

No. 23-689

IN THE
Supreme Court of the United States

CITY OF LOS ANGELES, CALIFORNIA, *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, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals erred in determining that a reasonable jury could conclude an unarmed arrestee, who died from the combined effects of prone restraint by three officers and repeated tasing by a fourth, did not pose a serious threat, given video evidence showing the arrestee, who was initially unconscious, offered minimal resistance and neither struck nor threatened anyone, but struggled to breathe and vocalized pain while under the officers' continuous control.

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Respondents M.A.R. and Silvia Imelda Rivera file this Opposition Brief in response to the Petition for a Writ of Certiorari filed by Petitioners City of Los Angeles, Brett Beckstrom, Angel Romero, Michael Lopez, and Tyler Moser.

INTRODUCTION

On August 14, 2020, Petitioners killed Daniel Rivera while taking him into custody. Rivera was unarmed and unconscious when the officers first began their restraint. As they handcuffed him, he offered minimal resistance and did not strike or threaten any of them. Nonetheless, three officers applied their weight to his neck and back for several minutes, shoving his face into the ground when he lifted his head to catch his breath. While they pressed Rivera down, another officer tased him four times. Rivera suffered a fatal heart attack induced by the extended prone restraint and repeated applications of the taser.

In an unpublished memorandum decision, the Ninth Circuit Court of Appeals carefully considered the evidence and held that Petitioners' conduct violated Rivera's clearly established rights. For more than twenty years, it has been clearly established that it is unreasonable and excessive for officers to kneel on a person's back and neck, when not necessary and when obviously causing physical pain or harm. *Drummond ex rel. Drummond v. City of Anaheim*, 343

F.3d 1052, 1059 (9th Cir. 2003). And for more than ten years, it has been clearly established that it is excessive to use a taser in drive-stun mode on a person who does not pose an immediate threat to anyone's safety. *Mattos v. Agarano*, 661 F.3d 433, 445–46 (9th Cir. 2011). The court determined that a reasonable jury could find that Rivera did not pose a threat to the officers, and therefore their sustained application of force to his back and neck and their repeated use of a taser violated clearly established law.

Petitioners disagree with the Ninth Circuit's interpretation of the evidence and seek error correction from this Court. In their view, the video shows that Rivera did pose a threat to the officers. Knowing that this is not a compelling reason for this Court to review their case, Petitioners allege that "courts of inferior jurisdiction have started to drift further and further away from Justice Scalia's sage reasoning [in *Scott v. Harris*]." Pet. at 5. However, despite their extensive research through case law, Petitioners were only able to find a single unpublished district court opinion to support their outlandish claim.

The Ninth Circuit consistently and regularly applies *Scott v. Harris*, and its view of the facts in this case was entirely consistent with the record. Therefore, the Court should reject Petitioners' meritless Petition for a Writ of Certiorari.

PROCEEDINGS BELOW

Respondents brought this suit on April 6, 2021. *M.A.R. v. City of Los Angeles*, No. 2:21-cv-02957-FWS-MAR, ECF No. 1 (C.D. Cal.). On March 28, 2022, the District Court granted in part and denied in part Petitioners' motion for summary judgment. Pet. App. 8–62. Respondents appealed to the Ninth Circuit Court of Appeals on April 21, 2022, and the Ninth Circuit reversed and remanded in an unpublished Memorandum issued on July 17, 2023. Pet. App. 3–7. On September 25, 2023, the Ninth Circuit denied Petitioners' request to rehear the case *en banc*. Pet. App. 1–2. Petitioners filed their writ in this Court on December 22, 2023.

STATEMENT OF THE CASE

On August 14, 2020, Los Angeles Police Department Officers responded to a call on Wingo Street in the Arleta neighborhood. Neighbors reported that Daniel Rivera was wandering the street—he appeared to be confused and under the influence, and was attempting to enter homes.

When Petitioners Beckstrom, Romero, Lopez, and Moser arrived, Rivera walked towards a fence at the end of the street with an unsteady gait.¹ Rivera's

¹ Pet. Exhibit 5, Moser Car Video at 06:25.

hands were empty, and he did not have a bag or any other items, much less weapons.²

The fence separated Wingo St. from the Pacoima Diversion Channel (the “wash”), which is a concrete flood channel with steep fifty-foot-high concrete embankments on either side of it.³

Rivera climbed over the approximately six-foot-tall fence and fell to the ground on the other side.⁴ He got up, limped towards the embankment, and lost his balance as he descended.⁵ A Flight Officer in the LAPD Air Unit helicopter reported over the radio that Rivera “rolled down” the embankment and was lying motionless at the bottom.⁶ The Flight Officer believed Rivera was injured from the fall and called for an ambulance.⁷

² Pet. Exhibit 5, Moser Car Video at 06:25.

³ Pet. Exhibit 5, Moser Car Video at 06:25–06:35.

⁴ Pet. Exhibit 5, Moser Car Video at 06:25–06:35.

