A Rising Tide against Qualified Immunity?

Friday, May 14, 2021

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by

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League of California Cities
City Attorney's Conference
May 14, 2021

I. INTRODUCTION

As a result of recent high-profile incidents involving uses of force, in general, and deadly applications of force, in particular, there has been a heightened call to re-examine best practices for policing. Bills have been introduced which call for greater oversight and review, a re-allocation of policies and priorities, and systemic reforms to law enforcement. Some of these measures call for restrictions on the use of "less-lethal" weapons, stricter examination of potential criminal charges for the use of force, the appointment of special prosecutors and/or review committees, the increased use and transparency regarding body-worn cameras, limitations on various compliance techniques, and a general "de-militarization" of federal, state, and local law enforcement.

However, by far, one of the most hotly-debated topics calls for limitations on the doctrine of qualified immunity. Such action – which has already been implemented by various municipalities – is short-sighted, will result in excess judgments (resulting in higher taxes, decreased services, a profound impact on the secondary insurance market), will have an adverse impact on recruitment and retention) and is not reasonably calculated to obtain the desired results.

II. A BRIEF OVERVIEW OF QUALIFIED IMMUNITY

It must be remembered that qualified immunity is a judicially created doctrine which was grounded in the recognition certain government officials must make discretionary decisions as part of their job functions. These officials sometimes do not have clear guidelines as to what actions may be unconstitutional or may be subsequently determined to be unconstitutional. The qualified immunity doctrine provides important safeguards and protections to these governmental employees in

the event that their decisions were not demonstrably unconstitutional at the time they occurred. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

The scope and reach of qualified immunity has continued to evolve and expand since the time of its inception. It is intended to apply if the mistake was *reasonable*. *Davis v. Scherer,* 468 U.S. 182 (1984). It recognizes that line officers should be held to the "reasonable person standard" and are not expected to be law professors. *Ward v. San Diego County,* 791 F.2d 1329 (9th Cir. 1986). It is designed to be sweeping in scope, designed to immunize all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs,* 475 U.S. 335 (1986).

The policy reasons underlying the implementation of the qualified immunity doctrine were obvious from its inception. The main policy reason being that it would be unjust to hold governmental official liable *for a federal civil rights violation* when they are not on notice that what they were doing may be unconstitutional. As such, the doctrine protects those who are called upon to make critical (and sometimes split-second) decisions.

Under existing law, qualified immunity only applies when the constitutional right at issue was not clear at the time the government official acted. It does *not* apply to any situation in which a "reasonable person would have known" there was a constitutional violation and it does *not* protect government employees from criminal negligence, criminal actions, or state liability. And, therefore, by definition, it does *not,* as critics would claim, protect "bad cops."

Finally, and importantly, qualified immunity applies equally to all governmental employees *not just law enforcement officers.* It has been utilized in employment law cases, governmental whistleblower cases, and cases involving schools and social services. This reality, however, is often overlooked by those targeting qualified immunity in the context of police reforms.

III. JUDICIAL ATTACKS ON QUALIFIED IMMUNITY

In late 2020, the law enforcement and municipal defense bars all held their collective breaths as no less than half a dozen Petitions for Certiorari involving qualified immunity to some extent were being considered by the United States Supreme Court. Long standing civil rights advocates associated in all numerous cases in an attempt to generate publicity, raise public awareness of the issue, and force this issue to the legal forefront of all pending cases. Virtually every civil rights lawsuit contained an argument calling for the end to the doctrine of qualified immunity.

Our law firm was involved in the *Salazar* matter, one of the cases in which the plaintiffs launched an attack on the qualified immunity doctrine. See Appendix A. After many sleepless nights, and as the Supreme Court's term came to an end, governmental entities all breathed a collective sigh of relief when the Supreme Court failed to grant certiorari on any of these cases.

Moreover, with Former President Trump's appointment of *three* justices to the High Court, all of whom tend to lean conservative, the prospect of a judicial ruling abrogating the doctrine of qualified immunity appears less and less likely.

That being said, while the composition of the Ninth Circuit has also drifted more right of center, the current justices share remarkably diverse views with respect to many issues, not the least of which is the continuing viability of the qualified immunity doctrine. Although it is *extremely* unlikely that the Ninth Circuit would attempt to completely disband the qualified immunity doctrine (and even less likely that such an attempt would survive Supreme Court review), smaller attempts to chip away at various police protections seem inevitable.

As a result, we are advising all of our clients with civil rights litigation to prepare for the long-haul. We anticipate having to fight civil rights lawsuits at the trial level, but also at the Ninth Circuit and Supreme Court level.

In addition, not only should municipalities be ready to vigorously defend qualified immunity cases, they should also seek out law enforcement cases which do not involve the application of force (i.e., unlawful detention claims, stale warrants, and search and seizures claims) as well as non-law enforcement cases which might provide an increasingly conservative majority on the Supreme Court the opportunity to re-affirm the doctrine of qualified immunity in a non-law enforcement case (i.e., claims against teachers, social workers, mental health clinicians, defendants in employment litigation, and governmental whistle blowers).

IV. LEGISLATIVE BILLS REGARDING POLICE REFORM

With an even 50/50 split in the Senate and no definitive action on the filibuster rule, the prospects of federal legislation seeking to abolish qualified immunity at the national level seems remote. That being said, multiple states and municipalities have passed legislation eliminating qualified immunity. (These locations – which include Colorado, Connecticut, New Mexico, and New York City – will be discussed in the next section.)

In addition, although there is no bill pending in California which would abolish qualified immunity *currently*, there are a number of reform bills which are present and which are instructive on the nature and extent of the proposed law enforcement amendments. These bills include the following:

AB 66 (Gonzalez)

This bill called for the complete ban on tear gas and restrictions on rubber bullets at any assembly, protest, demonstration, or other gathering of people regardless of the nature of magnitude of the threat. It served to effectively remove all less lethal options from officers during riots and reduce an agency's ability to respond due to liability and dangerous conditions. Result: Bill stalled at the end of the Legislative Session.

SB 629 (McGuire)

This bill called for prohibiting peace officers from intentionally interfering with or obstructing the media even when such actions would have been within the course and scope of their duties. It broadly defined media as anyone who "appears to be engaged in gathering, receiving or processing information" and who had a business card. It would have allowed for media overstepping during volatile situation with no way to control. Result: Gov. Newsom vetoed sating, "Law enforcement agencies should be required to ensure journalists and legal observers have the ability to exercise their right to record and observe police during protests and demonstrations. But doing so shouldn't inadvertently provide unfettered access to a law enforcement command center."

SB 731 (Bradford)

This bill implemented a system to decertify peace officers and created a civilian-majority decertification arm of POST which would make recommendations that could include lifetime decertification. This bill also authorized retroactive

investigation of closed cases of alleged misconduct and eliminated certain immunity provisions for peace officers. Result: Denied before the end of the Legislative Session, but it will be back this year.

