No. _____

In The Supreme Court of the United States

MICHELLE ALVIS; JOHN KEESOR; and PAUL MORGADO,

Petitioners,

v.

KATHLEEN ESPINOSA, individually and as personal representative of the Estate of Asa Sullivan; ASA SULLIVAN; A.S., a minor, by and through his Guardian Ad Litem Nicole Guerra,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Police officers shot and killed a suspect after a standoff in a dark attic. In a split decision, the Ninth Circuit held that even if the force used by the officers in the attic was otherwise a reasonable response to the threat posed by the suspect, the force would violate the Fourth Amendment if the officers' initial entry into the dwelling was unlawful. The circuits are divided on the question whether a police officer who initiates a search that is later found unlawful can still use reasonable force against a suspect who engages in resistive or violent conduct during that search. The questions presented are:

1. Did the Ninth Circuit err in holding that when an officer makes an unlawful entry, and does so "intentionally or recklessly," the officer loses authority under the Fourth Amendment to use reasonable force to protect himself or the public during that search?

2. Did the Ninth Circuit err in denying qualified immunity for the officers' use of force based solely on the conclusion that the force may have violated the Fourth Amendment, without performing the second step of the qualified immunity analysis by inquiring whether clearly established law prohibited the force under the circumstances?

QUESTIONS PRESENTED – Continued

3. Did the Ninth Circuit err in denying qualified immunity where, had it conducted the required inquiry, it would have asked: (i) whether clearly established law precluded police officers, who were investigating a bloody shirt in a reported "drug house" and had already detained one individual armed with a knife, from pointing their guns at a noncompliant suspect who fled into a dark attic; and (ii) whether clearly established law precluded officers from firing their weapons at the suspect, after he defied repeated orders to show his hands, threatened to kill the officers, and suddenly raised his right arm as if to point a gun at an officer?

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PETITION FOR A WRIT OF CERTIORARI

Michelle Alvis, John Keesor, and Paul Morgado respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 598 F.3d 528 and is reprinted in the Appendix at 1-19 (majority) and 20-44 (dissent).

The unpublished opinion of the District Court is reprinted in the Appendix at 46-70.

The order of the Court of Appeals denying petitioners' request for rehearing and rehearing en banc is reprinted in the Appendix at 71-72.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 2010. The Court of Appeals denied a petition for rehearing and rehearing en banc on February 28, 2011. On May 17, 2011, Justice Kennedy extended the time for filing this petition for certiorari to and including July 15, 2011. The statutory basis for this Court's jurisdiction is 28 U.S.C. § 1254(1).

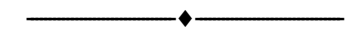
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution states:

> The right of the 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.

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.



STATEMENT OF THE CASE

As discussed in greater detail below, San Francisco police officers shot and killed a suspect after a standoff in a dark attic. In a split decision, the United States Court of Appeals for the Ninth Circuit denied qualified immunity, both for the officers' decision to point their weapons upon entering the attic, and for their decision to discharge their weapons in response to the threat posed by the suspect. It held that even if the officers' force was otherwise reasonable based on the threat posed by the suspect in the attic, the force would still violate the Fourth Amendment if a jury ultimately concluded that the officers' initial entry into the apartment was (1) unlawful, and (2) made "intentionally" or "recklessly." App. 18-19.

The Ninth Circuit's ruling on this issue exacerbates a split among the circuits on the question whether a police officer who initiates a search that is later found unlawful can still use reasonable force to seize a suspect who engages in resistive or violent conduct during that search. The majority of circuits holds that authority to use reasonable force against a violent suspect is not diminished by earlier officer errors. The minority, however, holds that the existence of an unlawful search limits officers' authority to use reasonable force during the search. In the decision below, the Ninth Circuit took the most extreme position within the minority, applying a rule that completely strips officers of authority to use reasonable force against a violent suspect, if officers

previously made an unlawful entry with the wrong subjective intent.

In addition to committing this substantive Fourth Amendment error, the Ninth Circuit failed to inquire whether, even if the officers' use of force violated the Fourth Amendment, the law governing their conduct was clearly established at the time. And had the Ninth Circuit conducted the required inquiry, it could not possibly have concluded that clearly established law prevented the officers from initially pointing their weapons at Sullivan, or from later firing their weapons.

1. The evening of June 6, 2006, Officer Paul Morgado was dispatched to check the security of a unit at a large apartment complex in San Francisco, based on a neighbor's report that the front door was swinging open and the unit might be a "drug house." App. 4. Officer Morgado spoke with an apartment security guard, who told him the front door lock was not an approved lock installed by the landlord. App. 9.[1] Officer Morgado pushed on the door to the unit. It opened, revealing a bloody shirt hanging on an interior door just inside the front doorway. Officer Morgado could not tell whether the blood was fresh or dry. App. 4. He requested backup over his police radio for help with a walk-through to investigate "a T-shirt

[1] Other details of their conversation were disputed. App. 4, 9, 13-14, 48-50.

. . . hanging on the door with blood all over it." App. 21 (quoting recorded radio communication).

Minutes later, Officer Michelle Alvis and Officer John Keesor responded. The three officers entered the unit, announcing they were San Francisco police officers. The officers found no one on the first floor, and nothing to explain the bloody shirt. Additional officers continued to respond and join in the search. The officers went upstairs to the second floor. The officers heard movement behind a closed, locked bedroom door. They announced they were police officers and ordered the person(s) inside to let them in. There was no response, and after some delay the officers kicked in the door. Inside, the officers found a young man, Jason Martin. They ordered Martin to the ground. Martin complied and was handcuffed. Shortly thereafter Officer Keesor pat-searched Martin and found a four-inch "ninja" knife. App. 4-5, 21-22.

