No. 23-35207

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Eleaqia McCrae,

Plaintiff-Appellant,

v.

City of Salem and **Robert Johnston**,

Defendants-Appellees.

On appeal from the United States District Court
for the District of Oregon
Case No. 6:20-cv-1489-IM
Hon. Karin J. Immergut

APPELLANT ELEAQIA MCCRAE'S OPENING BRIEF

Kevin Brague
THE BRAGUE LAW FIRM
4504 S. Corbett Avenue
Suite 250
Portland, Oregon 97239
(503) 922-2243

Athul K. Acharya
PUBLIC ACCOUNTABILITY
P.O. Box 14672
Portland, Oregon 97293
(503) 383-9492

Counsel for Plaintiff-Appellant
October 11, 2023

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STATEMENT OF JURISDICTION

Plaintiff Eleaqia McCrae appeals two of the district court's decisions: (1) its decision granting judgment as a matter of law for Defendant Robert Johnston despite the jury verdict in her favor, 1-ER-3, and (2) its decision granting Defendants' motion in limine to dismiss her negligence claim against Defendant City of Salem, 1-ER-39–40.

The district court had jurisdiction over this federal civil-rights action under 28 U.S.C. § 1331. It issued its final judgment on March 21, 2023. 1-ER-2. McCrae timely appealed the same day. 5-ER-1008; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

A jury found that Robert Johnston shot Eleaqia McCrae in the eye with a "Stinger" rubber bullet. It found that he used excessive force, that he permanently impaired her vision, and that she was entitled to over a million dollars in damages. Johnston did not challenge these findings when he moved for judgment as a matter of law.

Instead, he argued that even on the jury's view of the facts he was entitled to qualified immunity. The district court agreed and entered judgment in his favor. It based its decision primarily on the jury's special finding that even though Johnston shot McCrae, he hadn't "targeted" her. It assumed that if Johnston hadn't targeted McCrae, he must have "skip-fired" the round, or bounced it off the ground in a common technique for dispersing a crowd with minimal injury.

But that assumption conflicts with the rest of the jury's findings and with the evidence. Johnston testified with exceptional clarity that if he had skip-fired the round, it would've had "literally zero chance" of hitting McCrae in the eye. The jury found that it *did* hit McCrae in the eye, which means he couldn't have skip-fired it. In fact, taking the jury's findings as true and drawing inferences in McCrae's favor, only one set of facts is possible: Johnston "direct-fired" the round—shot it into the crowd at head height—without targeting McCrae in particular.

Under that premise, Johnston is not entitled to immunity. It has long been clearly established that an officer need not target the person

he shoots to be liable to her under the Fourth Amendment. Put differently, even if Johnston didn't aim at McCrae, he did use unreasonable force and he did hit her, so he is liable to her.

In rejecting that conclusion, the district court failed to accord the jury's verdict the deference it was due. Its other bases for granting qualified immunity were riddled with the same error. It found that the crowd was violent, even though the only uncontroverted testimony was that a few plastic bottles were thrown. It found that the police offered multiple warnings, even though police never warned attendees they would be subject to force if they didn't disperse. And it found that the police faced a public-safety exigency—the protesters' imminent occupation of a critical bridge—even though any exigency had dissipated long before Johnston fired his weapon.

All in all, when the evidence is viewed and inferences are drawn in favor of the jury's verdict, the force Johnston used was excessive under clearly established law. This Court should reverse and remand for entry of judgment in accordance with the verdict.

Issues Presented

1. **How the round was fired.** The jury found that Johnston shot McCrae in the eye with a rubber bullet. Johnston himself testified that a skip-fired round could never have bounced high enough to hit McCrae in the eye. Did the district court err in assuming that Johnston skip-fired the round anyway? Resolving disputes and drawing inferences in McCrae's favor, should it have instead inferred that he direct-fired it into the crowd at head height?

2. **Qualified immunity.** This Court has held since at least 2012 that maintaining public order during a tumultuous gathering does not justify shooting projectiles at the heads of non-threatening attendees without warning. McCrae and the protesters near her presented no threat and had committed minor offenses at most. Was McCrae's right not to be shot in the eye clearly established?

3. **Negligence.** The district court also ruled that McCrae could not try alternative theories of negligence and excessive force to a jury and dismissed her negligence claim on the eve of trial, even though both theories survived summary judgment. Should McCrae have been permitted to argue that if Johnston didn't shoot her intentionally, he shot her negligently?

MEDIA GUIDES

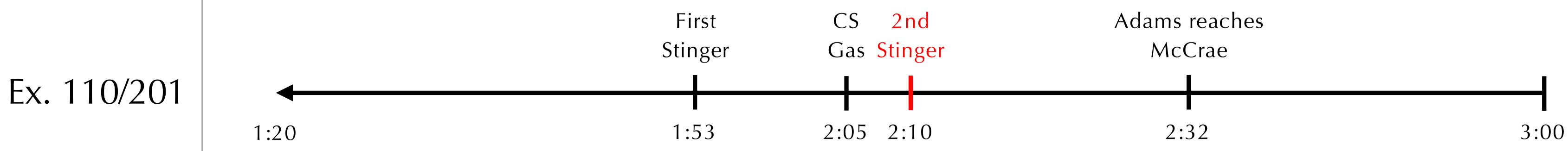
1. Exhibits

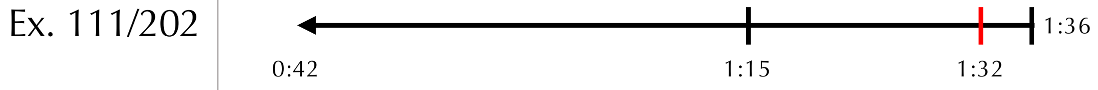
The following video and audio files are on the USB drive submitted to the Court.