AB 1506 (McCarty)

Required the DOJ to review use of force polices and allow a "State Prosecutor" to conduct investigations into officer-involved-shootings (OIS). This State Prosecutor is authorized to investigate and gather facts relating to an OIS, prepare and submit a written report, and initiate and prosecute the officer. Result: Governor Newsom signed into law on 9/30/20. See Gov't Code 12525.3.

SB 776 (Skinner)

Expanded on SB 1421 requiring more peace officer records to be released (even for unsustained findings). It also required retention of complaints, investigations, and evidence indefinitely regardless of whether unfounded or frivolous. The bill would require records subject to disclosure to be provided at the earliest possible time, but no later than 45 days after request, and would impose a civil fine of up to $1,000 per day for each day beyond 30 days that the records were not disclosed. It would have mandated the retroactive disclosure of thousands of files with no regard for workload or cost with cities and counties to bear the cost of implementation. Status: A compromised version passed in the assembly but failed to be taken up in time in the Senate by the deadline. It is anticipated to return this year.

AB 1196 (Gipson)

Prohibits law enforcement from using choke hold, carotid restraining, or techniques that create a substantial risk of positional asphyxia. This bill was an obvious reaction to the George Floyd incident. Law enforcement requests for an amendment that would allow for use of these techniques in self-defense was rejected. Result: Governor Newsom signed into law 9/30/20.

SB 480 (Archuleta)

Prohibits California law enforcement officers from wearing uniforms substantially similar to United States Armed Forces (i.e., no camouflage). Defines "substantially similar" as resembling an official uniform of the United States which would cause an ordinary reasonable person to believe that person wearing the uniform is a member of the United States Armed Forces or State Active Militia. Uniforms would not be deemed "substantially similar" if they contained at least two of the following three components: a badge or star mounted on the chest area, a patch on one or both sleeves displaying the insignia of the employing agency, and the word "Police" or "Sheriff" prominently displayed on the back or chest of the uniform. Result: Governor Newsom signed on 9/30/20.

V. VOLUNTARY ABANDOMENT OF QUALIFIED IMMUNITY

Despite the decreased likelihood of judicial changes and the uncertain nature of any legislative changes that attack the qualified immunity doctrine *directly*, many governmental entities are *voluntarily choosing* to forego the protections of qualified immunity.

Colorado

On June 19, 2020, less than one month after George Floyd's death, Colorado became the first state to end qualified immunity. This bill was part of a sweeping police accountability bill that was passed in the wake of nationwide protests over unfair treatment of racial minorities by law enforcement and was sparked by the death of George Floyd.

Connecticut

On July 31, 2020, just a few weeks later, Connecticut Governor Ned Lamont signed an omnibus reform bill intended to bolster police accountability, HB 6004. The most contested provision of the new law was its section limiting governmental immunity for police officers. A proposed amendment seeking to strike the qualified immunity provision was defeated by a single vote.

New Mexico

On April 4, 2021, New Mexico Governor Michelle Lujan Grisham signed the New Mexico Civil Rights Act – also known as HB 4 – advancing fair and equal treatment under the law. The law was touted as a way to hold officers liable who knowingly break the law.

New York City

Although only three states have voted to reject qualified immunity, on March 29, 2021, New York City became the first city in the United States to end qualified immunity. With a population of nearly 8.5 million people, New York City is the largest in the country; and the NYPD is the largest police force in the United States with over 36,000 officers.

Impact of Voluntarily Abandoning Qualified Immunity

In addition to these legislative changes, many municipalities are grappling with the decision about whether to eliminate – or to refuse to assert – the defense of qualified. Such a decision should not be made lightly for many reasons.

First, municipalities are stewards of the public funds which are entrusted to them. Each municipality has a duty to ensure that these funds are safeguarded and used for the public good. Any decision to opt out of a valid defense – particularly one as vibrant as qualified immunity – would necessarily have a deleterious impact on the fiscal condition of the municipality.

In addition, many if not most municipalities have contracted for insurance coverage for excess awards. Choosing not to assert a viable defense for social, moral, or political reasons could be seen as breach of the contractual relationship between the municipality and the excess carrier. Moreover, even if these actions did not constitute a breach *per se*, it would a dramatic impact on the City's insurability and, assuming coverage could even be obtained, on the rates for such coverage.

Finally, a decision to decline to assert a viable defense could result in a dramatic conflict of interest between law enforcement officers and their departments. As long as officers have the potential to be required to pay punitive

damage awards, they have a vested interest in using every available arrow in their quiver – which would include asserting a defense of qualified immunity – in the defense of their case.

To illustrate the magnitude of such a problem, imagine a scenario in which two dozen officers respond to a hostage situation, each are named in a 1983 lawsuit, and damages are claimed against each officer. Now imagine that the County or Local Government declines to assert a defense of qualified immunity. Such a decision could trigger claims of an irreconcilable conflict of interest, triggering the need for 25 different defense firms to litigate the case. The defense costs alone would be monumental.

VI. WHAT THE FUTURE HOLDS

The simple fact is that qualified immunity serves an important and legitimate purpose. Contrary to the talking points from those seeking police reform, it does not "immunize bad cops." Rather, it only applies when the constitutional right was not clear at the time the government employee was forced to make a decision without any clear direction about what was and was not unconstitutional. It does *not* provide immunity for those who knowingly violate the law.

The loss of such protection, however, would have a chilling effect on police officers. It would limit their ability and willingness to respond to critical incidents and place themselves in harm's way when serving the public. It would hinder efforts to enhance the hiring and retention of law enforcement officers.

Additionally, abolishing qualified immunity would result in higher costs of government due to increased financial risks, vicarious liability, and litigation costs. It could create conflicts between governmental employees and the municipalities,

excess insurers and the municipalities, and taxpayers and the municipalities. Each such conflict could result in increased litigation and would come at a substantial cost.

We encourage our clients to monitor changes to the law with respect to qualified immunity, prepare for lengthy and protracted battles, and to seek out cases to affirmatively press for positive rulings from the appellate courts. In addition, we strongly advise against any governmental entity from purposefully refusing to avail itself of the much-needed protections that result from the qualified immunity doctrine.

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APPENDIX "A"

No. _____

In The
Supreme Court of the United States

DEPUTY SHANNON DEASEY, DEPUTY PETER GENTRY, DEPUTY GARY BRANDT, SGT. MIKE RUDE, AND COUNTY OF SAN BERNARDINO,

Petitioners,

v.

DANIELLA SLATER AND DAMIEN SLATER (individually and as successors in interest, by and through their guardian ad litem Sandra Salazar), TINA SLATER AND DAVID BOUCHARD,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As this Court recently explained in *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-590, 199 L.Ed.2d 453 (2018), "[u]nder our precedents, officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' . . . [¶] To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. . . . [¶] The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' This requires a high 'degree of specificity.' " (Citations omitted.)

