APPENDIX TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAULETTE SMITH, individually and as Successor in Interest to Albert Dorsey, deceased,
Plaintiff-Appellee,

v.

EDWARD AGDEPPA, an individual,
Defendant-Appellant,

and

CITY OF LOS ANGELES, a municipal entity; DOES, 1 through 10,
Defendants.

No. 20-56254

D.C. No.
2:19-cv-05370-CAS-JC

OPINION

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted March 16, 2022
Submission Withdrawn April 11, 2023
Resubmitted May 4, 2023
San Francisco, California

Filed August 30, 2023

Before: Consuelo M. Callahan, Morgan Christen, and Daniel A. Bress, Circuit Judges.

Opinion by Judge Bress;
Dissent by Judge Christen

SUMMARY*

Qualified Immunity/Deadly Force

The panel reversed the district court's denial of qualified immunity to police officer Edward Agdeppa in a 42 U.S.C. § 1983 action alleging that Agdeppa used unreasonable deadly force when he shot and killed Albert Dorsey.

The panel first held that it had jurisdiction over this interlocutory appeal because, notwithstanding the factual disputes, Agdeppa only contested the district court's legal conclusion that there was a violation of Dorsey's clearly established rights.

The panel held that because Agdeppa did not

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

challenge the district court's determination that a reasonable juror could conclude that Agdeppa violated Dorsey's Fourth Amendment right to be free from excessive force, this appeal turned solely on the second step of the qualified immunity analysis—whether the claimed unlawfulness of Agdeppa's conduct was "clearly established."

The panel held that Agdeppa's use of deadly force, including his failure to give a warning that he would be using such force, did not violate clearly established law given the specific circumstances he encountered. In evaluating whether Dorsey posed an immediate threat to safety that would justify the use of deadly force, the panel noted that it was undisputed that Agdeppa and another officer repeatedly warned Dorsey to stand down; unsuccessfully tried to use non-lethal force; and engaged in a lengthy, violent struggle in a confined space with Dorsey, who dominated the officers in size and stature and who had gained control of a taser. Because none of the court's prior cases involved similar circumstances, there was no basis to conclude that Agdeppa's use of force here was obviously constitutionally excessive. Moreover, past precedent would not have caused Agdeppa to believe that he was required to issue a further warning in the middle of an increasingly violent altercation.

Dissenting, Judge Christen stated that qualified immunity was improper because Agdeppa's characterization of the facts conflicted with physical evidence and witness statements, so much so that a reasonable jury could reject the officers' account of the shooting. This court has well-established precedent

that an officer must give a deadly force warning if practicable, and a reasonable jury could conclude that Agdeppa had the opportunity to give a deadly force warning and failed to do so.

COUNSEL

Kevin E. Gilbert (argued) and Carolyn M. Aguilar, Orbach Huff Suarez & Henderson, Pleasanton, California; Susan E. Coleman, Keiko J. Kojima, and Lisa W. Lee, Burke Williams & Sorensen LLP, Los Angeles, California; for Defendants-Appellant.

Edward M. Lyman III (argued), Family Legal APLC, Playa Del Rey, California; Brian T. Dunn and James Bryant, The Cochran Firm - California, Los Angeles, California; Megan R. Gyongyos, Carpenter Zuckerman & Rowley LLP, Beverly Hills, California; for Plaintiff-Appellee.

OPINION

BRESS, Circuit Judge:

Two police officers were dispatched to a gym after a man reportedly threatened gym patrons and assaulted a security guard. The suspect then violently attacked the officers and refused to stop after they repeatedly deployed their tasers. One officer eventually resorted to lethal force to end the aggression. We are asked to decide whether this officer is entitled to qualified immunity. We hold that he is. The officer's use of deadly force did not violate clearly established law. For this sole reason, we reverse the

district court's decision.

I

A

We recite the facts in the light most favorable to the plaintiff, noting when facts are disputed or when the account of events is based principally on the officers' descriptions. When, as here, we have videotape of the events, we "view[] the facts in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007).

Around 9:00 a.m. on the morning of October 29, 2018, Officers Edward Agdeppa and Perla Rodriguez were called to a 24-Hour Fitness gym on Sunset Boulevard in Hollywood to investigate an apparent trespasser who was causing a disturbance. Both officers activated their body cameras before entering the gym. Once inside, an employee immediately approached the officers and reported, "We have a gentleman who's a little bit irate, and he's not listening, and he's already threatened a few members, and he's assaulted security as well." The employee led the officers to the men's locker room where the suspect, later identified as Albert Dorsey, was located.

Once inside, the officers encountered Dorsey, who was standing naked near a shower area and playing music from his phone aloud. Dorsey was a very large man, approximately 6'1" tall and weighing 280 pounds. Agdeppa and Rodriguez were 5'1" and 5'5," respectively, and each weighed approximately 145

pounds. The officers repeatedly ordered Dorsey to turn off his music, put on his clothes, and leave the gym. Dorsey did not comply.

After two minutes had passed, Dorsey walked across the room, away from his clothes, to look at himself in the mirror. Both officers again instructed Dorsey to get dressed, but Dorsey continued to refuse, appearing to taunt the officers. As the officers waited, Dorsey began dancing to the music while raising his middle finger in Agdeppa's direction. At various points in the videos, two private security guards are seen in the locker room with the officers.

After more than four minutes had passed since the officers first told Dorsey he needed to leave, Agdeppa approached Dorsey to handcuff him from behind. Dorsey resisted Agdeppa's attempts to control his arms, at which point Rodriguez stepped in to help. Agdeppa eventually managed to place a handcuff on Dorsey's right wrist while Rodriguez attempted to control Dorsey's left wrist and elbow. Dorsey continued to struggle, so the officers tried various tactical maneuvers to secure Dorsey's hands. This included attempting to secure Dorsey against the wall, switching sides, and using arm, finger, and wrist locks. Despite these efforts, the officers could not get Dorsey under control.

During the struggle, Agdeppa and Rodriguez attempted to use Rodriguez's handcuffs to form a "daisy chain," which involves connecting two or more sets of handcuffs together to restrain suspects who are too combative or large to be restrained by a single set

of cuffs. As the officers attempted to attach the handcuffs together, Dorsey forcefully pulled his left arm away from Rodriguez and managed to break free of her grip. The officers directed Dorsey to calm down and stop resisting, but he continued to defy them. The officers then maneuvered Dorsey against a wall while using their body weight to force his hands behind his back.

After initially pinning Dorsey to the wall, Agdeppa was able to broadcast a request for additional police units. As Dorsey became more combative, Agdeppa radioed in a request for backup units, which is a more urgent call for assistance. Approximately one minute after going "hands on" with Dorsey, Rodriguez's body camera was knocked to the ground in the struggle. Agdeppa's camera was knocked to the ground shortly thereafter, and the cameras captured minimal video of the rest of the events in question. But they continued to record audio, which included frequent bangs, crashes, shouts of pain, and other indicia of a violent confrontation.[1]

It is undisputed that a violent struggle ensued in the locker room. Despite their further efforts, the officers were unable to control Dorsey, who became

---

[1] What transpired during the rest of the altercation is based largely on the officers' testimony and the bodycam audio. But for purposes of our later legal analysis, the material aspects of the ensuing events are not genuinely disputed, such as Dorsey violently resisting arrest, the officers firing their tasers, and the fact that the violent struggle escalated in the moments leading up to the shooting.

increasingly aggressive. At multiple points during the audio recordings, the officers are repeatedly heard yelling at Dorsey to "Stop!" and "Stop resisting!" Dorsey eventually managed to break free of the officers' grips, and, in response, Agdeppa unholstered his taser and held it to Dorsey's chest. Agdeppa maintains that he warned Dorsey he would use the taser if Dorsey continued to resist. When Dorsey refused to stop his violent struggling, Agdeppa cycled the taser twice into Dorsey's body. After this failed to subdue Dorsey, Rodriguez fired her taser dart into Dorsey's back and activated it for approximately five seconds. After the first attempt failed, Rodriguez activated her taser twice more without success.

The audio recordings confirm that the struggle escalated after the taser deployments. Rodriguez can be heard repeatedly demanding that Dorsey "turn around" after the tasers were cycled. The officers are then heard shouting, groaning, and crying out in pain as the sounds of banging and thrashing increase in volume and intensity. Just before Agdeppa fired the fatal shots, we hear the most intense shouts of pain from the officers amidst loud crashing noises.

The officers' accounts of this part of the story are consistent with each other. Agdeppa indicated that Dorsey did not attempt to flee but instead "advance[d] upon" the officers, "punching at [their] heads and faces while the handcuff attached to his wrist also swung around and struck" them. During the struggle, Dorsey landed blows on Agdeppa's head and face area. Agdeppa recalled that one blow was extremely forceful and knocked him backwards into a wall, momentarily

disorienting him and causing him to drop his taser on the locker room floor. After Rodriguez fired her taser for the third time, Dorsey pivoted and struck her, knocking her to the ground. The officers claim that Dorsey then straddled Rodriguez, striking her repeatedly and gaining control of her taser.

Agdeppa remembered Dorsey "pummeling . . . Rodriguez with a flurry of punches" as she laid in the fetal position, trying to protect her face and head. Rodriguez believed that her life was at risk, and Agdeppa too feared that Dorsey would kill Rodriguez. It was at this point that Agdeppa fired the fatal shots. After he was shot, Dorsey was still holding one of the officers' tasers in his hand.

Agdeppa claimed he warned Dorsey before shooting him, but this part of the audio recording is chaotic. One can hear a man's voice shouting something just before the shots were fired, though what is said is unclear. Whether a final warning was given is disputed and cannot be readily ascertained from the audio recordings. Immediately thereafter, Agdeppa announced over his police radio that shots had been fired and that an officer and suspect were down.

Agdeppa and Rodriguez were treated at the emergency room following the incident. Agdeppa was given sutures on the bridge of his nose and later reported being diagnosed with a concussion, which left him unable to work for six months and had further longer-lasting effects. Rodriguez recalled having a swollen left cheek and right jaw, abrasions on her ear

and hands, and a pulled muscle behind her knee.

B

The Los Angeles Board of Police Commissioners (BOPC) reviewed the incident and issued written findings. The findings were based on various accounts, including from the two private security guards who are seen at different points in the bodycam videos. As the district court noted, "the course of events presented in the Findings largely conform to Agdeppa's account," with witnesses who were in the locker room substantiating key moments in the encounter. In particular, the BOPC report concluded that "available evidence supports that [Agdeppa's] belief that there was an imminent threat of death or serious bodily injury at the time of the [shooting] was objectively reasonable."

The witnesses' accounts in the BOPC findings corroborate the officers' descriptions of a violent, escalating struggle in which they faced a grave risk of serious injury, or worse. For example, as set forth in the BOPC report, Witness F, a security guard, recalled that after Dorsey was tased, Dorsey punched Agdeppa "more than eight times" in the "face and head area with his fist that was handcuffed," with "the force of the punches knock[ing] [Agdeppa] into the lockers and walls."[2] Witness F recalled that "[t]his caused

[2] Although the BOPC report refers to Officers "A" and "B," it is apparent based on the bodycam video and audio and the rest of the record that "A" is Agdeppa and "B" is Rodriguez.

[Agdeppa] to bounce back toward [Dorsey], who then struck [Agdeppa] in the face again." Witness F further described that Dorsey was "striking [Rodriguez] in the face with his half-open hand" and "straddling" her, and that "[Rodriguez] was bleeding from []her mouth as [Dorsey] was hitting []her."

The BOPC report states that after Rodriguez was "knocked to the ground by [Dorsey] and was attempting to defend [herself]," Dorsey "grabbed the TASER with his left hand and began to push the TASER into [Rodriguez]'s face, simultaneously hitting [Rodriguez] with his right fist, which had the handcuffs attached." Indeed, the BOPC report arguably describes a more desperate situation than even Agdeppa recalled: in Witness F's recollection, "moments prior" to the shooting, and "while [Dorsey] was straddling [Rodriguez], [Dorsey] grabbed [Agdeppa]'s gun and attempted to pull it out of its holster."

The BOPC report faulted the officers for poor planning and for failing to use de-escalation tactics earlier in the encounter. Because of these "tactical decisions" earlier in the encounter that placed the officers at a "tactical disadvantage," the BOPC report on this basis found the ultimate use of force unreasonable and outside of department policy. But the BOPC also found—relying on independent witnesses—that Agdeppa reasonably perceived a risk of death or serious injury to the officers:

> [Agdeppa] used deadly force at a time when, as supported by the accounts of

> two independent witnesses, he[] and [Rodriguez] were being assaulted by [Dorsey]. At that time, the violence of [Dorsey's] assault relative to the officers' capacities to defend themselves was such that it was objectively reasonable to believe that there was an imminent threat to the officers of death or serious bodily injury.

C

Paulette Smith, Dorsey's mother, filed this lawsuit against Agdeppa and the City of Los Angeles. Smith claimed a violation of 42 U.S.C. § 1983 based on Agdeppa's allegedly unreasonable use of deadly force. She also sought to hold the City liable under *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), for an assertedly unconstitutional policy or custom. Smith further brought wrongful death actions against Agdeppa and the City under California law. The parties later stipulated to the City's dismissal from the case.

Agdeppa moved for summary judgment. He argued that his use of deadly force was objectively reasonable and that regardless, he was entitled to qualified immunity. The district court found there was a genuine dispute over whether Dorsey posed an immediate threat to the officers sufficient to warrant the use of deadly force. In particular, the district court found disputes of fact concerning whether the severity of the officers' injuries was consistent with a threat of death or serious injury, whether (based on a bullet's

reported trajectory) Dorsey was crouching over Rodriguez when Agdeppa discharged his weapon, and whether witnesses intervened in the altercation. The district court also found that a reasonable jury could conclude that Agdeppa failed to warn Dorsey before firing the fatal shots.

The court then concluded that because a jury could find that a reasonable officer would not have believed Dorsey posed an immediate threat, Agdeppa was not entitled to qualified immunity. The court denied Agdeppa's motion for summary judgment on the plaintiff's state law claims for similar reasons. Agdeppa timely appeals.

II

The denial of summary judgment is usually not an immediately appealable final decision, but "that general rule does not apply when the summary judgment motion is based on a claim of qualified immunity." *Plumhoff v. Rickard*, 572 U.S. 765, 771 (2014). "[B]ecause 'pretrial orders denying qualified immunity generally fall within the collateral order doctrine,'" in the qualified immunity context we "typically have jurisdiction over interlocutory appeals from the denial of summary judgment." *Estate of Anderson v. Marsh*, 985 F.3d 726, 730 (9th Cir. 2021) (quoting *Plumhoff*, 572 U.S. at 772). Nevertheless, our "interlocutory review jurisdiction is limited to resolving a defendant's 'purely legal contention that his or her conduct did not violate the Constitution and, in any event, did not violate clearly established law.'" *Id.* at 731 (alterations omitted) (quoting *Foster v. City*

of Indio, 908 F.3d 1204, 1210 (9th Cir. 2018)).

Smith contends that Agdeppa's appeal is based only on factual disputes that are not reviewable on interlocutory appeal. That is not correct. Agdeppa only contests the legal conclusion that there was a violation of Dorsey's clearly established rights. We have jurisdiction "to the extent 'the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain facts showed a violation of clearly established law.'" *Foster*, 908 F.3d at 1210 (quoting *Johnson v. Jones*, 515 U.S. 304, 311 (1995)). The factual disputes that the district court highlighted therefore do not preclude our review because we "have jurisdiction to review an issue of law determining entitlement to qualified immunity—even if the district court's summary judgment ruling also contains an evidence-sufficiency determination." *Marsh*, 985 F.3d at 731; *see also Wilkins v. City of Oakland*, 350 F.3d 949, 951–52 (9th Cir. 2003).

We review de novo the district court's denial of summary judgment. *Tobias v. Arteaga*, 996 F.3d 571, 579 (9th Cir. 2021). We view the facts and draw reasonable inferences in the light most favorable to Smith, the nonmoving party. *District of Columbia v. Wesby*, 138 S. Ct. 577, 584 n.1 (2018). "Although we 'assum[e] that the version of material facts asserted by the [plaintiff] is correct,' we may consider facts offered by the defendant that are 'uncontradicted by any evidence in the record.'" *Hopson v. Alexander*, 71 F.4th 692, 697 (9th Cir. 2023) (citations omitted) (first quoting *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001); and then quoting *Wilkinson v. Torres*, 610 F.3d

546, 551 (9th Cir. 2010)).

A

The doctrine of qualified immunity protects government officials from § 1983 liability unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *Wesby*, 138 S. Ct. at 589 (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). Because Agdeppa does not challenge the district court's determination that a reasonable juror could conclude that Agdeppa violated Dorsey's Fourth Amendment right to be free from excessive force, this appeal turns solely on the second step of the qualified immunity analysis—that is, whether the claimed unlawfulness of Agdeppa's conduct was "clearly established."

For a right to be clearly established, it must be "sufficiently clear that every reasonable official would understand that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11–12 (2015) (per curiam) (quoting *Reichle*, 566 U.S. at 664). This is a high standard: "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). This means that "every 'reasonable official would understand that what he is doing' is unlawful." *Wesby*, 138 S. Ct. at 589 (quoting *al-Kidd*, 563 U.S. at 741–42). The "rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority.'" *Wesby*, 138 S. Ct. at 589–90 (first quoting

Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam); then quoting *al-Kidd*, 563 U.S. at 735). This "demanding" requirement "protects 'all but the plainly incompetent or those who knowingly violate the law'" and calls for "a high 'degree of specificity.'" *Wesby*, 138 S. Ct. at 589–91 (first quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986); then quoting *Mullenix*, 577 U.S. at 13); *see also Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7–8 (2021) (per curiam).

The Supreme Court has "repeatedly stressed that courts must not 'define clearly established law at a high level of generality.'" *Wesby*, 138 S. Ct. at 590 (quoting *Plumhoff*, 572 U.S. at 779). And this "specificity is especially important in the Fourth Amendment context, where . . . '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Mullenix*, 577 U.S. at 12 (alteration in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)). For us, then, "[t]he question . . . is whether 'clearly established law prohibited' [Agdeppa] from using the degree of force that he did in the specific circumstances that the officers confronted." *O'Doan v. Sanford*, 991 F.3d 1027, 1037 (9th Cir. 2021) (quoting *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam)).

The district court concluded that Agdeppa was not entitled to qualified immunity because "[a]t the time of the incident, it was 'clearly established' that '[w]here 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.'" (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). This reasoning was insufficient because, outside of an obvious case, "[t]he general principle that deadly force requires a sufficient threat hardly settles th[e] matter." *Mullenix*, 577 U.S. at 14; *see also Rivas-Villegas*, 142 S. Ct. at 8. As we have previously recognized, "[t]he standards from *Garner* . . . 'are cast at a high level of generality,' so they ordinarily do not clearly establish rights." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 951 (9th Cir. 2017) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)). Instead, "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* at 947 (emphasis in original) (quoting *Mullenix*, 577 U.S. at 12).

Applying these directives from the Supreme Court, we now analyze whether Agdeppa is entitled to qualified immunity. We conclude that he is.

B

To assess the reasonableness of a particular use of force, "we balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against 'the countervailing government interests at stake.'" *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir. 2003) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). To do so, "[w]e consider 'the type and amount of force inflicted'" in tandem with "'(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 the suspect was actively resisting arrest or attempting to evade arrest

by flight.'" *O'Doan*, 991 F.3d at 1037 (quoting *Miller*, 340 F.3d at 964). Another factor "relevant to the reasonableness of force" is whether proper warnings were or could have been given. *Isayeva*, 872 F.3d at 947. In conducting this analysis, we do not "second-guess officers' real-time decisions from the standpoint of perfect hindsight," *O'Doan*, 991 F.3d at 1036, and recognize that "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.

The district court found that factual disputes existed as to whether the severity of the officers' injuries was consistent with a threat of death or serious injury, whether Dorsey remained standing over Rodriguez until the final shot was fired, whether other witnesses entered the locker room during the struggle, and whether Agdeppa warned Dorsey before using lethal force.

In some instances, these asserted disputes of fact are not genuine. For example, Smith argued below that, based on reported bullet trajectories, an autopsy report "raise[d] questions as to whether, in fact, Dorsey was standing over Rodriguez until Agdeppa's final shot." This argument— which the district court noted the plaintiff had raised "for the first time" at the summary judgment hearing—is based not on expert analysis, but on the speculation of counsel. *See Barcamerica Int'l USA Tr. v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n.4 (9th Cir. 2002) ("[T]he arguments and statements of counsel 'are not evidence

and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment.'" (quoting *Smith v. Mack Trucks,* 505 F.2d 1248, 1249 (9th Cir. 1974) (per curiam))). Indeed, the district court discounted this argument earlier in its decision, recognizing that "[b]ecause there is no evidence regarding the sequence of the gunshots, the court cannot draw any inference as to how Dorsey was positioned relative to each gunshot."

