No. 24-15

IN THE

Supreme Court of the United States

PAULETTE SMITH, INDIVIDUALLY
AND AS SUCCESSOR IN INTEREST TO
ALBERT DORSEY, DECEASED,

Petitioner,

v.

EDWARD AGDEPPA,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

The Petition fails to present any compelling reason for this Court's review. Petitioner Paulette Smith ("Plaintiff") creates a fallacy by grossly misrepresenting the factual record and applicable legal standards in hopes of fabricating a conflict in the Opinion that neither exists, nor warrants review. The Ninth Circuit's Opinion ("Opinion") was firmly grounded in existing Supreme Court precedent and is a well-reasoned decision that should not be disturbed. In fact, the Opinion relies heavily on Supreme Court precedent for virtually every issue, providing an unwavering foundation for the Ninth Circuit's conclusions. Yet, Plaintiff invites the Court to deviate from that precedent and instead adopt flawed legal reasoning. Accordingly, the Petition should be denied.

Plaintiff, the mother of decedent Albert Dorsey ("Dorsey"), is prosecuting this action against Respondent/Defendant Officer Edward Agdeppa ("Agdeppa"), alleging claims of excessive force under 42 U.S.C. § 1983 for Agdeppa's use of force in protecting from a brutal beating at Dorsey's hands, facts wholly omitted from Plaintiff's Petition. The District Court for the Central District of California ("District Court") denied Officer Agdeppa's motion for summary judgment on the issue of qualified immunity ("Order"), relying on dissimilar cases, including *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), finding that Plaintiff's speculative evidence created issues of material fact and precluded qualified immunity. The Order flatly conflicted with both Circuit and Supreme Court precedent and did exactly what this Court has repeatedly admonished courts to avoid: relying on a high

level of generality in determining whether the law was "clearly established," sufficient to deny qualified immunity.

On August 30, 2023, the Ninth Circuit Court of Appeals reversed the District Court, correctly applying long-standing precedent, recognizing that no then-existing case provided notice to Agdeppa that his actions would be unlawful, thereby granting qualified immunity. The Ninth Circuit's Opinion also correctly evaluated and followed existing precedent when finding that appellate jurisdiction was appropriate, as well as confirming the relevant standards for adjudicating summary judgment motions, concluding that the perceived issues of fact as relied upon by Plaintiff and the District Court were not material and that Plaintiff's proffered evidence was speculative and insufficient to prevent summary judgment.

The Opinion does not warrant review, nor is it inconsistent with existing precedent.

STATEMENT OF THE CASE

Plaintiff's statement is both incomplete and misleading, including omitting key undisputed facts. Pursuant thereto, Agdeppa submits this abridged statement, which focuses on the pertinent facts as are relevant to Plaintiff's Petition, as necessary for a complete and accurate understanding of the legal issues.

I. The Incident

On October 29, 2018, Officers Agdeppa and Rodriguez (collectively "Officers") responded to calls that an individual (later identified as Dorsey) was refusing to

leave a gym after assaulting and threatening other gym members and staff. 3-ER-362-363 at ¶¶ 2, 5; 3-ER-371-372 at ¶¶ 2, 5.[1] Upon arrival, the Officers both activated their body-worn cameras. As a result, the majority of the facts discussed herein are undisputed.

Upon entering the locker room, the Officers observed Dorsey standing naked with a towel draped over his shoulder. 3-ER-363 at ¶ 6; 3-ER-372 at ¶ 7; 4-ER-439, 441. The Officers requested Dorsey put on his clothes. 3-ER-363 at ¶¶ 6-7; 3-ER-372 at ¶¶ 7-8; 4-ER-439, 441. Dorsey did not make any effort to comply with the Officers' directions. Id. The Officers then attempted, without success, to gain Dorsey's voluntary compliance through verbal tactics, including varying the audible level of their voices while using more forceful language. 3-ER-363 at ¶ 8; 3-ER-372 at ¶ 9; see also, 4-ER-439, 441. Unfortunately, Dorsey still refused to comply, ignoring them while raising the music on his cell phone, dancing naked, and telling both Officers to shut up while flipping them off. Id.

Given Dorsey's continued refusal to comply, the Officers attempted to detain him by going "hands on." 3-ER-363-364 at ¶ 9; 3-ER-372-373 at ¶ 10; see also, 4-ER-439, 441. The Officers approached Dorsey and grasped him by the arms. However, Dorsey resisted by

1. Pursuant to Supreme Court Rule 12, subsection 7, Agdeppa's citations are to the record below. Plaintiff attached an Appendix to her Petition, sequentially numbering the pages "App.1" through "App.115." Where included in Plaintiff's Appendix, the record citation has been modified to reference to the specific Appendix page (i.e. "App.20" would cite to Plaintiff's Appendix at page 20.)

tensing up, which prevented the Officers from controlling or handcuffing him. Id. The Officers continued attempting various tactical maneuvers to secure Dorsey's hands, including trying to pin him to the wall, switching sides, using arm, finger and wrist locks, bracing maneuvers, and using a double-cuff procedure while continually admonishing Dorsey to stop resisting. 3-ER-363 at ¶ 6; 3-ER-372 at ¶ 7; see also, 4-ER-439, 441. Unfortunately, none of those methods were effective. Id. As the struggle progressed, the Officers' body-worn cameras fell off onto the floor. 3-ER-364 at ¶ 14; 3-ER-373 at ¶ 15; 4-ER-439, 441. Although the cameras no longer captured a video of the interaction, the audio continued to record. Id. Despite speculation by Plaintiff, the remaining facts are undisputed.

