No. 11-208

IN THE
SUPREME COURT OF THE UNITED STATES

DARIN RYBURN AND EDMUNDO ZEPEDA,
Petitioners,
v.
GEORGE ROBERT HUFF, MARIA HUFF, AND VINCENT HUFF
Respondents.

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

REPLY BRIEF

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Pursuant to *Supreme Court Rule* 15(6), Petitioners Darrin Ryburn and Edmundo Zepeda hereby submit this Reply Brief to the Brief in Opposition of Respondents, George, Maria, and Vincent Huff.

INTRODUCTION

The Brief in Opposition submitted by Respondents actually acknowledges the split between the circuits as to whether this Court's decision in *Brigham City v. Stuart* (2006) 547 U.S. 398, 404, merged the emergency doctrine with the application of exigent circumstances for warrantless entry in an apparent emergency situation and thereby eliminated criminal probable cause as a requirement. [See e.g. Opposition 25.] Notwithstanding Respondents' attempts to label some of the opinions from <u>both</u> the Sixth and Tenth circuits as "isolated" and explain why the Ninth Circuit's opinion in this case addressed this issue properly [Id.], Respondents do not, and cannot, dispute that the split between the circuits on this important constitutional issue exists.

The remainder of the Opposition is something of an enigma. It is essentially a house of cards built largely upon the foundation of factual assertions which were not found to be true by the District Court. Indeed, Respondents failed to convince even the Ninth Circuit, which overturned the case in Respondents favor in part, that any of the District Court's factual findings in this case were clearly erroneous. The most oft repeated of these factual assertions—that the officers told the school to write a

letter calling the incident a hoax before they went to the Huffs house—can only be characterized as false. Both the evidence and the District Court's findings contradict this ridiculous assertion and make clear that the officers reported their conclusion that the rumors were a hoax only after they finally had the opportunity to speak with Vincent Huff inside Repondents' home. [Petition, App. 4; Reply, App. 18.]

In addition, notwithstanding Respondents' hyperbole [Opposition 9], Petitioners do not ask this Court to endorse unfettered warrantless entry in all school shooting investigations. Rather, the petition for a writ of certiorari should be granted to address the extent of the circumstances that officers may consider in an emergency entry situation in the early stages of an investigation of allegations that a student is planning a school shooting. In light of the difficulties in confirming or denying information flowing actively through a high school rumor mill, and the training that officers receive as to the hallmarks of the profile of school shooters, this information should not be completely disregarded, as was done by the Ninth Circuit in its only significant opinion on the subject. Rather, this Court should provide important direction to law enforcement agencies on this aspect of investigations of potential school shootings.

Finally, Respondents' argument on qualified immunity is telling. It ignores the key question of how such immunity could not be applied to protect the Petitioner officers' instantaneous decision, when

two learned federal judges sitting in quiet reflection suggest that the officers acted properly. Qualified immunity should apply to shield an officer who reasonably misapprehends the law governing the circumstances confronting him or her. *Brousseau v. Haugen* (2004) 543 U.S. 194, 198. In light of the changing and disparate legal treatment of the issue, conceded by Respondents, qualified immunity should apply to Petitioners. Respondents simply cannot show that the issue was clearly established in the law, and that a reasonable officer confronted with the situation before him should have known that his conduct was unlawful. *Saucier v. Katz* (2001) 533 U.S. 194, 201; *Anderson v. Creighton* (1987) 483 U.S. 635, 641.

Petitioners ask this Court to grant the Petition to resolve the conflict between the circuits, to address these important legal issues of national concern on the limits on important investigations and on all officer's liability therefore, and to ultimately overturn the ruling of the Ninth Circuit Court of Appeals.

ARGUMENT

I. RESPONDENTS CONCEDE THAT THE NINTH CIRCUIT'S RULING CONFLICTS WITH RULINGS IN THE SIXTH AND TENTH CIRCUITS

Respondents spend approximately nine pages of the Opposition arguing that the Sixth and Tenth Circuits misinterpreted this Court's holding in *Brigham City, supra.* [Opposition 25-33.] They argue

both that those cases were incorrectly decided and that the Ninth Circuit majority in this case correctly applied *Brigham City*. Respondents also spend considerable time attempting to distinguish the present case from the circumstances in *United States v. Huffman* (6th Cir. 2006) 461 F.3d 777,and *Armijo v. Peterson* (10th Cir. 2010) 601 F.3d 1065. Respondents' arguments serve to simply highlight the conflict between the Ninth Circuit on the one hand, and the Sixth and Tenth Circuits on the other. This Court should grant certiorari to resolve this conflict.

