No. 21-35293

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Linda Senn,

Plaintiff-Appellee,

v.

Kyle Smith,

Defendant-Appellant.

On appeal from the United States District Court
for the District of Oregon
Case No. 3:18-cv-1814-HZ
Hon. Marco A. Hernandez

PLAINTIFF-APPELLEE LINDA SENN'S RESPONSE BRIEF

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STATEMENT OF JURISDICTION

This Court's jurisdiction over this appeal is limited. True, the district court had jurisdiction under 28 U.S.C. § 1331, and Defendant Kyle Smith's notice of appeal was timely filed. Appellant's Opening Brief (OB) 2. But because Smith appeals from a *denial* of summary judgment, this Court's jurisdiction is limited to reviewing the "purely legal" question of whether "the facts alleged by the plaintiff" show a violation of clearly established law. *Pauluk v. Savage*, 836 F.3d 1117, 1121 (9th Cir. 2016) (quoting *Johnson v. Jones*, 515 U.S. 304, 319–20 (1995)); *Villanueva v. California*, 986 F.3d 1158, 1164–65 (9th Cir. 2021). This limit on the Court's jurisdiction is explained below at pp. 9–18.

ISSUES PRESENTED

This appeal centers on a few moments during a Portland protest. A sheriff's deputy pushed Plaintiff Linda Senn down some stairs; to steady herself, she touched him for two seconds. In response, Defendant Kyle Smith pepper-sprayed her in the face, twice. Viewing the evidence in the light most favorable to Senn, the district court found that her contact with the deputy was inadvertent, glancing, and debatable, and thus that a jury would have to decide whether Smith's use of force was excessive. Smith sought interlocutory review.

1. Appellate jurisdiction in this context extends only to legal issues. The district court found that the parties' evidence presented genuine disputes of fact about the nature of Senn's contact with the deputy and what Smith saw before he pepper-sprayed Senn. Given the interlocutory posture, may Smith seek to reverse that factual determination?

2. Resolving the disputes in favor of Senn, Smith saw that Senn's contact with the deputy was inadvertent, glancing, and debatable. Was he justified in pepper-spraying her?

3. For at least ten years, in case after case, this Court has held that pepper spray is a "significant intrusion" that may not be used against someone who is suspected of only minor offenses, is not a threat, and is not actively resisting. Did those cases clearly establish Senn's right to be free from pepper spray here?

STATEMENT OF THE CASE

1. Linda Senn went to Portland City Hall to attend a meeting of the Office of Neighborhood Involvement. ER-115. When she arrived, however, she learned that City Council was also meeting that day to ratify a collective-bargaining agreement with the police officers' union. *Id.* She decided that she wanted to offer public comment. *Id.* But so had many other people, and public comment turned into protest. ER-115–16. After several interruptions, the mayor ordered City Hall closed to the public. *Id.*

Yelling "Move!" and "Leave!", police officers pushed people toward the exit. ER-116. Once she was outside, Senn stayed near the doors. *Id.* Officers began to shut the doors, but Senn tried to hold them open "to make sure people could get out." ER-47.

Deputies with the Multnomah County Sheriff's Office Rapid Response Team (RRT), including Kyle Smith and Todd Brightbill, arrived to clear the area. ER-118. Senn and several other members of the public were still near the doors. *Id.* As RRT members moved to intervene, Brightbill pushed Senn away from the doors, down the stairs. ER-112 at 0:21–0:22.[1] To stabilize herself and keep from falling, Senn

[1] Whether Smith disputes the nature of this push is unclear. In his opening brief, he admits that Brightbill was "pushing" protesters. OB 4. In district court, he stipulated that "Plaintiff and Sergeant Brightbill [were] in physical contact as the RRT was working to move her and Allyson Drozd away from the door." ER-119. The district court thus held that Brightbill "attempted to move" Senn. ER-6. In

reached out and hung on to Brightbill's sleeve for two seconds.[2] ER-112 at 0:21–0:23; ER-53.

Right after Senn let go, Smith blasted her with pepper spray. ER-112 at 0:25.[3] Smith claims this blast was targeted at Allyson Drozd, another member of the public who had been standing near the doors, but it hit both Drozd and Senn. *Id.* (Drozd is in orange; Senn in green); OB 6. Senn and Drozd turned around and began descending the steps of City Hall. ER-112 at 0:25–0:26. Then Smith chose to deliver a second blast of pepper spray, this one directly at Senn. ER–112 at 0:26. Both blasts hit her in the face. ER-112 at 0:25–0:26.

2. Senn brought First and Fourth Amendment claims against Smith. ER-8. Smith sought summary judgment, arguing that he had qualified immunity. ER-9; ER-18. In a carefully reasoned decision, the district court held that Senn had failed to show a triable issue of fact on her First Amendment retaliation claim, ER-15–18, but that a reasonable

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the end, a video taken by an observer and posted on YouTube resolves any dispute. robert west, *PDX DON'T SHOOT protest 10/12/16 9 police attack*, YouTube (October 23, 2016), https://youtu.be/LfO_JxAI6-A. At 23:25, Brightbill can be seen pushing Senn.

[2] Smith suggests that Senn changed her testimony on this point. OB 5 n.2. Not so: As she testified, her earlier statement was about a "completely different" part of the day. ER-53.