Similarly, the district court identified a potential factual dispute as to whether the BOPC report contradicted Agdeppa's assertion that he was several feet away from Dorsey when he fired the fatal shots, suggesting Agdeppa may have been much closer, which in turn could call into question Agdeppa's credibility. But the district court acknowledged that "plaintiff does not raise this argument." And the BOPC report does not identify any apparent contradiction on this point. Rather, the BOPC report specifically credits Agdeppa as having fired "from an approximate distance of 5–7 feet." And the report later concludes that the BOPC's "investigation revealed that [Agdeppa] fired five rounds at [Dorsey], from an approximate distance of five to seven feet." The BOPC report at one point referenced Witness F's recollection that Dorsey was holding Agdeppa's wrist as the first shots were fired, as Witness F recalled that Dorsey had actually grabbed Agdeppa's gun and was attempting to pull it out of its holster. But we do not rely on that narrative, even as we note that it would strongly favor Agdeppa because it suggests a situation

even more dire than the one Agdeppa recalled.[3]

In any event, even accepting the claimed factual disputes that the district court identified, Agdeppa is still entitled to qualified immunity. Stated differently, the asserted factual disputes do not take away from the core undisputed features of this case which, at a minimum, confirm that any constitutional violation was not clearly established. *See Isayeva*, 872 F.3d at 945. We do not resolve any factual disputes, nor are any of the factual disputes that the district court identified dispositive. We instead consider the disputed facts in the light most favorable to Smith, alongside the undisputed facts and the video and audio recordings, which provide more than sufficient basis for reaching the legal conclusion that qualified immunity is warranted under the second step of the qualified immunity analysis.

The "most important" factor for evaluating Agdeppa's use of lethal force is "whether the suspect posed an immediate threat to the safety of the officers or others." *S.B. v. Cnty. of San Diego*, 864 F.3d 1010,

---

[3] Though it does not suggest he did not witness the events leading up to the shooting, the BOPC report also states that Witness F was no longer in the locker room at the moment shots were fired. If true, this would mean that Witness F's recollection could not legitimately conflict with Agdeppa's account of his positioning at the time of the shooting. And if the report was incorrect on this point and Witness F's testimony about Dorsey grasping for Agdeppa's gun was credited, then the situation would have been more dangerous than Agdeppa recalled. It is immaterial which is correct because either way, this favors Agdeppa.

1013 (9th Cir. 2017) (quoting *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013)). In this case, it is undisputed that the officers were placed in a high-stress, rapidly developing situation involving a person who had reportedly assaulted a gym security officer and threatened others, and who was violently resisting the officers and assaulting them in an enclosed area. *See Ames v. King Cnty.*, 846 F.3d 340, 349 (9th Cir. 2017) (explaining that courts should "focus [their] inquiry . . . on the serious—indeed, life-threatening—situation that was unfolding at the time"). Dorsey weighed 280 pounds and stood at 6'1", dominating Agdeppa and Rodriguez in size and stature. *See Isayeva*, 872 F.3d at 950 (holding that a "disparity in size posed obvious risks of physical harm to the officers"). The recordings from the body cameras confirm that after officers repeatedly implored Dorsey to stop, Dorsey violently resisted and assaulted the officers, in a struggle that grew more intense as it wore on. That is the same account that the BOPC report conveys.

When the officers were unable to bring Dorsey under their physical control with their hands and bodies, they both tried to subdue him with their tasers, but to no avail. Throughout the encounter, the officers are repeatedly heard shouting at Dorsey to stop resisting. Just before the fatal shots were fired, the officers can be heard crying out in pain as crashing and thrashing noises intensify. And in the BOPC report, two independent witnesses corroborated the severity of Dorsey's attack on the officers. Only after the use of nonlethal force had proven ineffective, and only after the assault continued to intensify—with

Dorsey having gained control of Rodriguez's taser—did Agdeppa fire the fatal shots. *See Isayeva*, 872 F.3d at 952 (holding that officers were entitled to qualified immunity where non-lethal force "plainly did not work" and where "the officers were quickly losing in hand-to-hand combat").[4]

We are not persuaded that the extent of the officers' injuries changes the calculus here. Although the plaintiff focuses heavily on this issue (as did the district court), the officers' injuries cannot take away from what the bodycam recordings, Dorsey's taking of the taser, the BOPC report, and the other undisputed facts clearly demonstrate. Nothing about the officers' account required injuries more severe. The dissent suggests that the district court described Rodriguez as "unscathed" following the incident, but the portion of the district court decision the dissent cites merely recites this as an argument made by the plaintiff.

Nor, in any event, were the officers' injuries insubstantial. Agdeppa sustained a prominent facial laceration. He received sutures on his nose (as confirmed in post-incident photographs) and suffered a concussion that reportedly left him unable to work

---

[4] The parties debate at length whether our decision in *Isayeva*, which reversed the denial of qualified immunity, is on all fours with this case, and the district court focused its analysis on that precedent. But the burden is not on the officers to prove they fit perfectly within the facts of a case granting qualified immunity; the burden is on the plaintiff to show a violation of a clearly established right in the specific circumstances at issue. *See Isayeva*, 872 F.3d at 946.

for months. Rodriguez reported swelling on her face and jaw, abrasions, and a pulled muscle. While it is true, as the district court noted, that neither officer appears to have suffered broken bones or more serious injuries, that fortuity does not alter the qualified immunity analysis. No clearly established law requires the officers to have sustained more grievous injuries or worse before using lethal force in the particular situation they confronted.

The dissent relies on *Newmaker v. City of Fortuna*, 842 F.3d 1108 (9th Cir. 2016), and *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (en banc), but contrary to the dissent, these cases did not involve "similar circumstances." In *Newmaker*, two officers provided conflicting testimony about the circumstances of the shooting and arrived at their version of events "[o]nly after receiving suggestions from [an investigator]." 842 F.3d at 1111–13. Even more significantly, the officers asserted that the suspect was standing and swinging a police baton at them, but the autopsy report and video evidence indicated that the man was shot in the back while lying on the ground. *See id.* at 1111–16. In *Gonzalez*, meanwhile, an officer shot a man in the head at point blank range with no warning and no prior resort to non-lethal force, and the officer's account, which turned on the speed of a moving vehicle, included as to that critical issue a "combination of facts [that] appear[ed] to be physically impossible." 747 F.3d at 794. These cases thus involved genuine disputes of highly material facts. There are no analogous disputes here, given the obvious import of the video and audio recordings and the rest of the record. Nor do

Newmaker and *Gonzalez* clearly establish the unlawfulness of Agdeppa's conduct.

Smith argues that *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), clearly establishes that Agdeppa violated Dorsey's Fourth Amendment rights. In *Deorle*, officers were dispatched to Deorle's residence after he became suicidal and acted erratically, but Deorle "was physically compliant," "generally followed all the officers' instructions," and did "not . . . touch, let alone attack, anyone." 272 F.3d at 1276–77. That is obviously not akin to what happened here. Indeed, as to the *Deorle* case in particular, the Supreme Court has already "instructed" us "not to read [our] decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law." *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018) (per curiam).

Smith also argues that qualified immunity should be denied based on the district court decisions in *Rose v. Cnty. of Sacramento*, 163 F. Supp. 3d 787 (E.D. Cal. 2016), *Berger v. Spokane Cnty.*, 2017 WL 579897 (E.D. Wash. Feb. 13, 2017), and *Lerma v. City of Nogales*, 2014 WL 4954421 (D. Ariz. Sept. 30, 2014). "We have been somewhat hesitant to rely on district court decisions" in the second prong of the qualified immunity analysis because "'district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards.'" *Evans v. Skolnik*, 997 F.3d 1060, 1067 (9th Cir. 2021) (quoting *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011)). And in any event, the district court cases on which Smith relies dealt with factual circumstances

materially distinct from those before us. Those cases therefore could not place the constitutional question here beyond debate, even assuming they had the precedential effect of appellate court decisions.

Finally, this case is "far from the obvious one where *Graham* and *Garner* alone offer a basis for decision." *Brosseau*, 543 U.S. at 199. The "situations where a constitutional violation is 'obvious,' in the absence of any relevant case law, are 'rare.'" *O'Doan*, 991 F.3d at 1044 (quoting *Wesby*, 138 S. Ct. at 590). And application of the "obviousness" exception is "especially problematic in the Fourth-Amendment context" due to the often fact-specific nature of the varied situations officers confront. *Sharp v. Cnty. of Orange*, 871 F.3d 901, 912 (9th Cir. 2017); *see also O'Doan*, 991 F.3d at 1044. There is no basis on these facts to conclude that the use of force here was obviously constitutionally excessive, in the absence of any precedent bearing more closely on the specific circumstances presented.

C

Smith makes one additional argument that is somewhat different: she maintains that even if the degree of force here was permissible based on the threat the officers faced, Agdeppa was constitutionally required to warn Dorsey before using such deadly force. For this, Smith relies on our observation in *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), that "whenever practicable, a warning must be given before deadly force is employed." *Id.* at 1201. We made a similar observation in *Gonzalez*. There, we stated that

"[i]n general, we have recognized that an officer must give a warning before using deadly force 'whenever practicable.'" *Gonzalez*, 747 F.3d at 794 (quoting *Harris*, 126 F.3d at 1201).

These general statements from our prior cases cannot carry the day here, whether Smith's argument is a standalone "warning" claim or part of the broader *Graham* analysis. The difficulty we have with Smith's warning argument is that it purports to "define clearly established law at a high level of generality," which the Supreme Court has "repeatedly told courts" not to do. *Kisela*, 138 S. Ct. at 1152 (quoting *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 613 (2015)). The qualified immunity analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 201). And Smith has not identified any precedent or body of precedent suggesting, much less confirming, that Agdeppa's alleged failure to give a warning before using deadly force was obviously unlawful in the circumstances Agdeppa faced. *See Sharp*, 871 F.3d at 911 (noting that plaintiffs "must point to prior case law that articulates a constitutional rule specific enough to alert *these* deputies *in this case* that *their particular conduct* was unlawful" (emphasis in original)).

Our very framing of the "warning" principle itself presupposes that it is not a one-size-fits-all proposition that applies in every case or context. We have stated only that the rule applies "[i]n general," "'whenever practicable.'" *Gonzalez*, 747 F.3d at 794 (quoting *Harris*, 126 F.3d at 1201). We have also

specifically emphasized that "[t]he absence of a warning does *not* necessarily mean that [an officer's] use of deadly force was unreasonable." *Id.* at 797 (emphasis added). The flexibility built into our "warning" rule makes it more difficult for that rule, standing alone, to clearly establish a constitutional violation in any given case.

The origins of our "warning" rule only further confirm that it typically operates at a level of generality that is too elevated for qualified immunity purposes. We sourced our "warning" rule to the Supreme Court's decision in *Garner*. *See Harris*, 126 F.3d at 1201 (citing *Garner*, 471 U.S. at 11–12). But as we have already noted above, *Garner* set forth standards that are for the most part pitched at too high a level of generality to overcome a qualified immunity defense. *See, e.g.*, *Rivas-Villegas*, 142 S. Ct. at 8; *Brosseau*, 543 U.S. at 199.

The general warning principle we have articulated thus does not, on its own, invariably indicate when a warning is required. Existing precedent does not clearly establish in every context when such a warning is "practicable," what form the warning must take, or how specific it must be. Nor does existing law clearly establish how the absence of a warning is to be balanced against the other *Graham* factors in the context of a case such as this. That officers may be constitutionally required to provide a warning before using deadly force in some cases does not mean it is clearly established that such a warning was required in this case.

As a result, Smith was required to come forward with "existing precedent" that "squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (quotation omitted). She has not done so. The cases Smith identifies all involved officers who shot suspects almost immediately after encountering them, where the suspects presented no obvious threat to officer safety. In *Harris*, a police sniper in a hilltop position opened fire on suspects who were exhibiting no immediate signs of aggression, without even announcing that police were present. 126 F.3d at 1193–94, 1202–04. In *Gonzalez*, the officer shot a man in the head at point blank range with no warning and no prior resort to non-lethal deterrents, immediately after the suspect drove away with the officer in the car at a speed that may have been no faster than three to seven miles per hour. *See* 747 F.3d at 794–97. In *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017), the officer shot a thirteen-year-old boy—who was holding a fake gun and displaying no signs of aggression—moments after arriving on the scene, "without knowing if [the boy's] finger was on the trigger, without having identified himself as a police officer, and without ever having warned [the boy] that deadly force would be used." *Id.* at 1010–11. And in *S.R. Nehad v. Browder*, 929 F.3d 1125 (9th Cir. 2019), which was decided *after* the events of this case, the suspect was making no sudden movements when an officer fatally shot him from seventeen feet away, less than five seconds after the officer stepped out of his car, after making no attempt to use non-lethal force. *Id.* at 1130–32, 1137–38.

These cases bear none of the hallmarks of this

case, in which it is undisputed that the officers repeatedly and unsuccessfully tried to use non-lethal force and were engaged in a lengthy, violent struggle with a large assailant in a tightly enclosed area, who was striking them and who had already gained control of an officer's taser. Dorsey was given numerous opportunities—through repeated verbal commands, attempted handcuffing, and taser deployments—to stop his attack. By the officers' words and actions, Dorsey was warned throughout the encounter. He was given numerous opportunities to stand down, and he instead continued to fight. The past precedents we discussed above would not have caused Agdeppa to believe he was required to issue a further warning—to call a "time-out"—in the middle of an increasingly violent altercation.

The dissent's contention that a jury could find that Agdeppa gave no deadly force warning assumes that such a warning was constitutionally required here. As we have explained, no clearly established law required this in the circumstances Agdeppa confronted. Nor, as the dissent suggests, has Agdeppa conceded that it was practicable for him to give the more extensive warning that the dissent apparently envisions in the final moments of the escalating confrontation. Agdeppa is entitled to qualified immunity because Smith does not identify "a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation 'under similar circumstances.'" *Wesby*, 138 S. Ct. at 591 (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)).

* * *

For the foregoing reasons, we reverse the district court's decision denying Agdeppa qualified immunity and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

CHRISTEN, Circuit Judge, dissenting: Officer Edward Agdeppa does not dispute that a reasonable jury could find that he violated Albert Dorsey's Fourth Amendment right to be free from excessive force. This appeal is limited to whether Agdeppa is entitled to qualified immunity. As the district court recognized, qualified immunity was improper because there were significant discrepancies between the officers' versions of their efforts to handcuff Dorsey in a locker room and other record evidence—so much so that a reasonable jury could reject the officers' account of the shooting.

Agdeppa claims that he yelled "stop" before shooting, but no such warning can be heard on either of the officers' body-cam recordings. The defense cannot argue that it was not possible for Agdeppa to give Dorsey a deadly force warning because Agdeppa's sworn statements admit that he had time to repeatedly tell Dorsey to "stop" during the fourminute locker room struggle. The officers tased Dorsey at least five times during this interval, yet Agdeppa never claimed to have warned Dorsey that he would switch from using his taser to using his firearm if Dorsey did not submit to being handcuffed.

The existence of Dorsey's constitutional rights is not in doubt: he had a right to be free from the use of excessive force, and police officers are certainly allowed to use deadly force if they face imminent risk of serious harm.[1] We also have well-established precedent that an officer must give a deadly force warning if it is practicable to do so. *See, e.g.*, *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794 (9th Cir. 2014) (en banc); *Harris v. Roderick*, 126 F.3d 1189, 1201, 1204 (9th Cir. 1997). There is no room for disputing that Officer Agdeppa was on notice of both of these well-established constitutional rules. Thus, as the district court correctly recognized, the only unresolved issues in this case are *factual*: (1) whether a reasonable officer in Agdeppa's position would have believed that Agdeppa's partner was in imminent danger; and (2) whether it was practicable for Agdeppa to warn Dorsey before using lethal force and he nevertheless failed to do so.

The majority mistakenly asserts that the district court denied summary judgment because "at the time of the incident it was 'clearly established' that '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.'" (alternations accepted). That

---

[1] *See Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994)) ("An officer's use of deadly force is reasonable only if '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.'" (emphasis removed) (quoting *Tennessee v. Garner*, 47 U.S. 1, 3 (1985)).

was the district court's recognition of the correct legal standard, not the reason it denied qualified immunity. The court denied qualified immunity because "a jury could find that a reasonable officer in Agdeppa's position would not have believed that [Agdeppa's partner] or anyone else was in imminent danger and thus, would have understood that his use of deadly force violated plaintiff's Fourth Amendment rights."

Rather than construing disputed facts in the light most favorable to the non-moving party, the majority usurps the jury's role. It avoids Agdeppa's sworn statements, which leave little room to doubt that he had an opportunity to provide a deadly force warning, and sidesteps other evidence that would allow a jury to decide that the officers were not at imminent risk when Agdeppa shot Dorsey. We lack interlocutory jurisdiction to review a district court's order denying qualified immunity when the decision turns on factual disputes rather than legal ones. *Peck v. Montoya*, 51 F.4th 877, 885–86 (9th Cir. 2022). The majority errs by disregarding this jurisdictional limitation, re-weighing the evidence, and deciding that the factual disputes identified by the district court are not material. For all of these reasons, I respectfully dissent.

I.

Our review of Agdeppa's interlocutory appeal is limited to the "purely legal . . . contention that [his] conduct 'did not violate the [Constitution], and in any event, did not violate clearly established law.'" *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018)

(quoting *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014)). Those portions of the district court's order determining questions of "'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial . . . [are] not appealable." *Johnson v. Jones*, 515 U.S. 304, 313 (1995). This rule forecloses review of any "*fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Est. of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021) (quoting *Foster*, 908 F.3d at 1210) (emphasis in original).

When a district court denies qualified immunity and "does not explicitly set out the facts that it relied upon, we undertake a review of the pretrial record only to the extent necessary to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Est. of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1007–08 (9th Cir. 2017) (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998)).

Deadly force cases present additional, unique challenges because defendant officers are often the only surviving eyewitnesses. *See, e.g.*, *Gonzalez*, 747 F.3d at 794; *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). For this reason, we have explained that summary judgment should be granted "sparingly" in deadly force cases and courts must take special care to "ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify." *Gonzalez*, 747 F.3d at 795 (quoting *Scott*, 39 F.3d at

915); *see Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016) (explaining that summary judgment is not appropriate in a deadly force case if the plaintiff's claim turns on an officer's credibility, and that credibility is genuinely in doubt).

The district court knew there was evidence in the record that contradicted the officers' statements. The court was obligated to leave it to the jury to consider that evidence and to decide whether it was persuaded by the officers' testimony. *See, e.g.*, *Bator v. State of Hawai'i*, 39 F.3d 1021, 1026 (9th Cir. 1994) ("At the summary judgment stage, . . . the district court may not make credibility determinations or weigh conflicting evidence.").

To assemble its narrative of the events leading up to the locker room shooting, the majority relies heavily on the officers' testimony, the audio-only recordings from the officers' body-cams, and especially on select portions of an internal investigation report prepared by the Los Angeles Board of Police Commissioners. The record also includes statements from two security guards, an autopsy report, and photos of the officers' bruises and cuts. Considered together, the evidence is inconsistent; some of it supports Officer Agdeppa's account and some cannot be reconciled with his description of the last three minutes before the shooting. At the summary judgment stage, contested issues of fact must be construed in plaintiff's favor.

The majority correctly observes that when "we have videotape of the events, we 'view[] the facts in the

light depicted by the videotape.'"[2] But in this case, the video does not depict the salient facts. There is no dispute about what happened when the officers initially made contact with Dorsey: he refused to comply with their instructions to get dressed, leave the locker room, and submit to being handcuffed. It is the final three minutes before the shooting that are in question, and there is no video of that part of the encounter because the officers' body-cams were knocked to the floor. From the audio-only portion of the body-cam recordings, the majority purports to find that the conflict escalated and that cries of pain came from the officers rather than Dorsey. But the audio is inconclusive. Banging sounds can be heard, along with the officers' warnings that they will tase Dorsey if he does not comply, followed by the sound of tasers deploying. The audio recording sheds no light on where Agdeppa and Dorsey were standing, or who was doing what in the locker room, just before the shots were fired. Agdeppa claims that he yelled for Dorsey to "stop" before escalating from his taser to his gun, but that cannot be heard on the audio. And contrary to the majority's interpretation of the audio-only portion of the recording, the district court decided that "a rational fact finder could find that both officers' body-worn camera footage [is] consistent with [plaintiff's] account, rather than Agdeppa's."

The majority relies heavily on the Police Commissioners' factual finding that Agdeppa

---

[2] Maj. 5 (quoting *Scott v. Harris*, 550 U.S. 372, 381 (2007)) (alteration in original).

reasonably believed Dorsey posed an imminent threat before Agdeppa shot, but downplays the Commissioners' conclusions that: (1) the officers' tactics warranted a finding of Administrative Disapproval; and (2) Agdeppa's use of deadly force was unreasonable. The report concluded:

> When assessed in light of the series of substandard tactical decisions leading up to Officer [Agdeppa]'s [officer-involved shooting], and the nexus between those decisions and the circumstances under which Officer [Agdeppa] found [himself] compelled to fire [his] weapon, *the lethal use of force by Officer [Agdeppa] was unreasonable.*

(emphasis added).

Tellingly, though the majority relies heavily on it, Officer Agdeppa objected to the admission of the Police Commissioners' report.[3] This is unsurprising because, at best, the report is a mixed bag for defendants.

