No. ________

In The
Supreme Court of the United States

CESAR VIZCARRA; JORGE BRAMBILA,

Petitioners,

vs.

MONICA ORTIZ, individually and as co-successor in interest to decedent Christian Pena; NORMA PENA, individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Cesar Vizcarra and Jorge Brambila, City of Rialto police officers, responded to a domestic dispute call from respondent Monica Ortiz. As captured on Vizcarra's body camera video, when the officers entered the apartment Christian Pena was highly agitated and confrontational, challenging the officers to "come on" and clenching his fists. As Pena remained combative and ignored commands to get down on the ground, Vizcarra fired his Taser, striking Pena, who fell to the floor, but continued to thrash about. A second and third Taser activation failed to disable Pena, who within a fraction of a second, grabbed a knife that had fallen from his pocket, and scooted towards Vizcarra, closing to within five feet, when Vizcarra shot him with his pistol. Pena initially fell back away from Vizcarra, only to roll quickly back towards the officer, who fired a second, ultimately fatal shot.

The Ninth Circuit, Judge Fernandez dissenting, dismissed the officers' appeal of the denial of summary judgment on qualified immunity for lack of jurisdiction under *Johnson v. Jones*, 515 U.S. 304 (1995).

The questions presented by this petition are:

1. Does *Johnson v. Jones*, 515 U.S. 304 (1995) foreclose interlocutory appeal of an order denying summary judgment on qualified immunity, where the underlying evidentiary fact is undisputed, but where different inferences may be drawn from

QUESTIONS PRESENTED—Continued

the particular fact, or do such disputes concern evaluation of the materiality of a particular fact, which, under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) is a legal issue, and therefore subject to interlocutory appeal under *Mitchell v. Forsyth*, 472 U.S. 511 (1985)?

2. Did the Ninth Circuit improperly depart from this Court's decision in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam) and numerous other cases by denying qualified immunity notwithstanding the absence of clearly established law imposing liability under circumstances closely analogous to those confronting the officers?

3. Did the Ninth Circuit improperly depart from this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014) in denying qualified immunity based upon the absence of a constitutional violation given that the undisputed facts established that Petitioners acted reasonably in responding to the threat of an armed suspect?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- Cesar Vizcarra and Jorge Brambila individuals, defendants and appellants below, petitioners here.
- Monica Ortiz, an individual, and as co-successor in interest to decedent Christian Pena, and Norma Pena, an individual, appellees below and respondents here.
- The City of Rialto is a party in the district court proceedings, but was not a party to the appeal which gives rise to this petition.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- United States District Court, Central District of California, Eastern Division, Case No. 5:16-cv-01384-JGB-KS, *Monica Ortiz individually, and as co-successor in interest to Decedent Christian Pena, Norma Pena, individually v. Cesar Vizcarra, Jorge Brambila, City of Rialto Police Department*.
- United States Court of Appeals for the Ninth Circuit, Case No. 18-55107, *Monica Ortiz individually, and as co-successor in interest to Decedent Christian Pena, Norma Pena, individually v. Cesar Vizcarra, Jorge Brambila, City of Rialto Police Department*.

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The Ninth Circuit's memorandum opinion, the subject of this petition, is not reported and is reproduced in the Appendix hereto ("Pet. App.") at pages 1-4. The Ninth Circuit's order denying rehearing, filed August 12, 2019 is reproduced in the Appendix at pages 40-41. The district court's decision denying petitioners' motion for summary judgment based on qualified immunity is not reported and is reproduced in the Appendix at pages 5-39.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit entered its judgment and memorandum opinion on July 17, 2019. (Pet. App. 1.) Petitioners timely filed a petition for panel and en banc rehearing, and on August 12, 2019, the court denied the petition. (Pet. App. 40-41.)

This Court has jurisdiction to review the Ninth Circuit's July 17, 2019 decision on writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents 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.

Respondents allege petitioners violated the rights secured by the United States Constitution's Fourth Amendment, which provides:

> 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.

STATEMENT OF THE CASE

A. The Underlying Incident.

On October 2, 2015, Petitioners, City of Rialto police officers Cesar Vizcarra and Jorge Brambila received a call of domestic disturbance. (Pet. App. 8.) The officers made contact with Respondent Ortiz, who stated that her husband, Christian Pena, had hit her multiple times, and the officers accompanied Ortiz to her apartment to obtain Pena's side of the dispute. (2ER000115-116.)[1] The front door of the apartment was partially open, Ortiz opened it and remained behind as the officers entered. (2ER000116.)

The following events are depicted in the video from Vizcarra's body camera.[2]

Vizcarra stepped into the apartment and both officers became concerned when they observed that the shirtless and shaved head Pena was covered in gang style tattoos. (2ER000129; 2ER000136-138.) The officers' concerns were heightened when the defiant Pena kept his hands in his pockets and, having not been patted down for weapons, was moving around the front room of the apartment. (2ER000122.) Pena's erratic behavior combined with a white crusty substance around

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[1] "ER" denotes the Excerpts of Record filed in the Ninth Circuit.

