No. 12-1201

In the Supreme Court of the United States

JONATHAN CHIN AND THE CITY OF SEATTLE,

Petitioners,

v.

ANDREW RUTHERFORD,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Andrew Rutherford filed this lawsuit, in part, because Officer Jonathan Chin, who was off duty, wearing jeans and a t-shirt, and driving his personal car, detained Mr. Rutherford at gunpoint in the middle of a dark, dead-end residential street to investigate alleged traffic violations even though Mr. Rutherford was *not* the driver of the car that Officer Chin had observed and had *not* committed *any* criminal acts. Applying a totality of the circumstances test, a jury concluded that Officer Chin acted unreasonably and violated Mr. Rutherford's constitutional rights. The district court then awarded prevailing party attorney fees. The Ninth Circuit, viewing the evidence in the light most favorable to Mr. Rutherford, affirmed, concluding that Officer Chin's decision to draw his gun on Mr. Rutherford was "unreasonable under the circumstances." The Ninth Circuit therefore rejected Officer Chin's claim that he was entitled to qualified immunity. The questions presented are:

1. Whether the Ninth Circuit correctly held—consistent with the decisions of this Court and other circuits—that Officer Chin's decision to draw his gun on Mr. Rutherford was "unreasonable under the circumstances" and therefore violated Mr. Rutherford's Fourth Amendment rights.

2. Whether the Ninth Circuit correctly held—consistent with the decisions of this Court and the jury verdict that Officer Chin violated Mr. Rutherford's Fourth Amendment rights—that Officer Chin was not entitled to qualified immunity.

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STATEMENT OF THE CASE

1. The lawsuit in this case arose out of a traffic incident involving an off-duty Seattle police officer. Around two o'clock in the morning on September 9, 2007, Officer Chin was cut off by a Jeep while driving home in his personal car. Officer Chin decided to follow the Jeep. He called 911 to report his progress and request uniformed backup.

After briefly losing sight of the Jeep in a residential neighborhood, Officer Chin found it again, stopped near the end of a dead-end street, at the bottom of a small hill. Officer Chin parked his car a short distance behind the Jeep and observed three men—Jared Alfonzo, Andrew Rutherford, and Myo Thant—exit the Jeep. Officer Chin admitted that he had no personal safety concerns while seated inside his car and that no one outside his car would be able to look at him or his car and identify him as a police officer. Additionally, at the time Officer Chin got out of his car, he observed no criminal activity.

Although the Seattle Police Department encourages off-duty officers to act as witnesses only and not to become actively involved in investigating a crime unless a person's life is in danger or a person is being physically attacked, Officer Chin decided to get out of his car and detain the three men while he waited for uniformed officers to arrive. Officer Chin directed Mr. Thant to come toward him, then told dispatchers that he needed fast backup. Fast backup is the second highest priority call for assistance after a call that an officer is down. Mr. Thant, already

walking toward Officer Chin, continued on his course.

Although Officer Chin had specifically directed Mr. Thant to come toward him, he became uncomfortable with Mr. Thant's approach. He then drew his personal gun (Officer Chin testified that the gun he carried that night was his own gun and not the gun issued to him by the Seattle Police Department) and ordered Mr. Thant to place his hands on the hood of the car. Mr. Thant complied.

Mr. Rutherford and Mr. Alfonzo saw Officer Chin throw Mr. Thant onto the hood of Officer Chin's car and began walking toward their friend. Officer Chin immediately turned toward Mr. Alfonzo and Mr. Rutherford and, with his gun pointed at them, ordered them to sit down in the middle of the street. At that point in time, Officer Chin had no reason to believe that the vehicle had been stolen, that the three young men were armed or dangerous, or that a crime of violence had occurred or was about to occur. To the contrary, the only "crime" that Officer Chin had observed was a non-violent traffic infraction, which could only be committed by the driver of the vehicle.

Mr. Alfonzo and Mr. Rutherford promptly complied with Officer Chin's command to sit down in the middle of the street. After Mr. Thant submitted to a brief pat-down by Officer Chin, he too complied with Officer Chin's command. All three men then began asking Officer Chin questions, trying to understand what was happening. All three were terrified and believed that the man pointing a gun at

them was not an off-duty police officer but rather someone who was going to rob and most likely shoot them, and they asked Officer Chin if that was his intent. Mr. Rutherford, who heard Officer Chin state that he was a police officer, did not believe that a Seattle police officer would be dressed in jeans and a t-shirt, be driving an unmarked car at 2 o'clock in the morning, and order them to sit down in the middle of a residential street at gunpoint.

While waiting for uniformed officers to arrive, Officer Chin asked who had been driving the Jeep, and Mr. Alfonzo honestly answered that he was the driver. Thus, to the extent that erratic driving caused Officer Chin to conclude that the driver was impaired or caused him to be concerned that the driver might re-enter the Jeep and drive away, Officer Chin was able to identify that driver. Mr. Rutherford, in contrast, was not the driver of the vehicle and (per his testimony) had not been drinking that evening. To the contrary, Mr. Rutherford was a passenger in the vehicle and had not committed any criminal acts when Officer Chin ordered him at gunpoint to sit down in the middle of the street. Officer Chin continued to detain Mr. Rutherford at gunpoint even after Mr. Alfonzo identified himself as the driver of the vehicle.

Because Officer Chin had requested fast backup, uniformed officers soon arrived in marked vehicles at high speed. Officer McKissack, the first uniformed officer to arrive, saw Officer Chin standing in the street with his gun pointed toward the three men who were seated in the middle of the street. Officer McKissack drove quickly toward the three men. Mr.

Rutherford then found himself seated directly in the path of Officer McKissack's fast-approaching police vehicle. Fearing that Officer McKissack could not see him sitting in the middle of the street in the dark and would in fact run him over, Mr. Rutherford got up and moved toward the side of the street where Officer Chin was standing.

Ignoring Mr. Rutherford's understandable desire to avoid being run over by Officer McKissack (who had just stopped his patrol car a few feet from where Mr. Rutherford had previously been ordered to sit at gunpoint), Officer Chin interpreted Mr. Rutherford's movement as either an attack or an attempt to flee. Officer Chin attempted to take Mr. Rutherford to the ground, struggled for some moments, and was eventually assisted by Officer McKissack, who violently tackled Mr. Rutherford and knocked him down onto the pavement. Officer Rurey, who arrived behind Officer McKissack, then immobilized Mr. Rutherford's legs. Officer McKissack, who outweighed Mr. Rutherford by more than 100 pounds, forced Mr. Rutherford's head and face into the pavement by putting his knee on the back of Mr. Rutherford's neck.