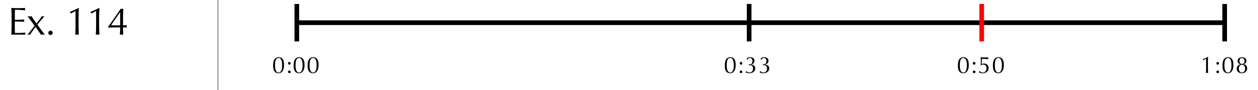
Exhibit No.	Description
110/201	GoPro video shot by Officer Adams
111/202	*Salem News Journal* clip
112	Video 1 shot by legal observer Carrie Elmore
113	Video 2 shot by Elmore
114	Video 3 shot by Elmore
204	"View From the Back Video" (*see* Dist. Ct. Dkt. 87 at 8)
207	Police radio-traffic audio recording

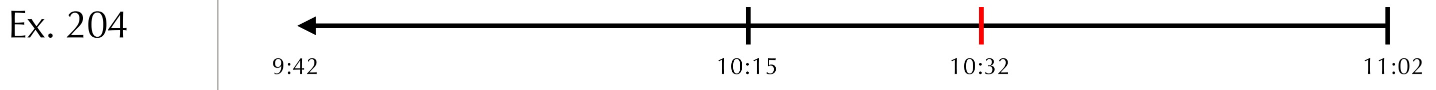
2. Timeline

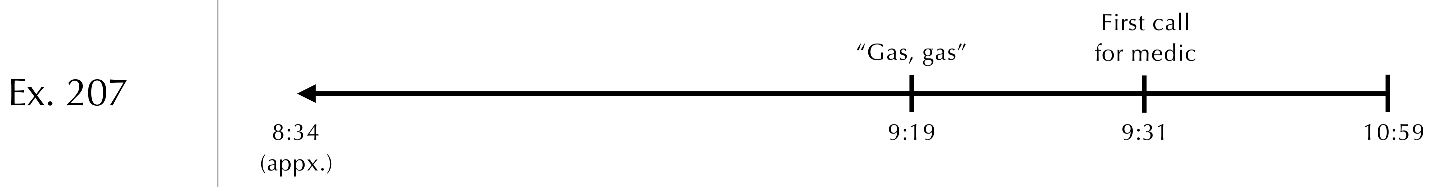
The following chart helps synchronize the media exhibits above. Each video in it contains two identical, consecutive bangs, 17 seconds apart. Johnston testified that the first bang was his first 40 mm Stinger shot, so it is labeled "First Stinger." 2-ER-194. McCrae was shot immediately after the second bang, and the jury found that Johnston shot her, so that bang is labeled "2nd Stinger." Ex. 110/201 at 2:08–11; 2-ER-195–96; 5-ER-933.


Ex. 110/201
First
Stinger
CS
Gas
2nd
Stinger
Adams reaches
McCrae
1:20
1:53
2:05
2:10
2:32
3:00


Ex. 111/202
0:42
1:15
1:32
1:36


Ex. 114
0:00
0:33
0:50
1:08


Ex. 204
9:42
10:15
10:32
11:02


Ex. 207
“Gas, gas”
First call
for medic
8:34
(appx.)
9:19
9:31
10:59

STATEMENT OF THE CASE[1]

When Eleaqia McCrae and her friends from school found themselves facing a wall of police arrayed in a "skirmish line," they felt confused. 2-ER-252; 3-ER-443; 3-ER-434. They had been peacefully protesting the murder of George Floyd, and the police had given them a wide berth all evening. 3-ER-435–37; 2-ER-289–90. "[E]verybody was pretty grateful that they were just leaving us be," said McCrae. 3-ER-440. And in turn, those marching also sought to avoid confrontation. 2-ER-106. So when they saw the police skirmish line, they wondered: "Why are they here? What's going on?" 3-ER-443.

A few minutes later, Officer Robert Johnston shot McCrae in the eye. 5-ER-933.

1. Protesters gather in Salem and march peacefully to protest the murder of George Floyd.

The protest began organically on social media. 2-ER-265; 3-ER-434–35. No one organized it or sought a permit; they just gathered at the state Capitol, made signs, cheered, chanted, hugged each other, and waved at passers-by. 3-ER-435; 3-ER-589; 2-ER-101; 2-ER-289. There was "a lot of support and beauty." 2-ER-289. One attendee

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[1] The following account construes the evidence at trial in the light most favorable to the jury's verdict, as required on a renewed motion for judgment as a matter of law. *See infra* pp. 22–24. For some key issues, however, both sides' versions are discussed.

called it "one of the most beautiful things [she'd] ever experienced." 2-ER-320.

McCrae went with her sister, Syvon Adams.[2] 2-ER-100. As the sun began to set, the crowd walked down to the riverfront and onto the Center Street Bridge, where they "took a knee for George Floyd." 2-ER-102; 3-ER-436; 2-ER-290. They knelt silently for "the whole time that he was held down by the police." 2-ER-290; 3-ER-436. Then they returned to the Capitol. 3-ER-436–37.

