No. _____

In the Supreme Court of the United States

ROBERT BOHANON; BLAKE WALFORD; AND JAMES LEDOGAR,
Petitioners,

v.

JACQUELINE LAWRENCE, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, and in what circumstances, a federal court of appeals has jurisdiction over an immediate appeal from a district court's summary-judgment order denying qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners are Robert Bohanon, Blake Walford, and James Ledogar. Petitioners were defendants in the district court and appellants in the court of appeals.

Respondents are Jacqueline Lawrence; Keith Childress, Sr., individually and as successor in interest to Keith Childress, Jr.; Carolina Navarro, guardian ad litem on behalf of K.C.; Araceli Saenz, guardian ad litem on behalf of A.S.; Amber Neubert, guardian ad litem on behalf of K.C.; and Frederick Waid, special administrator of the Estate of Keith Childress, Jr. Respondents were plaintiffs in the district court and appellees in the court of appeals.

The Las Vegas Metropolitan Police Department was a defendant in the district court and an appellant in the court of appeals.

The United States of America; United States Department of Justice; United States Marshals Service; and Brian Montana were defendants in the district court.

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

Lawrence v. Bohanon, No. 20-15669 (May 14, 2021), *reh'g denied* (July 9, 2021)

Lawrence v. Las Vegas Metropolitan Police Department, No. 20-15794 (June 24, 2020)

United States District Court (D. Nev.):

Lawrence v. Las Vegas Metropolitan Police Department, No. 16-cv-03039 (Apr. 1, 2020)

Lawrence v. United States, No. 18-cv-02314 (Jan. 8, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Robert Bohanon, Blake Walford, and James Ledogar petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-4a) is reported at 847 F. App'x 516. The order of the district court (App. 5a-34a) is reported at 451 F. Supp. 3d 1154.

JURISDICTION

The court of appeals entered its judgment on May 14, 2021 (App. 1a) and denied a timely petition for rehearing on July 9, 2021 (App. 36a-37a). On July 19, 2021, this Court entered an order extending the applicable deadline for filing a petition for a writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent statutory provision, 28 U.S.C. § 1291, is reproduced in the appendix. App. 38a.

INTRODUCTION

This petition presents a frequently recurring question of appellate jurisdiction over which the courts of appeals are "extraordinarily confused." *Estate of Anderson v. Marsh*, 985 F.3d 726, 735 (9th Cir. 2021) (W. Fletcher, J., dissenting) ("*Anderson* Fletcher Dissent"). Despite this Court's decisions in *Plumhoff v. Rickard*, 572 U.S. 765 (2014), and *Scott v. Harris*, 550 U.S. 372 (2007), the courts of appeals—with the exception of the Eleventh Circuit—are routinely and haphazardly rejecting jurisdiction over proper appeals of summary-judgment orders denying qualified immunity. The Court should seize this opportunity to clarify its precedent and restore appellate review in this crucial category of cases.

This Court has long held that summary-judgment "order[s] denying qualified immunity [are] immediately appealable" under 28 U.S.C. § 1291. *Scott*, 550 U.S. at 376 n.2. That is because "[q]ualified immunity is 'an immunity from suit rather than a mere defense to liability,'" and it is thus "irretrievably lost" if its vindication must await trial. *Plumhoff*, 572 U.S. at 771-72 (citation omitted). In *Johnson v. Jones*, 515 U.S. 304 (1995), however, the Court created a limited exception to that rule, holding that courts of appeals lack jurisdiction to review such orders if they "determine[] only a question of 'evidence sufficiency.'" *Id.* at 313.

Johnson's exception "has confused courts of appeals for twenty-five years." *Anderson* Fletcher Dissent, 985 F.3d at 742. Over that period, this Court has repeatedly concluded—most notably in *Scott* and *Plumhoff*—that appellate courts *do* have jurisdiction to review denials of qualified immunity at summary

judgment involving factual disputes, so long as those appeals present a question of law resolved by the district court. But, with the exception of the Eleventh Circuit, most courts of appeals have refused to give *Scott* and *Plumhoff* their clear effect. Reading those cases narrowly, those courts generally refuse to exercise jurisdiction over appeals challenging qualified-immunity denials that—at some ill-defined level—implicate a disagreement with the district court's factual assessment.

To justify their approach under *Scott* and *Plumhoff*, the courts in the majority have contrived a litany of unprincipled and "terribly confusing" distinctions. *Barry v. O'Grady*, 895 F.3d 440, 447-48 (6th Cir. 2018) (Sutton, J., dissenting) ("*Barry* Sutton Dissent"). Those courts concede that appellate courts can sometimes review and reverse fact-based denials of qualified immunity, but only when those decisions are "*really* wrong, not just conventionally wrong." *Id.* at 448 (emphasis added). And in every case, those courts scrutinize each factual assertion in an appellant's brief to determine whether it sufficiently tracks the district court's view of the facts. Under this approach, any hint of inconsistency might defeat jurisdiction—even when the appeal presents a legal question about whether certain conduct violated clearly established law.

The majority's approach is cumbersome and prone to error: It regularly shuts down meritorious appeals authorized by *Scott* and *Plumhoff*, while producing frequent dissents and inconsistent results. The Court fashioned the *Johnson* exception to conserve appellate resources. 515 U.S. at 317. But "what was supposed to be a labor-saving exception has now invited new kinds of labor all its own." *Walton v.*

Powell, 821 F.3d 1204, 1208 (10th Cir. 2016) (Gorsuch, J.). Indeed, the "uncertainty over the scope of [jurisdiction]" has only increased litigation and "add[ed] to appellate work loads"—precisely "one hundred and eighty degrees away from *Johnson*'s goal." *Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring in part and concurring in the judgment) ("*Romo* Sutton Concurrence"). The confusion has also harmed litigants: As the lower courts "struggle[]" to sort out the "parameters of the *Johnson* innovation," *Walton*, 821 F.3d at 1209, parties are left to navigate a maze in which appellate jurisdiction frequently depends on which of the competing theories the court happens to select and how the court decides to apply it.

This state of affairs is intolerable. Faced with "analytic chaos," courts and commentators have repeatedly urged this Court to "revisit the issue soon" and provide much-needed guidance. *Tuuamalemalo v. Greene*, 946 F.3d 471, 480, 485 (9th Cir. 2019) (W. Fletcher, J., concurring) ("*Tuuamalemalo* Fletcher Concurrence"). The United States agrees: In *Plumhoff*, it emphasized how much "lower courts have struggled" to apply *Johnson*, and even argued that *Johnson* is "incorrect" and should be "reconsider[ed]" in an appropriate case. Tr. of Oral Arg. 23, *Plumhoff*, *supra* (No. 12-1117).

This case is an ideal vehicle for the Court to clarify—once and for all—the circumstances in which appellate courts have jurisdiction to review denials of qualified immunity. Here, the Ninth Circuit applied its settled precedent and refused to address the district court's blatant legal errors in rejecting qualified immunity as to respondents' Fourth Amendment excessive-force claims. The Ninth

Circuit's jurisdictional ruling strays from this Court's precedent and squarely conflicts with the prevailing approach in the Eleventh Circuit (which would have resolved this case on the merits).

There is no reason to let the jurisdictional confusion fester. The Court should grant this petition and provide the clarity that the lower courts are desperately seeking.

STATEMENT OF THE CASE

A. Factual Background

In 2013, Keith Childress, Jr. committed a violent home invasion in Arizona. App. 7a. He was arrested and tried alongside other co-defendants on charges of armed robbery, kidnapping, aggravated assault, and theft. *Id.* On the final day of a nearly two-month trial in late 2015, Childress skipped bail and fled. *Id.* Arizona law enforcement issued an arrest warrant, describing Childress as "armed and dangerous with violent tendencies." *Id.* at 7a-8a.

Almost two weeks later, U.S. Marshals tracked Childress to his uncle's apartment in Las Vegas. *Id.* at 8a. When the Marshals observed Childress and his uncle departing the area in the uncle's vehicle, they moved in, but Childress escaped on foot, ignoring all commands to surrender. *Id.*

The Marshals radioed the Las Vegas Metropolitan Police Department ("LVMPD") for help in setting up a perimeter. *Id.* The LVMPD dispatcher relayed that Childress was hopping walls, running through residential yards, and climbing on rooftops. *Id.* at 8a-9a. LVMPD Sargent Robert Bohanon responded to the call. He was told that Childress was suspected of "attempt[ed] [homicide]"—and that a firearm was found inside Childress's uncle's vehicle. *Id.* at 9a.

Bohanon jumped into his police SUV and activated his body camera, thus ensuring that his efforts to apprehend Bohanon were captured on video. *Id.* That video was later introduced as a key piece of evidence in both courts below. *See* D. Ct. Doc. 86-10 (June 5, 2019); C.A. Doc. 35 (Jan. 5, 2021).

Bohanon drove to Childress's last known location, a residential area. Upon arriving, Bohanon found Childress walking down the street with his right hand concealed from view. App. 9a-10a. Bohanon exited his vehicle, pointed his firearm at Childress, and ordered him—four times—to "get on the ground." *Id.* at 10a. By this point, LVPMD Officer Blake Walford had arrived and joined Bohanon near his vehicle. *See id.* at 9a-10a.

Childress ignored Bohanon's commands and continued towards the houses, and both Walford and Bohanon saw a black object in Childress's hand that "Bohanon believed Childress was 'indexing' as if it were a firearm." *Id.* at 10a-11a. After broadcasting that "he's got something in his hands," Bohanon twice ordered Childress to show his hands. *Id.* at 10a. Again, Childress ignored him. *Id.*

Bohanon and Walford then took cover behind a parked car and repeatedly ordered Childress to "drop the gun," to "get your hands up," and "to surrender." *Id.* at 11a. Childress continued to ignore these commands and—despite being told more than a dozen times to "drop the gun"—never once communicated that he was unarmed. *Id.* at 10a-11a. Ultimately, LVMPD Officer James Ledogar and his police dog joined Bohanon and Walford on the scene, as did two U.S. Marshals. *Id.* at 11a, 14a. All of the officers had their firearms pointed at Childress as they pleaded with him to drop the gun and surrender. *Id.* at 11a-

12a. And because Childress was believed to be armed, Bohanon also repeatedly ordered him, "Do not walk towards us," and "Do not advance, you will be shot." *Id.* at 11a.

Within seconds, however, Childress started advancing on the officers. *Id.* at 12a. And while Childress's left hand was visible, he concealed his right hand from view. *Id.* Bohanon again ordered Childress, "do no[t] walk toward us." *Id.* But Childress continued. *Id.* All told, Childress ignored "over 25 verbal commands." *Id.*

As Childress neared the officers, Bohanon and Walford fired four or five shots and, two seconds later, another four shots. *Id.* at 12a-13a. Although the first set of shots knocked Childress to the ground, he continued to move in the two-second interval before the second set of shots. *Id.* at 12a-13a, 25a. All the shots happened within an eight-second span. *Id.* at 12a.

Bohanon then immediately requested medical assistance and continued ordering Childress to "drop the gun," as he still believed Childress was armed. *Id.* at 13a-14a. Ledogar released his police dog, which bit Childress's leg and held the bite for approximately 15 seconds, giving the officers time to approach and handcuff Childress. *Id.* at 14a. At that point, Walford found a black cell phone in Childress's right front pocket. *Id.* A medical unit arrived and pronounced Childress dead.

B. Proceedings Below

1. In December 2016, Childress's estate and heirs (respondents here) sued petitioners under 42 U.S.C. § 1983, asserting Fourth Amendment claims for use of excessive force. *See* App. 5a. Petitioners moved for

summary judgment, asserting that respondents failed to demonstrate a Fourth Amendment violation and that, in any event, qualified immunity precluded relief. The district court granted the motion in part and denied the motion in part. *Id.* at 5a-34a.

a. With respect to the claims against Bohanon and Walford, the court divided the shots into two "volley[s]," separated by the two-second pause. *Id.* at 22a-27a. As to the first volley, the court concluded that the officers' use of force was "reasonable" as a matter of law under the Fourth Amendment "given the severity of the crime they thought [Childress] had committed—attempted homicide—the fact that he had been evading arrest, and the fact that at the moment when Childress started walking towards the officers, Bohanon could not see Childress's right hand." *Id.* at 23a-24a. The court also noted that "a gun had been found in [Childress's uncle's] car" and that, just before the shots, Childress had "clutched a black object in a way that suggested he might have been indexing a gun." *Id.* at 24a. The court thus concluded that it was not "objectively unreasonable" for the officers to "belie[ve] that the black object in Childress's hands was a gun." *Id.* Because the court granted the motion on Fourth Amendment grounds, the court did not reach the qualified-immunity question.

