NO. 21-1220

In the Supreme Court of the United States

COUNTY OF SACRAMENTO AND
NICHOLAS RUSSELL,

Petitioners,

v.

KENARD THOMAS,

Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL POLICE ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The National Police Association is an Indiana non-profit corporation founded to provide educational assistance to supporters of law enforcement and support to individual law enforcement officers and the agencies they serve. The NPA seeks to bring important issues in the law enforcement realm to the forefront of public discussion in order to facilitate remedies and broaden public awareness.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this case, the Ninth Circuit took an uncomplicated use-of-force matter with numerous undisputed facts about the totality of the circumstances encompassing the use of force and reduced it into a short memorandum opinion that omitted nearly any mention of the circumstances in which the officers used

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[1] Under Rule 37.6 of the Rules of this Court, *Amicus Curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *Amicus Curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Under Rule 37.2, *Amicus Curiae* states that Petitioners received timely written notice and have consented in writing to the filing of this amicus brief. *Amicus Curiae* further states that Respondent has likewise received timely written notice and has consented in writing to the filing of this amicus brief. As such, under Rule 37.2(a), *Amicus Curiae* states that the written consent of all parties has been provided.

force. *See* App.2a-App.3a. Instead, the Ninth Circuit more or less adopted wholesale Plaintiff/Appellee's view of a few select facts and used them as grounds to reverse the District Court's grant of qualified immunity to Deputy Nicholas Russell. This despite the aforementioned bevy of undisputed facts that the District Court found relevant to its decision that the law was not clearly established on the date of the use of force.

Amicus Curiae National Police Association writes now to emphasize that in addition to the well-developed argument in Petitioners' cert petition, the Court should review this case because the Ninth Circuit's decision-making method—adopting only the nonmovant's facts and flatly ignoring relevant, undisputed facts that benefit the movants—runs headlong into this Court's well-settled summary-judgment precedent in *Celotex Corp. v Catrett* and *Anderson v. Liberty Lobby* and does violence to certain provisions of Fed. R. Civ. P. 56. Making matters worse, the Ninth Circuit's opinion is symptomatic of a problem afflicting more and more Circuit and District Court summary judgment opinions generally. Moreover, this case is yet another example of the Ninth Circuit's refusal to properly perform a qualified immunity analysis *and* refusal to properly perform its function as an intermediate appellate court.

For these reasons, in addition to those raised in the Petitioners' Petition for Writ of Certiorari, the Court should the Court should grant Petitioners' request and review this matter.

ARGUMENT

I. THE COURT SHOULD TAKE THIS CASE TO REINFORCE THE PROPER SCOPE OF SUMMARY JUDGMENT.

The chief problem reflected in the Ninth Circuit's underlying opinion is that it rejects years of precedent governing how District and Circuit Courts are to evaluate summary judgment motions. In brief, courts are to "believe []" the evidence of the non-movant, and draw all "justifiable inferences" in the non-movant's favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). But to "believe" the non-movant's evidence does not mean to "consider only and accept only the non-movant's facts." Unfortunately, that is precisely how the Ninth Circuit elected to proceed below. And even more unfortunately, the Ninth Circuit's decision is not alone; an increasing number of District and Circuit Courts, aided by dicta from this Court's opinion in *Scott v. Harris*, are treating *Anderson*'s "believe and credit" holding as a directive to rule as if the plaintiff's, and only the plaintiff's, list of undisputed facts were at issue. This is flatly contrary to principles from *Anderson* and warrants reversal.

A. A Brief History of Summary Judgment.

Over 150 years ago, the origins of summary judgment procedure took root in English law. At first available only to plaintiffs, and more specifically creditors seeking to collect debts, summary process sought to reduce the delay that often ensued when

defendants invoked frivolous defenses to avoid paying. *See* Schwarzer, Hirsch & Barrans, *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 446 (1992). Over time, the process took hold in American law, for many of the same policy reasons. *See*, *e.g.*, *Fidelity & Deposit Co. v. U.S.*, 187 U.S. 315, 320 (1902) ("The purpose of [summary judgment] is to preserve the court from frivolous defences and to defeat attempts to use formal pleading as a means to delay the recovery of just demands").[2] This occurred in name only, however, as American judges viewed summary process with skepticism, a "drastic remedy to be used only sparingly." *Schwarzer*, *supra*. Consequently, it wasn't.

