No. _____

In the
Supreme Court of the United States

KYLE SMITH; THEODORE HUNTSMAN; LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Petitioners,

v.

ROCHELLE SCOTT, individually, and as co-special administrator of the estate of ROY ANTHONY SCOTT; FREDRICK WAID, as co-special administrator of the estate of ROY ANTHONY SCOTT,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

CRAIG R. ANDERSON
MARQUIS AURBACH CHTD.
10001 Park Run Drive
Las Vegas, NV 89145
(702) 382-0711
canderson@maclaw.com

MEGAN M. WOLD
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
mwold@cooperkirk.com

Counsel for Petitioners

QUESTION PRESENTED

In March 2019, the Petitioner police officers responded to a call from Roy Anthony Scott, a paranoid schizophrenic individual who was hallucinating about armed, would-be intruders outside his apartment. Scott also had methamphetamine in his system.

During the encounter that followed, which was captured by the officers' body-worn cameras, Scott produced two weapons—a metal pipe and a knife—but refused to submit to a patdown and refused other police instructions. The officers attempted to handcuff Scott for their safety. They used bodyweight pressure to restrain Scott for no longer than 95 seconds and immediately moved him to the recovery position once handcuffing was complete. Scott was conscious and speaking throughout that process and did not show signs of respiratory distress. Several minutes later, Scott experienced medical distress and after a medical transport, he was pronounced dead.

The Ninth Circuit denied the officers qualified immunity.

The questions presented are:

1. Viewing the facts from the officers' perspective at the time, did the officers act reasonably under the Fourth Amendment by using bodyweight pressure to restrain a potentially armed and actively resisting individual only until handcuffing could be accomplished?
2. Did the panel err in denying qualified immunity where no case clearly established that pre-handcuffing bodyweight pressure violates the Fourth Amendment?

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Kyle Smith, Theodore Huntsman, and the Las Vegas Metropolitan Police Department.

Respondents (plaintiffs-appellees below) are Rochelle Scott, individually and as co-special administrator of the estate of Roy Anthony Scott, and Fredrick Waid, as co-special administrator of the estate of Roy Anthony Scott.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Scott, et al. v. Smith, et al.*, United States Court of Appeals for the Ninth Circuit, Case No. 23-15480.
- *Scott, et al. v. Smith, et al.*, United States District Court for the District of Nevada, Case No. 2:20-cv-01872.

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The district court's March 14, 2023, order denying summary judgment in part is not published but is available at *Scott v. Smith*, No. 20-cv-1872-RFB-EJY, 2023 WL 2504499 (D. Nev. Mar. 14, 2023), and is reproduced in the appendix to this petition ("Pet. App.") at Pet.App.26a–72a. The Ninth Circuit's July 30, 2024 opinion is published, *Scott v. Smith*, 109 F.4th 1215 (9th Cir. 2024), and is reproduced in the appendix at Pet.App.1a–25a. The Ninth Circuit's November 19, 2024, order denying panel and en banc rehearing is not published and is reproduced in the appendix at Pet.App.73a–74a.

JURISDICTION

This Court has jurisdiction to review the Ninth Circuit's July 30, 2024, decision on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed per the Court's order extending the time to file until April 18, 2025.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

Respondents allege Petitioners violated the rights secured by the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

INTRODUCTION

The Ninth Circuit Court of Appeals has a long and troubling track record of denying qualified immunity to police officers in contravention of this Court's precedents. Specifically, this Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (citation omitted). The Ninth Circuit has repeated that error here.

Officers Huntsman and Smith faced a difficult situation when they responded to a call from Roy Anthony Scott, a paranoid schizophrenic man who was hallucinating about armed intruders at his apartment. As their body-worn cameras show, the officers quickly realized that Scott was unwell and qualified for a medical hold. But the situation was dangerous, too. Scott was armed with a metal pipe and a knife, and although he relinquished those weapons, he refused many other police directions and would not submit to a patdown. When the officers attempted to conduct a patdown, Scott resisted with increasing intensity. The officers attempted to wait out his resistance while Scott lay face-up on the ground, but when his kicking became more aggressive, they moved him to his stomach to handcuff him. Scott grabbed at the handcuffs, kicked, and thrashed. Huntsman applied partial bodyweight pressure to Scott's back, and at some point, his knee slipped toward Scott's neck. Once the officers managed to handcuff Scott, they immediately removed all pressure and rolled him to his side in the "recovery position." Huntsman's bodyweight pressure lasted no longer than 95 seconds, and Scott appeared to be breathing (in fact, yelling) before, during, and after that time.

Nonetheless, several minutes later, Scott experienced medical distress. He was pronounced dead after paramedics transported him to a local hospital. Toxicology reports indicated he had methamphetamine in his system.

The Ninth Circuit panel held that Huntsman and Smith used excessive force to restrain Scott because when "Roy Scott called the police for help," "he did not get it." Pet.App.2a. They believed the officers should have engaged in more "verbal de-escalation strategies" or waited for more officers to execute a "team takedown." Pet.App.14a. They asserted that Scott "did not present a risk to officers or others," despite the fact that he had been armed and refused to allow the officers to pat him down. *Id*.

The panel's decision ignores this Court's instruction to "judge[] from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and to "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

The panel then denied qualified immunity to Huntsman and Smith, based solely on a Ninth Circuit precedent that held that "kneeling on the back and neck *of a compliant detainee* … even after he complained that he was choking and in need of air violates clearly established law." *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) (emphasis added). That case is materially distinguishable and obviously so because the bodyweight pressure in *Drummond* was applied to

a handcuffed and hobbled arrestee who was no longer resisting—an entirely different scenario from the facts of this case. This Court has repeatedly admonished lower courts *not* to engage in such expansive interpretation in the qualified immunity context and instead locate an "existing precedent [that] 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (citation omitted).

The Ninth Circuit's errors deepened a circuit split by joining the Seventh Circuit, which has also held that pre-arrest bodyweight pressure violates the Fourth Amendment, while the First, Third, Fourth, Sixth, and Tenth Circuits have held only that *post-arrest* bodyweight pressure violates the Fourth Amendment.

Certiorari is warranted to resolve this split in authority. This is an issue of critical importance because it affects officer and public safety. Bodyweight pressure is among the *lowest* levels of force available to officers who face a dangerous and rapidly evolving situation when they attempt to handcuff a resisting individual. If bodyweight pressure is unavailable to effect an arrest, police officers face a greater risk of injury, including the possibility that an arrestee breaks free and harms other officers or bystanders or requires an escalation to deadly force.

Lastly, this case presents an ideal vehicle for addressing the questions presented. The officers' interaction with Scott was captured by *two* body-worn cameras, which not only recorded the entire encounter but provided multiple angles of most events. That leaves no genuine factual dispute as to any material fact and makes this case an ideal candidate for review.

Petitioners urge this Court to grant the petition and reverse.

STATEMENT OF THE CASE

A. Factual Background

At 3:09 a.m. on March 3, 2019, Scott called 911 to report that three would-be intruders were outside his apartment and that one of them had a saw. Pet.App.3a. Two Las Vegas Metropolitan Police Department Officers, Officer Kyle Smith and Officer Theodore Huntsman (Petitioners) responded to the call. *Id*.

Officer Smith's and Officer Huntsman's body-worn cameras captured video footage of the events that followed.[1] This description matches the body-worn camera video.

When Officers Smith and Huntsman arrived to Scott's apartment they found nothing suspicious. In the video footage, the officers knock on Scott's door, and Scott yells back, telling the officers to "break the

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[1] The body-worn camera footage may be obtained by calling for the record below. The Ninth Circuit Court of Appeals accepted the filing of the body-worn camera footage as part of a DVD that also contained the 911 call and the dispatch audio. Notice of DVD Filing, *Scott v. Smith*, No. 23-15480 (9th Cir. Jan. 8, 2024), Dkt. No. 27; *see also* Unopposed Motion to Transmit Exhibit, *Scott*, No. 23-15480 (9th Cir. Dec. 27, 2023), Dkt. No. 11; Order Granting Unopposed Motion for Leave to Transmit Physical Exhibits, *Scott*, No. 23-15480 (9th Cir. Aug. 7, 2023), Dkt. No. 25.

The same materials are also part of the district court record. Exhibit A to Defendants' Motion for Summary Judgment, *Scott*, No. 2:20-cv-01872 (D. Nev. Feb. 7, 2022), Dkt. No. 19-2; *see also* Decl. of Craig Anderson ¶ 4, *Scott*, No. 2:20-cv-01872 (D. Nev. Feb. 7, 2022), Dkt. No. 19-1.

door down." Pet.App.3a. Because the officers do not hear anyone else inside, so they do not break down the door. Scott does not come to the door, however, so Officer Smith calls his sergeant for advice.[2] By this point in the encounter, the officers suspect that Scott is having a mental health crisis, potentially related to drug use. Pet.App.4a; *see also* Dep. Tr. of Theodore Huntsman at 76:12–18, *Scott*, No. 2:20-cv-01872 (D. Nev. Sept. 27, 2021), Dkt. No. 19-4 ("Huntsman Dep."); Dep. Tr. of Kyle Smith at 26:8–15, *Scott*, No. 2:20-cv-01872 (D. Nev. Sept. 27, 2021), Dkt. No. 19-5 ("Smith Dep.").

The sergeant suggests trying once more to get Scott to come to the door, so Officer Smith knocks again. This time, Scott opens the door. Pet.App.4a.

Officer Smith retreats down the stairs as Scott exits his apartment and descends the stairs with a metal pipe in his hand. The officers order him to drop the pipe, and he does. *Id*. Scott twice asks the officers, "What am I supposed to do?" The officers direct him to stand at a nearby wall, and Scott does. *Id*. The officers' weapons were holstered at this time, and Officer Smith uses a flashlight to illuminate Scott. Pet.App.5a.

The officers ask Scott to put his phone down, but he does not. Officer Huntsman tells Scott he wants to "make sure you don't have any other weapons on you." Scott says, "I don't have any other weapons." Officer Smith replies (referring to Officer Huntsman), "he's going to pat you down for weapons, keep your hands

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[2] Officer Smith briefly turned his body-worn camera off during this call, but Officer Huntsman's body-worn camera continued recording.

out of your pocket." Scott does not follow that instruction, but reaches to his waistband instead and produces a knife, which he hands to Officer Huntsman saying, "There you go, I'm sorry." Officer Huntsman discards the knife. Smith Body-Worn Camera II at T11:33:20Z.[3]

The officers then order Scott several times to turn around to face the wall. Scott does not and tells the officers, "I've got paranoid schizophrenia." Officer Huntsman responds, "I get it, that's fine. Just turn around so I can pat you down, ok?" *Id*. at T11:33:43Z.

Scott does not turn around. He asks, "Can't you just put me in the car, please?" Officer Smith responds, "Hey, right now we're just trying to talk to you so we can figure out what's going on." Scott repeats, "Can't you just put me in the car, please, sir?" And Officer Huntsman replies, "Yeah, we'll get you some help, but you've got to listen to us." Officer Smith agrees: "You've got to listen to us so we can help you." *Id*. at T11:33:51Z.

Scott then tells Officer Smith that his flashlight is bothering him. Officer Smith says, "Ok, you come out carrying a pipe down the thing and then you just pull a knife out of your pocket when I just told you not to put your hands in your pockets, right?" Scott says, "I think people are after me, man." Officer Smith says, "Ok. Well, just relax. My partner's going to pat you down, make sure you don't have any weapons, ok?" When Scott does not acquiesce, Officer Smith continues, "Just do me a favor, turn around, and we'll

[3] Body-worn camera time stamps do not reflect the current time in the jurisdiction but are keyed to.

take the light off, ok?" Then he turns off his flashlight. *Id*. at T11:34:06Z.

Scott does not turn around, saying, "I'm paranoid. I can't turn around because someone's gonna …." (trailing off). Officer Smith says, " Would you like to step up here, so that you can still watch?" This exchange continues, with Scott reasserting that he is paranoid, while Officer Smith encourages him to step away from the wall "so we can talk with you." Officer Smith also reassures Scott that, "You're fine. We're out here to help you, ok?," to which Scott replies, "I'm not fine." Officer Smith tells Scott again that they are there to help him. *Id*. at T11:34:25Z.

Although Scott still does not comply with the officers' instructions to turn around or step away from the wall, the conversation continues. Officer Smith says, "If you don't want to back away from the wall so that we can pat you down, we just want to make sure you don't have any weapons and you're not hurt or anything, ok?" [sic] Scott says he does not have any weapons, and Officer Smith responds, "ok, well, you've had two so far, so I'm not really comfortable with that answer." *Id*. at T11:34:51Z.

At this point, Scott moves his hand to the top of the zipper of his jacket and says something about taking his shirt off. Then, he unzips his jacket. *Id*. at T11:35:05Z. Officer Smith immediately tells him, "No, don't take your shirt off," and at the same time, Officer Huntsman approaches Scott and holds Scott's left hand at the wrist—the hand that had been reaching for his jacket. Officer Huntsman gently tries to guide Scott away from the wall and place his hands behind his back. *Id*. at T11:35:10Z. As he does so, Officer Huntsman tells Scott, "We're just going to make sure

you don't have any weapons on you, ok?" Huntsman Body-Worn Camera at T11:35:18Z. Officer Smith repeatedly instructs Scott to "step up here," meaning, away from the wall.

As Officer Huntsman is attempting to hold Scott away from the wall with his hands behind his back for a patdown, Scott begins to protest and resist. Scott repeatedly asks, "What are you doing?" as he pulls away from the officers' grasp with increasing force. The officers repeatedly tell him to stop. Officer Smith begins to physically assist Officer Huntsman by holding Scott's right upper arm. *Id.* at T11:35:28Z.

In the following seconds, Scott goes from standing up to lying on the ground. The video does not depict how Scott came to be on the ground, and the parties do not agree. Because this case arises on a motion for summary judgment and all factual inferences must be made in Respondents' favor, Petitioners will assume that the officers used some degree of force to bring Scott to the ground.[4] Even so, both body-worn cameras show that the degree of force is indisputably minimal, as it appears that the officers support Scott as he descends slowly, such that he does not land forcefully or hit his head on the pavement. *Id.* at T11:35:36Z; Smith Body-Worn Camera II at T11:35:36Z.

At this point, the officers struggle with Scott on the ground. Scott kicks and thrashes his legs and attempts to sit up forcefully. He repeatedly says "Please, sir," and "stop it, sir," and "leave me alone."

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[4] Both officers testified that they did not use force to bring Scott to the ground. Huntsman Dep. at 84:16–85:3; Smith Dep. at 40:2–6. The body-worn camera footage is consistent with this testimony and reasonably permits the inference that Scott fell as he was struggling with the officers.

The officers repeatedly respond, "stop," and Officer Smith says, "we're trying to help you." Smith Body-Worn Camera II at T11:36:00Z–28Z. A neighbor emerges from an apartment nearby and begins to observe. *Id*. at T11:36:32Z. Scott remains on his back on the ground, continuing to resist and protest, while the officers restrain him on either side.

Officer Smith then instructs Scott to roll over and both officers repeatedly tell Scott to "stop" struggling. *Id*. at T11:36:46Z. Scott, however, continues to protest and resist, alternately pushing his torso up and then raising his hips. Officer Smith tells Scott that the officers are going to pat him down. *Id*. at T11:37:20Z. But Scott continues struggling and the officers attempt to wait out his resistance, still unable to perform a patdown. The neighbor also attempts to speak to Scott and urges him to calm down.

Then, Scott's resistance intensifies, as he begins to kick again and more strongly. *Id*. at T11:38:15Z. Officer Smith tells Officer Huntsman, "Let's get him over," and the officers turned Scott over to his stomach. *Id*. at T11:38:31Z. Once on his stomach, Officer Huntsman attempts to control Scott for handcuffing by placing his left knee across Scott's back and shoulder area, *id*. at T11:38:35Z, and at one point, his knee slips up to Scott's neck, *id*. at T11:39:55Z. Officer Smith places his left knee on Scott's buttocks to restrain his lower body. Huntsman Body-Worn Camera at T11:38:39Z. The officers struggle with Scott, who frees one of his arms and grabs at their handcuffs. *Id*. at T11:38:41Z, T11:39:32Z. With great effort, the officers are able to handcuff Scott. *Id*. at T11:39:42Z.