⁵ Pet. Exhibit 5, Moser Car Video at 06:25–06:43.

⁶ See Pet. App. at 11 (“The air unit was still on scene and the Flight Officer reported that she had observed Rivera ‘roll down’ the embankment and lie motionless at the bottom. Because she believed that Rivera may be injured, the Flight Officer requested an LAFD Rescue Ambulance (‘RA’) to respond to the scene.”).

⁷ *Id.*

Officers Beckstrom and Moser approached the fence and saw Rivera lying on his stomach, motionless at the bottom of the wash.⁸ This video and radio evidence support the inference that Rivera tripped and tumbled down the embankment, landed at the bottom of the wash, and was knocked unconscious.

Officers Beckstrom, Romero, Lopez, and Moser watched Rivera from the top of the embankment.⁹ The officers asked each other if they could see Rivera's hands; an officer on the embankment to the north said he had "eyes" on Rivera's hands.¹⁰ Romero stated that Rivera's hands "look empty."¹¹

Beckstrom, Romero, Lopez, and Moser descended to the bottom of the wash and issued commands to Rivera in English and Spanish, but Rivera did not respond or move in any way.¹² They approached and told Rivera not to move.¹³ Rivera was still unconscious and his hands were visible—he did not react to the

⁸ Pet. Exhibit 7, Beckstrom BWV at 06:12–06:18.

⁹ Pet. Exhibit 7, Beckstrom BWV at 07:20–08:00; Pet. Exhibit 9, Romero BWV at 08:30–09:40.

¹⁰ Pet. Exhibit 9, Romero BWV at 09:25–09:41.

¹¹ Pet. Exhibit 9, Romero BWV at 09:35–09:41.

¹² Pet. Exhibit 7, Beckstrom BWV at 09:55–10:20.

¹³ Pet. Exhibit 7, Beckstrom BWV at 10:15–10:22; Pet. Exhibit 9, Romero BWV at 11:00–11:07.

officers' command or show any sign that he heard them.¹⁴

Even though Rivera posed no threat, being unconscious and injured from a severe fall, Romero grabbed Rivera's left wrist and forearm and placed his right knee on Rivera's left shoulder blade.¹⁵ Beckstrom used his right hand to grab Rivera's right wrist, his left hand to push down on Rivera's right shoulder blade, and planted his left knee squarely on Rivera's lower back.¹⁶ Beckstrom placed the majority of his bodyweight on his left knee on Rivera's back and extended his right leg onto the wash at a 45-degree angle, using it as a brace.¹⁷

When the officers applied this initial force, Rivera woke up for the first time: he opened his eyes, turned his head slightly to his right, and then back towards the ground.¹⁸ A reasonable inference is that Rivera was unconscious and unaware of the officers from the moment he fell down the embankment to when the

¹⁴ Pet. Exhibit 7, Beckstrom BWV at 10:15–10:22; Pet. Exhibit 9, Romero BWV at 11:00–11:07.

¹⁵ Pet. Exhibit 9, Romero BWV at 11:07–11:11.

¹⁶ Pet. Exhibit 7, Beckstrom BWV at 10:23–10:25.

¹⁷ Pet. Exhibit 7, Beckstrom BWV at 10:23–10:25; Pet. Exhibit 10, Moser BWV at 11:47–12:01.

¹⁸ Pet. Exhibit 7, Beckstrom BWV at 10:23–10:25.

officers used their initial controlling force—a total of four minutes.¹⁹

Beckstrom and Romero wrenched Rivera's hands onto the back of his head so they could handcuff him.²⁰ Beckstrom repositioned his left knee in the center of Rivera's back, causing Rivera to audibly gasp for air.²¹ Beckstrom used both of his hands to force Rivera's head to the ground while Romero pulled out handcuffs.²² Rivera instinctively tensed his shoulders and arms and dug his elbows into the ground in order to keep his chest from collapsing under Beckstrom and Romero's weight.²³

Romero secured the handcuff to Rivera's left wrist while Beckstrom continued to apply bodyweight and compressive force to Rivera's head, neck, right shoulder, and back.²⁴ Romero asked for a second pair of handcuffs and Officer Lopez assisted with connecting the second pair of cuffs to the open cuff.²⁵ Beckstrom repositioned his right leg, bending his knee

¹⁹ Pet. Exhibit 7, Beckstrom BWV at 06:18–10:24.

²⁰ Pet. Exhibit 7, Beckstrom BWV at 10:25–10:29.

²¹ Pet. Exhibit 7, Beckstrom BWV at 10:25–10:30.

²² Pet. Exhibit 7, Beckstrom BWV at 10:25–10:30; Pet. Exhibit 9, Romero BWV at 11:10–11:14.

²³ Pet. Exhibit 7, Beckstrom BWV at 10:25–10:30; Pet. Exhibit 9, Romero BWV at 11:10–11:14.

