No.

IN THE

Supreme Court of The United States

CITY OF ESCONDIDO, SGT. KEVIN TOTH, AND EPD OFFICER ROBERT CRAIG,

PETITIONERS,

V.

MARTY EMMONS,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Escondido Police Officers responding to a 9-1-1 domestic violence call at a residence encountered a large unknown man, Respondent Marty Emmons, hastily exiting the subject apartment, disobeying the officer's commands not to close the door so officers could gain entry to conduct a lawful welfare check on the occupants. The fast-moving encounter between Officer Robert Craig and Emmons, captured on the officer's body camera, reflects a limited use of force to detain him under the circumstances. As Emmons cited *no* legal authorities for the proposition that the nature of the force was excessive and therefore unconstitutional, the District Court granted summary judgment to all officers under the second prong of the qualified immunity standard under *Saucier v. Katz*, 533 U.S. 194 (2001).

The Ninth Circuit Court of Appeal reversed that decision citing a single case, decided after the event giving rise to this lawsuit, observing, simply and without elaboration that, "[t]he right to be free of excessive force was clearly established at the time of the events in question" and finding qualified immunity was unavailable. The panel below explicitly barred the officers from seeking any further review by the circuit.

1. Did the Ninth Circuit err in denying the officers qualified immunity by considering clearly established law at too high a level of generality rather than giving particularized consideration to the facts and circumstances of this case?

2. Did the Ninth Circuit err in denying the officers qualified immunity by relying on a single decision, published after the event in question, to support its conclusion that qualified immunity is not available?

3. Did the Ninth Circuit err in failing or refusing to decide whether the subject arrest was without probable cause or subject to qualified immunity?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit, whose judgments are sought to be reviewed, are Petitioners, and Defendants below, the City of Escondido, a municipal corporation in the State of California, Escondido Police Sergeant Kevin Toth, and Escondido Police Officer Robert Craig.

Respondent, and Plaintiff below, is Marty Emmons.

Maggie Emmons, Plaintiff below, is not a party to this Petition.

Escondido Police Chief Craig Carter, former Acting Escondido Police Chief Corey Moles, and Officers Huy Quach, Jake Houchin and Joseph Leffingwell, Defendants below, are not parties to this Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All parties before the Court are individuals except the City of Escondido, which is a general law city in the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Escondido, Police Officer Robert Craig and Sergeant Kevin Toth respectfully petition for a writ of certiorari to review the unpublished Amended Memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Ninth Circuit announced its original decision on February 22, 2018, and later amended its opinion on March 29, 2018. The panel ordered that no further petitions for rehearing or rehearing en banc be filed.

OPINIONS BELOW

The Ninth Circuit panel's Amended Memorandum opinion was not published but is available at 716 F.App'x 724 (9th Cir. 2018). (Appendix A.)

The Ninth Circuit panel's Order granting petition for panel rehearing and barring any further petitions for panel rehearing or rehearing *en banc* was not published. (Appendix E.)

The Ninth Circuit panel's original Memorandum opinion was not reported. (Appendix B.)

The Order of the United States District Court Granting Petitioners' Motion for Reconsideration pursuant to Fed.R.Civ.P. 60(b) is available at 2016 WL 10586164. (Appendix C.)

The Order of the United States District Court for the Southern District of California granting

Defendants' motion for summary judgment and granting qualified immunity to Petitioners filed by Defendants City of Escondido, Chief of Police Craig Carter, former Acting Chief of Police Corey Moles, Sgt. Kevin Toth, Officers Robert Craig, Jake Houchin and Joseph Leffingwell was not published. It is available at 168 F.Supp.3d 1265 (S.D. Cal. 2016). (Appendix D.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its original opinion on February 22, 2018. (App. 5-8.) It amended its opinion and denied the Petitioners any ability to further petition for rehearing or reconsideration for an *en banc* rehearing on March 29, 2018. (App. 36-37.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mr. Emmons alleges that Officer Craig and Sgt. Toth violated his civil rights under the Fourth Amendment to the United States Constitution, which 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, and particularly describing the place to be searched, and the persons or things to be seized.

Mr. Emmons brought the underlying action under 42 U.S.C. § 1983, which states:

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

INTRODUCTION

The state of the law in the Ninth Circuit puts police officers in the impossible position of enforcing the laws without knowing whether their particular conduct is constitutional. Indeed, this Circuit has been repeatedly admonished to respect the concept of qualified immunity. Yet, again, it ignores the clear direction of this Court making this Petition necessary.

A police officer is entitled to qualified immunity so long as his or her conduct is within a "reasonable range" of conduct. "In all, police officers are not required to use the least intrusive degree of force possible; they are required only to act within a reasonable range of conduct." *Forrester v. City of San Diego,* 25 F.3d 804, 806 (9th Cir. 1994). The decision below fails to identify the clearly established case law governing the circumstances of the subject encounter, relies on a single case decided after the event, and fails to address the question of probable cause to arrest raised at the trial and circuit court levels.

The District Court ruled that Mr. Emmons failed to cite to any authority that the officers had notice that taking him to the ground or placing a hand on him was unconstitutional. The courts reviewing the officers' videotape of the incident cannot agree whether Mr. Emmons' rights were clearly established. Yet, the Ninth Circuit panel's opinion concludes every reasonable police officer would immediately know, under the very circumstances presented here, that such conduct would constitute a clear violation of Mr. Emmons' constitutional rights.