To their surprise, the Salem police didn't try to stop the protesters or prevent them from marching. *Id.*; 2-ER-270–71. They didn't tell them they were violating traffic laws. *Id.* They didn't try to order them off the bridge—in fact, they blocked traffic for them. *Id.* So, as McCrae recalled later, everyone was "pretty grateful." 3-ER-440.

And they were peaceful. Syvon explained that those gathered were "adamant" the protest remain civil and nonviolent. 2-ER-105. If anyone "seemed like they wanted to start something," she testified, "they were shut down immediately." *Id.* "Our whole goal is to stay peaceful," they would remind each other. *Id.* "We don't want to start anything." *Id.* In short, the crowd policed itself.

It worked, too. From the Capitol to the bridge and back, there was no "violence, disturbance, [or] property damage." 2-ER-105; 3-

[2] Because there is also an Officer Mike Adams in this case, this brief refers to Syvon by her first name, and the officer as Officer Adams.

ER-439–40. There were no "interactions between the crowd and the Salem Police Department." 2-ER-264. The only "disturbance" was caused by a driver, not a protester. *See* 3-ER-601. One officer later wrote that even though the march was "un-permitted at [its] inception," police allowed it to proceed "due to the fact they were peaceful." 4-ER-921.

2. The protesters are met by a police skirmish line.

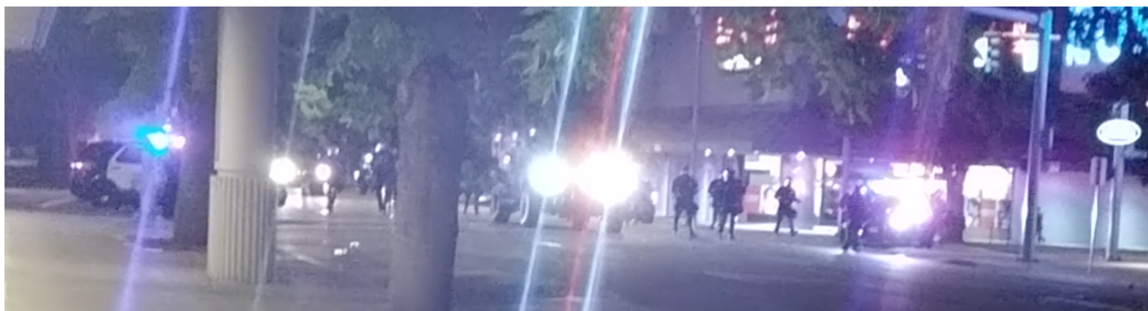
Back at the Capitol, the protesters drank water and ate snacks. 2-ER-104. They knelt or lay down in the street to "show[] just how defenseless George Floyd was." 3-ER-439. Then they began to march again. 2-ER-105. Again, they marched peacefully. 2-ER-291. No one broke any windows or caused other property damage; no one suggested that they "burn, loot, riot,[or] anything like that." 2-ER-268; 2-ER-274; 2-ER-291; *cf.* 2-ER-208.

Unlike the last march, this one was more aimless. 2-ER-106. But there were more police officers in the adjacent streets now, and the protesters felt "corral[ed]." *Id.* Trying to avoid an encounter, the crowd ended up turning west onto Center Street. *Id.* They hadn't planned to return to the bridge, but they seemed headed that way. 2-ER-266.

The Center Street Bridge is the fastest way (and one of the only ways) for residents of West Salem to reach downtown Salem. 3-ER-

593–94. It is "critical infrastructure." 3-ER-595. So even though police had "[no] information" that the crowd planned to return to the bridge, they staged at a parking lot nearby. 3-ER-595; 3-ER-619. If the march approached, they planned to block the road with a "skirmish line" a few blocks away. 3-ER-597. As McCrae's expert testified, that was a "reasonable decision." 3-ER-525.

And that's just what they did. Two squads of riot police—twenty-five to thirty armor-clad officers, a few SUVs, plus an armored vehicle known as a "BearCat"—formed a line and blocked off the street. 3-ER-598–600; 3-ER-606. Assembled in formation, they waited for the protesters to arrive:



Ex. 112 at 2:15; 2-ER-106; *see also* Ex. 111/202 at 1:00 (from behind).

3. After a five-minute standstill, the police march on the crowd and start firing.

As protesters reached the intersection one block east of the skirmish line, police declared an unlawful assembly using a long-range acoustic device (LRAD) on the armored vehicle. 4-ER-931 at 21:51:36–21:52:02; Ex. 204 at 4:04. The crowd stopped at the other

end of the block. *See* Ex. 110/201 at 0:00. They knelt to show they posed "no threat." 3-ER-445. Then they stood, and the people in front linked arms in solidarity. 3-ER-445–46; 2-ER-107. McCrae and Syvon found themselves in this group. 2-ER-107.

This standstill continued for nearly five minutes.[3] Then officers began to advance on the crowd, and a minute after that, Johnston fired his first shot. Ex. 110/201 at 0:46–1:53. At trial, the parties "hotly contested" what happened during those six minutes. 1-ER-16. The evidence focused on two questions: Were the protesters violent? Did the police warn them before using force?