[2] Ninth Circuit Dkt. Entry 30 (Real time and slow motion video lodged with court). The video can also be viewed at https://www.dropbox.com/s/4bkguuw5bt0bc12/EXHIBIT%202%20-%20REAL%20TIME.avi?dl=0 https://www.dropbox.com/s/kz61jqoybrlon92/EXHIBIT%202%20-%20SLOW-MO.avi?dl=0.

the corners of his mouth increased the officers' concern that Pena was likely under the influence of methamphetamine. (2ER000127; 2ER000132-134.)[3] Pena challenged the officers to "come on" as he clenched his fists and refused to comply with the officers' orders to "get back" and "show your hands." (Pet. App. 9.) Vizcarra initially drew his gun but then put his gun away, pulling out his Taser. (*Id.*)

Vizcarra deployed his Taser, striking Pena. (*Id.*) Pena stiffened, falling to the ground, but continued moving. (*Id.*) Brambila pushed down on Pena's back while commanding him to get on his back. (*Id.*)

Vizcarra then activated the Taser a second time, and again, Pena, was not immobilized, but continued to move on the ground. (*Id.*) A knife fell from Pena's pocket onto the floor. (*Id.*) Vizcarra activated the Taser a third time and again, Pena was not immobilized. (*Id.*) Pena was tased for a total of 15 seconds, and the time elapsed between the first Taser cycle beginning and the third Taser cycle ending was 21 seconds, and still he was not immobilized. (*Id.*)

Vizcarra then transitioned to his gun. (Pet. App. 10.) Pena, still on the floor, scooted towards Vizcarra. (*Id.*) Vizcarra stepped back onto the threshold of the door, but could retreat no further, given the staircase behind him, and Ortiz's presence. (*Id.*; 2ER000101.) Pena grasped the knife and appeared to raise it, with the blade facing down, thrusting towards Vizcarra,

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[3] Subsequent toxicology results confirmed that Pena had 0.11 mg/L of methamphetamine in his system. (2ER000105.)

who was standing less than five feet away. (Pet. App. 10, 42; Real Time Video:44; Slow Motion Video:127.) Vizcarra fired one shot, which struck Pena in the left shoulder. (*Id.*) After the first shot, Pena fell back, his arms and legs flailing, and then immediately moved back towards Vizcarra. (Pet. App. 10; Real Time Video:46.) Vizcarra fired a second shot, almost immediately shouting, "He's got the knife." (*Id.*) Although the second shot struck Pena in the abdomen, and was ultimately fatal, he initially continued to move towards Vizcarra and thrash about. (*Id.*)

B. The District Court Denies Petitioners' Motion For Summary Judgment Based On Qualified Immunity.

Respondents Monica Ortiz, Pena's surviving spouse, and Norma Pena, Pena's mother, filed suit against Vizcarra, Brambila and the City of Rialto, ultimately asserting (1) a § 1983 claim for unlawful seizure in violation of the Fourth Amendment, (2) a § 1983 claim for excessive force in violation of the Fourth Amendment, (3) a § 1983 claim for wrongful death, (4) a § 1983 claim for violation of the Fourteenth Amendment due process clause for interference in a familial relationship, and (5) a § 1983 claim against the City of Rialto for an unconstitutional custom, policy or practice, as well as various state law claims. (Pet. App. 6.)

Petitioners moved for summary judgment, asserting among other grounds that the Fourth and Fourteenth Amendment claims were barred by qualified

immunity. (Pet. App. 14-24.) The officers argued they were entitled to qualified immunity both because the undisputed evidence established that the use of force was objectively reasonable in light of Pena's repeated movement towards Vizcarra while armed with a knife and hence no constitutional violation had occurred, and that in any event, there was no clearly established law that would have put them on notice that use of force under these emergency circumstances would be unwarranted. (*Id.*)

The district court denied the motion, holding that there were triable issues of fact as to whether Vizcarra reasonably perceived a serious threat of harm from Pena sufficient to warrant the use of deadly force. (Pet. App. 14-21.) As to the first shot, the court acknowledged that it was undisputed that Pena was holding a knife and had scooted towards Vizcarra, closing to within five feet of the officer at the time the shot was fired. (Pet. App. 15.) However, the court concluded that a jury could find that Pena's grabbing the knife and moving towards Vizcarra as if to attack, was the result of the effects of the Taser. (Pet. App. 19.)

With respect to the second shot, the court found that a jury could conclude that although Pena plainly moved towards Vizcarra and might appear to be grabbing for the knife, his movement was the result of effects stemming from the first shot, and not an attack on Vizcarra. (Pet. App. 17.) The court also observed that a jury could find the force unreasonable in light of expert testimony submitted by plaintiffs to the effect that Vizcarra should have utilized less intrusive

means at his disposal, such as retreating, shouting warnings or deploying the Taser again (Pet. App. 19-20)—although acknowledging that Vizcarra had already retreated to the threshold, that Pena had already been tasered three times without incapacitating him, and the speed of Pena's movements made a warning somewhat impractical. (Pet. App. 10, 16, 19.)

The district court also found that the law was clearly established, that use of force against a suspect who merely had a knife and presented no immediate threat to an officer or others, was improper. (Pet. App. 21-23.)

C. The Ninth Circuit Dismisses The Appeal For Lack Of Jurisdiction.

Following briefing and argument, on July 17, 2019, the Ninth Circuit issued a memorandum decision dismissing the appeal for lack of jurisdiction. (Pet. App. 1-4.) The majority held that there was a triable issue of fact as to whether the use of force was reasonable, which barred interlocutory review of the denial of qualified immunity under *Johnson v. Jones*, 515 U.S. 304, 313 (1995). (Pet. App. 2-3.) Judge Fernandez dissented, noting:

> [T]he video recording of the incident shows beyond peradventure that in a period no longer than forty seconds an officer tried to subdue a belligerent man in close quarters while backing away from him and tasing him three times. Still, the man managed to arm himself

> with a knife and come even closer to the officer, whereupon the officer shot him twice in rapid succession. Given the undeniable and indisputable facts, even if there was a Fourth Amendment violation, I do not believe that this could reasonably be seen as "an obvious case in which any competent officer would have known that shooting [the man] . . . would violate the Fourth Amendment." *Kisela v. Hughes*, ___ U.S. ___, ___, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) (per curiam); *see also City of Escondido v. Emmons*, ___ U.S. ___, ___, 139 S. Ct. 500, 504, 202 L. Ed. 2d 455 (2019) (per curiam). Thus, because the officers must be entitled to qualified immunity, I respectfully dissent.