Having pinned Mr. Rutherford to the ground, the officers eventually cuffed Mr. Rutherford's hands behind his back and pulled him to a sitting position. Mr. Rutherford suffered from cuts and abrasions on his arms and legs, as well as a serious cut on his forehead that bled profusely. In a state of shock, Mr. Rutherford was examined by paramedics and eventually taken to a hospital for treatment of the cut on his forehead and head injury. Neither

Mr. Thant nor Mr. Alfonzo was cited or charged with any crimes that night, not even traffic violations. Indeed, Mr. Alfonso, the admitted driver of the vehicle, eventually got back into his car and drove home. Mr. Rutherford, on the other hand, was charged by the City of Seattle with obstructing an officer, but the City dismissed that charge prior to trial.

2. Mr. Rutherford subsequently filed a civil rights action against Officers Chin, McKissack, and Rurey and the City of Seattle. At trial, the jury was instructed to determine whether the length and scope of Mr. Rutherford's seizure were reasonable based on the "totality of the circumstances," including (1) "the aggressiveness of the police methods," (2) "how much [Mr. Rutherford's] liberty was restricted," and (3) "whether [Officer Chin] had a sufficient basis to fear for his safety to warrant the intrusiveness of the action taken." App. 58a. Following these instructions, the jury concluded that Officer Chin violated Mr. Rutherford's constitutional rights and returned a verdict in favor of Mr. Rutherford on his unlawful seizure claim against Officer Chin. App. 59a.

After the jury reached its verdict, Petitioners filed a renewed motion for judgment as a matter of law. The district court first addressed Petitioners' sufficiency of the evidence argument. The court noted, at the outset, that Petitioners were attempting to "reargue the merits of the case without acknowledging or applying the deferential standard owed to Rutherford's presentation of the facts and

the jury's verdict." App. 30a. Turning to that presentation, the district court stated:

> The jury heard testimony that Defendant Chin used a highly aggressive manner in confronting all three individuals. The jury also heard testimony from Rutherford and Alfonzo that Defendant Chin pointed his gun at Rutherford and forced him to sit at gun point. This severely restricted Rutherford's liberty and used an extremely high level of force for a situation where none of the suspects were armed, and were [sic] there was no ongoing criminal activity. The jury also heard testimony that Alfonzo identified himself as the driver, which permitted Defendant Chin to exclude Rutherford as a suspect of the two municipal violations he observed the driver of the Jeep make. While Defendant Chin may have had reason to doubt that Alfonzo was the driver, it was up to the jury to determine, based on the totality of the circumstances, whether it was reasonable to continue to detain Rutherford.

App. 31a (internal citations omitted). The court then concluded: "This evidence was sufficient to permit the jury to return a verdict in favor of Rutherford on this claim, and the Court must sustain the verdict." App. 31a-32a.

The district court next turned to Petitioners' argument that "Defendant Chin is entitled to qualified immunity because he was permitted to use his gun during the Terry stop without acting

illegally," which it described as "yet another untenable and flawed argument." App. 32a. The court noted, in particular, that "the use of the gun was largely occasioned by Defendant Chin's poor judgment that led him to exit his unmarked, personal vehicle in plain clothes on a dark dead-end street to confront three individuals who were no longer driving." App. 34a. It then concluded: "There is no basis on which to grant Defendant Chin qualified immunity, given that Defendant Chin violated clearly established law." *Id*.

Simultaneously, Mr. Rutherford moved for an award of attorney fees and costs pursuant to 42 U.S.C. § 1988. Although the district court recognized that a fee award was discretionary, it found that the significance of the issue litigated and the public benefit of the jury's verdict weighed in favor of awarding attorney fees. App. 44a-47a. The court found, for example, that an award of fees "encourages the City to train its officers in how to conduct themselves as off-duty officers and to understand the limits of investigatory stops." App. 46a. The court recognized the need for such training, in part, because Officer Chin's "individual conduct and lack of judgment placed everyone, including his fellow officers, at risk." *Id.*

Sadly, Petitioners attempted to marginalize the jury's verdict by submitting a declaration from the Assistant Police Chief stating that the jury's verdict "has provided the Department no basis to revisit current training protocols or policies." App. 47a. The district court described the declaration as "disingenuous because the Seattle Police Department

conducted an internal investigation into the incident and determined the [sic] Chin needed 'supervisory intervention' and remedial counseling." *Id.* The court then added:

> It is a sad day when the Seattle Police Department cannot stop to reflect upon the voices of citizen jurors who think that their conduct has overstepped the line or contemplate a change when an officer's judgment is found wanting. It should be a marker laid down to police officers that their authority is not absolute and before deadly force is used or displayed to gain compliance with their orders they must recognize that citizens hold precious rights given to them by the Constitution that cannot be breached.

Id. Finally, the court turned to the amount of attorney fees and awarded one-fifth of the fees requested ($83,600) because Mr. Rutherford prevailed on one of his five claims asserted at trial. App. 49a-50a.

3. The Ninth Circuit affirmed in an unpublished memorandum, stating (consistent with Ninth Circuit practice) that its disposition "is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3." App. 1a. As such, the Ninth Circuit's analysis is summary in nature. Nevertheless, the Court addressed and decided each of the three issues on appeal: (1) the underlying Fourth Amendment violation, (2) qualified immunity, and (3) attorney fees.

Starting with the underlying Fourth Amendment violation, the Ninth Circuit summarized the standard of review and pertinent evidence as follows:

> Rutherford and his friends testified that they committed only minor traffic violations and that they were compliant and non-confrontational at the scene. Viewing this evidence in the light most favorable to Rutherford, there was no reasonable basis for Officer Chin to believe that the three men might be armed or dangerous.

App. 3a. The Ninth Circuit then concluded that "Officer Chin's decision to draw his gun on Rutherford was therefore unreasonable under the circumstances." *Id.* (citing *Washington v. Lambert*, 98 F.3d 1181, 1192 (9th Cir. 1996)).