The Commissioners' report only summarized the guards' statements, but its narrative makes clear that one of the guards told the Police Commissioners' investigators that Dorsey was holding Agdeppa's arm

---

[3] The district court overruled Agdeppa's objection and concluded that the information in the report could be presented in a form admissible at trial and as a public record.

when the shots were fired. This guard's account conflicts with Agdeppa's description that he was standing six to eight feet away from Dorsey when he fired, and that Dorsey was still straddling Rodriguez and pummeling her. The district court recognized that "if introduced at trial, this evidence would impeach Agdeppa's credibility because, according to Agdeppa, he fired from six to eight feet away as Dorsey stood or hunched over Rodriguez." The majority dismisses this contradiction as not "dispositive." But the question is whether this factual dispute is *material*. *See Simmons v. G. Arnett*, 47 F.4th 927, 932 (9th Cir. 2022) ("A material fact is one that is needed to prove (or defend against) a claim, as determined by the applicable substantive law."). Where Dorsey was standing and what he was doing before Agdeppa shot him are essential to determining whether a reasonable officer would have believed that Dorsey posed an imminent threat of death or serious bodily injury to Agdeppa's partner. The actions taken in the final few minutes before the shooting will determine whether Agdeppa is entitled to qualified immunity.

The majority describes the gym's security guards as "independent witnesses," but a gym employee reported that Dorsey assaulted one of the guards before the officers arrived. More important, the majority decides that the statements the guards gave during the Police Commissioners' internal investigation corroborated Agdeppa's account, with no mention that some of the statements attributed to the guards sharply contradicted Agdeppa's declaration and the narrative he gave to investigators.

The majority recites a passage from the report that recounts one of the security guards recalling that he assisted in the locker room struggle and that Dorsey grabbed Agdeppa's gun but was unable to remove it from its holster, yet neither of the officers recalled the guards being involved and the report elsewhere states that the guards had left the locker room or were in the process of leaving before the shooting took place. The majority decides that whether one of the guards accurately described what occurred in the final moments is "immaterial," either because the guard could not impeach Agdeppa's testimony about the final moments before the shooting (because the guard was not there), or because the guard's narrative suggests that the situation in the locker room was "even more dire than the one Agdeppa recalled." The majority cannot have it both ways. We are not permitted to ignore the report's conclusion that Officer Agdeppa's use of lethal force was unreasonable, nor ignore that the guard provided statements that squarely contradicted Agdeppa's account.

In sum, the security guards' descriptions of the encounter differed from the officers' accounts in several respects, including the number of shots and volleys that Agdeppa fired, whether Dorsey reached for Agdeppa's firearm, whether Dorsey was holding Agdeppa's wrist when Agdeppa fired, and whether Dorsey remained hunched over Rodriguez when he was shot. To be sure, the guards described a struggle between Dorsey and the officers, but given the conflicting record, it is for the fact finder to decide whether the officers were at imminent risk of harm prior to the shooting.

The Commissioners' report incorporated the framework for evaluating excessive force cases set out in *Graham v. Connor*, 490 U.S. 386 (1989), along with Departmental policies.[4] The most important *Graham* factor is whether the suspect posed an imminent threat to the safety of the officers or others. *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc) (quoting *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir.1994)).

Mapping the *Graham* factors onto the facts of this case: Dorsey resisted arrest, but nothing suggests that he had committed a serious crime before the officers physically engaged with him and tried to handcuff him; there was no danger Dorsey was concealing a weapon because he was not wearing any clothing; and Dorsey did not present a flight risk. Turning to the threat that Dorsey posed, the Commissioners concluded that Agdeppa's use of deadly force was unreasonable because:

---

[4] The Commissioners quoted a familiar passage from *Graham*:

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather that with the 20/20 vision of hindsight. [. . .] The calculus of reasonableness must embody allowance 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.

(quoting *Graham*, 490 U.S. at 396–97).

> Once the officers had initiated physical contact with [Dorsey], it was readily apparent that [Dorsey's] greater size and strength, in concert with his noncompliant behavior, would make it difficult, if not impossible, for the officers to accomplish their goal of handcuffing him. *At that time during the incident, there was no exigency that required the officers to stay physically engaged with [Dorsey].* Nevertheless, the officers did not take the opportunity to disengage from their physical struggle and redeploy in order to allow for the assembly of sufficient resources. Rather, the officers stayed engaged as the situation continued to escalate, culminating in injurious assaults on both officers and the ultimate use of deadly force by Officer [Agdeppa].

(emphasis added).

The record also contains physical evidence that conflicts with Agdeppa's statements and declaration regarding the risk Dorsey presented to the officers. As explained, Agdeppa argued that it was necessary to shoot because Dorsey had "inflicted serious injuries on both officers" and he "was striking Rodriguez with his fist while turning her Taser on her." The order denying summary judgment observed that post-incident photographs showed an "unscathed" Rodriguez and that her medical records reflected only swelling, abrasions, and a pulled muscle—minor injuries very

different from the type one would expect if Dorsey had been pummeling Rodriguez such that "the next punch would likely kill her," as Agdeppa had described. The district court rejected Agdeppa's arguments that bruising and additional injuries were not visible in the photos because they constituted impermissible attacks on "the weight of the evidence, which [was] not for the [c]ourt to consider on summary judgment." The majority, by contrast, weighs the photos against other evidence and decides that the photos are unpersuasive.

The autopsy report's description of the bullet trajectories also undermines Agdeppa's account that Dorsey was standing over Rodriguez as she lay on the floor, that he was straddling and punching her, and that Agdeppa feared the next blow might kill his partner. This report states that several bullets traveled through Dorsey's body from right to left in a downward direction, and that one of the bullets traveled through Dorsey's stomach from left to right in an upward direction. The bullet trajectories cannot be squared with Agdeppa's testimony that, "Dorsey remained in the same position . . . as each shot was fired," and that immediately after the final shot, "Dorsey fell backward and off Rodriguez and did not move."[5]

---

[5] My colleagues mistakenly argue that the district court "discounted this argument earlier in its decision." In fact, the district court observed only that it could not make a finding "as to how Dorsey was positioned relative to each gunshot." The district court recognized that a fact finder *could* rely upon inconsistencies between Agdeppa's description and the physical evidence to impeach Agdeppa's credibility.

The majority improperly weighs the conflicting evidence (e.g., finding that the officers' injuries were not "insubstantial"); assesses the sufficiency of the evidence (e.g., characterizing the bullet trajectory evidence as "speculative"); and makes credibility determinations (e.g., concluding that security guards' statements "corroborate the officers' descriptions" even though it is not clear the guards were present). Finally, it must be noted that the majority relies on *Hopson v. Alexander* for the proposition that "we may consider facts offered by the defendant that are 'uncontradicted by any evidence in the record.'" 71 F.4th 692, 697 (9th Cir. 2023) (quoting *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010)). By invoking *Hopson*, the majority forgets that binding en banc authority requires that we take special care in fatality shooting cases to "ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead— is unable to testify." *Gonzalez*, 747 F.3d at 795 (quoting *Scott*, 39 F.3d 915). The quote from *Hopson* is inapt because that case did not involve a fatality.[6] We are bound by our en banc decision in *Gonzalez*.

Agdeppa will no doubt prevail if a fact finder is ultimately persuaded by his description of the way the struggle in the locker room unfolded. But on interlocutory appeal, we are not permitted to review "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Est.*

---

[6] *Wilkinson*, on which *Hopson* relied, did involve a fatality, but it predates *Gonzalez*.

of Anderson, 985 F.3d at 732; *see Peck*, 51 F.4th at 876 (declining to review a district court's determination "that there were genuine disputes of fact about whether [the suspect] posed an immediate threat"). We should affirm the district court's order denying qualified immunity.

II.

Under similar circumstances, we have reversed orders granting qualified immunity. In *Newmaker*, we rejected a request for qualified immunity based on evidence that contradicted the officers' account of a fatal shooting. 842 F.3d at 1110. There, as here, the crux of the case turned on what the jury would decide about what happened in the moments before the shooting. The lead-up to the *Newmaker* shooting mirrors this case in pertinent respects: Newmaker was nearly naked when he was shot, he refused to comply with officer instructions, and he physically resisted officers after they tased him in both "drive" stun and "dart" modes. *Id.* at 1111–12. The officer who shot and killed Newmaker alleged that he had grabbed another officer's baton, stood up, and swung it "violently" and "aggressively" at the officer's head. *Id.* at 1112. The defendant claimed that he warned Newmaker to drop the baton before shooting him from a standing position. *Id.* According to the defendant officer, Newmaker was also standing, but he shot Newmaker a second time after he fell to the ground because Newmaker rose and began swinging the baton again. *Id.*

We reversed the district court's order granting

summary judgment on qualified immunity grounds because the evidence conflicted with the officer's testimony. First, the officer had previously described shooting Newmaker twice in quick succession, failing to mention that Newmaker fell and got back up. *Id.* at 1113, 1116. Second, the autopsy report indicated that Newmaker was shot while he was bending over and low to the ground, not while he was standing. *Id.* at 1114–15, 1116. Third, though a car dashboard camera captured only bits and pieces of the scuffle and shooting, there was "nothing clearly visible in [Newmaker's] hands" when he was shot, and contrary to the officer's statement, it appeared that Newmaker was shot after he fell to the ground. *Id.* at 1115. We concluded that summary judgment was inappropriate because it was disputed "when, why, and how [the officer] shot Newmaker." *Id.* at 1117.

The majority seems to reason that because Dorsey was larger than the officers, was resisting arrest, and presented some risk to officer safety, Agdeppa is entitled to qualified immunity. This overlooks that all resisting suspects pose some risk to officer safety, and yet our precedent provides that officers may use deadly force only if they have probable cause to believe a suspect poses an imminent risk of death or serious physical injury to the officer or others. *See, e.g.*, *id.* at 1116. My colleagues decide that Dorsey's indisputably larger size and the actions he took to resist render the disputed facts not "dispositive." But qualified immunity depends on what happened in the moments before Agdeppa shot Dorsey—and whether a reasonable officer would have believed that Dorsey posed an imminent threat to the

officers. *See Simmons*, 47 F.4th at 932 (defining "material fact").

Gonzalez is also instructive. There, physical evidence conflicted with the officers' description of events preceding a police-officer fatality shooting. 747 F.3d at 791. The only testimony describing the actions leading up to Gonzalez's death came from the officers who stopped Gonzalez for a traffic violation. *Id.* at 792. They recalled that Gonzalez refused to exit his van or turn off its engine and that the officers, one standing on each side of the vehicle, reached in through the van's driver-side and passenger windows to open the van's doors. *Id.* They later testified that it appeared Gonzalez had something in his hands and that they struggled to restrain him as they were leaning in through the van's windows. *Id.* The officers recounted that Gonzalez managed to shift the van into "drive" and that he "stomped" on the accelerator while one of the officers was still leaning into the van. *Id.* at 792–93 (alteration accepted). That officer stated that he yelled at Gonzalez to stop and then shot him in the head from less than six inches away, killing him. *Id.* at 793.

Our en banc court reasoned that the key issues were whether a jury could decide that an objectively reasonable officer would have perceived an immediate threat of death or serious bodily injury, and whether a jury could decide it was practicable for the defendants to have given Gonzalez a deadly force warning. *Id.* at 794. We reversed the district court's order granting summary judgment because the officers' statements could not be reconciled with other evidence in the record. By their mutual account, the van accelerated to

fifty miles per hour after Gonzalez stomped on the accelerator and they both feared for the safety of the officer who had leaned into the van's passenger's side window and remained in the accelerating van. *Id.* at 794. But the defendants also said that the van traveled just fifty feet in five to ten seconds. If that had been the case, a jury could decide that the van was not traveling at a high speed and that it was practicable to provide a warning before using deadly force. *Id.* at 797 (citing *Deorle v. Rutherford*, 272 F.3d 1272, 1283–84 (9th Cir. 2001) ("Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable [where] . . . the officer neither orders the individual to stop nor drop the can or bottle . . . .")).

Quite unlike the majority's cramped view that "existing precedent does not clearly establish *in every context* when . . . a [deadly force] warning is 'practicable,'" our en banc court in *Gonzalez* reversed the district court's order granting summary judgment in favor of the officers because the evidence would have allowed jurors to decide that a deadly force warning had been practicable.

III.

Application of our rule requiring a deadly force warning is particularly straightforward in this case because Officer Agdeppa never claimed that it was not practicable to give a deadly force warning. Agdeppa's brief to this court recycles a bald assertion that appeared for the first time in his summary judgment

brief, that he "warned [Dorsey] that he would shoot." That assertion was flatly contradicted by Agdeppa's own pretrial statements, in which he consistently said that he only told Dorsey to "stop." Because counsel's argument was not evidence, *see, e.g.*, *Gaines v. Relf*, 53 U.S. 472, 490 (1851), the district court properly ignored it.

When asked at his deposition if he warned Dorsey before using deadly force, Agdeppa said, "I know I said something. . . . I yelled something." And in his sworn declaration submitted in support of his summary judgment motion and in the statement of undisputed material facts filed in the trial court, Agdeppa alleged that, before shooting, he "gave Dorsey a verbal warning, stating words to the effect that Dorsey needed to stop." The majority stops short of deciding that no such warning can be heard on the audio recording. It instead decides that the audio is "chaotic." But if we view the facts in the light most favorable to plaintiff, no warning was given. And we are not free to disregard Agdeppa's sworn account: whatever happened in the locker room after the body-cams were knocked off, Agdeppa has been consistent in recounting that he yelled "stop" several times before using his taser, and that he yelled "stop" before using his gun. Agdeppa's declaration is a sworn statement by a party opponent and there is no conflicting evidence on this point. *Cf.* Fed. R. Evid. 801(d)(2)(A).

Setting aside for the moment that no warning can be heard on the audio before the shooting starts, Agdeppa never claimed that he warned Dorsey he was going to switch from using his taser to using his

firearm if Dorsey did not stop resisting. This is critical because the officers had repeatedly warned Dorsey that they would tase him if he did not stop resisting—and followed up by tasing Dorsey at least five times. Another command to "stop" would have done nothing to warn Dorsey that Agdeppa was preparing to ramp up to deadly force. *See, e.g.*, *Harris*, 126 F.3d at 1204 ("Whenever practicable, a warning must be given *so that the suspect may end his resistance*." (emphasis added)); *see also S.R. Nehad v. Browder*, 929 F.3d 1125, 1138 (9th Cir. 2019) ("Even assuming Browder did command Nehad to 'Stop, drop it,' there is no dispute that Browder never warned Nehad that a failure to comply would result in the use of force, let alone deadly force.").[7] On this record, a reasonable jury could decide that it was practicable for Agdeppa to give Dorsey a deadly force warning, and that he did not provide one.

The majority argues that plaintiff failed to identify any precedent establishing that Agdeppa's failure to give a deadly force warning was "obviously unlawful in the circumstances Agdeppa faced," because Agdeppa posed a risk of danger to the officers. This is wrong for two reasons: (1) it repeats the error of assuming that the officers faced an imminent risk of serious injury based on conflicting evidence; and (2) it conflates the practicability of providing a deadly force

---

[7] *Browder* was published in 2019, after the events at issue in this case, but we concluded the officer's Fourth Amendment violation in that case violated law that was clearly established as of April 2015. *See Browder*, 929 F.3d at 1130, 1141.

warning—which depends on whether the risk of danger was imminent—with whether there was a risk of danger. Our en banc court's decision in *Gonzalez* clearly demonstrates these are two different inquiries.

Like the officers in this case, the officers in *Gonzalez* described an escalating and violent struggle to restrain a suspect. They recounted that Gonzalez accelerated the van he was driving while one officer was trapped inside. We concluded that factual discrepancies in *Gonzalez* would allow a reasonable jury to find that there was time to give a deadly force warning, despite the danger posed by the moving vehicle. Here, after hearing the conflicting evidence and deciding what happened in the locker room, a jury could find that Agdeppa had an opportunity to give Dorsey a deadly force warning, and failed to do so. Agdeppa provided several warnings before using intermediate force. Accepting Agdeppa's uncontested statements on this point, Agdeppa did not warn Dorsey that he was escalating to the use of his firearm.[8]

IV.

We are not permitted to accept Agdeppa's characterization of the struggle in the locker room

---

[8] The majority also argues that our precedent did not "clearly establish" "what form the warning must take, or how specific it must be." We have never required that level of specificity as a condition of applying this precedent. Nor is the issue implicated here, where a jury could find that Agdeppa gave no deadly force warning at all.

because physical evidence and witness statements conflict with it. *See Peck*, 51 F.4th at 875–76; *Newmaker*, 842 F.3d at 1116; *Gonzalez*, 747 F.3d at 791. The district court correctly recognized that a reasonable jury could conclude that Agdeppa did not provide a deadly force warning, and that it was practicable to do so. For these reasons, we should affirm the district court's order denying qualified immunity. Accordingly, I respectfully dissent.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAULETTE SMITH, individually and as Successor in Interest to Albert Dorsey, deceased,
Plaintiff-Appellee,

v.

EDWARD AGDEPPA, an individual,
Defendant-Appellant,

and

CITY OF LOS ANGELES, a municipal entity; DOES, 1 through 10,
Defendants.

No. 20-56254

D.C. No. 2:19-cv-05370-CAS-JC

OPINION

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted March 16, 2022
San Francisco, California

Filed December 30, 2022

Before: Morgan Christen and Daniel A. Bress, Circuit
Judges, and Gary Feinerman,[*] District Judge.

Opinion by Judge Christen;
Dissent by Judge Bress

SUMMARY[**]

The panel affirmed the district court's order denying, on summary judgment, qualified immunity to a police officer in an action brought pursuant to 42 U.S.C. § 1983 alleging defendant used unreasonable deadly force when he shot and killed Albert Dorsey during a failed arrest in the men's locker room of a gym.

Before the district court, defendant Officer Agdeppa maintained that he killed Dorsey because Dorsey was pummeling Agdeppa's partner, and Agdeppa feared Dorsey's next blow would kill her. Agdeppa also claimed that he yelled "stop" before

---

[*] The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

shooting, but no such warning could be heard on the officers' body-cam recordings.

The district court properly denied Agdeppa's request for qualified immunity for two reasons. First, the district court recognized that a reasonable jury could reject the police officers' account of the shooting because there were significant discrepancies between their versions of events and other evidence in the record. Second, this court has long held that the Fourth Amendment requires officers to warn before using deadly force when practicable. The defense cannot argue that it was not possible for Agdeppa to give Dorsey a deadly force warning because Agdeppa's sworn statements show that he had time to tell Dorsey to "stop." The encounter lasted approximately four minutes after the officers first attempted to handcuff Dorsey, and the officers tased Dorsey at least five times during that interval. Agdeppa never claimed that he warned Dorsey that he would switch from using his taser to using his firearm if Dorsey did not submit to being handcuffed, nor did he argue that it was impracticable to do so. The district court correctly ruled that a jury could decide that Agdeppa's use of deadly force violated clearly established law.

Dissenting, Judge Bress stated that the two police officers in this case found themselves in a violent confrontation with a large, combative suspect, who ignored their repeated orders to stop resisting and failed to respond to numerous taser deployments. After the suspect's assault on the officers intensified and he wrested one of the officers' tasers into his own hands, one officer shot the suspect to end the aggression. The

split-second decision officers made here presented a classic case for qualified immunity. The majority's decision otherwise was contrary to law and requires officers to hesitate in situations in which decisive action, even if leading to the regrettable loss of human life, can be necessary to protect their own.

COUNSEL

Kevin E. Gilbert (argued) and Carolyn M. Aguilar, Orbach Huff & Henderson LLP, Pleasanton, California; for Defendants-Appellant.

Edward M. Lyman III (argued), Brian T. Dunn, and James Bryant, The Cochran Firm, Los Angeles, California; Megan R. Gyongyos, Carpenter Zuckerman & Rowley LLP, Beverly Hills, California; for Plaintiff-Appellee.

OPINION

CHRISTEN, Circuit Judge:

Edward Agdeppa, a police officer in Los Angeles, shot and killed Albert Dorsey during a failed arrest in the men's locker room of a gym. Before the district court, Officer Agdeppa maintained that he killed Dorsey because Dorsey was pummeling Agdeppa's partner, and Agdeppa feared Dorsey's next blow would kill her. Agdeppa also claimed that he yelled "stop" before shooting, but no such warning can be heard on the officers' body-cam recordings. Dorsey's mother, Paulette Smith, sued Agdeppa for his allegedly unreasonable use of deadly force. The district court

denied Agdeppa's motion for summary judgment on qualified immunity grounds, and Agdeppa timely appealed.

The district court properly denied Agdeppa's request for qualified immunity for two reasons. First, the district court recognized that a reasonable jury could reject the officers' account of the shooting because there were significant discrepancies between their versions of events and other evidence in the record. Second, we have long held that the Fourth Amendment requires officers to warn before using deadly force when practicable. *See, e.g.*, *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794 (9th Cir. 2014) (en banc); *Harris v. Roderick*, 126 F.3d 1189, 1201, 1204 (9th Cir. 1997). The defense cannot argue that it was not possible for Agdeppa to give Dorsey a deadly force warning because Agdeppa's sworn statements show that he had time to tell Dorsey to "stop." The encounter lasted approximately four minutes after the officers first attempted to handcuff Dorsey, and the officers tased Dorsey at least five times during that interval. Agdeppa never claimed that he warned Dorsey that he would switch from using his taser to using his firearm if Dorsey did not submit to being handcuffed, nor did he argue that it was impracticable to do so. The district court correctly ruled that a jury could decide Agdeppa's use of deadly force violated clearly established law. We therefore affirm the district court's order denying summary judgment.

I.

