No. _____

In The
Supreme Court of the United States

MARCY NORIEGA,

Petitioner,

vs.

MARIA TORRES and MELCHOR TORRES,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under *Brower v. County of Inyo*, 489 U.S. 593 (1989), can a police officer's accidental, inadvertent use of deadly force against an arrestee constitute an unreasonable seizure under the Fourth Amendment?

Under *Graham v. Connor*, 490 U.S. 386 (1989), is the standard for unreasonable force under the Fourth Amendment identical to the standard of general negligence so that an officer may be held liable for the accidental, inadvertent use of deadly force against an arrestee?

Is a police officer entitled to qualified immunity for the accidental, inadvertent use of deadly force against an arrestee?

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:

- Maria Torres and Melchor Torres, plaintiffs, appellants below, and respondents here.
- Marcy Noriega, defendant, appellee below, and petitioner here.

There are no publicly held corporations involved in this proceeding.

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The August 22, 2011 opinion and judgment of the United States Court of Appeals for the Ninth Circuit that is the subject of this petition is reported at 648 F.3d 1119 (9th Cir. 2011) and reproduced in the Appendix ("App.") at pages 1-26.

The district court's order granting defendant and petitioner's motion for summary judgment and certifying the judgment for immediate appeal under Rule 54(b), Federal Rules of Civil Procedure, is reported at 655 F. Supp. 2d 1109 (E.D. Cal. 2009) and is reproduced in the Appendix at pages 27-83.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit issued its opinion and judgment in this case on August 22, 2011.

28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari, the August 22, 2011 opinion and judgment of the Ninth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondents pursuant to 42 U.S.C. § 1983, which reads as follows:

> 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 petitioner violated their rights under 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 Accidental Shooting Of Everardo Mejia And Resulting Federal Civil Rights Suit.

On October 27, 2002, police officers employed by the City of Madera arrested Everardo and Erica Mejia following a complaint of loud music. (App. 3.) They were handcuffed and placed in the backseat of a patrol car. (*Id*.) After approximately 30- to 45-minutes, during which time Everardo had fallen asleep, Mejia was removed and replaced by another arrestee. (*Id*.) Everardo awoke at this and began yelling and kicking the rear car door from inside. (*Id*.)

Defendant and petitioner Marcy Noriega was one of several police officers on site and standing a few feet directly behind the patrol car when she heard Everardo yelling. (*Id*.) Officer Noriega remarked to fellow officers that whoever was closest should use a Taser on Everardo because he could injure himself if he kicked through the glass window. (*Id*.) Officer Noriega herself was closest, so she approached the car and upon reaching the rear driver's side door, she opened it with her left hand. (*Id*. at 3-4.) Officer Noriega intended to pull out her Taser, which was in a holster on her right side, just below the holster that carried her service pistol, a Glock. (*Id*. at 4.) Although she intended to pull the Taser, she accidentally pulled her pistol instead, and shot Everardo. (*Id*.) He later died from the gunshot wound. (*Id*.)

Everardo's parents, respondents Maria and Melchor Torres, as administrator of his estate, filed suit

under 42 U.S.C. § 1983 asserting violation of Everardo's Fourth Amendment rights against unreasonable seizure, as well as state law claims. (App. 7.)

B. The First Motion For Summary Judgment And Reversal On Appeal.

The district court initially granted Officer Noriega's motion for summary judgment, holding that Everardo had not been seized by Officer Noriega's unintended use of a pistol instead of a Taser, and therefore no Fourth Amendment violation occurred. (*Id*.)

On interlocutory appeal, the Ninth Circuit reversed, concluding that under its long-standing "continuing seizure" doctrine, Everardo was seized within the meaning of the Fourth Amendment once he was arrested, without regard to the later use of force. *Torres v. City of Madera*, 524 F.3d 1053, 1056 (9th Cir. 2008). The Ninth Circuit found that Officer Noriega's conduct was governed by the Fourth Amendment "reasonableness" analysis, and remanded for the district court to consider in the first instance whether Noriega's mistake in using her pistol rather than her Taser was objectively unreasonable, for only then would Everardo have suffered a constitutional injury. (*Id*. at 1056-57.)

C. The District Court Again Grants Summary Judgment, And The Ninth Circuit Once Again Reverses.

Noriega again moved for summary judgment. The renewed motion and opposition focused on the reasonableness of Officer Noriega's mistake in light of her training and previous experience in using the Taser.

Officer Noriega and other Madera police officers received their new M26 Taser devices and initial training in late 2001 (App. 4), some 11 months before the tragic shooting of Everardo. Prior to the shooting, she had deployed her Taser on approximately five other occasions without incident. (App. 6.)

Plaintiffs focused on what they contended were two incidents of confusion on the part of Officer Noriega and use of the Taser prior to the fatal shooting. In one incident, Officer Noriega retrieved her handgun from the trunk of her car at the jail and mistakenly tried to place it into the Taser holster which was mounted directly below her gun holster. (App. 5.)

Approximately one week after that incident, Officer Noriega mistakenly confused her handgun for her Taser when she attempted to remove the front portion of the Taser's cartridge and had instead pulled her pistol. (App. 5.)

Concerned about her errors between the two weapons, Officer Noriega spoke with supervisors who had her undertake daily training, practicing drawing the

Taser and then drawing her handgun in order to better distinguish between the two. (App. 6.)

The district court granted summary judgment again, finding that Officer Noriega's mistaken use of deadly force did not constitute a violation of the Fourth Amendment. (App. 8, 61-62.) The court also found that even assuming any violation occurred, Officer Noriega would be entitled to qualified immunity because there was no clearly established law in 2001 that would have put her on notice that a mere accidental shooting could give rise to liability under the Fourth Amendment. (App. 67-71.) As the district court noted:

> This court has sympathy for Plaintiffs and their loss. However, in some circumstances 42 U.S.C. § 1983 simply does not provide relief. Not every injury done to a citizen by the government rises to the level of a constitutional violation. Plaintiffs[sic] remedy for Defendant Noriega's tragic mistake lies in tort, not the Constitution.