Building on this "unreasonable under the circumstances" analysis, the Ninth Circuit rejected Petitioners' arguments regarding qualified immunity as well as their arguments regarding attorney fees. As to the former, the Ninth Circuit concluded that "Officer Chin was not entitled to qualified immunity because the trial testimony viewed in the light most favorable to Rutherford supported a conclusion that Officer Chin violated Rutherford's clearly established … rights." *Id*. The Ninth Circuit added: "it was clearly established that officers cannot use firearms during a *Terry* stop absent special circumstances that were not present here." *Id.* (citing *Lambert*, 98 F.3d at 1192-93). Lastly, the Ninth Circuit affirmed the district court's award of attorney fees, holding that

the district court "properly weighed the three applicable factors" and did not abuse its discretion in awarding fees. *Id.*

Petitioners thereafter filed a timely petition for rehearing, which the Ninth Circuit denied. App. 53a.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S "UNREASONABLE UNDER THE CIRCUMSTANCES" TEST FOR WHEN AN OFFICER MAY DRAW A FIREARM DURING A *TERRY* STOP DOES NOT WARRANT THIS COURT'S REVIEW.

A. Consistent With Ninth Circuit Precedent And Respondent's Briefing, The Ninth Circuit Here Applied An "Unreasonable Under The Circumstances" Test.

Petitioners' first question presented is premised on a misreading of Ninth Circuit precedent and the holding below. Petitioners claim that the Ninth Circuit has adopted a "mechanistic 'special circumstances' rule for when an officer may display a firearm during a *Terry* stop." Pet. 13. As set forth below, that assertion is incorrect.

The crux of Petitioners' argument regarding Ninth Circuit precedent is *Lambert*. Contrary to Petitioners' argument that the Ninth Circuit in *Lambert* adopted a "special circumstances rule" (Pet. 13-15), the court held instead that "[t]here is no bright-line rule to determine when an investigatory

stop becomes an arrest" and that courts must therefore "consider the totality of the circumstances." 98 F.3d at 1185 (internal quotation marks and citation omitted). The court also explained that this test requires courts to "consider both the intrusiveness of the stop, i.e., the aggressiveness of the police methods and how much the plaintiff's liberty was restricted, and the justification for the use of such tactics, i.e., whether the officer had sufficient basis to fear for his safety to warrant the intrusiveness of the action taken." *Id.* (citations omitted). Lastly, the Ninth Circuit added: "The relevant inquiry is always one of reasonableness under the circumstances." *Id.* (internal quotation marks and citation omitted).

Having set forth the applicable legal principles for when an officer may draw a firearm during a *Terry* stop, the Ninth Circuit briefly discussed its previous decisions regarding similar claims. The Ninth Circuit observed that "we have only allowed the use of especially intrusive means of effecting a stop in special circumstances." *Id.* at 1189. This, of course, is the source of the alleged "special circumstances rule" that is the focus of Petitioners' argument. Pet. 13-15. But the Ninth Circuit was not stating its holding; it was merely discussing existing precedent. In addition, the Ninth Circuit *did not* provide an exhaustive or "mechanistic" (Pet. 13) list of any such circumstances. To the contrary, it provided a list that was preceded by the critical phrase "such as." 98 F.3d at 1189; Pet. 14. It then listed four such circumstances:

1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight;

2) where the police have information that the suspect is currently armed;

3) where the stop closely follows a violent crime; and

4) where the police have information that a crime that may involve violence is about to occur.

98 F.3d at 1189. Confirming once again that this list is *not* exhaustive, the Ninth Circuit identified two additional considerations: the "specificity" of the information about the suspect and "the number of police officers present." *Id*. at 1189-90. As the Ninth Circuit noted, these circumstances were present in cases that have upheld the use of highly intrusive measures to detain a suspect. *Id*.

Ninth Circuit Chief Judge Alex Kozinski wrote separately, concurring in the judgment. While Judge Kozinski expressly agreed "with much of the majority's analysis," he took issue with portions of the opinion addressing "the racial prejudices of police officers." *Id.* at 1194. But as to the merits of the parties' arguments, Judge Kozinski concluded that "[d]efendants were accused of a specific constitutional violation, which was amply proven." *Id.* Indeed, Judge Kozinski described the facts as "egregious," and added that the only "hard thing" about the appeal was "figuring out why defendants—having

been hit with surprisingly modest damages—chose to appeal." *Id.*

As can be seen, the Ninth Circuit in *Lambert* did not manufacture a "mechanistic 'special circumstances' rule" as Petitioners claim. Pet. 13. The Ninth Circuit could not have been more clear in eschewing such a rule when it stated that "[t]here is *no bright-line rule* to determine when an investigatory stop becomes an arrest" and that courts must instead "consider the totality of the circumstances" *Id.* at 1185 (internal quotation marks and citation omitted; emphasis added). The illustrative considerations and circumstances that are mentioned in *Lambert* do not supplant the totality of the circumstances test; rather, they are an integral part of it. Petitioners' first question presented, therefore, is premised on a misreading of *Lambert*.

Contrary to Petitioners' assertion (Pet. 10), Mr. Rutherford's briefing below is entirely consistent with the above discussion. Citing *Lambert*, Mr. Rutherford specifically stated that "the totality of the circumstances must be examined, *Lambert*, 98 F.3d at 1185." Resp. CA9 Br. at 12; *see also id.* at 18 ("the proper inquiry considers the totality of the circumstances"). Mr. Rutherford also criticized Petitioners' "divide-and-conquer" approach to analyzing a *Terry* stop and noted, in particular, that Petitioners "fail to analyze Officer Chin's conduct under *the totality of the circumstances, the proper standard for evaluating a Fourth Amendment violation*." *Id.* at 1 (emphasis added). Thus, while Mr. Rutherford emphasized that none of the

illustrative circumstances identified in *Lambert* was present in this case (*see* Pet. 10), he fully embraced the "totality of the circumstances" test reflected in *Lambert*.

The Ninth Circuit below, in turn, also did not adopt a "mechanistic 'special circumstances' rule." Pet. 13. To the contrary, the court stated:

> Rutherford and his friends testified that they committed only minor traffic violations and that they were compliant and non-confrontational at the scene. Viewing this evidence in the light most favorable to Rutherford, there was no reasonable basis for Officer Chin to believe that the three men might be armed or dangerous. Officer Chin's decision to draw his gun on Rutherford was therefore *unreasonable under the circumstances*.

App. 3a (emphasis added). The Ninth Circuit then cited page 1192 of its opinion in *Lambert*, which sets forth similar facts regarding a *Terry* stop and concludes: "Viewing the facts in the light most favorable to defendant, we find [the district court's] decision to be correct." 98 F.3d at 1192; App. 3a.