The correct question in a qualified immunity context is to determine whether the law under the facts particular to the case were clearly established such that a reasonable officer would know that his or her conduct was unlawful. In this matter, the panel made no effort to harmonize or compare the underlying circumstances of this event with the facts of *Gravelet-Blondin v. Shelton,* 728 F.3d 1086, 1093 (9th Cir. 2013) ("*Gravelet-Blondin*"), the sole case the

panel cites. The panel did not do so because the facts are not comparable.

In this matter, during an intense standoff with the occupant of a residence during a domestic violence welfare check, an unknown man surprised the officers by exiting unannounced. Officer Craig guided Mr. Emmons to the ground when he failed to obey the officer's commands not to close the apartment door and tried to push his way past him. Officer Craig did so without any violence or unnecessary roughness. While Mr. Emmons was on the ground, Sgt. Toth simply and briefly placed a hand on him producing no claimed injury or pain. In *Gravelet-Blondin*, the case relied upon by the Circuit panel, officers tased a bystander who was not advancing or threatening officers. *Gravelet-Blondin*, *supra*, 728 F.3d at 1089-90. The disparity of the facts and circumstances between these events are obvious and material.

This Court has repeatedly instructed the Circuit Courts, and particularly the Ninth Circuit, to avoid defining clearly established law at a high level of generality. Again, in the context of an excessive force and qualified immunity case, the Ninth Circuit panel below has defined clearly established law at such a high level of generality, that the single case relied upon by the panel below can also be interpreted to *support* the officers' use of force. The panel below relied solely upon *Gravelet-Blondin* for the proposition that "[t]he right to be free of excessive force was clearly established at the time of the events in question."[1] However, using the same level of

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[1] Although the Panel states that "The right to be free of

generality as the panel below, this very case could be interpreted to establish that a police officer *may* use force to arrest a passive resister.[2] The *Gravelet-Blondin* court noted: "While purely passive resistance can support the use of some force, the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance." *Gravelet-Blondin, supra*, at p. 1091, citing *Bryan v. MacPherson,* 630 F.3d 805, 830 (9th Cir. 2010).

Thus, the determination of whether the sole case relied upon by the circuit panel clearly establishes Mr. Emmons' right against excessive force depends upon the panel's interpretation of a case instead of the required analysis of *the officer's particular conduct* during the incident. Proper qualified immunity analysis cannot be so limited. Simply put, there is precedent governing the circumstances akin to the incident or there is not.

Apart from a failure to review the specific circumstances of the officers' conduct for an analysis of the applicability of qualified immunity of the excessive force allegation, the Circuit panel erred by

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excessive force was clearly established *at the time of the events in question*," *Gravalet-Blondin* was not decided until September 6, 2013, four months *after* the incident in this case.

[2] Mr. Emmons was not a "passive resister." Unlike Mr. Blondin who was not moving when tased, Mr. Emmons was using his body to push his way past Officer Craig, intentionally blocking Officer Craig from getting into the apartment to check the welfare of the occupants. App. 21-22, 33-34.

completely failing to address the District Court's ruling that Officer Craig had qualified immunity as to Mr. Emmons' false arrest allegation.

The Court should grant the Petition on all three questions presented, or, alternatively, summarily reverse the Ninth Circuit's decision. Clear guidance from the courts on the contours of the Fourth Amendment and qualified immunity is necessary.

STATEMENT OF THE CASE

I. Facts

A. Prior Incidence of Domestic Violence at Apartment

One month prior to the incident which gives rise to this lawsuit, in April 2013, Escondido police officers responded to a 9-1-1 call initiated by Maggie Emmons where she reported that her husband, Brandon, had used force upon her causing her injuries. ER 346-48, 528-29. Officer Jake Houchin, among other officers, responded to the apartment pursuant to the dispatch. He was involved in taking the domestic violence report, including a report that her husband had also injured her a week before; he took photographs of her injuries; and according to Ms. Emmons, he was a "nice" officer during the event. ER 349-354. Brandon was a large person at about 6'2" and 280 lbs. ER 355, 397-98.

B. Officers Respond to Dispatch for 9-1-1 Call Relating to Screams for Help at Apartment Containing Children

On May 27, 2013, at approximately 2:30 p.m., Escondido Police Dispatch received a 9-1-1 call from Trina Douglas, the mother of Ametria Douglas ("Ametria"), Ms. Emmons' roommate. ER 322 Audio A; ER 324-26. Ms. Douglas reported that she lived in Los Angeles and was on a telephone call with Ametria and that as she was speaking with her, the daughter's roommate (Ms. Emmons) started a fight, there was screaming and that the daughter screamed for help before the telephone line went dead. Ms. Douglas also reported that there were two children in the home and that she tried to call the number back but there was no answer. ER 325-26.

At approximately 2:40 p.m., Officers Houchin and (Petitioner) Robert Craig were dispatched to Ms. Emmons' apartment (a second floor unit) as a result. ER 390-91, 394, 468, 470. They received from dispatch the following information via their patrol unit computer:

> WC on RP's 24 yo daughter Ametria Douglas. RP was speaking to daughter on phone. Daughter's female roommate came home, started some kind of 415. Was screaming and jumping to Ametria. Ametria screamed into phone for her mother to help, then phone disconnect. No answer on call back. Two children also in resd.

