No. 25-538

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE,

Petitioners,

v.

ESTATE OF DANIEL HERNANDEZ BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ AND MARIA HERNANDEZ; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY; M.L.H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, CLAUDIA SUGEY CHAVEZ,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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ISSUE PRESENTED

Whether the Court of Appeals erred in remanding a case for trial when there was substantial factual disagreement over whether a suspect who had been shot four times by a police officer was a continuing threat to public safety and over whether the fatal fifth and sixth shots were objectively unreasonable from the perspective of the officer at the scene.

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INTRODUCTION

This is the unusual case where there is no dispute as to the law or the legal rules to apply. The plaintiffs and defendants, and both the majority and the dissent in the *en banc* decision of the Ninth Circuit, articulate exactly the same legal principles. There is no disagreement that this case is governed by *Graham v. Connor*, 490 U.S. 386 (1989), and *Plumhoff v. Rickard*, 572 U.S. 765 (2014), which articulate the standard for when excessive police force violates the Fourth Amendment. Indeed, both the majority and the dissent in the Ninth Circuit state the legal issue in identical terms: was the police use of force objectively reasonable when looked at, under the totality of the circumstances, "from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight"? *Graham*, 490 U.S. at 396; *see* Petition for a Writ of Certiorari, Appendix (hereafter "App.") at 12a (the majority opinion in the Ninth Circuit quoting this standard); at 30a (Nelson, J., dissenting, using this standard); App. at 60a-61a (Collins, J., dissenting, using this standard).

The dispute in this case is over the facts. There, of course, is no disagreement that Officer Toni McBride fired six shots at Daniel Hernandez, in three volleys of two shots each, and killed him. Nor is there disagreement that it was the sixth shot, which hit Hernandez in the head, that was fatal. The majority and the dissent in the Ninth Circuit's *en banc* decision agreed that the first four shots were objectively reasonable. But they very much disagreed over what happened subsequently. The majority opinion describes Hernandez as "rolling away . . . balled up in a fetal position" before the fifth shot. App. at 17a.

In their dissents, Judges Nelson and Collins stated that the video shows Hernandez moving and rolling, not in a fetal position. Judge Nelson states, "[h]e was not, as the majority posits, 'balled up in a fetal position.'" App. at 29a. Judge Collins says that the majority's characterization of Hernandez being "balled up in a fetal position" is "grossly inaccurate." App. at 57a n.4. The outcome in the lower courts thus turned on a factual dispute over what happened, not in any way an issue of law.

Likewise, the majority and the dissent in the Ninth Circuit had a factual dispute over whether Officer McBride, from the perspective of the reasonable officer at the moment, had the opportunity before the fifth and sixth shots to consider whether Hernandez was a danger. Again, the disagreement is not about the legal rule. This Court said in *Plumhoff v. Rickard*, 572 U.S. at 777, that "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." But this Court then said that it is a "different case" if the officer "initiates a second round of shots after an initial round ha[s] clearly incapacitated [the suspect] and ha[s] ended any threat." *Id.*

The disagreement between the plaintiffs and defendants, and the majority and the dissent in the Ninth Circuit, is a factual one over whether the first four shots incapacitated Hernandez and ended any threat. The majority stated, "Here, McBride did pause—albeit briefly—after the second volley. More importantly, she had already fired four rounds at Hernandez. A jury could find that Hernandez no longer posed an imminent threat." App. at 18a. But Judge Nelson, in dissent, stated

that Hernandez posed a continuing threat because he "remained armed and was in constant motion." App. at 36a. (The weapon, thought at the time to be a knife, was a box cutter, and the distance between Hernandez and Officer McBride was about 40 feet.)

The Ninth Circuit simply held that it should be for the jury to resolve the factual dispute over what happened. The Ninth Circuit's statement as to the law of qualified immunity is not in dispute: "Because it was clearly established that McBride acted unreasonably if she shot Hernandez after he was on the ground and no longer posed an immediate threat, she is not entitled to qualified immunity." App. at 25a. Thus, the disagreement is entirely about factually what Hernandez did after he was shot four times and whether he reasonably could be seen as continuing to pose a threat.

Granting certiorari, then, is inappropriate because there is no disputed legal question for this Court to resolve. As this Court said long ago, "[w]e do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Salazar-Limon v. City of Houston*, 581 U.S. 946, 947 (2017) (Alito, J., concurring in denial of certiorari) ("[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case").