[3] Smith implies that Senn let go only after he pepper-sprayed her, OB 6, but the video shows that he is mistaken. ER-112 at 0:25.

jury could find that Smith had violated Senn's clearly established right to be free from excessive force, ER-9–15.

The district court first held that Smith's use of pepper spray against Senn was "a serious intrusion that must be balanced by a serious government interest." ER-10. But, it found, Senn had committed at most "minor offenses" that justified only a "minimal use of force." *Id.* Viewing the video evidence and drawing reasonable inferences in the light most favorable to Senn, the court found that (1) a reasonable jury could conclude she was stumbling backward and had touched Brightbill's arm only in a "reflexive attempt to steady herself"; (2) her contact with Brightbill was "inadvertent[]," "glancing," and "debatable"; (3) she "was engaged in no more than passive resistance" and "did not present an immediate threat"; and (4) under those facts, Smith used an unreasonable degree of force when he pepper-sprayed her. ER-11–12, 14.

The district court also denied Smith's claim to qualified immunity. It first noted this Court's recent observation that "the 'right to be free from the application of non-trivial force for engaging in mere passive resistance' has long been established." ER-13 (quoting *Rice v. Morehouse*, 989 F.3d 1112, 1125 (9th Cir. 2021)). After reviewing several cases of which a reasonable officer in Smith's position should have been aware, including *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), *Young v. County of Los*

Angeles, 655 F.3d 1156 (9th Cir. 2011), and *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), it held that Senn's right not to be pepper-sprayed was "clearly established at the time of the incident" and thus denied summary judgment. ER-12–15.

This appeal followed.

STANDARD OF REVIEW

On interlocutory review of a denial of summary judgment, this Court reviews the district court's legal determinations de novo. *Davis v. United States*, 854 F.3d 594, 598 (9th Cir. 2017). A party is entitled to summary judgment only if he shows that there is "no genuine dispute as to any material fact" and that he is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As elaborated on below, the Court lacks jurisdiction to review whether the district court correctly found a factual dispute *genuine*; instead, resolving such disputes in favor of the nonmoving party, this Court has jurisdiction to review only whether they are *material*. *Infra*, pp. 9–18. In making that determination, the Court draws all reasonable inferences in favor of the nonmoving party. *Davis*, 854 F.3d at 598.

SUMMARY OF ARGUMENT

This is an interlocutory appeal: Smith appeals from the district court's denial of his motion for summary judgment.

1. This Court's jurisdiction in this context is limited to issues of law. *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013). The Court may not review whether there is enough evidence to create a genuine dispute, but only whether a disputed fact might change the legal outcome. *Id.* Put differently, the Court should "take, as given, the facts that the district court assumed when it denied summary judgment," and

decide the "purely legal" question of whether, under those facts, Smith was legally entitled to qualified immunity. *Johnson*, 515 U.S. at 319.

2. Here, the facts the district court assumed on summary judgment were that Senn's contact with Brightbill was glancing, inadvertent, and debatable, and that Smith could see that it was glancing, inadvertent, and debatable. On those facts, Senn wasn't a threat, wasn't actively resisting, and was committing at most minor offenses; and Smith, seeing all that, pepper-sprayed her anyway. The district court correctly held that a reasonable jury could find that this was excessive force.

Smith's primary argument on appeal is that the district court misapprehended the nature of Senn's contact with Brightbill. He says Senn had a "firm," "sustained" "grip" that threatened to topple Brightbill down the steps of City Hall. But that is nothing but an impermissible argument about "the sufficiency of [Senn's] evidence." *Cf. George*, 736 F.3d at 834. The district court held that Senn's evidence was sufficient for a jury to reach a different view, and Smith may not ask the Court to reassess the evidence in this appeal.

Smith's other argument is that the "angry, yelling crowd" made for "challenging circumstances" that excused his use of force. But the "general disorder" of a scene cannot legitimize the use of significant force against non-threatening individuals. *Nelson*, 685 F.3d at 881.

And under the facts at hand, Senn's own conduct did not justify the use of pepper spray.

3. Smith is not entitled to qualified immunity. He pepper-sprayed Senn in October 2016. The "right to be free from the application of non-trivial force for engaging in mere passive resistance" has been established since at least 2011. *Rice*, 989 F.3d at 1125 (quotation marks omitted). So by October 2016, a reasonable officer in Smith's position would have known under the circumstances that pepper-spraying Senn would be unconstitutional. Because Smith pepper-sprayed her anyway, he is not entitled to qualified immunity.

Argument

Under the facts the district court assumed when it denied summary judgment, Smith used excessive force and he is not entitled to qualified immunity.

1. The Court should decline to revisit the district court's factual conclusions.

This is an interlocutory appeal of a denial of summary judgment. This Court's jurisdiction doesn't usually extend to such appeals. There is an exception for denials of qualified immunity, but it is limited: A disappointed movant may not ask the court of appeals to review the district court's conclusions that a factual dispute is genuine, but only whether, accepting those conclusions and resolving the disputes in favor

of the nonmoving party, the district court's legal conclusions were correct.

Smith asks this Court to go further. He asks the Court to adopt his story—that Smith's two-second contact with Brightbill was a "sustained," "firm" grip that presented a serious threat to Brightbill. The district court found[4] that a reasonable jury might conclude otherwise. The Court should not revisit that finding on this interlocutory appeal.

