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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the Ninth Circuit, it is unconstitutional for a police officer to draw his firearm during a *Terry* stop "absent special circumstances." Pet. App. 3a (citing *Washington v. Lambert*, 98 F.3d 1181, 1192-93 (9th Cir. 1996)). That rule is directly at odds with the decisions of other circuits, which hold—in accordance with this Court's precedents—that the display of a gun is constitutional as long as it is reasonable under all the circumstances. Pet. 13-18. Far from "a matter of semantics" (Opp. 23), this conflict has enormous doctrinal importance. Moreover, as highlighted by the amici States and law enforcement organizations, it has serious real-world consequences for the 100,000-plus police officers in the Ninth Circuit. States Br. 6-11; National Sheriffs' Association (NSA) Br. 8-14. The Ninth Circuit raised the stakes in this case by holding that the *Lambert* "special circumstances" rule is "clearly established" law, Pet. App. 3a—exposing officers to personal damages actions any time they display their gun when the *Lambert* factors are absent.

Respondent does not even try to defend *Lambert*'s "special circumstances" rule. Instead, he attempts to reformulate that rule into the ordinary totality-of-the-circumstances test that determines the lawfulness of a *Terry* stop everywhere else. But that effort is doomed. Both *Lambert*—and cases applying *Lambert*—remove any doubt that the Ninth Circuit has indeed adopted a "special circumstances" rule for *Terry* stops involving the display of a gun. Respondent's argument that qualified immunity was properly denied by—in his words (at 28)—a "highly cursory" opinion that omits all but the shallowest description of key events is, like the Ninth Circuit rule he defends, completely at odds with

this Court's precedent. Nor has respondent identified any vehicle impediment to granting certiorari and bringing the Ninth Circuit in line with the rest of the nation on the vitally important questions presented.

I. RESPONDENT'S ATTEMPT TO RECAST THE NINTH CIRCUIT "SPECIAL CIRCUMSTANCES" RULE IS UNAVAILING

Respondent's primary response (at 10-15) is an attempt to recast *Lambert* as a run-of-the-mill "reasonableness under the circumstances" case. That argument is refuted both by *Lambert* and the way that Ninth Circuit courts have read *Lambert*.

1. Respondent bases his argument on prefatory language in *Lambert* in addressing when a *Terry* stop becomes unconstitutional *in general*. 98 F.3d at 1185. As noted in the petition (at 13-14), it is true that the decision says that a *Terry* stop ordinarily should be evaluated under the "totality of the circumstances." *Id.* But here is the rub: *Lambert* goes on to adopt a special rule for *Terry* stops involving the display of guns. As the court put it: "[O]ur cases make clear that we have *only* allowed the use of especially intrusive means of effecting a stop [such as display of a gun] in *special circumstances*." *Id.* at 1189 (emphasis added). The court then enumerated a list of "special circumstances" that could justify the display of a firearm. *Id.* at 1189-90; *id.* at 1191 (rejecting the officer's contention "that other factors supported his actions"). *Lambert* makes clear that this "special circumstances" rule trumps the totality-of-the-circumstances whenever a gun leaves the holster. As the district court put it, the "very holding" of *Lambert*

is that "brandishing a gun during a *Terry* stop is only permissible in extreme cases." Pet. App. 35a.[1]

2. Respondent denies "special circumstances" enumerated in *Lambert* are exhaustive or even restricting. Opp. 12, 18. But Ninth Circuit practice proves otherwise. Courts have consistently read *Lambert* to establish a limited and preordained set of "special circumstances" that can justify the display of a gun during a *Terry* stop. *See*, *e.g.*, *Jackson v. Johnson*, 797 F. Supp. 2d 1057, 1066 (D. Mont. 2011) (drawn weapon created an arrest where "[o]nly one of the four *Lambert* factors is even arguably present"); *Johnson v. Bay Area Rapid Transit*, 790 F. Supp. 2d 1034, 1052 (N.D. Cal. 2011) (officer not entitled to qualified immunity where "none of the [*Lambert*] circumstances were present"); *see also* NSA Br. 7 (citing cases).

