

No. _____

In the

Supreme Court of the United States

PAULETTE SMITH,

Petitioner,

v.

OFFICER EDWARD AGDEPPA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the context of Fourth Amendment claims alleging excessive force, the determination of a police officer's entitlement to qualified immunity in summary judgment proceedings requires a court to determine whether (1) the officer's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). In this § 1983 action arising out of a fatal police shooting, the Ninth Circuit reversed the district court's denial of qualified immunity, holding that, notwithstanding the factual disputes identified by the district court, the shooting officer was granted immunity solely upon the Ninth Circuit's determination that the law was not sufficiently "clearly established" as to the unlawfulness of the shooting officer's conduct. In so holding, the Ninth Circuit failed to determine whether the facts of the shooting incident relied upon by the district court at summary judgment, when viewed in the light most favorable to the plaintiff, raised genuine factual disputes concerning whether the shooting officer's conduct was unlawful. This case starkly places into focus important questions over which the Ninth Circuit remains sharply divided from the majority of circuit courts, as follows:

1. In a § 1983 action arising out of fatal police shooting involving disputed allegations of Fourth Amendment violations, did the Ninth Circuit's err in granting qualified immunity

to a shooting officer exclusively on grounds that the preexisting case law did not “clearly establish” the unlawfulness of the shooting officer’s conduct at summary judgment *without* resolving disputed issues of fact identified by the district court in favor of the plaintiff and nonmoving party?

2. When evaluating an officer’s entitlement to qualified immunity in summary judgment proceedings in § 1983 actions arising out of disputed allegations of Fourth Amendment violations during a use of force incident, is it constitutionally permissible for a circuit court to disregard a district court’s identification of disputed factual issues concerning whether the officer’s conduct violated a constitutional right associated with the *first prong* of the qualified immunity analysis, and nevertheless grant the officer qualified immunity based solely upon the circuit court’s determination that the law was not “clearly established” at the time of the incident based solely upon the *second prong* of the qualified immunity analysis?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellee below) is
Paulette Smith.

Respondent (defendant-appellant below) is
Officer Edward Agdeppa, in his official capacity as a
police officer with the Los Angeles Police
Department.

Defendant City of Los Angeles, a municipal
entity, is not a party to the instant proceeding.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Smith v. Agdeppa*, No. 20-56254, reported as *Smith v. Agdeppa*, 81 F.4th 994 (9th Cir. 2023) judgment entered on August 30, 2023; reprinted herein as **Appendix A**
- *Smith v. Agdeppa*, No. 20-56254, reported as *Smith v. Agdeppa*, 56 F.4th 1193 (9th Cir. 2022), judgment entered on December 30, 2022, reprinted herein as **Appendix B**
- *Smith v. Agdeppa*, No. 20-56254, reported as *Smith v. Agdeppa*, 94 F.4th 903 (9th Cir. 2024), Rehearing en Banc Denied on March 1, 2024, reprinted herein as **Appendix C**
- *Smith v. City of Los Angeles*, No. 2:19-cv-05370-CAS-JC, (United States District Court, C.D. California), judgment entered on November 6, 2020, reprinted herein as **Appendix D**

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PETITION FOR WRIT OF CERTIORARI

Paulette Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals dated August 30, 2023 is reported at 81 F.4th 994 (9th Cir. 2023) and is reprinted herein as **Appendix A**.

The opinion of the Ninth Circuit Court of Appeals dated December 30, 2022 is reported at 56 F.4th 1193 (9th Cir. 2022) and is reprinted herein as **Appendix B**.

The opinion of the Ninth Circuit Court of Appeals denying plaintiff-appellee's Petition for Rehearing En Banc dated March 1, 2024 is reported at 94 F.4th 903 (9th Cir. 2024) and is reprinted herein as **Appendix C**.

The opinion of the United States District Court for the Central District of California, No. 2:19-cv-05370-CAS-JC, dated November 6, 2020 is reported at 2020 WL 654953 (C.D. Cal., 2020), and is reprinted herein as **Appendix D**.

JURISDICTION

The Ninth Circuit Court of Appeals denied rehearing en banc on March 1, 2024. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution 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.