Moreover, Respondents' argument that this case is distinguishable from *Huffman* shows why the cases are actually similar and why it is important not to have different standards in different locales. As described by Respondents, in *Huffman* responding officers observed bullet holes in the house in responding to a shots fired call. "Based on their experience" the officers found the holes were consistent with driveby shootings in the neighborhood, and entered the property without a warrant to ensure that no one was lying injured inside. [Opposition 28.] In this case, the officers' training and experience told them that the Huffs were acting unusually in many respects, that Vincent fit into several categories of the profile of a potential school shooter, and that such shooters usually obtain their weapons from the home. Like the bullet holes in *Huffman*, Petitioners here saw Maria Huff's sudden dash back into the house at the first mention of guns. In both cases, combining the officers' observations with their experience

reasonably led them to believe that entry was warranted to address a potential emergency.

In *Armijo, supra,* as described by Respondents, officers entered a house without a warrant looking for a suspect who had been making bomb threats to a school. They made a warrantless entry based on concern over rumors that the threats might lead to a school shooting during the evacuation. The suspect fit the profile of information both known, suspected, and rumored about the offender. [Opposition 31-33.] In *Armijo*, the suspect had been expelled by the school, was in the gang rumored to be behind the bomb threats, and the officers felt that he had a reason to be angry at the school. [*Id.*]. In this case, facts and rumors about Vincent fit the profile of a possible school shooter, and when asked about guns, his mother suddenly bolted back into the house—which is exactly where the officers' training says school shooters usually obtain the weapons. In both *Armijo* and this case, officers used known facts, rumors and supposition to evaluate the totality of the circumstances involved.

Moreover, in labeling *Armijo* as "isolated," Respondents overlook *U.S. v. Najar* (10th Cir. 2006) 451 F.3d 710, 715, which preceded *Armijo* by four years and was the first Tenth Circuit case to follow *Brigham City* and not require criminal probable cause to enter without a warrant in emergency exigent circumstances.

In 2011, in this case, the Ninth Circuit ruled that criminal probable cause was required for officers to

enter without a warrant to address a potential emergency, when their duties fell more within the officers' criminal investigator function. Thus, the Ninth Circuit has split from the rules set up in the Sixth and Tenth Circuits, as well as with this Court's holding in *Brigham City*, and set up different tests for officers to use depending on their primary "function." There is a clear split between the Circuits which the Petition should be granted to resolve.

II. RESPONDENTS RAISE FACTUAL CONTENTIONS REJECTED BY THE DISTRICT COURT AND NOT SUPPORTED BY THE RECORD

Respondents acknowledge that they base their arguments in the opposition on the assertion of "crucial facts" which the District Court did not find to exist. [Opposition 14-15.]

Rule 52(a) of the Federal Rules of Civil Procedure requires that the District Court make factual findings in all cases tried without a jury. Such factual findings are reviewed under the "clearly erroneous" standard. *Zivkovic v. Southern California Edison Co.* (9th Cir. 2002) 302 F.3d 1080, 1088. A reviewing court may not reverse those findings even if it would have weighed the evidence differently. *Anderson v. Bessemer City* (1985) 470 U.S. 564, 674.

The District Court's factual findings were reviewed by the Ninth Circuit on Respondents' challenge thereto. The Ninth Circuit declined to overturn any of them, holding that the District

Court's findings were not clearly erroneous. Respondents' reliance upon these other "crucial facts", which contradict the District Court's findings is meritless. All arguments based thereon in the Opposition should be disregarded.

The facts that the Respondents unsuccessfully argued to the Ninth Circuit that the District Court should have found, but did not, include:

> "(1) whether Maria knew why the police were at her home before she went outside; (2) why Maria hung up her cell phone on Ryburn before proceeding outside to speak with the police; (3) whether Maria answered Ryburn's questions about whether there were any guns inside the Huff residence; (4) whether Maria told the officers she was going back into the house to get her husband; and (5) Maria's whereabouts upon returning inside the Huff residence."

Huff v. City of Burbank (9th Cir. 2011) 632 F.3d 539, 543. This list mirrors most of the "crucial facts" not adopted below as argued in the Opposition [Opposition 14-15.]

