No. 16-1441

In the Supreme Court of the United States

JAIME CARRASCO; ADRIAN DOMINGUEZ; CHRISTOPHER FOSTER; CRAIG KAISER; JOSE VAZQUEZ; and JASON WEIERS,

Petitioners,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

MICHAEL C. MANNING
LARRY J. WULKAN
Stinson Leonard Street LLP
1850 North Central Ave., Suite 2100
Phoenix, AZ 85004
(602) 212-8511
larry.wulkan@stinson.com

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Respondents

QUESTION PRESENTED

Whether this Court should intervene to review the unpublished, unanimous decision by the court of appeals that affirmed a district court order denying petitioners' motion for summary judgment on the basis of qualified immunity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

STATEMENT

Ernest Atencio was suffering psychosis as a result of mental illness. He was arrested for frightening a woman by yelling at her. Atencio was brought to Maricopa County's jail, which was then run by Joseph "Joe" Arpaio—who claimed to be the "toughest Sheriff in America."

Throughout Atencio's interactions with law enforcement before force was used against him, the evidence is clear: he never threatened any officer, nor did he pose a risk of any sort. For that reason, as the officers testified, they took his handcuffs off when they were booking him into the jail.

During booking, an officer asked Atencio to take off his shoes. This was the third time his shoes had been searched that day. Atencio promptly took off his right shoe, but he delayed in taking off his left. Officers decided to use force to gain Atencio's compliance. One officer wrestled Atencio to the ground. Petitioners joined, pinning Atencio to the ground and forming what one officer called a "dog pile" on Atencio.

While petitioners were holding Atencio to the ground, petitioner Weiers tasered Atencio three times for twenty-two seconds. Then, while petitioners continued to hold Atencio to the ground, another officer—petitioner Hatton—punched Atencio three or four times in the face. Atencio was then brought into a "safe cell," where petitioners held him down, again, while Hatton dropped his knee onto Atencio's back.

As a result of this trauma, Atencio died.

The district court "ruled there were genuine fact issues as to * * * whether Sergeant Weiers' tasing constituted excessive force." Pet. 5-6. As to the re-

maining petitioners, the district court found that there are factual disputes on whether their conduct constituted excessive force because a jury may find *no* force was reasonable in the circumstances, whether their conduct rendered them liable as integral participants, and whether they are liable for their failure to intervene.

Now, petitioners frame their petition as one principally raising the "integral participation" doctrine. Review should be denied.

To begin with, the claims against petitioners do not depend on the integral participation doctrine. The district court recognized that the record "shows multiple instances of unreasonable and excessive force, including the use of * * * 'dog piles' during which multiple officers held Atencio down by placing their full or partial weight on him while he was in a prone position." Pet. App. 38a. Thus, regardless of the integral participation doctrine, this case will proceed to trial against petitioners.

In any event, the integral participation doctrine does not warrant review. There is no split among the circuits. Every circuit agrees that certain conduct may not constitute a constitutional violation if done in isolation but may nevertheless render an officer liable when done in concert with the acts of others.

This conclusion follows from the "totality of the circumstances" test that governs whether a particular use of force is reasonable. Here, petitioners pinned Atencio to the ground. In some circumstances (though not here), pinning a detainee to the ground could potentially be reasonable. But pinning a detainee to the ground *while* another officer repeatedly tasers the detainee and yet a different officer punch-

es him in the face three or four times is a different sort of force altogether. Holding a detainee so he is prone, defenseless on the floor, all while knowing other officers are beating him, is blatantly unreasonable conduct. That is all the work that the "integral participation" doctrine does here.

Put differently, here, like always, the totality of the circumstances is what matters. Petitioners' essential assertion—that an officer's individual acts must be considered in isolation from the conduct of other officers—is utterly divorced from prevailing constitutional standards.

Beyond that, petitioners' very same conduct renders them liable on a failure-to-intervene theory. That is yet further reason why the integral participation doctrine is not actually implicated here.

Finally, petitioners' brief argument addressing qualified immunity is a meritless request for error correction.