As soon as handcuffing is complete, Officer Smith tells Scott, "Relax. Hey, hey, what's your name, buddy?," while Officer Huntsman simultaneously removes his knee from Scott. Smith II Body-Worn Camera at T11:40:04Z–10Z. The officers also immediately move Scott into the "recovery position," on his side. *Id*. at T11:40:12Z–18Z.

The body-worn camera footage makes clear that during the handcuffing struggle, Officer Huntsman applied pressure to Scott's upper body for, at most, 95 seconds. *Id*. T11:38:35Z–T11:40:08Z. It also shows that before, during, and after these 95 seconds, Scott is loudly protesting, sometimes in discernible words and phrases, like "leave me alone," and "why y'all doing this." *Id*. at T11:39:02Z, T11:39:13Z, T11:40:29Z. At no point does Scott mention anything about his breathing or complain that he is unable to breathe. Also, throughout the handcuffing struggle, the body-worn camera footage shows that Scott is actively resisting, including by kicking. *Id*. at T11:39:06Z.

After being placed on his side, Scott continued to thrash on the ground and yell at the officers. *Id*. at T11:40:12Z. Officer Huntsman radioed for medical assistance, noting that Scott appeared to have a cut on his face from the struggle on the ground. Huntsman Body-Worn Camera at T11:40:48Z. When Scott returns himself to laying on his back, the officers help him to roll again to his side, into the recovery position. *Id*. at T11:41:01Z–19Z. The officers reassure Scott that medical help is on the way and that they are not trying to hurt him. *Id*. at T11:41:22Z. As Scott continues to thrash, the officers move him to a safer spot, "so he doesn't hit his head" on nearby stone pavers. *Id*. at T11:41:48Z. Officer Huntsman then holds Scott's head

in his hand and tells him, "I'm going to hold your head so you don't hit it, ok?" *Id*. at T11:42:00Z. At this point, Scott is still thrashing and speaking, continuing to repeat phrases like, "why y'all doing this to me?," and the officers continue to tell Scott, "we are trying to help you," and "all we want to do is help." *Id*. at T11:42:07Z–21Z.

Scott finally begins to stop thrashing, more than two minutes after the officers removed all bodyweight pressure from him. *Id*. at T11:42:22Z. In the following minutes, Scott also becomes quiet. Smith Body-Worn Camera II at T11:44:00Z. Officer Smith grows concerned, pats Scott on the shoulder, and asks, "you alright, man?" *Id*. at T11:45:29Z. The officers confirm that Scott is still "breathing" and assess his condition. *Id*. at T11:46:15Z. In the minutes that follow, they re-confirm that Scott is still breathing, perform a sternum rub, radio dispatch that Scott is a "possible E.D." (for "excited delirium"), and request that medical help be expedited. *Id*. at 11:46:16Z–11:47:40Z. When paramedics ultimately arrive, they begin treating Scott and transport him on a gurney. *Id*. at T11:54:10Z.

The coroner's report explains that Scott went into cardiac arrest in the ambulance and was later pronounced dead at the emergency room of a nearby hospital. Coroner's Report of Investigation at 4, *Scott*, No. 2:20-cv-01872 (D. Nev. Feb. 7, 2022), Dkt. No. 19-10. The coroner concluded that Scott's "death was caused by methamphetamine intoxication" based on toxicology reports and other evidence, and that "review of body camera videos did not reveal restraint procedure related to death." *Id*. at 8. Respondents produced an expert who concluded that Scott died

from "restraint asphyxia." Expert Rep. of Dr. Kris Sperry at 10, *Scott*, No. 2:20-cv-01872 (D. Nev. Apr. 5, 2022), Dkt. No. 25-22.

B. Proceedings Below

Respondents Rochelle Scott and Fredrick Waid, co-special administrators of Scott's estate, brought this lawsuit against Petitioners Officer Smith, Officer Huntsman, and the Las Vegas Metropolitan Police Department. As relevant here, Respondents alleged under 42 U.S.C. § 1983 that Petitioners violated Scott's Fourth Amendment right to be free from excessive force. Specifically, Respondents alleged that the officers acted unreasonably in performing a "takedown" of Scott and applying bodyweight pressure in order to handcuff him. Pet.App.37a. Petitioners moved for summary judgment, arguing that no constitutional violation occurred and that they were entitled to qualified immunity.

As relevant here, the district court denied Petitioners' motion for summary judgment on Respondents' Fourth Amendment excessive force claim. Pet.App.45a. The district court concluded that genuine issues of disputed fact existed such that the force at issue could be deemed constitutionally excessive, and denied qualified immunity. Pet.App.51a. Petitioners appealed.

The Ninth Circuit affirmed the district court's denial of summary judgment, holding that "Smith and Huntsman's actions, taken in the light most favorable to Plaintiffs, establish a constitutional violation," Pet.App.16a, and that a single Ninth Circuit precedent, *Drummond*, 343 F.3d 1052, "clearly established that the officers' use of force was constitutionally excessive." Pet.App.19a.

The panel began its opinion by describing how Scott had "called the police for help" "[b]ut he did not get it." Pet.App.2a. In its recitation of the facts, the panel omitted any mention of the officers' repeated instructions to Scott about the need to conduct a patdown for weapons. The panel, construing the facts in Respondents' favor, described that Smith and Huntsman "pulled [Scott] to the ground," and that "Huntsman put his bodyweight on Scott's back and neck for about one to two minutes" while "Scott's pleas turned increasingly incoherent and breathless." Pet.App.5a–6a.

In its legal analysis, the panel began with the premise that "summary judgment in excessive force cases should be granted sparingly." Pet.App.8a (cleaned up). The panel then concluded that the officers used "severe, deadly force" in their interaction with Scott, Pet.App.10a, and that the government's interest in using force was "limited" for three reasons: (1) "Smith and Huntsman did not suspect Scott of a crime," (2) "Scott did not pose a danger to the officers or others," and (3) "Scott did not attack the officers or anyone else" but "stood where officers directed him to stand and made no threatening movements." Pet.App.12a–14a. The panel also claimed that "Smith and Huntsman ignored less intrusive alternatives to the force they employed" like "verbal de-escalation strategies, wait[ing] for the support of additional officers to execute a safer 'team takedown,' or wait[ing] for EMS to execute a 'soft restraint.'" Pet.App.14a. Then, balancing the interests, the panel concluded that because a "grievous injury does not serve the objective of taking an individual into custody to prevent injury to himself when he is not suspected of any crime," "a reasonable jury could thus find that

the officers' use of severe or deadly force was constitutionally excessive." Pet.App.16a (cleaned up).

Then, the panel considered whether a reasonable officer would have known that his conduct was unconstitutional, and concluded that he would have. "Our caselaw makes clear that any reasonable officer should have known that bodyweight force on the back of a prone, unarmed person who is not suspected of a crime is constitutionally excessive." Pet.App.16a–17a. The panel relied solely on its own previous opinion in *Drummond*, a case that—in the panel's own retelling—held that it was unconstitutionally excessive for officers to "press[] their weight against an individual's torso and neck, crushing him against the ground" and "maintain[] that pressure for a significant period of time while the suspect was prone, handcuffed, offered no resistance, and repeatedly told officers that he could not breathe and that they were choking him." Pet.App.17a (cleaned up).

Petitioners sought panel and *en banc* rehearing, which was denied. Pet.App.74a.

REASONS FOR GRANTING THE PETITION

I. The Officers Acted Reasonably Under The Circumstances.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons … against unreasonable … seizures." U.S. CONST. amend. IV.

In evaluating a claim under the Fourth Amendment, the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

In the context of an excessive force claim, this standard means that "[n]ot every push or shove … violates the Fourth Amendment," "even if it may later seem unnecessary in the peace of a judge's chambers." *Id*. (citation and quotation marks omitted). Instead, a reviewing court must "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id*. at 397.

Also, because this case arises in a summary judgment posture, the "facts must be viewed in the light most favorable to the nonmoving party," but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Where, as here, virtually *all* of the relevant facts are captured in video footage, the Court "should … view[] the facts in the light depicted by the videotape." *Id*. at 381.

Here, Officers Huntsman and Smith acted reasonably based on the information available to them at the time, and their actions did not violate the Fourth Amendment.

During the encounter, the officers understood that Scott was hallucinating about threats that did not exist and had armed himself against those imaginary threats. The officers knew that Scott had been carrying at least a metal pipe and a knife, and that he had at one point denied having more weapons before producing a knife from his waistband, contrary to the officers' orders not to reach there. The officers repeatedly asked to pat Scott down, but he was unwilling, so they had no way of knowing whether Scott was armed or not. Although Scott told the

officers he had no other weapons, Officer Smith reasonably assessed the situation out loud:"[W]ell, you've had two so far, so I'm not really comfortable with that answer." *See supra* at 7.

Officer Huntsman did not physically intervene until Scott had unzipped his jacket despite the officers' orders—an act that made the situation more dangerous, since Scott may have been armed. Even then, Officer Huntsman merely held Scott's wrist to guide him away from the wall for a patdown, and the struggle escalated because Scott began resisting the officers with increasing intensity.

In the minutes that followed, the officers used empty-hand tactics to restrain Scott. They initially attempted to hold his hands behind his back; then they brought him to the ground[5] where they restrained him face-up and attempted to wait out his resistance; and when his kicking intensified, they rolled him to his stomach for handcuffing. They applied bodyweight pressure only while attempting to handcuff Scott, and as soon as handcuffing was complete, they removed the pressure and placed Scott in the recovery position. At no point did the officers use punches or strikes to subdue Scott.

The facts just described are apparent from the body-worn camera footage and do not permit the conclusion that the officers used excessive force in their interaction with Scott. *Graham* instructs reviewing courts to consider "the severity of the crime at issue, whether the suspect poses an immediate

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[5] Again, Petitioners dispute that they performed a "takedown" of Scott, but because the body-worn camera is inconclusive, Petitioners draw the inference in the light most favorable to Respondents.

threat to the safety of the officers or others, and whether he is actively resisting arrest." 490 U.S. at 396. There is no dispute that the officers had cause to support a mental health hold of Scott; he posed an immediate threat to their safety because he would not submit to a patdown and was hallucinating threats; and he actively resisted the officers.

II. The Ninth Circuit Departed From This Court's Precedents In Denying The Officers Qualified Immunity.

Officers Huntsman and Smith are entitled to qualified immunity because they acted reasonably under the circumstances, based on the information known to them at the time of their encounter with Scott. Even if their conduct *could* be deemed to violate the Fourth Amendment, the officers are nonetheless entitled to qualified immunity because that violation was not clearly established by any case of this Court nor any Ninth Circuit precedent.

A. The Ninth Circuit Departed from This Court's Precedents in Concluding that the Officers' Use of Force Was Unreasonable.

The Ninth Circuit erred when it held that the officers' actions could be found to be unreasonable under the Fourth Amendment. That decision directly violates this Court's directives in *Graham* by relying on 20/20 hindsight to scrutinize the officers' actions from "the peace of a judge's chambers." 490 U.S. at 396 (quotation marks and citation omitted).

The panel opinion concluded that "Scott did not pose a danger to the officers or others" because he "immediately relinquished both" his weapons "when directed to do so." Pet.App.13a. But the officers *could*

not have known that the two weapons Scott had relinquished were the only two weapons he had because he would not submit to a patdown. They reasonably suspected he might still be armed, especially since Scott had already claimed to be unarmed before producing a knife.

The panel faulted the officers for using force when Scott "did not threaten [the] officers or himself," but that arm-chair quarterbacking ignores the nonverbal ways in which Scott's *behavior* posed a threat to the officers' safety. *Id.* Scott had repeatedly disregarded the officers' directions, even when they made accommodations to account for Scott's paranoia. And Scott's mental illness, even if beyond his control, added to the danger of the situation: he was hallucinating threats, was experiencing a mental break with reality, and may still have been armed. Pet.App.4a–5a.

The panel thought the degree of Scott's resistance was "complicated" because although "Scott … screamed and tried to pull away from the officers" he "did not attack the officers or anyone else." Here again, the panel ignored the body-worn camera footage, which clearly shows Scott kicking aggressively at the officers and resisting the officers with enough force to injure them.

The panel also said the officers "ignored less intrusive alternatives to the force they employed," like "de-escalation strategies" or "wait[ing] for the support of additional officers to execute a safer 'team takedown.'" Pet.App.14a. But the body-worn camera footage shows that the officers attempted to de-escalate throughout the encounter, assuring Scott that they wanted to help him, repeating and

explaining instructions to him multiple times, offering accommodations for conducting the patdown, and turning off the flashlight when Scott requested. Even when the encounter turned into a physical struggle, the officers created multiple opportunities for Scott to cease resisting, like restraining him face-up on the ground to wait for his cooperation—an effort that was only interrupted when Scott began kicking more aggressively at the officers.

Finally, the panel concluded that the officers used "deadly force," which was "not justified" because Soctt was "a mentally ill person who was not suspected of committing a crime and presented little or no danger." Pet.App.15a. As described, Scott *did* pose a significant danger to the officers. And *even if* the officers' force contributed to Scott's death, that result was not foreseeable to the officers based on the facts known to them at the time. Scott never complained about his breathing, and he continued speaking before, during, and after the 95 seconds in which the officers used some form of bodyweight pressure to restrain him. The panel admonished that causing "grievous injury does not serve the objective of taking an individual into custody to prevent injury to himself when he is not suspected of any crime," but Scott's medical distress occurred only *after* the officers had ceased their use of force. Pet.App.16a (cleaned up). It is a classic application of hindsight to evaluate the officers' force based on a "grievous injury" they could not have foreseen.

The Ninth Circuit departed from this Court's Fourth Amendment precedents in concluding that the officers used excessive force in their encounter with Scott.

B. The Ninth Circuit Departed from This Court's Precedents by Concluding that *Drummond* "Clearly Established" that Applying Bodyweight Pressure to Make an Arrest Is Unconstitutional.

Even if the officers' use of force had been excessive, the Ninth Circuit contravened this Court's precedents by concluding that one of their own readily and materially distinguishable decisions "clearly established" that the officers' conduct violated the Fourth Amendment. "[Q]ualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotation marks omitted). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (internal quotation marks omitted). "[F]or a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (quotation marks omitted). That "inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* (internal quotation marks omitted).

The Ninth Circuit relied exclusively on one of its own cases, *Drummond*, 343 F.3d at 1056–57, to conclude that Officers Huntsman and Smith acted in violation of the "clearly established" rule "that it is unconstitutional to use bodyweight force on the back and neck of a prone and unarmed individual." Pet.App.17a. *Drummond*, however, is readily and

materially distinguishable from the facts of this case and could not have "clearly established" that Officer Huntsman's and Smith's actions violated the Fourth Amendment.

In *Drummond*, police were called to respond to Brian Drummond, a mentally ill man who was agitated and hallucinating, though unarmed. 343 F.3d at 1054. The officers decided to take Drummond into custody for his own safety. *Id*. Eyewitnesses saw the officers knock Drummond to the ground and cuff him behind his back. *Id*. Although Drummond did not resist the officers, they applied knees and bodyweight pressure to Drummond's neck and back. *Id*. Eyewitnesses said that Drummond fell into respiratory distress and that he "repeatedly told the officers that he could not breathe and that they were choking him." *Id*. Twenty minutes later, they applied a hobble restraint to Drummond's ankles, at which point he went limp and lost consciousness. *Id*. at 1055. Drummond was later revived but sustained brain damage and remained in a permanent vegetative state. *Id*.

This Court has never held that controlling circuit precedent clearly establishes law for purposes of § 1983. *Rivas-Villegas*, 595 U.S. at 5. But assuming that it may, *Drummond* is obviously distinguishable from the facts of this case and did not clearly establish that Officer Huntsman's and Scott's conduct violated the Fourth Amendment.

Drummond applied the *Graham* factors to *post-handcuffing* use of force, concluding that the "*Graham* factors would have permitted the use of only minimal force *once Drummond was handcuffed and lying on the ground*." *Drummond*, 343 F.3d at 1058 (emphasis

added). The *Drummond* panel made the significance of the post-handcuffing timing explicit. The panel acknowledged that "some force was surely justified in restraining Drummond so that he could not injure either himself or the arresting officers," but "*after he was handcuffed and lying on the ground*, the force that the officers then applied was clearly constitutionally excessive." *Id.* at 1059 (emphasis added).