STATEMENT OF THE CASE

This civil-rights case, involving both federal and California state-law claims, arises from the shooting by

Los Angeles Police Department (LAPD) Officer Toni McBride which killed Daniel Hernandez.[1]

On the afternoon of April 22, 2020, LAPD Officers Toni McBride and Shuhei Fuchigami drove past a multi-vehicle collision in Los Angeles. The uniformed officers were in a patrol SUV en route to a different incident, but chose to respond to the collision instead.

As the officers exited their vehicle, the police radio broadcasted that "the suspect's vehicle is a black Chevrolet truck" and "the suspect is male, armed with a knife." (It was later learned that it was a box cutter.) The officers heard from witnesses at the scene that a man involved in the accident was inside of one of the vehicles and that he was cutting himself with a knife.

McBride asked Fuchigami if they had "less lethal" force options. Fuchigami was armed with pepper spray and a taser. Also, they knew that a 40-millimeter rubber projectile launcher—an option for using less lethal force against individuals with bladed weapons—was in the patrol SUV.

The officers had no information about Hernandez and no information that he had threatened anyone or that he had attempted to harm anyone other than himself. When

1. The procedural posture of this case is a summary judgment motion by the defendants. It is a "fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan v. Cotton*, 572 U.S. 650, 660 (2014). The United States Court of Appeals for the Ninth Circuit in its *en banc* ruling followed this rule and the following recitation of the facts is drawn from its opinion at App. 5a-9a.

Hernandez got out of his car, Officer McBride told him, "Let me see your hands." Hernandez was about 45 feet from Officers McBride and Fuchigami.

McBride gestured with her hand for Hernandez to stop and ordered: "Stay right there. Drop the knife." Hernandez took a few steps towards her. McBride again ordered: "Drop the knife. Drop the knife." Hernandez, still approaching, raised his fully extended arms to each side at roughly a 45-degree angle. He did not say anything. McBride pointed her gun at him. Hernandez took three more steps toward her, closing the distance between them to approximately 41 feet. McBride backed up and yelled "Drop it!" Without pausing or giving warning, she fired two rounds. Both shots hit Hernandez in the abdomen.

Hernandez fell to the ground on his right side. He then rolled to the left into a position with his knees, feet, and hands on the pavement, facing down, and apparently started to push himself up, though he did not continue walking toward McBride.

McBride again yelled at Hernandez to "drop it" and without pausing fired another two rounds. These shots hit him in the shoulder and the thigh. This second volley caused him to fall onto his back and curl up into a ball with his knees against his chest and his arms wrapped around them. As he rolled away from McBride onto his left side, she fired two more rounds. The third volley caused Hernandez to collapse on the ground and remain down. The sixth shot hit Hernandez in the head and immediately killed him. The next most serious injury, from the fourth shot, damaged his lung and liver but may have been survivable with immediate medical treatment.

The entire shooting sequence lasted 6.2 seconds. Roughly 2.5 seconds elapsed between the first and second volleys and then Officer McBride paused another 1.4 seconds between the second and third volleys.

Separate lawsuits were brought by Hernandez's parents and his minor daughter (M.L.H.) against Officer McBride, the Los Angeles Police Department, and the City of Los Angeles. The cases were consolidated and the federal district court granted summary judgment in favor of the defendants on each of the plaintiffs' claims. App. at 112a. The United States Court of Appeals for the Ninth Circuit affirmed the grant of summary judgment on plaintiffs' 42 U.S.C. § 1983 claims, but reversed and remanded the state law claims, which are not subject to qualified immunity under California law. App. at 84a; *see, e.g.*, *Ogborn v. City of Lancaster*, 101 Cal.App.4th 448, 460 (2002) ("The doctrine of qualified governmental immunity is a federal doctrine that does not extend to state tort claims against government employees.")

The Ninth Circuit granted *en banc* review and reversed the district court's grant of summary judgment on the federal law claims, remanding the case for a trial on both the federal law and state-law claims.[2] App. at 1a. Contrary to the assertion of Petitioners and the amicus brief filed on their behalf, the Ninth Circuit did not hold that the officer's killing of Hernandez was unreasonable. Rather, Ninth Circuit ruled that the reasonableness of the officer's actions was a question for a jury to decide.