The protesters' behavior. The "first thing" the protesters did when they saw the police was remind each other to "stay peaceful." 2-ER-107. "Let's just stay calm," they yelled. 3-ER-445. They continued to police themselves. When some interlopers arrived with eggs in their hands, members of the crowd hectored them into abandoning their plans. 2-ER-291; 2-ER-297; 2-ER-321. Elsewhere, an individual tried to move to the front of the crowd to throw a water bottle, but other protesters surrounded him, took it away, and expelled

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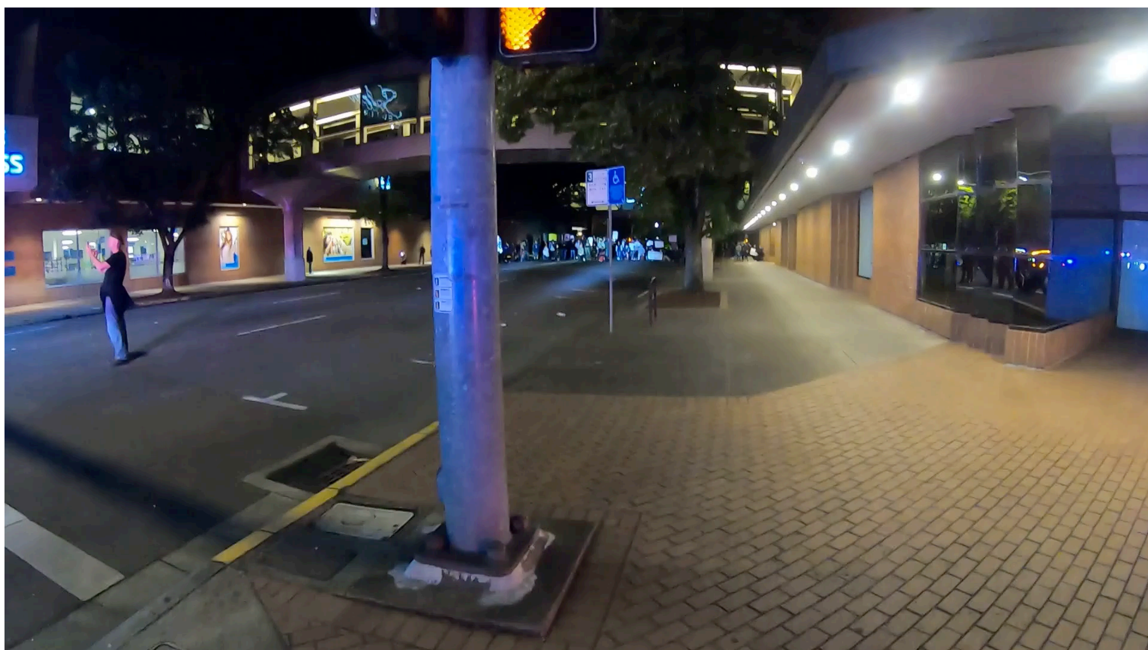
[3] In Exhibit 204, about six minutes pass between the beginning of the announcements (at 4:04) and the sound of Johnston's first shot (at 10:15). In Exhibit 110/201, Johnston's first shot is at 1:53, so timepoint 0:46, when the officers begin to advance, is equivalent to 9:08 in Exhibit 204—in other words, about five minutes after the announcements begin. The media timeline on page 7 of this brief helps synchronize the critical videos in this case.

him from the group. 2-ER-111. "[I]f you're going to do that kind of stuff," they told him, "[y]ou need to go." *Id.*

Not all their efforts were successful. One plastic water bottle thrown from the back landed a few feet in front of Syvon, but "very far from the police." 2-ER-111. Another flew horizontally across the crowd. *Id.* McCrae saw other plastic bottles land "just in front of" her, but "comical[ly]" far from the police. 3-ER-447–48. Still, in the main, "[t]he crowd remained peaceful the entire time." 2-ER-267; *cf.* 2-ER-208–09. Everyone "kind of just [stood] there holding their signs," waiting to see what the police would do. 2-ER-272.

About four minutes into the standoff, Officer Adams turned on his camera. 4-ER-682–83; Ex. 110/201; *see supra* n.3 (regarding timing). In his retelling, he began recording when the crowd started throwing projectiles. 4-ER-682–83. He saw a "water bottle coming towards [his] feet" and "wanted to start capturing that." *Id.*; 4-ER-686. Another officer testified that once the projectiles began, police were under "continuous onslaught." 4-ER-696.

Yet Officer Adams's video captures no onslaught. It opens with the protesters still nearly a full city block away:



Ex. 110/201 at 0:00. A few items are in the street, but none is more than halfway down the block. The air is free of projectiles and remains so for nearly two minutes. *Id.* at 0:00–1:53. As one protester seemingly trying to reason with the officers says, "no one is throwing anything." *Id.* at 0:12–15.

Adams and several other officers also testified that "[p]rior to advancing," a "mortar" or an "explosive" was thrown at the officers and "exploded underneath" the armored vehicle. 4-ER-681; 4-ER-693–94; 4-ER-671; 4-ER-663; 3-ER-637. Officer Grant Foster, in particular, testified at length. He recounted how "vividly" he remembered the missile coming at him, how he "worried" for his safety, how he stood his ground because he had an obligation to "stay on the line." 4-ER-694.

