No. 16-1474

In The Supreme Court of the United States

PATRICK HANLON and NICHOLAS FRENCH,

Petitioners,

v.

ERNEST JOSEPH ATENCIO, et al.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

BRAD HOLM
City Attorney
CITY OF PHOENIX
LAW DEPARTMENT
200 W. Washington St.,
Suite 1300
Phoenix, AZ 85003
602-262-6761
brad.holm@phoenix.gov

MARY R. O'GRADY
Counsel of Record
ERIC M. FRASER
HAYLEIGH S. CRAWFORD
OSBORN MALEDON, P.A.
2929 N. Central Ave.,
Suite 2100
Phoenix, AZ 85012
602-640-9000
mogrady@omlaw.com
efraser@omlaw.com
hcrawford@omlaw.com

Attorneys for Petitioners Patrick Hanlon and Nicholas French

September 22, 2017

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INTRODUCTION

Respondents largely agree with Petitioners' legal arguments regarding the requirements for the integral participant doctrine. The Ninth Circuit, however, has disregarded these requirements, and this Court should accept review to end the use of the integral participant doctrine to bypass fundamental requirements of 42 U.S.C. § 1983.

The Ninth Circuit's decision improperly requires Officers Hanlon and French to stand trial and face the prospect of liability for the conduct of others and for conduct that was not clearly established to be unconstitutional. Respondents invoke the role of the trial and the jury, as if a jury trial eliminates the need for this Court's review of this case. Qualified immunity, however, is not a mere defense to liability, but rather an entitlement not to stand trial or face the burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). And because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted).

This Court's review is necessary to correct course in the Ninth Circuit and ensure that the qualified immunity doctrine serves its important purpose.

I. The Ninth Circuit's integral participant doctrine neither requires nor considers proximate cause and culpability.

Respondents do not dispute that this Court's § 1983 jurisprudence forbids vicarious liability and requires a showing of both culpability and proximate cause. (Opp. 24-30.) They argue that this Court should not review the integral participant doctrine because it "requires proximate cause, it holds individuals liable for their own conduct, and it is distinct from vicarious liability." (Opp. 25.)

The Ninth Circuit's decision, however, refutes any contention that its integral participant doctrine incorporates the proximate cause and culpability standards that Respondents concede are necessary. (*See* App. 1-8; *see also* Pet. 9-22.) The Ninth Circuit's discussion of the doctrine as to the Phoenix officers mentions neither proximate cause nor culpability:

> 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* [*v. City of Orange*], 485 F.3d [463,] 481 n.12 [(9th Cir. 2007)] (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).

(App. 6.) This analysis necessarily relies on but-for causation. (Pet. 19-22.) The discussion does not even hint at foreseeability or knowledge.

Nevertheless, Respondents contend that proximate cause and culpability are "baked into" the Ninth Circuit's decision. (Opp. 26.) In support, they cite to the portion of the court's ruling holding that MCSO Sergeant Scheffner could not be held liable:

> The district court concluded that genuine issues of material fact regarding [Sergeant Scheffner's] 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 it 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).

(App. 6-7.) Respondents suggest that the "directed or otherwise knew" phrase reflects the standard for liability under the integral participant doctrine. (*E.g.*, Opp. 25, 26, 28.) But "[d]irected or otherwise knew" is the *supervisory liability* standard. *E.g.*, *Taylor v. List*,

880 F.2d 1040, 1045 (9th Cir. 1989) (a supervisor is liable for subordinates' acts "if the supervisor participated in or directed the violations, or knew of the violations [of subordinates] and failed to act to prevent them").

Respondents also suggest that Officers Hanlon and French held Atencio down so that the MCSO officers could punch and taser him. (*See* Opp. 2, 6, 9, 23.) But as the district court specifically noted, the Phoenix officers had disengaged by the time the MCSO officers acted. (*Carrasco v. Atencio*, No. 16-1441, Pet. App. 61a ("As to the uses of force that occurred *after Hanlon and French were no longer physically involved, e.g.*, *the facial strikes by Hatton and the Taser deployment by Officer Weiers*, the Court denied summary judgment on the issue of qualified immunity because there was a genuine factual dispute as to whether Hanlon and French were integral participants in that use of force." (emphasis added)).)