42 U.S.C. § 1983 provides:

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

Qualified immunity involves two questions: (1) whether the defendant violated a constitutional right, and (2) whether that right was clearly established at the time of the alleged violation. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

The First Prong in Practice

As defined by this Court, the first prong of the qualified immunity analysis involves a determination of whether the defendant violated a constitutional right. *Id.* As applied to Fourth Amendment claims involving allegations of excessive force by government officials, the specific components of this determination are squarely

governed by this Court's seminal holding in *Graham v. Connor*, 490 U.S. 386 (1989) which set forth three factors, commonly referred to as the "*Graham* factors" which the Court prescribed to govern the determination of the objective reasonableness of a particular use of force including (1) "the severity of the crime" at issue; (2) "whether the suspect posed an immediate threat to the safety of the officers or others"; and (3) "whether he is actively resisting arrest or attempting to evade arrest." 490 U.S. 386, 396 (1989). It follows that when a district court evaluates the objective reasonableness of a use of force in a § 1983 action, it carefully evaluates the facts and circumstances of the particular case in the context of the three factors set forth above, and arrives at its determination as to the "objective reasonableness" of a particular use of force accordingly.

The Second Prong in Practice

In a manner which is categorically distinguishable from the court's determination of whether a constitutional violation occurred in the *Graham v. Connor* analysis, the determination of whether a right is "clearly established", as prescribed by the second prong of the qualified immunity analysis requires the reviewing court and the involved parties to scour prior published case authorities within their circuit for the purpose of determining whether or not the facts of such prior cases are sufficiently similar to the case being decided so as to put the involved officer on notice

that his or her conduct was unlawful when the force was used in the case being decided. Stated succinctly, in such situations the plaintiff seeks to persuade the court that the facts and issues involved in prior published cases are similar to the case before the court, and the government seeks to persuade the court that the facts and issues involved in prior published cases are different than the case before the court.

This analysis, which is limited to the perfunctory comparison of the facts of prior published cases within a particular circuit, is entirely distinguishable from the determination of whether the force used in the case being decided is constitutionally permissible, and involves only the analysis of prior relevant case law, usually in the form of published case authorities within a particular circuit.

In *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) this Court held: “The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The *Pearson* Court recognized that there are several narrow situations in which the dictates of judicial efficiency may support a reviewing court bypassing first prong of the analysis, including cases in which the court’s determination of whether a

constitutional violation occurred is “so fact dependent that the result will be confusion rather than clarity, (*Id.*, at 237) cases involving a constitutional question that is pending before the court en banc, or when a district court encounters a constitutional question that is before the court of appeals. *Id.*, at 238. As will be discussed herein, none of these unique situations are implicated in cases involving the simple determination of whether an officer’s use of force is reasonable in § 1983 actions alleging excessive force.

The Constitutional Dilemma Associated with a Circuit Court’s Granting of Qualified Immunity Based Solely on the on the Absence of “Clearly Established” Law, Without Any Consideration of Whether the Involved Use of Force Was Objectively Reasonable under Graham v. Connor

As discussed herein, several constitutional issues are implicated when a circuit court determines an officer’s entitlement to qualified immunity based solely on that court’s determination of whether the law was “clearly established” without making a determination as to whether a constitutional violation in fact occurred.

Firstly, in a typical § 1983 case involving allegations of Fourth Amendment violations caused by an officer’s use of excessive force, when a circuit court grants qualified immunity based solely on its determination that the law was not “clearly established” sufficient to put the involved officer on

notice that his conduct was unlawful, that circuit court effectively dismisses a plaintiff's § 1983 claims based exclusively on the state of the prior published case law within that circuit, without making a determination as to whether a constitutional violation in fact occurred, which entirely sidesteps the well established formula for the evaluation of excessive force claims articulated by the Court in *Graham*. In such cases, a plaintiff's Fourth Amendment claim is foreclosed based only on the circuit court's determination that prior case authorities are factually distinguishable from the case before it, without any determination of whether that officer's use of force was, in fact, objectively reasonable in light of (1) "the severity of the crime" at issue; (2) "whether the suspect posed an immediate threat to the safety of the officers or others"; and (3) "whether he is actively resisting arrest or attempting to evade arrest." 490 U.S. 386, 396 (1989).

Secondly, when a circuit court affirms an officers entitlement to qualified immunity without making any determination as to whether that officer's use of force was objectively reasonable, that court's ruling contains no precedential value that would contribute to the evolution of jurisprudence within that circuit, which interminably fixes the state of the law its present form and forestalling any evolution of published or non-published case law within that Circuit.