The mid-to-late 1920s marked a sea change. Around that time, scholars began advocating for summary judgment as a tool to relieve heavily congested court dockets that were plagued by excessive delay. *See*, *e.g.*, Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 455 (1929). This line of thinking found black-letter footing in the 1938 adoption of the Federal Rules of Civil Procedure. *See* Schwarzer, *supra*. Rule 56 of the newly established Federal Rules now permitted both sides to move for summary judgment. A subsequent 1963 amendment made clear that a party opposing summary judgment could not simply rest on their pleadings, but must offer evidence of a genuine issue

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[2] *Fidelity & Deposit Co.* specifically referenced the "75th Rule" of the D.C. Supreme Court, which was effectively that court's summary process rule. *Amicus Curiae* replaced it with the term "summary judgment" for ease of understanding.

for trial. *Id*. As a result of these clarifications, the process gained momentum. *Id*.

Still, perceived inconsistencies in Rule 56 hampered its effectiveness. In particular, courts—spurred on by this Court's pronouncement in *Adickes v. S.H. Kress & Co*., 398 U.S. 144 (1970)—struggled with whether a defendant could prevail by showing simply that plaintiff had no evidence to support an element of their case, or whether defendant had to affirmatively disprove an element of plaintiff's case to win. Courts and commentators generally interpreted *Adickes* as saying defendants had to disprove the plaintiff's claim to win on summary judgment. *See* Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 64 n. 56 (1988). As a result, the summary judgment procedure remained little used. In one commentator's words, it was "encumbered by ambiguities, an overlay of restrictive interpretations, and considerable judicial aversion." *See* Schwarzer, *supra*, at 451.

B. The Court's Clarifications to Rule 56.

The Court addressed these problems in a series of mid-1980s opinions: *Celotex Corp. v Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc*., 477 U.S. 424 (1986), and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986). Two announcements in these cases are key. First, in *Catrett*, the Court held that the summary judgment movant need not negate an element of the opposing party's case to prevail, overturning/casting doubt on *Adickes*. *See* 477 U.S. at 322-23 ("Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case[.]").

Second, and most important here, is the Court's pronouncement in *Anderson*. There the Court considered a libel claim brought by Liberty Lobby against the publisher of a magazine called *The Investigator*, which had run pieces portraying Liberty Lobby as "neo-Nazi, anti-Semitic, racist, and Fascist." *Anderson*, 477 U.S. at 245. The publisher moved for and obtained summary judgment on the theory that Liberty Lobby and its associates were limited public figures and that the publisher's reporters did not act with actual malice. *Id*. at 246; *accord*. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). The Court of Appeals affirmed in part and reversed in part, and this Court accepted certiorari. *Id*. at 247.

In reversing the Court of Appeals for applying the wrong substantive standard when the Court of Appeals itself reversed the District Court, this Court made several holdings that infused Rule 56 with both clarity and staying power. *First*, this Court defined "genuine" and "material" for purposes of the phrase "genuine dispute of material fact." *Id*. at 247-28. *Second*, this Court held that Rule 56 (summary judgment) and Rule 50 (directed verdict) employed the same test for granting the movant relief ("whether the evidence is sufficient to sustain a verdict for the non-moving party," *see Schwarzer*, *supra*, at 451). *Third*—and most importantly here—this Court held that reviewing courts must view the evidence in the light most favorable to the non-movant and assess evidentiary sufficiency according to the evidentiary burden imposed by substantive law. *Id*. at 252, 255.

This holding, combined with this Court's decisions in *Catrett* and *Matsushita Electrical Industrial Co.*, brought significant clarity to Rule 56. *See* Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. DAVIS L. REV. 94, 125-26 (1988) ("Courts now use rule 56 to dispose of specific types of cases formerly thought to be particularly inappropriate for rule 56 treatment."). In the ensuing years, the federal summary judgment process achieved recognition "not only as a procedure for avoiding unnecessary trials on insufficient claims or defenses but also as an effective case management device to identify and narrow issues." *See Schwarzer*, *supra*, at 451. And it remains true that "properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties." *Id.* at 452. But it is *also* true that "proper use of the rule is the *sine qua non* of its utility." *Id.* And that is where the Ninth Circuit's opinion in this case went awry.