While the officers were dealing with Martin, they heard movement above them and thought a person was trying to flee to the roof. Officer Morgado called for a police dog unit, and Officer Keesor spoke with another officer about setting up a perimeter. The officers investigated further, and inside a second-floor bedroom closet, they found a small, 2½-foot hole leading to the attic. App. 22-23.

One by one, Officers Alvis, Keesor, and Morgado entered the attic by climbing up the closet shelving and through the hole. The attic was dark, with the officers' flashlights the only source of light. The

officers announced themselves, but no one responded. Their guns were drawn. Blown-in insulation, exposed beams, and heating ducts obstructed the officers' views as they looked around the attic. There was not enough room to stand upright in the A-frame attic, even at its highest point. App. 23.

Officer Alvis eventually spotted Asa Sullivan. Sullivan was crouched between two exposed beams, partially covered by insulation and wearing dark clothing and eyeglasses. The officers again identified themselves as police and, guns pointed, repeatedly ordered Sullivan to show his hands. Sullivan refused and told officers he would not be taken into custody. Officer Morgado radioed that Sullivan was "148" – a person resisting arrest. App. 23-24.

As the standoff began, the three officers were in different locations in the attic. Each officer had a different, partial view of Sullivan. None of the officers could see Sullivan's hidden hands, and the insulation, ducts, and beams further obstructed their views. App. 24, 26 n.6. Over the next several minutes, Sullivan made several "disturbing" statements, including statements that "were of a threatening nature in regards to the officers' safety" and that "indicated his intent not to be taken into custody." App. 17, 36. For example, Sullivan said:

- "Kill me or I'll kill you." App. 17.
- "Are you ready to shoot me?" App. 17.

- "Hey, tell my mom that I love her, and tell my girl that I love her. You guys, I'm gonna make my move and you'll be sorry." App. 28-29.

Sullivan also tried to kick a hole through the second-floor ceiling below him. Sullivan's words and behavior during the standoff prompted Officer Morgado to broadcast that Sullivan was "trying to 801 [commit suicide] by cop." App. 25.

Throughout the confrontation, the officers took several steps to resolve the confrontation short of using deadly force. They tried to persuade Sullivan to cooperate, unsuccessfully. They requested Martin's cooperation in getting more information about the person in the attic – without success. Officers on the second floor tried to enlarge the hole that Sullivan kicked in the ceiling, so they could reach Sullivan from below, but without success. Officers discussed using an Extended Range Impact Weapon (a shotgun that fires a lead-filled beanbag round), but that was not feasible due to obstructions in the attic and the weapon's potentially lethal effect at close range. The police dog unit the officers called for still had not arrived. App. 24-25. The officers decided that retreating would not be safe or prudent. The only way they knew to exit the attic was to climb down through the hole in the closet ceiling. That required using both hands, leaving the officer defenseless against a potential attack from Sullivan – who was refusing orders to show that he did not have a weapon. App. 44.

Twelve minutes into the standoff, Officer Alvis communicated over her police radio, "under the insulation, cannot see it, he's making movement." Officer Keesor saw Sullivan with "this weird look; and he takes a deep breath." All three officers saw Sullivan suddenly bring up his right hand toward Officer Alvis. Officer Keesor saw a "black oblong thing" in Sullivan's hand, which he thought was a gun. Officer Keesor and Officer Alvis heard a "pop" sound. Officer Alvis fell backwards to protect herself, and Officer Keesor saw her fall. Officer Alvis and Officer Keesor fired at Sullivan, while Officer Morgado held his fire out of concern he would shoot Officer Keesor. Sullivan was killed. App. 5, 26-28.

All three officers thought – mistakenly, as it turned out – that Sullivan had a gun. Crime scene inspectors searched the attic later that night and did not find a gun; however, they found a black eyeglasses case underneath Sullivan's right forearm. App. 29.

2. Sullivan's estate and survivors filed suit, alleging several claims under 42 U.S.C. § 1983 as well as state law claims. The officers moved for summary judgment. In pertinent part, the District Court denied qualified immunity on the respondent estate's Fourth Amendment claims. App. 52-62.

The District Court found material factual disputes concerning the officers' entry into the unit and therefore denied summary judgment on the Fourth Amendment unlawful entry claims. App. 52-55, 57-58. On the Fourth Amendment force claims – against

Officer Alvis and Officer Keesor for using deadly force, and against all three officers for pointing a gun at Sullivan – the District Court also denied summary judgment. The District Court did not discuss any of the facts about the confrontation in the attic, or identify any factual disputes about it. Instead, relying on *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), the District Court held that factual disputes about the *entry* claims precluded summary judgment on the *force* claims, because if the officers entered the apartment unit unlawfully, and their entry "provoked" the use of force in the attic, the officers could be held liable for using even *reasonable* force in the attic. App. 58-59. The District Court also denied qualified immunity, simply stating in a footnote that "[t]he same questions of fact which preclude this Court from granting Defendants' motion for summary judgment on the merits of Plaintiffs' claims also preclude summary judgment based on qualified immunity." App. 59.

3. The officers brought an interlocutory appeal from the District Court's denial of qualified immunity. The Court of Appeals affirmed. App. 1-19 (majority opinion), App. 20-44 (partial dissent). The panel unanimously affirmed on the entry claims, but split on the force claims.

With regard to Sullivan's gun-pointing claim against the three officers, the majority held there was a triable issue whether pointing a gun violated the Fourth Amendment "at the point when [the officers] entered the attic." The majority held that the bloody

shirt and the knife established only a "low level of threat," and Sullivan's flight into the attic weighed *against* the reasonableness of pointing guns because he fled in response to an unlawful entry. The majority did not discuss the significance of Sullivan's refusal to show his hands or his threats to kill the officers. App. 16-17.