1.1. On interlocutory appeal, the Court has jurisdiction only over "purely legal" issues.

The federal courts of appeals have jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. Denials of summary judgment, however, are "by their terms interlocutory." *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976). The courts of appeals do not normally have jurisdiction to review such decisions. *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011). The collateral-order doctrine provides a limited exception. It allows a court of appeals to hear an interlocutory

[4] Formally, a conclusion that the nonmoving party has presented enough evidence to dispute a factual issue is not a "finding of fact." *Cf.* Fed. R. Civ. P. 52(a)(1). But this Court's decisions use that shorthand in this context, and this brief follows the Court's lead. *Cf., e.g.*, *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 947 (9th Cir. 2017) ("Remaining within the bounds of our jurisdiction, we accept the district court's findings that these factual disputes are genuine and supported by the record.").

appeal of a denial of qualified immunity—but only "to the extent that it turns on an issue of law." *Villanueva*, 986 F.3d at 1164 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). Put differently, the final-judgment rule in qualified-immunity cases is not a jurisdictional bar but a jurisdictional screen. Purely legal issues get through; issues of fact do not.

When the denial of qualified immunity comes on a motion to dismiss, this rule is simple enough to implement: The court of appeals must assume the plaintiff's allegations are true and determine whether the defendants' conduct, as alleged, violated clearly established law. *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018). But when the order below is a denial of summary judgment, implementing the rule is trickier; it turns on the difference between "genuineness" and "materiality."

When a district court denies summary judgment, it necessarily decides that the parties' evidence presents at least one "genuine dispute as to a[ ] material fact." Fed. R. Civ. P. 56(a). A dispute is "genuine" if "there is enough evidence in the record for a jury to conclude that certain facts [that the movant denies] are true." *George*, 736 F.3d at 835 (quotation marks omitted). A dispute is "material" if, under the governing law, changing the outcome of the dispute would change the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If a dispute is both, then to a jury it must go. *Id.*

With this delineation in mind, the jurisdictional rule here is clearer: The Court has jurisdiction to review whether the disputes identified by the district court are legally material, but not whether they are evidentially genuine. *George*, 736 F.3d at 834–35; *Johnson*, 515 U.S. at 307, 313. This rule forbids exacting "scrutin[y] of the record": If the district court found that the nonmoving party had presented enough evidence to dispute a point of fact, this Court "categorically" lacks jurisdiction to reach a different conclusion. *George*, 736 F.3d at 834–35 (quotation marks omitted).

An example will help illustrate. In *George*, sheriff's deputies killed a man on his back patio. 736 F.3d at 832. They claimed he had raised his gun and pointed it directly at them. *Id.* at 833 n.4. The district court reasoned that a reasonable jury might disbelieve them and conclude based on record evidence that the man had done no such thing. *Id.* at 835. On appeal, this Court accepted the district court's finding and held that if the deputies had indeed shot the man "without objective provocation while he used his walker, with his gun trained on the ground, then a reasonable jury could determine that they violated the Fourth Amendment." *Id.* at 839. That is, it "simply [took], as given, the facts that the district court assumed when it denied summary judgment" and decided the "purely legal" question of whether, under

those facts, the defendant was entitled to qualified immunity.[5] *Johnson*, 515 U.S. at 319; *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

1.2. Smith's appeal hinges on disputing the facts.

Whether Smith is entitled to summary judgment "rests entirely on the reasonableness of [his] fear" that Senn presented a threat to Brightbill. *See Villanueva*, 986 F.3d at 1169 n.8; OB 6. Smith emphasizes that he perceived Senn's contact with Brightbill as a "firm," "sustained" "grasp," even if it lasted all of two seconds. OB 5. He argues that "[b]ased on what he could see and hear," he reasonably perceived Senn's actions "to threaten Sergeant Brightbill's safety and actively resist attempts to clear the area around City Hall." OB 6. He argues that "unchallenged video[]" bars any dispute over these assertions. OB 13, 16.

But Senn does dispute them. And the district court found that she had enough evidence for a jury to believe her: "[G]iving particular attention to the video evidence . . . there are disputed issues of material fact with respect to the physical contact between Senn and Brightbill, and the degree to which Senn was engaged in active resistance[.]" ER-12. It held that a reasonable jury could find that Senn merely "touched Brightbill's arm in a reflexive attempt to steady herself"; that her contact

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[5] The deputies had forfeited the second prong of qualified immunity. *George*, 736 F.3d at 837.

with Brightbill was "glancing," "debatable," and "inadvertent[ ]"; and, most importantly, that "Senn did not *present*"—i.e., that Smith could not reasonably have perceived that she *was*—"an immediate threat to Brightbill or the other members of the RRT." ER-11, 12, 14 (emphasis added).

These findings put this case on all fours with *George v. Morris*. Just as here, the district court there had found a genuine dispute about whether the decedent had "presented a threat" to the safety of the deputies. 736 F.3d at 833. On appeal, this Court held that it lacked jurisdiction to "decide at this interlocutory stage" if the district court's assessment of the evidence was correct. *Id*. at 835; *see also, e.g.*, *Isayeva*, 872 F.3d at 947–48 (similar); *Pauluk*, 836 F.3d at 1121–22 (similar). So too here.