ER 322 Audio B; ER 329, 390-91, 421, 470.

A "415" is a common abbreviation for California Penal Code § 415 and used over police dispatch to cover diverse events such as fights, arguing, and other disturbances. ER 471-73. Officer Craig viewed this as an emergency situation. ER 474, 504-05; SUPP ER-007-008 (children shouting "don't take my mom to jail" led him to believe that there was some sort of emergency); SUPP ER-009-010; SUPP ER-011-012; SUPP ER-013.

Not knowing everything about the incident prior to their arrival, the officers were concerned about all potential occupants of the apartment, not just the reporting party's daughter. ER 417, 477, 498. The officers arrived at approximately the same time and walked to the apartment at the same time. ER 395, 475-76. The officers activated their body video cameras shortly after their arrival at the apartment. ER 392-93, 466-67.

The officers proceeded to the apartment together to investigate the call as a welfare check. ER 397,486, 487, 493-94. Dressed in police uniforms, Officer Craig knocked on the door while Officer Houchin contacted Ms. Emmons at a side window adjacent to an external walkway. ER 274 Craig A at 0:00-0:10. Both Ms. Emmons and Mr. Emmons immediately knew they were Escondido police officers. ER 358-59, 430-31. On and off over the next 7 minutes Officers Houchin and Craig alternatively spoke with Ms. Emmons at the side window. ER 274 Craig A at 0:00-6:30; ER 277-83. Ms. Emmons appeared at the side window through a small opening surrounded by vertical blinds making the interior of the apartment dark and the officers could not see into

the interior of the apartment. ER 274 Craig A at 4:45-6:30; ER 534, 400, 407-08, 432-33, 534. Officer Craig perceived her demeanor as not calm but evasive. ER 490-91.

Within approximately one and one-half minutes upon arrival, a request was made to police dispatch for additional officers to provide assistance should there be a need for forced entry. ER 322 Audio C; ER 332, 399, 410-11, 495-96. There had in fact been screaming coming from inside the apartment earlier, although it was not related to a movie on the television as suggested by Ms. Emmons. AOB 5. Within approximately 6 minutes of the discussion at the window, Ms. Emmons admitted to Officer Craig that her children had been screaming in the apartment when she threatened to hit them. ER 274 Craig A at 5:10-5:20; ER 281. The officers made continued efforts through the side window to have Ms. Emmons allow entry so that a welfare check could be conducted in the apartment. The response of Ms. Emmons was making Officer Craig more concerned as to the safety of the occupants and he believed the call was becoming more dangerous. ER 497.

While the officers were talking to Ms. Emmons, Ametria was at the ground floor pool with Ms. Emmons' boys around the time they arrived. Ametria has testified that she did not know her mother had called the police when the officers were there. ER 526-27. Nevertheless, right after the officers arrived, Ametria told them everything was fine and they could leave. ER 483-84, 523, 525. Based on Officer Craig's experience, her manner of reporting

the situation was a "red flag" and her demeanor was inconsistent with there being no problem at the apartment. ER 484-85, 487.

Even though Ametria represented herself as being connected to the apartment, the officers had not confirmed her identity until later and they did not know who the boys were at that time. ER 274 Houchin D at 0:30-2:00; ER 274 Houchin 1E at 4:55-8:25; ER 306-08, 309, 317-19, 401-04, 407, 437, 478-81, 482, 524. The welfare check dispatch made no reference to a woman at the pool of the apartment complex. ER 329, 405-06. The officers asked her to come up and let them into the apartment or talk to Ms. Emmons. ER 274 Craig A at 2:57-3:07, 3:50-4:00; ER 274 Houchin C at 3:15-3:35; ER 280, 303, 488. From the window, Ms. Emmons told Ametria not to talk to the police officers. ER 274 Craig A at 4:30-4:40; ER 280, 515-16. Ametria never advised the officers that the boys at the pool were Ms. Emmons' or that they lived at the subject apartment. ER 478-79, 524. Ametria stayed at the pool area the entire time and never came upstairs to assist, intervene or speak with Ms. Emmons. ER 530. Further, she never provided any information to the officers about why anyone would have called and reported that she needed help. She did however confirm that there was screaming inside the apartment prompting the call for police intervention. ER 284.

As she had done with Officer Houchin, Ms. Emmons interrupted and talked over Officer Craig's efforts to explain the reason for their presence. ER 274 Craig A at 0:00-0:40, 5:04-5:30; ER 281. Ms. Emmons refused to allow Officers Craig and

Houchin entry demanding instead that they produce a warrant. The officers repeatedly explained to her that they believed they were performing a welfare check and they had exigent circumstances to enter for the safety of the occupants. ER 274 Craig A; ER 277-282. At one point, as Officer Craig was talking to Ms. Emmons at the window, an unknown and unseen male inside the apartment told Ms. Emmons to come away from the window. ER 274 Craig A at 6:20-6:28; ER 283, 434-35, 449-50, 489, 492, 505. Although it was actually Mr. Emmons, he never came to the window to present or identify himself and the officers did not know who that person was as neither Ms. Emmons nor Ametria ever advised the officers who was in there. ER 274 Craig A at 6:15-6:30 (Male voice heard telling Maggie to come away from the window); ER 376, 408, 409, 434-35. Officer Craig asked who the person was, and Mr. Emmons did not respond or come to the window. ER 283. The dispatch for the welfare check did not report the presence of a male in the apartment. ER 329.

