No. 20-1539

In The Supreme Court of the United States

DANIEL RIVAS-VILLEGAS,

Petitioner,

vs.

RAMON CORTESLUNA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by this petition are:

1. Did the Ninth Circuit depart from this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989) and *Plumhoff v. Rickard*, 572 U.S. 765 (2014) in denying qualified immunity to petitioner based upon the absence of a constitutional violation, by concluding that pushing a suspect down with a foot and briefly placing a knee against the back of a prone, armed suspect while handcuffing him, could constitute excessive force?

2. Did the Ninth Circuit depart from this Court's decision in *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam) and numerous other cases by denying qualified immunity even though two judges concluded the use of force was reasonable, and notwithstanding the absence of clearly established law imposing liability under circumstances closely analogous to those confronting petitioner?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- Daniel Rivas-Villegas, an individual, defendant, appellee below, and petitioner here; and
- Ramon Cortesluna, plaintiff and appellant below and respondent here; and
- City of Union City, a California municipal entity, Manuel Leon, and Robert Kensic were defendants in the district court and appellees in the Ninth Circuit and jointly represented by counsel for petitioner Rivas-Villegas.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- *Ramon Cortesluna v. Manuel Leon; Robert Kensic; Daniel Rivas-Villegas; City of Union City*, California, United States Court of Appeals for the Ninth Circuit, Case No. 19-15105.
- *Ramon Cortesluna v. Manuel Leon*, *et al.*, United States District Court, Northern District of California, Case No. 17-cv-05133-JSC.

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The district court's December 21, 2018 order granting summary judgment to petitioner is not reported, and is reproduced in the appendix to this petition ("Pet. App.") at pages 42-80. The Ninth Circuit's October 27, 2020 opinion is published, *Cortesluna v. Leon*, 979 F.3d 645 (9th Cir. 2020), and is reproduced in the appendix at pages 1-41. The Ninth Circuit's December 3, 2020 order denying panel and en banc rehearing is not published and is reproduced in the appendix at pages 81-82.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction to review the Ninth Circuit's October 27, 2020 decision on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed per the Court's March 19, 2020 order extending the time to file any petition to 150 days after denial of rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983, which states:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges petitioner violated the rights secured by the United States Constitution's Fourth Amendment, which provides:

> 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.

STATEMENT OF THE CASE

A. Background Of The Action.

On the night of November 6, 2016, a 911 dispatcher received a call from a 12-year-old girl, I.R., reporting that she, her mother, and her 15-year-old sister were barricaded in a room at their home because her mother's boyfriend, plaintiff and respondent Ramon Cortesluna, had a chainsaw and was going to attack them. (Pet. App. 5.) I.R. told the dispatcher that plaintiff was "always drinking," had "anger issues," was "really mad," and was using the chainsaw to "break something in the house." (*Id.*) I.R. said that her mother was holding the door closed to prevent plaintiff from entering and hurting them. (*Id*.) I.R.'s sister got on the phone and said that plaintiff was "right outside the bedroom door" and "sawing on their door knob." (*Id*.) The 911 operator could hear manual sawing in the background. (*Id*.) I.R.'s sister described plaintiff and what he was wearing. (*Id*.)

A police dispatcher requested that officers respond. (*Id*.) The dispatcher reported that a 12-year-old girl had reported that her mother's boyfriend had a chainsaw and was trying to hurt her, her sister, and her mother, who were together in a room. (*Id*.) The dispatcher relayed the girl's report that the boyfriend was "always drinking" and was using the chainsaw to break something in the house. (*Id*.) The dispatcher further reported that there had been another potentially related 911 call in the area and that, on that call, crying

could be heard, but the caller hung up without speaking. (*Id*. at 5-6.)

Petitioner Daniel Rivas-Villegas, a Union City police officer, along with fellow officers Leon and Kensic, with two other police officers, responded to the scene. (*Id*. at 6.) When the first three officers, including Rivas-Villegas and Kensic, arrived, they observed plaintiff's home for several minutes and saw that "[plaintiff] is right here" in his window and "doesn't have anything in his hand" except, at some points, a beer. (*Id*.) The officers confirmed with dispatch that the caller had reported a chainsaw. (*Id*.) The dispatcher acknowledged "we can't hear [a chainsaw] over the phone" but noted that plaintiff could be using the chainsaw "manually." (*Id*.) An officer asked the 911 operator if the girl and her family could leave the house. (*Id*.) The operator stated that they were unable to get out and that she heard sawing sounds in the background, as if the boyfriend were trying to saw the bedroom door down. (*Id*.)

Defendant Leon arrived at the scene later. (*Id*.) When Leon arrived, another officer told him, "so, he's standing right here drinking a beer. What do you think [about] just giving him commands, having him come out, and do a protective sweep?" (*Id*.) The officers formulated a plan to approach the house and "breach it with less lethal, if we need to," a reference to Leon's beanbag shotgun. (*Id*.)

The following events are depicted in a video admitted as evidence, which was posted to the Ninth Circuit's public website pursuant to the request of

dissenting Judge Collins (Pet. App. 29 n.1), and can be viewed at https://cdn.ca9.uscourts.gov/datastore/opinions/media/19-15105-Cortesluna-Videotape.mp4.