2. It is important to note that even if the decision of the Ninth Circuit is reversed and the officer is accorded qualified immunity, there still will be a trial in the federal district court on the state-law claims.

Drawing all inferences in favor of Hernandez, the Court merely held that a jury could find the officer's final two shots to constitute excessive force and thus remanded the case for a trial.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. Certiorari is Inappropriate Because this Case Depends on Unresolved Factual Questions that Should be Decided by the Jury.

In *Graham v. Connor*, 490 U.S. at 395, this Court held that excessive police force is a seizure that violates the Fourth Amendment and that whether the use of force is excessive is determined from the perspective of the reasonable officer at the scene. As this Court recently stated, "[s]o the question in a case like this one, as this Court has often held, is whether the force deployed was justified from 'the perspective of a reasonable officer on the scene,' taking due account of both the individual interests and the governmental interests at stake." *Barnes v. Felix*, 605 U.S. 73, 79 (2025) (citations omitted). The "inquiry into the reasonableness of police force requires analyzing the 'totality of the circumstances." *Id.* (citation omitted).

There, of course, is no dispute in this case that this is the legal standard to be applied. It is exactly the legal rule articulated and applied by the Ninth Circuit in this case. App. at 12a. As is so often the case in litigation about excessive police force, the dispute—between the parties, as well as between the judges in the majority and the dissent in the Ninth Circuit—is entirely about the facts

as to what happened. As this Court noted, "the Fourth Amendment requires, as we once put it, that a court 'slosh [its] way through' a 'fact bound morass.'" *Barnes v. Felix*, 605 U.S. at 80 (citations omitted).

The majority and the dissent in the Ninth Circuit agreed that Officer McBride's first four shots did not constitute excessive force.[3] Their disagreement—and the matter to be tried in the district court—is over what happened next. That is crucial to a determination of whether there was excessive force. Defendants, and the dissenting judges in the Ninth Circuit, say that even after having been shot four times, Hernandez "was moving and rolling, not in a fetal position" and that Hernandez "appeared to be regaining his footing." Petition for a Writ of Certiorari [hereafter "Pet."] at 14; App. at 29a (Nelson, J., dissenting).

But plaintiffs contend that this is not what happened, as is clearly reflected in video footage. After being shot four times and grievously wounded, Hernandez was on the ground. There is no indication that he was getting up or even possibly could rise, let alone be any threat to anyone at this point. As the Ninth Circuit noted, Hernandez posed no threat to anyone after having been shot four times because he was on the ground in a fetal position. The Ninth Circuit stated: "When McBride fired the third volley of

3. Plaintiffs disagreed with that conclusion in the lower courts and argued that the third and fourth shots were excessive force because they occurred after Hernandez was seriously wounded and on the ground. But that issue is not before this Court. The focus is only on the fifth and sixth shots, for which the Ninth Circuit denied qualified immunity and remanded to the district court for a trial on the disputed factual issues.

shots, Hernandez was rolling away from her, balled up in a fetal position. Viewing the video footage in the light most favorable to the plaintiffs, Hernandez did not constitute an immediate threat, and McBride could have and should have reassessed the situation to see whether he had been subdued." App. at 17a.

Was Hernandez, having been shot four times, trying to get up and a threat, or was he down on the ground and making no effort to get up? This question is obviously crucial to determining whether the fifth and sixth shots were excessive force. But that is a factual question for a jury to resolve, not one capable of being decided by this Court on a writ of certiorari.

Likewise, there is the factual question of whether after the second volley of shots, Hernandez was incapacitated so that Officer McBride should not have fired two more times. Or at the very least, the question whether Officer McBride should have waited longer before the third volley to see whether Hernandez who was 41 feet away could stand up. This Court in *Plumhoff v. Rickard* explained that "if lethal force is justified, officers are taught to keep shooting until the threat is over." 572 U.S. at 777 (citation omitted). But at the same time, this Court stressed "this would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight." *Id.*

Thus, the question is entirely a factual one: was Hernandez incapacitated by the four shots that seriously wounded him? Petitioners state: "Hernandez was never 'clearly incapacitated' or 'surrendering' between the fourth and fifth shots." Pet. at 16. Petitioners, and the

dissenting Ninth Circuit judges, say "the video shows him armed, moving, and attempting to rise throughout the encounter—including during the final shots." *Id.*

But that description is wrong and was rejected by the majority in the Ninth Circuit's *en banc* decision. The video shows that Hernandez was down on the ground after four shots and was attempting to roll away from the officers. As the Ninth Circuit concluded, there is nothing to support Petitioners' assertion that Hernandez was getting up or trying to get up or even able to get up off the ground. As the Ninth Circuit said, "[t]his second volley caused him to fall on to his back and curl up into a ball with his knees against his chest and his arms wrapped around them." App. at 8a.

