No. 11-84

IN THE

Supreme Court of the United States

MICHELLE ALVIS ET AL.,

Petitioners,

v.

KATHLEEN ESPINOSA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DECEDENT ASA SULLIVAN ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners entered an apartment in violation of the Fourth Amendment and subsequently shot an unarmed man in the attic. On interlocutory appeal, the Ninth Circuit recognized that petitioners were entitled to qualified immunity unless they violated Fourth Amendment law that was "clearly established at the time of the violation." Pet. App. 3 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Petitioners do not challenge the Ninth Circuit's holding that the officers' initial entry violated clearly established Fourth Amendment principles. With respect to the shooting, the court affirmed on two independent grounds. Construing the facts in respondents' favor, the court held: (i) petitioners' conduct in the attic, standing alone, violated clearly established Fourth Amendment law; and alternatively (ii) petitioners' unconstitutional entry recklessly provoked the violent confrontation. The questions actually presented are:

1. Whether, given the court of appeals' alternative holding that the use of force here violated clearly established Fourth Amendment law without regard to the officers' earlier unconstitutional conduct, this case nonetheless presents an appropriate vehicle to address whether that earlier conduct would be categorically irrelevant to determining the constitutionality of the later use of force.

2. Whether the court of appeals, having expressly recognized the proper qualified immunity test, misapplied it to the facts of this particular case.

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STATEMENT OF THE CASE

I. Introduction

This case involves the shooting death of an unarmed man, the material details of which, the courts below found, are in genuine dispute. On the petition's telling of the facts, Asa Sullivan resisted arrest, threatened the police, made suicidal statements, and ultimately provoked the shooting by hiding his hands and then suddenly pointing an object that looked like a gun at the officers. But that story depends entirely on the credibility of those accused in the shooting, and their self-serving testimony is full of inconsistencies, contradictions, and demonstrable untruths. Viewing the facts in the light most favorable to respondents, a jury could easily disbelieve petitioners' version of events and decide instead that although Sullivan may have refused to cooperate with the police, he did not threaten them, suggest that he intended to commit "suicide by cop," or make the sudden movements the officers later claimed (with significant inconsistencies in their stories) justified the shooting.

On this other plausible view of the facts, the questions presented by the petition either do not arise or are immaterial to the proper disposition of the case. Specifically, petitioners ask this Court to decide whether the officers' initial unconstitutional entry into the home was relevant to the question whether the officers used excessive force in killing Sullivan in the attic. But they fail to acknowledge that the Ninth Circuit's ruling on that question was a wholly independent backup to its principal holding that even accepting petitioners' claim that the entry

violation was irrelevant, summary judgment was properly denied because of genuine disputes over what actually happened in the attic.

Petitioners challenge that holding as well, but they do not claim that it implicates any general issue of law dividing the circuits. Their plea for fact-bound error correction again is premised on a mischaracterization of the summary judgment record and a disregard for the limitations on an appellate court's jurisdiction to consider questions about the factual record on an interlocutory qualified immunity appeal. Finally, even if those arguments were properly subject to appellate review, the evidence in this case amply supports the denial of qualified immunity.

II. Factual Background

On June 6, 2006, San Francisco police officers shot and killed Asa Sullivan after cornering him in the attic of the home where he had been staying.[1] Pet. App. 4-5. Two officers shot twenty-five bullets at Sullivan, striking him with sixteen. Pet. App. 17; SER000652 (Med. Exam. Rep.). Although some of the officers claimed that they fired their weapons on the belief that Sullivan had pointed a weapon (and even fired) at them, Pet. App. 17-18, he was in fact unarmed, never claimed to have a weapon, and died with nothing in his hands, *see* Pet. App. 18; SER000501 (Leung Depo.).

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[1] The facts are described in the light most favorable to respondents. *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996).

Earlier that evening, Officer Paulo Morgado had gone to the house to investigate a report that a door had been left open. Pet. App. 4. However, when he arrived, the door was closed. *Id.* Morgado nonetheless called for backup and, although he had no warrant to enter the premises, forced open the door. *Id.* He looked inside and saw a T-shirt with blood on it draped over an interior door. *Id.* Morgado initially told a homicide investigator that he could not tell if the blood was fresh or dry. SER000924-25 (Morgado Int.). He later changed his story, however, and claimed at his deposition that the blood was wet. Pet. App. 4; SER000083 (Morgado Depo.).

Two more officers, Michelle Alvis and John Keesor, arrived and went inside. Pet. App. 4. Upon entering the house, both officers saw the T-shirt. *Id.* 5. When interviewed immediately after the incident, Keesor, like Morgado, said that he could not determine whether the blood was dry or fresh. SER001043-44 (Keesor Int.). Also like Morgado, he subsequently changed his account and insisted in his deposition that the shirt was stained with "fresh, fresh blood." SER000198 (Keesor Depo.). In any event, once inside, the officers made no attempt to inquire further into the state of the bloody T-shirt. *See* SER000193 (Keesor Depo.).

Instead, the officers walked through the downstairs, saw nothing suspicious, then continued upstairs and banged on a closed door on the second floor. *See* Martin Depo. 78; SER000194 (Keesor Int.); SER000205 (Keesor Depo.). Officer Alvis told homicide investigators that the occupant refused to answer the door, leading the officers to kick it in. SER001080 (Alvis Int.); SER000797 (Alvis Depo.).

The other two officers, however, insisted that the room's occupant opened the door voluntarily and let them in. SER001044-45 (Keesor Int.); SER000208 (Keesor Depo.); SER000912 (Morgado Int.). The occupant, Jason Martin, was "picture perfect" compliant as police ordered him to the ground, handcuffed him, and searched him. Pet. App. 5; SER001045 (Keesor Int.). The officers found a pocket knife, with no trace of blood on it, in Martin's back pocket. SER000228-29 (Keesor Depo.). They did not ask if anyone was injured. SER000335 (Alvis Depo.).

