No. 11-84

In The
Supreme Court of the United States

MICHELLE ALVIS; JOHN KEESOR;
and PAUL MORGADO,

Petitioners,

v.

KATHLEEN ESPINOSA, individually and as personal representative of the Estate of Asa Sullivan, *et al*.,

Respondents.

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

REPLY BRIEF

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I. The Conflict On The First Question Presented Is Genuine And Important

1. Respondents are wrong to assert there is no genuine conflict between the circuits about whether an officer loses authority to use reasonable force to defend himself or others against a violent suspect he encounters during a search, if that search began with an unlawful entry. Opp. 15-23.

Respondents attempt to minimize the differences between the Ninth Circuit and the other circuits, Opp. 15-23, by relying on *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), as a correct statement of the Ninth Circuit's current view. That reliance is unsound. Initially, even when *Billington* was the most recent Ninth Circuit decision, the circuits, along with academic commentators, already recognized a conflict. Petition 19-20 (circuits); *e.g.*, Michael Avery, *Unreasonable Seizures Of Unreasonable People: Defining The Totality Of Circumstances Relevant To Assessing The Police Use Of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 273-287 (2003).

Then, *Espinosa* exacerbated this already-existing conflict by discarding *Billington*'s requirement that the initial violation be the proximate cause of the later force. The term "proximate cause" is absent from the majority opinion below. And the very concept of proximate cause was missing from the majority's analysis. The dissent recognized that the majority did not impose any proximate causation

requirement. App. 38-44. And contrary to respondents' claim, Opp. 17-18, the Third Circuit recognized the same thing. *Lamont v. New Jersey*, 637 F.3d 177, 186 (3d Cir. 2011) (recognizing conflict with *Espinosa* concerning proximate cause, and specifically whether a suspect's resistance after a police officer's unlawful entry is a superseding cause of the officer's need to use force).[1]

Even if respondents were correct in claiming that some circuits side with the minority rather than the majority view, Opp. 18,[2] that would hardly disprove the existence of a genuine conflict.

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[1] *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999), does not support respondents' claim of similar approaches in the Third and Ninth Circuits. In *Grazier ex rel. White v. City of Philadelphia*, 328 F.3d 120, 127 (3d Cir. 2003), the Third Circuit explained that *Abraham* did not adopt a position whether pre-seizure errors were even *relevant* to force claims, but simply observed a circuit conflict. Neither *Abraham* nor *Grazier* addressed the proximate cause issue, unlike *Lamont*.

[2] Respondents' arguments are incorrect. The Fourth Circuit holds officers' pre-seizure errors irrelevant, and restated this principle in a recent case that also explained that *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) stands only for the proposition that the severity of a crime is relevant to the reasonableness of force. *Waterman v. Batton,* 393 F.3d 471, 477, 481 (4th Cir. 2005). Likewise, courts and commentators agree that the Eleventh Circuit's decision in *Menuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994), aligns it with the majority. *E.g.*, *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996); Avery, *supra*, at 282.

Finally, the conflict persists across criminal and civil cases, Petition 21, and respondents do not argue otherwise.

2. This conflict is important. Seven organizations have appeared as *amici* urging this Court to grant the petition. These organizations – representing law enforcement officers, police chiefs, county sheriffs, and local governments that protect a public constituting one-eighth of the Nation's population – have outlined the dire real-life consequences of the minority approach: uncertainty for officers who must make split-second decisions whether to use force when lives are at stake; danger to the public when officers hesitate to investigate threats to public safety because they cannot be assured that they retain the most basic right of self-defense; and crushing liability for officers who err in initiating a search and then are unlucky enough to encounter a violent suspect. Respondents do not acknowledge or rebut these concerns, or any of the *amici*'s other considered views.