C. The Problems Posed by the Ninth Circuit's Memorandum Opinion and Others Like It.

The District Court did not issue a written order but ruled from the bench that Deputy Nicholas Russell was entitled to qualified immunity because the law was not clearly established. *See* App.24a. The District Court properly noted the existence of numerous undisputed facts that bore on its qualified immunity analysis; namely, that (1) the officers had been called to serve a restraining order on a suspect who had violated a domestic violence order; (2) the suspect's victim had been told she was a victim of domestic violence order including that her nose had been broken;

(3) the victim believed the suspect had a gun; (4) the suspect was known to carry knives, to evade police, and to be violent; (5) the suspect was on probation; (6) the suspect had prior arrests for domestic violence as well as resisting and obstructing peace officers; (7) the officers made numerous announcements but that the suspect continued to hide in the closet; (8) the suspect never responded to any announcement before exiting the closet; and (9) the suspect, within two or three feet of Deputy Russell, opened the door with no prior verbal warning. *See* App.12a-App.13a. These facts were undisputed and material to the "totality of the circumstances" of the use of force. The District Court was right to consider them.

The Ninth Circuit, however, acted more or less as though these facts did not exist. Instead, it noted merely that (1) Deputy Russell "shot Thomas while he was slowly emerging from a closet with his hands by his ears in response to police commands to show himself," and (2) the room was lit, Deputy Russell's weapon-mounted light was directed at Thomas, and Thomas's hands were right by his face. *See* App.2a-App.3a. The Ninth Circuit said nothing about the undisputed facts listed above that plainly inform the "totality of the circumstances" inquiry required in use-of-force cases by *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989).

Thus, framed under the guise of "viewing the evidence in the light most favorable to Thomas," *see* App.2a, the Ninth Circuit "assumed" the truth of Thomas's version of events (*see* App.3a) and then reversed the District Court's qualified immunity ruling. *Id*. According to the Ninth Circuit, it was clearly established that "the police cannot quickly escalate

to deadly force when they have little prior information indicating that a suspect is armed, the suspect has not committed a serious crime, and the suspect acts in a manner that can be interpreted as consistent with police orders—even when an officer and the suspect are in very close quarters and even when the suspect's actions could also be interpreted as threatening." *See* App.3a (citing *A.K.H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1105 (9th Cir. 2016)).[3]

This ruling rests on a faulty premise. It may be true that the law is so clearly established, but because the Ninth Circuit appears to only have considered the non-movant's facts, it abjectly failed to properly adjudge summary judgment under Fed. R. Civ. P. 56. *Anderson* makes clear that lower courts must believe the non-movant's facts (unless belied by documentary evidence), but in no sense does *Anderson* stand for the premise that the reviewing court accept *only* the non-movant's facts.[4] This indefensible mis-step improperly deprived Deputy Russell of the benefits of the qualified immunity defense, but more importantly,

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[3] The Ninth Circuit likewise cited additional factual scenarios from past Ninth Circuit cases as having clearly established the law, but *Amicus Curiae* need not discuss them here as Petitioners have done so at length *and* those citations are built on the same faulty premise—the acceptance of only the non-movant's facts—as the discussion of *Landeros*.

[4] Indeed, the Ninth Circuit's Memorandum Opinion appears to have employed a standard more akin to that used by trial and intermediate appellate courts in deciding motions to dismiss under Fed. R. Civ. P. 12(b)(6). *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (ruling on 12(b)(6) motion to dismiss requires "operating on the assumption that the factual allegations in the complaint are true[.]").

it eliminates the "sine qua non" of summary judgment procedure entirely.

If this case were to serve as the newest pronouncement on how Rule 56 procedure operates, then Rule 56 as known no longer exists. All plaintiffs would have to do to survive summary judgment is find the only the most tenuous pieces of evidence to support their list of facts. The onus would then shift to the movant, usually the defendant, to argue why the plaintiff's evidence on any particular point was not sufficient, instead of why the undisputed facts show no genuine issue of material fact as Rule 56 currently mandates. This would effectively return the Rule 56 process to something similar to a pre-*Anderson*, pre-*Catrett* world by forcing the movant to negate the existence of a fact that, under *Anderson*, the non-movant would have had to prove.