In this Court, Respondents rely primarily upon assertions that 1) Maria Huff answered the officer's question about whether there were guns in the house, 2) that Maria Huff walked in and out of several rooms after re-entering the house, and 3) upon a new assertion that Petitioner Ryburn told the school to write a letter calling the incident a

hoax before he went to the Huff's house. [Opposition 15.]

Respondents then improperly use these "facts" extensively to respond and attempt to undermine Petitioners' arguments about the importance of the issues for review, and to suggest that entry was clearly improper, and immunity clearly should not apply. However, these new "facts", which are critical to Respondents' arguments, are actually contradicted by the District Court's findings.

First, the District Court clearly found that Maria Huff did not answer the question about guns. Specifically, the court found that Ryburn "asked if there were any guns in the house. Mrs. Huff immediately turned around and ran into the house." [Petition, App. 3.]

Second, the District Court rejected Respondents' attempt to argue that Maria walked in and out of different rooms after entering. Specifically, the Court found that "Ryburn followed Mrs. Huff into the house" [Petition, App. 3.] and that "[a]fter the officers entered the house, they remained in the living room with Mrs. Huff and Vincent." [Petition, App. 4.]

Finally, the officers did not tell the school that the incident was a hoax until returning to the school *after* meeting the Huffs. The District Court noted this report in its findings stating: "The officers remained inside the home for five to ten minutes, talking to Mr. Huff and Vincent. Ultimately, they satisfied themselves that the rumors about threats

were a hoax. They left the home and returned to the school to report their conclusions." [Petition, App. 3.]

Moreover, Respondents' attempt to suggest that the principal's testimony supports his assertion that Ryburn told the school it was a hoax before going to the Huffs house is disingenuous at best. That testimony only shows that she wrote the letter to students noting it was a hoax on the date of the incident. [Opposition, App. 79b-80b.] When asked in cross examination immediately following this excerpt if the officers told her before they left for the Huffs house that they thought it was hoax, the principal stated clearly "Definitely not." [Reply, App. 18.] The report that it was a hoax came back to her after the officers went to the Huffs house. [Id.]

III. RESPONDENTS CANNOT DIMINISH THE NATIONAL IMPORTANCE OF SCHOOL SHOOTING INVESTIGATIONS

Respondents attempt to both marginalize the case as not involving an actual school shooting, and overstate Petitioners' request for guidance from this Court as one seeking unfettered warrantless entry in school shooting investigations. Notwithstanding these tactics, the limits of the facts and circumstances that law enforcement agencies may consider in warrantless entry situations in school shooting investigations is an "important question of federal law that has not been, but should be settled by this Court." *Supreme Court Rule* 10(c).

Respondents do not deny the difficulties in confirming or denying information flowing actively through a high school rumor mill, nor do they deny the validity of the training that these officers received as to the usual profile of school shooters. This information should not be completely disregarded, as was done by the Ninth Circuit in this case.

Indeed, inadvertently, Respondents point out that *Armijo, supra,* 601 F.3d at 1071 involved warrantless entry in an investigation which involved concern about a potential school shooting, in addition to the telephone bomb threats. In that case, as discussed above, the Tenth Circuit validated the warrantless entry based on the combination of facts, rumors, and supposition known to the officers. In this case, the Ninth Circuit refused to review the totality of these circumstances, instead limiting its review to provable facts. Respondents, therefore, have in fact demonstrated a split in the Circuits on this important issue that further merits review by this Court.

IV. QUALIFIED IMMUNITY SHOULD PROTECT OFFICERS WHERE REASONABLE LEGAL MINDS DIFFER

Finally, Respondents' argument on qualified immunity is as telling for what it omits, as for what it argues. The Opposition ignores the timeline showing that the opinions in *Brigham City* in May 2006, *Najar, supra,* 451 F.3d at 715 in June 2006, and *Huffman, supra*, 461 F.3d at 780 in August 2006

each issued almost a year before the events at issue. Respondents entirely ignore the *Najar* case, perhaps because therein the Tenth Circuit removed probable cause from a test that was essentially the same as the one that had been used in the Ninth Circuit.