When the officers heard a noise coming from the attic, Pet. App. 5, Martin told them that he thought that Sullivan – who was also staying at the house with the permission of the leaseholder, *id.* 4 – was in the closet, SER000913 (Morgado Int.); Martin Depo. 98. The police found no one in the closet but discovered an opening into the attic. SER000231 (Keesor Depo.). Martin told officers that Sullivan was unarmed and had no access to any weapons. Martin Depo. 113-14.

After further investigation, the officers confirmed that the attic had no other exit. SER000877 (CAD Radio Rec.); SER001032-33 (Keesor Int.). Other officers on the scene repeatedly suggested pulling back and establishing a perimeter. Pet. App. 5; SER000879 (CAD Radio Rec.); SER000884 (CAD Radio Rec.). Sullivan was not suspected of any crime, and the officers had no reason to believe that he was armed or otherwise posed a threat. Pet. App. 16, 18. Nonetheless, Officer Alvis entered the attic and radioed, "Cover both closets. I have him at gunpoint. He's not going anywhere." Pet. App. 5; SER000879 (CAD Radio Rec.).

Keesor and Morgado joined Alvis in the attic, and a fourth officer positioned himself at the attic's entry. SER000934 (Morgado Int.). All four officers had flashlights trained on Sullivan and could see him "plain as day." SER001035 (Keesor Int.); SER000934 (Morgado Int.). Sullivan was sitting against one of the walls of the attic. SER001034 (Keesor Int.). Although Keesor "t[old] her to stop," Alvis kept advancing towards Sullivan, ignoring Keesor's pleas that they should "[j]ust stop. Let's wait for more people." SER001034 (Keesor Int.).

The officers ordered Sullivan to show his hands. SER000941 (Morgado Int.). According to the officers, Sullivan showed only his left hand. SER000941 (Morgado Int.). Keesor began to speak with Sullivan and said he was responsive to the officers' questions. SER000252 (Keesor Int.). Alvis and Morgado claimed that Sullivan made threatening remarks and suggested that he intended to commit "suicide by cop," asking the officers to tell his family that he loved them. SER001082-83 (Alvis Int.); SER000916 (Morgado Int.). However, Keesor, the primary communicator with Sullivan, SER000252 (Keesor Depo.), denied that Sullivan was suicidal, and said that the possibility that Sullivan was attempting to create a potentially deadly confrontation was "the farthest thing from [his] mind," SER001052 (Keesor Int.). Keesor specifically denied that he heard Sullivan ask the officers to tell his family that he loved them. SER000263-64 (Keesor Depo.).

Some period of time later, and for reasons that remain in dispute, officers Alvis and Keesor opened fire, emptying their magazines and hitting Sullivan with sixteen shots. Pet. App. 17; SER000652 (Med.

Exam. Rep.). Alvis claimed that she opened fire because Sullivan had pointed and fired a gun at her. SER001084 (Alvis Int.). She asserted that she heard a gunshot coming from Sullivan's direction and saw a "muzzle flash" emanating from his gun. SER001084, SER001090 (Alvis Int.). She even reported that one of Sullivan's bullets grazed her ear. SER001103 (Alvis Int.). Keesor also said that he fired upon seeing Sullivan pointing an oblong object at Officer Alvis and hearing gunfire from Sullivan. SER001040 (Keesor Int.). It is undisputed, however, that Sullivan was unarmed and never in fact pointed a gun or fired at the officers. Pet. App. 5. And Morgado denied that Sullivan had any gun-like object in his hands or ever stretched out his arms. SER000540-41 (Morgado Depo.).

Officer Leung, who had been below the attic during the shooting, was the first to search the body. *See* SER000495 (Leung Depo.). Officer Choy reported that Leung said at the time that he had found a glasses case, but that the object was "in the person's pocket." SER001158 (Choy Int.). Another officer on the scene, Officer McCray, stated that she found the glasses case under Sullivan's right arm. SER000479-81 (McCray Depo.). A crime scene technician photographed Sullivan's body, including his right arm, but the glasses case is not visible in any of the photographs. *See* Photos SER001180-1204. The technician claimed he failed to photograph the glasses case in its place before taking it into evidence. SER000443 (Shouldice Depo.).

Pursuant to standard practice, all of the officers were interviewed by homicide detectives shortly after the shooting. However, in violation of policies

intended to prevent officers from coordinating their stories, Alvis and Keesor rode alone together in a car from the scene to the police station, SER000858-59 (Reiter Rep.); SER001062 (Keesor Int.), despite the fact that another officer on the scene had specifically told Keesor to go to the station separately from Alvis, SER001147 (Choy Int.).

III. Procedural History

Sullivan's mother and son filed this action, alleging a number of constitutional violations under 42 U.S.C. § 1983, as well as state law claims. The constitutional claims were primarily premised on the officers' violation of the Fourth Amendment by illegally entering into the apartment without a warrant, as well as later using excessive force in the attic.

After discovery, petitioners moved for summary judgment on grounds of qualified immunity with respect to respondents' § 1983 claims of unlawful entry and excessive force in violation of the Fourth Amendment. Respondents moved for summary judgment on the claim of unlawful entry. The district court denied the motions with respect to the constitutional claims, ruling that material issues of fact precluded summary judgment in favor of either party.[2] Pet. App. 53-59.

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[2] On similar grounds, the district court also denied petitioners' motion for summary judgment on respondents' claims under California Civil Code § 52.1. Pet. App. 65-67. The district court granted in part and denied in part petitioners' motion for summary judgment on respondents' negligence

Petitioners filed an interlocutory appeal from the denial of summary judgment on the constitutional claims to the Ninth Circuit. They did not seek review of any of respondents' state law claims.

The court of appeals affirmed. Citing this Court's decision in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), the court explained that "[f]or qualified immunity, we determine whether the facts show that (1) the officer's conduct violated a constitutional right; and (2) the right which was violated was clearly established at the time of the violation." Pet. App. 3. Applying that settled standard, the court found that petitioners' claim to qualified immunity was premised on disputed issues of fact precluding summary judgment.