As to the second volley of shots, however, the court denied summary judgment. *Id.* at 25a-27a. Although Childress was still "moving" and concealing his "right hand side" after being struck by the first volley, the court noted that the officers did not conclusively identify the presence of a gun in the two-second window between the volleys. *Id.* at 25a. In the court's view, "[i]t is therefore an issue of disputed material

fact whether or not Childress was moving in a threatening way after having been shot," and "a reasonable juror could have found the second volley of shots unreasonable." *Id.*

"Furthermore," the court declared, "if a jury so found, Officers Bohanon and Walford would not have been subject to qualified immunity." *Id.* According to the court, it was "clearly established" at the time of the shooting that "continued force against a suspect who no longer posed an immediate threat was unlawful." *Id.* at 26a. To support this proposition, the court cited a Ninth Circuit case involving an officer who "punched a handcuffed suspect in the face while he lay on the floor," *id.* at 26a-27a (citing *Davis v. City of Las Vegas*, 478 F.3d 1048 (9th Cir. 2007)); and a Ninth Circuit case in which officers "sat on a prone suspect's back and asphyxiated him," *id.* at 27a (citing *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003)). The court made no effort to reconcile the obvious distinctions between those cases—which did not involve a standoff or even a police shooting—and this one.

The district court also quoted this Court's decision in *Plumhoff*, which "noted"—in finding *no* Fourth Amendment violation—that "[t]his would be a different case if [the officers] had initiated a second round of shots after an initial round had clearly incapacitated [the suspect] and had ended any threat of continuing flight, or if [the suspect] had clearly given himself up." *Id.* (alterations in original) (quoting *Plumhoff*, 572 U.S. at 777).

b. The district court also denied summary judgment as to the excessive-force claim against Ledogar for deploying the police dog. *Id.* at 27a-28a. "Construing all inferences in [respondent's] favor,"

the court believed that "a reasonable juror could conclude that it would be objectively unreasonable to deploy a K9 on a person who had been shot several times and was severely bleeding on the ground." *Id.* at 27a. The court also concluded that this conduct would violate clearly established law, pointing to a single Ninth Circuit case referring to the use of a "canine on a handcuffed arrestee who has fully surrendered and is completely under control." *Id.* at 28a (quoting *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994)). Childress was not handcuffed and had not fully surrendered, but the court believed the statement in *Mendoza* to be "sufficiently analogous." *Id.*

2. Petitioners appealed to the Ninth Circuit.

a. Respondents initially moved to dismiss the appeal for lack of jurisdiction, contending that the district court's order was "categorically unreviewable" under *Johnson* because it rested on factual disputes. Resp. Mot. to Dismiss 4 (citation omitted). Petitioners opposed the motion, explaining that they did "not dispute any of the District Court's factual issues" and contended on appeal that "they are still entitled to qualified immunity as a matter of law." Pet. Opp. to Mot. to Dismiss 8. A motions panel denied the motion. App. 35a.

Respondents again challenged jurisdiction in their merits brief. And petitioners again clarified that they did "not dispute any of the District Court's factual issues and accept[ed] them as true." Pet. C.A. Reply Br. 7-8. Rather, petitioners argued that their conduct did not violate the Fourth Amendment and, in any event, warranted the grant of qualified immunity. Among other legal points, petitioners challenged (1) the district court's failure to consider the risk

posed by Childress after the first volley of shots from petitioners' perspective; (2) the court's belief that the Fourth Amendment analysis turned on whether petitioners had conclusively identified a weapon; (3) the court's reliance on inapposite cases to demonstrate "clearly established" law; and (4) the court's inference that Childress was "clearly incapacitated" after the first volley given the facts plainly shown in the video. *See* Pet. C.A. Br. 30-40; Pet. C.A Reply Br. 13-17.

b. The court of appeals dismissed petitioners' appeal for lack of jurisdiction. App. 1a-4a.

Relying on the Ninth Circuit's prior interpretation of *Johnson*, the court held that it lacked jurisdiction to review the "district court's determination that 'the parties' evidence presents genuine issues of material fact.'" *Id.* at 3a (quoting *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013)). "Specifically," the court reasoned, the district court "held that there is a dispute as to whether 'Childress was moving or had access to his pocket after being shot' during the first volley and concluded that, under [respondents'] version of the facts, [petitioners] 'continued to shoot at Childress' and deployed a K9 on him 'despite his clear incapacitation.'" *Id.* (quoting App. 15a, 27a).[1]

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[1] Contrary to the Ninth Circuit's quotation, it is undisputed (and the video conclusively shows) that Childress *was* "moving" after the first volley of shots. App. 25a; *see* D. Ct. Doc. 86-10 (video at 15:36-15:47). The supposedly relevant "dispute" identified by the district court was whether he was "moving *in a threatening way*" after that volley. App. 25a (emphasis added). Nothing in this petition turns on the Ninth Circuit's mischaracterization of the district court's ruling on this point.

The court believed that petitioners "implicitly reject[ed] this understanding of the record" because, in their appellate brief, they at times referred to Childress's movements after the first volley as an "'attempt[] to stand back up.'" *Id.* The court did not address any of petitioners' legal arguments, declaring instead that the appeal "boil[s] down to factual disputes about the record." *Id.* (internal alteration omitted) (quoting *Anderson*, 985 F.3d at 732).

The court also refused to exercise appellate jurisdiction under the Ninth Circuit's interpretation of *Scott*. The court concluded that the video evidence does not "'blatantly contradict[]'" what "the district court held was the version of the facts most favorable to [respondents]." *Id.* at 4a (quoting *Scott*, 550 U.S. at 380). In the court's view, a jury watching the video might find that Childress's movements after the first volley "were an involuntary response to being shot" and that he was "clearly incapacitated." *Id.*

REASONS FOR GRANTING THE PETITION

Federal courts of appeals are hopelessly divided over the scope of their jurisdiction to review summary-judgment orders denying qualified immunity under *Johnson*, *Scott*, and *Plumhoff*. This important issue recurs with great frequency—which is why courts, the United States, and commentators have urged this Court to provide guidance. This case is an ideal vehicle for doing so: The Ninth Circuit's decision cleanly implicates the circuit split and contradicts this Court's precedent. Certiorari is warranted.

I. Review Is Needed To Resolve The Circuit Split And Widespread Confusion Over *Johnson*, *Scott*, And *Plumhoff*

This Court's decisions have created "persistent confusion"—which has solidified into an intractable circuit split—over the scope of appellate jurisdiction to review orders denying summary judgment based on qualified immunity. *Anderson* Fletcher Dissent, 985 F.3d at 737. The Eleventh Circuit properly recognizes that *Johnson*'s exception to jurisdiction is narrow and limited to appeals raising purely factual issues. By contrast, most courts, including the Ninth Circuit, have adopted a broad interpretation of *Johnson*'s exception to jurisdiction that is at odds with *Scott* and *Plumhoff*, and improperly restricts defendants' appellate rights.

A. *Johnson*'s Jurisdictional Exception Is Narrowly Limited To Appeals Challenging Purely Factual Disputes

1. Courts of appeals have jurisdiction to hear appeals from "final decisions" of the district courts. 28 U.S.C. § 1291. Although "[a]n order denying a motion for summary judgment is generally not a final decision within the meaning of § 1291," this "general rule does not apply when the summary judgment motion is based on a claim of qualified immunity." *Plumhoff*, 572 U.S. at 771. Rather, "pretrial orders denying qualified immunity generally fall within the collateral order doctrine," *id.* at 772, which permits immediate appeal of certain orders entered before the termination of litigation that are "too important" for review "to be denied," *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985) (citation omitted).

In *Johnson*, however, the Court carved out a narrow exception to that rule. There, the plaintiff alleged that several police officers beat him during an arrest. 515 U.S. at 307. Some of the officers moved for summary judgment, asserting only that they were not present during the time of the alleged beating. *Id.* The district court denied the motion because circumstantial evidence supported a contrary factual finding. *Id.* at 308. The Seventh Circuit dismissed the officers' interlocutory appeal, concluding that it lacked jurisdiction over their pure "'evidence insufficiency' contention that 'we didn't do it.'" *Id.* (citation omitted).

This Court affirmed, holding that "a district court's summary judgment order that . . . determines *only* a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial," is not immediately appealable, even if it is "entered in a 'qualified immunity' case." *Id.* at 313 (emphasis added). The Court explained that such an appeal does not present an "'*issue of law*'" separable from the merits, as contemplated in *Mitchell*. *Id.* at 313-15 (quoting *Mitchell*, 472 U.S. at 530). The Court also rested its holding on "considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources," stating that appeals over purely factual issues "can consume inordinate amounts of appellate time." *Id.* at 316-17.

2. Since *Johnson*, this Court has recognized that the existence of factual disputes does not automatically preclude appellate jurisdiction over qualified immunity denials as long as the district court's order does not determine "*only* a question of 'evidence sufficiency.'" *Id.* at 313 (emphasis added).

The Court first made this point the year after deciding *Johnson*. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court rejected an argument that *Johnson* precluded appellate jurisdiction because the district court's denial of summary judgment had "rested on the ground that '[m]aterial issues of fact remain.'" *Id.* at 312 (alteration in original). "Denial of summary judgment often includes a determination that there are controverted issues of material fact," the Court explained, "and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable." *Id.* at 312-13. Rather, *Johnson* applies to a district court's "determinations of evidentiary sufficiency," and it precludes appellate jurisdiction only "if what is at issue in the sufficiency determination is *nothing more* than whether the evidence could support a finding that particular conduct occurred." *Id.* at 313 (emphasis added).

The Court confirmed this approach in *Scott*. There, the Court considered an excessive-force claim against a police officer who tried to "stop a fleeing motorist" by "ramming the motorist's car from behind." 550 U.S. at 374-75. The district court denied the officer's motion for summary judgment, "finding that 'there are material issues of fact on which the issue of qualified immunity turns.'" *Id.* at 376 (citation omitted). The Eleventh Circuit affirmed, accepting the plaintiff's "view of the facts as given" and concluding that those facts would violate clearly established law. *Id.*

In this Court, the parties "argued vigorously for and against appellate jurisdiction, based on conflicting interpretations of *Johnson*." *Anderson* Fletcher Dissent, 985 F.3d at 739 (describing *Scott* briefs). The Court rejected the jurisdictional

challenge. *See Scott*, 550 U.S. at 376 n.2. Presumably recognizing that the *Scott* petitioner was disputing not merely the lower courts' factual analysis—but *also* their determination that those facts amounted to a Fourth Amendment violation—the Court reached the merits and reversed. It explained that "the [c]ourt of [a]ppeals should not have relied on" the plaintiff's "version of the facts" to deny summary judgment because that version was "blatantly contradicted by the record," which included "a videotape capturing the events in question." *Id.* at 378-81. And, "[j]udging the matter on that basis," the Court found it "quite clear that [the officer] did not violate the Fourth Amendment." *Id.* at 381.

The Court again reiterated *Johnson*'s limited scope in *Plumhoff*. There, the Court considered excessive-force claims against police officers for shooting at a fleeing car. 572 U.S. at 768-70. As in *Scott*, the district court held that the record on summary judgment revealed a material factual dispute about the level of danger posed by the driver's flight and thus rejected the officers' claim of qualified immunity. Based on this factual dispute, the Sixth Circuit "express[ed] some confusion" about whether it should dismiss or affirm under *Johnson*; after first dismissing the appeal, the court granted rehearing and affirmed on the merits. *Id.* at 770-71 & n.2.

This Court unanimously reversed. The Court emphasized the narrow scope of *Johnson*'s exception to jurisdiction. It explained that the district court order on appeal in *Johnson* merely found there was conflicting "evidence in the summary judgment record" over the "purely factual issue[]" of whether the officers were "present at the time of the alleged beating." *Id.* at 772-73. In *Plumhoff*, by contrast, the

defendant officers did not "claim that other officers were responsible for shooting [the plaintiff]; *rather, they contend[ed] that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law*." *Id.* at 773 (emphasis added).