STATEMENT OF THE CASE

This appeal originally followed the district court's denial of qualified immunity during summary judgment proceedings. (*Smith v. Agdeppa* Case No. 2:19-CV-05370-CAS-JCx) On December 30, 2022, Ninth Circuit panel judges, including the Hon. Morgan Christen, the Hon. Daniel Bress, and the Hon. Gary Feinerman, sitting by designation from the Northern District of Illinois, issued a published opinion affirming the district court's denial of qualified immunity. *Smith v. Agdeppa*, 56 F.4th 1193 (9th Cir. 2022.) After the published opinion was filed, but before the remittitur was issued, Judge Feinerman resigned from judicial service. In an Order dated May 4, 2023, after Judge Consuelo Callahan was drawn as a replacement judge, (*Smith v. Agdeppa*, 66 F.4th 1199 (9th Cir. 2023)) the reconstituted panel majority voted sua sponte to grant panel rehearing. (*Id.*) Judge Callahan and Judge Bress voted in favor of rehearing, and Judge Christen voted against rehearing.

In a published decision dated August 30, 2023, the Court reversed its prior decision, and the new majority, consisting of Judges Callahan and Bress, reversed the district court's denial of qualified immunity. *Smith v. Agdeppa*, 81 F.4th 994 (9th Cir. 2023).

On March 1, 2023, the Ninth Circuit denied Plaintiff-Appellee's petition for rehearing en banc

Denied on March 1, 2024, reprinted herein as *Smith v. Agdeppa*, 94 F.4th 903 (9th Cir. 2024).

Factual Background

This case arises out of the October 29, 2018 fatal shooting of 30 year old Albert Ramon Dorsey, who was undisputedly shot and killed by Defendant Officer Edward Agdeppa of the Los Angeles Police Department. The shooting occurred following a physical altercation in the bathroom of a Hollywood fitness center involving Officer Agdeppa, and his female partner, Officer Perla Rodriguez. *See* Appendix D.

Prior to their arrival at the fitness center, the totality of information known to Officers Agdeppa and Rodriguez was dispatched to them, and they did not personally witness any of the events giving rise to the call for service that culminated in the death of Albert Dorsey. Concerning this information, Officer Agdeppa testified he had received information that Mr. Dorsey was “refusing to leave” the fitness center, “that he just assaulted patrons or a worker”. After arriving at the fitness center, Officer Agdeppa overheard a security guard tell Officer Rodriguez that Mr. Dorsey had “assaulted a security guard”. The officers had no information about the facts and circumstances surrounding any of these alleged assaults, had no information that Mr. Dorsey had injured any person, had no information that any weapons were involved, and did not interview any person who was

allegedly assaulted by Mr. Dorsey prior to making contact with him. (*Id.*) The crimes described to the officers, at most, would describe misdemeanor crimes sounding in trespass and possibly battery. *Id.*

Upon entering the locker room, the officers approached Mr. Dorsey, who was naked and obviously unarmed. After Mr. Dorsey refused the officers' commands to leave, and generally appeared unresponsive to their official presence, a physical altercation ensued, in which the officers attempted to physically subdue Mr. Dorsey, who was considerably taller and heavier than the officers. As the physical altercation intensified, Mr. Dorsey resisted the Officers' efforts to handcuff him, and during the struggle, the officers' body worn cameras became dislodged, and consequently, the final minutes of the incident, including Mr. Dorsey's actions leading up to the shooting, are not captured by video evidence. Although not depicted in the portions of the body worn video that can be viewed, the officers describe Mr. Dorsey as being physically violent in the moments preceding his death, which, according to the officers, precipitated Officer Agdeppa's decision to use deadly force against Mr. Dorsey. *Id.*

The following items of evidence represent the most significant examples of facts presented in the district court demonstrating genuine issues of fact on the issue of the objective reasonableness of Agdeppa's use of deadly force which the panel failed

to consider in the light most favorable to the plaintiff and non-moving party.