On the morning of October 29, 2018, Agdeppa

and his partner Officer Perla Rodriguez responded to a Hollywood gym to investigate calls that someone was trespassing and engaging in disruptive conduct. Both officers activated their body-worn cameras, and followed a gym employee into the men's locker room. The staff member who met the officers told them, "We have a gentleman who is a little bit irate and he's not listening. He's already hurting a few members and he's also assaulted security as well."

The officers encountered Dorsey in the shower area of the locker room, where they spent several minutes ordering Dorsey to get dressed, to turn off his music, and to leave the gym. In response, Dorsey ignored the officers, walked back and forth across the room to look at himself in the mirror, slowly dried his body with a towel, and danced to the music on his phone, raising his middle finger toward Agdeppa.

Agdeppa and Rodriguez then attempted to handcuff still-naked Dorsey, who resisted the officers' attempts by tensing up and pulling his arms away. Agdeppa managed to place one handcuff onto Dorsey's right wrist, but the body-cam videos show that, for roughly a minute and twenty seconds, Dorsey used his size to thwart the smaller officers' attempts to handcuff him. As Dorsey resisted, both officers' bodycams were knocked from their uniforms onto the locker-room floor. While the next three-or-so minutes are not visible on video, the body-cams continued to record audio.

Agdeppa alleges that after the body-cams fell to the floor, the locker room struggle escalated and

turned violent. Agdeppa and Rodriguez assert that Dorsey struck Rodriguez in the face with his elbow as he pulled away from the officers, and Agdeppa warned Dorsey that he would tase him if he did not submit to handcuffing. But Dorsey continued to resist, and in the officers' telling, he began swinging at the officers after Rodriguez fired the darts from her taser at Dorsey's back.[1] Both officers also attested that they used their tasers in "stun" mode several times as Dorsey became increasingly aggressive. In his deposition testimony and affidavit submitted in support of his summary judgment motion, Agdeppa alleged that Dorsey repeatedly struck him on the face and knocked him backward into a wall, disorienting him and causing him to drop his taser.

Agdeppa claims that as he recovered from his disorientation, he witnessed Dorsey "straddling" Rodriguez and "pummeling" her head and face with a "flurry of punches" as she lay on the floor in a fetal position. Agdeppa alleged that Dorsey appeared to be trying to kill Rodriguez in a "vicious[] and violent[]" attack and he "believed that the next punch would likely kill her." In his affidavit, Agdeppa stated that he "unholstered and drew [his] service weapon" and "gave Dorsey a verbal warning, stating words to the effect that Dorsey needed to stop." Agdeppa alleged that Dorsey instead "continued to pummel" Rodriguez with her taser in his hand, so from a distance of six-to-eight feet away, Agdeppa fired five shots to stop Dorsey, who

---

[1] The autopsy reported a single taser dart wound in Dorsey's midline central back.

"began to fall backwards and away" from Rodriguez as Agdeppa fired the final shot.

Smith disputes Agdeppa's account of the shooting. Dorsey cannot testify because he is dead, but in its decision denying summary judgment, the district court identified several sources of evidence that conflict with the officers' version of events.

The district court explained, "a rational fact finder could find that both officers' body-worn camera footage [is] consistent with [plaintiff's] account, rather than Agdeppa's." Video from the officers' body-cams shows that during the first several minutes of the encounter, Dorsey refused to comply with the officers' instructions to get dressed, leave the locker room, and submit his arms for handcuffing. After the video ends, the audio-only portion of the body-cam recording cannot shed any light on where Agdeppa and Dorsey were standing or what they were doing, but banging sounds and the sound of tasers deploying are audible.[2] Agdeppa claims that he yelled for Dorsey to "stop" before escalating from his taser to his gun, but as the district court recognized, that warning cannot be heard on the audio.

Bystander-witness statements also contradicted Agdeppa's story. The gym's security guards were

---

[2] The dissent purports to know what is occurring in the moments leading up to the shooting, attributing "pained groaning" and "grunting" to the officers. The district court made no findings of this sort and, absent speculation, grunting sounds do not tell us what was occurring before Agdeppa drew his firearm.

present during part of the encounter and they provided statements for the Los Angeles Board of Police Commissioners' internal investigation of the shooting. The Commissioners found the officers' tactics warranted a finding of Administrative Disapproval, and that Agdeppa's use of deadly force was unreasonable. The officers' actions were deemed inconsistent with the Department's deadly force policy because the officers' "inappropriate tactical decisionmaking" and "series of substandard tactical decisions" prevented the officers from "respond[ing] effectively using non-lethal and less-lethal force." The Commissioners' report did not attach the guards' statements, but the district court correctly recognized from the report's narrative that one of the guards attested that Dorsey was holding Agdeppa's arm when the shots were fired. The district court recognized that "if introduced at trial, this evidence would impeach Agdeppa's credibility because, according to Agdeppa, he fired from six to eight feet away as Dorsey stood or hunched over Rodriguez."

The security guards' accounts differed from the officers' in several respects, including the number of shots that Agdeppa fired, the number of volleys that Agdeppa fired, whether Dorsey reached for Agdeppa's firearm, and whether Dorsey was holding Agdeppa's wrist until after the second shot was fired. To be sure, the guards described a struggle between Dorsey and the officers, but the question for the fact-finder will be what happened in the moments before the shooting, and as the Commissioners' report noted, the gym's surveillance video shows that one of the guards was not present in the locker room at the time of the

shooting and the other was "in the process of exiting the locker room."[3]

Significantly, the Commissioners recognized that the officers' actions are not to be judged with 20/20 hindsight, their report incorporated the framework for evaluating excessive force cases set out in *Graham v. Connor*, 490 U.S. 386 (1989), along with Departmental policies, and it concluded that Agdeppa's use of lethal force was unreasonable.[4] Dorsey resisted arrest, but nothing suggested that he had committed a serious crime before the officers

---

[3] The Commissioners' report is in summary form and "does not reflect the entirety of the extensive investigation." It refers to other evidence and witness statements, but they are not attached to the report and do not appear to have been part of the district court's record. The vantage point from which the guards made their detailed observations cannot be determined on our record. On remand, the parties will have an opportunity to engage in discovery. Whether the guards' testimony is ultimately deemed credible will be a question for the fact-finder.

[4] The Commissioners cited an oft-quoted passage from *Graham*:

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather that with the 20/20 vision of hindsight. [. . .] The calculus of reasonableness must embody allowance 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.

Graham, 490 U.S. at 396–97.

physically engaged with him in an attempt to apply handcuffs. The district court recognized that there was no danger he was concealing a weapon because he was not wearing any clothing, and he did not present a flight risk. The Commissioners concluded that Agdeppa's use of deadly force was unreasonable because after a struggle ensued, "there was no exigency that required the officers to stay physically engaged with [Dorsey]":

> Once the officers had initiated physical contact with [Dorsey], it was readily apparent that [Dorsey's] greater size and strength, in concert with his noncompliant behavior, would make it difficult, if not impossible, for the officers to accomplish their goal of handcuffing him. At that time during the incident, there was no exigency that required the officers to stay physically engaged with [Dorsey]. Nevertheless, the officers did not take the opportunity to disengage from their physical struggle and redeploy in order to allow for the assembly of sufficient resources. Rather, the officers stayed engaged as the situation continued to escalate, culminating in injurious assaults on both officers and the ultimate use of deadly force by Officer [Agdeppa].

The record also contains physical evidence that conflicts with Agdeppa's story. Agdeppa argued that it was necessary to shoot because Dorsey had "inflicted

serious injuries on both officers" and he "was striking Rodriguez with his fist while turning her Taser on her." But the district court's order denying summary judgment observed Smith's argument that post-incident photographs showed an "unscathed" Rodriguez and that the officers' medical records reflected only minor injuries very different from the type that one would expect if Dorsey had been pummeling Rodriguez in the way Agdeppa described. The district court correctly rejected Agdeppa's contrary arguments that bruising and other injuries were not visible in the photos as "unavailing" because they impermissibly attacked the weight of the evidence at the summary judgment stage.

An autopsy report's description of the bullet trajectories and the fact that one witness reported Dorsey was holding Agdeppa's arm when he was shot also undermine Agdeppa's description that Dorsey was standing over Rodriguez as she laid on the floor, that he was straddling her and punching her, and that Agdeppa feared the next blow might kill his partner. The autopsy report indicates that several bullets traveled through Dorsey's body from right to left in a downward direction, and one of the bullets traveled through Dorsey's stomach from left to right in an upward direction. Witness F told the police investigators that after he was shot the second time, Dorsey let go of Agdeppa's wrist, began to walk toward Agdeppa, and that Agdeppa then fired two more times. The dissent decides the Commissioners' report must contain a typo, and that it must have intended to refer to Dorsey holding onto Rodriguez's wrist. But we are not free to speculate about whether there are errors in

the record. As the district court correctly determined, if deemed credible by the fact-finder, this evidence would allow a jury to question Agdeppa's credibility because he claimed that he shot Dorsey from a distance of six-to-eight feet while Dorsey was standing over Rodriguez.[5]

On this conflicting record, the district court correctly concluded that "a jury could find that a reasonable officer in Agdeppa's position would not have believed that Rodriguez or anyone else was in imminent danger and, thus, would have understood that his use of deadly force violated plaintiff's Fourth Amendment rights." It remains to be seen whether Smith's claims can be established at trial, but pervasive disputes of material fact make this case a textbook example of an instance in which summary judgment was improper.

II.

We review de novo the district court's decision on summary judgment that an officer was not entitled to qualified immunity. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir. 2009). We view the facts in the light most favorable to the plaintiff. *Est. of*

---

[5] The dissent mistakenly argues that the district court "discounted this argument earlier in its decision." In fact, the district court observed that it could not make a finding "as to how Dorsey was positioned relative to each gunshot." But the district court recognized that a fact-finder could rely upon inconsistencies between Agdeppa's description and the physical evidence to impeach Agdeppa's credibility.

Lopez ex rel. Lopez v. Gelhaus, 871 F.3d 998, 1006 (9th Cir. 2017).

An order denying summary judgment is not usually an immediately appealable final decision, but "that general rule does not apply when the summary judgment motion is based on a claim of qualified immunity" because "pretrial orders denying qualified immunity generally fall within the collateral order doctrine." *Plumhoff v. Rickard*, 572 U.S. 765, 771–72 (2014). The scope of our review in these interlocutory appeals is limited to the "purely legal . . . contention that [an officer's] conduct 'did not violate the [Constitution], and in any event, did not violate clearly established law.'" *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018) (quoting *Plumhoff*, 572 U.S. at 773). Accordingly, those portions of the district court's order determining questions of "'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial . . . [are] not appealable" until after final judgment. *Johnson v. Jones*, 515 U.S. 304, 313 (1995). This rule forecloses interlocutory review of any "*fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Est. of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021) (quoting *Foster*, 908 F.3d at 1210).

When the district court denies qualified immunity and "does not explicitly set out the facts that it relied upon, we undertake a review of the pretrial record only to the extent necessary to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *Est. of Lopez*,

871 F.3d at 1007–08 (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998)). We then examine: (1) whether the facts, viewed in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right; and (2) whether the right in question was "clearly established" at the time of the officer's action. *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014). If we answer either question in the negative, the officer is entitled to qualified immunity.

III.

A.

Smith argues that Agdeppa's use of deadly force was objectively unreasonable and violated Dorsey's clearly established Fourth Amendment rights. Courts assess whether an officer's use of force was objectively reasonable by weighing "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. The *Graham* factors are not "considered in a vacuum," but must be weighed "in relation to the amount of force used to effect [the] particular seizure." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc) (quoting *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994)). We take the perspective of the officer on the scene without the benefit of 20/20 hindsight. *Graham*, 490 U.S. at 396–97. Because deadly force involves a serious intrusion on Fourth Amendment rights, deadly force is reasonable *only* if the officer has probable

cause to believe the suspect poses an immediate and significant threat of death or serious physical injury to the officer or others. *Gonzalez*, 747 F.3d at 793 (quoting *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994)); *see Tennessee v. Garner*, 471 U.S. 1, 11 (1985). We have also repeatedly stated that an officer must give warning before using deadly force "whenever practicable." *Gonzalez*, 747 F.3d at 794 (quoting *Harris*, 126 F.3d at 1201).

Deadly force cases present additional, heightened challenges because defendant officers are often the only surviving eyewitnesses. *See, e.g.*, *Gonzalez*, 747 F.3d at 794; *Scott*, 39 F.3d at 915. For this reason, we have explained that summary judgment should be granted "sparingly" in deadly force cases and courts must take special care to "ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify." *Gonzalez*, 747 F.3d at 795 (quoting *Scott*, 39 F.3d at 915); *see Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016) (explaining that summary judgment is not appropriate in a deadly force case if the plaintiff's claim turns on an officer's credibility, and credibility is genuinely in doubt).

When other evidence in the record, "such as medical reports, contemporaneous statements by the officer, the available physical evidence, and any expert testimony proffered by the plaintiff" is inconsistent with material evidence offered by the defendant, "[q]ualified immunity should not be granted." *Newmaker*, 842 F.3d at 1116 (alterations, quotation

marks, and citation omitted). In such cases, district courts must allow juries to consider the evidence that contradicted the officers' version of events, and decide whether they were persuaded by the officers' testimony. *See, e.g.*, *Bator v. State of Hawai'i*, 39 F.3d 1021, 1026 (9th Cir. 1994) ("At the summary judgment stage, . . . the district court may not make credibility determinations or weigh conflicting evidence.").

Our case law bears out that we have consistently applied these standards. In *Newmaker*, we rejected a request for qualified immunity based on evidence that contradicted the officers' account of a fatal shooting. 842 F.3d at 1110. There, as here, the crux of the case turned on what the jury would decide about what happened in the moments before the shooting. The lead-up to the shooting in *Newmaker* mirrors this case in pertinent respects: Newmaker was nearly naked when he was shot, he refused to comply with officer instructions, and he physically resisted officers after they tased him in "drive" stun and "dart" mode. *Id.* at 1111–12. The officer who shot and killed Newmaker alleged that Newmaker grabbed another officer's baton, stood up, and swung it "violently" and "aggressively" at the officer's head. *Id.* at 1112. The defendant claimed that he warned Newmaker to drop the baton before shooting him from a standing position. *Id.* According to the officer, Newmaker was also standing, but he shot Newmaker a second time after he fell to the ground because Newmaker rose and began swinging the baton again. *Id.*

We reversed the district court's order granting summary judgment on qualified immunity grounds

because the evidence conflicted with the officer's testimony. First, the officer had previously described shooting Newmaker twice in quick succession, failing to mention that Newmaker fell and got back up. *Id.* at 1113, 1116. Second, the autopsy report indicated that Newmaker was shot while he was bending over and low to the ground, not while he was standing. *Id.* at 1114–16. Third, though a car dashboard camera captured only bits and pieces of the scuffle and shooting, there was "nothing clearly visible in [Newmaker's] hands" when he was shot, and contrary to the officer's statement, it appeared that Newmaker was shot after he fell to the ground. *Id.* at 1115. We concluded that summary judgment was inappropriate because it was disputed "whether the officers were telling the truth about when, why, and how [the officer] shot Newmaker." *Id.* at 1117.

Gonzalez v. City of Anaheim is another fatal shooting case in which physical evidence conflicted with the officers' description of events leading up to the shooting. 747 F.3d at 791. The only testimony concerning the minutes leading up to Gonzalez's death came from officers who stopped Gonzalez for a traffic violation. *Id.* at 792. They described that Gonzalez refused to exit the van or turn off its engine and the officers, one standing on each side of the vehicle, reached through the van's driver and passenger windows to open the van's doors. *Id.* They later testified that it appeared Gonzalez had something in his hands and that they struggled to restrain him as they were leaning through the van's windows. *Id.* The officers recounted that Gonzalez managed to shift the van into "drive," and that he "stomped" on the

accelerator. *Id.* at 792–93. The officer who shot Gonzalez was still leaning into the van. He stated that he yelled at Gonzalez to stop and then shot him in the head from less than six inches away, killing him. *Id.* at 793.

Our en banc court reasoned that the key issues were whether a jury could decide that an objectively reasonable officer would have perceived an immediate threat of death or serious bodily injury, and whether a jury could decide it was practicable for the defendants to have given Gonzalez a deadly force warning. *Id.* at 794. We reversed the district court's order granting summary judgment because the officers' statements could not be reconciled with the record. By their mutual account, the van accelerated to fifty miles per hour after Gonzalez stomped on the accelerator and they both feared for the safety of the officer who had leaned into the van's passenger's side and was trapped in the accelerating van. *Id.* at 794. But the defendants also recounted that the van traveled just fifty feet in five to ten seconds. We reasoned that if that had been the case, a jury could decide that the van was not traveling at a high speed and that it was practicable to provide a warning before using deadly force. *Id.* at 797 (citing *Deorle v. Rutherford*, 272 F.3d 1272, 1283–84 (9th Cir. 2001) ("Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable [where] . . . the officer neither orders the individual to stop nor drop the can or bottle . . . .")).

The dissent missteps by conflating the

practicability of providing a deadly force warning—which depends on whether the risk of danger was imminent—with whether there was a risk of danger. Our en banc court's decision in *Gonzalez* clearly demonstrates these are two different inquiries. Like the officers in this case, the officers in *Gonzalez* described an "escalating" and "violent" struggle to restrain Gonzalez after a traffic stop, and they recounted that Gonzalez accelerated the van he was in while one officer was trapped inside. We concluded that factual discrepancies in *Gonzalez* would allow a reasonable jury to find that there was time to give a deadly force warning, despite the danger posed by the moving vehicle. Here, depending on what happened in the locker room, a jury could find that Agdeppa had an opportunity to give Dorsey such a warning before escalating to deadly force. Indeed, Agdeppa provided several warnings before using intermediate force, but at no point did Agdeppa warn Dorsey that he was escalating to the use of his firearm.

The dissent engages in its own detailed and elaborate fact-finding and decides that Dorsey presented a significant risk to officer safety. But all resisting suspects pose some risk to officer safety and our precedent nevertheless provides that an officer may use deadly force only if the officer has probable cause to believe a suspect poses an immediate and significant threat of death or serious physical injury to the officer or others. *See Gonzalez*, 747 F.3d at 793; *Newmaker*, 842 F.3d at 1116. It also requires that, if the circumstances permit, an officer must give notice before using deadly force. *See, e.g.*, *Gonzalez*, 747 F.3d at 794.

B.

The district court did not err in denying Agdeppa's request for qualified immunity because "the version of events offered by [Agdeppa was] materially contradicted by the record." *Newmaker*, 842 F.3d at 1116. Agdeppa argues that he did not violate Dorsey's clearly established constitutional rights by using "lethal force during hand-to-hand combat," but he attested that he was standing between six and eight feet away from Dorsey when he shot. Both Agdeppa and the dissent forget the limited scope of our interlocutory jurisdiction and ignore the district court's factual findings, improperly weigh conflicting evidence, assess the sufficiency of the evidence, and make credibility determinations.[6] The district court construed the evidence in the light most favorable to Smith and concluded that a jury could reasonably reject Agdeppa's description of a "deadly fight" in the locker room and find that "a reasonable officer in Agdeppa's position would not have believed that Rodriguez or anyone else was in imminent danger, and thus, would have understood his use of deadly force

---

[6] For example, the dissent includes a table that selects statements from the audio recording, but draws numerous inferences in favor of the officers; e.g. "pained grunt/groan." Elsewhere, the dissent decides the security guards' statements thoroughly corroborate the officers' description of events, only to later suggest that the guards were unable to see what was happening prior to the shooting. In fact, the record does not allow us to determine the guards' respective vantage points and we are not allowed to make credibility determinations. This is an issue for the fact-finder on remand.

violated plaintiff's Fourth Amendment rights." *See Scott*, 39 F.3d at 914 ("An officer's use of deadly force is reasonable only if '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.'" (quoting *Garner*, 471 U.S. at 3)).[7]

It is uncontested that Dorsey posed some danger to the officers' safety by actively resisting arrest, but our case law required Agdeppa to give a deadly force warning if doing so was practicable. *See, e.g.*, *Gonzalez*, 747 F.3d at 794; *Harris*, 126 F.3d at 1201, 1204; *Est. of Lopez*, 871 F.3d at 1011 (holding that an officer's use of deadly force was unreasonable because the officer "indisputably had time to issue a warning, but never notified [the decedent] that he would be fired upon if he either turned or failed to drop the gun"). And as the district court explained, Smith presented evidence calling into question whether Agdeppa warned Dorsey of his intent to use deadly force.

---

[7] Agdeppa also argues that the evidence in the record was insufficient to create a dispute of material fact as to whether Dorsey posed an imminent threat to the officers and contends that the district court erred in considering the autopsy and Commission reports because they were inadmissible. We lack jurisdiction to consider Agdeppa's challenges to the sufficiency of the evidence, *see Est. of Anderson*, 985 F.3d at 731, and boiled down, Agdeppa's evidentiary arguments are disguised challenges to the sufficiency of the evidence. In any event, the district court was entitled to consider the report at the summary judgment stage because it could be presented in a form admissible at trial. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010).