This is a critical and fundamental difference between *Drummond* and this case. Here, Officers Huntsman and Smith used *only pre-handcuffing* bodyweight force, and once they handcuffed Scott, the officers removed all pressure and placed Scott on his side to facilitate breathing. For that reason alone, *Drummond* cannot have "clearly established" that Officers Huntsman and Smith applied unconstitutional force to Scott.

Drummond is different in other material ways, too. The *Drummond* panel noted that, "[o]nce on the ground, prone and handcuffed, Drummond *did not resist* the arresting officers," who nevertheless "pressed their weight against his torso and neck, crushing him against the ground." *Id.* (emphasis added). Here, Scott was resisting before, during, and after the time in which the officers applied bodyweight pressure to restrain him. Also, in *Drummond*, the officers "did not remove th[eir] pressure despite Drummond's pleas for air." *Id.* Scott, however, never complained that he could not breathe and appeared to be breathing well throughout the 95 seconds of bodyweight pressure, as evidenced by his audible (and often intelligible) yelling before, during, and after that time.

In fact, the use of force in *Drummond* was so extreme that the panel concluded the officers had "fair warning" that their conduct was constitutionally excessive even without any precedent directly on point. In their words, "*[a]ny* reasonable officer should have known" that it was unconstitutional to "crush[] Drummond against the ground …[,] continuing to do so despite his repeated cries for air, and despite the fact that his hands were cuffed behind his back and he was offering no resistance." *Id.* at 1061 (emphasis in original); *see also id.* at 1062 ("We need no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law.").

This case is entirely different. Officers Huntsman and Smith faced a potentially armed, hallucinating individual who was actively resisting. They applied bodyweight pressure for at most 95 seconds, and removed the pressure as soon as handcuffing was complete. By contrast, in *Drummond*, officers applied bodyweight pressure to a handcuffed, compliant, unarmed individual for twenty minutes, even as he repeatedly cried out for air.

These differences matter. This Court has repeatedly instructed that the "clearly established" "inquiry must be undertaken in light of the specific context of the case, not as a broad, general proposition." *Rivas-Villegas*, 595 U.S. at 5 (internal quotation marks omitted). "[S]pecificity is especially important in the Fourth Amendment context, where … it is sometimes difficult for an officer to determine how the relevant legal doctrine … will apply to the

factual situation the officer confronts." *Id*. at 6 (quoting *Mullenix*, 577 U.S. at 12).

Additionally, other unpublished Ninth Circuit precedents support that *Drummond* set out a rule that the *post-handcuffing* use of bodyweight pressure may constitute excessive force, *not* that *Drummond* creates a blanket rule that bodyweight pressure is inherently excessive or deadly. In *Tucker v. Las Vegas Metropolitan Police Dep't*, the Ninth Circuit cited *Drummond* while granting qualified immunity to officers related to "the force used *before [the target] was handcuffed*" and denying qualified immunity as to the application of "body pressure to restrain him *after he was handcuffed* and face down on a bed." 470 F. App'x 627, 628–29 (9th Cir. 2012) (emphases added). And in two other cases, other Ninth Circuit panels recited the rule of *Drummond* as specifically applying to post-handcuffing bodyweight pressure. *Abston v. City of Merced*, 506 F. App'x 650, 652 (9th Cir. 2013) (relying on *Drummond* to establish that officers' "use of body compression as a means of restraint was unreasonable" where target "was handcuffed and shackled"); *Arce v. Blackwell*, 294 F. App'x 259, 261–62 (9th Cir. 2008) (relying on *Drummond* to establish that bodyweight pressure when the target's "hands were cuffed behind his back" was excessive while distinguishing a case where officers "ceased using force once [the target] was handcuffed," which was not excessive (quotation marks omitted)).

Expanding *Drummond* to apply to pre-handcuffing bodyweight pressure is also inconsistent with this Court's decision in *Rivas-Villegas*, which granted qualified immunity to an officer who placed

his knee onto the back of a prone suspect for eight seconds before he could be handcuffed. 595 U.S. at 4.

The Ninth Circuit departed from the precedents of this Court in holding that Officers Huntsman and Smith violated the Fourth Amendment when they applied pre-handcuffing bodyweight pressure to Scott.

III. The Ninth Circuit's Errors Deepen A Circuit Split About The Use Of Pre-Handcuffing Bodyweight Pressure.

In denying qualified immunity here, the Ninth Circuit joined the Seventh Circuit in breaking with the majority rule of the First, Third, Fourth, Sixth, and Tenth Circuits, which have found no constitutional violation or have granted qualified immunity where officers used bodyweight pressure to secure an arrest.

The Tenth Circuit has twice articulated the rule that subjecting an arrestee to bodyweight pressure "for a significant period after it was clear that the pressure was unnecessary to restrain him" is excessive under the Fourth Amendment. *Weigel v. Broad*, 544 F.3d 1143, 1152 (10th Cir. 2008). In *Weigel*, the Tenth Circuit denied qualified immunity where there was evidence "that for three minutes the troopers subjected [the arrestee] to force that they knew was unnecessary to restrain him and that a reasonable officer would have known presented a significant danger of asphyxiation and death." *Id.* at 1153. While, "up to a point, the troopers were protecting themselves and the public from [the arrestee] and [the arrestee] from himself," the prolonged, *post-arrest* bodyweight pressure was deemed excessive. *Id.* at 1155. The Tenth Circuit also denied qualified immunity in *Estate of Booker v.*

Gomez, where the facts could support that an officer placed more than 140 pounds of force on an arrestee's "back while he was handcuffed on his stomach" in a "prone, restrained, position." 745 F.3d 405, 424 (10th Cir. 2014).

In *McCue v. City of Bangor*, the First Circuit denied qualified immunity to officers where a genuine factual dispute existed over the duration of the officers' post-handcuffing bodyweight pressure. 838 F.3d 55, 65 (1st Cir. 2016). Dashboard camera footage in *McCue* could not resolve a factual dispute over whether the officers had applied post-handcuffing bodyweight pressure for 66 seconds or five minutes after the arrestee had ceased resisting. *Id.* at 63 ("[T]here could be close to five minutes—not 66 seconds—during which the officers continued to exert force on a nonresisting [arrestee]."). The First Circuit denied qualified immunity based on the material, factual dispute about at what point the arrestee "ceased resisting and for how long after that moment the officers continued to apply force on his back." *Id.* at 65.

The Fourth Circuit has held that officers engaged in constitutionally permissive force when they used bodyweight pressure to handcuff and restrain a mentally ill man. *Est. of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 897–98 (4th Cir. 2016). There, the officers used far greater *total* pre-arrest force than here—tasing, wrestling, choking, leg-shackling, and applying bodyweight pressure to the man—during a mental health crisis in which he posed only a danger to himself. *Id.* Some of that force was constitutionally excessive. *Id.* at 906. But the Fourth Circuit simultaneously endorsed the use of *some* force

in this circumstance. *Id.* ("[W]e certainly do not suggest that [the officers] had a constitutional duty to stand idly by and hope that [the arrestee] would change his mind and return to the Hospital on his own accord."). And the court specifically isolated the officers' bodyweight pressure and concluded that "[a]pplying just enough weight to immobilize an individual continuing to struggle during handcuffing is not excessive force." *Id.* at 906 n.11 (cleaned up). The court also granted qualified immunity for *all* of the force used because no case had clearly established that the stronger measures were unconstitutional in a like circumstance. *Id.* at 907.

The Sixth Circuit has also held that bodyweight pressure constituted excessive force only *after* the arrestee was handcuffed and incapacitated. In *Champion v. Outlook Nashville, Inc.*, police responded to a mentally ill individual who had overpowered his caretaker. 380 F.3d 893 (6th Cir. 2004). The officers used pepper spray, a takedown maneuver, handcuffs, and a hobble device to restrain him. *Id.* at 897. Then *after* the individual was restrained, officers allegedly continued to use pepper spray and applied bodyweight pressure to his back. *Id.* The Sixth Circuit held that *this* use of post-arrest force was constitutionally excessive. *Id.* at 903. The court held that it was "clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position *after being subdued and/or incapacitated* constitutes excessive force" and denied qualified immunity. *Id.* (emphasis added).

The Third Circuit has held that officers did not engage in constitutionally excessive force when one

officer pressed a knee into the chest of an arrestee who was continuing to thrash, flail, and resist "even *after* he had been handcuffed with his hands in front of his body." *Bornstad v. Honey Brook Twp.*, 211 F. App'x 118, 120 (3d Cir. 2007) (emphasis added). The Third Circuit distinguished circumstances in which an arrested individual becomes compliant such that continuing to apply bodyweight pressure would be excessive. It is not "clearly unreasonable to exert severe force on an individual who continues to violently resist arrest," including by "continu[ing] to struggle with police even after" the arrestee is "down on the ground and handcuffed." *Id.* at 124.

Only the Seventh Circuit has *denied* qualified immunity to officers who applied pre-handcuffing bodyweight force. In *Abdullahi v. City of Madison*, officers applied bodyweight pressure to a target's back and shoulder area for approximately 30–45 seconds in order to handcuff him, and they removed that pressure afterwards. 423 F.3d 763, 765 (7th Cir. 2005). The panel concluded that medical evidence, which indicated that the arrestee suffered a fatal crushing injury as a result of the pressure, supported "an inference of unreasonable conduct" and denied summary judgment to the officers involved. *Id.* at 773.

The Ninth Circuit's decision here deepened an existing split about the reasonable use of bodyweight pressure to complete an arrest. The First, Third, Fourth, Sixth, and Tenth Circuits hold that bodyweight pressure becomes unreasonable only when applied *after* arrest, to an incapacitated individual. Only the Ninth and Seventh Circuits have held that officers act unreasonably under the Fourth Amendment when they use bodyweight pressure to restrain an individual in order to make an arrest.

IV. The Questions Presented Are Critically Important And This Is An Ideal Vehicle To Resolve Them.

Not only does the Ninth Circuit's decision here depart from this Court's controlling precedents and from the rule of at least five other circuits, it does so on an issue that is extremely important to officer safety and in a case in which the record is exceptionally clear because *two* body-worn cameras captured the relevant events. That makes this case an ideal vehicle to address a critically important issue, and certiorari is warranted.

"[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. This is especially true of the decision to take someone into custody, particularly when that person resists. Officers must then make split-second decisions about many possible uses of force, ranging from empty hand grappling tactics to deploying pepper spray, a baton, or a taser. And they must do so even if the individual lashes out at them with fists, kicks, bites, or other types of injuring force.

On that continuum of possible force, bodyweight pressure is among the *least* forceful options available, but the Ninth Circuit's decision threatens to embroil officers in constitutional litigation *any time* they employ it. This case is not about bodyweight pressure that extends past the time it takes to apply handcuffs, when such force is more likely to be punitive and excessive. This case concerns *pre-handcuffing* bodyweight pressure that is removed once handcuffing is complete. Pre-handcuffing bodyweight pressure is a

reasonable use of force when applied to take someone into custody lawfully.

Of course, bestowed with the gift of 20/20 hindsight, a judge may think that a particular duration or amount of pre-handcuffing bodyweight pressure exceeded what was strictly required to restrain an individual, but qualified immunity exists to prevent judicial second-guessing in that circumstance. Qualified immunity protects officers from suit unless "existing precedent placed the statutory or constitutional question beyond debate." *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015) (cleaned up). That is an intentionally exacting standard precisely because it "gives government officials breathing room to make reasonable but mistaken judgments," such that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id*. (quotation marks omitted).

By restricting a basic handcuffing technique, the Ninth Circuit's decision invites judicial armchair-quarterbacking of the kinds of split-second judgments officers must make under extreme pressure. It also puts officers and the public at risk. Without the use of bodyweight force, officers may be unable to make an arrest of a resisting subject, allowing a subject to break free and potentially injure the officer or bystanders. That may even, perversely, lead to the use of greater force to detain the individual, including deadly force. It is critically important that officers be permitted to use low-level force to effect an arrest, like the bodyweight pressure employed here.

This case is also an ideal vehicle for addressing this important question because the record is as clear

as can be expected from any police encounter. Both officers wore body cameras that captured the entire encounter with Scott, almost always with two simultaneous angles of the same event. Several witnesses were also present for portions of the encounter and were deposed about what they saw that evening. As a result, the record presents a clear factual picture against which the Fourth Amendment and qualified immunity standards can be applied, and very few facts can be reasonably disputed at all. The panel noted several disputed facts that it thought prevented summary judgment in the case, but these do not present any vehicle flaw because they are not *material* to the legal questions at issue. *See* Pet.App.7a–8a (describing "genuine issues of fact" about how and why Scott fell to the ground, the duration of the bodyweight pressure, and Scott's cause of death). Even when the plaintiff's interpretation of these disputed facts is accepted, as Petitioners do for purposes of this Petition, the officers are still entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

CRAIG R. ANDERSON
MARQUIS AURBACH
CHTD.
10001 Park Run Drive
Las Vegas, NV 89145
(702) 382-0711
canderson@maclaw.com

MEGAN M. WOLD
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
mwold@cooperkirk.com

Counsel for Petitioners

April 18, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15480
D.C. No. 2:20-cv-01872-RFB-EJY

ROCHELLE SCOTT, INDIVIDUALLY, AND AS CO-SPECIAL ADMINISTRATOR OF THE ESTATE OF ROY ANTHONY SCOTT; FREDRICK WAID, AS CO-SPECIAL ADMINISTRATOR OF THE ESTATE OF ROY ANTHONY SCOTT,

Plaintiffs-Appellees,

v.

KYLE SMITH; THEODORE HUNTSMAN; LAS VEGAS METROPOLITAN POLICE DEPARTMENT,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Nevada
Richard F. Boulware II, District Judge, Presiding

Argued and Submitted May 13, 2024
Phoenix, Arizona

Filed July 30, 2024

Appendix A

Before: Roopali H. Desai and Ana de Alba, Circuit Judges, and Philip S. Gutierrez,* District Judge.

OPINION

DESAI, Circuit Judge:

Early in the morning on March 3, 2019, Roy Scott called the police for help. But he did not get it. Las Vegas Metropolitan Police Department Officers Kyle Smith and Theodore Huntsman came to the scene. Scott was unarmed and in mental distress. Though he complied with the officers' orders and was not suspected of a crime, Smith and Huntsman initiated physical contact, forced Scott to the ground, and used bodyweight force to restrain him. Shortly after, Scott lost consciousness and he was later pronounced dead. Scott's daughter and a representative of Scott's estate sued the officers and the Department for violating their constitutional rights, including the Fourth Amendment right to be free from excessive force and the Fourteenth Amendment right to familial association.

Officers Smith and Huntsman appeal the district court's order denying summary judgment on the basis of qualified immunity. We hold that, construing the facts in the light most favorable to Plaintiffs, Smith and Huntsman violated Scott's Fourth Amendment rights. Because the applicable law was clearly established at the time of the

* The Honorable Philip S. Gutierrez, United States District Judge for the Central District of California, sitting by designation.

incident, we affirm the denial of qualified immunity for Plaintiffs' Fourth Amendment claim. As to Rochelle Scott's Fourteenth Amendment claim, we hold that Officers Smith and Huntsman violated Rochelle Scott's Fourteenth Amendment right to familial association, but that right was not yet "clearly established" at the time of the violation. We thus affirm in part and reverse and remand in part.

BACKGROUND

Early in the morning on March 3, 2019, Roy Scott called 911.[1] He reported multiple assailants outside his apartment with a saw. Las Vegas Metropolitan Police Department Officers Smith and Huntsman were assigned to the call. Dispatch notified the officers that Scott was mentally ill.

Scott was distressed and hallucinating when Officers Smith and Huntsman arrived at his apartment. After Smith and Huntsman knocked and identified themselves, Scott yelled to the officers to "break the door down" claiming that there were people inside his house. The officers did not break the door in because they did not hear anyone inside the apartment. Instead, they continued to knock and order Scott to come to the door. About two minutes after first knocking on the door, Smith told Huntsman, "this is a 421A for sure," using the department code to indicate

1. This is an interlocutory appeal challenging the denial of qualified immunity. As we recount the facts here, we thus resolve all disputed factual issues in Plaintiffs' favor. *See Est. of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021).

he believed Scott was mentally ill. Huntsman then called through the door: "Sir, have you been diagnosed with any mental diseases?" After Scott did not come to the door, Smith asked dispatch to call Scott back to ask him to come to the door, noting again that Scott appeared to be mentally ill. Smith then said to Huntsman: "I ain't going in there. That's too sketchy." Huntsman agreed, "That dude's wacky." Peering into Scott's window, Huntsman asked Smith if he could see the "crazed look in [Scott's] eye." They could not see anyone else in Scott's apartment.