²⁴ Pet. Exhibit 9, Romero BWV at 11:12–11:17.

²⁵ Pet. Exhibit 9, Romero BWV at 11:22–11:35.

at a ninety-degree angle so that the majority of his bodyweight was placed on his left knee on Rivera's back.²⁶ Rivera continued to gasp for air while Lopez pushed Rivera's head to the ground with his hand.²⁷

Beckstrom then instructed Romero and Lopez to "Pull behind his head. Grab it behind his head."²⁸ Romero and Lopez removed Rivera's hands from the back of his head and elongated them straight in front of him.²⁹ They lifted his elbows from the ground, causing Rivera to lift his head so his chest would not be crushed to the ground.³⁰ Beckstrom gripped the back of Rivera's neck and pushed his head back down.³¹ Romero pulled Rivera's left arm towards his left side, in an effort to swing the arm behind his back.³² Rivera clasped his hands together, tensed his arms, and continued to struggle to breathe while Beckstrom placed the majority of his bodyweight on his back and forced his head and neck to the ground.³³

²⁶ Pet. Exhibit 9, Romero BWV at 11:25–11:30.

²⁷ Pet. Exhibit 8, Lopez BWV at 11:32–11:37.

²⁸ Pet. Exhibit 9, Romero BWV at 11:33–11:38.

²⁹ Pet. Exhibit 9, Romero BWV at 11:38–11:45.

³⁰ Pet. Exhibit 9, Romero BWV at 11:38–11:45; Pet. Exhibit 8, Lopez BWV at 11:40–11:45.

³¹ Pet. Exhibit 7, Beckstrom BWV at 10:55–11:00.

³² Pet. Exhibit 9, Romero BWV at 11:44–11:49.

³³ Pet. Exhibit 9, Romero BWV at 11:44–11:49.

Lopez then used his right knee to pin Rivera's right arm to the ground while Romero pulled Rivera's left arm towards his back.³⁴ Rivera raised his head again to breathe.³⁵ Beckstrom and Lopez forced Rivera's head to the ground.³⁶ Rivera shouted in distress.³⁷ Romero and Lopez extended Rivera's clasped hands straight out in front of him and Beckstrom forced Rivera's head to the ground in the space between his arms.³⁸

Rivera was completely flattened to the ground with Officers Romero and Lopez pulling his arms in front of him and Beckstrom on his back, pushing down on his head and neck.³⁹ Despite the officers having control of Rivera, Officer Moser applied a TASER to Rivera's left thigh.⁴⁰

After the first TASER shock, Rivera screamed in pain and shouted gibberish.⁴¹ Romero had control of Rivera's left arm and Lopez had control of Rivera's right arm as they began to bring Rivera's arms behind

³⁴ Pet. Exhibit 8, Lopez BWV at 11:45–11:52.

³⁵ Pet. Exhibit 8, Lopez BWV at 11:54.

³⁶ Pet. Exhibit 8, Lopez BWV at 11:55–12:00.

³⁷ Pet. Exhibit 8, Lopez BWV at 11:55–12:00.

³⁸ Pet. Exhibit 8, Lopez BWV at 12:00.

³⁹ Pet. Exhibit 11, Whitelaw BWV at 00:00–00:10.

⁴⁰ Pet. Exhibit 10, Moser BWV at 12:40–12:45.

⁴¹ Pet. Exhibit 11, Whitelaw BWV at 00:10–00:15.

his back.⁴² Beckstrom used both of his hands to push down on Rivera's head and neck while Romero began moving Rivera's left arm behind his back.⁴³

Sixteen seconds after the first TASER application, Moser moved the TASER down Rivera's left calf and applied a second shock.⁴⁴ Rivera screamed in pain again and writhed his legs.⁴⁵ Beckstrom was centered on Rivera's back: Beckstrom's left knee and shin were laid across Rivera's lower back, pushing his chest into the ground, while he used his left hand to pin Rivera's head to the ground.⁴⁶

Fourteen seconds after the second TASER application, Moser applied a third shock to Rivera's left leg.⁴⁷ During this application, Lopez had his right knee on top of Rivera's head.⁴⁸ Beckstrom shifted his left knee to Rivera's left flank then lifted and planted his right knee onto Rivera's right side.⁴⁹

⁴² Pet. Exhibit 11, Whitelaw BWV at 00:10–00:15.

⁴³ Pet. Exhibit 7, Beckstrom BWV at 11:26–11:30.

⁴⁴ Pet. Exhibit 10, Moser BWV at 12:55–13:00.

⁴⁵ Pet. Exhibit 10, Moser BWV at 13:00–13:05.

⁴⁶ Pet. Exhibit 10, Moser BWV at 13:03–13:07.

⁴⁷ Pet. Exhibit 10, Moser BWV at 13:10–13:20.

⁴⁸ Pet. Exhibit 9, Romero BWV at 12:32–12:36.

⁴⁹ Pet. Exhibit 10, Moser BWV at 13:15–13:25.