In Part I of its opinion, the Ninth Circuit analyzed the claim of illegal entry into the home and ruled that the claim could not be resolved at the summary judgment stage. Pet. App. 6. It affirmed the district court's determination that disputed issues of fact prevented it from deciding (1) whether Sullivan had a reasonable expectation of privacy in the home, *id.* 6-7; (2) whether there was an emergency situation that would have justified the officers' warrantless entry, *id.* 8-12; and (3) whether a security guard could grant implied third-party consent to the officers, *id.* 12-14.

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claims. *Id.* 64-65, 68. The district court granted petitioners' motion for summary judgment on respondents' claims of loss of familial relationships, municipal liability, California Civil Code § 51.7, and their request for punitive damages. *Id.* 59-65, 68.

In Part II, the panel determined that factual disputes likewise precluded resolving respondents' excessive force claim at the summary judgment stage. Pet. App. 14. The court recognized that under this Court's clearly established law, its task was to apply an "objective reasonableness standard," *id.* (citing *Scott v. Harris*, 550 U.S. 372, 381 (2007)), to "balance the extent of the intrusion on the individual's Fourth Amendment rights against the government's interests," *id.* 14-15 (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

Applying that standard, the court ruled that factual disputes prevented it from concluding that the officers' use of force against Sullivan in the attic was reasonable. Pet. App. 16-17. Taking the evidence in the light most favorable to respondents, the court determined that the level of threat apparent to the officers was low. The court did not accept the officers' assertion, echoed by the dissent, that the undisputed evidence showed that Sullivan had threatened the officers, made suicidal comments, and provoked the shooting, either by pointing a gun-like object at them or suddenly raising his arms toward them as if pointing a weapon. *Compare* Pet. App. 17-18 (majority opinion) *with id*. 37 (dissent). Accordingly, the court concluded that taking the evidence in the light most favorable to respondents, Sullivan "did not present a danger to the public," "could not escape from the attic," "had not been accused of any crime," "had not initially caused this situation," "had not brandished a weapon, spoken of a weapon, or threatened to use a weapon," and "in fact, did not have a weapon." *Id.* 16, 18. On the other side of the balance, the level of force used by officers was

extreme: two officers "fired their entire magazines at Sullivan," and "[a]ll shots were fired at close range." *Id.* 17. In such circumstances, the court held, whether the force was constitutional or not depended on important factual questions that had yet to be resolved. *Id*.

In Part III of its opinion, the court provided an additional rationale for affirming the district court's denial of summary judgment. Relying on its earlier decision in *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002), the Ninth Circuit held that the officers might be liable for provoking the confrontation which led to the shooting by entering the home without a warrant in the first instance. Pet. App. 18-19. The court explained that the "evidence strongly suggest[ed] that the initial entry into the apartment . . . violated Sullivan's Fourth Amendment rights." *Id.* 19. Under *Billington*, the "genuine issues of fact" about whether petitioners "intentionally or recklessly provoked a violent confrontation" provided a secondary, independent reason to deny qualified immunity at this time. *Id*.

Judge Wu dissented in part. He agreed that summary judgment was properly denied on the illegal entry claim. Pet. App. 20. But he concluded – based on his own de novo review of the summary judgment record, *id*. 20 n.1 – that summary judgment should have been granted on the excessive force claims. *Id*. 44.

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied On The First Question Presented.

Petitioners acknowledge that this Court has repeatedly, and recently, declined to review the first question presented by this petition. *See* Pet. 27 n.5 (citing, *e.g.*, *Swofford v. Eslinger*, 395 Fed. Appx. 559 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1053 (2011)).[3] Petitioners seek to distinguish away these prior denials by claiming that those cases presented poor vehicles for resolving the constitutional question, either because a ruling in favor of petitioners would not affect the judgment (the court of appeals having also reached the same result on alternate grounds), or because the excessive force claim turned on disputed facts. Pet. 27 n.5. But the same is true in this case. Here, too, the ruling the petition challenges was one of two independent grounds for denying summary judgment. And here, too, petitioners' objections to the decision turn on their incorrect characterization of a highly disputed summary judgment record.

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[3] *See also Burnette v. Gee*, 137 Fed. Appx. 806 (6th Cir.), *cert. denied*, 546 U.S. 1032 (2005); *Bella v. Chamberlain*, 24 F.3d 1251 (10th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995); *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1124 (1986).

In any event, the petition exaggerates the degree, and practical significance, of the differences among the courts of appeals over whether an officer's unconstitutional and reckless provocation informs the reasonableness of the officer's later use of defensive force. Review by this Court, accordingly, is not warranted.

A. This Case Is Not An Appropriate Vehicle To Decide The First Question Presented.

The first question presented by the petition does not genuinely arise in this case and its resolution by this Court would not change the result.

1. Throughout this case, respondents have advanced two independent theories of why the attic shooting constituted an excessive use of force in violation of the Fourth Amendment. First, focusing entirely on the events in the attic, respondents straightforwardly argue that petitioners had an insufficient basis to use their weapons. Second, and alternatively, respondents argue that even if the officers had some cause to believe that Sullivan was threatening them in the attic at the time of the shooting, petitioners are liable because Sullivan's death is a result of their unconstitutional and reckless entry into the apartment.

The court of appeals held that summary judgment was properly denied with respect to each theory. In Part II of its opinion, the court squarely held that the facts regarding the events in the attic standing alone, properly construed in respondents' favor, establish that petitioners used "unreasonable force" both in

employing a "threat of deadly force" and then in actually using "deadly force." Pet. App. 14-18.

Only after reaching that conclusion did the court of appeals – in a short, separately numbered section of the opinion – set out the portion of the decision that petitioners challenge in their first question presented. In that separate Part III, the court of appeals observed that summary judgment was *also* properly denied for a second reason: petitioners could seek to prove at trial that any confrontation in the attic proximately resulted from petitioners' unconstitutional and reckless initial entry into the apartment. Pet. App. 18-19 (citing *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)).

