No. _____

In the
Supreme Court of the United States

ESTATE OF REX VANCE WILSON; PETRA WILSON; MARIO WILSON; AARON WILSON; JESSE WILSON; HAYLEY WILSON; HARMANI WILSON; MATTHEW WILSON; ALEX WILSON; HALINA WILSON, a Minor, by and through guardian Petra Wilson; ELIJAH WILSON, a Minor, by and through guardian Petra Wilson,
Petitioners,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; JOSEPH LOMBARDO; CHRISTOPHER GOWENS; ERIC LINDBERG; JOHN SQUEO; TRAVIS SWARTZ,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a plaintiff adequately argues and preserves a federal claim or a state law claim before the district court, may the plaintiff advance new arguments in favor of that claim on appeal before the federal appellate court?

2. Given the general rule a federal appellate court does not consider an issue not passed upon below, does a federal appellate court err as a matter of law or abuse its discretion in deciding an issue not passed upon by the district court without first considering (a) whether an exception to the general rule applies and (b) whether, even if an exception applies, the particular circumstances of the case overcome the presumption against deciding an issue not passed upon by the district court?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners

Estate of Rex Vance Wilson, Petra Wilson, Mario Wilson, Aaron Wilson,

Jesse Wilson, Hayley Wilson, Harmani Wilson, Matthew Wilson, Alex Wilson,

Halina Wilson, and Elijah Wilson.

Respondents

Las Vegas Metropolitan Police Department, Joseph Lombardo, Christopher Gowens, Eric Lindberg, John Squeo, and Travis Swartz.

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JURISDICTION

The Ninth Circuit's Memorandum Opinion affirming the September 24, 2021 final judgment of the United States District Court for the District of Nevada was issued on November 28, 2022. (1a-3a.) The Ninth Circuit denied Petitioners' Motion for Rehearing and Rehearing En Banc on December 29, 2022. (5a.) Jurisdiction of this Court to review the Ninth Circuit's decision and judgment is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. I, cl. 8, § 9: "Congress shall have Power . . . to constitute Tribunals inferior to the supreme court."

U.S. Const. Art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court,

and in such inferior Courts as the Congress may from time to time ordain and establish. . . .."

STATEMENT OF THE CASE

The petition presents two important questions of federal appellate procedure that have not been, but should be settled, by this Court, namely (1), where a party adequately argues and preserves either a federal law claim or a state law claim before the district court, may that party advance new argument in favor of that claim on appeal before the federal appellate court, and (2), given the general rule a federal appellate court does not consider an issue not passed upon below, does a federal appellate court err as a matter of law or abuse its discretion in proceeding to decide an issue not passed upon by the district court without first determining (a) whether an exception to the general rule applies, and (b) whether, even if such an exception applies, the particular circumstances of the case overcome the presumption against deciding an issue not passed upon by the district court? Petitioner alternatively submits the Ninth Circuit so far departed from the accepted and usual course of appellate judicial procedure as to call for an exercise of this Court's implied supervisory power over inferior courts under Article III, § 1 of the Constitution. *See also* U.S. Const. Art. I, cl. 8, § 9.

Summary of Proceedings Below

This case involves a civil rights action brought in the United States District Court for the District of Nevada under 42 U.S.C. § 1983 by the Estate of Rex Vance Wilson, his widow and children against Las Vegas Metropolitan Police Department (LVMPD); Sheriff Joseph Lombardo; and LVMPD officers Travis Swartz, Christopher Gowens, Eric Lindberg, and

John Squeo. The District Court had jurisdiction over the Plaintiffs' 42 U.S.C. § 1983 action under the federal question jurisdiction statute, 28 U.S.C. § 1331, and under 28 U.S.C. § 1343, and, it had jurisdiction over the related Nevada state law claims under 28 U.S.C. § 1367 (*see Complaint*, at p. 2, ¶ 1) (121a).

The District Court, the Honorable Andrew P. Gordon presiding, initially granted defendants' motion for summary judgment dismissing all of Petitioners' federal claims and all of Petitioners' Nevada state law claims except the negligence and negligent infliction of emotional distress (NIED) claims asserted against Officer Squeo for his act of ramming into the vehicle decedent Rex Wilson was driving. *Wilson I*, 2020 WL 6930099, at *9.