1. *The Information Known to Officers Agdeppa and Rodriguez Prior to Their Encounter with Mr. Dorsey Described, At Most, Misdemeanor Offenses and Did Not Give Them the Legal Authority to Arrest Mr. Dorsey*

Prior to their arrival at the fitness center, the totality of information known to Officers Agdeppa and Rodriguez was dispatched to them, and they did not personally witness any of the events giving rise to the call for service that culminated in the death of Albert Dorsey. Concerning this information, Officer Agdeppa testified he had received information that Mr. Dorsey was “refusing to leave” the fitness center, “that he just assaulted patrons or a worker”. After arriving at the fitness center, Officer Agdeppa overheard a security guard tell Officer Rodriguez that Mr. Dorsey had “assaulted a security guard”. The officers had no information about the facts and circumstances surrounding any of these alleged assaults, had no information that Mr. Dorsey had injured any person, had no information that any weapons were involved, and did not interview any person who was allegedly assaulted by Mr. Dorsey prior to making contact with him. (*Id.*) The crimes described to the officers, at most, would describe misdemeanor crimes sounding in trespass and possibly misdemeanor battery. *Id.*

2. *Officer Agdeppa Did Not Issue Any Kind of a Warning Prior to Discharging Five Rounds in Rapid Succession at Mr. Dorsey from Aa Distance of Six to Eight Feet*

It is undisputed that Officer Agdeppa fired five rounds total, and does not recall, and can discern no audio evidence depicting, his issuing any kind of a warning to Mr. Dorsey regarding his intent to use deadly force prior to firing. (EA 67:21-68:1; 109:9-20) When he fired his five rounds, Officer Agdeppa estimated his distance from Mr. Dorsey to have been six to eight feet.

3. *At the Moment Agdeppa Decided to Use Deadly Force, He Fired in Defense of Officer Rodriquez, and Not in Self-Defense*

As distinguished from firing in self-defense, Officer Agdeppa has always maintained that at the moment he discharged his five rounds, he fired in defense of Officer Rodriguez. As to his justification for using lethal force, According to Adgeppa, in the moments immediately preceding his use of lethal force, he believed that Dorsey was punching Rodriguez with a degree of force so powerful that Agdeppa believed that Dorsey would “kill Rodriguez imminently”. As reported by Agdeppa, this was due to the fact that Dorsey was:

- (1) “Viciously and violently” attacking Rodriguez;
- (2) while straddling over Rodriguez, who

was lying on the ground in the fetal position;

- (3) by “punching her repeatedly in the face with a flurry of punches, hitting her over and over again in the head and face”;
- (4) while Rodriguez attempted to protect herself while lying on the ground in the fetal position.

(*Id.*)

4. *The Panel Ignored the Evidentiary Significance of Post-incident Close-up Photos of Officer Rodriguez’s Face Reveal No Evidence of Physical Injuries to Rodriguez’s Face, Which Creates Genuine Issues of Fact Regarding Officer Adgeppa’s Justification for Shooting*

The evidentiary record presented in the district court included two close-up photos of Officer Rodriguez’s face, taken in the immediate aftermath of the incident. These photos reveal no discernable signs of physical injury to Officer Rodriguez’s face. (*See Smith v. City of Los Angeles*, USDC Case No. Dkt. 50-3 to 50-5) The genuine issues of fact presented by this evidence are obvious, as if Agdeppa actually reasonably believed that Dorsey was punching Rodriguez with a degree of force so powerful that Agdeppa believed that Dorsey would “kill Rodriguez imminently”, one would expect the objective evidence to reveal the type and manner of

physical injuries sustained by Rodriguez to be commensurate with her being exposed to a significant threat of “death or serious bodily injury” due to the blows inflicted upon her face by Dorsey. To the contrary, not only did Officer Rodriguez undisputedly suffer no broken bones, no concussion, no facial or head fractures, and no injuries that would require her to miss even a single day of work, *the close up photos of her face taken on the day of the incident reveal no discernable signs of injury, whatsoever.* (See *Smith v. City of Los Angeles*, Dkt. 50-3 to 50-5).

5. *The Panel Did not Consider the Report of the Forensic Pathologist who Performed Dorsey’s Autopsy Contradicts the Officers’ Versions of Events in the Light Most Favorable to the Plaintiff and Non-moving Party*

Mr. Dorsey sustained a total of four gunshot wounds, described by Dr. Ashraf as follows:

- I. A gunshot wound that entered towards the *back of Mr. Dorsey’s right neck*, which traveled in a downward trajectory, perforating the trachea, aortic arch, right atrium and both lobes of the left lung, resulting in a substantial amount of blood entering Mr. Dorsey’s pleural cavity. According to Dr. Ashraf, the wounds associated with this shot resulted in severe injuries which perforated the heart, lungs, trachea, and aorta, which would have

directly affected the ability of the heart to pump blood, and would have affected the ability of the lungs to breathe. [2 ER 137-138]