Other Ninth Circuit opinions are in accord. In the more than 15 years since *Lambert* was decided, the Ninth Circuit has repeatedly reviewed Fourth Amendment claims based on the totality of the

circumstances.[1] Indeed, the district court below, consistent with *Lambert*, specifically instructed the jury to consider the "totality of the circumstances," including (1) "the aggressiveness of the police methods," (2) "how much [Mr. Rutherford's] liberty was restricted," and (3) "whether [Officer Chin] had a sufficient basis to fear for his safety to warrant the intrusiveness of the action taken." App. 58a. In their zeal to manufacture a purported conflict, Petitioners largely ignore the district court's jury instructions and seriously misread this entire body of Ninth Circuit law.

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[1] *See, e.g., United States v. Hunter*, 434 F. App'x 581, 582 (9th Cir. 2011) (reviewing the totality of the circumstances, including that Hunter ran from police, refused to comply with the officer's orders, and made furtive movements by a bush); *Miller v. City of Simi Valley*, 324 F. App'x 681, 682-83 (9th Cir. 2009) (holding that aggressive detention was reasonable based on totality of circumstances, including proximity to crime, officer's knowledge of area, time of day, similarities between Miller's appearance and witness description, and report suspect was armed); *United States v. Miles*, 247 F.3d 1009, 1013 (9th Cir. 2001) (officers acted reasonably under the circumstances based on specificity of information that led officers to suspect that individuals they intended to question were actual suspects being sought, number of police officers present, and whether suspect was currently armed); *United States v. Meza-Corrales*, 183 F.3d 1116, 1123 (9th Cir. 1999) (identifying circumstances that justify use of handcuffs including limited number of officers, presence of weapons, several suspects fled from police, and other suspects refused to cooperate with police).

B. The Ninth Circuit's "Unreasonable Under The Circumstances" Test Does Not Conflict With The Decisions Of Other Circuits.

The "unreasonable under the circumstances" test outlined in *Lambert* and applied by the Ninth Circuit in this case does not conflict with the decisions of other circuits. To the contrary, *Lambert* has been cited with approval and followed in more than a dozen cases from other state and federal courts, including the First Circuit,[2] the Eighth Circuit,[3] federal district courts in Colorado,[4] Illinois,[5]

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[2] *United States v. Acosta-Colon*, 157 F.3d 9, 18-19 (1st Cir. 1998) ("Thus, when the government seeks to prove that an investigatory detention involving the use of handcuffs did not exceed the limits of a *Terry* stop, it must be able to point to *some* specific fact or circumstance that could have supported a reasonable belief that the use of such restraints was necessary to carry out the legitimate purposes of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm. *See Washington* [*v. Lambert*], 98 F.3d at 1189 (describing examples of such circumstances).").

[3] *See El-Ghazzawy v. Berthiaume*, 636 F.3d 452, 457-60 (8th Cir. 2011) (relying on *Lambert* to conclude that detention was unreasonable because officer could not point to any specific facts supporting concerns for officer safety).

[4] *Davis v. City of Aurora*, 705 F. Supp. 2d 1243, 1257-60 (D. Colo. 2010) (listing factors court considers in totality of the circumstances to determine if investigative detention was unreasonable).

[5] *See Rabin v. Cook Cnty.*, 837 F. Supp. 2d 949, 954 (N.D. Ill. 2011) (concluding that investigatory detention was unreasonable under the circumstances because Rabin was

(continued . . .)

Kansas,[6] Massachusetts,[7] and Minnesota,[8] and state courts in Illinois,[9] Iowa,[10] Maryland,[11] Michigan,[12]

(. . . continued)
compliant and cooperative, Rabin was not suspected of any inherently dangerous crimes, and Rabin was not armed).

[6] *See Anderson v. Willis*, No. 11-2484-RDR, 2013 WL 74314, at *6 (D. Kan. Jan. 7, 2013) ("The totality of circumstances is examined including the following factors: 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" (quoting *Weigel v. Broad*, 544 F.3d 1143, 1151-52 (10th Cir. 2008))).

[7] *United States v. Mohamed*, No. 08-10019-PBS, 2008 WL 5216254, at *3 (D. Mass. Dec. 10, 2008) (holding coercive action appropriate during investigative stop only if officer can point to "specific facts or circumstances" that justify actions).

[8] *El-Ghazzawy v. Berthiaume*, 708 F. Supp. 2d 874, 882-83 (D. Minn. 2010) (identifying factors that justify using force during an investigatory detention, including number of officers present, nature of crime, whether suspect is believed to be armed, and suspicious behavior by suspect), *aff'd,* 636 F.3d 452 (8th Cir. 2011).

[9] *People v. Arnold*, 914 N.E.2d 1143, 1150-51 (Ill. App. Ct. 2009) (analyzing circumstances confronting officer, including that suspect was compliant, officer was investigating municipal ordinance violation, and suspect did not attempt to flee).

[10] *State v. DeWitt*, 811 N.W.2d 460, 469-70 (Iowa 2012) (listing factors and specific circumstances, including those identified in *Lambert*, that may justify use of force during an investigative detention).

[11] *Trott v. State*, 770 A.2d 1045, 1062-63 (Md. Ct. Spec. App. 2001) (using handcuffs was reasonable under the circumstances because Trott was suspected of burglary, had a history of break-ins, was known to flee from police, was acting increasingly
(continued . . .)

and Minnesota.[13] Indeed, no court has ever described *Lambert*'s holding as "mechanistic" or concluded that the list of considerations set forth in *Lambert* is exhaustive. Nor has any court ever claimed—as Petitioners do here—that *Lambert* conflicts with the decisions of other circuits.

The cases cited by Petitioners do not establish any such conflict. Citing a variety of Fourth Amendment cases, Petitioners claim that "other circuits evaluate an officer's use of a firearm during a *Terry* stop by asking whether the officer's conduct was reasonable under all the circumstances." Pet. 16. But as discussed above, that is the *same test* that the Ninth Circuit adopted in *Lambert* and applied in the decision below. In addition, a careful review of the cases cited by Petitioners confirms that the

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jittery, and was carrying a suspicious assortment of equipment that could conceal a weapon).

[12] *People v. Spano*, No. 202378, 1999 WL 33444335, at *9-12 (Mich. Ct. App. May 14, 1999) (discussing *Lambert* in depth and concluding that detaining Swift at gunpoint was reasonable under the circumstances because Swift was a known felon suspected of multiple break-ins, he fled from officers at scene of break-in the week before, and officer was investigating a break-in that had just been reported in the area).

[13] *State v. Balenger*, 667 N.W.2d 133, 140 (Minn. Ct. App. 2003) ("Based on the information Officer Peterson had provided him, Officer Taylor harbored an objectively reasonable belief that Balenger was armed and had committed a criminal offense by pointing a gun at someone, and he took reasonable steps to protect himself and others.").

courts in the cited First,[14] Second,[15] Fifth,[16] Sixth,[17] Seventh,[18] Eighth,[19] Tenth,[20] Eleventh,[21] and D.C.

