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5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE DISTRICT OF ARIZONA**
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8 Hector Lopez,

9 Plaintiff,

10 v.

11 Unknown Bollweg, et al.,

12 Defendants.
13

No. CV-13-00691-TUC-DCB

ORDER

14 On October 30, 2018, the Ninth Circuit Court of Appeals issued an opinion denying
15 the Defendants' interlocutory appeal of this Court's denial of qualified immunity and
16 issued the Mandate on December 12, 2018. (Mandate (Doc. 141)); (Opinion (Doc. 141-
17 1)). The Defendants sought rehearing from the appellate court, which was denied on
18 December 4, 2018. (Response (Doc. 145) at 2.) Accordingly, the 90-day time period for
19 filing a writ of certiorari expires on March 4, 2019. (Motion (Doc. 143) at 2); Sup.Ct.
20 R.13(1) (90 days from entry of the judgment to petition for writ of certiorari).

21 Upon issuance of the Mandate, this Court returned the case to its active docket and
22 on December 18, 2018, ordered the parties to, within 30 days, file a Joint Pretrial Order
23 for the purpose of proceeding to trial. (Order (Doc. 142)). On January 16, 2019, the
24 Defendants filed a Motion to Stay, "pending the outcome of Defendants' prospective
25 Petition for Writ of Certiorari to the Supreme Court . . ." (Motion (Doc. 143) at 1.)

26 It is Defendants' position that the Ninth Circuit panel's decision affirming
27 this Court's denial of summary judgment on the issue of qualified
28 immunity conflicts with *City of Escondido v. Emmons*, No. 17-1660, 2019
WL 113027 (U.S. Jan. 7, 2019), which reversed and remanded the Ninth
circuit upon finding that the Court of Appeals failed to conduct a proper
qualified-immunity analysis. *See also Kisela v. Hughes*, 584 U.S. ___, __

1 (2018) (slip op., at 4) (“This Court has repeatedly told courts . . . not to
2 define clearly established law at a high level of generality.”); *City of San*
3 *Francisco v. Sheehan*, 135 S. Ct. 1765, 1775-76 (2015) (admonishing the
4 Ninth Circuit and directing the court *not* to define clearly established law at
5 a high level of generality).

6 *Id.*

7 The Plaintiff objects to the stay. Plaintiff notes that *Kisela* and *Sheehan* were cited
8 to the appellate court. (Response (Doc. 145) at 4.) Plaintiff complains that the Defendants
9 did not participate in preparing the Joint Pretrial Order, which Plaintiff filed with the Court
10 on January 17, 2019. (Notice (Doc. 144)).

11 The Court denies the stay. First, the *City of Escondido, Calif. v. Emmons*, 2019 WL
12 113027 (January 7, 2019) is not “new” legal authority. In *Escondido*, the Court framed its
13 holding as follows:

14 As we have explained many times: “Qualified immunity attaches when an
15 official's conduct does not violate clearly established statutory or
16 constitutional rights of which a reasonable person would have known.”
17 *Kisela v. Hughes*, . . . 138 S.Ct. 1148, 1152 . . . (2018) (per curiam) (internal
18 quotation marks omitted); see *District of Columbia v. Wesby*, . . . 138 S.Ct.
19 577, 593 . . . (2018); *White v. Pauly*, . . . 137 S.Ct. 548, 551 . . . (2017) (per
20 curiam); *Mullenix v. Luna*, . . . 136 S.Ct. 305, 308 . . . (2015) (per curiam).

21 *Id.* at *2 (emphasis added). As noted above, the Ninth Circuit Court of Appeals was well
22 aware of *Kisela* and *Sheehan* when ruling on Defendants’ interlocutory appeal.

23 Second, the Defendants did not seek a stay of the Mandate pursuant to Fed. R. App.
24 P. 41(d) which provides: A party may move to stay the mandate pending the filing of a
25 petition for a writ of certiorari in the Supreme Court. The motion must be served on all
26 parties and must show that the petition would present a substantial question and that there
27 is good cause for a stay.” Defendants instead ask this Court for a stay yet submit that this
28 Court should not “assess the likelihood that its own ruling [and the ruling of the appellate
court] will survive appellate review” by the Supreme Court. (Reply (Doc. 146) at 5.) The
Court agrees. When the Ninth Circuit Court of Appeals affirmed this Court’s denial of
qualified immunity, it determined that this Court defined the clearly-established law at
issue here with specificity and not at a high level of generality. It remains for the Supreme
Court to review the adequacy of the appellate court’s assessment. This six-year old case

1 is before this Court for trial, until and unless certiorari is granted.

2 **Accordingly,**

3 **IT IS ORDERED** that the Motion to Stay (Doc. 143) is DENIED.

4 **IT IS FURTHER ORDERED** that the Defendants shall immediately meet with the
5 Plaintiff, complete the Joint Pretrial Order, and file it with the Court within 14 days of the
6 filing date of this Order.

7 Dated this 8th day of February, 2019.

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Honorable David C. Bury
United States District Judge