Petitioner Rivas-Villegas knocked on the front door, stating, "[P]olice department, come to the front door, Union City police, come to the front door." (Pet. App. 7.) A few seconds later, plaintiff emerged through a sliding glass door near the front door, holding a large metal object. (*Id.*) Kensic said, "He's coming . . . he's got a weapon in his hand" that looks "like a crowbar." (*Id.*) Plaintiff was ordered to "drop it," which he did. (*Id.*) Meanwhile, Leon said, "I'm going to hit him with less lethal," referring to his beanbag shotgun, and told another officer to get out of his way. (*Id.*)

Petitioner then ordered plaintiff to "come out, put your hands up, walk out towards me." (*Id.*) As plaintiff walked out of the house and toward the officers, petitioner commanded him: "Stop. Get on your knees." (*Id.*) Plaintiff stopped approximately ten to eleven feet from the officers. (*Id.*) Immediately after petitioner's order, Kensic saw a knife in the front left pocket of plaintiff's sweatpants and announced that plaintiff had "a knife in his left pocket, knife in his pocket." (*Id.*) Kensic told plaintiff, "[D]on't, don't put your hands down" and "hands up." (*Id.*) After Kensic shouted this last order, plaintiff turned his head toward Kensic, who was on plaintiff's left side, (and away from Leon, who was on plaintiff's right side) and lowered his head and his hands. (*Id.*) Leon immediately shot plaintiff with two beanbag rounds in rapid succession—the rounds approximately two seconds apart. (*Id.* at 7-8.)

The second shot hit plaintiff on the hip, and plaintiff again raised his hands. (*Id.* at 8.) The officers ordered him to "[G]et down." (*Id*.) As plaintiff started to lower himself to the ground, petitioner used his foot to push plaintiff down—with pressure so slight that plaintiff did not even feel it. (*Id*. at 8, 30 n.2.) Petitioner then pressed his knee against plaintiff's back for approximately eight seconds, while pulling plaintiffs arms up so Leon could handcuff plaintiff. (*Id*. at 8, 29-30.) Petitioner was straddling plaintiff, with his right foot on plaintiff's right side and his left leg bent at the knee on plaintiff's left side, where plaintiff had a knife in his pocket. (*Id.* at. 30.) This was done to prevent plaintiff from rising up while being handcuffed—a standard field procedure done for reasons of officer safety. (*Id*. at 19, 30, 33.) A few moments later, petitioner lifted plaintiff up by his handcuffed hands and moved him away from the doorway. (*Id.* at 8.) The incident concluded. (*Id*.)

B. The Lawsuit.

Plaintiff filed a complaint asserting (a) a claim under 42 U.S.C. § 1983 against Leon and Rivas-Villegas for excessive force; (b) a § 1983 claim against Kensic for failing to intervene and stop the excessive force; (c) a claim against the City under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for the officers' actions; and (d) several state-law claims. (Pet. App. 8.)

The district court granted defendants' motion for summary judgment. (*Id*. at 8-9.) As to Leon and petitioner Rivas-Villegas, the court found that the force used was objectively reasonable in the circumstances and that they were entitled to qualified immunity. (*Id*.) As to Kensic, the court found that he had no reasonable opportunity to intervene and therefore could not be liable. (*Id*. at 9.) Having granted summary judgment in favor of the individual defendants, the court dismissed plaintiff's claim against the City. (*Id*.) The court declined to exercise supplemental jurisdiction over the state-law claims and dismissed them without prejudice. (*Id*.)

C. The Appeal.

Plaintiff appealed, and a sharply divided Ninth Circuit panel affirmed in part and reversed in part in a published opinion in which no two judges joined in all respects. Judge Graber authored the court's opinion, affirming summary judgment in favor of Leon and Kensic, and reversing as to petitioner Rivas-Villegas. (Pet. App. 4, 12-21.) As to Leon, the Judge Graber found that firing the beanbag rounds was reasonable given the serious nature of the threat, the fact that plaintiff was armed with a knife, and the rapidly evolving circumstances. (*Id*. at 12-14.) As to Kensic, Judge Graber agreed with the district court that there was no evidence that Kensic would have had time to perceive or intervene to prevent any excessive force. (*Id*. at 20-21.)

However, as to petitioner, Judge Graber concluded that there was an issue of fact whether petitioner's pushing plaintiff down with his foot and pressing his knee against plaintiff's back while plaintiff was being handcuffed, constituted excessive force. (*Id*. at 14-16.) Citing *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), Judge Graber asserted that it was clearly established that it was excessive force for an officer to press a knee into the back of a prone, compliant suspect so as to cause injury. (*Id*. at 15-16.)

Judge Gilman concurred in part and dissented in part. (*Id*. at 22.) He concurred with respect to affirming as to Kensic and reversing as to petitioner but dissented in that he would also have reversed as to Leon. (*Id*. at 22-27.)