No mortar is visible on video. *Cf.* Ex. 110/201 at 0:00–46. The defense offered no physical evidence of one at trial—no photos of a singed vehicle, no fragments of exploded ordnance. Several minutes *after* Johnston shot McCrae, the radio log mentions "fireworks." 4-ER-931 at 22:02:02; 3-ER-621. But Lieutenant Jason VanMeter, the commanding officer on the scene, testified that he saw no fireworks before Johnston shot McCrae. 3-ER-621; 3-ER-603; *see* 3-ER-585. And as for Johnston, he saw only "a glass bottle and some water bottles." 2-ER-209. (More on that glass bottle shortly.)

In fact, VanMeter and Johnston's testimony casts doubt on a panoply of projectiles the other officers claimed to have seen. One testified that he saw "mortars," "fireworks," and "water bottles that had frozen water with nails sticking out." 3-ER-637. (On cross-examination, he recanted the frozen-nail bottle. 4-ER-646.) Two others testified that they were hit with eggs.[4] But VanMeter saw only "a rock," "a glass bottle," and "a lot of water bottles." 3-ER-603. Johnston didn't even see the rock. *See* 2-ER-209. No rocks appear on video, either.

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[4] Officer Garland claimed that an egg hit the BearCat's windshield. 4-ER-671. But when cross-examined, he admitted that the videos from before McCrae was shot showed no such thing. 4-ER-672. Officer Foster said an egg hit his helmet. 4-ER-694. But he admitted in cross-examination that it could've happened at any point during the night. 4-ER-696–97.

As for that glass bottle, all of McCrae's witnesses repudiated it. "Oh, God, no," said one protester, when asked whether she'd seen a glass bottle. 2-ER-292. "[O]nly water bottles. Plastic ones," said McCrae. 3-ER-448; *see also* 2-ER-248; 2-ER-315.

Still, two moments in the videos bear mention. First, in the seconds before Johnston begins shooting, the videos do contain the sound of breaking glass. Ex. 110/201 at 1:50–51; Ex. 114 at 0:30. But Officer Adams's video, which has a clear view of the entire crowd, shows no projectile. Ex. 110/201 at 1:46–52. Whatever the sound may have been, it was not a glass bottle launched at police. Second, once the officers are near the crowd, one video does show a bottle landing at the wheel of the BearCat. Ex. 114 at 0:33–34. But any sound it may have made is partially obscured by Johnston's first shot. *See id.*; 2-ER-198. The defense insisted it was glass, but as Syvon said after watching the video a few times: "It could have been glass, but it also could have been water just as equally." 2-ER-128.

So all in all—once evidence that was contradicted, impeached, or disputed is factored out—the only evidence from the beginning of the encounter until Johnston shot McCrae that the protesters posed a threat was that a few of them threw some plastic water bottles. *See* 3-ER-448.

The police's announcements. The police declared several times that the protest was an unlawful assembly and ordered attendees to disperse. The exact wording changed slightly, but the substance was

always the same: "This is the Salem Police Department. This has been declared an unlawful assembly. You need to leave. Time to go home. You're committing the crime of disorderly conduct. If you do not leave, you'll be subject to arrest. Turn around and walk away. Leave now." *E.g.*, Ex. 110/201 at 1:07.[5]

In between these announcements, police sounded the alarm on the LRAD. *E.g.*, Ex. 110/201 at 1:24–35. The LRAD is "both a sound speaker and . . . an audio weapon at very high volumes." 2-ER-246.[6] When the videos were played at trial, one juror asked that the volume be turned down "three notches." 2-ER-314. Several witnesses testified that they could barely hear what police said because the alarm was so loud that it made them "disorient[ed]" and left their ears "ringing and blaring." 3-ER-446; 2-ER-305; 2-ER-311; 2-ER-325.

But they did hear bits and pieces. Syvon heard police tell the protesters to "turn around and go home," and that they could be arrested if they remained. 2-ER-107–08; 2-ER-117. Another protester heard the words "disorderly conduct." 2-ER-307. McCrae "eventually" heard the unlawful assembly announcement. 3-ER-459.

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[5] About halfway through, the LRAD operator added: "Stop throwing stuff." Ex. 204 at 7:57. "No one's throwing anything," responded a protester. Ex. 110/201 at 0:02.

[6] In fact, the Second Circuit has held that use of the LRAD itself can be excessive force because it can cause pain and hearing loss. *Edrei v. Maguire*, 892 F.3d 525, 543–44 (2d Cir. 2018).

But no one heard a warning that police would shoot, "that munitions would be used," or anything of that nature. 2-ER-313; 3-ER-459; 3-ER-462. No such warning is audible in Exhibit 204, which includes all the announcements the police made. Ex. 204 at 4:04–10:11. The closest police came was warning protesters that they could be arrested for disorderly conduct. *See, e.g.*, Ex. 110/201 at 1:07.

*   *   *

After five minutes of standing off, the officers moved forward a few steps. Ex. 110/201 at 0:46–50; *see supra* n.3. The protesters, in turn, took a few steps back. 2-ER-115. With one last announcement—but still without warning protesters that they would be gassed or shot—officers began marching forward at a "route step." Ex. 110/201 at 1:39; 3-ER-610. Twenty-four seconds in, Johnston fired his first round of "Stinger" rubber bullets. Ex. 110/201 at 1:53; Ex. 114 at 0:33; 2-ER-198.