(App. 82.)

Plaintiffs appealed. On August 22, 2011, the Ninth Circuit issued its published opinion reversing summary judgment. (App. 1.) The Ninth Circuit found that it was clearly established as of 2001 that police officers could be held liable for violations of the Fourth Amendment based upon unreasonable mistakes in using force. (App. 21-22.) The court held that there was a material issue of fact as to whether

Officer Noriega's inadvertent use of her pistol instead of the Taser was an unreasonable mistake for purposes of a Fourth Amendment violation. (App. 18, 24.)

REASONS TO GRANT THE PETITION

Review is necessary to resolve an express conflict among the circuit courts on an issue that has injected needless complexity into what would otherwise be routine tort cases and prompted the filing of numerous suits in federal court – whether a police officer's mere inadvertent use of force can violate the Fourth Amendment.

Here, it was stipulated that Everardo Mejia was accidentally shot after he had been arrested, when petitioner, Officer Marcy Noriega, inadvertently drew her pistol instead of her Taser. Despite the purely unintended nature of Noriega's actions, the Ninth Circuit found a viable Fourth Amendment claim. It side stepped this Court's holding in *Brower v. County of Inyo*, 489 U.S. 593 (1989) that a Fourth Amendment seizure only occurs where a suspect is stopped by the very means that an officer intentionally applies for that purpose, by invoking the Ninth Circuit's "continuing seizure" doctrine. Under this rule, once a suspect is arrested he is "seized" for all purposes, and thus any action by an officer that injures the suspect – even purely inadvertent, unintentional action – is evaluated as to whether it is "objectively reasonable" without need to revisit the issue of whether the force was

intentionally applied. Hence, under this rule, negligent conduct routinely falls within the Fourth Amendment.

The Ninth Circuit also misconstrued this Court's holding in *Graham v. Connor*, 490 U.S. 386 (1989) that motive is irrelevant to whether force is objectively reasonable under the Fourth Amendment, to mean that whether an officer intends to perform a particular act is similarly irrelevant. Thus, purely inadvertent, accidental conduct – an officer dislodging a flashlight on his belt that falls on an arrestee's foot, when the officer instead intended merely to procure handcuffs, constitutes a Fourth Amendment claim.

Similarly, the Ninth Circuit construed this Court's repeated statement that officers will not be liable for reasonable mistakes under the Fourth Amendment, as creating the corollary rule that officers will therefore necessarily be liable for unreasonable mistakes – regardless of whether the officer's conduct is intentional or inadvertent, with "reasonableness" determined by a jury using the text book definition of negligence.

This Court has never held that purely inadvertent conduct by an officer can support an excessive force claim under the Fourth Amendment. Indeed, the Court's decisions in *Graham* and *Brower* foreclose such negligence based claims. Nonetheless, the Ninth Circuit now joins the Fourth and Seventh Circuits in finding that the "reasonableness" standard of the Fourth Amendment is coextensive with ordinary negligence.

Yet, the First, Second, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have declined to apply a negligence standard to such claims.

Because of the rampant confusion concerning whether there can be a negligent violation of the Fourth Amendment, the lower federal courts are filled with suits that would otherwise be nothing more than state tort claims. And, when such negligence claims are "shoe horned" into the Fourth Amendment, they create needless complexity, often producing multiple opinions in a single case. This case is a good example, the district court having initially granted summary judgment because it believed there could not be an "unintended" seizure by the mistaken use of a handgun, only to be reversed by the Ninth Circuit for a determination of whether there could be a negligently "unreasonable" use of force under the Fourth Amendment. Similarly, in *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011) (en banc), the case was up and down between the district and appellate court three times before an en banc opinion eventually concluded that the police officer's plainly inadvertent use of a handgun instead of a Taser could constitute an unreasonable use of force under the Fourth Amendment.

Indeed, the reasoning behind such cases is dizzying – with courts tortuously attempting to explain that an officer should have been on notice that his or her conduct violated the Fourth Amendment based upon clearly established law under circumstances where it is undisputed that the officer's understanding

of the law had nothing to do with the manner in which force was used – the point in such cases is that the officer intended to do one thing, but mistakenly did another.

The federal courts should not be put through the labored gymnastics of attempting to fit straightforward negligence claims into a constitutional framework. This Court has held that mere negligence does not violate the due process clause of the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). The Court should now resolve the question with respect to the Fourth Amendment and hold that mere inadvertent and negligent use of force by a police officer is insufficient to constitute an unreasonable seizure under the Fourth Amendment.

I.

REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER INADVERTENT AND NEGLIGENT APPLICATION OF FORCE VIOLATES THE FOURTH AMENDMENT.

A. In *Brower v. County of Inyo*, 489 U.S. 593 (1989) And *Graham v. Connor*, 490 U.S. 386 (1989), The Court Found That An Unreasonable Seizure Under The Fourth Amendment Requires The Intentional Application Of A Particular Means Of Force In An Objectively Unreasonable Manner.

In 1989, in a pair of cases, the Court created a template for claims concerning application of force by police officers. In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court held that to assert a claim for an unlawful seizure under the Fourth Amendment, a plaintiff must prove that he has been seized by means of the intentional application of force. In *Brower*, the question was whether a suspect who was killed when his car smashed into a roadblock set up by police officers could assert a claim for excessive force under the Fourth Amendment. The Ninth Circuit held that no seizure had occurred simply by placing a roadblock in the decedent's path. The Court, in an opinion authored by Justice Scalia, reversed, noting that the roadblock was placed on a blind curve and plainly designed to stop the decedent's vehicle. *Id*. at 598-99. The Court distinguished between a chase that terminates when

the vehicle inadvertently loses control without any intention by the officers to cause a crash, and the intentional application of force that is likely to produce a particular result:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . , nor even when there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Id. at 596-97 (emphasis in original).

