No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did this Court's decision in *Brigham City v. Stuart* (2006) 547 U.S. 398, 404, merge the emergency doctrine and application of exigent circumstances for warrantless entry in an apparent emergency situation and eliminate the criminal probable cause requirement therefrom? If so, is the Ninth Circuit's opinion in this case in conflict with that requirement in holding that the officers' entry was constitutionally invalid because of the lack of criminal probable cause?

Should this Court resolve a clear conflict between the Ninth Circuit's holding that distinctions remain between evaluating warrantless entry under the emergency doctrine and under the doctrine of exigent circumstances, and the decisions of the Sixth Circuit in *United States v. Huffman* (6th Cir. 2006) 461 F.3d 777, 780 and the Tenth Circuit in *United States v. Najar* (10th cir. 2006) 451 F.3d 710, 718; and *Armijo v. Peterson* (10th Cir. 2010) 601 F.3d 1065, 1071, holding that under *Brigham City, supra*, the emergency doctrine and exigent circumstances have merged for the purpose of evaluating officers' warrantless entry in emergency situations?

When officers are in the early stages of investigating a potential plan for a school shooting and have found the possible suspect fits several elements of the typical profile of a school shooter, where the officers know that such shooters typically obtain their weapons from their home, and where an officer's question about the presence of guns caused

the suspect's parent to turn and run inside the house, may the officers briefly enter the house to prevent any possible harm to themselves and others?

Where two out of four federal judges who have reviewed the case in quiet reflection (*e.g.* the District Court and one Judge of the Ninth Circuit) have found that the officers' conduct was arguably constitutionally valid under a competing legal doctrine, may the Circuit Court majority nevertheless conclude that the officers are not even entitled to qualified immunity because the decisions the officers made in response to the sudden act of a respondent, where lives were potentially at stake, was in violation of the clearly established law that they hold applies?

PARTIES TO THE CASE

Before the Ninth Circuit, the appellants were George Huff, Maria Huff and Vincent Huff.

Respondents before the Ninth Circuit were the City of Burbank, and Darrin Ryburn, Edmundo Zepeda, Chris Robarts and Fernando Munoz.

In the Ninth Circuit, the Huffs prevailed against Ryburn and Zepeda who are petitioners herein.

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The Ninth Circuit opinion in this matter is published at *Huff v. City of Burbank* (9th Cir. 2011) 632 F.3d 539, *rehearing denied April 27, 2011.*

The District Court's decision can be found at *Huff v. City of Burbank* (C.D. Cal. 2009) 2009 WL 113862.

BASIS FOR JURISDICTION

The Ninth Circuit issued its opinion herein on January 11, 2011. [App. 8-37][1] The Ninth Circuit denied rehearing on April 27, 2011. [App. 38.]

This Court has jurisdiction to review the judgment of the Ninth Circuit Court of Appeals upon petition for writ of certiorari. 28 *U.S.C.* § 1254(1). The petition is timely filed within ninety (90) days of the Ninth Circuit's decision denying rehearing on April 27, 2011. *Supreme Court Rules* 13.1, 13.3.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution provides:

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[1] Citations to documents in the Appendix shall be to the corresponding Appendix page number(s) as [App. __ .]

> "The right of 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

On June 1, 2007, Burbank police officers Darrin Ryburn and Edmundo Zepeda responded to a call from Bellarmine-Jefferson High School. The school's officials were concerned about rumors flying around the campus about a letter purportedly written by respondent Vincent Huff stating that he planned to "shoot up" the school. [App. 2.]

Ryburn and Zepeda had received training regarding investigations of targeted school shootings from the lessons learned from Columbine and similar tragedies. [App. 57-58] School shooters were usually the victims of bullying [App. 57-58], who were typically absent from school for some period of time to plan the crime [App. 63], and who usually obtained their weapons from home. [App. 73-74.]

The Officers learned at the school that Vincent had been subject to bullying, had been absent from school for two days, and both students interviewed by the Officers had heard the reports that Vincent's threats had been communicated in writing. [App. 2;

App. 43-45.] The principal, who knew Vincent [App. 52-53], and who had spent several hours investigating the reports at school herself [App. 52-54], was concerned about the threat. [App. 61-63] One of the students interviewed by the officers felt Vincent was capable of the alleged threats. [App. 44-45.]

The windows of the Huff home were covered when Ryburn and Zepeda, along with Burbank Officers Roberts and Munoz, arrived there early in the afternoon. [App. 64-65.] No one answered the officers' loud knocks on the door, or the officers' call to the home telephone, which the officers could hear ringing from outside the house. [App. 2.] Maria finally answered the officers' call to her cell phone, and appeared outside the house with Vincent about a minute later. [App. 2-3.]

Officer Zepeda told Vincent they were investigating threats at school, and Vincent conceded his knowledge of the reports, saying "I can't believe you're here for that." [App. 3.] In a similar acknowledgement, Maria never asked the officers why they were at her house. [App. 3; App. 73-74.] She also declined to let the officers discuss the issues regarding Vincent with her privately inside the house. In the officers' extensive experience in dealing with parents over juvenile issues, Maria's actions were highly unusual. [App. 3; App. 73-74.]

Ryburn asked Maria if there were any weapons in the house to make sure that neither of them would access any weapons while the officers were there,

and mindful that school shooters get their weapons from home. [App. 3, App. 73-75] Maria's response was to immediately run into the house. [App. 3.] Vincent turned to go into the house at the same time as Maria. [App. 51.] Ryburn entered after Maria; Zepeda followed Vincent in. [App. 3.]

The officers entered into the living room with Maria and Vincent, where they remained. George Huff entered the living room from another room and confronted the officers. The officers remained in the house for five to ten minutes, talking to George and Vincent. They became satisfied there was no threat to the officers or to the school and left. While in the residence they did not search any person or property therein. [App. 4.]

THE DISTRICT COURT

Plaintiff brought this action in the Unites States District Court. It was tried to the Court on January 13 and 14, 2009. The District Court held that the officers' actions were justified under the doctrine of exigent circumstances because the officers reasonably believed that there was a substantial risk of harm to themselves or others at the time they entered. [App. 2-4.] The Court also found the officers would be entitled to qualified immunity, because the unlawfulness of their entry, if any, would not have been apparent. [App. 4-5.]

THE NINTH CIRCUIT

Plaintiff appealed. In a 2-1 decision, the Ninth Circuit reversed the District Court as to officers Ryburn and Zepeda.[2] The court found that there were not exigent circumstances to justify the entry, that the entry would also not be justified under the emergency doctrine, and that Ryburn and Zepeda were not entitled to qualified immunity because the unlawfulness of a warrantless entry in a non-emergency situation without exigent circumstances was clearly established in law.

Judge Rawlinson dissented. Citing this Court's decision in *Brigham City v. Stuart* (2006) 547 U.S. 398, among others, he found that "at a minimum" as of 2007, it was unclear whether warrantless entry into a home by officers fearing for their safety violated the Fourth Amendment. [App. 36-37.] He would have affirmed the District Court's decision at least upon the ground that Ryburn and Zepeda were entitled to qualified immunity. [App. 37.]

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[2] Munoz and Roberts also entered the residence. However, because they had been positioned closer to the street and did not hear the exchange between Ryburn, Zepeda, Maria and Vincent outside the house, the Ninth Circuit found they had qualified immunity because they assumed consent for entry had been given.

ORIGINAL BASIS FOR FEDERAL COURT JURISDICTION

The basis for jurisdiction before the trial court was federal question jurisdiction pursuant to 28 U.S.C. § 1331, as the controversy arose under the "Constitution, laws, or treaties of the United States." Plaintiff brought and tried two claims under 42 U.S.C. § 1983 for violation of their rights under the Fourth and Fourteenth Amendments.

ARGUMENT

I. INTRODUCTION

This case asks the Court to resolve a conflict between the circuits as to whether the emergency doctrine and doctrine of exigent circumstances have merged for purposes of warrantless entry in instances of apparent danger to the officers and others. Notwithstanding, this Court's decision in *Brigham City v. Stuart* (2006) 547 U.S. 398, 402, which appears to eliminate criminal probable cause from the requirements for warrantless entry in such emergency situations, and decisions in the Sixth and Tenth Circuits to that effect, the Ninth Circuit would maintain the criminal probable cause requirement for warrantless entry by police officers in response to an emergency arising during criminal investigations. It does so under the guise of maintaining a distinction between application of the doctrine of exigent circumstances in such investigations and application of the emergency doctrine. Where the

emergency arises more in an officer's community caretaker function, the Ninth Circuit would employ the different standards in the emergency doctrine for warrantless entry as described in *Brigham City, supra*, which does not include probable cause.

This conflict between the Circuits should be resolved so as not to further endorse a set of competing standards whose application could be unclear in situations where the officers' functions may include aspects both criminal and caretaker, or in situations where emergencies arise during criminal investigations that may or may not be directly related to the investigation. The Court should grant the petition to make clear that the conclusions reached by the Sixth and Tenth Circuits are correct that these two doctrines have merged and that criminal probable cause is not required for warrantless entry in an emergency.

Moreover, this petition asks the Court to set guidelines for reasonableness of the officers' actions in the early stages of an investigation of possible school shooters. As it stands the Ninth Circuit ties the hands of officers trying to investigate alleged threats of a school shooting. It would require the officers to dig through the morass of a high school rumor mill to find admissible evidence, in lieu of trusting what police know from numerous other shooting cases as a valid base of an investigation. Without such admissible evidence, officers might be at a loss to protect themselves, should the unexpected arise, as it did briefly in this case, when they go to the best source of information on such

threats—the purported would-be shooter. Or the officers might delay that critical aspect of the investigation, possibly endangering lives were a threat to turn out to be genuine.

Finally, this petition asks the Court to evaluate the bounds and proper application of qualified immunity for officers in this and similar cases as to which the two-judge Ninth Circuit majority overruled its dissenting judge and the District Court herein. Where reasonable judicial minds differ on the existence of a constitutional violation because there are, at least, competing, potentially applicable legal standards, the possible confusion over these standards should be taken into account in determining either whether the law is clearly established or whether the officers' conduct was reasonable. Moreover, the circuit courts should be instructed to actually engage in an objective balancing of the evidence both in favor of and against the reasonableness of the officers' actions and not to simply recite a list of reasons that support the Court's decision to decline qualified immunity.

Petitioners Darin Ryburn and Edmudo Zepeda were officers with the Burbank Police Department on June 1, 2007, who were sent to investigate reports of a student planning a school shooting. They confirmed the existence of the reports with students and the concern of school officials about the threat and found that the named student fit into a profile of school shooters. A series of odd behavior by the student and his family at his house included the acknowledgement of the reports by the student

himself when he finally met officers outside his front door with his mother. When the officers next asked whether there were any guns in the house, the mother turned and bolted into the family home—right where the officers' training tells them school shooters obtain their weapons. The officers briefly entered the house, just long enough to keep the family members in sight and from potentially accessing any weapons, while also questioning the student and determining that he was not planning to "shoot up" his school.

Overturning the District Court, the Ninth Circuit determined that the officers' actions both violated the Fourth Amendment rights of respondent Huff family against warrantless entry, and were not subject to qualified immunity. Petitioners ask this Court to grant this Petition and address these important legal issues of national concern, and overturn the ruling of the Ninth Circuit Court of Appeals.

