No. 20-1006

IN THE
Supreme Court of the United States

CITY OF HAYWARD, A MUNICIPAL CORPORATION, ET AL.,
Petitioners,

v.

JESSIE LEE JETMORE STODDARD-NUNEZ,
Respondent.

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

PETITIONERS' REPLY BRIEF

Michael S. Lawson,
City Attorney
Joseph E. Brick,
Asst. City Attorney
CITY OF HAYWARD
777 B Street, 4th Fl.
Hayward, CA 94541
Tel: (510) 583-4450

Michael L. Fox*
Terrance J. Evans
C. Todd Norris
Sean Patterson
DUANE MORRIS LLP
One Market Plaza
Spear Tower, Ste. 2200
San Francisco, CA
94105
Tel: (415) 957-3000
mlfox@duanemorris.com

**Counsel of Record*

TABLE OF CONTENTS

Page

Table of Authorities ii

REPLY BRIEF 1

I. The Ninth Circuit Failed To Only Consider Facts Knowable To Officer Troche From His Perspective 3

II. There Is No Triable Issue Of A Material Fact 5

III. The Ninth Circuit's Disregard Of This Court's Precedent Concerning Qualified Immunity Warrants Review 8

IV. The Ninth Circuit Overlooked Undisputed Evidence Establishing There Was No Seizure Of The Victim-Passenger 10

V. CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Acosta v. City and County of San Francisco
83 F.3d 1143 (9th Cir. 1996) 1, 8-10

Beets v. County of Los Angeles
669 F.3d 1039 (9th Cir. 2012) 6

Brendlin v. California
551 U.S. 249 (2007) 10-11

Fagre v. Parks
2020 WL 1066977 (D. Me. 2020)..... 11

Fraser v. Goodale
342 F.3d 1032 (9th Cir. 2003) 3, 5

Graham v. Connor
490 U.S. 386 (1989) 3, 6

Heck v. Humphrey
512 U.S. 477 (1984) 6

Kingsley v. Hendrickson
576 U.S. 389 (2015) 4-5

Kisela v. Hughes
—— U.S. ——, 138 S. Ct. 1148 (2018) 8

Plumhoff v. Rickard
572 U.S. 765 (2014) 2, 10

TABLE OF AUTHORITIES—continued

Page

Salem v. U.S. Lines Co.
370 U.S. 31 (1962) 7

Torres v. Madrid
___ U.S. ___, 141 S.Ct. 989 (2021) 11

United States v. Johnson
875 F.3d 1265 (9th Cir. 2017) 7

United States v. Scheffer
523 U.S. 303 (1998) 7

Villanueva v. California
986 F3d. 1158 (9th Cir. 2021) 8, 12

White v. Pauly
___ U.S. ___, 137 S.Ct. 548 (2017) 3

Wilkinson v. Torres
610 F.3d 546 (9th Cir. 2010) 4, 9-11

OTHER AUTHORITIES

Fed. R. Evid. 602..... 6

Fed. R. Evid. 612..... 6

Fed. R. Evid. 803(5) 6

U.S. Sup. Ct. Rule 10(a)..... 2

U.S. Sup. Ct. Rule 10(c) 2

REPLY BRIEF

There are multiple splits in authority among federal courts (one already recognized by this Court) on two important federal questions: (1) Whether an oncoming vehicle that suddenly turns deprives a shooting officer of qualified immunity; and (2) Whether a victim-passenger of that fleeing vehicle is "seized" for purposes of the Fourth Amendment. This case presents a unique opportunity for this Court to exercise its supervisory role over resistant lower federal courts and provide needed guidance to resolve these conflicts.

Respondent's brief misses the mark by (1) applying the wrong standard to a qualified immunity defense; (2) relying on inadmissible evidence not pertinent to this Court's consideration of the petition; (3) denying the circuit splits recognized by this Court; and (4) repeating the error made by the Ninth Circuit when it defined "clearly established law" at high level of generality in order to bring this case within its holding in *Acosta v. City and County of San Francisco,* 83 F.3d 1143 (9th Cir. 1996).

By defining "clearly established law" at a high level of generality, the Ninth Circuit's decision not only runs afoul of this Court's precedent concerning qualified immunity, but also conflicts with its own precedent, which the Ninth Circuit below failed to distinguish or discuss. Neither Respondent nor the panel could identify a pre-incident case that would have put Officer Troche on notice of a "clearly established law," other than at an impermissibly high

level of generality. Every case relied on by Respondent is materially distinguishable.

In addition to an important qualified immunity question, this petition presents an important issue of a victim-passenger's standing to bring a § 1983 claim. This Court has recognized a circuit split on this issue *Plumhoff v. Rickard,* 572 U.S. 765, 778, n. 4 (2014), providing yet another compelling reason for review. U.S. Sup. Ct. Rule 10(a) & (c). Respondent ignores *Plumhoff's* recognition of the circuit split.