The Court drew a distinction between the intention to effect a seizure using a particular instrumentality and whether or not a defendant intended that the instrumentality produce a particular result:

> In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by *the very instrumentality* set in motion or put in place *in order to achieve that result*. It was enough here, therefore, that according to the allegations of the complaint, Brower was

> meant to be stopped by the physical obstacle of the roadblock – and that he was so stopped.

Id. at 598-99 (emphasis added).

The Court noted that while the precise character of the roadblock, i.e., whether it was intended to effect a voluntary stop or designed in such a manner so as to almost assure a collision, was irrelevant to the question of whether a seizure occurred, it would be relevant in the context of determining whether the resulting seizure was reasonable. *Id*. at 599 ("This is not to say that the precise character of the roadblock is irrelevant to further issues in this case. 'Seizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable.'").

Three months later, in *Graham v. Connor*, 490 U.S. 386 (1989), the Court set forth criteria for determining when a seizure was unreasonable under the Fourth Amendment. The Court held:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake.

Id. at 396.

The Court continued:

> [P]roper application requires careful attention to 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.

The Court made it clear, that as in other applications of Fourth Amendment standards, mere mistakes by officers would not be sufficient to support a claim:

> 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. [Citation.] The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, [citation], nor by the mistaken execution of a valid search warrant on the wrong premises, [citation]. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," [citation], violates the Fourth Amendment. The calculus of reasonableness must embody 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.

Id. at 396-97.

The Court concluded:

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Id. at 397.

The principles articulated in *Brower* and *Graham*, namely that the Fourth Amendment contemplates an evaluation of reasonableness in the context of an officer's intention to use a particular means to effect a seizure, leaving room for mistakes in applying the means selected, have spawned a clear conflict among the circuit courts concerning whether the mere inadvertent and negligent application of force constitutes a violation of the Fourth Amendment. This conflict, in turn, has spawned numerous cases in the district courts, many of them little more than state tort claims forced into a constitutional framework. It is vital that this Court grant review to provide clear guidelines and weed out legitimate constitutional claims from those best addressed in the context of traditional state tort law.

B. The Ninth Circuit Has Joined The Fourth And Seventh Circuits In Concluding That Merely Negligent Conduct Can Constitute A Violation Of The Fourth Amendment, And That Inadvertent Use Of A Particular Level Of Force Violates The Fourth Amendment.

Although this Court's decision in *Brower* made it clear that an excessive force claim under the Fourth Amendment required volitional conduct by an officer, and in *Graham*, the Court noted that the objective reasonableness standard left room for officers to make mistakes, nonetheless, three circuits have found that an excessive force claim under the Fourth Amendment is essentially coextensive with common law negligence. Thus, even purely inadvertent actions by a police officer can give rise to a Fourth Amendment claim.

It is undisputed that Officer Noriega did not intend to shoot Everardo with her pistol; rather, she intended to fire her Taser, but mistook the pistol for the Taser. (App. 4.) The Ninth Circuit found that a jury could properly find that this purely mistaken use of force constituted a violation of the Fourth Amendment. The result is potential Fourth Amendment liability for what all concede to be the unintended application of a particular type of force against Everardo.

The Ninth Circuit noted that it need not determine whether Officer Noriega had attempted to seize Everardo by the particular means employed, i.e., by

shooting him with a pistol instead of a Taser. (App. 7.) This is because since Everardo was already arrested and in custody, he was deemed to be "seized" under the Fourth Amendment for all purposes under the Ninth Circuit's "continuing seizure" doctrine. (*Id.*; *Torres v. City of Madera*, 524 F.3d 1053, 1056 (9th Cir. 2008).) Once Everardo had been arrested, any application of force to him, inadvertent or not, was therefore subject to an evaluation as to whether or not it was reasonable under the Fourth Amendment. (*Id.*)[1]

The court then found that whether Officer Noriega intended to use a Taser instead of a pistol was irrelevant, citing this Court's statement in *Graham* – and other cases – that an officer's state of mind was irrelevant to determining the purely objective question of whether the officer's conduct was reasonable under the Fourth Amendment. (App. 12 (*citing Graham*, 490 U.S. at 397).) Thus, the Ninth Circuit confused the question of whether an officer's subjective *motive* was relevant to evaluating whether force was excessive under the Fourth Amendment – irrelevant under *Graham* – with the question of whether an officer's conduct must be volitional, i.e., the officer

[1] In an earlier decision in the case, the Ninth Circuit had reversed summary judgment for defendant based on the district court's having found that there was no seizure under *Brower*. Applying the "continuing seizure" doctrine, the court reversed for a determination of whether the force applied was reasonable under the Fourth Amendment. *Torres v. City of Madera*, 524 F.3d at 1056-57; App. 7.

must have intended to perform the physical act that resulted in the injury.

Similarly, the Ninth Circuit noted that this Court had held that an officer would be shielded from liability for reasonable mistakes of fact. (App. 10.) From this, the Ninth Circuit concluded that an unreasonable mistake of fact by an officer would be sufficient to impose liability under the Fourth Amendment. In sum, a jury could determine that the mistake made by Officer Noriega was unreasonable, and hence she was liable for excessive force under the Fourth Amendment. (App. 14-16.)

The Ninth Circuit then concluded that Officer Noriega was not entitled to qualified immunity, because based upon preexisting Ninth Circuit case law she should have been aware that a police officer could be liable for the mistaken application of force. The court cited its decision in *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998) where it had held that an officer's mistaken shooting of a fellow police officer could support a Fourth Amendment claim. (App. 21, 23.)