Smith seeks to get around this interlocutory-review framework under the auspices of *Scott v. Harris*, 550 U.S. 372 (2007). OB 13. He argues that "[w]hen there are unchallenged videos," *Scott* permits an appellate court to override a district court's finding that material facts are genuinely disputed. OB 13. But *Scott* is not a case about interlocutory jurisdiction. *George*, 736 F.3d at 835. It never once mentions the limits of the collateral-order doctrine. *Id*. It doesn't even cite (much less overrule) *Johnson* or *Behrens*, the Supreme Court's authorities on the subject. *Id*. It is simply a case about how the

ordinary summary-judgment standard applies to video evidence. *Scott*, 550 U.S. at 380–81.

To be sure, *Scott* did arise in an interlocutory posture. 550 U.S. at 376. But as this Court and the Supreme Court have often admonished, a court's failure to consider its jurisdiction should not be mistaken for an assertion of jurisdiction. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring); *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 846–47 (9th Cir. 2017). Such "drive-by jurisdictional ruling[s]" carry "no precedential weight." *Hampton*, 869 F.3d at 847 (quotation marks omitted). Besides, the Supreme Court has since reaffirmed that parties may contest only purely legal issues on interlocutory qualified-immunity appeals. *Ortiz*, 562 U.S. at 188, 190. That is why this Court has held that *Scott* did not "establish an exception to the rules for interlocutory review." *George*, 736 F.3d at 835–36.

Even if the Court were inclined to treat *Scott* as establishing a limited exception, it wouldn't apply here. In *Scott*, the plaintiff's story was so "blatantly contradicted," so "utterly discredited" by the video evidence that "no reasonable jury could have believed him." 550 U.S. at 380–81. By contrast, Smith himself admits that Senn's contact with Brightbill lasted a scant "two seconds." OB 5 (citing ER-112 at 0:21–0:23). He also admits that Senn made contact only after Brightbill

"push[ed]" her. OB 4; *see* ER-112 at 0:21–0:22; *supra* n.1. And the video shows that Smith administered his first blast of pepper spray *after* the contact was over. ER-112 at 0:25. To be sure, this first blast may have been a matter of mistimed reflexes. Then again, Smith is an eighteen-year veteran of the force and supposedly an expert in using pepper spray "when appropriate." ER-109–10 ¶¶ 2–4, 8. So maybe not. But that is quintessentially for a jury to decide. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

The video also shows that Smith chose to deliver a second blast once Senn and Drozd had turned around and were descending the steps of City Hall. ER-112 at 0:26. Even if the first blast could have been in response to a reasonably perceived threat, the second was well after any arguable threat had ended. *Cf. Corteslunа v. Leon*, 979 F.3d 645, 655 (9th Cir. 2020) ("a use of force that may have been reasonable moments earlier can become excessive moments later"). At best (for Smith), the video evidence is ambiguous about whether he could have reasonably perceived that Senn posed a threat both times he pepper-sprayed her. But resolving that ambiguity is, as the district court rightly held, the province of the jury. ER-12. Nothing in the video "blatantly contradicts" the district court's view of the evidence, so even if *Scott* did establish an exception to the rule of *Johnson*, *Behrens*, and *Ortiz*, this case would be outside it.

At bottom, what Smith and Senn dispute are facts—"what occurred, [and] why." *See Ortiz*, 562 U.S. at 190. Specifically, they dispute what Senn did, what Smith saw, and why he pepper-sprayed Senn. Smith argues that "the video shows the historical facts at issue—what Deputy Smith could see and hear." OB 16. But the videos show what was visible from the *camera's* vantage point—not Smith's. As the district court explained, the videos do not permit a court to "conclude one way or the other" what Smith could see. ER-27. So what Smith could see is material and disputed, and resolving that dispute "is the jury's job." *Conner v. Heiman*, 672 F.3d 1126, 1131 n.2 (9th Cir. 2012).[6]

In urging the Court to credit his account instead, Smith effectively argues that Senn "could not 'prove [her story] at trial.'"

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[6] *Conner* includes an extended discussion, on which Smith relies, asserting that courts should determine as a matter of law what inferences may be drawn from known facts. 672 F.3d at 1131–32 & n.2; OB 16. But it also explains that determining "what officers knew"—which is always a matter of inference—"is the jury's job." 672 F.3d at 1131 n.2. This is not as paradoxical as it seems. The question in that case was whether the officers might have reasonably inferred from the plaintiff's undisputed behavior that he had culpable mens rea. *Id.* at 1132. *That* question—what an officer might have reasonably inferred from undisputed facts—is indeed a matter of "logic and law." *Id.* at 1131 n.2. What an officer might have reasonably seen, on the other hand, is a *factual* determination—and if it must be inferred from shaky videos shot from other vantage points, that inference is the "jury's job." *See id.*; *Tolan*, 572 U.S. at 657–58.

George, 736 F.3d at 834 (quoting *Johnson*, 515 U.S. at 313). But the district court found that perhaps she could. ER-11–12. That's a factual determination, not a legal one. So on this interlocutory appeal, the Court lacks jurisdiction to review it. *George*, 736 F.3d at 835–36; *Isayeva*, 872 F.3d at 947.