A. Factual background.

Police officers observed Atencio acting erratically. They concluded that the cause of Atencio's behavior was mental illness, not drugs or alcohol. Atencio showed no signs of being a danger to himself or others. He simply acted "goofy" and appeared to be off medication. Pet. App. 10a. But, because Atencio yelled at a woman, he was searched and arrested for "misdemeanor assault" and was brought to the Maricopa County Jail. Pet. App. 10-11a.[1]

---

[1] Petitioners' factual statement (Pet. 2-5) lacks any citation to the record. While petitioners' account may well be the factual narrative that they hope a jury will adopt, it departs in materi-

At the jail, Atencio acted strangely and was babbling incoherently. Pet. App. 11a. Atencio's altered state of mind manifested as a difficulty focusing on questions and as confused and inconsistent behavior. One officer described Atencio as very confused or "lost." C.A. Dkt. No. 29-1, at SER0082. "Although he was acting oddly, for instance talking to peanut butter as if it was a person, and talking in word salad, his overall demeanor was described as humorous, jovial, and non-aggressive." Pet. App. 21a (internal quotations omitted).

Atencio was brought to the jail's linescan room, which contains an x-ray machine used to search inmates' possessions. Pet. 2. When Atencio entered the linescan room, the officer escorting him did not believe he was a threat, so the officer removed Atencio's handcuffs so that he could be processed through the jail's intake system more easily. Pet. App. 13a.

An officer ordered Atencio to remove his shoes so they could be put through the x-ray machine. While Atencio took off his right shoe, he did not immediately take off his left one.[2] "[T]his disobedience did not appear to be intentional, but instead appeared to be because he was confused, and the officers were aware that Atencio was in some form of psychotic state." Pet. App. 21a.

A witness testified that, at "no point was [Atencio] physically or verbally aggressive with the

---

al respects from what the lower courts found a reasonable jury, viewing the evidence in favor of respondents, could conclude.

[2] On multiple prior occasions that day, Atencio had removed his shoes, and officers had already searched them. C.A. Dkt. No. 29-1, at SER0081.

officers." Pet. App. 14a. "Atencio was not being combative, violent, or threatening; he did not display any violent or aggressive behavior towards anyone." *Id.* at 21a.

Yet, when Atencio "merely crossed his arms over his chest" (Pet. App. 13a), an officer "immediately grabbed Atencio by the wrist, and twisted Atencio's arm behind his back as the other officers * * * immediately engaged. A struggle ensued, with Atencio standing but bent over by the officers and passively resisting." *Id.* at. 13a-14a. "Numerous officers then held Atencio down on the ground in what has been characterized as a 'dog pile.'" *Id.* at 14a.

While petitioners pinned Atencio to the ground, Atencio "did not punch, strike, bite, spit, or kick at anyone." Pet App. 21a. Indeed, "there was no violent response to which the officers were responding." *Id.* at 23a.

As Kaiser, Foster, Carrasco, Dominguez, and another detention officer—Vazquez—held Atencio, Weiers tasered Atencio. Data from the taser indicates that it was activated for 22 seconds. Pet. App. 26a.

While these petitioners continued to hold Atencio, another detention officer—Hatton—used additional force. Hatton punched Atencio three or four times in the linescan room. Pet. App. 39a. One of his fellow officers testified that Atencio was "defenseless" when Hatton punched him with a closed fist, in an "unreasonable" and "excessive" manner. *Ibid.* Another officer testified, based on his training, experience, observations of Atencio and Hatton in relation to the other officers, and the "totality of the circumstances," that Hatton's use of force was "un-

reasonable." C.A. Dkt. No. 29-1, SER0092-3. He even intervened to stop Hatton and protect Atencio. *Ibid.*

Atencio was then taken to a padded cell. While Atencio was being held down by petitioners Carrasco, Dominguez, Foster, and Vazquez, Hatton kneed him with what he described at one point as his "full" weight. C.A. Dkt. No. 29-1, SER0094. Upon seeing this, one of Hatton's fellow officers yelled his name to "catch his attention to let him know to chill out" and stop using force against Atencio. *Id.* at ¶112. Hatton's use of force was found to violate Maricopa County's policies. C.A. Dkt. No. 16-3, JER158. Even the detention officers' own use of force expert in this case opined that Hatton's use of force was excessive. Pet. App. 40a.