The Ninth Circuit holds that the law is "clearly established" if there is a "sufficiently analogous" case to the one before the Court, and it applied that standard to the present case in determining that the district court erred in finding that Petitioners were entitled to qualified immunity. In contrast, the Seventh Circuit requires more, that there be a "closely analogous case," a position explicitly rejected by the Ninth Circuit.

This petition presents the question whether, for purposes of qualified immunity, a merely "sufficiently analogous" case is enough to show that the law is "clearly established", or if something more is required, i.e., a "closely analogous" case finding the alleged violation unlawful?

PARTIES TO THE PROCEEDINGS

Petitioners Deputy Shannon Deasey, Deputy Peter Gentry, Deputy Gary Brandt, Sgt. Mike Rude and the County of San Bernardino were the defendants in the district court proceedings and appellees and cross-appellants in the court of appeal proceedings. Respondents Daniella Slater and Damien Slater (individually and as successors in interest, by and through their guardian ad litem Sandra Salazar), Tina Slater, and David Bouchard were the plaintiffs in the district court proceedings and appellants and cross-appellees in the court of appeal proceedings.

RELATED CASES

Daniella Slater, et al. v. Deputy Shannon Deasey, et al., San Bernardino County Superior Court Case No. CIVDS 1722045.

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PETITION FOR WRIT OF CERTIORARI

Deputy Shannon Deasey, Deputy Peter Gentry, Deputy Gary Brandt, Sgt. Mike Rude and the County of San Bernardino 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 BELOW

The Ninth Circuit's opinion is reported at *Slater v. Deasey*, 776 F. App'x. 942 (9th Cir. 2019) and reproduced at App. 12. The Ninth Circuit's order denying Petitioners' motion for reconsideration and rehearing *en banc* and dissenting opinion is reported at 943 F.3d 898 (9th Cir. 2019) and reproduced at App. 48. The Ninth Circuit's amended opinion is reported at *Slater v. Deasey*, 2019 U.S. App. LEXIS 35870 (9th Cir. 2019) and reproduced at App. 1. The opinion of the District Court for the Central District of California is reproduced at App. 19.

JURISDICTION

The court of appeal entered judgment on June 20, 2019. The court of appeal denied a timely petition for rehearing *en banc* on December 3, 2019, with four judges dissenting. The court of appeal filed an amended opinion on December 3, 2019. This Court has

jurisdiction under 28 U.S.C. § 1254(1). This petition is filed under this Court's Rule 11.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983:

> 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.

U.S. Constitution, Amendment IV:

> 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.
>
> U.S. Constitution, Amendment XIV, Section 1:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents Daniella and Damien Slater (by and through their Guardian Ad Litem Sandra Salazar), the children of Joseph Slater ("Slater"), and Tina Slater and David Bouchard, the parents of Slater, commenced this action in the district court on May 27, 2016.

The district court had original subject matter jurisdiction of Respondents' Fourth and Fourteenth Amendment claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4), because those claims arose under the Constitution of the United States and sought to recover damages under an Act of Congress providing for the protection of civil rights, i.e., 42 U.S.C. § 1983. The district court had supplemental subject matter

jurisdiction over Respondents' state-law claims pursuant to 28 U.S.C. § 1367(a).

On August 4, 2017, the Court granted Respondents' motion for leave to amend their complaint, which the Respondents filed on August 7, 2017.

In their first amended complaint, Respondents asserted federal claims against the Petitioners under 42 U.S.C. § 1983 on a survival basis for alleged violations of constitutional rights of Slater: unreasonable seizure (detention), excessive force, and deliberate indifference to Slater's medical needs. Respondents asserted a claim against Petitioners under 42 U.S.C. § 1983 for violation of their rights to familial relationship with Slater. Finally, Respondents asserted state claims against Petitioners for wrongful death by negligence in force and restraint upon Slater, and survival claims for assault and battery upon Slater.

On August 14, 2017, Petitioners filed their motion for summary judgment. Respondents filed their opposition to defendants' motion on August 25, 2017, and Petitioners filed their reply on September 1, 2017.

At the September 11, 2017 hearing on Petitioners' motion for summary judgment, the district court granted the motion as to Respondents' first claim for unreasonable seizure (detention) and third claim for deliberate indifference to Slater's medical needs. The district court took under submission Petitioners' motion on Respondents' second claim for excessive force and fourth claim for violation of rights to familial

relationship, pending supplemental briefing from the parties regarding qualified immunity.

On September 25, 2017, the district court granted summary judgment on the merits of Petitioners' pre-confinement force (pepper spray, knee strikes, and first hobble). [App. 20-21, 29]. As to the in-car restraint force (second and third hobbling, positioning) the district court determined that there was a triable issue of material fact which precluded granting qualified immunity to the Petitioners under the first prong of *Saucier v. Katz*, 533 U.S. 194, 201 (2001), as to whether, based on the facts "[t]aken in the light most favorable to the party asserting the injury . . . the officer's conduct violated a constitutional right." [App. 33-34]. However, the district court granted Petitioners' motion for summary judgment as to Respondents' remaining federal claims based on the second prong of qualified immunity under *Saucier*, *supra* [App. 36-38, 40-42], and dismissed Respondents' supplemental state law claims without prejudice to refiling them in state court. [App. 42-43].

Judgment was entered on October 11, 2017 [App. 45-47] and the Respondents appealed. Petitioners filed a cross-appeal.

In its memorandum opinion filed on June 20, 2018, the Ninth Circuit panel affirmed the conclusion of the district court that the application of the first hobble by the Petitioners did not constitute excessive force. [App. 16]. Likewise, the Ninth Circuit panel affirmed the grant of summary judgment as to the Fourth and

Fourteenth Amendment claims against Petitioners for denial of medical care. [App. 18].

However, the Ninth Circuit panel reversed the district court and denied qualified immunity to Petitioners as to the second prong of qualified immunity. The Ninth Circuit relied primarily upon *Drummond ex. rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003), in determining that the actions of the Petitioners in the application of the second and third hobbles on Slater violated clearly established law [App. 15-17].

On December 3, 2019, the Ninth Circuit denied Petitioner's petition for reconsideration and for rehearing en banc. [App. 48-50]. Judge Daniel P. Collins authored a very lengthy dissent to the denial of the petition for rehearing, which was joined by three other judges. [App. 50-75]. Also on December 3, 2019, the Ninth Circuit panel filed an amended memorandum opinion. [App. 1-8].

STATEMENT OF THE FACTS

On April 15, 2015, the San Bernardino County Sheriff's Department ("SBSD") received a call around 1:00 a.m. from a Valero gas station clerk in Highland, California. The clerk reported that a suspect was vandalizing the property by pulling wires out of the gas station which caused the gas pumps to stop working. The clerk gave a description of the suspect to the SBSD.

