

Case No. 24A\_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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Jonathan Christian,

Petitioner/Applicant,

v.

Elisabeth Epps,

Respondent,

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**APPLICATION TO RECALL AND STAY THE MANDATE  
PENDING DISPOSITION OF PETITION FOR CERTIORARI**

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To the Honorable Neil Gorsuch,  
Associate Justice of the Supreme Court of the United States and  
Circuit Justice for the Tenth Circuit

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**PARTIES TO THE PROCEEDINGS**

Applicant in this Court and Defendant-Appellant below is Jonathan Christian.

Respondent in this Court and Plaintiff-Appellee below is Elisabeth Epps.

Defendants below are the City and County of Denver (also an Appellant in Case No. 24-1367 before the United States Court of Appeals for the Tenth Circuit), and Keith Valentine.

**RELATED PROCEEDINGS BELOW**

Case No. 24-1367 before the United States Court of Appeals for the Tenth Circuit involves the appeal of Defendant City and County of Denver related to the same proceedings before the District Court.

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TO THE HONORABLE NEIL GORSUCH, ASSOCIATE JUSTICE OF THE  
SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR  
THE TENTH CIRCUIT

Applicant Jonathan Christian (“Applicant” or “Officer Christian”) respectfully requests an immediate recall and stay of the mandate of the United States Court of Appeals for the Tenth Circuit in Case No. 24-1371 pending the filing and disposition of a petition for writ of certiorari with this Court. Applicant filed a Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari on May 26, 2026. The Tenth Circuit denied the Motion in an Order dated May 28, 2026, forcing Applicant to seek relief from this Court.

Officer Christian respectfully requests this Court recall and grant a stay of the mandate by the Tenth Circuit pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23 pending this Court’s disposition of Denver’s forthcoming petition for writ of certiorari to be filed with this Court by July 20, 2026.

**INTRODUCTION**

The Tenth Circuit affirmed the District Court’s denial of Officer Christian’s qualified immunity. In so doing, the Tenth Circuit failed to analyze the clearly established prong of the qualified immunity inquiry with the requisite specificity and particularity required by this Court. Instead, the Tenth Circuit relied on two of its prior decisions for the general proposition the use of less-lethal force on a non-threatening protestor who had committed a minor criminal offense and was not evading arrest violated clearly established Fourth Amendment law.

Officer Christian respectfully requests this Court recall and stay the Tenth Circuit mandate pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23 pending the filing and disposition of Denver’s petition for writ of certiorari due on July 20, 2026. Officer Christian meets the requirements for a recall and stay of the mandate under these circumstances. Whether the law was clearly established in the protest context concerning the use of pepperball presents an issue of substantial importance given the increasing number of protests, the use by police of less-lethal munitions in protest contexts, and the proliferation of litigation as a result. This Court should once again remind the lower federal courts of the particularity requirement of the clearly established law inquiry by applying qualified immunity principles in this different and important police use of force context. Based on the Tenth Circuit’s erroneous qualified immunity approach, a reasonable probability exists this Court would reverse. Moreover, equitable considerations support the stay. Absent a stay, Denver, on behalf of Officer Christian, will be required to pay the substantial judgment and will be irreparably harmed if it is required to do so and this Court decides to review the Tenth Circuit’s decision after the judgment has been satisfied. Respondent will not be harmed by the stay because post-judgment interest will continue to accrue during the pending of the stay. And because the judgment comes from the public fisc, the public interest favors the ability of Officer Christian to seek review of the Tenth Circuit’s decision from this Court before Denver has to satisfy the judgment.

## OPINIONS BELOW

The Tenth Circuit’s order denying Applicant’s motion for a stay is unpublished, but reproduced at App. 1. The Tenth Circuit’s opinion affirming the District Court is published at 173 F.4<sup>th</sup> 1236 (10<sup>th</sup> Cir. 2026), and is also reproduced at App. 2-19.

The District Court’s rulings on summary judgment, during trial pursuant to Fed. R. Civ. P. 50, and post-trial ruling pursuant to Fed. R. Civ. P. 50 and Fed. R. Civ. P. 59 are reproduced at App. 20-67.