4. Officer Johnston shoots McCrae in the eye.

A Stinger round is a 40 mm cartridge that contains eighteen rubber bullets. 3-ER-517. They exit the muzzle at 325 feet per second, or "about 228 miles per hour." *Id.* They spread out like a shotgun blast, so they're typically used to "address an area" of people rather than individuals. 4-ER-661; 4-ER-765. They can be "skip-fire[d]"—bounced off the ground—or "direct-fired"—aimed directly at

the intended area. 4-ER-657–58; 2-ER-146; 4-ER-900. If they're skip-fired, they lose much of their "kinetic energy" and thus "hit lower." 4-ER-659; 4-ER-767; 2-ER-161. Unless the skip surface is "irregular"—gravel, for instance, rather than asphalt—they "never" go above waist height. 2-ER-161; 2-ER-169. Johnston was exceptionally clear on this: A Stinger bullet skip-fired off asphalt would have "literally zero chance" of hitting someone above the waist. 2-ER-161.

Johnston did skip-fire that first round of Stingers. The bullets "skid[ded] across the ground" and hit Syvon in her calves and thighs. 2-ER-108. He "immediately" reloaded his 40 mm launcher with more Stingers. 2-ER-189–90. He was "locked and ready to go." 2-ER-204.

About ten seconds later, he tossed a canister of CS gas, commonly known as "tear gas," into the crowd. Ex. 114 at 0:41–0:44; 2-ER-200; *see* 2-ER-307.

Six to nine seconds after that, he fired a second round of Stingers and hit McCrae in the eye. Ex. 110/201 at 2:10; 2-ER-308. McCrae's head "flew backwards" and she collapsed into a nearby planter. 2-ER-299; 3-ER-449–50. She heard someone nearby say to her: "That's what you fucking get." 3-ER-450. When she opened her eyes, the only people she saw were police. 3-ER-451.

5. McCrae's vision is permanently damaged and her life forever changed.

Johnston's rubber bullet scratched McCrae's cornea and tore a hole in the center of her retina. 3-ER-468; 3-ER-398; 3-ER-400. That sort of injury can rob a person of her central vision. 3-ER-400. McCrae's ophthalmologist monitored it closely to see if the hole would heal by itself, but it didn't. 3-ER-402–03. So McCrae underwent surgery to repair it. *Id.*

After surgery, her vision in the injured eye eventually stabilized at about 20/75. 3-ER-407. That means that at 20 feet, she sees what the average person can see at 75 feet.[7] Even the vision she has is "squiggly," like a "funhouse mirror." 3-ER-409; 3-ER-557. She can't "always [see] what's in front of her," she misses her mouth when she's eating, and sometimes she reaches for things that aren't there. 3-ER-372; 3-ER-425.

Before Johnston shot her in the eye, McCrae was a track star. She'd been on the varsity team all four years of high school and had gotten letters of interest from Yale, the University of North Carolina, and other Division I schools. 3-ER-430; 3-ER-433; 3-ER-418. She was thoughtful about her choices. She chose to attend community college on a full scholarship first, reasoning that if she did well in

[7] Celia Vimont, *What Does 20/20 Vision Mean?*, American Academy of Ophthalmology (Jan. 28, 2022), https://www.aao.org/eye-health/tips-prevention/what-does-20-20-vision-mean.

collegiate track there, she could transfer to a four-year school. 3-ER-367; 3-ER-431–32.

Now, she can't see where she's going well enough to jump reliably, much less competitively. 3-ER-561–62. When she looks down "to see if [she's] going to make it," she's "way off." *Id.* She has not engaged in any track and field events since her injury. 2-ER-119. And the damage isn't limited to her athletic career. Her ophthalmologist testified that she will develop a cataract in her 30s instead of her 70s. 3-ER-407. Her retina is more likely to detach, and she is more likely to develop glaucoma. *Id.* And while her friends used to see her as "ray of sunshine," now she suffers from anxiety, tremors, and nightmares. 2-ER-117; 3-ER-366.

6. The jury awards McCrae over a million dollars in damages.

At trial, Johnston disputed all the evidence above. He argued that McCrae was hit not by his Stinger bullet but by a protester's unidentified projectile. 3-ER-637–38; 4-ER-818. He argued that he couldn't have hit McCrae because he only ever skip-fired Stinger bullets, and skip-fired Stingers don't hit above the waist. 2-ER-203; 2-ER-169; 4-ER-819. He argued that the crowd was noncompliant and throwing "projectiles," and that as a result he was justified in dispersing them with rubber bullets and tear gas. 2-ER-179–80; 4-ER-826–27. And he

argued that McCrae would never have had an athletic career anyway. 4-ER-837; *cf.* 3-ER-428–30; 3-ER-433.

On each of these points, the jury sided with McCrae. It found that Johnston "shot [McCrae] in the eye." 5-ER-933. It found that he "violated her Fourth Amendment right not to be subjected to excessive force." *Id.* It did find that she failed to prove Johnston had "targeted" her, and accordingly it rejected her First Amendment claim. *Id.* But it found for McCrae on her Fourth Amendment claim and awarded her $1,050,000 in damages. 5-ER-934.

7. The district court grants Johnston qualified immunity.

After trial, Johnston moved for entry of judgment in his favor under Federal Rule of Civil Procedure 50(b). 1-ER-3. He argued that despite the verdict, he was entitled to qualified immunity. *Id.* The district court granted his motion and entered judgment against McCrae. 1-ER-34–35; 1-ER-2.