The Ninth Circuit therefore stated the final inquiry for the jury in this case in terms of a standard negligence claim:

> [H]ere, if Officer Noriega knew or should have known that the weapon she held was a Glock rather than a Taser, and thus had been aware that she was about to discharge deadly force on an unarmed, nonfleeing arrestee who did

> not pose a significant threat of death or serious physical injury to others, then her application of that force was unreasonable.

(App. 12.)

The Ninth Circuit is not alone in parsing the Court's various statements in *Brower* and *Graham* as embracing a Fourth Amendment excessive force claim arising from purely inadvertent conduct by a police officer. In *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011) (en banc) (Petition for Writ of Certiorari docketed October 13, 2011, No. 11-458), the Fourth Circuit, under facts strikingly similar to this case, held that an officer's mistaken use of a pistol instead of a Taser could give rise to liability under the Fourth Amendment. There, the police offer was attempting to serve an arrest warrant on the plaintiff when the plaintiff turned and fled on foot. The officer intended to shoot the plaintiff with his Taser, but as in this case, the Taser holster was located just below the holster for his Glock .40 caliber pistol. The officer mistakenly drew the pistol and shot the plaintiff in the elbow. 652 F.3d at 528.

Like this case, *Henry* was back and forth between the trial and appellate courts several times. In its final en banc decision, the court acknowledged that the parties had stipulated that the shooting was based on a mistake of fact in that Purnell believed he was firing his Taser rather than the pistol. 652 F.3d at 528. Nonetheless, as the Ninth Circuit did here, the Fourth Circuit found that the question of whether

Purnell intended to employ his Taser instead of his pistol was irrelevant given *Graham*'s statement that an officer's state of mind was irrelevant to determining the reasonableness of any force used. *Id*. at 531-32. The Fourth Circuit similarly found that the question was whether or not mistaking the pistol for a Taser was a reasonable mistake of fact. Thus, the court concluded the issue for the jury was whether it was reasonable to have made the mistake. *Id*. at 532-33.

The court found that Purnell was not entitled to qualified immunity because it would be up to the jury to determine whether there was a reasonable mistake of fact, and the officer could not have been mistaken as to the law – it would have been clear to a reasonable officer that shooting a fleeing, nonthreatening misdemeanant with a firearm violated the Fourth Amendment. *Id*. at 532, 535.

Three judges dissented in *Henry*. As Judge Niemeyer noted in his dissenting opinion, "[t]he majority's analysis . . . has the difficulty of now suggesting that an officer can violate the Fourth Amendment with merely negligent conduct." 652 F.3d at 556.

The Seventh Circuit has expressly held that the reasonableness standard of the Fourth Amendment is congruent with the standard of care in negligence cases. In *Villanova v. Abrams*, 972 F.2d 792 (7th Cir. 1992), a Fourth Amendment claim arising from civil commitment proceedings, writing for the court, Judge Posner stated:

> The test of negligence at common law and of an unlawful search or seizure challenged under the Fourth Amendment is the same: unreasonableness in the circumstances.

Id. at 796.

District courts have applied *Villanova*'s negligence standard in the context of claims for excessive force under the Fourth Amendment. *See*: *Johnson v. City of Milwaukee*, 41 F. Supp. 2d 917, 925-29 (E.D. Wis. 1999) (officer accidentally shot suspect while attempting to search him for weapons; noting that under *Villanova*, "unreasonableness" test is the same for negligence and Fourth Amendment and jury could conclude the officer's action leading up to the shooting were unreasonable); *Estate of Thurman v. City of Milwaukee*, 197 F. Supp. 2d 1141, 1148-50 (E.D. Wis. 2002) (officer intentionally shot suspect during struggle; noting that under *Villanova*, Fourth Amendment unreasonableness test is the same for common law negligence concluding that reasonable jury could find that seizure was unreasonable under Fourth Amendment because officer's conduct preceding shooting "created a high probability of serious harm and was unjustified by any offsetting potential benefit to the public"); and *Rex v. City of Milwaukee*, 321 F. Supp. 2d 1008, 1012-13 (E.D. Wis. 2004) (officer broke plaintiff's arm while handcuffing her, holding that under *Villanova*, test for unreasonableness of the Fourth

Amendment seizure is the same as the test for negligence).[2]

Notwithstanding the view of the Ninth, Fourth, and Seventh Circuits that mere negligence can violate the Fourth Amendment, other circuit courts have recognized that nothing in this Court's jurisprudence suggests that non-volitional conduct by a police officer can constitute excessive force under the Fourth Amendment.

C. Seven Circuits Have Expressly Found That Mere Negligence Is Not Synonymous With "Unreasonable" Conduct Under The Fourth Amendment.

Seven circuits have rejected the notion that mere negligence by a law enforcement officer is sufficient to establish unreasonable conduct under the Fourth Amendment. They have done so both in the context of use of force, and in addressing other claims under the Fourth Amendment.

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[2] *See also Patterson v. Fuller*, 654 F. Supp. 418, 427 (N.D. Ga. 1987) (suspect killed when officer's gun accidentally discharged; negligence may violate the Fourth Amendment and to prevail, "plaintiff must prove that [the officer] acted negligently" in having his gun cocked while standing over the suspect); *Austin v. City of East Grand Rapids*, 685 F. Supp. 1396, 1400, 1402 & n.1 (W.D. Mich. 1988) (negligent failure to provide prompt probable cause determination for warrantless arrestee actionable under Fourth Amendment).

1. Circuits rejecting negligence as a basis for finding unreasonable conduct by an officer for purposes of excessive force claims under the Fourth Amendment.