It also ignores the key question of how such immunity could not be applied to protect the Petitioner officers' instantaneous decision, when two federal judges, sitting in quiet introspection suggest that the officers acted properly. Respondents' argument that the Sixth and Tenth Circuit opinions misapplied the law essentially concedes that the issue of the propriety of warrantless entry in an apparent emergency was not clearly established in the law at that time and that a reasonable officer confronted with the situation before him may not have known that his conduct was unlawful. *Saucier v. Katz* (2001) 533 U.S. 194, 201; *Anderson v. Creighton* (1987) 483 U.S. 635, 641.

Nor do Respondents dispute the importance of clarifying the application of qualified immunity for police officers in areas of apparently changing law. The Court should grant the petition to ensure that courts properly consider areas of conflict in the law in weighing qualified immunity. The Court should also act to ensure that the courts consider the totality of the circumstances confronting the officers in the face of a possible emergency. Courts should not blithely dismiss some of the factors contributing to an officer's reasonable, split-second decision simply because the court feels that those factors were

based on speculation or had not yet been confirmed with admissible evidence.

The District Court characterized the apparent emergency as a "rapidly evolving incident", holding that: "Within a very short period of time, the officers were confronted with facts *and circumstances* giving rise to grave concern about the nature of the danger they were confronting." [Petition, App. 7 (emphasis added).]

Respondents do not dispute that the Ninth Circuit refused to consider many of these circumstances confronting the officers as speculation and rumor. [Petition, App. 22-23.] Such evidentiary status might properly affect the weight given the circumstance, but should not require an officer to ignore it completely when events unfold quickly. This Court should grant the Petition to ensure that courts evaluating qualified immunity consider not only the provable facts but also all other circumstances that color an officer's decision in a rapidly evolving incident to enter a property without a warrant.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, this Court should grant the Petition for a writ of certiorari and hear this matter on the issues presented.

Respectfully submitted,

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November 11, 2011

App. 14

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE HON. JUDGE FLORENCE-MARIE COOPER, JUDGE PRESIDING

GEORGE ROBERT HUFF; MARIA H. HUFF; and VINCENT ROBERT HUFF, a minor, by and through his Guardian Ad Litem, George Robert Huff, Plaintiffs vs. CITY OF BURBANK; a municipal corporation; BELLARMINE-JEFFERSON HIGH SCHOOL, et al., Defendants	No. 07-CV-04114-FMC

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, January 13, 2009

LISA M. GONZALEZ, CSR 5920 – Official Reporter
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I N D E X

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* * * [185]

Q Did you write this letter?

A Yes, I did.

Q Is that your signature?

A Yes.

MR. TERRELL: Your Honor I would like to move Exhibit 16 into evidence.

THE COURT: Yes, admitted.

(*Exhibit 16 received.*)

BY MR. TERRELL:

Q Sister, Milner, could you tell the Court why you wrote this letter.

A June 1st was a Friday, and we had a situation that had developed in the course of the day that involved many, many students, a great deal of disruption within the school day; and I thought it was a good idea to communicate the situation to parents and send this home with students before the end of the school day.

Q Is it fair to say that you had a discussion with Sergeant Ryburn of the Burbank Police Department that a letter should be generated pertaining to the events that occurred on June 1st, 2007?

A Yes, it is.

Q And that conversation you had with Sergeant Ryburn occurred when he was on campus on June 1st, 2007, correct?

A Correct.

* * *

[186]

MR. TERRELL: I have no further questions, Your Honor.

THE COURT: Cross.

MS. HUMISTON: Yes, Your Honor.

Cross-Examination

BY MS. HUMISTON:

Q Sister Cheryl, we've heard discussion that this letter wherein it says, about the police: "They concluded, as did I, that this was an example of vicious and irresponsible gossip."

Now, that report came back to you from Officer Zepeda when he came back to the school, after he went to the Huff house; correct?

A Correct.

Q They didn't tell you before they left that they thought it was a hoax, that it was false, they concluded there was nothing to this threat?

A Definitely not.

Q Now, Burbank police officers responded to Bell-Jeff at the request of Bell-Jeff; correct?

A Yes.

Q And when the officers got there, you talked to at least --

Do you recognize Sergeant Ryburn?

A I do.

* * * [215]

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript format is in conformance with the regulations of the Judicial Conference of the United States.

Date: July 18, 2009

s/
LISA M. GONZALEZ, U.S. COURT REPORTER
CSR NO. 5920

App. 14

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Date: July 18, 2009

s/
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CSR NO. 5920