The case as it comes to this Court thus does not actually pose the question the petition presents. Petitioners challenge the *Billington* rule that an initial violation of the Fourth Amendment may in appropriate circumstances be relevant to determining whether an officer's later, "otherwise *reasonable* defensive use of force" violates the Fourth Amendment. 292 F.3d at 1190. But the court of appeals' principal holding settles for purposes of petitioners' summary judgment motion that petitioners' use of force in the attic was neither *defensive* nor *reasonable*. The petition does not ask the Court to decide the fact-bound question whether the events in the attic, standing alone, establish a Fourth Amendment violation.[4] Nor, in any event,

[4] In their third question presented, petitioners do ask the Court to decide whether any Fourth Amendment violation in the

would such a case-specific claim warrant this Court's attention. *See infra* Part II.C.

Petitioners attempt to avoid this glaring vehicle problem by stating that the court of appeals "held that *even if* the force used by the officers in the attic was otherwise a reasonable response to the threat posed by the suspect, the force would violate the Fourth Amendment if the officers' initial entry into the dwelling was unlawful," Pet. i (emphasis added), and that the court supposedly "emphasized" that basis for holding that the officers' use of force violated the Fourth Amendment, *id.* 10. That characterization of the ruling below is accurate only insofar as it is a shorthand summary of the court of appeals' alternative basis for holding that petitioners were properly denied summary judgment. It does not show, as a petition for certiorari must, that the question presented matters to the outcome of the case.

2. Further review also is unwarranted because this case is in an interlocutory posture. Not only is the Ninth Circuit's reliance on the *Billington* rule unnecessary to the denial of summary judgment, but it is unclear whether *Billington* will play any role in the ultimate disposition of the case. As noted, respondents' principal submission is that petitioners should be held liable for their conduct in the attic standing alone. The first question presented will be

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attic was *clearly established*. *See* Pet. ii, 30, 34. But that is a different question than whether the Fourth Amendment was violated.

relevant only if respondents at trial (a) fail in their principal claim, but nonetheless present sufficient evidence to (b) prevail on the ground that (i) the officers unconstitutionally and recklessly entered the apartment, and (ii) that conduct proximately caused the deadly confrontation in the attic. In the event the eventual judgment does rest on that unique combination of factors, respondents will of course be free to follow the ordinary course of presenting their Fourth Amendment claim to this Court after a final judgment. In that event, the evidence presented at trial will illuminate, among other things, the causal relationship between the two alleged Fourth Amendment violations. The case would then – as opposed to now, on a contested record – present a far better vehicle for assessing the *Billington* rule.

B. Petitioners Overstate The Degree, And Practical Significance, Of Any Difference Among The Circuits' Approaches.

Petitioners are also wrong in asserting that this case implicates a significant conflict in the circuits. Nor have petitioners shown that any variation in the circuits' approaches has any practical effect in practice.

1. Petitioners Incorrectly Assert That Ninth Circuit Precedent Significantly Diverges From Other Circuits'.

Petitioners contend that the precedent of the Ninth Circuit conflicts with decisions of seven circuits that treat "an officer's pre-seizure errors as irrelevant to the determination whether the force was

reasonable at the moment it was used to seize a violent suspect." Pet. 19. That is not so.

a. To begin with, petitioners mischaracterize the law of the Ninth Circuit. Petitioners assert that the Ninth Circuit holds that once officers unlawfully enter a house, any subsequent use of force violates the Fourth Amendment, even if otherwise justified as an act of self-defense. *See* Pet. 3-4. They are wrong.

The Ninth Circuit has never held that a prior Fourth Amendment violation automatically renders any subsequent shooting an unconstitutional use of force. First, liability arises only if the officers violate the Fourth Amendment and moreover act recklessly, not merely negligently. *Billington*, 292 F.3d at 1189; *see also Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). This threshold inquiry provides significant protection for officers.

Moreover, even if the officers recklessly violated the Fourth Amendment, the Ninth Circuit provides yet another limitation by asking "what harms the constitutional violation proximately caused." *Billington*, 292 F.3d at 1190. For example, in *Duran v. City of Maywood*, 221 F.3d 1127 (9th Cir. 2000), the Ninth Circuit held that even if the officers violated the Fourth Amendment by entering a suspect's property without a warrant, their decision to open fire on the decedent after he pointed his weapon at them was justified because nothing the officers did "caused an escalation that led to the shooting." *Id.* at 1131; *see also Billington*, 292 F.3d at 1189.

Finally, the Ninth Circuit has held that throughout the Fourth Amendment analysis courts

must allow 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.'" *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996) (quoting *Graham v. Connor,* 490 U.S. 386, 396-97 (1989)).

b. The law in other circuits is largely consistent with the Ninth Circuit's. For example, petitioners' principal reliance on the law of the Third Circuit, *see* Pet. 17-18, fails to recognize that court's *rejection* of a "rigid rule" excluding "all context and causes prior to the moment" police seize a citizen, *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999). Such a rule, the Third Circuit has explained, would be irreconcilable with this Court's command to consider whether the "'totality of the circumstances'" renders a particular seizure reasonable. *Id.* at 291 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). Thus, *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995) (Alito, J.), acknowledged that officers might be held liable for using excessive force to subdue a suspect if the injuries were the result of the officers' unlawful entry into a house. *Id*. at 400 (explaining that "under basic principles of tort law . . . the troopers would be liable for the harm 'proximately' or 'legally' caused by their tortious conduct (i.e., their illegal entry)"). The Third Circuit recognized that a victim's actions toward the police may be a superseding cause that breaks the chain of proximate cause between a prior Fourth Amendment violation and a suspect's death. *See* Pet. 17-18 (citing *Lamont v. New Jersey*, 637 F.3d 177 (3d Cir. 2011)). This parallels the Ninth Circuit's holding in *Duran*, which denied liability where an individual

responded to the police entering his property by opening fire on officers, and the officers defended themselves with deadly force. *Duran*, 221 F.3d at 1130-31.

Like the Third Circuit, the Fourth Circuit also accounts for antecedent officer misconduct. "The better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances." *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994). Similarly, the Eleventh Circuit in *Menuel v. City of Atlanta*, 25 F.3d 990 (11th Cir. 1994), did not confine its analysis to the moment of the shooting, but rather considered the police officers' conduct in entering the home, encircling the decedent, and storming the room where she had gone. *Id.* at 996.