For that reason, Respondents' example of an officer holding an arrestee's hands behind him while another officer punches the arrestee in the face misses the point. (Opp. 2, 23.) The problem is that integral participant doctrine has been extended to officers who do *not* directly facilitate the use of force, and do *not* know or have reason to know the force will be used.

Respondents also argue that the integral participant doctrine is coextensive with a failure-to-intervene

theory, and that the Phoenix officers could be found liable under either one. (Opp. 11-12, 34-36.) They are wrong on both counts.

First, failure to intervene and integral participation are distinct theories. *See, e.g.*, *Aguilar v. City of Concord*, No. 16-cv-01670, 2017 WL 3895715, *4 (N.D. Cal. Sept. 5, 2017) (noting an officer's alleged integral participation in another officer's excessive force was "distinct from his allegedly failing to intervene"); *Alvarez v. Buchan*, No. C16-0721, 2017 WL 3424971 (D. Or. Aug. 9, 2017) (analyzing failure to intervene and integral participation as distinct theories); *Onyenwe v. City of Corona*, No. CV 12-01363, 2013 WL 12169375 (C.D. Cal. Dec. 1, 2013) (same). And unlike the Ninth Circuit's current formulation of integral participation, the failure-to-intervene theory requires proximate cause and culpability. (*See* Pet. 18.)

Second, both the district court and Ninth Circuit declined to apply a failure-to-intervene theory against the Phoenix officers, even though they accepted it for MCSO officers.[1] (*Compare* App. 27-28 ("There is a genuine factual dispute as to whether these [MCSO] officers were integral participants in the use of excessive force . . . , as well as whether these officers violated a

[1] The petition erroneously stated that Respondents had not raised a failure-to-intervene argument against the Phoenix officers. (Pet. 18 n.4.) Although Respondents raised that argument, both the district court and the Ninth Circuit declined to apply a failure-to-intervene theory against the Phoenix officers. (App. 4-7 (discussing only direct and integral participant liability as to the Phoenix officers); App. 17-26 (same).)

duty to intervene to prevent the use of excessive force."), *with* App. 26 ("there are genuine disputes of fact regarding whether Hanlon and French used excessive force against Atencio, either individually or as integral participants").)

In the same vein, Respondents suggest that the Phoenix officers could have intervened to stop the MCSO officers' actions, but did not. At one point, Respondents state: "He [Officer Gabriel] (unlike Hanlon or French) intervened to ultimately stop Hatton and end the beating." (Opp. 6.) Officer Gabriel, however, intervened to stop Officer Hatton *in the safe cell*, not in the linescan room. Officers Hanlon and French never went to the safe cell. (*See* App. 44.) Because what happened in the safe cell took place out of Officers Hanlon and French's sight and without their knowledge, it makes no sense to suggest that they failed to intervene in that conduct.

But even if the district court or Ninth Circuit *could have* applied a valid failure-to-intervene theory, that does not excuse the Ninth Circuit's flawed integral participant doctrine. The Ninth Circuit used to hew to the causation and culpability requirements incorporated into the Fifth Circuit's integral participant rule. (*See* Pet. 15-16 (discussing *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989), cited by *Chuman v. Wright*, 76 F.3d 292, 294-95 (9th Cir. 1996)).) *See also Boyd v. Benton Cty.*, 374 F.3d 773, 780 (9th Cir. 2004) (citing *Melear* and *Chuman* to hold that integral participant doctrine applied where "every officer was aware of the decision to use the flash-bang, did not object to it, and

participated in the search operation knowing the flash-bang was to be deployed"). But in *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007), the Ninth Circuit abandoned these core principles in favor of a looser, but-for causation standard.