This question should not turn on whether an officer subsequently says he or she "shot at the car," instead of saying, he or she "shot at the driver inside the car," two statements that are not mutually exclusive, and both of which were made in this case. The present matter involves the split-second decision of an officer to fire at the intoxicated and non-compliant driver of a moving vehicle while perceiving the imminent danger of being run over. Officer Troche unintentionally shot a passenger in the vehicle while attempting to avert the threat by firing at the non-compliant driver. This Court should resolve the circuit split as to whether such a victim-passenger has standing to bring a § 1983 claim.

Contrary to Respondent's brief, there are no material fact issues that need to be resolved. In ruling otherwise, the Ninth Circuit relied on inadmissible evidence. The Ninth Circuit opined that resolution of "outstanding material factual issues" raised by the oncoming-driver's video interview, the coroner's report, and photographs of bullet holes in the side of

the car, "is essential for determining the reasonableness of Officer Troche's use of deadly force, and must be resolved by a trier of fact." Pet. App. 3a. However, the Ninth Circuit's cursory reliance on *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003), overlooked the inadmissibility of, and inferences properly drawn from, the cited evidence, instead using 20/20 hindsight in contravention of *Graham v. Connor,* 490 U.S. 386 (1989). In addition, the Ninth Circuit ignored undisputed evidence establishing there was no seizure of the victim-passenger as a matter of law to support the § 1983 claim in the first instance.

Respondent brushed aside the importance of this case, and the opportunity for this Court to resolve these acknowledged splits on questions of profound legal and practical significance. This Court should not do the same.

I. The Ninth Circuit Failed To Only Consider Facts Knowable To Officer Troche From His Perspective

This Court has long held that in cases involving the defense of qualified immunity, the Court considers only the facts that were knowable to the defendant officers. *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 550 (2017) (citing *Kingsley v. Hendrickson*, 576 U.S. 389, 399, 135 S.Ct. 2466, 2474, (2015).) Respondent failed to recognize this standard.

Respondent complains that the petition "is written entirely from the perspective of the

Petitioner . . ..” Opposition at 2. However, in *Kingsley*, the Court noted that officers “are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Id.* (quoting *Graham*, 490 U.S. at 397). Thus, the *Kingsley* court explained, “For these reasons, we have stressed that a court must judge the reasonableness of the force used *from the perspective and with the knowledge of the defendant officer*.” *Id.* (emphasis added). Respondent therefore has it wrong when he contends that writing this petition from the perspective of the Petitioner is “contrary to the well-established rules that govern summary judgment proceedings.” Opposition at 2. In fact, it is what this Court mandates where the defense of qualified immunity is concerned: “A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.” *Kingsley,* 576 U.S. at 397); *Wilkinson v. Torres,* 610 F.3d 546, 551 (9th Cir. 2010) (“Even if [the officer] was in fact out of harm's way by the time of the shooting. . . the critical inquiry is what [the officer firing his weapon]] perceived.”). Here, Officer Troche testified that he stopped firing as soon as *he had perceived* that the threat was past him. ER 732.

Some of the bullets, however, struck the victim-passenger side doors of the vehicle. ER 542-46. From this *physical evidence*, as well as Pakman’s *unknowable intent* (that he allegedly did not drive toward anyone and wasn’t trying to run anyone over),

the Ninth Circuit incorrectly concluded, with the benefit of 20/20 hindsight, that there was a triable issue because "an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him" Pet. App. 6a (quoting *Orn v. City of Tacoma*, 949 F.3d 1167, 1178 (9th Cir. 2020)).

Thus, the Ninth Circuit erred by focusing on the physical evidence to the exclusion of all other facts and circumstances, including Officer Troche's perspective and what was knowable to him at that moment. Simply put, the physical evidence does not contradict what Officer Troche perceived to be happening during the rapidly evolving situation. *Kingsley*, 576 U.S. at 397.

II. There Is No Triable Issue Of A Material Fact

Like the Ninth Circuit below, Respondent's brief improperly relies on inadmissible evidence.

The Ninth Circuit determined that resolution of "outstanding material factual issues" raised by the contents of the oncoming-driver's video interview, hearsay in the coroner's report, and photographs of bullet holes in the side of the car, "is essential for determining the reasonableness of Officer Troche's use of deadly force, and must be resolved by a trier of fact." Pet. App. 3a. However, the Ninth Circuit's mere citation to *Fraser v. Goodale*, 342 F.3d 1032, overlooked the inadmissibility of, and inferences properly drawn from the cited evidence, and instead

used 20/20 hindsight in contravention of *Graham,* 490 U.S. 386.