II. THE OPINION CONFLICTS WITH THE HIGH COURT'S RULING IN *BRIGHAM CITY* AND RULINGS IN THE SIXTH AND TENTH CIRCUITS

This Court should grant certiorari because the Ninth Circuit's Opinion herein conflicts with decisions of other federal circuit courts, and because it conflicts with a prior decision of this Court establishing the proper standards for warrantless entry in response to emergency situations in which the officers or others might be in danger. Supreme

Court Rule 10(a), (c). The Court recently granted certiorari and rendered an opinion in *Kentucky v. King* (2011) ___ U.S. ___, 113 S.Ct. 1849, a case involving warrantless entry pursuant to a different kind of exigent circumstance—to stop the destruction of evidence.

As pointed out by the Ninth Circuit dissent [App. 34] in this case, in *Georgia v. Randolph*, (2006) 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208, this Court said:

> "It would be silly to suggest that police would commit a tort by entering... to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur. Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes..."

This Court granted certiorari in *Brigham City v. Stuart* (2006) 547 U.S. 398, 402, to resolve differences among state courts and the Circuits concerning the appropriate Fourth Amendment standard that must be met for a warrantless entry in an emergency situation. The court held that the only standard that must be met to allow warrantless entry for protection against harm is solely that "the circumstances viewed objectively, justify the action." *Id.*, at 404. There was no probable cause requirement. In *Brigham, supra*, the officers had an objectively reasonable basis to believe that a violent

confrontation at the home "was just beginning." *Id.*, at 406.

However, as noted in the Ninth Circuit's opinion below, that circuit's Fourth Amendment analysis has historically drawn a distinction between exigent circumstances and the emergency doctrine. The exigent circumstances doctrine, including application to actions taken for officer safety, has been held to derive from police officers' criminal investigator functions, while the emergency doctrine, has been applied to actions protecting the officers and others from harm, stemming from their "community caretaking function." *See Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 763. Application of exigent circumstances has required probable cause of a crime as well as circumstances justifying the intrusion. *Id.*, at 766-767. Prior to *Brigham City*, application of the emergency doctrine in the Ninth Circuit required a three part showing including reasonable grounds to believe an emergency existed and probable cause. *U.S. v. Morales Cervantes* (9th Cir. 2000) 219 F.3d 882, 888.

Notably, this Court in *Brigham City* did not engage in a debate as to whether the situation should be evaluated as an exigent circumstance, or under the emergency doctrine. Instead, *Brigham City* treated these legal doctrines as one in setting forth the applicable standard. Indeed, it would have been difficult to choose just one of those doctrines in that case, as the entry, based upon 911 calls and an assault and fight observed by officers, stemmed from

both concern for the protection of the victims and the need to investigate and arrest the assailant.

In *U.S. v. Huffman* (6th Cir. 2006) 461 F.3d 777, 780, the Sixth Circuit applied the holding in *Brigham City* directly to the doctrine of exigent circumstances, holding that "risk of danger to the police or others" is an exigent circumstance. No showing of probable cause was required. In *Armijo v. Peterson* (10th Cir. 2010) 601 F.3d 1065, 1071 (emphasis added), the Tenth Circuit held that the exigent circumstances doctrine "permits warrantless home entries when officers reasonably believe that some actor or object in a house may immediately cause harm to persons or property" without regard to probable cause. *See also U.S. v. Najar* (10th Cir. 2006) 451 F.3d 710, 715.

In *U.S. v. Snipe* (9th Cir. 2008) 515 F.3d 947, based on *Brigham City*, the Ninth Circuit rejected two of the three elements of the former test set forth in *U.S. v. Morales Cervantes* (9th Cir. 2000) 219 F.3d 882, 888, for entry in response to an apparent emergency, including the probable cause requirement, which it held was "superfluous because *Brigham City* failed to conduct any traditional probable cause inquiry." *Snipe, supra*, 515 F.3d at 952. *Snipe* acknowledged that the Sixth and Tenth Circuits had similarly set forth a single, merged emergency/exigency standard, with no probable cause requirement, after *Brigham City*. *Id.*, at 952-953 (*citing Huffman, supra*, 461 F.3d at 783, and *United States v. Najar* (10th Cir. 2006) 451 F.3d 710, 715). As such, in *Snipe* the Ninth Circuit purported

to adopt a new test under the emergency doctrine that asks whether, (1) Considering the totality of circumstances, the officers had an objectively reasonable basis to conclude that there was an immediate need to protect others or themselves from serious harm; and (2) the scope and manner of the search was reasonable.[3] *Id.*

Nevertheless, in the Ninth Circuit's Opinion in this matter, that court held that its historic distinction between exigent circumstances exception and the emergency doctrine continues to exist, notwithstanding *Brigham City*. In the Ninth Circuit, officers acting in response to a threat to their own safety that arises in the context of a *criminal* investigation cannot reasonably and minimally enter without a warrant to protect themselves and others from an apparent threat of harm unless criminal probable cause of the investigated crime has been shown. Thus, the Ninth Circuit has, at best, created a direct conflict between its standard for evaluating warrantless entry in these situations and the merged exigent/emergency doctrines employed by the Sixth and Tenth Circuits. At worst, it has set up a

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[3] In *Snipe, supra*, which has marked similarities to the present case, officers responding to a hysterical, but vague, 911 call entered a residence after one officer saw someone run into the residence upon their arrival. *Id.*, at 949 and fn. 2. The officers entered the residence and determined that there was no emergency by speaking with the residents inside. They did not search, but later obtained a warrant based upon the drugs they saw in plain view. *Id.*, at 949-950.

standard in the Ninth Circuit which contradicts this Court's holding in *Brigham City* as to the applicable standard.

Police officers must be given greater clarity of the law in such situations. When an apparent emergency arises, officers should not be expected to weigh and react differently depending upon whether a court might find that they are acting more as criminal investigators or as community care takers. In short, the Court should hear this matter to resolve differences that persist between the circuits concerning the appropriate Fourth Amendment standard that must be met for a warrantless entry in an emergency situation involving the exigent circumstance of danger to the officers or others.

This Court should decide whether pursuant to its decision in *Brigham City* the emergency doctrine and exigent circumstances of officer safety have merged into the single standard as held in the Sixth and Tenth Circuits, or whether there remain separate standards with separate tests, some of which require criminal probable cause and some of which do not, as held herein in the Ninth Circuit.

III. THE COURT SHOULD HEAR THE MATTER TO PROVIDE BETTER GUIDANCE ON EXIGENT CIRCUMSTANCES IN SCHOOL SHOOTING INVESTIGATIONS

Petitioners have been unable to find a guiding case concerning probable cause evaluation, warrantless entry, exigent circumstances, or qualified immunity involving an investigation of

allegations of the planning of a school shooting. Certainly, it does not appear that this Court has put its imprimatur upon the application of these legal principles to the national issue of school shooting cases. Petitioners submit that this Petition should be granted because this is an "important question of federal law that has not been, but should be settled by this Court." *Supreme Court Rule* 10(c).

As shown in this case, police investigators have received training in the hallmarks of school shooters. They know that they are usually the victim of bullying, they often put their plans or threats down in writing, they are usually absent from school for a few days before the shooting, and that the shooters usually obtain their weapons at home. Police should be given clear direction on the limits on both the full force and the legal limits of their powers in conducting investigations which might prevent a future Jonesboro, Columbine, or Virginia Tech.

Indeed, federal courts have provided fairly consistent guidance to *schools* on handling, through disciplinary procedures, in-school speech which graphically describes and appears to threaten a Columbine-style school shooting. The courts have consistently held such speech not protected by the Constitution, and validated swift disciplinary action, up to and including expulsion of the student from school for such threatening speech. See e.g. *Boim v. Fulton County School District* (11th Cir. 2007) 494 F.3d 978, 984 (student suspended for journal entry describing her murdering her math teacher in class); *Ponce v. Socorro Independent School District* (5th Cir.

2007) 508 F.3d 765, 771 (student transferred to alternative program because of diary describing call for Columbine style shooting and other violence); *LaVine v. Blaine School District* (9th Cir. 2001) 257 F.3d 981, 989-990 (approving emergency expulsion over poem describing school shooting in first person).

According to these courts, "Our recent history demonstrates that threats of an attack on a school and its students must be taken seriously." *Ponce, supra*, 508 F.3d at 765. Moreover, "it is imperative that school officials have discretion and authority to deal with" these threats.[4] *Boim, supra*, 494 F.3d at 984. In some cases, as in this one, the police may be in a better position to investigate and deal with the threat of a possible school shooting. The threat may be considered too credible and dangerous for school officials, it may have come to light outside of the

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[4] In *Boim, supra*, 494 F.3d at 984, the Eleventh Circuit further stated:

> "Thus, in this climate of increasing school violence and government oversight, and in light of schools' undisputably compelling interest in acting quickly to prevent violence on school property, especially during regular school hours, we must conclude that the defendants did not violate Rachel's First Amendment rights. We can only imagine what would have happened if the school officials, after learning of Rachel's writing, did nothing about it and the next day Rachel did in fact come to school with a gun and shoot and kill her math teacher.

school setting, or the student himself might be absent from school at the time the threat is discovered. The police must also take the threat "seriously" and it is just as "imperative" that the Police have clear direction as to the bounds of their ability to investigate and prevent a further tragedy.

Time can certainly be of the essence in these investigations. No one wants another school shooting tragedy that could have been averted, but for the delay in confronting the suspect at his home—where the weapons usually are obtained—while investigators try to meet the Ninth Circuit's requirement of criminal probable cause necessary to enter and protect themselves should something go wrong.

Whether argued and ultimately opined in the course of discussion on Fourth Amendment entry, or in a discussion on the reasonableness of the actions of officers for purposes of qualified immunity, the issue should be addressed by this Court. Otherwise, the only precedent on the topic will be the holding herein by the Ninth Circuit, holding that the officers did not validly protect themselves, and others, when they briefly entered after an erratically acting parent of a possible shooter bolted into the house immediately upon being asked if they had any guns. Leaving officers defenseless in the face of such sudden, erratic actions in the early stages of a school shooting investigation is a dangerous legal precedent.

IV. THE COURT SHOULD HEAR THE MATTER TO DETERME WHETHER QUALIFIED IMMUNITY SHOULD APPLY AT A TIME WHEN LEGAL STANDARDS WERE CHANGING

The Court should grant the petition on the issue of qualified immunity applicable in this changing area because it is an "important question of federal law that has not been, but should be settled by this Court." *Supreme Court Rule* 10(c). It is also an area directly affected by the conflicting rulings between the Ninth Circuit in this case and the other circuits following the standards set forth in *Brigham City*, as discussed above. Finally, the qualified immunity standard set forth by the Ninth Circuit conflicts with the decisions of this Court.

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. While the phrasing of tests to employed in qualified immunity arguments vary slightly, it ultimately comes down to three considerations: 1) was a right violated, 2) was the right clearly established in the law, and 3) would a reasonable officer confronted with the situation before him 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.