Atencio lost consciousness and died. His death was the result of "a combination of pain and fear [that] activated Atencio's 'sympathetic system, which dumped epinephrine and norepinephrine into his system and caused sudden cardiac death.'" Pet. App. 32a. This followed the "sum total of the uses of force that caused his sympathetic nervous system to go into overdrive." *Ibid.*

B. Proceedings below.

1. Atencio's estate filed suit against several defendants, including petitioners.

The district court denied petitioners' request for summary judgment on the basis of qualified immunity. Pet. App. 25a-30a. The court later elaborated on its reasoning in its order denying reconsideration. *Id.* at 57a-62a.

The court specifically noted that, in conducting its analysis, "a 'team effort' approach that simply

lumps all defendants together, rather than examining each individual officer's own conduct, is prohibited." Pet. App. 17a. The court simultaneously recognized that "an individual officer's conduct cannot be viewed in isolation from the conduct of other officers involved in the incident." *Ibid.* Thus, in addition to officers being liable for their independent uses of excessive force, the court reasoned that an officer is *also* liable if (a) the cumulative force applied by the officers is unconstitutionally excessive and (b) the officer himself was an "integral participant in" that use of excessive force. *Ibid.*

The district court recognized that there is a significantly disputed question of fact whether Atencio's conduct in the linescan room—declining to immediately remove his left shoe—was "an act of defiance or resistance justifying the immediate use of force." Pet. App. 19a. This is especially so "in light of evidence that the officers knew Atencio was having trouble following directions, was in a state of psychosis * * * and did not appear to be intentionally disobeying commands but rather was just very confused." *Ibid.*

Because "Atencio was not acting aggressively" and Atencio's conduct "could be reasonably seen as merely slow compliance, the result of confusion or, at most, passive resistance," the court concluded that the use of *any* force in these circumstances was "unreasonable." Pet. App. 23a. Later, the court again emphasized that, given the facts, a jury could conclude that "the use of force may not have been needed" at all. *Id.* at 60a.

Yet the "evidence, viewed in the light most favorable to [Atencio], shows multiple instances of unreasonable and excessive force, including [petitioners'] use of * * * 'dogpiles' during which multiple of-

ficers held Atencio down by placing their full or partial weight on him while he was in a prone position." Pet App. 38a. In addition to describing petitioners' conduct that independently qualifies as an unconstitutional use of force, the court found: "Even assuming that their conduct, when looked at individually, was not unreasonable, these officers are not entitled to summary judgment. While these officers were holding Atencio down in the linescan room, Hatton delivered strikes to Atencio's facial region, and Weiers used the Taser on Atencio." *Id*. at 25a.

The district court concluded that there "is a genuine factual dispute as to whether these officers were integral participants in the use of excessive force in the linescan room and/or the safe cell, as well as whether these officers violated a duty to intervene to prevent the use of excessive force." Pet. App. 25a.

2. Petitioners filed an interlocutory appeal and, in a unanimous, unpublished opinion, the court of appeals affirmed in part and reversed in part. Pet. App. 1a-8a.[3]

The court broadly affirmed the district court's conclusions: "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." Pet. App. 4a. Relevant here, the court of appeals did not disturb any of the district court's conclusions regarding any of the petitioners.

In reference to petitioners' conduct in the linescan room, the Ninth Circuit explained: "When

---

[3] Judge Melloy, of the Eighth Circuit, sat on the panel by designation. Pet. App. 3a n.**.

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." Pet. App. 4a. Addressing petitioners' conduct in the safe cell, the court continued: "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 [petitioners]." *Ibid.* Importantly, the court recognized, "[u]nder these circumstances, a reasonable jury could conclude that *some or all of those actions* were objectively unreasonable." *Ibid.*

This was in contrast to the court's conclusion as to respondents' claim against Sergeant Scheffner. See Pet. App. 6a. Scheffner was a supervisor on site. *Id.* at 26a-27a. The district court found that there was a genuine dispute as to whether Scheffner was an "integral participant" in the excessive force that occurred in the safe cell. *Id.* at 28aa. The court of appeals reversed: "[T]here 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." *Id.* at 6a. Absent such factual demonstration, the court found respondents' integral participant and failure-to-intervene theories untenable. *Ibid.*

Petitioners subsequently sought rehearing. No member of the court of appeals requested a poll. Pet. App. 70a-71a.

REASONS FOR DENYING THE PETITION

Petitioners frame this case as mainly one addressing the "integral participation" doctrine. But the claims against petitioners do not depend on the integral participation doctrine at all: entirely apart from that doctrine, the claims will proceed against all officers because a reasonable jury could conclude that their individual conduct alone constituted excessive force or, alternatively, that their individual failures to intervene breached Atencio's rights.