In *Dodd v. City of Norwich*, 827 F.2d 1 (2d Cir. 1987), a police officer was in the process of handcuffing a suspect when the suspect reached for the officer's gun. The officer reacted by pulling the gun away, accidentally discharging the weapon and killing the suspect. *Id*. at 3. The district court found there had been no violation of the suspect's constitutional rights, and the Second Circuit affirmed. The court held that *Tennessee v. Garner*, 471 U.S. 1 (1985), which barred "the deliberate use of deadly force to seize an unarmed, fleeing . . . felon," was inapplicable to the "inadvertent shooting of an already apprehended burglar during a struggle initiated by him in an attempt to disarm the arresting officer and after he had apparently surrendered." 827 F.2d at 7. The court explained that the officer shot the suspect not to seize him, but by accident after a seizure had already taken place. *Id*. The court held:

> It makes little sense to apply the standard of reasonableness to an accident. If such a standard were applied, it would result in a fourth amendment violation based upon simple negligence. The fourth amendment, however, only protects individuals against "unreasonable" seizures, not seizures conducted in a "negligent" manner.

Id. at 7-8.

In *McCoy v. City of Monticello*, 342 F.3d 842 (8th Cir. 2003), police officers chased the suspect's truck and forced it into a ditch. The driver exited and raised his arms into the air, and as an officer ran toward him, the officer slipped and his gun discharged, injuring the suspect. *Id*. at 845. The Eighth Circuit affirmed summary judgment for the officer, holding that while a seizure had occurred, the officer's conduct was objectively reasonable. *Id*. at 847-49. The court noted, however, that the shooting was unintentional, thereby raising the question: "after an intentional Fourth Amendment seizure has occurred, does an accidental shooting implicate the Fourth Amendment?" *Id*. at 847 n.3. Citing *Dodd*, the court suggested the answer was necessarily no, though it noted that in any event the conduct of the officer was objectively reasonable under the circumstances. *Id*.

In *Evans v. Hightower*, 117 F.3d 1318, 1320-21 (11th Cir. 1997), the court tacitly rejected the Ninth Circuit's "continuing seizure" rule, holding that no seizure occurred where an officer detained a suspect in the street while awaiting backup and the responding officer negligently ran over suspect with a patrol car. The court found that the suspect was already seized before being hit by a car and being run over "was not part of the seizure, but was rather, 'the accidental effect[ ] of otherwise lawful government conduct.'"

Similarly, in *Neal v. Melton*, 2011 WL 2559003 (6th Cir. 2011) (unpublished) a police dog entered the suspect's car during an investigatory stop and

attacked the occupants. The court held that plaintiffs failed to state an excessive force claim because even if the officers negligently failed to control the dog, they did not intentionally use the dog to seize the passenger.[3]

Indeed, the Ninth Circuit here and in its prior opinion in the case, acknowledged the ongoing circuit split concerning application of the "continuing seizure" rule to the full panoply of arrest based claims of injury. (App. 7 n.8 (*citing Torres v. City of Madera*, 524 F.3d at 1056 nn.3&4).) *See Riley v. Dorton*, 115 F.3d 1159, 1163-64 (4th Cir. 1997) *abrogated on other grounds in Wilkins v. Gaddy*, ___ U.S. ___, 175 L. Ed. 2d 995, 130 S. Ct. 1175 (2010) (excessive force claim against pre-trial detainee governed by Fourteenth Amendment and rejecting application of Fourth Amendment to such claims under "continuing seizure" doctrine);

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[3] Numerous district courts have held that an accidental shooting, or other inadvertent use of force, after a seizure has occurred, is not "unreasonable" under the Fourth Amendment. *See Troublefield v. City of Harrisburg*, 789 F. Supp. 160, 166 (M.D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992) (mem.); *Matthews v. City of Atlanta*, 699 F. Supp. 1552, 1556-57 (N.D. Ga. 1988); *Clark v. Buchko*, 936 F. Supp. 212, 218-20 (D.N.J. 1996); *Brice v. City of York*, 528 F. Supp. 2d 504, 510-14 (M.D. Pa. 2007); *Owl v. Robertson*, 79 F. Supp. 2d 1104, 1114 (D. Neb. 2000); *Cardona v. Connolly*, 361 F. Supp. 2d 25, 32-34 (D. Conn. 2005); *Lyons v. City of Conway*, 2008 WL 2465030, at *9-10 (E.D. Ark. 2008); *Young v. City of Chicago*, 1998 WL 1033110, at *2-3 (N.D. Ill. 1998); *Pollino v. City of Philadelphia*, 2005 WL 372105, at *6-8 (E.D. Pa. 2005); *Williams v. Bowling*, 2008 WL 4397426, at *6-8 (S.D. Ohio 2008); *Arrington v. District of Columbia*, 597 F. Supp. 2d 52, 59-60 (D.D.C. 2009).

Wiley v. City of Chicago, 361 F.3d 994, 998 (7th Cir. 2004) (declining to recognize Fourth Amendment malicious prosecution claim under "continuing seizure" rule).[4]

Federal appellate courts have also repeatedly rejected using a negligence standard to evaluate the reasonableness of an officer's conduct in creating the circumstances that prompted the use of force:

- *Myers v. Oklahoma County Board of County Commissioners*, 151 F.3d 1313, 1319-20 (10th Cir. 1998) (when officers entered decedent's apartment to take him into protective custody, decedent pointed gun at officers, and officers shot him; officers' decision to enter apartment was objectively reasonable; "actions leading to a confrontation . . . must be

[4] Tellingly, the Circuits the Ninth Circuit identified as adopting the "continuing seizure" rule in the context of excessive force claims do not use that phrase, nor do they adopt the reasoning of the Ninth Circuit that such a rule means that once a suspect is in custody, there is no need to determine whether any subsequent injury was sustained by means of force intentionally applied under *Brower*. *McDowell v. Rogers*, 863 F.2d 1302, 1306 (6th Cir. 1988) is a pre-*Graham* case where the court elected to apply the Fourth Amendment and not the Fourteenth Amendment to an excessive force claim. In *Wilson v. Spain*, 209 F.3d 713, 715-16 (8th Cir. 2000), *United States v. Johnstone*, 107 F.3d 200, 206-07 (3d Cir. 1997), *Frohmader v. Wayne*, 958 F.2d 1024, 1026 (10th Cir. 1992) and *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) the courts merely held that the Fourth Amendment applied to excessive force claims by arrestees occurring after the initial arrest, not that they were subject to a "continuing seizure."