A. Where Legal Standards Are Changing And Easily Conflated, Qualified Immunity Should Apply

The Ninth Circuit majority held that the dissent by Judge Rawlinson "mistakenly conflates" the emergency doctrine with the requirements under exigent circumstances review. [App. 26.] The District Court Judge, Florence-Marie Cooper, seemingly made the same 'mistake.' With all due respect to the Ninth Circuit, these 'mistakes' illustrate why qualified immunity should have been applied to the petitioner officers.

Both Judge Cooper and Judge Rawlinson, sitting in quiet reflection upon the record for days, or months respectively, with the ability to carefully review and compare the facts and law, found the officers' conduct to be objectively reasonable. The officers themselves had just a moment to decide how to react without potentially endangering themselves and others in light of all of the circumstances confronting them. How is it that under the law, the officers are expected to make a better decision in a moment than Judge Rawlinson and Judge Cooper made in their carefully considered written opinions? The fact that learned judges have "conflated" two legal doctrines which can arguably apply in the same circumstances should be weighed by any court considering whether a point of law has been clearly established for purposes of qualified immunity.

Noting the decisions of this Court in *Brigham City* and of the Sixth Circuit in *Huffman*, and the Tenth

Circuit in *Najar,* Judge Rawlinson opined that Qualified Immunity should apply as application of the law in such emergency situations or exigent circumstances was changing and arguably justified the entry.[5] The Ninth Circuit majority clearly missed this point in blithely dismissing the emergency doctrine because they found that it did not apply. They should have been considering whether the changes in that doctrine prevent a finding that the violation of law was clearly established.

The Ninth Circuit denied qualified immunity to Ryburn and Zepeda on the ground that probable cause was clearly established in the law as necessary element of justification for a warrantless entry in all cases of exigent circumstances. [App. 26.] As noted, the Ninth Circuit majority accused the dissent of "conflating" the emergency doctrine with exigent circumstances, but closer examination, as discussed above herein, reveals that the Supreme Court actually, or at least arguably, extricated the probable cause element in response to situations threatening the safety of the officers and others. Even if the Court does not decide that the entry was justified under these changing legal standards, and declines

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[5] Judge Rawlinson is less overt in his findings than Judge Cooper on the validity of the entry, but the statement that "at a minimum" qualified immunity should apply, strongly communicates the judge's assertion that the entry was arguably valid under the merged exigent circumstance/emergency doctrine. [App. 36.]

to follow the Sixth and Tenth Circuits, it should find the petitioning officers have qualified immunity. Even if not ultimately applicable, the objective confusion created by these changing competing legal standards of how to evaluate this entry under either the emergency doctrine, exigent circumstances, or a merged doctrine, should require a finding that their actions were not prohibited by clearly established law.

The events in this case occurred on June 1, 2007. *Brigham City, supra*, which removed probable cause as an element in justifying emergency warrantless entry based on threat of harm to others, was decided just over a year earlier on May 22, 2006. On June 21, 2006, in response to *Brigham City*, the Tenth Circuit altered its test for warrantless entry to protect the safety of the officers or others by eliminating the probable cause requirement, *Najar, supra*, 451 F.3d 710, 718, a test essentially the same as the test in the Ninth Circuit; *Snipe, supra*, 515 F.3d at 953. The Sixth Circuit issued its opinion in *Huffman, supra*, 461 F.3d at 780 in which it held the doctrines merged and no probable cause was required for emergency warrantless entries, on August 30, 2006. Thus, ten months before the events at issue herein, it appears that the "clearly established" exigent circumstances tests relied upon by the Ninth Circuit to deny qualified immunity have been altered for emergency situations.

B. The Court Should Grant The Writ To Clarify How To Objectively Evaluate The Reasonableness of the Officers' Actions

Moreover, this Court should hear this matter in order to consider the two different ways in which the Ninth Circuit failed to properly apply the reasonableness standard in qualified immunity evaluation, and to provide clearer instruction to prevent such failures in the future. The reasonableness inquiry is meant to evaluate the actions of the officers objectively based on the circumstances confronting them, without regard to their actual motivation or intent. *Graham v. Connor* (1989) 490 U.S. 386, 397. In a fourth amendment entry situation the test comes down to: Could a reasonable officer have believed that the entry was lawful? *Anderson v. Creighton* (1987) 483 U.S. 635, 641.

First, even though the Ninth Circuit ultimately concluded that the changes in the law of the emergency doctrine did not change the law on exigent circumstances, the court should have considered whether those changes might lead an objectively reasonable officer to believe he could enter in an apparent emergency situation that arises during a criminal investigation. The Ninth Circuit should not have dismissed this issue simply because it had already opined its view that only the exigent circumstances doctrine could apply and was not met. Thus, even if not relevant to a decision on whether the relevant point of law is clearly established, legal uncertainty created by change in a competing and

potentially applicable legal doctrine should be considered in the objective determination as to whether the officers acted reasonably.

Secondly, the Ninth Circuit's actual reasonableness evaluation as to Ryburn and Zepeda failed any measure of objectivity. It simply lined up arguments in favor of an apparently pre-determined result, while ignoring the real evidence that strongly suggested possible imminent danger. This Court should grant the petition to make clear that objective qualified immunity evaluation of the reasonableness standard must include a balancing of the factors both in favor and against a finding of objective reasonableness.

The Ninth Circuit states that the officers "were aware that no crime had been committed at the Huff home. Both Zepeda and Ryburn knew that no crime was in progress in at the Huff home." [App. 29-30.] This is mere speculation by the Ninth Circuit.[6] The officers were there to investigate whether a crime—the planning of a school shooting—was in progress at the home. The officers had not been in the home to that point, and could neither "be aware" or have 'known' what was going on in the house for sure at that moment.

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[6] Ironically, the Ninth Circuit accused the District Court of engaging in speculation in evaluating the actual circumstances confronting the officers in its opinion while discussing the exigent circumstances doctrine.

The Ninth Circuit goes on[7] to hold that "Neither Zepeda nor Ryburn knew a gun to be present at the Huff home, ever saw a gun, or was ever informed of the presence of a gun." [App. 30.] However, the officers had no basis to discount the possibility of the presence of a gun, and the Ninth Circuit would be speculating to say whether a gun was actually present or not. In the end, Maria did not check on or pull a gun with the officers present in the house, and the officers did not search the house.

The Ninth Circuit further held that "A reasonable officer confronted with the situation may have been frustrated by having a parent refuse them entry, but would not have mistaken such a refusal or reluctance to answer questions as exigent circumstances." [App. 30.] This is not a balanced, objective analysis of the circumstances which actually confronted the officers.

It seems that the biggest barrier to a balanced objective analysis is the Ninth Circuit's determination not to include within the universe of circumstances confronting the officers any of the information about the alleged threats attributed to Vincent that he was planning a school shooting since it was ultimately determined to be mere rumor. This hindsight view of the case however, does a disservice

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[7] The circuit court's opinion next notes that the officers were aware that they did not have probable cause to detain Vincent or Maria, and that they had not been given consent to enter the Huff home. [App. 29-30.]

to the officers who objectively, did not know those rumors to be false at the point they entered the house. Thus, any objective analysis must also include all of the circumstances confronting the officers, including the rumors and unconfirmed reports they were investigating in the first instance.

In this case, such a truly objective analysis might lead to very different results. Indeed, consider the last moments leading to the entry: Vincent acknowledged knowing about the threats, and Maria seemed unsurprised. Immediately thereafter, in response to Ryburn's question as to whether there were any guns in the house, Maria turned and ran into the house. Objectively, it reasonably could appear that Maria ran into the house to either access a weapon, hide weapons, or to confront someone about weapons in the house. Either option could place the officers, Vincent, Maria, and any one else at the house, in danger.

Thus, in the moment the officers had to decide whether to enter in time to possibly prevent a deadly confrontation over weapons, the officers had to evaluate the objective totality of the circumstances. They had to balance the extent to which the alleged threats were rumor, with the following information they had learned or observed: 1) the odd behavior of the family in appearing to be hiding inside a darkened house at midday and not answering loud knocks on their door or a telephone call on their land line which the officers could hear ringing from outside the house; 2) the fact that, in the officers' extensive experience, a parent refusing to discuss

juvenile criminal investigations of their children inside the house was extremely unusual; 3) school officials and a student they spoke to felt that Vincent could pose a genuine threat; 4) Vincent fit the profile for a school shooter in that he had been bullied, been absent from school, and was at least rumored to have put his threat in writing; 5) Vincent acknowledged knowing about the threats attributed to him and Maria was unsurprised; 6) Maria's response to the question about the presence of the guns was her sudden dash into the home; and 7) the home is where most school shooters obtain their weapons.

If a court *balances* all of these factors, it is difficult to objectively say that petitioning Officers Ryburn and Zepeda could not have reasonably believed that their entry was lawful. With George Huff still hiding inside, and Vincent turning to follow Maria into the house, the officers may very well have prevented a confrontation between family members, or against the officers with any weapons in the house. The Court should grant the Petition to provide direction on the proper balancing of all of the circumstances confronting officer.

CONCLUSION

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

Respectfully submitted,

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July 22, 2011

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[8] Mr. Terzian, who is admitted to practice before this Court, is counsel of record for petitioners pursuant to Supreme Court rules. Mr. Tyson is admitted to practice before the highest Court of the State of California, and is listed here as other counsel for petitioners pursuant to *Supreme Court Rule* 34(f).

APPENDIX

App. 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GEORGE ROBERT HUFF, MARIA H. HUFF, AND VINCENT HUFF, Plaintiff(s), vs. CITY OF BURBANK, BELLARMINE-JEFFERSON HIGH SCHOOL, ALEX SEPANOSSIAN, DARIN RYBURN, EDMUNDO ZEPADA, CHRIS ROBARTS, FERNANDO MUNOZ, Defendant(s)	2:07-cv-04114-FMC-AJWx FINDINGS OF FACT AND CONCLUSIONS OF LAW

The matter came on for trial before the Court sitting without a jury, on January 13 and January 14, 2009. Following the presentation of evidence and argument, the matter was taken under submission. The Court now makes the following findings of fact and reaches the following conclusions of law.

Findings of Fact

1. On June 1, 2007, four officers of the Burbank Police Department (defendants Chris

Robarts, Fernando Munoz, Edmundo Zepeda, and Darin Ryburn) responded to a call from Bellarmine-Jefferson High School.

2. At the high school, they learned that there was a rumor circulating at the school that a letter had been written by plaintiff, Vincent Huff, (a student at the school) in which he had threatened to shoot up the school.

3. After interviewing the school principal and two students, they learned that Vincent was a student who had been subjected to bullying, that he had been absent from school for two days, and that many parents had heard about the letter and had kept their children at home.

4. The officers went to the plaintiffs' home to interview the family and continue their investigation.

5. On arrival at the home, Zepeda knocked on the door and announced, several times, that they were with the Burbank Police Department. No one responded.

6. Ryburn then called the home phone number. Although the officers could hear the telephone ringing inside the house, there was no answer.

7. Ryburn then called Mrs. Huff on her cell phone. She answered the phone. Ryburn identified himself and asked her where she was. She said she was in her house. He asked where Vincent was, and she responded that he was with her.

Ryburn told her they were outside her house and wanted to talk to her. She hung up the phone.