In *Blankenhorn*, the court of appeals held that "gang-tackling" and using hobble restraints on an arrestee constituted excessive force. *Id.* at 478-80. The court found that an officer who arrived *after* the gang-tackling and handcuffed the arrestee *before* someone else applied the hobbles was an integral participant in the use of the hobbles, even though the officer did not know or have reason to know that hobbles would be used. *Id.* at 469 & n.3. In a footnote, the court reasoned that the officer's "help in handcuffing Blankenhorn was instrumental in the officers' gaining control of Blankenhorn, which culminated in Ross's application of hobble restraints," and therefore, his "participation was integral to the use of the hobble restraints." *Id.* at 481 n.12.

Blankenhorn thus applied a "but-for" theory of causation – but for the officer handcuffing the arrestee, the other officers would not have been able to place the hobble restraints on him. This problematic footnote has been cited in other decisions approximately 150 times. Indeed, the Ninth Circuit cited footnote 12 from *Blankenhorn* twice in its decision here. So it is hardly surprising that the court of appeals committed the same error here and upheld integral participant liability on the basis of but-for causation alone. (*See* Pet.19-22.)

Some decisions from courts in the Ninth Circuit continue to cite earlier Ninth Circuit integral participant cases like *Boyd v. Benton County*, and thus correctly require proximate cause and culpability. But others do not, often because they rely on *Blankenhorn*, which does not require proximate cause or culpability as part of the integral participant analysis. For example:

- In *Campbell v. Santa Cruz Cty.*, No. 14-CV-00847, 2016 WL 6822081, at *1, *5-6 (N.D. Cal. Nov. 18, 2016), the plaintiff alleged that officers used excessive force when tackling him during a search. The court held that an officer serving as armed backup could be found liable as an integral participant, without analyzing whether the officer knew or had reason to know that the tackling would occur.

- *Tubbs v. Sacramento Cty. Jail*, No. CIV S06-280, 2008 WL 3551187, at *6 (E.D. Cal. Aug. 13, 2008), *amended by* 2008 WL 4601501 (Oct. 15, 2008), held that officers who remained outside the plaintiff's cell could be integral participants in excessive force used by officers inside because they could be perceived as providing backup. The court did not analyze whether the backup officers knew or had reason to know the officers inside the cell would use the force they did.

- In *Monteilh v. County of Los Angeles*, 820 F. Supp. 2d 1081, 1089 n.10 (C.D. Cal. 2011), the court correctly required proximate cause and culpability under *Boyd*, but also stated that, in some circumstances, "officers may be

> integral participants *even if they have no knowledge of a plan to commit the alleged violation* if their physical participation in the alleged violation was part of a closely related series of physical acts leading to the violation." (Citing *Blankenhorn*, 485 F.3d at 481 n.12.)

This Court's intervention is needed to bring the integral participant doctrine back in line with 42 U.S.C. § 1983 and this Court's precedent.

II. The Court should resolve whether a single circuit court decision is enough to deny an officer qualified immunity.

A. Respondents ignore the question presented.

The second question Petitioners raise is whether a single circuit court decision involving different circumstances can amount to "clearly established" law for qualified immunity purposes.

Instead of addressing this question, Respondents argue that (a) the Ninth Circuit applied the correct legal framework; (b) a jury could find the Phoenix officers used excessive force; and (c) the law was clearly established under *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003), the sole case cited by the court of appeals. (Opp. 16-22.) Petitioners, however, neither (a) contend that the Ninth Circuit applied the wrong legal framework, nor (b) invite this Court to review any factual determinations. Respondents' third argument

bypasses the question presented and incorrectly assumes that a single circuit court decision involving different circumstances satisfies the "clearly established" requirement.

This Court has stated that a federal right can be clearly established by controlling Supreme Court precedent, and *may* be established by a "robust consensus of cases of persuasive authority" in the courts of appeals. *E.g.*, *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1778 (2015) (citation omitted). But the Court has not directly addressed whether a circuit's own precedent, by itself, may show that a right is "clearly established." (Pet. 26, 28 (citing *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012); *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam)).)