- II. A gunshot wound which entered the *right side of Mr. Dorsey's chest*, traveling at a downward trajectory, which was described as "less severe" than #1, causing primarily skin and soft tissue injuries. (*Id.*)
- III. A gunshot wound which entered the *upper part of Mr. Dorsey's right shoulder*, traveling at a downward trajectory, which fractured ribs and caused a severe spinal cord injury and associated hemorrhaging around the spinal cord, each of which was described as "severe" by Dr. Ashraf. (*Id.*)
- IV. A gunshot wound which entered Mr. Dorsey's *left upper abdomen*, traveling in an upward trajectory, and causing extensive injuries, including severe damage to the heart and left lung, causing a significant amount of blood to pour into the chest cavity, irreparably compromising breathing ability. (*Id.*)

The nature and extent of these gunshot wounds depict four separate and distinct entry points on both the left and right side of Mr. Dorsey's body, with three wounds having a downward trajectory, and one with an upward trajectory. The multifaceted areas of entry suggest that Mr. Dorsey was not in a fixed position during the shooting,

which tends to cast doubt on Officer Agdeppa's version of events, to wit, that Mr. Dorsey was straddling and punching Officer Rodriguez when all five shots were fired.

6. *The Panel Did Not Consider the Evidentiary Significance of the Los Angeles Police Department Board of Police Commissioners' Determination that Officer Agdeppa's Shooting was "Out of Policy" in the Light Most Favorable to the Plaintiff and Non-moving Party*

The BOPC determined Officer Ageppa's use of deadly force to be "out of policy", finding in part as follows:

In this case, [Officers Agdeppa and Rodriguez] did not formulate a tactical plan prior to encountering the Subject. Upon arrival at the scene, neither officer obtained details about the incident or about the Subject from the staff at the facility. Upon observing the Subject, the officers did not properly assess the threat that he posed to them – i.e., the Subject's size in relation to their own, his non-compliance with their commands, and his escalating aggressive behavior toward them.

Id.

Additionally the BOPC was critical of the

officers' lack of utilizing time in order to redeploy, their delay in requesting additional resources, and their inadequate maintenance of lines of communication with the Subject prior to attempting to handcuff him. By not observing the warning signs of a potentially violent Subject, the officers acted too quickly and placed themselves at a tactical disadvantage during the incident. *Id.*

Based on the totality of the circumstances, including an analysis of percipient witnesses who contradicted the officers' versions of events, the BOPC determined that the officers' actions of not formulating a tactical plan, not assessing the Subject's threat level, not redeploying, and not utilizing time to wait for additional resources was a substantial deviation, without justification from approved Department tactical training. *Id.*

REASONS FOR GRANTING THIS PETITION

This case presents an optimal vehicle for resolving recurring constitutional deprivations caused by the court's systematic failure to redress deprivations of fundamental Fourth Amendment rights solely because they are subjectively determined to be factually distinguishable from preexisting published case authorities.

When a circuit court grants qualified immunity to an officer in a § 1983 action based entirely on the determination that the law was not "clearly established", that court sidesteps the use of

force analysis articulated by this Court in *Graham v. Connor* and consequently fails to protect the Fourth Amendment rights all citizens. Put another way, if it is to be considered axiomatic that the Fourth Amendment is a fundamental right guaranteed by the United States Constitution, that right cannot be enforced if a reviewing circuit court can fully adjudicate a claim in favor of the government, without even having to consider the existence of a constitutional deprivation.

Moreover, the systematic adjudication of a person's Fourth Amendment claims through the simple determination that the facts a person's case are dissimilar to the facts of prior published cases renders impossible any evolution legal jurisprudence, as, by definition, it employs a legal analysis that systematically fails to consider any particular use of force on the merits.

Hypothetically speaking, suppose a police department develops a highly injurious weapons system that has not been before, and uses it in a manner that consistently causes serious and unwarranted injuries to members of the public. Based on the current state of the law, there is, quite literally, no way that any constitutional deprivations caused by the government's use of that new weapons system could ever be redressed, because if a district court ever found it to constitute an unreasonable use of force, an interlocutory appeal would be filed, and the government would be absolved of all liability on the grounds that the case

law within that circuit, that predated the existence of that new weapons system, could never put any government official on notice as to any constitutional deprivations attendant to the unreasonable or excessive use of that weapon.