8. One or two minutes later, Mrs. Huff and Vincent came out of the house and stood on the steps.

9. Zepeda spoke to Vincent and told him they were there to talk about some threats at the school. Vincent responded, "I can't believe you're here for that."

10. Ryburn approached Mrs. Huff and asked if they could go inside the house to talk. She said, "No."

11. Juvenile Officers always offer to conduct their interviews inside to protect the privacy of the minors. It is extremely unusual to have a parent refuse entry.

12. He asked if there were any guns in the house. Mrs. Huff immediately turned around and ran into the house.

13. Ryburn followed Mrs. Huff into the house. Vincent then entered the residence, followed by Zepeda. Zepeda entered the residence because of "officer safety" concerns. Because of the report concerning threats to shoot, he did not want his fellow officer to enter the house alone.

14. Munoz and Robarts had been standing back near the sidewalk. They could see that Ryburn and Zepeda were talking to the two plaintiffs, but could not hear their conversation.

15. After Ryburn and Zepeda went into the house, Munoz and Robarts, who assumed plaintiffs had given their consent, entered the home.

16. After the officers entered the house, they remained in the living room with Mrs. Huff and Vincent.

17. Mr. Huff entered the room and challenged the authority of the officers to be in his home.

18. 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.

19. During the time they were inside the residence, they conducted no search of any persons or property.

Conclusions of Law

All four individual defendants are entitled to qualified immunity for their actions in this case. Although a constitutional violation occurred (the officers made a warrantless entry into plaintiffs' home), "qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brousseau v. Haugen*, 543 US. 194, 198 (2004). The analysis is an objective one: whether a reasonable officer could have believed the warrantless entry was

lawful. *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034 (1987).

Therefore, the inquiry here is not whether an unconsented to, warrantless entry into a residence violates the Fourth Amendment. Rather, it is whether, in light of existing law, the unlawfulness of the particular entry was apparent. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986).

The Supreme Court explained in Anderson, 483 U.S. at 641:

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable. [citation]. The same is true of their conclusions regarding exigent circumstances....[¶] [T]he determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.... The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."

Anderson, 483 U.S. at 641.

An exception to the warrant requirement is the existence of exigent circumstances. An exigency is generally found to exist in cases "in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [or arrest] until a warrant could be obtained." *United States v. Al-Azzawy*, 784 F.2d. 890, 894 (9thCir. 1986). In *Al-Azzawy*, the Ninth Circuit concluded that the existence of an exigency turned on whether the officers "reasonably believed" that there was a substantial risk of harm at the time of their entry. *Id.* at 894.

Here, the officers testified that a number of factors led them to be concerned for their own safety and for the safety of other persons in the residence: the unusual behavior of the parents in not answering the door or the telephone; the fact that Mrs. Huff did not inquire about the reason for their visit or express concern that they were investigating her son; the fact that she hung up the telephone on the officer; the fact that she refused to tell them whether there were guns in the house; and finally, the fact that she ran back into the house while being questioned. That behavior, combined with the information obtained at the school -- that Vincent was a student who was a victim of bullying, who had been absent from school for two days, and who had threatened to "shoot up" the school -- led the officers to believe that there could be weapons inside the house, and that family members or the officers themselves were in danger.

The Court holds that the officers' conclusions were objectively reasonable. 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. This was a rapidly evolving incident, in which case there should be a far greater reluctance to fault the police for not obtaining a warrant. See *United States v. Tarazon*, 989 F.2d 1045 (9th Cir. 1993); *Laaman v. United States*, 973 F.2d. 107 (2d Cir. 1992).

Verdict

Judgment in favor of defendants and against plaintiffs.

Counsel for defendants is directed to provide a Judgment for the Court's signature.

Dated this 16th day of January 2009.

/s/
FLORENCE MARIE COOPER
United States District Court Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ROBERT HUFF; MARIA HUFF; and VINCENT HUFF, *Plaintiffs-Appellants,* v. CITY OF BURBANK; DARIN RYBURN; EDMUNDO ZEPEDA; CHRIS ROBERS; and FERNANDO MUNOZ, *Defendants-Appellees.*	No. 09-55239 D.C. No. 2:07-cv-04114-FMC-AJW OPINION

Appeal from the United States District Court
for the Central District of California
Florence-Marie Cooper, United States District Judge, Presiding

Argued and Submitted
June 8, 2010—Pasadena, California

Filed January 11, 2011

Before: Alex Kozinski, Chief Circuit Judge, Johnnie B. Rawlinson, Circuit Judge, and Algenon L. Marbley, United States District Judge.*

Opinion by Judge Marbley;
Partial Concurrence and Partial Dissent by Judge Rawlinson

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* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

COUNSEL

Leo James Terrell (argued) and Erikson M. Davis, Law Offices of Leo James Terrell, Beverly Hills, California, for the plaintiffs-appellants.

Calvin House (argued), Gutierrez, Preciado & House, LLP, Pasadena, California, for the defendants-appellees.

OPINION

MARBLEY, District Judge:

Plaintiffs George, Maria, and Vincent Huff appeal the district court's judgment in favor of four officers who entered their home without a warrant. For the reasons below, we find that only two of the four officers were entitled to qualified immunity.

I. BACKGROUND

On June 1, 2007, the four officers responded to a call from Bellarmine-Jefferson High School. At Bellarmine, they learned of a rumor about a letter that said that Vincent, a student there, was going to "shoot up" the school. The principal, Sister Milner, told Sergeant Ryburn and Officer Zepeda that Vincent had not been at school in two days, that she was concerned about the threat and the safety of her students, that some parents had kept their students home, and that she wanted the police to investigate. After conducting interviews with Sister Milner and two students, the officers could not confirm the existence of any threatening letter.

The officers decided to go to the home of George; Maria, his wife; and Vincent, their son, to interview the family and continue their investigation. Before leaving Bellarmine, the officers asked Sister Milner to make sure that no one contacted the Huffs to inform them that the Burbank Police were on the way to their home. When the officers arrived in the vicinity of the Huff home, they parked their cars

away from the residence so that the Huffs would not see them approaching.

Upon arrival at the Huff residence, Zepeda knocked on the door and announced that the officers were with the Burbank Police Department. When no one responded, Ryburn called the home telephone number, and though the officers could hear the telephone ringing inside the house, no one answered. Ryburn then called Maria on her cell phone, which she answered. Ryburn identified himself and indicated he wanted to talk to Maria about her son Vincent. Maria then hung up the phone.

Two minutes later Maria and Vincent came out of the house and stood on the front steps in front of Ryburn and Zepeda. Zepeda told Vincent that the Officer Defendants were there to talk about some threats at the school, to which Vincent replied "I can't believe you're here for that." (ER 78:2223.) The officers concede that when they encountered Vincent outside of the Huff residence, they did not have probable cause to enter the home[3] (1 RT 44:3-9.)

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[3] Officer Roberts testified explicitly at the hearing that when he followed Sergeant Ryburn into the house, he did not believe that they had probable cause. He testified as follows:

> Q: And you were going inside the Huff residence, you never ever saw any criminal conduct; isn't that true?
>
> A: Correct.
>
> Q: You never saw anything that gave you probable cause that any of your fellow officers were about to be injured or in danger of their lives; isn't that true?

Ryburn approached Maria and asked if they could go inside the house to talk. She said, "No," because the Officer Defendants did not have a warrant. (ER 78:24-25; 2 RT 44:1-8, 96:18-97:8.) Ryburn then asked Maria if there were any guns in the home. Maria testified that she responded that she would go get her husband. Maria then turned around and went into the house.

Ryburn followed Maria into the house. Ryburn acknowledges that, at this point, Maria was not detained or arrested, and that she was free to leave from where she had been standing and speaking with Ryburn and Zepeda. Vincent then entered the residence, followed by Zepeda. Zepeda entered the home because of "officer safety" concerns. (ER 79:3-4.) Since the officers were there to investigate threats to shoot, he did not want Ryburn to enter the house alone. The other two officers, Munoz and Roberts, had been standing near the sidewalk, unable to hear any of the conversation between Maria, Vincent, Ryburn, and Zepeda. After Ryburn and Zepeda entered the Huff residence, Munoz and

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A: Correct.

(1 RT 44:3-9.) Sergeant Ryburn testified that when he left Bell-Jeff for the Huff residence, he had "reasonable suspicion to detain Vincent Huff." (2 RT 9:18-21.) Reasonable suspicion does not rise to the level of probable cause. *See Alabama v. White*, 496 U. S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause . . ."). Finally, at oral argument, defense counsel conceded that the Officer Defendants did not have probable cause when they arrived at the Huff residence or when Mrs. Huff entered her residence.

Roberts assumed that Maria and Vincent had given consent and entered the home.

After entering the Huff residence, the officers remained in the living room. George entered the room and challenged the authority of the police to be in his home. The officers remained inside the Huff home for five to ten minutes, talking with the Huff family. The officers satisfied themselves that the rumors about the threats at Bellarmine were untrue. They then left the Huff residence and returned to the school to report their conclusions. At no time while the officers were in the Huff home did they conduct any search of George, Maria, Vincent, or any property.

After the officers returned to Bellarmine, Ryburn suggested to Sister Milner that she send out a notice to the parents of Bellarmine's students informing them that there was no such threat or letter. As a result of speaking with Ryburn about the morning's events, Sister Milner sent a letter to parents, which explained that there was no truth to the rumor about a student threatening to shoot anyone.

The Huffs initiated this action, which sought compensatory and punitive damages, alleging that their constitutional rights had been violated when the police entered their home. After holding a two-day bench trial, the district court held that exigent circumstances permitted the police's warrantless entry into the Huff residence and that the officers were entitled to qualified immunity. The Huffs appeal.

II. LAW AND ANALYSIS

A. Findings of Fact

The Federal Rules of Civil Procedure require that the district court make findings of fact and conclusions of law in all cases tried without a jury. Fed. R. Civ. P. 52(a). The factual findings must be sufficient to indicate the factual basis of the district court's ultimate conclusions. *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943); *Vance v. Am. Haw. Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir. 1986). It is also not "necessary that the trial court make findings asserting the negative of each issue of fact raised." *Carr v. Yokohama Specie Bank, Ltd., of San Francisco*, 200 F.2d 251, 255 (9th Cir. 1953). The district court's findings should be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." *Alpha Distrib. Co. of Cal. v. Jack Daniel Distillery*, 454 F.2d 442, 453 (9th Cir. 1972) (citing *Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955).

The district court's findings of fact are reviewed under the clearly erroneous standard. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). This review for clear error is "significantly deferential," and the reviewing court "must accept the district court's factual findings absent a 'definite and firm conviction that a mistake has been committed.'" *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (quoting *United States v. Syrax*, 235

F.3d 422, 427 (9th Cir. 2000). This Court may not reverse the district court even though we may be convinced we would have weighed the evidence differently had we been the trier of fact. *Phoenix Eng'g and Supply Inc. v. Universal Elec. Co., Inc.*, 104 F.3d 1137, 1141 (9th Cir. 1997) (citing *Anderson v. Bessemer City, N. C.*, 470 U.S. 564, 674 (1985)).

The Huffs argue that the district court erred in several findings of fact. First, the Huffs assert that the district court did not resolve conflicting testimony regarding: (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. Second, the Huffs contend that the district court did not state that it was undisputed that Maria was free to return to her home. Third, the Huffs believe the district court erroneously failed to state why Ryburn went into the Huff residence.