In initially denying summary judgment on the negligence and NIED claims against Officer Squeo, the District Court determined Squeo's decision to ram the vehicle Wilson was driving was not entitled to discretionary immunity. *Wilson I*, 2020 WL 6930099, at *8. The District Court, however, reserved decision on the question whether plaintiffs could rely on LVMPD's policies and the police officers' testimony to establish the requisite standard of care and Officer Squeo's breach of that standard by his decision to ram Wilson's vehicle, or whether plaintiffs were required to present expert testimony on that issue. *Id.*, at *9.

After additional briefing, the District Court determined "[a]n expert is necessary in these circumstances to establish the standard of care. Because the plaintiffs have not provided an expert, they cannot satisfy the duty element of negligence." *Wilson II*, 2021 WL 4395045, at *3. The District Court therefore granted summary judgment in

Officer Squeo's favor on the remaining claims for negligence and NIED. *Id.* at *3-4. The District Court, however, did not address or decide the issue raised by the LVMPD Respondents that Petitioners had failed to present any evidence Officer Squeo's act of ramming the vehicle being driven by Wilson had caused any injuries or damages to Wilson (7a-8a).

Petitioners appealed to the Ninth Circuit, arguing the District Court erred in determining expert testimony was required to show the requisite standard of care. The LVMPD Respondents, in their Answering Brief, again raised the issue of lack of evidence of causation of damages as an alternative ground upon which the Ninth Circuit could affirm the judgment of the district court. (123a.) As the Ninth Circuit recognized, "[i]n their reply brief on appeal, Plaintiffs . . . suggest[ed] that some of the injuries described in the autopsy report were caused specifically by the contact between the police car [driven by Officer Squeo] and the SUV [driven by Plaintiffs' decedent Wilson][.]" *Wilson III*, 2022 WL 17248985, at *1 (3a; *see* 125a).

The Ninth Circuit did not reach the issue whether or not, under Nevada law, Petitioners were required to present expert testimony to establish the applicable standard of care. Instead, the appeals court summarily disposed of the appeal by affirming the District Court's judgment on the alternative ground of lack of evidence of causation of damages, concluding the Petitioners' causation "argument [, first advanced in Petitioners' Reply Brief in response to LVMPD Respondents' lack of causation contention,] was forfeited because it was not raised in the district court." *Id.*, *1 (3a). Alternatively, the appeals court ruled, "it is not obvious from the face of

the autopsy report that the injuries would have been caused by the contact between the cars as opposed to impact from broken glass after bullets hit the car during the later shooting, and Plaintiffs presented no evidence that they were." *Id.* (3a).

Statement of Facts

Rex Vance Wilson, who was unarmed, was fatally shot by police officers following a 30-minute, high-speed car chase.

On October 12, 2016, LVMPD's Downtown Area Command received a report of a stolen Nissan Rogue, which was then spotted in downtown Las Vegas. (56a-57a.) Around 11:20 pm, LVMPD Officer Smith attempted to initiate a vehicle stop near Wyoming Avenue and Commerce Street, but the vehicle fled down Oakey Boulevard and a vehicle pursuit began. (57a.) During the course of the pursuit, officers learned the driver was Rex Wilson, and that Wilson was suspected of committing a series of recent armed robberies in the Las Vegas area. (56a-57a)

As the police chased Wilson through downtown Las Vegas and onto Charleston, the officers attempted a Precision Intervention Technique ("PIT") maneuver. (57a.) According to LVMPD's Use of Force and Vehicle Pursuit Policies: a PIT is a specific manner of intentional contact using a police vehicle against a fleeing vehicle to cause the fleeing vehicle to come to a stop. The purpose is to render a vehicle immobile by blocking it in place with police vehicles so that subjects can be taken into custody. A PIT maneuver is not considered deadly force when used at speeds of 40 miles per hour and below. (117a-118a, 127a.)

On the other hand, a PIT maneuver is considered Deadly Force in the following instances:

i. At speeds of more than 40mph.

ii. When used on motorcycles.

iii. When used on high center of gravity vehicles likely to roll over, such as vans, SUVs and jeeps.

iv. In circumstances creating a substantial risk of death or serious bodily injury. (117a.)

