
- The Ninth Circuit's opinion found that immediately upon making contact with Rivera, two officers "pressed their knees into Decedent's upper torso; each applied more than half his weight to Decedent's back. Decedent tensed his body and grunted, but he posed no threat. With his hands on his head, Decedent began to move his shoulders and upper torso as the officers tried to handcuff him. During the attempt to secure the handcuffs, the two officers continued to press their knees into Decedent's back while he remained prone on the ground. Decedent tried to raise his head twice; both times, Defendant officers forced his head back to the ground." However, the BWC footage demonstrates that Rivera was continually moving his upper and lower body during the entire event, including attempting to kick Officer Beckstrom when Officer Beckstrom was straddling Rivera.

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[2] Exhibit 9 – Romero BWC (6-ER-1204); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EeLesW89CF1LvcJ9KVvQAK0BoY6fvfCCO6b6Fl351f4hmw?e=YHgRVS

Exhibit 7 – Beckstrom BWC; Exhibit 9 – Romero BWC; Exhibit 10 – Moser BWC.[3] Moreover, even when Beckstrom straddled Rivera, the BWC footage clearly demonstrates that there was an open gap of space between Rivera and Officer Beckstrom's bodies, with the majority of Officer Beckstrom's weight on his own knees, which were on the ground on either side of Rivera, belying the assertion that crushing weight was being imposed. *Id.*

- Contrary to the suggestion that this was a prolonged encounter, the entire encounter from the first contact to being handcuffed, hobbled and put on his side was 3 minutes and 12 seconds: the officers first made contact at 11:08. Exhibit 9 – Romero BWC.[4] It took roughly two minutes to handcuff Rivera (at 13:14) plus an additional one minute to hobble him (at 14:13). Rivera is placed

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[3] Exhibit 7 – Beckstrom BWC (6-ER-1202); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EbGYim-ZSKNJns6Ie2jDIwABliIGL6MvdWk_X8gFyt76dQ?e=4b42WD

Exhibit 9 – Romero BWC (6-ER-1204); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EeLesW89CF1LvcJ9KVvQAK0BoY6fvfCCO6b6Fl351f4hmw?e=YHgRVS

Exhibit 10 – Moser BWC (6-ER-1205); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EZbVksWfSr5AryJaNdH56HgBSqxmTX5eWKl-uDGkm5tofw?e=9JcWQR

[4] Exhibit 9 – Romero BWC (6-ER-1204); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EeLesW89CF1LvcJ9KVvQAK0BoY6fvfCCO6b6Fl351f4hmw?e=YHgRVS

on his side 7 seconds after being hobbled (at 14:20).

- As to the prone position, the BWC video shows that after Rivera was hobbled, the Officers immediately placed him on his side and held him there for approximately 52 seconds, during which time he continually struggled to lay on his stomach. *Id.* at 14:16 to 20:00.
- Rivera remained face down for approximately 2 minutes and 35 seconds. *Id.* at 15:05-17:46. No "crushing pressure" was placed on his back or neck and, instead, Officers Beckstrom and Romero simply maintained contact with only finger pressure, plus a flat hand on Rivera for 8 seconds (*Id.* at 16:34-16:42) and the tip of the knee for 7 seconds (*Id.* at 17:33 to 17:40).
- At the time of the TASER deployment, Rivera was actively resisting. See Exhibit 10 – Moser BWC at 12:45 (first deployment), 13:00 (second deployment), 13:15 (third deployment), and 13:27 (fourth deployment). Thereafter, Rivera was handcuffed at 13:50, **after** the final TASER deployment. Specifically, the BWC shows that Rivera was bucking his hips and shaking from side to side, causing the officers to have to reposition themselves to maintain control of the resisting Rivera. In addition, immediately before the final TASER deployment, Rivera is seen kicking up at Officer Moser and his foot makes full contact with the hand in which Officer Moser is holding the TASER *Id.* at 13:23.

In sum, the Ninth Circuit's recitation of the facts and subsequent conclusion that Rivera was not

resisting, was compliant, and was not a threat is wholly inconsistent with the incontrovertible BWC evidence. The BWC video demonstrates that the officers could not see Rivera's hands, that Rivera was continually moving his upper and lower body during the entire event, Rivera attempted to kick Officer Beckstrom, that the entire encounter from first contact to hobbling was a total of 3 minutes and 12 seconds, and that Rivera continued to struggle to lay on his stomach after being handcuffed. Exhibit 7 – Beckstrom BWC, Exhibit 9 – Romero BWC, Exhibit 10 – Moser BWC.[5] This BWC evidence also demonstrates an absence of any "crushing pressure" on Rivera's back or neck and that at the time of the TASER deployment, Rivera was actively resisting. These facts were uncontroverted pursuant to *Scott v. Harris*.

Moreover, the Ninth Circuit's framing of this case as one in which Rivera was not resisting, was compliant and did not constitute a threat is inconsistent with the video evidence for multiple additional reasons.