The district court was not clearly erroneous in its findings such that reversal by this Court would be appropriate. That we may have weighed the testimony of the witnesses and other evidence in another manner, thus reaching different findings of fact, is not a proper basis for reversal. *Phoenix Eng'g and Supply Inc.*, 104 F.3d at 1141. The Federal Rules of Civil Procedure require "the reviewing court [to]

give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). Accordingly, we've held that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Working*, 224 F.3d 1093, 1102 (9th Cir. 2000) (en banc) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985)). Here, the district court needed only to find the facts sufficient to indicate the basis for its ultimate legal conclusions. The district court was not required to find all possible facts, or to state explicitly why it had chosen to believe the testimony of the officers over Maria. Additionally, because the court found that exigent circumstances justified the warrantless entry into the Huff residence, the court was not required to state Ryburn's reason for entering the home.

Accordingly, the district court's findings of fact are not clearly erroneous.

B. Fourth Amendment Violation

[1] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. Physical entry into the home is "the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U. Dist. Court*, 407 U.S. 297, 313 (1972); *see also Murdock v. Strout*, 54 F.3d 1437, 1440 (9th Cir. 1995) ("[T]he protection of individuals from unreasonable government intrusion into their houses

remains at the very core of the Fourth Amendment."). Therefore, "No safeguard the home, we normally require a warrant before the police may enter." *Frunz v. City of Tacoma*, 468 F.3d 1141, 1142-43 (9th Cir. 2006). Without a search warrant, the "search of a house is per se unreasonable, and absent exigency or consent, warrantless entry into the home is impermissible under the Fourth Amendment." *United States v. Shaibu*, 920 F.2d 1423, 1425 (9th Cir. 1990) (internal citation omitted). The existence of exigent circumstances is a mixed question of law and fact that we review de novo. *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000).

In this case, the district court found that "a constitutional violation occurred" when "the officers made a warrantless entry into plaintiffs' home," and acknowledged that lain exception to the warrant requirement is the existence of exigent circumstances." (ER 79:23-25, 80:24-25.) It is not clear whether the district court actually found that there were exigent circumstances present to justify entry into the home or if the district court merely found that the officers reasonably believed that exigent circumstances were present such that they are entitled to qualified immunity despite their Fourth Amendment violation. The threshold issue before this Court, therefore, is whether there were exigent circumstances that justified the warrantless entry into the Huff home.

1. Exigent Circumstances of Officer Safety

[2] Because the Officer Defendants had no warrant to search the Huff home, and were not given consent to enter the residence by either Maria or Vincent, their entry into the house is constitutionally impermissible unless exigent circumstances are present. *See id.* There are exigent circumstances to justify a warrantless entry by police officers into a home if the officers have a reasonable belief that their entry is "necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *Fisher v. City of San Jose*, 558 F.3d 1069, 1075 (9th Cir. 2009). We have stated that "the exigent circumstance does not, however, relieve the police of the need to have probable cause." *United States v. Johnson*, 256 F.3d 895, 905 (9th Cir. 2001) (en banc). In *Johnson*, we stated that "when the government relies on the exigent circumstances exception, it . . . must satisfy two requirements: first, the government must prove that the officer had probable cause to search the house; and second, the government must prove that exigent circumstances justified the warrantless intrusion." *Id.; see also United States v. Ojeda*, 276 F.3d 486, 488 (9th Cir. 2002) (per curiam).

The Supreme Court has stated that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984); *see also Minnesota v. Olson*, 495 U.S. 91, 100

(1990) ("[I]n the absence of hot pursuit there must be at least probable cause to believe that one or more of the other factors justifying the entry were present . . . ."). We have further explained that police officers can meet their heavy burden only by showing "specific and articulable facts" that justify a finding of exigent circumstances. *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 957 (9th Cir. 2000) (quoting *United States v. Shephard*, 21 F.3d 933, 938 (9th Cir. 1994)). Mere speculation is not enough to establish exigent circumstances. *See United States v. Suarez*, 902 F.2d 1466, 1468 (9th Cir. 1990) (finding that speculation about the presence of drugs on the premises and the danger of their destruction is not sufficient to show exigent circumstances); *United States v. Driver*, 776 F.2d 807, 810 (9th Cir. 1985) ("[T]his burden is not satisfied by leading a court to speculate about what may or might have been the circumstances."). The Supreme Court has recognized only a few such conditions that constitute exigent circumstances. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (ongoing fire); *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (hot pursuit of a fleeing felon); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (same); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (destruction of evidence).

[3] In addition to exigency, officers must have probable cause. "Officers have probable cause for a search when 'the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.'" *United States v. Henderson*, 241 F.3d 638, 648 (9th Cir. 2000) (quoting *Ornelas v. United*

States, 517 U.S. 690, 696 (1996)). Probable cause is determined based on "the totality of the circumstances known to the officers at the time." *United States v. Alaimalo*, 313 F.3d 1188, 1193 (9th Cir. 2002).

[4] Here, the police did not have, nor did the district court find, probable cause to believe that an offense had been or was being committed.[4] See *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (outlining the probable cause standard requiring that officers "have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person

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[4] "The Officer Defendants argue that the constitutional requirements of probable cause and a warrant exist only where an intrusion results in a deprivation of liberty or property. The Officer Defendants take the position that where there is merely an intrusion, "it should be sufficient that exigent circumstances exist." *Id.* The Supreme Court has not embraced the view that the existence of a constitutional violation should be determined by the events that happen after police officers make a warrantless entry into a home. *See Payton v. New York*, 445 U.S. 573, 589-90 (1980) ("But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind .. . [because] the Fourth Amendment has drawn a firm line at the entrance to the house."); *see also LaLonde*, 204 F.3d at 954-55 ("*Payton* specifically reversed the lower court opinion which had relied on the premise that a warrantless entry to seize a person within the home can be held to a lower standard than a warrantless entry to search and seizure property within a home.").

being arrested"). And "Supreme Court and Ninth Circuit cases unequivocally hold that probable cause is a precondition for any warrantless entry to seize a person in his home." *LaLonde*, 204 F.3d at 954. Indeed, the police testified that they did not think a crime had been or was being committed and that they had no reason to detain Maria or Vincent. The only arguable way we could find exigent circumstances would be to find that Maria's behavior "would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons." *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984).

[5] Additionally, there were no exigent circumstances. The Officer Defendants were not pursuing a fleeing felon. The Officer Defendants were not trying to prevent the destruction of contraband or evidence. No crime had been committed. No crime was in progress.

Here, the district court held:

> [T]he officers testified that a number of factors led them to be concerned for their own safety and for the safety of other persons in the residence: the unusual behavior of the parents in not answering the door or the telephone; the fact that Mrs. Huff did not inquire about the reason for their visit or express concern that they were investigating her son; the fact that they hung up the telephone on the officer; the fact that she refused to tell them whether there were guns in the house; and

> finally that she ran back into the house while being questioned. That behavior, combined with the information obtained at the school — that Vincent was a student who was a victim of bullying, who had been absent from school for two days, and who had threatened to shoot up the school — led the officers to believe that there could be weapons inside the house, and that family members or the officers themselves were in danger.

(ER 81:4-15.)

[6] These facts relied upon by the district court in its legal conclusions amount to mere speculation. They do not satisfy the heavy burden required for a finding of exigent circumstances. That the Huffs did not answer their door or telephone may be "unusual," but it did not create exigent circumstances. *Hopkins v. Bonvicino*, 573 F.3d 752, 765 (9th Cir. 2009) ("[N]othing requires an individual to answer the door in response to a police officer's knocking."). The district court was incorrect in finding that Maria Huff's failure to inquire about the reason for the officers' visit, or her reluctance to speak with the officers and answer questions, were exigent circumstances. "[T]o the extent that the officers reasonably perceived [Maria] to be antagonistic, they were still not at liberty to enter [her home] under these circumstances." *LaLonde*, 204 F.3d at 957 n.16. Nothing in the district court's findings of fact states that Maria did not inquire about the reason for the officers' visit or express concern that they were investigating her son. Nothing in the district court's

findings of fact indicates that Maria was not free to leave and return to her home, or that any of the officers had indicated that she was either required to answer their questions or restricted from returning to the inside of her house. Additionally, Maria did answer her cell phone when Ryburn called, spoke to him on the telephone, and went outside with her son Vincent upon learning they were present at her residence. She was under no obligation to invite the officers into her home. Indeed, our Constitution protects her decision to refuse the police entry into her home when they did not possess a warrant. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

[7] Further, "the officers' assertion of a potential threat to their safety must be viewed in the context of the underlying offense." *LaLonde*, 204 F.3d at 957 n.16. Here, there was no underlying offense; the officers were investigating rumors of threats. We have stated that:

> [t]he mere fact that a person owns a rifle and does not like law enforcement officials does not in itself allow police officers to enter the person's home and seize him simply because he is unwilling to step into the public domain for questioning, even if probable cause exists to believe that some offense has been committed.

Id. In *LaLonde*, we found no exigent circumstances where probable cause existed; *a fortiori*, we should not find exigent circumstances where it is undisputed that no probable cause existed. It is also significant that Munoz and Roberts, two officers fully briefed on the background information preceding the officers' visit to the Huff home and present at the residence during the entire incident, entered the house because they believed they had been given consent, and not because of any perceived exigency. Nor did Ryburn or Zepeda communicate any exigency to Munoz and Roberts. When the officers entered the Huff home, they committed a Fourth Amendment violation. The district court was incorrect in finding that exigent circumstances existed.

Finally, we note that although the officers do not specifically argue that their warrantless entry was justified by emergency circumstances, we would reject such a claim. The emergency doctrine applies when police officers reasonably believe entry is necessary to "protect or preserve life or avoid serious injury." *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). This exception may appear to fit better the facts of this case because the officers need not have probable cause to show a crime has been or is about to be committed; instead, "[t]here must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." *Hopkins*, 573 F.3d at 764 n.5. Here, however, there was no "objectively reasonable basis for concluding that there [w]as an immediate need to protect others or themselves from serious harm."

United States v. Snipe, 515 F.3d 947, 951-52 (9th Cir. 2008). Maria merely asserted her right to end her conversation with the officers and returned to her home. Therefore, as discussed above, any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable.