The other decisions cited by petitioners generally reject the proposition that officers can be held liable for provoking a confrontation through bad tactics or negligent conduct. *See Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007); *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005); *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996); *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995); *Fraire v. City of Arlington*, 957 F.3d 1268 (5th Cir. 1992). But so does the Ninth Circuit. *See, e.g.*, *Billington*, 292 F.3d at 1190 ("Our precedents do not . . . permit a plaintiff to establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided."). That some of these decisions have used broad language suggesting a bright-line rule refusing to consider any pre-seizure conduct provides no basis for this Court's intervention. These courts

have not decided whether officers may be held liable for injuries resulting from a confrontation proximately caused by a prior reckless *Fourth Amendment violation* because the facts of those cases did not present that distinct question. *See, e.g.*, *Dickerson v. McClellan*, 101 F.3d 1151, 1160, 1162 (6th Cir. 1996) (rejecting assertion of Fourth Amendment violation upon entry); *Menuel*, 25 F.3d at 994-95 (finding no "genuine claim that the shooting . . . arose proximately from a seizure" that infringed on Fourth Amendment rights). That distinction is essential. It is one thing to reject the assertion that officers violate the Fourth Amendment when they use force as a result of negligent conduct not amounting to a constitutional violation. It would be quite another to hold that the Fourth Amendment allows officers to injure or kill citizens who are placed in harm's way as a proximate result of the officers' own reckless constitutional violations. Until other circuits directly confront that question and expressly reject the proximate cause holdings of the Third and Ninth Circuits, there is no reason for this Court to intervene.

2. Petitioners Have Not Shown That Any Difference In The Circuits' Approaches Leads To Disparate Results In Similar Cases In Practice.

Certiorari is also not warranted because any disagreement in the wording of the circuits' decisions is not outcome determinative.

Despite petitioners' alarmist rhetoric, courts in the Ninth Circuit overwhelmingly grant defendants summary judgment on *Billington* claims. *See, e.g.*,

Jensen v. Burnsides, No. CV-06-2356-PHX-GMS, 2008 WL 4700020 (D. Ariz. Oct. 23, 2008); *David v. City of Fremont*, No. C 05-46 CW, 2006 WL 2168329 (N.D. Cal. July 31, 2006); *Robbins v. City of Hanford*, No. CIVF F04-6672AWI SMS, 2006 WL 1716220 (E.D. Cal. June 19, 2006); *McCartor v. City of Kent*, No. C05-0032Z, 2005 WL 2600421 (W.D. Wash. Oct. 12, 2005). Indeed, respondents have been unable to identify a single case in the Ninth Circuit in which a plaintiff has prevailed at trial on such a claim.

Likewise, among the cases petitioners cite from circuits allegedly adopting an insufficiently officer-friendly rule, Pet. 20-21, the courts of appeals actually ruled in the officers' favor in all but one, in which case the court deferred to a jury's verdict, *Young v. City of Providence*, 404 F.3d 4, 9 (1st Cir. 2005).

C. The Ninth Circuit's *Billington* Rule Is Correct.

Certiorari is also unwarranted because there is no merit to petitioners' extreme submission that the Constitution is indifferent to whether a citizen is killed as a result of an officer's egregious violation of the Fourth Amendment. On petitioners' view, an officer could break into an unsuspecting citizen's home, point a gun at him, and then shoot him if he tried to defend himself from what he reasonably believed to be an attack by a burglar. Indeed, because petitioners insist that the officer's subjective motives are irrelevant to the Fourth Amendment analysis, Pet. 26, the officer could do this for the express purpose of provoking the homeowner and then killing him. That cannot be, and is not, the law.

The Ninth Circuit's *Billington* rule arose from *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). In *Alexander*, the police accompanied health officials to inspect Henry Quade's home for sewage problems. *Id.* at 1358. Police knew that Quade was "mentally unstable," elderly, and "half-blind." *Id.* Quade refused to open his door and threatened to get a gun. *Id*. Although the police had no warrant authorizing them to enter the home to arrest Quade, they nonetheless decided to storm the house with a SWAT team to take him into custody. One of the commanding officers later explained the decision not to obtain an arrest warrant, stating that "[i]t wasn't necessarily dangerous but we could have been waiting all day long. . . . [W]e felt that rather than keep traffic blocked up and the streets blocked all day long we would try to go in and arrest him." *Id.* at 1358-59. The police then smashed in the door with a battering ram, stormed in, and killed Quade after he attempted to fire on them.

The Ninth Circuit held that the warrantless entry violated the Fourth Amendment. *Id.* at 1361-62. The court then agreed with the plaintiff that although the police may have acted reasonably in shooting Quade once he "pointed his gun at the officers and pulled the trigger," the "force the police used was unreasonable under *all* the circumstances." *Id*. at 1366. The court explained that under this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), the "force which was applied must be balanced against the *need* for that force." *Alexander*, 29 F.3d at 1367 (emphasis in original). Thus, summary judgment was not appropriate because a

jury could find the police acted unconstitutionally in sending in a SWAT team to conduct a sewage inspection, without the arrest warrant required by the Fourth Amendment. *Id.*

This Court's precedents reveal the folly of petitioners' contrary position. Proper analysis of a police seizure requires considering if "the totality of the circumstances justified a particular sort of search or seizure." *Garner,* 471 U.S. at 9. Because "the extent of the intrusion" is central to the Fourth Amendment analysis, it is "plain that reasonableness depends on not only when a seizure is made, but also *how* it is carried out." *Id.* at 8 (emphasis added).

The "how" is at the heart of analyzing reasonableness under the totality test, *see Garner,* 471 U.S. at 9, and requires an examination of the entire chain of events leading to an officer's use of deadly force. In *Scott v. Harris*, 550 U.S. 372 (2007), for example, the Court determined it was reasonable for police to ram a speeding driver during a lengthy chase down a rural road in part because "[i]t was respondent" who "intentionally" created the need for the use of force with his prior actions. *Id.* at 384. The Court was explicit that such prior "[c]ulpability *is* relevant." *Id.* n.10.