When Scott did not open the door, Smith called their sergeant, turning off his body worn camera. On Huntsman's camera, Smith can be heard telling their sergeant that Scott sounds mentally ill. After ending the call, Smith told Huntsman that their sergeant said that "at the end of the day we can't do anything if we don't hear any reason to have an exigent circumstance." Smith also explained that their Sergeant suggested they try again to get Scott to come to the door. Smith resumed knocking and ordered Scott to come to the door. Seconds later, and about seven minutes after Smith and Huntsman arrived on the scene, Scott opened the door.

As Scott opened the door, Smith retreated down the stairs in front of Scott's apartment. Scott held a metal pipe at his side as he descended the stairs. He immediately dropped the pipe when officers asked him to do so. Disoriented, Scott asked the officers twice: "What am I supposed to do?" Smith and Huntsman directed him to stand near a wall at the base of the stairs, and Scott immediately complied. When Huntsman asked Scott if

he had any other weapons, Scott produced a knife from his front pocket and said, "I am sorry." He handed the knife to Huntsman handle-side out and did not make any threatening gestures.

Smith and Huntsman ordered Scott to face the wall, shining a flashlight at him. Scott told them that the light bothered him and that he had paranoid schizophrenia. He asked twice: "Can you just put me in the car please?" When asked about the weapons he had relinquished, Scott explained, "I think people are after me." Smith again directed Scott to face the wall, and Scott replied, "I'm paranoid, I can't turn around." Smith told Scott, "You're fine. We are out here to help you." Scott repeatedly responded, "I'm not fine." Although they did not discuss it, officers allege they recognized Scott was in "some sort of distress" and concluded he met the qualifications for a medical hold for his mental health and safety.

Smith and Huntsman approached Scott and grabbed his arms. Scott repeatedly pleaded "please" and "what are you doing" in a distressed voice, while Smith and Huntsman pulled him to the ground. At first, the officers held Scott's arms at his sides while he was lying on his back. In this position, Scott screamed, struggled, and pled with the officers to leave him alone for over two minutes. The officers then eventually rolled Scott onto his stomach, repeatedly ordering Scott to "stop." With Scott on his stomach and with his hands restrained behind his back, Huntsman put his bodyweight on Scott's back and neck for about one to two minutes. At the same time Smith put his weight on Scott's legs, restraining his lower body. Scott's

pleas turned increasingly incoherent and breathless as Huntsman applied his bodyweight.

After handcuffing him, the officers attempted to roll Scott on his side, as he continued to incoherently cry out that he wanted to be left alone. When they rolled Scott over, his face was bloody from contact with the ground. Scott stopped yelling and thrashing around after a few minutes. Scott did not respond when Smith and Huntsman tried to wake or revive him. Shortly after, when the paramedics arrived, Scott was still unresponsive. Scott was pronounced dead after paramedics removed him from the scene. Plaintiffs' expert found that Scott had died from restraint asphyxia.

Rochelle Scott (Scott's daughter and co-special administrator of his estate) and Fredrick Waid (co-special administrator of Scott's estate) sued Officer Smith, Officer Huntsman, and the Department. They alleged claims under 42 U.S.C. § 1983 for violation of Scott's Fourth Amendment right to be free from excessive force and Rochelle Scott's Fourteenth Amendment right to familial association, among other claims. Defendants Smith and Huntsman moved for summary judgment, arguing in part that no constitutional violation occurred and that they were entitled to qualified immunity.

The district court granted in part and denied in part Defendants' motion for summary judgment. Relevant here, the district court denied qualified immunity to Smith and Huntsman on Plaintiffs' Fourth Amendment claim and on Rochelle Scott's Fourteenth Amendment claim. Smith and Huntsman timely appealed.

Appendix A

JURISDICTION

As a threshold matter, we address our jurisdiction to hear this interlocutory appeal. A denial of summary judgment is not ordinarily appealable because it is not a "final decision." *See* 28 U.S.C. § 1291; *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022). But we may "review orders denying qualified immunity under the collateral order exception to finality." *Ballou*, 29 F.4th at 421. The scope of our jurisdiction is "circumscribed." *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013). We cannot consider "a *fact*-related dispute" over whether the evidence is "sufficient to show a genuine issue of fact for trial." *Est. of Anderson*, 985 F.3d at 731 (quoting *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018)). But we may decide "whether the defendant would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor." *George*, 736 F.3d at 836 (quoting *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012)) (cleaned up). In other words, we have jurisdiction when defendants are not asking us "to redecide the facts, but rather, to reapply the law." *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir. 1998).

Smith and Huntsman devote much of their briefing to *their* version of events that Scott disputes. But here, the district court denied the officers' request for qualified immunity because the record presents multiple genuine issues of fact. Those include whether Scott tried to reach for his jacket pocket before falling to the ground, whether Scott voluntarily fell to the ground or was forced to the ground in a takedown maneuver, how long Scott was

in a facedown position on the ground, how long Officer Huntsman had his knee on Scott's back and neck, the timing of Scott's handcuffing, and the cause of Scott's death. We must accept these findings unless Plaintiffs' "version of events is 'blatantly contradicted by the record.'" *Orn v. City of Tacoma*, 949 F.3d 1167, 1171 (9th Cir. 2020) (quoting *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)). In short, we cannot credit *Defendants'* version of the facts or "assume that a jury would resolve factual disputes in [*their*] favor." *Id.* Thus, though we lack jurisdiction to redecide factual disputes, we can evaluate whether, assuming each dispute is resolved in favor of Plaintiffs, Defendants are entitled to qualified immunity. Construing the facts in favor of Plaintiffs, we hold that Officers Smith and Huntsman are not entitled to qualified immunity for Plaintiffs' Fourth Amendment claim. We find Smith and Huntsman are entitled to qualified immunity for Rochelle Scott's Fourteenth Amendment claim.

STANDARD OF REVIEW

We review the grant or denial of summary judgment on the ground of qualified immunity de novo. *Ballou*, 29 F.4th at 421. "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions . . . summary judgment . . . in excessive force cases should be granted sparingly.'" *Torres v. City of Madera*, 648 F.3d 1119, 1125 (9th Cir. 2011) (quoting *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002)).

Appendix A

DISCUSSION

To determine whether Smith and Huntsman are entitled to qualified immunity, we ask two questions. First, viewing the facts in the light most favorable to Plaintiffs, did Smith and Huntsman violate a constitutional right? *Rice v. Morehouse*, 989 F.3d 1112, 1120 (9th Cir. 2021). And second, if a constitutional right was violated, was it a clearly established right? *Id.* Plaintiffs assert that Smith and Huntsman violated both their Fourth and Fourteenth Amendment rights. For each claim, we answer these questions in turn.

I. Fourth Amendment Claim

A. Smith and Huntsman violated Scott's Fourth Amendment rights.

"Under the Fourth Amendment, police may use only such force as is objectively reasonable under the circumstances." *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). To assess the objective reasonableness of an officer's actions, "we consider: (1) the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted, (2) the government's interest in the use of force, and (3) the balance between the gravity of the intrusion on the individual and the government's need for that intrusion." *Rice*, 989 F.3d at 1121 (quoting *Lowry v. City of San Diego*, 858 F.3d 1248, 1256 (9th Cir. 2017) (en banc)) (cleaned up). We must consider the totality of the circumstances "from the perspective of a reasonable

officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). After weighing the totality of the circumstances, we find that Officers Smith and Huntsman violated Scott's Fourth Amendment rights.

i. The type and amount of force used.

First, we hold that Smith and Huntsman used deadly force. To classify the force used, we consider the specific circumstances of the case. *Rice*, 989 F.3d at 1121. "Both the nature and degree of physical contact and the risk of harm and the actual harm experienced are relevant." *Seidner v. de Vries*, 39 F.4th 591, 597 (9th Cir. 2022) (quoting *Williamson v. City of National City*, 23 F.4th 1146, 1152 (9th Cir. 2022) (cleaned up). Deadly force is force that "creates a substantial risk of causing death or serious bodily injury." *Smith v. City of Hemet*, 394 F.3d 689, 706 (9th Cir. 2005).

Huntsman used bodyweight compression on Scott's back and neck during and shortly after handcuffing him. While Smith restrained Scott's lower body, Huntsman kept his bodyweight on Scott's back and neck for about one to two minutes while Scott's pleas turned increasingly incoherent and breathless. Shortly after, Scott lost consciousness. He was declared dead after paramedics removed him from the scene. This was severe, deadly force.

Our precedent establishes that the use of bodyweight compression on a prone individual can cause compression

asphyxia. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056-57 (9th Cir. 2003). In *Drummond*, for example, officers "press[ed] their weight on [the plaintiff's] neck and torso as he lay handcuffed on the ground." *Id.* at 1056. This force was "severe and, under the circumstances, capable of causing death or serious injury." *Id.* Drawing all reasonable inferences in Plaintiffs' favor, a jury could find Smith and Huntsman's conduct was similar deadly force.[2]

ii. The government's interest in the use of force.

We next evaluate the government's interests by considering the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether a suspect is actively resisting arrest or attempting to escape. *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010). "These factors are non-exhaustive, and we examine the totality of the circumstances, including the availability of less intrusive alternatives to the force employed and whether proper warnings were given." *Rice*, 989 F.3d at 1121-22 (citations omitted). The "most important" factor is whether the suspect posed an immediate threat. *Id.* at 1121 (quoting *Isaveya v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 947 (9th Cir. 2017)). "However, a simple statement

2. This comparison is further bolstered by the fact that *Drummond* used a stricter test than the one we apply today. After *Drummond*, we relaxed our definition of deadly force to encompass force that creates a substantial risk of serious bodily injury, rather than only a substantial risk of death. *See Smith*, 394 F.3d at 705-06.

by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001).

When weighing these factors, we also take a detainee's mental illness into account. *Drummond*, 343 F.3d at 1058. "The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." *Id.* (quoting *Deorle*, 272 F.3d at 1282-83). Even if "an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him," the government interest in using such force is limited "by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." *Id.* (quoting *Deorle*, 272 F.3d at 1283). Thus, although there is no per se rule establishing different classifications of suspects, we have recognized that counseling, where feasible, "may provide the best means of ending a crisis." *Id.* (quoting *Deorle*, 272 F.3d at 1283).

Here, the City's interests were limited. First, Smith and Huntsman did not suspect Scott of a crime. Indeed, Scott called 911 because he feared he was a *victim* of a crime. And officers quickly acknowledged at the scene that he appeared to be suffering from mental illness.

Second, viewing the facts in the light most favorable to Plaintiffs, Scott did not pose a danger to the officers or others. Huntsman and Smith did not receive any warning that Scott was dangerous or that he had threatened himself or others. When Smith and Huntsman arrived on the scene, Scott was alone in his apartment, and did not threaten officers when speaking through the closed door. Nor did he threaten his own life. After officers persuaded Scott to exit his apartment, he still did not threaten officers or himself. Scott stood against a wall as ordered and made no sudden or threatening gestures toward the officers.

Defendants argue that Scott posed a threat because he had two weapons—a pipe and a knife. But at the scene, Scott immediately relinquished both objects when directed to do so, handing the knife to the officers with the handle out. He explained openly that he was mentally ill and paranoid and asked the officers to put him into their patrol car. Taking the facts in the light most favorable to Scott, a jury could find he posed no threat to the officers. *See Smith*, 394 F.3d at 702 (holding that, though the plaintiff was not completely compliant, "considering the evidence in the light most favorable to him, a rational jury could very well find that he did not, at any time, pose a danger to the officers or others").

Third, whether Scott was "actively resisting arrest" is more complicated. Scott asked Smith and Huntsman not to touch him, and screamed and tried to pull away from the officers after they pulled him to the ground.

But degree matters. Scott did not attack the officers or anyone else, nor did he threaten to do so. Instead, he stood where officers directed him to stand and made no threatening movements. *See id.*, 394 F.3d at 703 (finding it significant that the suspect did not attack or threaten officers although he "ignored the officers' requests to remove his hands from his pajamas and to place them on his head").

Finally, construing the facts in favor of Plaintiffs, Smith and Huntsman ignored less intrusive alternatives to the force they employed. Plaintiffs' expert opined that Smith and Huntsman had alternatives to bodyweight force. They could have used verbal de-escalation strategies, waited for the support of additional officers to execute a safer "team takedown," or waited for EMS to execute a "soft restraint." Smith and Huntsman employed none of these alternatives. *See Rice*, 989 F.3d at 1124 ("Although officers 'need not avail themselves of the least intrusive means of responding to an exigent situation,' their failure to consider 'clear, reasonable and less intrusive alternatives' to the force employed 'militates against finding the use of force reasonable.'" (quoting *Glenn v. Wash. Cnty.*, 673 F.3d 864, 876 (9th Cir. 2011))).

In sum, because Scott was mentally ill, was not suspected of a crime, and did not present a risk to officers or others, the government's interest in applying force was limited.

iii. The balance of interests.

Finally, we must balance the force used against the need for such force to determine whether the force used was "greater than is reasonable under the circumstances." *Espinosa*, 598 F.3d at 537 (quoting *Santos*, 287 F.3d at 854). Generally, deadly force is not permissible "unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Smith*, 394 F.3d at 704 (quoting *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)). But even non-deadly force must not to be deployed lightly. *Drummond*, 343 F.3d at 1057. Force "is permissible only when a strong government interest *compels*" the degree of force used. *Id.* (quoting *Deorle*, 272 F.3d at 1280).

We hold that Smith and Huntsman were not justified in using deadly force against Scott, a mentally ill person who was not suspected of committing a crime and presented little or no danger. *See Garner*, 471 U.S. at 8, 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). Indeed, there are genuine issues of fact regarding whether *any* force was necessary. *See, e.g., Young v. County of Los Angeles*, 655 F.3d 1156, 1166 (9th Cir. 2011) (officer was not justified in use of "significant force" against a nonviolent individual suspected of a misdemeanor). The balance of interests here is similar to *Drummond*, where officers also used significant or deadly force on a

mentally ill individual to detain him for a mental health hold. *Drummond*, 343 F.3d at 1059. Like *Drummond*, an officer pressed his "weight against [Scott's] torso and neck, crushing him against the ground." *Id.* And despite his pleas, and a lack of any apparent danger, they continued to detain him. *Id.* at 1059-60. There, as here, "grievous injury does not serve [the] objective" of taking an individual into "custody to prevent injury to himself" when he is not suspected of any crime. *Id.* at 1059. Viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could thus find that the officers' use of severe or deadly force was constitutionally excessive.

B. Scott's Fourth Amendment rights were clearly established at the time of the violation.

Because we hold that Smith and Huntsman's actions, taken in the light most favorable to Plaintiffs, establish a constitutional violation, we must next consider whether the law was clearly established, so that a reasonable officer would know the officers' conduct was unconstitutional. "Conduct violates a clearly established right if the unlawfulness of the action in question is apparent in light of some pre-existing law." *Ballou*, 29 F.4th at 421 (quoting *Benavidez v. County of San Diego*, 993 F.3d 1134, 1151-52 (9th Cir. 2021) (cleaned up). There need not be a case "directly on point," but "the constitutional question must be 'beyond debate.'" *Ohlson v. Brady*, 9 F.4th 1156, 1166-67 (9th Cir. 2021) (quoting *Kramer v. Cullinan*, 878 F.3d 1156, 1163 (9th Cir. 2018)).