Pakman repeatedly stated throughout his interview that he could not recall what happened: "I don't know what happened"; "I can't give you a timeline"; "I can't tell you step-by-step." Thus, the contents of the interview – including Pakman's self-serving denial that he "didn't drive at anybody" and "wasn't trying to run anybody over" and acknowledgment that he "might have come close to hitting somebody on the way out" – were mere speculation by Pakman after the fact, and not recitations of events within his personal recollection and knowledge that can be admitted into evidence at trial, as his denials do not satisfy Fed. R. Evid. 602, 612, and 803(5). The statements also conflict with his plea and conviction for causing his victim-passenger's death (ER 814-818), which would not have occurred unless he was driving at and threating Troche and his "ride along" passenger, Russell McLeod ("McLeod"), so pursuant to the *Heck* preclusion doctrine, they cannot support Plaintiff's § 1983 claims. *Heck v. Humphrey*, 512 U.S. 477, 487 (1984); *Beets v. County of Los Angeles*, 669 F.3d 1039, 1047-1048 (9th Cir. 2012). Accordingly, Pakman's unsworn speculation about details he admittedly could not recall fail to raise a genuine issue of material fact by appearing to contradict Troche's account of the incident.

Similarly, the Ninth Circuit misconstrued the coroner's report and the admissibility of its contents. The report states, "[McLeod] had been sitting in the

passenger seat with the door open and sustained minor injuries. Troche continued to fire his handgun at the car as it went past him." ER658. The report itself is Monaghan's hearsay recitation of Koller's hearsay recitation of what occurred, without any indication of how Koller obtained her information. Without personal knowledge of the incident or further information as to Koller's source, the contents of Monaghan's and Koller's hearsay statements in the report also fail to raise a genuine issue of material fact.

Finally, the Ninth Circuit's reliance on *Salem v. U.S. Lines Co.,* 370 U.S. 31, 35 (1962) to conclude that a reasonable trier of fact could examine photographs of bullet holes, absent an expert report, and draw an inference regarding the trajectory of the bullets that created those holes, is misplaced and contrary to established precedent. Forensic ballistics and bullet trajectory analysis is a highly technical area requiring expert analysis, which was not provided. *See United States v. Johnson,* 875 F.3d 1265, 1280 (9th Cir. 2017); *United States v. Scheffer,* 523 U.S. 303, 313 (1998) (noting that ballistic analysis is squarely within the province of expert testimony and not a layperson's knowledge). Thus, the Ninth Circuit erred by improperly opining on physical evidence that requires specialized knowledge to interpret.

III. The Ninth Circuit's Disregard Of This Court's Precedent Concerning Qualified Immunity Warrants Review

In denying Officer Troche qualified immunity, the Ninth Circuit relied on *Acosta* 83 F.3d 1143, explaining that in *Acosta,* "[w]e stated that the car was moving sufficiently slowly that the officer could have just stepped to the side, making his use of deadly force unreasonable." Pet. App. at 6a. Just earlier this year, the Ninth Circuit stated that *Acosta* "clearly established that an officer who shoots at a *slow-moving car* when he can easily step out of the way violates the Fourth Amendment." *Villanueva v. California* (9th Cir. 2021) 986 F.3d 1158, 1171 (emphasis added).

Because excessive use of force is a highly fact-specific inquiry, even when a court determines excessive force was used, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' *the specific facts at issue*." *Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1153 (2018) (citation omitted)(emphasis added).

It is only at the very highest level of generality that the facts in this case resemble the facts in *Acosta.* There is nothing in the record to suggest Pakman's vehicle was moving so slowly that Officer Troche and McLeod could have simply stepped out of its way. Indeed, not only was Officer Troche backpedaling to avoid the oncoming vehicle as he fired his gun, but McLeod was in fact struck by the door of the cruiser

after it was hit by Pakman's fleeing vehicle. ER 761-64, 776.

Below, the Ninth Circuit improperly modified and broadened *Acosta's* holding by stating "an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him" Pet. App. 6a (quoting *Orn*, 949 F.3d at 1178). Thus, the Ninth Circuit removed "slow-moving" (from the *Acosta* holding) and added "moving away from him" in an effort to bring this case within *Acosta's* holding, in order to show a violation of clearly established law. That the Ninth Circuit found it necessary to omit "slow-moving" and to add "moving away from him" demonstrates that in fact there was no violation of "clearly established law." Moreover, this case falls squarely within the holding in *Wilkinson,* 610 F.3d 546. Even if this Court were to accept (it should not) that it was proper for the Ninth Circuit to rely on inadmissible evidence in order to find a triable issue of fact, the Ninth Circuit's own opinion in *Wilkinson*, subsequent to *Acosta,* dictates that Officer Troche is entitled to qualified immunity. Importantly, the Ninth Circuit did not mention, much less try to distinguish its own opinion in *Wilkinson.*