The application of our well-established rule to Agdeppa's conduct is straightforward because Agdeppa never claimed that it was not practicable to give a deadly force warning. On the contrary, when asked at his deposition if he warned Dorsey before using deadly force, Agdeppa said, "I know I said something. . . . I yelled something." In his sworn declaration submitted in support of his summary judgment motion, and in the statement of undisputed material facts he filed in the trial court, Agdeppa alleged that, before shooting, he "gave Dorsey a verbal warning, stating words to the effect that Dorsey needed to stop."[8] If we view the facts in the light most favorable to Smith, we cannot disregard Agdeppa's sworn account: whatever happened in the locker room after the body-cams were knocked off, Agdeppa's statement was that he had time to yell "stop." Setting aside for the moment that no such warning can be heard on the audio recording, Agdeppa never claimed that he warned Dorsey he was going to switch from using his taser to using his firearm if Dorsey did not stop resisting. Because the officers had tased Dorsey at least five times, a command to "stop" would have done nothing to warn

---

[8] Agdeppa's brief to this court recycles a bald assertion that appeared for the first time in his summary judgment brief, that he "warned [Dorsey] that he would shoot." This assertion lacked any evidentiary support and conflicted with Agdeppa's pre-trial statements that he told Dorsey to "stop." Because counsel's argument was not evidence, *see, e.g.*, *Gaines v. Relf*, 53 U.S. 472, 490 (1851), the district court properly ignored it.

Ironically, the unsupported assertion in Agdeppa's brief that he did provide a warning supports Smith's contention that there was time to provide one.

Dorsey that Agdeppa was preparing to ramp up to use deadly force. *See, e.g.*, *Gonzalez*, 747 F.3d at 794 ("In general, we have recognized that an officer must give a warning before using deadly force 'whenever practicable.'" (quoting *Harris*, 126 F.3d at 1201)); *Harris*, 126 F.3d at 1204 ("Whenever practicable, a warning must be given *so that the suspect may end his resistance*." (emphasis added)); *see also S.R. Nehad v. Browder*, 929 F.3d 1125, 1138 (9th Cir. 2019) ("Even assuming Browder did command Nehad to 'Stop, drop it,' there is no dispute that Browder never warned Nehad that a failure to comply would result in the use of force, let alone deadly force.").[9] Agdeppa's declaration is a sworn statement by a party opponent and there is no conflicting evidence on this point. *Cf.* Fed. R. Evid. 801(d)(2). Particularly in light of the Commissioners' report, a reasonable jury could decide that it was practicable for Agdeppa to give Dorsey a deadly force warning.

Finally, as the district court recognized, no warning, not even the "stop" that Agdeppa alleges he yelled, can be heard on the officers' body-cam audio clips. On that basis alone, a reasonable jury could find Agdeppa's use of deadly force was unreasonable and violated clearly established law.

The dissent laments that we do not say more

---

[9] *Browder* was published in 2019, after the events at issue in this case, but we concluded the officer's Fourth Amendment violation in that case violated law that was clearly established as of April 2015. *See Browder*, 929 F.3d at 1130, 1141.

about the standard for qualified immunity, but our opinion accurately explains the applicable standard. It is curious that the dissent compiles a detailed set of factual findings from contested evidence, and disregards our limited jurisdiction on interlocutory review: we cannot engage in fact-finding, we cannot make credibility determinations, and we are obliged to view disputed facts in Smith's favor. From the beginning, the dissent forgets our role. It first accepts that no warning is audible on the recording, then goes on to assume that Agdeppa told Dorsey to "stop" in the moments before the shooting; it decides that Agdeppa had only a "micro-second interval" to provide a warning and credits Witness F's recollection that "moments prior" to the shooting, Dorsey tried to pull Agdeppa's gun from his holster—even though, according to the Commissioners' report, the gym's security video showed that Witness F had exited the locker room prior to the shooting. Despite its suggestions to the contrary, body-cam video does not justify appellate fact-finding in this case, because there is no video footage of the moments before the shooting—there are only grunting and banging sounds.

If a fact-finder ultimately rules in Agdeppa's favor regarding the way the events unfolded in the locker room, Agdeppa will likely prevail. But at this stage, we are not free to overlook the Commissioners' contrary finding that once a struggle ensued, there was "no exigency that required the officers to stay physically engaged with [Dorsey]." Nor are we free to ignore the factual disputes identified by the district court. *See, e.g.*, *Est. of Anderson*, 985 F.3d at 731 ("A public official may not immediately appeal 'a fact-

related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.'" (alteration omitted) (quoting *Foster*, 908 F.3d at 1210)). As even the dissent concedes, a factor that can be considered in the excessive force analysis is whether proper warnings were given.

IV.

It is not our place to step into the jury's shoes and we do not know what happened in the crucial interval before Agdeppa shot Dorsey. Left to assess the evidence and witness credibility, a reasonable fact-finder could decide that Agdeppa's characterization of the events in the locker room was contradicted by other evidence in the record. A reasonable jury could also conclude that Agdeppa had an opportunity to warn Dorsey and did not do so. Both were valid grounds for the district court to properly deny qualified immunity.

AFFIRMED.

BRESS, Circuit Judge, dissenting:

The two police officers in this case found themselves in a violent confrontation with a large, combative suspect, who ignored their repeated orders to stop resisting and failed to respond to numerous taser deployments. After the suspect's assault on the officers intensified and he wrested one of the officers' tasers into his own hands, one officer shot the suspect

to end the aggression. Two independent witnesses verified the officers' account. Was it clearly established for purposes of overcoming qualified immunity that officers enduring a frenzied onslaught were legally required to call a "time out" and issue another warning before they used deadly force? Remarkably, the majority says yes. That is clearly wrong.

The Supreme Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015)). Our court today repeats that same error, in this case finding it clearly established that officers in the heat of battle must follow a judge-devised warning script when officer safety is most jeopardized. The split-second decision officers made here presents a classic case for qualified immunity. The majority's decision otherwise is contrary to law and requires officers to hesitate in situations in which decisive action, even if leading to the regrettable loss of human life, can be necessary to protect their own.

After repeated verbal commands and efforts to use nonlethal force failed, no clearly established law required these officers to recite magic words of further warning in the highly dangerous situation they confronted. Respectfully, I dissent.

I

In its effort to turn tangential "disputed" facts

into supposedly critical ones, the majority fails to provide a full account of the perilous circumstances that produced the events in this case, while glossing over the officers' repeated attempts to avoid resort to deadly force. Though the majority strains to detect inconsistencies in the officers' accounts, the key aspects of this case are undisputed, based largely on video and audio recordings. To be clear, the majority's claimed factual disputes are ultimately beside the point because even accepting them as valid, the majority opinion still commits a fundamental error of law in treating as clearly established a warning rule that operates at too high a level of generality, and that we have never said applies in the throes of a violent altercation. Nevertheless, and although we construe the facts in the light most favorable to the plaintiff, a more complete retelling of the events is warranted.

A

Around 9:00 a.m. on the morning of October 29, 2018, Officers Edward Agdeppa and Perla Rodriguez were called to a 24-Hour Fitness gym on Sunset Boulevard in Hollywood to investigate an apparent trespasser who was causing a disturbance. Both officers activated their body cameras before entering the gym. Once inside, an employee immediately approached the officers and reported, "We have a gentleman who's a little bit irate, and he's not listening, and he's already threatened a few members, and he's assaulted security as well." The employee led the officers to the men's locker room where the suspect, later identified as Albert Dorsey, was located.

Once inside, the officers encountered Dorsey, who was standing naked near a shower area and playing music from his phone aloud. Dorsey was a very large man, approximately 6'1" tall and weighing 280 pounds. Agdeppa and Rodriguez each weighed approximately 145 pounds and were 5'1" and 5'5", respectively. The officers repeatedly ordered Dorsey to turn off his music, put on his clothes, and leave the gym. Dorsey did not comply.

After two minutes had passed, Dorsey walked across the room, away from his clothes, to look at himself in the mirror. Both officers again instructed Dorsey to get dressed, but Dorsey continued to refuse, seemingly taunting the officers. As the officers waited, Dorsey began dancing to the music while raising his middle finger in Agdeppa's direction. At various points in the videos, two private security guards are seen in the locker room with the officers.

After more than four minutes had passed since the officers first told Dorsey he needed to leave, Agdeppa approached Dorsey to handcuff him from behind. Dorsey resisted Agdeppa's attempts to control his arms, at which point Rodriguez stepped in to help. Agdeppa eventually managed to place a handcuff on Dorsey's right wrist while Rodriguez attempted to control Dorsey's left wrist and elbow. Dorsey continued to struggle, so the officers tried various tactical maneuvers to secure Dorsey's hands. This included attempting to secure Dorsey against the wall, switching sides, and using arm, finger, and wrist locks. Despite these efforts, the officers could not get Dorsey under control.

During the struggle, Agdeppa and Rodriguez attempted to use Rodriguez's handcuffs to form a "daisy chain," which involves connecting two or more sets of handcuffs together to restrain suspects who are too combative or large to be restrained by a single set of cuffs. As the officers attempted to attach the handcuffs together, Dorsey forcefully pulled his left arm away from Rodriguez and managed to break free of her grip. The officers directed Dorsey to calm down and stop resisting, but he continued to defy them. The officers then maneuvered Dorsey against a wall while using their body weight to force his hands behind his back.

After initially pinning Dorsey to the wall, Agdeppa was able to broadcast a request for additional units. As Dorsey became more combative, Agdeppa radioed in a request for backup units, which is a more urgent call for assistance. Approximately one minute after going "hands on" with Dorsey, Rodriguez's body camera was knocked to the ground in the struggle. Agdeppa's camera was knocked to the ground shortly thereafter, and the cameras captured minimal video of the rest of the events in question. But they continued to record audio, which included frequent bangs, crashes, shouts of pain, and other indicia of a violent confrontation.

It is undisputed that a violent struggle ensued in the locker room. Despite their further efforts, the officers were unable to get control of Dorsey, who became increasingly aggressive. At multiple points during the audio recordings, the officers are heard yelling at Dorsey to stop resisting. Dorsey eventually

managed to break free of the officers' grips, and, in response, Agdeppa unholstered his taser and held it to Dorsey's chest. Agdeppa maintains that he warned Dorsey he would use the taser if Dorsey continued to resist. When Dorsey refused to stop his violent struggling, Agdeppa cycled the taser twice into Dorsey's body. After this failed to subdue Dorsey, Rodriguez fired her taser dart into Dorsey's back and activated it for approximately five seconds. After the first attempt failed, Rodriguez activated her taser twice more without success.

The audio recordings confirm that the struggle escalated after the taser deployments. Rodriguez can be heard repeatedly demanding that Dorsey "turn around" after the tasers were cycled. The officers are then heard groaning and crying out in pain as the sounds of banging and thrashing increase in volume and intensity. Just before Agdeppa fired the fatal shots, we hear the most intense shouts of pain from the officers amidst loud crashing noises.

The officers' accounts of this part of the story are fully consistent with each other. Agdeppa indicated that Dorsey did not attempt to flee but instead "advance[d] upon" the officers, "punching at [their] heads and faces while the handcuff attached to his wrist also swung around and struck" them. During the struggle, Dorsey landed blows on Agdeppa's head and face area. Agdeppa recalled that one blow was extremely forceful and knocked him backwards into a wall, momentarily disorienting him and causing him to drop his taser to the locker room floor. After Rodriguez fired her taser for the third time, Dorsey

pivoted and struck her, knocking her to the ground. The officers claim that Dorsey then straddled Rodriguez, striking her repeatedly and gaining control of her taser.

Agdeppa, still dazed from Dorsey's blow, reoriented himself and looked up to see Dorsey straddling Rodriguez. Agdeppa remembered Dorsey "pummeling . . . Rodriguez with a flurry of punches" as she laid in the fetal position, trying to protect her face and head. Rodriguez believed that her life was at risk, and Agdeppa, too, feared that Dorsey would kill Rodriguez. It was at this point that Agdeppa fired the fatal shots. After he was shot, Dorsey was still holding one of the officers' tasers in his hand. Agdeppa claimed he warned Dorsey before shooting him, but this part of the audio recording is chaotic. One can hear a man's voice shouting something just before the shots were fired, though what is said is unclear. I will assume, as the majority does, that no final warning was given.

But for all its focus on the warning that was allegedly not provided, the majority opinion fails to acknowledge the numerous commands—in word and deed—that the officers gave in trying to halt Dorsey's aggression. Before they went "hands on" with Dorsey, both officers repeatedly urged him to put on his clothes and leave the gym. Once they went "hands on," the recordings confirm that the officers gave repeated verbal directives and used various means of nonlethal force to get Dorsey to stop his assault. *See Scott v. Harris*, 550 U.S. 372, 381 (2007) (courts at summary judgment "should . . . view[] the facts in the light depicted by the videotape").

Reciting only what I can clearly discern after officers went "hands on," this is what the recordings show about what officers said to Dorsey during the four minutes of violent struggle:

Officer	**Command or Sound**	**Timestamp**
Agdeppa	"Give me your hand."*[1]	16:09:32[2]
Rodriguez	"Put your hands behind your back."	16:09:33
Rodriguez	"Stop tensing up!"	16:09:35
Rodriguez	"Stop tensing up!"	16:09:36
Rodriguez	"Do not tense up on me!"	16:09:37
Rodriguez	"Do not fucking tense up on me!"	16:09:38

[1] The commands that I denote with an asterisk can be heard more clearly in Agdeppa's body camera recording than in Rodriguez's. Gaps in time without directives or especially loud sounds are filled with other sounds of struggle, officer-to-officer coordinating communications, and Dorsey's initial verbal protests, which I do not include. I also do not include a small number of statements from the officers that are difficult to make out over the crashes of the altercation and the music still playing from Dorsey's phone. Contrary to the majority's assertion, I draw no inferences in favor of the officers, but have simply set forth what is apparent from the recordings.

[2] Timestamps are displayed in both officers' body camera recordings. The two recordings' timestamps are consistent with one another.

Officer	Command or Sound	Timestamp
Agdeppa	"I swear to God, if you fucking tense up, buddy!"	16:09:39
Rodriguez	"Do not tense up on me."	16:09:40
Agdeppa	"What are you gonna do?"	16:09:47
Rodriguez	"Do not fucking tense up on me."	16:09:49
	[Officers continue to struggle with Dorsey as they try to place handcuffs on him]	16:09:51-16:10:03
Agdeppa	"Calm down."	16:10:04
Agdeppa	"Calm down."	16:10:05
Rodriguez	"Give me your fucking hand then!"	16:10:10
	[Officers continue to struggle with Dorsey in attempting to handcuff him with two sets of cuffs in a "daisy chain"]	16:10:12-21
Rodriguez	[Pained Exclamation/Grunt]*	16:10:20

Officer	Command or Sound	Timestamp
	[Rodriguez's body camera is knocked to the ground as Dorsey escalates his resistance]	16:10:20
Agdeppa	"Hold on!"	16:20:20
	[Agdeppa's body camera is knocked to the ground]	16:10:22
Agdeppa	"Stop resisting!"	16:10:23
	[Loud Bang]	16:10:35
	[Bang]	16:10:41
	[Dorsey is briefly visible on Rodriguez's camera wrestling and pushing the officers]	16:10:45-51
	[Thud]	16:11:03
Agdeppa	"Stop."	16:11:10
Rodriguez	"Give me your fucking hand!"	16:11:17
Agdeppa	"Give her your hand."	16:11:18
Rodriguez	"Give me your fucking hand."	16:11:22

Officer	Command or Sound	Timestamp
Rodriguez	"Stop fucking resisting!"	16:11:24
Agdeppa	"Will you relax!"	16:11:31
Agdeppa	"Get off her!"*	16:11:33
	[Loud Bang]	16:11:34
	[Thud]	16:11:44
Agdeppa	"Just relax!"	16:11:54
Agdeppa	"You're alright."*	16:11:55
Rodriguez	"Stop!"	16:11:55
Rodriguez	"Stop!"	16:11:57
Agdeppa	"Relax!"	16:12:10
Rodriguez	"Stop!"	16:12:12
Agdeppa	"Relax!"	16:12:20
	[Inaudible Raised Voices]	16:12:20-25
Rodriguez	"Stop Trying to [Inaudible]!"	16:12:27
	[Audible Taser Deployment]	16:12:28
Rodriguez	"Turn around or I'm going to tase you again!"*	16:12:34

Officer	Command or Sound	Timestamp
Rodriguez	"Turn around!"	16:12:36
Rodriguez	"Turn around!"	16:12:39
Rodriguez	"Turn around!"	16:12:40
Rodriguez	"Turn around!"	16:12:42
Rodriguez	"Just give me your hand!"*	16:12:45
	[Repeated and Ongoing Taser Deployments and Crashing Sounds]	16:12:45-16:13:11
Rodriguez	[Pained Groan/Grunt]	16:12:55
Rodriguez	[Pained Shout]	16:12:56
Rodriguez	[Pained Shout and Bang]	16:12:58
	[Bang and Buzz from Taser]	16:12:59
Rodriguez	[Pained Grunt/Groan]	16:13:01
Rodriguez	[Pained Groan/Grunt]	16:13:02
Agdeppa	[Loud Cry of Pain]	16:13:04
Rodriguez	[Pained Grunt/Groan]	16:13:05
	[Inaudible Shout (Man's Voice)]	16:13:11
	[Gunshots]	16:13:12

Officer	Command or Sound	Timestamp
Agdeppa	"Are you okay?"	16:13:15
Rodriguez	"I'm good!"	16:13:16
Agdeppa	"6A15, shots fired! Officer needs help! [Inaudible]"	16:13:17

Agdeppa and Rodriguez were treated at the emergency room following the incident. Agdeppa was given sutures on the bridge of his nose and later reported being diagnosed with a concussion, which left him unable to work for six months and had further longer-lasting effects. Rodriguez recalled having a swollen left check and right jaw, abrasions on her ear and hands, and a pulled muscle behind her knee.

The Los Angeles Board of Police Commissioners (BOPC) reviewed the incident and issued written findings. The findings were based on various accounts, including from the two private security guards who are seen at different points in the bodycam videos. As the district court noted, "the course of events presented in the Findings largely conform to Agdeppa's account," with other witnesses who were in the locker room substantiating key moments in the encounter. Although the BOPC faulted the officers for not using greater de-escalation techniques earlier in the encounter, it concluded that "available evidence supports that [Agdeppa's] belief that there was an imminent threat of death or serious bodily injury at the time of the [shooting] was objectively reasonable."

B

The majority claims there are "significant discrepancies" in the events recounted above. That is simply inaccurate. Based on the reports of the two officers and others, the BOPC report describes the events as I have. Relying on the BOPC report, the majority contends that "[b]ystander witness statements . . . contradicted Agdeppa's story." The opposite is true. The majority relies on only one alleged contradiction: one witness recalling Agdeppa potentially being closer to Dorsey at the time of the shooting than Agdeppa described. But in fact, the witnesses' accounts in the BOPC findings thoroughly corroborate the officers' descriptions of a violent, escalating struggle in which they faced a grave risk of serious injury, or worse.

For example, as set forth in the BOPC report, Witness F, a security guard, recalled that after Dorsey was tased, Dorsey punched Agdeppa "more than eight times" in the "face and head area with his fist that was handcuffed," with "the force of the punches knock[ing] [Agdeppa] into the lockers and walls."[3] Witness F recalled that "[t]his caused [Agdeppa] to bounce back toward [Dorsey], who then struck [Agdeppa] in the face again." Witness F further described that Dorsey was "striking [Rodriguez] in the face with his half-open hand" and "straddling" her, and that "[Rodriguez] was bleeding from []her mouth as [Dorsey] was hitting

[3] Although the BOPC report refers to Officers "A" and "B," it is apparent that "A" is Agdeppa and "B" is Rodriguez.

[]her." The BOPC report states that after Rodriguez was "knocked to the ground by [Dorsey] and was attempting to defend [herself]," Dorsey "grabbed the TASER with his left hand and began to push the TASER into [Rodriguez]'s face, simultaneously hitting [Rodriguez] with his right fist, which had the handcuffs attached."

Even the alleged inconsistency the majority relies upon supports Agdeppa because it describes a more desperate situation than even Agdeppa recalled: in Witness F's recollection, "moments prior" to the shooting, and "while [Dorsey] was straddling [Rodriguez], [Dorsey] grabbed [Agdeppa]'s gun and attempted to pull it out of its holster." There is also another problem: the majority opinion is purporting to identify a supposedly critical factual dispute based on what Witness F observed at the exact moment of the shooting, but a careful reading of the BOPC report shows that based on video surveillance, Witness F was no longer even in the locker room at that exact moment, having exited just immediately before. (There is no suggestion in the BOPC report that Witness F did not see the violent struggle in the moments leading up to the shooting—an account the BOPC report fully credits.) And for avoidance of doubt, it accomplishes nothing for the majority to poke holes in Witness F's account when it is the majority opinion that is relying on the BOPC report to create a supposed disputed of fact; I am merely showing why that reliance is wholly

misplaced.[4]

---

[4] It is worth noting that, in claiming the BOPC report contradicts Agdeppa's account of where he was standing when he fired the fatal shots, the majority relies exclusively on the district court's decision. But the district court, which acknowledged that "plaintiff does not raise this argument," focused on a line in the BOPC report which stated that, "According to Witness F," after the second shot, "[Dorsey] let go of Officer A's wrist." In the very next sentence, however, the BOPC report states that "Witness F believed that [Dorsey] looked at *Officer A* and then began to walk toward him/her, and that Officer A fired two more rounds." (emphasis added). This sequence of events would not be possible if Dorsey were holding Officer A's (Agdeppa's) wrist. The line on which the district court (and the majority) thus rely—referencing Dorsey holding an officer's wrist—should likely be a reference to *Officer B* (Rodriguez). And to the extent this portion of the BOPC report should be read as meaning that Officer A (Agdeppa) had time to move away from Dorsey after Dorsey let go of his wrist, that would allow Agdeppa to be placed several feet from Dorsey when he shot him. Thus, either way the majority is wrong (and thus, contrary to the majority, I do not "decide" that the BOPC report contained a mistake).