Beckstrom placed all of his bodyweight onto his knees and shins on Rivera's lower back and hips.⁵⁰ Rivera squirmed in pain as Beckstrom used both of his legs to push and pin Rivera's lower body to the ground.⁵¹

Approximately ten (10) seconds after the third TASER application, Moser shocked Rivera's left leg a fourth (and final) time.⁵² Rivera's body gave up—he stopped squirming and his chest collapsed to the ground.⁵³

After the fourth TASER application, Beckstrom stayed on Rivera's back, placed his right forearm across the back of Rivera's neck, and pushed down with almost all of his upper bodyweight.⁵⁴ Romero brought Rivera's left arm around to his side and then cuffed his hands behind his back.⁵⁵

When Rivera was handcuffed, Beckstrom stayed straddled on Rivera's lower back, even though Rivera

⁵⁰ Pet. Exhibit 10, Moser BWV at 13:15–13:25.

⁵¹ Pet. Exhibit 10, Moser BWV at 13:15–13:25.

⁵² Pet. Exhibit 10, Moser BWV at 13:22–13:27.

⁵³ Pet. Exhibit 9, Romero BWV at 12:45–12:55.

⁵⁴ Pet. Exhibit 9, Romero BWV at 12:50–13:00.

⁵⁵ Pet. Exhibit 9, Romero BWV at 13:00–13:15.

was no longer moving and had short, shallow breathing.⁵⁶

Lopez and Officer Ramos applied the hobble restraint around Rivera's ankles.⁵⁷ Beckstrom continued to push down on Rivera's back, at times pushing down on Rivera's neck, with both hands.⁵⁸ Rivera shouted "No! No!" as Lopez tightened the hobble restraint around his ankles.⁵⁹ When Lopez finished applying the hobble restraint, Beckstrom got off of Rivera's back and rolled him onto his left side.⁶⁰

In total, Beckstrom was on Rivera's back for approximately three minutes and ten seconds.⁶¹ Even when Rivera was handcuffed and subdued, Beckstrom straddled and pushed down on Rivera's back for approximately one minute and ten seconds.⁶²

When Beckstrom rolled Rivera onto his left side, Rivera was making small choking and gasping sounds because he was having trouble breathing.⁶³ Romero and Beckstrom held Rivera on his left side while

⁵⁶ Pet. Exhibit 9, Romero BWV at 13:10–13:40.

⁵⁷ Pet. Exhibit 9, Romero BWV at 13:10–13:40.

⁵⁸ Pet. Exhibit 9, Romero BWV at 13:40–14:00.

⁵⁹ Pet. Exhibit 9, Romero BWV at 13:40–14:00.

⁶⁰ Pet. Exhibit 9, Romero BWV at 14:00–14:20.

⁶¹ Pet. Exhibit 9, Romero BWV at 11:07–14:19.

⁶² Pet. Exhibit 9, Romero BWV at 13:09–14:19.

⁶³ Pet. Exhibit 9, Romero BWV at 14:15–14:25.

Rivera writhed in pain—arching his chest out and gasping for air.⁶⁴

Lopez lifted Rivera's ankles, wrapping the hobble restraint around them again, causing Rivera to roll onto his stomach.⁶⁵ At this point, Beckstrom and Lopez placed their hands on Rivera, maintaining him in the prone position for control.⁶⁶ Lopez kneeled on Rivera's ankles to keep his feet in place.⁶⁷

Rivera began to pray, calling out to God in between gasps for breath.⁶⁸ He convulsed and rolled straight onto his chest⁶⁹ and made small choking sounds and babbled in gibberish, arching his back and yelling in pain several more times.⁷⁰ As Rivera fought for his life, one of the officers told him, "Calm down—you got me all muddy and shit."⁷¹

Beckstrom moved over to Rivera's right side, placing his right knee on Rivera's back for approximately ten seconds.⁷² Beckstrom eventually

⁶⁴ Pet. Exhibit 9, Romero BWV at 14: 20–14:40.

⁶⁵ Pet. Exhibit 9, Romero BWV at 15:00–15:15.

⁶⁶ Pet. Exhibit 9, Romero BWV at 15:00–15:15.

⁶⁷ Pet. Exhibit 9, Romero BWV at 15:10–15:20.

⁶⁸ Pet. Exhibit 9, Romero BWV at 15:20–15:30.

⁶⁹ Pet. Exhibit 9, Romero BWV at 15:30–15:45.

⁷⁰ Pet. Exhibit 9, Romero BWV at 15:45–16:30.

⁷¹ Pet. Exhibit 9, Romero BWV at 16:43–16:49.