With regard to the deadly force claims against Officer Alvis and Officer Keesor,[2] the majority did not identify any factual disputes about the confrontation in the attic, but nevertheless concluded there was a triable issue of fact. The majority acknowledged that Sullivan refused orders to show his hands, made "disturbing" statements such as "Kill me or I'll kill you" and "Are you ready to shoot me?", and moved his right arm in a way that made the officers think he was about to shoot. The majority, however, held that four factors about the confrontation would support a verdict in favor of Sullivan at trial: (1) Sullivan had not mentioned or brandished a weapon and "in fact, did not have a weapon"; (2) Officer Alvis fired 13 shots and Officer Keesor fired 12 shots; (3) Sullivan did not "initially cause this situation"; and (4) "Sullivan had not been accused of any crime." App. 17-18.

In denying qualified immunity for the gun-pointing and deadly force claims, the majority emphasized that the officers should be held liable for

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[2] Because Officer Morgado did not fire at Sullivan, the only force claim against him is the gun-pointing claim.

using *reasonable* force in the attic, if they entered the apartment unlawfully and with the wrong subjective intent. App. 18-19. Relying on the Ninth Circuit's earlier decision in *Billington*, *supra*, the majority stated: "If an officer intentionally or recklessly violates a suspect's constitutional rights, then the violation may be a provocation creating a situation in which force was necessary and such force would have been legal but for the initial violation." App. 18-19. Thus, a trial was required because "there is evidence that the illegal entry created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable." App. 19.

After the majority concluded there was a triable issue on the Fourth Amendment claims, it did not discuss whether, even if the facts were resolved most favorably to Sullivan, clearly established law would have prohibited the officers from using the challenged force. App. 16-18. Rather, the majority simply held: "the district court properly denied the summary judgment motion regarding qualified immunity because defendants failed to show as a matter of law that they did not violate Sullivan's Fourth Amendment rights." App. 19; *see also* App. 3.

The dissent would have held it reasonable for the officers to point their weapons at Sullivan. The dissent identified the following undisputed facts supporting that use of force: the bloody shirt was a reason to fear danger to officers; Martin did not immediately open the door for the officers; Sullivan fled from the officers' search; the officers found a

knife on Martin; the attic was dark; and Sullivan remained hidden and did not respond to the officers. In addition, Sullivan continued to threaten and resist the officers, and kept his right hand hidden, which prevented the officers from determining whether he was armed. App. 32-35. And the dissent concluded it was not clearly established that officers could not point weapons on these facts. The dissent found the facts here "clearly distinguishable" from other Ninth Circuit cases involving liability from pointing guns: Sullivan was not cooperative, said he would not be taken into custody, was possibly armed, and was with the officers in a dark, confined, obstructed location. App. 35.

The dissent also disagreed with the majority's ruling regarding the reasonableness of deadly force on the undisputed facts. The dissent observed that "further consideration of the facts/evidence is warranted." App. 20. The dissent noted that throughout the confrontation, Sullivan refused orders to show his hands, threatened the officers, and led the officers to believe he was contemplating "suicide by cop." App. 36. Moreover, in the attic, the officers "did not act precipitously," and instead considered other options short of deadly force. App. 37. Finally, "and most importantly," the dissent noted Sullivan's sudden movement of his right hand before the officers fired, and their belief that Sullivan was firing on them – which although mistaken, could be held objectively reasonable. App. 37-38.

The dissent disagreed with the majority's fundamental conclusion that the officers could be held liable in this case for their use of force based on a prior unlawful entry. App. 38-44. The dissent observed that "had Sullivan cooperated with the officers' commands as did [Sullivan's friend] Martin, there is no doubt that he would have been treated in the same manner and survived the encounter." App. 44.

The officers' petition for rehearing was denied after a vote. App. 71-72.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's ruling exacerbates the division among the circuits on an important Fourth Amendment issue, and in so doing further complicates the already difficult decisions that law enforcement officers must make when they confront a resisting or violent suspect. Currently there is a direct conflict among the circuits regarding whether a police officer who initiates a search that is later held unlawful may still use reasonable force to seize a suspect who engages in resistive or violent conduct during that search. Given the uncertainty in this important area of the law – involving decisions with life-or-death consequences for officers, the people they arrest, and the public at large – this Court should grant certiorari.

The Court should also grant certiorari to consider whether the officers were entitled to qualified

immunity on the ground that no clearly established law precluded them from initially pointing their guns at Sullivan and from later firing their weapons at Sullivan. Here, the Ninth Circuit simply skipped the mandatory second step of the qualified immunity analysis, and failed to inquire whether the law governing the officers' conduct was clearly established at the time of the incident. Had the Ninth Circuit conducted this inquiry, it could not possibly have concluded that clearly established law prohibited their conduct. Regarding the gun-pointing claim, as of 2006 the only Ninth Circuit decisions allowing officers to be held liable for pointing a gun involved specific circumstances not present in this case: an allegation that an officer continued to point a gun at a demonstrably unarmed, cooperative and compliant individual in a situation that did not present danger to the officers. Regarding the deadly force claim, no precedent existed to suggest that the officers could not fire their weapons when a suspect defied repeated orders to show his hands, threatened to kill officers, and suddenly raised his right arm as if to point a gun at an officer.