Instead, respondents claim that there is insufficient indication that officers lose immunity based on "provocation" claims. Opp. 19-20 (conceding one liability finding, *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005)). Respondents are wrong. Courts taking the minority view *do* strip officers of immunity for using force to make a seizure, if there was a colorable constitutional (or even non-constitutional) officer error during the events leading up to that seizure. *E.g.*, *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *Sevier v. City of Lawrence,* 60 F.3d 695, 701

(10th Cir. 1995); *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993). And when courts in the Ninth Circuit find a colorable claim that an earlier Fourth Amendment violation preceded a use of force, they deny immunity and send the force claim to trial on the same "provocation" theory alleged by respondents. *See, e.g.*, *Espinosa*; *Federman v. County of Kern*, Nos. 01-16691, 01-16785, 2003 WL 1878837, at *2-*3 (9th Cir. April 15, 2003); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994); *Dietzmann v. City of Homer*, No. 3:09-CV-00019 RJB, 2010 WL 4684043, at *15 (D. Alaska Nov. 17, 2010); *Burns v. City of Redwood City*, 737 F. Supp. 2d 1047, 1061-62 (N.D. Cal. 2010); *Estate of Bojcic v. City of San Jose*, No. C05-3877 RS, 2007 WL 2825656, at *7 (N.D. Cal. Sept. 26, 2007).[3] Indeed, after the petition for certiorari was filed in this case, the Ninth Circuit, in a published decision, applied *Espinosa* to deny summary judgment on a "provocation" claim. *Glenn v. Washington County*, No. 10-35636, ___ F.3d ___, 2011 WL 5248242, at *13 (9th Cir. Nov. 4, 2011).[4]

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[3] By contrast, none of the decisions cited by respondents to support their argument – that district courts in the Ninth Circuit "overwhelmingly grant" officers' summary judgment motions on these "provocation" claims, Opp. 19-20 – involved a colorable claim of an *initial* Fourth Amendment violation, which is the predicate for a claim that the earlier violation "provoked" the later use of force.

[4] *Glenn* also appeared to further expand the Ninth Circuit's "provocation" rule, by allowing the plaintiffs to premise officers' force liability not only on *constitutional* errors that preceded a

(Continued on following page)

The obvious result of this conflict is that officers will be subjected to very different standards in different circuits, and juries will be instructed in opposite ways regarding constitutional claims. Under *Espinosa*, district courts in the Ninth Circuit must instruct juries hearing Fourth Amendment force claims to consider the lawfulness of an officer's earlier entry or arrest, *and* an officer's subjective intent during the prior conduct, in deciding whether his later force against a resisting suspect was lawful. Meanwhile, juries in other circuits will be instructed *not* to consider those matters in deciding whether force was reasonable.

3. There is no reason for the Court to delay resolution of this conflict. Nearly every encounter that ends with an officer's use of force begins with a decision to make a search, arrest, or investigative detention subject to an independent Fourth Amendment analysis. This Court recognizes that a "single familiar standard is essential to guide police officers" concerning conduct regulated by the Fourth Amendment. *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (internal quotation marks omitted). But in the Ninth Circuit and other circuits in the minority, there is no "single familiar standard" to guide officers' use of force. Rather, the minority view involves a *post facto* determination of what standard controlled – and a

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use of deadly force, but also on *non-constitutional* errors like allegedly unreasonable tactics. *Id.* at *10-*11.

finding of an error at the outset of an encounter retroactively strips officers of their normal authority to use force against a resisting suspect.

Respondents urge the Court to deny review so that the decisions in *Kentucky v. King*, 131 S. Ct. 1849 (2011) and *Scott v. Harris*, 550 U.S. 372 (2007) can "percolat[e]." Opp. 24. But neither of these decisions will resolve the circuit conflict, because neither decision addressed the relationship between an initial unlawful search and a separate later use of force.

II. This Case Is An Appropriate Vehicle For Resolving This Conflict

1. Contrary to respondents, Opp. 12-14, the Ninth Circuit's rulings that the two uses of force in this case – initially pointing weapons at Sullivan, then later using deadly force – could be found unreasonable were not "independent" or "alternative" to the "provocation" ruling. Rather, both rulings likewise relied on the officers' potentially unlawful entry as a basis to find their later force unreasonable. In ruling on the gun-pointing claim, the majority stated "Sullivan had not caused the officers to forcibly enter the home; he ran from them." App. 16. And in ruling that deadly force could be found unreasonable, the majority again relied on the officers' entry, and stated that Sullivan "had not initially caused this situation." App. 17. Thus, no aspect of the Ninth Circuit's holding on the force claims was "independent" of the rule that officers who make an unlawful entry can be held

liable, based on the entry, for forcibly seizing a suspect who later resists and threatens to kill police officers.