Indeed, although petitioners assert that events prior to the moment of a shooting are constitutionally immaterial, petitioners themselves, in attempting to justify their actions, emphasize several facts antecedent to the shooting in the attic: the officers claim that they had seen a bloody shirt, found a knife on Jason Martin, and believed Sullivan had fled. Pet. 4-8. They further justify their actions on the grounds that Sullivan initially refused to show his hands and

had allegedly threatened the officers. *Id*. 34-35. There is no principled legal rule that would consider a suspect's recklessness in creating a dangerous situation and not consider an officer's. *See Raso*, 183 F.3d at 291. General tort principles recognize this point: "One cannot provoke a fight and then rely on a claim of self-defense when that provocation results in a counterattack, unless he has previously withdrawn from the fray and communicated this withdrawal." *Harris v. United States,* 364 F.2d 701, 702 (D.C. Cir. 1966) (citing *Rowe v. United States,* 164 U.S. 546 (1896)).

Accordingly, this Court only last Term ruled that the police cannot justify conduct that would otherwise violate the Fourth Amendment by pointing to an emergency they themselves created through a prior Fourth Amendment violation. In *Kentucky v. King*, 131 S. Ct. 1849 (2011), the Court held that officers' otherwise unconstitutional warrantless entry into a home may be justified by exigent circumstances only if the officers did not create the exigency by violating the Fourth Amendment. *Id.* at 1854. The basic, sound principle is that "an essential predicate" to reasonableness of a police seizure is "that the officer did not violate the Fourth Amendment" in the steps preceding the seizure. *Id.* at 1858 (citing *Horton v. California*, 496 U.S. 128, 136 (1990)). The same principle applies here: petitioners may not justify shooting an unarmed man by pointing to a deadly confrontation they themselves caused through conduct that independently violates the Fourth Amendment.

D. Further Percolation Is Warranted In Light Of Recent Decisions From This Court.

Finally, the Court should delay any review on the first question posed by the petition until the lower courts have had an opportunity to consider how this Court's decisions in *Scott* and *King* affect their current Fourth Amendment precedents in this area. As one federal court has recognized, the reasoning of *Scott* "could easily be applied in reverse to a situation where the police created the need for force, making the use of force by police correspondingly less reasonable." *Fortunati v. Campagne*, 681 F. Supp. 2d 528, 543 n.13 (D. Vt. 2009). Decisions that have refused to analyze police conduct prior to a use of force are "at least call[ed] into question" by *Scott*. *Id.* Similarly, the conclusion that the Fourth Amendment requires "that the steps preceding the seizure be lawful," *King*, 131 S. Ct. at 1858, implies that courts must consider some of the prior steps, and must develop principles, as the Ninth Circuit has, to determine what prior action is relevant.

II. Certiorari Is Unwarranted To Review The Ninth Circuit's Application Of Settled Qualified Immunity Principles To This Case.

In their second and third questions presented, petitioners ask this Court to decide whether the opinion below correctly applied established qualified immunity jurisprudence to the particular facts of this case. But petitioners cannot seriously contest that the panel correctly identified and properly stated the qualified immunity inquiry announced by this Court,

Pet. App. 3, nor do they claim that the Ninth Circuit applies a different qualified immunity analysis than other circuits. Instead, they simply criticize one part of the panel opinion in this particular case for allegedly failing to walk through a separate "clearly established" analysis under which they would have supposedly prevailed under their view of the facts. Pet. 28-38.

Even assuming that the portion of the opinion petitioners cite could more explicitly have invoked the two-step qualified immunity analysis, petitioners cannot plausibly claim that the panel misunderstood the long-established test the panel cited and quoted in its opinion. Moreover, any criticism of the court's opinion writing is pointless unless petitioners could show that the panel erred in its ultimate disposition of the case. But this Court "does not sit" as a court of "error-correction," *Halbert v. Michigan*, 545 U.S. 605, 611 (2005), and undertaking that function in this case would require the Court to wade through a complicated and much-disputed factual record, encumbered by the jurisdictional constraints that limit an appellate court's review of the summary judgment record on an interlocutory qualified immunity appeal. And even if the Court undertook that fact-bound inquiry, it would be compelled to conclude that the Ninth Circuit properly upheld the denial of summary judgment in this case.

A. The Ninth Circuit Properly Applied The Second Step Of The *Saucier* Test.

The basis for petitioners' complaint is far from clear. Petitioners do not contest that the opinion below states the correct standard, explaining that

"[f]or qualified immunity, we determine whether the facts show that (1) the officer's conduct violated a constitutional right; and (2) the right which was violated was clearly established at the time of the violation." Pet. App. 3 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). The panel further demonstrated that it recognized that the second portion of the rule was an independent step, explaining that if the officers violated "a [constitutional] right, but it was not clearly established, then they are entitled to immunity." *Id.* (citing *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1129 (9th Cir. 2002)). The opinion again recognized that these two steps are conceptually distinct in explaining that the disputed fact issues in this case were material not only to "whether the officers violated Asa Sullivan's Fourth Amendment rights," but also to the "reasonableness of the officers' belief in the legality of their actions." *Id.*

The panel's failure to repeat this conclusion again later in its opinion is perfectly understandable. The real dispute in this case is over the facts. As discussed below, the Ninth Circuit reasonably rejected petitioners' claim that the undisputed evidence showed that Sullivan posed a significant threat to the officers. And it goes without saying that the Fourth Amendment clearly prohibits pointing a gun at and fatally shooting a suspect who does not pose a threat, is not suspected of criminal activity, and cannot escape. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (holding that the Fourth Amendment prohibits shooting an apparently unarmed felony suspect, even if he is fleeing); *see also Harris v.*

Roderick, 126 F.3d 1189, 1202-04 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998).

In any event, even assuming that the court of appeals' analysis could have been clearer, this Court "reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). As discussed next, petitioners' objection to the result below is meritless and unworthy of this Court's attention.