Dorsey continued to resist the Officers' attempts to handcuff him, while becoming increasingly more combative, even striking Rodriguez in the face. 3-ER-365 at ¶ 17; 3-ER-374 at ¶ 17. The Officers then attempted to utilize their tasers on Dorsey, further warning him to the effect of "I'm going to tase you if you don't stop resisting. Relax!" 3-ER-365 at ¶ 18; 4-ER-439, 441. Despite those warnings, Dorsey continued to resist and became even more combative, resulting in the Officers activating their tasers. Id.; 3-ER-374 at ¶ 17. However, the tasers were ineffective. Id.; 3-ER-365 at ¶ 18.

Instead, Dorsey began punching the Officers, while a handcuff dangled from his wrist. Id.; 3-ER-374 at ¶¶ 17-19. Dorsey struck Agdeppa multiple times in the face and head area. 3-ER-365-366 at ¶¶ 21-22; 3-ER-374 at ¶ 18; 4-ER-439, 441. The force of Dorsey's punches knocked Agdeppa backwards into a wall of lockers, which caused him to become disoriented and drop his taser. Id.

In response to Dorsey's attack on Agdeppa, Rodriguez again activated her taser, which still had no effect. Instead, it resulted in Dorsey attacking her, including punching her in the face, knocking her to the ground, then continuing to brutally punch her, while stripping Rodriguez of her taser and attempting to press it against her face, while simultaneously punching her with the other hand. 3-ER-374 at ¶¶ 18-19; 4-ER-439, 441.

With Rodriguez lying on the floor, Dorsey hovered over her for approximately 30-40 seconds while continuing to beat her about the head and face. 3-ER-374 at ¶¶ 20-21; 4-ER-439, 441. Due to Dorsey's size and position straddling over Rodriguez, she was unable to break free or defend herself, instead believing that Dorsey was about to kill her. 3-ER-374 at ¶ 21.

As Agdeppa began to refocus his vision, he observed Dorsey straddling Rodriguez while viciously punching her repeatedly in the face. 3-ER-366 at ¶¶ 23-25. Based upon Dorsey's actions, his refusal to comply, his significant size and strength, his position over Rodriguez, and the beating that he was giving Rodriguez, Agdeppa believed that Dorsey was attempting to kill his partner. Id.

In order to protect both his and his partner's life, Agdeppa unholstered and drew his weapon followed by giving Dorsey a verbal warning, words to the effect that Dorsey needed to stop. 3-ER-366-367 at ¶¶ 26-27; 3-ER-375 at ¶¶ 22-23; 4-ER-439, 441. Yet, Dorsey continued. Id. To save Rodriguez's life, Agdeppa fired five shots at Dorsey, which immediately stopped Dorsey's attack. Id.

II. Relevant Procedural History

A. The District Court's Order Denying Qualified Immunity

Agdeppa's motion for summary judgment was heard on October 19, 2020. 2-ER-22-39. On November 6, 2020, the District Court issued its order, denying the motion, finding that a genuine dispute of fact existed as to whether Dorsey posed an immediate threat to the Officers. App.112, 115. The District Court based this finding on the following facts:

> 1) that Rodriguez did not suffer any broken bones, did not miss work and appears "unscathed in her post-incident photograph" (App.109),
>
> 2) that Agdeppa's broken nose was unsupported (App.109),
>
> 3) that Plaintiff's interpretation of a statement from the autopsy report and last minute verbal arguments at the hearing questioning the trajectory of one of the bullets, casts doubt on whether Agdeppa "remained standing over Rodriguez until the final shot" (App.109), and
>
> 4) that non-sworn witness statements, which were interpreted and summarized in the post-incident report conducted by the City of Los Angeles' Board of Police Commissioner ("BOPC") had a different perspective of the

> incident and Agdeppa's proximity to Dorsey when he fired his first shots (App.110).

Notwithstanding that these assumptions are unsupported by the evidence, over Agdeppa's objections, and directly contradictory to the BOPC's conclusion that Dorsey presented an imminent threat, the District Court ruled 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 [sic [Dorsey's]] Fourth Amendment rights" and denied qualified immunity. App.114.

To be clear, there is absolutely no dispute that Dorsey was fighting the Officers when lethal force was used. 3-ER-363-366, 372-375; 2-ER-135-136 ("The BOPC noted that Officer A used deadly force at a time when, as supported by the accounts of two independent witnesses, he/she and Officer B were being assaulted by the Subject. At that time, the violence of the Subject'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."). As such, there was no logical basis for the District Court's conclusion that Dorsey did not pose an immediate threat to the Officers.

Plaintiff merely challenged the severity of the Officers' injuries and the precise location that Agdeppa may have been standing when he fired each shot, but not whether a fight occurred. In fact, the District Court stated that Plaintiff's evidence "largely conforms to Agdeppa's account" and that Dorsey was aggressively and violently

fighting the Officers. App.105; see also, 3-ER-167 at 105:19-106:18; 3-ER-204 at 33:15-24; 2-ER-135-136.