SBSD dispatch relayed this information over the radio and uniformed SBSD Deputy Shannon Deasey ("Deasey") responded to the location about 30 seconds later in a marked patrol car.

Much of the events which follow were captured on video from security cameras at the gas station and are a part of the record.

Deasey was the first deputy to arrive on scene. Deasey saw a man who matched the description of the possible vandalism suspect given by the gas station clerk. The suspect was crouched down by some logs and tossing them around in front of the store. Deasey recognized the suspect as Slater. Slater was known to Deasey and other SBSD deputies as a person with a reported history of drug abuse, dangerous behavior, and one who had sometimes engaged in violent behavior toward law enforcement and others.

Deasey approached Slater, identified himself, and asked Slater what he was doing. Slater glanced back at Deasey, said nothing, and returned his focus to a large display screen at the gas station. Deasey took ahold of Slater's right hand and asked Slater to put his left hand behind his back, and Slater complied. Deasey then handcuffed Slater behind the back and walked Slater over to his patrol car and opened the door. Deasey asked Slater to have a seat, and Slater sat down.

At this point, Slater repeatedly denied that Deasey was a police officer, and stated that Deasey was going to kill him. Deasey repeatedly assured Slater

that he was not trying to kill or harm him, and would try to get Slater some help at a local hospital.

Slater was sitting in the back seat of Deasey's patrol vehicle, facing outward toward the rear passenger door, with his legs hanging outside the vehicle and facing a little bit toward Deasey, and with his chest area facing towards the outside of the door.

Deasey gave Slater over half-a-dozen increasingly loud commands to slide into the car. Deasey also tried to push Slater into the car. Slater failed to comply with any of Deasey's commands, and physically pushed back against Deasey's efforts to force him into the car. Deasey repeatedly warned Slater that if he did not slide into the car, Deasey would pepper spray him. Slater's feet were pointed outside of the vehicle as he was kicking his feet toward Deasey and trying to force his way out of the vehicle, while Deasey was trying to keep Slater inside the vehicle despite Slater's physical resistance. Slater then kicked Deasey on his left shin. Deasey believed that Slater was a threat to his safety if Slater was able to stand and further attack Deasey with his kicking. In response, Deasey deployed his pepper spray at Slater's facial area.

Slater then became more aggressive in his movements: flailing in the back seat, screaming, and pushing his feet and torso out of the patrol car with even greater force. Slater's efforts prompted Deasey to step back slightly. As Slater was actually forcing himself out of the vehicle, Deasey deployed a second burst of pepper spray.

When it appeared to Deasey that he could not overcome Slater's efforts to force his way out of the patrol car, Deasey used Slater's momentum to pull Slater out of the car to try to regain control of Slater by restraining him on the ground. As Slater came out of the car and bumped Deasey, Deasey held onto Slater's left shoulder and they both went to the ground. Slater initially went down to his knees, then onto his right hip area. Deasey held Slater on his left shoulder while Slater was on his right hip and his right shoulder.

Deasey struggled to restrain Slater on the ground, trying to keep Slater from getting up and running off. While Slater's right shoulder and right hip were on the ground, and Deasey was struggling to restrain Slater, Slater was kicking his feet back toward Deasey. This caused Deasey to believe Slater was trying to kick him, so Deasey deployed a third burst of pepper spray.

Deasey used his hand to bat away Slater's backkicks toward him. In response to Slater's continued resistance, Deasey deployed a knee strike to Slater's upper left thigh/buttocks area to try to get Slater to stop kicking at him. Deasey then radioed that he had a suspect who was resisting, that it was Slater, and called for medical aid to come to the scene.

Uniformed SBSD Deputy Pete Gentry ("Gentry") was the second officer to arrive on scene. When Gentry arrived, he saw Deasey in the parking lot on his knees restraining Slater on the ground: Slater was facing the gas station, on the ground and on his right side, with

his hands handcuffed behind his back, and his feet moving back and forth.

When Gentry went to assist Deasey, Gentry suggested getting a hobble. While Deasey went to get a hobble, Gentry grabbed ahold of Slater's feet and moved up toward Slater's waist. Slater's chest was still up off the ground and Slater was still on his side.

When Deasey came back with a hobble, Slater then forced his body upward, causing Gentry to lose his balance and fall forward toward Slater's upper body. Gentry came to rest with his knee across Slater's shoulder blades. Slater was prone on his stomach with his chest flat down on the ground for approximately 40 seconds while Gentry had his knee across Slater's shoulder blades. When Gentry removed himself from being in contact with Slater, Slater laid on his right side, with his chest no longer on the ground.

Watch commander uniformed SBSD Sergeant Mike Rude ("Rude") was the next officer to arrive on scene. When Rude first approached Slater, Slater was on the ground lying on mostly his right shoulder and right hip/right leg area. Gentry was above and behind Slater's left shoulder and neck area; and Deasey was above Slater's right leg area with his hand on Slater's left shoulder.

Rude assisted Deasey with putting the first hobble on Slater's legs. Rude positioned himself on the left side of Slater toward his feet, grabbed the hobble on Slater's left side where it seemed to be hung up on Slater's pants, and moved it above Slater's pants.

When Slater was hobbled on the ground, he was still on his right hip and right shoulder, with his legs only 10 to 20 degrees from being straight out.

Once Slater's legs were hobbled, the three deputies then removed themselves from holding Slater on the ground, and Slater sat upright on his own. Slater remained in that position until fire paramedics arrived. While seated upright, Slater was looking left to right and was twisting the upper part of his body slightly left to right. Slater was saying names and numbers that seemed random to the deputies.

The last officer to arrive on the scene was uniformed SBSD Deputy Gary Brandt ("Brandt"). When Brandt arrived, Gentry, Deasey, and Rude were with Slater, who was sitting up.

While Slater was seated upright with the four deputies nearby, Cal Fire paramedics arrived. Cal Fire checked on Slater and reported no medical emergency at that time. An American Medical Response ("AMR") ambulance also arrived on scene, and Cal Fire asked them to stand by.

To decontaminate Slater from the pepper spray, Gentry and Rude carried the handcuffed and hobbled Slater over to the air and water station at the gas station to try to wash the pepper spray off Slater. Brandt followed them, while Deasey left to decontaminate himself inside the gas station. During this time, the driver's side rear door of Deasey's vehicle remained open, as it had been since Slater's initial resistance to Deasey's efforts to place him in the back.

During the approximate 1 ½ minutes of decontamination, Gentry held Slater from behind and attempted to pull Slater's head up so that Rude could run water over Slater's face. Slater was trying to pull his head down and trying to get away from Gentry. While Rude was attempting the decontamination, Slater was moving around, screaming and yelling, while the water was running over him. During this process, Rude was able to get some water on Slater's face.