C. Brief, Selective and Reasonable Force Used on Mr. Emmons as He Exits Unannounced from Apartment

Within approximately 9-10 minutes of Officers Craig's and Houchin's arrival, Mr. Emmons opened the front door without announcing he was coming out. He stepped onto the landing pushing past and coming in contact with Officer Craig while the officer ordered him not to close the door. ER 274 Craig A at 9:34-9:50; ER 362, 363, 436, 440, 441-42, 454, 455, 498-99, 500-02, 511-13. Mr. Emmons knew the officers wanted to access the apartment and yet intentionally

shut the door behind him to "protect" his daughter. ER 274 Houchin E at 0:45-0:55; ER 288-89, 316, 362, 363, 436, 440, 441-42, 454, 455, 498-99, 500-502, 511-13.

Officer Craig grabbed hold of Mr. Emmons by his arm, told him to get on the ground several times, guided him to the ground in a control hold, placed him prone on the ground, and then handcuffed him. ER 274 Craig A, at 9:34-10:00; ER 500-01, 503. The full extent of Mr. Emmons' description of the force was that he was "forcibly thrown to the ground." ER 124. At that time, Officer Craig believed it was a fast moving event and it was necessary to control Mr. Emmons on the ground because the officer was alone, did not know what was happening in the apartment, Mr. Emmons had tried to physically push past him, and refused to obey his order not to close the door. ER 274 Craig A at 9:34-9:50; ER 503-05. At this time, Officer Craig also had information about the prior domestic violence at the apartment and did not know who Mr. Emmons was when he came out unannounced. ER 505-06. Mr. Emmons was arrested for a violation of Penal Code § 148 by Officer Craig. ER 414, 508, 509, 511-12, 583-84. Penal Code § 148 is a misdemeanor offense prohibiting the willful delaying, resisting or obstructing of a peace officer in the discharge or attempted discharge of his or her duties. Cal. Penal Code § 148(a)(1).

Within 2 minutes of securing Mr. Emmons on the ground, Officer Craig assisted him in getting up in the manner requested by Mr. Emmons, and then stood him against an adjacent exterior wall on the landing a few feet away. ER 274 Craig A at 9:48-

11:50; ER 507. Other than the brief touching of Mr. Emmons' shoulder by Sgt. Toth, no officer other than Officer Craig touched him. ER 414, 447-48, 542, 583, 584. No other officer observed the beginning of the contact between Officer Craig and Mr. Emmons. ER 413, 541, 558-59.

At no time did Officer Craig or any other officer at the scene display or use any weapon on Mr. Emmons, or use a chemical agent, punch, elbow, kick, knee, choke hold, or threaten him with any other form of force during the entire time the officers were there at the scene. ER 442-43, 444, 447-48, 451. Instead, Sgt. Toth made efforts to make Mr. Emmons comfortable during the investigation by asking if he wanted a chair to sit on while the officers were there. Mr. Emmons refused that offer. ER 274 Houchin E at 0:00-0:38; ER 315, 445-46.

Soon after Sgt. Toth had arrived, Officer Houchin, debriefed him as to the status of the incident however, at that time, there was still confusion as to what was happening inside the apartment, who Mr. Emmons was, and who the woman by the pool was. ER 274 Houchin D at 0:30-2:00; ER 306-08, 412.

D. Officer Leffingwell Enters Apartment With Ms. Emmons' Consent to Conduct Brief and Limited Search

While Mr. Emmons was being taken into custody and began speaking with Sgt. Toth outside of the apartment, at the side window along the landing, Officer Joseph Leffingwell, who just arrived on scene, spoke with Ms. Emmons through the window. ER

364, 379-80, 560-61. Officer Leffingwell is a specially trained Psychological Emergency Response Team (PERT) officer with experience dealing with serious emotional issues (*e.g.*, active suicide attempts) and de-escalation techniques. ER 554, 555-57. At first, Officer Leffingwell observed Ms. Emmons at the window between the blinds and the interior of the apartment was dark. ER 565. Officer Leffingwell believed, based on the information he had at that time, including the commotion by the door where Mr. Emmons was being taken into custody, entry into the apartment to check on the occupants was necessary under the totality of circumstances. ER 566-67, 573.

Ms. Emmons consented to allow entry into the apartment. ER 364, 379-80, 568, 569-70, 571, 572-73. At that time, Officer Leffingwell did not witness, had no knowledge of, and was not involved with the other officers' previous efforts to get into the apartment. ER 562-63, 570. Ms. Emmons moved from the window, unlocked the door, opened it, and then said to Officer Leffingwell "you can walk anywhere you want to walk." ER 274 Houchin D at 2:00-2:05; ER 576. Sgt. Toth was not involved in the decision to enter and/or search Ms. Emmons' apartment. ER 543.