Our caselaw makes clear that any reasonable officer should have known that bodyweight force on the back of

a prone, unarmed person who is not suspected of a crime is constitutionally excessive. Long before Scott's death, we clearly established that it is unconstitutional to use bodyweight force on the back and neck of a prone and unarmed individual. *See Drummond*, 343 F.3d at 1059. The law is especially clear where, as here, the officers know the prone individual is suffering from a mental illness and is not suspected of a crime. *Id.* In *Drummond*, officers "pressed their weight against [an individual's] torso and neck, crushing him against the ground." *Id.* They "maintained that pressure for a significant period of time" while the suspect was prone, handcuffed, "offered no resistance," and "repeatedly told the officers that he could not breathe and that they were choking him." *Id.* at 1054, 1063. We found that "[v]iewing the evidence in the light most favorable to [the plaintiff], . . . the officers had 'fair warning' that the force they used was constitutionally excessive even absent a Ninth Circuit case presenting the same set of facts." *Id.* at 1061. Indeed, we needed "no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law." *Id.* at 1062.

The similarities between this case and *Drummond* are striking. Scott was not suspected of a crime. Instead, he was taken into custody because of his mental health. Though they were presented with an individual experiencing a mental health crisis and presenting no obvious danger to others, Smith and Huntsman crushed Scott's back and neck to subdue him while handcuffing him. Scott also cried out with increasing distress and incoherence as the

officers' force escalated. Reasonable officers would have known that their force was not reasonable and that it created a serious risk of asphyxiating Scott.

Defendants argue that *Drummond* does not control because it clearly established that the use of bodyweight force was excessive only on a prone and *already handcuffed* individual. But construing the events in Scott's favor, officers used their bodyweight on Scott while he was restrained with his hands behind his back, which is the functional equivalent of being handcuffed. And more critically, the officers received fair notice that their force was constitutionally excessive despite the timing of the handcuffing. *Drummond* addressed a handcuffed suspect, but as explained above, it also opined more generally about the use of bodyweight force on a prone individual. *See Drummond*, 343 F.3d at 1061-62. Indeed, *Drummond* also addressed a mentally ill and distressed individual who was not suspected of any crime and was being taken into custody only for his own safety. *Id.*

Moreover, as *Drummond* itself demonstrates, a decision with identical facts is not required to clearly establish that it is unreasonable to use deadly force when the force is totally unnecessary to protect officers, the public, or the suspect himself. *See Hope v. Pelzer*, 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (There can be "notable factual distinctions between the precedents relied on . . . so long as the prior decisions g[i]ve reasonable warning that the conduct then at issue violated constitutional rights." (quoting *United States v. Lanier*, 520 U.S. 259, 269, 117 S. Ct. 1219, 137 L. Ed. 2d

432 (1997))). Though officers must be fairly on notice that their conduct was unconstitutional, defining the "right allegedly violated" in too much detail allows "officials, and future defendants, to define away all potential claims." *See LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1158 (9th Cir. 2000) (quoting *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)) (cleaned up). We have thus repeatedly applied *Drummond* as clearly established law despite some variation in the force presented. *See, e.g., Zelaya v. Las Vegas Metro. Police Dep't*, 682 F. App'x 565, 567 (9th Cir. 2017) (mem.) (holding that although officers used bodyweight force for a period shorter than the officers in *Drummond*, *Drummond* controlled because there was a material issue of fact regarding whether the force was used for a "significant" period); *Tucker v. Las Vegas Metro. Police Dep't*, 470 F. App'x 627, 629 (9th Cir. 2012) (mem.) (holding that although, unlike *Drummond*, the suspect resisted, *Drummond* still controlled because of the similar use of bodyweight force).[3] We do the same here. *Drummond* clearly established that the officers' use of force was constitutionally excessive.

3. Our court's recent decision in *Perez v. City of Fresno*, 98 F.4th 919 (9th Cir. 2024), does not change this analysis. There, we found the officers were entitled to qualified immunity because they were acting at the direction of a paramedic when they applied their bodyweight. *Id.* at 926 ("Given the specific context of this case, we cannot conclude that *Drummond* put the officers on fair notice that their actions—pressing on a backboard on top of a prone individual being restrained for medical transport, *at the direction of a paramedic working to provide medical care*—was unlawful." (emphasis in original)). Smith and Huntsman did not rely on an equivalent intervening decisionmaker here.

II. Fourteenth Amendment Claim

Rochelle Scott alleges that Smith and Huntsman's use of force also violated her Fourteenth Amendment substantive due process rights. We hold that Smith and Huntsman violated Rochelle Scott's constitutional right to familial association, but because that right was not clearly established, Smith and Huntsman are entitled to qualified immunity.

A. Smith and Huntsman violated Rochelle Scott's Fourteenth Amendment rights.

Parents and children have a substantive due process right to a familial relationship free from unwarranted state interference. *Hardwick v. County of Orange*, 980 F.3d 733, 740-41 & n.9 (9th Cir. 2020). To show a violation of the right to familial association under the Fourteenth Amendment based on an officer's use of force, a plaintiff must establish that an officer's conduct "shocks the conscience." *Nicholson v. City of Los Angeles*, 935 F.3d 685, 692 (9th Cir. 2019) (quoting *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010)).

Two tests govern whether an officer's conduct "shocks the conscience." *Ochoa v. City of Mesa*, 26 F.4th 1050, 1056 (9th Cir. 2022). "Which test applies turns on whether the officers had time to deliberate their conduct." *Id.* The "deliberate-indifference test" applies when a situation "evolve[s] in a time frame that permits the officer to deliberate before acting." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). The more demanding "purpose-to-

harm test" applies when a situation "'escalate[s] so quickly that the officer must make a snap judgment." *Id.*

To decide which test to apply, we must thus ask whether actual deliberation by the officer was "practical." *Porter*, 546 F.3d at 1137 (quoting *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372 (9th Cir. 1998), *as amended* (Nov. 24, 1998)). But we have recognized that deliberation may be practical even without an extended timeline of events. In *Nicholson*, for example, an officer had time to deliberate when, after seeing a teenager with a toy gun, he jumped out of a car and fired several shots. 935 F.3d at 693-94. The officer's "immediate use of force without communicating with his partner, his failure to seek cover, and his failure to formulate a plan before acting were" sufficient to create a genuine dispute of fact on whether deliberation was practical. *Id.* at 693. The court thus applied the deliberate indifference test. *Id.*; *cf. Wilkinson*, 610 F.3d at 554 (distinguishing exigent circumstances by applying the purpose-to-harm standard where "[w]ithin a matter of seconds, the situation evolved from a car chase to a situation involving an accelerating vehicle in dangerously close proximity to officers on foot").

We hold that, viewing the facts in the light most favorable to Plaintiff, Smith and Huntsman had time to deliberate. In other words, the encounter was not escalating, and officers had time to consider their next steps. Over seven minutes passed after officers arrived on the scene before they had any physical contact with Scott. Indeed, the officers called their sergeant to ask for guidance before continuing the encounter. And once

Scott exited his apartment, he moved slowly, complied with officers' orders, and openly explained that he was suffering from mental illness. These circumstances gave the officers ample time to consider their conduct before acting, and the deliberate indifference standard applies.

Applying the deliberate indifference standard, Smith and Huntsman violated Rochelle Scott's Fourteenth Amendment rights. An officer acts with deliberate indifference by disregarding a known or obvious consequence of their actions. *Nicholson*, 935 F.3d at 693. This "entails something more than negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Tatum v. Moody*, 768 F.3d 806, 821 (9th Cir. 2014) (quoting *Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013)). In *Nicholson*, for example, an officer observed a teenager among a group of students in uniforms and with backpacks who appeared to be holding a gun pointed at the ground. 935 F.3d at 693. We held that, because the suspect "was not engaged in any threatening . . . behavior," and was surrounded by other minors, the officer acted with deliberate indifference when he rushed toward the teens and fired his weapon at them as he ran. *Id.*

Taking the facts in the light most favorable to Plaintiff, Smith and Huntsman were deliberately indifferent to the risk that their use of force could seriously injure or kill Scott. Scott presented no immediate risk to the officers before they initiated deadly force. And when officers took Scott to the ground, he cried out in distress over the course

of the encounter. After Huntsman put his bodyweight on Scott, Scott's cries were also increasingly muffled and incoherent. A jury could find the use of bodyweight force given these circumstances was deliberate indifference. *Cf. Farmer v. Brennan*, 511 U.S. 825, 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (finding when evaluating deliberate indifference in an Eighth Amendment claim that whether an "official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, . . . and a factfinder may conclude that [the] official knew of a substantial risk from the very fact that the risk was obvious").[4] Thus, construing all facts and resolving all disputes in Rochelle Scott's favor, Smith and Huntsman violated her Fourteenth Amendment rights.

B. Rochelle Scott's Fourteenth Amendment rights were not clearly established at the time of the violation.

Even if a constitutional violation occurred, Smith and Huntsman are nevertheless entitled to qualified immunity unless the constitutional right was clearly established at the time of the officers' conduct. *Rice*, 989 F.3d at 1120. Because no analogous case existed at the time of the events here, we hold that the district court erred by denying Defendants qualified immunity for this claim.

We have long recognized that a child's constitutionally protected interest in the companionship of a parent can

4. Defendants appear to acknowledge as much, arguing that they did not engage in "conscience shocking" behavior only by applying the purpose-to-harm standard.

be violated by an officer's conscience shocking conduct. *See Hayes v. County of San Diego*, 736 F.3d 1223, 1229-30 (9th Cir. 2013). But clearly established law cannot be defined at such a "high level of generality." *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). Instead, "[f]or a right to be clearly established, case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law." *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017). That is not the case here. Although Plaintiff need not identify a factual twin, Plaintiff identifies no authority for finding a Fourteenth Amendment violation here, instead citing only a general statement of the rule.[5] We have not identified any such authority either. Smith and Huntsman are entitled to qualified immunity for this claim.

We thus reverse the district court's summary judgment denying Officers Smith and Huntsman qualified immunity because Rochelle Scott's constitutional right was not clearly established at the time of the violation. But we now clarify that right going forward. *See supra* Section II.A.

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5. Although the facts underlying the claims may be the same, "Fourth Amendment cases . . . do not clearly establish the contours of . . . Fourteenth Amendment substantive due process rights." *Nicholson*, 935 F.3d at 696 & n.5.

CONCLUSION

We affirm the district court's denial of qualified immunity to Smith and Huntsman as to the Fourth Amendment claim and reverse the court's ruling as to the Fourteenth Amendment claim. We remand for proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party shall bear its own costs on appeal.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED MARCH 14, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. 2:20-cv-01872-RFB-EJY

SCOTT, *et al.*,

Plaintiffs,

v.

SMITH, *et al.*,

Defendants.

ORDER

I. INTRODUCTION

Before the Court is Defendants Kyle Smith, Theodore Huntsman, and Las Vegas Metropolitan Police Department's ("LVMPD") Motion for Summary Judgment. ECF No. 19.

For the foregoing reasons, the motion is granted in part and denied in part.

II. PROCEDURAL BACKGROUND

Plaintiffs[1] filed the Complaint on October 7, 2020. ECF No. 1. The Complaint alleges nine causes of action: (1) excessive force in violation of the Fourth Amendment against Defendants Smith and Huntsman, (2) denial of medical care in violation of the Fourth Amendment against Defendants Smith and Huntsman, (3) denial of familial relationship in violation of substantive due process under the Fourteenth Amendment against Defendants Smith and Huntsman, (4) municipal liability for an unconstitutional custom or policy against Defendant LVMPD, (5) disability discrimination in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et. seq., against all Defendants, (6) municipal liability for failure to train against Defendant LVMPD, (7) municipal liability for ratification against Defendant LVMPD, (8) battery against all Defendants, and (9) negligence against all Defendants. *Id.* Plaintiffs seek compensatory, hedonic damages, funeral and medical expenses, punitive damages, and costs and fees. *Id.* Defendants answered on January 6, 2021. ECF No. 8. Discovery closed on January 6, 2022. *See* ECF No. 18.

Defendants filed the instant Motion for Summary Judgment on February 7, 2022. ECF No. 19. Plaintiffs responded on April 5, 2022. ECF No. 25. Defendants

1. Plaintiff, Rochelle Scott, is decedent Roy Anthony Scott's surviving daughter and is suing in her individual capacity and as co-special administrator of Scott's estate, along with Plaintiff Fredrick Waid, also a co-special administrator of Scott's estate.

replied on May 6, 2022. ECF No. 29. A hearing was held on the motion on June 22, 2022. ECF No. 31. This Order follows.

III. FACTUAL BACKGROUND

a. Undisputed Facts

The Court finds the following facts to be undisputed. Sometime in the early morning hours of March 3, 2019, Scott called 911 for assistance. He reported there were assailants outside of his apartment, one of whom was possibly holding a saw. LVMPD officers, Defendants Smith and Huntsman, were assigned to the call and arrived at Scott's apartment shortly thereafter. He was never suspected of a crime.

Both officers were wearing body cameras.

Upon arrival, the officers go to Scott's door, then knock and announce themselves as police officers. Scott yells for them to break his door down because there are people in his apartment. Besides Scott's voice, no other voices or noises are evident from outside the door. The officers tell Scott that they are not going to break his door down. About three minutes after the encounter had begun, Huntsman asks Scott, "have you been diagnosed with any mental health diseases?" Scott's response is unintelligible from outside of the door where the officers are still standing.

Smith and Huntsman then walk back downstairs to discuss what to do, as Scott has not exited his apartment.

Smith tells Huntsman that he is not "going in" the apartment. Huntsman agrees saying that Scott appears "wacky." Smith calls the officers' assigned Sergeant, on a cell phone. Smith explains to that person that they arrived at the site of the call, and no one appeared to be there except for the caller who was inside of the apartment. While Smith is on the phone, Huntsman shines his flashlight into the second story window where Scott is visible. Upon completion of the call, Huntsman confirms with Smith that both could see Scott. Huntsman then remarks that he could see "that crazed look in his eye—there ain't nobody in there." Huntsman then asks Smith what the Sergeant said, and Smith relays that the Sergeant told him that they could not do anything if they did not have a cause or basis to enter. Smith then abruptly yells toward the window at Scott: "Sir, go to the door." Smith then goes back up the stairs and then knocks on the door a few more times, then yells "Police Department come to the door." Finally, after a few seconds, Scott opens the door. This is approximately seven minutes after the encounter began.

Scott is compliant and walks out of his apartment. Smith goes back down the stairs, upon hearing the door open. Scott appears to be holding a pipe when he comes out of the apartment. Smith flashes his light at Scott once he appears, points his gun at Scott, and orders Scott to drop the pipe. Scott complies and walks downstairs. As he walks down, Scott says twice "What am I supposed to do." Smith tells him "Get down here." Scott, with a phone visible in his hand, walks towards a wall facing his apartment and turns to face the officers. Huntsman

asks Scott if he has any other weapons on him. Scott then reaches into his pocket and hands a pocketknife to Huntsman and says "I am sorry." Huntsman directs Scott to turn around to face the wall. Scott tells the officers that he has "paranoid schizophrenia." He then asks twice, "can you just put me in the car please." Huntsman tells Scott that they were "just trying to talk" to him to figure out what is happening. Scott tells Smith that the light in his eyes is bothering him. Smith tells Scott "my partner is going to pat you down to make sure you don't have any weapons okay." Scott then says "I am scared." He tells the officers that he does not want to turn his back and face the wall because someone might get him. He says "I am paranoid." Smith tells Scott "You're fine. We are out here to help you okay." Scott repeatedly replies, "I am not fine." Smith says "we are just here to help you." Smith says that he wants to check Scott for weapons.

The officers then approach Scott wearing gloves. The officers approach him and put their hands on him to hold his arms. Scott then repeatedly says in a plaintive voice "please, please, please." Huntsman then places Scott's left arm behind his back as Smith approaches from the other side. During this time, Scott repeatedly states, "what are you doing," and pleads with the officers to "stop." The officers tell Scott to stop moving so they can handcuff him. The officers continue to grab and hold Scott moving him away from the wall and placing his hands behind his back. He asks the officers "Why are you all doing this to me?" He visibly appears increasingly concerned and scared by the officers' actions.

Scott then either falls to the ground or is taken to the ground by the officers. He begins to resist being handcuffed by the officers, as he attempts to face them and asks again why they are doing this to him. While on the ground, Scott's pleas escalate in intensity — eventually turning to screams — as both officers grab ahold of his arms. Specifically, the body camera footage shows Scott initially lying on his back with the officers holding him down and holding his hands pressed to his body. The officers continue holding him in this position for approximately three minutes. Scott is now screaming over and over "please leave me alone." Now, he is actively resisting the officers' attempt to handcuff him. The officers eventually roll Scott over onto his stomach. Scott struggles against the officers, pleading for them to leave him alone, while the officers repeatedly tell him to stop. The officers physically struggle with Scott. Smith then places his weight on Scott's buttocks and legs. Huntsman places his weight on Scott's back and his knee on Scott's neck for well over a minute. The process of handcuffing Scott takes approximately two to three minutes.