The linchpin of the district court's decision was its factual conclusion that "Officer Johnston fired the Stinger round toward the ground in front of the crowd at large as the weapon is designed: for dispersal." 1-ER-33–34; 1-ER-19–20. It held that Stinger bullets, so used, are not deadly force. 1-ER-33–34. Based on that premise, it also held that no controlling precedent involved use of a similar weapon. 1-ER-28–29. And it held that given the behavior of the crowd, the

critical nature of the bridge, and the warnings offered, "a reasonable officer would not have been on notice that using the Stinger round in accordance with the officer's training" would violate the Fourth Amendment. 1-ER-30–34.

McCrae appeals.

STANDARD OF REVIEW

This Court reviews a post-verdict grant of qualified immunity de novo. *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 452–53 (9th Cir. 2013). It does not defer to the district court's decision, but it does "give significant deference to the jury's verdict" and to interpretations of the evidence that support the jury's verdict. *Id.* at 453.

Ordinarily, on a renewed motion for judgment as a matter of law, the question is whether the jury had a "legally sufficient evidentiary basis" for its verdict. Fed. R. Civ. P. 50(a)(1). This case is in a slightly different posture. Johnston didn't challenge the evidentiary basis for the jury's verdict; he argued only that he was entitled to qualified immunity despite the verdict. 1-ER-3–4; *see also* Dist. Ct. Dkt. 115 at 2. That is, he accepted the jury's resolution of "disputed factual issues" and argued that even under the jury's view of the facts, he had not violated any clearly established constitutional right. *See Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017); *cf. A.D.*, 712 F.3d at 458–59 (arising in a similar posture).

A court hearing such a motion must "apply the qualified immunity framework to the facts that the jury found." *A.D.*, 712 F.3d at 459. Where the jury found specific facts in response to special interrogatories, those facts govern. *Tan Lam v. City of Los Banos*, 976 F.3d 986, 1000 (9th Cir. 2020). For the "remaining factual disputes," the standard is the same as for evidentiary sufficiency: The court construes the evidence and draws all reasonable inferences in favor of the nonmoving party. *Id.* at 997, 1000 (quotation marks omitted); *see also Morales*, 873 F.3d at 826. "[D]eference to the jury's view of the facts persists throughout each prong of the qualified immunity inquiry." *A.D.*, 712 F.3d at 456 (quotation marks omitted).

That means the court "give[s] credence" to all evidence favoring the party that prevailed at trial. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000). Other evidence comes in only if it is "uncontradicted," "unimpeached," and offered by "disinterested witnesses." *Id.* (quotation marks omitted). Put differently, the court must "disregard" all evidence favorable to the moving party that the jury was not required to believe. *Tan Lam*, 976 F.3d at 995 (quoting *Reeves*, 530 U.S. at 150–51). In short, once a party prevails at trial, she is entitled to "the full benefit of [her] proof." *Ace v. Aetna Life Ins.*, 139 F.3d 1241, 1247 (9th Cir. 1998) (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)).

The court must also avoid interpretations of the evidence that create inconsistencies among the jury's findings. Under the Seventh Amendment's bar on reexamining facts tried to a jury, the court must accept "any reasonable [internally consistent] interpretation" of the verdict form. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1038 (9th Cir. 2003) (quoting *Gallick v. Baltimore & O.R.R. Co.*, 372 U.S. 108, 119 (1963)). If necessary, it must "reconcil[e] the jury's findings 'by exegesis.'" *Id.* Courts do not "lightly cast aside the solemnity of the jury's verdict," so "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1015 (9th Cir. 2008) (quotation marks omitted); *Tan Lam*, 976 F.3d at 995 (quotation marks omitted).

SUMMARY OF ARGUMENT

1. Qualified immunity applies only when the law is unclear. The law is not unclear just because a case presents "novel factual circumstances." Existing caselaw can apply to new situations with "obvious clarity." *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam) (quotation marks omitted). The touchstone is whether the officer had "fair notice" that what he was doing was unlawful.

2. The law here was clear: Johnston violated McCrae's right not to be shot in the eye at a peaceful protest.

Johnston shot a round of rubber bullets at protesters' heads and hit McCrae in the eye. In a 2012 case, this Court held unlawful a nearly identical use of force and denied qualified immunity. *Nelson v. City of Davis*, 685 F.3d 867, 874–84 (9th Cir. 2012). As in that case, McCrae posed no threat and had committed minor offenses at most; the same was true of the people near her; neither Johnston nor any other officer offered a warning that they would use force; and Johnston had ample alternatives to shooting at protesters' heads.

The district court reached the opposite conclusion by assuming that Johnston had actually skip-fired the round at the ground rather than at protesters' heads. That assumption goes against the evidence, the jury's special findings, and the jury's general verdict. On the jury's view of the facts, *Nelson* gave Johnston more than fair warning that what he was doing was unlawful, so this Court should reverse and reinstate the jury's verdict.

3. The district court held that McCrae could not try alternative theories of negligence and excessive force to a jury because the two theories have different mental-state requirements. But both survived summary judgment, which necessarily meant that the evidence allowed either inference. The way to close that gap is by having the *jury* elect which inference it believes. In forcing McCrae to elect instead, the district court repeated a common error in the District of Oregon's jurisprudence. The Court should reverse for this reason as well.