Indeed, the Ninth Circuit's failure to grant qualified immunity to the officers was an error so fundamental, and so contrary to this Court's precedent, that even if this Court is not inclined to hear argument, it should summarily reverse the decision below, as it did in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). It is black-letter law that a court cannot merge the qualified immunity inquiry with

the merits inquiry of a Fourth Amendment force claim, and deny qualified immunity based solely on a conclusion that a Fourth Amendment violation may have occurred. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). And it is black-letter law that a court may not deny qualified immunity without inquiring whether clearly established law precluded the officers' conduct, not based on general principles, but based on the precedent governing the specific conduct in the case. *Id.* at 201; *accord Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011). Here, any prohibition most certainly was not clearly established. Because the Ninth Circuit's error was so clear, and because the error will likely cause courts in the Ninth Circuit to hold officers liable for conduct that is necessary to the performance of their critical public protection function, summary reversal in this case is warranted.

I. This Court Should Grant Certiorari To Resolve The Conflict Over Whether A Police Officer Who Makes An Entry That Violates The Fourth Amendment Can Still Use Reasonable Force To Seize A Suspect Who Engages In Resistive Or Violent Conduct During The Unlawful Search

A common claim in section 1983 cases is that the force used to make a Fourth Amendment seizure is made unreasonable by an officer's separate Fourth Amendment violation earlier in an encounter – such as making an unlawful search, detention, or arrest.

Often, there is a claim that "but for" the initial violation, the force never would have been used, and even force that would have been reasonable, based on the threat posed by a suspect, should be ruled unreasonable under the Fourth Amendment. This Court has never directly addressed the question whether a police officer who makes an entry that violates the Fourth Amendment can still use reasonable force to seize a violent suspect he encounters during the unlawful search.

Eleven circuits, however, have addressed this question in civil cases, and the decisions are in conflict. Seven circuits hold that officers' earlier errors do not affect their later authority to use reasonable force to seize a violent suspect. Four other circuits disagree, and impose three different tests to determine the effect of earlier officer errors. Several published decisions expressly acknowledge disagreement among the circuits, and the Third Circuit has already acknowledged a conflict with the Ninth Circuit's decision in this case. *Lamont v. New Jersey*, 637 F.3d 177, 186 (3d Cir. 2011).

There is also a conflict between criminal and civil cases. In criminal cases, the circuits have uniformly adopted the majority view, and *rejected* claims that officers' Fourth Amendment errors earlier in an encounter – such as making an unlawful search, detention, or arrest of a suspect – can prohibit the officer from making a valid seizure of the suspect

when the suspect's response to the officer is resistance, violence, or flight. Thus, in the four circuits in the minority, officers are subject to conflicting rulings about their authority to make a Fourth Amendment seizure, depending whether the issue arises in a civil or a criminal case.

This Court's intervention is necessary also because the Ninth Circuit's ruling – and the rulings of the other circuits in the minority – departs from this Court's past Fourth Amendment decisions. And the minority approach has dangerous consequences. Suspects should not be free to commit violence against police officers who make a search that is later held unlawful, and officers should not be prevented from using reasonable force to protect themselves or the public from a suspect's violent conduct.

A. The Circuits Are In Conflict On This Fourth Amendment Question

The Third Circuit has already recognized a conflict with the Ninth Circuit's ruling in this case. *Lamont*, 637 F.3d at 186.[3] The rule in the Third Circuit is that a suspect's violent response to an officer's unlawful search is a "superseding cause" that allows an officer to use reasonable force to seize the violent suspect, notwithstanding the officer's earlier violation. In *Bodine v. Warwick*, 72 F.3d 393 (3d Cir.

[3] A petition for certiorari was not filed in *Lamont*.

1995), the Third Circuit offered a hypothetical to illustrate this proximate causation principle. Then-Judge Alito wrote for the court:

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is "no."

Id. at 400; *see also Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2001) ("[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause that limited the officers' liability.").[4]

[4] The District of Columbia Circuit has not ruled on this question in a section 1983 case, but conducted a similar analysis in a case arising under District of Columbia tort law. *Hundley v. District of Columbia*, 494 F.3d 1097, 1104-05 (D.C. Cir. 2007); *see Lamont*, 637 F.3d at 186 (noting "similar analysis" in *Hundley*).

Six other circuits – the Second, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits – join the Third in treating an officer's pre-seizure errors as irrelevant to the determination whether the force was reasonable at the moment it was used to seize a violent suspect. *See Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force."); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) ("[T]he reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis . . . ."); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275 (5th Cir. 1992); *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007) (noting circuit split); *Schulz v. Long*, 44 F.3d 643, 648-49 & n.3 (8th Cir. 1995) (noting circuit split); *Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994). These circuits do not make an exception for pre-seizure errors that are Fourth Amendment violations. For example, the Sixth Circuit has ruled that when an officer makes an unlawful entry, his later use of force is still analyzed based only on the threat posed by the suspect at the moment force is used to make the seizure. *E.g.*, *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996).

The four circuits in the minority apply different tests for deciding whether an officer's prior error strips him of the authority to use reasonable force to defend himself or protect the public. The Ninth Circuit takes the most extreme position, holding that

an officer's pre-seizure Fourth Amendment violation, committed with an improper subjective motive, renders any later force unlawful – even if the force would otherwise have been a reasonable response to a violent suspect. App. 18-19; *see also Billington*, 292 F.3d at 1186-88 (noting circuit split).

In the First and Seventh Circuits, a court reviews an officer's pre-seizure conduct for both constitutional *and* non-constitutional errors, and then considers those errors as part of the ultimate analysis whether the force used was reasonable. *Young v. City of Providence*, 404 F.3d 4, 22 & n.13 (1st Cir. 2005) (noting circuit split); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (considering failure to knock and announce earlier in encounter); *Catlin v. City of Wheaton*, 574 F.3d 361, 368 & n.7 & n.8 (7th Cir. 2009) (same, and noting circuit split). Thus, in the First and Seventh Circuits, an officer's earlier constitutional violation will limit – not *eliminate*, like in the Ninth Circuit – an officer's authority to use reasonable force against a violent suspect.