In any event, the "integral participation" doctrine does not itself warrant review. The doctrine merely recognizes that the "totality of the circumstances" test governs whether a use of force is reasonable. Thus, the conduct of other officers is undeniably relevant. As the decision below demonstrates—and consistent authority from the Ninth Circuit confirms—this doctrine does not establish vicarious liability.

Finally, petitioners' qualified immunity argument is an insubstantial request for error correction.

A. The claims against petitioners do not depend on the "integral participation" doctrine.

The petition principally asks this Court to evaluate the "integral participation" doctrine. Pet. 8-11. But the lower courts squarely held that the evidence, taken in the light most favorable to respondents, allows a jury to conclude that petitioners' conduct constitutes unlawful excessive force independent of the actions of anyone else. Thus, the petition is not an appropriate vehicle to review the merits of the integral participation doctrine.

"When Atencio was being held down by several officers in a 'dog pile,' there was evidence that Sergeant Weiers tasered Atencio," and a "reasonable jury could conclude" that this action was "objectively unreasonable." Pet. App. 4a. Indeed, use of force experts specifically opined that this use of a taser was unreasonable. *Id.* at 25a-26a. Thus, the district court concluded that, given the circumstances, "a reasonable juror could conclude that Weiers' use of the taser under these circumstances was excessive." *Id.* at 26a.

Likewise, as to the other petitioners, they engaged in conduct in both the linescan room (dog piling on Atencio) and the safe cell (holding Atencio prone on the ground) that the lower courts determined a reasonable jury could conclude was objectively unreasonable. Pet. App. 4a. As the district court put it, petitioners "were participants in the struggle with Atencio, and assisted with taking Atencio to the floor and holding him down on the floor in a 'dog pile' in the linescan room." Pet. App. 62a. The court continued, explaining that, in the safe cell, petitioners held Atencio "while Defendant Hatton delivered a knee strike to Atencio's back; and that at no point was Atencio actively aggressive or violent towards the officers or anyone else." *Ibid.*

The court concluded: "Under this view of the facts, it was objectively unreasonable for [petitioners] to hold Atencio down while officers engaged in the facial strikes and knee strike, and tased Atencio." Pet. App. 4a. As the Ninth Circuit recognized, "the district court properly examined each officer's conduct rather than employing a 'team effort' approach that simply lumps all the defendants together." *Ibid.*

Petitioners incorrectly suggest that "no one claimed" they "used excessive force when trying to

control Atencio's flailing arms and legs." Pet. 6. Later, they say that petitioners "were not even alleged to have * * * 'subjected' Atencio to constitutional injury." *Id.* at 8. This is belied by the record. See C.A. Dkt. No. 31-2 at 85. In fact, the lower courts specifically held that a jury could conclude that *no* use of force was reasonable in the circumstances. See, *e.g.*, Pet. App. 23a. This thus *is* a case where petitioners are alleged to have themselves "*engage[d] in* the allegedly unconstitutional act itself." Pet. 8.

If the jury finds no force was appropriate, petitioners will be liable for all of their individual uses of force, regardless of the other officers' actions. Thus, with or without the integral participant doctrine, this case is heading to trial.

B. The "integral participation" question does not warrant review.

Even if this petition did present some broad question regarding the "integral participation" doctrine, review is not appropriate. Petitioners do not assert that there is any conflict among the circuits that warrants this Court's review. Their argument loses sight of the governing "totality of the circumstances" test. What's more, petitioners drastically misstate the doctrine, and the claims at issue here are separately supported by a failure-to-intervene theory.

1. Excessive force claims turn on the totality of the circumstances.

The excessive force "inquiry requires analyzing the totality of the circumstances." *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2020 (2014). As relevant here, this totality test requires an analysis of the "objective reasonableness" of petitioners' conduct. *Kingsley* v.

Hendrickson, 135 S. Ct. 2466, 2473 (2015). The standard takes into account "what the officer knew at the time." *Ibid.*

Here, petitioners pinned Atencio to the ground in the linescan room. While they pinned him down, petitioner Weiers tasered him for 22 seconds; he first deployed the taser's probes, and then he twice used the taser in drive-stun mode. Pet. App. 26a. Hatton then punched him three or four times. *Id.* at 39a. Petitioners continued to pin Atencio down as Weiers and Hatton tasered and punched him repeatedly. *Id.* at 14a.