(Pet. App. 4.)

The majority discounted the significance of the video, asserting that the dissent "recites the inferences its author draws from the video," but "unlike in *Scott v. Harris*, 550 U.S. 372, 380-81 (2007), Ortiz's version of the facts is neither 'blatantly contradicted' nor 'utterly discredited' by video evidence." (Pet. App. 3 n.2.)

Petitioners filed a petition for panel and en banc rehearing, which was denied on August 12, 2019. (Pet. App. 41.)

REASONS WHY CERTIORARI IS WARRANTED

This Court has repeatedly recognized the importance of qualified immunity in assuring that law enforcement officers may perform their duty to protect public safety, without fear of entanglement in litigation and potential liability, and make decisions in tense, rapidly evolving circumstances. Most recently, in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam) and *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500 (2019) (per curiam), the Court reaffirmed the special importance of qualified immunity in use of force cases which, by their nature, turn on the particular facts in a given case.

The Ninth Circuit's decision here undermines these important principles. The panel majority side stepped its obligation to analyze petitioners' qualified immunity claim based on an erroneous interpretation of *Johnson v. Jones*, 515 U.S. 304 (1995). The panel majority decision joins other courts in concluding that even if a particular evidentiary fact is undisputed—here the video—if conflicting inferences may be drawn from the fact, *Johnson* forecloses appellate review. To be sure, other circuits have properly interpreted *Johnson* as permitting review of such orders—a deep and ongoing circuit split that in and of itself justifies review—but the rule applied by the Ninth Circuit here and other courts, eviscerates interlocutory review of qualified immunity in use of force cases and undermines the very purpose of the immunity.

As this Court noted in *Plumhoff v. Rickard*, 572 U.S. 765 (2014), when an evidentiary fact is essentially undisputed, the question whether there is a genuine issue of material fact as to the reasonable use of force in evaluating the merits of a Fourth Amendment claim is one for the appellate court, notwithstanding a district court's determination that a jury might ultimately find the force to be excessive. The question in such cases is whether the officer could reasonably perceive a threat necessitating the use of the force at issue. In the context of use of force, there are many circumstances in which an officer may confront a situation where various inferences about a suspect's conduct can be drawn, but an officer does not need ultimately to be correct in his or her assessment of the situation, only reasonable.

The mischief of the Ninth Circuit's approach is underscored by the majority's refusal to address petitioners' qualified immunity arguments on the pretext of a material factual dispute. Although petitioners submit that, as Judge Fernandez observed, the body camera video supports their contention that Pena moved towards Vizcarra brandishing a knife in a threatening manner so as to justify the use of deadly force, even if it were somehow inconclusive, they would still be entitled to qualified immunity. Petitioners were confronted with circumstances requiring the very sort of split second decision at issue in *Kisela*, and if anything, Pena posed a far more imminent threat, and acted in a far more aggressive manner than the suspect in *Kisela*, where the Court found that the officer's conduct did not

violate clearly established law. Even if petitioners were mistaken about whether Pena was actually attacking Vizcarra, they would be entitled to qualified immunity, which encompasses reasonable mistakes of fact, as well as mistakes of law, *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), and indeed the Fourth Amendment does not require officers to be correct in their assessments, only reasonable, *Graham v. Connor*, 490 U.S. 386, 397 (1989).

The panel majority's unduly crabbed view of interlocutory jurisdiction in qualified immunity appeals will have a particularly pernicious impact on cases, like this one, involving video evidence of the use of force. Given cell phones, the use of dashboard cameras in both civilian and law enforcement vehicles, and the widespread adoption of body cameras for law enforcement personnel, video evidence is increasingly used in excessive force cases. The basic evidentiary fact of such video evidence, i.e., when and where a recording was made, is generally undisputed. If a dispute about the inferences that can be drawn from otherwise undisputed video evidence is sufficient to defeat appellate jurisdiction, the net result is insulating such orders denying qualified immunity from appellate review, which is contrary to this Court's decisions in *Plumhoff* and *Scott v. Harris*, 550 U.S. 372 (2007).

The Court's intervention is necessary to assure compliance with this Court's decisions in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Plumhoff*, and *Scott* concerning interlocutory review of the denial of qualified immunity and proper application of the doctrine to

shield officers from entanglement in litigation when they have acted reasonably in light of existing law. The petition should be granted.

I. REVIEW IS NECESSARY TO ASSURE MEANINGFUL INTERLOCUTORY REVIEW OF ORDERS DENYING QUALIFIED IMMUNITY ON SUMMARY JUDGMENT AND RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS CONCERNING THE APPEALABILITY OF SUCH ORDERS.

A. This Court Has Repeatedly Recognized The Importance Of Qualified Immunity To Assure That Officers Are Not Subjected To The Burden Of Litigation And Threat Of Liability When Making Split Second Decisions Under Tense, Rapidly Evolving Circumstances In The Course Of Protecting The Public.

An officer is entitled to qualified immunity when his or her conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam). While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id*. In short, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id*.

This Court has recognized that qualified immunity is important to society as a whole. *City and County of San Francisco v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1774 n.3 (2015); *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017). It assures that officers, when confronted with uncertain circumstances, may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' ").

As the Court observed in *Harlow*, failure to apply qualified immunity inflicts "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " 457 U.S. at 814. Those concerns are magnified in the context of use of deadly force, where by definition, an officer is confronted by the imminent threat of serious harm to himself, or to others, and where hesitation could have deadly consequences.