The Tenth Circuit considers an officer's pre-seizure errors as one factor in the reasonable force analysis. However, the Tenth Circuit imposes two constraints on what errors are relevant. First, merely unreasonable conduct is not relevant; an officer's "own reckless or deliberate conduct (as opposed to mere negligence)" must "unreasonably create[ ] the need to use force." *Thomas v. Durastanti*, 607 F.3d 655, 664 (10th Cir. 2010). Second, the pre-seizure recklessness must be "immediately connected" with

the need to use force. *Thomson v. Salt Lake County*, 584 F.3d 1304, 1321 (10th Cir. 2009). The "primary focus" remains the level of danger at the "exact moment" force is used. *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001).

In criminal cases – unlike civil cases – the circuits have uniformly recognized that the Fourth Amendment permits police officers to seize a suspect who resists an unlawful detention, arrest, or search. *See, e.g.*, *United States v. Sledge*, 460 F.3d 963, 966 (8th Cir. 2006) (collecting cases); *United States v. Sprinkle*, 106 F.3d 613, 619 n.4 (4th Cir. 1997) (collecting cases). "[N]otwithstanding a strong causal connection in fact between lawless police conduct and a defendant's response, if the defendant's response is itself a new, distinct crime, then the police constitutionally may arrest the defendant for that crime." *United States v. Bailey*, 691 F.2d 1009, 1016-17 (11th Cir. 1982); *accord, e.g.*, *United States v. Schmidt*, 403 F.3d 1009, 1016 (8th Cir. 2005) ("In our circuit, resistance to an illegal arrest can furnish grounds for a second, legitimate arrest."). Even the circuits that limit officers' authority to make such a seizure in civil cases have held otherwise in criminal cases. *E.g.*, *United States v. King*, 724 F.2d 253, 256 (1st Cir. 1984); *United States v. Pryor*, 32 F.3d 1192, 1196 (7th Cir. 1994); *United States v. Mitchell*, 812 F.2d 1250, 1253 (9th Cir. 1987); *United States v. Waupekenay*, 973 F.2d 1533, 1537 (10th Cir. 1992).

B. The Court Should Grant Certiorari In This Case To Resolve This Conflict

1. The Same Facts Lead To Different Results, Depending On The Circuit And Depending On Whether The Issue Arises In A Civil Or A Criminal Case

Most federal appellate courts would have decided this case differently. In the Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits (and in a criminal case in any circuit), the petitioners' authority to use reasonable force to seize Sullivan in the attic would not be diminished if their initial entry were held unlawful. Under the test employed in the Tenth Circuit, the officers' authority to use reasonable force also likely would not have been affected, because the officers' entry – even if unlawful – was not "immediately connected" with their later use of force in the attic. Under the test employed in the First and Seventh Circuits, the force claim would proceed to trial because of a factual dispute about the lawfulness of the officers' entry, and a jury would weigh that consideration against the threat posed by Sullivan to determine whether the ultimate seizure was reasonable. And in the Ninth Circuit, the force claim would proceed to trial for a determination whether the officers unlawfully entered and did so intentionally or recklessly – and if they did, this would strip them of authority to use reasonable force to defend themselves against Sullivan.

2. The Conflict Among The Circuits Involves A Recurring Issue Of Great National Importance

The minority approach places the lives of officers and the public at risk. It prohibits officers from using reasonable force to deal with violent suspects, thus denying officers the most basic right to protect themselves. Under the minority approach, officers are discouraged from investigating any imminently dangerous situation without an ironclad warrant – and the public is endangered as a result.

Furthermore, the minority approach sows tremendous uncertainty. An officer's authority to use *force* turns on an after-the-fact ruling about whether some officer may have lacked consent or other appropriate basis to make a *search* at some earlier point in an incident, or whether some officer acted with the wrong subjective motives. Two officers dealing with the same suspect cannot have different authority under the Fourth Amendment to use deadly force to seize a suspect who poses a threat of serious harm to officers or the public, based on whether one officer earlier made a constitutional error but the other did not. Officers are entitled to a consistent, predictable rule governing the force that they are legally authorized to use in the midst of a life-or-death confrontation.

3. The Ninth Circuit's Ruling Is In Sharp Tension With This Court's Precedent

In addition to squarely conflicting with the decisions of other circuits, the Ninth Circuit's ruling is in sharp tension with this Court's precedents in at least six ways.

First, this Court's test for whether deadly force is reasonable has long turned on whether "the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In *Graham v. Connor*, 490 U.S. 386, 396 (1989), this Court explained some of the factors that bear on determining the threat a suspect poses. And in *Scott v. Harris*, 550 U.S. 372, 382-83 (2007), the Court once again emphasized that the decisive issue in the reasonableness analysis is the threat posed by a suspect. The Ninth Circuit and the other circuits in the minority erred by concluding that the lawfulness of an officer's entry has a necessary or logical relationship with the threat posed by a suspect officers find inside.

Second, the tests adopted by the minority depart from the "standard of reasonableness at the moment" that applies in a Fourth Amendment force analysis. *Graham*, 490 U.S. at 396-97. The reason for this standard is that officers must make "split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 397. The minority's various tests examine matters other

than officers' "split-second judgments" about using force. The majority of circuits, in contrast, correctly understands that *Garner* and *Graham*'s use of the term "totality of the circumstances" refers to everything officers know about the threat a suspect poses at the moment he makes the decision to use force; that phrase is not a mandate to premise force liability on officers' earlier decisions.

Third and relatedly, the basis for reviewing an officer's use of force under section 1983 is that a "seizure" occurred, as this Court recognized in *Graham*, *Garner*, and *Scott*. A "seizure" occurs at the exact moment that a suspect voluntarily submits to authority or is physically controlled; a seizure has not occurred if a suspect is still resisting. *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989). The "seizure" that is subject to Fourth Amendment scrutiny is not the officer's conduct in dealing with a suspect who is resisting and has not yet been seized.