Further, if the Ninth Circuit's Memorandum Opinion accurately sums up how Rule 56 operates, then it reads certain provisions of Rule 56 out of existence. Rule 56(c), for example, describes how "a party" is to support their "factual positions." Rule 56(e) describes how a court can act if a party "fails to properly support an assertion of fact." If the Ninth Circuit was correct, then as to summary judgment movants, these provisions are a nullity. It wouldn't matter how movants are to "support" their "factual positions" or "properly support an assertion of fact" because those factual positions wouldn't be considered. This makes the referenced parts of Rule 56(c) and Rule 56(e) null, running afoul of the foundational canon of construc-

tion[5] that texts should construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

At the very least, Rule 56 and its interpreting cases require courts to consider—and not ignore—relevant, undisputed facts. *See Reitan v. Travelers Indem. Co.*, 267 F.2d 66, 69 (7th Cir. 1959) ("[W]hile we must consider the evidence in the light most favorable to the plaintiff . . . [t]his does not mean that we may ignore uncontradicted, unimpeached evidence supporting defendant's position"); *see also Jones v. Nevada ex rel. Bd. of Regents for Nevada Sys. of Higher Ed.*, No. 2:14-CV-01930-APG-NJK, 2017 WL 10276018, at *3 (D. Nev. June 20, 2017) ("I must view the facts in the light most favorable to [plaintiff] but that does not mean I must ignore undisputed facts adverse to him").

D. The Reasons for Review.

To sum the above, the Ninth Circuit Memorandum Opinion's view of summary judgment is (1) not supported by precedent and (2) does violence to the text of Rule 56. These are reason enough alone for review. But making this case even more

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[5] Whether the Federal Rules are subject to canons of construction appears up for debate. *See* David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 935 (2011). Still, the Court has employed canons of construction in interpreting the Federal Rules before, so it is not without precedent. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination*, 507 U.S. 163, 168 (1993) (interpreting Rules 8(a)(2) and 9(b) with reference to the canon of *expressio unius est exclusio alterius*).

problematic, and thus even more a candidate for review, is the fact that its vision for summary process is actively percolating in the lower courts. *See*, *e.g.*, *Ouza v. City of Dearborn Heights*, *Mich.*, 969 F.3d 265, 278 (6th Cir. 2020) ("The precise scope of our appellate jurisdiction on interlocutory appeal from a denial of qualified immunity is whether 'the plaintiff's version of facts demonstrates a violation of clearly established rights'") (citation omitted); *Estate of Valverde by and through Padilla v. Dodge*, 967 F.3d 1049, 1055 (10th Cir. 2020) (citing Tenth Circuit precedent for the proposition that when considering a qualified immunity summary judgment motion, a court "usually must adopt the plaintiff's version of the facts[.]"); *Mazloum v. Dist. of Columbia Metropolitan Police Dep't.*, 522 F. Supp. 2d 24, 34 (D.D.C. 2007) ("As the Supreme Court has indicated, resolution of the first stage of the qualified immunity inquiry normally requires 'adopting . . . the plaintiff's version of the facts.'").

As *Mazloum* suggests, many of these holdings seem prompted by dicta from *Scott v. Harris*, where this Court noted that the "light most favorable" standard "in qualified immunity cases . . . usually means adopting . . . the plaintiff's version of the facts." 550 U.S. 372, 378 (2007). But given the principles announced in *Catrett* and *Anderson*, discussed above, the dicta from *Scott* cannot be said to have established a new interpretation of Rule 56 because the dicta in question runs contrary to *Anderson*'s principles without acknowledging it was doing so. This Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000); *see also*

Permian Basin Area Rate Cases, 390 U.S. 747, 775 (1968) (this Court "does not decide important questions of law by cursory dicta inserted in unrelated cases"); *Waine v. Sacchet*, 356 F.3d 510, 517 (4th Cir. 2004) ("[D]icta does not and cannot overrule established Supreme Court precedent").

At bottom, to the *Scott* dicta's demise, Rule 56 requires an analysis of both parties' fact submissions in the course of identifying what facts are undisputed and material. *See*, *e.g.*, *Gupta v. Melloh*, 19 F.4th 990, 997 (7th Cir. 2021) ("Taking the facts in the light most favorable to the non-moving party does not mean that the facts must come only from the nonmoving party."); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994) ("Evidence is viewed in a light most favorable to the nonmoving party . . . this, however, does not mean that we are constrained to accept all the nonmovant's factual characterizations and legal arguments"). As such, the Court should take this case to correct its dicta in *Scott* and emphasize to District and Circuit Courts that Rule 56 requires an evaluation of both parties' slate of alleged undisputed facts in reaching their conclusions on summary judgment.

II. THE COURT SHOULD TAKE THIS CASE TO EMPHASIZE THE IMPORTANCE OF ASSESSING THE TOTALITY OF THE CIRCUMSTANCES IN WHETHER THE LAW WAS CLEARLY ESTABLISHED.

