

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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JAY RUSSELL SHAFER,

*Petitioner,*

v.

FREDDY PADILLA,

No 2465, individually and as a peace officer,

*Respondent.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

In a civil rights action based on excessive force, a deputy sheriff denies engaging in the physical acts that constituted excessive force. The plaintiff at trial proves that the deputy's denials were false and that he did engage in the acts. The jury determines that the deputy used excessive force and did so with malice, oppression or recklessness. Is the deputy entitled to qualified immunity for engaging in the acts of excessive force, despite his denials of having done so and the jury's findings?

**PARTIES TO THE PROCEEDINGS**

The plaintiff in the District Court and appellee in the Ninth Circuit: Jay Russell Shafer.

The defendant in the District Court and appellant in the Ninth Circuit: Freddy Padilla.

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**OPINIONS BELOW**

The Ninth Circuit's opinion was reported at 868 F.3d 1110 (9<sup>th</sup> Cir. 2017), and is reproduced below, at Appendix pages 1-15.

The District Court's judgment and order were not reported. The jury's verdict and the District Court's judgment and post-verdict order are reproduced below, respectively, at Appendix pages 48-51 and Appendix pages 16-47.

**JURISDICTION**

The jurisdiction of this Court is invoked under United States Code, Title 28, section 1254(1), and Supreme Court Rule 13.1.

The Ninth Circuit issued its opinion on August 29, 2017. App. 1. It denied a petition for rehearing on December 4, 2017. App. 52. A petition for certiorari was due 90 days from that date (March 4, 2018), however, Justice Kennedy extended the time to file this petition to April 3, 2018.

**PERTINENT STATUTORY PROVISIONS**

United States Code, Title 42, section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . .

California Penal Code section 148:

(a)(1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

## **STATEMENT**

### **A. Facts**

Mr. Shafer, a 19-year-old student at the University of California at Santa Barbara, was walking along a busy and festive street in a college town, Isla Vista, at around midnight. (SER 120:20-22; 122:19-25 (Carrillo)<sup>1</sup>; 166:3-4 (Shafer). He was with three friends, Mallory Carrillo, her husband Dominic Gianola, and Jon Conde. (SER 122:10-18 (Carrillo); 90:18-22 (Gianolo); 167:18-21 (Shafer).)

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<sup>1</sup> In this petition, the trial transcripts are referenced as Excerpts of Record (ER) and Supplemental Excerpts of Record (SER) and are followed by page:line, followed by (name of witness).

They were openly carrying water-balloons with them, intending to toss them over a fence and into backyard parties. (SER 91:13-92:4 (Gianola); 121:7-122:6 (Carrillo); 71:13-17, 184:13-21, 185:8-12 (Shafer).) This was commonplace at Isla Vista, a form of juvenile entertainment. (SER 121:14-22 (Carrillo).)

### **1. The Events, According to the Defendant**

Deputy Freddy Padilla testified that he and his partner, Deputy LeFemine, politely approached Mr. Gianola and Mr. Shafer, and said, “Hey, guys, I just got a report that someone was hit with water-balloons. You guys need to come over here and talk to me on the curb.” (SER 13:13-22 (Padilla).)

Deputy Padilla told the jury that (1) Mr. Shafer tried to walk past him (SER 16:12-16; 207:11-18 (Padilla)); (2) that he (Padilla) politely requested that Mr. Shafer give him the water-balloons (SER 14:1-8 (Padilla)); (3) that Mr. Shafer disobeyed an order to sit; (4) that Mr. Shafer was “escorted” and “guided” down to the ground (ER 236:16-23; 237:2-12 (Padilla)); (5) that Mr. Shafer “popped up” and tried to run away (SER 193:15-194:6, 205:4-206:14 (Padilla)), and; (6) that he told Mr. Shafer that he was under arrest before the escort to the ground (SER 25:10-15 (Padilla).) At trial, the defendant testified that he had to use force to get Mr. Shafer to sit on the curb before he was arrested. (SER 18:1-19:8 (Padilla).) The defendant also denied “taking down” Mr. Shafer and repeatedly asserted that he merely “escorted” Mr. Shafer to the ground. (ER 237:2-12; SER 25:16-26:6 (Padilla).)

Deputy Padilla testified that, while on the ground, Mr. Shafer kept his hands under his body to resist being handcuffed. (SER 20:14-20.) Padilla also told the jury that Mr. Shafer struggled while he was on the ground with the police officers on top of him. (SER 21:17-22:20 (Padilla).)