Judge Collins also concurred in part and dissented in part. (*Id*. at 29.) Judge Collins agreed that summary judgment as to Kensic and Leon was proper but dissented with respect to reversal of the judgment as to petitioner. (*Id*.) Judge Collins noted that the video established beyond dispute that the minimal force applied by petitioner—pressing plaintiff down with his foot, and then pressing his knee against plaintiff's back while plaintiff, still armed with a knife, was being handcuffed—was reasonable as a matter of law. (*Id*. at 31-34.) Plaintiff did not even feel petitioner's foot on his back. (*Id*. at 30 n.2.) Pressing a knee against plaintiff's back for eight seconds during handcuffing was a reasonable safety measure against a still armed suspect. As Judge Collins observed:

> The majority erroneously discounts the threat presented by the knife, asserting that, because it was "protruding blade-up" in Cortesluna's pocket, "it would not have been possible for Plaintiff to grab it and attack anyone." *See* Maj. Opn. at 15 [Pet. App. 15]. The majority overlooks the fact that, as the videotape makes clear, the knife was loosely sitting in the large pocket of Cortesluna's baggy pajama bottoms—meaning that Cortesluna could have fit his hand into the pocket to reach the handle.

(*Id.* at 32.)

As a result, Judge Collins noted that the panel opinion runs afoul of this Court's "pointed admonition to this court not to confidently downplay, from the comfort of our chambers, the dangers that officers face in making arrests." (*Id*. at 32-33 (citing *Ryburn v. Huff*, 565 U.S. 469, 477 (2012)).)

Nor had plaintiff offered any proof of severe injury from which it could be inferred that the brief, eight second pressing of petitioner's knee against his back as depicted in the video, was somehow excessive. As Judge Collins noted, plaintiff provided no medical evidence of any physical injury, but simply his own testimony claiming ongoing subjective pain following the incident. (*Id*. at 35-36.) Judge Collins observed:

> On this record, and given these objective circumstances, the mere fact that Cortesluna subsequently claimed ongoing subjective pain is not enough, by itself, to raise a reasonable

> inference that an objectively unreasonable level of force was used at the time of the arrest. But under the majority's opinion, it is now apparently the law in the Ninth Circuit that all an arrestee has to do to get a jury trial on an excessive force claim—including defeating qualified immunity—is to assert that the arrest resulted in ongoing subjective pain. For the reasons I have explained, that is not correct.

(*Id.*)

Judge Collins also found that even assuming petitioner's conduct could constitute excessive force, petitioner would be entitled to qualified immunity because no clearly established law would have put him on notice that his conduct could give rise to liability under these particular circumstances. (*Id*. at 36.) Judge Collins noted that *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000) was not similar to the present case, as in *LaLonde*, the suspect was unarmed and not accused of any serious crime, unlike plaintiff, who was suspected of serious physical assault and had a knife clearly visible in his pocket as petitioner helped to restrain him. (*Id*. at 36-39.) As Judge Collins observed, the real world impact of the panel's decision would be to discourage use of a vital tool to ensure officer safety:

> [T]he practical effect of the majority's ruling today will likely be to eliminate the use of a knee to protectively hold down a non-resisting suspect while handcuffing him. The majority discounts that possibility, claiming that it has merely reaffirmed that "police may not kneel

> on a prone and non-resisting person's back *so hard as to cause injury*." *See* Maj. Opn. at 19 [Pet. App. 20] (emphasis added). But this disregards the fact that an officer on the scene *cannot know whether the arrestee will later claim ongoing subjective pain*; the officer can only know what his or her objective actions are and what the arrestee's contemporaneous response is. Here, the officers' body-cameras' audiotapes confirm that, from the moment he was shot with the beanbags, Cortesluna moaned in pain during his arrest and that Cortesluna did not say at the time that the *knee* was hurting him. On this record, there was nothing about the then-knowable circumstances that would suggest to the officer that the force here was excessive. Under the majority's opinion—in which a later claim of ongoing subjective pain from the use of a knee is all you need to get to a jury—an officer would be taking a significant risk by using a knee to secure an arrestee during handcuffing.

(*Id.* at 39-40.)

Petitioner filed a petition for panel and en banc rehearing which was denied on December 3, 2020. (*Id.* at 81-82.)

REASONS WHY CERTIORARI IS WARRANTED

This Court has repeatedly recognized the importance of qualified immunity in assuring that law

enforcement officers may perform their duty to protect public safety, without fear of entanglement in litigation and potential liability, and make decisions in tense, rapidly evolving circumstances. It has stringently applied the standards of *Graham v. Connor*, 490 U.S. 386 (1989) to eschew after the fact second-guessing of field decisions and find use of force reasonable as a matter of law as established by video evidence. *Scott v. Harris*, 550 U.S. 372 (2007); *Plumhoff v. Rickard*, 572 U.S. 765 (2014). Most recently, in *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548 (2017) (per curiam), *Kisela v. Hughes*, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam), and *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500 (2019) (per curiam), the Court reaffirmed the special importance of qualified immunity in use of force cases which, by their nature, turn on the particular facts in a given case. The Court has stressed the need to "identify a case where an officer acting under similar circumstances" was "held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552. As the Court held in *Kisela*, in use of force cases "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." 138 S. Ct. at 1153.

