

No. 17-706

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

SARA LOWRY,

Petitioner,

v.

CITY OF SAN DIEGO,

Respondent.

**On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit**

**OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the petition fails to present compelling reasons to grant certiorari when the court of appeals followed Supreme Court precedent in determining the amount of force used was moderate due to the manner in which the force was used and that, under the totality of the circumstances, it was reasonable for the officers to believe the suspect posed an immediate threat of harm.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT	7
I. The Petition Should be Denied Because Petitioner Bases Her Request on a Non- Existent Policy of the City of San Diego.....	8
II. The Petition Does Not Present a Matter of National Importance or Conflict with this Court’s Prior Opinions	9
III. The Ninth Circuit’s Decision Correctly Evaluates the Use of Force Without Resorting to 20/20 Hindsight.....	11
IV. The Ninth Circuit Correctly Focused on the Manner in which the Officer Used the Police Dog	14
V. The Ninth Circuit Correctly Found that the Officers Reasonably Believed They were Searching for a Burglar that Posed an Immediate Threat to Their Safety.....	15

CONCLUSION.....	17
APPENDIX A-Brief of <i>Amici Curiae</i> in United States Court of Appeals	A-1
APPENDIX B-Letter of Jones & Mayer	A-18
APPENDIX C-Article from Police Practice and Research.....	A-20

TABLE OF AUTHORITIES

Cases

<i>Chambers v. U.S.</i> , 555 U.S. 122 (2009) <i>overruled on other grounds by Johnson v. U.S.</i> , 135 S. Ct. 2551 (2015).....	16
<i>Cty. Of Los Angeles, Calif. v. Mendez</i> , ___ U.S. ___, 137 S. Ct. 1539 (2017).....	13
<i>Graham v. Connor</i> , 490 U.S. 386 (1989).....	6, 7, 9, 11, 13, 17
<i>Lowry v. City of San Diego</i> , 858 F.3d 1248 (9th Cir. 2017).....	7
<i>Robinette v. Barnes</i> , 854 F.2d 909 (6th Cir. 1988) ..	14
<i>Monell v. Dept. of Social Services of City of New York</i> , 436 U.S. 658 (1978).....	8-9
<i>Scott v. Harris</i> , 550 U.S. 372 (2007).....	7, 13
<i>Sykes v. United States</i> , 564 U.S. 1 (2011), <i>overruled on other grounds by Johnson v. U.S.</i> , 135 S. Ct. 2551 (2015).....	16
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1985)	10, 13, 15
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	17
<i>United States v. Alcala-Sanchez</i> , 666 F.3d 571 (9th Cir. 2012).....	16

Statutes

28 U.S.C. 1254(1)	1
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Other Authorities

Canine Unit Operations Manual, San Diego Police Department	6, 9
San Diego Police Department Procedure 1.04 – Use of Force.....	6, 9
San Diego Police Department Procedure 6.16 – Police Service Dogs	6, 9

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals (Pet. App. 1-38) is reported at 858 F.3d 1248. The panel opinion of the Court of Appeals (Pet. App. 39-87) is reported at 818 F.3d 840. The District Court's order granting summary judgment (Pet. App. 88-124) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 2017. The petition was filed on November 6, 2017 after the Clerk of this Court granted an extension for the petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case involves an encounter between the petitioner and a police service dog, Bak, which lasted approximately two seconds. The canine handler used his police service dog in such a manner that he was able to call the dog off and minimize the amount of force used. As a result, the petitioner sustained a small laceration on her upper lip.

San Diego Police Department ("SDPD") Officers David Zelenka, Michael Fish, and Sergeant Bill Nulton were dispatched to investigate a burglar alarm in a commercial building that was triggered shortly before 11:00 p.m. on a Thursday night. Excerpts of Record ("ER") at 66-67, 309-10, 334, 338:25-339:7, 391-92. The three officers arrived on the scene within two or three minutes of getting the call. ER at 31, 70, 355-56, 368, 380. Sgt. Nulton, an experienced canine handler, responded to the scene with his police service dog, Bak.