Indeed, in the last three terms, this Court has issued per curiam reversals of lower court denials of qualified immunity in deadly force cases. In doing so, the Court emphasized that such cases, which are

necessarily highly fact-dependent and concern tense, hectic circumstances, require courts to closely analyze existing case law to determine whether the law was clearly established within the particular circumstances confronted by the officers in question.

In *White v. Pauly*, the Court held that an officer who arrived belatedly to the scene of an evolving firefight could reasonably rely on the actions of other officers in determining it was necessary to shoot a suspect who fired at the officers. 137 S. Ct. at 550-51. The Court observed that the highly unusual circumstances of the case should have alerted the lower court to the fact that the law governing such situations was not clearly established, and the officer was, indeed, entitled to qualified immunity. *Id.* at 552.

In *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam), the Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer who received a 911 call reporting a woman hacking a tree with a kitchen knife and acting erratically. *Id.* at 1151. Shortly after arriving at the scene, the officer saw a woman standing in a driveway. The woman, separated from the street and the officer by a chain-link fence, was soon approached by another woman, who was carrying a kitchen knife and matched the description that had been related to the officer via the 911 caller. *Id.* With the knife-wielding woman only six feet away from what appeared to be her potential victim, and separated by the chain-link fence, which impaired the potential victim's ability to flee and the officer's ability to physically intervene, when the

woman refused commands to drop the knife, the officer fired and wounded her. *Id.*

In reversing the Ninth Circuit, the Court underscored the importance of applying qualified immunity to use of force cases, again emphasizing the highly fact-specific nature of such claims, and the relevance of the exceedingly narrow window of time in which officers usually have to make such life or death decisions. *Id.* at 1153 (observing that "Kisela had mere seconds to assess the potential danger to Chadwick"). As the Court noted:

> 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.

Id. at 1153 (citing *Mullenix*, 136 S. Ct. at 309, 312).

In *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500 (2019) (per curiam), the Court again reversed the denial of qualified immunity to an officer where the Ninth Circuit panel had defined the right at issue at too high a level of generality, and had failed to identify any case involving similar facts that would put an officer on notice that his or her conduct could give rise to liability. In *Emmons*, an officer sought entry into a residence to conduct a welfare check for reported

domestic abuse. *Id.* at 501. The plaintiff exited the residence, ignoring the officer's command not to close the door, and attempted to run past the officer, who took him to the ground. *Id*. at 502.

In denying qualified immunity, the Ninth Circuit found an issue of fact as to whether the use of force was reasonable and simply stated: "'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).'" *Emmons*, 139 S. Ct. at 502. This Court noted that such a generalized statement of the law was improper, this was a case involving active resistance to an officer and that "the Ninth Circuit's *Gravelet-Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case." *Id*. at 503-04.

The Court emphasized that this was "a problem under our precedents":

> "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body

> of relevant case law is usually necessary to clearly establish the answer. . . ." [*District of Columbia v.*] *Wesby*, 583 U.S. at ___, 138 S. Ct. [577] at 581 [(2018)] (internal quotation marks omitted).

Emmons, 139 S. Ct. at 504.

While this Court has repeatedly recognized the importance of qualified immunity, particularly in the context of use of force cases, nonetheless, the lower federal courts—particularly the Ninth Circuit—have been somewhat recalcitrant in following this Court's dictates concerning the need to apply the doctrine with rigor, particularly at the pre-trial stage, thus repeatedly requiring this Court's intervention. *White*, 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases).

The same concerns for vindicating the important purposes of qualified immunity, which have led the Court to repeatedly grant review to reaffirm its jurisprudence concerning the need to define clearly established law with a high degree of specificity, again require this Court's intervention in this case. When interlocutory review of the denial of qualified immunity is not available, the "social costs" outlined in *Harlow* fall disproportionately on officers. It is necessary for the Court to grant review to repudiate a limitation on interlocutory jurisdiction that undermines the principles of qualified immunity and allows an appellate court to avoid the substantive inquiry entirely.

B. The Rule Adopted By The Panel Majority Here And Other Circuit Courts Which Bars Interlocutory Review Of The Denial Of Summary Judgment On Qualified Immunity Based On Conflicting Inferences From Otherwise Undisputed Evidence Is Contrary To The Decisions Of This Court And Undermines Qualified Immunity.

In dismissing petitioners' appeal for lack of jurisdiction, the Ninth Circuit panel majority concluded that there was a material issue of fact as to the reasonableness of the use of force which foreclosed appellate review under *Johnson v. Jones*, 515 U.S. 304 (1995), and chided dissenting Judge Fernandez for drawing inferences from the video only in favor of petitioners. (Pet. App. 2-3 & n.2.) In so holding, the majority sidestepped its obligation to assess the merits of petitioners' qualified immunity defense.

The narrow view of appellate jurisdiction applied by the panel majority here, and, as we discuss below, adopted by other circuit courts, is contrary to the decisions of this Court and undermines the important protections of qualified immunity.

In *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), the Court held that where a district court denies a motion for summary judgment on qualified immunity based upon its determination of what constituted clearly established law, the order is immediately appealable. The Court reasoned that such an order fell within the collateral order doctrine of *Cohen v. Beneficial Industrial*

Loan Corp., 337 U.S. 541 (1949). *Id.* at 527. This is because determination of the legal question, as to whether the law was clearly established, was independent of the merits of the underlying claim. *Id.* at 527-28. Interlocutory appellate review is also required because qualified immunity is an immunity not simply from liability, but from participation in litigation at all. Hence, the benefits of that protection would be lost if an officer was required to undergo a full trial before being able to obtain review of a district court's failure to grant immunity. *Id.* at 525-27.