The Court concluded that such arguments on appeal raised precisely the sort of "legal issues" that appellate courts have a "core responsibility" to decide in qualified-immunity cases *Id.* Thus, just as in *Scott*—where the Court "expressed no doubts about the jurisdiction of the [c]ourt of [a]ppeals under § 1291"—the district court's decision in *Plumhoff* was immediately appealable. *Id.*

On the merits, the Court then held that the officers' conduct did not violate the Fourth Amendment. *Id.* at 775-78. The Court determined that the plaintiff's version of events was "conclusively disprove[d]" by "the record," and it rejected the argument that the officers acted "unreasonably" by "fir[ing] as many rounds as they did." *Id.* at 775-77. "[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop the shooting until the threat has ended." *Id.* at 777. The Court separately concluded that the defendant officers were "entitled to summary judgment based on qualified immunity," as their conduct "violated no clearly established law." *Id.* at 778-81.

Consistent with *Plumhoff*'s narrow view of *Johnson*, this Court has repeatedly reversed qualified-immunity decisions in which lower courts believed that factual disputes precluded summary judgment. *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam); *Taylor v. Barkes*, 575 U.S. 822

(2015) (per curiam); *see also Reichle v. Howards*, 566 U.S. 658 (2012) (same result, pre-dating *Plumhoff*); *Saucier v. Katz*, 533 U.S. 194 (2001) (same); *Anderson* Fletcher Dissent, 985 F.3d at 741-72. In none of these cases did the Court suggest that *Johnson* might preclude appellate jurisdiction. To the contrary, in every single one, the Court reversed the denial of summary judgment on the merits.

B. The Courts Of Appeals Are Intractably Divided Over How To Apply *Johnson*, *Scott*, And *Plumhoff*

In the wake of this Court's decisions, the courts of appeals "have struggled . . . to fix the exact parameters of the *Johnson* innovation" limiting appellate jurisdiction over a subset of qualified-immunity denials. *Walton*, 821 F.3d at 1209 (Gorsuch, J.). That "uncertainty" has spawned various "conflicts" both within and among the courts of appeals. *Romo* Sutton Concurrence, 723 F.3d at 686. Although the degree of confusion makes it difficult to categorize the various positions into neatly defined boxes, there are basically two camps—a narrow view of *Johnson* (embraced by the Eleventh Circuit) and a broad view of *Johnson* (embraced by the Ninth Circuit and other courts of appeals). Only the former approach is consistent with *Scott* and *Plumhoff*.

1. The Eleventh Circuit has adopted a bright-line rule that *Johnson* narrowly precludes appellate jurisdiction only when "there is *no* legal question to review" and thus "the *only* question before the appellate court is a factual one." *Hall v. Flournoy*, 975 F.3d 1269, 1276-77 (11th Cir. 2020) (emphasis added). That court has explained that "the presence of a

factual dispute on appeal does not automatically foreclose interlocutory review; rather, jurisdictional issues arise when the *only* question before an appellate court is one of pure fact." *Id.* at 1276. This approach respects what "[this] Court made clear" in *Scott* and *Plumhoff*—that *Johnson* precludes jurisdiction over appeals presenting only "'*purely* factual issues.'" *Id.* (quoting *Plumhoff*, 572 U.S. at 773).

Under its approach, the Eleventh Circuit will "exercise jurisdiction 'where the [summary-judgment] denial is based *even in part* on a disputed issue of law.'" *Spencer v. Benison*, 5 F.4th 1222, 1229-30 (11th Cir. 2021) (emphasis added) (quoting *Cottrell v. Caldwell,* 85 F.3d 1480, 1485 (11th Cir. 1996)). And "in the course of deciding such an interlocutory appeal, [the court] may resolve any factual issues that are 'part and parcel' of the core legal issues." *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1250 n.3 (11th Cir. 2013) (quoting *Cottrell,* 85 F.3d at 1486); *see Stanley v. City of Dalton*, 219 F.3d 1280, 1286-87 (11th Cir. 2000).

In a series of opinions over the past decade, Judges Sutton and Sykes have similarly explained that, under this Court's decisions in *Scott* and *Plumhoff*, "*Johnson*'s exception to the *Mitchell* rule is really quite narrow." *Stinson v. Gauger*, 868 F.3d 516, 532 (7th Cir. 2017) (en banc) (Sykes, J., dissenting), *cert. denied*, 138 S. Ct. 1325 (2018); *see Smith v. Finkley*, 10 F.4th 725, 751-52 (7th Cir. 2021) (Sykes, C.J., dissenting); *accord Barry* Sutton Dissent, 895 F.3d at 446; *Romo* Sutton Concurrence, 723 F.3d at 678. Like the Eleventh Circuit, Judges Sutton and Sykes understand *Johnson* to establish a "limited principle" under which "[a]n officer may not appeal the denial of

a qualified immunity ruling *solely* on the ground that the plaintiff's record-supported facts are wrong"—that is, the "rare case" in which "all the officer" argues on appeal is "that the plaintiff is lying." *Barry* Sutton Dissent, 895 F.3d at 446 (emphasis added); *accord Stinson*, 868 F.3d at 532 (Sykes, J., dissenting) ("*Johnson* blocks an immediate appeal *only* when the district court's order is limited to pure questions of historical fact—in other words, when the sole dispute is whether and how certain events or actions occurred."). "Otherwise," though, the courts of appeals "have jurisdiction to decide—on de novo review—whether, after reading the factual record in the light most favorable to the plaintiff, the officer should win as a matter of law on the first or second prong of qualified immunity." *Barry* Sutton Dissent, 895 F.3d at 446.

Judge Fletcher has taken an even narrower view of *Johnson*. In his view, "an appellate court [is] without jurisdiction" "[o]nly when officers provide disputed evidence showing that they were not present, and were in no way involved in the challenged conduct." *Anderson* Fletcher Dissent, 985 F3d at 741. This rule is the only way "to be faithful" to this Court's post-*Johnson* decisions in *Scott*, *Plumhoff*, and other cases. *Tuuamalemalo* Fletcher Concurrence, 946 F.3d at 483-85; *see Anderson* Fletcher Dissent, 985 F.3d at 741 ("I have difficulty reading [this Court's cases] any other way.").

Although these views of *Johnson* differ in some respects, they all agree that appellate jurisdiction exists so long as the defendant is appealing the district court's legal determination—regardless of whether the appeal challenges that court's assessment of the facts along the way. This rule

aligns with *Johnson* and reflects the Court's subsequent willingness to reassess lower courts' analyses of disputed facts in cases like *Scott* and *Plumhoff*. Indeed, it directly implements *Plumhoff*'s distinction between cases raising "purely factual issues" (*no* jurisdiction) and those in which the appellants argue that the district court mistakenly concluded that their conduct "did not violate the Fourth Amendment" or "did not violate clearly established law" (*yes* jurisdiction). 572 U.S. at 773.

2. Unlike the Eleventh Circuit, most other circuits believe *Johnson* broadly precludes appellate jurisdiction over a "district court's determination that 'the parties' evidence presents genuine issues of material fact.'" App. 3a (quoting *George*, 736 F.3d at 834); *see, e.g.*, *Simpson v. Little*, 16 F.4th 1353, 1359-62 (10th Cir. 2021); *Smith*, 10 F.4th at 735-36 (7th Cir.); *Cole v. Carson*, 935 F.3d 444, 452-53 (5th Cir. 2019) (en banc), *cert. denied*, 141 S. Ct. 111 (2020); *Barry*, 895 F.3d at 443 (6th Cir.); *McCue v. City of Bangor*, 838 F.3d 55, 61 (1st Cir. 2016).

On this view, appellate jurisdiction is limited to "*pure* questions of law." *Smith*, 10 F.4th at 735 (emphasis added). These courts believe they lack jurisdiction to review the district court's factual assessment or even its resolution of "mixed questions of law and fact." *Id.* As a result, virtually every factual assertion in an appellate brief triggers a jurisdictional inquiry: If the appellant makes any assertion inconsistent with the district court's assessment of the facts, the court disclaims jurisdiction to consider it. Even when a fact-based assertion is part of an undeniably legal argument—such as an argument that the law was not clearly established—these courts will "'dismiss the appeal for

want of jurisdiction'" if they "'detect a back-door effort'" to challenge the "district court's view of the evidence" or otherwise fail to present exclusively "abstract question[s] of law." *Stinson*, 868 F.3d at 525-26 (citation omitted).

In some cases, these courts may try to separate "appealable abstract legal question[s]" from the "non-appealable factual dispute[s]" addressed by the district court in an effort to salvage jurisdiction. *Smith*, 10 F.4th at 735; *see, e.g.*, *Simpson*, 16 F.4th at 1364-65. In others, as here, the court will simply dismiss the entire appeal. *See* App. 3a-4a.

3. The majority side's broad interpretation of *Johnson*'s exception is not "faithful to what th[is] Court wrote in *Plumhoff*." *Tuuamalemalo* Fletcher Concurrence, 946 F.3d at 484. *Plumhoff* expressly held that *Johnson* is limited to appeals presenting "*purely* factual issues," and that a defendant's appellate arguments that his conduct did not "violate the Fourth Amendment" or "violate clearly established law" raise "legal issues" that a court of appeals is can resolve. 572 U.S. at 773 (emphasis added). And in adjudicating those legal issues on the merits, *Plumhoff* (like *Scott* before it) recognized that appellate courts are not constrained by a district court's erroneous conclusion that there is a material factual dispute. *See id.* at 776-77; *Scott*, 550 U.S. at 380-81. This Court's approach in *Plumhoff* and *Scott* directly conflicts with any interpretation of *Johnson* that precludes appellate courts from reviewing the district court's factual analysis.

Faced with these problems, courts on the long side of the split have adopted a wholly artificial exception to their rule for when the district court's factual analysis "blatantly contradicts" the summary

judgment record. Under that exception, although the court of appeals lacks jurisdiction to review a district court's determination that a jury could credit the "plaintiff's version of the facts," the court of appeals *does* have jurisdiction if that "version of the facts is 'blatantly contradicted by the record, so that no reasonable jury could believe it.'" *Anderson*, 985 F.3d at 731 & n.3 (citations omitted); *see, e.g.*, *Smith*, 10 F.4th at 737; *Barry*, 895 F.3d at 443. In other words, appellate jurisdiction hinges on whether the district court's assessment of the factual record is "*really* wrong, not just conventionally wrong." *Barry* Sutton Dissent, 895 F.3d at 448 (emphasis added).

That gloss on *Scott* and *Plumhoff* impermissibly conflates jurisdiction with the merits. Although courts on the majority side pluck the "blatantly contradicts" language from *Scott*, they ignore the context in which the language appeared: *Scott* held that the record "blatantly contradicted" the version of the facts credited by the lower courts, but it made that determination *on the merits*. 550 U.S. at 380. *Scott* did not rely on the contradiction as the basis for any sort of jurisdictional ruling.

Unsurprisingly, the blatant-contradiction rule has proven to be "a terribly confusing way to decide something as essential as [appellate] jurisdiction." *Barry* Sutton Dissent, 895 F.3d at 448. As one scholar concluded after surveying hundreds of cases, "the blatant-contradiction [rule] is a murky rule that creates uncertainty about appellate jurisdiction and inevitably invites litigation." Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 Ga. L. Rev. 959, 994-1001 (2021) (surveying cases). That is because, along with its "theoretical and doctrinal problems," *id.* at

994-96, the blatant-contradiction test requires "determining whether the district court was *really* wrong (as opposed to just wrong)" in its factual assessment—a nebulous inquiry over which courts and litigants easily and frequently disagree, *id.* at 998-99.

4. The broad interpretation of *Johnson*'s exception has proven confusing and unworkable in other ways, too. As noted, this approach requires appellate courts—as part of their jurisdictional inquiry—to make fine-grained distinctions among "legal and factual arguments." *Smith*, 10 F.4th at 735. But the distinction between "'fact-based' and 'abstract' legal questions" is "not well defined," particularly in the qualified immunity context, where the legal question of whether a plaintiff has shown "a clearly established violation of law cannot be decided in isolation from the facts." *Ashcroft v. Iqbal*, 556 U.S. 662, 673-74 (2009); *see White*, 137 S. Ct. at 552 ("[T]he clearly established law must be 'particularized' to the facts of the case." (citation omitted)).

