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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

We live in a watershed moment in which serious cases of excessive force such as that of George Floyd command public discourse and redress. But shining a light on manifest acts of abuse does not justify abandoning standards used to measure the propriety of police conduct in the face of tense, uncertain circumstances, nor, contrary to *Graham v. Connor*, 490 U.S. 386, 396-97 (1989), countenance transforming "every push or shove" in the course of an arrest into a federal case. To do so trivializes the federal civil rights statutes as a means to afford redress in appropriate cases, and worse yet, does so at the expense of basic practices that ensure officer safety.

ARGUMENT

I. REVIEW IS NECESSARY TO CLARIFY AND COMPEL COMPLIANCE WITH THE EXCESSIVE FORCE STANDARDS SET BY THIS COURT AS APPLIED TO CLAIMS ARISING FROM WIDELY ACCEPTED MEASURES TO PROTECT OFFICER SAFETY WHILE HANDCUFFING SUSPECTS.

This Court has recognized that where undisputed video 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). While respondent asserts that a jury could somehow draw inferences in support of an excessive force claim here (Brief In Opposition ("BIO") 37-38), this contention is flatly contradicted by what the video actually depicts—petitioner's placement of his knee against respondent's back for approximately eight seconds during handcuffing—and

unsupported by any actual physical evidence indicating that the force was excessive.

As a result, what respondent ultimately contends, and what the panel opinion ultimately holds, is that a plaintiff may assert a potential excessive force claim virtually any time an officer touches a suspect while handcuffing, based solely on the plaintiff's subjective, after-the-fact statement that he suffered injury as a result of the officer's actions.

Thus, respondent argues that there is "clearly established law in every circuit court supporting the proposition that 'an officer cannot place his knee on the back of a prone, unresisting suspect.'" (BIO 18.) Yet, review of the cited cases belies respondent's argument.

Dancy v. McGinley, 843 F.3d 93 (2d Cir. 2016), did not involve alleged excessive force based solely on placement of an officer's knee against the suspect's back. One plaintiff contended he suffered a broken jaw after the defendant police officer bent him over the hood of an automobile and caused his "face [to] slam into the car." *Id.* at 103. The other plaintiff claimed excessive force based not upon placement of a knee on his back during arrest, but premised on the plaintiff being wrongfully arrested having committed no crime, slammed against the ground and then beaten by several officers. *Id.* at 102.

In *Couden v. Duffy*, 446 F.3d 483 (3d Cir. 2006), the court found that if plaintiff's version of events was credited, there were no grounds for multiple officers to use force at all, and that "[t]he participation of so many officers and the use of mace, several guns pointed at Adam's head, and handcuffs constituted excessive force against a cooperative and unarmed subject." *Id.* at 497.

Similarly, in *Smith v. Ray*, 781 F.3d 95 (4th Cir. 2015), the court found an officer could be liable for excessive force where there was no indication plaintiff was armed and she was cooperative, but the officer nonetheless "threw her to the ground" then "jumped on her, jamming his full weight into her back with his knee, and painfully twisting her right arm behind her back." *Id*. at 98.

In *Lachance v. Town of Charlton*, 990 F.3d 14 (1st Cir. 2021), officers responded to a 911 call, found plaintiff in mental distress and in the course of subduing him pushed him into a recliner which tipped over, and then placed him on the floor, applying knee pressure to his back. Plaintiff sustained a fractured back, and in affirming the denial of summary judgment on qualified immunity that court observed that based on the medical evidence there was a triable issue of fact whether the back injury was caused by the fall, or by pressing a knee into the plaintiff's back with such force that it caused bruising. *Id*. at 29-30. No such evidence exists here.

Peterson v. City of Fort Worth, Tex., 588 F.3d 838 (5th Cir. 2009), did not involve an excessive force claim based on placing a knee against a suspect's back during handcuffing. Plaintiff claimed he was pinned upright against a truck, and that an officer used several "knee strikes" against him even though he did not resist and that an officer placed a knee on his neck and ground his face into the earth. *Id*. at 846.

Nor does the unpublished Sixth Circuit decision, *Harris v. Langley*, 647 F. App'x 585 (6th Cir. 2016) support respondent. There officers responded to a request for a welfare check at plaintiff's residence, and without provocation an officer "body-slammed" the plaintiff, "knocked him to the floor" then placed his knee on plaintiff's back, grabbed his wrist and handcuffed him. *Id*. at 587.

The Sixth Circuit noted that if plaintiff's evidence was given due weight: "There was no need for *any* force in this situation because no crime was being committed and there was no immediate threat to the safety of anyone; yet, when Harris decided to close the door to his own home, Officer Pendleton suddenly attacked him without warning. This unprovoked violence cannot be excused as the consequence of a 'split-second judgment.' The facts, as alleged, portray a patently unreasonable use of force." *Id*. at 590.