While approaching the building, the officers did not see anyone fleeing the building or the parking lot. ER at 32, 355-56, 368, 380-81. The officers checked the north, south and west sides of the building for points of entry and did not see any broken windows or other points of entry. ER at 32, 355-56, 368, 380-81. A door on the second floor of the east side of the building was propped open. ER at 32, 356, 368, 381. Consequently, the officers believed that there was a burglary in progress. ER at 356, 369, 381-82.

The officers entered the premises and went to the second floor. They first determined that there was an unlocked door leading to an empty bathroom and another locked door. ER at 34, 114, 356, 368, 381. They then approached the only remaining access point, a door that was propped open. ER at 356, 368, 381. The office suite was dark and only illuminated by the little ambient lighting from outside the office suite. ER at 356, 368, 381. No lights were on in the suite. ER at 74. No computer screens were on to light up the interior. *Id.* As a result, the officers were unable to see inside the suite. ER at 356, 368, 381.

The officers believed that whoever triggered the burglar alarm was inside the suite. ER at 357, 369, 381-82. The officers arrived on scene in only one to three minutes and did not see anyone leaving. *Id.* Since the lights were out and the door was open, the officers suspected that the burglar who triggered the alarm was inside the suite lying in wait. *Id.* The officers did not know if the burglar had found a potential hostage, such as a janitor or someone working late, to open the door and gain entry. ER at 368-69, 356-56, 381-82. The officers had no legitimate explanation for a triggered burglar alarm and an open door to a blacked out office suite at 11:00 p.m. on a Thursday night other than a burglary in progress. ER at 357, 369, 381-82.

Before entering the suite, Sgt. Nulton yelled into the office suite as loud as he could, "This is the San Diego Police Department! Come out now or I'm sending in a police dog! You may be bitten!" ER at

356-57, 369, 381. Sgt. Nulton waited 30 to 60 seconds for a response. He did not get one. *Id.* Sgt. Nulton repeated the same verbal warning as loud as he could into the open suite. *Id.* Again, the officers waited 30 seconds to a minute for a response, but did not receive a response. *Id.* In fact, no one ever responded to any of Sgt. Nulton's warnings. *Id.*

Faced with a triggered burglar alarm, an open door to a blacked out office suite at 11:00 p.m. on a Thursday, and concerned that a potentially armed burglar was lying in wait, Sgt. Nulton sent in Bak to clear the suite. ER at 357, 367, 369, 370, 382. Sgt. Nulton took Bak off leash and followed a few feet behind him. Bak searched the small office in the front of the suite, the main room in the office suite, and then entered the second (and last) small office in the suite. ER at 164, 167, 370, 357, 382. At all times, Sgt. Nulton was close enough to Bak to be able to see him. ER at 170.

Sgt. Nulton was standing in the threshold of the last office when Bak entered the room. Sgt. Nulton shined his flashlight and saw the contents of a purse strewn across the floor. ER at 370, 358. Sgt. Nulton moved his flashlight beam against one of the office walls and saw a lump covered by a blanket on a sofa. ER at 370. Sgt. Nulton believed it was a person but could not tell the person's gender, race, hair color or whether the person was armed. *Id.* At the same time, Sgt. Nulton saw Bak in the air moving toward the sofa. *Id.*

Even though Sgt. Nulton did not know if the person under the blanket was armed, he immediately called Bak off. *Id.* Sgt. Nulton was unable to verbalize his commands for Bak to heel before Bak jumped to engage the lump on the sofa. ER at 370. The lump on the sofa turned out to be Sara Lowry. *Id.* In the process of landing on Ms. Lowry and then jumping off of her, Ms. Lowry sustained a laceration to her upper lip. ER at 358, 366, 370, and 382. The entire encounter between Ms. Lowry and Bak lasted about two seconds. ER at 295-96, 370¹.