In other words, the disagreement in this case is not about the legal standards for determining excessive force or qualified immunity. The dispute is about what happened. And this Court has been clear that it does not grant certiorari to resolve factual disputes. *United States v. Johnston*, 268 U.S. at 227. (1925).

II. Certiorari is Inappropriate Because There is No Conflict Between the Ninth Circuit's Decision and the Decisions of Other Circuits or the Supreme Court as to the Legal Standard for Excessive Force Under the Fourth Amendment or for Qualified Immunity.

Petitioners argue that the Ninth Circuit's decision conflicts with this Court's rulings in *Graham v Connor*, *Plumhoff v. Rickard*, and *Barnes v. Felix.* Pet. at 12-20. Quite the contrary, the Ninth Circuit carefully applied each

of these decisions. In discussing each case, Petitioners present their view of the facts and say that the Ninth Circuit erred based on not accepting this version of what occurred. But this begs the question of what happened.

With regard to *Graham v. Connor*, the Ninth Circuit applied exactly the law Petitioners urge and declared: "Although we determine reasonableness objectively we do so 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' *Graham*, 490 U.S. at 396. We must allow for an officer's need 'to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving.'" *Id.*; App. at 13a. The Ninth Circuit said that since Hernandez was on the ground in a fetal position after having been shot four times, it was not reasonable for Officer McBride to continue shooting. Although *Graham v. Connor* stated that the events must be looked at from the perspective of the officer's judgment in difficult circumstances, it is not, as Petitioners want it to be, a total bar of liability for officers who use excessive force. The Ninth Circuit correctly applied *Graham* and it determined that a jury should decide the factual questions involved.

Similarly, the Ninth Circuit very carefully applied this Court's decision in *Plumhoff v. Rickard*. This Court expressly said that if a person is incapacitated by police bullets, it is excessive force to continue shooting. *See* 572 U.S. at 777. Petitioners dispute that Hernandez was incapacitated by the four bullets that hit him. In discussing *Plumhoff*, Petitioners say that "Hernandez did not abandon his armed advance on McBride until she stopped firing, six shots in six seconds." Pet. at 17. But a jury could determine that is not what happened. As the

Ninth Circuit said, Hernandez having been shot four times was on the ground and there is no evidence that he was getting up or able to get up after the second volley. App. at 17a. Again, the dispute is not over the legal rule that police cannot continue shooting when a person is incapacitated by previous shots. The disagreement is factual over whether Hernandez was incapacitated by four bullets that hit him in his shoulder, his thigh, and twice in his abdomen.

Nor is there any conflict between the Ninth Circuit's ruling and this Court's holding in *Barnes v. Felix* that excessive force is to be determined from the totality of the circumstances. Pet. at 18. The Ninth Circuit was explicit that it was looking at exactly this in evaluating excessive force and qualified immunity. App. at 12a-13a. The Ninth Circuit stated: "Courts must carefully balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against 'the countervailing governmental interests at stake,'" *Graham v. Connor*, 490 U.S. 386, 396, (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)), *considering 'the totality of the circumstances,' Plumhoff*, 572 U.S. at 774." App. at 12a (emphasis added).

The Ninth Circuit followed this Court's command in *Barnes v. Felix* in looking at the totality of the circumstances. The LAPD officers stopped at the scene of a traffic collision. There was no evidence that Hernandez was a threat to anyone except himself. The bystanders provided declarations that they did not feel threatened, but were concerned that he might hurt himself. Officer McBride resorted to lethal force, without seriously considering less alternative means to subdue someone who could have been a victim of a traffic collision and

suffering from trauma from the accident. The Ninth Circuit's conclusion was simply that the reasonableness of Officer McBride's conduct that killed Hernandez should be determined by a jury that resolves the contested facts.