The District Court, relying on *Tennessee v. Garner* and *Deorle v. Rutherford*, without any analysis or comparison of the facts in those cases, or any case precedent that would have put Agdeppa on notice that his actions could have been unlawful – and despite the overwhelming evidence of the existence of a violent fight between the Officers and Dorsey – found that "[a]t the time of 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.'" App.114.

Agdeppa timely filed his notice of appeal on November 25, 2020, challenging the denial of qualified immunity. 3-ER-404-405.

B. Plaintiff's Evidence Was Pure Speculation and Insufficient to Defeat Summary Judgment

On August 30, 2023, after initially upholding the District Court's flawed analysis and after Agdeppa sought rehearing *en banc*, the Ninth Circuit reversed both the District Court and its earlier opinion. In reversing, the Circuit found that numerous facts raised by Plaintiff were either not material to the qualified immunity analysis, or that the evidence supporting such allegedly disputed issues was purely speculative. Pertinent here, the Ninth Circuit concluded that all of the disputes raised by Plaintiff failed to refute the most important fact, i.e. that Dorsey posed an imminent threat to the Officers. In relevant part, the Opinion concluded "the fact that the

violent struggle escalated in the moments leading up to the shooting" was *not* materially disputed. App.7, n.1; see also, App.7 ("It is undisputed that a violent struggle ensued in the locker room.").

The Ninth Circuit distinguished each of Plaintiff's alleged issues of fact, including stating that "[i]n some instances, these asserted disputes of fact are not genuine." App.17. Plaintiff's Petition takes umbrage with the Circuit for allegedly failing to consider these immaterial and speculative facts in the light most favorable to her. However, Plaintiff's Petition omits that her evidence was speculative, nor does she explain how her evidence is sufficient to satisfy her burden at summary judgment.

Plaintiff's Petition alleges that the Ninth Circuit failed to properly evaluate: 1) whether Rodriguez was sufficiently injured to support that she was being punched by Dorsey, 2) whether the Officers' testimony was credible, despite it being corroborated by eye-witness accounts and all of the admissible evidence, 3) whether the autopsy report, as interpreted by Plaintiff's counsel, suggested a bullet trajectory where Agdeppa could have been standing in a different position at the time of the shooting, and 4) whether the post-incident opinions from a civilian Board of Police Commissioners should have been considered. With the exception of the last issue (which is raised for the first time in the Petition), each was cogently addressed and dismissed by the Ninth Circuit. Moreover, none of these issues address the *most important* factor, i.e. the imminent threat posed by Dorsey.

Turning first to Plaintiff's bullet trajectory theory, Plaintiff interprets the autopsy report to assume that Dorsey was moving and not standing over Rodriguez

when all five shots were fired. However, neither the District Court nor the Ninth Circuit accepted Plaintiff's assertion on this issue. The District Court stated that notwithstanding the argument being introduced "for the first time" at the summary judgment hearing, "[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, such as, for instance whether he was standing or hunched over when the first bullet struck him." App.104.

The Ninth Circuit further criticized Plaintiff's theory, concluding it was not based "on expert analysis, but on the speculation of counsel." App.17. Notably, this Court has held that bullet trajectories are within the province of experts, not lay persons. *United States v. Scheffer*, 523 U.S. 303, 312 (1998) (identifying ballistics as "factual matters outside of the jurors' knowledge" to which an expert witness must testify); see also, *Krause v. County of Mohave*, 459 F. Supp. 1258, 1265-1266 (D. Az. 2020) ("[B]ullet trajectory analysis is highly technical area, subject to peer-reviewed research, and some degree of standardization. Ballistics testimony requires specialized expertise.").

Plaintiff then speculated (and the District Court agreed) that because unidentified Witness F stated (as summarized in the BOPC Report) that Dorsey grabbed Agdeppa's wrist when shots were fired, which was slightly different than Agdeppa's testimony of shooting from a small distance, this discrepancy could render Agdeppa's testimony less-than credible. However, the Ninth Circuit addressed this issue, too, explaining that Witness F's recollection nonetheless favored Agdeppa and that if,

in fact, as Witness F stated that Dorsey was fighting Agdeppa for Agdeppa's gun at the time gunshots were fired, "then the situation would have been more dangerous than Agdeppa recalled." App.17-18, see also, App.18, n.3. Thus, this alleged dispute did not negate that Dorsey was an imminent threat.

Notably, minor inconsistencies in an officer's testimony will not defeat summary judgment. *Hart v. City of Redwood City*, 99 F.4th 543, 548 (9th Cir. 2024); *Gregory v. Cnty of Maui*, 523 F.3d 1103, 1107-08 (9th Cir. 2008); *Reynolds v. Cnty of San Diego*, 84 F.3d 1162, 1169-70 (9th Cir. 1996) ("Illuminating a potential minor inconsistency . . . is insufficient to raise a genuine issue of material fact regarding the reasonability of the use of force . . ."), *overruled on other grounds by Acri v. Varian Assoc., Inc.*, 114 F.3d 999 (9th Cir. 1997). Thus, the Ninth Circuit was consistent with existing precedent in finding that such a minor inconsistency was immaterial, especially when the differences did not negate the existence of the ongoing fight and Dorsey's imminent threat.

Plaintiff then speculated further, averring the Officers' testimony was not credible because, in Plaintiff's view, Officer Rodriguez's post-injury photos did not show *enough* physical injuries. The Ninth Circuit ultimately held that the extent of the Officers' injuries was immaterial, concluding in relevant part as follows:

> We are not persuaded that the extent of the officers' injuries changes the calculus here. . . . 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. App.20.