## JURISDICTION

This Court has jurisdiction over this application for a stay under 28 U.S.C. § 1254(1), and has the authority to grant the requested stay pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

## STATEMENT OF THE CASE

### **A. The Summer 2020 George Floyd Protest and Officer Christian’s Actions Towards Elisabeth Epps.**

Following George Floyd’s death on May 27, 2020, the Denver Police Department (“DPD”) learned of possible protest activity in Downtown Denver. The afternoon of May 28, 2020, protestors mainly gathered near the State Capitol, but attempts were also made to overtake I-25 and the District 6 police station. The first night individuals associated with the protest engaged in criminal acts resulting in substantial property destruction and endangering public safety. Similarly, during the night of May 29, 2020, individuals associated with the protest also engaged in criminal acts directed at both property and police officers. As a result of these events,

on May 30, 2024, the Mayor of the City and County of Denver declared a State of Local Disaster Emergency and issued an Emergency Curfew constating of a nighttime curfew imposed in all public places, streets, and rights-of-way.

Officer Christian was a Denver Police Officer who was a member of the gang unit during the protest. The use of force incident involving Officer Christian and Ms. Epps occurred at approximately 9:00 p.m. on May 29, 2020, at the intersection of 14<sup>th</sup> and Lincoln on the South side of the State Capitol. Officer Christian was on the State Capitol grounds when he observed Ms. Epps crossing in the middle of the street through traffic. Officer Christian testified he believes the reason the gang unit was deployed on the State Capitol grounds on May 29, 2020, was to move people away from the State Capitol and keep them from returning.

Officer Christian did not intend to hit Ms. Epps with the pepperball. Rather, Officer Christian intended to deploy the pepperball in an area saturation manner to encourage Ms. Epps to get out of the street. Area saturation deploys the pepperball on the ground so the chemical agent encourages a person or people to move from the area of the deployment. Officer Christian does not believe he hit Ms. Epps with the pepperball. Based on his review of the video, Officer Christian believes the pepperball hit the street. Ms. Epps testified she was struck with the pepperball. Officer Christian agrees the OC powder from the pepperball may have gotten on Ms. Epps. Officer Christian described his perspective about what occurred during his trial testimony as follows:

A. So, at that point, we had finally pushed everybody away, and I think in my body-worn camera footage, off to the right, you can kind of see the crowd moving along the street. We had a few break off, which was no problem, but I believe my mindset at the time was Ms. Epps had stepped into the roadway, and cars were honking and actually going around her.

And I remember watching, I believe it was two if not three vehicles honk their horns at her as they're going around her, before I had deployed the PepperBall at her in order to get her to move from the roadway. And after I deployed it, she still hadn't moved from the roadway. I then yelled for her to move from the roadway, at which point she did.

Q. Okay. So, where were you aiming?

A. I would have been—and I should go ahead and specify. I don't remember this incident, because I've been shown my body-worn camera. There was a lot that had happened that night. I don't have any independent knowledge of this. I can just kind of based off of—based off of who I am and my experiences, my information or my intent would have been to shoot at her feet.

Q. Okay. So, there is a concept related to deployment of PepperBall called area saturation; right?

A. Yes, sir.

Q. Describe what area saturation means.

A. Area saturation would include shooting an area with PepperBall in order for the powder, the chemical agent to disperse in order to get a person to move from one area to another area, a person or a group of people.

Q. What-were you employing area saturation with the PepperBall on May 29<sup>th</sup>, 2020, at approximately 9:00 p.m.?

A. Yes, sir.

Q. Okay. So, what were you trying to do is land the PepperBall by where this person's feet were to cause them to move?

A. Yes, sir.

Q. You weren't trying to target any part of the person's body?

A. No, sir.

[Tr. 1515:1-1516:18].

**B. Proceedings Before the District Court:**

Respondent Elisabeth Epps, and others, filed her Complaint and Jury Demand on June 25, 2020. A First Amended Complaint was filed on October 19, 2021. Respondent alleged Defendant Jonathan Christian violated her First and Fourth Amendment rights bringing claims pursuant to 42 U.S.C. § 1983. Officer Christian answered on December 22, 2021.

On February 1, 2022, Officer Christian with the other Denver Defendants filed a Motion for Summary Judgment raising qualified immunity. The District Court denied summary judgment to Officer Christian including denying qualified immunity. App. at 20-36.

