NO. 17-1660

IN

The Supreme Court of The United States

CITY OF ESCONDIDO, KEVIN TOTH, AND ROBERT CRAIG,

PETITIONERS,

V.

MARTY EMMONS,

RESPONDENT.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite the admonition in Supreme Court Rule 14.1(a) that questions presented "should be short and should not be argumentative," Petitioners begin their Questions Presented with at least six *disputed* facts: (1) that police were responding to a "domestic violence" call; (2) that Respondent Marty Emmons was entirely "unknown" at the time he was arrested; (3) that Mr. Emmons "hastily" exited the subject apartment; (4) that Petitioners Kevin Toth and Robert Craig were conducting a "lawful" welfare check when Mr. Emmons was arrested; and (5) that Mr. Emmons has "cited *no* legal authorities for the proposition that the nature of the force was excessive."

Mr. Emmons would re-state Petitioners' Questions Presented as a single question:

1. Did the Ninth Circuit err in holding Petitioners Kevin Toth and Robert Craig were not entitled to summary judgment, on the issue of whether they are immune from having to defend against Mr. Emmons' claim, that they violated the Fourth Amendment, when they arrested and used force on Mr. Emmons?

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INTRODUCTION

Despite there being no indication of an ongoing emergency when police officers arrived at the Escondido apartment of Respondent Marty Emmons' daughter, in response to a 911 report from a caller in Los Angeles, the officers insisted on searching the apartment.

When Mr. Emmons' exited the apartment to explain his daughter's insistence on a search warrant, Officer Craig forced Mr. Emmons to the ground and held him there with Sergeant Toth's help, thus injuring Mr. Emmons' back and hip. Mr. Emmons was then arrested for interfering with the officers' quest to get inside the apartment.

The Ninth Circuit did not err in this case when, on interlocutory appeal, it assumed all disputes of fact were resolved in Mr. Emmons' favor, then concluded Mr. Emmons' Fourth Amendment right to be free from unreasonable seizures was "clearly established" under the circumstances of this case.

The Petition should be denied.

STATEMENT OF THE CASE

I. Facts

A. The Police Arrive to Everyone's Surprise

In 2013, Maggie Emmons lived in an apartment in Escondido, California with her husband (who was working in Rhode Island at the time), two young sons, and roommate, Ametria Douglas. ER057, ER075, ER086, ER107.

On Memorial Day, May 27, 2013, Respondent Marty Emmons was visiting his daughter, Maggie Emmons, and grandsons at their Escondido apartment. ER060, ER087, ER106.

In the early afternoon that day, Ms. Emmons' roommate, Ms. Douglas, was talking on the phone with her mother when Ms. Douglas' phone unexpectedly stopped working. ER097. Thinking nothing of it, Ms. Douglas soon took Ms. Emmons' sons to play at the apartment complex pool. ER109.

A while after Ms. Douglas took the boys to the pool, the police showed up. ER111. When they responded, the officers had no information confirming the veracity of what the 911 caller had reported. ER233. And the officers did not, either before or during the incident, listen to the 911 call or attempt to contact the 911 caller for more information. ER231-ER232.

Importantly, there was no indication that this was a "domestic violence" call as the term is defined by California Penal Code sections 273.5 and 243(e)(1). The term "domestic violence" applies only to violence between individuals involved in a current or former intimate/romantic relationship. *See People v. Belton*, 168 Cal. App. 4th 432 (2008) ("For purposes of section 273.5, the term 'cohabitant' 'requires something more than a platonic, rooming-house arrangement.'"). Here, of course, officers were responding to a reported verbal altercation between two adult women roommates.

From the pool, Ms. Douglas was the first to see Officer Craig arrive, along with Officer Jake Houchin, who is not a party to this proceeding,[1] Ms. Douglas saw these officers approach and knock on the door to Ms. Emmons' apartment.[2] ER088-ER089. At the time, Ms. Emmons' sons were playing and splashing in the pool, and no one else was around. ER099, ER248.

Officer Craig "had no idea" if there was an ongoing emergency and had no information that

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[1] Mr. Emmons and his daughter had stayed in the apartment, watching a movie. ER088.