The courts of appeals often express uncertainty or disagreement when trying to traverse this "hazy" boundary. *Smith*, 10 F.4th at 735-36 (citation omitted); *see, e.g.*, *id.* at 747 ("[W]hat the dissent sees as a legal issue, the majority views as a factual dispute precluding appellate jurisdiction."); *see also Gillispie v. Miami Township*, — F.4th —, 2021 WL 5575563, at *8 (6th Cir. Nov. 30, 2021) (Bush, J., concurring in part and dissenting in part) (disagreeing over "difficult" task of separating legal and factual issues). And when it comes to supposed "factual inferences" drawn by the district court, the courts of appeals are hopelessly "conflict[ed]": Nearly "every circuit in the country has some decisions" that

permit appellate review of factual inferences "and some that" forbid it. *Romo* Sutton Concurrence, 723 F.3d at 685-86 (cataloguing cases); *see, e.g.*, *Anderson*, 985 F.3d at 734 n.6 (refusing to review the district court's determination of "the inferences that can be drawn from the evidence").

Courts on the majority side of the split have also contrived a litany of other, similarly confusing distinctions. For instance, the Tenth Circuit has held that jurisdiction might exist to consider a factual issue if the district court "fails to identify the particular charged conduct that it deemed adequately supported by the record," or if the district court "commits *legal* error en route to a *factual* determination." *Simpson*, 16 F.4th at 1360 (citations omitted). It has also recognized jurisdiction to assess the summary-judgment facts de novo in Fourth Amendment cases if the district court failed to analyze those facts "from the perspective of the officer." *Estate of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1060-62 (10th Cir. 2020).[2]

For its part, the Ninth Circuit has declared that "[a]lthough [it will] not review on interlocutory appeal claims that a plaintiff has presented *insufficient* evidence," it will sometimes exercise jurisdiction to

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[2] Exemplifying the confusion, the Seventh Circuit refused to exercise jurisdiction in *Smith*, a case with "facts close but not identical to those" in the Tenth Circuit's *Valverde* case. 10 F.4th at 745-46. The Seventh Circuit justified its different conclusion because, in its view, "[t]he threat in *Valverde* was greater"—the officers not only "reasonably believed [the suspect] was armed" but "saw" the suspect's "hand on the gun." *Id.* at 746. But this kind of factual distinction should be irrelevant to appellate jurisdiction, which "cannot depend on the facts of a particular case." *Behrens*, 516 U.S. at 311 (citation omitted).

"review claims that a plaintiff has presented *no* evidence" demonstrating "the illegality of [the] defendant's conduct." *Anderson*, 985 F.3d at 731 n.3 (first emphasis added) (citation omitted).

Each of these "too-many-to-count additional glosses" on the jurisdictional inquiry reflects a misguided effort to square a broad view of *Johnson* with this Court's cases rejecting that broad view. *Barry* Sutton Dissent, 895 F.3d at 446. The untenable result is a "needlessly complicated" analysis fraught with inconsistencies. *Id.*

II. The Jurisdictional Confusion Is Intolerable And Warrants Review

This Court's primary function is to ensure that federal law is correctly and uniformly applied across the country. As the discussion above makes clear, that is simply not happening with respect to appellate jurisdiction over summary-judgment denials of qualified immunity. This Court's intervention is badly needed.

The "analytic chaos" surrounding this issue has been widely lamented by courts and commentators alike. *Tuuamalemalo* Fletcher Concurrence, 946 F.3d at 480; *see also, e.g.*, *Anderson* Fletcher Dissent, 985 F.3d at 737 (collecting cases observing that "*Johnson* has created persistent confusion [in the] courts of appeals"); *Gant v. Hartman*, 924 F.3d 445, 449 (7th Cir. 2019) ("The line between appealable and non-appealable orders . . . can often be difficult to apply."); 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.10 (2d ed. 2021) ("The [*Johnson*] rule has encountered great difficulty in practice" and "generated significant complexities and confusions"); Martin A. Schwartz, *Section 1983 Litigation Claims*

and Defenses § 9A.16[B][5] (4th ed. 2021 Supp.) ("The circuit courts have experienced ongoing difficulties concerning the appealability of district court orders denying qualified immunity."); Edward Brunet et al., *Summary Judgment: Federal Law and Practice* § 11:3(f)(iii) (2020) ("The courts of appeals have struggled with the question of how much *Scott* and *Plumhoff* limited the *Johnson* rule.").

Indeed, the "perpetua[l]" disarray on the issue has prompted multiple "plea[s] to th[is] Court" for guidance. *Anderson* Fletcher Dissent, 985 F.3d at 742; *see also, e.g.*, *Tuuamalemalo* Fletcher Concurrence, 946 F.3d at 485 (urging "the Supreme Court [to] revisit the issue soon"); *Colston v. Barnhart*, 146 F.3d 282, 286 (5th Cir. 1998) (DeMoss, J., dissenting from denial of rehearing en banc) (writing in "hopes" of "attract[ing] the Supreme Court's attention to the increasingly complex panorama of doctrine and dissent" surrounding *Johnson*); Lammon, 55 Ga. L. Rev. at 1023 ("Confusion over the rule in *Johnson v. Jones* has gone on too long.").

Notably, the United States has told this Court that the lower-court confusion over *Johnson* is so pronounced that the Court should grant certiorari to "reconsider" *Johnson*—which "adopted the incorrect position"—in a case that "properly present[s]" the question. *Plumhoff* Oral Arg. Tr. 23. Judge Fletcher has echoed that sentiment, expressing "hope" that this Court will "disavow *Johnson* entirely." *Tuuamalemalo* Fletcher Concurrence, 946 F.3d at 485. And 22 States have urged this Court to resolve the "jurisdictional morass" in the lower courts. Br. of Ohio et al. as Amici Curiae 2-15, *Plumhoff*, *supra* (No. 12-1117).

That the confusion centers on jurisdiction "raises the stakes" and heightens the need for clarity, as jurisdiction cannot be waived and must be ascertained in every appeal. *Romo* Sutton Concurrence, 723 F.3d at 680. This Court has long recognized the "importance" of "clear" and "uniform" rules governing appellate jurisdiction. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988); *see also, e.g.*, *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 587 (2020) (emphasizing that the "[c]orrect delineation" of appellate jurisdiction "is a matter of considerable importance"). "[V]ague" jurisdictional rules unnecessarily consume "'an enormous amount of expensive legal ability'" by the parties and the courts that would "'be much better spent upon elucidating the merits.'" *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (citation omitted).

Here, the "inevitable outcome" of the confusion has been jurisdictional "uncertainty" and, with it, increased "litigation over appealability." *Romo* Sutton Concurrence, 723 F.3d at 686. Courts and litigants squander considerable resources debating the scope of *Johnson* and attempting to reconcile it with this Court's post-*Johnson* decisions. In this case, for example, jurisdiction consumed a separate round of briefing and was considered by two different panels of the Ninth Circuit. *See supra* at 10-11.

Similar inefficiencies regularly play out across the country. Even after *Plumhoff*, divided panels frequently issue lengthy opinions disagreeing over the scope and application of appellate jurisdiction in

this context.[3] In two recent decisions, the appeals were dismissed for lack of jurisdiction only after the panels collectively filled nearly 50 pages of the Federal Reporter debating the issue. *See Smith*, 10 F.4th 725; *Anderson*, 985 F.3d 726. This is the opposite of what a jurisdictional rule should be: a clear rule under which judges can "tell easily and fast what belongs in [their] court and what has no business there." *Sisson*, 497 U.S. at 375 (Scalia, J., concurring in the judgment) (citation omitted).

Massive jurisdictional uncertainty is reason enough for this Court to intervene. But review is especially necessary because the confusion arises in the context of qualified-immunity denials. Immediate appeals are warranted in that context because "[q]ualified immunity is 'an immunity from suit rather than a mere defense to liability.'" *Plumhoff*, 572 U.S. at 771-72 (citation omitted). Each time a court of appeals erroneously denies jurisdiction, the "promise of assuring a meaningful interlocutory opportunity to vindicate what is supposed to be an

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[3] *See, e.g.*, *Gillispie*, 2021 WL 5575563 (6th Cir.); *Colson v. City of Alcoa*, No. 20-6084, 2021 WL 3913040 (6th Cir. Sept. 1, 2021); *Smith*, 10 F.4th 725 (7th Cir.); *Anderson*, 985 F.3d 726 (9th Cir.); *Sevy v. Barach*, 815 F. App'x 58 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1064 (2021); *Cole*, 935 F.3d 444 (5th Cir.); *Reyes v. Fischer*, 934 F.3d 97 (2d Cir. 2019); *Foster v. City of Indio*, 908 F.3d 1204 (9th Cir. 2018); *Estate of Williams ex rel. Rose v. Cline*, 902 F.3d 643 (7th Cir. 2018); *Barry*, 895 F.3d 440 (6th Cir.); *Pauly v. White*, 874 F.3d 1197 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2650 (2018); *Grice v. McVeigh*, 873 F.3d 162 (2d Cir. 2017); *Stinson*, 868 F.3d 516 (7th Cir. 2017); *Thibault v. Wierszewski*, 695 F. App'x 891 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1280 (2018); *Thompson v. City of Lebanon*, 831 F.3d 366 (6th Cir. 2016); *Zuhl v. Haskins*, 652 F. App'x 358 (6th Cir. 2016); *Oliver v. Greene*, 613 F. App'x 455 (6th Cir. 2015).

immunity from trial [is] 'irretrievably lost.'" *Walton*, 821 F.3d at 1209 (citation omitted). Such an error can also harm plaintiffs, by eliminating the possibility that the court of appeals might affirm the denial of summary judgment on the merits and thereby "give[] [the parties] and the trial judge clear direction as to what [is] at stake and what law should control the jury trial." *Barry* Sutton Dissent, 895 F.3d at 449.

Finally, the frequency with which the question recurs only underscores the need for review. "[T]here are few days of oral argument in the life of an appellate judge that do not involve at least one qualified immunity interlocutory appeal." *Romo* Sutton Concurrence, 723 F.3d at 680. The question of appellate jurisdiction arises in every one of those cases. The Court should grant review and bring some order to the analytic chaos plaguing the lower courts.

III. This Case Is An Ideal Vehicle To Resolve The Confusion

This case provides an optimal vehicle for the Court to provide clarity as to appellate jurisdiction going forward.

First, the jurisdictional issue is perfectly teed up for review: It was fully briefed by the parties in the Ninth Circuit, and squarely resolved by that court. App. 3a-4a. Indeed, the court's jurisdictional ruling provided the sole basis for its disposition of petitioners' entire appeal. *Id.*

Second, this case directly implicates the circuit conflict. Had this case arisen in the Eleventh Circuit, the court would have exercised jurisdiction because it does not fall into the narrow class of appeals in which "there is *no* legal question to review" and "the *only* question before the appellate court is a factual one."

Hall, 975 F.3d at 1276-77 (emphasis added). Here, as noted above, petitioners offered several legal questions for review—including the same core questions over which this Court exercised appellate jurisdiction in *Plumhoff*: (1) whether petitioners' conduct "violate[d] the Fourth Amendment," and (2) whether that conduct "violate[d] clearly established law." 572 U.S. at 773; *see supra* at 10-11. The Eleventh Circuit has regularly held that it has appellate jurisdiction over such claims, even when they also involve challenges to the district court's factual assessment of the summary judgment record. *See, e.g.*, *Teal v. Campbell*, 603 F. App'x 820, 822-23 & n.1 (11th Cir.), *cert. denied*, 577 U.S. 979 (2015); *Crenshaw v. Lister*, 556 F.3d 1283, 1288-89 (11th Cir. 2009).

Likewise, appellate jurisdiction would have been warranted under the approaches espoused by Judges Sykes, Sutton, and Fletcher. *See supra* at 19-20. The "district court's order is [not] limited to pure questions of historical fact," *Stinson*, 868 F.3d at 532 (Sykes, J., dissenting), and petitioners' appeal does not rest "solely on the ground that [respondents'] record-supported facts are wrong," *Barry* Sutton Dissent, 895 F.3d at 446. Rather, the district court's order resolved legal questions regarding both prongs of qualified immunity, and petitioners challenged those conclusions on appeal. And petitioners certainly do not "dispute that [they were] at the scene." *Anderson* Fletcher Dissent, 985 F.3d at 742.

Even the Tenth Circuit—which has generally adopted the broader view of *Johnson*'s exception—would have exercised jurisdiction here. As noted, that court recognizes an exception to its broad view of *Johnson* for cases in which the appellant argues that

the district court misapplied the Fourth Amendment by failing to consider the facts from the *officer's* perspective. *See Valverde*, 967 F.3d at 1059-60, 1062. Petitioners advanced that exact same argument here. *See supra* at 10-11.