The Opinion further noted that the reference to Officer Rodriguez as "unscathed" was merely "an argument made by the plaintiff." App.20. Plaintiff offered no expert testimony or other admissible evidence to support that Officer Rodriguez was uninjured or that a violent fight between Dorsey and the Officers had not occurred.

The Ninth Circuit further noted that the Officers' injuries were not "insubstantial," noting that Agdeppa had "sustained a prominent facial laceration . . . . and suffered a concussion that reportedly left him unable to work for months" and that "Rodriguez reported swelling on her face and jaw, abrasions, and a pulled muscle." App.20. The Ninth Circuit further acknowledged that "[w]hile 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 . . . . [, as] [n]o clearly established law requires the officers to have sustained more grievous injuries or worse before using lethal force in the particular situation they confronted." App.20-21.

Thus, the facts relied upon by Plaintiff and the District Court were not supported by anything other than pure speculation of counsel, which is insufficient to demonstrate a triable issue of material fact or to survive summary judgment. App.17, citing *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."); *Scott v. Harris*, 550 U.S. 372 (2007) ("...the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.").

SUMMARY OF THE ARGUMENT

The Ninth Circuit's Opinion was both consistent with Supreme Court and Circuit precedent. It properly recognized jurisdiction of this case, based firmly on the foundations enunciated in *Behrens v. Pelletier*, 516 U.S. 299 (1996). It also properly focused upon the second question of the qualified immunity analysis, consistent with *Pearson v. Callahan*, 555 U.S. 223, 239 (2009). The Ninth Circuit correctly analyzed only issues of law, and did not weigh any evidence, consistent with foundational precedent on summary judgment. The Ninth Circuit also adhered to Supreme Court precedent in finding that Agdeppa was entitled to qualified immunity, as his actions did not violate clearly established law.

Conversely, Plaintiff's position directly conflicts with decades of Supreme Court jurisprudence on qualified immunity, particularly with regard to when a right has been "clearly established." Indeed, Plaintiff seeks to reinstate the overruled Provocation Rule, denounced in *County of Los Angeles v. Mendez*, 581 U.S. 420, 428-429 (2017) and ultimately to eradicate the defense of qualified immunity. In sum, adopting Plaintiff's position would create conflicts with decades of Supreme Court precedent, creating disastrous results and leading to the creation of dangerous circumstances for countless law enforcement officers throughout the country.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Thereafter, Rule 10 lists examples of the types of cases in which the Court may grant certiorari, none of which are applicable here, while further confirming that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Id.

The Petition should be denied because it presents no "compelling reasons" for granting certiorari, as discussed below. Moreover, this case does not involve: (1) a conflict among United States Court of Appeals; (2) a conflict between a United States Court of Appeals and a state court of last resort; or (3) a conflict on an important federal question among state courts of last resort. Therefore, in the absence of any compelling reasons for granting certiorari, the Petition should be denied.

I. The Opinion is Consistent with Circuit and Supreme Court Precedent

A. The Ninth Circuit Correctly Maintained Jurisdiction Over the Appeal

Though not explicitly stated in the Petition, Plaintiff implies that the Ninth Circuit lacked jurisdiction due to alleged disputes of fact noted by the District Court. Plaintiff arrives at this erroneous conclusion only through a tortured analysis of the so-called "facts," ignoring long-standing Supreme Court and Circuit precedent and fixating on issues that are simply not material.

It is axiomatic that appellate review regarding application of qualified immunity is appropriate even when a purported dispute of material fact exists. *Behrens v. Pelletier*, 516 U.S. 299 (1996). In *Behrens*, the Supreme Court held that the district court's denial of summary judgment where "material issues of fact remain" did not automatically render the denial of immunity non-appealable. *Id.* at 313. Rather, *Behrens* held that the critical issue is whether the facts that are disputed are material to the immunity defense. *Id.* The Ninth Circuit correctly recognized this long-standing principle in its Opinion, stating "[t]he factual disputes that the district court highlighted . . . 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.'" App.29, citing *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997) (defendant may bring an immediate appeal regarding whether the alleged conduct met the standard of "objective legal reasonableness[.]").

Furthermore, the Supreme Court has held for many years that whether an officer violated a constitutional right, which may include analyzing material facts, is also a question of law. *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014) (explaining that the questions in the qualified immunity analysis, including whether a violation of the Fourth Amendment occurred, "raise legal issues" which are "quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort [i.e. the qualified immunity analysis] is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden."). Importantly, in analyzing qualified immunity on

appeal, the reviewing court may review either of the two prongs of the qualified immunity question, i.e. 1) whether there was a constitutional violation, or 2) whether a right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 239 (2009). The Ninth Circuit was not limited to only analyzing whether a violation had occurred, as Plaintiff erroneously contends.

Prior to *Pearson*, courts analyzed the qualified immunity question in a two-step process, consistent with *Saucier v. Katz*, 533 U.S. 194 (2001), addressing the constitutional question first before proceeding to the clearly established question. *Pearson*, 555 U.S. at 231-232. In overruling *Saucier's* two-step process, *Pearson* recognized that there may be cases where it is appropriate to reach the question of whether the contours of the right at issue were clearly established prior to developing a factual record. *Id*. at 239-240.