The initial PIT maneuver attempted was unsuccessful and the officers continued the chase Wilson's vehicle from Decatur onto I-95 north, and eventually to the 215, where the chase continued eastbound to the 5th Street exit. Wilson exited the 215 at 5th Street, turned left, and got back onto the 215, this time heading west. (57a-58a.) LVMPD officers then tried to end the chase by laying down Stop Sticks ("Sticks") at the Aliante exit, then the Decatur exit, then at the Bradley Road exit, but Wilson simply drove past the Sticks. (58a.) A Stop Stick is a tire-deflation device that law enforcement agencies use to end high-speed car chases. (117a.)

Finally, LVMPD Sergeant Christopher Halbert placed Sticks near the Sky Point Drive, and this time the Sticks worked, puncturing the right front tire of Wilson's vehicle. (58a.) Wilson's vehicle stopped east of Hualapai Way, then continued westbound, with Officers Gowens and Squeo (in one car), Officer Lindberg (in another car), and Officer Swartz (in a third car) in pursuit. (*Id.*)

The officers noted over the radio that the front left tire of Wilson's vehicle was off and that his vehicle was driving on its rims. (109a.) It's clear, however, that Officer Gowens was not content to allow Wilson's

vehicle to simply roll to a stop surrounded by police cars, as he urged Officer Squeo to "PIT. . .PIT that fucker out, right now." (112a.) As Gowan shouted to his partner, "PIT him, PIT him now!" their patrol car slammed into Wilson's small Nissan. (*Id.*)

Officer Gowan yelled, "Now! Again. Again. He's right there. Go! Go get that motherfucker, bro! ***Ram him!***" and again the police cruiser being driven by Officer Squeo smashed into Wilson's car, this time forcing it into the highway median. (112a; *see also* Gowens Depo. at 50:25 to 51:22, 92a-93a.) Pursuant to LVMPD's Use of Force policy a "Ram" is considered deadly force and is defined as "[t]he use of a vehicle to intentionally hit another vehicle, outside the approved PIT, blocking and stationary vehicle immobilization policies." (127a.) "Ramming is prohibited unless it is a deadly force situation which can be clearly articulated." (*Id.*) Yet, Officer Squeo could *not* clearly articulate that this was a deadly force situation. (Deposition of Officer Squeo 99:7 to 108:7, 70a-80a.)

In the median, Wilson's vehicle was surrounded on three sides by police cruisers: Gowens' and Squeo's car blocked Wilson's driver's-side doors; Swartz's car blocked the passenger doors, and Lindberg's car was in front of the disabled, smoking vehicle. (112a.) Almost immediately after Gowens and Squeo used deadly force against Wilson by ramming Wilson's car, they were out of their cruiser with weapons drawn and shooting, which made the other officers shoot as well. All told, officers shot approximately 36 rounds into Wilson and his disabled vehicle. (61a.) While the officers waited, mistakenly believing that Wilson was armed, Wilson bled to death.

At the time Officer Squeo used deadly force and rammed Wilson's vehicle, Wilson's vehicle was in the median on loose gravel. (Gowens Depo. at 52:24 to 53:1, 95a.) Wilson was surrounded by police (Gowens Depo. at 53:8-11, 95a), had a deflated tire, was going no more than 20 mph, had just been PITed, and police were at all approaching exits. (Squeo Depo. at 93:10 to 95:10, 63a-65a; Gowens Depo. 72:22 to 73:19, 103a-104a.) Furthermore, a helicopter was overhead providing surveillance. (Gowens Dep. at 49:15-16, 91a ("We have NHP. We have air units. We have K9. We have all these resources there.").) In addition, there were no pedestrians or civilian traffic in the area. (Squeo Dep. at 93:17 to 94:16, 64a-65a.) Yet, Officer Squeo used deadly force by "ramming" Rex Wilson's vehicle. (Squeo Depo. at 107:4-8, 78a-79a; Gowens Depo. at 74:3-25, 105a-106a ("Q. And what was it you believe Squeo's maneuver was of these? A. […] ***I would say it would be the ram***. Q. So you would agree it was a ram? A. ***Sure***. […]) (emphasis added).).)