more than merely negligent to be 'unreasonable'" for Fourth Amendment purposes);

- *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (where police shot suspect during standoff, officers did not recklessly or deliberately create the need to use deadly force; "to constitute excessive force, the conduct arguably creating the need for force . . . must rise to the level of recklessness, rather than negligence");

- *Ansley v. Heinrich*, 925 F.2d 1339, 1344 (11th Cir. 1991) (security guard was shot by officers who thought he was a robber; district court properly instructed jury that negligence alone cannot support a Fourth Amendment violation);

- *Young v. City of Killeen*, 775 F.2d 1349, 1352-53 (5th Cir. 1985) (officer shot drug transaction suspect he mistakenly believed was reaching for a gun; officer did not violate Fourth Amendment by negligently approaching suspect contrary to good police procedure, thus "creating a situation where the danger of such a mistake would exist"; "[t]he constitutional right to be free from unreasonable seizure has never been equated . . . with the right to be free from a negligently executed stop or arrest");

- *Coon v. Ledbetter*, 780 F.2d 1158, 1163 (5th Cir. 1986) (officers shot suspect during a confrontation; district court erred in giving jury instruction that allowed the jury to find officers liable for excessive force if they believed

officers were merely negligent in failing to identify themselves; "[w]hile the difference between ordinary tort [of negligence] and constitutional tort may be indistinct at their juncture points, the difference is clear at their poles");

- *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 694-96 (1st Cir. 1994) (officers shot intoxicated suspect who resisted arrest and threatened officers with knives; objective reasonableness under the Fourth Amendment should not be judged by a common-law tort standard and officer's actions, "even if mistaken, were not unconstitutional");
- *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991) (officer's actions preceding shooting of suspect were not objectively reasonable, but noting; "mere negligence" does not support a constitutional violation).

As we discuss, even outside the use of force context, a majority of circuits have rejected the notion that mere negligence is sufficient to establish unreasonable conduct for purposes of the Fourth Amendment.

2. Rejection of a negligence standard in Fourth Amendment claims not involving the use of force.

As noted, the Seventh Circuit has expressly embraced application of a negligence standard in evaluating all claims under the Fourth Amendment. Yet,

other circuit courts have expressly rejected application of a negligence standard in evaluating whether an officer's conduct is reasonable in the context of Fourth Amendment claims not involving the use of force.

In *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir. 2001), an officer arrested plaintiff on an outstanding warrant that was actually for her relative, who had used plaintiff's name as an alias. Before arresting plaintiff, the officer called a police communications operator to verify the warrant; the operator misread the information on her computer and failed to notice that plaintiff's name was listed only as an alias. *Id*. at 732. The Eighth Circuit held that the arrest did not violate the Fourth Amendment, because the officer had an objectively reasonable basis for making the arrest. *Id*. at 733-34. The court noted that the operator "was mistaken, but the mistake was not deliberate"; rather, "[i]t was occasioned . . . by the press of business and by the speed with which [the operator] was required to act." *Id*. at 734. The court found that the mistake, and the officer's reliance on it, "amounted to nothing more than negligence," which was insufficient to render the arrest "unreasonable" under the Fourth Amendment. *Id*.

In *United States v. De Leon-Reyna*, 930 F.2d 396 (5th Cir. 1991) (per curiam), the Fifth Circuit held that a border patrol officer's reliance on erroneous information provided by dispatcher could be deemed objectively reasonable for Fourth Amendment purposes, even if the error resulted from the officer's own negligence. *Id*. at 399-400. The court held that the

erroneous information should be considered in determining the legality of a warrantless investigatory stop. *Id*.; *see also Smith v. Busby*, 172 F.Appx. 123, 124 (8th Cir. 2006) (officers' alleged negligence in allowing third parties to enter home during search did not constitute Fourth Amendment violation).

Plainly, there is a wide divergence among the federal appellate courts concerning application of a negligence standard to claims under the Fourth Amendment.

D. This Case Provides A Strong Factual And Procedural Foundation For The Court To Resolve The Ongoing Conflict Among The Lower Courts On The Recurring Issue Of Fourth Amendment Claims Arising From Inadvertent Use Of Force By Police Officers.

It is essential that the Court address the ongoing conflict among the circuits on the issue of whether inadvertent use of force by a police officer can give rise to an excessive force claim under the Fourth Amendment. As noted, the issue arises with great frequency in the lower federal courts. In addition, because of the esoteric nature of the analysis on both sides of the question, these cases consume a disproportionate amount of time and judicial resources. Indeed, this case, as well as the Fourth Circuit's decision in *Henry v. Purnell*, are both marked by multiple trips between the trial and appellate courts at each level trying to sift out the various issues as to

whether a seizure occurred and if so, whether reasonableness under the Fourth Amendment is measured by the standard of common law negligence.

This case presents an excellent vehicle for the Court to resolve this issue. First, the case brings into sharp focus the ongoing conflict concerning the "continuing seizure" doctrine. The Ninth Circuit found it unnecessary to resolve the issue of whether Officer Noriega intended to seize Everardo by use of a particular means of force, i.e., a Taser instead of a pistol, because under the Ninth Circuit's "continuing seizure" doctrine once Everardo had been arrested and was in custody, he was "seized" for all purposes under the Fourth Amendment. Hence, after that time *any* conduct causing any injury to him would be evaluated as to whether it was "reasonable" under the Fourth Amendment. (App. 7.) The case therefore allows the Court to address the issue of how *Brower*'s standards apply in this instance, i.e., must each use of force by a police officer be measured through *Brower*'s prism of determining whether the officer intended to seize a suspect by a particular means, or as the Ninth Circuit has concluded, once force or restraint has been applied, the *Brower* standard disappears and any use of force is measured by the reasonableness standard of the Fourth Amendment.

