No. 24-152

IN THE

Supreme Court of the United States

MICHAEL PINA,

Petitioner,

v.

ESTATE OF JACOB DOMINGUEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

NORA FRIMANN
MAREN CLOUSE
MALGORZATA LASKOWSKA*
OFFICE OF THE CITY ATTORNEY
200 East Santa Clara Street, 16th Floor
San José, CA 95113
(408) 535-1900
cao.main@sanjoseca.gov

* *Counsel of Record*

Counsel for Petitioner

130739

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

CONSTITUTIONAL PROVISION

I. Introduction

The Petition identifies a clear failure by the Ninth Circuit to analyze qualified immunity as this Court has instructed—a failure all the more concerning because it ignores not only this Court's rulings, but also a jury's factual finding. The Opposition refuses to accept and address the import of the jury's factual finding. And it fails to explain how the Ninth Circuit identified a case clearly establishing it was unconstitutional to use deadly force on the facts the jury found. According to Respondent, "[t]he Courts correctly denied the application of qualified immunity because it was proven that Pina shot and killed an unarmed suspect, who had surrendered and complied with the officer's commands, and who was not an imminent threat to Pina, or anybody else." (Br. in Opp. at 3.) Almost everything about that sentence is wrong. The jury found not that Dominguez was surrendering and complying when he was shot, but that he had stopped complying with officers' commands by dropping his hands and leaning forward. And the lower courts did not properly apply qualified immunity because they did not identify a case that would have instructed Officer Pina that any further action or information was needed under those circumstances before reacting with deadly force. Indeed, the closest precedent, *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014), would have suggested to a reasonable officer that he was justified in shooting Dominguez when Dominguez dropped his hands and leaned forward. Respondent does not succeed in distinguishing *Cruz*.

Review is warranted because the Ninth Circuit's error is clear from the face of its decision and the jury's special interrogatory response. Summary reversal by this Court

will result in reinstating qualified immunity to Officer Pina and in a judgment in his favor.

II. Argument

A. The Jury Resolved in Petitioner's Favor the Only Disputed Fact Relevant to the Qualified Immunity Analysis.

The Ninth Circuit explicitly "accept[ed] the jury's findings that Dominguez dropped his hands and leaned forward before Officer Pina shot him . . . ." (App. A at 6a.) The Opposition refuses to do so. Instead, it claims from the outset that the jury "determined Pina used excessive force in shooting [Dominguez] while his hands were raised in compliance with officers' commands." (Br. in Opp. at 1.) The Brief in Opposition also mischaracterizes Dominguez as a "surrendering suspect." (*Id.* at 2. *See also id.* at 3 (claiming Dominguez "had surrendered and complied with the officer's commands").) The jury made no such findings. That was an argument Respondent made at trial (*see* App. B at 44a), but if the jury had accepted it, it would have reached the opposite conclusion on the special interrogatory (*see* App. C at 57a-58a). Respondent suggests the special interrogatory should be discounted because the jury was confused about it. (Br. in Opp. at 8.) But that argument was rejected below, including by the trial court presiding over the deliberations. (App. B at 14a-17a; *see also* App. A at 15a-16a.)

The Opposition's discussion of the forensic evidence at trial is irrelevant in light of the jury's special interrogatory finding. To whatever extent the forensic evidence might have supported a conclusion Officer Pina shot Dominguez

while he was still complying with officers' commands, the jury made the opposite finding. And whether Dominguez had raised one arm again when he was shot so that the bullet passed through the sweatshirt sleeve, it remains the fact (as found by the jury) that Dominguez dropped his hands and leaned forward *before* Officer Pina fired. Those facts alone establish Petitioner's entitlement to qualified immunity. Neither the Ninth Circuit nor Respondent identifies any case to the contrary. Accordingly, judgment should have been granted in Petitioner's favor.

B. Clearly Established Law Did Not Prohibit Petitioner's Use of Force in the Circumstances the Jury Found.

The Petition explained that the Ninth Circuit did not conduct the qualified immunity analysis this Court prescribes and, as a result, erred. The Opposition does nothing to dispel that conclusion.

First, Respondent argues that qualified immunity does not apply because no case absolves an officer of liability for shooting a suspect when the officer did not see a gun and there is a bullet hole in the suspect's sweatshirt. (Br. in Opp. at 2.) This argument has the analysis backwards. Qualified immunity is not limited to the specific facts of cases where it has been found to apply. Rather, qualified immunity applies unless there is fair warning to an officer that his actions violate the Constitution in the circumstances he confronts. *See, e.g.*, *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) ("police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue") (quotation omitted).