Pursuant to Fed. R. Civ. P. 50, Officer Christian raised qualified immunity at the conclusion of Respondent's evidence. The District Court denied Officer Christian's Rule 50 Motion and denied him qualified immunity. App. at 37-43.

After a fifteen-day jury trial, the jury found for Respondent on her Fourth Amendment claim and for Officer Christian on her First Amendment claim. The jury awarded Respondent \$1,000,000.00 in compensatory damages against Officer Christian and Denver jointly and severally according to the interpretation of the

verdict by the District Court, and punitive damages of \$250,000.00 against Officer Christian..

Officer Christian filed a Motion for Judgment as a Matter of Law, or a New Trial, or Remittitur pursuant to Fed. R. Civ. P. 50(a) and Fed. R. Civ. P. 59(a) on May 13, 2022. The Motion again raised qualified immunity. On September 19, 2022, the District Court denied qualified immunity, denied Officer Christian’s request for judgment as a matter of law and a new trial and denied a remittitur of the compensatory damages amount, but granted a remittitur reducing the punitive damages to \$50,000.00. App. at 44-67. Respondent accepted the remittitur of the punitive damages award.

Proceedings before the District Court continued related to other claims against other Defendants. Amended Final judgment was entered by the District Court on August 19, 2024. Officer Christian filed his Notice of Appeal on September 16, 2024.

**C. Proceedings before the Tenth Circuit:**

The Tenth Circuit affirmed the District Court in an opinion issued on April 21, 2026. The Tenth Circuit affirmed the District Court’s determination Officer Christian was not entitled to qualified immunity. Respecting the second prong of the qualified immunity analysis, the Tenth Circuit concluded two prior decisions from the Tenth Circuit—*Fogerty v. Gallegos*, 523 F.3d 1147 (10<sup>th</sup> Cir. 2008) and *Buck v. City of Albuquerque*, 549 F.3d 1269 (10<sup>th</sup> Cir. 2008)—“recognized in 2008 that shooting a non-threatening protestor with a pepperball when the protestor had committed, at most, a minor offense and was not trying to evade arrest, violated the Fourth Amendment.

Those two earlier Tenth Circuit cases are sufficiently analogous to the circumstances presented here to have put a reasonable officer in Officer Christian's position on notice in May 2020 that shooting Epps with a pepper ball in the context of her peaceful behavior would violate the Fourth Amendment." App. at 14.

### **REASONS FOR GRANTING THE STAY**

Officer Christian's application satisfies the criteria for obtaining a stay pending the filing and disposition of a petition for writ of certiorari. To obtain a stay, "an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers). In close cases, "it may be appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Conkright v. Frommert*, 566 U.S. 1401, 1402 (2009) (internal quotations omitted).

#### **A. There is a Reasonable Probability Four Justices of this Court Will Consider the Issues to be Raised in the Petition Sufficient Meritorious to Grant Certiorari**

Officer Christian need not establish he will succeed on the merits of his arguments. Instead, Denver need only show a reasonable probability four Justices of

this Court will consider its issues meritorious to grant certiorari. Officer Christian meets this standard here.

The Tenth Circuit's qualified immunity determination fundamentally misapplies this Court's repeated admonition not to analyze the constitutional right at issue in a non-particularized manner. The Tenth Circuit's reliance on two decisions with important factual distinctions to Officer Christian's actions towards Respondent is misplaced. Moreover, the fact this matter arises in the context of a protest against police activity and the application of a pepperball provide a different context for this Court to analyze qualified immunity, not one previously addressed by this Court. A reasonable probability exists four Justices of this Court will consider the need to address what constitutes clearly established law for qualified immunity purposes in this important and now frequently litigated different context.

The Tenth Circuit broadly asserts *Fogarty* and *Buck* clearly establish it is a Fourth Amendment violation for Officer Christian to deploy less-lethal munitions on Ms. Epps as an unthreatening protestor who was neither committing a serious offense nor seeking to flee. However, this formulation of clearly established law casts the constitutional right at issue too generally and fails to acknowledge this Court's mandate of analyzing clearly established law based on the specific facts of the case. This Court has repeatedly instructed lower courts to analyze the law for clearly established purposes based on the specific facts at issue. The discussion in *White v.*

*Pauly*, 580 U.S. 73 (2017), when this Court reversed the Tenth Circuit, provides one of many examples of this admonition:

Today, it is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality. As this Court explained decades ago, the clearly established law must be particularized to the facts of the case. Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of unqualified liability simply by alleging violation of extremely abstract rights.