In her First Amended Complaint, Petitioner did not identify any particular policy, custom or practice by the City of San Diego that she contended

¹ What the officers did not know at the time, was that earlier in the evening, Ms. Lowry had been out drinking with friends. ER at 344, 124-127, 370, 358, 382-83. At approximately 9:30 p.m., after consuming at least five vodka drinks, Ms. Lowry returned to her office. ER at 344, 124-28. Ms. Lowry fell asleep on the sofa in her office. ER at 344, 129-30. She woke later that evening needing to use the restroom. ER at 344, 131-33.

During business hours, Ms. Lowry used an interior bathroom in the adjoining office. ER at 344, 131-33. On the night in question, Ms. Lowry unlocked and opened the interior door between the suites. *Id.* Realizing “it wouldn’t be right for [her] to use [the interior bathroom] at night,” she immediately closed the door and used an exterior public bathroom instead. ER at 131, 133-34, 344. It was when Ms. Lowry opened the door to use the interior bathroom that she set off the burglar alarm. ER at 66-67, 338:25-339:7. Ms. Lowry then went back inside her suite and went back to sleep. ER at 134. She has no recollection of closing the front door to Suite 201. ER at 134-35.

was the moving force behind the alleged constitutional violation. ER at 403-05. Further, in her responses to written discovery, Petitioner identified “the Canine Unit Operations Manual, San Diego Police Department (SDPD) Procedure 6.16 – Police Service Dogs, and SDPD Procedure 1.04 – Use of Force.” ER at 312-13.

The clear language of the policies and procedures identified by Petitioner require a canine handler to determine whether it is appropriate to use a police dog based on the totality of the circumstances. ER at 319-25, 327-29. SDPD Procedures 1.04 and 6.16 permit a trained canine handler with a trained police service dog to use the dog to search for suspects after the handler conducts an analysis of the need to use such force pursuant to *Graham v. Connor*. SDPD Procedure 6.16 explicitly requires an officer, prior to deployment of the police service dog to determine: “1) the severity of the crime; 2) the immediacy of the threat; and, 3) if the subject is actively resisting arrest (*Graham v. Connor*).” Sgt. Nulton testified that he conducted the *Graham v. Connor* analysis and determined that it would be appropriate for him to use Bak to locate the suspect.

Petitioner claims for the first time that the use of police dogs as a means of force has grown more and more prevalent. There is nothing in the record before this Court, or before the Ninth Circuit, that supports such a claim. To the contrary, the City of San Diego can show its use of police dogs has remained static for the last 30 years or so.

ARGUMENT

Petitioner has not presented any “compelling reason” for granting *certiorari* in this case. *See* Sup. Ct. R. 10. The Ninth Circuit held that Sgt. Nulton did not use excessive force. *Lowry v. City of San Diego*, 858 F.3d 1248, 1260 (9th Cir. 2017). In so doing, the Ninth Circuit engaged in the analysis required by *Graham v. Connor*². Petitioner argues that the Ninth Circuit improperly conducted a results-based analysis when it concluded the quantum of force was moderate. She also claims

² *Graham v. Connor*, 490 U.S. 386 (1989), sets the test for determining whether a use of force was unconstitutional. The relevant inquiry is “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* at 397. The standard of “objective reasonableness” applies regardless of the level of force used. *Scott v. Harris*, 550 U.S. 372, 381 (2007). Further, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, without the benefit of hindsight. *Graham*, 490 U.S. at 396.

In determining the reasonableness of a seizure, a court must first assess the gravity of the particular intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted. Second, the court must assess the importance of the government interests at stake by evaluating: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. Third, the court must balance the gravity of the intrusion on the individual against the government’s need for that intrusion to determine whether it was constitutionally reasonable. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

that its ruling allows all officers under all circumstances to presume that a burglary suspect poses an immediate risk of harm. This is incorrect. The Ninth Circuit, instead, looked at how the force was utilized and engaged in a common sense analysis of the totality of the circumstances to determine that it was reasonable for these officers, under these circumstances, to conclude that the suspect posed an immediate risk of harm to them.