⁷² Pet. Exhibit 9, Romero BWV at 16:50–17:40.

rolled Rivera onto his left side,⁷³ after Rivera had been held in a prone position for an additional two and a half minutes.⁷⁴

Once he was on his side, Rivera's body went limp and his breathing became shallow—he stopped speaking or moving.⁷⁵ Beckstrom and Lopez rolled Rivera onto his chest and stomach, then on his right side.⁷⁶ Beckstrom kept Rivera handcuffed and hobbled on his right side for approximately three and a half minutes until the Fire Department came to Rivera's side.⁷⁷ The paramedics instructed the officers to put Rivera in an upright, seated position.⁷⁸

Approximately seven and a half minutes later, the paramedics determined that Rivera had no pulse.⁷⁹ Rivera went into full cardiac arrest and died at 6:54 p.m., approximately forty minutes after Beckstrom and Romero made initial physical contact with him.

⁷³ Pet. Exhibit 9, Romero BWV at 17:40–17:50.

⁷⁴ Pet. Exhibit 9, Romero BWV at 15:10–17:40.

⁷⁵ Pet. Exhibit 9, Romero BWV at 17:50–18:55.

⁷⁶ Pet. Exhibit 9, Romero BWV at 20:50–21:00.

⁷⁷ Pet. Exhibit 9, Romero BWV at 21:00–24:30; Pet. Exhibit 7, Beckstrom BWV at 21:40–23:50.

⁷⁸ Pet. Exhibit 7, Beckstrom BWV at 24:10–25:00.

⁷⁹ Pet. Exhibit 7, Beckstrom BWV at 25:00–32:30.

REASONS FOR DENYING THE PETITION

I. The Question Presented is a Meritless Request for Error Correction

The Ninth Circuit's decision is partially based on its determination that a reasonable jury could find that Rivera did not pose a threat to the officers when they forcefully restrained him with significant weight on his back and tased him four times, resulting in his death.

Petitioners disagree with the Ninth Circuit's assessment and seek error correction from this Court. In an attempt to give their petition more weight, Petitioners argue that the Ninth Circuit ignored video evidence in defiance of *Scott v. Harris*. But the Ninth Circuit's view of the facts is entirely consistent with the video evidence in this case and the Petitioners' arguments to the contrary are meritless.

In *Scott v. Harris*, a deputy used a precision immobilization technique to stop a motorist, causing him to lose control of his vehicle and crash. *Scott v. Harris*, 550 U.S. 372, 375 (2007). The Ninth Circuit upheld a district court's denial of the deputy's summary judgment motion. *Id.* at 376. In its analysis, the Ninth Circuit adopted the plaintiff's version of events, notably that there was no danger to other people and the motorist remained in control of his vehicle during the chase. *Harris v. Coweta Cnty., Ga.*

433 F.3d 807, 815 (9th Cir. 2005), *reversed*, *Scott v. Harris*, 550 U.S. 372 (2007). But the video clearly showed that the motorist’s driving was extremely reckless, “resembl[ing] a Hollywood-style car chase of the most frightening sort.” *Scott*, 550 U.S. at 380. In overturning the Ninth Circuit’s ruling, this Court described the facts as depicted by the video:

[W]e see respondent’s vehicle 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.⁶ We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane.

Scott v. Harris, 550 U.S. at 379–80 (2007).

This Court found that the district and appellate courts improperly disregarded the videotape of the police chase explaining that “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.* at 380.

In contrast to *Scott v. Harris*, the Ninth Circuit in this case based its decision on a balanced recitation of the facts, true to the video recordings of the incident and the record as a whole. Far from glossing over the incident in Rivera's favor, the court acknowledges that Rivera was being arrested in relation to a residential burglary and appeared intoxicated. Pet. App. 5. The court notes that upon initial confrontation by the officers, Rivera disobeyed their command to get on the ground, jumping a fence and stumbling down an embankment instead. *Id.* The court describes Rivera as "convulsing, grunting, and yelling uncontrollably" at some points, and the court recognizes the officers' inability to handcuff him for a considerable duration as he was held down by the combined weight of three officers and tased four times, implying some resistance to the arrest. *Id.*

However, the court found that these factors were outweighed by the most important *Graham* factor because Rivera did not pose a threat to the officers. *Id.* The court's conclusion is bolstered by the video evidence showing that when the officers approached him, Rivera was lying face down and motionless at the bottom of a drainage wash with his hands visible. Further, throughout the incident, he was pinned to the ground by multiple officers who had control of his arms, and he did not strike or threaten any of them. The Ninth Circuit's account of the facts precisely parallels the actual events as depicted in the video, forming a clear contrast with the fictitious version of

the facts delivered by the district and appellate courts in *Scott v. Harris*.

Petitioner provides a list of specific examples of the Ninth Circuit’s “fatally flawed” factual findings. Pet. at 14. But in each case, the court’s view of the facts is clearly supported by the record and consistent with the video evidence.