B. Petitioners' Qualified Immunity Claims In This Court Are Premised On A Mischaracterization Of The Summary Judgment Record.

Even if poring over a complex summary judgment record were a proper use of this Court's resources, certiorari would not be warranted. Petitioners' fact-bound arguments ignore both the conflicts in the record and the procedural posture of the case, which requires that all factual disputes be viewed in the light most favorable to respondents and precludes appellate determination of which facts are genuinely in dispute. *See, e.g.*, *Behrens v. Pelletier*, 516 U.S. 299, 309, 313 (1996); *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

As explained by then-Judge Alito, summary judgment on qualified immunity grounds is inappropriate in a Fourth Amendment case in which there is "sharply conflicting evidence regarding the critical events," such that "a reasonable jury could have found for either side," "[d]epending on which version of the facts it believed." *Bodine v. Warwick*, 72 F.3d 393, 396 (3d Cir. 1995). In this case,

petitioners' plea for qualified immunity depends on their assertion that at the time of the shooting, "Sullivan refused to show his hands, refused to follow commands, threatened to kill police officers, told them they would be sorry when he made his move," Pet. 35, and then "suddenly [brought] up his arm as if to point a weapon" at the officers, *id*. 34 (capitalization altered). But that description of the facts depends entirely on petitioners' own self-serving testimony. And a jury here would be well justified in refusing to credit that testimony in light of the pattern of inconsistencies both across officers and across time, with significant self-serving changes occurring between the homicide interview immediately following the shooting and the officers' later depositions. Other testimony is disputed by witnesses who do not share the officers' interests, or cannot be true due to physical impossibility.

For example, the officers gave conflicting stories about their justifications for entering the home at all. After initially stating the security guards told him only that the lock on the front door did not belong to the landlord, SER000910 (Morgado Int.), Morgado changed his testimony and claimed the guards told him "there was nobody on the lease, and that the prior person had moved out," Morgado Depo. 76. The security guards deny this claim. *See* SER000846 (Reiter Rep.).

In addition, the officers were initially consistent in stating they "couldn't tell if [the blood stains] were fresh or not," SER001044 (Keesor Int.), a factor highly relevant to the exigency of their search. SER000193 (Keesor Depo.); SER000925 (Morgado

Int.); SER000330 (Alvis Depo.). But Keesor and Morgado later changed their testimony. Keesor began his deposition by stating, consistent with what he told homicide investigators, that he could not tell if the blood was dry or fresh. SER000189 (Keesor Depo.). His attorney, however, asked for a break shortly afterward, and when Keesor returned, he changed his story completely. Not only did Keesor now claim that he had been able to determine the state of the blood on the shirt, he emphatically insisted that it was covered in "fresh, fresh blood." SER000198 (Keesor Depo.). Morgado likewise changed his story and testified at his deposition that the blood was fresh. Morgado Depo. 83.

Alvis told homicide investigators that when the officers made their way upstairs, the bedroom occupants refused to open the door, "so we kicked the door in." SER001080 (Alvis Int.); *see also* SER001094 (Alvis Int.). That assertion was refuted by Keesor and Morgado, who insisted that Martin opened the door for the officers and that his behavior in the room was "picture perfect. No resistance, nothing." SER001045 (Keesor Int.); *see also* SER000912 (Morgado Int.). Such an inconsistency cannot be explained away as a simple difference in recollection or observation. One (or more) of petitioners is lying.

Furthermore, despite being within a few feet of Sullivan and each other, the officers gave sharply conflicting testimony about the nature of Sullivan's statements in the attic. Keesor denied in his interview that Sullivan made any serious threats, suggested suicide, or talked about his family. SER001052 (Keesor Int.). "[H]e didn't exhibit

anything else of like . . . he was going to, you know, commit suicide, or suicide by cop, or anything like that. Another officer mentioned that. He was like, Hey, I, I think he is going to try to 801 [suicide] by cop. But, uh, he, he, he, he wasn't – I don't remember him saying anything like, you know, say Hi to my family, or give my family a call, or tell my girl I love her, or anything like that." SER001056 (Keesor Int.).

The officers' statements also conflicted when describing their use of deadly force. Indeed, some claims reach the level of physical impossibility. Although petitioners now admit that Sullivan was unarmed, they initially claimed they shot him only after he fired a gun at them. Thus, in the immediate aftermath of the shooting, Alvis told investigators that she shot Sullivan because she heard what was "[d]efinitely" a gunshot coming from Sullivan, SER001118 (Alvis Int.). She said, "From where he was, I could see his gun firing. I could see the flashes of his gun firing." SER001103 (Alvis Int.). Alvis further insisted that "I could see muzzle flash, muzzle like fire as [Sullivan] was shooting," "so I shot at him and John [Keesor] shot at him." SER001084 (Alvis Int.). Keesor also testified that he heard what "sounded exactly like . . . gunshots" coming from Sullivan, and that he shot Sullivan because his partner "was being shot at. She was, in my mind, she was already shot." SER001049-50 (Keesor Int.).

At their later depositions, once it was clear that Sullivan had no gun, the officers changed their testimony. Alvis admitted that she didn't know whether the gunshot she heard could have come from her own gun, but said that the gunshot she heard

was not the reason she decided to shoot. SER000372 (Alvis Depo.).

For his part, Keesor now testified that "[i]mmediately before I fired at Mr. Sullivan . . . he sat up forward and punched his arms straight out and pointed an object, long, black slender object" toward Alvis. SER000279 (Keesor Depo.). But Alvis told investigators that Sullivan did no such thing. Despite having "the best view of [Sullivan's] hands" of all the officers in the attic, SER001089 (Alvis Int.), Alvis never saw any kind of object in either of Sullivan's hands, SER001115 (Alvis Int.), and she "did not observe his arms outstretched in [her] direction . . . or him pointing his hands at [her]," SER000362-63 (Alvis Depo.). Likewise, Morgado denied that Sullivan had any gun-like object in his hands or ever stretched out his arms. SER000540-41 (Morgado Depo.).