Mr. Shafer suffered an injury to his face during the arrest, but Deputy Padilla denied knowledge of how it happened, telling the jury, “I never saw it happen.” (SER 33:24.)

## **2. Mr. Shafer Disproves Deputy Padilla’s Denials**

At trial, Mr. Shafer had to marshal several witnesses and documents to disprove Deputy Padilla’s denials that he committed acts constituting excessive force. Because Mr. Shafer prevailed in the jury trial on the excessive force count, the evidence is viewed in the light most favorable to him. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1064 n.1 (9<sup>th</sup> Cir. 2016). So too, as the party opposing a motion for judgment based on qualified immunity, the facts must be taken in the light most favorable to the injured party. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

Several independent witnesses and, under cross-examination, Deputy Padilla himself and his colleagues, contradicted and disproved his account.

Deputy Padilla approached Mr. Gianola and Mr. Shafer, waving a flashlight beam at them. Mr. Shafer did not try to get past Padilla. (SER 169:1-8 (Shafer); 99:4-14 (Gianola).) Mr. Shafer assumed that Padilla wanted to talk to him, so he walked towards Padilla.

(SER 124:21-125:9 (Carrillo); 92:14-16, 93:17-22 (Gianola); 168:4-12, 168:23-25 (Shafer).) Deputy Padilla did *not* announce that he was investigating a recent report of someone being struck with a water-balloon. (SER 126:18-24 (Carrillo); 96:16-20 (Gianola); 170:3-8, 173:17-21.) Deputy Padilla's partner, Deputy Todd LeFemine, who was right next to Padilla, denied any recollection that Padilla told Mr. Shafer that he (the defendant) was investigating a recent report of a battery by water-balloon. (SER 53:24-54:5, 55:5-14 (LeFemine).)

Deputy Padilla did *not* invite Mr. Shafer to the sidewalk to have a seat for a talk about an investigation. (SER 126:11-24 (Carrillo); 96:21-22 (Gianola); 173:8-12, 181:18-20, 183:11-13 (Shafer).) Nor did the defendant ever command Mr. Shafer to sit down. (SER 129:6-9 (Carrillo).) The defendant did *not* ask whether they had been involved in a balloon-throwing incident. (SER 107:23-108:1 (Gianola).)

Deputy Padilla demanded that Mr. Shafer drop the water-balloons. Deputy Padilla yelled at Mr. Shafer to "drop the water-balloons" or "get rid of the water-balloons." (SER 125:25-126:10, 126:15-127:2 (Carrillo); 93:17-22, 95:19-24, 96:10-15 (Gianola); 169:9-11, 169:23-170:2 (Shafer).)

Mr. Shafer did not do so; instead he asked Deputy Padilla, several times, why he was not allowed to have water-balloons, but Padilla refused to answer. (SER 126:25-127:14 (Carrillo); 96:10-13, 96:23-97:14 (Gianola); 170:9-21, 171:14-15 (Shafer); 14:14-18; 203:23-204:5 (Padilla).) Mr. Shafer remained calm and was not disrespectful, threatening, or combative.

(SER 131:19-23, 145:16-22 (Carrillo); 171:6-9 (Shafer); (SER 78:3-21, 79:4-14 (Flint).)

Deputy Padilla became increasingly angry at Mr. Shafer for asking these questions; Deputy Padilla admitted under cross-examination that he saw the questions as challenges to his authority. (SER 128:18-21 (Carrillo); 97:12-22 (Gianola); 208:11-15 (Padilla).)

Within ten or twelve seconds of approaching Mr. Shafer, Deputy Padilla lashed out at Mr. Shafer, grabbing him, pulling him, and forcing Mr. Shafer to drop the water-balloons. (SER 127:18-23, 128:18-129:2, 139:24-140:14, 142:1-5, 145:12-15, 145:23-25 (Carrillo); 98:18-20 (Gianola); 171:16-21 (Shafer); 79:15-23, 85:11-18 (Flint).)

Even after Mr. Shafer dropped his water-balloons, Deputy Padilla's attack continued. (SER 98:18-20 (Gianola).) Deputy Padilla grabbed, kicked, and swung Mr. Shafer around. (SER 115:2-116:14 (Gianola).)