The officers never lied or used any trick or misrepresentation to gain access to the apartment. ER 374-75. No officer ever pointed or displayed a weapon at Ms. Emmons, threatened to use violence upon her personally, or touched her in anyway at any time. ER 360-61, 377, 451. No equipment or weapons were ever used to break down the door or gain access

through any opening into the apartment at any time during the event. ER 364-65, 374, 438-39, 451, 452.

Officer Leffingwell made a cursory inspection of the apartment lasting approximately one minute looking only for potential injured persons. ER 368, 577-78, 580-82. Once inside, Ms. Emmons never stated that she changed her mind about the police entry, stated that she felt compelled to allow entry, demanded that any officer leave, or objectively demonstrated any reconsideration of her decision to allow entry. ER 274 Houchin D at 2:00-6:45; ER 365-66, 366-67, 370-71. Once the cursory sweep for potentially injured occupants was completed, Officers Leffingwell and Houchin explained to Ms. Emmons why they were there and why they needed to enter the apartment. ER 274 Houchin D, at 2:00-6:45; ER 309-12, 572-73. Ms. Emmons was never touched, searched, detained or arrested by any officer. ER 377, 415-16, 514, 579.

II. Proceedings

A. District Court

1. The Underlying Action

Mr. Emmons and his daughter sued the City of Escondido, the current Chief of Police, Craig Carter, the former Acting Chief of Police, Corey Moles, and all the officers involved including Sgt. Kevin Toth, Officers Robert Craig, Huy Quach, Jake Houchin, and Joseph Leffingwell ("officers"). (App. 9-10, 12-15.) The parties stipulated to dismissing Officer Huy

Quach because he arrived after Mr. Emmons' arrest. (App. 10.)

The Emmonses asserted claims for relief in their First Amended Complaint as follows:

1. Unlawful Seizure, Arrest and Detention against all officers;

2. Excessive force against all officers;

3. Unreasonable Search without a Warrant against all officers;

4. *Monell* violations against the City of Escondido, former Acting Chief of Police Corey Moles and Chief of Police Craig Carter;

5. Failure to Properly Train against the City of Escondido, former Acting Chief of Police Corey Moles, Chief of Police Craig Carter, and Sgt. Kevin Toth;

6. Failure to Supervise and Discipline against the City of Escondido, former Acting Chief of Police Corey Moles and Chief of Police Craig Carter;

7. Violations for the *Bane Act*, California Civil Code §§ 52.1 and 52.3 against all named Defendants in the lawsuit.

(App. 12-13.)

2. The Parties Stipulated to Bifurcate the *Monell* Claims and Dismissed the *Bane Act* Claims

The parties jointly bifurcated the case to separate the *Monell* claims. The parties further agreed that should the court rule in the summary judgment cross motions that none of the police officers violated both of Mr. and Ms. Emmons' federal civil rights, or they all have qualified immunity from any liability to the Emmonses, neither of the them would have a viable federal civil rights claim based on the facts alleged by them in this case, including the *Monell* claims, against the City, Chief of Police Craig Carter, and (former) Acting Chief of Police Corey Moles. Defendants'-Appellees' Opening Brief at 13.

In light of the Stipulation, the City's Motion for Summary Adjudication did not seek a judgment as to the Fourth, Fifth and Sixth Causes of Action, or any other claims that existed elsewhere in the Complaint, as it relates to the *Monell* claims. Therefore, the City, (former) Acting Chief Corey Moles and Chief Carter sought judgment in their favor solely on the grounds that the police officers did not violate Mr. and Ms. Emmons' federal civil rights during the course of the subject incident.

Mr. and Ms. Emmons dismissed their Seventh Cause of Action for Violations of the Bane Act against all named Defendants as a result of an earlier District Court Order Denying Motion for Relief from Claims Filing Requirement, etc., filed October 17, 2014.

3. The District Court Granted the Officers' Motion for Partial Summary Judgment and Denied the Emmonses' Motion

The Parties filed cross Motions for Partial Summary Judgment. On March 2, 2016, the District Court denied Mr. and Ms. Emmons' motion and granted the motion brought on behalf of the City, all officers and the two police chiefs. (App. 12-35.)

The District Court concluded that there were issues of fact whether Officer Craig used excessive force, but granted all of the police officers, including Officer Craig, qualified immunity under the second prong of the two-step analysis approved in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Specifically, the District Court noted that there is no authority clearly establishing Officer Craig's "tackle or take-down" of Mr. Emmons violated the Fourth Amendment and he failed to cite to any such authority. Therefore, the officers were not provided with "fair warning that their conduct was unlawful:"

The District Court further found that "the objective evidence revealed the officers had probable cause – based on the totality of the circumstances – to believe that Mr. Emmons violated Penal Code §148(a)" and that the officers were entitled to qualified immunity on the false arrest claim. (App. 26-28.)

B. Ninth Circuit Court of Appeals

1. Original Opinion

On February 22, 2018, the Ninth Circuit panel correctly affirmed the District Court's judgment as to Maggie Emmons' Fourth Amendment claims finding that the "officers had an objectively reasonable basis to conclude that there was a need to conduct a welfare check" inside the apartment. (App. 6-7.) However, the panel reversed the District Court's summary judgment as to Mr. Emmons' excessive force claim. (App. 7-8.) The panel's entire opinion overturning the District Court's granting of qualified immunity to Mr. Emmons' excessive force claim is as follows:

> As to Mr. Emmons, there is a genuine issue of material fact as to whether separating him from the house was accomplished with excessive force. We consider the following factors in determining if the use of force is excessive: "(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] is actively resisting arrest or attempting to evade arrest by flight." *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1005 (9th Cir. 2017) (alteration in original) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (internal quotation marks omitted). There is evidence from which a reasonable trier of fact could find that Mr. Emmons was unarmed and non-hostile. The district court therefore

erred in granting qualified immunity on his excessive force claim.