Huntsman orders paramedics to the scene for a cut on Scott's lip. Officers then attempt to roll him on his side. After a few minutes, Scott stops yelling or thrashing around. Defendant Smith asks Scott if he is okay, Scott does not respond. The officers then check Scott's breath and pulse and conduct a sternum rub. They note that Scott appears to be alive and breathing. Huntsman contacts the dispatch operator and requests that medical team be expedited to the scene as Scott is having trouble breathing.

Smith calls their Sergeant to report that Scott's breathing is faint.

The paramedics arrive on the scene some minutes later. Scott is still unresponsive. At some time later, Scott is reported to have died.

b. Disputed Facts

The following facts are in dispute. The parties dispute whether, just prior to falling to the ground, Scott attempted to reach into his jacket pocket, prompting Huntsman to place Scott's left arm behind his back. They dispute whether Scott voluntarily dropped to the ground or fell or was taken down to the ground in a takedown maneuver. Further, they dispute whether Scott resisted the officers with extraordinary strength. The parties also dispute the duration of how long Scott was face down in a prone position on the ground, how long Huntsman had his knee on Scott's back, the timing of the handcuffing, and how long Huntsman had his knee on Scott's neck. Moreover, they dispute whether the officers' use of force caused Scott to asphyxiate. Lastly, the parties dispute Scott's cause of death, including whether cardiac failure, resulting from hypoxia caused by the officers' use of force, was a proximate cause of his death.

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, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (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 non-moving 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, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (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. County of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (citations omitted).

V. DISCUSSION

a. Federal Law Claims

The Court first addresses Plaintiffs' federal law claims. For the reasons discussed below, the Court grants Defendants summary judgment only against Plaintiffs' second cause of action for denial of medical care but denies it as to the rest of the federal law claims.

Appendix B

i. Excessive Force (First Cause of Action)

Defendants seek summary judgment as to the claim under the First Cause of Action that Defendants Smith and Huntsman used excessive force against Scott in violation of the Fourth Amendment.

To make out a prima facie case under 42 U.S.C. § 1983, a plaintiff must show that a defendant: (1) acted under color of law, and (2) deprived the plaintiff of a constitutional right. *Borunda v. Richmond*, 885 F.2d 1384, 1391 (9th Cir. 1989).

Claims of excessive force are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (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. In determining whether a particular use of force was unreasonable and thus in violation of the Fourth Amendment, a court is to consider: "(1) the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted, (2) the government's interest in the use of force, and (3) the balance between the gravity of the intrusion on the individual and the government's need for that intrusion." *Williamson v. City of National City*, 23 F.4th 1146, 1151 (9th Cir. 2022) (citing *Graham*, 490 U.S. at 397).

Defendants argue that Smith and Huntsman used objectively reasonable force in performing a lawful

detention of Scott. First, the officer's brief use of body weight to detain Scott did not constitute deadly force. Second, the officers had a legitimate interest in using force against Scott because they were attempting to take him into custody for a mental health hold pursuant to Nevada Revised Statute § 433A.160.[2] Third, the officers reasonably perceived Scott as a threat because he had already possessed two weapons and was objecting to a pat down intended to ensure he had no other weapons.

For support in finding that the force the officers used was reasonable, Defendants rely on *Gregory v. City of Maui*, 523 F.3d 1103, 1105 (9th Cir. 2008). There, the decedent, who was mentally distressed and under the possibly influence of drugs, was wielding a pen as a weapon; the officers verbally ordered him to drop the pen; and when he refused, the officers wrestled him to the ground and handcuffed him. *Id.* at 1106-07. Throughout the struggle, he kept shouting that he could not breathe but continued to fight the officers. *Id.* at 1105. When the officers finally handcuffed him, they discovered that he

2. Nevada Revised Statute § 433A.160(1)(a), in its current formulation, authorizes the police to place a person they have "probable cause to believe" is "in a mental health crisis . . . on a mental health crisis hold by" "[t]aking the person into custody without a warrant for assessment, evaluation, intervention and treatment at a public or private mental health facility or hospital." In Nevada, this is known as a "Legal 2000" detention. *At the time of the March 2019 incident* in this case, however, the statute only authorized an officer to take a person into custody if the officer had "probable cause to believe that person has a mental illness, and because of that illness, is *likely to harm himself or herself or others if allowed his or her liberty*." Nev. Rev. Stat. § 433A.160(1)(a) (emphasis added) (amended 2019); *see also* 2019 Nev. Stat. 345, 351.

was not breathing. *Id.* They were unable to resuscitate him. *Id.* The Ninth Circuit upheld the dismissal of the case, reasoning that the use of force was not excessive in light of: the decedent's aggressive behavior throughout the confrontation, his resistance when they tried to take his pen, the officers resorting to physical confrontation only after verbal requests failed, and the lack of evidence that the officers used weapons. *Id.* at 1107-08.

Defendants also assert that this case is unlike *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), an excessive force case involving a decedent who suffered from schizophrenia. In *Drummond*, the decedent was "hallucinating and in an agitated state" in a convenience store parking lot, and the defendant officers were called to take him into custody to "help protect" him. *Id.* at 1054. Even though the decedent had not committed a crime, was not a danger to himself or others, and did not offer resistance, the officers knocked him to the ground and placed a knee to the back of his neck as they put him into protective custody. Two officers continued to place their entire body weight on the decedent's back and neck, for several minutes after he was restrained, controlled, prone, no longer a threat, and pleading for air. The decedent suffered a heart attack and fell into a permanent coma. The Ninth Circuit held that, based upon the undisputed and disputed facts asserted by the plaintiff, the force used was unconstitutionally excessive, and reversed a grant of summary judgment in favor of defendant police officers. Here, Defendants assert that *Drummond* stands for the proposition that it is unconstitutional for multiple officers to put their entire body weight on the torso and neck of a handcuffed, prone,

and non-resisting suspect for several minutes. Defendants contend that Smith and Huntsman did not use force until Scott resisted their efforts to pat him down. Even then, the officers only briefly applied weight to Scott's back and buttocks to control him as he escalated his resistance. The officers carefully monitored the situation and only used necessary, minimal force, during the 90-second struggle, as indicated by the fact that they never used any tools, punches, kicks, or strikes against Scott.

In opposition, Plaintiffs contend that the force the officers subjected Scott to during their interaction with him was not objectively reasonable. First, the officers used unreasonable force when they used a takedown maneuver on Scott because there was no government interest to justify applying such force, as Scott had committed no criminal offense. In fact, the Ninth Circuit has held that individuals have a right to be free from the application of force when engaging in passive resistance, which is all Scott engaged during his encounter. Indeed, he had only called 911 seeking assistance during a mental health crisis. Second, the officers used unreasonable force when they applied their bodyweight to Scott, after he was already prone on the ground.

The Court concludes that a jury could find that the officers' use of force in this case was not objectively reasonable.

1. Type and Amount of Force

A jury could find that the severity of intrusion on Scott's Fourth Amendment rights was significant based on the type and amount of force inflicted. Under this

consideration, a court assesses the "specific factual circumstances of the case in classifying the force used. The nature and degree of physical contact are relevant to this analysis, as are the risk of harm and the actual harm experienced." *Williamson*, 23 F.4th at 1151-52 (citations omitted).

The Court finds that, based upon the undisputed and disputed facts, the force in this case escalated to become a severe and substantial intrusion on Scott and his rights. The officers began by ordering him out of the apartment. While Scott was passive, simply standing against the wall, the officers escalated the force and intrusion by grabbing Scott without his consent and against his will. They then held his arms by his sides. The officers then allegedly used a takedown tactic which forced Scott to the ground. They continued to hold Scott while on the ground, keeping one of his arms pinned behind him while pressing his other arm to this stomach torso so he could not control his arms and to keep him pinned to the ground. Initially, he was on his back with the officers pinning him down by using the exertion of force against him. As Scott continued to plead with the officers and to attempt to get up from the ground, the officers forced him over on his stomach. Both officers placed their body weight on Scott, as he lay prone on his stomach. While he could move his arms and legs, the officers' body weight and strength completely pinned and held him to the ground. While he was pinned in this position, Huntsman placed his knee and body weight on Scott's neck.

Further, the Court finds that the risk of harm and actual harm to Scott from the use of force was substantial.

Taking the facts in the light most favorable to Plaintiffs and their expert, the Court concludes that a jury could find that the use of force by the officers had the potential for fatal consequences, and that it in fact caused his death. Plaintiffs' expert opined that exerting substantial force in the form of an officers body weight on a person's neck who was in Scott's position can have catastrophic and fatal consequences, even if only done for several seconds. While Defendants and their expert dispute that the officers use of force contributed to Scott's death, it is not the role of the Court at this stage to resolve factual disputes and make credibility determinations.

At bottom, the Court finds that, based upon the record, there are genuine issues of disputed fact as to the type and amount force used. There is a genuine issue of fact as to whether the officers used force to bring him down, or whether he voluntarily fell to the ground. There is also a fact issue as to the severity of the positional restraint used by the officers. There is also a genuine dispute as to the length of time and amount of pressure that was exerted on Scott's neck. Finally, there is dueling expert testimony regarding the impact of Huntsman's use of force on Scott's back and neck. The genuine factual disputes underlying this consideration prevent the Court from granting summary judgment.

2. Government Interest

The Court further finds that there are genuine issues of disputed fact as to the government's interest in the use of force against Scott. Assuming the facts in the light most favorable to Plaintiffs, a jury could find that there

was *de minimis* or no government interest in the use of force. 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). "Among these considerations, the most important is the second factor—whether the suspect posed an immediate threat to others." *Williamson*, 23 F.4th at 1153 (internal quotation marks omitted). Nevertheless, these factors are not exclusive, and the Court must consider the totality of the circumstances. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010).

First, as to the most important factor in the analysis, the Court finds that, viewing the evidence in a light most favorable to Plaintiffs, Scott posed *no threat* to the officers or anyone else during this incident. The officers had not received any information that Scott had threatened or was threatening anyone. Upon arriving at the scene, Scott was alone in his apartment and did not threaten the officers during their communications through the door. Instead, it was the officers who ordered him out of his apartment after he said that people were after him. When he eventually emerged from the apartment, he immediately dropped, upon command, the pipe he had in his hand. He never threatened the officers with it.

Furthermore, after leaving his apartment, Scott continued to behave in a nonthreatening manner. He stood against the wall as ordered and made no threatening

gestures toward the officers. As he stood against the wall, he spoke to the officers in calm and pleading tone. When questioned about whether he had weapons, he pulled a pocketknife from his pants and handed it to the officers. *He had not threatened the officers, anyone else or even himself with any weapon*, including the pipe or pocketknife, throughout their encounter. He told them he suffered from schizophrenia, was paranoid, and scared. At that moment, he was not a threat to anyone and there was no immediate need for the officers to advance on him and place their hands on him when they did. At each stage of the encounter, it was the officers who escalated the level of force, not Scott. The undisputed and disputed facts demonstrate that he posed no threat to the officers when they initiated and escalated their use of force. As the Ninth Circuit has clearly proclaimed, "force is only justified when there is a need for force." *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 (9th Cir. 2007) (interpreting *Graham*). Scott's nonthreatening manner did not justify the officers' use of force.

Second, the Court concludes that a jury could find that the severity of the crime in this case did not warrant the force used by the officers. Specifically, based upon the undisputed and disputed facts taken in the light most favorable to Plaintiffs, Scott had not committed any crime at the time that the officers initiated their use of force, even as they escalated their use of force against him. It is undisputed that the officers never observed a crime committed by Scott nor were they told by the 911 radio dispatcher that Scott had committed a crime. He never threatened them with a weapon or with force. He also

never threatened to harm himself. Indeed, Defendant Smith was the one who ordered Scott out of the apartment which started the incident. Thus, the officers observed no crime that justified their use of force at all.

The Court rejects Defendants' assertion that the officers' level of force was justified as a matter of law by their need to affect a Legal 2000 detention under Nevada law. *See* NRS § 433A.160(1)(a) (amended 2019). At the time of the encounter in this case, the version of the statute in force only authorized an officer to take a person into custody if there was "probable cause to believe that person has a mental illness, and because of that illness, is *likely to harm himself or herself or others if allowed his or her liberty.*" *Id.* (emphasis added). The record does not support a finding by this Court that the officers had probable cause to believe that Scott was likely to harm anyone, including himself, if left at his liberty. He had not threatened anyone. He had been compliant and passive with the officers until they grabbed him. He told the officers that he did not want to face the wall, and that he was feeling paranoid. In fact, at the moment the officers grabbed him and allegedly took him down, there was no apparent reason to use force in that moment. Even after the officers grabbed him and could tell that he had no weapons, they could have released their grip upon him. While it is undisputed that Scott had called police and might have been seeking assistance, these facts by themselves do not establish the level of probable cause set forth in the statute, at that time, to detain Scott. *Id.* At best, there is a genuine issue of disputed fact as to whether the officers had probable cause to take Scott into custody. This dispute prevents a grant of summary judgment.

Thus, even if the officers' intent was to effect a detention for his benefit, assuming the facts in Plaintiffs' favor, it was clear that their actions were only exacerbating his distress and were not justified as a matter of law.

Third, the Court finds that a jury could conclude that, even if Scott was resisting arrest, he had a reasonable basis for doing so. "[A] person has a limited right to offer reasonable resistance to an arrest that is the product of an officer's personal frolic. That right is not triggered by the absence of probable cause, but rather by the officer's bad faith or provocative conduct." *Blankenhorn*, 485 F.3d at 479. As an initial matter, the Court has just found that there are genuine issues of disputed fact as to whether the officers even had legal authority to detain Scott, let alone arrest him. Moreover, the Court has found that it is undisputed that the officers did not have a factual basis for effecting a lawful arrest. The officers never observed Scott commit a crime nor were they told that he had committed one. Thus, there are genuine issues of disputed fact as to whether Scott's resistance was itself lawful opposition to an unlawful detention and whether the officers' use of force constituted "bad faith or provocative conduct." This too prevents a grant of summary judgment as to this claim.

3. Balance of Interests

Next, the Court finds, for the reasons previously stated in this order, that a jury could find that the balance of interest heavily weighs in favor of Scott as the government had minimal or no interest in the use of force implemented, because Scott posed no threat to anyone at the time that severe, and ultimately lethal,

force was used against him. To put it directly, a jury could find the gravity of the intrusion was significant given Scott's death, and that the government's need for intrusion was minimal given the lack of a threat Scott presented. Indeed, a jury could reasonably determine that there was no need to use any force against Scott. As the Ninth Circuit in *Drummond* and *Glenn v. Washington County*, explained, there is a limited government interest in using force against an individual who is experiencing a mental health crisis but who poses no physical threat, particularly when the purpose of the interaction is to take the individual into a mental health hold for his or her protection and benefit. *See* 343 F.3d 1058; 673 F.3d 864 (9th Cir. 2011). In terms of the officers' attempt to assist Scott, use of force does not become reasonable simply because the objective is to provide assistance to a person in mental distress. In *Drummond*, for instance, the Court observed that Drummond "was a mentally disturbed individual not wanted for any crime, who was being taken into custody to prevent injury to himself," such that "causing him grievous injury d[id] not serve that objective in any respect." 343 F.3d at 1059. Again, at best, there is a genuine issue of disputed fact as to whether the balance of interests here would support the officers' use of force given the government's minimal interest here.

4. Consideration of Alternatives

Finally, the Court finds that one additional, but salient consideration, must be considered in its objective reasonableness analysis: the availability of other strategies that involved less or no force. In analyzing the objective

reasonableness of a particular use of force, courts may take into account whether the officer considered the existence of alternative tactics, if any, to effect an arrest or detention. *Bryan*, 630 F.3d at 831. In this instant case, the Court finds that, based upon the undisputed and disputed facts, there were alternative less forceful tactics that the officers could have used. As Scott posed no threat to anyone or himself, there was no immediate need to take him into custody. Accordingly, rather than grab Scott and allow him to be taken to the ground, the officers simply could have talked to him until they felt he was more calm or until they reached a mutually agreeable approach to take him to a mental health facility.