Again, Petitioners' claim of a conflict with the law is really a factual disagreement. In arguing that there was a conflict between the Ninth Circuit decision and *Barnes v. Felix*, Petitioners say that after the first two shots, "Hernandez had just risen into a runner's stance." App. at 19. But as the video shows, and as the Ninth Circuit explained, after the first two shots, Hernandez was on the ground "with his knees, feet, and hands on the pavement, facing down." App. at 8a. At this point, Petitioners say, "he started to push himself up, though he did not continue walking toward McBride." *Id.* Hernandez was trying to push himself up off the ground with one hand, but contrary to Petitioners' assertion, he had not risen and was not in a runner's stance. Regardless, the two non-fatal shots that followed (the third and fourth shots) are no longer at issue in this case.

In this discussion, too, Petitioners dispute that Hernandez was on the ground in a fetal position after the first four shots. Pet. at 19. But again, this is not about the Ninth Circuit failing to follow *Barnes v. Felix*. Petitioners' disagreement with the Ninth Circuit is over the facts, which ultimately should be determined by a jury in the trial court.

Petitioners say that the Ninth Circuit erred by not following "what the video actually depicts." Pet. at 15. But there is nothing in any of the opinions to support Petitioners' assertion that the dissenting judges looked at

the video, while those in the majority ignored it. Quite the contrary, all of the judges had access to the same video and the same record in the case.

Petitioners repeated assertion that its controverted version of the facts must be accepted contradicts this Court's holding that in considering a motion for summary judgment—and this case was decided by the district court on defendants' motion for summary judgment—factual uncertainty must be resolved in favor of the non-moving party. This Court's decision in *Tolan v. Cotton*, 572 U.S. 650 (2014), is exactly on point. It, too, was an excessive-force case. And in it, too, the district court granted summary judgment for the defendant police officers. This Court reversed the lower courts stressing that "[o]ur qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard." *Id.* at 657. The Court said that the "inescapable conclusion [was] that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Id.* at 659. The Court then concluded in language crucial for this case: "The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Id.* at 660. This is exactly what the Ninth Circuit properly did in this case.

Again, the dispute is not about the law, but about the facts of what occurred. The Ninth Circuit explained that "Defendants do not contest [the legal rules that are applied]. Rather, they dispute the factual premise, arguing that Hernandez was 'clearly a serious threat' for the duration of the shooting. But as we have explained, the immediacy of the threat abated by the end of the second volley, when Hernandez was curled up on the ground and rolling away from McBride." App. at 21a.

Nor is there any conflict between the Ninth Circuit's decision and that of any other circuit. Every circuit applies the same legal tests for determining excessive force and qualified immunity. A close examination of the cases Petitioner cite reveals that there is no split at all among the circuits on the issues presented in this case.

Petitioners first contend that the Ninth Circuit's decision on qualified immunity conflicts with the Eight Circuit's decision in *Ching as Trustee for Jordan et al. v. City of Minneapolis*, 73 F.4th 617 (8th Cir. 2023). Pet. at 20. That is not true. The very passage Petitioners rely on to prove the circuit split shows the essential differences between the two cases. Petitioners cite the Eight Circuit: "While *mere seconds can be sufficient time for an officer to reassess a threat* [citation], this Court's precedent at the time of the shooting did not provide [the officer] with notice that *a single second in less than two-second encounter* was sufficient time for him to reassess the threat Jordan presented." *Ching v. City of Minneapolis*, 73 F.4th at 621 (cited at Pet. 21-22) (emphases added). The Eight Circuit here is specifically stating that "mere seconds" *can* be sufficient time for an officer to reassess a threat. *Ching v. City of Minneapolis*, 73 F.4th at 621. So, there is no

circuit split on that point. The Eighth Circuit then held that within the context of a "less-than-two-second total encounter," at a 6 to 12 foot distance, within the confined, indoor, space of an apartment, a single second is too short for an officer to reassess the threat. *Id.* Accordingly, the court clearly implies that a single second in a *longer lasting*, contextually different setting could be sufficient to reassess the threat as a matter of law. Here, of course, Officer McBride's full encounter with Hernandez was longer; it was outside; the suspect was significantly further away; and the suspect was clearly injured in some fashion already.