Here, as Judge Collins noted in his dissenting opinion, the Ninth Circuit departed from these controlling principles. Worse yet, it has done so in a manner that jeopardizes officer safety by inviting litigation over a basic handcuffing technique involving minimal force, designed to protect officers, that is employed

hundreds, perhaps even thousands of times each day, by law enforcement officers throughout the country.

Review is necessary to compel compliance with the standards set out in *Graham*. As Judge Collins recognized in dissent, the panel majority's entire analysis of the use of force issue is premised on the very sort of leisurely second guessing of split-second decisions made under tense, rapidly evolving circumstances that this Court rejected in *Graham*. As the video established, the force applied by petitioner was minimal. He pushed plaintiff down with his foot, with pressure so light that plaintiff did not even feel it. Petitioner then straddled plaintiff, pressing his knee against the still armed plaintiff's back for eight seconds, to ensure that plaintiff did not suddenly rise up or attempt to grab the knife while handcuffing was completed—a standard practice for officer safety. Plaintiff did not complain of any undue pressure at the time, nor was there any medical evidence indicating that pressure from petitioner's knee was at a level capable of causing, much less likely to cause, any injury. All we have is plaintiff's subjective belief that subsequent pain stems from petitioner's actions—no matter how trivial the level of force applied. As Judge Collins observed, if that is enough to get an excessive force claim to the jury, application of this basic handcuffing technique as a measure to ensure officer safety is an open invitation to litigation, that few, if any officers would be willing to risk. Moreover, the Ninth Circuit's decision cannot be reconciled with case law in other Circuits which

uniformly recognize that using a knee to restrain a suspect during handcuffing is not excessive force.

Review is also necessary, because the Ninth Circuit has once again ignored this Court's command that other than in the most obvious cases, an officer is entitled to qualified immunity "unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153. Here, the panel majority failed to cite any case that remotely meets that rigorous standard. The only case cited, *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), involved applying a knee restraint to an unarmed individual after officers were summoned to investigate a noise complaint. In contrast, here officers responded to a report of violent assault, confronted an armed suspect, and petitioner placed his knee against plaintiff's back while plaintiff was still armed with a knife. Nor would looking to the law of other Circuits put petitioner on notice of any potential impropriety. Indeed, as noted, other Circuits have rejected excessive force claims based on similar conduct. Moreover, the fact that two of the four judges to have analyzed the case believed the use of force was reasonable compels application of qualified immunity. This Court has made it clear that qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Where two respected judicial officers (Judge Collins and the district court judge), with time for reflection and careful consideration of the facts

confronting petitioner, believed the use of force was reasonable, how can petitioner be said to be "plainly incompetent" or "knowingly violat[ing] the law" when making the same determination while confronting a split-second need to react?

Under this Court's controlling authority, the Ninth Circuit panel majority was not free to ignore salient facts relevant to assessing the reasonableness of petitioner's conduct or abdicate its responsibility to identify pertinent case law imposing liability under substantially similar facts before rejecting qualified immunity. Petitioner was entitled to summary judgment on the excessive force claim and review is necessary to secure adherence to the decisions of this Court, and to confirm the wide latitude officers have in making split-second decisions when confronting combative individuals in the field.

I. REVIEW IS NECESSARY TO CLARIFY AND COMPEL COMPLIANCE WITH THE *GRAHAM* STANDARDS AS APPLIED TO CLAIMS ARISING FROM WIDELY ACCEPTED MEASURES TO PROTECT OFFICER SAFETY WHILE HANDCUFFING SUSPECTS.

A. The Ninth Circuit Decision Fails To Properly Apply The *Graham* Standards In Assessing The Reasonableness Of Basic Measures To Protect Officers While Handcuffing Suspects.

In *Graham v. Connor*, 490 U.S. 386 (1989), this Court held that claims for excessive force under the

Fourth Amendment must be evaluated based upon the objective reasonableness of an officer's conduct. *Id*. at 395-97. That evaluation "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." *Id*. at 396. "The operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 1546 (2017) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Moreover, the reasonableness of force must be evaluated based on the information officers possessed at the time. *Saucier v. Katz*, 533 U.S. 194, 207 (2001); *Mendez*, 137 S. Ct. at 1546-47; *Graham*, 490 U.S. at 397 ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . "). Critically, the Court has emphasized that the reasonableness of "a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making "allowance for the fact that police officers are often forced to 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." *Graham*, 490 U.S. at 396-97.

As the Court emphasized:

> The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "*Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers*," *violates the Fourth Amendment.*

Id. at 396 (citations omitted, emphasis added).

This Court has recognized that where the undisputed evidence establishes that the force used was objectively reasonable, an officer is entitled to summary judgment. *Plumhoff v. Rickard*, 572 U.S. 765, 776-77 (2014); *Scott v. Harris*, 550 U.S. 372, 386 (2007). Petitioner submits that is the case here.