Deputy Padilla at least twice tried to kick Mr. Shafer's feet out from under him. (SER 99:24-100:17 (Gianola); 174:8-16 (Shafer).) Mr. Ryen Flint, a witness to the attack, described Deputy Padilla's actions as "violent." (SER 87:25-88:6 (Flint).) Up to that point, Deputy Padilla did not tell Mr. Shafer that he was under arrest. (SER 129:23-25 (Carrillo); 99:2-3 (Gianola).)

Mr. Shafer never lifted his hands to the defendant, or try to break free of the hold. (SER 79:24-80:1, 80:18-81:7, 86:13-21, (Flint).) Mr. Shafer, surprised by the attack, was just trying to keep from falling. (SER 98:3-17, 115:25-116:3 (Gianola); (SER 172:7-23, 174:17-175:4 (Shafer).) Deputy Padilla's police practices

expert agreed that Mr. Shafer, surprised by the attack, was merely trying to prevent himself from falling. (SER 151:19-152:9 (Dossey).)

Contrary to Deputy Padilla's testimony, Mr. Shafer was not, before the attack, sitting on the ground and he did not "pop" back up. Mr. Shafer never freed himself from Deputy Padilla's hold and he did not try to run away. (SER 81:14-82:6 (Flint); 103:1-6 (Gianola); 181:1-3, 182:24-183:3 (Shafer).)

An independent witness also described to the jury that, "[t]here was a sweep of the leg. Jay was down, multiple officers on top and a knee on his head." (SER 84:1:3-10 (Flint).) Mr. Shafer was thrown face-first into the ground. (SER 175:7-25 (Shafer); 131:10-14 (Carrillo).)

In cross-examination, Deputy Padilla's expert also agreed that Padilla did not "escort" Mr. Shafer to the ground; this was a "takedown." (SER 161:1-13; and 156:17-24 (Dossey).) Deputy Padilla's colleague, Officer Jeffrey Lupo, conceded under cross-examination that Padilla's actions were a takedown. (SER 36:3-8, 42:17-43:1, 46:21-47:1 (Lupo).)

On the ground, Mr. Shafer still did not resist. (SER 83:16-24 (Flint); 104:2-13, 133:13-21 (Carrillo); 175:5-6, 176:11-20 (Shafer). Mr. Shafer did not try to rise to his knees, did not place the palms of his hands on the ground to try to get up, and was not kicking his legs. (SER 84:17-23 (Flint); 176:21-177:3 (Shafer); 101:4-6 (Gianola).)

After the attack, Deputy Padilla pulled Mr. Shafer up and yelled, “Well, now you’re going to jail,” but did not tell him why. (SER 134:19-135:3 Carrillo); 105:8-24, 118:2-10 (Gianola); 176.1:18-25 (Shafer).

In addition to bringing several witnesses to impeach or refute Deputy Padilla’s denials, Mr. Shafer at trial also established that Deputy Padilla tried to cover-up his use of force. Deputy Padilla’s probable cause declaration (the document that explains under penalty of perjury the reason for the arrest) did not say anything about Mr. Shafer being forced to sit or popping back up. (SER 17:15-23, 197:20-199:12, 206:15-18 (Padilla); 3 ER 307 (Ex. 13).) Although Padilla testified that he had to use force to get Mr. Shafer to sit on the curb before he was arrested, (SER 18:1-19:8 (Padilla)), neither the defendant’s probable cause declaration, nor his full report, included any mention of having to use force to get Mr. Shafer to sit on the curb. (SER 30:4-7 (Padilla), 3 ER 304-305, 307 (Exs. 9, 13).)

The Santa Barbara County Sheriff’s use of force policy requires a deputy to report a use of force that causes an injury, but he failed to report the use of force on Mr. Shafer. (SER 30:8-12; 30:13-23; 31:16-33:21(Padilla).) Deputy Padilla did not attempt to get names or statements from any witnesses because he assumes “people lie to us.” (SER 210:14-211:13 (Padilla).) Mr. Dossey, his police practices expert, agreed that Deputy Padilla failed to apply “proper standards of investigative collection.” (SER 153.1:4-23 (Dossey).)

## **B. Procedural History**

### **1. The Civil Rights Act Action**

Mr. Shafer filed his against Deputy Padilla in federal district court in California. The causes of action included violation of civil rights based on excessive force, malicious prosecution, false arrest, and violation of Mr. Shafer's First Amendment rights. (3 ER 290-291.)

### **2. The Jury's Verdict**

Deputy Padilla argued to the jury that, "[t]his case comes down to credibility, and you have to decide who do you believe in this case." (SER 223:8-10 (Deft's Counsel, Closing Arg).)