Then, petitioners brought Atencio into a safe cell and "held him down in a 'dog pile' while his clothes were removed. While the officers were removing Atencio's clothing, Hatton delivered a knee strike by dropping his full weight with his knee onto Atencio's back." *Id.* at 14a.

In assessing whether the petitioners used reasonable force in pinning Atencio to the ground, *of course* the conduct of Weiers and Hatton is relevant.

Pinning a detainee to the ground is one thing. It is a different thing entirely to pin a detainee to the ground while a fellow officer tasers him three times, for twenty-two seconds, and another officer punches him three or four times in the face. And, while an officer might attempt to assert surprise at the first taser bolt or the first punch to the face, it is certainly relevant if the officer *continues* to hold the detainee in place during the second and third prolonged shocks and the second, third, and fourth punches to the face.

Petitioners' conduct must be considered under the totality of the circumstances and, therefore, be

adjudicated with reference to the conduct of the other officers. Petitioners' contrary suggestion that "others' allegedly unconstitutional acts" are irrelevant to their own liability (Pet. 8) ignores the governing "totality" standard. Each officer's acts *must* be analyzed in context of the complete circumstances.

2. Petitioners significantly distort the Ninth Circuit's doctrine.

In asking this Court to review the "integral participation" doctrine, petitioners misstate the governing doctrine. They are wrong to repeat and repackage their claim that the "integral participation" doctrine establishes some form of vicarious liability. Pet. 8-11.

This doctrine stems from the Fifth Circuit's decisions in *James* v. *Sadler*, 909 F.2d 834, 837 (5th Cir. 1990), and *Melear* v. *Spears*, 862 F.2d 1177, 1186 (5th Cir. 1989). That court explained that, when multiple officers execute an unlawful search, an officer who is "a full, active participant in the search" and "not a mere bystander" is liable for the constitutional violation. *Melear*, 862 F.2d at 1186.

The Ninth Circuit likewise limits liability to officers who "participated" in "some meaningful way" in a constitutional violation. For instance, in *Boyd* v. *Benton County*, 374 F.3d 773, 780 (9th Cir. 2004), officers who were "aware of the decision to use [a] flash-bang," "did not object to it," and "participated in [a] search operation knowing the flash-bang was to be deployed" could be liable for the use of the flash-bang.

And the Ninth Circuit has specifically rejected a jury instruction that would base "integral participation" on a "team effort." *Chuman* v. *Wright*, 76 F.3d

292, 294 (9th Cir. 1996). The theory applies only when there is "fundamental involvement in the conduct that allegedly caused the violation." *Blankenhorn* v. *City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007). By contrast, an officer is not an integral participant by being a "mere bystander." *Chuman*, 76 F.3d at 294-295.

One need look no further than the decision below, acknowledging that a court must "examine[] each officer's conduct rather than employing a 'team effort' approach that simply 'lump[s] all the defendants together.'" Pet. App. 5a. And, by treating the defendants individually, the court of appeals *reversed* the district court as to Sergeant Scheffner, finding a lack of evidence that he "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." Pet. App. 6a-7a.

Additionally, the court of appeals specifically found that "[n]either 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." Pet. App. 5a-6a. Similarly, the court of appeals found Officer Kaiser was not an integral participant in the excessive force used 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." *Ibid.*

This holding will, of course, control later stages of this case. An officer may not be held liable via integral participation unless he is shown to have acted with knowledge of what his conduct would accomplish, physically participated in the act, or failed to intervene. The law that will control below is thus

vastly different than the vicarious liability standard that petitioners conjure.

In fact, petitioners appear to *admit* that there is nothing wayward about the Ninth Circuit's law. Citing multiple published cases from that court (Pet. 10-11), petitioners recognize that the Ninth Circuit has limited liability to where "the defendant officers actually participated in the unconstitutional conduct." Pet. 11. Petitioners thus appear to argue that the unpublished opinion in this case diverged from the Ninth Circuit's authority. While, for reasons we have shown, that contention is incorrect, it is certainly not an argument in favor of certiorari.