First, Petitioners claim that the court erred finding that Rivera’s hands were visible at the time the officers arrived. *Id.* Surprisingly, Petitioners fail to inform this Court that this fact was *undisputed* by Petitioners for the purpose of their motion for summary judgment. Case No. 2:21-cv-02957, Dkt. 91-1 at 36, 37. On appeal, Petitioners take the complete opposite position, arguing that it is undisputed that Rivera’s hands *were not* visible. If the Petitioners can see this issue both ways, surely a jury can, as well. Moreover, the Ninth Circuit’s finding is supported by the video evidence, which shows that as the officers watched Rivera from the top of the embankment, an officer stated he had “eyes” on Rivera’s hands and Officer Romero said Rivera’s hands “look empty.”⁸⁰

Second, Petitioners argue that the Ninth Circuit erred by failing to discuss Rivera “attempting to kick” Officer Beckstrom. Pet. at 14. But the video shows Rivera never came close to kicking anyone and his leg

⁸⁰ Pet. Exhibit 9, Romero BWV at 09:25–09:41

movements appear to be a reflexive pain response to being repeatedly tased.⁸¹ Petitioners also argue that the court's opinion is inconsistent with the video showing Rivera's "continually moving his upper and lower body during the entire event." Pet. at 14. However, the court directly addresses Rivera's movements and describes them accurately: the court states that Rivera "tensed his body and grunted," "began to move his shoulders and upper torso as the officers tried to handcuff him," and "tried to raise his head twice." Pet. App. at 5. The court's description of Rivera's movements is entirely consistent with the video.⁸²

Next, finding no further specific factual findings to critique, Petitioners fabricate some of their own. They argue that the video contradicts the "suggestion" that this was a prolonged encounter. Pet. at 15. But the Ninth Circuit made no such suggestion. The length of the encounter is undisputed in this case. And nothing in the Ninth Circuit's opinion contradicts the undisputed timeline of events.

Petitioners go on to argue that the video contradicts the "assertion that crushing weight was

⁸¹ Pet. Exhibit 10, Moser BWV at 12:41–14:00.

⁸² Pet. Exhibit 10, Moser BWV at 12:41–14:00; Pet. Exhibit 7, Beckstrom BWV at 10:24–11:40; Pet. Exhibit 9, Romero BWV at 11:11–13:06; Pet. Exhibit 11, Whitelaw BWV at 00:02–00:25; Pet. Exhibit 8, Lopez BWV at 11:54–12:14.

applied.” Pet at 15. But the Ninth Circuit made no such assertion. Further, even if we broadly interpret the Petitioners’ critique to encompass a general objection to the Ninth Circuit’s description of the amount of weight applied to Rivera’s back, the argument still lacks merit. The Ninth Circuit found that a reasonable jury could determine that at the beginning of the encounter, Officers Beckstrom and Romero put more than half their weight on Rivera and that after the third application of the taser, Officer Beckstrom placed his whole weight on Rivera. Pet. App. at 5–6. Both factual findings are supported by the record and consistent with the video evidence.⁸³

Petitioners go on to accuse the Ninth Circuit of framing this case as one in which Rivera was compliant and not resisting. Pet. at 17. Once again, Petitioners mischaracterize the Ninth Circuit’s opinion. The court never asserts that Rivera was compliant, to the contrary, the court points out that Rivera “did not obey a command to get on the ground” when the officers first encountered him. Pet. App. at 5. Nor does the court deny that Rivera was resisting arrest; to the contrary, some minimal level of resistance is implied by the timeline described by the court. Moreover, in explaining its ruling, the Court cites *Bonivert v. City of Clarkston*, 883 F.3d 865 (9th

⁸³ Pet. Exhibit 10, Moser BWV at 11:49–13:33; Pet. Exhibit 7, Beckstrom BWV at 10:24–11:40; Pet. Exhibit 9, Romero BWV at 11:11–12:51.

Cir. 2018) and *Mattos v. Agarano*, 661 F.3d 433, 445–46 (9th Cir. 2011) (en banc), for the proposition that it is clearly established that tasing someone who is not an immediate threat is unreasonable *even if they are actively resisting arrest*. So, even if the court were to accept Petitioners’ characterization of the video as showing active resistance, it would have come to the same result.

Following *Scott v. Harris*, circuit courts have a simple rule to apply: they must not accept a version of events that is blatantly contradicted by video evidence. For all the reasons discussed above, it is clear that nothing in the Ninth Circuit’s memorandum runs afoul of this rule. The Petitioners do not have an important legal question for this Court to resolve, rather, they disagree with the Ninth Circuit’s interpretation of the record and would like this Court to wade into the record and correct the Ninth Circuit’s alleged error.

Unfortunately for Petitioners, this Court’s rules state that the Court does not grant certiorari to engage in error correction. S. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”) In the context of qualified immunity, Justice Alito has explained why: “Every year, the courts of appeals decide hundreds if not thousands of cases in which it is debatable whether the evidence in a summary

judgment record is just enough or not quite enough to carry the case to trial. If we began to review these decisions we would be swamped, and as a rule we do not do so.” *Taylor v. Riojas*, 592 U.S. 7, 11 (2020) (Alito, J., concurring).