In *Johnson v. Jones*, the plaintiff asserted that various defendants had either unlawfully beat him or failed to stop other officers from doing so. 515 U.S. at 307. The officers moved for summary judgment based on qualified immunity, arguing that there was no evidence they had participated in the beating. *Id.* at 307-08. The district court denied summary judgment, finding that there was evidence that defendants were in or near the room where the beating occurred. *Id.* at 308. The defendants appealed and the appellate court dismissed for lack of jurisdiction. *Id.*

This Court affirmed, noting that *Mitchell* held that an order denying summary judgment that was based upon the district court's application of law, i.e., assessing whether or not it was clearly established for purposes of qualified immunity, was subject to immediate review. *Johnson*, 515 U.S. 304. In *Johnson* however, the defendants were not contesting whether the district court properly applied the law, but rather, whether the district court was correct in assessing that

there was sufficient evidence to support plaintiff's account of what transpired. As the Court observed, the question whether a factual dispute is "genuine" is the sort of task performed by trial courts, not appellate courts. *Id.* at 313, 316.

In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court reaffirmed the broad scope of appellate review afforded by *Mitchell*. There, the district court had denied defendants' summary judgment motion on qualified immunity, based on its determination that there was a genuine issue of material fact, but without specifying the particular conduct that was subject to the factual dispute. *Id.* at 312-13. The plaintiff argued that the order was not appealable under *Johnson*, but this Court rejected the contention, noting that "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, *see* Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable." *Id.* The Court emphasized that "*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." *Id*. at 313. Instead, "summary judgment determinations *are* appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity" such as whether the law was clearly established with respect to the conduct at issue. *Id.*

Thus, the Court held that the order was appealable, and that in light of the district court's failure to

specify precisely what conduct was disputed, the task for the appellate court was "'to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed'" and then apply the law to those facts. *Id.* (citing *Johnson*, 515 U.S. at 319).

In *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014), this Court reaffirmed the principle that an appellate court is free to review a district court's determination of the legal significance of evidentiary facts, i.e., whether there is a material dispute, that precludes summary judgment based on qualified immunity. In *Scott*, the plaintiff, who was fleeing police in a vehicle, was severely injured when an officer terminated the high-speed pursuit by striking plaintiff's vehicle with his car. 550 U.S. at 374-75. The plaintiff filed suit, alleging excessive force, and the district court denied the officer's motion for summary judgment, finding that there was a material issue of fact whether the force was excessive, and that the law governing use of force to terminate pursuits was clearly established. *Id.* at 375-76. The Eleventh Circuit affirmed. *Id.* at 376.

This Court reversed, finding that the force employed was reasonable as a matter of law. 550 U.S. at 376, 381-86. The Court emphasized that there was no dispute concerning the evidentiary facts of the case, most significantly, because there was a video tape of the incident. *Id.* at 378 ("There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts

differs from what actually happened."). As a result, the Court held that despite the district court's conclusion that there was a material issue of fact based on plaintiff's characterization of the evidence, as a matter of law, no reasonable jury could find the force excessive in light of the undisputed evidence in the form of the video:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life.

Id. at 380.

The Court reaffirmed this principle in *Plumhoff*. There too, officers terminated a high-speed pursuit of fleeing suspects through the use of force—eventually firing several rounds after the suspect's vehicle had collided with several police vehicles. 572 U.S. at 769-70. The district court denied the officers' motion for summary judgment on qualified immunity. The court found a triable issue of fact as to whether the force was excessive and stated that the law was clearly established with respect to the use of such force. *Id*. at 770. A Sixth Circuit motions panel initially dismissed the appeal under *Johnson* but subsequently deferred decision on the issue to a merits panel. *Id.* The panel

determined that jurisdiction was proper under *Scott*, but affirmed the district court's order. *Id*. at 770-71.

This Court reversed. 572 U.S. at 768. The Court held that *Johnson* did not foreclose appellate review because there was no dispute about what happened, i.e., what the officers did or the circumstances prompting the use of force:

> The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.

Id. at 773.

As a result, the Court addressed the merits of the qualified immunity claim and concluded that the use of force was reasonable, that in any event, the law was not clearly established, and hence, the officers were entitled to qualified immunity. *Id.* at 775-81.

This Court's decisions in *Mitchell*, *Johnson*, *Behrens*, *Scott*, and *Plumhoff* recognize that the question of whether a factual dispute is material is necessarily

a question of law, and therefore appropriate for appellate review. This is consistent with the Court's observation in *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986), that under Federal Rule of Civil Procedure 56, "the materiality determination rests on the substantive law," and "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id*. at 248. The court noted that "materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes." *Id*.

The rule reflected in the Ninth Circuit's decision here which allows appellate courts to avoid their obligation to assess the materiality of any factual dispute in the context of a motion for summary judgment upon simple declaration that differing inferences may be drawn from otherwise undisputed facts, cannot be reconciled with the decisions of this Court. It distorts the law governing review of motions for summary judgment and undermines application of qualified immunity by foreclosing interlocutory review. As this case illustrates, the Ninth Circuit's narrow view of appellate jurisdiction has a particularly pernicious impact on the growing number of qualified immunity motions that turn on video evidence.