Because this case directly implicates the circuit conflict, granting review would give this Court a perfect opportunity to clarify the correct approach to *Johnson*, *Scott*, and *Plumhoff*. Indeed, the Court could also consider whether to recalibrate or overturn *Johnson* altogether, as the United States and Judge Fletcher have urged. *See supra* at 27; *see also Pearson v. Callahan*, 555 U.S. 223, 233 (2009) ("[r]evisiting precedent" is "particularly appropriate" when it "consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings"). Either way, the Court should resolve the confusion and provide courts and litigants with the guidance they urgently need.[4]

Finally, this case highlights the harm wrought by overbroad applications of *Johnson*. Below, the Ninth Circuit refused to review a district court decision that contains the same kind of flawed legal reasoning routinely overturned on appeal. Had the Ninth Circuit exercised jurisdiction, it would have easily reversed.

As petitioners explained, the district court's decision suffers from multiple problems. *See supra* at 10-11. For instance, rather than analyzing the facts

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[4] To be clear, petitioners believe *Johnson*, properly understood, poses no barrier to appellate jurisdiction in this case. *See supra* at 13-21. But if this Court disagrees, then it should overturn *Johnson*.

"from the perspective 'of a reasonable officer on the scene'" as required by the Fourth Amendment, *Plumhoff*, 572 U.S. at 775 (citation omitted), the district court's decision wrongly invites a jury to decide for itself whether Childress "was [in fact] moving in a threatening way" after the first volley of shots, App. 25a. *See* Pet. C.A. Br. 30-34; Pet. C.A. Reply Br. 13-17.

The court's analysis of "clearly established" law is even more glaringly wrong. App. 26a-28a. According to the court, "existing precedent [had] established that continued force against a suspect who no longer posed an immediate threat was unlawful." *Id.* at 26a. But "this Court has [repeatedly] considered—and rejected—almost that exact formulation" because it "'define[s] [the] clearly established law'" at an impermissibly "'high level of generality.'" *Mullenix*, 577 U.S. at 12 (citation omitted). Rather, the correct inquiry is whether "'existing precedent'" established "'beyond debate'" that petitioners' use of force was unreasonable "in the *particular circumstances* that [they] faced." *Plumhoff*, 572 U.S. at 779 (emphasis added) (citation omitted). Here, those circumstances consisted of a high-pressure standoff with a dangerous escapee who seconds earlier had advanced towards the officers with what appeared to be a gun after persistently refusing to surrender or show his hands.

The district court compounded its error by relying on four inapposite cases to demonstrate the clearly established law. App. 26a-28a. Two of those cases did not even involve a police shooting, let alone in similar circumstances: One involved an officer who "punched a handcuffed suspect in the face while he lay on the floor," *id.* at 26a-27a (citing *Davis*, 478 F.3d at 1053),

and the other involved officers who "sat on a prone [and handcuffed] suspect's back and asphyxiated him," *id.* at 27a (citing *Drummond*, 343 F.3d 1052). Needless to say, "the facts of [those cases] are dramatically different from the facts here" and could not "'clearly establish[]'" that petitioners' "use of force was unlawful" in the particular circumstances they faced. *City of Tahlequah v. Bond*, — S. Ct. —, 2021 WL 4822664, at *2 (Oct. 18, 2021) (per curiam).

The district court also invoked dicta from two cases holding that the defendant officers did *not* violate the Fourth Amendment. App. 27a-28a (citing *Plumhoff*, 572 U.S. at 777; *Mendoza*, 27 F.3d at 1362). But as this Court recently reiterated, the "clearly established inquiry" in this context requires "precedent *finding a Fourth Amendment violation* under similar circumstances"; it "is not enough that a rule be *suggested* by then-existing precedent." *Bond*, 2021 WL 4822664, at *2-3 (emphasis added); *see Kisela v. Hughes*, 138 S. Ct. 1148, 1152-54 (2018) (per curiam). To top it off, the *Mendoza* dictum quoted by the district court is also inapplicable on its own terms, because Childress was not "a handcuffed arrestee who ha[d] fully surrendered." App. 28a (quoting 27 F.3d at 1362).

All told, no existing precedent placed the unlawfulness of petitioners' particular conduct "'beyond debate.'" *Plumhoff*, 572 U.S. at 779. Petitioners are thus entitled to qualified immunity. And by refusing to exercise appellate jurisdiction to correct this error, the decision below simply underscores how an overbroad application of *Johnson* frustrates the purpose of that immunity. This Court should grant review to reaffirm appellate jurisdiction

in this category of cases and resolve the jurisdictional confusion that has bedeviled the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 6, 2021

APPENDIX

TABLE OF CONTENTS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 14, 2021]

JACQUELINE LAWRENCE, KEITH CHILDRESS, SR., individually and as Successor in Interest to Keith Childress, Jr., deceased; CAROLINA NAVARRO, guardian ad litem on behalf of K.C.; ARACELI SAENZ, guardian ad litem on behalf of A.S.; AMBER NEUBERT, guardian ad litem on behalf of K.C.; and FREDERICK WAID, as special administrator of the Estate of Keith Childress, Jr.,

Plaintiffs-Appellees,

v.

ROBERT BOHANON; BLAKE WALFORD; and JAMES LEDOGAR,

Defendants-Appellants.

No. 20-15669

D.C. Nos. 2:16-CV-03039-RFB-NJK
2:18-CV-02314-RFB-CWH

MEMORANDUM*

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

Appeal from the United States District Court for the District of Nevada

Richard F. Boulware, II, District Judge, Presiding

Argued and Submitted May 6, 2021
Portland, Oregon

[847 F. App'x 516]

Before: W. FLETCHER and FRIEDLAND, Circuit Judges, and BLOCK,** District Judge.

On December 31, 2015, Defendant-Officers Robert Bohanon and Blake Walford fatally shot Keith Childress, Jr. ("Childress") while attempting to arrest him. After Childress ignored verbal commands to surrender and began approaching Defendant-Officers, Bohanon shot him twice and Walford shot him three times. Childress fell to the ground, and two-to-five seconds later, Bohanon and Walford shot him two more times each. Defendant-Officer James Ledogar then deployed a police dog, which bit Childress as he lay bleeding on the ground. Bohanon, Walford, and Ledogar (together, "the Officers") now appeal the denial of their motion for summary judgment, on qualified immunity grounds, on Plaintiffs' excessive force claim.[1] We dismiss for lack of appellate jurisdiction.

"We have jurisdiction to determine our jurisdiction." *United States v. Decinces*, 808 F.3d 785, 788 (9th Cir. 2015). Although an order denying summary judgment is generally not appealable, "the

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** The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

[1] The Officers have abandoned their state law immunity claims. We therefore do not consider them on appeal.

Supreme Court has created an exception to the final judgment rule for certain interlocutory appeals when the district court has denied a motion for summary judgment based on qualified immunity." *Pauluk v. Savage*, 836 F.3d 1117, 1120–21 (9th Cir. 2016). However, that exception does not extend to a district court's determination that "the parties' evidence presents genuine issues of material fact." *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013) (quoting *Eng v. Cooley*, 552 F.3d 1062, 1067 (9th Cir. 2009)).

Here, the district court denied the Officers' motion for summary judgment because it found disputed issues of material fact. Specifically, it held that there is a dispute as to whether "Childress was moving or had access to his pocket after being shot" during the first volley and concluded that, under Plaintiffs' version of the facts, the Officers "continued to shoot at Childress" and deployed a K9 on him "despite his clear incapacitation." *Lawrence v. Las Vegas Metro. Police Dep't*, 451 F. Supp. 3d 1154, 1165, 1170-71 (D. Nev. 2020). The Officers implicitly reject this understanding of the record, arguing that they are entitled to immunity because Childress was not incapacitated but, to the contrary, "immediately attempted to stand back up" after the Officers' first volley struck him.

Thus, the Officers' arguments on appeal "[boil] down to factual disputes about the record." *Est. of Anderson v. Marsh*, 985 F.3d 726, 732 (9th Cir. 2021). Such arguments are outside the limited scope of our jurisdiction. *Id.* at 734 (holding, on interlocutory appeal, that the court was without jurisdiction to review the district court's determination "that there is a genuine factual dispute as to whether [the plaintiff] made a sudden movement").

The Officers contend, however, that we may reach the merits because the video evidence "blatantly contradict[s]" and "discredit[s]" what the district court held was the version of the facts most favorable to Plaintiffs. *Scott v. Harris*, 550 U.S. 372, 380 (2007). But the video does not do so. A jury viewing it could conclude, as Plaintiffs do, that if Childress moved at all after the first volley, his movements were an involuntary response to being shot. A jury could also find that Childress was "clearly incapacitated" when Bohanon and Walford began their second volley and when Ledogar released his dog. *Scott* is therefore inapposite.

DISMISSED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed April 1, 2020]

[451 F. Supp. 3d 1154]

JACQUELINE LAWRENCE, et al Plaintiff(s), v. LAS VEGAS METROPOLITAN POLICE DEPARTMENT et al Defendant(s).	Case No. 2:16-cv-03039-RFB-NJK (Consolidated with Case No. 2:18-cv-02314-RFB-CWH) **ORDER**

I. INTRODUCTION

Before the Court are Defendant Brian Montana's Motion to Dismiss, Defendants Robert Bohanon, Las Vegas Metropolitan Police Department ("LVMPD"), James Ledogar, and Blake Walford's Motion for Summary Judgment, Defendant Brian Montana's Motion for Summary Judgment, and Consol Defendant United States's Motion for Summary Judgment. ECF Nos. 83, 86, 87, and 88.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their complaint on December 30, 2016. The complaint asserts Fourth Amendment excessive force and denial of medical care claims via 42 U.S.C. § 1983, substantive due process claims, battery, negligence, wrongful death via the Federal Tort Claims Act ("FTCA") (28 U.S.C. § 1346(b)),

Monell[1], and Bivens claims for supervisory liability, excessive force, and substantive due process violations. Id.

On July 17, 2017, Defendants the United States Department of Justice ("US DOJ") and United States Marshal Service filed a motion to dismiss on the basis that the Court did not have subject matter jurisdiction over them because Plaintiffs had not exhausted their administrative remedies under the FTCA. ECF No. 20. Plaintiffs filed their first amended complaint adding Defendant Brian Montana. ECF No. 21. DOJ then filed a motion to dismiss the first amended complaint on July 31, 2017. ECF No. 24.

On November 9, 2017, the Court dismissed the First Amended Complaint's Ninth and Tenth claims for relief without prejudice. On April 9, 2018, Plaintiffs filed a stipulation to file amended pleadings. The operative second amended complaint was filed on April 9, 2018. On June 12, 2018, Defendants US DOJ and US Marshals moved to dismiss the second amended complaint. On November 15, 2018, the Court dismissed US DOJ and the US Marshals Service without prejudice. ECF No. 77. LVMPD answered on April 23, 2018. ECF No. 63. Defendants United States DOJ Marshals service and DOJ moved to dismiss on June 12, 2018. ECF No. 65.

The Court granted Defendants' Motion to Dismiss without prejudice as to the United States Department of Justice and United States Marshals Service. ECF No. 77. On December 5, 2018 Plaintiffs filed a complaint against Defendants United States and

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[1] Plaintiffs have since dropped their Monell claims against Defendant LVMPD.

Brian Montana, asserting a wrongful death claim under the False Claims Tort Act, and Bivens Fourth Amendment excessive force and Fifth Amendment substantive due process claims in the case 18-cv-2314.

On January 8, 2019, case 18-cv-2314 was consolidated under 16-cv-03039. ECF Nos. 78, 79. Defendant United States filed its answer to the Second Amended Complaint on April 22, 2019. ECF No. 82. Defendant Brian Montana moved to dismiss on April 22, 2019. A response and reply were filed. ECF Nos. 84, 85. Defendants Robert Bohanon, LVMPD, James Ledogar and Blake Walford moved for summary judgment on June 5, 2019. ECF No. 86. A response and reply were filed. ECF Nos. 90, 98. Defendant Brian Montana moved for summary judgment on June 5, 2019. ECF No. 87. A response and reply were filed. ECF Nos. 99, 100. Defendant United States moved for summary judgment on June 5, 2019. ECF No. 88. A response and reply were filed. ECF Nos. 94, 99.

III. FACTUAL BACKGROUND

The Court makes the following findings of undisputed and disputed fact.

a. Undisputed Facts

i. Background

Keith Childress, Jr was arrested and charged with armed robbery, kidnapping, aggravated assault, and theft based on a home invasion in Arizona in 2013 along with three other co-defendants. The criminal trial lasted from October 26, 2015 through December 17, 2015. Childress attended the trial.