Fourth, this Court imposes a requirement of proximate causation in section 1983 actions. *E.g.*, *Brower*, 489 U.S. at 599. As the Third Circuit and the criminal cases have correctly reasoned, a suspect's acts of resistance during an unlawful arrest or search are superseding causes of an officer's use of force. *Bodine*, 72 F.3d at 400. The Ninth Circuit's rule is contrary. *Lamont*, 637 F.3d at 186 (noting conflict).

Fifth, the protections of the Fourth Amendment rely on an objective reasonableness standard. Outside the narrow context of administrative or inventory searches, this Court has repeatedly rejected any consideration of officers' subjective motives in considering whether a Fourth Amendment violation occurred. *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011). This principle applies equally to force claims. *Graham*, 490 U.S. at 397. The Ninth Circuit's and Tenth Circuit's rules conflict with this law by making officers' authority under the Fourth Amendment turn on whether they acted "recklessly" or "deliberately."

Sixth and finally, in a Fourth Amendment case, a court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott*, 550 U.S. at 383. The Ninth Circuit has adopted a test that fails to strike the correct balance between protecting the right against unreasonable searches, and the governmental interest in law enforcement officers being able to defend themselves or the public against a violent suspect who commits a new crime. The Fourth Amendment does not confer a right to respond to an unlawful search or arrest with violence. "A person does not have a license to kill a police officer merely because the officer arrested him without probable cause." *Mitchell*, 812 F.2d at 1253. The social costs of the Ninth Circuit's rule are too high.

4. This Case Provides The Appropriate Vehicle For Resolving This Question

The Ninth Circuit's decision adopts a clean legal rule that simply strips officers of authority to use reasonable force against a violent suspect, if officers make an unlawful entry with the wrong subjective intent. Because the Ninth Circuit's legal rule itself effectively bypasses the reasonable force analysis, this Court can grant review and decide this legal question without entering the "fact-bound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383. Nor is there any need to postpone consideration of this question. The Third Circuit has already acknowledged a conflict, and the other circuits have weighed in on this question.[5]

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[5] Other petitions for certiorari have presented a related but broader question, which can be summarized as follows: whether officers' allegedly unreasonable, reckless, or deliberate conduct while approaching or confronting a suspect can render the officer's later use of force unreasonable. These broader formulations did not distinguish between pre-seizure errors that are separate constitutional violations, and those that are not – a distinction that is helpful in narrowing the issue for decision. In any case, those cases may have been unworthy of certiorari for other reasons not present here, notwithstanding the importance of the legal question presented. *Swofford v. Eslinger*, 395 Fed. Appx. 559 (11th Cir. 2010), *cert. denied sub nom. Morris v. Swofford*, 131 S. Ct. 1053 (2011) (No. 10-712) (Eleventh Circuit's unpublished decision did not address legal question presented in petition for certiorari); *Burnette v. Gee*, 137 Fed. Appx. 806 (6th Cir.), *cert. denied*, 546 U.S. 1032 (2005) (No. 05-358) (Sixth Circuit's unpublished decision held the challenged pre-seizure conduct reasonable, so a ruling in favor of petitioners – that unreasonable

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II. The Court Should Grant Certiorari To Review The Ninth Circuit's Qualified Immunity Rulings

The Ninth Circuit below never considered whether clearly established law prohibited a reasonable officer from using force under the circumstances presented here. This basic error – simply skipping the mandatory second step of a qualified immunity analysis – warrants a grant of certiorari, because even a basic review of precedent shows that clearly established law did not preclude the officers from initially pointing their guns at Sullivan when they found him in the attic or from later firing their weapons. Furthermore, if the Court were not inclined to hear argument in this case (for example, if it were to deem unworthy of certiorari the first question presented), summary

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tactics would be relevant to reasonableness of force – would not have affected the result); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366-67 (9th Cir. 1994), *cert. denied sub nom. Lennon v. Alexander*, 513 U.S. 1083 (1995) (No. 94-876) (denial of summary judgment on force claim turned on disputed fact whether governmental interest in using force was to arrest decedent for criminal violations or to execute administrative inspection warrant); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (No. 94-527) (because Tenth Circuit held that no seizure occurred, a ruling in favor of petitioners regarding what conduct was relevant to seizure would not assist their claim; unique facts involving petitioner's helicopter being hijacked by escaping prisoners); *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994) (No. 93-2005) (petition identified only one other circuit with a conflicting decision); *see also Sampson v. Gilmere*, 476 U.S. 1124 (1985) (dissent from denial of certiorari).

reversal on the qualified immunity question would be warranted.

A. The Ninth Circuit Never Analyzed Whether Clearly Established Law Prohibited The Challenged Force

As this Court has repeatedly explained, the qualified immunity analysis involves two legal determinations. First, did the official conduct violate a federal right? Second, was that right clearly established? The questions are *not* the same. *Saucier*, 533 U.S. at 201. A court may *grant* immunity without addressing the first question. But a court cannot *deny* immunity without addressing the second question. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 818 (2009).

In this case, however, the Ninth Circuit did just that. The Ninth Circuit denied qualified immunity without addressing whether clearly established law as of 2006 prohibited a reasonable officer from initially pointing a weapon at Sullivan, and later using deadly force in light of the events during the standoff. App. 14-19. In a published decision that will provide misleading guidance to district courts in future cases, the Ninth Circuit simply held that "the district court properly denied the summary judgment motion regarding qualified immunity because defendants failed to show as a matter of law that they did not violate Sullivan's Fourth Amendment rights." App. 19.