Plaintiff maintains that *Pearson* limited the instances of when a court may consider the clearly established question before first deciding whether a constitutional violation occurred. However, the *Pearson* Court explicitly stated that "the *Saucier* procedure should not be regarded as an inflexible requirement" and that its "present determination that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained." *Pearson,* at 227, 234. Contrary to Plaintiff's position, nowhere in *Pearson* is a requirement enunciated that courts must strictly adhere to the *Saucier* two-step procedure. Indeed, the Supreme Court stated that "[t]he judges of the district courts and the courts of appeals *should be permitted to exercise their sound discretion* in deciding which of the two prongs of the qualified

immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 235 (emphasis added). *Pearson* further emphasized that "there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all."

Relevant here, *Pearson* specifically held that "[t]here are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." Given the divided panel Opinion and the District Court's contrary decision, this case was a difficult case (factually) to decide, especially when considering Plaintiff's speculative evidence. But, the legal issue of whether the right was clearly established was unambiguous as there was no prior case that put Agdeppa on notice that his actions would be unlawful. Thus, the Ninth Circuit properly chose to consider only the clearly established question.

In an apparent attempt to circumvent *Pearson*, Plaintiff avers that the Opinion somehow created a conflict among the Circuits. Even if a circuit court's misapplication of Supreme Court precedent could be interpreted as a "circuit conflict," any review of the actual circuit decisions refutes Plaintiff's argument. Notably, all of the Circuits relied upon by Plaintiff have, at times, chosen to render a decision only on the clearly established prong, rather than analyzing the facts of whether a violation occurred. See, **Fourth Circuit:** *Brown v. Elliott*, 876 F.3d 637, 641 (4th Cir. 2017) (choosing to "skip ahead" to the clearly established question, pursuant to *Pearson*), *Atkinson v. Godfrey*, 100 F.4th 498, 504 (4th Cir. 2024) (choosing

to exercise "the analytical discretion permitted for considering qualified immunity" and beginning "with prong two"); **Fifth Circuit:** *Morrow v. Meachum*, 917 F.3d 870, 876-880 (5th Cir. 2019) (evaluating only the clearly established prong and finding plaintiff's proffer of cases insufficient), *Bailey v. Preston*, 702 Fed.App'x 210, 212-214 (5th Cir. 2017) (finding it unnecessary to "reach the first prong of the qualified-immunity analysis"); **Sixth Circuit:** *Burnett v. Griffith*, 33 F.4th 907, 911 (6th Cir. 2022) (focusing "on the second prong"), *Hagans v. Franklin Cnty Sheriff's Ofc.*, 695 F.3d 505, 508 (6th Cir. 2012) (finding that the "first question raises some complications" and as the "second one does not" opting "to answer the easier of the two questions, saving the harder one for another day"); **Seventh Circuit:** *Findlay v. Lendermon*, 722 F.3d 895, 899 (7th Cir. 2013) (finding "it economical to . . . consider only whether [plaintiff] has shown that the alleged constitutional violation . . . was clearly established"), *Lopez v. Sheriff of Cook Cnty*, 993 F.3d 981, 987 (7th Cir. 2021) ("Like the district court, we begin and end with the second step of the analysis: determining whether [the officer] violated [the subject's] clearly established . . . right" and granting qualified immunity); **Eighth Circuit:** *Thurmond v. Andrews*, 972 F.3d 1007, 1012 (8th Cir. 2020) (Stating that "[g]iven both our limited jurisdiction and the presence of factual disputes in this case, we will begin and end our inquiry with the clearly established prong" and granting qualified immunity), *Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019) (declining to address the factual question and finding that the defendant did not violate a clearly established right); **Tenth Circuit:** *Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) ("elect[ing] to focus on the second prong" and granting qualified immunity), *Quinn v. Young*, 780 F.3d 998, 1007 (10th Cir.

2015) ("As our qualified-immunity jurisprudence permits us to do, we exercise our discretion to proceed straight to the latter question and resolve this claim on the clearly-established-law prong of our qualified-immunity test."). Thus, the Opinion from the Ninth Circuit is consistent, and there simply is no split among the Circuits.

Furthermore, Plaintiff ignores other cases, where the Ninth Circuit examined the "more difficult" question of whether a constitutional right had been violated before reaching the clearly established question, consistent with *Saucier*. Recently, in *Hart v. City of Redwood City*, 99 F.4th 543 (9th Cir. 2024), the Ninth Circuit reached *both* the clearly established question and the "more difficult" question of whether a right had been violated and concluded that the officer was entitled to qualified immunity, again reversing a district court's denial of summary judgment. Thus, the Opinion is entirely consistent with *Pearson,* as well as the Circuit decisions.

B. The Ninth Circuit Correctly Applied Summary Judgment Standards

Plaintiff next advances the mistaken premise that an appellate court *must* adhere to a trial court's factual findings on summary judgment. At summary judgment, however, no court may make factual determinations by weighing the evidence. *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (holding on summary judgment courts may not "weigh the evidence and determine the truth of [a] matter"). Indeed, the premise of summary judgment is that the case may be resolved on issues of law because there are no issues of material fact. Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant

shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). Thus, there are no factual findings that can be made at summary judgment, only legal conclusions based upon undisputed facts.