Nevertheless, recent decisions suggest that the less conclusively established the alleged right is, the closer the facts and circumstances must be between the cases. In *Carroll v. Carman*, for example, this Court reversed the Third Circuit when it relied exclusively on one of its own decisions to deny a police officer qualified immunity. The Court emphasized that even small factual differences between the two cases meant that the alleged constitutional right was not "beyond debate":

> *Marasco* held that an unsuccessful "knock and talk" at the front door does not automatically allow officers to go onto other parts of the property. It did not hold, however, that knocking on the front door is *required* before officers go onto other parts of the property that are open to visitors. Thus, *Marasco* simply did not

> answer the question whether a "knock and talk" must begin at the front door when visitors may also go to the back door. Indeed, the house at issue seems not to have even had a back door, let alone one that visitors could use.

135 S. Ct. at 351 (citations omitted).

As discussed in the petition and below, the facts and circumstances of this case differ materially from those in *Lolli v. County of Orange*. (Pet. 26-29.) The Ninth Circuit's decision thus conflicts with this Court's decision in *Carroll v. Carman* and others like it.

B. Even if a single circuit court decision could "clearly establish" a constitutional right, *Lolli* does not establish, "beyond debate," that the type and amount of force the Phoenix officers used was excessive.

Even if a single circuit court decision could "clearly establish" a constitutional right, *Lolli v. County of Orange* does not clearly establish that the type and amount of force used by the Phoenix officers was unlawful under the circumstances.

The court of appeals reasoned that *Lolli* 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." (App. 5.)

This analysis fails for multiple reasons. First, the lower courts framed the issue at too high a level of generality. By Respondents' own description, the courts correctly determined that "the law was clearly established that officers may not use unreasonably excessive force against pre-trial detainees." (Opp. 19.) But that broad statement violates "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.' As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citations omitted).

Second, neither of the Phoenix officers used the types or amounts of force that the Ninth Circuit found clearly excessive in *Lolli*, namely, strikes, tasering, and a knee strike. (Pet. 27.) Although Respondents note that one of the officers in *Lolli* admitted to using a wristlock, the Ninth Circuit's decision did not identify that conduct as clearly excessive here. (App. 5-6.)

Third, *Lolli* does not clearly establish that the type and amount of force the Phoenix officers actually used was excessive because *Lolli* involved materially different circumstances. (Pet. 26-28.) Pre-trial detainee Lolli was a diabetic who, after several hours in a holding cell, asked if he could get a snack to help with his low blood sugar. Officers responded to Lolli's question by viciously attacking and beating him without warning. Lolli was sober, compliant, and secured in a holding cell at the time.

Unlike Lolli, Atencio was not sober, compliant, or secured. Atencio admitted to having used methamphetamine recently, was not following basic instructions, and was not yet secured in a holding cell. Whether he was unable or unwilling to comply, the material, objective facts are that Atencio was not complying with basic commands while unsecured and behaving eratically. Thus, it is simply not true that the circumstances in *Lolli* are "indistinguishable from this case." (Opp. 21.)

Instead of grappling with these differences, Respondents recast Petitioners' arguments, suggesting that Petitioners claim *Lolli* does not apply simply because it does not address "the precise *kind* of force used," i.e., a wristlock and chokehold. (Opp. 21.) But as Respondents acknowledge, excessive force cases "focus on whether the *circumstances* render an officer's use of force unreasonable." (Opp. 21.) Because the circumstances in this case and *Lolli* are different, *Lolli* cannot clearly establish that the Phoenix officers' actions were unlawful as a matter of law.

The Ninth Circuit's analysis cannot be squared with this Court's decision in *Carroll v. Carman*, and it undermines the foundation of qualified immunity by relying on distinguishable circuit court precedent to identify supposedly clearly established constitutional rights.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

MARY R. O'GRADY
Counsel of Record
ERIC M. FRASER
HAYLEIGH S. CRAWFORD
OSBORN MALEDON, P.A.
2929 N. Central Ave., Suite 2100
Phoenix, AZ 85012
602-640-9000
mogrady@omlaw.com
efraser@omlaw.com
hcrawford@omlaw.com

BRAD HOLM
City Attorney
CITY OF PHOENIX
LAW DEPARTMENT
200 W. Washington St., Suite 1300
Phoenix, AZ 85003
602-262-6761
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