2. Smith's use of pepper spray was unreasonable and violated the Fourth Amendment.

When a police officer uses physical force against a free individual, he must comply with the Fourth Amendment's prohibition against unreasonable seizures. *Villanueva*, 986 F.3d at 1169. If the officer uses a degree of force that is "objectively [un]reasonable in light of the facts and circumstances," his conduct violates the Fourth Amendment. *Rice*, 989 F.3d at 1121 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

Whether a particular use of force is reasonable depends, on the one hand, on the type, amount, and severity of force used; and on the other hand, on the government's interest in using that degree of force. *Id.*; *Villanueva*, 986 F.3d at 1169. This question of fact is "traditionally" one for the jury. *Cortesluna*, 979 F.3d at 652 (quotation marks omitted). That is why this Court has often held that summary judgment in excessive-force cases should be granted "sparingly." *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795 (9th Cir. 2014) (en

banc). Summary judgment will lie only if "*any* reasonable juror" would find that the use of force was objectively reasonable under the circumstances. *Cortesluna*, 979 F.3d at 652 (emphasis added).

2.1. Pepper-spraying Senn was a "serious" intrusion on her liberty interests.

Pepper spray is "*designed* to cause intense pain." *Young*, 655 F.3d at 1162 (quotation marks omitted). It inflicts a burning sensation on the victim's skin, paralyzes the victim's larynx, causes mucus to come out of the victim's nose, and generally subjects the victim to "disorientation, anxiety, and panic." *Id.* It can cause "protracted impairment of a function of a bodily organ" and "lifelong health problems such as asthma." *Id.* That is why it is considered a "dangerous weapon" under the criminal sentencing guidelines. *Nelson*, 685 F.3d at 878 (quotation marks omitted). That is also why, in the Fourth Amendment context, this Court considers it to be "intermediate force"—a "significant intrusion upon an individual's liberty interests." *Young*, 655 F.3d at 1161.[7]

[7] Smith argues that Senn "was washing the pepper spray off within three to five minutes." OB 6. But pepper spray is considered intermediate force "due to the immediacy and uncontrollable nature of the pain involved," *Nelson*, 685 F.3d at 878 (quotation marks omitted), so it doesn't matter that she managed to seek relief nearby. Besides, the pepper spray still burned "two or three hours" later. ER-105.

Smith administered two one-second blasts of pepper spray to Senn's face. ER-112 at 0:25–0:26; ER-14. These were more than just a "minimal burst" intended to alert her to the potential for greater force, *Young*, 655 F.3d at 1162, because she had already turned around and was descending the stairs when Smith delivered his second blast. ER-112 at 0:25–0:27. Pepper-spraying someone for "several seconds," especially when they are already in retreat, is a "significant amount" of force. *Young*, 655 F.3d at 1162. As the district court found, it must be justified by a "commensurately serious state interest." *Id.* at 1162–63; ER-9–10.

2.2. Pepper-spaying Senn was not justified by a commensurately serious state interest.

The state's interests in using force are evaluated under the totality of the circumstances, but with a particular eye toward three factors: how severe the victim's purported offense was, whether she posed an "immediate threat" to the safety of the officers or others (the "most important" factor), and whether she was "actively resisting arrest" or trying to flee. *Rice*, 989 F.3d at 1121–22 (quotation marks omitted). Other relevant factors include whether "less intrusive alternatives" were available and whether "proper warnings were given." *Id.*

2.2.1. Senn was committing, at most, minor offenses.

Senn was never charged with any crime. ER-10. Arguably, she was trying to exercise her constitutional right to access a public city council meeting. *See Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 829–31 (9th Cir. 2020). The district court held that she was committing, at most, "minor offenses" that justified only a "comparably minimal use of force." ER-10; *see also Mattos v. Agarano*, 661 F.3d 433, 444 (9th Cir. 2011) (en banc) ("trespassing and obstructing a police officer were not severe crimes"). Smith does not contest that decision here. *See* OB 10 (mainly contesting Senn's level of resistance).

2.2.2. Senn did not present an immediate threat to Smith, Brightbill, or anyone else.

The Fourth Amendment demands an "objective inquiry" into an officer's use of force. *Villanueva*, 986 F.3d at 1169. Courts may not "base [their] analysis on what officers actually felt or believed during an incident." *Bryan v. MacPherson*, 630 F.3d 805, 831–32 (9th Cir. 2010). Even if an officer subjectively feels threatened, "there must be objective factors to justify such a concern." *George*, 736 F.3d at 838 (quotation marks omitted). Here, Smith argues that he "believed" that Senn's actions "threatened [Brightbill's] safety." OB 1. What matters, however, is not what he believed but what he "could have seen." *Cortesluna*, 979 F.3d at 653. If he could have seen that Senn posed no

threat, then the reasonableness of his use of force must go to a jury. *Id.* at 653–54.

The district court's factual determinations are dispositive on this question. First, it adopted the parties' stipulation that Brightbill attempted to physically move Senn away from the doors. ER-6; ER-119; *see supra* n.1 (Brightbill pushed Senn away from the doors, down the stairs). It then held that a reasonable jury could find that Senn merely "touched Brightbill's arm in a reflexive attempt to steady herself," ER-11, and that her contact with Brightbill was "glancing," "debatable," and "inadvertent[]," ER-12, 14.