Even more critically, however, as I have noted above, the majority purports to base its key identified factual dispute on Witness F's recollection of Agdeppa's positioning at the exact moment of the shooting, *when the BOPC later notes that Witness F was not even present in the locker room at that exact point in time*. That may explain why the BOPC report had no difficulty crediting Agdeppa as having fired "from an approximate distance of 5–7 feet." In fact, the BOPC explained that the investigation into the shooting "revealed that [Agdeppa] fired five rounds at [Dorsey], from an approximate distance of five to seven feet." The supposedly grand inconsistency in the BOPC report on which the majority hangs its hat (which was based on the district court's own independent theorizing) is an inconsistency that the BOPC tellingly did not even acknowledge.

To this point, the BOPC report specifically found—relying on independent witnesses—that Agdeppa reasonably perceived a risk of death or serious injury to the officers:

> [Agdeppa] used deadly force at a time when, as supported by the accounts of two independent witnesses, he[] and [Rodriguez] were being assaulted by [Dorsey]. At that time, the violence of [Dorsey's] assault relative to the officers' capacities to defend themselves was such that it was objectively reasonable to believe that there was an imminent threat to the officers of death or serious bodily injury.

For our purposes, the BOPC report unequivocally supports the officers. Confusing issues, the majority relies on portions of the BOPC report that criticize the officers for having gotten themselves into this situation and for failing to use de-escalation tactics earlier in the encounter. But those findings are irrelevant for purposes of this case. The issue here is not whether the officers could have de-escalated the situation before it grew violent, but whether, at the moment Agdeppa shot Dorsey, the officers faced an imminent threat of death or serious injury. On this critical point, the BOPC concludes that they did, based on the same undisputed facts I have set forth.

Equally wrong is the majority's assertion that "physical evidence . . . conflicts with Agdeppa's story." The "evidence" the majority refers to here is the

officers' injuries, which the majority (like the district court) believes are too insubstantial. But as I recounted above, the officers *did* suffer injuries, including Agdeppa sustaining a prominent facial laceration. The officers never claimed to have suffered the level of injury the majority apparently expects they should have sustained. And nothing about the officers' account required injuries more severe. Although it is true, as the district court noted, that neither officer appears to have suffered broken bones or more serious injuries, that fortuity cannot alter the analysis. The majority suggests that the district court described Rodriguez as "unscathed" following the incident, but the portion of the district court decision the majority cites merely recites this as an argument made by the plaintiff.

The majority is also clearly wrong in asserting that the autopsy report "undermines Agdeppa's description" of the events. The district court noted that "from their entry point, three of the four bullets travelled downward relative to Dorsey's body, but one travelled upward." Based on this, the plaintiff argued that the bullet trajectory raised questions as to whether Dorsey was standing or hunched over Rodriguez at the time he was shot. This argument—which the district court noted the plaintiff had raised "for the first time" at the summary judgment hearing—is based not on expert analysis, but on the impromptu speculation of counsel.

Nevertheless, the majority claims that "the district court correctly determined this evidence could allow a jury to question Agdeppa's credibility" as

inconsistent with Agdeppa's claims about Dorsey's positioning at the time of the shooting. That is, again, flatly inaccurate. The district court listed the plaintiff's bullet-trajectory argument as a potential factual dispute that the plaintiff had identified. But the district court in fact discounted this argument earlier in its decision, recognizing that "[b]ecause there is no evidence regarding the sequence of the gunshots, the court cannot draw any inference as to how Dorsey was positioned relative to each gunshot."

In short, although the majority tries to gin up factual disputes, none are material, or even real. This confirms the total irrelevancy of the majority's multi-page discussion of *Newmaker v. City of Fortuna*, 842 F.3d 1108 (9th Cir. 2016), and *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (en banc), two cases that have nothing to do with this one beyond the fact they concerned officer-involved shootings. In *Newmaker*, two officers provided conflicting testimony about the circumstances of the shooting and arrived at their version of events "[o]nly after receiving suggestions from [an investigator]." 842 F.3d at 1111–13. Even more significantly, the officers asserted that the suspect was standing and swinging a police baton at them, but the autopsy report and video evidence indicated that the man was shot in the back while lying on the ground. *See id.* at 1111–16. In *Gonzalez*, an officer shot a man in the head at point blank range with no warning and no prior resort to nonlethal force, and the officer's account, which turned on the speed of a moving vehicle, included as to that critical issue a "combination of facts [that] appear[ed] to be physically impossible." 747 F.3d at 794.

These cases involved genuine disputes of *highly material* facts. They provide no license for elevating phantom factual disputes into critical ones, as the majority does here. The implicit suggestion in the majority opinion that these (nonexistent) factual disputes provide the linchpin for disbelieving the obvious import of the video and audio recordings, the officers' sworn statements, and the confirmatory bystander recollections, is entirely unfounded. It is therefore completely false for the majority to assert that "the version of events offered by Agdeppa was materially contradicted by the record."

But even granting the majority its claimed factual discrepancies, the key facts here are *undisputed*: officers were engaged in a violent struggle in an enclosed area with a much larger man who fought with the officers and repeatedly resisted arrest, who refused to stop his aggression despite repeated warnings and tasings, and who had taken control of one officer's taser. Just before the fatal shots were fired, the officers can be heard crying out in pain as crashing and thrashing noises intensify. Two independent witnesses corroborated the severity of Dorsey's attack.

The majority's repeated accusation that I have engaged in fact-finding is baseless. It is the majority that is ignoring the critical and undisputed facts. The question, then, is whether it was clearly established that the officers in this extreme situation were required to give a further warning before using deadly force.

II

The majority opinion says almost nothing about the rigorous legal standards governing the qualified immunity analysis, but they are central to the proper resolution of this case. Qualified immunity protects government officials from § 1983 suits unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). We need not answer the first question if the law is not clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

For a right to be clearly established, it must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quoting *Reichle*, 566 U.S. at 664). This is a high standard: "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The "rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority." *Wesby*, 138 S. Ct. at 589–90 (quotations omitted). This "demanding" requirement "protects all but the plainly incompetent or those who knowingly violate the law," and calls for "a high degree of specificity." *Id.* at 589–91 (quotations omitted); *see also Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7–8 (2021) (per curiam).

It is critical that clearly established law be sufficiently specific. The Supreme Court has "repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Wesby*, 138 S. Ct. at 590 (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). This "specificity is especially important in the Fourth Amendment context, where . . . '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Mullenix*, 577 U.S. at 12 (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (alteration in original)).

Because no one suggests this is the rare "obvious case" in which general principles suffice to clearly establish the unlawfulness of Agdeppa's conduct, *Wesby*, 138 S. Ct. at 590 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)), Agdeppa is entitled to qualified immunity unless "existing precedent *'squarely governs' the specific facts at issue*." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (emphasis added) (quoting *Mullenix*, 577 U.S. at 13); *see also, e.g.*, *Brosseau*, 543 U.S. at 201; *Ventura v. Rutledge*, 978 F.3d 1088, 1091 (9th Cir. 2020). The critical question is thus "whether the violative nature of *particular* conduct is clearly established." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742).

The plaintiff's theory is that Agdeppa used excessive force when he shot Dorsey. To assess the

reasonableness of a particular use of force, we apply the standards from *Graham v. Connor*, 490 U.S. 386 (1989), and "balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against 'the countervailing government interests at stake.'" *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir. 2003) (quoting *Graham*, 490 U.S. at 396). In doing so, "[w]e consider 'the type and amount of force inflicted'" in tandem with "'(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 the suspect was actively resisting arrest or attempting to evade arrest by flight.'" *O'Doan v. Sanford*, 991 F.3d 1027, 1037 (9th Cir. 2021) (quoting *Miller*, 340 F.3d at 964). Another factor that can be considered is whether proper warnings were or could have been given. *See Isayeva v. Sacramento Sheriff's Department*, 872 F.3d 938, 947 (9th Cir. 2017). In conducting this analysis, we do not "secondguess officers' real-time decisions from the standpoint of perfect hindsight," *O'Doan*, 991 F.3d at 1036, and we must recognize that "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.

Interestingly, the majority opinion does not appear to take issue with Agdeppa's use of force standing alone, much less suggest that Agdeppa violated clearly established law in that regard (this was the basis for the district court's decision denying qualified immunity, which was clearly wrong). Instead, the majority tells us, what makes Agdeppa's use of

force violative of clearly established law is that Agdeppa failed to give a special warning before he shot. Although the plaintiff here barely raised this issue in the district court, the majority holds that Ninth Circuit precedent creates a "well-established rule" that "required Agdeppa to warn before using deadly force if doing so was practicable," and that construing the facts in favor of the plaintiff, Agdeppa's failure to give a pre-shot warning "violated clearly established law."

The majority thereby contravenes the Supreme Court's clear directives on qualified immunity. The Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality," explaining that "[a] rule is too general if the unlawfulness of the officer's conduct does not *follow immediately* from the conclusion that the rule was firmly established." *Wesby*, 138 S. Ct. at 590 (emphasis added) (quotation & alteration omitted). The Supreme Court has told us this again and again, sometimes even calling our court out by name due to our repeated infractions in this area. *See Kisela*, 138 S. Ct. at 1152; *Sheehan*, 575 U.S. at 613; *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam); *al-Kidd*, 563 U.S. at 742.

The majority opinion repeats our mistakes of the past. The majority is correct that under Ninth Circuit precedent, "[i]n general, we have recognized that an officer must give a warning before using deadly force 'whenever practicable.'" *Gonzalez*, 747 F.3d at 794 (quoting *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997)). But this standard is obviously

far, far too general to create clearly established law for purposes of overcoming qualified immunity. We need look no further than our articulation of this "warning rule," which on its face recognizes it is not a one-size-fits-all proposition. We have stated only that the rule applies "*[i]n general*," "'*whenever practicabl*e.'" *Gonzalez*, 747 F.3d at 794 (emphasis added) (quoting *Harris*, 126 F.3d at 1201). We have also specifically emphasized that "[t]he absence of a warning does *not* necessarily mean that [an officer's] use of deadly force was unreasonable." *Id.* at 797 (emphasis added).

Standing alone, and outside of an obvious case (this is not one), the warning principle is pitched at a level of generality that is much too high to create clearly established law in "the particular circumstances" that Agdeppa faced. *Wesby*, 138 S. Ct. at 590. Our "warning principle" cases certainly do not clearly establish the types of situations in which a warning is "practicable," what form the warning must take, or how specific it must be. Nor does existing law clearly establish how the lack of a warning is to be balanced against the other *Graham* factors in the context of a case such as this, and, in particular, the type of imminent threat to safety that the officers faced.

The origins of the warning principle only further confirm that it operates at a level of generality that is too elevated for qualified immunity purposes. In *Harris*, we sourced our warning rule to the Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), which held that "[w]here 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." *See Harris*, 126 F.3d at 1201 (citing *Garner*, 471 U.S. at 11–12). But the Supreme Court has been clear that "[t]he standards from *Garner* . . . 'are cast at a high level of generality,' so they ordinarily do not clearly establish rights." *Isayeva*, 872 F.3d at 951 (quoting *Brosseau*, 543 U.S. at 199); *see also Rivas-Villegas*, 142 S. Ct. at 8 (same). When *Garner* is too general to create clearly established law in a particular case, a general warning principle inferred from *Garner* is likewise incapable of serving that function.

The majority was thus required to come forward with "existing precedent" that "squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (quotation omitted). But no precedent possibly fits that bill because the cases the majority identifies all involved officers who shot suspects almost immediately after encountering them, where the suspects presented no obvious threat to officer safety. In *Harris*, a police sniper in a hilltop position opened fire on suspects who were exhibiting no immediate signs of aggression, without even announcing that police were present. 126 F.3d at 1193–94, 1202–04. In *Gonzalez*, the officer shot a man in the head at point blank range with no warning and no prior resort to nonlethal deterrents, immediately after the suspect drove away with the officer in the car at a speed that may have been no faster than three to seven miles per hour. *See* 747 F.3d at 794–97. In *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017), the officer shot a thirteen-year-old boy—who was holding a fake gun and displaying no signs of

aggression—moments after arriving on the scene, "without knowing if [the boy's] finger was on the trigger, without having identified himself as a police officer, and without ever having warned [the boy] that deadly force would be used." *Id.* at 1010–11. And in *S.R. Nehad v. Browder*, 929 F.3d 1125 (9th Cir. 2019), which was decided *after* the events of this case, the suspect was making no sudden movements when an officer fatally shot him from seventeen feet away, less than five seconds after the officer stepped out of his car, after making no attempt to use nonlethal force. *Id.* at 1130–32, 1137–38.

These cases bear none of the hallmarks of this case, in which the officers repeatedly and unsuccessfully tried to use nonlethal force and were engaged in a lengthy, violent struggle with a large assailant in a tightly enclosed area, who was striking them and who had already gained control of an officer's taser. There is no possible sense in which the precedents the majority cites would have made it "clear to [Agdeppa] that his conduct was unlawful in the situation he confronted." *Wesby*, 138 S. Ct. at 590 (quotation omitted). Those precedents are light years away from this one. Agdeppa is entitled to qualified immunity because "neither the panel majority nor the [plaintiff has] identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation 'under similar circumstances.'" *Wesby*, 138 S. Ct. at 591 (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)).

Nor does the rationale of our warning cases

apply here, either. We have said that a warning must be given "whenever practicable" so that a suspect "who do[es] not pose an immediate threat" to officer safety "may end his resistance." *Harris*, 126 F.3d at 1204. Dorsey *did* pose an immediate threat to officer safety. And he was given numerous opportunities—through repeated verbal commands, attempted handcuffing, and taser deployments— to stop his aggression. This was not the case of a suspect who was shot before he had a chance to comply. By the officers' words and actions, Dorsey was warned throughout the encounter. He was given numerous opportunities to stand down, and he instead ramped up his violent resistance. A suspect in this situation either knows or should know what can happen next. At the very least, it is not clearly established that the logic of our warning rule applies when all past warnings have failed, and a violent situation has grown more dire.

I must lastly respond to the majority's assertion that Agdeppa has somehow conceded that he had the opportunity to issue a final warning before he shot Dorsey. The district court, which said virtually nothing about Agdeppa's failure to warn (again, the plaintiff barely raised the issue below), made no such finding. The majority instead seizes on the fact that Agdeppa stated in his deposition and in a declaration that he yelled "stop" before shooting. From this, the majority asserts that "Agdeppa never claimed that it was not practicable to give a warning," and goes so far as to assert that Agdeppa in fact "*cannot argue* that it was not possible for Agdeppa to warn Dorsey." (emphasis added). Once again, the majority seriously misconstrues the record.

Agdeppa has never conceded that it was practicable for him to give a warning for the simple reason that the warning he claims he gave obviously falls short of the more detailed warning the majority has in mind. The majority of course does not tell us what Agdeppa was supposed to have said, but whatever it was, it was more extensive than "stop." After setting up Agdeppa's own statements as the supposed basis for the practicability of a further warning, the majority then remarkably represents that "there is no conflicting evidence on this point." But there is *extensive* undisputed evidence on this point, most notably the harrowing video and audio recordings showing this was not a situation in which quaint notions of "practicability" could have reasonably been at the forefront of the officers' minds. Given the recordings and the BOPC report, the majority cannot feign that we somehow have no idea what happened in that locker room. The majority claims that on the bodycam recordings, "there are only grunting and banging sounds," but that is demonstrably incorrect. We know much more than enough to conclude that the warning obligation the majority imposes was not clearly established in the circumstances these officers confronted.

Instead, the majority opinion at times seems to imply that because our warning rule contains a practicability component, whether a warning was practicable will always be a question of fact. But that would mean that qualified immunity should be denied in every case in which an officer fails to warn, contrary to our case law that "[t]he absence of a warning does not necessarily mean that [an officer's] use of deadly

force was unreasonable." *Gonzalez*, 747 F.3d at 797. The problem here is not Agdeppa supposedly conceding away his entire defense—he did no such thing— but the majority applying a legal rule that, as a matter of law, cannot serve as clearly established law.

All of this would be bad enough in any case erroneously denying qualified immunity, in which the unwarranted burdens of further litigation are added to the already burdensome responsibilities that law enforcement officers undertake in protecting the public. But the dangers of today's decision are especially ominous. At what microsecond interval in the final heated moments of this escalating confrontation was Agdeppa somehow legally required to hit the "pause button" and recite some yet-undisclosed, court-created warning script? The uncertainty the majority opinion invites stands as a further condemnation of its holding. And the rule of law it treats as clearly established on these facts could well make the difference in whether officers like Agdeppa and Rodriguez make it out of a violent altercation alive. No clearly established law remotely requires officers who already put themselves in harm's way to do so as riskily as the majority opinion now demands.

Because these grave consequences result from the majority's manifest misapplication of the Supreme Court's clear directives on qualified immunity, I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL '0'

Case No. 2:19-CV-05370-CAS-JCx

Date November 6, 2020

Title PAULETTE SMITH *v.* CTIY OF LOS ANGELES, ET AL.

Present: The Honorable CHRISTINA A SNYDER

Catherine Jeang
Deputy Clerk

Not Present
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) - DEFENDANT OFFICER EDWARD AGDEPPA'S MOTION FOR SUMMARY JUDGMENT OR, IN THE

ALTERNATIVE, PARTIAL SUMMARY JUDGMENT (Dkt. 37, filed on June 30, 2020)

I. **INTRODUCTION**

On June 16, 2019, plaintiff Paulette Smith, individually and as successor in interest to decedent Albert Dorsey, filed a complaint against defendants Officer Edward Agdeppa and the City of Los Angeles ('City"). Dkt. 1 ("Compl."). In her complaint, Smith alleged four claims for relief: (1) violations of 42 U.S.C. § 1983 ("Section 1983") against Officer Agdeppa based on an unreasonable use of deadly force; (2) violations of Section 1983 based on an unconstitutional policy, practice or custom against the City; (3) wrongful death against Agdeppa and the City based on battery, pursuant to Cal. Gov't Code §§ 815-2(a), 820(a) and Cal. Civ. Code§ 43; and (4) wrongful death against Agdeppa and the City based on negligence, pursuant to Cal. Gov't Code §§ 815.2(a), 820(a). *See* Compl.

The City answered on August 8, 2019, Dkt, 10; and on August 16, 2019, Agdeppa answered, Dkt. 15. On May 6, 2020, the parties stipulated to dismiss the City from the case, leaving claims one, three and four as alleged against Agdeppa. *See* Dkts. 30, 31.

On June 30, 2020, Agdeppa, now the sole defendant, filed the instant motion for summary judgment, or, in the alternative, partial summary judgment, Dkt. 37 ("MST"). Plaintiff filed an opposition to Agdeppa's MSJ, Dkt. 45 ("Opp."), a statement of disputed facts, Dkt, 51 ("Opp. SDF"), a request for

judicial notice, Dkt. 46, and several exhibits, Dkts. 47-50, 53. Agdeppa filed a reply, Dkt. 55 ("Reply"), along with evidentiary objections, Dkt.55-1 ("Evid. Obj.").[1] The Court held a hearing on October 19, 2020.

Having carefully considered the parties' arguments and submissions, the Court finds and concludes as follows.

II. BACKGROUND

A. Officers' Arrival and Initial Encounter with Dorsey

On the morning of October 29, 2018, the police received multiple calls requesting police assistance at a 24-Hour Fitness gym in the 6300 block of Sunset Boulevard, in Los Angeles, California, where it was reported that a visitor to the gym was engaged in disruptive conduct. Opp. SDF No. 1. Officers Agdeppa and Perla Rodriguez (collectively, "officers"), arrived at the gym at approximately 9:05 a.m. and activated their body-worn cameras ("BWC"). Opp. SDF No. 5; *see* MSJ Exh. B, Agdeppa's BWC Footage ("Ag. BWC"); MSJ Exh. C, Rodriguez's BWC Footage ("Rod, BWC").

A gym staff member met the officers at the entry door to the gym, and volunteered, "We have a gentleman who is a little bit irate and he's not

---

[1] The Court resolves only those evidentiary objections relevant to evidence upon which it relies in this order; any objections to evidence not relied upon in this order are denied as moot.

listening. He's already hurting members [inaudible] and assaulting security as well." Rod. BWC at 04:01;[2] *see* Opp, SDF No.6.

The officers immediately proceeded to the men's locker room because, Agdeppa contends, they were concerned Dorsey would imminently assault gym patrons or staff. Opp. SDF No. 6. Plaintiff disputes this, arguing that the officers had no information regarding–and did nothing to investigate–whether Dorsey had a weapon or had injured anyone at the gym. *Id.* at Nos. 1, 6.