Laury v. Rodriguez, 659 F. App'x 837 (6th Cir. 2016), is also inapposite. The case did not involve brief use of a knee against the back during handcuffing, but prolonged use of a knee against the plaintiff's back with the officer's full body weight—even after the plaintiff was handcuffed. *Id*. at 845 ("And even if it were reasonable for Price to use his body weight to keep Laury down until he was handcuffed, the video shows Price kneeling on Laury's back *after* Laury was handcuffed and was not resisting").

Cole v. City of Dearborn, 448 F. App'x 571 (6th Cir. 2011), is similarly far afield. There, the court did not hold that placing a knee against the back of a suspect for several seconds while handcuffing them could constitute excessive force. Rather the court held that "stomping on" a compliant suspect's back, "stepping on his neck," and "driving a knee into [his] back" would "come within the protective reach of the Fourth Amendment." *Id*. at 575.

Bennett v. Krakowski, 671 F.3d 553 (6th Cir. 2011), is nothing like this case. There the court dismissed the officers' appeal from denial of their motion for summary judgment because there were disputed issues of fact as to what transpired. *Id*. at 559-60. According to plaintiff he immediately lay on the ground when confronted by officers only to have them, without provocation, kneel on his back, beat and then taser him. *Id*. at 557-58.

Alicea v. Thomas, 815 F.3d 283 (7th Cir. 2016), did not involve a contention that placing a knee against a suspect's back during handcuffing constituted excessive force. As relevant, the plaintiff, a burglary suspect, asserted that one officer improperly deployed a canine to bite him, though he offered no resistance, and another officer improperly struck him while he was still being bitten by the canine. *Id.* at 290 ("At the point at which Alvarez first saw Alicea, Alicea's arm was in the jaws of a seventy-two pound dog. Two other officers were already at the scene. A reasonable officer would not think that punching, kicking, and stomping on [the plaintiff] was required to control the situation").

In *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005), a suspect died within two minutes after an officer pressed his knee against the suspect's shoulder for 30 to 45 seconds (*id.* at 765-66) "with chest-crushing force, and the undisputed medical evidence reveals that decedent died of injuries consistent with a crushing or squashing type trauma" (*id.* at 771). No such knee pressure of similar duration or force is even remotely at issue here.

In *Perry v. Woodruff County Sheriff Department*, 858 F.3d 1141, 1144-45 (8th Cir. 2017), the court affirmed the district court's determination that the officers had committed excessive force when they threw an unarmed, fully compliant suspect to the ground to handcuff him. Similarly, in finding qualified immunity inappropriate in *Ziesmer v. Hagen*, 785 F.3d 1233 (8th Cir. 2015), the court noted that plaintiff asserted he offered no resistance to being taken into custody, but that the officer "tackled him to the ground and dug his knee into his back, while pulling [his] hands behind his back, causing his shoulder to pop out of its socket." *Id.* at 1236. The same is true in *Smith v. Kansas City, Mo. Police Department*, 586 F.3d 576, 579, 581-82 (8th Cir. 2009),

where the court affirmed the denial of qualified immunity to officers where plaintiff testified he had committed no crime and offered no resistance but was pulled from his doorway by defendants who then "shoved [his] face into the concrete and placed their knees on his back as they handcuffed him." *Id*. at 579. No comparable degree of force is at issue here.

Herrera v. Bernalillo County Board of County Commissioners, 361 F. App'x 924, 926-27 (10th Cir. 2010) is yet another dissimilar case involving use of force inflicting serious injury—torn ligaments and a torn meniscus—on a fully compliant suspect. *Id*. at 926 ("It is undisputed that [plaintiff] promptly complied with the deputies' order, lying face down on the ground with his hands out. At this point, [the officers] approached [plaintiff] and all three jumped on him. One deputy drove his knee into [his] back. A second deputy drove his knee into the back of [plaintiff's] left knee. The third deputy grabbed [plaintiff's] left leg and twisted it by the ankle").

That is also true of *Scott v. City of Red Bay*, 686 F. App'x 631 (11th Cir. 2017), where the court denied qualified immunity where an officer used force against an unarmed, fully compliant suspect. *Id*. at 633 ("Assuming, as we must, that James was not resisting arrest for a minor offense, the acts of shoving him to the ground, kneeling on his back, pressing his face into the ground, and ignoring his assertions that he could not produce his arm for handcuffing and could not breathe were excessive").