I. The Petition Should be Denied Because Petitioner Bases Her Request on a Non-Existent Policy of the City of San Diego.

The petition should be denied because it is based on a fundamentally faulty premise: an allegation that the City of San Diego has a “bite and hold” policy regarding the use of police service dogs that requires officers to use excessive force. No such policy exists nor was the allegation before the district court. Petitioner did not previously claim that such a policy was the moving force behind the alleged constitutional violation. The questions presented and the purported importance of the case all stem from this flawed premise. Simply put, Petitioner’s perceived theory of liability in this petition is not the theory of liability pled in her complaint or identified in her discovery responses. As such, Petitioner waived this argument and should not be permitted to raise it in the petition.

A predicate of municipal liability is a policy, custom or practice that is the moving force behind a constitutional violation. *Monell v. Dept. of Social*

Services of City of New York, 436 U.S. 658 (1978). Here, Petitioner did not identify any such policy. Although she now argues that the City has a “bite and hold” policy, she did not identify such a policy in the operative complaint or in her responses to discovery. Instead, Petitioner identified “the Canine Unit Operations Manual, San Diego Police Department (SDPD) Procedure 6.16 – Police Service Dogs, and SDPD Procedure 1.04 – Use of Force.” ER at 403-05, 312-13. The policies identified by the petitioner do not direct unconstitutional conduct. Those policies require a canine handler to determine whether it is appropriate to use a police service dog under the totality of the circumstances, applying the standards announced by this Court in *Graham v. Connor*, *supra*.

II. The Petition Does Not Present a Matter of National Importance or Conflict with this Court’s Prior Opinions.

Review is not warranted. Petitioner does not argue that the Ninth Circuit’s *en banc* holding conflicts with this Court’s prior opinions. Moreover, this case does not present a new issue of national importance. The petition only presents Petitioner’s disagreement with an appellate court’s correct analysis applying this Court’s precedent. The City’s procedures for using a police service dog comply with the objective standards of the Fourth Amendment because the policies require an officer to engage in the analysis required by this Court in *Graham*.

Petitioner concedes that the “bite and hold” training philosophy is the predominant training method used in this country to train police dogs to search for and apprehend suspects. As such, this training philosophy is entitled to deference. *See Tennessee v. Garner*, 471 U.S. 1, 15-16 (1985). The United States Police Canine Association (USPCA) and International Municipal Lawyers Association (IMLA) submitted a joint *amicus* brief in support of the City’s request for an *en banc* review by the Ninth Circuit. In their brief, USPCA and IMLA explained that a police service dog is not simply a weapon such as a gun, taser, or baton. Instead, a police dog is a tool “used to aid law enforcement officers in fulfilling their core role of locating and capturing criminal suspects.” Resp. App. A at A-1 and A-7.

Amici stated that police dogs predominantly serve as a tool to assist officers in searching for and apprehending suspects, and, secondarily, they serve to protect officers. Instead of needing several officers with guns drawn to physically search for a person, a police dog can complete this task quicker and with less risk to the officers. *Id.* *Amici* also discussed the difference between the “bite and hold” training philosophy and the “guard and bark” (aka “circle and bark”) philosophy.

With “bite and hold”, the decision whether to bite is left in the hands of the human canine handler. With the other approaches, the decision to bite is left with the dog. It would be irresponsible to abdicate this decision to a dog. Furthermore, *amici* California Police Chiefs’ Association, California

State Sheriffs' Association and California Peace Officers' Association submitted a study that shows that using "guard and bark" or "circle and bark" results in greater bite ratios. Resp. App. B at A-18 and App. C at A-20, and A-40-43.

"Bite and hold" allows an officer to use a police dog after conducting the evaluation required by *Graham v. Connor*. This training philosophy leaves the officer with the ability, as in this case, to call the dog off and minimize any physical harm. This is the predominant training method for good reason. Petitioner failed to present a matter of national importance and has not pointed out any conflicts with this Court's precedence. Accordingly, this Court should deny review.