This is entirely inconsistent with any conceptualization of the Fourth Amendment as a fundamental right, and Court can and should put a stop to this by disallowing the summary denial of otherwise viable constitutional claims based exclusively upon a determination that the rights attendant to such otherwise viable deprivations of rights aren't "clearly established".

In § 1983 Actions Involving Disputed Allegations of Excessive Force, the Fourth Fifth, Sixth, Seventh, Eighth, and Tenth Circuits Evaluate an Officer's Entitlement to Qualified Immunity in Summary Judgment Proceedings, in a Manner Which Is Starkly Divergent from the Ninth Circuit Panel's Analysis in *Smith v. Agdeppa*, and This Court Should Use This Case to Resolve This Irreconcilable Conflict

There is a robust consensus of authority within the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits concerning the preferred analytical framework to be used when engaging in a de novo review of the district court's evaluation of § 1983 cases involving disputed allegations of excessive force in summary judgment proceedings which is starkly divergent from the Ninth Circuit's

analysis in *Smith v. Agdeppa* in two key areas:

1. In stark contrast to the Ninth Circuit panel's analysis in *Smith v. Agdeppa*, when determining an officer's entitlement to qualified immunity, the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits favor the consideration of *both prongs* of the qualified immunity analysis, giving due consideration to whether disputed factual issues exist regarding the objective reasonableness of a particular use of force, and,
2. In stark contrast to the Ninth Circuit panel's analysis in *Smith v. Agdeppa*, when determining whether a police officer's actions violate clearly established law, the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits view evidence at summary judgment in the light most favorable to the nonmoving party.

FOURTH CIRCUIT

See Knibbs v. Momphard, 30 F.4th 200 (4th Cir. 2022)(In de novo review of district court's granting of summary judgment on qualified immunity grounds in an § 1983 fatal deputy involved shooting case on appeal, Fourth Circuit evaluated the objective reasonableness of a police shooting evaluated both prongs of the qualified immunity analysis and determined that fact issues

existed as to whether the deputy's use of force was reasonable. *Knibbs v. Momphard*, 30 F.4th 200, 216 (4th Cir. 2022); *See also Williams v. Strickland*, 917 F.3d 763 (4th Cir. 2019) (In de novo review of district court's denial of summary judgment on qualified immunity grounds in an § 1983 law enforcement shooting case on interlocutory appeal, Fourth Circuit evaluated the objective reasonableness of a police shooting and determined that fact questions presented to the district court existed as to whether officers started or continued to open fire on arrestee after they were no longer in the trajectory of arrestee's car was material fact issue precluding summary judgment in favor of officers on qualified immunity grounds. *Williams v. Strickland*, 917 F.3d 763, 769 (4th Cir. 2019); *See also Livingston v. Kehagias*, 803 Fed.Appx. 673 (In de novo review of district court's denial of summary judgment on qualified immunity grounds in an § 1983 fatal officer involved shooting case on interlocutory appeal, Fourth Circuit held that genuine disputes as to material facts regarding police officer's actual state of mind, including whether officer had believed that arrestee had taken his stun gun, precluded summary judgment for officer on qualified immunity grounds with respect to § 1983 claim against officer by arrestee's estate alleging unlawful use of deadly force in violation of Fourth Amendment. *Livingston v. Kehagias*, 803 F. App'x 673, 682-83 (4th Cir. 2020).

FIFTH CIRCUIT

See Roque v. Harvel, 993 F.3d 325, 334-35 (5th Cir. 2021)(In de novo review of district court's denial of summary judgment on qualified immunity grounds in an § 1983 fatal officer involved shooting case on interlocutory appeal, genuine issues of material fact as to whether officer's shots at individual were excessive precluded summary judgment as to qualified immunity, as Fifth Circuit held: "Although qualified immunity raises two distinct questions (whether the conduct was unconstitutional and whether the unconstitutionality was clearly established), we have discretion "to decline entirely to address the" first question. We can "skip straight to the second question concerning clearly established law." But we have repeatedly emphasized that there is value in addressing both questions "to develop robust case law on the scope of constitutional rights." *Roque v. Harvel*, 993 F.3d 325, 332 (5th Cir. 2021); *See also Amador v. Vasquez*, 961 F.3d 721 (2020) (In de novo review of district court's denial of summary judgment on qualified immunity grounds in an § 1983 fatal deputy involved shooting case on interlocutory appeal, Fifth Circuit evaluated the objective reasonableness of a deadly police shooting and concluded that genuine disputes of material fact precluded appellate court's jurisdiction over interlocutory appeal, holding "We have no jurisdiction to hear an interlocutory appeal, however, when a district court's denial of qualified immunity rests on the basis that genuine issues of