*Id.* at 79 (citations and internal quotation marks omitted and cleaned up). Since *White*, this Court has continued to emphasize this point. *See, e.g., Rivas-Villegas*, 595 U.S. 1, 5 (2021); *City of Escondido v. Emmons*, 586 U.S. 38, 42 (2019). Moreover, this Court has also repeatedly explained the specificity requirement tailored to the facts of the case is of special importance in the Fourth Amendment context including evaluating whether police officers have used excessive force. *City of Tahlequah v. Bond*, 595 U.S. 9, 12-13 (2021); *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

This Court's precedent demonstrates an appropriate analysis under the clearly established qualified immunity prong required the Tenth Circuit to analyze the specific facts of what Officer Christian did on May 29, 2020, and determine whether existing precedent as of that date clearly established the law. Critically, clearly established law cannot be framed generally, as being about whether a police officer violates the Fourth Amendment by using a less-lethal munition like pepperball on a non-violent protestor who does not pose a threat and is not attempting to flee the

officer. If cast at this high level of generality, qualified immunity would be overcome in all protest related uses of force unless someone posed a direct, active threat to the safety of the responding officers or the public. Under the Tenth Circuit's decision, any use of pepperball, tear gas, or oleoresin capsicum spray impacting non-violent protestors would violate clearly established law. Instead of a close and careful analysis of the actual facts involved in any specific case as required by this Court, the Tenth Circuit determined because it found in *Buck* and *Fogarty* in those specific factual contexts the use of force against non-violent protestors violates the Fourth Amendment that is enough to create clearly established law. This Court has repeatedly instructed this is not the law.

*Fogarty* and *Buck* are legally and factually distinguishable. Initially, both decisions apply an incorrect legal framework for the clearly established qualified immunity inquiry. Instead of defining the constitutional right at issue with specificity and then examining whether clearly established law exists to place officers on notice their conduct violates the constitution before it occurs, the decisions improperly use *Graham* itself as the focus of their clearly established law analysis. This analysis is wrong under this Court's precedent.

Further, *Fogarty* and *Buck* are also factually distinguishable. Based on the facts outlined by the Tenth Circuit in those decisions the only plaintiffs in the two decisions whose situations are even potentially factually comparable are Mr. Fogarty and Ms. Chavez. However, the context of the uses of force with those two individuals

and the actual force used on them is not comparable to Officer Christian's use of force on Ms. Epps. Contextually, the facts of the anti-Iraq invasion protest in Albuquerque in 2003 and the George Floyd protest in Denver in 2020 differ significantly. Nothing in the Tenth Circuit's decisions describes any violence or destruction of property in Albuquerque. The Albuquerque protest was a single-day event, not a multi-day, multi-location event like in Denver. The protest in Albuquerque was in the day while the interaction between Ms. Epps and Officer Christian occurred at night. Officer Christian used force on Ms. Epps following a police operation to move protestors from the State Capitol grounds and prevent them from returning with Ms. Epps walking in the street towards the State Capitol and not engaging in any protest activity at the time while the force used on Mr. Fogarty and Ms. Chavez occurred during their protest activities. These are all distinguishing features between the two events.

Similarly, the force used on Mr. Fogarty and Ms. Chavez differs from the force used by Officer Christian on Ms. Epps. The description of the total force used on Mr. Fogarty and Ms. Chavez by the Tenth Circuit is markedly more force than the single pepperball Officer Christian fired at Ms. Epps. Evaluating all the force used in the entire encounter between the police and Mr. Fogarty and Ms. Chavez is the appropriate inquiry under the totality of the circumstances analysis required by *Graham*. Precedent does not support analysis of each separate use of force as establishing clearly established law for qualified immunity purpose; rather, the entire event—its totality of circumstances—must be analyzed. However, even

considering only the use of less-lethal munitions, the facts involving Mr. Fogarty and Ms. Chavez are still distinguishable. Mr. Fogarty was exposed to tear gas once and it was deployed near him a second time, and he was struck by a pepperball or another less-lethal munition. *Fogarty*, 523 F.3d at 1151-52. Ms. Chavez was repeatedly exposed to tear gas and shot with multiple pepperball while she was either sitting or lying down in the street. *Buck*, 549 F.3d at 1289. Factually, these cases are different than Officer Christian's use of force on Ms. Epps. The two cases the Tenth Circuit relied upon as creating clearly established law do no such thing.