III. The Ninth Circuit's Decision Correctly Evaluates the Use of Force Without Resorting to 20/20 Hindsight.

Petitioner takes issue with the court of appeals' conclusion that the force used in this circumstance was moderate. She asks this Court to simultaneously disregard the extent of the injuries she sustained but yet to consider her status at the time of the incident. Neither issue should be factored into the analysis of the Court or an officer.

The Ninth Circuit correctly found that the use of the police dog in this case was not the unconstitutional use of force. Rather than engaging in the 20/20 hindsight for which Petitioner advocates, the Ninth Circuit viewed the facts that

were known to the officers as the time Sgt. Nulton decided to use Bak to locate what the officers believed was a burglary suspect lying in wait.

The ability to use a police dog to locate and apprehend a suspect is what makes police dogs a tool rather than a weapon. *Amici* USPCA and IMLA stated that police dogs are uniquely qualified to locate and apprehend a suspect because a dog's sense of smell is at least 44 times greater than that of a human being, dogs can get into confined areas, and dogs can locate through scents coming out of those confined areas. Resp. App. A at A-8.

The officers in this case knew they had responded to the scene within one to three minutes of being dispatched, they had not seen anyone fleeing the scene, there was a door propped open on the second floor, Sgt. Nulton had given two or three warnings that he would send in a dog if the suspect did not surrender, and he had not received any response. The officers believed that there was a burglary in progress and that the burglar was lying in wait. Sgt. Nulton then followed within feet of Bak so that he would be in a position to exercise control over Bak should he locate a person in the suite. As a result, Sgt. Nulton was able to minimize the contact between Bak and the petitioner to two seconds. It was based on these facts that the Ninth Circuit concluded that the use of force was moderate in nature.

Petitioner, on the other hand, asks this Court to consider that Petitioner was "innocent" and

unarmed even though the officers did not and could not have known this. This type of analysis was explicitly prohibited by *Graham v. Connor*. It is the core function of the police to investigate crimes and apprehend criminal suspects. Officers cannot competently fulfill this role while worrying about being second guessed. Simply stated, Petitioner puts the cart before the horse. This Court should deny review because the Ninth Circuit correctly analyzed this case without using 20/20 hindsight.

IV. The Ninth Circuit Correctly Focused on the Manner in which the Officer Used the Police Dog.

Petitioner incorrectly and inaccurately describes the Ninth Circuit's analysis and decision in this case. Rather than using a results-based analysis, the Ninth Circuit properly focused on the manner in which the canine handler used the police dog to determine the risk of injury. Such an analysis complies with this Court's prior rulings indicating that the manner in which a seizure is made is relevant to determining the extent of an intrusion on a person's Fourth Amendment rights. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Cty. Of Los Angeles, Calif. v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 1546 (2017). As such, it is necessary to analyze how the force is used.

Petitioner points to *Scott v. Harris*, 550 U.S. 372 (2007) in an effort to frame the use of a police dog as the potential use of deadly force and to persuade this Court that the Ninth Circuit failed to consider the risk involved in using a police dog in the

circumstances facing the officers in this case. There is no evidence that the use of a police dog is deadly force. Indeed, despite the prevalent use of police dogs claimed by Petitioner, there appears to be only one reported case in which a police dog was deemed the cause of death – *Robinette v. Barnes*, 854 F.2d 909 (1988). Additionally, the Ninth Circuit considered the risk of the force used when it evaluated the manner in which Sgt. Nulton utilized Bak to search for and apprehend the burglary suspect. This analysis complied with this Court's prior rulings.