As a result, an appellate court is not required to adhere to any "findings" by the trial court because there are none. This is precisely why an appellate court's review of a trial court's decision on summary judgment, particularly on the issue of qualified immunity, is reviewed *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts." [citations omitted] That question of law, like the generality of such questions, must be resolved *de novo* on appeal."). Thus, Plaintiff's suggestion that the Ninth Circuit should have accepted the alleged "disputes" of material fact as determined by the District Court represents a serious misunderstanding of the summary judgment and qualified immunity analyses. The Ninth Circuit was well within its authority to delve into the qualified immunity analysis and determine whether any disputes of material fact precluded summary judgment. It was not required to adhere to any alleged "findings" by the District Court.

Moreover, whether facts are "material" to a claim is also a question of law, appropriate for appellate review. *Jeffers v. Gomez*, 267 F.3d 895, 904-05 (9th Cir. 2001) (Ninth Circuit extrapolating from *Behrens* that "*any* issue of law, including the materiality of the disputed issues of fact, is a permissible subject for appellate review." Emphasis in original.).

Here, the Ninth Circuit concluded that none of the allegedly disputed issues of fact raised by Plaintiff or the District Court were "dispositive." App.18. The Ninth Circuit recited the factors outlined in *Graham v. Connor*, 490 U.S. 386, 396 (1989), in considering whether Agdeppa's use of force was excessive, but found that no evidence diminished the "most important" factor; that Dorsey unquestionably posed an imminent threat. App.16, 19.

Notably, while Plaintiff ignores that the Ninth Circuit found her evidence to be speculative, the Circuit's decision was a legal one. On summary judgment, the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once Agdeppa met his burden, the burden shifted to Plaintiff, the non-moving party, to "set out specific facts showing a genuine issue for trial." *Id*. at 324. To carry this burden, Plaintiff must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electrical Industry Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986). Indeed, Plaintiff must set forth "significant probative evidence tending to support the complaint" and may not rely on the mere allegations in the pleadings in order to preclude summary judgment. *T. W. Elec. Serv., Inc. v. Pacific Elec. Contractors Association*, 809 F.2d 626, 630-631 (9th Cir. 1987); *Scott v. Harris*, 550 U.S. 372 (2007) ("...the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.").

Plaintiff did not meet her burden. There was no evidence to support that the Officers were not engaged in a vicious and brutal fight with Dorsey; to the contrary, all of the evidence undeniably confirms Dorsey's violent attack. Thus, the Opinion was well-founded, relying upon decades of Supreme Court and Ninth Circuit precedent. The Ninth Circuit correctly applied the summary judgment standards in concluding Plaintiff's alleged disputes of fact were immaterial and her purported evidence insufficient to overcome her burden on the issue of qualified immunity.

C. The Law is Not Clearly Established When a Warning of Lethal Force Must Be Given

The Ninth Circuit also addressed Plaintiff's dispute of whether a "proper" warning had been issued. The Opinion discussed Ninth Circuit precedent that the issuance of a "warning" "is not a one-size-fits-all proposition that applies in every case or context." App.24. The Ninth Circuit has employed a rule that a warning need be given "'[i]n general,' 'whenever practicable.'" Id., citing *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794 (9th Cir. 2014) (*en banc*), quoting *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997). The Opinion explained that the origins of the Ninth Circuit's "'warning' rule" was "sourced . . . to the Supreme Court's decision in [*Tennessee v.*] *Garner*." App.24.

In *Garner*, the Supreme Court stated that "if a suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been

given." 471 U.S. 1, 11-12 (1985). The facts in *Garner* are significantly different than those here, especially as the use of force was employed to prevent escape, and not in defense of an imminent threat. In *Garner*, the subject was never armed, as the officer admitted, but was fleeing the scene of a burglary when the officer used lethal force, ultimately killing Garner. *Id.* at 3-4. Unlike the facts here, Garner was not attacking an officer with a weapon, nor did he pose an imminent threat.

Prior precedent has consistently stated 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 v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997). Here, it is undisputed that Dorsey posed an imminent threat. It is also undisputed that Agdeppa uttered something before firing, which he believes was something to the effect of "stop!" 3-ER-366-367 at ¶¶ 26-27; 3-ER-375 at ¶¶ 22-23; 4-ER-439, 441. As the audio and video demonstrate, Dorsey was warned by the Officers numerous times of their escalating force. Yet, Dorsey chose to, instead, ramp up his violent resistance.

The Ninth Circuit further noted that the legal requirements surrounding warnings of lethal force are not defined in currently existing case law such that an officer would know "when a warning is 'practicable,' what form the warning must take, or how specific it must be." App.25. The Ninth Circuit further noted it is not clear "how the absence of a warning is to be balanced against the other *Graham* factors in the context of a case such as this." Consequently, the Circuit concluded that 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" and found the alleged lack of warning did not suffice to deny Agdeppa qualified immunity. App.24.

The Opinion succinctly explained the standard of review on whether a right is 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 [v. Howards]*, 566 U.S. [658,] 664 [(2012)]). 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." [*Dist. of Columbia v.] Wesby*, 138 S. Ct. [577], 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). App.14.

Applying this standard, the Ninth Circuit concluded that Plaintiff "was required to come forward with 'existing precedent' that 'squarely governs the specific facts at issue,'" but "has not done so." App.25 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)).