Second, the case presents a textbook scenario for resolving the question of whether the standard of reasonableness under the Fourth Amendment is identical to the standard for common law negligence. There is no issue of fact concerning Officer Noriega's

use of force in this case. The parties stipulated that Noriega intended to employ her Taser against Everardo, but mistakenly employed her pistol instead. There is no dispute that the shooting was inadvertent. It clearly presents the opportunity for the Court to determine whether an inadvertent, negligent use of force by a police officer can constitute "unreasonable" force under the Fourth Amendment.

II.

REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S "CONTINUING SEIZURE" RULE AND DECISION IN THIS CASE FINDING THAT INADVERTENT, NEGLIGENT CONDUCT BY A POLICE OFFICER CAN CONSTITUTE EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT, IS CONTRARY TO *BROWER* AND *GRAHAM*, AND SPAWNS CIVIL RIGHTS ACTIONS THAT ARE NOTHING MORE THAN COMMON LAW NEGLIGENCE CLAIMS.

A. The "Continuing Seizure" Rule Adopted By The Ninth Circuit Is Contrary To *Brower* Because It Sanctions Fourth Amendment Claims Premised On Injuries Inflicted By Means Other Than Those An Officer Intended To Apply.

The Ninth Circuit's "continuing seizure" rule as applied to claims concerning use of force against individuals already in custody is flatly contrary to this Court's decision in *Brower*. In *Brower*, the Court made it clear that a seizure occurs "when there is a

governmental termination of freedom of movement *through means intentionally applied*." 489 U.S. at 597 (emphasis in original). Although the Court noted that "[i]n determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line," noting that a seizure would occur if a police officer intended to shoot a suspect in the leg but instead struck him in the heart, the Court emphasized that the termination of movement had occurred by virtue of the means the officer *intended* to apply, even if the officer did not intend the particular consequences. *Id*. at 598-99 ("We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock – and that he was so stopped.").

It is undisputed that Everardo was not seized by the means that Officer Noriega intended. She intended to seize him using a Taser, not a pistol. Yet, the Ninth Circuit sidestepped this inconsistency with *Brower* by invoking its "continuing seizure" doctrine, i.e., that once Everardo was arrested, he was seized for all purposes. The Ninth Circuit's "continuing seizure" doctrine cannot be squared with *Bower*'s clear repudiation of accidental, inadvertent conduct as being sufficient for purposes of a seizure under the Fourth Amendment.

In addition, as this case illustrates, the Ninth Circuit's "continuing seizure" doctrine effectively creates a Fourth Amendment cause of action anytime a prisoner is injured while in custody, since, having been arrested, the suspect has already been seized, and therefore any injury inflicted – even if plainly inflicted only as a result of negligence – becomes a Fourth Amendment claim. For example, if a suspect is injured in a car accident while being transported to jail, under the Ninth Circuit's "continuing seizure" rule, he would have a potential Fourth Amendment claim if he could establish that the officers' actions while driving were negligent, i.e., unreasonable. In sum, the "continuing seizure" rule reduces the Fourth Amendment to nothing more than the constitutional equivalent of common law negligence.

B. Allowing Fourth Amendment Excessive Force Liability To Be Predicated Upon Inadvertent Use Of Force By A Police Officer Is Contrary To *Graham v. Connor* And Subverts Basic Principles Of Qualified Immunity.

All of this Court's decisions concerning use of force under the Fourth Amendment have involved the intentional application of force by police officers. The Court has never suggested that inadvertent conduct by an officer may give rise to a Fourth Amendment claim.

While in *Graham v. Connor* this Court made it clear that an officer's subjective intentions play no

part in determining whether force is reasonable, this is not the equivalent, as the Ninth Circuit and other circuits have held, to saying that whether an officer intends to perform a particular act is irrelevant under the Fourth Amendment. Rather, as the Court emphasized just last term, the objective reasonableness standard simply contemplates that *motive* is irrelevant. *Ashcroft v. al-Kidd*, ___ U.S. ___, 179 L. Ed. 2d 1149, 131 S. Ct. 2074, 2080 (2011) (if the "'circumstances, viewed objectively, justify [the challenged] action . . . ,'" then the conduct is objectively reasonable "'*whatever* the subjective intent' *motivating* the relevant officials") (emphasis added). Thus, while the objective reasonableness standard "recognizes that the Fourth Amendment regulates conduct rather than thoughts" (*id.*) this is not the same thing as saying it regulates inadvertent conduct by law enforcement officers.

To be sure, this Court has noted that officers may be shielded from liability where they make reasonable mistakes. *Hill v. California*, 401 U.S. 797, 803-04 (1971) (no liability for mistakenly arresting wrong individual pursuant to valid warrant); *Maryland v. Garrison*, 480 U.S. 79, 85-87 (1987) (lawfulness of search of wrong apartment turns on reasonableness of factual mistake). But the corollary to this is not that when officers act unreasonably in a tort sense that there is necessarily Fourth Amendment liability. Even in cases involving mistaken conduct by officers, the mistakes at issue led the officers to deliberately take particular intentional action, albeit for mistaken

reasons. The Court has never suggested that purely inadvertent conduct, i.e., specifically intending to perorm one particular physical act but instead performing another, is sufficient to give rise to liability under the Fourth Amendment.