[2] The pool is situated directly under the landing of Ms. Emmons' apartment; thus, Ms. Douglas could see and hear what was happening near the front door of the apartment. ER089. Officer Craig confirms the pool was situated directly under the landing to Ms. Emmons' apartment and was thus "very close" to where the officers were standing next to Ms. Emmons' apartment. ER236.

anyone in the apartment was armed or dangerous. ER239-ER240. The officers heard no screaming or fighting coming from within the apartment; they did not observe anyone running into or out of the apartment; they did not see any indication that someone was injured; and they did not locate or encounter any neighbor that could confirm that any screaming or altercation had occurred as reported by the 911 caller. ER241-ER242, ER142, ER149-ER150.

When the officers knocked on the apartment door, Ms. Douglas asked the officers why they were there. ER089-ER090. Ironically, the officers responded that the matter did not concern her, to which Ms. Douglas replied, "Well, that's my apartment. What's going on?" ER090, ER246. The officers responded they were doing a welfare check, to which Douglas responded, "Well, everyone is fine. I'm here. My name is Ametria Douglas. I live there. You can leave. There's no reason for you to be here anymore. You can see I'm fine, and I'm with the boys. Everything is fine." ER090. Despite Ms. Douglas making these statements within a minute or two of the officers arriving, the officers insisted they needed to get into the apartment. ER090, ER094, ER101.

Officer Craig confirms Ms. Douglas attempted to communicate with him and Officer Houchin as they were approaching Ms. Emmons' door. ER242-ER243. While Officer Craig acknowledges it appeared Ms. Douglas and the children in the pool were "connected to the apartment," neither he nor Officer Houchin attempted to confirm Ms. Douglas' identity. ER244-

ER245, ER303. Though, after hearing that she lived in the apartment, Officer Craig began demanding that Ms. Douglas leave the pool to unlock the apartment. ER247.

Upon seeing Officer Craig through the peephole in her front door, Ms. Emmons became scared and did not want to answer the door "[b]ecause of the aggression of how the way that they were knocking on the door" and because of a previous incident when her husband was arrested against her wishes by officers from the same department.[3] ER064-ER067.

Ms. Emmons instructed her father not to answer the door, then went to a nearby window. ER066. Ms. Emmons pushed aside the blinds and stood in front of the open window to talk to Officer Houchin. ER068.

The officers began demanding that Ms. Emmons open the door to the apartment or they would kick the door down. ER277. Ms. Emmons did not understand why the police were "trying to barge in the house like that." ER058. "It was scary." ER058.

The officers did not tell Ms. Emmons they were there because Ms. Douglas' mother had called 911; the officers instead kept asking Ms. Emmons where her husband was, to which Ms. Emmons responded that her husband was working in Rhode Island. ER059, ER062-ER063, ER068-ER069, ER278. Ms. Douglas

[3] Although arrested, no charges were ever filed against Ms. Emmons' husband. ER290.

confirmed Ms. Emmons' husband was not home. ER278.

Ms. Emmons could only guess the police were there because someone had reported her children screamed after she told them they could not go down to the pool and that she would spank them. ER061, ER067, ER281.

Even though police were dispatched with information about a verbal altercation involving Ms. Douglas and her *female* roommate, the officers continued to demand that Ms. Emmons' husband exit the apartment or the officers would break down the door. ER112.

While at the window, Ms. Emmons repeatedly asserted she did not want the officers in her home without a warrant. ER069, ER278, ER280. In response, Officer Craig continued to withhold the specific reason for their presence (i.e., the 911 call from Ms. Douglas' mother), repeating that if Ms. Emmons did not open the door, the officers would knock it down. ER069, ER281-ER283.

Apparently unconcerned with confirming whether an emergency was actually at hand, Officer Craig testified he "just wanted to have [Ms. Emmons] let [him] in." ER250. Officer Craig does not recall, for example, asking Ms. Emmons her name, if everything was ok, or for any other information to corroborate the 911 call before demanding entry. ER250-ER251.

It was not until well into the incident that Officer Houchin finally told Ms. Douglas the officers were there because of a 911 call from "somebody's mom up in L.A." ER303. Even then, Officer Houchin did not ask Ms. Douglas to confirm her identity. ER143-ER146. Officer Houchin claims, confusingly, that before he could confirm Ms. Douglas' identity, he needed to get into Maggie Emmons' apartment. ER146.