**B. There is a Fair Prospect a Majority of the Court Will Vote to Reverse the Judgment Below Because the Arguments Advanced are Plausible**

This Court has repeatedly rejected the non-particularized, casting the constitutional right at too high a level of generality approach adopted by the Tenth Circuit. As a result, if this Court accepts review of the case, there is a fair prospect this Court will reverse the Tenth Circuit. *Compare District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) (“We have stressed the ‘specificity’ rule is ‘especially important in the Fourth Amendment context.’”; citations omitted); *Bond*, 595 U.S. at 12-13 (“Such specificity is ‘especially important in the Fourth Amendment context,’ where it is ‘sometimes difficult for an officer to determine how relevant doctrine, here excessive force, will apply to the factual situation the officer confronts.’”; citations omitted).

Finally, other courts have applied qualified immunity to individual police officers in the context of George Floyd and other protests further demonstrating the fundamental flaws of the Tenth Circuit's approach here. *Compare Keup v. Sarpy Cnty.*, 159 F.4th 533, 538 (8th Cir. 2025) (concluding use of pepperball in an attempt to disperse rather than arrest was not a clearly established violation of the Fourth Amendment); *Perkins v. City of Des Moines*, 712 F.Supp.3d 1159, 1174-75 (S.D. Iowa 2024) (concluding striking an individual who was walking back and forth in a street during a protest with a single less-lethal round was not a clearly established violation of the Fourth Amendment); *Black Lives Matter D.C. v. Trump*, 544 F.Supp.3d 15, 48-9 (D.C. 2021) (police effort to disperse crowd by using less-lethal munitions to move them another location not clearly established constitutional violation).

**C. Irreparable Harm to Officer Christian Will Result from the Denial of a Stay**

Officer Christian will be irreparably harmed in the absence of a stay. If the judgment is not stayed pending the petition for writ of certiorari being ruled upon by this Court, Denver, on behalf of Officer Christian, will either be required to pay the judgment or Respondent will be permitted to seek to collect the judgment. If this Court were to grant the petition without a stay of the mandate and the judgment, Officer Christian and Denver will be irreparably harmed by having to satisfy a judgment subject to review by this Court, particularly if this Court ultimately accepts review and then reverses. Under such circumstances, efforts would need to be made to recover the money from Respondents and their counsel. Ready legal remedies for

Officer Christian and Denver to seek to collect money paid do not readily exist and would not be easily accomplished. Such an approach simply makes no practical sense and demonstrates the irreparable harm under these circumstances.

**D. The Balance of the Equities Favors Officer Christian**

Moreover, the balance of the equities favors Officer Christian here. The District Court awarded post-judgment interest. Accordingly, interest will continue to accrue during any stay issued by this Court and during any time period while the petition is pending consideration by this Court meaning Respondent will remain financially whole and financially unharmed by a stay. Respondent obtained only monetary relief before the District Court so there is nothing other than money at issue. Under such circumstances, because there is no financial harm to Respondent due to the continued accrual of interest, equity does not favor Respondent.

Additionally, the public interest supports a stay. The judgment in this matter will be paid by public funds from Denver. As a result, Denver's taxpayers have an interest in the opportunity for Officer Christian to file a petition for writ of certiorari for consideration by this Court and a concomitant stay pending resolution of the petition. The public interest supports allowing this Court to decide if this matter warrants review before a substantial monetary judgment to be paid from the public fisc becomes final and is satisfied.

**CONCLUSION**

In conclusion, for all the foregoing reasons, Jonathan Christian respectfully requests the Court recall and grant a stay of the Tenth Circuit’s judgment pending the filing of his petition for writ of certiorari and the disposition of the petition by this Court, and for all other and further relief as this Court deems just and appropriate.

Dated:           June 5, 2026.

Respectfully submitted,

/s/ Andrew D. Ringel .

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