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[14] *United States v. Pontoo*, 666 F.3d 20, 30-31 (1st Cir. 2011) (holding officer's conduct lawful because suspect was believed to be armed and dangerous and officer was investigating a recent murder); *Flowers v. Fiore*, 359 F.3d 24, 30 (1st Cir. 2004) (relying on *Lambert* to conclude that use of weapons and handcuffs was reasonable under the circumstances because officers had information suspect was armed and crime of violence was imminent).

[15] *United States v. Vargas*, 369 F.3d 98, 101-02 (2d Cir. 2004) (officer's display of force was reasonable because he had reliable information that Vargas was armed, attempted to flee, and continued to resist the officer once he was on the ground); *United States v. Garcia*, 339 F.3d 116, 119 (2d Cir. 2003) (officers' use of weapons reasonable because they were investigating drug crimes in an area known for narcotics trafficking and suspects were engaging in counter-surveillance).

[16] *United States v. Sanders*, 994 F.2d 200, 207 (5th Cir. 1993) (officer did not violate Fourth Amendment when he drew his weapon because officer had report that suspicious person was at a convenience store with a gun, suspect fit description of suspicious person, suspect was holding a paper bag that appeared to contain an alcoholic beverage, suspect began to walk away as soon as officer pulled into parking lot, and several other people were in immediate vicinity who could be injured by gunfire).

[17] *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 309 (6th Cir. 2005) (officers' use of drawn weapons and handcuffs was reasonable under the circumstances given nature of crime being investigated (residential burglary), time of day, and suspect's admission he was armed).

[18] *United States v. Shoals*, 478 F.3d 850, 853 (7th Cir. 2007) (officers acted reasonably under the circumstances when they ordered Shoals to exit house at gunpoint because "the officers were responding late at night to a 911 report of gunfire when

(continued . . .)

Circuit[22] cases considered the *same* circumstances as set forth in *Lambert*. The state court decisions cited by Petitioners do so as well.[23] The Ninth Circuit's

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they encountered Shoals, who matched the description of the suspect, was wearing a coat even though he was indoors, and hung back and hid out in the kitchen until he was ordered outside"); *United States v. Ocampo*, 890 F.2d 1363, 1369 (7th Cir. 1989) ("[T]he nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the approach of the police are all facts which bear on the issue of reasonableness.").

[19] *United States v. Smith*, 648 F.3d 654, 659 (8th Cir. 2011) (use of weapons reasonable because officers were investigating armed robbery, suspect refused to comply with officer instructions, and suspect attempted to flee).

[20] *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993) (use of guns and handcuffs reasonable because officers were investigating large-scale marijuana cultivation in remote area, officers found numerous guns, and suspect's presence indicated a connection to marijuana fields).

[21] *United States v. Blackman*, 66 F.3d 1572, 1576 (11th Cir. 1995) (use of handcuffs reasonable because officers were investigating violent armed bank robberies, there were four male suspects, and officers had reason to believe suspects were armed and dangerous).

[22] *United States v. White*, 648 F.2d 29, 35-36 (D.C. Cir. 1981) (officers did not violate Fourth Amendment by drawing weapons because they were investigating drug trafficking and narcotics offenses, they had reason to believe narcotics were in car, and they had a reasonable belief suspects were armed and dangerous).

[23] *In re Roy L.*, 4 P.3d 984, 988 (Ariz. Ct. App. 2000) (holding gun at side not unreasonable under the circumstances when suspect believed to be armed); *State v. Rawlings*, 829 P.2d 520,
(continued . . .)

Fourth Amendment analysis in the decision below, like its analysis in *Lambert*, is entirely consistent with those other decisions.

After citing the preceding string of footnoted cases, Petitioners claim that Judge Posner's opinion in *United States v. Serna-Barreto*, 842 F.2d 965 (7th Cir. 1988), "illustrates the stark analytical divide between the Ninth Circuit rule and the approach followed in other circuits." Pet. 18. But as with the preceding cases, the Seventh Circuit in *Serna-Barreto* focused on the *same* circumstances described in *Lambert*:

(. . . continued)

523 (Idaho 1992) (holding officer running toward suspect with gun drawn was not unreasonable under the circumstances because officer was investigating burglary in early morning hours, suspect was only other person in area, and officer had to run to intercept suspect before he disappeared from view); *Reid v. State*, 51 A.3d 597, 603-06 (Md. 2012) (concluding that officer's use of taser in dart mode was unreasonable under the circumstances even though suspect was believed to be armed); *Harris v. Commonwealth*, 500 S.E.2d 257, 258-59 (Va. Ct. App. 1998) (drawing weapon reasonable under the circumstances because suspect was not cooperative, suspect advanced on officer, suspect refused to show his hands, and officer was outnumbered); *State v. Dickerson*, 65 So. 3d 172, 178-79 (La. Ct. App. 2011) (officer acted reasonably under the circumstances when he ordered suspect to lie on ground at gunpoint because officer knew suspect was armed, suspect fled as soon as he saw marked patrol car, and suspect refused to cooperate with officer commands); *State v. Belieu*, 773 P.2d 46, 53 (Wash. 1989) ("[C]ourt must look at the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the police, all of which bear on the issue of reasonableness.").

> Among the considerations supporting the district judge's determination that this was a lawful stop are, first, that the encounter occurred at night; second, that the suspects were suspected on more than a hunch or an uncorroborated informer's tip of narcotics offenses; third, that many drug traffickers are armed and they sometimes shoot policemen; fourth, that there were two suspects and (at first) only one officer (others were on the scene, and assisted in the arrest of Serna-Barreto and her companion after she tried to grab the cassette box back from Dailey); fifth, that because the suspects were seated in a car the officer did not have them in full view; and sixth, that—surprising as this may seem—Serna-Barreto testified that she was not scared by the gun.

842 F.2d at 967-68 (citation omitted). Far from illustrating a "stark analytical divide," *Serna-Barreto* confirms—once again—that lower courts consider the *same* facts and circumstances in deciding whether an officer's conduct violates the Fourth Amendment.