This error is fundamental. A factual dispute whether the Fourth Amendment was violated is not a sufficient reason for bypassing the second question of

the qualified immunity analysis. A factual dispute at summary judgment does not prevent a court from ruling on qualified immunity; a court simply resolves all evidentiary disputes in favor of the plaintiff, and then makes a legal ruling whether clearly established law prohibited the conduct. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

And this error is an important one. This Court has repeatedly recognized that a public officer is entitled to fair warning of the legal constraints on his conduct. For liability to be imposed on a public officer, the law prohibiting that conduct must be so clearly established that "every reasonable official would have understood that what he is doing violates that right." *Ashcroft*, 131 S. Ct. at 2083 (internal quotation marks and citations omitted). Qualified immunity allows an officer to make the wrong decision, so long as the decision was not "plainly incompetent." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Court of Appeals' failure to conduct any analysis of clearly established law was a basic error that resulted in the denial of qualified immunity.

B. Clearly Established Law Did Not – And Does Not – Prohibit Officers Investigating A Dangerous Situation From Pointing Their Weapons At A Hiding Suspect While Ordering Him To Show His Hands

Here, the officers faced a situation that was far more dangerous than any other case in which officers have been held liable for pointing a weapon. That

alone entitles the officers to qualified immunity. Moreover, the Ninth Circuit's ruling on the underlying Fourth Amendment issue is also wrong, and will have deadly consequences.

For officers to lose qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 131 S. Ct. at 2083. Broad general propositions of law do not constitute clearly established law; there must be precedent that prohibits the specific conduct at issue. *Id.* Two issues are pertinent to whether the law was clearly established that the officers could not point their guns at Sullivan.

First, it was not clearly established that pointing a gun at a *noncompliant* suspect like Sullivan was even a "seizure." In fact, this Court has expressly recognized that when a suspect is noncompliant and not yet physically controlled, a Fourth Amendment "seizure" has not yet occurred. *Hodari*, 499 U.S. at 626. Here, the Ninth Circuit excluded from its Fourth Amendment analysis any consideration of the undisputed fact that Sullivan did not comply with the officers' orders, thereby bypassing the question whether a "seizure" occurred. But there is no question that *if* a "seizure" occurred, that was not clearly established as of 2006.

Second, it was not clearly established that the level of threat the officers faced would not justify pointing their weapons. This Court's Fourth Amendment decisions recognize the paramount governmental

interest in allowing officers to ensure their safety when they investigate potentially dangerous situations. *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Terry v. Ohio*, 392 U.S. 1, 23 (1967). Accordingly, the lower courts have recognized that pointing a gun is not unreasonable under the Fourth Amendment when an officer could reasonably conclude, based on the information available to him, that there was a threat of violence or danger. *See, e.g.*, *Aponte Matos v. Toledo Davila*, 135 F.3d 182, 191-92 (1st Cir. 1998); *Edwards v. Giles*, 51 F.3d 155, 156-57 (8th Cir. 1995); *Courson v. McMillian*, 939 F.2d 1479, 1496 (11th Cir. 1991); *Collins v. Nagle*, 892 F.2d 489, 495-97 (6th Cir. 1989).

In contrast, liability has been permitted in gun-pointing cases under only very narrow circumstances. As of 2006, the only Ninth Circuit decisions allowing officers to be held liable for pointing a gun involved circumstances vastly different from these: an allegation that an officer continued to point a gun at a demonstrably unarmed, cooperative, and compliant individual in a situation that did not present danger. *See Motley v. Parks*, 432 F.3d 1072, 1089 (9th Cir. 2005) (en banc); *Robinson v. Solano County*, 278 F.3d 1007, 1014-15 (9th Cir. 2002) (en banc).[6] As even the majority acknowledged, the bloody shirt and the knife found on Martin gave officers reason to be concerned

[6] In ruling that the officers violated the Fourth Amendment, the Ninth Circuit cited these two cases as well as a case decided in 2007 – which would not have been clearly established law in 2006. App. 17.

for their safety. App. 16. In addition, the officers were in a reported "drug house," and narcotics are correlated with weapons and violence. Moreover, Sullivan fled and hid from the officers – giving the officers reason to believe he was a potential suspect related to the bloody shirt. *See Illinois v. Wardlaw*, 528 U.S. 119, 124-25 (2000). No clearly established law stood for the Ninth Circuit's contrary interpretation of Sullivan's flight: that it was caused by an illegal entry and therefore *negated* officers' authority to take reasonable steps to protect themselves. App. 16. Then, the officers entered a dark attic to confront Sullivan, who had hidden in a confined, obstructed area. No precedent had clearly established, or even suggested, that this level of danger does not justify pointed weapons, at least until a suspect has followed officers' orders and been handcuffed.

The Ninth Circuit's Fourth Amendment ruling has significance beyond whether qualified immunity applies in this particular case. The Ninth Circuit has informed officers that the facts here posed only a "low level of threat" that, under the Fourth Amendment, did not permit them to draw their weapons. App. 17. If the facts here posed only a "low level of threat," it is difficult to conceive of a set of facts that would permit officers to even *point* their weapons, short of being attacked – at which point, it would be too late. By imposing such a strict limitation on officers' authority to point their weapons under the Fourth Amendment, this ruling endangers the safety of officers, as well as public safety.

C. Clearly Established Law Did Not – And Does Not – Prohibit Deadly Force Against A Suspect Who Refuses Orders To Show His Hands, Threatens To Kill Police Officers, And Suddenly Brings Up His Arm As If To Point A Weapon At A Police Officer

In determining whether qualified immunity protects an officer's use of deadly force, a court must analyze the case law that governed the use of deadly force in factually similar situations. *See Brosseau*, 543 U.S. at 200. In the context of deadly force claims, it is even more difficult to conclude that a right is clearly established, because the applicable case law shows that "the result depends very much on the facts of each case." *Id.* at 201.