The jury found for Mr. Shafer on the excessive force claim, found that Deputy Padilla acted with malice, fraud, oppression, or with recklessness, and awarded damages. The jury found for Deputy Padilla on the other causes of action. App. 49-50.

### **3. The District Court's Post-Verdict Rulings**

The District Court denied Deputy Padilla's motion for judgment as a matter of law, explaining that the jury's determination that there was probable cause for arrest for violation of California Penal Code section 148 does not foreclose a finding of excessive force. App. 22-23. Section 148 makes it unlawful to willfully resist, obstruct, or delay a peace officer." The District Court rejected Deputy Padilla's claim that Mr. Shafer physically resisted him, so he was entitled to use force. App. 22-23. The jury could conclude that the failure to obey orders to drop the water balloons was delay under

Penal Code section 148 and, thus, could logically conclude that the continuing attack upon Mr. Shafer after he had dropped the water balloons was excessive force. App. 23.

The District Court found that Mr. Shafer's right not to be subjected to the force that Deputy Padilla used was clearly established in 2009. App. 26-28. The District Court cited (App. 27-28) *Young v. County of Los Angeles*, 655 F.3d 1156 (9<sup>th</sup> Cir. 2011) (minor crime; no physical resistance; no apparent threat to officers), and *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1199 (9<sup>th</sup> Cir. 2000, as amended 2001), *vacated* 534 U.S. 801, 122 S. Ct. 24 (2001) (force constitutionally unreasonable if no need for any force); *Lolli v. County of Orange*, 351 F.3d 410, 417 n.5 (9<sup>th</sup> Cir. 2003) (*Headwaters* excessive force holding remains good law).

The District Court also explained that Deputy Padilla's motion was based on the flawed premise that Mr. Shafer was physically resisting — i.e., the defendant's version of events. App. 28-29. "In short, a reasonable officer would have known that his conduct was unlawful as to the investigation of a minor crime, where the suspect posed no immediate threat and did not physically resist." App. 29.

#### **4. The Ninth Circuit's Decision**

The Ninth Circuit reversed. The appellate court acknowledged that Deputy Padilla's version of events was "much different" from that of Mr. Shafer. *Shafer*, 868 F.3d at 1114; App. 5. The court also acknowledged that the evidence was sufficient to

support the jury's verdict that Deputy Padilla's force was excessive.<sup>2</sup> App. 11-12; *Shafer*, 868 F.3d at 1116.

Even though Deputy Padilla denied committing the acts constituting excessive force (arm grab, leg sweep, and take down), and was found to have acted with malice, he was entitled to qualified immunity. The appellate court compared Padilla's excessive force with a police officer who "reasonably misapprehends the law governing the circumstances [ ]he confronted." App. 14; *Shafer*, 868 F.3d at 1118, quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004);

The Ninth Circuit denied a petition for rehearing on July 10, 2017. App. 52-53.

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<sup>2</sup> The Ninth Circuit characterized the jury's verdict as making "clear" that Mr. Shafer willfully resisted, obstructed or delayed" Padilla *during the execution of Mr. Shafer's arrest*. *Shafer*, 868 F.3d at 1116; App. 11. It is a minor point for purposes of this petition for certiorari, but the appellate court's observation was incorrect. The statute, California Penal Code section 148, makes unlawful resisting, delaying, or obstructing a peace officer in the discharge or attempt to discharge any duty of his or her office (such as not following a lawful order). It applies to more than "resisting arrest".

The evidence established that Deputy Padilla did not decide to arrest Mr. Shafer until *after* the violent takedown. (SER 134:19-135:3 Carrillo); 103:19-105:24, 118:2-23 (Gianola); 176:1:18-25 (Shafer).) The evidence also established that Mr. Shafer did not offer any physical resistance before or after Padilla attacked him and took him down. (SER 83:16-24; 84:17-23 (Flint); 101:4-6 (Gianola); 104:2-13, 133:13-21 (Carrillo); 175:5-6, 176:11-177:3 (Shafer).)