The Ninth Circuit’s memorandum is a faithful application of the law, and its conclusions are not blatantly contradicted by the video evidence in this case. This is far from a case contemplated by Rule 10, where a court has “so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.” Rule 10(a). Moreover, Petitioners’ request for error correction is especially unfounded in this case, because the decision below is unpublished. A decision in this case “adds virtually nothing to the law going forward” because the lower court’s opinion is not precedential. *Taylor*, 592 U.S. at 11 (Alito, J., concurring).

These kinds of petitions are routinely rejected by this Court. For example, in *Robinson v. Lehman*, 552 U.S. 1172 (2008), a qualified immunity case, this Court mandated the Ninth Circuit to review video evidence in light of *Scott v. Harris*. *Id.* On remand, the Ninth Circuit reviewed the video, concluded that it did not blatantly contradict Plaintiff’s version of events, and affirmed the denial of qualified immunity.⁸⁴ The

⁸⁴ *Lehman v. Robinson*, 346 F. App’x 188 (9th Cir. 2009).

defendants petitioned this Court again for a writ of certiorari, continuing to argue that the Ninth Circuit's view of the facts was clearly contradicted by the video.⁸⁵ However, since it was simply an issue of error correction, this Court denied the petition.⁸⁶

In conclusion, the Ninth Circuit's memorandum faithfully applies the law and is consistent with the video evidence in this case. Petitioners' arguments for error correction are meritless, and the unpublished nature of the decision below further undermines the need for this Court's review. For these reasons, the Court should deny the Petition for a Writ of Certiorari.

II. There Is No Circuit Split or Confusion Regarding *Scott v. Harris*.

Petitioners make the vague, unsubstantiated claim that “in recent years, courts of inferior jurisdiction have started to drift further and further away from Justice Scalia’s sage reasoning [in *Scott v. Harris*].” Pet. at 5. Petitioners allege that “some circuit courts will cherry pick facts” while ignoring “undisputed evidence (shown on video).” *Id.* However, Petitioners’ only evidence to support this bold

⁸⁵ See Petition for a Writ of Certiorari, *Robinson v. Lehman*, 2009 WL 4875834, at *15.

⁸⁶ *Robinson v. Lehman*, 560 U.S. 924 (2010) (denying petition for writ of certiorari).

indictment of lower courts is a single unpublished district court opinion. The reason Petitioners cannot cite more cases to support their argument is that *Scott v. Harris* is being applied faithfully in district and appellate courts.

In just the last three years, the Ninth Circuit has cited *Scott v. Harris* at least 59 times. *See, e.g., Hughes v. Rodriguez*, 31 F.4th 1211, 1218 (9th Cir. 2022) (“[F]or purposes of ruling on a motion for summary judgment, a district court may properly view the facts in the light depicted by bodycam footage and its accompanying audio, to the extent the footage and audio blatantly contradict testimonial evidence.”); *Harris v. City of Kent*, No. 22-35346, 2023 WL 6784361, at *2 (9th Cir. Oct. 13, 2023) (citing *Scott v. Harris* and viewing the facts in light of video evidence); *Smith v. Agdeppa*, 81 F.4th 994, 997 (9th Cir. 2023) (same); *Rosalia v. City of Hayward*, No. 22-16135, 2023 WL 5842308, at *1 (9th Cir. Sept. 11, 2023) (same); *R. H. by & through Brown v. City of Redding*, No. 22-15361, 2022 WL 17844183, at *1 (9th Cir. Dec. 22, 2022) (same); *Alphonsis v. Garnica*, No. 21-56141, 2022 WL 7842130, at *1 (9th Cir. Oct. 14, 2022), cert. denied, 144 S. Ct. 139, 217 L. Ed. 2d 47 (2023) (same); *Estate of Hernandez v. City of Los Angeles*, 2024 WL 1203884 at *2 n.1 (9th Cir. Mar. 21, 2024) (same); *Amons v. Tindall*, 2021 WL 3015107 at *3–4 (9th Cir. July 15, 2021) (same).