However, on the date the guilty verdict was read, Childress left Arizona and a warrant was issued for his arrest. Childress was listed in the National Crime

Information Center (NCIC) as "armed and dangerous with violent tendencies." On December 29, 2015, the Las Vegas Field Office for the U.S. Marshall Service received notice from the Maricopa County Arizona U.S. Marshall Service about the possibility that Childress might be in Las Vegas with his uncle, Vincent Matlock. One of the Deputy United States Marshals assigned to the case was Defendant Brian Montana.

On December 30, 2015, the task force conducted surveillance for several hours at Matlock's apartment, which was located in the Monaco apartment complex near Desert Inn Road and Durango Drive.

ii. Chase of Childress Preceding the Shooting

On December 31, 2015, at approximately 1:55 pm, the marshals saw Childress and Matlock leave Matlock's apartment and walk toward Matlock's car, a black Hyundai. The marshals activated lights and sirens on at least one of their cars and Childress ran. Defendant Brian Montana along with nonparty deputy marshal Desiree Sida, proceeded to chase after Childress. The U.S. Marshals attempted to stop Childress from leaving in Matlock's vehicle. One marshal recovered a gun from the vehicle registered and belonging to Vincent Matlock.

Upon realizing that Childress was going to successfully escape the complex, nonparty Deputy Marshal Kozisek radioed LVMPD for assistance in setting up a perimeter. Childress ignored all of the U.S. Marshall's commands to surrender. At approximately 2:02 pm, LVMPD dispatch broadcast

that a foot pursuit was occurring and that there was a need to set up a perimeter.

The dispatcher relayed that Childress was hopping walls, running through yards, and climbing on rooftops. LVMPD Sergeant Bohanon was at his house eating lunch when he heard the dispatch call. Bohanon requested additional information, and Deputy U.S. Marshal Brian Montana radioed that Childress was an "attempt 420 (homicide) suspect. LVMPD Dispatch then asked whether the suspect was armed. Montana broadcast an answer of "unknown." Bohanon assigned himself to the call, activated his body worn camera, and began driving to Childress's last known location. During the drive, Bohanon learned that a firearm was found inside Matlock's vehicle.

iii. The Shooting

As Bohanon was driving to the call, LVMPD Officer Walford[2] arrived on the scene and took up a perimeter spot at Golden Cypress Court and Maple Valley Street. Neither Bohanon nor Walford ever received any information that the suspect had harmed anyone, had other prior acts of violence, or that he was under the influence of drugs or alcohol. Bohanon and Walford did not have any information that Childress had any criminal record, other than the false information that Childress was wanted for attempted homicide.

Walford received information from LVMPD's Air Unit that Childress was climbing over residential walls and running along roof tops of residential

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[2] Walford's bodycam footage was not available, because he did not activate his bodycam during the encounter with Childress.

homes. As Walford approached the street of Gilded Crown Court, Bohanon's patrol vehicle drove past him. After turning onto Gilded Crown Court, Bohanon encountered Childress walking on the right side of the road towards the dead-end portion of the culde-sac. Bohanon was in a marked black and white police SUV with its overhead lights activated.

Childress began to cross the street. Bohanon could see Childress's left arm and body, but not his right hand or side. As Bohanon slowed down, Walford joined him and began walking alongside his SUV. Bohanon stopped, exited his vehicle, pointed his firearm directly at Childress, and ordered him to "get on the ground" two times. Childress looked directly at Bohanon but continued to walk away. Bohanon could see the full right side of Childress's body. But Bohanon could see a black object in Childress's right hand that Bohanon believed Childress was "indexing" as if it were a firearm.

Video of Bohanon's bodyworn camera that captured the incident never shows Childress holding a black object in either hand. Bohanon considered that the black object he saw could be a cellphone. Bohanon did not see anything in Childress's left hand.

Bohanon unsuccessfully ordered Childress to "get on the ground" two more times. As Childress continued to walk toward the houses, Childress began to steer his vehicle toward Childress and broadcast, "he's got something in his hand." Childress continued to ignore Bohanon's commands and walked up a driveway. Bohanon again stopped his car, pointed his firearm at Childress, and issued orders to "show me your hands" and "let me see your hands."

Walford joined Bohanon and the officers took position behind a red Pontiac vehicle. Walford says he saw Childress walking across the street with a black object in his hand but Walford never specifically identified the object as a gun.

Bohanon was also wearing a Level 3A bulletproof vest and had TASER X26, OC spray, and baton. Immediately after reaching the red vehicle, Bohanon told Walford, "he's got a 413 (gun)" and unsuccessfully ordered Childress to "get your hands up" two more times. Bohanon admitted he had yet to identify anything on Childress as a gun at that point. Walford also issued commands for Childress to get on the ground. Bohanon warned Childress that he was "going to be surrounded" because a K-9 unit was on its way. Bohanon next ordered Childress to "let me see our hands, drop the gun." Bohanon continued to instruct Childress to "drop the gun" and "to surrender." Childress never said a word and never made any attempt to communicate that the object was not, in fact, a gun. According to Bohanon, the totality of Childress's actions led him to believe the object was a gun. Eventually, Defendant Brian Montana and nonparty Deputy Marshal Desiree Sida, joined Bohanon and Walford at the Pontiac. Bohanon informed them that Childress "has a gun in his right hand." At this point, Bohanon believed the officers were likely to end up in a standoff.

At some point, Childress left the corner of the house and began to walk towards the officers. During this period helicopters continue to hover over the officers and Childress. Right before Childress approached the officers, Bohanon said, "Do not advance, you will be shot," and "Do not walk towards us," twice. Bohanon, Walford, Montana, and Sida all

had their guns pointed at Childress as he walked towards them. Childress had his right hand either in his front pocket or behind his leg. Walford claims that Childress's right hand, including all of his fingers were inside his pocket and that Walford could only see the top backside of his hand near his wrist. Bohanon could not see Childress's right hand at all and did not know whether Childress had an object in his right hand. As Childress continued to walk towards the officers, both Bohanon and Walford opened fire on Childress. Bohanon shot first, immediately followed by Walford. Bohanon fired two shots and Walford fired three. Prior to the first shot, neither officer ever saw Childress's right hand or right arm come up and neither ever saw Childress point an object at them. Montana and Sida also never saw Childress's hand or any object come out of Childress's pocket prior to the shots. Bohanon continued to issue verbal commands to Childress to "drop the gun" and he warned Childress that "if you advance on us you will be shot," and "do not walk toward us." Within seconds of being told that if he "advance[es]" or "walk toward us" that he will be shot, Childress left the house and began walking directly toward the officers. Childress's left hand remained visible but his right hand near his right side was not visible. Bohanon gave one final order "do no walk toward us," and then he opened fire at Childress. Childress was about 15 yards from the officers when they opened fire. Both officers agree that Childress never raised his right arm or pointed the object at them. All of the shots occurred within eight seconds and after the officers had unsuccessfully given over 25 verbal commands.

It was apparent to both officers that Childress had been struck by the first volley of shots. After

Childress fell to the ground, both Bohanon and Walford shot at Childress two more times for a total of four shots. Bohanon still could not see a black object on Childress. Bohanon believed that his third and fourth shot also struck Childress. There was an approximately two second pause between Bohanon's first volley and second volley. During this two second pause, Bohanon moved to get a better view of Childress. In between the first and second volley, Bohanon knew that Childress's right hand was out and away from his body. Walford estimates that there was a five second pause between his first volley and second volley.

After the first volley, Walford had time to reassess and saw that Childress was on the ground. In between the first volley and second volley, Walford never saw a black object anywhere in Childress's hand or on his person, never saw Childress point a black object at him, and never saw Childress's arm coming up in his direction with or without an object in it. Sida was watching Childress the entire time while Childress was walking and when he was on the ground and never saw anything that she thought was a weapon or identified as a gun on Childress. At no time during the incident did Childress ever verbally threaten any of the officers.

Although both Montana and Sida had their guns pointed at Childress, neither ever discharged their weapon. When Childress went to the ground, Sida did not see any weapon in Childress's hand. After Childress went to the ground, Montana could see both of Childress's hands and did not see a gun in his hands, on his person, or on the ground. After Childress went to the ground, Montana believed he did not need to shoot because based on his training

and observations he had no reason to fire. Once Childress was shot and on the ground, Bohanon continued to give verbal commands that Childress "drop his gun." Bohanon, while maintaining his focus on Childress, ordered medical be dispatched to the scene, "if you have not already done it." Medical was requested within thirty seconds of the shooting and was immediately en route.

iv. The K-9

A K-9 unit arrived shortly after or just before Childress was shot. Prior to deploying the K-9, Childress was not moving. Ledogar did not give a warning that he was going to deploy the K-9 prior to deployment. Ledogar directed the K-9 to Childress and the other officers followed close behind. The dog bit Childress's leg as he lay on the ground for approximately 15 seconds. The K-9 held his bite on Childress for approximately fifteen seconds. Once the K-9 was controlled, several officers handcuffed Childress's bleeding body and searched him for weapons. Both of Childress's arms were out and clearly visible with nothing in either hand when Bohanon approached. Montana and Sida grabbed a hold of Childress's arms and placed Childress onto his stomach as an LVMPD officer handcuffed Childress. After Childress was handcuffed, Walford patted Childress down and pulled out a black cell phone from Childress's right pocket. The cell phone was approximately 4 inches in length and 2 inches in width.

Unable to find a gun on Childress, the officers continued to search Childress and the area surrounding him. None of the officers on scene provided Childress with medical aid. Bohanon

concedes that he now believes the black object he had seen in Childress's hand was his cell phone.

b. Disputed Facts

The Court finds the following fact to be disputed: whether Childress had his right hand near his pocket when approaching the officers, and whether Childress was moving or had access to his pocket after being shot and falling to the ground. The remainder of the parties' dispute concerns the legal effects and appropriate inferences to draw from the facts.

IV. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322(1986).

When considering the propriety of summary judgment, the court views all facts and draws all inferences in the light most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir. 2014).

If the movant has carried its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation marks omitted).

It is improper for the Court to resolve genuine factual disputes or make credibility determinations at

the summary judgment stage. Zetwick v. Cty. of Yolo, 850 F.3d 436, 441 (9th Cir. 2017) (citations omitted).

Summary judgment in excessive force cases should be granted sparingly, because "[w]hether a particular use of force was reasonable is rarely determinable as a matter of law." Green v. City & Cty. of San Francisco, 751 F.3d 1039, 1049 (9th Cir. 2014) (citing Chew v. Gates, 27 F.3d 1432, 1443 (9th Cir. 1994)).

V. DISCUSSION

a. Defendant Brian Montana's Motion to Dismiss and Motion for Summary Judgment

i. The Court finds that it has personal jurisdiction over Montana in the 2018 case, but not in the 2016 case.

"A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Rule 4 of the Federal Rules of Civil Procedure." Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986). "So long as a party receives sufficient notice of the complaint, Rule 4 is to be liberally construed to uphold service." Travelers Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1135 (9th Cir. 2009)(internal citations omitted). However, "neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction without substantial compliance with Rule 4." Benny, 799 F.2d at 492 (citation and quotes omitted).

Rule 4(b) requires that a "summons must be issued for each defendant to be served." Fed. R. Civ. P. 4(b). Rule 4(i)(3) requires that when a federal employee is being sued in connection with actions or omissions that occurred in connection with their work on behalf

of the United States, the party must serve the United States *and* the officer. Fed. R. Civ. P. 4(i)(3). However, the Court must allow a party a reasonable time to cure a failure to comply with Rule 4(i)(3). Fed. R. Civ. P. (i)(4). Finally, Rule 4(m) gives parties 90 days to serve defendants after the complaint is filed. Fed. R. Civ. P. 4(m). If, however, the plaintiff shows good cause for their failure to meet the time limit, the Court "must extend" the time for service for an appropriate period. Id.

This action consolidates two cases—a 2016 case that did not originally name Montana as a defendant, and a 2018 case that did. Both cases were brought by the same plaintiffs, and subsequent amendments of the 2016 case named Montana in his individual capacity and asserted the same claims against him as were asserted in the 2018 case, which the Court consolidated with the 2016 case in January 2019. Montana now argues that the Court does not have personal jurisdiction over him in the 2016 case, because Plaintiffs failed to properly complete service of process on Montana.