Plaintiff and the District Court patently failed to analogize the facts of this case to *any* precedent that would have put Agdeppa on notice that he needed to articulate a specific lethal force warning in these circumstances – i.e. circumstances of hand-to-hand combat, where the suspect poses an imminent threat. Neither the facts in *Newmaker v. City of Fortuna*, 842 F.3d 1108 (9th Cir. 2016), *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (en banc), or any other case cited by the dissent in the Opinion are remotely similar, as required to have given Agdeppa notice that his actions would be unlawful. As the Opinion explained, "[t]hese 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." App.26.

Ultimately, the Opinion concluded that "[t]he 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" and "no clearly

established law required this in the circumstances Agdeppa confronted." App.26. Consequently, the Opinion is consistent with and rests soundly on long-standing Supreme Court precedent.

II. Adopting Plaintiff's Position Would Conflict With Established Precedent

To adopt Plaintiff's view would conflict with decades of precedent. Even if the facts supported that Agdeppa violated Dorsey's rights in some manner, there were no cases that clearly established Agdeppa's actions were unlawful.

None of the cases cited by Plaintiff or the District Court put an officer on notice that using lethal force was unlawful in the situation confronted by Agdeppa. The District Court relied upon *Tennessee v. Garner* and *Deorle v. Rutherford*, but without any analysis or comparison of the facts in those cases to the case at bar. Instead, and ignoring the context of the dispute at hand, the District Court found that "[a]t the time of 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.'" App.114.

The District Court's analysis was both overly generalized and factually inapposite to the undisputed evidence. Here, there is no evidence whatsoever to suggest Dorsey did not pose an immediate threat, whereas in both *Garner* and *Deorle,* there *was* evidence that the subjects were not a threat or were otherwise compliant with the officers' orders. *Garner*, at 3-4 (noting that the officer

himself admitted he did not believe Garner was armed); *Deorle*, at 1276-1278 (noting the officer shot Deorle without warning and without asking Deorle to drop the bottle despite Deorle's repeated compliance with officer's orders prior to that). Thus, *Garner* and *Deorle* could not have informed Agdeppa about his use of force, especially as those cases did not involve hand-to-hand combat.

Agdeppa argued below that other Ninth Circuit precedent established his actions were, in fact, lawful. For example, *Isayeva* and *Billington* clearly establish that an officer that appears to be losing in hand-to-hand combat may use deadly force. *Billington v. Smith*, 292 F.3d 1177, 1185 (9th Cir. 2002), *overruled in part on other grounds by County of Los Angeles v. Mendez*, 581 U.S. 420, 428-429 (2017) (finding that an imminent threat of injury or death has already been realized when a suspect physically assaults and punches the officers); *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 950, 953 (9th Cir. 2017) (finding that officer's use of lethal force did not violate clearly established law when objective facts demonstrated that subject was "winning this fight and was doing so quickly, highlighting the risks to [the deputy]" that was being pummeled). Plaintiff and the District Court, however, disregarded this precedent, deeming those cases inapposite. Notwithstanding, it was not Agdeppa's burden to demonstrate that the right at issue was clearly established; that obligation rests solely with Plaintiff. App.20, n.4, citing *Isayeva*, 872 F.3d at 946; *Davis v. Scherer*, 468 U.S. 183, 197 (1984).

Given the District Court's failure to analyze whether Agdeppa's actions were proscribed by clearly established law, the Order did precisely what the Ninth Circuit has

been admonished for doing in the past – casting the clearly established law at a high level of generality to deny qualified immunity. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *City & Cnty of San Francisco v. Sheehan*, 575 U.S. 613 (2015); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). As the Supreme Court has repeatedly stated:

> Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela*, 138 S. Ct. at 1153, quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778-779 (2014).

To adhere to the position advanced by Plaintiff in the Petition, this Court would need to disregard decades of precedent regarding the definition of "clearly established" and would leave law enforcement officers essentially to guess whether their actions could constitute a violation, particularly when it is not an "obvious" case. "Qualified immunity is no immunity at all if "clearly established" law can simply be defined as the right to be free from unreasonable searches and seizures." *Sheehan*, 135 S. Ct. at 1776.

Plaintiff's hypothetical concern about futuristic weapons is also without merit, as decades of precedent have always maintained that "general statements of the

law are not inherently incapable of giving fair and clear warning to officers." *Kisela*, 138 S. Ct. at 1153 (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017), quoting *United States v. Lanier,* 520 U.S. 259, 271 (1997)). Thus, if an officer used a new technology as a means of lethal force (think futuristic laser guns), the requirements of *Graham* would still apply and govern, regardless of the novelty of the technology. *al-Kidd*, 563 U.S. at 741 ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.").

In Plaintiff's new argument advocating that the BOPC's admonitions of the Officers' pre-shooting conduct should have been considered, Plaintiff also seeks to resurrect the Provocation Rule that the Supreme Court denounced in *County of Los Angeles v. Mendez*, 581 U.S. 420, 428-429 (2017).

In *Mendez,* the Supreme Court found that a "different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Id.* at 423. The officers had been searching (under an arrest warrant) for a man they suspected as being at the property, but when they attempted to search a shack on the property, they instead encountered Mendez and his wife. *Id.* at 423-424. Mendez was getting up with a BB gun in his hand (to put it down) when the officers entered the shack unannounced, saw Mendez with the gun, and opened fire shooting both Mendez and his wife, causing non-fatal injuries to both. *Id.* at 424.