Taking these findings "as given," *Johnson*, 515 U.S. at 319, Senn's reaching for Brightbill was just like the plaintiff's "reactive, instinctive" movement in *Thomas v. Dillard*, 818 F.3d 864, 885 (9th Cir. 2016) (in which the plaintiff stepped back briefly to avoid being frisked). The Court held that this sort of instinctive gesture "in response to an officer's own aggressive movement" could not reasonably be perceived as a threat. *Id.* And that's just what the district court found here: Senn's "reflexive" reaching out to steady herself "did not present an immediate threat to Brightbill or the other members of the RRT." ER-11.[8]

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[8] Smith argues that the district court erroneously relied on Senn's "subjective intent." OB 11–12. It did nothing of the sort. Its finding that Senn did not "present" an immediate threat is a finding about what Smith could see—the objective conduct that Senn "offer[ed] for

Smith argues that even if Senn's actions did not present a threat, he did not have "time for measured deliberation." OB 12. But a bare desire to resolve a possibly dangerous situation "quickly" cannot justify "the use of force that may cause serious injury." *Bryan*, 630 F.3d at 826 (quotation marks omitted); *see also Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1129 (9th Cir. 2021) (same). The person against whom force is used must independently present a threat. *Ibid.*

Relatedly, Smith argues that he could use force against Senn because the *crowd* was "angry and resistive." OB 14–16. But the Fourth Amendment does not permit this type of collective punishment. The "general disorder" of a scene cannot legitimize the use of significant force against non-threatening individuals. *Nelson*, 685 F.3d at 881.

Smith invokes three cases in support of his collective-punishment argument: *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001), *Shafer v. County of Santa Barbara*, 868 F.3d 1110 (9th Cir. 2017), and *Felarca v. Birgeneau*, 891 F.3d 809 (9th Cir. 2018). OB 12, 15. Not one fits the bill:

- *Jackson* sanctioned force based on the plaintiff's *own* conduct, including actively interfering with an arrest. 268 F.3d at 652–53.

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observation"—not what Senn was thinking. *See, e.g.*, *Present (v.)*, Am. Heritage Dictionary (5th ed. 2020), *available at* https://ahdictionary.com/word/search.html?q=present.

- *Shafer* sanctioned force because of "consistent" testimony from all witnesses except Shafer that Shafer had physically resisted the officer's lawful arrest, leading the officer to "progressively increase[] his use of force" from verbal commands to a takedown. 868 F.3d at 1114, 1116–17.
- And *Felarca* carefully teased out the degree of force permissible according to the level of threat posed by each plaintiff. Three plaintiffs posed no threat and resisted only passively. 891 F.3d at 818. The court held that their conduct justified "minimal force"—a "jab," a "brush," "incidental" contact—nothing so forceful even as an overhand strike. *Id.* at 817–18. The fourth had pushed and kicked officers and grabbed their batons, and thus posed a greater threat. *Id.* Against him, the court authorized commensurately greater force. *Id.*

The lesson of *Jackson*, *Shafer*, and *Felarca* is that even in "challenging" situations, *cf.* OB 12, only a person's own conduct can justify the use of force against them. Here, a reasonable jury could find that Senn's conduct posed no threat. ER-11. Taking that "as given," *cf. Johnson*, 515 U.S. at 319, Senn's own conduct did not justify the use of pepper spray against her. *Young*, 655 F.3d at 1166–67.

2.2.3. Senn was only passively resisting.

"Resistance" is a matter of degree, not of kind. It "runs the gamut" from purely passive civil disobedience to active physical assault on an officer. *Bryan*, 630 F.3d at 830. Mere disobedience, such as failure to disperse, "neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force." *Nelson*, 685 F.3d at 881. Even some level of resistance, where "not particularly bellicose," cannot justify serious force like bean-bag projectiles or pepper spray in response. *Id.* at 882 (cleaned up).

The district court determined that "there are disputed issues of material fact with respect to . . . the degree to which Senn was engaged in active resistance, which must be resolved by the trier of fact." ER-12. Specifically, it found that a reasonable jury could conclude that Senn's "debatable" contact with Brightbill's arm "in the midst of a protest" amounted to "no more than passive resistance." *Id.*

As with the previous factor, Smith urges the Court to reevaluate the district court's findings. He argues that any reasonable jury would conclude that Senn was "grabbing and pulling" Brightbill, and thus that she was offering active resistance. OB 11, 13–14. But on interlocutory appeal, this Court should "take, as given, the facts that the district court assumed when it denied summary judgment." *Johnson*, 515 U.S. at 319; *see supra* pp. 9–18. Those facts were that Senn's contact with Brightbill

was—and that Smith could see that it was—inadvertent, glancing, and reflexive. ER-11–12, 14.

Under those facts, the district court was on firm legal ground in finding that a jury could conclude Senn was offering "only passive or perhaps minimal resistance." ER-13. In *Davis v. City of Las Vegas*, this Court held that an arrestee who physically prevented an officer from searching his pockets—who engaged the officer in a "pushing and pulling match," in fact—was not "actively resisting." 478 F.3d 1048, 1052, 1056 (9th Cir. 2007). Similarly, in *Mattos*, this Court held that a plaintiff's pushing an officer away to prevent him from grazing her chest while he was arresting someone else could not justify use of a taser against her, because her conduct was merely "defensive" and "intended to protect her own body." 661 F.3d at 449; *see also Nelson*, 685 F.3d at 881–82 (collecting cases). These cases provide ample support for the district court's conclusion that Senn's conduct was at most minimal resistance that did not justify Smith's use of pepper spray against her. *See* ER-13–14 (collecting more cases).