Plaintiffs filed their First Amended Complaint in the 2016 case naming Montana as a new defendant on July 20, 2017. Plaintiffs did not serve Montana until January 31, 2018, far past the 90-day deadline imposed by Rule 4(m) of the Federal Rules of Civil Procedure. Plaintiffs filed their Second Amended Complaint in the 2016 case on April 9, 2018. Plaintiffs did not serve the Second Amended Complaint on Montana. An original complaint is only superseded when the amended complaint is properly served, thus the operative complaint with regard to Montana is the First Amended Complaint. Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001) (adopting

Doe v. Unocal Corp., 27 F.Supp.2d 1174, 1180 (C.D. Cal. 1998) as its opinion).

Montana argues that there were two defects in Plaintiffs' service of the First Amended Complaint. First, Montana argues that Plaintiffs failed to serve the United States as a separate party under Rule 4(i)(3). Second, Montana argues that Plaintiffs has not sufficiently showed good cause for their late filing in Rule 4. Plaintiffs argue that the United States *was* properly served the First Amended complaint, because the United States had consented to electronic filing, and pursuant to District of Nevada Local Rule IC 4-1, participation in the court's electronic filing system constitutes consent to electronic service of the pleadings. LR IC 4-1. Thus, Plaintiffs argue, when they filed the First Amended complaint in the 2016 case that named Montana as a defendant, the United States, which was also represented by the District of Nevada's Assistant United States Attorney, had been sufficiently served and notified.

The Court agrees with Montana that service was not properly effectuated pursuant to Federal Rule of Civil Procedure 4(i)(4). The Court does not find that LR IC 4-1 saves Plaintiffs' argument here, as the Rule is also clear that "service of documents in paper form is required . . . when the document is a summons or complaint." LR IC 4-1(c). The Court will also refuse to grant Plaintiffs additional time to cure this defect. While the Court is aware that it must give Plaintiffs reasonable time to cure, the Court finds that Plaintiffs have already had ample time to cure this defect. Fed. R. Civ. P.4(1)(4)(B). The Advisory Committee describes the cure provision as requiring that "[a] reasonable time to effect service on the United States must be allowed *after the failure is*

pointed out." Advisory Committee Notes, 2000 Amendment, Rule 4 (emphasis added). Plaintiffs first became aware of this defect in service when Montana filed his motion to dismiss on April 22, 2019, raising this defense. Plaintiffs have made no subsequent effort to serve the United States almost a year later. Notice by a defendant that a plaintiff has not properly effectuated service under Rule 4(i) can be sufficient to trigger the reasonable time requirement. Kurzberg v. Ashcroft, 619 F.3d 176, 185 (2d Cir. 2010) ("[N]otification to the plaintiff by the defendant, rather than by the court, of a defect in the service of process is sufficient to start the clock on the reasonable amount of time afforded to the plaintiff to cure the defect."). Accordingly, the Court will not grant Plaintiffs additional time to cure the defect and dismisses Montana from the 2016 case. As neither party disputes that Montana and the United States were properly served in the 2018 case, the Court finds that it has personal jurisdiction over Montana in the 2018 case.

ii. The Court dismisses the wrongful death claim brought under the Federal Tort Claims Act as against Montana.

The Court dismisses the wrongful death claim brought under the Federal Tort Claims Act ("FTCA") (28 U.S.C. § 1346(b)) against Montana because only the United States is a proper defendant in a claim brought under the FTCA. Kennedy v. U.S. Postal Service, 145 F.3d 1077, 1078 (9th Cir. 1998) ("[T]he United States is the only proper party defendant in an FTCA action.").

iii. The Court finds that Plaintiffs do not have a Bivens remedy.

The Supreme Court case Bivens v. Six Unknown Named Agents, "recognized for the first time an implied private action for damages against federal officer alleged to have violated a citizen's constitutional rights." 403 U.S. 388, 397 (1971). "Specifically, the Supreme Court allowed a plaintiff to bring a damages action in federal court against individual federal officials for violating the Fourth Amendment, despite the absence of any federal statute authorizing such action." W. Radio Servs. Co. v. U.S. Forest Serv., 578 F.3d 1116, 1119 (9th Cir. 2009).

The Supreme Court has sharply circumscribed Bivens, however, and has since developed a test for determining whether Bivens remedies can be extended. Lanuza v. Love, 899 F.3d 1019, 1023 (9th Cir. 2018) (citing Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)). First, the Court must determine whether the plaintiff is seeking a Bivens remedy in a new context. Lanuza, 899 F.3d at 1023. If not, then the analysis ends there. If the Court *does* find that the plaintiff is seeking a Bivens remedy in a new context, then the Court must determine whether "special factors counsel hesitation." Lanuza, 899 F.3d at 1023 (citing Abbasi, 137 S. Ct. at 1860). A case presents a new context if it is "different in a meaningful way from previous Bivens cases decided by the Supreme Court." Lanuza, 899 F.3d at 1023.

"A case can present a new context for Bivens purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential

special factors that were not considered in previous Bivens cases." Vega v. United States, 881 F.3d 1146, 1153 (9th Cir. 2018) (citing Abbasi, 137 S. Ct. at 1864).

Although the Ninth Circuit has recognized that Bivens claims can be brought on Fourth Amendment excessive force violations, Ting v. United States, 927 F. 2d 1504, 1509 (9th Cir. 1991), the Court finds that the circumstances of the case here are such that they differ from previous actions in which either the Supreme Court or Ninth Circuit have found Bivens remedies to be available. See Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020) ("A Bivens claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.").

There is not a sufficiently analogous case where either the Ninth Circuit or Supreme Court have considered whether false information transmitted on a radio could be considered integral participation in the violations of a person's Fourth Amendment rights to be free from excessive force or Fifth Amendment rights to be free from interference with familial relations.

In considering whether to recognize a Bivens remedy, the Court should consider whether there is an "alternative, existing process for protecting the interest," and then "whether there are special factors counseling hesitation in the absence of affirmative action by Congress." Vega, 881 F.3d at 1154. If there is an alternative remedial structure already in place, then that alone may suffice to find a Bivens remedy applicable. Id. The alternative remedial structure may take many forms, including administrative, statutory, equitable, and state law remedies. Id.

Plaintiffs have an alternative remedial structure in the form of the Federal Tort Claims Act, of which they have already taken advantage by filing a concurrent FTCA claim. The Supreme Court did recognize in Carlson v. Green that the FTCA may not always be as effective a remedy since a party cannot seek punitive damages, demand a jury trial, sue individuals, or assert a claim under the FTCA if there is no analogous state law tort available. 446 U.S. 21-23 (1980). But the alternative remedial structure and the potential Bivens remedy need not be identical, and "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from a new and freestanding remedy in damages." Vega, 881 F.3d at 1155 (finding state law claims through FTCA appropriate alternative remedy)(internal citations omitted). Accordingly, the Court dismisses Plaintiffs' Bivens claims, and grants both Montana's motion to dismiss and motion for summary judgment.

b. Defendants Bohanon, Walford, and Ledogar's Motion for Summary Judgment

1. Fourth Amendment Excessive Force Claim Against Bohanon and Walford

Claims of excessive force are analyzed under the Fourth Amendment's "objective reasonableness" standard. Graham v. Connor, 490 U.S. 386, 395-97 (1989). Under this standard, "the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397 (internal quotation marks omitted). In determining whether a particular use of

force was unreasonable and thus in violation of the Fourth Amendment, courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the government's countervailing interests. Id.

In evaluating the governmental interest, the Court generally considers factors including (a) the severity of the suspect's alleged crime; (b) whether the suspect posed an immediate threat to the officers' safety; and (c) whether the suspect was actively resisting arrest or attempting to escape. Isayeva v. Sacramento Sheriff's Dep't, 872 F.3d 938, 947 (9th Cir. 2017). Other factors relevant to the reasonableness of the force used include "the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." Id. citing Glenn v. Washington Cty., 673 F.3d 864, 872 (9th Cir. 2011). Of all the considerations, the most important is whether the suspect posed an immediate threat to the safety of the officers or others, and when an officer uses deadly force, "this factor becomes a strict requirement." Id. (citing Tennessee v. Garner, 471 U.S. 1 (1985)). The factors are not exclusive, and the Court must consider the totality of the circumstances.

The Court finds that Bohanon and Walford's use of lethal force for the first volley of shots was reasonable. The key question for the Court's consideration is whether Bohanon's belief that Childress had a gun was an objectively reasonable one. While a mistaken belief that a suspect is armed may be reasonable in some circumstances, "[n]ot all errors in perception or judgment . . . are reasonable

. . . . nor does the Constitution forgive every officer's mistake." Torres v. City of Madera, 648 F.3d 1119, 1123 – 24 (9th Cir. 2011). Where an officer's particular use of force is based on a mistake of act, the Court must ask whether a reasonable officer would have or *should* have accurately perceived that fact." Id.

Bohanon believed that Childress was an attempted homicide suspect. He also knew that a gun had been found in a car that Childress had been previously spotted exiting earlier that same day. Bohanon testified that he could not get a clear view of Childress's right arm, which clutched a black object in a way that suggested he might have been indexing a gun. Bohanon and Walford gave multiple warnings to Childress with which he did not comply. Bohanon specifically yelled at Childress that if he continued to walk toward them he would shoot and Childress did not comply. There is no evidence in the record that Childress had any substance abuse issues, mental health issues, or hearing issues that would have adversely affected his ability to hear Bohanon's commands.

Given the prior information that Bohanon had about Childress at that point, the Court does not find, given these facts, that Bohanon's belief that the black object in Childress's hands was a gun was objectively unreasonable. The Court subsequently also finds that Bohanon and Walford's use of lethal force was reasonable, given the severity of the crime they thought he had committed—attempted homicide—the fact that he had been evading arrest, and the fact that the moment when Childress started walking toward the officers, Bohanon could not see Childress's right hand.

Once Childress was on the ground however, the Court finds that a reasonable juror could conclude that Bohanon and Walford's continued shooting was unreasonable. Once Childress hit the ground, Bohanon and Walford both had time to reassess the situation prior to firing their second round of shots. Defendants argue that Childress was still a threat when he was on the ground because his hands were moving. Bohanon, Walford and Sida all testified they did not have a clear view of Childress's right hand side before the shots were fired, and Bohanon and Walford testified that his hands were moving while he was on the ground. But Bohanon also testified that he never specifically identified the black object as a gun, that he did not see Childress pull anything out of his pocket, and that he saw no weapon in Childress's hand when he hit the ground. It is therefore an issue of disputed material fact whether or not Childress was moving in a threatening way after having been shot, and the Court finds that a reasonable juror could have found the second volley of shots unreasonable. Furthermore, if a jury so found, Officers Bohanon and Walford would not have been subject to qualified immunity.

In deciding whether officers are entitled to qualified immunity, courts consider, taking the facts in the light most favorable to the nonmoving party, (1) whether the facts show that the officer's conduct violated a constitutional right, and (2) if so, whether that right was clearly established at the time. Id. Under the second prong, courts "consider whether a reasonable officer would have had fair notice that the action was unlawful." Id. at 1125 (internal quotation marks omitted). "This requires two separate determinations: (1) whether the law governing the

conduct at issue was clearly established and (2) whether the facts as alleged could support a reasonable belief that the conduct in question conformed to the established law." Green v. City & Cty. of San Francisco, 751 F.3d 1039, 1052 (9th Cir. 2014). While a case directly on point is not required in order for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." Ashcroft v. al–Kidd, 563 U.S. 731, 741 (2011).

Further, the right must be defined at "the appropriate level of generality . . . [the court] must not allow an overly generalized or excessively specific construction of the right to guide [its] analysis." Cunningham v. Gates, 229 F.3d 1271, 1288 (9th Cir. 2000); see also al–Kidd, 563 U.S., at 741. The plaintiff bears the burden of proving that the right was clearly established. Id. at 1125. In deciding a claim of qualified immunity where a genuine dispute of material fact exists, the court accepts the version asserted by the non-moving party. See Bryan v. MacPherson, 630 F.3d 805, 823 (9th Cir. 2010).