The Ninth Circuit majority dismissed the petitioners' appeal for lack of jurisdiction, finding that there were issues of fact as to whether the force employed was reasonable, and discounting the body camera video because Ortiz's version of the facts was not

"blatantly contradicted" nor "utterly discredited" by the video. (Pet. App. 3 n.2.) The court therefore did not determine whether, even assuming the video was equivocal about whether Pena was actually attacking Vizcarra with a knife, the petitioners might reasonably have perceived such a threat, even if they were ultimately incorrect. Similarly, the court did not address whether, under clearly established law, the officers would be on notice that their actions under such tense, rapidly evolving circumstances might give rise to liability. In sum, on the pretext of a factual dispute concerning inferences that could be drawn from otherwise undisputed evidence—after all, the video shows what it shows—the Ninth Circuit majority sidestepped its core obligation, as established by this Court's decisions, to undertake meaningful inquiry into defendants' entitlement to qualified immunity.

The ubiquity of cell phone, civilian and law enforcement dashboard cameras, and the increasing use of body cameras on police personnel, has made video evidence a prime component in motions for summary judgment concerning qualified immunity. The Ninth Circuit's decision here underscores the need for this Court to intervene at this time and provide clear guidelines for future cases. In addition, it is vital that the Court assure adherence to its precedents concerning the importance of qualified immunity and the obligation of appellate courts to conduct a rigorous inquiry as to the clearly established law, thus foreclosing the sort of end run around the Court's decisions that

underlies the Ninth Circuit's opinion here. The petition should be granted.

C. The Circuit Courts Are Divided On The Scope Of Interlocutory Jurisdiction Under *Johnson*.

The panel majority's decision here is also contrary to the decisions of other circuits which underscores the general confusion concerning the scope of interlocutory review following the Court's decision in *Johnson*.

In *Walton v. Powell*, 821 F.3d 1204 (10th Cir. 2016), the district court denied the defendant's motion for summary judgment based upon qualified immunity, finding that there was a triable issue of fact concerning whether plaintiff was improperly discharged in retaliation for conduct protected under the First Amendment. *Id.* at 1207. Writing for the court, then Circuit Judge Gorsuch noted that before the court could turn to the merits of any qualified immunity inquiry, it had to "work our way through the parties' procedural puzzles." *Id.* The plaintiff contended that this Court's decision in *Johnson v. Jones* barred the appellate court from assessing the district court's conclusion that a reasonable jury could find her dismissal was the result of her political affiliation. *Id.* Judge Gorsuch acknowledged, "[w]e can see how Ms. Walton might read *Johnson* as standing for so much," but rejected the contention. *Id*. at 1208.

In doing so, Judge Gorsuch noted the complexity that *Johnson* had brought to qualified immunity cases,

observing that "what was supposed to be a labor-saving exception has now invited new kinds of labor all its own." 821 F.3d at 1208. Judge Gorsuch concluded that *Johnson* does not foreclose an appellate court from assessing the legal significance of facts, whether such facts are identified by the district court, apparent from the record—including video evidence of the sort considered by this Court in *Scott* and *Plumhoff*—or conceded by the moving party on summary judgment. *Id.*

In sum, while "*Johnson* requires us to accept as true the facts the district court expressly held a reasonable jury could accept," it "does not *also* require this court to accept the district court's assessment that those facts suffice to create a triable question on any legal element essential to liability. That latter sort of question is precisely the sort of question *Johnson* preserves for our review." 821 F.3d at 1208. Were the rule "otherwise and we could not consider the sufficiency of the (given) facts to sustain a lawful verdict, a great many (most?) qualified immunity summary judgment appeals would be foreclosed and *Mitchell*'s promise of assuring a meaningful interlocutory opportunity to vindicate what is supposed to be an immunity from trial would be 'irretrievably lost.'" *Id.* at 1209 (citing *Plumhoff*, 572 U.S. at 772).

The Ninth Circuit's decision here cannot be reconciled with *Walton*. As then Judge Gorsuch noted in *Walton*, an appellate court is not divested of jurisdiction to decide a qualified immunity appeal simply upon a declaration that different inferences may be drawn from otherwise undisputed evidence—here the body

camera video. It is incumbent upon an appellate court to assess the legal significance of those facts, which here would require the court to determine, after reviewing the video, whether, for purposes of qualified immunity an officer, in light of existing law, might reasonably perceive that Pena posed a threat to Vizcarra, even if a jury might ultimately conclude that the officer was in error.

The Ninth Circuit is not the only circuit to abdicate its duty to conduct a rigorous qualified immunity analysis by simply declaring video evidence "inconclusive" and reading *Scott* and *Plumhoff* as rendering video evidence pertinent to the qualified immunity inquiry only where it conclusively shows that force employed was reasonable. In *Raines v. Counseling Associates, Inc.*, 883 F.3d 1071, 1073-75 (8th Cir. 2018), the Eighth Circuit dismissed a qualified immunity appeal for lack of jurisdiction based on the district court's determination that a video depicting the use of force was inconclusive, and that a jury might draw varying inferences as to whether the video showed the plaintiff attacking an officer with a knife, as opposed to simply moving towards the officer.

Although the Ninth and Eighth Circuits' conflict with the Tenth Circuit's decision in *Walton* would, in and of itself, warrant this Court's intervention, the need for this Court's guidance is underscored by an acknowledged general confusion among the appellate courts about the scope of interlocutory jurisdiction under *Johnson*. In his concurring opinion in *Romo v. Largen*, 723 F.3d 670 (6th Cir. 2013), Judge Sutton

agreed with the majority that resolution of the underlying qualified immunity argument was straightforward, but that "deciding how to apply *Johnson v. Jones*," and "deciding whether we have jurisdiction over this interlocutory appeal," was not. *Id*. at 677.