For that reason, Respondent's efforts to distinguish the two cases on which the Ninth Circuit relied are inadequate. According to Respondent, *Cruz*, 765 F.3d 1076, differs from this case because in *Cruz*, the officers were informed not only that the suspect was carrying a gun, but also that he was carrying it in his waistband. (Br. in Opp. at 14.) *Cruz* concluded it would be reasonable for officers to shoot if the suspect reached for his waistband. *Cruz*, 765 F.3d at 1078. But *Cruz* does not hold it is unreasonable to shoot a suspect who appears to reach for where he can retrieve his gun if the officer has not been told precisely where the gun is usually kept. *Cruz* does not even suggest such a rule. Respondent differentiates *Peck v. Montoya*, 51 F.4th 877 (9th Cir. 2022), because the officers in *Peck* saw the suspect near a gun. (Br. in Opp. at 16.) But *Peck*'s analysis turned on whether the suspect was arming himself—not whether the weapon was visible. *Peck*, 51 F.4th at 888. And *Peck* did not hold that an officer must see a gun to use deadly force. Neither *Cruz* nor *Peck* teaches that an officer may not use lethal force in response to the movement the jury found Dominguez made.

Second, the Brief in Opposition argues it is clearly established that "a suspect possesses the right to be free from deadly force when the suspect does not present an imminent threat of death or great harm . . . ." (Br. in Opp. at 12.) The Opposition thus makes the same mistake the Ninth Circuit's erroneous decision reflects: that because the jury found Officer Pina used excessive force, Dominguez was not an imminent threat, and therefore qualified immunity does not attach. (Br. in Opp. at 12-13.) But that only accounts for the first prong of the qualified immunity analysis; it does not address whether it was clearly established that an officer's use of force would be deemed excessive under the circumstances found by the jury.

Moreover, Respondent states the law at a high level of generality this Court's authority explicitly and repeatedly forbids for qualified immunity purposes. "[T]he clearly established right must be defined with specificity. 'This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality.'" *City of Escondido v. Emmons*, 586 U.S. 38, 42 (2019) (quoting *Kisela*, 584 U.S. at 104). The general statement that officers may not use deadly force in the absence of an imminent threat is insufficient to clearly establish a right. There must be a case "where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." *White v. Pauly*, 580 U.S. 73, 79 (2017).

As explained in the Petition, no case clearly establishes that Officer Pina could not use lethal force when Dominguez dropped his hands and leaned forward in the driver's seat. *Cruz* leads to the opposite conclusion, and *Peck*'s circumstances are too different. *Peck* also post-dates the use of force here. Respondent fails to address the problems with *Peck* that Petitioner identified and that warrant reversal.

C. The Remaining Facts Only Strengthen the Conclusion that Summary Reversal is Warranted.

Respondent repeatedly assigns import to facts contrary to established law. The Opposition begins by asserting this was not a "tense and rapid situation at the time of killing." (Br. in Opp. at 1.) That is directly contradicted by the video evidence introduced at trial; though it did not capture Dominguez's movements, the

audio and limited visuals amply convey the tension, urgency, and escalation of the situation. (Ex. 38.) Officers were attempting to arrest a suspect involved in an armed robbery who they were told had a gun, and the encounter proceeded from surrounding the vehicle to Dominguez dropping his hands and leaning forward in less than 30 seconds. (*See* Pet. at 5.) And the evidence at trial was that, after initially complying with officers' commands, Dominguez "quickly" dropped his hands and leaned forward and then "quickly" started to sit back upright. (App. B at 43a.) Those are just the sort of "tense, uncertain, and rapidly evolving" circumstances for which this Court has long said "allowance" must be made. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Thus, in *Kisela*, 584 U.S. at 105-06, this Court held qualified immunity attached when an officer used deadly force with "mere seconds" to assess the threat posed by a woman with a knife who was behaving erratically and ignoring officers' commands.