Shortly after the shooting, Sergeant Christopher Halbert arrived at the scene and instructed Gowens, Squeo, Lindberg, Swartz to fall back to the cover of their police vehicles until a ballistic shield could be procured. The "shots fired" call was first broadcast over the police radio at 11:47 p.m. on October 12, 2016. (109a,112a.) The call for medical assistance did not go out until 12:02 a.m. on October 13, 2016, and Wilson did not actually receive medical assistance for an hour or so after that. (*Id.*) Officer Gowens has testified that at the point the officers fired their weapons, Rex Wilson was no longer moving and was no longer a threat. (Gowens Depo. at 58:2-24, 100a-101a.) Yet, the officers let him remain in the vehicle

without even *attempting* to provide medical treatment. No gun was recovered from Wilson's vehicle. Instead, officers found a hose nozzle wrapped with electrical tape. An autopsy would later show that Wilson was shot in his left temple, left ear, left upper chest, right mid-abdomen, left upper buttock, left lower buttock, left thigh, and left knee. (26a-33a.) In Wilson's final minutes, as he lay bleeding from eight different gunshot wounds, one imagines the once-proud Marine's last thoughts would have been that he had failed, as a husband, and a father, and this would explain why investigators would later find one word scrawled in blood on the vehicle's navigation screen: "sorry." (15a.)

The autopsy report shows that, aside from the gunshot wounds suffered by decedent, Petitioners' decedent also suffered "blunt force injuries" of his head, torso, and extremities. (33a-34a.) As argued in Petitioners' Reply Brief (125a), a jury could reasonably infer that those blunt force injuries were proximately caused, in whole or in part, by the collisions occurring when Officer Squeo rammed decedent's vehicle and may award damages for such injuries.

As also argued in Petitioners' Reply Brief (A125a-126a), a jury also could award damages for the mental anguish or emotional distress caused to decedent by such injuries. That Plaintiffs' decedent suffered severe emotional distress after his vehicle was rammed and prior to his death can be seen from the fact that investigators later found one word scrawled in blood on the vehicle's navigation screen: "sorry." While of course a great deal of this emotional distress was attributable to the subsequent gunshot wounds suffered by decedent following the ramming of his

vehicle, it will be up to the jury to parse and determine to what extent or degree the decedent suffered emotional distress due to the injuries caused by the ramming as opposed to that emotional distress suffered as a result of the fatal wounds arising from the shooting.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THIS COURT SHOULD CLARIFY IT IS CLAIMS THAT ARE DEEMED WAIVED OR FORFEITED, NOT ARGUMENTS, AND THAT THIS PRINCIPLE APPLIES TO PRESERVED STATE LAW CLAIMS AS WELL AS PRESERVED FEDERAL CLAIMS.

Indisputably, in the district court below, Petitioners properly raised Nevada state-law negligence claims against Respondent Officer Squeo based on his actions in using his police car to ram the car Plaintiffs' decedent was driving. The Ninth Circuit recognized the LVMPD Respondents "argued [in the district court] that there was no evidence that the collision with Squeo's police car caused [the decedent, Rex] Wilson any damages." *Estate of Wilson*, 2022 WL 17248985, at *1 (2a). Specifically, the LVMPD Respondents argued, "assuming [the district court] finds issues of fact prevent summary judgment on the negligence-based claims, the claims still fail as plaintiffs cannot establish causation of damages." (7a.) Plaintiffs responded "[t]he remaining elements of Negligence – breach, causation, and damages – should be evaluated by the jury," and that "regarding causation, the relatively quick transition from the 'ramming' to the shooting itself rais[es] genuine issues as to causation which

can be resolved by the jury, such as whether the 'ramming' proximately caused the shooting." (10a-11a.) The Ninth Circuit characterized Plaintiffs' responsive argument below as "identify[ing] no such evidence [of causation], thereby leaving this argument unrebutted." *Estate of Wilson*, 2022 WL 17248985, at *1 (2a).