Accordingly, contrary to Petitioners' contention, the Eighth Circuit specifically held that "mere seconds" *can* be sufficient to reassess a threat. Nothing in the Eight Circuit's holding conflicts with the Ninth Circuit's judgment that, first, an officer can reassess a threat in the span of "mere seconds", and second, that under certain circumstances, a six-second window can be sufficient for a threat reassessment.

Petitioners also contend that the Sixth Circuit's unpublished decision in *Stevens-Rucker v. City of Columbus*, 739 F. App'x 834 (6th Cir. 2017), conflicts with the Ninth Circuit's decision below. Pet. at 22. But Petitioners misstate the holding, specifically the nature of the Sixth Circuit's review of the district court's timing analysis. In *Stevens-Rucker*, an officer chased a confused, disturbed man through an apartment complex in the middle of the night, after a woman woke up to him wielding a knife inside her apartment. She succeeded in locking him out and called the police. 739 F. App'x at 836. After a chase and several close encounters with the suspect, officers

ultimately fired six shots, in three separate volleys, all within the span of 8 to 10 seconds, killing the man. *Id.* at 838, 842. According to an affidavit sworn by the officer, "[t]he time between the second and third set [volley] of shots may have been only a second or even fractions of a second." *Id.* at 838.

In creating the illusion of a circuit split, Petitioners fundamentally misstate the Sixth Circuit's holding. Petitioners assert incorrectly that: "The Sixth Circuit . . . reversed, finding that that the district court *improperly separated the last four shots from the first two*, stating that the district court "failed to point to any evidence that the final four shots were *likewise* separated by such a significant gap in time that they must be viewed as distinct incidents requiring individualized analysis." Pet. at 23, citing *Stevens-Rucker*, 739 F.App'x 834, 844 (emphases added).

Quoting the full sentence, what the Sixth Circuit actually said was this:

> The district court *correctly concluded* that the record indicates that *the first two shots fired by McKee were separated in time from the four subsequent shots*; however, it failed to point to any evidence that the final four shots were likewise separated by such a significant gap in time that they must be viewed as distinct incidents requiring individualized analysis.

Stevens-Rucker, 739 F.App'x 834, 844 (emphases added).

Petitioners' characterization of the decision is thus inaccurate. The Sixth Circuit did not take issue with the district court's separation of the last four shots from the first two shots. Rather, the Sixth Circuit rejected how the district court "likewise separated" (as they separated the first volley from the others) the *last four shots* into two distinct volleys of two shots each. The Sixth Circuit specifically noted the difference it saw between the district court's first temporal division (between the first volley and the second and third volleys) and the district court's second temporal division (between the final two volleys). "We . . . disagree with the district court's view that the evidentiary record supports separating the final four shots into two distinct incidents." *Id.* at 843-844. In sum, the Sixth Circuit held that because only a second or less separated the final two volleys from one another, they were "led to conclude that Mckee's firing of his weapon constituted two, not three, distinct incidents: the first includes the initial two shots, the second the final four." *Id.* at 844.

Petitioner's misstatement of the Sixth Circuit's holding is important. The Sixth Circuit did not object to the parsing of an 8 to 10 second encounter into various discrete segments, as Petitioner appears to suggest. *See* Pet. at 23. The Court did not have an issue conceptually separating the first volley from the final two volleys, despite the short timeline, the intensity of the situation, and the evident threat posed by the suspect. Instead, the Sixth Circuit merely had a different view of whether the *final* volley was separable into two distinct segments. There is a significant difference between saying that an eight-second time window is fundamentally indivisible, as Petitioners appear to present the Sixth Circuit's decision,

and disagreeing with the district court's judgment as to *how to divide* the time window, which is what the Sixth Circuit actually said. *Compare* Pet. 23 *with Stevens-Rucker*, 739 F.App'x 834, 844.

Petitioners then suggest that the Sixth Circuit's unpublished decision in *Rush v. City of Lansing*, 644 F. App'x 415 (6th Cir. 2016), conflicts with the Ninth Circuit's decision. Pet. at 24. However, the facts in *Rush* are quite unlike the facts in this case. In *Rush*, officers responded to a bank alarm and found a woman in a storage room apparently armed with a pair of scissors. 644 F.App'x at 417. The officers who responded succeeded in prying the scissors away from her, but then, while apparently defensively kneeling, the suspect suddenly pulled a serrated kitchen knife from her jacket and began slashing. The officers were "about an arm's length away." *Id.* One of the officers, in the heat of the moment, responded to the sudden threat by shooting the suspect twice, in quick succession, with the first shot hitting her in the stomach and the second shot fatally hitting her in the head. *Id.* at 417-18.