Despite the similarity of such facts and circumstances, Petitioners claim that the Seventh Circuit in *Serna-Barreto* adopted a different legal framework for Fourth Amendment claims because "the court considered the lawfulness of the officer's conduct under the 'constellation of facts,' relying in particular on the fact that the officer was outnumbered." Pet. 18 (citing *Serna-Barreto*, 842 F.2d at 968). In *Lambert*, the Ninth Circuit likewise

considered "the number of police officers present," including whether the officer "was alone and outnumbered." 98 F.3d at 1190. Remarkably, the Ninth Circuit's discussion of that consideration is *expressly premised* on—and adopts—the Seventh Circuit's holding in *Serna-Barreto*. *Id*. The district court below similarly embraced the Seventh Circuit's observation in *Serna-Barreto* that "[i]t would be a sad day for the people of the United States if police had carte blanche to point a gun at each and every person of whom they had an 'articulable suspicion' of engaging in criminal activity." App. 35a (quoting 842 F.2d at 967). Such consistency can hardly be described as a "stark analytical divide."

Nor does it matter that the Seventh Circuit described its analysis as resting on a "constellation of facts." *Serna-Barreto*, 842 F.2d at 968. This, clearly, is a matter of semantics. To determine whether an officer's conduct is unlawful under the Fourth Amendment, courts must consider the relevant circumstances. It is entirely immaterial whether that test is referred to as "constellation of facts," "unreasonable under the circumstances," "totality of the circumstances," or "special circumstances." What matters is that courts, including the Ninth Circuit, unanimously agree that police officers cannot use firearms during a *Terry* stop unless there is some reasonable basis to conclude that such extraordinary measures are necessary to ensure the officers' safety. Petitioners' cases do not establish that lower courts apply conflicting legal principles for when an officer may draw a firearm during a *Terry* stop, but rather illustrate the application of a *settled* legal framework

to different fact patterns. The Ninth Circuit's fact-specific application of that test does not remotely merit this Court's review.[24]

C. The Ninth Circuit's "Unreasonable Under The Circumstances" Test Also Does Not Conflict With The Decisions Of This Court.

The "unreasonable under the circumstances" test outlined in *Lambert* and applied by the Ninth Circuit in this case is also the test set forth by this Court in the very same cases that Petitioners cite. Pet. 19-20. In *Graham v. Connor*, 490 U.S. 386, 396 (1989), for example, the Court stated:

> Because "[t]he test of reasonableness under the Fourth Amendment is not capable of

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[24] Petitioners also assert that Ninth Circuit precedent somehow "reverses the customary Fourth Amendment inquiry." Pet. 2. If Petitioners are referring to the applicable legal standard, that is addressed in the text above. If Petitioners are referring to the burden of proof, the district court properly instructed the jury that Mr. Rutherford "has the burden to prove that the acts of the Defendant Officers deprived the Plaintiff of particular rights under the United States Constitution." App. 56a; *see also* App. 57a-58a (requiring Mr. Rutherford to prove Fourth Amendment claim "by a preponderance of the evidence"). Although the Ninth Circuit did not address that issue in *Lambert* or in the decision below, the court has repeatedly confirmed that the plaintiff has the ultimate burden of proving such claims. *See Larez v. Holcomb*, 16 F.3d 1513, 1517 (9th Cir. 1994) ("[B]ecause Larez's action was a § 1983 civil action, Larez at all times had the ultimate burden of proving to the jury that she had been seized unreasonably in violation of the Fourth Amendment.").

> precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S. [1, 8-9 (1985)] (the question is "whether the totality of the circumstances justifie[s] a particular sort of ... seizure").

The Court did not provide an exhaustive and all-inclusive list of relevant circumstances. Rather, the Court emphasized a few of the circumstances that may justify an officer using a greater degree of force during an investigatory stop. That is also what the Ninth Circuit did in *Lambert* and in its decision below.

More recently, in *Muehler v. Mena*, 544 U.S. 93 (2005), which Petitioners also cite (Pet. 21 n.15), this Court relied on *Graham* in analyzing the degree of force used to detain occupants during a search of a house. Referring to "the balance of interests under *Graham*," the Court held that handcuffing the occupants and restraining them for two to three hours was reasonable under the circumstances because the officers were looking for a known gang member who had participated in a drive-by shooting and had reason to believe the suspect was armed and dangerous. 544 U.S. at 95-96, 99-100. Here again,

the Ninth Circuit's analysis in *Lambert* and in its decision below—as set forth in Section I.A above—does not conflict with *Muehler*. In this respect as well, there is no conflict with the decisions of this Court that could warrant further review.[25]

II. THIS CASE IS A POOR VEHICLE FOR REVIEWING THE CLAIMED FOURTH AMENDMENT ISSUE.

Even if Petitioners could establish that the Ninth Circuit has adopted a rule for when an officer may draw a firearm during a *Terry* stop that conflicts with the decisions of other circuits or with the decisions of this Court (which they cannot), the petition for a writ of certiorari should be denied because this case is a poor vehicle for reviewing the

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[25] Although Petitioners cite several additional decisions of this Court that consider the totality of the circumstances when analyzing Fourth Amendment issues (Pet. 19-20), none of those decisions addresses the level of force an officer can use during a *Terry* stop. *See, e.g.*, *Florida v. Harris*, 133 S. Ct. 1050, 1054 (2013) (explaining that probable cause depends on consideration of all of the circumstances); *Florida v. J.L.*, 529 U.S. 266, 272-74 (2000) (rejecting exception to reasonable circumstances requirement for investigatory stops); *Richards v. Wisconsin*, 520 U.S. 385, 391-95 (1997) (clarifying that "knock and announce" rule requires fact-specific judgment); *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991) (analyzing circumstances under which a person has been "seized"); *United States v. Place*, 462 U.S. 696, 709-10 (1983) (concluding that there can be no strict time limit on an investigatory detention). But even if these cases are relevant here, the Ninth Circuit's unreasonable under the circumstances test, as discussed above, is entirely consistent with those decisions as well.

claimed Fourth Amendment issue. That is so for at least the following reasons:

1. Rather than presenting a clear legal issue for the Court's consideration, Petitioners are merely rearguing their version of the facts. Petitioners admit, as they must, that "[i]n determining whether a Fourth Amendment violation occurred [the Court must] draw all reasonable factual inferences in favor of the jury verdict" (Pet. 28-29), yet they repeatedly present the facts in the light most favorable to their own arguments. The district court below expressed a similar concern regarding Petitioners' post-trial motion for judgment as a matter of law, noting that Petitioners were attempting to "reargue the merits of the case without acknowledging or applying the deferential standard owed to Rutherford's presentation of the facts and the jury's verdict." App. 30a. Petitioners nevertheless continue to assert "facts" that are not only contrary to the district court record but are material to the formulation and resolution of the Questions Presented in their Petition. Such factual disputes do not remotely warrant this Court's review.