The lower courts both found that although the use of force in response to what appeared to be a BB gun pointed directly at one of the officers was lawful, because

the entry to the shack was unannounced, the officers were nonetheless liable for the injuries they caused. *Id.* at 425-426. The Supreme Court, however, found this analysis inconsistent with Fourth Amendment jurisprudence. In rejecting the Ninth Circuit's then existing Provocation Rule, the Cout stated that the rule "instructs courts to look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim." *Id.* at 428 (emphasis in original). The Court went on to conclude:

> This approach mistakenly conflates distinct Fourth Amendment claims. Contrary to this approach, the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional. An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry.
>
> By conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms. That is precisely how the rule operated in this case. The District Court found (and the Ninth Circuit did not dispute) that the use of force by the deputies was reasonable under *Graham*. However,

> respondents were still able to recover damages because the deputies committed a separate constitutional violation (the warrantless entry into the shack) that in some sense set the table for the use of force. That is wrong. The framework for analyzing excessive force claims is set out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately. *Id.* at 428-429 (emphasis added).

This is the same misunderstanding that Plaintiff advances here. Notwithstanding Plaintiff's waiver of this issue below, there is no reason for either the District Court or the Ninth Circuit to have given consideration to the BOPC's admonishments for the Officers' pre-shooting conduct because it was irrelevant to the excessive force analysis. Nor does Plaintiff attempt to explain how the Officers' pre-shooting conduct related to the ultimate use of lethal force. Plaintiff's position is simply untenable; to accept it would be to re-institute the Provocation Rule and upend yet more precedent. Thus, the issue is without merit.

III. Adopting Plaintiff's Position Would Create Dangerous Circumstances for Law Enforcement

Adopting Plaintiff's position would not only set bad precedent, but could effectively end the defense of qualified immunity and put countless law enforcement officers in more dangerous circumstances.

The dangers of adopting Plaintiff's position was best articulated by Justice Bress in his dissent to the earlier (now reversed) Ninth Circuit opinion:

> [T]he 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. App.94.

Officers need not await the "glint of steel" or suffer a certain amount of injury before using force to protect themselves or others. *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014); *Bowles v. City of Porterville*, 571 F. App'x 538, 540-41 (9th Cir. 2014); *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) ("A reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is 'often . . . too late to take safety precautions.'"). Contrary to Plaintiff's assertion, the Fourth Amendment does not require that law enforcement officers incur a heightened level of injury before employing lethal force.

The defense of qualified immunity is important. The law of qualified immunity allows officials to make reasonable mistakes of fact. *al-Kidd*, 563 U.S. at 743 ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."); *Malley v. Briggs*, 475 U.S. 335 (1986) (Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."). When the issue is whether the law was clearly established, a dispute of fact will not preclude a grant of qualified immunity, unless the facts are material to the analysis. Here, the alleged disputes of fact are immaterial, because it is undisputed that a violent fight was occurring between the Officers and Dorsey. It was reasonable for the Officers to perceive an imminent threat, as the BOPC Report also concluded. 3-ER-136 ("The available evidence supports that [Agdeppa's] belief that there was an imminent threat of death or serious bodily injury at the time of the OIS was objectively reasonable.").

Supporting Plaintiff's reliance on immaterial facts and speculation would result in the improper denial of qualified immunity based on an alleged dispute of fact – even when there is no evidence, just conjecture, to support the alleged fact in dispute. Consequently, were Plaintiff's position followed, the ensuing ruling could singlehandedly irradicate the defense of qualified immunity by allowing any plaintiff to manufacture an alleged dispute of fact, regardless of the absurdity of the theory or "scintilla" of evidence to support the fact.

Plaintiff's position contradicts long-established Supreme Court precedent, which requires more than

"the existence of a mere scintilla of evidence" to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Scott v. Harris*, 550 U.S. 372 (2007). Here, none of the "facts" relied upon by Plaintiff or the District Court are material to whether the law was clearly established. Even assuming the Officers were not as injured as they contended, there is no evidence to support that Dorsey was nonetheless an imminent threat, which is the only fact material for determination of whether the law was clearly established. There is simply no dispute that Dorsey posed an imminent threat to the Officers. *Scott v. Harris*, 550 U.S. at 380 (on summary judgment, improper to credit party's version of events which was "so utterly discredited by the record [a video recording] that no reasonable jury could have believed him").

Were the Court to accept Plaintiff's assertions, the resulting ruling would make it virtually impossible for any officer to succeed on the defense of qualified immunity prior to trial, when the defense can be denied whenever mere allegations of disputes of fact are made based on nothing more than an attorney's theory, argument, or speculation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity defense is an "immunity from suit rather than a mere defense to liability; and … it is effectively lost if a case is erroneously permitted to go to trial"). Consequently, Plaintiff's position is in direct contradiction to Supreme Court precedent and cannot be countenanced. The Petition for Writ of Certiorari must be denied.

CONCLUSION

The Petition for Writ of Certiorari must be denied. The Ninth Circuit's decision is well-grounded in decades of Supreme Court precedent and is consistent with all of the other Circuits. Adopting Plaintiff's position would be disastrous, not only contradicting decades of foundational precedent surrounding qualified immunity, appellate jurisdiction and summary judgment, but would also result in creating dangerous circumstances for law enforcement officials and the public they serve, essentially eradicating the defense of qualified immunity. Such a drastic upending should not be countenanced, especially when the Petition is supported by nothing more than flawed legal reasoning, speculation, and conjecture. The Petition must be denied.

Respectfully submitted,

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