District courts in the Ninth Circuit are also properly applying *Scott v. Harris*, citing it at least 800 times in the last three years. *See, e.g. Hollamon v. City of Los Angeles*, No. 2:22-CV-08778-SB-MAR, 2023 WL 9327589, at *2 n.3 (C.D. Cal. Dec. 22, 2023) (citing *Scott v. Harris* and viewing the facts in light of video evidence); *Murillo v. City of Los Angeles*, No. CV 22-3188-DMG (SKX), 2023 WL 9379182, at *2 n.3 (C.D. Cal. Dec. 20, 2023) (same); *Smith v. Cnty. of Orange*, No. 821CV00265SPGKES, 2023 WL 4680798, at *6 (C.D. Cal. June 23, 2023), appeal dismissed sub nom. *Smith v. Packham*, No. 23-55641, 2023 WL 9291578 (9th Cir. Dec. 6, 2023) (same); *Rodriguez v. Cnty. of Los Angeles*, 654 F. Supp. 3d 1029, 1039 n.4 (C.D. Cal. 2023) (same); *Reynolds v. Huddleston*, 2023 WL 8114834 at *5 (C.D. Cal. July 17, 2023) (same); *Perez v. City of Fontana*, 2023 WL 4826232 at *5 (C.D. Cal. June 15, 2023) (same); *Garcia v. Cnty. of Riverside*, 2022 WL 2200425 at *8 (C.D. Cal. Apr. 6, 2022) (same); *Cadeaux v. Las Vegas Metro. Police Dep't*, 646 F. Supp. 3d 1312, 1324 n.71 (D. Nev. 2022) (same); *Gregory v. Palmer*, 2023 WL 6048844 at *1 n. 2 (D. Nev. 2023) (same); *Oakry v. City of Tempe*, 629 F. Supp. 974, 980 n. 1 (D. Ariz. Sept. 21, 2022) (same); *Blomdahl v. Cuevas*, 2023 WL 3603602 at *4 (D. Ariz. May 23, 2023); *Harris v. Bertz*, 2022 WL 3682027 at *2 (D. Ariz. Aug. 25, 2022) *aff'd*, *Harris v. City of Phoenix*, 2023 WL 6635077 (9th Cir. Oct. 12, 2023) (same); *Denis v. Ige*, 2022 WL 301423 at *3–4 (D. Haw. July 29, 2022) (same).

Petitioners' claim that courts have deviated from Justice Scalia's reasoning in *Scott v. Harris* is entirely baseless. The frequent citation and application of *Scott v. Harris* in both district and appellate courts underscores its continued relevance and authority in evaluating evidence in qualified immunity cases. Thus, the Court should reject Petitioners' argument and deny their Petition for a Writ of Certiorari.

**III. The “Reasonable Mistake of Fact”
Argument Is Not Included in the Petition’s
Question Presented and Was Not Raised
Below**

The Petitioners also argue that the Ninth Circuit erred in denying qualified immunity because any alleged mistake of fact was reasonable. However, this issue is not set forth in the question presented, nor is it fairly encompassed within the question presented, which is based entirely on Petitioners' baseless argument that the Ninth Circuit ignored video evidence that clearly contradicted its view of the facts. Having failed to raise this as a question presented, it is not properly before the Court. *See* S. Ct. R. 14.1(a).

Furthermore, the question of “reasonable mistake” was not argued in the briefing to the courts below, and it is improper for Petitioners to raise this argument for the first time in their petition for a writ of certiorari. A review of the record is conclusive: the phrase “reasonable mistake” and the word “mistake”

do not appear in Petitioners' Answering Briefs submitted to the Ninth Circuit,⁸⁷ or their Motion for Summary Judgment or Reply Brief submitted to the district court.⁸⁸ Petitioners never alleged, in any of their briefing, that they made reasonable mistakes of fact or law.⁸⁹ The Ninth Circuit did not consider or address the "reasonable mistake" issue because Petitioners never presented it to the district court or the Ninth Circuit.

In *Ellis v. Dixon*, 349 U.S. 458, 464 (1955) the Court ruled that it lacked jurisdiction to review the petitioner's constitutional questions because he failed to plead such questions to the appellate court. *Id.* at 464. The appellate court had issued an order without stating the grounds for its decision, omitting any discussion of the petitioner's constitutional question. *Id.* at 459. The petitioner requested a writ of certiorari

⁸⁷ See Appellees Beckstrom, Romero, Lopez, and Moser's Answering Brief, Ninth Circuit Case No. 22-55415, Dkt. 29; see also Appellees City of Los Angeles, Michel Moore, and Nathan Ramos' Answering Brief, Ninth Circuit Case No. 22-55415, Dkt. 32.

⁸⁸ See Petitioners' Notice of Motion and Motion for Summary Judgment, or in the Alternative for Partial Summary Judgment, Case No.: 2:21-cv-02957-JFW-MAR, Dkt. 64; Petitioners' Reply in Support of Motion for Summary Judgment, or in the Alternative for Partial Summary Judgment, Case No.: 2:21-cv-02957-JFW-MAR, Dkt. 91.

⁸⁹ *Id.*

to this Court, raising the constitutional question for the first time. Due to the paucity of the petitioner's constitutional argument, this Court declined review. *Id.* at 462. ("What has been alleged is entirely too amorphous to permit adjudication of the constitutional issues asserted."). After reviewing the record, the Court inferred that the appellate court did not address the constitutional issue because the petitioner's allegations were inadequate, not because the appellate court erred. *Id.* at 462–63 ("Otherwise we would have to assume that the Court of Appeals desired to thwart review of the constitutional questions, an assumption wholly unjustified by this record.").

Because Petitioners failed to make any "reasonable mistake" argument anywhere in the record below, the Court should reject this argument and deny the Petition for a Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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