As noted by the Ninth Circuit, Sgt. Nulton did not allow Bak to roam the suite to search for suspects. Instead, Sgt. Nulton walked only feet behind Bak and monitored Bak's search. Bak found Ms. Lowry with Sgt. Nulton only feet away. Sgt. Nulton saw a lump on a sofa that appeared to be a person at the same time that he saw Bak moving in the air toward Ms. Lowry. Sgt. Nulton immediately called Bak off. Bak landed on Ms. Lowry and she sustained a small laceration to her upper lip. It was this measured use of Bak that minimized the injury and the risk in this case.

Unlike a traditional weapon, such as a gun, taser, or baton, a police dog can be recalled if a handler is in a position to make that happen. As demonstrated by the facts in this case, Sgt. Nulton was able to call Bak off very quickly because he remained so close to Bak during the search. As a result, the interaction between Bak and the petitioner was limited to two seconds.

V. The Ninth Circuit Correctly Found that the Officers Reasonably Believed They were Searching for a Burglar that Posed an Immediate Threat to Their Safety.

Petitioner claims the Ninth Circuit's decision always allows a presumption that a suspect poses an immediate threat of harm when officers are investigating a burglary. The Ninth Circuit only ruled that, under the circumstances presented, the officers reasonably concluded that the burglary suspect could pose an immediate threat to their safety.

Petitioner argues that the facts in this case are similar to those presented in *Tennessee v. Garner*, 471 U.S. 1 (1985) – another deadly force case – and, therefore, the officers in this case were not entitled to use the police dog to search for the burglary suspect. Petitioner takes issue with the court of appeals finding that the officers reasonably presumed the suspect in the circumstances they faced posed an immediate threat to their safety. Petitioner is wrong.

This matter's similarity to *Garner* is limited to officers responding to a nighttime burglary. The case at bar does not involve the use of deadly force. It also does not involve using force without the ability to recall that force once it was deployed. Rather, the case at bar involves the measured use of a police dog with an officer in a position to limit the potential for injury.

Additionally, in *Garner*, the officer saw the suspect and was “reasonably sure” the suspect was unarmed. The officer shot and killed the suspect when the suspect attempted to flee anyway. Here, the officers did not have the opportunity to interact with, or the ability to see, the burglary suspect. The officers were dispatched due to a burglar alarm, they arrived quickly, they found a dark commercial building with a door propped open, and no one responded to the canine warnings. *Lowry*, 858 F.3d at 1258. The court indicated that it was reasonable for the officers to conclude that a suspect was hiding and was potentially dangerous because the suspect did not respond to the warnings. *Id.*

The SDPD officers who responded to this burglar alarm were tasked with investigating a potentially violent and aggravated felony involving a dark office building at night. This Court and the State of California classify burglary as a violent and aggravated felony. *See Chambers v. U.S.*, 555 U.S. 122, 124-25 (2009) overruled on other grounds by *Johnson v. U.S.*, 135 S. Ct. 2551 (2015); *see also Sykes v. United States*, 564 U.S. 1 (2011), overruled on other grounds by *Johnson v. U.S.*, 135 S. Ct. 2551 (2015) [recognizing that burglary is dangerous because it can end in a confrontation leading to violence]; *see also United States v. Alcala-Sanchez*, 666 F.3d 571, 573 (9th Cir. 2012) [noting that burglary is an aggravated felony pursuant to California Penal Code § 450].

Petitioner wants this Court to adopt a rule that officers cannot use any level of force when

investigating a potentially dangerous crime unless those officers have first seen the suspect and determine the suspect is an immediate threat to their safety. However, this ignores officer safety and the longstanding rule that officers are entitled to use reasonable force to effectuate an arrest. *Graham v. Connor*, 490 U.S. at 396 citing *Terry v. Ohio*, 392 U.S. 1, 22-27 (1968).

This Court should deny review of the Ninth Circuit's ruling because it correctly allows officers to reasonably presume, under the circumstances presented, that a suspect is an immediate threat of harm and to protect themselves accordingly.

CONCLUSION

For the foregoing reasons, Respondent City of San Diego respectfully requests that this Court deny the Petition.

**RESPECTFULLY SUBMITTED this 1st day
of February 2018.**

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