Additionally, the Court should take this case to emphasize to lower courts that in a use-of-force, qualified immunity case, evaluating the "totality of the circumstances" is mandatory even if the only prong at issue is the clearly established one. *See*, *e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 195, 198 (2004)

(inquiring as to whether conduct violated clearly established law "'in light of the specific context of the case'" and construing "facts . . . in a light most favorable" to the nonmovant); *Sims v. Leonard*, 465 F. App'x. 869, 871 (11th Cir. Mar. 20, 2012) ("The court must . . . evaluate those facts to determine whether, as a matter of law, the alleged conduct was 'clearly established' as a constitutional violation at the time it occurred") (citation omitted).

The "totality of the circumstances" framework emerges from the nature of the Fourth Amendment's reasonableness inquiry. Reasonableness, in the Fourth Amendment context, is not a negligence inquiry; instead, it is considered by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government interests alleged to justify the intrusion." *Garner*, 471 U.S. at 8; *see also Bridges v. Wilson*, 996 F.3d 1094, 1100 (10th Cir. 2021) (discussing the difference between state-law negligence and Fourth Amendment reasonableness).

In short, this balancing test is designed to determine whether a particular sort of search or seizure was justified. *Garner*, 471 U.S. at 8-9. That is, justified by the circumstances that led to the use of force. Those circumstances must, therefore, be evaluated. If a court does not, and instead simply cherry picks one specific, "extremely abstract right []" that it then says was clearly established, then the test the court would be employing would convert the rule of qualified immunity "into a rule of virtually unqualified liability[.]" *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

Given the above, it was essential that the Ninth Circuit evaluate the whole set of circumstances facing Deputy Russell. Its failure to do so is significant. As the District Court acknowledged but the Ninth Circuit panel basically ignored, at the time Deputy Russell and others went to the home:

(1) the officers had been called to serve a restraining order on a suspect who had violated a domestic violence order;

(2) the suspect's victim had been told she was a victim of domestic violence order including that her nose had been broken;

(3) the victim believed the suspect had a gun;

(4) the suspect was known to carry knives, to evade police, and to be violent;

(5) the suspect was on probation;

(6) the suspect had prior arrests for domestic violence as well as resisting and obstructing peace officers;

(7) the officers made numerous announcements but that the suspect continued to hide in the closet;

(8) the suspect never responded to any announcement before exiting the closet; and

(9) the suspect, within two or three feet of Deputy Russell, opened the door with no prior verbal warning.

See App.12a-App.13a. This is the exact type of information that shapes an officer's view of how to conduct herself or himself in arresting a suspect. *See*, *e.g.*, *Escobar v. Montee*, 895 F.3d 387, 394 (5th Cir. 2018)

(emphasizing facts within the defendant officer's knowledge as the basis for reversing a denial of qualified immunity).

The Ninth Circuit's opinion should have contained references to what, for example, a reasonable officer serving a restraining order on a domestic violence suspect would have done. Or how a reasonable officer who had reason to believe the suspect may be in possession of a gun would have proceeded. Or how a reasonable officer who knew the suspect had a reputation for to carrying knives, fleeing police, and generally being violent would have proceeded. Something of that nature was required to lift the Ninth Circuit's opinion from reversible error to acceptable review. As it stands, however, the opinion contains almost nothing of the sort. For that reason, in addition to those discussed elsewhere above and in Petitioners' Petition for Writ of Certiorari, the Court should grant Petitioners' request and review this matter.

III. THE COURT SHOULD TAKE THIS CASE TO EMPHASIZE TO LOWER COURTS THE IMPORTANCE OF PERFORMING A FULL FACT EVALUATION.

Lastly, were this Court to deny review, it would stand as a tacit acceptance of the panel's decision to disavow their obligation to the public to provide reasoned, thorough evaluations of the legal questions before them. An encumbering problem in the Ninth Circuit's decision below is that it completely disregards the general principle that courts, District or Circuit, should strive to inquire into the facts and circumstances of the cases before them in reaching a decision.

It is not enshrined that lower courts *must* provide detailed written findings except in specific situations, which do not include on dispositive motions. *See*, *e.g.*, Fed. R. Civ. P. 52(a); *accord*. *Anderson*, 477 U.S. at 250 and n. 6 ("There is no requirement that the trial judge make findings of fact," but "findings are extremely helpful to a reviewing court"). But when they do not, especially on dispositive motions, lower courts deprive the appellate courts of their "tools of review," *see Clay v. Equifax, Inc.*, 762 F.2d 952, 957 (11th Cir. 1985), and reduce the appellate courts to the plight of "the proverbial blind hog, scrambling through the record in search of an acorn." *Id.* This requires the appellate court—already made significantly busy by the fact that lower-court appeals in the federal system are typically a matter of right, not discretion—to engage in a "cumbersome review of the record to ferret out facts that the district court likely assumed." *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008).