Hall v. District of Columbia, 867 F.3d 138 (D.C. Cir. 2017) is yet another case involving dissimilar facts. The officer was summoned to investigate a claim that plaintiff had left a restaurant without paying for her party, even though she had merely gone across the street to greet friends and had left her purse, phone and credit card—which the restaurant had charged—at the

restaurant. *Id.* at 144-45, 154. The court found that the officer could be liable for battery based on grabbing plaintiff, slamming her against a wall, then taking her outside, shoving her to her knees on the pavement, and swinging her around while placing a knee in her back and pulling her arms back, resulting in severe injury. *Id.* at 158-60.

Thus, respondent's assertion that these cases are "directly on point, [and] limited to *brief and mild to moderate application of knee to back* prior to or during handcuffing" (BIO 22 (emphasis added)) does not withstand scrutiny. None of the cases suggests that a brief placement of a knee against a suspect's back during handcuffing as a precaution against renewed resistance, especially coupled with the absence of any evidence that an officer could have contemporaneously perceived as indicating the infliction of any injury, could constitute excessive force.

Respondent tacitly concedes the point, asserting, based on pure speculation that "[t]here are relatively few mild to moderate 'knee on back' use of force cases given that the subject of such a use of force is often unable to identify which law enforcement officer applied pressure to his or her back." (BIO 21.) But in fact the majority of circuits have expressly rejected such excessive force claims. (Pet. 21-23.)

Under respondent's (and the panel majority's) view, any precautionary placement of a knee against a suspect's back in the course of handcuffing can give rise to an excessive force claim so long as the plaintiff subsequently asserts it was "too much," even in the absence of any medical evidence, or indeed physical evidence, linking the force to any actual injury. As the panel dissent notes, the result is an open ended invitation to litigation that will

necessarily deter officers from taking a widespread and rudimentary measure to ensure officer safety in the course of handcuffing suspects.[1/]

Respondent contends that no proof of physical injury is required for a constitutional claim. (BIO 27.) But that is a strawman argument that ignores the point actually made in the petition and uniformly adopted by federal appellate courts—that it is incumbent on a plaintiff in an excessive force claim to show that the force was in fact excessive, beyond his or her own subjective opinion on the matter. There must be objective evidence establishing that the degree of force was excessive. (Pet. 24-25.) Respondent simply ignores what cited cases actually hold, but turning a blind eye to this authority does not make it disappear.

Indeed, in *Lombardo v. City of St. Louis*, No. 20-391, __ U.S. __, 2021 WL 2637856, *2 (June 28, 2021), the Court underscored that evidence as to the intensity of force used was essential in evaluating the extent of force used in the excessive force context. *See also id.* at *5 (Alito, J., dissenting) (noting medical evidence indicating "officers' use of force inflicted serious injuries").

The view espoused by respondent and the panel majority cannot be reconciled with the decisions of this Court concerning the reasonable use of force, nor the decisions of other circuits recognizing that the de minimis application of force here—placement of a knee against a suspect's back during handcuffing—is reasonable as a matter of law. The petition should be granted.

[1/]As noted in the petition, and as the panel dissent emphasized, the precautionary nature of the knee placement was particularly manifest here, given that respondent, who was not yet handcuffed, might still have reached into the baggy pocket of his pajama pants and pulled the knife out by its handle. (Pet. 8-9 (citing Pet. App. 32).)

II. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH ITS DECISIONS REQUIRING COURTS TO GRANT QUALIFIED IMMUNITY WHERE THE LAW IS NOT CLEARLY ESTABLISHED.

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). Immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 12.

In the Fourth Amendment context the Court has made it clear that the requirement of clearly established law to put an officer on notice that their conduct might be subject to liability is particularly exacting. Other than in an obvious case, "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes* ___U.S.__, 138 S. Ct. 1148, 1153 (2018) (citing *Mullenix*, 577 U.S. at 13); *White v. Pauly*, __ U.S. __, 137 S. Ct. 548, 551 (2017).

Respondent, echoing the panel majority, cites *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000) as rendering the law clearly established with respect to the situation confronted by petitioner. But as noted in the petition, *LaLonde* is nothing like this case.

In *LaLonde*, the officers merely responded 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 responded 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 pocket—the side where Rivas-Villegas placed his knee. Plainly, 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." (Pet. App. 39 (Collins, J., dissenting).)

Respondent flatly ignores these differences, instead relying on a purported general proposition that officers cannot place a knee against the back of a suspect once a situation has purportedly de-escalated. (BIO 31-32.) Yet, this is the sort of generalized statement of the law, divorced from specific facts that inform the excessive force inquiry that this Court has repeatedly rejected. (*See* Pet. at 28-31.)

Respondent was required to identify "existing precedent [that] 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153. He failed to do so. As a result, under the controlling decisions of this Court, the Ninth Circuit was required to grant petitioner qualified immunity. It is again necessary for this Court to grant review to compel the Ninth Circuit to adhere to this Court's precedent concerning qualified immunity.

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CONCLUSION

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

Respectfully submitted,

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