On Petitioners' appeal to the Ninth Circuit, the LVMPD Respondents, in their Answering Brief, again raised the issue of lack of evidence of causation of damages as an alternative ground upon which the Ninth Circuit could affirm the judgment of the district court. (123a) As the Ninth Circuit recognized, "[i]n their reply brief on appeal, Plaintiffs now suggest that some of the injuries described in the autopsy report were caused specifically by the contact between the police car [driven by Officer Squeo] and the SUV [driven by Plaintiffs' decedent][.] *Estate of Wilson*, 2022 WL 17248985, at *1 (3a; *see* 125a). The Ninth Circuit, however, erroneously concluded, in affirming the judgment of the district court on the alternative ground of lack of evidence of causation of damages, Petitioners' "argument was forfeited because it was not raised in the district court." *Id.*

The Ninth Circuit thereby overlooked that, "[a]s the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004); *accord*, *United States v. Lillard*, 935 F.3d 827, 833 (9th Cir. 2019). Thus, this Court has repeatedly held, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; *parties are not limited to the precise arguments they made below*." *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (emphasis added); *accord*,

Hemphill v. New York, ___ U.S. ___, 142 S.Ct. 681, 689 (2022). Indeed, in *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Court held that an argument the petitioner expressly disavowed before the lower courts, and did not raise until after certiorari was granted, was not waived and should be addressed in the normal course, reasoning: "Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obligated to provide[.]" 513 U.S. at 378-79.

The Ninth Circuit likewise has held "[o]nce a . . . claim is properly presented, a party can make any argument in support of that claim . . .." *Lillard*, 935 F.3d at 833, quoting *Yee v. Escondido* in determining that, even though Lillard "claimed below that [18 U.S.C.] § 3664(k), rather than § 3664(n), was the proper provision under which to address his changed economic circumstances," he was not precluded by waiver from raising an argument on appeal based on § 3664(n); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004), quoting *Yee* in rejecting Wacker's contention plaintiffs failed to cite a regulation in support of their "consistent claim" "throughout the proceedings that the FLSA prohibits the use of a paid lunch period to offset overtime (or other) compensation owed to employees" and noting "Plaintiffs have presented no new claim on appeal."

While all of the claims in these cases were either federal constitutional or federal statutory/regulatory claims, the underlying principle of appellate review enunciated in these cases clearly applies to *both* state law and federal law claims. *See, e.g., D.C. Dep't of*

Health v. D.C. Office of Employee Appeals, 273 A.3d 871, 876 n. 4 (D.C. 2022), quoting *Yee v. Escondido* in rejecting argument D.C. Department of Health waived its argument the 90-day cap of the District's regulations was directory rather than mandatory "because it did not articulate this point before [the Office of Employee Appeals] or the [D.C.] Superior Court"; *Associated Estates v. BankAtlantic*, 164 A.3d 932, 941 & n. 12 (D.C. 2017), citing *Yee v. Escondido* in rejecting BankAtlantic's argument "that because AE did not cite Restatement [(Second) of Contracts] § 177 in its motions filed in the trial court, its argument based on it is waived and should not be considered by this court" and "elect[ing] to consider the argument as a species of the undue influence argument AE did present to Judge Mott"; *Phoenix Lighting Group L.L.C. v. Genlyte Thomas Group L.L.C.*, 160 Ohio St.3d 32, 39, ¶¶ 22-23, 153 N.E.3d 30, 38 (2020), entertaining on appeal new argument regarding calculation of state law award of attorney's fees, stating "new arguments relating to preserved claims may be reviewed," citing *Yee*; *Hammet v. Wells Fargo Bank NA*, 2018 WL 4771112, *4-5 (Tenn. App. Oct. 2, 2018) (No. M2018-00352-COA-R3-CV), holding, relying on *Yee*, that where appellants "properly raised the issue of promissory estoppel in the trial court below," they could, on appeal, "offer[] alternative theories in pursuit of recovery on the basis of promissory estoppel."

Nor are the cases cited by the Ninth Circuit to the contrary. In *Visendi v. Bank of America, N.A.*, 733 F.3d 863 (9th Cir. 2013), in a class action that had been removed to the federal district court, the plaintiffs argued for the first time on appeal the Class Action Fairness Act's "local controversy" exception, 28 U.S.C.

§ 1332(d)(4)(A), precluded federal removal jurisdiction. After recognizing that "[w]e apply a 'general rule' against entertaining arguments on appeal that were not presented or developed before the district court," the Ninth Circuit acknowledged that "a 'disappointed plaintiff may attack subject matter jurisdiction for the first time on appeal....'" 733 F.3d at 869 (citations omitted). The court then concluded that the "local controversy" exception was not jurisdictional, meaning that plaintiffs could not raise it on appeal. *Id.* at 869-70.