Several minutes into the incident, Mr. Emmons approached the window through which his daughter was talking with Officer Craig. ER114. While there, Mr. Emmons was identified as Maggie Emmons' father. ER115, ER283. Mr. Emmons and his daughter then stepped away from the window to talk about whether Ms. Emmons should open the door for the officers. ER118-ER121. It was at this point that Officer Craig made it clear he did not view Mr. Emmons as a threat, stating Mr. Emmons was "trying to talk sense to her in there." ER283, ER302.

Around this time, Petitioner Sergeant Toth was called to the scene. ER163. When he arrived, Officers Craig and Houchin still had not discovered any evidence to corroborate the 911 report that Ms. Douglas had screamed for help. ER178-ER180. And while Sergeant Toth thought there was "potential" for an emergency situation to exist, he was not aware of any ongoing emergency in the apartment. ER181-ER183.

B. The Police Do Not Perceive Ongoing Emergency

The incident was classified only "priority 2," i.e., not the highest dispatch priority. ER229-ER230. In responding to the initial call to Ms. Emmons' apartment, for example, Officer Houchin did not drive with lights and siren, because he did not believe that the call warranted such a response. ER135-136.

Like Officer Houchin, Officer Craig drove "normally" to Ms. Emmons' residence, neither speeding to the scene nor using lights and siren. ER234-ER235.

Another officer not a party to this proceeding, Officer Joseph Leffingwell, testified he did not think the incident "elevated to the level that required immediate force to make entry" and that, when he told Ms. Emmons to open her door, he was asking for consent. ER208-ER209.

The lapse in time is significant, as well, to the lack of an ongoing emergency. Officer Houchin confirmed that, once officers arrived, they had time to call for backup and a supervisor, wait for their arrival, then formulate a plan before attempting to enter Ms. Emmons' apartment. ER151. Officers Craig and Houchin were "very calm" as they waited for additional officers. ER249.

Sergeant Toth confirmed that, if there had been an imminent threat before he or another supervisor

arrived, the responding officers could have forced entry. ER168-ER169.

C. The Police Unlawfully Arrest Mr. Emmons, Using Excessive Force

When Sergeant Toth arrived, he says he was met by Officer Houchin who began filling him in on the situation.[4] Officer Houchin was interrupted, however, when Mr. Emmons exited the apartment. ER165-ER167, ER172-ER173, ER133.

Trying to balance his daughter's fear of the police with the officers' repeated threats to break down the door, Mr. Emmons eventually decided he should go outside to talk with the officers. ER113.

As he exited and closed the apartment door, Mr. Emmons did not hear any clear command to leave open the door. ER116, ER122, ER124. In fact, when Mr. Emmons exited, no officer was immediately visible, as Officers Craig and Houchin were near the window. ER123.

Further, as Mr. Emmons closed the door, he was facing the door. ER124. Thus, Mr. Emmons first realized an officer was near the door when he was grabbed and forced to the ground. ER124. Thus, it

[4] Officer Houchin admits he turned his body camera off for this discussion with Sergeant Toth, and (unsurprisingly) claims it was during this unrecorded period that he told Sergeant Toth there had been a prior incident of domestic violence at Ms. Emmons' apartment. ER133-ER134.

cannot be said Mr. Emmons closed the door after hearing a clear and lawful police order. ER117, ER125,

Ms. Douglas remembers Mr. Emmons' arrest as him being "yanked out," then being "on the ground in handcuffs." ER091. Ms. Douglas observed no aggressive behavior by Mr. Emmons. ER091-ER092. She never saw Mr. Emmons slam the door on the officers. ER094. Ms. Douglas saw Mr. Emmons "being tackled to the ground." ER100-ER101.

Officer Craig never directly commanded Mr. Emmons to open the door to Ms. Emmons' apartment. ER252-ER253. And according to Officer Craig, Mr. Emmons' exiting and closing of the door could be considered, at most, only passive resistance. ER254-ER255.

Upon seeing Mr. Emmons' arrest, his grandsons began yelling up from the pool: "Let my granddaddy go! . . . What are you doing to my granddaddy?!" ER093, ER285. Both crying, the boys left the pool and tried to go up to the apartment to help their grandfather. ER093.

In addition to helping Officer Craig press Mr. Emmons to the ground, Sergeant Toth gave his stamp of approval to Mr. Emmons' continued unlawful arrest and false charge of violating California Penal Code section 148. ER184.

