No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF PHOENIX, PATRICK HANLON AND NICHOLAS FRENCH,
Petitioners,

vs.

ERNEST JOSEPH ATENCIO, et al,
Respondents.

RESPONSE TO THE APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BY PETITIONERS CITY OF PHOENIX, HANLON AND FRENCH

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April 17, 2017

To the Honorable Justice Anthony M. Kennedy, Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

The City of Phoenix, Hanlon and French have requested an extension of time within which to file a petition for writ of certiorari in this case. Undersigned represents Maricopa County Sheriff's Office (MCSO) detention officers Carrasco, Dominguez, Foster, Kaiser, Vazquez and Weiers, who are co-defendants of the City, Hanlon and French. The MCSO officers also intend to file a petition for writ of certiorari in this case. As the City of Phoenix, Hanlon and French have noted, the case involves a question of alleged excessive force under the Fourth Amendment. The Ninth Circuit affirmed the denial of qualified immunity to the City of Phoenix Petitioners, and to these Petitioners, based on an expansive "integral participant" theory that exposes law enforcement officers to potential liability under Section 1983 for alleged excessive force by others, even when the detention officer is not alleged to have personally used excessive force, or caused others to use excessive force, and when the officer does not know or suspect that others might use excessive force. The petitions for writ of certiorari will ask the Court to review this improper

expansion of Section 1983 liability, which contravenes this Court's rejection of vicarious liability in *Monell v. Department Social Services of City of New York*, 436 U.S. 658, 692 (1978). The Ninth Circuit's decision also failed to apply this Court's qualified immunity precedent that requires a violation of a "clearly established" constitutional right by relying on a single, factually-distinguishable Ninth Circuit case to conclude that a constitutional right is clearly established.

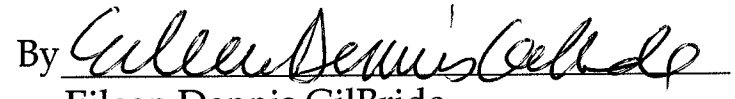
The MCSO officers are prepared to file their petition within the currently-scheduled deadline of May 15, 2017. However, the Court might prefer to have all parties from the same case file their cert petitions at the same time. If the Court intends to grant the extension request by the City of Phoenix, Hanlon and French, and if the Court would prefer to have all related petitions filed at the same time, then the MCSO officers will be happy to coordinate their filing with the City, Hanlon and French, and with another intended petitioner (co-defendant Hatton); and in that event requests the Court to order the same extension – to June 5, 2017 – for all petitions arising from this case. However, if the Court would prefer to have the MCSO detention officers file their petition within the current deadline, they are prepared to do so.

CONCLUSION

For the foregoing reasons, Petitioners Carrasco, Dominguez, Foster, Kaiser, Vazquez and Weiers respectfully request that if the Court would prefer to have all petitions from the same case filed at the same time, to extend the deadline for these Petitioners to file their petition for writ of certiorari to June 5, 2017, the same date as Petitioners City of Phoenix, Hanlon and French. Otherwise, the MCSO officers are prepared to file their petition by the current deadline of May 15, 2017.

RESPECTFULLY SUBMITTED this 17th day of April, 2017.

JONES, SKELTON & HOCHULI, P.L.C.

By 

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April 17, 2017

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF PHOENIX, PATRICK HANLON AND NICHOLAS FRENCH,
Petitioners,

vs.

ERNEST JOSEPH ATENCIO, et al,
Respondents.

CERTIFICATE OF SERVICE

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Vazquez and Weiers

April 17, 2017

It is hereby certified that all parties required to be served have been served with copies of RESPONSE TO THE APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BY PETITIONERS CITY OF PHOENIX, HANLON AND FRENCH, via e-mail and first-class mail, postage prepaid, this 17th day of April, 2017.

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RESPECTFULLY SUBMITTED this 17th day of April, 2017.

JONES, SKELTON & HOCHULI, P.L.C.

By 

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APPENDIX 1

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 30 2016

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al.,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al.,

Defendants-Appellants,

and

MARICOPA, COUNTY OF, a public entity; et al.,

Defendants.

No. 15-15451

D.C. No. 2:12-cv-02376-PGR

MEMORANDUM*

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al.,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff

Nos. 15-15456

D.C. No. 2:12-cv-02376-PGR

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Joseph Arpaio, husband; et al.,

Defendants,

and

PHOENIX, CITY OF, a public entity; et al.,

Defendants-Appellants.