When Deasey came out of the gas station, he saw Slater being decontaminated at the water station. Slater was sitting up with his legs crossed behind him, yelling out numbers and a female's name.

After the decontamination, Gentry and Brandt took Slater back over towards Deasey's vehicle to be placed inside. Rude followed. As they carried Slater back to Deasey's patrol car, Brandt and Gentry had one arm on each side and up underneath an armpit of Slater. Slater was upright with his torso at about a 45 degree angle relative to the deputies that were carrying him. Slater's legs were as if he were sitting on his knees, even though they hung largely off the ground. Slater's feet and lower legs were straight out at a roughly 90 degree angle from his thighs, and his feet were slightly angled toward his hands.

Slater was then placed in Deasey's patrol car head first through the rear driver's side door, chest down at first, with his head initially pointed toward the passenger side. As they were trying to put Slater in the vehicle, Slater arched his body and started kicking at them,

despite the hobble restraint. As Brandt and Gentry pushed Slater in, Rude pulled Slater in by his shirt area through the rear passenger door of Deasey's car. Brandt and Gentry eventually put Slater in the back of Deasey's patrol car and shut the door.

When Slater was initially put in the car, he was lying flat on his stomach for about three seconds. Before the deputies closed the driver's side rear door, they moved Slater onto his right side, so that the front of his body was facing the cage of the patrol car. After Slater was placed back in the vehicle, he moved himself into an upright seated position. Once seated upright, Slater began flailing all over in the back seat: sitting up, changing from the right to left side, sitting up, laying on his left side, laying on his right side, rocking and slamming his torso back and forth against the vertical part of the backseat, and yelling and calling out numbers.

At about this time, Cal Fire advised the AMR ambulance that they could leave. However, Cal Fire remained on scene.

While Slater continued these thrashing movements and yelling in the back seat area, one of the officers stated that Slater needed to be seat-belted. Gentry entered the car from the passenger's side rear door, and then the driver's side rear door was opened by Brandt, who tried to pass the seat belt to Gentry so Gentry could connect it. Slater leaned away from Gentry and attempted to go out the driver's side rear door. In response, Gentry tried to pull Slater back toward

him from the passenger's side. At one point they were able to get Slater back inside the vehicle, closer to the center, and the driver's rear door was closed; but Slater then pushed himself off the inside of the driver's side rear door and slid partially out of the car through the open rear passenger side door.

Slater slid out head first and approximately half of his body length, from the waist up, was out of the car on the rear passenger side at this point. Slater's head was close to the ground, but did not strike it. As Slater tried to force his way out of the patrol car while handcuffed and hobbled behind his back, Gentry and Brandt lifted Slater and put him back into the rear of Deasey's patrol car. Slater was facing down through the rear passenger door of the car toward the driver's side rear door as they lifted him back inside.

When the deputies placed Slater inside the back seat of Deasey's patrol car, Slater was canted onto his left shoulder, left hip, and facing the back of the cage. Gentry saw Slater arch his back by pulling his upper body toward his feet, like a bow and arrow, and try to lift his head up at the same time: pulling the front of his torso away from the seat. Slater then resumed flopping around, moving back and forth, kicking, and screaming in the back seat. Slater still had only one hobble on him, but there appeared to be enough slack in the connection with his handcuffs to allow Slater to keep his legs at greater than a 90 degree angle relative to the back of his buttocks.

Deasey believed it was Gentry who was on the passenger side and stated they should probably put a second hobble on Slater because he was kicking at the window and pushing on it while lying on his side (which could harm Slater or the deputies if broken). Approximately one minute after Slater was put back in the car, Brandt went to his vehicle, got another hobble, and gave it to Gentry. Gentry opened the driver's side rear door to apply a second hobble to Slater, who was still laying partially on his stomach and partly on his side. Gentry's plan was to try to further restrict Slater's leg movements by bending his legs farther back, closer to the cuffs and Slater's backside.

To attach the second hobble, Gentry put his left foot inside of the driver's side rear compartment of the car where someone would put their feet. Gentry then reached over Slater with his hands to Slater's feet and held onto them. While Gentry was applying the second hobble, he was leaning over Slater's torso; however, Gentry's torso was not touching Slater's torso during the second hobble application. Gentry may have had some contact against Slater's back with his right knee, which was touching Slater's left rib area, underneath the armpit, for less than 15 seconds. However, Slater was on his side at this point; he was not chest-down nor flat on the seat.

Gentry attached the second hobble by sliding its loop through the first hobble that was down toward Slater's feet, and passed it through the cage area to Deasey, who was on the other side of the cage, leaning into the car from the now-open driver's side front door.

While Gentry was applying the second hobble, Slater continued to resist and moved to push himself head-first out of the rear driver's side door of the car. When Gentry finished attaching the second hobble, there was roughly a 90 degree angle from the back of Slater's thighs to the back of his calves. It took Gentry about 45 seconds to attach the second hobble because Slater was yelling numbers and flailing about in the back seat, kicking his feet back and forth, kicking them toward the window, and pressing them on the window.

At this point, Brandt, who was standing at the driver's side rear door, put his right foot against the top of Slater's left shoulder, near the top of the shoulder blade, pressing sideways to prevent Slater from successfully pushing his way back out of the patrol car again, as Gentry was leaning into the vehicle and over Slater to attach the second hobble. Slater remained on his left side, with his head pointed toward the rear driver's side door, his face pointed forward toward the cage of the patrol car, and his bent knees pointed toward the passenger side. At least half of Slater's face was then visible to the deputies.

When Gentry passed the second hobble through to Deasey, it was not long enough to connect to the front driver seat hook. There was then a discussion about extending the second hobble to the exterior of the vehicle where it could be secured.

Brandt kept his right foot placed against the top of Slater's left shoulder for approximately 1 minute

and 10 seconds while Deasey was attaching the third hobble, and then removed his foot.

During the application of the second and third hobbles, Slater continued to thrash around on the back seat, laying on his side, screaming and yelling out numbers.

Deasey attached the third hobble to the second hobble, and looped it through the cage in order to extend the hobble to the exterior of the vehicle to further secure Slater from thrashing, resisting, and/or trying to flee from custody. It took approximately 86 seconds for the second and third hobbles to be applied.

Throughout the deputies' efforts to put a handcuffed, rear-hobbled Slater in the back of the patrol car, fire paramedics and medical personnel were standing nearby. Slater did not appear to them to be in any physical or respiratory distress, nor to need any medical attention.