II. Proceedings

Mr. Emmons does not take issue with Petitioners' recitation of this case's procedural history; he notes only a few facts for clarification or emphasis.

A. Southern District of California

The district court concluded "genuine issues of material fact preclude summary judgment on whether Officer Craig used a reasonable amount of force under the circumstances." (App. 30.)

B. Ninth Circuit

Petitioners argue the Ninth Circuit "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.'" (Pet'n 20.) Though, if the Court grants the Petition, the Ninth Circuit's decision as to Maggie Emmons' unreasonable-search claim will also have to be reviewed.

Petitioners' justification for arresting and using force on Mr. Emmons rests on their claim that an ongoing "emergency" required their entry into Maggie Emmons' apartment, and that Mr. Emmons impeded this mission.

As set forth in the preceding section, however, by the time Mr. Emmons was forced to the ground and arrested, the officers had seen the individual they were sent to check on (namely, Ms. Douglas) playing with Maggie Emmons' two children in a pool, located just under the subject apartment. Ms. Douglas had identified herself as an occupant of the apartment, saying there was no need for assistance.

Maggie Emmons had already talked to the officers through an open window, repeatedly explaining she did not want the officers in her apartment without a warrant because she had recently had a scary experience with officers from the same department. There was no indication Ms. Emmons' husband was anywhere nearby.

By the time Mr. Emmons was forced to the ground and arrested—nearly ten minutes into the incident—the officers had no evidence corroborating the 911 report of an adult woman screaming for help. In fact, by the time Mr. Emmons exited the apartment, the officers still had not explained the exact reason for their presence.

By the time Mr. Emmons exited the apartment, even Officer Craig had acknowledged Mr. Emmons was "trying to talk sense" to his daughter, who was continuing to insist on a warrant.

To the extent Petitioners claim the Ninth Circuit's decision on Mr. Emmons' Fourth Amendment claim is subject to review, so too is the

question of whether disputes of material fact exist as to whether the officers reasonably believed an ongoing emergency was at hand, such that the emergency/welfare exception to the warrant requirement applied.

REASONS TO DENY WRIT

"A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10.

Considerations in deciding whether to grant a writ include: (1) whether a "court of appeals has entered a decision in conflict with the decision of another . . . court of appeals," and (2) whether a "court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(a) & (c).

The Ninth Circuit's holding that Sergeant Toth and Officer Craig are not entitled to qualified immunity at the summary judgment stage does not conflict with the decision of another circuit court or with relevant decisions of this Court.

There are no compelling reasons to grant the Petition. The Petition should be denied. And the Court should not, as Petitioners suggest, summarily reverse the Ninth Circuit's decision as to Mr. Emmons' Fourth Amendment claim against Sergeant Toth and Officer Craig.

I. The Ninth Circuit Applied the Correct, Though Amorphous, Legal Standard in Denying Qualified Immunity at Summary Judgment

While the Ninth Circuit's Amended Memorandum does not set forth a complete exposition of qualified-immunity jurisprudence, it squarely addresses the issue. (App. 4.) The court states, "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. 4.) And without repeating it here, the Ninth Circuit in *Gravelet-Blondin* correctly explained the qualified-immunity standard in detail. *See id.* at 1092-95.

That said, Mr. Emmons' agrees with the Cato Institute's recent assessment of this judge-made doctrine. (Cato Inst. Amicus Br., *Almighty Supreme Born Allah v. Milling*, S. Ct. No. 17-8654, filed May 25, 2018.) Mr. Emmons agrees that—despite this Court issuing more than thirty opinions clarifying the application of this doctrine since its inception in the 1980s—the doctrine remains "amorphous" and "unmoored from any lawful justification and in need of correction." (*Id.* at 2-3, 7.)

Mr. Emmons further agrees with the Cato Institute that the question of whether a right is "clearly established" is "nebulous," having become "exactly what the Court assiduously sought to avoid—

a 'freewheeling policy choice.'" (*Id.* at 20.) Application of this one standard, has resulted in drastically different outcomes from circuit to circuit. (*See id.* at 7-11.)

Even Petitioners acknowledge application of the "clearly established" prong may depend on the selection of, "unfortunately, Circuit panels." (Pet'n 29-30.)