**REASONS FOR GRANTING THIS PETITION****A. This Court has Not Addressed the Question Presented: Can a Police Officer Deny the Historical Facts About Her or His Misconduct, But Claim Qualified Immunity when the Jury Finds those Denials Not Credible and The Misconduct Malicious?**

This Court has often explained that qualified immunity “protects all but the plainly incompetent or those who knowingly violate the law.” *White v. Pauly*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017). This petition presents a question tied to this very basis for the doctrine: The police officer who is mendacious, who tries to cover-up his use of force by failing to report it honestly to his superiors and who testifies falsely about it to the jury. Deputy Padilla’s fabricated testimony is compelling evidence that he was aware that he violated Mr. Shafer’s civil rights when he attacked Mr. Shafer.

The doctrine of qualified immunity for civil rights violations by law enforcement personnel developed as a balance between the rights of injured people to hold them accountable, and to protect those personnel when they perform their jobs reasonably even if mistakenly. “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity 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.” *Pearson v. Callahan*, 555

U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (internal quotations and citation omitted).

Qualified immunity is not a defense to liability; it is an immunity to being sued. *Pearson v. Callahan*, 555 U.S. 223, 237, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009). This purpose of qualified immunity is to permit the resolution of many insubstantial claims on summary judgment and to avoid subjecting government officials either to the costs of trial or to the burdens of broad-reaching discovery in cases where the legal norms the officials are alleged to have violated were not clearly established at the time. *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S. Ct. 2727, 2737–38, 73 L. Ed. 2d 396 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985).

“The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, *it is effectively lost if a case is erroneously permitted to go to trial.*” *Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815 (emphasis added). For this reason, this Court held that denial of qualified immunity, through denial of an official’s summary judgment motion, is appealable even in the absence of a final judgment. *Mitchell*, 472 U.S. at 527, 105 S. Ct. at 2816.

The considerations underlying this Court’s qualified immunity jurisprudence is that the government official — police officer, elected official, appointed administrator — prefers to avoid suit altogether and, certainly, does not want to proceed to trial. *Mitchell* emphasized that the official who is denied qualified immunity faces trial and the other burdens of litigation. *Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815.

These considerations have no role in the circumstances here, a circumstance that this Court has not addressed: The police officer who makes a strategic decision *not* to seek qualified immunity before trial — the officer who chooses to stand trial, to accept the burdens of litigation, in order to put forth a version of events that was untrue and try to demand qualified immunity even if he lost.

With such a strategy, the mendacious officer can employ a “heads I win, tails you lose” gamble. If the jury, despite all of the contrary and impeaching evidence, believed him, he would prevail on the excessive force claim. If the jury disbelieved him — as it ultimately did here — he could urge that he is entitled to qualified immunity despite his mendacity.

Case law establishes that qualified immunity should be denied if there is a dispute about what actually happened between the suspect and the police officer. This Court, however, has not addressed a critical corollary issue: Whether a police officer who fabricates testimony — with either incomplete or false reports or mendacious testimony — to deny committing the acts of excessive force, can demand qualified immunity when the jury determines the truth.

It has been long recognized that mendacity strongly supports a conclusion that a person knew he or she was committing an unlawful act. *See e.g. District of Columbia v. Wesby*, \_\_\_ U.S. \_\_\_, \_\_\_, 138 S. Ct. 577, 587-588, 199 L. Ed. 2d 453 (2017) (lying suggests a guilty mind; witness’s “lying and evasive behavior gave the officers reason to discredit everything she had told them”); *St. Mary’s Honor Society v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993) (fact-finder’s disbelief

of employer's reason for termination, particularly if accompanied by suspicion of mendacity, sufficient to show intentional, wrongful discrimination).

This principle applies equally well to the law enforcement officer who falsifies or knowingly omits information from official reports, or who testifies falsely. The defendant who is revealed to be untruthful in his official reports and in his testimony supports the conclusion that he knew he was violating the arrestee's civil rights. In the present case, for example, Deputy Padilla failed to report his use of force in violation of sheriff department policy, did not mention it in his arrest report, and did not mention it in his probable cause declaration. (SER 30:8-12; 30:13-23; 31:16-33:21 (Padilla).)

In her concurring opinion in *Saucier, supra*, Justice Ginsburg touched on the problem of contradictions between a plaintiff's version of events and a police officer's version. In *Saucier*, this Court held that, to determine qualified immunity on summary judgment under the standard articulated in *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989), a court should first determine whether the facts, taken in the light most favorable to the party asserting the injury, show that the defendant's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201, 121 S. Ct. at 2153. If so, a court should next determine whether the right was "clearly established" at the time of the relevant events.<sup>3</sup> *Saucier, supra*.