2. Qualified Immunity

Qualified immunity can shield government officials from individual civil liability where their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). We use a two-step analysis to determine whether the facts show that: (1) the conduct of the officers violated a constitutional right; and (2) the right that was violated was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Hopkins*, 573 F. 3d at 762. Here, it has been established that the Officer Defendants committed a Fourth Amendment violation because there were no exigent circumstances justifying their entry into the Huff home.

a. Clearly Established Law

[8] Next we must determine whether the right which the Officer Defendants violated was clearly established at the time of the violation. This inquiry, whether the law was clearly established, is a pure question of law for the court to decide. *Romero v. Kitsap Cnty.*, 931 F.2d 624, 628 (9th Cir. 1991); *see*

also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). If the officers violated such a right, but it was not clearly established, then they are entitled to immunity. *Hopkins*, 573 F.3d at 762. A right is clearly established if a reasonable officer would know that his conduct was unlawful in the situation he confronted. *Headwaters Forest Defense v. Cnty. of Humboldt*, 276 F.3d 1125, 1129 (9th Cir. 2002); *see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

[9] We have explicitly stated that "with respect to the lack of probable cause and the lack of exigent circumstances —the absence of either of which would preclude the officers' reliance on the exigency exception — the law as to both was clearly established in 2003." *Hopkins*, 573 F.3d at 772. The dissent relies on *Brigham City v. Stuart*, 547 U.S. 398 (2006), to argue that it was not clearly established law that a warrantless entry predicated on a perceived emergency but lacking probable cause violates the Fourth Amendment. In so doing, the dissent mistakenly conflates the emergency doctrine, which requires an objectively reasonable basis, with the exigent circumstances doctrine, which requires probable cause as well as a reasonable belief that entry is necessary. The Ninth Circuit has not merged these two doctrines; in fact, we have been explicit in recognizing their contours and their autonomous applications.[5] *See, e.g., Hopkins*, 573 F.3d at 763

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[5] The dissent implies that we should abandon our long-standing rule distinguishing between the emergency and exigency exceptions to the war rant requirement in favor of approaches adopted by the Sixth and Tenth Circuits, which the dissent

(explaining that the emergency doctrine derives from the police officers' "community caretaking function" whereas the exigent circumstances doctrine derives from the police officers' "investigatory function"). In *Brigham City*, the Supreme Court confirmed the standard for whether police may enter a home without a warrant in accordance with the emergency doctrine: Officers must have "an objectively reasonable basis" to conclude that an emergency is occurring and immediate action is necessary to protect themselves or others from serious, imminent harm. *Brigham City*, 547 U.S. at 400; *see also*

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reads as dispensing with probable cause in favor of the objectively reasonable basis standard. *See United States v. Huffman*, 461 F.3d 777 (6th Cir. 2006); *Armijo v. Peterson*, 601 F.3d 1065 (10th Cir. 2010). In both of these cases, the courts expanded the scope of *Brigham City* over vigorous dissents. Neither case contains jurisprudential explanations or prudential concerns sufficient to justify why it is now necessary for us to merge these two distinct doctrines and dispense with the firmly-established rule announced by the Supreme Court and followed by every other circuit that the Fourth Amendment requires both probable cause and exigent circumstances, including safety, for a warrantless entry into the home. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam); *Estate of Bennett v. Wainwright*, 548 F.3d 155, 169 (1st Cir. 2008); *Loria v. Gorman*, 306 F.3d 1271, 1283 (2d Cir. 2002); *Estate of Smith v. Marasco*, 318 F.3d 497, 518 (3d Cir. 2003); *United States v. Moses*, 540 F.3d 263, 269-70 (4th Cir. 2008); *United States v. Newman*, 472 F.3d 233, 236 (5th Cir. 2006); *United States v. Venters*, 539 F.3d 801, 806-07 (7th Cir. 2008); *United States v. Clarke*, 564 F.3d 949, 959 (8th Cir. 2009); *Bates v. Harvey*, 518 F.3d 1233, 1245 (11th Cir. 2008); *In re Sealed Case 96-3167*, 153 F.3d 759, 764 (D.C. Cir. 1998).

Michigan v. Fisher, 130 S. Ct. 546, 548 (2009) (per curiam) (characterizing *Brigham City* as an "emergency aid exception" case). As discussed above, this exception does not apply to the present case. *Brigham City* does not, as the dissent suggests, disturb the requirement that probable cause is necessary when a warrantless entry is based on exigent circumstances. This was clearly established law when the officers entered the Huff residence, and it is the law that continues to protect the privacy and sanctity of the home today. *See United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010). Accordingly, when we consider the actions of the officers "in the light of pre-existing law[,] the unlawfulness [is] apparent." *Anderson*, 483 U.S. at 640. The issue then becomes whether a reasonable officer would have known the conduct of Ryburn, Zepeda, Roberts, and Munoz in this situation was unlawful.

b. Objective Reasonableness

The reasonableness inquiry is objective, evaluating "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

i. Roberts and Munoz

[10] The district court found that Roberts and Munoz entered the Huff residence because they believed they had been given consent. Though Roberts and Munoz were mistaken in their beliefs,

their actions were reasonable under the circumstances. They were not party to the conversations occurring between Ryburn, Zepeda, Maria, and Vincent. They entered the Huff home only after their colleagues Ryburn and Zepeda. No one communicated to them the basis for entry or indicated to them that they should remain outside. Under those conditions, a reasonable officer may have believed, though mistakenly, that he and his fellow officials had been given consent to enter the home. Roberts and Munoz are entitled to qualified immunity for their warrantless entry into the Huff residence in violation of the Fourth Amendment.

The Huffs argue that even if there were exigent circumstances to justify entry into their home, the officers violated their Fourth Amendment rights by remaining in their home once they realized that no exigent circumstances existed. But "officers [are] not required to periodically reassess whether the exigency persisted throughout" the duration of a search. *Fisher*, 558 F.3d at 1077. Here, Roberts and Munoz's remaining in the home for five to ten minutes "was merely a continuation of the initial entry," and we therefore decline to hold them personally liable for failing to leave. *Id.* (quoting *United States v. Echegoyen*, 799 F.2d 1271, 1280 (9th Cir. 1986)).

ii. Ryburn and Zepeda

[11] The district court found that Zepeda entered the Huff home because of "officer safety concerns" and that Ryburn faced "a number of factors" that led

to safety concerns. (ER 79:3-5, 81:4-5.) Both Zepeda and Ryburn knew that they were at the Huff house to investigate alleged threats that had been made by Vincent. They were aware that no crime had been committed at the Huff home. Both Zepeda and Ryburn knew that no crime was in progress at the Huff home. Both Zepeda and Ryburn were aware that they did not have probable cause to stop or detain Maria or Vincent. Both Zepeda and Ryburn knew that they had not been given consent to enter the Huff residence. Neither Zepeda nor Ryburn knew a gun to be present at the Huff home, ever saw a gun, or was ever informed of the presence of a gun. A reasonable officer confronted with this situation may have been frustrated by having a parent refuse them entry, but would not have mistaken such a refusal or reluctance to answer questions as exigent circumstances. Thus, Ryburn and Zepeda are not entitled to qualified immunity for their warrantless entry into the Huff residence in violation of the Fourth Amendment.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** in part and **REVERSE** in part the district court's judgment and **REMAND** the case.[6]

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[6] Each party shall bear its own costs on appeal.

Rawlinson, Circuit Judge, concurring in part, and dissenting in part:

I would pose the issue in this case as whether it was clearly established law that a warrantless entry predicated on a perceived emergency violates the Fourth Amendment despite the lack of probable cause. In my view, that point of law was not clearly established, and should result in our affirming the grant of qualified immunity to all the officers who are defendants in this case.

Unquestionably, the discrete incident that precipitated the entry in this case was Mrs. Huff's response to the question regarding whether there were guns in the house. The majority recites a sanitized account of this event, stating that Mrs. Huff "went into the house" and "testified that she responded that she would go get her husband." Majority Opinion, pp. 621-22. However, the district court's findings of fact, which the majority concedes must be credited, *see* Majority Opinion, p. 624, differs markedly from the majority's rendition. Indeed, the district court found that when asked whether there were guns in the house, rather than responding, Mrs. Huff turned and *ran* into the house. Mrs. Huff's precipitous departure understandably prompted safety concerns. Sergeant Rayburn testified as follows regarding his actions after Mrs. Huff declined the suggestion to go inside the home:

> Q. So when she said "no," did you decided [sic] to start questioning her as if you were inside the house?

A. Yes. And that's why I asked if there was any weapons in the house.

Q. In targeted violence situations, does that question have a particular meaning to you?

A. Absolutely because of, again, the threat that he was going to blow up or shoot up the school. I wanted to make sure neither one of them could access any weapons from inside the house, and that's where they normally get the weapons from is from either their parents or relatives or friends.

Q. Did Mrs. Huff say "no" to your question about whether there were guns in the house?

A. She didn't say anything at all. She just turned around and went into the house.

Q. Did she say she was going to get her husband? A. No.

Q. When Mrs. Huff turned and went into the house, were you concerned?

A. Absolutely.

Q. Were you scared?

A. I was scared because I didn't know what was in that house and, again, I've seen too many officers killed in shootings. I did not want one of us to be

injured. So I went in and followed her in the house.

Q. Did you go into the house to search for guns?

A. No.

Q. Why did you go into the house?

A. Because I didn't want her to access a weapon or Vincent Huff accessing a weapon.

Q. Why didn't you just grab her? Stop her?

A. It all happened so quick. As soon as I asked her about the weapons, she turned and ran into the house. I didn't have a chance to. Caught me by surprise.

In my view, the cases cited by the majority that address circumstances where law enforcement has targeted a person or an item for search or seizure are not the appropriate guideposts for our analysis. I would look instead to those cases that specifically address the scenario where officer safety concerns prompted the entry.

In *Brigham City v. Stuart*, 547 U.S. 398 (2006), the United States Supreme Court was called upon to "consider whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury."

Id. at 400. The Supreme Court "conclude[d] that they may." *Id.*

In its analysis, the Supreme Court focused on "the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation." *Id.* at 402 (citations omitted). Without mentioning a probable cause requirement, the Supreme Court upheld the warrantless entry because "the officers had an objectively reasonable basis for believing "that an emergency situation existed." *Id.* at 406.

The Supreme Court's analysis in *Brigham City* is consistent with its earlier pronouncement in *Georgia v. Randolph*, 547 U.S. 103 (2006). Randolph involved the warrantless search of a shared dwelling over the express refusal of a co-resident of the dwelling. *See id.* at 106. Although the Supreme Court determined that there was no valid consent by Randolph, and the results of the search were "unreasonable and invalid as to him," *id.*, in responding to the dissent's argument that the ruling would "shield[] spousal abusers and other violent cotenants," *id.* at 117 (citation omitted), the majority observed that:

> [I]t would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur . . . Thus, the question whether the police might lawfully enter over objection in

> order to provide any protection that might be reasonable is easily answered yes ...

Id. at 118 (citation omitted).

At least one other circuit had applied the analysis articulated in *Brigham City* to uphold a warrantless search as of 2007, when this challenged entry occurred. In *United States v. Huffman*, 461 F.3d 777, 780 (6th Cir. 2006), there was a report of shots fired. Police were dispatched to the scene, and observed bullet holes and glass. *See id.* The officers did not observe any blood or signs of injury. *See id.* After there was no response to the officers' knock and announcement of their presence, the officers entered the residence. *See id.* Huffman was asleep in a chair with a fully loaded assault rifle on a table in front of him. *See id.* Huffman was arrested and charged with firearm violations. *See id.* Huffman's motion to suppress on the basis of a Fourth Amendment violation was denied. *See id.* at 781. The district court concluded that the facts "were sufficient to establish exigent circumstances justifying entry into the residence without a warrant." *Id.*

In discussing the exigent circumstances exception to the warrant requirement, the Sixth Circuit cited *Brigham* for the proposition that there are "four situations that may give rise to exigent circumstances: 1) pursuit of a fleeing felon, 2) imminent destruction of evidence, 3) the need to prevent a suspect's escape, and 4) *a risk of danger to the police* or others." *Id.* at 782 (citation omitted) (emphasis added). The Sixth Circuit explained that "to satisfy the exigent circumstances exception [the

government] must show that there was a risk of serious injury posed *to the officers* or others that required swift action. *Id.* (citation omitted). The Sixth Circuit, as was the case in *Brigham City*, did not mention probable cause.