It is undisputed, though, that the entrance to the men; s locker room was blocked with a table and yellow caution tape when the officers arrived, and that the locker room was empty except for Dorsey. *Id.* at No. 7; Rod. BWC at 05:15. The officers found Dorsey, who was 6'1" and 280 pounds, wearing no clothes, with a bath towel over his left shoulder, listening to music from his phone. Opp. SDF No. 8; Rod. BWC at 05:15. At the time, Agdeppa was 5'l" and 145 pounds, and Rodriguez was 5'5" and 145 pounds. Opp, SDF No.2.

B. Officers' Request that Dorsey Leave the Gym

Upon entering the locker room, Agdeppa asked

---

[2] Plaintiff submits its own transcript of the body-worn camera footage in this case. Opp. Exh. 6. Agdeppa objects to the accuracy and admissibility of the transcript. Evid. Obj. at 2. The Court need not resolve the accuracy or admissibility of the transcript because it does not rely on plaintiffs proffered transcript.

Dorsey what he was doing, and Rodriguez told him, "We want you out. You gotta get out." Rod. BWC at 05:15--05:24. Dorsey looked at the officers, but did not acknowledge them, swaying in time with his music for several seconds. *Id.* at 05:25-05:37.

Rodriguez again requested that Dorsey leave, stating, "Turn off your music, put on your clothes and get out." *Id.* at 05:37. Dorsey initially ignored Rodriguez, but then asked in a low volume, "What's the problem?" *Id.* at 05:41. Agdeppa told Dorsey that he was causing a disturbance. *Id.* at 05:44. Dorsey replied inaudibly, to which Agdeppa responded, "I don't care, you gotta put on your clothes right now. You're not listening to us." *Id.* at 05:48. Dorsey nodded his head once, and appears to have said, "Okay, can I just grab some things?" while pointing down and to Agdeppa's right. *Id.* at 05:51. Agdeppa responded, "No, I have to watch you." *Id.* at 05:53.

Dorsey proceeded to dry himself with his towel for roughly one minute, before speaking quietly to Agdeppa, who had moved into the shower area several feet from Dorsey. *Id.* at 05:54-06:54. Agdeppa repeated the officers' request that Dorsey leave, stating, in a somewhat raised voice, "[S]omeone called on you. So you need to hurry up 'cause I'm losing my patience right now." *Id.* at 06:54. Several seconds later, Rodriguez repeated that Dorsey needed to leave. *Id.* at 07:10.

Dorsey then walked toward and past Rodriguez, across the locker room and to a mirror at the other end of the room. *Id.* at 07:17. Agdeppa asked Dorsey what

he was doing, to which Dorsey appears to have responded, 'Tm about to get my fucking [inaudible]. What the fuck you think I'm about to do?" *Id.* at 07:21. Agdeppa replied, "Alright," and Rodriguez said, "Go ahead, put on your clothes." *Id.* at 07:26, 07:31. Dorsey did not immediately put on his clothes, though, but instead continued drying himself. Agdeppa then asked, in a level tone of voice, "You gonna get dressed, or are we going to have to drag you out of here like this?" *Id.* at 07:47. Rodriguez again told Dorsey to"[j]ust hurry up and put on your clothes. That's all you gotta do." *Id.* at 07:51.

During this exchange, Dorsey walked slowly around the locker room, and still made no gesture toward putting on his clothes. When Dorsey walked back across the room to the shower stall where the officers initially found him, the officers put on latex gloves. *Id.* at 08 :00-08: 11. Agdeppa raised his voice and said, "Are you going to put on your clothes or not?" *Id.* at 08:12. Dorsey, with his voiced raised, responded, "I am. [Inaudible.]" *Id.* at 08:14. At this point, both officers raised their voices, saying, among other things, "[S]top walking around," *id.* at 08: 15, and, "I asked you one simple thing: Take your clothes, put them onto your body," *id.* at 08:19. Dorsey responded in a somewhat raised voice, "Okay, well let me tell you one simple thing: Stop talking to me." *Id.* at 08:24.

Meanwhile, Dorsey continued drying himself with his towel and slowly rearranging his personal effects on the seat in the shower stall. *Id.* at 08:37. But Dorsey did not sit, and instead began dancing intermittently for roughly 41 seconds while

occasionally drying himself. Ag. BWC at 08:51-08:32; Opp. SDF No. 11. About half a minute later, Rodriguez told Dorsey, in a raised voice, "Hurry up stop dancing, hurry up," but Dorsey continued **to** dance. Rod. BWC at 09:14. Dorsey raised the middle finger on his right hand and waived it **in** time with the music for roughly three seconds, directing it at times toward the shower wall in front of him, and at times in the direction of the officers, who were standing to his left. Ag. BWC at 09:24-09:27.

C. Officers' Physical Engagement with Dorsey

At that point, Agdeppa states that he and Rodriguez decided to go "hands on" in light of Dorsey's refusal to dress and leave. Opp. SDF No. 12. The officers quickly approached Dorsey and grasped his arms; while Agdeppa placed a handcuff on Dorsey's right wrist, Rodriguez attempted to restrain Dorsey's left arm. *Id.* at No. 13. Dorsey resisted the officers' attempts to handcuff him by "tensing up," and the officers demanded that he stop resisting.[3] *Id.*

Unable to apply the other handcuff to Dorsey's left arm, the officers applied finger and wrist locks, "bracing maneuvers," and a "double-cuff procedure." *Id.* at No. 14. The officers repeatedly demanded that Dorsey stop resisting and calm down. *Id.* at No. 15.

---

[3] At this point, although the officers' body-worn cameras remained in place and continued to record, the video image is obscured due to the officers' proximity to Dorsey.

Despite both officers' attempts to wrest Dorsey into submission, Dorsey freed his left arm from Rodriguez's grip, at which point the officers attempted to pin Dorsey to the wall. *Id.* at No. 14. At some point in the struggle, Agdeppa radioed for backup. *Id.* at No. 18.

D. Agdeppa's Account of the Escalating Struggle and Shooting

The parties dispute certain key facts regarding the physical altercation from this point on. Because the officers' body-word cameras fell to the floor soon after the initial attempts to handcuff Dorsey, there is no video of the altercation, although the cameras continued to record audio. *Id.* at No. 16.

According to Agdeppa, during the struggle with the officers, Dorsey struck Rodriguez in the face. *Id.* at No. 17; MSJ at 6. As the struggle continued, Agdeppa unholstered his Taser, pressed it against Dorsey's chest and warned that, if Dorsey did not desist, he would use his Taser. Opp. SDF No. 19; MSJ at 6. The parties agree that, after issuing the warning, Agdeppa activated his Taser, cycling it two times into Dorsey's chest. Opp. SDF No. 20; MSJ at 6. The parties also agree that around this time, Rodriguez fired the darts from her Taser into Dorsey's back. Opp. SDF No. 20.

Agdeppa contends that, after he and Rodriguez used their Tasers on Dorsey these three times, Dorsey became "even more aggressive and combative," that he "made no move to flee," and that "he advanced upon the officers, punching at their heads and faces while the handcuff, still attached to his wrist, also swung

and struck them." Opp. SDF No. 21; MSJ at 6. Agdeppa avers that, while striking him in the face repeatedly with his handcuffed fist, Dorsey struck Agdeppa on the bridge of the nose with such force that the blow knocked him backward into a wall, caused him to drop his Taser, and disoriented him. Opp. SDF No. 22; MSJ at 6.

According to Rodriguez, although Dorsey's body obscured her view, she believed Dorsey was striking Agdeppa based on Dorsey's swinging his arms and the sound of punches. Opp. SDF No. 23. She therefore again activated her Taser. *Id.*; MSJ at 6. Dorsey responded by turning and striking Rodriguez in the face four times in quick succession, knocking her to the ground. Opp. SDF No. 23; MSJ at 7. Rodriguez recounts that Dorsey attempted to wrest her Taser from her, turning it toward her face, while simultaneously striking her repeatedly with his handcuffed fist. Opp. SDF No. 23; MSJ at 7. Rodriguez does not recall Dorsey's attempting to take control of her gun. Dkt. 48, Opp. Exh. 2 ("Rodriguez Depo."), at 12:15-13:5. According to Agdeppa, Dorsey straddled Rodriguez for approximately 30 to 40 seconds, "continually striking her multiple times on both sides of her face and head, with her head being knocked from side to side." Opp. SDF No. 24; MSJ at 7. Rodriguez believed "Dorsey was attempting to kill her," and that "her life was at risk." Opp. SDF No. 24; Dkt. 374, Declaration of Officer Rodriguez ("Rodriguez Decl."), ¶¶ 20--21.

Agdeppa recounts being dazed throughout these 30 to 40 seconds. Opp. SDF No. 25; MSJ at 7. When he

recovered, he saw Dorsey straddling and "viciously and violently" attacking Rodriguez, "punching her repeatedly in the face with a flurry of punches, hitting her over and over again in the head and face" while she attempted to protect herself in the fetal position on the floor. Opp. SDF No. 25; MSJ at 7. Agdeppa reports believing Dorsey would kill Rodriguez imminently. Opp. SDF No. 25; MSJ at 7.

Although not discernable from the audio portion of the body-worn camera footage, Agdeppa avers that he verbally warned Dorsey to stop his attack, but that Dorsey continued nonetheless. Opp. SDF No. 26; MSJ at 7. (Plaintiff disputes that Agdeppa issued such a warning. Opp. at 3.) At this point, Agdeppa fired five shots in quick succession, four of which hit Dorsey. Opp. SDF No. 26. Agdeppa reports having been six to eight feet from Dorsey when he fired. Dkt. 47, Opp. Exh. 1 ("Agdeppa Depo."), at 73:5-8. Agdeppa contends he drew his weapon "[i]n order to protect both his and his partner's life," MSJ at 7, although he also states that he fired his weapon "[i]n an effort to save Officer Rodriguez's life," *id.* at 8; Agdeppa Depo. at 73:I-4. According to Agdeppa, Dorsey remained in the same position, "straddling" or "hunched over" Rodriguez, as each shot was fired. SDF Nos. 25, 26; Agdeppa Depo. at 115:15-20. Immediately after the final shot, Dorsey fell backward and off Rodriguez and did not move. Opp. SDF No. 26; MSJ at 8. Dorsey still held Rodriguez's Taser in his hand, and the officers did not approach him. Opp. SDF No. 27; MSJ at 8.

Agdeppa reports Rodriguez was treated at the emergency room for swelling on her left cheek and

right jaw, abrasions on her ear and hands, a pulled muscle behind her left knee, and head pain.. Opp. SDF No. 28; MSJ at 8; Rodriguez Decl. ¶ 28.

Agdeppa further reports having abrasions on his arms and head, being treated at the emergency room for a fractured nose, and receiving sutures on the bridge of his nose. Opp. SDF No. 29; MSJ at 8; Dkt. 37-3, Declaration of Officer Agdeppa, ¶ 30. The following day, he began experiencing severe headaches, sensitivity to light, and difficulty focusing. Opp. SDF No. 29; MSJ at 8. Agdeppa says he was diagnosed with and experienced ongoing symptoms of a concussion, which prevented him from returning to work for six months. Opp. SDF No. 29; MSJ at 8.

E. Plaintiff's Dispute of Agdeppa's Account

Plaintiff disputes the officers' account of the physical altercation between the officers' first attempt to handcuff Dorsey and the shooting. The crux of plaintiffs argument is that the medical records and physical evidence are inconsistent with the officers' account of Dorsey overpowering and viciously beating both officers, one to the edge of her life. *See* Opp. at 3-5. Plaintiff first argues that photographs of Rodriguez, taken shortly after the incident, depict no evidence of being struck in the face-in fact, according to plaintiff, Rodriguez appears "virtually unscathed." Opp. SDF Nos. 17, 21, 23, 24, 25; Opp. at *5; see* Opp. Exh. 5 ("Rodriguez Post-Incident Photograph"). Furthermore, Rodriguez suffered no broken bones–in her face or elsewhere–nor a concussion or other head injury, and she did not miss any work due to injury. Opp. SDF No.

17: Opp. at 3.

Plaintiff also contends physical evidence and contradictions in Agdeppa's deposition testimony undermine the credibility of Agdeppa's account that Dorsey struck him with sufficient force to knock him into a wall and daze him for 30 to 40 seconds. Opp. SDF No. 22. Plaintiff cites evidence that, (1) despite Agdeppa 's assertion that he fractured his nose, he also provided deposition testimony that the X-ray of his nose showed no fracture; (2) a post-incident photograph shows no evidence of a blow as forceful as that recounted by Agdeppa, except a laceration on his nose; (3) the post-incident photograph also shows Agdeppa overstated the length of the laceration on his nose; and (4) the video evidence shows no sign of "active resistance" to the officers.[4] Opp. SDF No. 22; Opp. at 3-5; *see* Agdeppa Depo. at 54:1-61: 10; Opp. Exh. 7 ("Agdeppa Post-Incident Photograph").

F. Dorsey's Injuries

The parties do not dispute the injuries suffered by Dorsey, although they do dispute, for purposes of seeking pre-death pain and suffering damages, how quickly Dorsey succumbed to them. Dr. Zuhha Ashraf

---

[4] Plaintiff disputes the credibility of Agdeppa's testimony that he suffered a concussion on the ground that Agdeppa admitted he did not review the CAT scan itself. Opp. at 4. But as pointed out by Agdeppa's counsel at oral argument, Agdeppa's testimony nonetheless supports his claim of having suffered a concussion, including by clarifying that he received that diagnosis from the doctor who reviewed the CAT scan.

conducted an autopsy on November 2, 2018. *See* Dkt. 48, Opp. Exh. 3, Deposition of Dr. Ashraf ("Ashraf Depo."); Dkt. 49, Opp. Exh. 4 "(Autopsy Rpt").[5] She characterized Dorsey's death as a homicide resulting from the four gunshot wounds. Autopsy Rpt at 1. Although Agdeppa suggests Dorsey died "immediately after the final shot was fired," plaintiff disputes this account and points to Dr. Ashraf's deposition testimony that Dorsey likely would have died within "seconds to minutes." Opp. SDF Nos. 26, 44.

In addition to the gunshot wounds, Dr. Ashraf observed (I) two areas of blunt force trauma to Dorsey's head, which she concluded occurred "within hours of death"; (2) several abrasions on Dorsey's neck; (3) abrasions and contusions on his wrists, which "could be consistent with handcuffing"; and (4) that the Taser dart and wire remained in Dorsey's back at the time of the autopsy. *Id.* at No. 44.

Finally, in the October 19, 2020 hearing, plaintiff advanced for the first time the argument that

---

[5] Agdeppa moves to exclude the autopsy report as inadmissible hearsay pursuant to Fed. R. Evid. 802. Evid. Obj. at 1. To the extent the Court relies on the report, it may do so for the purpose of a motion for summary judgment because the report "could [] be presented in a form admissible at trial" as a public record pursuant to Fed. R. Evid. 803(8). *Koho v. Forest Labs., Inc.,* 17 F. Supp. 3d 1109, 1113 (W.D. Wash. 2014)(citation omitted)(considering improperly authenticated autopsy report at summary judgment); *see U.S. v. Midwest Fireworks Mfg. Co., Inc.*, 248 F.3d 563, 566 (6th Cir. 2001) ("Opinions, conclusions, and evaluations, as well as facts, fall within the Rule 803(8)[(A)(iii)] exception." (quotation omitted)).

the location and direction of Dorsey's gunshot wounds raise questions as to whether, in fact, Dorsey was standing over Rodriguez until Agdeppa's final shot. See Opp. SDF No. 26; MSJ at 8. Specifically, the autopsy report states that, from their entry point, three of the four bullets travelled downward relative to Dorsey's body, but one travelled upward. Autopsy Rpt at 1-2. Plaintiff argues this evidence suggests Dorsey moved significantly at some point during the shooting. Because there is no evidence regarding the sequence of the gunshots, see Ashraf Depo. at 12:7-11, the court cannot draw any inference as to how Dorsey was positioned relative to each gunshot, such as, for instance, whether he was standing or hunched over when the first bullet struck him.

G. Board of Police Commissioners Findings

Plaintiff submitted the "Abridged Summary of Categorical Use of Force Incident and Findings by the Los Angeles Board of Police Commissioners, Officer-Involved Shooting – 059-18," which appears to recount the incident at issue here based on, *inter alia,* the number in the title (059-18), which appears in the Los Angeles Police Department video addressing the incident, "Hollywood Division Officer Involved Shooting 10/29/18 (NRF059-18)," see Opp. Exh. 8; the date; and the fact pattern, see Dkt. 46 ("BOPC Findings" or "Findings"). The Findings characterizes itself as "a brief summary designed to enumerate salient points regarding this Categorical Use of Force incident," and does not reflect the entirety of the investigation nor BOPC deliberations. BOPC Findings

at 1. It consists of three parts: an incident summary apparently based on interviews of the officers, witness interviews, and footage from the body-worn cameras and available security cameras in the gym; a findings section; and a section on the basis for those findings. *See id.* The Findings includes no indication that disciplinary actions were taken against the officers, nor does it suggest any such actions.

As a preliminary matter, Agdeppa objects to the admission of the BOPC Findings as, *inter alia,* a subsequent remedial measure, inadmissible hearsay and lacking authentication. Evid. Obj. at 3; *see* Fed. R. Evid. 407, 802, 901. Plaintiff, for her part, requests that the Court take judicial notice of the Findings. Dkt. 46; *see* Fed. R Evid. 201. With regard to Agdeppa's objections on hearsay and foundation grounds, the Court concludes these objections do not prevent the Court from considering the BOPC Findings for the limited purposes of this motion because the Findings could be admissible at trial pursuant to Fed. R. Evid. 803(8), as discussed in note four, above. *See Koho*, 17 F. Supp. 3d at 1113; *Midwest Fireworks*, 248 F.3d at 566.

Turning to Agdeppa's argument that the BOPC Findings is inadmissible as a subsequent remedial measure pursuant to Rule 407, Agdeppa contends *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986), requires its exclusion. In *Maddox*, the Ninth Circuit found an internal affairs investigation and disciplinary proceeding conducted by the City of Los Angeles following a police officer's fatal use of a prohibited chokehold were subsequent remedial

measures inadmissible at trial. *Id.* at 1417. But Maddox is unavailing here for at least two reasons. First, the BOPC Findings here includes no disciplinary measures against the officers, unlike in *Maddox*. It is therefore not properly characterized as a "remedial measure." *See In re Aircrash in Bali, Indonesia*. 871 F.2d 812, 816 n.2 (9th Cir. 1989) ("(S]ubsequent remedial measures include only the actual remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for." (quotation omitted)); *Willis v. Vasguez*, No. LA CVI0-07390 JAK (DTBx), 2014 WL 12596313, at *11 (C.D. Cal. Apr. 1, 2014) (*Maddox* inapplicable where report "recommended corrective action" but was not, "in and of itself, a remedial measure"), *affd,* 648 F. App'x 720 (9th Cir. 2016). Second, even if the BOPC Findings did include disciplinary measures, Maddox's holding is limited to the admission of reports introduced against municipal defendants, not individual officers. *Martinez v. Davis*, No. CV 05-5684 ABC(JEMx), 2011 WL 13213962, at *2 (C.D. Cal. Mar. 17, 2011) (admitting internal affairs investigation and disciplinary actions against police officer defendants because "the deputies were not responsible for undertaking the investigation or imposing discipline; the City took these measures"). In any event, courts consider BOPC findings at summary judgment. *See, e.g., Garrett v. City of Los Angeles*, No. CV 12-1670 FMO (SSX), 2014 WL 11397949, at *7 (C.D. Cal. Mar. 3, 2014). Accordingly, while the Court reserves judgment on both parties' requests, it considers the Findings for the limited purposes of this motion.

Turning to its substance, the course of events

presented in the Findings largely conforms to Agdeppa's account. Notably, the Findings includes the accounts of several eyewitnesses to at least portions of the physical altercation between the officers and Dorsey: Witness A, who was an employee of the gym, and Witnesses E and F, who were security guards.[6] BOPC Findings at 2, 3. These witnesses' accounts, as reported in the B0PC Findings, substantiate Agdeppa's version of events at several moments disputed by plaintiff. For instance, Witness F apparently reported that Dorsey[7] struck Officer A–who likely refers to Agdeppa–in the face numerous times, one of which knocked Officer A into the wall, causing him to drop his Taser. *Id.* at 6. Witness F also believed Dorsey struck Officer B-likely Rodriguez-in the face several times with his "half-opened" hand. *Id.* Although ambiguous, the Findings can be read to state that Witness F also saw the subject knock Officer B to the ground, then attempt to take her Taser and turn it against her face while hitting her with his right fist; alternatively, the Findings may be simply restating the officers' account. *Id.* at 6-7.

However, the witnesses' accounts also differ from Agdeppa's in several ways. According to the

---

[6] The parties' filings make no reference to these witnesses, nor did either party mention the witnesses in the October 19, 2020 hearing. The record includes no indication that these witnesses have been deposed or interviewed by the parties. The witnesses remain anonymous.

[7] The B0PC Findings refers to "the Subject," but, assuming the Findings recounts the events at issue here, the Subject is Dorsey.