material fact exist.” *Amador v. Vasquez*, 961 F.3d 721, 726 (5th Cir. 2020); *See also Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013)(In de novo review of district court’s denial of summary judgment on qualified immunity grounds in an § 1983 false arrest and excessive force case, Fifth Circuit evaluated both prongs of qualified immunity analysis and concluded that genuine issue of material fact existed as to whether use of force by county sheriff’s deputy to arrest was clearly excessive to need and objectively unreasonable, precluding summary judgment on arrestee’s civil rights claim alleging excessive force in arrest. *Ramirez v. Martinez*, 716 F.3d 369, 377-78 (5th Cir. 2013).

SIXTH CIRCUIT

See Jacobs v. Alam, 915 F.3d 1028 (6th Cir. 2019) (In de novo review of district court’s denial of summary judgment on qualified immunity grounds in an § 1983 law enforcement shooting case on interlocutory appeal, Sixth Circuit evaluated the objective reasonableness of a police shooting and determined that fact questions presented to the district court existed as to whether officers’ use of deadly force violated Fourth Amendment which precluded appellate jurisdiction over qualified immunity determination on excessive force claim. *Jacobs v. Alam*, 915 F.3d 1028 (6th Cir. 2019); *See also Cunningham v. Shelby County, Tennessee*, 994 F.3d 761 (2021) (In de novo review of district court’s denial of summary judgment on qualified immunity

grounds in a § 1983 deputy shooting case on interlocutory appeal Sixth Circuit evaluated both prongs of the qualified immunity analysis in reverse order, concluding that the law was not clearly established sufficient to put the shooting deputy on notice that his conduct was unlawful, and concluding that the district court erred in relying on screen shots from videotapes to determine that genuine issues of material fact precluded summary judgment in favor of deputies. *Cunningham v. Shelby Cnty., Tennessee*, 994 F.3d 761 (6th Cir. 2021) *See also Floyd v. City of Detroit*, 518 F.3d 398 (6th Cir. 2008) (In de novo review of district court's denial of summary judgment on qualified immunity grounds in an § 1983 police shooting case on interlocutory appeal, Sixth Circuit evaluated both prongs of the qualified immunity analysis and upon viewing the facts in the light most favorable to the plaintiff, affirmed the district court's denial of qualified immunity and found sufficient evidence of a Fourth Amendment violation in police shooting. *Floyd v. City of Detroit*, 518 F.3d 398, 407 (6th Cir. 2008).

SEVENTH CIRCUIT

See Smith v. Finkley, 10 F.4th 725 (7th Cir. 2021) (In de novo review of district court's denial of summary judgment on qualified immunity grounds in an § 1983 law enforcement shooting case on interlocutory appeal, Sixth Circuit evaluated the objective reasonableness of a police shooting and determined that fact questions presented to the

district court existed as to whether officers' use of deadly force violated Fourth Amendment which precluded appellate jurisdiction over qualified immunity determination on excessive force claim.

The Seventh Circuit held that fact question as to whether totality of circumstances justified police officers' use of deadly force precluded appellate jurisdiction. *See Smith v. Finkley*, 10 F.4th 725 (7th Cir. 2021) (“To repeat, our evaluation of appellate jurisdiction requires us to decide if the defendants’ arguments for qualified immunity depend upon, and are inseparable from, the factual disputes concerning Smith's movement and the level of threat he posed. On the second prong of qualified immunity, the question is whether the constitutional right at issue was clearly established at the time of the alleged violation.”) *Smith v. Finkley*, 10 F.4th 725, 742 (7th Cir. 2021); *See also White v. Gerardot*, 509 F.3d 829, 835 (7th Cir. 2007) (“Jurisdiction is not proper when “all of the arguments made by the party seeking to invoke our jurisdiction are dependent upon, and inseparable from, disputed facts.”) *White v. Gerardot*, 509 F.3d 829, 835 (7th Cir. 2007); *See also Gutierrez v. Kermion*, 722 F.3d 1003, 1009 (7th Cir 2013) (When deciding on which side of this line a qualified immunity appeal properly belongs, we closely examine two things. We first review the district court's decision to see if it identifies factual disputes as the reason for denying qualified immunity. And we consider the arguments (or stipulations) offered by those appealing to see if they adopt the plaintiff's

facts, or instead make a “back-door effort” to use disputed facts. *Gutierrez*, 722 F.3d at 1011-1011; *Accord Strand v. Minchuk*, 910 F.3d 909, 913-14 (7th Cir. 2018).