So did the district court and the Ninth Circuit in this case. The district court denied Officer Chin's JMOL motion after concluding that none of the "four-fold … exceptional circumstances set out in [*Lambert*] that allow the use of a gun is met." Pet. App. 33a-34a. The Ninth Circuit likewise affirmed because "it was clearly established that officers cannot use firearms during a *Terry* stop absent special circumstances that were not present here." *Id.* at 3a. Respondent's argument (at 13) that *Lambert* did not "supplant the

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[1] This is not the first time the Ninth Circuit has used "totality of the circumstances" language in a decision, but obviously flouted that test. *See United States v. Arvizu*, 232 F.3d 1241, 1247 (9th Cir. 2000), *rev'd*, 534 U.S. 266, 274 (2002); *see also* States Br. 4.

totality of the circumstances test" for stops involving the display of a gun is make believe.[2]

II. THE NINTH CIRCUIT RULE IS IN STARK CONFLICT WITH THE LAW IN THE REST OF THE COUNTRY AND THIS COURT

1. Respondent's only basis for denying the obvious circuit conflict is the implausible notion that *Lambert* establishes an all-things-considered rule. But taking *Lambert* on its terms (*see* Part I), the Ninth Circuit "special circumstances" rule clearly conflicts with the rule in other circuits for determining when the display of a gun is permissible during a *Terry* stop—which actually does consider whether the officer's decision to display his firearm was reasonable under *all* the circumstances. Pet. 15-18. Because courts outside of the Ninth Circuit are not fenced in by the "special circumstances" rule, they have been free to take into account critical factors not enumerated by *Lambert* that explain an officer's decision to draw a weapon—and to consider all the facts in a contextual and holistic manner. *See, e.g.*, *Courson v. McMillian*, 939 F.2d 1479, 1496 (11th Cir. 1991) (suspects' intoxication); *United States v. Serna-Barreto*, 842 F.2d 965, 967 (7th Cir. 1988) (night-time encounter); *United States v.*

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[2] The cases cited by respondent (at 15 n.1) are not to the contrary. *United States v. Hunter*, 434 F. App'x 581, 582 (9th Cir. 2011), stopped after *Lambert*'s first factor. *United States v. Miles*, 247 F.3d 1009, 1013 (9th Cir. 2001), and *Miller v. City of Simi Valley*, 324 F. App'x 681, 683 (9th Cir. 2009), did not even purport to evaluate the display of a weapon under the totality of the circumstances. And *United States v. Meza-Corrales*, 183 F.3d 1116 (9th Cir. 1999), did not address the display of a firearm at all.

White, 648 F.2d 29, 36 (D.C. Cir. 1981) (deserted location). This case illustrates how the two approaches can make all the difference. *See* NSA Br. 10-14 (discussing facts disregarded under *Lambert* rule).

2. The Ninth Circuit "special circumstances" rule also sharply conflicts with this Court's own precedent:

First, the "special circumstances" rule displaces the totality-of-the-circumstances approach that forms the bedrock of Fourth Amendment analysis for *Terry* stops—including those involving the display of a gun. By looking only to a preordained set of "special circumstances," the *Lambert* rule prevents case-by-case evaluation of reasonableness based on *all* the circumstances. Pet. 19-20. That flexibility is critical given the "incredibly rich" diversity of situations officers face. *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

Second, even if *Lambert* did not establish a strictly exhaustive list of "special circumstances," it still invites a "divide-and-conquer analysis" under which courts are encouraged to consider "factors in isolation from each other." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Instead of checking off "special circumstances" one by one (as the district court did here, Pet. App. 34a), courts should consider the reasonableness of the officer's actions under *all* the circumstances faced from the officer's perspective as the situation unfolded. The Ninth Circuit's mechanistic "special circumstances" approach prevents officers from "draw[ing] on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Id.* at 273 (citation omitted).

Third, as this Court recognized in *Illinois v. Lidster*, 540 U.S. 419 (2004), a rule—like *Lambert*'s—

that police conduct is unconstitutional "absent special circumstances" operates as a "presumptive rule of unconstitutionality." 540 U.S. at 423-26. *Lidster* illustrates the common-sense point that an unconstitutional-absent-special-circumstances rule is fundamentally different than a constitutional-if-reasonable-under-all-the-circumstances rule—to which no presumption of *un*constitutionality attaches. In that regard, respondent's suggestion (at 23, 36) that the difference between *Lambert*'s "special circumstances" rule and the usual totality-of-the-circumstances test is only "a matter of semantics" is perverse.