The Sixth Circuit focused on the second shot. In evaluating whether the suspect posed an immediate threat to the safety of the officers or others, the Court noted that the officers were in a confined space, at night in a dark bank, with "no clear or unmistakable surrender," and that the suspect's use of the knife came just after "misleading pleas of 'I'm sorry, I'm sorry.'" *Id.* at 423. Therefore, the Court concluded, "taking all of the record facts into account," it was not unreasonable for the officer to continue using deadly force. *Id.* at 423-24.

Once again, the Sixth Circuit did not hold, as Petitioners suggest, that there are no circumstances under which an officer may be required to reassess a threat level within a short time span. It is true that the Sixth Circuit rightly emphasized its concerns with hindsight and "sanitization" that accompany legal analysis of such dramatic moments. But the Court nowhere stated or even suggested a categorical rule according to which officers are not required to reassess a threat level for a given number of seconds, considering the totality of the circumstances. On the contrary, the Sixth Circuit appeared to emphasize the contextual factors—the small space, the suspect's previous misleading surrender, the dark room—more than the time between the shots themselves. *Id.* at 423. Thus, once again, Petitioners manufactures a circuit split by generalizing from a distinct contextual analysis.

Petitioners also contend that *Estevis v. Cantu*, 134 F.4th 793 (5th Cir. 2025), reveals a circuit split with the Ninth Circuit's decision. Pet. at 24. In *Estevis*, after a two-hour long pursuit ended in his truck being boxed in by patrol cars, the suspect suddenly reversed and rammed into a patrol car. 134 F.4th at 795. Under clear and immediate threat from the moving car, officers subsequently fired shots into the car's cab. The suspect continued driving until eventually colliding with a fence. *Id.* Officers advanced on the truck and fired six times in the first five seconds, followed by a one or two second pause and then three more rounds. *Id.* The suspect survived and sued for excessive force.

Petitioners once again downplay the significant factual differences between the cases, despite the Court's clear guidance that judicial judgments as to excessive force are

deeply contextual and factually specific. Petitioners make much of the Fifth Circuit's holding that "all the shots were fired within ten seconds. During that brief time, it would have [been] impossible for the officers to know for certain that the threat from [the suspect's] truck had ceased." *Id.* at 797; Pet. at 25. But that statement must be understood in the context of the facts of *Estevis*, which did not concern a situation in which reasonable people can and do disagree as to whether the suspect continued to pose a threat between volleys. In *Estevis*, the suspect was still behind the wheel, even after the first shots were fired; he had demonstrated a willingness to ram police cars, wielding what the court described as a "5000-pound weapon." 134 F.4th at 798. Indeed, following *Plumhoff*, the Court said that the holding of the case was that "officers could use deadly force to apprehend a boxed-in suspect who uses his vehicle as a battering ram." *Id.* Those facts are fundamentally unlike the case below, where Officer McBride is further away; the only weapon was a box cutter; and most importantly, there is a factual dispute as to whether the suspect had been incapacitated. Hence, once again, Petitioners ignore the factual specifics and seek to draw out a circuit split in pursuit of a bright-line rule insulating officers from accountability so long as officers use lethal force within a certain time frame.

There is thus no conflict between the Ninth Circuit's decision and any ruling of this Court or another circuit that would justify granting certiorari.

III. Certiorari is Inappropriate as to the Issue of Qualified Immunity Because the Ninth Circuit Applied Clearly Established Law that Every Reasonable Officer Should Know.

The Ninth Circuit concluded that "it was clearly established that continuing to shoot a suspect who appears incapacitated violates the Fourth Amendment." App. at 19a. This statement is unassailable under Supreme Court and Ninth Circuit precedents.

The Ninth Circuit, of course, recognized that "the clearly established right must be established with specificity." App. at 20a. The court then concluded: "In 2020, it had been clearly established for several years that an officer cannot reasonably 'continue shooting' a criminal suspect who 'is on the ground,' 'appears wounded,' and 'shows no signs of getting up' unless the officer first 'reassess[es] the situation'—'particularly . . . when the suspect wields a knife rather than a firearm'—because the suspect 'may no longer pose a threat.'" App. at 21a (citation omitted).