Smith offers a bevy of irrelevant cases in response. He argues that if the plaintiff's conduct in *Emmons*—closing a door and pushing past an officer—constituted active resistance, so must Senn's. OB 11 (citing *Emmons v. City of Escondido*, 921 F.3d 1172, 1175 (9th Cir. 2019)). But as this Court explained in *Rice*, Emmons "was a potential suspect (for domestic abuse) and was attempting to flee"—*that* was what

justified the use of force against him. 989 F.3d at 1127. *Emmons* does not help Smith here.

Smith argues also that *Jackson* authorizes "using pepper spray towards an individual actively resisting an officer's attempt to control an angry, yelling crowd." OB 14 (citing 268 F.3d at 652). This argument again urges the Court to depart from the district court's conclusion that a reasonable jury could find that Senn was engaged in only passive resistance. Besides, the plaintiff in *Jackson* was yelling and swearing at officers, "advanc[ing] upon" them, and trying to physically prevent their arrest of another member of her party. *Jackson*, 286 F.3d at 649–50. The district court correctly concluded that kind of resistance bears no resemblance to Senn's two-second, reflexive contact. *See* ER-14.

Finally, Smith invokes *Felarca*. OB 15. But, as explained above, the only individual against whom the court authorized more than "minimal" force in *Felarca* had been pushing and kicking officers. 891 F.3d at 817–18. Far from advancing Smith's case, *Jackson* and *Felarca* only underscore that Senn was *not* engaging in active resistance.

2.2.4. Smith had alternatives to pepper-spraying Senn.

Along with the three main factors, this Court also considers whether less-intrusive alternatives to the force employed were available, including giving a warning first. *Isayeva*, 872 F.3d at 947. Smith gave Senn no warning before he pepper-sprayed her. ER-112 at 0:21–0:26.

If he had—if he'd offered even a short "let go or I'll pepper-spray you!"—he would have seen that she'd *already* let go. *See id.* That he failed to do so "makes clear just how limited was the government's interest in the use of significant force." *Young*, 655 F.3d at 1166.

2.3. In pepper-spraying Senn, Smith used excessive force.

Even though Senn was committing at most minor offenses, presented no threat, and was not actively resisting, Smith used a significant amount of intermediate force against her without warning. He did not "*need*" to use such force: "[I]t is rarely necessary, if ever, for a police officer to employ substantial force without warning against an individual who is suspected only of minor offenses, is not resisting arrest, and, most important, does not pose any apparent threat to officer or public safety." *Nelson*, 685 F.3d at 878 (quotation marks omitted); *Young*, 655 F.3d at 1166–67. Because he pepper-sprayed Senn needlessly, Smith violated the Fourth Amendment. *Ibid.*

3. Smith is not entitled to qualified immunity.

3.1. Qualified immunity protects officers only when the law is unclear.

Qualified immunity protects government agents from liability for violating constitutional rights unless those rights were "clearly

established." *Camreta v. Greene*, 563 U.S. 692, 705 (2011).[9] To determine whether an officer violated clearly established law, this Court looks for factually similar cases, "mindful that there need not be a case directly on point." *A.K.H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1013 (9th Cir. 2016) (quotation marks omitted).

The Supreme Court has recently reaffirmed that controlling precedents can clearly establish the law even for novel facts. *See, e.g.*, *McCoy v. Alamu*, 950 F.3d 226, 233 (5th Cir. 2020) (granting qualified immunity to a prison guard who pepper-sprayed a non-threatening inmate), *vacated and remanded*, 141 S. Ct. 1364 (2021). That principle applies with especial vigor in excessive-force cases. *Mattos*, 661 F.3d at 442. The constitutional standard for excessive force is "very fact-specific," so if courts always required a prior case with identical material facts, officers would "rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment." *Id.* That is why this Court has underscored en banc that officers who use unreasonable force can be on notice that their conduct violates clearly

[9] Courts may tackle the two prongs of qualified immunity—whether the officer violated a right and whether that right was clearly established—in any order, but the Supreme Court has recognized that addressing the merits first is "often beneficial." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). This Court "typically" addresses the merits first. *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013). This brief addressed the merits in Part 2, *supra*.

established law "even in novel factual circumstances." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

3.2. Senn's right not to be pepper-sprayed while passively resisting has long been clearly established.

Smith pepper-sprayed Senn in October 2016. ER-115. Senn's right not to be pepper-sprayed while passively or minimally resisting at a protest was established long before that. On every element of the excessive-force analysis, Senn's authorities date from well before October 2016.

Degree of force. This Court had clearly established by 2011 that pepper spray is a "significant intrusion upon an individual's liberty interests" that counts as "intermediate force." *Young*, 655 F.3d at 1161; *see also Headwaters Forest Def. v. Cty. of Humboldt*, 276 F.3d 1125, 1130–31 (9th Cir. 2002).

Severity of offenses. This Court had clearly established by 2011 that "trespassing and obstructing a police officer [are] not severe crimes." *Mattos*, 661 F.3d at 444; *see also Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1091 (9th Cir. 2013).

Degree of threat and resistance. This Court had clearly established by 2012 that "failure to fully or immediately comply with an officer's orders" does not justify a non-trivial level of force. *Nelson*, 685 F.3d at 881–82 (collecting much earlier cases).