BOPC Findings, Witness F recalled he and Witness E "attempt[ed] to assist the officers during their struggle with the Subject," and that "the Subject grabbed Witness E by his jacket and grabbed him (Witness F) by the neck." *Id.* at 7. "The Subject pushed Witness E away from him and choked Witness F." *Id.* But neither officer recounted any witnesses intervening in the altercation. Moreover, the Findings states that Witness F reported that, "moments prior to the OIS [officer involved shooting], while the Subject was straddling 0fficer B, the Subject grabbed Officer A's [Agdeppa's] gun and attempted to pull it out of its holster," but that he was "unable to remove the gun because Officer A pushed the Subject away." *Id.* But the BOPC Findings also reports that "Officer A had no recollection of the subject grabbing his/her service pistol," *id.*, and neither officer's account of the altercation mentioned Dorsey's doing so. Third, according to the BOPC Findings, Witness F reported that "[a]fter the second round [gunshot], the Subject let go of Officer A's wrist. Witness F believed that the Subject looked at Officer A and then began to walk toward him/her, and that Officer A fired two more rounds." *Id.* at 8. But Agdeppa states that he was not touching Dorsey at the time of the shooting, but rather was six to eight feet away, and that Dorsey did not move from his position over Rodriguez during the shooting. Agdeppa Depo. at 73:5-8, 115:15-20.

The Findings concludes, among other things, that the officers' use of non-lethal and less-lethal force was reasonable and in policy. BOPC Findings at 14-15. But it also concludes that the officers "did not effectively utilize tactical de-escalation techniques,"

and that this, along with other tactical failures, amounted to a "substantial deviation, without justification from approved Department training." *Id.* at 12. Additionally, while "Officer A's drawing and exhibiting of a firearm [was] in Policy," the "lethal use of force by Officer A was unreasonable." *Id.* at 13; 16-17.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate where "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). The moving party must show that a rational trier of fact would not be able to find for the nonmoving party, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986), and thus bears the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim upon which the moving party seeks judgment, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial burden, the opposing party must then set out specific facts showing a genuine issue for trial in order to defeat the motion. *Anderson v. Liberty Lobby Inc*., 477 U.S. 242, 250 (1986); *see also* Fed. R. Civ. P. 56(c), (e). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990); *see also Celotex*, 477 U.S. at 324. When deciding a motion for summary

judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U.S. at 587 (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997).

IV. DISCUSSION

Agdeppa moves for summary judgment on each of plaintiff's claims.

A. Section 1983 Excessive Force Claim

Section 1983 provides for a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the U.S. Constitution. "To prove a case under section 1983, the plaintiff must demonstrate that (1) the action occurred 'under color of state law' and (2) the action resulted in the deprivation of a constitutional right or federal statutory right." *Jones v. Williams,* 297 F.3d 930, 934 (9th Cir. 2002) (citation omitted). Agdeppa makes two arguments: first, that his use of deadly force was objectively reasonable; second, that even if his use of force was excessive, he is entitled to qualified immunity. The Court addresses each argument in turn.

1. Objectively Reasonable Use of Force

Agdeppa first argues that plaintiff's excessive force claim cannot withstand summary judgment because his use of deadly force was objectively

reasonable. MSJ at 10-17.

An excessive force claim is analyzed under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). The relevant inquiry is whether 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 (quotation and citation omitted). "The calculus of reasonableness must embody allowance 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 396-97. However, "it is equally true that even where some force is justified, the amount actually used may be excessive." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

Courts apply a balancing test to determine whether force used is reasonable. *Graham*, 490 U.S. at 396. Courts "must balance [1] the nature and quality of the intrusion on the individual's Fourth Amendment interests against [2] the importance of the governmental interests alleged to justify the intrusion." *Scott v. Harris*, 550 U.S. 372, 383 (2007) (quotation omitted). "An officer's use of deadly force," specifically, "is reasonable only if '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.'" *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)) (additional citation omitted). But "[d]eadly force cases pose a particularly difficult

problem under this regime because the officer defendant is often the only surviving eyewitness." *Id.* at 915. Accordingly, "the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Id.* With this admonition in mind, the Court now applies the *Graham* balancing test to the evidence here.

Courts begin by evaluating "the type and amount of force inflicted." *Miller v. Clark Cty.,* 340 F.3d 959, 964 (9th Cir. 2003). Here, there is no dispute that the use of deadly force was a severe intrusion on Dorsey's Fourth Amendment rights.

Second, courts evaluate the countervailing governmental interests by considering a range of factors, including: (a) whether the suspect was actively resisting or attempting to evade arrest by flight; (b) the severity of the crime at issue; and (c) whether the suspect posed an immediate threat to the safety of the officers or others. *Lal v. California*, 746 F.3d 1112, 1117 (9th Cir. 2014). This list is not exhaustive, though, and courts also consider whether the officer warned the suspect prior to use of force, *Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010); the parties' relative culpability, *Espinosa v. City & Cty. of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010); and "whether there were less intrusive means of force that might have been used," *Glenn v. Washington Cty.*, 673 F.3d 864, 876 (9th Cir. 2011). Nonetheless, the "most important" factor is whether the suspect posed an "immediate threat to the safety of the officers or

others." *Bryan*, 630 F.3d at 826.

Here, Agdeppa argues that, because Dorsey had already inflicted serious injuries on both officers and was striking Rodriguez with his fist while turning her Taser on her, Dorsey posed an immediate threat to Rodriguez's safety. He therefore fired at Dorsey "[i]n an effort to save Officer Rodriguez's life." MSJ at 8; Agdeppa Depo. at 73:1-4.

But plaintiff disputes Agdeppa's account and whether in fact the circumstances provided probable cause to believe Dorsey posed an immediate and significant threat of death or serious injury to Rodriguez. *See* Opp. SDF Nos. 17, 21, 23, 24, 25. First, plaintiff argues Rodriguez did not suffer any broken bones in her face or elsewhere, suffered no concussion or head fracture, did not miss work due to her injuries, and appears unscathed in her post-incident photograph. *Id.* at No. 17; Opp. at 5. Second, plaintiff argues Agdeppa's claim that he suffered a "broken nose" remains unsupported. Opp. at 4-5. Third, in the October 19, 2020 hearing, plaintiff advanced an argument that the trajectory of one of the bullets as it entered Dorsey calls into question Agdeppa's account that Dorsey remained standing over Rodriguez until the final shot. *See* Autopsy Rpt at 1-2. Finally, although plaintiff does not raise this argument, according to the BOPC Findings, Witness F's account of the moments before the shooting differed in several significant respects from Agdeppa's: Witness F said he and Witness E were actively intervening in the altercation, and Dorsey was fighting for control of Agdeppa's firearm and holding Agdeppa's arm when he

was shot. BOPC Findings at 7. Whether this version of events provides additional support for the reasonableness of Agdeppa's belief that deadly force was necessary is irrelevant–if introduced at trial, this evidence would impeach Agdeppa's credibility because, according to Agdeppa, he fired from six to eight feet away as Dorsey stood or hunched over Rodriguez. SDF Nos. 25, 26; Agdeppa Depo. at 73: 1-8; 115:15-20.

Agdeppa's arguments to the contrary are unavailing. Contrary to Agdeppa's characterization of plaintiff's evidence as "mere speculation ... or fantasy," Reply at 3, the evidence is specific and exceeds "conclusory allegations," *Lujan*, 497 U.S. at 888; *see Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992) ("circumstantial evidence can speak clearly and often unequivocally"), as amended (Mar. 5, 1992), *overruled on other grounds as recognized by Federman v. Cty. of Kern,* 61 F. App'x 438, 440 (9th Cir. 2003). Moreover, Agdeppa's argument that the post-incident photographs cannot depict all the officers' injuries, such as headaches, muscle strains, or even bruises so soon after the altercation, Reply at 3, is a question of the weight of the evidence, which is not for the Court to consider on summary judgment, *Benas v. Baca*, 159 F. App'x 762, 765 (9th Cir. 2005) (summary judgment inappropriate where "thorough inquiry into the facts, including [decedent's conduct toward officer], is needed"). In any event, the Court must "resolv[e] all factual disputes in favor of the plaintiff' if it is to grant summary judgment for Agdeppa. *Henrich*, 39 F.3d at 915. Finally, although Agdeppa is correct that an officer has no obligation to wait to suffer serious injury before employing force, he is incorrect in concluding

that, therefore, the extent of either officer's injuries is irrelevant. Reply at 1. As mentioned above, the extent of the officers' injuries goes to Agdeppa's account of the events that purportedly gave rise to his belief that Dorsey posed a significant threat. *Hopkins*, 958 F.2d at 885 (summary judgment inappropriate where "medical evidence in the record undermine[d] [Officer] Andaya's story" and evinced "milder version of the threat Andaya faced"); *Newmaker v. City of Fortuna*, 842 F.3d 1108 (9th Cir. 2016) (summary judgment inappropriate where credibility of defendant officer in dispute). And not every threat to an officer warrants deadly force as a matter of law, and a rational fact finder could view plaintiffs evidence and conclude that the threat here did not warrant such extreme force. *See Santos*, 287 F.3d at 853.

Turning to the other factors appropriately considered under Graham, plaintiff argues that the severity of the crime for which the officers initially seized Dorsey weighs heavily against reasonableness. Opp. at 2; Opp. SDF No. 1. Other courts have reasoned that "the severity of the crime was relatively low" even "assum[ing] that [the suspect] had assaulted individuals." *Berner v. Spokane Cty.*, No. 2:15-CV-140-RMP, 2017 WL 579897, at *7 (E.D. Wash. Feb. 13, 2017) (citation omitted); *see Smith v. City of Hemet*, 394 F.3d 689, 702-03 (9th Cir. 2005) (where suspect is alleged to have committed domestic violence, "the circumstances are not such ... to warrant the conclusion that [the suspect] was a particularly dangerous criminal" and thus "the nature of the crime at issue [provided] little, if any, basis for the officers' use of physical force").

Plaintiff further presents evidence calling into question whether Agdeppa warned Dorsey of his intent to use deadly force. Opp. at 3, 10. Also, although it is undisputed that he resisted arrest when the officers :initially attempted to handcuff him, at no point was Dorsey a flight risk. Dorsey was naked and was concealing no weapon. Finally, plaintiff cites to the BOPC Findings, which concludes that the officers' initial approach of Dorsey and failure to use proper de-escalation techniques were a substantial deviation from Department policy, and that, in light of these failures, "the lethal use of force . . . was unreasonable."[8] BOPC Findings at 11-12, 10:-17. And plaintiff argues a rational fact finder could find both officers' body-worn camera footage consistent with this account, rather than Agdeppa's. Opp. at 10.

Agdeppa responds that *Cty. of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017), precludes the Court from considering the officers' pre-shooting tactical decisions. Reply at 7. But Agdeppa's reliance on *Mendez* is misplaced. *Mendez* stands for the proposition that once an officer's use of force is judged reasonable under *Graham*, it does not become unreasonable because a prior Fourth Amendment violation "provoked" the confrontation that ultimately necessitated the use of force. 137 S.Ct. at 1546-47. Here, the question is not whether the officers provoked the confrontation with Dorsey by committing a prior

[8] The BOPC's use of the term "unreasonable" does not necessarily equate to the term as used in the context of the Fourth Amendment.

Fourth Amendment violation; rather, the question is whether Agdeppa' s use of deadly force was reasonable under *Graham* in the first instance, which appropriately considers preshooting circumstances. *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (en banc) ("The question ... is whether the force used was reasonable in light of *all* the relevant circumstances." (emphasis in original)).

Finally, having considered. the severity of the intrusion and the importance of the government's interests, the Court must balance these two considerations in order to determine whether the force used was reasonable. *Santos*, 287 F.3d at 854. Here, a rational fact finder could conclude the countervailing governmental interests do not justify the amount of force used. Critically, there is a genuine dispute over whether plaintiff posed an immediate threat to the officers sufficient to warrant the use of deadly force. Therefore, the Court cannot conclude that Agdeppa's use of force was reasonable as a matter of law. *See Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994) ("[W]hether a particular use of force was reasonable is rarely determinable as a matter of law."); *Santos*, 287 F.3d at 853 (excessive force cases "nearly always require[] a jury to sift through disputed factual contentions, and to draw inferences therefrom").

2. Qualified. Immunity

Agdeppa also argues that summary judgment is appropriate as to plaintiffs Section 1983 claim because, even if his use of force was excessive, he is entitled to qualified immunity. MSJ at 17-20.

"Qualified immunity is an immunity from suit rather than a mere defense to liability," and therefore must be resolved "at the earliest possible stage in litigation." *Pearson v. Callahan,* 555 U.S. 223, 231-32 (2009) (quotation omitted). Qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly" against "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* at 231. In excessive force cases., it protects officers in the "hazy border between excessive and acceptable force." *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (quotation omitted). Accordingly, an officer will be denied qualified immunity in a Section 1983 action if, "(1) taken in the light most favorable to the party asserting injury, the facts alleged show that the officer's conduct violated a constitutional right, and (2) the right violated was 'clearly established' at the time of the incident such that a reasonable officer would have understood his conduct to be unlawful in that situation." *Torres v. City of Madera,* 648 F.3d 1119, 1123 (9th Cir. 2011)(quoting *Saucier*, 533 U.S. at 201). Courts may address either prong first. *Pearson*, 555 U.S. at 236. "'[W]hether the violative nature of particular conduct is clearly established' ... must be answered 'not as a broad general proposition,' but with reference to the facts of specific cases." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 947 (9th Cir. 2017) (quoting *Mullenix v. Luna* 577 U.S. 7, 12 (2015)).

Agdeppa points to several cases which he argues are factually analogous and establish that he is entitled to qualified immunity. *See* MSJ 12-13. Most analogous is *Isayeva*. There, construed in favor of the

plaintiff, the relevant facts were as follows: After two officers at the scene used escalating measures to subdue the suspect, including physical restraints and multiple Taser deployments, the suspect hit one officer with enough force that the officer fell to the ground. *Isayeva*, 872 F.3d at 950. The suspect then turned on the second officer, hitting him until he began to lose consciousness. *Id.* The second officer fell back onto a bed while the suspect approached with balled fists. *Id.* After shoutng "[s]hoot him," the second officer, from his position on the bed, shot and killed the suspect. *Id.* at 950-51. The *Isayeva* court found the second officer enjoyed qualified immunity because the suspect did not hold a clearly established right to be free from deadly force in those circumstances. *Id.* at 951.

Agdeppa argues that, because his account of the events preceding Dorsey's shooting are analogous to those in *Isayeva*, *Isayeva* is dispositive. MSJ at 19. But Agdeppa reads *Isayeva* too broadly; it cannot be read to overturn the principle that "the court may not simply accept what may be a self-serving account by the police officer," but rather "must also look at the circumstantial evidence." *Scott*, 39 F.3d at 914. To this point, the *Isayeva* court explicitly stated that the "clearly established" prong of qualified immunity "must be answered ... with reference to the facts of specific cases." *Isayeva*, 872 F.3d at 947.

Turning to the *Isaveva* court's reasoning, that court was not forced to "simply accept" the officers' account because they were not "the only surviving eyewitness[es]." *Scott*, 39 F.3d at 915. The plaintiff in *Isaveva*–the decedent's wife–saw portions of the

altercation preceding the shooting; and, although "[f]rom her position outside the room [she] did not see [the decedent] punch either of the deputies," she could hear the final moments and the shooting itself. 872 F.3d at 943-44. Nevertheless, despite being highly motivated to dispute the officer's account, her testimony largely mirrored that of the officer's, and she did not raise a dispute of fact regarding the officer's claim that he was losing consciousness and that his life was in danger.[9] *See Id.* at 950. Here, by contrast, there is no comparable witness. (Although the BOPC Findings reports that Witness F saw the altercation immediately preceding the shooting, his testimony diverges significantly from Agdeppa's account, as discussed above. *See supra* Part II.G. In any event, Witness F remains anonymous, provided no declaration, gave no deposition, and was not mentioned in either party's filings.) Furthermore, plaintiff cites circumstantial evidence that undermines Agdeppa's account. By contrast, in *Isayeva*, the court was able to substantiate the officer's account with circumstantial evidence that he "had visible injuries including bruises and swelling around his eyes, bruising and redness to his left ear, and bruising at the base of his neck," and that he "developed nausea and went to the emergency room, where he was

---

[9] The only two disputed facts relevant to the use of deadly force were "whether ... [the decedent] had purposely thrown [the second officer] against a wall or merely had inadvertently 'bucked' him into a wall"; and "whether [he] subsequently punched, pushed, or threw" the first officer, although it was undisputed that the decedent used force against the officer. *Isayeva v. Sacramento Sheriffs Dep't*, 872 F.3d 938, 944, 950 (9th Cir. 2017).

diagnosed with a non-serious head injury." 872 F.3d at 944. Finally, there is a meaningful factual distinction between this case and *Isayeva*. That court's reasoning relied heavily on the fact that the officer had "beg[un] to pass out when he was being beaten," which would have rendered him completely vulnerable and left his firearm available to the suspect. *Id.* at 952. Here, although Agdeppa contends he thought Dorsey's next punch would kill Rodriguez, Opp. SDF No. 25; MSJ at 7, plaintiff raises a genuine dispute as to whether that belief was reasonable. The Court must consider "the facts of [this] specific case[]," *Isayeva* at 947, which, taken in the light most favorable to plaintiff, do not match those in *Isayeva* such that that case is dispositive.

Having concluded *Isayeva* is not dispositive, the Court must determine whether Agdeppa violated a clearly established right held by Dorsey. At the time of the incident, it was "clearly established" that "[w]here 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." *Garner*, 471 U.S. at 11; *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001) ("A desire to resolve quickly a potentially dangerous situation is not the type of government interest that, standing alone, justifies the use of force that may cause serious injury."). As discussed above, viewing the facts in the light most favorable to plaintiff, a jury could find that a reasonable officer in Agdeppa's position would not have believed that Rodriguez or anyone else was in imminent danger and, thus, would have understood that his use of deadly force violated

plaintiff's Fourth Amendment rights. *See supra* Part IV.A.1. Therefore, Agdeppa is not entitled to qualified immunity as a matter of law. *See Act Up!/Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir . .1993) ("[i]f a genuine issue of fact exists" as to "what the officer and claimant did or failed to do," qualified immunity at summary judgment is inappropriate). Accordingly, the Court **DENIES** Agdeppa's motion for summary judgment on plaintiff's excessive force claim.

B. State Law Wrongful Death Claims Based on Battery and Negligence

Plaintiff's third and fourth claims allege wrongful death based on battery and negligence, respectively. Compl. ¶¶ 41-56. "Claims of excessive force under California law are analyzed under the same standard of objective reasonableness used in Fourth Amendment claims." *Hayes v. Cty. of San Diego*, 736 F.3d 1223, 1232 (9th Cir. 2013) (applying *Graham* to negligent wrongful death claim); *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272-74 (1998) (noting that Section 1983 is "the federal counterpart of state battery or wrongful death actions"). Agdeppa argues that the battery and negligence claims fail as a matter of law because his use of force was reasonable. MSJ at 23. However, the Court has already concluded that there is an issue of disputed fact regarding his use of deadly force and denied summary judgment on plaintiffs excessive force claim. *See supra* Part IV.A.1. Therefore, the Court also **DENIES** Agdeppa' s motion for summary judgment on plaintiffs battery and negligence claims.

C. *Chaudhry* Damages

The Ninth Circuit recognizes a decedent's right to recover damages for pre-death pain and suffering through a survival action brought by his heirs, *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103-105 (9th Cir. 2014), including *"for every second* a decedent survives following a Constitutional violation," *Willis v. City of Fresno*, No. 1:09-CV- 01766-BAM, 2017 WL 5713374, at *7 (E.D. Cal. Nov. 28, 2017) (emphasis in original); *Nunez v. Santos*, 427 F. Supp. 3d 1165, 1192 (N.D. Cal. 2019) (upholding *Chaudhry* damages where "jury could have concluded" decedent suffered "for at least [a] few seconds"), *appeal dismissed sub nom. Nunez v. City of San Jose*, No. 20-15057, 2020 WL 1862133 (9th Cir. Feb. 28, 2020).

Here, Agdeppa argues no jury could award *Chaudhry* damages because Dorsey's death was "instantaneous." MSJ at 24. But plaintiff has raised a genuine dispute as to whether Dorsey's death was indeed instantaneous, as supported by Dr. Ashraf's deposition testimony that he could have died "seconds to minutes" after being shot. Opp. SDF No. 44; Opp. at 17. Accordingly, the Court also **DENIES** Agdeppa's motion for summary judgment on plaintiff's request for Chaudhry damages.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Agdeppa's motion for summary judgment with respect to all plaintiff's claims.

IT IS SO ORDERED.

	00:00
Initials of Preparer	CMJ

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAULETTE SMITH, individually and as Successor in Interest to Albert Dorsey, deceased,
Plaintiff-Appellee,

v.

EDWARD AGDEPPA, an individual,
Defendant-Appellant,

and

CITY OF LOS ANGELES, a municipal entity; DOES, 1 through 10,
Defendants.

No. 20-56254

D.C. No. 2:19-cv-05370-CAS-JC

ORDER

Filed March 1, 2024

Before: Consuelo M. Callahan, Morgan Christen, and Daniel A. Bress, Circuit Judges.

ORDER

Judge Callahan and Judge Bress voted to deny the petition for rehearing en bane. Judge Christen voted to grant the petition for rehearing en bane. The full court was advised of the petition for rehearing en bane. A judge requested a vote on whether to rehear the matter en bane. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en bane consideration. Fed. R. App. P. 35(a). Appellee's petition for rehearing en bane, Dk:t. 65, is DENIED.