EIGHTH CIRCUIT

See Perry v. Woodroff Cnty. Sheriff Dep’t by and through Barker, 858 F.3d 1141 (8th Cir. 2017)(In de novo review of district court’s denial of summary judgment on qualified immunity grounds in an § 1983 excessive force case on interlocutory appeal, the Eighth Circuit decided both prongs of the qualified immunity analysis and determined that police officer's alleged acts of restraining arrestee's arm and forcing her knee into his back were objectively unreasonable and were excessive force in violation of Fourth Amendment, holding: “Viewing the evidence in the light most favorable to Perry, we conclude that the district court did not err in holding that Wolfe violated Perry's Fourth Amendment right to be free from excessive force because her use of force was objectively unreasonable as a matter of law.”) *Perry v. Woodruff Cnty. Sheriff Dep’t by & through Barker*, 858 F.3d 1141, 1145 (8th Cir. 2017); *See also Williams v. City of Burlington, Iowa*, 27 F.4th 1346 (8th Cir. 2022) (In de novo review of district court’s denial of summary judgment on qualified immunity grounds in an § 1983 fatal officer involved shooting case on interlocutory appeal, Eighth Circuit evaluated both prongs of qualified immunity analysis and held that whether police officer saw

fleeing suspect drop gun he was carrying and whether officer was unreasonable in believing suspect was taking a firing position rather than surrendering were material fact issues precluding shooting officer's entitlement to qualified immunity at summary judgment stage. *Williams v. City of Burlington, Iowa*, 27 F.4th 1346, 1350-51 (8th Cir. 2022); *See also Wealot v. Brooks*, 865 F.3d 1119 (8th Cir. 2017)(In de novo review of district court's granting of summary judgment on qualified immunity grounds in an § 1983 fatal officer involved shooting case on interlocutory appeal, Eighth Circuit evaluated both prongs of qualified immunity analysis and determined that genuine issue of material existed as to whether officers could have seen or actually did see suspect throw gun as they pursued him, and genuine issue of material existed as to whether suspect was turning around to officers with his hands raised to surrender which precluded shooting officer's entitlement to qualified immunity in summary judgment proceedings. *Wealot v. Brooks*, 865 F.3d 1119, 1125-28 (8th Cir. 2017) ("Wealot has sufficiently demonstrated there are at least two genuine issues of material fact.")

TENTH CIRCUIT

In stark contrast to the Ninth Circuit's practice of granting qualified immunity solely on the "clearly established law" second prong of the qualified immunity analysis in § 1983 actions alleging excessive force, the consensus of Tenth

Circuit authorities involving a review of a district court's denial of summary judgment on qualified immunity grounds favors the analysis of *both prongs* of the qualified immunity analysis in § 1983 actions alleging excessive force. *See Surat v. Klamser*, 52 F.4th 1261, 1271 (10th Cir. 2022) (In de novo review of district court's denial of summary judgment on qualified immunity grounds in an § 1983 excessive force case on interlocutory appeal, Tenth Circuit reiterated its preference for considering both prongs of the qualified immunity analysis, affirming that "addressing both prongs of the test promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Surat v. Klamser*, 52 F.4th 1261, 1271 (10th Cir. 2022); *see also Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1162 (10th Cir. 2021) (In de novo review of district court's denial of summary judgment on qualified immunity grounds in an § 1983 dog bite case on interlocutory appeal, Tenth Circuit affirmed "this court ordinarily must accept the version of facts the district court assumed true at summary judgment." *See Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1162 (10th Cir. 2021), further holding "We first evaluate whether Sergeant Sanders's conduct, under the version of facts the district court assumed true at summary judgment, constituted excessive force" in addressing both prongs of qualified immunity analysis *Id.* *See also Perea v. Baca*, 817 F.3d 1198, 1202-1204 (10th Cir. 2022) (In de novo review of district court's

denial of summary judgment on qualified immunity grounds in § 1983 stun gun on interlocutory appeal, Tenth Circuit considered both prongs of the qualified immunity analysis in determining fact question properly precluded summary judgment.)

CONCLUSION

For all of the foregoing reasons, this Petition should be granted in its entirety.

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