Indeed, the Ninth Circuit "special circumstances" rule effectively places the display of a gun during a *Terry* stop on equal constitutional footing with the warrantless search of a house. *See Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011). That is a dramatic departure from existing precedent.

III. THE NINTH CIRCUIT'S QUALIFIED IMMUNITY RULING WARRANTS REVIEW

The Ninth Circuit's qualified-immunity ruling is also dramatically out of step with this Court's precedents. Respondent's attempt (at 32-34) to downplay that ruling is unpersuasive.

1. The "highly cursory" (Opp. 28) nature of the Ninth Circuit's qualified-immunity analysis is deeply problematic. Without even attempting to analyze Officer Chin's conduct from the standpoint of the specific "situation he confronted" (*Saucier v. Katz*, 533 U.S. 194, 202 (2001)), the court concluded "it was clearly established that officers cannot use firearms during a *Terry* stop absent special circumstances that were not present here." Pet. App. 3a. Resolving the

qualified-immunity question based on such "a broad general proposition"'—in lieu of evaluating Chin's conduct in "'the specific context of this case' "—was error. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citation omitted). But it underscores that the "special circumstances" rule was central to the court's ruling.

As this Court has made clear, law enforcement officers like Officer Chin are protected from personal liability for on-the-job conduct unless "*every* 'reasonable official would have understood that what he is doing violates'" clearly established rights. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (citation omitted). In petitioners' view, the only permissible conclusion from the record—even giving respondent all reasonable inferences—is that Officer Chin's actions were reasonable, and thus constitutional, under all the circumstances. But the Ninth Circuit's conclusion (Pet. App. 3a) that he violated *clearly established* rights is astounding. The only way that the Ninth Circuit could—and did—reach that conclusion was by assigning talismanic significance to its "special circumstances" rule. *Id.*; *see id.* at 34a (because "none of the exceptional circumstances set out in [*Lambert*]" was present, "Chin violated clearly established law").

2. Like the Ninth Circuit, respondent also fails to appreciate the dangerous real-world consequences of the Ninth Circuit's qualified-immunity ruling. The purpose of the qualified-immunity doctrine is to create "breathing room" for public officials, *al-Kidd*, 131 S. Ct. at 2085, so they do not "'err … on the side of caution,'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (citation omitted). The Ninth Circuit decision in this case tells law enforcement officers: If you draw your firearm in a situation that does not fit neatly into one of the

Lambert "special circumstances," you will expose yourself to personal liability and fee awards. Indeed, in awarding attorney's fees, the district court in this case sought to lay down a "marker … to police officers." Pet. App. 47a. As the amici States and law enforcement organizations have emphasized, that message will directly threaten officer safety. *See* States Br. 11-12; NSA Br. 8-14. Yet, far from distancing himself from that problem, respondent actually urges this Court to deny certiorari so that the case *will* send a "strong message" to police. Opp. 30.

IV. THERE IS NO VEHICLE PROBLEM

Unsurprisingly in view of the compelling factors favoring certiorari, respondent attempts (at 26-32) to identify a vehicle defect. He strikes out.

1. Respondent is quite wrong (at 27) that the petition simply "reargu[es]" disputed facts. Petitioners seek review of the *legal* question of what is the proper Fourth Amendment standard for determining whether the display of a gun during a *Terry* stop converts the stop into an unconstitutional encounter. As the amici States and law enforcement organizations have stressed, proper resolution of that Fourth Amendment question is a matter of exceptional importance.

The fact that a jury sided with respondent on his "*Terry* claim" does not mean that the Ninth Circuit and district court were not obligated to undertake the proper legal inquiry in reviewing petitioners' JMOL motion and request for qualified immunity. Indeed, this case is in the same procedural posture as *Muehler v. Mena*, 544 U.S. 93 (2005), where this Court vacated a Ninth Circuit decision affirming a jury verdict that police officers had violated a suspect's Fourth

Amendment rights by handcuffing her during the search of a house. Here, as in *Muehler*, the Court can conclude that there was no violation of federal rights at all under the correct legal standard. *See* Pet. 21 n.15.