Visendi thus did not involve a new argument in support of a preserved federal or state law claim, but rather a new, non-jurisdictional argument that removal of the case to federal court was improper, not raised before the district court.

As for *Tibble v. Edison Int'l*, 843 F.3d 1187 (9th Cir. 2016) (en banc), the Ninth Circuit quoted *Visendi* for the proposition that, "[g]enerally, we do not 'entertain[ ] arguments on appeal that were not presented or developed before the district court.'" 843 F.3d at 1193 (quoting *Visendi*, 733 F.3d at 869). The *Tibble* court then concluded the plaintiff-beneficiaries had not forfeited "their [duty to monitor] *claim* in the district court" "challenging the prudence of maintaining retail share classes first selected before the limitations period." 843 F.3d at 1194 (emphasis added).

In this case, as in *Tibble*, Plaintiffs adequately preserved in the district court, and therefore did not forfeit, their Nevada state law claim Plaintiffs' decedent was injured and suffered damages proximately caused by Officer Squeo's negligent actions in ramming the car being driven by the

decedent. They merely advanced a new argument on appeal in support of that claim.

In short, the Court should grant certiorari to make clear that new arguments or theories regarding either preserved federal claims *or preserved state law claims* may be raised on appeal to a federal circuit court of appeals.

II. THIS COURT SHOULD CLARIFY A FEDERAL APPEALS COURT SHOULD NOT CONSIDER AN ISSUE NOT PASSED UPON BELOW BY THE DISTRICT COURT WITHOUT FIRST EXERCISING ITS DISCRETION TO DETERMINE WHETHER AN EXCEPTION APPLIES TO THE GENERAL RULE AN APPEALS COURT IS A COURT OF REVIEW, NOT FIRST VIEW.

The Ninth Circuit below went on to state that, "[i]n any case, it is not obvious from the face of the autopsy report that the injuries would have been caused by the contact between the cars as opposed to impact from broken glass after bullets hit the car during the later shooting, and Plaintiffs presented no evidence that they were." *Estate of Wilson*, 2022 WL 17248985, at *1 (3a). The Ninth Circuit thereby decided an issue not addressed by the district court below regarding whether there was sufficient evidence of causation of damages in the summary judgment record. The Ninth Circuit thereby overlooked this Court's admonition "[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *accord*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008). The Ninth Circuit likewise has recognized, "[a]s a general rule, 'a federal appellate

court does not consider an issue not passed upon below.'" *Golden Gate Hotel Ass'n v. City & County of San Francisco*, 18 F.3d 1482, 1487 (9th Cir. 1994) (quoting *Singleton*); *accord, DaVita, Inc. v. Virginia Mason Memorial Hospital*, 981 F.3d 679, 696 (9th Cir. 2020); *Planned Parenthood of Northern Washington and North Idaho v. U.S. Dep't of Health & Human Services*, 946 F.3d 1100, 1110 (9th Cir. 2020). In other words, a federal appeals court is "a court of review, not first view." *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014) (en banc) (per curiam). In sum, "[a]n appellate court should usually wait for the district court to decide in the first instance." *Planned Parenthood*, 946 F.3d at 1111.

"While the general rule . . . is flexible—an appellate court can exercise its equitable discretion to reach an issue in the first instance," *Planned Parenthood*, 946 F.3d at 1110, the Ninth Circuit failed to exercise this discretion to determine whether or not an exception to the general rule applies. Exceptions include: "[w]hen 'proper resolution is beyond any doubt,' *Singleton*, 418 U.S. at 121 . . . (citing *Turner v. City of Memphis*, 369 U.S. 350 . . . (1962)), when 'injustice might otherwise result,' *id.* (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 . . . (1941)), . . . when an issue is purely legal, [*United States v.*] *Patrin*, 575 F.2d [708] at 712 [(9th Cir. 1978)] . . . [and when] 'significant questions of general impact are raised,' *Guam v. Okada*, 694 F.2d 565, 570 n. 8 (9th Cir. 1982)[, *cert. denied*, 469 U.S. 1021 (1984)]." *Planned Parenthood*, 946 F.3d at 1110-1111. These exceptions to the general rule have been termed "narrow." *Dream Palace v. City of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

No injustice would result from having the district court decide the issue regarding whether adequate proof of causation of damages is in the summary judgment record in the first instance. Nor does this question involve a significant question of general impact.