(App. 7-8.)

The opinion does not address the District Court's finding of qualified immunity as to Mr. Emmons' false arrest allegation, an issue raised in his briefing. Plaintiffs'-Appellants' Opening Brief (AOB) at 40-42. No disposition was made as to Chiefs Carter and Moles.

2. Amended Opinion and Denial of Further Rehearing

On March 7, 2018, all officers/Defendants in the action filed a Petition for Panel Rehearing as to the following four issues:

1. Whether Officers Houchin, Leffingwell, Sgt. Toth, Chief Carter and former Chief Moles are dismissed from the action, and in particular, in relation to Mr. Emmons' excessive force claim;

2. If they are not dismissed, whether they are entitled to qualified immunity;

3. Whether Officer Craig is entitled to qualified immunity; and

4. Whether Chief Carter and former Chief Moles should be dismissed as redundant Defendants.

On March 29, 2018, the Ninth Circuit issued an Amended Memorandum now reinstating qualified immunity for Officers Leffingwell and Houchin and finding summary judgment appropriate for all other Defendants except Craig and Toth. (App. 3-4.) The entirety of the panel's amended opinion as to the specific applicability of qualified immunity to Mr. Emmons' excessive force claim is as follows:

> The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013).

(App. 36-37.)

Again, no disposition was made as to the false arrest claim.

The Ninth Circuit panel issued an order in its Amended Memorandum barring any further petitions for panel rehearing or rehearing en banc. (App. 37.)

REASONS FOR GRANTING THE WRIT

I. The Panel Opinion Improperly Denies Qualified Immunity by Assessing the Officers' Conduct at a Highly Generalized Level

The Ninth Circuit's panel opinion fails to heed numerous admonitions from this Court about defining "clearly established" constitutional rights too generally. This Court's repeated findings of qualified immunity emphasize the narrow circumstances in which government officials may be held personally

liable for their actions in suits for money damages. *See, Kisela v. Hughes*, *supra*, 138 S.Ct. 1148, 1152-53; *District of Columbia v. Wesby*, __ U.S. ___, 138 S.Ct. 577, 589-91 (2018) ("*Wesby*"); *Ziglar v. Abbasi*, __ U.S. ___, 137 S.Ct. 1843, 1866-67 (2017); *White v. Pauly*, __ U.S. ___, 137 S.Ct. 548, 551-52 (2017); *Mullenix v. Luna*, __ U.S. ___, 136 S.Ct. 305, 308-09 (2015) ("*Mullenix*"); *Taylor v. Barkes,* 135 S.Ct. 2042, 2044 (2015); *Carroll v. Carman,* 135 S.Ct. 348, 350-52 (2014) (*per curiam*); *Lane v. Franks,* 134 S.Ct. 2369, 2383 (2014); *Wood v. Moss,* 134 S.Ct. 2056, 2070 (2014); *Plumhoff v. Rickard,* 134 S.Ct. 2012, 2023-24 (2014); *Stanton v. Sims,* 134 S.Ct. 3, 7 (2013).

This Court has repeatedly warned the lower courts not to analyze clearly established law at too high a level of generality. *Mullenix, supra*, 136 S.Ct. at 311; *City and Cnty. of San Francisco v. Sheehan,* 135 S.Ct. 1765, 1775-76 (2015). In all section 1983 cases, courts must undertake the qualified immunity analysis "in light of the specific context of the case, not as a broad general proposition." *Mullenix, supra*, 136 S.Ct. at 308 (quoting *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (*per curiam).* Put another way, the court must enunciate "a concrete, particularized description of the right." *Hagans v. Franklin Cnty. Sheriff's Office,* 695 F.3d 505, 508 (6th Cir. 2012); *Spady v. Bethlehem Area Sch. Distr.,* 800 F.3d 633, 638 (3d Cir. 2015) (the right at issue must be framed "in a more particularized, and hence more relevant, sense, in light of the case's specific context").

This Court's precedent has generally clarified the qualified immunity defense, beginning with

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) where this Court reformulated the qualified immunity standard to require "*every* 'reasonable official . . . [to] underst[an]d that what he is doing violates that right.' " *Id*. at 741, quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (emphasis added). Qualified immunity now protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix, supra*, 136 S.Ct. at 308. This Court's repeated recitation of the standard in *Mullenix* has signaled that *Mullenix* should be applied broadly to section 1983 claims made against police officers.

An officer enjoys qualified immunity and is not liable for excessive force unless he has violated a "clearly established" right, such that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Kingsley v. Hendrickson,* 135 S.Ct. 2466, 2474 (2015) (quoting *Saucier v. Katz, supra,* 533 U.S. at 202). The immunity inquiry acknowledges that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here the use of reasonable force to effect an arrest, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, the officer is entitled to the immunity defense. *Ashcroft v. Al-Kidd*, *supra*, 563 U.S. at 743.