In fact, there was a prior Ninth Circuit case which explicitly held that when a suspect is incapacitated, it is excessive force for the police to continue shooting. In *Zion v. County of Orange*, 874 F.3d 1072 (9th Cir. 2017), the officer initially shot the suspect nine times, but then perceiving the suspect as moving and trying to get up, fired another volley of shots which killed the suspect. The Ninth Circuit's holding in *Zion* could not be more on point for this case. The court in *Zion* declared:

> Defendants argue that [the officer's] continued use of deadly force was reasonable because [the suspect] was still moving. They quote *Plumhoff* v. *Rickard*: '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.' But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting. This is particularly true when the suspect wields a knife rather than a firearm. In our case, a jury could reasonably conclude that [the officer] could have sufficiently protected himself and others after [the suspect] fell by pointing his gun at [the suspect] and pulling the trigger only if [the suspect] attempted to flee or attack.

874 F.3d at 1076 (internal citations omitted).

In *Zion*, like in this case, there was a factual dispute over whether a wounded suspect was incapacitated or trying to get up. The Ninth Circuit concluded that this factual dispute was for the jury to resolve: "[The officer] testified that [the suspect] was trying to get up. But we 'may not simply accept what may be a self-serving account by the police officer.' This is especially so where there is contrary evidence. In the video, [the suspect] shows no signs of getting up. This is a dispute of fact that must be resolved by a jury." *Id.* at 1076 (citation omitted).

Thus, the law applicable in this case was clearly established, indeed with a case on point from the controlling jurisdiction. That is why the Ninth Circuit was correct in denying qualified immunity and remanding the case to determine factual issues. Contrary to Petitioners' assertion, the Ninth Circuit did not state the right at an impermissibly high level of abstraction, but focused on clearly established law, from Supreme Court and Ninth Circuit precedents that directly govern these facts.

Petitioners argue that this Court should grant certiorari to decide "whether an officer must reassess after every shot fired." Pet. at 33. Petitioners say: "Nor has this Court clearly delineated the precise point at which an officer must halt the use of lethal force, except perhaps in circumstances where a suspect is 'clearly incapacitated.'" *Id.* Petitioners object to a "moment by moment approach to analyzing use-of-force incidents." *Id.*

Petitioners argue against a straw person. Neither Plaintiffs nor the Ninth Circuit say that an officer must "reassess after every shot fired." Also, Petitioners are wrong in asserting that this Court has not articulated a legal rule for such situations. In *Plumhoff v. Rickard* this Court articulated the standard: an officer cannot start a new volley of shots "if an initial round had clearly incapacitated [the suspect] and had ended any threat of continued flight, or if [the suspect] had clearly given himself up." 572 U.S. at 777. When there is a factual dispute, as in this case, it is for the trier of fact to decide if the suspect has been incapacitated. This, of course, will necessitate in some cases a moment-by-moment analysis of what happened. But that sort of factual analysis often is essential to determining whether there was excessive

force and whether the officer is protected by qualified immunity.

As the Ninth Circuit majority put it,

> "Even when, as here, an officer is initially justified in using lethal force, she cannot unnecessarily create a sense of urgency by continuing to fire after the immediate threat has ended. Were it otherwise, the officer would have perverse incentives; so long as she fired rapidly enough, no jury could consider whether the circumstances continued to call for lethal force, no matter how the barrage or how clear the suspect's incapacitation has become." App at 18a-19a, n.5 (citation omitted).

The amicus brief of the National Police Association in support of Petitioners recognizes this is the current law, but urges the Court to adopt a "safe harbor rule declining to second-guess police decision making in the first 10-15 seconds while officers are under attack unless bad faith somehow exists." Brief Amicus Curiae of the National Police Association in Support of Petitioners, at 28. This would mean that if an officer shot and incapacitated a person or the person surrendered, the officer nonetheless could pause for many seconds and then resume shooting. Besides arguing for a totally arbitrary temporal dividing line, this would mean that once police began shooting they could pause and then resume when further use of deadly force was unnecessary because a person surrendered or was incapacitated. There is no support in the law for this radical change as to the standard for excessive force under the Fourth Amendment and there is no reason to

replace the basic approach of *Plumhoff v. Rickard*: when a suspect has surrendered or is incapacitated, police should not begin a new volley of shots.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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