Nor is there any risk that the Ninth Circuit's unpublished decision in this case will lead to the improper application of vicarious liability in Section 1983 cases. Indeed, in the months since the Ninth Circuit's unpublished opinion, courts within the Ninth Circuit have either dismissed or granted summary judgment to police officers:

- Where plaintiff "produced no evidence at trial from which a reasonable jury could have found that any individual Defendant was fundamentally involved in any alleged beating beyond those in which he was already specifically identified as a direct participant." *Adkins* v. *Corr. Corp. of Am.*, 2017 WL 971815, at *1 (9th Cir. 2017).
- Where officers were held not to be "integral participants simply by the virtue of being present at the scene of an alleged unlawful act. Instead, integral participation requires some fundamental involvement in the conduct that allegedly caused the violation."

Jimenez v. *City of Napa*, 2017 WL 2617964, at *3 (N.D. Cal. 2017).

- Where plaintiff only alleged officers' mere presence during a constitutional violation. *Call* v. *Badgley*, 2017 WL 2214966, at *9 (N.D. Cal. 2017).
- Where plaintiff "failed to produce evidence from which a reasonable jury could conclude that any of the Defendants was an integral participant in the alleged events." *Brown* v. *County of San Bernardino*, 2017 WL 1398639, at *1 (C.D. Cal. 2017)
- Where there was no evidence that an officer was an integral participant in the deployment of a police dog handled by another officer. *May* v. *San Mateo County*, 2017 WL 1374518, at *10 (N.D. Cal. 2017).
- Where conclusory allegations of officer's participation in preparing an application for warrant were insufficient to show integral participation. *Martinovsky* v. *County of Alameda*, 2017 WL 878042, at *1 (N.D. Cal. 2017).
- Where plaintiff "alleges no facts suggesting that [sergeants] were more than mere bystanders to this alleged use of excessive force." *Lagmay* v. *Nobriga*, 2017 WL 539579, at *6 (D. Haw. 2017).

3. Any "integral participation" claim is coextensive with failure to intervene.

Review is unwarranted for an additional reason. To the extent that the "integral participation" doc-

trine has any possible relevance to this case, it overlaps with the separate failure-to-intervene theory.

When one officer commits a constitutional violation in front of another—such as when Hatton beat Atencio in front of petitioners—officers with an "opportunity to intervene" must protect individuals in custody. See, *e.g.*, *Robins* v. *Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995). See also, *e.g.*, *Velazquez* v. *City of Hialeah*, 484 F.3d 1340, 1342 (11th Cir. 2007) ("an officer who is present at such a beating and fails to intervene may be held liable though he administered no blow"); *Miller* v. *Smith*, 220 F.3d 491, 495 (7th Cir. 2000) ("If Miller can show at trial that an officer attacked him while another officer ignored a realistic opportunity to intervene, he can recover."); *Burgess* v. *Fischer*, 735 F.3d 462, 475 (6th Cir. 2013) (officers are liable where they "'observed or had reason to know that excessive force would be or was being used' *and* 'had both the opportunity and the means to prevent the harm from occurring'").

That sort of claim is in play here. As the district court recognized, officers may be liable based not only on their role as "integral participants," but also on their failure to intervene. Pet. 6; Pet. App. 25a ("There is a geninue factual dispute as to whether [petitioners] were integral participants in the use of excessive force in the linescan room and/or the safe cell, as well as whether these officers violated a duty to intervene to prevent the use of excessive force."). The court of appeals recognized one theory of liability is whether an officer had "a realistic opportunity to stop" the unconstitutional act. *Id*. at 6a. Respondents pressed this theory below. See, *e.g.*, C.A. Dkt. No. 31-2, at 33 ("As to Officers Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers[,] * * * [t]here is a

genuine factual dispute as to whether these officers * * * violated a duty to intervene to prevent the use of excessive force.").

And this sort of claim is indistinguishable from the integral participation doctrine examined below—which focused on whether a defendant "knew" the excessive force would occur and had a "realistic opportunity" to prevent it. Pet. App. 6a.

Here, petitioners held Atencio down while Hatton punched Atencio repeatedly and Weiers tasered Atencio. A reasonable jury could therefore conclude that petitioners breached Atencio's constitutional rights by failing to intervene to protect him. The Court should not review the "integral participation" doctrine in a context where the conduct at issue constitutes a prototypical failure-to-intervene claim.