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<sup>3</sup> This Court has since decided that the *Saucier* test does not have to be applied sequentially. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 818, 172 L. Ed. 2d 565 (2009).

In *Graham*, this Court held that “all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard . . .” Whether police use of force was objectively unreasonable “requires careful attention to the facts and circumstances of each particular case, including [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 he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396, 109 S. Ct. at 1872.

Justice Ginsburg accepted the objective reasonableness test of *Graham* to resolve excessive force cases. When there are two conflicting stories about what happened on the street, Justice Ginsburg observed, a trial is necessary. *Saucier*, 533 U.S. at 216, 121 S. Ct. at 2164 (Ginsburg, J. concurring). But, Justice Ginsburg concluded, “[o]nce it has been determined that an officer violated the Fourth Amendment by using ‘objectively unreasonable’ force as that term is explained in *Graham v. Connor*, there is simply no work for a qualified immunity inquiry to do.” *Saucier*, 533 U.S. at 217, 121 S. Ct. at 2164 (Ginsburg, J. concurring) (emphasis added).

That is the predicament in the law that this case highlights. In Deputy Padilla’s version of events, the acts of excessive force never happened (“I didn’t do it”), yet the jury not only rejected the denials and concluded that he employed excessive force, the jury concluded he acted with malice as well. The jury rejected Deputy

Padilla's denials of having engaged in the acts that constitute excessive force. Deputy Padilla's lack of candor, false denials, and efforts to cover-up his use of excessive force demonstrate that he understood that his conduct was unlawful.

As Justice Ginsburg explained, at this point, "there is simply no work for a qualified immunity inquiry to do." *Saucier*, 533 U.S. at 217, 121 S. Ct. at 2164 (Ginsburg, J. concurring). The Ninth Circuit, however, imposed a qualified immunity analysis to the facts as the jury determined them, even though the defendant denied them, and here reevaluated the evidence. Despite the deputy's false denials and attempts to hide what happened on the street, he was still granted qualified immunity.

#### **B. The Crucial Need for this Court to Grant Certiorari in this Case**

The development of qualified immunity jurisprudence has been the subject of increasing concern and discussion. Justice Thomas, in a recent concurring opinion in *Ziglar v. Abbasi*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017), questioned the current qualified immunity doctrine:

Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . We apply this "clearly established" standard "across the board" and without regard

to the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated. . . .

*Ziglar*, \_\_\_ U.S. at \_\_\_, 137 S. Ct. at 1843 (Thomas, J., concurring) (citations and internal quotations omitted).

Justice Ginsburg expressed concern that the qualified immunity doctrine, as it has developed, "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." *Wesby*, \_\_\_ U.S. at \_\_\_, 138 S. Ct. at 594 (Ginsburg, J., concurring). Justice Ginsburg's concurrence suggested a reexamination "in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment analysis." *Id.*

This petition presents that future case. The matter comes to this court after trial, with a well-developed record, in which the police officer made his intent and credibility the key issues of his defense. The jury's verdict, rejecting his explanations and finding that he engaged in excessive force and acted with malice, constitutes a determination about his credibility and his intent.

The Ninth Circuit's analysis gives law enforcement personnel incentives to devise stories and engage in cover-ups of unlawful acts, with the comfort of knowing that if juries do not believe them they can still be rescued by the qualified immunity doctrine. This undermines the purpose of the qualified immunity doctrine *and* undermines the purpose of Section 1983 (to hold government officials accountable). The careful

balance of those goals is lost when the defendant can be mendacious *and* immune.

This Court should grant this petition, in short, because the Ninth Circuit’s grant of qualified immunity to a police officer who acted with malice and then lied and falsified records to cover up his actions, “if followed elsewhere, would undermine the values qualified immunity seeks to promote.” *Wesby*, \_\_\_ U.S. at \_\_\_, 138 S. Ct. at 589 (citation and internal quotation omitted). *See also Kisela v. Hughes*, 584 U.S. \_\_\_, \_\_\_, \_\_\_ S. Ct. \_\_\_, \_\_\_, \_\_\_ L. Ed. 2d \_\_\_, Slip op. at 23, Docket no. 17-467 (April 2, 2018) (Sotomayor, J., dissenting) (raising concern that development of qualified immunity doctrine has become one-sided and is sending “alarming signal to law enforcement officers” and telling public that “palpably unreasonable conduct will go unpunished.”).

**CONCLUSION**

This petition for certiorari should be granted.

Respectfully submitted,

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