The plaintiff's burden to rebut a showing of qualified immunity is a demanding standard. *See Kingsley,* 135 S.Ct. at 2474-75; *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015). This burden can only be met by assessing the specific evidence and context of the case, and not by taking refuge in lofty principles wholly divorced from the realities actually confronted by police officers. The requirement that the law be clearly established is designed to ensure that officers have fair notice of what conduct is proscribed. *Hope v. Pelzer,* 536 U.S. 730, 739 (2002).

The correct inquiry is "whether the violative nature of *particular conduct* is clearly established" (emphasis supplied). *Ashcroft v. al-Kidd, supra,* 563 U.S. at 742. "[E]xisting precedent must have placed the statutory or constitutional question *beyond debate*" (emphasis supplied). *Id.* at 741; *see also, Mullenix, supra*, 136 S.Ct. at 308; *Stanton, supra,* 134 S.Ct. at 5. To find the existence of a clearly established right, the court must "conclude that the firmly settled state of the law, established by a forceful body of persuasive precedent, would place a reasonable official on notice that his actions obviously violated a clearly established constitutional right." *Spady v. Bethlehem Area Sch. Dist., supra,* 800 F.3d at 639.

In the present case, the Ninth Circuit panel once again ignored this Court's admonishments by falling back on general principles and holding that: "The right to be free of excessive force was clearly established at the time of the events in question.

Gravelet-Blondin v. Shelton, *supra*, 728 F.3d at 1093 (9th Cir. 2013)."[3] (App. 4, 37.)

While *Gravelet-Blondin* did not require a case directly on point, it still acknowledged that in order for a right to be clearly established, the existing precedent must have placed the right "beyond debate." *Gravelet-Blondin, supra*, 728 F.3d at 1093, citing to *Ashcroft v. al–Kidd*, *supra*, 563 U.S. at 741.

Just a month before the Ninth Circuit overturned qualified immunity for Officer Craig and Sgt. Toth, this Court decided *Wesby*. In *Wesby*, this Court articulated the stringent requirement for a precedent to be clearly established:

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," [Citations omitted] which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive

[3] By contrast, other Circuits have become far more precise in their definition of clearly established rights at issue in particular cases. *See, e.g., Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 907-08 (4th Cir. 2016) ("[t]he constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure") citing *Hagans v. Franklin Cnty. Sheriff's Office, supra,* 695 F.3d at 509 ("[d]efined at the appropriate level of generality - a reasonably particularized one - the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force").

> authority,' . . . ." It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know.
>
> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Wesby, 138 S.Ct. at 589–90.

Most recently, in *Kisela,* this Court went to great lengths to reiterate the importance of qualified immunity for police officers in an excessive force context and identify what is required to deny a police officer the protection of qualified immunity.

> "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific

> facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.
>
> …
>
> Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela, *supra,* at 138 S.Ct. at 1152-53 (internal citations omitted).

In this case, the Ninth Circuit defined the right at issue as simply the Fourth Amendment right to be free from the excessive use of force absent a threat or danger. This formulation lacks the required level of specificity and does not address the question that needs to be answered in this specific context. Indeed,

a prior Ninth Circuit panel criticized this type of generic formulation of the law, noting that "The standards from *Garner* and *Graham* 'are cast at a high level of generality,' so they ordinarily do not clearly establish rights. *[Citation omitted.]* Rather, it is the facts of particular cases that clearly establish what the law is." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 951 (9th Cir. 2017), citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004).

When the Ninth Circuit tried to compare dissimilar facts in *Kisela* in order to make a high level of generality definition of a clearly established right, this Court took note. In *Kisela*, the Ninth Circuit compared Kisela's conduct to the officers' conduct in *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997). In *Harris,* the Court of Appeals determined that an FBI sniper, who was positioned safely on a hilltop, used excessive force when he shot a man in the back while the man was retreating to a cabin during the Ruby Ridge standoff. In *Kisela*, Officer Kisela shot and killed a woman with a knife who had a history of mental illness and had earlier been hacking a tree with a knife. Kisela shot the knife-wielding woman through a chain link fence because he perceived her as a threat when she approached her roommate, carrying the knife, and was only six feet from her roommate. This Court in *Kisela* found that "[t]he panel's reliance on *Harris* does not pass the straight-face test." *Kisela, supra,* 138 S.Ct. at 1154.

It appears that the current state of the law for law enforcement in California is that an officer's individual liability hinges on an arbitrary choice among various general propositions . . . and

unfortunately, Circuit panels. For instance, in this case, the panel could have found support for the officers' use of force under the general standard of *Graham v. Connor*: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 396 (1989) citing *Terry v. Ohio*, 392 U.S. 1 (1968) and *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973). Therefore, in this matter, *Graham v. Connor* could support a finding that Officer Craig and Sgt. Toth's conduct was constitutional or that the law was not clearly established. *See also, Forrester v. City of San Diego, supra*, 25 F.3d at 806 (police officers not required to use the least intrusive degree of force possible; they are required only to act within a reasonable range of conduct).