A rule allowing purely inadvertent conduct to give rise to a Fourth Amendment claim also plays havoc with this Court's qualified immunity jurisprudence in that it essentially renders the "clearly established law" prong nonsensical. Here, the Ninth Circuit held that Officer Noriega would not be entitled to qualified immunity for her inadvertent use of a handgun instead of a Taser, because she should have been put on notice by the Ninth Circuit's earlier case law that even negligent conduct could constitute a violation of the Fourth Amendment. (App. 21.) As Judge Niemeyer noted in dissenting from the en banc decision in *Henry v. Purnell*, 652 F.3d 524, any inquiry about an officer's understanding of clearly established law for purposes of a qualified immunity inquiry in the context of the inadvertent use of force makes no sense. This is because the point in such cases is that the officer did not intend to perform the specific act in question: "Officer Purnell did not intend to use his gun as he set out to stop Henry with a Taser and mistakenly shot him with a gun. He could not have had prior knowledge and therefore understood that he was about to shoot Henry. In the language of the qualified immunity standard, he could not have 'reasonably believed' or 'reasonably anticipated' that his actions would violate clearly established law." *Id*. at 555.

In *Paul v. Davis*, 424 U.S. 693 (1976), this Court declared that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id*. at 701. In *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986), the Court held that the due process clause did not encompass claims for negligence, regardless of whether they were premised upon inadvertent conduct, or deliberate conduct undertaken in negligent fashion. *Daniels*, 474 U.S. at 333-34; *Davidson*, 474 U.S. 347-48. In so holding in *Daniels*, the Court observed that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." 474 U.S. at 332. As the Court held:

> That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed. It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.

Id. at 333.

The Court therefore declined to "trivialize the centuries-old principle of due process of law" by holding that mere negligence could fall within the scope of the Fourteenth Amendment. *Id*. at 332. As the Court emphasized, "we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'" *Id*. at 330.

Here, too, the Court should not trivialize the Fourth Amendment by allowing claims in federal court where there has been no "affirmative abuse of power" but rather, mere inadvertent conduct by a police officer. It is vital that the Court foreclose what are essentially common law tort actions being brought under the auspices of the Fourth Amendment. For this reason as well, review is warranted.

III.

REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY DEPARTS FROM THIS COURT'S PRECEDENTS AND UNDERSCORES THE CONFUSION AMONG THE APPELLATE COURTS CONCERNING APPLICATION OF QUALIFIED IMMUNITY TO INADVERTENT CONDUCT BY POLICE OFFICERS.

This Court has made it clear that an officer is entitled to qualified immunity when he or she has made a reasonable mistake as to the law, the facts, or both. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Court has stated that qualified immunity is available

to all officers save for those who are "plainly incompetent" or "knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Here, quite clearly, Officer Noriega did not "knowingly" do anything. She certainly did not knowingly violate the law, having intended to do one thing – employ her Taser – but actually doing another, discharging her pistol. Nor can she be characterized as "plainly incompetent" for making the mistake in question, having received limited training with respect to using the Taser, and none as to how to avoid the confusion that occurred in this case. Indeed, concerned about potential mistakes, she practiced distinguishing between the two weapons. There is no evidence that Officer Noriega, rather than the police department itself, dictated that she wear the weapons on the same side, one holster above the other, a position which, as illustrated here and in the *Henry* case, was a recipe for disaster.

Nonetheless, the Ninth Circuit denied qualified immunity here. It noted under *Tennessee v. Garner*, 471 U.S. 1 (1985), the law was clearly established that it was unreasonable for an officer to shoot an unarmed prisoner. It similarly found that based upon its prior decision in *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir. 1998), that Officer Noriega should have been aware that even an accidental shooting by a police officer might violate the Fourth Amendment.

The Ninth Circuit's analysis does not withstand scrutiny. As Judge Niemeyer noted in his dissenting opinion in *Henry*, inquiry about an officer's knowledge of clearly established law is meaningless where one is discussing a factual mistake. Of course Officer Noriega knew it would be unconstitutional to use deadly force against an unarmed arrestee. But, it is undisputed that she did not intend to do that. Her understanding of the law had nothing to do with employing one type of force, and instead accidentally employing another.

Nor would the Ninth Circuit's prior decision in *Jensen* have put Officer Noriega on notice of any clearly established law that would have had an impact on the tragic mistake that occurred here. In *Jensen*, the Court merely held that an officer who intentionally shot a figure he believed to be a criminal suspect but subsequently found out was a fellow police officer, could be held liable under the Fourth Amendment. *Jensen*, 145 F.3d 1078. Even assuming knowledge of the governing legal standard is relevant in cases like this involving inadvertent deployment of force, nothing in *Jensen* would have informed Officer Noriega that the purely inadvertent use of one type of force when intending to use another type of force, would result in liability. The officer in *Jensen* intended to shoot the very person at whom he pointed his weapon, albeit mistaken as to the person's identity. Officer Noriega did not even intend to apply the means of force that resulted in the injury. She intended to perform one physical act, but instead performed another.

The Ninth Circuit points to no similar case of weapons confusion that would have alerted Noriega of the constitutional dimensions of her mistake. Its invocation of *Jensen* as alerting officers that mistaken shootings may violate the Fourth Amendment is the very sort of highly generalized statement of "clearly established law" by the Ninth Circuit that this Court has repeatedly decried. *Ashcroft v. al-Kidd*, 131 S. Ct. at 2084 ("We have repeatedly told courts – and the Ninth Circuit in particular, [citation] . . . – not to define clearly established law at a high level of generality.").

As the Ninth Circuit's decision here, and the Fourth Circuit's decision in *Henry* make clear, the circuit courts have great difficulty in applying this Court's qualified immunity jurisprudence in the context of inadvertent purportedly negligent application of force. Petitioner submits that under the governing law, Officer Noriega would be entitled to qualified immunity. The Court should therefore grant review to clarify application of qualified immunity in these circumstances.

CONCLUSION

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

Respectfully submitted,

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