Likely for that reason, this Court has empowered Circuit courts to set aside District Court grants of summary judgment when the subject order is "opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim." *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *accord*. *Iascone ex rel. Isacone v. Conejo Valley Unified School District*, 15 F. App'x. 401, 404 (9th Cir. 2001) (unpublished).

The need for thorough evaluation is all the more pressing in qualified immunity appeals due to the often fact-intensive nature of the question the court system must answer, and the fact that officers "are entitled to a thorough determination of their claim[s]

of qualified immunity if that immunity is to mean anything at all." *Solomon v. Petray*, 699 F.3d 1034, 1039 (8th Cir. 2012). Indeed, Deputy Russell *did* suffer by virtue of the Ninth Circuit's failure to seriously inquire into the facts and circumstances at issue, in the same way that the state actors in the above-listed cases suffered by their respective District Courts' failure to assess the qualified immunity defense in the first instance. That alone merits the Court intervening to reverse, or at least review, the Ninth Circuit panel's decision. But, as it were, this Court has *not* shied away from remanding cases back to the Circuit Courts for more thorough factual evaluations, as shown recently by its decision in another excessive force case, *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2021).

In *Lombardo*, the Eighth Circuit affirmed a District Court's grant of summary judgment where the District Court found the officers' use of force not excessive. *Id.* at 2241. The Court granted certiorari to review, taking particular note that the Eighth Circuit appeared to conclude that, based on Circuit precedent, the use of a prone restraint was "*per se* constitutional so long as an individual appears to resist officers' efforts to subdue him." *Ibid.* Given that this apparent holding seemed to minimize facts that could have distinguished the relied-on precedent and appeared important under the a recent excessive-force opinion (*Kingsley v. Hendrickson*, 576 U.S. 389 (2015)), the Court vacated the judgment and remanded the case to give the Eighth Circuit "the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering" the Court's questions. *Id.* at 2242; *see also City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503-04 (2019) (vacating a denial of

qualified immunity where the Circuit Court failed to "ask[] whether clearly established law prohibit the officers from stopping and taking down a man *in these circumstances*") (emphasis added).

The Ninth Circuit's limited opinion here in no sense fulfills the court system's obligation to thoroughly assess Deputy Russell's qualified immunity defense. *See* App.2a-App.3a. The Ninth Circuit flatly refused to acknowledge important, undisputed facts about the "totality of circumstances" facing Deputy Russell at the time—such as the fact that the caller advised that she'd had her nose broken in a domestic violence incident. *See* App.12a. Moreover, the Ninth Circuit made little effort to apply the Court's settled excessive-force legal framework to the facts it *did* find. *See* App.2a-App.3a.

Though the order appealed dealt only with the clearly established prong of qualified immunity, a full-throated factual evaluation of the present circumstances is crucial to determining whether the law was clearly established in the same circumstances. *See*, *e.g.*, *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 365 (E.D.N.Y. 1994) ("Inquiry into whether a right is clearly established cannot stop at a generalized level of fact . . . [a]n evaluation of the state of the law at the time of the official action in light of the particular factual circumstances of the case is required.") (citing *Anderson*, 483 U.S. at 640); *see also* Section II, *supra*, at 13. As such, it cannot be that the Ninth Circuit's opinion satisfies the Court's hinted-at preference for lower courts to thoroughly evaluate and discuss the questions before them. *See Lombardo*, 141 S. Ct. at 2422.

The requirement for fact-laden legal opinions is fundamentally important in the qualified immunity

context. It is as important for the public to have a robust qualified immunity regime—including what is and what is constitutional—as it for law enforcement. The Eleventh Circuit once aptly stated that "a court must craft its orders so that those who seek to obey may know precisely what the court intends to forbid." *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1411 (11th Cir. 1998). That opinion was in the context of preliminary injunctions, but in a realm where adjudications of immunity operate in the same conduct-defining way, the sentiment makes just as much sense. As such, the Court should grant certiorari and, at the very least, vacate the Ninth Circuit's ruling and remand it for further consideration.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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