Departing from the majority in analysis, if not result, Judge Sutton concluded—consistent with the Tenth Circuit's approach in *Walton*—that under *Johnson* an appellate court had jurisdiction to decide a qualified immunity appeal where the district court denial was based upon the determination that the facts, while undisputed, might give rise to conflicting inferences. 723 F.3d at 678. This is because "[e]ven if the *genuine-issue* question somehow is purely factual in nature, the issue of *materiality* is not," and determining "[w]hich facts are material to a constitutional claim will always be a legal question" for an appellate court. *Id*. at 683. In his view, *Johnson* forecloses review only where there is a specific dispute about a particular evidentiary fact, what he termed "'I didn't do it' appeals," and does not bar review when there is simply a difference as to the inferences that may be drawn from undisputed evidence. *Id*. at 681. As Judge Sutton noted, "[i]t is difficult to think of qualified immunity appeals that do not involve inference drawing by the district courts, whether implied or explicit," and if that were sufficient to call appellate jurisdiction into question, the issue would be present in "many, if not most, qualified immunity appeals." *Id.* at 680-81.

As Judge Sutton observed, "nearly twenty years after *Johnson*, every circuit in the country has some

decisions that adopt my reading of it and some that adopt the majority's." 723 F.3d at 686. Adding to the chaos is the fact that even within the circuits there is little agreement on uniform application of *Johnson*, with panels of the same circuit applying the decision in vastly disparate manner. *Id.* (collecting cases). As Judge Sutton points out, in "every other circuit, save possibly for the D.C. and Federal Circuits, there are opinions supporting my view or otherwise involving appellate court review of inferences on the merits," yet, at the same time "there are also decisions in every other circuit, save for the D.C. and Federal Circuits, that suggest the opposite." *Id.*

This case presents the Court with the opportunity to provide clarity on application of *Johnson* and curtail the ongoing and open-ended litigation of jurisdictional questions in appeals from the denial of summary judgment based on qualified immunity. The case is perhaps the clearest example of a dispute about materiality—the underlying fact, i.e., the body camera video, is itself undisputed. The only question is the legal significance of what is depicted on the video, which is precisely the inquiry this Court conducted in *Scott* and *Plumhoff*.

Review is therefore necessary to vindicate the important principles underlying qualified immunity, and to provide guidance to the appellate courts on an issue that needlessly consumes judicial resources.

II. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH *KISELA V. HUGHES* AND OTHER DECISIONS REQUIRING COURTS TO GRANT QUALIFIED IMMUNITY WHERE THE LAW IS NOT CLEARLY ESTABLISHED OR THE UNDISPUTED EVIDENCE DEMONSTRATES THAT NO VIOLATION OCCURRED.

In improperly dismissing petitioners' appeal for lack of jurisdiction, the Ninth Circuit majority abdicated its responsibility to conduct a searching inquiry into whether petitioners were entitled to qualified immunity. Contrary to this Court's decisions in *Plumhoff v. Rickard* and *Scott v. Harris*, in particular, it failed to evaluate the body camera video with an eye towards determining whether under clearly established law no reasonable officer would believe use of force was reasonable in light of what the video depicted. Nor did it assess whether, as a basic matter, petitioners could reasonably perceive a threat justifying the use of force, thus precluding an excessive force claim on the merits. This failure to address either prong of qualified immunity, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), was flatly improper and departed from the controlling decisions of this Court.

A. No Clearly Established Law Put Petitioners On Notice That Their Use Of Force Might Violate The Fourth Amendment.

This Court has repeatedly admonished the lower appellate courts that other than in an obvious case,

"officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citing *Mullenix*, 136 S. Ct. at 309); *White v. Pauly*, 137 S. Ct. at 551. Here, as Judge Fernandez observed in his dissent, no existing precedent squarely governs the facts confronted by petitioners so as to put them on notice that their use of force might be deemed improper under the Fourth Amendment. Indeed, if anything, existing case law underscored that their use of force was proper.

Notwithstanding the panel majority's suggestion that the body camera video is somehow inconclusive, i.e., that inferences can be drawn from it to support respondents' claims, petitioners submit that it manifestly supports their account of the incident—that Pena moved towards Vizcarra with a knife in a threatening manner, or, at the very least, could reasonably be perceived as doing so. (Pet. App. 42; n.2, *supra*.) Pena, acting erratically, and armed with a knife, after being tased three times, was within five feet of Vizcarra, thus requiring a split-second reaction by Vizcarra and leaving him with little or no margin for error. No case law would have suggested that his use of force in these circumstances could be deemed unreasonable.

In fact, under this Court's decision in *Kisela*, it is plain that petitioners are entitled to qualified immunity. In *Kisela*, the Court found that the law was not clearly established so as to deprive an officer of qualified immunity for using deadly force against an individual who was standing six feet away from a potential victim, and holding a knife, but not actively

threatening the person. The Court emphasized that the officer was aware that the knife-wielding individual had been acting erratically earlier and had only seconds to react. 138 S. Ct. at 1153. That is precisely the situation here. If anything, Pena was much more actively threatening than the plaintiff in *Kisela*.

To the extent the decisions of this Court define clearly established law for purposes of qualified immunity, then *Kisela* mandates that petitioners be granted qualified immunity.

Even assuming one must look at Ninth Circuit law to determine whether the law was clearly established with respect to petitioners' use of force for purposes of qualified immunity (an issue the Court has left open),[4] no Ninth Circuit case would have put petitioners on notice that the use of force here would be improper.

The district court acknowledged that there was no case "completely analogous to the present facts" (Pet. App. 23), but cited *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017) as establishing that use of deadly force after a suspect no longer posed a threat, constitutes excessive force. (Pet. App. 21.) Yet, *Zion* cannot render the law "clearly established" with respect to petitioners' conduct because the decision was

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[4] The Court has noted that "[w]e have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity." *District of Columbia v. Wesby*, 583 U.S. ___, 138 S. Ct. 577, 591 n.8 (2018); *see also Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) (reserving question whether court of appeals decisions can be "a dispositive source of clearly established law").

issued almost two years after the underlying events here. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("Because 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.").