In front of this backdrop, it cannot be said the Ninth Circuit misstated or misapplied this Court's qualified-immunity jurisprudence when, assuming all disputes of fact were resolved in Mr. Emmons' favor, it found Mr. Emmons' right to be free from excessive force was "clearly established" under the circumstances of this case.

Because Petitioners contend, at most, that the Ninth Circuit misapplied the doctrine of qualified immunity, the Petition should be denied. *See* S. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

II. All But the Plainly Incompetent or Those Who Knowingly Violate the Law Would Have Known the Arrest of, and Use of Force on, Mr. Emmons Violated His Fourth Amendment Right to Be Free From Excessive Force

In *Gravelet-Blondin*, the court explained that, in the Ninth Circuit, "the right to be free from the application of non-trivial force for engaging in passive resistance was clearly established *prior to 2008*." 728 F.3d at 1092-95 (emphasis added). In support of its explanation, the Ninth Circuit cited numerous cases establishing the distinct "contours" of this right, including *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012).

In *Nelson*, the Ninth Circuit, again citing numerous cases establishing the contours of this right, explained "that a failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force." 685 F.3d at 881-82.

Thus, contrary to Petitioners' misleading argument that the Ninth Circuit relied on a *single* case, "decided after the event" (Pet'n 32-33), the Ninth Circuit, in fact, relied on numerous cases to support its conclusion that Mr. Emmons' right to be free from excessive force was "clearly established" as early as 2008—five years before this incident in 2013.

Of course, whether Mr. Emmons actively resisted the officers, and whether the officers used more than a non-trivial amount of force on Mr. Emmons, are among the material facts that remain in dispute.

If the Ninth Circuit intended to rely solely on *Gravelet-Blondin* (as opposed to the many cases cited therein), this would not be plain error, as this Court has repeatedly emphasized that satisfaction of the "clearly established" prong "does not require a case directly on point for a right to be clearly established," and that "general statements of the law are not inherently incapable of giving fair and clear warning." *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017).

Given extensive body of Ninth Circuit law delineating the right to be free from non-trivial force in response to passive resistance, "all but the plainly incompetent or those who knowingly violate the law," *see Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015), would have known, at the time of this incident, that it would violate the Fourth Amendment to force an elderly man to the ground, and hold him there for minutes, thereby injuring his back and hip, after acknowledging this man had been trying to bring order to the incident (by "talking sense to" his daughter, as described by Officer Craig).

III. A Writ of Certiorari is Not Required to Resolve the Issue of Probable Cause

Mr. Emmons agrees with Petitioner that the Ninth Circuit did not decide whether disputes of material fact preclude summary judgment in the officers' favor on Mr. Emmons' claim that officers did not have probable cause to arrest him for violating California Penal Code section 148(a)(1) (interfering with or obstructing an officers' lawful duties). (*See* Pet'n 34.)

The Ninth Circuit did, however, find: "There is evidence from which a reasonable trier of fact could find that Mr. Emmons was unarmed *and non-hostile*." (App. 3-4 (emphasis added).) One could infer the Ninth Circuit intended this holding to include the issue of probable cause; that is, that disputes of fact precluded summary judgment on the issue of probable cause, as well.

Indeed, as set forth in Mr. Emmons' Statement of the Case, there is evidence showing Mr. Emmons could not have possibly interfered with or obstructed any lawful police conduct. Mr. Emmons remembers, for example, having already closed the apartment door before hearing any command to leave the door open. And whether the command to leave the door open was lawful, of course, raises the question of whether the officers reasonably perceived an ongoing emergency when Mr. Emmons was commanded to leave the door open.

Regardless, whether the Ninth Circuit failed to rule on the issue of probable cause is not grounds for granting a petition for writ of certiorari. *See* S. Ct. R. 10.

The Court may, of course, issue an order pursuant to Supreme Court Rule 24.1(a), instructing the Ninth Circuit to rule on the issue of probable cause. Though, given the disputes of material fact underlying Mr. Emmons' unlawful-arrest claim, Mr. Emmons would request any such order direct the Ninth Circuit to enter a ruling stating that disputes of material fact preclude summary judgment on Mr. Emmons' unlawful-arrest claim.

CONCLUSION

The Ninth Circuit did not err in applying the relatively young, amorphous doctrine of qualified immunity in this case. The Court should deny the Petition.

Respectfully submitted,

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