Although the more dated cases cited by the majority import a probable cause requirement into the exigent circumstances analysis, *Brigham City*, *Huffman* and other more recent cases discussing exigent circumstances do not. *See Michigan v. Fisher*, 130 S. Ct. 546 (2009) (describing the *Brigham City* holding as embodying the "emergency aid exception," requiring "only an objectively reasonable basis for believing that a person within the house is in need of immediate aid[.]" *Id.* at 548 (citations, alteration and internal quotation marks omitted); *see also United States v. Snipe*, 515 F.3d 947 (9th Cir. 2008) ("Considering the totality of the circumstances, law enforcement must have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm." *Id.* at 951-52 (emphasis added); *Armijo v. Peterson*, 601 F.3d 1065, 1071 (10th Cir. 2010) ("[T]he exigent circumstances exception permits warrantless home entries when officers reasonably believe that some actor or object in a house may *immediately* cause harm to persons or property not in or near the house." (Emphasis in the original).

In any event, as of 2007 when the events in this case occurred, at a minimum it was unclear whether a warrantless entry into a home by police officers

who feared for their safety violated the Fourth Amendment. Under the rationale articulated in *Brigham City*, *Randolph* and *Huffman*, a police officer could have reasonably believed that he was justified in making a warrantless entry to ensure that no one inside the house had a gun after Mrs. Huff ran into the house without answering the question of whether anyone had a weapon. *See, e.g., United States v. Paopao*, 469 F.3d 760, 766 (9th Cir. 2006), *as amended* ("Depending on the circumstances, the exigencies of a situation may make it reasonable for officers to enter a home without a warrant in order to conduct a protective sweep.") (quoting *United States v. Cavely*, 318 F.3d 987, 995-96 (10th Cir. 2003).) Accordingly, I conclude that it was not clearly established that the actions taken by Sergeant Ryburn and Officer Zepeda violated the Fourth Amendment. As a result, I would affirm the district court's decision granting qualified immunity to all four officers involved in the incident.

I, therefore, concur in that portion of the opinion holding that Officers Roberts and Munoz were entitled to qualified immunity. I respectfully dissent from that portion of the opinion holding that Sergeant Ryburn and Officer Zepeda were not entitled to qualified immunity.

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U.S. COURT OF APPEALS

FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE ROBERT HUFF; et al.; Plaintiffs-Appellants, v. CITY OF BURBANK, a municipal corporation; et al., Defendants-Appellees.	No. 09-55239 D.C. No. 2:07-cv-04114-FMC-AJW ORDER

Before: KOZINSKI, Chief Judge, RAWLINSON, Circuit Judge, and MARBLEY, District Judge.*

The petition for rehearing and rehearing en banc is denied. See Fed. R. App. P. 35, 40.

Judge Rawlinson would grant the petition.

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

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

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I N D E X

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* * * [110]

Q Did she tell you she had heard the report that morning for the first time?

A Yes.

Q And who did she tell you she heard from?

A She heard it from Elizabeth.

Q The –

A The female student I interviewed.

Q Did Sister Cheryl express to you that having conducted her investigation, she still remained concerned for the safety of the school, even though she couldn't find the letter?

A Yes.

Q Did Sister Cheryl, tell you whether Vincent Huff had been in school that day?

A She told me that he was not at school that day or the day before.

Q What was the significance of that to you?

A Well, in regards to the type of investigation, its – if there is a school shooter, they do not go to school and arrive at school after school has started because again it's always planned, it's not a spontaneous act; so the shooter would know exactly

where the students would be at, or, should I say, the targets.

Q So I didn't know if I heard you correctly. They would normally come to school on time or they would come to school at a later time?

* * * [111]

A They would come to school at a later time.

Q What did you do after Sister Cheryl briefed you on what she had been told; what her concerns were?

A I asked her to bring in – bring in Elizabeth so I could talk to her in regards to – in regards to the letter and the threats.

Q And where did you speak to Elizabeth Hinojosa?

A In Sister Cheryl's office.

Q And who was present?

A It was Sister Cheryl and Sergeant Ryburn.

Q What did Elizabeth Hinojosa tell you?

A She told me that she had heard about the threatening letter from another student the day before. And when I asked her in regards to identifying that student, she wasn't able to identify that student for me. She forgot, she said.

Q Did that seem credible to you?

A No.

Q Why not?

A Because in regards to a letter like that, a student would know who the person would have told her about that. I mean, be concerned.

Q What did that indicate to you?

A That she was hiding the identity of the person who told her.

* * * [112]

Q Did you ask Elizabeth Hinojosa if she thought Vincent Huff was the kind of kid that could perform this kind of act?

A I did.

Q And what did she tell you?

A She told me yes.

And I asked her why.

Q And what did she tell you?

A She said it's because Vincent is always – always picked on at school.

Q And what was the significance to you of the fact, this report that Vincent Huff was being picked on at school?

A It's a common factor in school shootings in regards to the shooter that they're bullied.

Q Was Sister Cheryl and Sergeant Ryburn present at all times during the interview?

A Yes.

Q Did Sergeant Ryburn participate in the interview?

A In Elizabeth's interview, no.

Q How would you describe Elizabeth Hinojosa's demeanor?

A She seemed scared.

Q Scared of you? The officers?

A I don't know if it was from me or the whole situation.

Q Did you interview anyone else?

A Yes.

* * * [113]

Q Who?

A Good friend of Mr. Vincent Huff's, Justin Stones.

Q And who identified him as a good friend of Vincent Huff?

A Sister Cheryl.

Q And did Justin Stones confirm that when you spoke to him?

A Yes.

Q And what did you ask Justin Stones?

A I asked him if – if he had heard about the threats. He also told me that yes, I did hear it. It's been spreading around the school.

Q Did you ask him if whether he thought Vincent Huff was the type of kid who would do something like this?

A Yes, I did ask him.

Q What did he say?

A He said no.

Q How would you describe his demeanor?

Q Really nonchalantly, like, you know, he really didn't care.

Q Now, during these interviews were Officer Robarts and Officers Munoz present?

A Inside the principal's office, I don't recall.

Q Were they involved in the interviews?

A No.

* * * [114]

Q And what did you think you could do by talking to him?

A In talking to him, I would know more – I would know more – more information in coming from the student who supposedly had made those threats. It would have been – it would have allowed me to see if there was a threat.

Q You thought by speaking to him, you would be able to better assess?

A That's correct.

Q Had you had occasion in the past to go out to speak to parents and students about conduct, criminal conduct?

A Yes, ma'am.

Q Many times?

A I do it all the time, yes, ma'am.

Q And as of your experience as of June 1st, 2007, would you have expected the parents to be confrontational about that or inviting, to sit down and discuss?

A Inviting.

Q Why?

A Because the parents that I've dealt with always – they want to know anything that's going on with their child, and they're concerned in regards to why – in regards to – you know, in regards to the police basically being involved.

Q Did Sergeant Ryburn agree that an interview should be conducted of Vincent Huff?

A Yes.

* * * [116]

Q At that time, was there a discussion about searching the Huff residence?

A No. At that time, it was basically just going and speaking with Vincent Huff.

Q Was Sister Cheryl present during Justin Stones' interview, too?

A Yes.

Q After they were all done, did Sister Cheryl continue to express her concern for the students' safety?

A Yes.

Q Did Sister Cheryl ever say to you, "I know Vincent Huff. He's not the type of kid who would do this"?

A No.

Q Did you tell Sister Cheryl that you were going to the house?

A Yes.

Q And did you do, or Sergeant Ryburn let her know that you would come back and let her know what the result of the interview was?

A Yes. I advised her I would come back to the school after going to the residence.

Q Did you or Sergeant Ryburn instruct Sister Cheryl not to let the Huff family know that you were coming?

A Yeah, Sergeant Ryburn advised her not to call.

Q Where did you park your patrol vehicle?

* * * [123]

Q Did that surprise you?

A Yes.

Q Why?

A Because as a parent and from my experience, I wouldn't want the police outside of my house

speaking to us. Again, I'd rather keep it as a private matter.

Q Up until that point in time, had you heard Mrs. Huff ask, "Why are you here? What are you doing here? What are you here about? Is everything okay?" Anything like that?

A No.

Q What was the next thing you heard Sergeant Ryburn say?

A Sergeant Ryburn asked Ms. Huff if there were – if there were any guns in the house.

Q Investigating this type of crime, is that the type of question you would expect to be asked?

A Yes.

Q Why? What is the significance of guns in the house?

A Well, because, again, usually in regards to a school shooter, it's a common factor that the shooter acquires the guns from the home or a relative.

Q Did you hear a response from Ms. Huff?

A No response. No verbal response.

Q What did you see Ms. Huff do?

A She immediately turned around and walked out of my view.

* * * [124]

Q Where did you understand where she was going?

MR. TERRELL: Objection. Calls for speculation.

THE COURT: No. You may answer.

THE WITNESS: Inside the house.

BY MS. HUMISTON:

Q Could you actually see inside the house from where you were standing?

A No, ma'am.

Q Almost immediately after Ms. Huff went to move into the house, what did you see Vincent Huff do?

A He turned around towards his mom. At the same time, I observed the sergeant walk in right after Ms. Huff.

Q Now, at the time you had Vincent Huff outside, was he being detained?

A Yes.

MR. TERRELL: Objection. Calls for a legal conclusion, Your Honor.

THE COURT: No, you may answer.

Were you detaining him?

THE WITNESS: Yes, Your Honor.

BY MS. HUMISTON:

Q Technically, did Vincent Huff, in your mind, have the right to walk away and say, "No, I'm not going to answer questions or talk to you"?

A No.

* * * [182]

Q Do you work at Bell-Jeff High School?

A Yes, I do.

Q And can you tell the Court what your current position is at Bell-Jeff?

A I'm the principal of Bellarmine-Jefferson High School.

Q How long have you been the principal, Sister Milner?

A I began July 1st of 1997, so I think it's 12 years, but I'm not sure.

Q All right. Sister Milner, prior to June 1st, 2007, have you had a chance to meet Vincent Huff?

A I don't recall if I met Mr. Huff before.

Q Vincent Huff.

A Oh, excuse me. I'm sorry.

Q No, problem.

A Did you say Vincent? I didn't hear you.

Q No problem.

A Oh, yes. I definitely met Vincent Huff.

Q And how did you come to know Vincent Huff prior to June 1st, 2007?

A He was a student enrolled in our school.

Q And how would you describe Vincent Huff as a student prior to June 1st, 2007?

MS. HUMISTON: Objection. Relevance.

THE COURT: It's a little vague.

* * * [187]

Q And do you recognize Officer Zepeda?

A I do.

Q And you spoke to Sergeant Ryburn and Officer Zepeda about what had occurred up to that point that day?

A Yes. My first conversation was with Officer Zepeda.

Q And it was joined by Sergeant Ryburn; correct?