As both the district court and dissenting Judge Collins concluded, review of the video of the incident establishes that petitioner's use of force was reasonable under *Graham*. Officers were summoned to the scene of a potentially serious crime and confronted by a suspect they knew to be potentially dangerous, and who indeed was initially carrying what appeared to be a crowbar and had a large knife plainly visible in his pocket.

The force applied by petitioner was manifestly minimal. He placed his foot on plaintiff's back to hasten his lying on the ground with force so minimal that

plaintiff did not recall feeling it. Employing a basic technique to ensure officer safety, he then straddled plaintiff and held his knee against the left side of plaintiff's back—the side where plaintiff had a knife clearly visible, and still accessible in his pocket. While the panel majority, in the ultimate second guess, concludes that the knife posed no danger to anyone as it was protruding blade up and could not be grasped by the plaintiff, as Judge Collins notes (Pet. App. 32), the pocket was baggy, and a reasonable officer mindful of his safety and that of his colleagues, is not required to discount the possibility that plaintiff could reach into the bottom of the pocket to grab the handle and pull out the knife. This is particularly true given the highly compacted time frame—a matter of seconds—in which petitioner was required to make a decision as to the level of force to apply.

As Judge Collins noted, there was absolutely no evidence that petitioner applied a level of force capable of inflicting serious injury under the circumstances. Plaintiff did not complain of too much pressure on his back at the time and manifested no signs of any injury from petitioner's actions. No medical evidence was submitted indicating any injury as a result of petitioner's use of force. There was no objective evidence that the level of force was excessive, and indeed the only objective evidence, the video, makes it clear that petitioner's use of force was minimal, and manifestly reasonable.

The panel majority concludes that notwithstanding the objective evidence establishing that the level of force was minimal and reasonable, that a jury could

find it excessive based on plaintiff's subjective claim of pain experienced after the event which he attributes to the use of force. But as Judge Collins notes, an officer's conduct must be assessed in light of information available at the time of the use of force, and plaintiff did not indicate at the time of the event that the pressure on his back was somehow extreme or hurting him, and, of course, review of the video belies any suggestion that the force was injurious. And again, the absence of any objective medical evidence underscores that there is simply no evidence that the force employed by petitioner was injurious in any way, much less excessive in light of the circumstances.

The net result, as Judge Collins observed, is that virtually every time a suspect is handcuffed and an officer employs the standard technique of placing a knee against the suspect's back as a precaution during handcuffing, a plaintiff can get to a jury simply by complaining of subjective pain after the fact, without an iota of any objective evidence that force was employed at a level that could be injurious or excessive. Faced with that possibility, officers and the agencies that employ them will be reluctant to employ a long accepted practice that has protected officers in the field while performing a task that is part of their day to day duties.

The panel majority's suggestion that the Ninth Circuit has applied *Graham* in similar fashion to cases involving claims of injury resulting from unduly tight handcuffs, does not, as Judge Collins noted, withstand scrutiny. When handcuffs are applied, an officer can, *at*

the time, see if they are too tight, or an arrestee can advise them of discomfort. No such objective factors are present here. Moreover, as Judge Collin observed, the Ninth Circuit, as well as the Eighth Circuit have rejected excessive force claims based on tight handcuffs where the plaintiff had no medical evidence to suggest they suffered any injury attributable to the handcuffing. (Pet. App. 35 (citing *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) (affirming summary judgment on excessive force claim: "Arpin's claim of injury is equally unsupported as she does not provide any medical records to support her claim that she suffered injury as a result of being handcuffed."); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) (arrestee's claims that "he has suffered nerve damage in his arms as a result of being in handcuffs" and experiences "pain" as a consequence insufficient to defeat summary judgment on excessive force claim where arrestee "presents no medical records indicating he suffered any long-term injury as a result of the handcuffs")).)

The encounter with plaintiff occurred over an extremely brief, but tense period of time and against the background of plaintiff's agitated state, and possession of a large knife, plainly visible in his pocket. An officer in the field does not have the luxury of assuming that a suspect's momentary compliance signals full blown surrender obviating the need to take precautions, especially when the suspect is still armed and not yet handcuffed. The Ninth Circuit's decision departs from *Graham*'s real-world standards and threatens the

safety of law enforcement officers performing their duties at great physical hazard.

B. The Ninth Circuit's Decision Conflicts With The Decisions Of Other Circuits Which Recognize That Placing A Knee Against A Suspect To Secure Them During Handcuffing Is Not Excessive Force.

Cortesluna is not only a striking departure from this Court's precedents, it stands alone and conflicts with other Circuit court decisions. Other Circuits have universally held that it is not excessive force for an officer to place a knee against a suspect's back with mild or moderate force in the course of handcuffing, particularly where, as here, the plaintiff had previously resisted officers' commands and the situation was volatile.

- *White v. Jackson*, 865 F.3d 1064, 1080 (8th Cir. 2017) (after plaintiff involved in Ferguson protests was hit with five bean bag rounds, it was "not unreasonable" to then "push [plaintiff] to the ground and place a knee on his back").