A jury could also find that the police manipulated the evidence in the attic to try to justify an unprovoked shooting. Officer Choy, who was on the floor of the apartment below the attic during the shooting, testified that Officer Leung, the first to approach the body, yelled out that "there was an object in [Sullivan's] pocket in some sort of case, a glasses case." SER001158-59 (Choy Int.). Officer McCray, the second responder, then claimed to have found this same glasses case under Sullivan's right forearm. SER000479-81 (McCray Depo.). But the eyeglasses case does not appear in any of the forensic scene photos, *see* Photos SER001180-1204, a discrepancy Inspector Shouldice attempted to explain by claiming to have neglected to photograph the

glasses case in its alleged place before moving it, SER000443 (Shouldice Depo.).

In light of the pattern of story-changing and inconsistencies among the officers' versions of events in this case, a jury would be entitled to disbelieve petitioners' assertions about what actually happened at the moment of the shooting.[5] Most significantly, given the witnesses' proven unreliability, a jury could well decide that Sullivan did *not* threaten the officers and then "suddenly bring[] up his arm as if to point a weapon" at them, Pet. 34 (capitalization altered).

The Ninth Circuit correctly recognized that once the facts are properly construed in respondents' favor, summary judgment was properly denied. The court explained that it was undisputed that the

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[5] Two of the three petitioners were subsequently criminally charged for misconduct that involved acts of dishonesty. Officer Morgado falsified a police report to reflect that a man had resisted arrest and attacked Morgado, while video footage showed Morgado charging and attacking the man before handcuffing and arresting him. Brent Begin, *SFPD Officer Fired After Video Contradicts His Report*, S.F. EXAMINER, Apr. 9, 2011, *available at* http://www.sfexaminer.com/local/2011/04/sfpd-officer-fired-after-video-contradicts-his-report; Dan Noyes, *SFPD Officer Charged; Suit Asks for $1 Million*, ABC 7 NEWS, Apr. 8, 2009, *available at* http://abclocal.go.com/kgo/story?section=news/iteam&id=6749849. Officer Alvis was indicted for stealing cash from an evidence locker in 2008. Jaxon Van Derbeken, *Officer Who Killed Suspect in '06 Pleads Not Guilty to Theft*, S.F. CHRON., Apr. 16, 2008, at B14. Prosecutors decided not to retry her after a jury failed to reach a verdict. Jaxon Van Derbeken, *Prosecutors Drop Felony Theft Charges Against Cop*, S.F. CHRON., May 18, 2009, at B1.

officers fired twenty-five close-range shots at an unarmed man whom the officers knew could not escape the attic crawlspace in which he was cornered. Pet. App. 17-18. Sullivan had not initially caused the situation, but rather hid after officers had unexpectedly burst into his home. *Id.* 16, 18. It is undisputed that Morgado did not see the bloody shirt until *after* he entered the home, so the shirt cannot establish that Morgado "could have had an objectively reasonable belief that a life-threatening emergency was occurring or a crime was in progress" when he entered without a warrant. *Id.* 9. When Sullivan fled to the attic as the officers entered the bedroom, the officers knew he had not been accused of any crime, could not escape the attic because there were no other exits, and was not a threat to the public. *Id.* 18. Nevertheless, the officers pursued Sullivan into the attic with their loaded guns drawn, *id.* 16, and ignored repeated suggestions that they pull back and establish a plan before proceeding, *see* SER000879, SER000884 (CAD Radio Rec.). It is undisputed that Sullivan "had not brandished a weapon, spoken of a weapon, or threatened to use a weapon." Pet. App. 18.

In light of the sharply conflicting evidence and reasons to doubt the officers' self-serving testimony, a reasonable jury could find that Sullivan did not pose a serious threat to the officers or the public as he sat cornered in the attic. It could find that the officers had no basis to believe Sullivan was armed, and that the conflicting testimony about the nature of his arm movements and statements in the attic support the conclusion that the officers shot Sullivan without sufficient provocation.

C. The Procedural Posture Of This Case Makes It A Particularly Poor Vehicle For Review.

Even if deciding the proper set of facts on qualified immunity in a case-specific manner were sometimes worthy of this Court's attention, doing so would be inappropriate here for two reasons.

1. This Court lacks jurisdiction to decide for itself what facts are undisputed in the summary judgment record. In *Johnson v. Jones*, 515 U.S. 304 (1995), the petitioners attempted to appeal the district court's denial of qualified immunity on summary judgment. The district court had ruled that the "evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." This Court held that an appellate court does not have jurisdiction over this type of appeal, explaining that interlocutory appeals of qualified immunity decisions were limited to "cases presenting more abstract issues of law." *Id.* at 317. Accordingly, in such an appeal, the reviewing court must accept the district court's determination of which facts are disputed, and which are not. *Behrens*, 516 U.S. at 313 (citing *Johnson*, 515 U.S. at 313-18).

In this case, the district court did not make a clear record of the facts it assumed. That does not, however, provide an appellate court license to undertake a de novo review of the summary judgment record to decide for itself what facts are genuinely undisputed, as the dissent did in this case. *See* Pet. App. 20 n.1. Instead, in such cases, the appellate court must "undertake a cumbersome

review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Johnson*, 515 U.S. at 319. That task is particularly unworthy of this Court's resources.

Moreover, it would be an especially difficult assignment in this case because not only did the district court fail to make express findings about the factual record, it did not even consider the state of the record with respect to events in the attic because it had denied summary judgment on other grounds before it reached that question. *See* Pet. App. 58-59.

2. While qualified immunity is designed to avoid unnecessarily subjecting public officials to the expense and inconvenience of a trial, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), granting certiorari and reversing here would not avoid those burdens. Petitioners do not seek review of the denial of summary judgment on the claim of a constitutional violation at entry. *See* Pet. App. 6. They also did not appeal (and do not seek review here regarding) the district court's denial of summary judgment on respondents' state law claims. *See* Pet. App. 64-67. Accordingly, trial will proceed on these claims, after which the court of appeals and this Court could review the judgment on a full factual record. Until then, however, this case is not a proper vehicle for petitioners' qualified immunity contentions, and this Court should deny review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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