In sum, the Court finds that, based on all these considerations, there are genuine factual disputes as to whether the officers used excessive force against Scott that prohibit it from granting Defendants' summary judgment on this claim.

ii. Qualified Immunity

The Court rejects the Defendants' assertion of qualified immunity in this case.

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

Appendix B

Qualified immunity is an immunity from suit rather than a defense to liability, and it "ensures that officers are on notice their conduct is unlawful before being subjected to suit." *Tarabochia v. Adkins*, 766 F.3d 1115, 1121 (9th Cir. 2014). 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 (brackets in original 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 and County of San Francisco*, 751 F.3d 1039, 1052 (9th Cir. 2014). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) ((brackets in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). While a case directly on point is not required for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Further, the right must be defined at

"the appropriate level of generality . . . [, and 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 Ashcroft*, 563 U.S. at 741-42. The plaintiff bears the burden of proving that the right was clearly established. *Tarabochia*, 766 F.3d at 1125.

In deciding a claim of qualified immunity where a genuine issue of material fact exists, the court accepts the version asserted by the non-moving party. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013). Summary judgment must be denied where a genuine issue of material fact exists that prevents a finding of qualified immunity. *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154, 1160 (9th Cir. 2014).

Defendants argue that they are entitled to qualified immunity because the officers' use of force was reasonable. They contend that the officers did not use deadly force, and no court has ever held that brief use of body weight to control a resisting suspect prior to handcuffing is deadly force. Rather, they argue, that the Ninth Circuit's caselaw on positional asphyxia holds that officers can use body weight to control and restrain a prone resisting suspect, but that officers should remove all body weight once the suspect is handcuffed and no longer a threat. The officers, Defendants assert, did that here. Second, Defendants argue that they are entitled to qualified immunity because the law regarding the officers' use of force was not clearly established. According to them, no Supreme Court or Ninth Circuit case put the officers on notice that their

use of bodyweight under the facts and circumstances of this case could be unconstitutional. The Court disagrees.

The Court first finds that Plaintiffs have presented facts demonstrating that Defendants' alleged conduct violated Scott's constitutional rights. In deciding whether Defendants may assert qualified immunity where facts are disputed, the Court accepts Plaintiffs' version of events as the non-moving party. Based on Plaintiffs' assertions, Defendants Smith and Huntsman violated Scott's Fourth Amendment right by using excessive force, resulting in death, when they employed force against an individual going through a mental health crisis who posed no threat, was compliant and passive with the officers, but who was nonetheless subject to being grabbed and forced to the ground unexpectedly and against his will. At the time force was initiated against him, he had committed no crime and there was no legal basis to take him into custody under Nevada law for a Legal 2000 detention. He pleaded with the officers to leave him alone and release him, as their use of force, without a legal basis, escalated. What is more, as Scott became increasingly distressed and panicked, the officers continued to escalate the force by rolling him on his stomach and placing their body weight on him. As a result, one of the officers placed his body weight on Scott's back and neck for several minutes causing his ultimate death from hypoxia.

The use of force alleged by Plaintiffs is unconstitutional. First, it is unconstitutional to use force when force is not legally justified. As the Ninth Circuit has held "force is only justified when there is a need for force." *Blankenhorn*, 485 F.3d at 481; *see also Andrews v. City of Henderson*, 35

F.4th 710, 719 (9th Cir. 2022) (explaining that *Blankenhorn* established that it was unconstitutional to take down and pile on top of a suspect who had been calm and posed no threat to officer safety). Here, the Court finds that the officers sought to use force to detain Scott when they had no legal basis to do so, as he had committed no crime and did not even satisfy the threshold for a Legal 2000 arrest.

The Court further finds that, even if Scott was subject to a Legal 2000 arrest, it was unconstitutional for them to use substantial or nontrivial force on a passive and compliant individual like Scott. *See Bryan*, 630 F.3d at 829-830. Officers may not subject an individual to nontrivial force when he has not resisted, or has merely engaged in passive resistance to, an officer's commands. *See id.*; *see also Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013) ("The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008"); *Nelson v. City of Davis*, 685 F.3d 867, 881-82 (9th Cir. 2012) (acknowledging that the Ninth Circuit has "recognized that a failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force"). Assuming the facts in Plaintiffs' favor, there was no need or legal basis to initiate force against Scott, and there certainly was no need or basis to escalate that force with the takedown maneuver or the use of body weight on his back and neck. Separately, there is also a genuine issue of fact as to whether any resistance by Scott could be construed as a lawful opposition to an unlawful detention. *See Blankenhorn*, 485 F.3d at 479.

In addition, it is unconstitutional for an officer to use substantial force against an individual suspected of a minor crime and who posed no threat to officer safety. *See Young v. County of Los Angeles*, 655 F.3d 1156, 1168 (9th Cir. 2011) ("The principle that it is unreasonable to use significant force against a suspect who was suspected of a minor crime, posed no apparent threat to officer safety, and could not be found to have resisted arrest, was thus well-established in 2001. . . ."). In this case, Scott was not suspected of even committing a minor crime. Rather, he was allegedly being taken in custody for his own benefit — without a legal basis. Under such circumstances, the use of force, especially the substantial force employed in this case, is unconstitutional.

As for the second prong of the qualified immunity inquiry, the Court finds that Plaintiffs have also met their burden in showing that Defendants violated clearly established rights. The cases cited above in the Court's discussion regarding the first prong of the qualified immunity analysis demonstrate that the law regarding Defendants' unconstitutional conduct was clearly established at the time of the officer's March 2019 encounter with Scott. *See, e.g., Blankenhorn*, 485 F.3d at 481; *see also Andrews*, 35 F.4th at 719; *Young*, 655 F.3d at 1168.

The Court disagrees with Defendants that the law was not clearly established as to their conduct in this case. Defendants' qualified immunity analysis focuses almost exclusively on the application of force to Scott's neck. The Court, however, must consider the entire interaction between Scott and the defendants when determining the

objective reasonableness of force and the applicability of qualified immunity. The Court also disagrees with Defendants' narrow construction of the principle clearly established in *Drummond*. It would be anathema to the qualified immunity jurisprudence for the Court to import a specific factual timeframe for an nontrivial use of force in this case, i.e., a knee pressed with substantial pressure to the neck of an individual, as being clearly (or not) established, because the qualified immunity inquiry does not require that level of detail, *see Gates*, 229 F.3d at 1288, and in this case, there are genuine issues of disputed fact as to the extent of the force and its duration, *see Sandoval*, 756 F.3d at 1160.

Separately, the Court finds that qualified immunity must also be denied because there are genuine issues of disputed fact regarding: a.) whether there was probable cause to even detain Scott under Nevada law, b.) whether Scott exhibited any conduct or behavior that warranted even placing hands on him, c.) whether the officers used a takedown maneuver on Scott to force him to the ground, d.) how actively Scott was resisting the officers at various stages of the encounter, e.) how long Huntsman's knee was on Scott's neck, f.) when Scott was subdued and handcuffed, and g.) whether there were less intrusive or nonintrusive tactics available to the officers. These disputes require the Court to deny qualified immunity to the Defendants. *Id.*

Accordingly, the Court denies Defendants' qualified immunity defense and motion for summary judgment on this claim.

iii. Denial of Medical Care (Second Cause of Action)

Defendants contend first that it is undisputed that the officers met their constitutional obligations for provision of medical care to Scott. They assert that one minute and thirty seconds after Scott was handcuffed, the officers requested medical for precautionary reasons. At the time of the medical request, Scott had not complained of injury nor was he having difficulty breathing. When Scott showed signs of medical distress, Defendant Huntsman requested that medical expedite. Throughout the encounter the officers monitored Scott's breathing and pulse and provided updates. Therefore, Defendants argue, the officers met their constitutional obligations to promptly summon medical assistance. Second, Defendants assert that, at a minimum, there is no clearly established law prohibiting the way the officers handled Scott's medical treatment.

The Fourth Amendment requires that law enforcement officers provide objectively reasonable post-arrest care. *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1098-99 (9th Cir. 2006). Plaintiffs concede this claim cannot survive summary judgment and abandon it. The Court therefore grants Defendants summary judgment as to this claim.

iv. Denial of Familial Relationship (Third Cause of Action)

Defendants assert that the officers did not engage in sufficiently "conscience shocking" behavior to establish a Fourteenth Amendment denial of familial

relationship claim. The officers were only attempting to lawfully handcuff Scott and, once their task was completed, immediately placed him into the recovery position and summoned medical. There is no evidence the officers intended to harm Scott or acted with deliberate indifference towards his health. Plaintiffs, on the other hand, contend that the officers acted with deliberate indifference to Scott's needs. There was no urgency for them to act because Scott never threatened or attacked them. He merely sought to avoid being touched and handcuffed. Thus, by using excessive force against him while he was experiencing a mental health crisis, they acted with deliberate indifference. All this, Plaintiffs assert, is sufficient to establish a claim for Fourteenth Amendment deprivation of familial relationship.

The Court concludes that a jury could find that the officers acted with deliberate indifference to Scott's needs in violation of Plaintiffs' substantive due process right to a familial relationship.

A substantive due process claim may be asserted by both the parents and children of a person killed by law enforcement officers. *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). "[O]fficial conduct that shocks the conscience in depriving parents [or children] of that interest is cognizable as a violation of due process." *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1132-33 (9th Cir. 2017) (internal quotations marks omitted). In determining whether excessive force shocks the conscience in this context, the court must first ask "whether the circumstances are such that 'actual deliberation [by the officer] is practical.'" *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2007) (*quoting*

Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 372 (9th Cir. 1998)). Where actual deliberation is practical, then an officer's "deliberate indifference" may suffice to shock the conscience. *Osborn*, 546 F.3d at 1137. The term "deliberation" is not to be interpreted in a narrow, literal, or technical sense. *See Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). On the other hand, if an officer is forced to act quickly because of an escalating situation or the evasive actions of a suspect, then it will be deemed that an insufficient period of time for deliberation existed and the heightened purpose to harm standard will apply. *See Tan Lam v. City of Los Banos*, 976 F.3d 986, 1003-04 (9th Cir. 2020); *Wilkinson*, 610 F.3d at 554. Thus, where a law enforcement officer "must make a snap judgment" because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose "to cause harm unrelated to the legitimate object of arrest." *Osborn*, 546 F.3d at 1137, 1140.

Here, Plaintiffs' theory is that the officers acted with deliberate indifference to Scott's needs, and that such deliberate indifference establishes the "shocks the conscience" requirement for the purposes of establishing a Fourteenth Amendment deprivation of familial relationship claim. In contrast, Defendants' theory is that this case involves the purpose to harm standard because Smith and Huntsman were required to make split-second decisions while lawfully arresting Scott. The Court finds that, based upon the undisputed facts, the officers had sufficient time and lack of exigency such that they had time to deliberate.

Appendix B

Nine minutes pass between the time the officers arrive on the scene and the time they decide to place their hands on Scott. More specifically, almost six minutes pass from the time the officers arrive on the scene before Huntsman asks Smith regarding their Sergeant's assessment of their initial encounter with Scott. Calmly, Smith relays that the Sergeant told him that they could not do anything if they did not have a cause or basis to enter. Both officers, while shining their flashlights at Scott's window at different times, acknowledge seeing him inside, Smith even determining that Scott "looks normal." After the call with the Sergeant, Smith and Huntsman spend more than a minute trying to get Scott to open the door until Scott finally does. More than two minutes pass between the time Scott opens the door and Huntsman grabs Scott's left arm. During these more than two minutes, Scott complies with Smith's order to drop the pipe in his hand, asks two times what he is supposed to do, hands Huntsman the pocketknife he had in his pocket, tells the officers he has "paranoid schizophrenia," asks to be put in the car, complains about the light being shined in his face, explains he is paranoid and therefore does not feel comfortable turning towards the wall to be pat down, and then, in a calm demeanor, states that he is not fine, and finally, asks if he can take off his shirt.

Before Huntsman grabs Scott's left arm, Scott was not acting in a manner that would require either officer "to 'act decisively,' "without the luxury of a second chance' to address a life-threatening situation." *Moreland*, 159 F.3d at 372. In fact, after the officers arrived on the scene,

they had sufficient time to speak with Scott, assess the scene, and call their Sergeant. Further, they did not need to order Scott out of his apartment, nor did they have the legal authority to detain him at that point. Nevertheless, after Scott came out of his apartment, he did not threaten anyone, including himself. He was passive and compliant. He admitted to suffering from schizophrenia and being paranoid. He attempted to calmly interact with the officers. At the time the officers their initiated contact with Scott, and as they continued to escalate their force, there was no threat to anyone or a legal need to initiate or escalate such force. Even as Scott pleaded with the officers to leave him alone and release him, the officers continued to escalate their use of force despite its clear detrimental effect on his mental state. Accordingly, the facts show that the officers had sufficient time to deliberate before they decided to use and escalate force against Scott. *Cf. Greer v. City of Hayward*, 229 F. Supp. 3d 1091, 1108 (N.D. Cal. 2017) ("Here, the officers had time to deliberate while they lay on Greer's back as he struggled to breathe."); *Wroth v. City of Rohnert Park*, No. 17-CV-05339-JST, 2019 U.S. Dist. LEXIS 68068, 2019 WL 1766163, at *9 (N.D. Cal. Apr. 22, 2019) ("[O]nce officers have subdued a suspect to the point that there is no longer a threat, it becomes practical to deliberate about the type and degree of force to use in continuing to restrain the suspect.").

Next, applying the deliberate indifference standard and viewing the evidence in a light most favorable to Plaintiffs, the Court finds that there are genuine issues of fact for a jury to resolve, for the purposes of establishing whether the officers acted with deliberate indifference.

For instance, there is dueling evidence in the record that a jury must weigh as to: (a) whether use of force (both the takedown and the restraint) on Scott was at all necessary; (b) whether there were opportunities to use lesser intrusions to subdue Scott; and (c) whether the continued use of force on Scott's neck exhibited deliberate indifference when Scott began to cry out with increasing intensity while pinned to the ground. Therefore, there are material factual disputes in the record as to whether the officers acted with deliberate indifference. Further, assuming the facts in Plaintiffs' favor, a jury could find that the officers acted with deliberate indifference in a non-emergency situation, or that they acted with a purpose to harm Scott.

In sum, genuine issues of fact remain as to Plaintiffs' denial of familial relationship claim.

Lastly, the Court finds that Defendants have failed to show that they are entitled to qualified immunity on this claim. Once again, the Court accepts Plaintiffs' version of events as the non-moving party in deciding whether Defendants are entitled to qualified immunity where facts are disputed. As to the first prong, the Court incorporates by reference its analysis above finding that actual deliberation was practical, that the officers had sufficient time to deliberate using force against Scott, that such use of force led to Scott's death, even though there was no imminent need to use force against Scott, and that such conduct amounted to deliberate indifference to Scott's needs in violation of Plaintiffs' due process right to familial association. Second, and despite Defendants' argument

to the contrary, the Ninth Circuit "has recognized that a child has a constitutionally protected liberty interest under the Fourteenth Amendment in the 'companionship and society'" to a parent. *Hayes v. County of San Diego*, 736 F.3d 1223, 1229-30 (9th Cir. 2013); *see also Rosenbaum v. Washoe County*, 663 F.3d 1071, 1079 (9th Cir. 2011) ("[T]he substantive due process right to family integrity or to familial association is well established[.]").[3]

Accordingly, the Court denies Defendants qualified immunity and summary judgment on Plaintiffs' denial of familial relationship claim.

v. *Monell* Liability (Fourth, Sixth, and Seventh Causes of Action)

Defendants first argue that the Court should find that the officers did not violate Scott's constitutional rights, and accordingly find that all Plaintiffs' *Monell* claims[4] fail as a matter of law. In the alternative, Defendants argue that, even if the Court finds a constitutional violation, Plaintiffs' *Monell* claims still warrant dismissal because there is no evidence of a *Monell* violation. First, Plaintiffs never identified a single policy or practice that they allege to be unconstitutional. LVMPD has an exhaustive and comprehensive use of force policy and policies dealing with

3. A grant of qualified immunity would also be inappropriate here because there are material facts in dispute regarding this claim. *See Sandoval*, 756 F.3d at 1160.

4. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

the handling of people with mental illnesses, and Plaintiffs have produced no evidence challenging the sufficiency of these policies. Thus, there is nothing to support a *Monell* claim under the "unconstitutional policy or custom" theory. Second, the evidence shows that LVMPD exhaustively trains its officers in both use of force and its treatment of individuals who suffer from mental illness. Plaintiffs had possession of all training documents and did not find any evidence that the policy was sub-standard or deficient. Thus, there is nothing to support a *Monell* claim under the "failure to train" theory. Plaintiffs also failed to generate any evidence supporting a ratification claim. Finally, even if Plaintiffs had evidence to support a *Monell* claim under any of the above theories, these claims cannot survive because Plaintiffs have generated no evidence of any other similar incidents. In fact, Defendants contend, Plaintiffs' *Monell* claims are based entirely on a single isolated incident.

In response, Plaintiffs contend that Defendants' summary judgment motion errs by arguing that all *Monell* claims require evidence of other similar incidents. First, there is a viable *Monell* policy or practice claim because there was a lack of affirmative policies or procedures guiding LVMPD officers on applying force in manners that would avoid the dangers of placing weight on prone subjects constituting deliberate indifference, considering Defendant LVMPD's history with the maneuver's dangers. Second, Defendants Smith and Huntsman were not trained in the dangers of application of weight on a prone subject, and there was no training or policy to avoid or limit the placing of weight on a prone subject. The severe

harm to civilians was the highly predictable consequence of this deficient absence of training. This is confirmed by the subsequent death, under similar circumstances as Scott's, of an individual named Bryon Williams that prompted policy changes. Lastly, the absence of discipline can constitute ratification for the purposes of prevailing on a *Monell* claim. Here, the officers were not disciplined for their use of force against Scott. Plaintiffs asserts that the internal review was a sham as it did not evaluate the propriety or lawfulness of the takedown or explain how Scott ended up on the ground. The review also did not assess or evaluate the propriety or lawfulness of placing bodyweight when Scott was prone.

The Court concludes that a jury could find that Defendant LVMPD violated Plaintiffs' constitutional rights as established under *Monell*.

The Ninth Circuit has explained that a litigant may recover from a municipality under § 1983 on three different theories: commission, omission, or ratification. *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1249-50 (9th Cir. 2010). "Commission" refers to a local government implementing its official policies or established customs that are deliberately indifferent to a constitutional right, which includes, for example, the inadequate training of government officials. *Id.* "Omission" refers to the government's omission to an official policy - such as a failure to train. *Id.* Finally, "ratification" refers to an authorized policymaker's purposeful approval of a subordinate's unconstitutional conduct. *Id.*

Appendix B

1. Commission Theory

The Court concludes that Plaintiffs' commission theory based *Monell* liability claim should survive summary judgment because there are genuine issues of fact as to whether Defendant LVMPD had a policy or practice of subduing individuals by unlawfully placing weight on a prone subject, or whether it lacked a policy to avoid such uses of force. For instance, Plaintiffs have adduced evidence that six months after Scott's death, LVMPD officers used the same prone restraint in subduing Byron Williams. After Williams's death, county coroners concluded that the prone restraint contributed to Williams's death. Like Scott, Williams was restrained with a knee on his neck in the prone position for over one minute, a technique that Defendant LVMPD calls the "segmenting" technique. Separately, there is also deposition testimony from Defendant Huntsman that to his knowledge, "segmenting is still taught," despite the in-custody deaths of Scott and Williams.

2. Omission ("Failure to Train") Theory

Additionally, the Court finds that Plaintiffs' omission theory based *Monell* liability claim should survive summary judgment because there are genuine issues of fact as to whether the municipality failed to train its officers. First, the parties dispute the extent and scope of the relevant training in this case. Second, Defendants argue that the officers were Crisis Intervention Trained ("CIT") and implemented that training in their attempts to

subdue Scott. Plaintiffs' medical expert report, however, states that the officers here were not trained in the dangers in applying weight to someone in a prone position, despite the significant dangers in doing so, which were well-known prior to the time of the incident involving Mr. Scott. Plaintiffs also retained a use-of-force consultant who opined that LVMPD failed to properly train Smith and Huntsman on the dangers and risks associated with the use of maximally prone restraint techniques on subjects who may be exhibiting signs of Agitated Delirium or Excited Delirium prior to Scott's death. There is also deposition testimony from Defendant Huntsman that he was never trained that continued pressure to an individual's back or neck could cause hypoxia.

3. Ratification Theory

Lastly, the Court finds that Plaintiffs' ratification theory based *Monell* liability claim should survive summary judgment because there are genuine issues of material fact as to whether Defendant LVMPD ratified an unconstitutional practice by failing to discipline the subject officers, and by failing to change its approach to prone restraint following Scott's death. As stated above, there is evidence in the record that LVMPD officers used the same type of force against Byron Williams, resulting in Williams's death, and there is also testimony from Defendant Huntsman that Defendant LVMPD continues to use the "segmenting" technique. *See Henry v. County of Shasta*, 132 F.3d 512, 520 (9th Cir. 1997) ("The subsequent acceptance of dangerous recklessness by the policymaker tends to prove a preexisting disposition and policy.").

Therefore, the Court denies Defendants summary judgment on all Plaintiffs' *Monell* claims as well.

vi. Americans with Disabilities Act (Fifth Cause of Action)

1. Proper Defendants

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Plaintiffs pursue this claim against all Defendants, including against Defendants Smith and Huntsman in their individual capacities. Individuals, however, cannot be held liable under the ADA. *See* 42 USC § 12131. Accordingly, Plaintiffs' ADA claim only proceeds against Defendant LVMPD.

2. Statute of Limitations

Defendants first contend that Plaintiffs' ADA claim is barred by the applicable statute of limitations. They argue that, because Title II of the ADA does not contain an express statute of limitations, the Court borrows the limitations period from the most analogous state law claim available, Nevada Revised Statute § 651.070. Under this state statute, the limitations period for bringing a claim under the relevant state law is one year. Accordingly, Defendants argue that Scott had one year from the date of the incident to file suit, and it is undisputed that the subject

incident occurred on March 3, 2019, and that Plaintiffs did not file the Complaint until October 7, 2020. Because Plaintiffs did not comply with the applicable statute of limitations, Defendants argue that the Title II claim should be dismissed with prejudice. Plaintiffs disagree, contending that the ADA claim is timely.

The Court agrees with Plaintiffs. In *Funke v. Hatten*, No. 19-CV-01335, 2021 U.S. Dist. LEXIS 107173 (D. Nev. June 8, 2021), a case also involving a similar Title II, ADA claim, this Court found that Nevada Revised Statute § 651.070's one year statute of limitations did not

> provide an analogous claim for [plaintiff]'s allegations in this case. This finding is readily supported by a comparison of the language and object of these two statutes. Title II addresses discrimination in the provision of "services" by "public entities," whereas NRS § 651.070 is directed to discrimination in "public accommodation" including private entities. In the latter regard, this Nevada statute more closely tracks and is analogous to Title III of the ADA which is also directed to discrimination in "public accommodation" by individuals or entities, including private entities. 42 U.S.C. § 12182.
>
> A consideration of the nature of the ADA claim here only underscores why these statutes are not analogous. The nature of [plaintiff]'s Title II claim is not directed to discrimination in the provision of 'public accommodation' by Metro or

> any private entity. The claim here is based upon Metro's alleged discrimination in the provision of its services as a public entity. The Court does not find that Nevada provides a direct analogue to Title II of the ADA.
>
> The Court finds that the most analogous statute of limitations for [plaintiff]'s Title II claim is the two-year statute of limitations for state personal injury and federal § 1983 claims. *See generally, Shade v. Las Vegas Metro. Police Dep't*, 2017 U.S. Dist. LEXIS 161896, 2017 WL 4390100, at *2 (D. Nev. Sept. 30, 2017). This is consistent with other courts who have applied the statute of limitations period for personal injury claims when there is no direct analogue to an ADA Title II claim in state law. *See. e.g.*, *McCormick v. Miami Univ.*, 693 F.3d 654, 664 (6th Cir. 2012)(finding the statute of limitations period for a Title II claim in Ohio to be that for personal injury claims because Ohio has no analogue to Title II).

2021 U.S. Dist. LEXIS 107173, [WL] at *9. As in *Funke*, Plaintiffs do not allege discrimination in "public accommodations." Instead, they allege discrimination in the provision of Defendant LVMPD's services as a public entity. Thus, the two-year statute of limitations for state personal injury claims should apply. Accordingly, the applicable two-year statute of limitations date was March 3, 2021. Here, Plaintiffs' Complaint was filed on October 7, 2020, therefore the ADA claim is not time barred.

3. Analysis

The Court now addresses this claim on the merits.

Defendants argue that Plaintiffs' ADA claim fails. Here, Plaintiffs are alleging that Defendant LVMPD failed to accommodate Scott's mental disabilities while detaining him. Yet, Defendants contend that Plaintiffs fail to identify any specific reasonable accommodations that LVMPD did not provide Scott. Moreover, both officers were also CIT — meaning they underwent four days of training in learning how to assess mental illness and how to detain individuals with mental illness. Accordingly, the officers used this training to accommodate Scott's mental disabilities, including by calmly speaking to Scott, continuously trying to reassure him that they were there to help him, providing him pat down alternatives, and not rushing the encounter. Defendant LVMPD also produced its CIT training document, while Plaintiffs generated no evidence that LVMPD's training was insufficient or deliberately indifferent.

In turn, Plaintiffs argue that the ADA claim survives summary judgment because accommodations could have been made by employing de-escalation strategies with the intent of achieving a safe and nonviolent self-surrender, and by engaging in non-threatening communications, respecting Scott's comfort zone, waiting for medical assistance, and using the passage of time to defuse the situation peacefully rather than encouraging a deadly confrontation.

The Court concludes that a jury could find that Defendant LVMPD failed to reasonably accommodate any of Scott's mental disabilities in violation of Title II of the ADA.

A failure to reasonably accommodate a person's disability can constitute discrimination under Title II of the ADA. 28 C.F.R. § 35.130(b)(7). Title II also governs arrests. *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, (9th Cir. 2014). Courts have recognized at least two types of Title II claims applicable to arrests: (1) wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity and (2) reasonable accommodation, where, although police properly investigate and arrest a person with a disability for a crime unrelated to that disability, they fail to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees. *Id.* at 1232-33.

In this case, Plaintiffs are alleging the second type of ADA claim — failure to accommodate. To state such a claim, a plaintiff generally must show: (1) he is an individual with a disability; (2) he is otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) he was either excluded from participation in or denied the benefits of the public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (4) such

exclusion, denial of benefits or discrimination was by reason of his disability. *Id.* To recover monetary damages under Title II of the ADA, a plaintiff must prove intentional discrimination on the part of the defendant. *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001). To prove intentional discrimination, the plaintiff must show the defendant acted with deliberate indifference.

The Court finds that Plaintiffs' ADA claim should survive summary judgment because the issues of material fact discussed above in the excessive force and denial of familial relationship analyses claims also exist here. For example, there are factual disputes that go to whether the officers failed to reasonably accommodate Scott's obvious and known mental health difficulties, including whether the officers could have, but failed to, use less intrusive interventions in attempting to subdue Scott. There are also factual disputes as to whether the officers' use of force was deliberately indifferent to Scott.

Thus, while the Court grants summary judgment to Defendants Smith and Huntsman as to this claim, the Court denies it as to Defendant LVMPD.

b. State Law Claims

The Court now addresses Plaintiffs' state law claims. For the foregoing reasons, the Court denies Defendants summary judgment on both causes of action.

Appendix B

i. Battery (Eighth Cause of Action)

Defendants assert that, because a state law battery claim is identical to a Fourth Amendment excessive force claim, applying the arguments raised in support of summary judgment on the excessive force claim, warrant summary judgment in their favor on this cause of action as well. Plaintiffs argue the opposite, contending that the battery claim survives for the same reasons the excessive force claim survives. Moreover, the battery claim is supported by evidence that goes beyond the scope of the mere takedown and prone restraint use-of-force. It includes a broader range of conduct, covering all the officers' acts of touching Scott — for example, grabbing Scott and handling him in a manner whereby he ended up on the ground, whether by takedown or other another method, holding him on the ground, moving him into the prone position, and using force while he was prone.

"A battery is an intentional and offensive touching of a person who has not consented to the touching." *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544, 376 P.3d 167, 171 (Nev. 2016). The Court finds that there is clear evidence in the record that the officers intentionally touched Scott without his consent, and there is a genuine issue as to whether the touching was "offensive."

Thus, the Court denies Defendants summary judgment as to this claim.

ii. Negligence (Ninth Cause of Action)

Defendants argue that the negligence claim should be dismissed because the officers are subject to discretionary-act immunity under Nevada Revised Statute § 41.032. As set forth above, Defendants argue, no reasonably jury could conclude the officers used deadly force because placing a knee on a suspect's upper back and shoulder area for around 90-seconds is not deadly force. Because deadly force was not used in this case, Plaintiffs' negligence claim is premised entirely upon Defendants' discretionary acts. Plaintiffs disagree. They contend that the burden of showing that discretionary immunity applies is on Defendants, and Defendants concede that "uses of force" are not covered by discretionary-act immunity. Also, immunity does not apply unless, *inter alia*, the state actor's decision is based on considerations of social, economic, or political policy. Here, Plaintiffs assert that a jury could find that Defendants breached their duty when they used deadly or excessive force against Scott, and therefore Defendants' decisions were not based on these considerations.

To prevail on a negligence claim, a plaintiff must show that "(1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages." *DeBoer v. Senior Bridges of Sparks Family Hosp., Inc.*, 128 Nev. 406, 282 P.3d 727, 732 (Nev. 2012).

Nevada uses a two-part test to resolve discretionary immunity questions. *Martinez v. Maruszczak*, 123 Nev.

433, 168 P.3d 720, 729 (Nev. 2007). To fall within the scope of discretionary immunity, "a decision must (1) involve an element of individual judgment or choice, and (2) be based on considerations of social, economic, or political policy." *Id.* Further, discretionary act immunity is an affirmative defense and Defendants carry the burden of proving it applies.

The Court finds that discretionary-act immunity does not apply to this claim because it has not been established by Defendants that the officers' choice was based on considerations of "social, economic, or political policy." *Id.* Indeed, for the reasons there are genuine issues of fact undergirding the excessive force and denial of familial relationship analyses, there also genuine issues of fact as to whether the officers breached their duty to Scott in subduing him with excessive force and whether the officers are nevertheless entitled to discretionary-act immunity. *See Davis v. City of Las Vegas*, 478 F.3d 1048, 1059-60 (9th Cir. 2007). Therefore, the Court denies Defendants summary judgment as to this claim.

VI. CONCLUSION

IT IS THEREFORE ORDERED that Defendants Kyle Smith, Theodore Huntsman, and Las Vegas Metropolitan Police Department's Motion for Summary Judgment is GRANTED in part and DENIED in part. It is granted as to Plaintiffs' denial of medical care against all Defendants and as to their ADA cause of action against Defendants Smith and Huntsman. Summary judgment is denied as to all the other causes of action against Defendants.

IT IS FURTHER ORDERED that the parties shall submit a joint pretrial order by April 4, 2023.

DATED: March 14, 2023

/s/ Richard F. Boulware, II
RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 19, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15480

D.C. No. 2:20-cv-01872-RFB-EJY
District of Nevada,
Las Vegas

ROCHELLE SCOTT, INDIVIDUALLY, AND AS CO-SPECIAL ADMINISTRATOR OF THE ESTATE OF ROY ANTHONY SCOTT; FREDRICK WAID, AS CO-SPECIAL ADMINISTRATOR OF THE ESTATE OF ROY ANTHONY SCOTT,

Plaintiffs-Appellees,

v.

KYLE SMITH; *et al.*,

Defendants-Appellants.

ORDER

Before: DESAI and DE ALBA, Circuit Judges*

* The Honorable Philip S. Gutierrez, United States District Judge for the Central District of California, sitting by designation, has retired. The remaining two judges decide this matter as a quorum. General Order 3.2(h).

Appendix C

Judge Desai and Judge de Alba have voted to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is **DENIED**. (Dkt. 37).