- *Shreve v. Jessamine Cnty. Fiscal Court*, 453 F.3d 681, 684, 686-87 (6th Cir. 2006) (deputies' interest in ending plaintiff's passive resistance—hiding in the closet with a blanket over her head—"justified their alleged use of pressure point submissions and the placing of a knee across [plaintiff's] back to prevent her from wriggling free").

- *Smith v. Mattox*, 127 F.3d 1416, 1418-20 (11th Cir. 1997) (where plaintiff initially attempted to escape the police, but then "docilely submitted to arrest," officer "put[ting] his knee on [plaintiff's] lower back" after he was on the ground "to prepare to handcuff him" was reasonable).

- *Hunt v. Massi*, 773 F.3d 361, 365-66 (1st Cir. 2014) ("[N]o reasonable officer would have believed that his or her decision to handcuff [plaintiff] according to standard police practice"—"knee[ing] [him] in the leg and the back" while "they tried to handcuff [him]"—was excessive force).

- *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 567, 573 (2d Cir. 1996) (in confused moments following plaintiff's attempt to move plainclothes police vehicle, officer applying knee to plaintiff's back in the course of arresting her was not excessive).

- *Griggs v. Brewer*, 841 F.3d 308, 313-14 (5th Cir. 2016) (takedown of drunken, erratic suspect was not excessive force where officer body-slammed plaintiff to ground, placed his weight on top of him, and punched him to gain control over his arms and handcuff him).

- *Jones by Jones v. Webb*, 45 F.3d 178, 180-81, 184 (7th Cir. 1995) (in reaction to twelve-year old boy's trespassing private residence, "limited force" by officer directing him to the ground and putting "his knee in the boy's back" to handcuff him was "proper and was not unconstitutionally excessive").

- *Cavataio v. City of Bella Villa*, 570 F.3d 1015, 1017, 1019-20 (8th Cir. 2009) (officer "knee[ing]" unresisting seventy-five year old plaintiff—who was arrested for failing to remove debris from driveway—was de minimus force that did not "rise to the level of a Fourth Amendment violation").

- *Croom v. Balkwill*, 645 F.3d 1240, 1252-53 (11th Cir. 2011) (pushing sixty-three year old woman to the ground and "holding her there with a foot (or knee) in the back for up to ten minutes" was reasonable where the home was known "to be involved in the distribution of controlled substances"; "[f]or the safety of everyone involved," officers "were authorized to exercise 'unquestioned command of the situation'").

- *Nolin v. Isbell*, 207 F.3d 1253, 1254, 1258 n.4 (11th Cir. 2000) (in response to roughhousing with a friend that was reported as a "fight," grabbing and shoving plaintiff, pushing a knee into his back and his head against a van—was a "de minimus" and "typical" amount of force in effecting arrest).

- *Scott v. District of Columbia*, 101 F.3d 748, 759-60 (D.C. Cir. 1996) (finding no excessive force where officers in a "quickly developing situation" grabbed plaintiff who had been arrested for DUI and was attempting to flee, slammed him to the ground, and put their knees on his back in the course of handcuffing him).

In finding excessive force, the panel majority observed that circumstances can "de-escalate" as fast as they escalate, requiring split-second adjustments in the application of force. (Pet. App. 19.) Yet other Circuits, consistent with *Graham* have rejected that artificial construct, recognizing that where an officer is responding to a volatile and/or ambiguous situation, such an approach is untenable and compromises officer safety. *Smith*, 127 F.3d at 1419 (even if arrestee was "not actively resisting arrest at the very moment the force was applied," if he had been passively or actively resisting before, an officer "could reasonably have believed that without some force restraining [plaintiff], he would have resumed either his attacks or his flight"); *Crosby v. Monroe County*, 394 F.3d 1328, 1334-35 (11th Cir. 2004) ("Given the circumstances and the risks inherent in apprehending any suspect," officer "reasonably could have concluded that it was imperative to keep [plaintiff], who had not been entirely cooperative, completely flat and immobile until he had been successfully handcuffed"); *see also Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 588-90, 593 (7th Cir. 1997) (where plaintiff was behaving strangely, struggling and armed with two ballpoint pens, it was "reasonable" for officer to place "enough weight on [plaintiff] to keep him from rolling over and kicking"; otherwise plaintiff "could have gotten up again and would have been a danger to himself, the officers and the hotel employees").

The quantum of force applied also matters, and other Circuits have recognized the need for a plaintiff