C. Petitioners' request for error correction is meritless.

Petitioners also make a naked request for error correction pertaining to their claimed entitlement to qualified immunity. Pet. 11-14. This argument is insubstantial.

1. The petition rests on challenges to what the district court found to be a disputed question of material fact.

In asking this Court to address qualified immunity, petitioners repeatedly assert that "Atencio was actively resisting when Petitioners moved in to assist in getting him under control." Pet. 12. This infects every aspect of petitioners' qualified immunity argument. See also *ibid*. ("an actively resisting pretrial detainee"); *id*. at 13 ("Neither *Lolli* nor any other case clearly establishes that detention officers who

use soft empty hands to control an actively resisting detainee can be subject to Section 1983 liability."). Even the question presented rests on the assertion that petitioners were attempting "to control and handcuff an actively resisting Atencio." Pet. i.

But, whether Atencio was actively resisting or—at most, passively resisting—is a disputed question of fact:

> There is a genuine factual dispute regarding what actually occurred prior to Hatton's delivery of the face and knee strikes. Although Hatton claimed he delivered the strikes in self-defense (at least as to the facial strikes), other evidence indicates that Atencio was helpless and defenseless at the time Hatton made these strikes and that the strikes were unreasonable, unjustifiable, and excessive.

Pet. App. 64a. Indeed, the court found that "Atencio's response to Hanlon could be reasonably seen as merely slow compliance, the result of confusion or, at most, passive resistance." *Id.* at 23a.

Petitioners recognize this: "The district court premised its ruling on the incorrect assertion that Atencio demonstrated 'at most, passive resistance.'" Pet. 6 n.1.[4] Petitioners' dispute with the lower courts

---

[4] Throughout this litigation, petitioners have attempted to take an isolated snippet from the record to suggest that respondents have somehow conceded that Atencio was "actively resisting." This is flatly wrong. At JER811, this statement appears: "Although Marty may have displayed active resistance to the force being used against him, he was not actively aggressive when he was tased." C.A. Dkt. No. 16-5, JER811. As the lower courts concluded, this is by no stretch a concession that Hat-

as to what a jury could reasonably conclude is not a proper basis for certiorari.

Separately, petitioners contest whether there is any claim that petitioners themselves engaged in excessive force. Pet. 13. As we have explained, there is undoubtedly a claim that petitioners' individualized conduct, standing alone, was excessive force. See, *supra*, 10-12.

The Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon* v. *City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari). Yet that is all petitioners argue here.

---

ton's use of force was a warranted response to any sort of active resistance.

During oral argument, the court of appeals panel focused on the use in this statement of "may have." It did not indicate that Atencio *did* resist at any time. This is entirely consistent with what the district court held: whether Atencio actively resisted is a question of fact for the jury to resolve.

Even if, contrary to fact, it were a concession of some sort, it suggests solely that Atencio resisted in *response* to force; it does not suggest that resistance *preceded* petitioners' use of force. As the district court found, prior to the use of any force, "Atencio's response to Hanlon could be reasonably seen as merely slow compliance, the result of confusion or, at most, passive resistance." Pet. App. 23a.

The record evidence is also overwhelming on the point. There is no video evidence that Atencio resisted; other officers testified that he didn't resist; Maricopa County found that Hatton breached policy; and experts (both plaintiff and defense) found that officer Hatton acted unreasonably, suggesting Atencio did not "actively resist." At bottom, this is a disputed factual question—as the district court plainly held. Pet. App. 64a.

2. This Court, moreover, lacks jurisdiction to address petitioners' argument that the facts in dispute are not material.

The Court reviews interlocutory appeals turning on "abstract issues" (*Johnson* v. *Jones*, 515 U.S. 304, 317 (1995)) that test the substance and clarity of pre-existing law. *Ortiz* v. *Jordan*, 562 U.S. 180, 190 (2011). It does not review "*fact*-related dispute[s] about the pretrial record." *Johnson*, 515 U.S. at 307.

That is because the "existence, or nonexistence, of a triable issue of fact * * * is the kind of issue that trial judges, not appellate judges, confront almost daily." *Johnson*, 515 U.S. at 316. "[Q]uestions about whether or not a record demonstrates a 'genuine' issue of fact for trial, if appealable, can consume inordinate amounts of appellate time." *Ibid.* And the "close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the many instances in which it upholds a district court's decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial," because there will be "just enough change brought about by the trial testimony to require [the appellate court], once again, to canvass the record." *Id.* at 316-317.