In *Gravelet-Blondin, supra,* the Ninth Circuit ruled that force may be used to overcome even passive resistance: "While purely passive resistance can support the use of some force, the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance." *Id*. at 1091, citing *Bryan v. MacPherson,* 630 F.3d 805, 830 (9th Cir. 2010). Further, in *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), the Ninth Circuit reiterated the same rule that force may be used for effecting an arrest for passive resistance. *Id*. at 881, citing *Bryan v. MacPherson*, *supra*.

The panel opinion made no effort to compare the facts of this case with the facts of *Gravelet-Blondin*. Here, the officers were lawfully trying to check the welfare of the occupants in an apartment

with a known history of domestic violence. (App. 20.) Suddenly and without warning, Mr. Emmons, an unknown male opened the front door and backed out of the apartment pushing and coming into contact with Officer Craig who was by himself at the time. Officer Craig's demands not to close the door were ignored. (App. 21-22, 27.) Officer Craig grabbed hold of Mr. Emmons by his arm, told him to get on the ground several times, guided him to the ground in a control hold, placed him prone on the ground, and then handcuffed him. (App. 22, 30-31.) This Court has ruled that the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Graham v. Connor,* 490 U.S. 386, 396–97, (1989) (emphasis added) (citations omitted).

This event was video recorded. These recordings confirm that it was impossible for Officer Craig to know what Mr. Emmons' intentions were exiting the apartment where officers were obviously trying to enter. There was no evidence in the record to support the conclusion that any reasonable officer in Officer Craig's position could have known whether Mr. Emmons was leaving the scene of a crime, or carrying a concealed weapon or evidence of a crime. Thus, the Court's reliance on the fact that Mr. Emmons was later determined to be unarmed violates the standard that courts may not judge an officer's use of force using 20/20 hindsight. *See*, *Graham v. Connor, supra; White v. Pierce County,* 797 F.2d 812 (9th Cir. 1986)

II. The Panel's Sole Reliance on *Gravelet-Blondin* was Misplaced Because it was Published Four Months *After* the Incident in this Matter

The panel erroneously concluded that any constitutional violation was so clearly established that qualified immunity does not apply to Officer Craig and Sgt. Toth. Any constitutional violation was far from clearly established, especially given that Mr. Emmons did not and could not cite a similar case that put Officer Craig and Sgt. Toth on notice their conduct was unconstitutional. AOB 39-42. Mr. Emmons had the burden to prove the right was clearly established and has never done so. *Alston v. Read,* 663 F.3d 1094, 1098 (9th Cir. 2011)

The panel originally did not cite to any case in reversing qualified immunity and simply stated, "There is evidence from which a reasonable trier of fact could find that Mr. Emmons was unarmed and non-hostile. The district court therefore erred in granting qualified immunity on his excessive force claim." (App. 5-8.) Only after the officers' request for a rehearing did the panel advance a single case, *Gravelet-Blondin*, for the proposition that Mr. Emmons' rights had been clearly established. (App. 3-4.) This is clear error.

The panel simply cannot overturn the District Court's finding of qualified immunity, as they have done, based upon *Gravelet-Blondin*. *Gravelet-Blondin* was not decided until September 6, 2017, four months after the incident in this matter. A court cannot rely on a case decided after the event because

a reasonable officer is not required to foresee judicial decisions that do not yet exist. *Brosseau v. Haugen*, *supra*, 543 U.S. at 200, n. 4 (other cases postdating the conduct in question, of course, could not have given fair notice to Brosseau and are of no use in the clearly established inquiry). As the *Brosseau* Court noted, "[b]ecause the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Id.* at 198; *Kisela*, *supra*, 138 S.Ct. at 1152.

More recently, this Court in *Kisela* again restated the canon that the Ninth Circuit cannot rely on a case that postdated the conduct at issue.

> *Glenn,* which the panel described as "[t]he most analogous Ninth Circuit case," 862 F.3d, at 783, was decided after the shooting at issue here. Thus, *Glenn* "could not have given fair notice to [Kisela]" because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious. *Brosseau,* 543 U.S., at 200, n. 4, 125 S.Ct. 596. *Glenn* was therefore "of no use in the clearly established inquiry."

Kisela v. Hughes, *supra*, 138 S.Ct. at 1154.

Making matters worse, the panel barred the officers from further filings in the Ninth Circuit for rehearing to resolve the panel's clear errors. (App. 37.)

III. The Panel Did Not Decide the Probable Cause Issue Raised by Emmons

Both Mr. Emmons and the officers moved for summary judgment on the False Arrest allegations in the Complaint. (App. 12-13, 19.) The District Court found that the officers had probable cause to believe Mr. Emmons had violated Penal Code § 148(a) and that the officers were entitled to qualified immunity on the claim. (App. 27-28.)

Mr. Emmons' appeal included the contention that the District Court erred in granting the officers summary judgment on all matters, including the judgment on his false arrest claim for relief pled in the First Cause of Action. AOB 40-42.

The Ninth Circuit, in both its original Memorandum decision and Amended Memorandum, failed to address this issue in any respect. (App. 1-4, 5-8, 36-37.)

The Ninth Circuit committed clear error in failing or refusing to consider and dispose of the issue briefed by both parties. The refusal to allow a petition for rehearing before the panel or *en banc* will create confusion with the District Court if this case is to be tried.

CONCLUSION

The Ninth Circuit continues to defy decades of clearly established jurisprudence on qualified immunity. The Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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