The Ninth Circuit relied on four factors to conclude that the officers' use of deadly force violated the Fourth Amendment. App. 17-18. But none of these four factors can be said to derive from clearly established law. Indeed, as set forth below, the Ninth Circuit's reliance on these four factors was contrary to the great weight of authority.

First, the Ninth Circuit stated that Sullivan had not mentioned or brandished a weapon and "in fact, did not have a weapon." App. 18. The "fact," however, that Sullivan did not actually have a weapon was *not* known to the officers and was therefore irrelevant to the reasonableness of their force. Under *Graham*, courts and juries may not rely on the "20/20 vision of hindsight" in judging the reasonableness of deadly

force. 490 U.S. at 396-97. Consistent with *Graham*, existing deadly force precedent held that the subsequent discovery that a suspect was *actually* unarmed is irrelevant to the reasonableness of deadly force. *E.g.*, *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991). Nor were the officers constitutionally required to wait for Sullivan to "brandish[ ]" or describe a weapon. App. 18. Sullivan refused to show his hands, refused to follow commands, threatened to kill police officers, and told them they would be sorry when he made his move. App. 17, 28, 36. Under existing deadly force precedent, Sullivan's defiance of the officers' orders to show his hands entitled the officers to treat him as armed. *E.g.*, *McLenaghan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994). Existing case law authorized the officers to fire, without waiting to see whether Sullivan was holding a gun when he suddenly raised his right arm as if to fire at Officer Alvis. *E.g.*, *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001) ("An officer is not constitutionally required to wait until he sets eyes on the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."); *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001); *McLenaghan*, 27 F.3d at 1007-08. Officers are entitled to make reasonable mistakes, like mistaking an object for a gun, *e.g.*, *Anderson*, 247 F.3d at 130 (eyeglasses case), or thinking that another officer's gunfire is coming from a threatening suspect, *e.g.*, *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994).

Second, the Ninth Circuit relied on Officer Alvis firing 13 shots and Officer Keesor firing 12 shots. App. 17. But deadly force is not made unreasonable by the number of bullets fired. Courts hold that once officers are justified in using deadly force and killing a suspect who poses a threat, they are entitled to continue firing until they are certain that they have eliminated the threat. *E.g.*, *Wilkinson v. Torres*, 610 F.3d 546, 552 (9th Cir. 2010); *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007); *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996); *see also* App. 38 n.14 (dissent).

Third, the Ninth Circuit ruled that officers' force against Sullivan could be held unreasonable because Sullivan "had not initially caused the situation." App. 18. In invoking this factor, the Ninth Circuit allowed its analysis of the unlawful entry to affect its analysis of the reasonableness of the force in light of the threat Sullivan posed. Under the Fourth Amendment, this ruling was incorrect, for all of the reasons stated in Part I above. Moreover, clearly established law did not premise liability on this factor. As the dissent explained, imposing force liability in this case based on an entry was actually inconsistent with previous Ninth Circuit cases. App. 38-44.[7] When judges cannot

[7] The Ninth Circuit invoked this Court's decision in *Scott*, 550 U.S. at 384, and its use of the term "relative culpability," to support its holding that these officers should be found liable if they "caused" an encounter with a dangerous individual by making an unlawful entry. App. 15-16. *Scott* was decided in 2007, so it could not have established any constraints on the use

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agree about how to apply precedent to a new set of facts, the law is not clearly established. *Ashcroft*, 131 S. Ct. at 2085.

Fourth, the Ninth Circuit stated that deadly force was unreasonable because "Sullivan had not been accused of any crime." App. 18. It is correct that when the officers entered the attic, they did not have probable cause to believe that Sullivan perpetrated a specific crime related to the bloody shirt; Sullivan was only a suspect. Nevertheless, the Ninth Circuit was incorrect to address only Sullivan's potential crimes *before* he encountered the officers, and to exclude consideration of his conduct – and crimes – *during* the encounter. That approach is contrary to this Court's deadly force precedent, so it cannot reflect clearly established law. In *Scott*, this Court rejected the formalistic analysis that the Ninth Circuit applied here, explaining that even though the respondent in *Scott* had committed only a minor traffic offense before he encountered the officers, it was his conduct during the encounter that established he posed a threat justifying deadly force. *Scott*, 550 U.S. at 382 n.9. Likewise here, the deadly force determination turned on Sullivan's conduct once he encountered the

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of deadly force in 2006. More significantly, the Ninth Circuit misinterpreted *Scott*. *Scott* did not suggest that when officers make an *unlawful entry*, they become more culpable than a person who later violently *threatens to kill* them – or that subjective factors like an officer's "culpability" are a proper part of a Fourth Amendment analysis.

officers. The fact that Sullivan's conduct also violated the criminal laws – by delaying and interfering with an investigation, threatening police officers, and assaulting a police officer, for example – reflected the threatening character of that conduct.

D. Summary Reversal Is Warranted

In light of the foregoing, even if one were to assume that the officers violated the Fourth Amendment in pointing their guns or in firing their weapons, they were plainly entitled to qualified immunity. The Ninth Circuit committed the most fundamental of errors in failing to conduct the second step of the qualified immunity analysis. The error led to an obviously incorrect ruling, because it is beyond dispute that existing law did not preclude the use of force in the situation that confronted the officers. And the error is important, because the Ninth Circuit's ruling sets a precedent that subjects officers to liability for so much as unholstering their weapons during an obviously dangerous situation. Accordingly, if the Court were not inclined to hear argument in this case, summary reversal would be warranted. *See, e.g.*, *Brosseau*, 543 U.S. at 201.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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