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[5] Exhibit 7 – Beckstrom BWC (6-ER-1202); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EbGYim-ZSKNJns6Ie2jDIwABliIGL6MvdWk_X8gFyt76dQ?e=4b42WD

Exhibit 9 – Romero BWC (6-ER-1204); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EeLesW89CF1LvcJ9KVvQAK0BoY6fvfCCO6b6Fl351f4hmw?e=YHgRVS

Exhibit 10 – Moser BWC (6-ER-1205); https://jonesandmayer.sharepoint.com/:v:/s/PUBLICSHARING/EZbVksWfSr5AryJaNdH56HgBSqxmTX5eWKl-uDGkm5tofw?e=9JcWQR

First and foremost, Rivera was suspected of a felony, specifically residential burglary of an occupied dwelling, which carries with it the threat of weapons and violence from the person being detained. In addition, he refused to show his hands and actively struggled with the officers, even kicking one during the time when officers were attempting to lawfully detain him and using reasonable legal force to do so. No case holds that under such facts, an officer cannot use reasonable force (which they did) and, indeed, such a rule would exponentially increase the risk of danger to police officers and have a chilling impact on police officers who are attempting to protect the public in the lawful performance of their duties.

In this case, the uncontroverted video evidence shows that the officers were reasonable with respect to the force used on an unsearched, felony suspect who fled from the police and who actively resisted lawful arrest. Given this evidence, there are no facts for a jury to resolve. *Scott v. Harris*, 550 U.S. at 380. When viewed through this lens, the uncontroverted facts demonstrate that the force used under the totality of the circumstances was reasonable and the officers are entitled to qualified immunity as a matter of law. *Graham v. Connor*, 490 U.S. at 388.

In sum, if this Court's mandate to view the evidence in the light depicted in the undisputed video evidence is not followed, it is a direct violation of binding precedent and leads to an absurd result. The suggestion that *Scott v. Harris* is no longer good law or that it should be blithely disregarded even in the absence of a

claim of fabrication is worrisome and would eradicate a long line of caselaw, as is the notion that a reviewing court can use an incomplete version of the uncontroverted facts to overturn grants of qualified immunity. This Court can and should mark a brighter line regarding the use of undisputed video evidence and provide further instruction to courts of inferior jurisdiction on this critical issue.

B. Since the Doctrine of Qualified Immunity Contemplates the Possibility of an Officer's Reasonable Mistake of Fact, Issues of Fact Do Not Preclude Summary Judgment Where Any Alleged Mistakes Were Reasonable

The law is clear that qualified immunity protects governmental officials from suit under federal law claims if "their conduct does not violate clearly established statutory or constitutional rights or which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "**The protection of qualified immunity applies regardless of whether the governmental official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact**.'" *Pearson v. Callahan*, 555 U.S. at 230 (emphasis added).

To evaluate qualified immunity, a court must first decide whether the facts show that the governmental official's conduct violated a constitutional right. *Jackson v. County of Bremerton*, 268 F.3d 646 (9th Cir.

2001). Second, a court decides whether the governmental official could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established right. *Id*. However, the court may skip the first step and proceed to the second. *Pearson v. Callahan*, 555 U.S. at 227.

This Court has recently clarified that a governmental official is entitled to qualified immunity from suit/liability where, at the time of the conduct, there was no prior precedent or case law with facts specifically and substantially identical to the facts of the incident at issue which would have put the defendant on notice that his or her conduct was unconstitutional. *White v. Pauly*, 580 U.S. at 79 ("clearly established law" should not be defined "at a high level of generality" but must be "particularized" to the facts of the case). This Court has emphasized this point again and again, because qualified immunity is important to society as a whole and because the immunity from suit is effectively lost if a case is erroneously permitted to go to trial. *Id*. at 551-555.

Under the doctrine of qualified immunity, if a governmental official's mistake as to what the law requires is reasonable, the governmental official is entitled to qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 205 (1984). Moreover, this doctrine is sweeping in scope and designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Applying the two-pronged qualified immunity analysis, this Court must first look to whether the officers' conduct violated a constitutional right. *Jackson*, 268 F.3d at 646. However, there is no relevant case authority which holds that the offices' conduct in this matter was constitutionally deficient.

In this case, the Ninth Circuit determined that the law "was clearly established that kneeling on a person's back and neck, **when not necessary** and when obviously causing physical pain or harm, constitutes excessive force." App. 6-7 (emphasis added). The Ninth Circuit further determined that it was "clearly established that repeatedly using a TASER in drive-stun mode on a person **who is not an immediate threat** to officers raises a genuine issue of material fact precluding qualified immunity, even in the face of conflicting evidence that the person attacked an officer, screamed at officers using profanity, and continued to struggle and not obey officers' commands." App. 7 (emphasis added). However, despite the nature of this law, Petitioners are still entitled to qualified immunity under the second prong as any mistakes which were arguably made by the officers were reasonable based on the undisputed video evidence. *Pearson v. Callahan*, 555 U.S. at 230.