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al.,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al.,

Defendants,

IAN CRANMER, husband; et al.,

Defendants,

and

ANTHONY HATTON, husband

Defendant-Appellant.

Nos. 15-15459

D.C. No. 2:12-cv-02376-PGR

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted November 17, 2016
San Francisco, California

Before: MELLOY,** CLIFTON, and WATFORD, Circuit Judges.

Defendants-Appellants appeal from the district court's denial of summary judgment based on qualified immunity. We have jurisdiction under 28 U.S.C. § 1291.[1] We affirm in part, reverse in part, and remand.

We review de novo an order denying summary judgment based on qualified immunity. *Glenn v. Wash. Cty.*, 673 F.3d 864, 870 (9th Cir. 2011). A public official is entitled to qualified immunity if (1) the disputed facts taken in the light most favorable to the party asserting the injury do not show that the official's conduct violated a constitutional right, or (2) the constitutional right was not clearly established at the time the official acted. *See, e.g.*, *CarePartners, LLC v. Lashway*, 545 F.3d 867, 876 (9th Cir. 2008).

** The Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit, sitting by designation.

[1] Plaintiffs-Appellees' ("Atencio") motion to dismiss for lack of jurisdiction is denied because we have jurisdiction to consider "whether the defendant[s] would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff[s'] favor." *George v. Morris*, 736 F.3d 829, 836 (9th Cir. 2013) (brackets added) (quoting *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012)).

Viewing the evidence in the light most favorable to Atencio, including the available video evidence, several of Defendants' acts could be found by a jury to constitute excessive force. Officer French appeared to apply what might be perceived as a carotid hold on Atencio when he was already physically subdued by several officers and arguably posed no immediate threat. When Atencio was being held down by several officers in a "dog pile," there was evidence that Sergeant Weiers tasered Atencio three times and Officer Hatton struck Atencio repeatedly with a closed fist before Atencio was handcuffed and taken to a safe cell. There, Officer Hatton delivered a knee strike to Atencio's upper body, and possibly his head, even though Atencio was handcuffed and being held in a prone position on the ground by several officers. Under these circumstances, a reasonable jury could conclude that some or all of those actions were objectively unreasonable. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Assuming these facts for the purpose of the second part of the qualified immunity test, there was clearly established precedent that would have made it sufficiently clear to reasonable officials that the acts here constituted excessive force. The circumstances here are not meaningfully different from those in *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003), in which this court held that the defendants were not entitled to summary judgment on an excessive force claim

alleging that a group of officers took a pre-trial detainee to the ground without warning, then began to strike and pepper spray him even though he posed no threat and was neither aggressive nor violent to the officers. *Id.* at 417. *Lolli* should have put a reasonable official on notice that he was prohibited from the type and amount of force used against Atencio, including multiple strikes to the face, repeated tasering, and a knee strike, when Atencio was at most passively resisting, he posed no threat to the officers, and he was already being physically restrained by several officers.

We recognize that a jury could credit the testimony of the officers and find that their use of force was permissible. However, because Atencio has shown that there exists a genuine dispute of material fact as to the reasonableness of their conduct, and because under one version of the facts, their conduct violated clearly established law, Officer French, Sergeant Weiers, and Officer Hatton are not entitled to summary judgment based on qualified immunity on the excessive force claim.

The district court denied qualified immunity to several other Defendants because there were genuine issues of material fact as to whether they were "integral participants" in these acts of excessive force. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007). In analyzing the various

Defendants' integral participation, the district court properly examined each officer's conduct rather than employing a "team effort" approach that simply "lump[s] all the defendants together." *Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002). Contrary to what Defendants claim, the district court properly found that Officer Kaiser had no involvement in the safe cell, but that there were genuine issues of material fact as to whether he was an integral participant in the linescan room events. The district court also properly determined that Officer Vazquez may have been an integral participant in the linescan room. Neither the video evidence nor Officer Vazquez's own affidavit resolved whether he entered the linescan room with enough time to participate in the tasering or the strikes.