As for whether this issue is purely legal, it must be pointed out that "[a] district court is usually best positioned to apply the law to the record." *Planned Parenthood*, 946 F.3d at 1111, citing *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1095 (9th Cir. 2014) ("While the record in this case is fully developed, and Davis pressed her unconscionability argument before the district court and did so again here, the resolution of the issue is not clear, and for that reason we decline to exercise our discretion to address the unconscionability question in the first instance."), and *American President Lines, Ltd. v. Int'l Longshore Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1157 (9th Cir. 2013) (reversing the district court's holding that plaintiff lacked standing but declining to decide whether defendant violated the relevant statute *or caused plaintiff's alleged damages*). It is the district court that would be in the best position to examine the autopsy report, view the video of the ramming, and consider the other evidence of record to determine whether Plaintiffs have provided sufficient evidence of causation of damages.

"Another way to state the purely legal exception is to say that the decision to remand should not prejudice the party that opposes the appellate court's reaching a novel issue." *Planned Parenthood*, 946 F.3d at 1111. In this case, Petitioners were prejudiced by not being able to advance before the district court in the first instance their distinct legal argument that

some of the injuries described in the autopsy report were caused specifically by the ramming of the SUV being driven by Plaintiff's decedent by the police car driven by Officer Squeo. It would be unjust not to give Petitioners that opportunity, especially since the district court is in the best position to apply the Nevada law of causation of damages to the record.

Nor is the proper resolution of the question of causation of damages clear. Under Nevada law, proximate cause is usually a question fact for the jury. *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981). The fact that it may not be "obvious" or clear from the face of the autopsy report that at least some of the damages to Plaintiff's decedent were caused by the ramming, as opposed to the shooting, goes to the weight of that evidence, not its relevance or admissibility on the issue of causation of damages. Plaintiffs, moreover, are required to show causation of damages *by a preponderance of the evidence*, not by clear and convincing evidence or some other higher standard of proof. *See, e.g., Masellis v. Law Office of Leslie F. Jensen*, 50 Cal.App.5th 1077, 1094, 264 Cal.Rptr.3d 621, 633 (2020) (concluding "the applicable standard of proof for the elements of causation and damages in a 'settle and sue' legal malpractice action is the preponderance of the evidence standard" and not "[a] higher standard of proof").

Finally, "[e]ven when a case falls into one of the exceptions to the rule against considering new arguments on appeal, [a federal appeals court] must still decide whether the particular circumstances of the case overcome [the] presumption against hearing new arguments." *Dream Palace,* 384 F.3d at 1005.

The Ninth Circuit made no such determination in this case.

"'[F]ailure to exercise discretion constitutes an abuse of discretion.'" *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1027 (9th Cir. 2000) (quoting *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990)); *accord*, *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) ("failure or refusal, either express or implicit, actually to exercise discretion" constitutes abuse of discretion, citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978)); *Vinci v. Consolidated Rail Corp.*, 927 F.2d 287, 288 (6th Cir. 1991) ("The failure to exercise discretion can also constitute an abuse of discretion."); *United States ex rel. Berman v. Curran*, 13 F.2d 96 (3d Cir. 1926) (exclusion of aliens under sixteen, unaccompanied by or not coming to a parent, was, in view of their qualification for admission, an abuse of discretion because of a failure to exercise discretion).

Certiorari should therefore be granted in order for this Court to clarify a federal appeals court should not decide an issue not passed upon below by the district court unless the appeals court first properly exercises its discretion to determine (a) whether or not an exception applies to the general rule that an appellate court does not consider an issue not passed upon below, and (b) whether, even if an exception applies, the particular circumstances of the case overcome the presumption against deciding an issue not passed upon by the district court.

CONCLUSION

In view of the reasons set forth above, Petitioners respectfully request that the Court grant their Petition for Certiorari, issue a writ of certiorari to

review the November 28, 2022 decision of the Ninth Circuit, reverse such decision, and remand this matter to the Ninth Circuit for further proceedings.

Respectfully submitted,

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