In this case, Respondents' entire case was premised on the notion that Rivera did not pose a threat to the public and was not resisting arrest – an argument onto which the Ninth Circuit seized. However, this position is directly inconsistent with and refuted by the

video evidence and impacts the entirety of the Ninth Circuit's opinion in numerous respects.

First, as to the level of threat, the Ninth Circuit's opinion ignores that Rivera was an unsearched felony burglary suspect who had fled and then actively resisted arrest. However, the California Supreme Court has recognized that the crime of burglary is one that carries a threat of violence and/or weapons. *People v. Gauze*, 15 Cal.3d 709, 715 (1975). Thus, there is a heightened risk of potential harm to officers or the public under these factual circumstances.

Second, the suggestion that there is no evidence of resisting arrest is plainly contrary to the videos. Here, the BWC footage clearly demonstrates that Rivera was continually moving his body during the entire incident, attempted to kick Officer Beckstrom, and continued to resist up until the final TASER deployment.

Third, the implication that Rivera was subjected to "crushing pressure on the back or neck" as was present in *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), simply did not happen in this case based on the undisputed video evidence. Unlike *Drummond*, Rivera never showed any signs of respiratory distress and never said he was unable to breathe during the encounter, instead yelling various things at the officers. Indeed, the evidence demonstrates that the controlling force used upon Rivera was neither "significant" nor "continued" and that Rivera was neither subdued nor incapacitated in that he was actively struggling throughout the incident. Since the officers'

actions did not involve any direct, sustained compression with their body weight as in the cases that involved asphyxia, these opinions are not controlling.

Fourth, in *Drummond*, the officer had knowledge that the suspect was mentally ill (which was not present here). Moreover, Drummond had committed no crime (unlike the violent felony that Rivera committed in this case). Unlike here, two officers put sustained weight on Drummond's back and neck and Drummond offered no resistance. As such, *Drummond* is inapposite and cannot meet the requirement that the law was "clearly established" at the time of the incident.

Turning to the issue of the TASER deployment, the law is clear that officers cannot use intermediate force when a suspect is restrained, has stopped resisting, and does not pose a threat. *Hyde v. City of Wilcox*, 234 F.4th 863, 873 (9th Cir. 2022). However, again, this is not what is shown in the BWC. Indeed, as discussed above, the BWC demonstrates that Rivera continued to struggle up until the time of the final deployment of the TASER.

In addition, *Bonivert v. City of Clarkston*, 883 F.3d 865 (9th Cir. 2018), the case upon which the Ninth Circuit relies to deny qualified immunity regarding the use of the TASER device, is factually distinguishable. In *Bonivert*, the suspect was suspected of a misdemeanor, did not flee, and the officers were informed that the suspect had no weapons. In addition, Bonivert did not resist arrest but was tasered several times notwithstanding compliance. Such a case is insufficient to

articulate "clearly established" law with the requisite degree of specificity required by *White v. Pauly*, 580 U.S. at 79.

In sum, the Ninth Circuit's analysis that the law is clearly established is based on a summary of the facts that simply did not happen in this case, as established by the irrefutable video evidence. Given that the facts demonstrated in the BWC video are so fundamentally different from those contained in prior reported cases, these prior cases cannot stand for the proposition that the law was clearly established that the officers could not act in the manner in which they did.

Finally, to the extent that the officers were wrong about either the nature of the law or whether Rivera was resisting and/or constituted a threat, they are nonetheless entitled to qualified immunity. The doctrine is sweeping in scope and designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. at 341.

Respondents have maintained that the video evidence in this case supports the reasonable interpretation that Rivera was not resisting and did not constitute a danger. Although the presence of multiple reasonable interpretations might ordinarily preclude a grant of summary judgment, this is not the case when analyzing a qualified immunity case which specifically allows for a defense when there is a reasonable mistake regarding the nature of the facts or, as here, when all relevant uncontroverted facts are considered. See *Pearson v. Callahan*, 555 U.S. at 320.

Accordingly, even assuming *arguendo* that Rivera was not resisting and/or posed no threat, the fact that Petitioners' interpretation was reasonable under the totality of the circumstances is mandated with the courts' mandates regarding the application of qualified immunity. *Malley v. Briggs*, 475 U.S. at 341; *Pearson v. Callahan*, 555 U.S. at 320. Stated another way, issues of fact do not preclude a grant of summary judgment based on qualified immunity where any alleged mistake of fact was **reasonable**. Because this was neither considered nor addressed in the Ninth Circuit's opinion, a writ of certiorari is warranted.

CONCLUSION

This Court should issue the requested writ of certiorari in order to clarify to lower courts the proper use of undisputed video evidence, which will only be increasingly part of civil and criminal litigation, in general, and civil rights litigation, in particular.

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