In addition to the reasons stated in Petitioner's opening brief,[1] in *Wilkinson*, the suspect's vehicle, similar to what is incorrectly alleged in this case, was *never headed directly at the officer*. *Id.* at 552. Rather,

[1] Petitioner's Opening Brief at 17-19.

the vehicle in *Wilkinson* arced around the officer who fired eleven rounds into the side of the vehicle. *Id.* at 549. Thus, *Wilkinson* stands for the proposition that there *are* indeed circumstances in which an officer may need to shoot at the side of an accelerating vehicle, *even if* the vehicle is not headed directly at the officer. The Ninth Circuit's opinion below directly contradicts *Wilkinson*. Accordingly, the Ninth Circuit erred by defining "clearly established law" at an impermissibly high level of generality (based on *Acosta)*, and in direct contravention of its own opinion in *Wilkinson.*

IV. The Ninth Circuit Overlooked Undisputed Evidence Establishing There Was No Seizure Of The Victim-Passenger

Respondent also contends this petition should be denied with respect to the standard for determining standing to assert a seizure claim under the Fourth Amendment. Opposition at 22. Respondent contends that there is no "true split" between the circuits regarding the applicable standard and, if there ever was one, it has been resolved by this Court's ruling in *Brendlin v. California*, 551 U.S. 249 (2007). Respondent's argument fails on both counts.

First, Respondent's Opposition ignores that this Court, several years after *Brendlin*, explicitly acknowledged the split among the circuits on this issue. *Plumhoff*, 572 U.S. at 765, n. 4. Furthermore, while *Brendlin* addressed whether the "seizure" occurred through submission to authority in a traffic stop, 551 U. S. at 254, the contested seizure here was

the result of an application of physical force via Officer Troche's shots at Pakman and/or the vehicle. ER 685-86, 730-733, 829-30.[2] Accordingly, any reliance on *Brendlin* is misplaced.

Respondent further contends that this Court's recent decision in *Torres v. Madrid*,___ U.S. ___, 141 S.Ct. 989, 1001 (2021) also disposes of the seizure question raised by Petitioner. Opposition at 25. Respondent's reliance on *Torres*, however, is somewhat surprising because this Court explicitly criticized its prior decision in *Brendlin* as not adequately "attentive" to the distinctions that can arise in the seizure analysis: "In all fairness, we too have not always been attentive to this distinction when a case did not implicate the issue." *Torres*, 141 S.Ct. at 1001 (citing *Brendlin,* 551 U. S. at 254). Aside from this criticism, the Court explicitly limited its holding: "The rule we announce today is narrow." *Torres*, 141 S.Ct. at 999. "All we decide today is that the **officers seized Torres by shooting her with intent to restrain her movement**." *Id.* at 1003 (emphasis added).

---

[2] As noted in the Amicus Brief filed by the IMLA, this very difference has led other circuits to find that *Brendlin* does not control. (Amicus Brief, at p. 7, citing to *Fagre v. Parks,* 2020 WL 1066977, *5 (D. Me. 2020), aff'd __ F.3d __ (1st Cir. 2021) ("The Supreme Court's recognition in *Brendlin* that traffic stops 'intentionally' seize all occupants of a vehicle does not mean an officer's gunshot 'intentionally' seizes a victim he or she does not aim at in the first place.").)

That is not the question at issue here because the only admissible evidence establishes that the application of force – the shooting – was never intentionally directed at the decedent. ER 369, 376, 482-483*; see also*, Opening Brief at 25-26. Officer Troche specifically testified that he was aware of the victim-passenger, and that it was *not* his intention to shoot at him. ER 485.

Whether a victim-passenger has standing to assert a seizure claim, when the shooting was accidental, remains unaddressed by this Court. And the Ninth Circuit's failure to address the issue in this case and subsequent expression of its view in *Villanueva,* 986 F3d. 1158, only exacerbates the split among the circuit courts.

V. CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

June 21, 2021

Michael S. Lawson,
City Attorney
Joseph E. Brick,
Asst. City Attorney
CITY OF HAYWARD
777 B Street, 4th Flr.
Hayward, CA 94541
Tel: (510) 583-4450

Michael L. Fox*
Terrance J. Evans
C. Todd Norris
Sean Patterson
DUANE MORRIS LLP
One Market Plaza
Spear Tower, Ste. 2200
San Francisco, CA 94105
Tel: (415) 957-3000
mlfox@duanemorris.com
**Counsel of Record*