to point to some *physical evidence* as to the level of force employed. As the Seventh Circuit observed in *Abdullahi v. City of Madison*, 423 F.3d 763, 771 (7th Cir. 2005): "The reasonableness of kneeling on a prone individual's back during an arrest turns, at least in part, on how much force is applied. Kneeling with just enough force to prevent an individual from 'squirming' or escaping might be eminently reasonable, while dropping down on an individual or applying one's full weight (particularly if one is heavy) could actually cause death." *See also Blazek v. City of Iowa City*, 761 F.3d 920, 923-24 (8th Cir. 2014) (if officers had lifted passively resistant plaintiff "off his feet, thrown him to the ground, and jumped on his back to handcuff him" without causing ankle fracture, separated shoulder and torn rotator cuff, they "would have acted reasonably or at least be entitled to qualified immunity"); *Wertish v. Krueger*, 433 F.3d 1062, 1067 (8th Cir. 2006) ("relatively minor scrapes and bruises and the less-than-permanent aggravation of a prior shoulder condition were *de minimus* injuries" that supported officer "did not use excessive force"); *Durruthy v. Pastor*, 351 F.3d 1080, 1085, 1094 (11th Cir. 2003) (officer grabbing plaintiff "from behind," pulling him "onto the ground, while struggling to pin his arms behind him and handcuff him," and kneeing plaintiff "in the back" was "de minimus" force that even if "unnecessary, plainly [] was not unlawful"). As noted, Section I.A., *supra*, here plaintiff submitted no medical evidence of any injury sustained as a result of petitioner's actions.

The Ninth Circuit panel decision here cannot be reconciled with the standards articulated by this Court in *Graham*, or the decisions of other Circuit's which reject excessive force claims premised on an officer's use of a basic safety measure to secure a suspect while handcuffing. The Ninth Circuit decision is bad law, and worse policy and requires intervention by this Court.

II. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH *EMMONS*, *KISELA* AND OTHER DECISIONS REQUIRING COURTS TO GRANT QUALIFIED IMMUNITY WHERE THE LAW IS NOT CLEARLY ESTABLISHED.

A. This Court Has Repeatedly Recognized The Importance Of Qualified Immunity To Assure That Officers Are Not Subjected To The Burden Of Litigation And Threat Of Liability When Making Split-Second Decisions Under Tense, Rapidly Evolving Circumstances In The Course Of Protecting The Public.

An officer is entitled to qualified immunity when his or her conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam). While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id*. In short, immunity protects "'all

but the plainly incompetent or those who knowingly violate the law.'" *Id*.

This Court has recognized that qualified immunity is important to society as a whole. *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015); *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 551 (2017) (per curiam). It assures that officers, when confronted with uncertain circumstances, may freely exercise their judgment in the public interest, without undue fear of entanglement in litigation and the threat of potential liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'").

As the Court observed in *Harlow*, failure to apply qualified immunity inflicts "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" 457 U.S. at 814. Those concerns are magnified in the context of use of deadly force, where by definition, an officer is confronted by the imminent threat of serious harm to himself, or to others, and where hesitation could have deadly consequences.

Indeed, this Court has repeatedly issued per curiam reversals of lower court denials of qualified immunity in deadly force cases. In doing so, the Court emphasized that such cases, which are necessarily highly fact-dependent and concern tense, hectic circumstances, require courts to closely analyze existing case law to determine whether the law was clearly established within the particular circumstances confronted by the officers in question.

In *White v. Pauly*, the Court held that an officer who arrived belatedly to the scene of an evolving firefight could reasonably rely on the actions of other officers in determining it was necessary to shoot a suspect who fired at the officers. 137 S. Ct. at 550-51. The Court observed that the highly unusual circumstances of the case should have alerted the lower court to the fact that the law governing such situations was not clearly established, and the officer was, indeed, entitled to qualified immunity. *Id*. at 552.

In Kisela v. Hughes, ___ U.S. ___, 138 S. Ct. 1148 (2018) (per curiam), the Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer who received a 911 call reporting a woman hacking a tree with a kitchen knife and acting erratically. *Id*. at 1151. Shortly after arriving at the scene, the officer saw a woman standing in a driveway. *Id*. The woman, separated from the street and the officer by a chain-link fence, was soon approached by another woman, who was carrying a kitchen knife and matched the description that had been related to the officer via the 911 caller. *Id*. With the knife-wielding woman only

six feet away from what appeared to be her potential victim, and separated by the chain-link fence, which impaired the potential victim's ability to flee and the officer's ability to physically intervene, when the woman refused commands to drop the knife, the officer fired and wounded her. *Id*.

In reversing the Ninth Circuit, the Court underscored the importance of applying qualified immunity to use of force cases, again emphasizing the highly fact-specific nature of such claims, and the relevance of the exceedingly narrow window of time in which officers usually have to make such life or death decisions. *Id*. at 1153 (observing that "Kisela had mere seconds to assess the potential danger to Chadwick"). As the Court noted:

> Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

Id. at 1153 (citing *Mullenix*, 577 U.S. at 13, 18).

In *City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500 (2019) (per curiam), the Court again reversed the denial of qualified immunity to an officer where the Circuit court had defined the right at issue at too high a level of generality, and had failed to

identify any case involving similar facts that would put an officer on notice that his or her conduct could give rise to liability. In *Emmons*, an officer sought entry into a residence to conduct a welfare check for reported domestic abuse. *Id.* at 501. The plaintiff exited the residence, ignoring the officer's command not to close the door, and attempted to run past the officer, who took him to the ground. *Id.* at 502.

In denying qualified immunity, the Ninth Circuit simply stated: "'The right to be free of excessive force was clearly established at the time of the events in question. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013).'" *Emmons*, 139 S. Ct. at 502. This Court noted that such a generalized statement of the law was improper, this was a case involving active resistance to an officer and that "the Ninth Circuit's *Gravelet-Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case." *Id*. at 503-04.