After the third hobble was attached, Brandt shut the driver's side rear door. Slater was now in the back seat canted to the left with a portion of his stomach on the seat, but not flat on his stomach, and his feet were facing toward the back rest portion of the back seat. After the second and third hobbles were attached, Slater's legs were bent at the knees and bent behind him; his feet were about a foot to a foot and a half from his buttocks, and his legs were positioned in a roughly 45 degree angle relative to his backside. The third hobble limited the movement of Slater's legs, but did not

keep Slater's legs from moving; Slater could move his feet back and forth in a 5 to 6 inch range.

After the door was closed, deputies started looking into the vehicle through the windows and realized that Slater was not moving around anymore, and some of them wondered if he may have stopped breathing. Deputies also saw a small amount of what appeared to be vomit on the seat close to Slater's face.

In response to seeing Slater's abrupt change, and approximately 40 seconds after the door had been closed, Gentry opened the door. While positioned outside of the patrol car, Gentry shook Slater by moving his hands up and down between Slater's shoulder blades, in order to see if Slater was responsive. At that point, Slater took two deep breaths, and his head slightly moved up to the right and toward the back of the front seat. Other than those two deep breaths, Gentry did not see Slater otherwise respond to his attempt to wake him.

Believing Slater may be in need of medical attention, the deputies began removing Slater's hobble connections to the patrol car in order to remove him from the back seat. Slater was removed from the back seat on the passenger side essentially feet first. Once outside the vehicle, Slater was put on the ground on his left side. Slater was unhandcuffed, the hobble on his legs was unfastened, and nearby medical aid was summoned to treat Slater.

Cal Fire Captain Kevin Merrill radioed a dispatcher to start another ambulance to the scene. Fire

department personnel nearby started tending to Slater, and Gentry and Brandt heard a statement by one of the firefighters that there was a pulse. Initially, Cal Fire paramedic Todd Beard was able to locate a pulse on Slater; but when he checked Slater for a pulse a second time he was unable to locate one. Shortly thereafter, Slater was attached to an ECG heart monitor, and was found to be pulseless (asystole) and not breathing; CPR was started.

A different AMR ambulance arrived on scene. AMR Paramedic/EMT Steven Vallez took over performing CPR on Slater within a minute after his arrival. Slater was put in the ambulance and Vallez continued CPR on Slater until their arrival at St. Bernardine's Medical Center in San Bernardino.

After almost 18 minutes of medical aid at the scene, Slater was then transported to a local hospital. Slater was then pronounced dead at 2:27 a.m. on April 15, 2015.

Leticia Schuman, M.D. ("Dr. Schuman"), a forensic pathologist with the Riverside County Sheriff Coroner's Bureau, conducted Slater's autopsy on April 16, 2015. She was the only physician who examined Slater post-mortem. Dr. Schuman testified that, to a reasonable degree of medical certainty, the only cause or contributing factor to Slater's death was acute methamphetamine intoxication, and that there was no other condition, factor, or symptom that in any way caused or contributed to Slater's death. In forming her cause of death conclusion, the toxicology report was

most significant to Dr. Schuman's conclusion, because Slater's methamphetamine level was measured at 1.140 milligrams per liter in his blood; a level that was five times the fatal amount.

Dr. Schuman was familiar with positional asphyxiation. Some retained experts believe that placing a suspect in a hobbled-behind-the-back prone position for too long a time will mechanically prevent the suspect from inhaling so as to cause asphyxia (positional asphyxia): a condition that would be exacerbated if weight was applied to the suspect's back (compressional asphyxia). Dr. Schuman testified that whether a person is hobble-tied and handcuffed does not affect the cardiac response, that hobbling has been shown not to cause hypoxia or asphyxia, and that body position does not lead to hypoxia or asphyxia. Dr. Schuman testified that there were no external, nor internal, signs on Slater's body consistent with asphyxia, and no evidence that Slater had asphyxiated on anything at all. According to Respondents' expert, in order for a person to die by asphyxia (of any kind), that person must suffer a complete deprivation of oxygen intake for at least two continuous minutes. Dr. Schuman testified that there was no evidence that positional asphyxia in any way caused or contributed to Slater's death.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

"In holding that the police officers in this case violated clearly established law when they restrained Joseph Slater in the back of a patrol car, allegedly causing his death, the panel continues this court's troubling pattern of ignoring the Supreme Court's controlling precedent concerning qualified immunity in Fourth Amendment cases. Indeed, over just the last ten years alone, the Court has reversed our denials of qualified immunity in Fourth Amendment cases at least a half-dozen times, often summarily. By repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal." [App. 50].

As four judges of the Ninth Circuit clearly intimate in their sweeping dissent from the denial of the petition for rehearing filed in this case, the Ninth Circuit's decision cries out for review by this Court.

Specifically, the Ninth Circuit is persisting in its erroneous opinion that a merely "sufficiently analogous" case is enough to show that the law is "clearly established." That position is not consistent with numerous opinions of this Court, and directly conflicts with the position of the Seventh Circuit, which requires that "to show that the law was 'clearly established,' plaintiffs must point to a 'closely analogous case' finding the alleged violation unlawful." *Reed v. Palmer*, 906 F.3d 540, 547 (7th Cir. 2018).

Thus, review of this case is appropriate under both sub-divisions (a) and (c) of Supreme Court Rule 10.

1. THE DOCTRINE OF QUALIFIED IMMUNITY SERVES AN IMPORTANT PURPOSE, AND THE LAW DESCRIBING HOW CLAIMS OF QUALIFIED IMMUNITY ARE TO BE DETERMINED HAS BEEN WELL-ESTABLISHED BY THIS COURT.

As this Court recently explained in *District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L.Ed. 2d 453 (2018), "[u]nder our precedents, officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' 'Clearly established' means that, at the time of the officer's conduct, the law was '"sufficiently clear" that every "reasonable official would understand that what he is doing"' is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" (Citations omitted.)

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct ' "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " [Citations]. *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L.Ed. 2d 255 (2015). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' [Citation]." *Id.*

The initial question in determining whether an officer is entitled to qualified immunity is whether, taken in the light most favorable to the party asserting injury, the facts alleged show that the defendant's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L.Ed. 2d 272 (2001). If so, a court can then decide "whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right." *Jackson v. County of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001). If not, "there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201. A court may also skip the first question and proceed to the second. *Pearson v. Callahan*, 555 U.S. 223, 227, 129 S. Ct. 808, 172 L.Ed. 2d 565 (2009).

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' [Citation]. 'We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.' [Citation]" *Mullenix*, *supra*, 136 S. Ct. at 308.

As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed. 2d 523 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely

abstract rights. [Citation].” *White v. Pauly*, 137 S. Ct. 548, 552, 196 L.Ed. 2d 463 (2017).

“‘We have repeatedly told courts . . . not to define clearly established law at a high level of generality.’ [Citation]. The dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’ *Ibid*. (emphasis added). This inquiry ‘“must be undertaken in light of the specific context of the case, not as a broad general proposition.”’ [Citation]” *Mullenix*, *supra*, 136 S. Ct. at 308.

“Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that ‘[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.’ [Citation].” *Mullenix*, *supra*, 136 S. Ct. at 308.

The law regarding the amount of force that is reasonable must “accommodate limitless factual circumstances.” *Saucier*, *supra*, 533 U.S. at 205 (2001). In Fourth Amendment excessive force cases, “police officers are entitled to qualified immunity unless existing precedent ‘*squarely governs*’ the *specific* facts at issue.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1153, 200 L.Ed. 2d 449 (2018).

“[T]his Court has issued a number of opinions reversing federal courts in qualified immunity cases. [Citation]. The Court has found this necessary both because qualified immunity is important to ‘“society as a whole,”’ *ibid.*, and because as “‘an immunity from

suit,'" qualified immunity '"is effectively lost if a case is erroneously permitted to go to trial."' [Citation]." *White*, *supra*, 137 S. Ct. at 551-552.

"[W]here, as here, the Court of Appeals erred on both the merits of the constitutional claim and the question of qualified immunity, 'we have discretion to correct its errors at each step.' [Citations]. We exercise that discretion here because the D.C. Circuit's analysis, if followed elsewhere, would 'undermine the values qualified immunity seeks to promote.' [Citation]." *District of Columbia v. Wesby*, *supra*, 138 S. Ct. at 589.

2. THE NINTH CIRCUIT IS WRONG IN CONCLUDING THAT THE EXISTENCE OF A "SUFFICIENTLY ANALOGOUS" CASE MEETS THIS COURT'S REQUIREMENT THAT "THE CLEARLY ESTABLISHED LAW MUST BE 'PARTICULARIZED' TO THE FACTS OF THE CASE."

There is a conflict in the Circuit Courts as to whether the existence of a merely "sufficiently analogous" case is enough to show that the law is "clearly established" for purposes of qualified immunity.

In the present case, the Ninth Circuit determined that the facts of *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) were "sufficiently analogous" to those of this case to make the relevant law "clearly established." [App. 17]. This is consistent with prior Ninth Circuit case law, that has held that "[c]losely analogous preexisting case law is

not required to show that a right was clearly established. [Citations].” *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000). *See also: Ioane v. Hodges*, 939 F.3d 945, 957 (9th Cir. 2019).

In contrast, the Seventh Circuit has reached the opposite result. “Ordinarily, to show that the law was ‘clearly established,’ plaintiffs must point to a ‘closely analogous case’ finding the alleged violation unlawful. [Citation]. They need not point to an identical case, ‘but existing precedent must have placed the statutory or constitutional question beyond debate.’ [Citations].” *Reed v. Palmer*, 906 F.3d 540, 547 (7th Cir. 2018). *See also: Hardeman v. Curran*, 933 F.3d 816, 820 (7th Cir. 2019) and *Estate of Escobedo v. Bender*, 600 F.3d 770 (7th Cir. 2010).

The Ninth Circuit misunderstands what is required to show that law is “clearly established,” and the Court’s analysis and application of the relevant law to the facts of the present case makes that clear. In applying the lesser “sufficiently analogous” standard, the Ninth Circuit panel committed the very same error for which it was summarily reversed by this Court in *Kisela*. *See Kisela*, *supra*, 138 S. Ct. at 1151 (Ninth Circuit had denied qualified immunity “because of Circuit precedent that the court perceived to be analogous.”). The Ninth Circuit’s misapplication of the law in this case should lead to the same result as in *Kisela*.

A. Drummond ex rel. Drummond v. City of Anaheim

In this case, the Ninth Circuit panel relied on *Drummond ex. rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) to conclude that the law was clearly established so as to deprive the Petitioners of the ability to claim qualified immunity as a defense in this action.

In *Drummond*, *supra*, three officers responding to a call regarding a mentally ill individual decided to take him into custody for his own safety before the ambulance arrived. One of the officers knocked Drummond to the ground and handcuffed him. Despite the fact that Drummond offered no resistance, two officers held him down. One of the officers held Drummond down by putting both knees into plaintiff's back and placing the weight of his body on Drummond. The other officer held Drummond down by putting one knee on Drummond's back and one knee on Drummond's neck, and placing the weight of his body on Drummond. ***Drummond told the officers that he could not breathe and that they were choking him***, but the two officers kept their body weight on Drummond's neck and back. About twenty minutes later a third officer arrived and Drummond was hobbled. Within one minute of being restrained Drummond went limp and lost consciousness. *Drummond*, *supra*, 343 F.3d at 1054-1055.

In *Drummond*, the Ninth Circuit characterized the force used by the officers as "compression asphyxia,"

where "prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers. [Citations]." *Drummond*, *supra*, 343 F.3d at 1056-1057.

In determining the force used to be constitutionally excessive, the Ninth Circuit in *Drummond* explained: "Once on the ground, prone and handcuffed, Drummond did not resist the arresting officers. Nevertheless, two officers, at least one of whom was substantially larger than he was, pressed their weight against his torso and neck, crushing him against the ground. They did not remove this pressure ***despite Drummond's pleas for air***, which should have alerted the officers to his serious respiratory distress." *Drummond*, *supra*, 343 F.3d at 1059 (emphasis added).

The Ninth Circuit in *Drummond* concluded that: "The officers—indeed, any reasonable person—should have known that squeezing the breath from a compliant, prone, and handcuffed individual ***despite his pleas for air*** involves a degree of force that is greater than reasonable." *Drummond*, *supra*, 343 F.3d at 1059 (emphasis added). "[W]e conclude that the officers had 'fair warning' that the force they used was constitutionally excessive even absent a Ninth Circuit case presenting the same set of facts. The officers allegedly crushed Drummond against the ground by pressing their weight on his neck and torso, and continuing to do so despite his repeated cries for air, and despite the fact that his hands were cuffed behind his back and he was offering no resistance. Any reasonable officer should have known that such conduct constituted the

use of excessive force." *Drummond*, *supra*, 343 F.3d at 1061.

B. The Ninth Circuit's Contention That A Merely "Sufficiently Analogous" Case Can Show That The Law Is Clearly Established Is Wrong, As A Review Of Its Application Of The *Drummond* Decision Makes Clear

The *Drummond* decision does not "squarely govern" the specific facts at issue in this case. The Ninth Circuit panel drew a general rule from the decision in *Drummond* which that case did not establish, and then applied this general rule to a fact pattern in this case distinctly different from *Drummond*.