A Correct.

Q And you explained to them that you had received this report, that some parents had kept their kids out of school; correct?

A Yes.

Q And you explained to them that Vincent Huff hadn't been in school for two days?

A Yes.

Q And you explained to them that you were concerned about the threat; correct?

A Definitely.

Q And you explained that this threat had come to your attention and you wanted them to further investigate the threat?

A Yes. I perceived there was some element of hysteria in the – with the parents that had kept their kids home with the teachers that were reporting this to me at the start of the day which was like 8:00 o'clock. So I counseled with Mr. Aguirre, our dean of students, as to what

* * * [188]

the best procedure would be. And we concluded and agreed that calling our school resource officer would be the best course of action.

Q At the time you first called the Burbank Police Department to talk to the school resource officer, you had already conducted some investigation at the school?

A Yes, we had.

Q And with respect to the letter, you had not been able to confirm the existence of the letter; correct?

A Correct. The first part of the morning, it really wasn't about the letter. That came out a little bit after we started interviewing students. The first part was about the student, Vincent Huff, who was not at school, and the rumor about him coming to school.

Q To shoot up the school?

A Yes, with guns; a gun.

Q When Officer Zepeda was done interviewing Elizabeth Hinojosa and Justin Stones, you and he and Sergeant Ryburn talked about what would happen next; correct?

A Yes. I don't think I was offering much information. I think I was listening more.

Q Of course.

One of the things Sergeant Ryburn suggested is that, in light of police officers being on your campus that

* * * [200]

Your Honor.

THE COURT: You may examine.

MS. HUMISTON: Thank you.

THE WITNESS: Excuse me.

Cross Examination

BY MS. HUMISTON:

Q What was your position with the Burbank Police Department on June 1, 2007?

A Juvenile bureau sergeant.

Q As a Burbank police officer and as a juvenile sergeant, have you been trained in the threat assessment approach to investigating targeted violence in the schools?

A Yes, I have.

Q Do you make a distinction between a potential suspect who has made a threat versus posing a threat?

A Yes. Posing a threat – we have to investigate all of those, and we gather information by interviewing people and up to and including the alleged person that made that statement.

Q What is the Burbank Police Department's policy about investigating reports of threats?

Do you investigate all or do you distinguish?

A We investigate all of them as fully as we can, including interviewing witnesses, involved parties, suspects.

* * *

[201]

Q Tell me the type of factors you're looking for when you conduct an investigation of targeted violence in the schools.

A Well, we look at the individual; we look at the bullying, the communications maybe – the latest ones are through the Web sites on the computer – we get that information; the – how the child is treated in the home and the neighborhood. So it's a combination of factors, up to and including interviewing school mates, their friends because those are the ones that usually give us the information that, "Well, yeah. She or he has done this or that."

Q What's the relationship between bullying and a threat assessment targeted violence in the schools?

A The bullying creates resentment and those people want to take that out on the people that have been bullying them; and taking it out on them which up to and including stabbing them, shooting them; so they have – they're intent on taking that out. They feel put down.

Q What is the primary motivation of school shooters?

A Bullying, picking on.

Q Are school shootings spontaneous or planned?

A No, no. These are planned events, just like – we've gathered information from Columbine and Virginia Tech as to what happened there, and we learned from it. We trained –

* * * [202]

the Burbank Police Department actually was involved in some active shooter training targeting specifics within the school.

How are we going – how to respond to it. And it's not just the school resource officers, it's all of Burbank police officers because the school resource officer may not be on the campus that day.

Q How did you first become aware that there was a potential threat at Bell-Jeff?

A I received a phone call, but I don't remember from who.

Q Was it somebody from Bell-Jeff?

A I talked to someone at the school.

Q And what basically were you told?

A That there was an individual that made a threat to shoot up the school, and that they wanted the police department to come out and investigate it; and they asked for Steve Turner, but he was not there.

Q Who was Steve Turner?

A I'm sorry. Steve Turner was the school resource officer that's at Burbank High School, but one of his ancillary duties was to handle Bellarmine-Jefferson High School. He was off that day. We only had one school resource officer.

Q Did it come to your attention from any other source

* * * [206]

A That is the home number for Mr. and Mrs. Huff.

Q At 12:41 there's a phone call to 323 578-1102.

Do you know who that's to?

A That's the cell phone number that I talked to Mrs. Huff.

Q Now, at 1:01, you dialed a number 818-599-3158.

Do you recognize that number?

A Yes, I do.

Q Is that business or personal?

A That was a personal call.

Q So does that indicate to you that at least by 1:01 you were done?

A I wouldn't have made a personal call while I was investigating, no. I was completed by then.

Q Did you talk to Sister Cheryl when you got to Bell-Jeff about her concerns?

A Yes, I did.

Q And did she explain to you that she had been investigating for several hours that morning?

A Oh, it had been – yeah, I think she started right when school began at 8:00 o'clock that morning. The school was looking in to it. They were – they were doing their own investigation.

Q Did she tell you that to that time she had not been able to find any letter associated with this threat?

* * * [207]

A Yes, she never found a letter.

Q Did she express to you her concern that she was concerned for her students?

A For the concern of the safety of the students and the staff.

Q She did?

A Yes, she did.

Q At any point – at that point in time did Sister Cheryl suggest to you that she didn't think Vincent Huff was capable of doing this?

A No.

Q Were you present during the interviews of Elizabeth Hinojosa and Justin Stones?

A I was present for part of them because I kept going in and out of the office.

Q Why?

A I wanted to get the contact information for the kids that we interviewed because some times we get calls to the department upset that they interviewed their children; so I wanted to at least have those available.

Q After the interviews were over, did you discuss with Officer Zepeda what he had been told?

A Yes, I did. And based on what he told me and his determination, we decided we needed to go interview Vincent Huff.

* * *

[208]

Q And were Officer Robarts and Officer Munoz present during that conversation?

A I don't know if they were present at the time I talked to Officer Zepeda. They were in the area.

Q Did you discuss with them what you knew?

A Yes.

Q What was their significance that you heard that formed your opinion that you needed to pursue this investigation?

A There was a couple of things. Absent from school. The letter allegedly was threatening to shoot up the school. We wanted to talk to him and find out – to interview him.

My concern was for the safety of those kids, and that's why we decided to go talk to Vincent Huff.

Q Were you informed or did you hear that Elizabeth Hinojosa had reported that Vincent Huff was bullied in school?

A Yes.

Q What was the significance of that to you?

A Well, that adds to one of the factors of being bullied to return to the school, and so those factors, based on the information from Elizabeth Hinojosa and Sister Cheryl, we decided to go down there and interview him.

Q What was the significance of the fact that Vincent Huff hadn't been in school?

A Because that's another factor that the shootings that

* * * [209]

I've looked at, they've come back to school after school began because they know that the people that they're targeting are in a fixed position within the school.

Q What was the significance to you that, notwithstanding the fact that Sister Cheryl knew Vincent Huff, she remained concerned, and she didn't say she didn't think it was possible he could have committed this?

A I think she left that up to us.

Q But was there a significance to you about the fact that she remained concerned?

A Other than – she knows the kids more than we do. She knows them. I think that concern – that concerned her that he wasn't in school, what she heard from the parents the night before; so those factors.

Q When you decided to go to Vincent Huff's house, were you intending to search?

A No.

Q Did you ever search?

A No.

Q Did you consider suggesting that Sister Cheryl lock down the school?

A No.

Q Why not?

A Because it would have caused an increased – I think it would have caused increased safety issues for the school

* * * [211]

wall, but we couldn't get into that, and so we walked around to the other side which there were double doors on the north side of the residence.

Q And was there anyone with you there at those double doors?

A Officer Zepeda and I walked up to the doors.

Q And what, if anything, did Officer Zepeda do?

A Well, he knocked on the door, and while he was knocking on the door, I was trying to look in the windows, but I couldn't.

Q Why not?

A Because they were all covered.

Q Did he announce "Burbank police"?

A Yes.

Q Approximately how many times did he do that?

A I think it was two or three times.

Q Did you wait to see if there was a response at the door?

A Oh, yes.

Q Was there a response?

A No, there wasn't. It was probably two minutes, two, three minutes.

Q Knowing that Vincent Huff was supposed to be – were you told that Vincent Huff was home sick?

A He had been home sick the previous day which had been...

* * * [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

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; A.S., a minor; DARIN RYBURN, as an individual and in his official capacity; EDMUNDO ZEPEDA, as an individual and in his official capacity; CHRIS ROBARTS, as an individual and in his official capacity; FERNANDO MUNOZ, as an individual and in his official capacity; DOES 1 through 10, Inclusive, Defendants.	No. CV 07-4114-FMC-AJWx

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REPORTER'S TRANSCRIPT ON APPEAL

Los Angeles, California

Wednesday, January 14, 2009, 8:04 A.M.

Day 2 of Court Trial, Page 1 through 190, Inclusive

Pat CUNEO, CSR 1600-CRR-CM
Official Reporter

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I N D E X

CHRONOLOGICAL INDEX OF WITNESSES

ALPHABETICAL INDEX OF WITNESSES

EXHIBITS

EXHIBITS

DEFENDANTS' EXHIBIT	DESCRIPTION	FOR IDENTIFICATION	IN EVIDENCE	VOL
23	Emergency Card		6	2
24 & 25	Cellphone Documents		6	2
26	Tapes		7	2
27	Documents		8	2
29	School Records		8	2

* * * [14]

THE WITNESS: Hundreds because I worked not only as a juvenile bureau sergeant but I worked as a school resource officer so we talked to parents and children almost on a daily basis.

Q. At their home?

A. At their home.

Q. And in your experience, are parents generally cooperative with the police?

A. Yes. They want to know why the police are there and normally welcome us into the house.

Q. In your training in threat assessment of potential school shootings, are you trained to go to the threat or wait for the threat?

A. No. We are to go to the threat and investigate it and actually go to the threat.

Q. When you call on your cellphone to another cellphone, is your number blocked?

A. Yes, it's unavailable.

Q. Before Ms. Huff hung up the phone, did she ask you why you were there?

A. No.

Q. Did you think that was unusual?

A. Normally, when I – excuse me. I said I was with the police department. I expected her to ask why I was there.

Q. When you were on the landing at the top of the steps

* * * [16]

A. Yes.

Q. So when she said "no," did you decided to start questioning her as if you were inside the house?

A. Yes. And that's why I asked if there was any weapons in the house.

Q. In targeted violence situations, does that question have a particular meaning to you?

A. Absolutely because of, again, the threat that he was going to blow up or shoot up the school. I wanted to make sure neither one of them could access any weapons from inside the house, and that's where they normally get the weapons from is from either their parents or relatives or friends.

Q. Did Mrs. Huff say "no" to your question about whether there were guns in the house?

A. She didn't say anything at all. She just turned around and went into the house.

Q. Did she say she was going to get her husband?

A. No.

Q. When Ms. Huff turned and went into the house, were you concerned?

A. Absolutely.

Q. Were you scared?

A. I was scared because I didn't know what was in that house and, again, I've seen too many officers killed in...

* * *

* * * [190]

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 page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: May 30, 2009

/S/ Pat Cuneo

PAT CUNEO, OFFICIAL REPORTER
CSR NO. 1600