The Court emphasized that this "was a problem under our precedents":

> [W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the

> unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer. . . . [*District of Columbia v.*] *Wesby*, 583 U.S. at ___, 138 S. Ct. [577], at 581 [(2018)] (internal quotation marks omitted).

Emmons, 139 S. Ct. at 504.

This Court has repeatedly recognized the importance of qualified immunity, particularly in the context of use of force cases, as the Court observed in *White*. Nonetheless, the lower federal courts have been somewhat recalcitrant in following this Court's dictates concerning the need to apply the doctrine with rigor, particularly at the pre-trial stage, thus repeatedly requiring this Court's intervention. *White*, 137 S. Ct. at 551; *Sheehan*, 575 U.S. at 611 n.3 (collecting cases).

The same concerns for vindicating the important purposes of qualified immunity, which have led the Court to repeatedly grant review to reaffirm its jurisprudence concerning the need to define clearly established law with a high degree of specificity, similarly justify this Court's intervention in this case. When qualified immunity is improperly denied, the "social costs" outlined in *Harlow* fall disproportionately on officers. It is necessary for the Court to grant review because the Ninth Circuit's rejection of qualified immunity was flatly improper and departed from the controlling decisions of this Court.

B. No Clearly Established Law Put Petitioner On Notice That His Use Of Force Might Violate The Fourth Amendment.

As noted, this Court has repeatedly admonished the lower appellate courts that other than in an obvious case, "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citing *Mullenix*, 577 U.S. at 13); *White*, 137 S. Ct. at 551. Here, no existing precedent squarely governs the facts confronted by petitioner so as to put him on notice that his use of force might be deemed improper under the Fourth Amendment.

As Judge Collins noted in his dissent, the panel majority did exactly what this Court decried in *Emmons*—defined the underlying right at a high level of generality, i.e., the right to be free of excessive force, and held that a case involving use of force against an unarmed, non-dangerous, compliant suspect was sufficient to give petitioner fair warning that his use of force under the particular facts of this case could give rise to liability for purposes of denying qualified immunity. (Pet. App. 38-40.)

Yet, assuming one must look at Ninth Circuit law to determine whether the law was clearly established with respect to petitioner's use of force for purposes of qualified immunity (an issue the Court has left open)[1],

[1] This Court has noted that "[w]e have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity." *District of Columbia v.*

the relevant case law makes it clear that qualified immunity is appropriate.

The only case cited by the majority as rendering the law clearly established, was *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000). In *LaLonde*, while responding to a noise complaint, a police officer first tried to pin down an unarmed LaLonde and then sprayed him in the face with pepper spray. 204 F.3d at 952. A different officer, while handcuffing LaLonde, "deliberately dug his knee into LaLonde's back with a force that caused him long-term if not permanent back injury." *Id.* at 959 n.17; *see also id*. at 952.

But as the dissent noted, *Lalonde* is materially different than the present case. In *LaLonde*, the officers were responding merely to a neighbor's complaint that LaLonde was making too much noise in his apartment (204 F.3d at 950-51), whereas petitioner and the other officers were responding to an alleged incident of domestic violence that, according to the police dispatch he heard, reportedly included the suspect's use of a chainsaw to break something in the house. LaLonde was also unarmed, holding only a sandwich (204 F.3d at 951), while plaintiff was carrying a pick tool when he first approached the officers and, after putting that down, he still had a long knife protruding from his left

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Wesby, 583 U.S. __, 138 S. Ct. 577, 591 n.8 (2018); *see also Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) (reserving question whether court of appeals decisions can be a "dispositive source[s] of clearly established law"); *Emmons*, 139 S. Ct. at 503 (assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity).

pocket—the side where Rivas-Villegas placed his knee. As Judge Collins observed:

> There is a very significant difference between using a knee to hold down a person who is suspected of a serious violent crime who is armed with a knife (as in this case) and using a knee to hold down a noisy neighbor armed with nothing more than a sandwich (as in *LaLonde*).

(Pet. App. 39.)

Application of this Court's requirement for factual specificity in the context of excessive force claims makes it clear that petitioner is entitled to qualified immunity. There was no Ninth Circuit case remotely suggesting petitioner Rivas-Villegas' application of force—placing his foot on plaintiff's back to hasten his lying on the ground and putting a knee on plaintiff's left side for approximately eight seconds during the handcuffing process to keep him immobile and prevent him from reaching the knife in his pocket—could constitute excessive force.

Moreover, as noted (Section I.B., *supra*), a review of similar cases in other Circuits would have indicated that the level of force employed was manifestly reasonable.

Indeed, given that two of the four judges who have analyzed the use of force here concluded that it was reasonable as a matter of law, it cannot seriously be contended that the issue is "beyond debate" or that petitioner was "plainly incompetent" or "knowingly

violat[ing] the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Under the decisions of this Court, the Ninth Circuit was required to grant petitioner qualified immunity. It is therefore necessary for the Court to grant review to compel compliance with precedent and reinforce the important public policies served by qualified immunity.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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