2. The Ninth Circuit's decision is manifestly correct. Viewed in the light most favorable to Mr. Rutherford, the record shows (a) that Officer Chin was investigating, *at most*, misdemeanor offenses (reckless driving and driving under the influence), (b) that Officer Chin had no reason to freeze the scene and no reason to believe that anyone was armed or that violence was imminent, and (c) that Mr. Rutherford was not violent, not intoxicated, and not the driver of the vehicle. CA9 ER 1645, 1656, 1676;

App. 11a, 31a. Indeed, on the evidence presented, the jury could reasonably find that Officer Chin acted out of anger (road rage) and unnecessarily put both his own safety and Mr. Rutherford's safety at risk. After hearing the witnesses testify, that is precisely what the district court concluded: "[T]he use of the gun was largely occasioned by Defendant Chin's poor judgment that led him to exit his unmarked, personal vehicle in plain clothes on a dark dead-end street to confront three individuals who were no longer driving." App. 34a. The Ninth Circuit correctly affirmed the district court's decision denying Petitioners' motion for judgment as a matter of law, and there is no compelling reason to disturb that analysis.

3. The Ninth Circuit did not issue a decision that is conducive to further review, nor did it intend to do so. Although the Ninth Circuit addressed and decided the Fourth Amendment issue, it did so in a highly cursory fashion, consistent with its practice of issuing unpublished memoranda stating (as the court did here) that the disposition "is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3." App. 1a. In his testimony before Congress regarding the utility and propriety of unpublished decisions, Ninth Circuit Chief Judge Alex Kozinski explained that such decisions are "intended for the parties alone" and therefore it is not "important to be terribly precise in phrasing the legal standard announced, or providing the rationale for

the decision."[26] Contrary to Petitioners' assertion (Pet. 30), the cursory nature of the Ninth Circuit's decision does not "sound[] alarm bells"; it merely reflects accepted Ninth Circuit practice and the unremarkable nature of the Ninth Circuit's analysis. Here again, such a decision does not remotely warrant this Court's review.

4. Even if the Ninth Circuit somehow erred in the precise wording of the applicable legal standard, that error, too, does not warrant this Court's review. Petitioners concede—as they must—that "the jury was generally instructed to consider the lawfulness of the *Terry* stop under the 'totality of the circumstances.'" Pet. 21 n.15 (quoting App. 58a). Addressing this issue, Petitioners claim that Mr. Rutherford's previous reliance on the district court's jury instructions "misses the point," which according to Petitioners is that they "were entitled to seek judgment as a matter of law on respondent's Fourth Amendment claim." *Id*. But Petitioners did seek such relief, and the district court denied that motion based on the "totality of the circumstances" test. App. 30a-31a. The Ninth Circuit, in turn, summarized much of the same evidence and, based on that evidence, concluded that "Officer Chin's decision to draw his gun on Rutherford was therefore unreasonable under the circumstances" and "affirmed." App. 3a. Any alleged error in the precise

[26] Testimony of Hon. Alex Kozinski Before the Subcommittee on Courts, the Internet, and Intellectual Property (June 27, 2002), *available at* http://notabug.com/kozinski/unpublished-dispositions.

wording of the Ninth Circuit's decision is, at most, harmless.

5. Granting review would dilute the strong wording of the district court's post-trial rulings. In awarding attorney fees in favor of Mr. Rutherford, the district court concluded that "Officer Chin failed to recognize that his individual conduct and lack of judgment placed everyone, including his fellow officers, at risk." App. 46a. The court then added that this case "should be a marker laid down to police officers that their authority is not absolute and before deadly force is used or displayed to gain compliance with their orders they must recognize that citizens hold precious rights given to them by the Constitution that cannot be breached." App. 47a. Clearly, the district court meant to send a strong message to the Seattle Police Department that changes are necessary to protect both the safety of its officers and the Fourth Amendment rights of individuals. That message is an important one and should be preserved.

6. Granting review may interfere with the federal government's concerted effort to seek important reforms within the Seattle Police Department. In a much-publicized investigation,[27] the Civil Rights Division of the United States Department of Justice found that "SPD engages in a

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[27] U.S. Dep't of Justice, Civil Rights Div., U.S. Attorney's Office, W. Dist. of Wash., Investigation of the Seattle Police Dep't (Dec. 16, 2011), *available at* http://www.justice.gov/crt/-about/spl/documents/spd_findletter_12-16-11.pdf.

pattern or practice of using unnecessary or excessive force, in violation of the Fourth Amendment" (p. 3), that "SPD officers escalate situations and use unnecessary or excessive force when arresting individuals for minor offences" (p. 4), that this "pattern is the result of inadequate policies, supervision, discipline and training" (p. 8), and that the use of excessive force "is especially problematic when, given the nature of the underlying offense, the use of verbal tactics might have defused the situation" (p. 10). The federal government recommended numerous remedial measures, including significant revisions to the Seattle Police Department's "Use of Force" policy (p. 37). Granting review in this matter may interfere with these efforts to *decrease*—rather than *increase*—Seattle Police Department's use of force during *Terry* stops.

7. Far from presenting issues regarding "officer safety" (Pet. 21), Petitioners' arguments—if accepted by this Court—would seriously threaten the safety of officers and individuals who come into contact with them. Petitioners repeatedly claim, for example, that Officer Chin was "outnumbered." Pet. 6, 10, 24, 27. But when, during a routine *Terry* stop, is a police officer not outnumbered? If that were enough, then police officers could almost *always* draw a weapon during routine *Terry* stops. Recognizing this concern, the Eighth Circuit squarely rejected a similar argument in *El-Ghazzawy* as follows: "Counsel may shout 'officer safety' until blue-in-the-face, but the Fourth Amendment does not tolerate, nor has the Supreme Court or this Court ever condoned, pat-down searches without some specific and articulable

facts to warrant a reasonable officer in the belief that the person detained was armed and dangerous." 636 F.3d at 460 (internal quotation marks and citation omitted). As the district court correctly noted, the only safety issues in this case arose because Officer Chin's "lack of judgment placed everyone, including his fellow officers, at risk." App. 46a. For this reason too, there is no reason to disturb the lower courts' analysis and certainly no reason to consider Petitioners' argument that there should be no financial consequences for Officer Chin's conduct.