In this case it would have been clearly established that, assuming Plaintiffs' version of events, shooting a suspect as he lay bleeding on the ground, who had pointed no weapon at the officers and who posed no threat of serious bodily injury was objectively unreasonable and violated the Fourth Amendment. In 2015, there was existing precedent that established that continued force against a suspect who no longer posed an immediate threat was unlawful. In Davis v. City of Las Vegas, the Ninth Circuit held that an officer violated the Fourth Amendment when he punched a handcuffed suspect in the face while he lay on the floor. 478 F.3d 1048,

1053 (9th Cir. 2007). In Drummond v. City of Anaheim, the Ninth Circuit found that officers used excessive force when they sat on a prone suspect's back and asphyxiated him. 343 F.3d 1052 (9th Cir. 2003). Finally, in Plumhoff v. Rickard, the Supreme Court, in holding that a police officer's use of deadly force against a suspect was not excessive, expressly noted that, "[t]his would be a different case if [the officers] had initiated a second round of shots after an initial round had clearly incapacitated [the suspect] and had ended any threat of continuing flight, or if [the suspect] had clearly given himself up." 572 U.S. 765, 777 (2014).

It would have been clearly established at the time of the shooting in 2015, that this was indeed a "different case" in which the officers continued to shoot at Childress despite his clear incapacitation, again assuming Plaintiffs' version of events. Accordingly, the Court will not grant summary judgment to Defendants on this claim.

2. Fourth Amendment Excessive Force Claim against Officer Ledogar

The Court finds that a reasonable juror could conclude that Officer Ledogar's deployment of the K9 was objectively unreasonable. Ledogar concedes in his deposition that Childress was not moving when the K-9 was unleashed on Childress. Construing all inferences in Plaintiffs' favor, a reasonable juror could conclude that it would be objectively unreasonable to deploy a K9 on a person who had been shot several times and was severely bleeding on the ground.

Although use of a K9 and a K9 bite and hold of even up to a minute does not constitute use of deadly force, Miller v. Clark Cty., 340 F.3d 959, 963–65 (9th

Cir. 2003), the Court can still evaluate whether the use of a dog bite consists of excessive nondeadly force. Id. If Childress was lying on the ground, severely bleeding and not moving, a reasonable juror could certainly conclude that Childress did not pose an immediate threat to the officers or to other people. Accordingly, the government's interest in the use of force would ebb to its lowest point, and the use of the K-9 could constitute excessive force.

Ledogar would not be subject to qualified immunity on this claim, as it would have been clearly established that the use of a K9 on a suspect who lay dying on the ground and no longer posed an immediate threat was unreasonable. Mendoza v. Block, 27 F.3d 1357, 1362 ("[N]o particularized case law is necessary for deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control."). While Childress was not yet handcuffed when the K9 was released on him, he was lying on the ground with his hands visible, bleeding profusely, and clearly incapacitated. This is sufficiently analogous to the situation described in Mendoza, and the Court denies summary judgment to Ledogar on this claim.

3. Fourth Amendment Denial of Medical Care Claim Against Officers Bohanon, Walford, and Ledogar

The Supreme Court has held that the Fourth Amendment Due Process Clause requires that medical care be provided to persons who are injured while being apprehended by the police. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). The Ninth Circuit has further clarified that a police officer

who promptly summons the necessary medical assistance has acted reasonably for purposes of the Fourth Amendment. Tatum v. City & Cty. of San Francisco, 441 F.3d 1090, 1099 (9th Cir. 2006).

In Tatum, the Court specifically noted with regard to Fourth Amendment denial of medical care cases that the "critical inquiry is not whether the officers did all that they could have done, but whether they did all that the Fourth Amendment requires." Id. In that case officers did not perform CPR on a man who was having trouble breathing, but had immediately called for paramedics. "Here, the officers promptly requested medical assistance, and the Constitution required them to do no more." Id.

In this case, it is undisputed that Bohanon called for medical services within thirty seconds after the shooting. The Court finds that this is sufficient for purposes of the Fourth Amendment, and grants summary judgment to Defendants on this claim.

4. Fifth Amendment Substantive Due Process Claim

The Court grants summary judgment to Officers Bohanon, Walford and Ledogar on Plaintiffs' Fifth Amendment substantive due process claim. In order to make a claim that Plaintiffs have been deprived of a familial relationship with Childress that violates their substantive due process rights, they must prove that the officers' use of force shocked the conscience. Gonzalez v. City of Anaheim, 747 F.3d 789, 797–98 (9th Cir. 2014). The Ninth Circuit has clarified that, "[w]here, as here, the officers did not have time to deliberate, a use of force shocks the conscience only if the officers had a 'purpose to harm' the decedent for reasons unrelated to legitimate law enforcement

objectives." Id. The Court does not find that Plaintiffs can make that showing. Plaintiffs cannot and have not produced any evidence that the officers had any ulterior motives for using force against Childress, other than their desire to eliminate any threat he may have posed to themselves or others. Accordingly, the Court grants summary judgment to the officers on this claim.

5. State Law Claims

The Court finds that the officers are not entitled to summary judgment on the battery or negligence claims. A reasonable juror could find that the gunshots and dog bite were harmful intentional contacts to which Childress did not consent. Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct., 376 P.3d 167, 171 (Nev. 2016) ("A battery is an intentional and offensive touching of a person who has not consented to the touching."). To establish negligence under Nevada law, a party must establish, (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages. Clark County Sch. Dist. v. Payo, 403, P.3d 1270, 1279 (Nev. 2017). The Court finds that there are genuine issues of fact as to whether or not the officers' actions constituted negligence.

c. Defendant United States' Motion for Summary Judgment

i. The Court Grants the United States Summary Judgment on All FTCA Claims.

Under the Federal Tort Claims Act ("FTCA"), when a government employee acting in the scope and course of her employment causes the death of another through her negligence, wrongful acts or omissions,

the United States is liable therefor. 28 U.S.C. § 1346(b). The United States is thus liable for money damages "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (2010). In actions brought under the FTCA, the Court must apply the law state courts would use in an analogous tort action. Rhoden v. United States, 55 F.3d 428, 431 (9th Cir. 1995).

Nevada's wrongful death statute allows the heirs of the decedent to receive damages when the death of the decedent was caused by the wrongful act or neglect of another. Nev. Rev. Stat. § 41.085. To establish negligence under Nevada law, a party must establish, (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages. Clark County Sch. Dist. v. Payo, 403, P.3d 1270, 1279 (Nev. 2017). Whether a duty exists in the negligence context is a question of law. Lee v. GNLV Corp., 22 P.3d 209, 212 (Nev. 2001).

Nevada abides by the public duty doctrine, which holds that the duty of fire and police departments is owed to the public, not specific individuals. Coty v. Washoe Cty., 839 P.2d 97, 99 (Nev. 1992). There are two exceptions to the doctrine. Id. The first is when the officers "made a specific promise or representation" upon which a person relied to their detriment. Nev. Rev. Stat. § 41.0336(1). The second exception is when the conduct of the officer "affirmatively causes" the harm. Nev. Rev. Stat. § 41.0336(2).

Plaintiffs argue that a reasonable juror could find that a special relationship could have been created between Montana and Childress when Montana began to pursue Childress and called for LVMPD reinforcements. But Plaintiffs rely on the Ninth

Circuit's federal common law conception of the public duty doctrine, rather than Nevada's. See Ting v. United States, 927 F.2d 1504, 1511 (9th Cir. 1991) (describe the "special relationship" exception to public duty doctrine). Plaintiffs have proffered no facts indicating that Montana made a specific promise or representation to Childress upon which he relied. The Court therefore does not find that the first exception to the public duty doctrine applies.

Plaintiffs next argue that Montana "affirmatively caused" harm to Montana, and so Montana's conduct fell under the second exception to the public duty doctrine. The Nevada Supreme Court has found that "affirmatively caused the harm," as used in NRS 41.0336(2), means that "a public officer must actively create a situation which leads directly to the damaging result." Coty, 839 P.2d at 99. The Nevada Supreme Court has not explicitly stated whether the causation standard under the "affirmatively caused the harm" exception to the public duty doctrine is identical to the causation analysis for negligence. However the Court infers from the Nevada Supreme Court's reference to "legal cause," that the two are sufficiently analogous. Coty, 839 P.2d at 760 – 61.

Causation, a necessary element to find negligence, consists of two components: actual cause and proximate cause. Dow Chemical Co. v. Mahlum, 970 P.2d 98, 107 (Nev. 1998) abrogated on other grounds by GES, Inc. v. Corbitt, 21 P.3d 11 (Nev. 2001). To demonstrate actual causation, a party must demonstrate that "*but for* defendant's negligence, his or her injuries would not have occurred." Sims v. Gen. Tel. & Elecs., 815 P.2d 151, 156 (Nev. 1991) overruled on other grounds by Tucker v. Action Equip. & Scaffold Co., Inc., 951 P.2d 1027 (Nev. 1997);

overruled on other grounds by Richards v. Republic Silver State Disposal, Inc., 148 P.3d 684 (Nev. 2006). To demonstrate legal or proximate cause, a party must show that the defendant could have foreseen that his or her negligent conduct could have caused a particular variety of harm to a certain type of plaintiff. Sims, 815 P.2d at 156.

Plaintiffs cannot demonstrate that Montana's false transmission on the radio that Childress was wanted for attempted homicide was the direct legal or actual cause of Childress's death. Undisputedly the direct cause of Childress's death was the volley of shots fired at him by Bohanon and Walford, premised on the belief that Childress was armed, not on the fact that he had been wanted for attempted homicide. Even if Montana had broadcast the correct crime—burglary, armed robbery, kidnapping, aggravated assault, and theft—Plaintiffs cannot demonstrate that this would have changed anything. Plaintiffs cannot demonstrate that it would have primed Bohanon or Walford to think of Childress as less dangerous, or that it would have have primed Bohanon to think that Childress was less likely to be armed.

While Bohanon may have stated that he wouldn't have left lunch for any crime less severe than attempted murder, what killed Childress wasn't that Bohanon left his lunch to join his pursuit, but that Bohanon believed Childress was armed. Because Plaintiffs cannot demonstrate that Montana's false transmission lead directly to Childress's death, they cannot demonstrate that an exception to the public duty applies, and the Court thus finds that Montana owed no duty to Childress as a matter of law and

grants summary judgment to the United States on this claim.

VI. CONCLUSION

IT IS ORDERED that Defendant Brian Montana's Motion to Dismiss (ECF No. 83) is GRANTED. The Court dismisses Defendant Brian Montana from this action with prejudice.

IT IS FURTHER ORDERED that Defendants Robert Bohanon, Las Vegas Metropolitan Police Department, James Ledogar, and Blake Walford's Motion for Summary Judgment (ECF No. 86) is DENIED in part and GRANTED in part. The Court grants summary judgment to Defendants on the Fifth Amendment Substantive Due Process and Fourth Amendment Denial of Medical Care claims, but denies summary judgment on Plaintiffs' state law claims and Fourth Amendment Excessive Force claim.

IT IS FURTHER ORDERED that Defendant Brian Montana's Motion for Summary Judgment (ECF No. 87) is GRANTED.

IT IS FURTHER ORDERED that Consol Defendant United States' Motion for Summary Judgment (ECF No. 88) is GRANTED.

DATED March 31, 2020

/s/

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 15, 2020]

JACQUELINE LAWRENCE; et al., Plaintiffs-Appellees, v. ROBERT BOHANON; et al. Defendants-Appellants, and UNITED STATES DEPARTMENT OF JUSTICE; et al., Defendants.	No. 20-15669 D.C. Nos. 2:16-CV-03039-RFB-NJK 2:18-CV-02314-RFB-CWH District of Nevada, Las Vegas ORDER

Before: W. FLETCHER and BYBEE, Circuit Judges.

Appellees' motion to dismiss this appeal for lack of jurisdiction (Docket Entry No. 20) is denied without prejudice to renewing the arguments in the answering brief. *See Nat'l Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss).

The motion to transmit physical exhibits will be addressed by separate order.

The opening brief has been filed. The answering brief is due November 16, 2020. The optional reply brief is due within 21 days after service of the answering brief.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 9, 2021]

JACQUELINE LAWRENCE; et al., Plaintiffs-Appellees, v. ROBERT BOHANON; et al. Defendants-Appellants, and UNITED STATES DEPARTMENT OF JUSTICE; et al., Defendants.	No. 20-15669 D.C. Nos. 2:16-CV-03039-RFB-NJK 2:18-CV-02314-RFB-CWH District of Nevada, Las Vegas ORDER

Before: W. FLETCHER and FRIEDLAND, Circuit Judges, and BLOCK,* District Judge.

Appellants filed a petition for panel rehearing or, in the alternative, rehearing en banc on June 10, 2021 (Dkt. Entry No. 54). The panel has voted to deny the petition for panel rehearing. Judges Fletcher and Friedland have voted to deny the petition for rehearing en banc, and Judge Block so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has

* The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing or rehearing en banc is **DENIED**.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.