The Brief in Opposition emphasizes that no officer saw Dominguez with a gun before or during the attempted apprehension. (Br. in Opp. at 3.) But this Court has never held that an officer must see a weapon before reacting when a suspect makes a motion that would allow him to retrieve a weapon. Nor has the Ninth Circuit. To the contrary, the Ninth Circuit explained a decade ago that a furtive movement by someone police suspect—but are not sure—is armed may create an immediate threat that justifies deadly force. *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) ("if the person is . . . reasonably suspected of being armed . . . a furtive movement [or] harrowing gesture might create an immediate threat"). And in *Cruz*, 765 F.3d 1076, the Ninth Circuit explained

it would be reasonable to shoot a suspect who reached for where his gun was believed to be—there was no additional requirement that officers see the gun. The same is true of the many cases from other circuits cited in the Petition. (Pet. at 13-16.)

Relatedly, whether Dominguez turned out to have a gun does not inform the qualified immunity analysis. This Court's directive is that use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and "in light of the facts and circumstances confronting them." *Graham*, 490 U.S. at 396-97. There is no dispute that officers were attempting to apprehend Dominguez for his involvement in a robbery at gunpoint and the gun used in that crime had not been recovered. (Pet. at 4.) That was ample reason to believe Dominguez was armed. Again, no case of this Court or the Ninth Circuit holds otherwise.

Respondent argues Officer Pina should not additionally have relied on reports from an "anonymous informant." (Br. in Opp. at 1.) But the informant was "confidential," not "anonymous" (App. B at 43a), and Respondent identifies no case where it has even been suggested that an officer may not use information provided by a confidential source as he assesses the circumstances confronting him. Again, *Cruz*, 765 F.3d 1076, leads to the opposite conclusion. The officers in *Cruz* received information from a confidential informant that Cruz, whose criminal history included a felony involving a firearm, was carrying a gun. *Id.* at 1077-78. So, in light of that information, if Cruz reached for his waistband instead of obeying officers' commands, "[i]t would be unquestionably reasonable for officers to shoot." *Id.* at 1078. Nothing in the case law of the Ninth

Circuit or this Court would have informed Petitioner that a different rule applied during Dominguez's apprehension.

The Opposition also criticizes Officer Pina for his tactical decisions, including his placement near Dominguez's vehicle as he tried to make the arrest. (Br. in Opp. at 6-7.) But the Brief in Opposition offers no reason to believe any allegedly imperfect tactics could amount to a Constitutional violation, let alone that Officer Pina would have been on notice of one. This Court's decisions suggest otherwise. In *Plumhoff v. Rickard*, 572 U.S. 765, 769-70 (2014), officers attempting to stop a vehicle that had engaged in a dangerous high-speed pursuit approached the suspect vehicle on foot and, "gun in hand, pounded on the passenger-side window." That did not affect the Court's determination that it was reasonable for the officers to shoot the driver when he tried to continue his escape. *Id.* at 777. This Court has also explained that a prior unlawful decision does not render a reasonable use of force unconstitutional. In *County of Los Angeles v. Mendez*, 581 U.S. 420, 428 (2017), in rejecting the Ninth Circuit's so-called "provocation rule," the Court emphasized that a Fourth Amendment violation must be assessed based on the facts, circumstances, and information known to officers "when the conduct occurred." So the question is not whether Officer Pina might have avoided the confrontation that resulted when Dominguez dropped his hands and leaned forward, but whether—when Dominguez made that movement—Officer Pina was on notice that using lethal force to protect himself would be unconstitutional. He was not.

Finally, the Brief in Opposition repeats the Ninth Circuit's faulty reasoning that the jury's response to the

special interrogatory does not resolve details about how far Dominguez dropped his hands or leaned forward or whether he brought his arm back up and, if so, how far. (Br. in Opp. at 8.) Like the Ninth Circuit, Respondent does not identify any case where those details would have mattered to the reasonableness of an officer's use of deadly force in an incident like this one. The jury found Dominguez made a motion toward where he could have retrieved the gun Officer Pina believed he had. No case holds Officer Pina needed to assess any other details or wait to see if Dominguez brought his arm back up, potentially holding a gun, before using deadly force to protect himself.

III. Conclusion

The Court should grant the Petition and summarily reverse the Ninth Circuit's erroneous decision denying Petitioner qualified immunity to which he is entitled.

Respectfully submitted,

Nora Frimann
Maren Clouse
Malgorzata Laskowska*
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San José, CA 95113
(408) 535-1900
cao.main@sanjoseca.gov

* *Counsel of Record*

Counsel for Petitioner