III. THE NINTH CIRCUIT'S QUALIFIED IMMUNITY RULING ALSO DOES NOT WARRANT REVIEW.

Lastly, Petitioners argue that the Ninth Circuit's qualified immunity ruling also warrants review. Pet. 29-32. Under this Court's precedent, a police officer is not entitled to qualified immunity if (1) the officer violated a constitutional right, and (2) that right was "clearly established" at the time of the challenged conduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The district court below acknowledged both prongs of the qualified immunity test and rejected Petitioners' argument, which it described as "untenable and flawed." App. 32a-36a. The Ninth Circuit also addressed both prongs of the qualified immunity test and concluded that "Officer Chin was not entitled to qualified immunity because the trial testimony viewed in the light most favorable to Rutherford supported a conclusion that Officer Chin violated Rutherford's clearly established rights." App. 3a. Although Petitioners claim that the

Ninth Circuit's analysis "was infected by errors that this Court has corrected in prior cases" (Pet. 30), no such error occurred here.

Petitioners claim, at the outset, that the Ninth Circuit's qualified immunity analysis is flawed because the inquiry must be undertaken "'in light of the specific context of the case,' which 'depends very much on the facts of each case.'" *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 201 (2004)). The Ninth Circuit did exactly that, by expressly premising its qualified immunity analysis on its conclusion that "Officer Chin's decision to draw his gun on Rutherford was … unreasonable under the circumstances." App. 3a. That conclusion, in turn, is expressly premised on "the specific context" and unique "facts" of this case, which the Ninth Circuit summarized as follows:

> Rutherford and his friends testified that they committed only minor traffic violations and that they were compliant and non-confrontational at the scene. Viewing this evidence in the light most favorable to Rutherford, there was no reasonable basis for Officer Chin to believe that the three men might be armed or dangerous.

Id. Petitioners disagree with that analysis, of course, but that is largely because they continue to ignore the controlling standard of review, which requires that the evidence be viewed in the light most favorable to Mr. Rutherford. *Id.*; *see also* points 1 and 2 on pages 27-28 above.

Petitioners next claim that the Ninth Circuit's "special circumstances test" somehow "short-circuited its qualified immunity inquiry and no doubt led it to the result it reached—in the summary fashion that it did." Pet. 30. The Ninth Circuit decided the case in a "summary fashion" because its analysis is fact-specific and therefore lacks precedential value. App. 1a. As to the so-called special circumstances test, Petitioners misread both *Lambert* and the Ninth Circuit's decision below on that point. Neither decision announces a mechanical or rigid rule for when an officer may use a firearm during a *Terry* stop. To the contrary, as noted previously, the Ninth Circuit in *Lambert* expressly *disavowed* any such bright-line rule and emphasized that courts must "consider the totality of the circumstances." 98 F.3d at 1185 (internal quotation marks and citation omitted) (discussed on page 13 above). For this reason too, the Ninth Circuit's qualified immunity ruling, like its underlying Fourth Amendment ruling, does not warrant this Court's review.[28]

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[28] On May 3, 2013, two amici briefs were filed on behalf of certain states in the Ninth Circuit and Guam (Amici States Br.) and several law enforcement organizations (Amici Sheriffs Br.). The amici's arguments largely echo Petitioners' and fail for the same reasons. First, amici claim that the Ninth Circuit has adopted an approach to *Terry* stops that is inconsistent with the totality-of-the-circumstances approach adopted by other circuits and this Court. Amici States Br. 3-6; Amici Sheriffs Br. 5-8. By way of example, Amici States specifically highlight this Court's opinion in *United States v. Arvizu*, 534 U.S. 266 (2002). Amici States Br. 3-5. That argument is premised on a misreading of Ninth Circuit precedent and the holding below. *See* Section I.A

(continued . . .)

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Petitioners conclude their Petition by quoting Judge Posner's observation in *Serna-Barreto* that "[i]t would be a sad day for the people of the United States if police had carte blanche to point a gun at each and every person of whom they had an 'articulable suspicion' of engaging in criminal

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above. Second, Amici Sheriffs claim that the Ninth Circuit's approach excludes relevant considerations and that district courts in the Ninth Circuit have confined their analysis accordingly. Amici Sheriffs Br. 7. The cited cases do not support that argument. For example: (1) in *Jackson v. Johnson*, 797 F. Supp. 2d 1057, 1064 (D. Mont. 2011), the district court recognized that *Lambert* provides "examples" of circumstances "under which intrusive techniques may be used"; and (2) in *United States v. Zacarias*, No. CR 07-01009-SJO, 2008 WL 1766950, at *3 (C.D. Cal. Apr. 15, 2008), the district court considered circumstances (time of day, ambient lighting, and suspect's hand movements) beyond those mentioned in *Lambert*. To the extent that the Ninth Circuit below did not specifically address a particular circumstance, that is inherent in the nature of an unpublished memorandum decision. *See* point 3 on pages 28-29 above. Finally, Amici States claim that the Ninth Circuit's qualified immunity analysis fails to consider whether it would be clear to a reasonable officer that Officer Chin's conduct was unlawful in the situation he confronted. Amici States Br. 13-14. As noted previously, the Ninth Circuit specifically addressed that issue and concluded—consistent with the decisions of this Court and other circuits—that Officer Chin's decision to draw his gun on Mr. Rutherford was "unreasonable under the circumstances" and therefore violated Mr. Rutherford's clearly established Fourth Amendment rights. App. 3a. Amici, like Petitioners, have not shown that the Ninth Circuit's fact-specific application of these uniformly established legal principles merits this Court's review.

activity." Pet. 31 (quoting 842 F.2d at 967). While Petitioners expressly "agree" with Judge Posner's observation, they claim that the Ninth Circuit "has taken the law to the opposite extreme." *Id*. As set forth above, that is incorrect: whether the applicable test is referred to as "constellation of facts," "unreasonable under the circumstances," "totality of the circumstances," "special circumstances," or any other such descriptive phrase, what matters is that courts, including the Ninth Circuit, unanimously agree that police officers cannot use firearms during a *Terry* stop unless there is some reasonable basis to conclude that such extraordinary measures are necessary to ensure the officers' safety. Here, as the Ninth Circuit correctly held, "[v]iewing [the] evidence in the light most favorable to Rutherford, there was no reasonable basis for Officer Chin to believe that the three men might be armed or dangerous." App. 3a. Given the egregious nature of the facts and the highly deferential standard of review, the only "hard thing" about this matter is "figuring out why defendants—having been hit with surprisingly modest damages—chose to appeal." 98 F.3d at 1194 (Kozinski, J., concurring).

CONCLUSION

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

Respectfully submitted,

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