In *Johnson*, the defendant officers were alleged to have mistaken a seizure, brought on by a lack of insulin, for symptoms of alcohol intoxication. The plaintiff claimed he was beaten by several officers during his arrest. Those officers, however, claimed they were not present during the event. The district court denied summary judgment based on this genuine factual dispute. Therefore, the Court held that

the district court's order was not appealable. 515 U.S. at 308, 320.

Petitioners' dispute with the record is precisely the sort of issue that *Johnson* holds is outside the scope of interlocutory jurisdiction.

3. In any event, the right at stake was clearly established.

As the Ninth Circuit recognized, "[t]he circumstances here are not meaningfully different from those in *Lolli* v. *County of Orange*, 351 F.3d 410 (9th Cir. 2003)." Pet. App. 4a. There, the court held that officers "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." *Ibid.*

In particular, *Lolli* explained that, "by 1985, the law of this circuit would have put reasonable officers on notice that an 'unprovoked and unjustified attack by a prison guard' violated clearly established constitutional rights." 351 F.3d at 421-422. That is, when a detainee poses no danger to anyone, "a jury could conclude that little to no force was necessary or justified here." *Id.* at 417. And, "'[w]here there is no need for force, *any* force used is constitutionally unreasonable.'" *Ibid.*

Thus, if a jury concludes that Atencio was not acting aggressively, then *Lolli* renders it clearly established law that no force was reasonable in these circumstances.

In arguing qualified immunity, moreover, petitioners disregard wholly the totality of circumstances. See Pet. 12.

Petitioners frame the question as to whether it was clearly established that officers may use "soft empty hands" in an attempt to restrain "an actively resisting pretrial detainee." Pet. 12. Setting aside, for the moment, the factual dispute about whether Atencio was actively resisting at all, the issue here is not the use of soft hands in isolation. It is pinning a detainee to the floor *while* another officer repeatedly tasers the detainee and a different officer punches him in the face three or four times.

Trying to escape this reality, petitioners assert that the context is their pinning Atencio to the ground while others (including petitioner Weiers) "spontaneously engaged in alleged acts of excessive force." Pet. 12. Petitioners thus want to frame this as a circumstance where the use of force by petitioners Weiers and Hatton somehow caught them by surprise.

That is incorrect. The officers knew Weiers was going to use his taser. See C.A. Dkt. No. 16-6, at JER827. But, even if they could claim that the first bolt caught them by surprise, petitioners continued to hold Atencio in place while Weiers tasered him twice more, for twenty-two seconds. And, even if Hatton's first punch was spontaneous, petitioners held Atencio in place while Hatton punched him two or three times more. Given that petitioners held Atencio prone and defenseless on the floor while other officers beat him, their assertion that the "excessive force" was "spontaneous[]" lacks all merit.

Ultimately, the lower courts found that a jury could conclude that "Atencio was not being combative, violent, or threatening; he did not display any violent or aggressive behavior towards anyone." Pet. App. 59(a). If a jury finds that as a matter of fact, it would be extraordinary to conclude that petitioners' conduct was *not* contrary to clearly established law.

4. Additionally, petitioners do not so much as address the failure to intervene theory. That is an independent basis on which the officers may be found liable. See Pet. App. 25a. And the obligation to intervene in like circumstances has long been clearly established. See, *e.g.*, *Robins*, 60 F.3d at 1442.

5. Finally, resolution of petitioners' claim for qualified immunity has limited practical importance.

Petitioners make no serious showing that the issue addressed here—whether the particular circumstances confronted by French and Hanlon entitle them to immunity—are likely to recur with any frequency. And, in any event, the question has no implications for the day-to-day operations of law enforcement. Rather, all law enforcement officers labor under a clearly established, inviolable duty—they cannot use unreasonable force. Whether that duty is later enforced and litigated in the context of the officers' direct use of force, failure to intervene in another's use of force, or integral participation in a use of force has no bearing on how officers are to conduct their business.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MICHAEL C. MANNING
LARRY J. WULKAN
Stinson Leonard Street LLP
1850 North Central Ave., Suite 2100
Phoenix, AZ 85004
(602) 212-8511
larry.wulkan@stinson.com

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Respondents

SEPTEMBER 2017