This Court had also clearly established by 2011 that brief "defensive" physical contact "to protect [one's] own body" is not active resistance. *Mattos*, 661 F.3d at 449; *see also Davis v. City of Las Vegas*, 478 F.3d at 1056 (plaintiff who physically prevented an officer from searching his pockets was not actively resisting). In addition, this Court clearly established in May 2016—months before the events giving rise to this case—that a "reactive, instinctive movement in response to an officer's own aggressive movement" could not constitute a threat or active resistance. *Thomas*, 818 F.3d at 885.

Protest conditions. This Court had clearly established by 2012 that the government's interest in "stopping any and all disorderly behavior" and in "resolv[ing] quickly a potentially dangerous situation" cannot justify force against someone who is not herself posing a threat or actively resisting. *Nelson*, 685 F.3d at 883; *Bryan*, 630 F.3d at 826 (quotation marks omitted).

Balancing the force used against the state's interests. This Court had clearly established by 2011 that the use of "substantial force without warning against an individual who is suspected only of minor offenses, is not resisting arrest, and, most important, does not pose any apparent threat to officer or public safety" is unreasonable. *Young*, 655 F.3d at 1166–67; *see also Rice*, 989 F.3d at 1125; ER-13–14. Even if Senn's reflexive reaching for Smith were considered "minimal" rather than "passive" resistance, the district court correctly concluded this

Court has long held that "the use of non-trivial force [is] not justified in the face of passive or minimal resistance." ER-13 (citing *Nelson*, 685 F.3d at 881–82 (collecting cases)).

Smith responds that no single case encapsulates all of these principles. OB 10–13. He argues that unless an officer's conduct is "obvious[ly]" unconstitutional, a plaintiff must find a single case that controls each and every factor of the excessive-force analysis to overcome qualified immunity. OB 9 (quoting *Cortesluna*, 979 F.3d at 652). As explained above: Not so. *Mattos*, 661 F.3d at 442; *see also Bonivert v. City of Clarkston*, 883 F.3d 865, 872–73 (9th Cir. 2018). Such a requirement would imbue officers not with qualified immunity but with absolute impunity. *Mattos*, 661 F.3d at 442; *Bonivert*, 883 F.3d at 872–73.

Instead, what a plaintiff needs is a "body of relevant case law" that, as a whole, clearly establishes the unconstitutionality of the officer's conduct. *Rice*, 989 F.3d at 1126 (quotation marks omitted). Put differently, a plaintiff can defeat qualified immunity with cases that clearly establish the law on "specific factors" of the excessive-force inquiry. *Isayeva*, 872 F.3d at 947 (quotation marks omitted). *Rice*, for example, synthesizes six different cases that together clearly established the relevant state of the law. 989 F.3d at 1126. *Nelson* is similar. 685

F.3d at 883–87. So is *Gravelet-Blondin*. 728 F.3d at 1093–96. Qualified immunity does not alter this basic mode of legal analysis.

So it matters not that *Young*, *Nelson*, *Gravelet-Blondin*, and *Nelson* might have involved plaintiffs who were more passive than Senn. *Cf.* OB 11–13. Nor does it matter that *Jackson*, *Felarca*, and *Emmons* authorized force against individuals who were more threatening or actively resisting than Senn. *Cf.* OB 14–16; *see supra* pp. 23–24, 26–27 (explaining why the conduct of the plaintiffs in these cases was materially different from Senn's).

What matters is that well before October 2016, this Court's cases had clearly established (1) that *Senn's* conduct—making brief, reflexive, defensive contact with an officer—did not constitute threatening behavior or active resistance, *Mattos*, 661 F.3d at 449; *Thomas*, 818 F.3d at 885; and (2) that Smith's conduct—using "substantial force against a passively resisting person"—was unconstitutional "beyond debate." *Rice*, 989 F.3d at 1126 (quotation marks omitted) (collecting cases).[10] Those are the precedents that define "the right's contours"

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[10] Smith also seeks support in *Brooks v. Clark County*, in which a courtroom marshal used a "shove[]" to eject a bail bondsman who repeatedly disrupted a courtroom and defied a judge's order to leave. 828 F.3d 910, 920–21 (9th Cir. 2016). Although the court there did not classify the degree of force used, a "shove" is surely much less serious force than pepper spray. *Cf. Young*, 655 F.3d at 1162 (describing the effects of pepper spray). So *Brooks*, like Smith's other cases, does not entitle him to qualified immunity.

and move this case "beyond the otherwise hazy border between excessive and acceptable force." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quotation marks omitted).

In sum, the "right to be free from the application of non-trivial force for engaging in mere passive resistance" has been established since at least 2011. *Rice*, 989 F.3d at 1125 (quoting *Gravelet-Blondin*, 728 F.3d at 1093). So by October 2016, a reasonable officer in Smith's position would have known not to pepper-spray Senn. Because he pepper-sprayed her anyway, he is not entitled to qualified immunity.

CONCLUSION

For all these reasons, the district court's order denying summary judgment should be affirmed.

Dated: September 24, 2021 Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel is aware of one related case: *Drozd v. McDaniel*, No. 21-35584 (9th Cir.). *Drozd* involves facts related to those here.

Dated: September 24, 2021 Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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