Moreover, *Zion* involved completely different facts than those present here. In *Zion*, the officer fired an initial volley of shots at a suspect who had just stabbed a fellow officer, and a second volley once the suspect was motionless on the ground, followed by a head stomp. The court noted that plaintiffs acknowledged that the first volley was reasonable but found that a jury could find the later application of force excessive. 874 F.3d at 1075-76.

The district court cited *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997) as holding that officers may not "shoot to kill unless, at minimum, the suspect presents an immediate threat to the officer or others." (Pet. App. 21.) However, as this Court observed in *Kisela*, *Harris* involved a unique situation—an F.B.I. sniper, consistent with the rules of engagement, shot an individual in the back from a substantial distance while the individual was not making any "threatening movement of any kind," but instead trying to return to a cabin. *Harris*, 126 F.3d at 1203; *Kisela*, 138 S. Ct. at 1154. Here, as in *Kisela*, the lower court's "reliance on *Harris* 'does not pass the straight-face test.' " 138 S. Ct. at 1154.

Davis v. City of Las Vegas, 478 F.3d 1048 (9th Cir. 2007) and *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) (Pet. App. 21-22) are similarly far afield. Both cases involve use of force against handcuffed and fully secured suspects.

The district court's invocation of *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011) and *George v. Morris*, 736 F.3d 829 (9th Cir. 2013) (Pet. App. 22) is also untenable. *Glenn* involved a suspect who was holding a knife to his own throat and was not attacking the officers or anyone else. 673 F.3d at 878-80. *George* involved a factual dispute whether a suspect, moving with a walker, manipulated a pistol and/or pointed it directly at deputies or whether he was even physically capable of wielding the pistol. 736 F.3d at 833, 837. Neither case is remotely similar to this one.

While *Hayes v. County of San Diego*, 736 F.3d 1223 (9th Cir. 2013) involved use of force against a suspect holding a knife, as the district court acknowledged, in *Hayes* the suspect was eight feet away from officers and raised his arms in compliance with the officers' commands, with the knife tip pointing downwards, and was shot when he took only one or two steps forward. (Pet. App. 22-23.) That is a far cry from the events here, where the video establishes that Pena rapidly scooted towards Vizcarra with a knife, giving the officer only a split second to respond.

Review of the video reveals that in fact Pena attacked Vizcarra with a knife, but even if the video is somehow inconclusive on whether Pena was *actually*

attacking Vizcarra with the knife, the key inquiry for purposes of qualified immunity is whether the officers could have *reasonably perceived* Pena as doing so and believed their conduct proper under existing law. That they might have been mistaken, i.e., that a jury could draw a different inference from the video, does not foreclose qualified immunity, as this Court has emphasized that qualified immunity embraces not just mistakes of law, but also mistakes of fact. *Pearson*, 555 U.S. at 231 ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' ").

As Judge Fernandez recognized, under both *Kisela* and *Emmons*, petitioners are plainly entitled to qualified immunity.

B. The Undisputed Evidence Established That Petitioners' Use Of Force Was Reasonable.

This Court has recognized that where the undisputed video evidence establishes that the force used was objectively reasonable, an officer is entitled to summary judgment. *Plumhoff*, 572 U.S. at 776-77; *Scott*, 550 U.S. at 386. That is the case here.

In *Graham v. Connor*, 490 U.S. 386 (1989), this Court held that claims for excessive force under the Fourth Amendment must be evaluated based upon the objective reasonableness of an officer's conduct. *Id*. at 395-97. That evaluation "requires careful attention of

the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396. "The operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 1546 (2017) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Moreover, the reasonableness of force must be evaluated based on the information officers possessed at the time. *Saucier v. Katz*, 533 U.S. 194, 207 (2001); *Mendez*, 137 S. Ct. at 1546-47; *Graham*, 490 U.S. at 397 ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . "). The Court has emphasized that the reasonableness of "a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making "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*, 490 U.S. at 396-97.

The circumstances petitioners confronted were certainly "tense, uncertain, and rapidly evolving." Review of the video establishes that Vizcarra fired at Pena in response to his movement towards Vizcarra

while brandishing a knife. Thus, despite the district court's conclusion that the video created an issue of fact as to whether the use of force was reasonable, and the Ninth Circuit's majority's statement that the video is not determinative as in *Plumhoff* and *Scott*, independent review of the video belies the characterizations of the lower courts.

Moreover, even assuming the officers were ultimately mistaken in their assessment that Pena was attacking Vizcarra, and his movements were somehow equivocal, that does not mean the force was excessive under the Fourth Amendment. *Graham* only requires that an officer act reasonably, not that he or she must ultimately be correct in their assessment in any given situation. The standard enunciated by the Court in *Graham* concerns probable cause to use force, and just as "[t]he Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises," so too "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." 490 U.S. at 396 (citations omitted). An officer need only believe that there is probable cause to believe the force is necessary, and as the Court has observed, "the probable-cause requirement: . . . '[D]oes not deal with hard certainties, but with probabilities.'" *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality); *Hill v. California*, 401 U.S. 797, 804 (1971) ("[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . . .").

Viewed through the prism of *Graham*, *Plumhoff*, and *Scott*, petitioners submit that the body camera video establishes that petitioners acted reasonably in perceiving a threat and that Vizcarra acted reasonably in using force to halt that threat. For this reason too, review is warranted.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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