2. Nor did the Ninth Circuit issue an alternative "principal holding" that "summary judgment was properly denied because of genuine disputes over what happened in the attic." Opp. 1-2. Rather, the majority accepted as undisputed the facts about Sullivan's threats, defiance, and other actions in the attic – and held that a jury could find the force unreasonable on those undisputed facts. With regard to the gun-pointing claim – the only force claim against Officer Morgado – the majority ruled that a jury could find it unreasonable for officers investigating a bloody shirt, who are searching through a reported "drug house" and have already detained one man armed with an illegal knife, to point their weapons at a noncompliant suspect who fled from officers' unlawful entry to hide in a dark attic. App. 16-17. Likewise, on the deadly force claim against Officer Alvis and Officer Keesor, the Ninth Circuit accepted as undisputed that Sullivan threatened the officers, refused to show his hands, and suddenly moved his right arm. "Still," the Ninth Circuit ruled, a jury could conclude the force was unreasonable based on: the number of shots fired, the officers' (potentially unlawful) entry, that "Sullivan had not been accused of any crime," and the later-discovered fact that Sullivan was actually unarmed. App. 17-18. Indeed, the dispute between the majority and the dissent was not based on the existence of a factual dispute about the events in

the attic – it concerned what holding should follow from those undisputed events. The factual disputes urged by respondents appear nowhere in *Espinosa*, as is clear from respondents' citations not to the opinion but to the record and, worse, to matters outside the record.

3. The interlocutory posture of this case favors review, rather than counseling against it, Opp. 14-15, 35. Qualified immunity is effectively lost if officials are forced to undergo a trial. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1945-46 (2009). This entitlement not to stand trial applies to each separate claim, so the fact that a trial will still proceed as to some claims is no barrier to determining qualified immunity as to others. *Behrens v. Pelletier*, 516 U.S. 299, 311-12 (1996);[5] *see also Brosseau v. Haugen*, 543 U.S. 194, 195 n.1 (2004) (per curiam) (reviewing federal claims but not state law claims). Consistent with these principles, this Court grants review when lower courts deny qualified immunity before trial – and equally so in Fourth Amendment deadly force cases. *E.g., Scott*, 550 U.S. at 376; *Brosseau*, 543 U.S. at 195.

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[5] *Behrens* likewise undermines respondents' argument that any "independent" holding on the force claims would bar review. Even if the Ninth Circuit had issued an "independent" force holding – which it did not – the officers would still be entitled under *Behrens* to a determination whether they were immune from respondents' "provocation" force claim.

4. Respondents erroneously contend that this petition suffers from the same vehicle problems as previous petitions that presented related but less focused legal questions. Opp. 11. To the contrary, the present decision is published, the decision rules on the legal issue presented by the petition, and that legal issue is the subject of a well-developed circuit conflict. That was not so for previous petitions. Petition 27-28.

III. This Court Should Review The Ninth Circuit's Qualified Immunity Rulings

1. Respondents ignore the importance of the substantive legal issues at stake in the qualified immunity rulings below: whether officers can protect themselves by pointing their guns at a noncompliant suspect; and whether officers can lawfully use deadly force to protect themselves against a suspect who threatens to kill police officers, repeatedly refuses to show his hands, and then suddenly raises his right arm as if to point a gun. Respondents do not respond to the persuasive case made by *amici* that the Ninth Circuit's decision places law enforcement officers in an impossible position. This Court's intervention is warranted to correct the Ninth Circuit's rulings on these important Fourth Amendment questions.

2. Respondents tepidly suggest that because the majority correctly recited the two-part test for qualified immunity, this must mean the majority actually applied that test. Opp. 25-27. One does not follow

from the other. Here, the Ninth Circuit did not analyze whether clearly established law put the officers on notice that their force was prohibited on these facts. Nor can this error be brushed off as a mere aberration, because the Ninth Circuit has since relied on *Espinosa* to commit the same error: expressly declining to engage in the required "clearly established law" analysis, because of a holding on the first question that a trial might show a Fourth Amendment violation. *See Glenn*, ___ F.3d at ___, 2011 WL 5248242, at *2.