First, there is no evidence in this case that Slater ever verbalized to Petitioners that he could not breathe or that they were choking him as did the suspect in *Drummond*. But the Ninth Circuit did more than simply disregard this difference. When it quoted *Drummond* in its initial decision in this case, it used ellipses to edit out a crucial fact which demonstrated why *Drummond* did not apply to this case. The Ninth Circuit panel wrote that *Drummond* "clearly established that 'squeezing the breath from a compliant, prone, and handcuffed individual . . . involves a degree of force that is greater than reasonable.'" Slater, Mem. Dispo. at 6 (quoting *Drummond*, 343 F.3d at 1059) (ellipses added by panel). [App. 17]. The problem with this is that the actual language from *Drummond*—

incorporating the portion eliminated by the panel—states in full that "[t]he officers—indeed, any reasonable person—should have known that squeezing the breath from a compliant, prone, and handcuffed individual *despite his pleas for air* involves a degree of force that is greater than reasonable." *Drummond*, *supra*, 343 F.3d at 1059 (emphasis added).

Notably, the panel did not restore the language it had removed when it amended its Memorandum opinion [App. 6, 9-11], even though the removal of this phrase from the quotation was a point raised in the Petition for Rehearing.

"But this statement literally elides critical differences between this case and *Drummond* by improperly using ellipses to generalize *Drummond*'s much more specific holding that 'any reasonable person' should have known that 'squeezing the breath from a compliant, prone, and handcuffed individual *despite his pleas for air* involves a degree of force that is greater than reasonable.' 343 F.3d at 1059 (emphasis added). That critical feature of *Drummond* is missing here: . . . ." [App. 52] (emphasis in original).

"This crucial difference—that, unlike in this case, the officers in *Drummond* continued to apply force despite the detainee's pleas for air—'"leap[s] from the page."' *Kisela*, 138 S. Ct. at 1154 (quoting *Sheehan*, 135 S. Ct. at 1776). Or, to be more precise, it would have leapt from the page had the panel not effaced the text." [App. 69].

Second, unlike *Drummond*, Slater resisted the Petitioners' efforts to take him into custody throughout the incident. Slater resisted Deasey's initial efforts to get him inside of Deasey's patrol car. Slater resisted the efforts of Gentry and Brandt to put him inside of Deasey's patrol car after the decontamination. Slater resisted the efforts of the officers to try to seat belt him inside of Deasey's patrol car. Slater resisted the efforts of Gentry and Brandt to apply the second and third hobbles when Slater was inside of Deasey's patrol car.

Third, at no time during the incident did any of the Petitioners crush Slater against the ground by putting their full body weight on him by kneeling on his torso and neck, as did the two officers in *Drummond*.

At no time while the first hobble was being applied did Deasey or Gentry hold Slater down with their full body weight for any significant period of time. When Slater was prone on his stomach with his chest flat down on the ground, Gentry had his knee across Slater's shoulder blades for approximately forty seconds. When Gentry removed himself from being in contact with Slater, Slater then laid on his right side, with his chest no longer on the ground. Once Slater's legs were hobbled, Slater sat upright under his own power and remained in that position until Cal Fire paramedics arrived.

When the second hobble was being applied as Slater was lying on the rear seat of Deasey's patrol car, Gentry may have had some contact against Slater's back with his right knee, which was touching Slater's

left rib area underneath the armpit, for about forty-five seconds.

When the third hobble was being applied as Slater was lying on the rear seat of Deasey's patrol car, Brandt had his right foot against Slater's left shoulder for approximately seventy seconds, and then removed it.

The video evidence further confirms that it took approximately eighty-six seconds for the second and third hobbles to be applied, and that approximately forty-three seconds passed from when Brandt closed the driver's side passenger door of Deasey's patrol car after the second and third hobbles were attached, until Gentry opened that door again to check on Slater.

The significance of this evidence, as even Respondents' expert witness acknowledged, is that in order for a person to die by asphyxia (of any kind), that person must suffer a complete deprivation of oxygen intake for at least two continuous minutes.

The pressure applied by Petitioners here was materially different, both in nature and in duration, from that applied by the officers in *Drummond*. This point is underscored by *Drummond* itself, which in a footnote distinguished two cases in which incidental or light pressure was applied to a struggling detainee for less than one minute. *See* 343 F.3d at 1060, n.7. One of these cases was *Price v. County of San Diego*, 990 F. Supp. 1230 (S.D. Cal. 1998), which *Drummond* distinguished as follows:

"The pressure allegedly applied here—two officers leaning their weight on Drummond's neck and torso for a substantial period of time—was far greater than that applied in. . . . *Price* at 1239-40 ('incidental pressure' on the detainee's torso 'for a few seconds'). Moreover, there was far less need for such pressure in the case at hand. In . . . *Price*, the suspect[] [was] struggling violently as the police attempted to restrain [him], but according to an independent eyewitness, once Drummond was on the ground, he 'was not resisting the officers.' Furthermore, in neither of the above cases [*Price*] did the court find that the police were actually put on notice of the detainee's respiratory distress. Here, Drummond offers evidence that he repeatedly told the officer that he could not breathe—indeed, that he begged for air." *Drummond*, *supra*, 343 F.3d at 1060, n.7 (bracketed material added).

Fourth, this case involves not just the alleged compression from Petitioners' knee and foot, but also the alleged breathing difficulty allegedly created by the position in which the hobbles ultimately put Slater. Respondents claim that the manner in which the hobbles were applied put Slater in a position such that, coupled with the brief incidental pressure placed on his back during the securing of the hobbles by Petitioners, Slater was put at risk of "positional or restraint asphyxia." But *Drummond* was a straightforward case of compression asphyxia. *Drummond* did not address a hybrid positional or restraint asphyxia theory like that argued by Respondents.

3. THE NINTH CIRCUIT PANEL IMPROPERLY PLACED THE BURDEN OF PROOF ON PETITIONERS TO SHOW THAT THE CONSTITUTIONAL RIGHT ALLEGEDLY VIOLATED WAS CLEARLY ESTABLISHED.

The Ninth Circuit panel committed further error when, after identifying the two factors that are to be considered in evaluation claims of qualified immunity, it asserted that "Defendants bear the burden of proving they are entitled to qualified immunity." [App. 5].

But the well-settled rule is that "[t]he plaintiff bears the burden of proving that 'the right allegedly violated was clearly established at the time of the alleged misconduct.' [Citations]." *Martinez v. City of Clovis*, 943 F.3d 1260, 1275 (9th Cir. 2019); *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017); *Devereaux v. Perez*, 218 F.3d 1045, 1051 (9th Cir. 2000); and *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991), citing *Davis v. Scherer*, 468 U.S. 183, 197, 104 S. Ct. 3012, 82 L.Ed. 2d 139 (1984).

CONCLUSION

For the foregoing reasons, this Court should:

a) grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit,

b) summarily reverse that decision and order the Court of Appeals to affirm in its entirety the order of the District Court, or, in the alternative, agree to review the decision of the Court of Appeals, and

c) following such review, reverse the decision of the Court of Appeals and order that Court to affirm in its entirety the order of the District Court.

Respectfully submitted,

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