We cannot say that the district court erred in applying the integral participation doctrine to Officer Hanlon for his wrist lock of Atencio, because his wrist lock was instrumental in controlling Atencio, which allowed the other officers to commit the excessive force against him. *See Blankenhorn*, 485 F.3d at 481 n.12 (holding that officer was liable as an integral participant for his help in handcuffing plaintiff because it "was instrumental in the officers' gaining control of [him], which culminated in" excessive force).

However, the district court erred in denying qualified immunity to Sergeant Scheffner for his role in Officer Hatton's knee strike of Atencio in the safe cell.

The district court concluded that genuine issues of material fact regarding his integral participation, supervisory liability, and the duty to intervene precluded summary judgment in his favor based on qualified immunity. We disagree. Sergeant Scheffner could not be liable as a matter of law under any of these theories because, even though he may have seen Hatton deliver the knee strike, there is no evidence that Sergeant Scheffner directed or otherwise knew that the solitary knee strike would occur, physically participated in the knee strike, or had a realistic opportunity to stop the knee strike from happening. *See, e.g.*, *Cunningham v. Gates*, 229 F.3d 1271, 1289-92 (9th Cir. 2000) (discussing standards for supervisory liability and duty to intervene).

The district court also erred in denying qualified immunity to Officer Hanlon on Atencio's substantive due process claim for loss of familial association. "Official conduct that 'shocks the conscience' in depriving [family members] of that interest is cognizable as a violation of [substantive] due process." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). "In determining whether excessive force shocks the conscience, the court must first ask 'whether the circumstances are such that actual deliberation [by the officer] is practical.' Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Id.* The "deliberate indifference" standard is applicable

because the circumstances appeared to permit actual deliberation by Officer Hanlon before he applied the wrist lock. However, it cannot be said that his use of the wrist lock showed his deliberate indifference to Atencio's death. Hanlon could not have reasonably foreseen that his use of a wrist lock would cause or would trigger events ultimately leading to Atencio's death.[2]

We decline to exercise pendent jurisdiction over the district court's denial of summary judgment in favor of the Defendants regarding Atencio's state law claims because these issues are not "inextricably intertwined" with the qualified immunity issues properly raised on interlocutory appeal. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 960 (9th Cir. 2004). Whereas "qualified immunity is an immunity from suit rather than a mere defense to liability," *Jones v. County of Los Angeles*, 802 F.3d 990, 999 (9th Cir. 2015), the Arizona justification statutes raised by Defendants in their motion for summary judgment on the state law claims merely provide a potential defense when the merits are adjudicated, A.R.S. §§ 13-413 and 13-403(2).

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[2] None of the other Defendants, apart from Officers Hanlon and French, appealed the denial of qualified immunity as to the substantive due process claim. Although the Defendants attempted to incorporate each other's arguments by reference, Officers Hanlon's and French's arguments regarding the substantive due process claim were limited to their own conduct, so they do not apply to the other Defendants.

We reverse the district court's denial of denial of summary judgment as to Defendant Scheffner for Atencio's excessive force claim based on qualified immunity. We also reverse the district court's denial of qualified immunity to Defendant Hanlon on Atencio's familial association claim under the Fourteenth Amendment. We affirm in all other respects.

Each party to bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... *(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

[ ] v. [ ] 9th Cir. No. [ ]

The Clerk is requested to tax the following costs against: [ ]

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al., Plaintiffs-Appellees, v. JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al., Defendants-Appellants, and MARICOPA, COUNTY OF, a public entity; et al., Defendants.	No. 15-15451 D.C. No. 2:12-cv-02376-PGR ORDER

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al., Plaintiffs-Appellees, v. JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al., Defendants,	Nos. 15-15456 D.C. No. 2:12-cv-02376-PGR

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and

PHOENIX, CITY OF, a public entity; et al.,

Defendants-Appellants.

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al.,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al.,

Defendants,

IAN CRANMER, husband; et al.,

Defendants,

and

ANTHONY HATTON, husband

Defendant-Appellant.

Nos. 15-15459

D.C. No. 2:12-cv-02376-PGR

Before: MELLOY,* CLIFTON, and WATFORD, Circuit Judges.

* The Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit, sitting by designation.

The panel voted to deny the petitions for rehearing. Judge Watford voted to deny the petitions for rehearing en banc, and Judge Melloy and Judge Clifton so recommended.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35.

The petitions for rehearing and the petitions for rehearing en banc are DENIED.