This Court has previously reviewed and reversed decisions – like this one – that recite the two-part qualified immunity test but then apply legal principles totally at odds with it. *E.g.*, *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2084 (2011); *Brosseau*, 543 U.S. at 198-99. Here, had the Ninth Circuit actually performed the second "clearly established" step of the analysis, the law would compel a finding of immunity on both the gun-pointing claim and the deadly force claim. Petition 30-38. And respondents do not argue that the law is clearly established otherwise. Indeed, respondents' own retained police practices expert conceded that on the same facts identified by the Ninth Circuit, it was reasonable at the moment for officers to use deadly force in response when Sullivan suddenly moved his right arm. ER72-76, 269-271. Rather, respondents' expert complained about the officers' initial entry and their tactical decision not to retreat from the attic. ER52-53.

3. Rather than address the deficiencies in the Ninth Circuit's qualified immunity rulings, respondents repeat their argument, made to the court of appeals and district court below, that there was a factual dispute about the events in the attic, which respondents contend would require this Court to "por[e] over a complex summary judgment record." Opp. 27-33. Below, petitioners exhaustively rebutted respondents' claims of factual disputes. *E.g.*, Corrected Reply Brief, No. 08-16853, Docket #23 (9th Cir. June 4, 2009). And the Ninth Circuit reviewed the summary judgment record and found no dispute that Sullivan repeatedly threatened the officers, refused to show his hands, and suddenly raised his right arm. *Supra*, Part II.

4. Respondents' attempt to discredit the San Francisco Police Department as a hotbed of liars and conspirators[6] does not provide a valid alternative ground for concluding the Ninth Circuit's judgment was correct. As this Court has explained, a non-moving party does not defeat summary judgment by discrediting witnesses, as respondents attempted below and attempt here; rather, it prevails only if it brings forth conflicting *evidence* on material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57

[6] Respondents go outside the record, and take liberties even when citing the record. For example, respondents state "Officer Morgado denied that Sullivan had any gun-like object in his hands." Opp. 6. But Officer Morgado never saw Sullivan's right hand. SER955 ("I never saw his right hand."). So he hardly could deny anything about what Sullivan was holding.

(1986). This rule applies equally in a deadly force case: respondents cannot tender an alternative *version* of events without *evidence* to support it. *Scott*, 550 U.S. at 380.

And here, respondents have no evidence to support a version of events other than what the Ninth Circuit found: that Sullivan repeatedly threatened the officers, refused to show his hands, and suddenly raised his right arm. Indeed, because the Ninth Circuit implicitly rejected respondents' contrary version, there was no occasion for the majority to detail the undisputed independent and forensic evidence that negated respondents' version. That evidence included recorded police radio transmissions, which provided a contemporaneous record of Sullivan's repeated resistance, threats, and refusals to show his hands (noted by the dissent, App. 21); the pattern of elongated blood spatter marks on Sullivan's right arm, which was consistent with Sullivan's right arm being outstretched as if aiming a gun with his arm in front of his chest when the officers fired, ER287, 293; the unsmeared blood spatter marks on the eyeglasses case, which was consistent with Sullivan holding the case in his right hand when the officers fired, and inconsistent with respondents' claim that officers "planted" the case or removed it from Sullivan's pocket after the fact, ER287-88; SER602, 604, 611; and, acoustic analysis demonstrating that when the eyeglasses case is closed rapidly, it makes a loud "popping" sound that could reasonably be perceived as a gunshot in an enclosed area like the attic, ER288. Respondents left all of this evidence unrebutted at summary judgment,

and respondents simply ignore it in their presentation to this Court in their attempt to erect obstacles to summary reversal.

5. Finally, respondents' objection to appellate jurisdiction, Opp. 34-35, based on the district court's not making a "clear record of the facts it assumed," is groundless. An appellate court has jurisdiction to review a district court's terse denial of qualified immunity by simply resolving evidentiary disputes in favor of the non-moving party. *Behrens*, 516 U.S. at 312-13.

This Court should grant the petition.

Respectfully submitted,

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