Moreover, it is undisputed that petitioners timely renewed their qualified-immunity defense following trial. The central issue on qualified immunity is whether the Ninth Circuit properly treated its own "special circumstances" rule as the clearly established law on when an officer's display of a gun converts a *Terry* stop into an unconstitutional encounter. That is a "'neat abstract issue[] of law,'" "capable of resolution 'with reference only to undisputed facts,'" that this Court can—and should—resolve. *Ortiz v. Jordan*, 131 S. Ct. 884, 893, 892 (2011) (citation omitted); *see Elder v. Holloway*, 510 U.S. 510, 516 (1994) (question "[w]hether an asserted federal right was clearly established at a particular time" is reviewed de novo).

2. That the Ninth Circuit disposed of this case by way of a "highly cursory" unpublished opinion (Opp. 28-29) is further reason to *grant* certiorari, not deny it. This Court often reviews unpublished decisions addressing important issues that turn on published decisions. *See, e.g.*, *Alleyne v. United States*, 133 S. Ct. 420 (2012); *Descamps v. United States*, 133 S. Ct. 90 (2012); *Millbrook v. United States*, 133 S. Ct. 98 (2012). That practice serves the interests of justice and decreases any incentive to "resort to an unpublished, abbreviated disposition to conceal or avoid a troublesome issue." Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. Fla. L. Rev. 205, 222 (1985). In any event, *Lambert*—on which the Ninth Circuit grounded its decision below—is a published

decision that will continue to affect over 100,000 officers in the Ninth Circuit. States Br. 6.

3. Finally, respondent's attempt (at 27-28) to evade review by mischaracterizing the underlying events should be rejected. Although respondent is entitled to the benefit of reasonable inferences from the evidence, he is not entitled to reinvent it. Respondent not only fails to acknowledge many facts supported by his *own* testimony, but—like the Ninth Circuit—fails to consider the evidence from the standpoint of the situation Officer Chin faced in real time.

For example, while respondent claims (at 27) that Officer Chin had "no reason" to believe that "violence was imminent," respondent himself admitted that the driver of the car was speeding, "aggressive," and "cut[] someone off," and that debris was being thrown out of the window. CA9 ER 1191-93, 1495-97. Officer Chin's hair-raising, eye-witness account of this conduct resolves any doubt about the serious threat he perceived. Pet. 5 n.1. Officer Chin testified that he believed that he had just observed "DUI, reckless driving, reckless endangerment, possible stolen car and possible possession of stolen property"—all "things that could easily evolve into a violent crime." CA9 ER 1311; *see also id.* at 1314. What he observed also led him to believe that the driver (at least) was intoxicated, and all three suspects—including respondent—admitted to drinking alcohol. Pet. 6.

Moreover, it is undisputed that Officer Chin did not draw his gun until Thant came "toward him" and "he became uncomfortable with Mr. Thant's approach." Opp. 2; *see* Pet. 6-7. Like the Ninth Circuit, respondent tries to trivialize Officer Chin's reaction based on Monday morning quarterbacking. But what controls is

"the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The record is uncontradicted that Officer Chin observed Thant approach him "much more aggressively, much faster than [he] anticipated," CA9 ER 948, "clos[ing] the distance [between them] very quickly, even after [Chin] had identified [himself] as a police officer several times," *id.* at 1319; he "felt like [Thant] was about to fight," *id.*; and "as soon as [Thant] came up on [him]," the two other suspects "came up very quickly" too, *id.* at 1320. From Officer Chin's perspective, he felt "outnumbered" (*id.* at 1382), "threatened" (*id.* at 1668), and "unsafe" (*id.* at 1320), and believed the situation had become "very dynamic very quickly" (*id.* at 1679) and "quickly spiraled out of control" (*id.* at 957).

So Officer Chin drew his gun to protect his safety and "freeze" the situation until "fast backup" arrived and could "determine whether [the suspects] were intoxicated or not, whether or not they were fit to drive, or whether or not they were involved in any other crime." *Id.* at 1662, 950, 1314. Only application of the formulaic and unrealistic "special circumstances" rule could lead to the conclusion that Officer Chin's decision to draw his gun not only violated the Fourth Amendment, but violated clearly established rights.[3]

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[3] Respondent suggests (at 30-31) that certiorari is inappropriate because of an investigation by the Department of Justice (DOJ). But that investigation has no bearing on the questions presented here, which—as the amici presence alone underscores—are by no means limited to Seattle. And that investigation cannot address the flawed *Lambert* rule.

CONCLUSION

For the foregoing reasons, and those stated in the petition, certiorari should be granted.

Respectfully submitted,

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