ARGUMENT

Qualified immunity is about "fair notice." *Wright v. Beck*, 981 F.3d 719, 734 (9th Cir. 2020) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). It shields government agents from liability for violating constitutional rights that weren't "clearly established" at the time of the violation. *Camreta v. Greene*, 563 U.S. 692, 705 (2011). It consists of two prongs: Whether the official violated a right and whether that right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Here, the jury found that Johnston violated McCrae's Fourth Amendment right against excessive force. 5-ER-933. Its verdict "is sufficient to deny him qualified immunity on [the first] prong of the analysis," so the only question for the Court is whether that right was clearly established. *See A.D.*, 712 F.3d at 456. It was: This Court's controlling precedents gave Johnston ample notice that firing less-lethal rubber bullets at the heads of nonthreatening members of a largely peaceful crowd was an excessive use of force.

1. Qualified immunity applies only when the law is unclear.

To determine whether an officer violated clearly established law, the 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 warned lower courts against applying prior cases at a "high level of generality." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (quotation marks omitted). "[B]road pronouncements of an abstract right" and uncontroversial "constitutional truism[s]" do not suffice to clarify the "outer limits of lawful conduct." *Wright*, 981 F.3d at 734–35. In Fourth Amendment cases, courts may not simply reiterate the "general test for excessive force," hold that it is clearly established, and deny immunity. *Mullenix*, 577 U.S. at 13 (quotation marks omitted).

But the Court has also recently reiterated that even in novel factual circumstances, officials are not entitled to immunity if their conduct "obvious[ly]" or "egregious[ly]" violates the Constitution. *Taylor*, 141 S. Ct. at 54 (quotation marks omitted); *see also Wright*, 981 F.3d at 735 (similar). In excessive-force cases, that principle applies with especial vigor. *Bonivert v. City of Clarkston*, 883 F.3d 865, 872–73 (9th Cir. 2018). The constitutional standard for excessive force is "inevitably" fact-intensive, so if courts were to require a case with identical material facts, officers would "rarely, if ever, be held accountable" for using excessive force. *Id.* (quotation marks omitted). That is why this Court has underscored that officers who use unreasonable force can be on notice that their conduct violates clearly

established law "even in novel factual circumstances." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 745 (2002)).

2. The law here was clear: Johnston violated McCrae's right not to be shot in the eye at a peaceful protest.

When a police officer uses physical force, he must comply with the Fourth Amendment's prohibition on unreasonable seizures. *Villanueva v. California*, 986 F.3d 1158, 1169 (9th Cir. 2021). Using a level of force that is "'objectively [un]reasonable' in light of the facts and circumstances" violates the Fourth Amendment. *Rice v. Morehouse*, 989 F.3d 1112, 1121 (9th Cir. 2021) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). Whether a particular use of force is reasonable is a balancing test. *Id.* at 1124. It depends, on the one hand, on the type, amount, and severity of force the officer used; and on the other hand, on the officer's interest in using that much force. *Id.*; *Villanueva*, 986 F.3d at 1169.

2.1. Johnston used serious, life-changing, and perhaps deadly force.

The first question in the excessive-force analysis is what "quantum of force" Johnston used. *Glenn v. Washington Cnty.*, 673 F.3d 864, 871 (9th Cir. 2011). Johnston shot a round of "less-lethal" rubber bullets into a crowd at head height. He caused a serious, life-changing injury. This Court established decades ago that officers may not use such force

unless "a strong governmental interest compels the employment of such force." *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001). In fact, this Court has long held that such force is deadly force. *See Smith v. City of Hemet*, 394 F.3d 689, 705–06 (9th Cir. 2005) (en banc).

2.1.1. Johnston shot rubber bullets at protesters' heads and hit McCrae in the eye.

The jury found that Johnston shot McCrae in the eye, that he violated her Fourth Amendment rights, but that he didn't "target[]" her. 5-ER-933. Only one factual premise fits all three findings and also the evidence: Johnston direct-fired the Stinger round into the crowd at head height without aiming at McCrae in particular. He shot at protesters' heads and one of his bullets hit McCrae. Call this the "direct-fire" premise.

The direct-fire premise is a reasonable inference from the evidence. The manufacturer's specification sheet explains that Stingers can be direct-fired. 4-ER-900. Whether direct-fired or skip-fired, they travel in the direction of fire. 2-ER-177. When direct-fired, they travel farther because they do not "lose so much . . . kinetic energy" bouncing off the ground. 2-ER-160; 2-ER-177; *see* 4-ER-766–77. They have a maximum effective range of about 50 feet, and the video evidence shows that when the second Stinger was fired, the distance from the front of the skirmish line to McCrae was easily less than that. 4-ER-900; Ex. 114 at 2:10. So the evidence supports the direct-fire premise,

and the direct-fire premise interprets the evidence in line with the jury's findings that Johnston shot McCrae and violated her Fourth Amendment rights. Under the post-verdict evidentiary standard, the direct-fire premise is the right inference to draw. *See A.D.*, 712 F.3d at 456–57.

The district court drew a different inference. It assumed that Johnston skip-fired the round "towards the ground to disperse the crowd" and that an "errant" bullet bounced into the air and hit McCrae in the eye. 1-ER-30. Call this the skip-fire premise. The district court explained that it was adopting this premise based on the jury's no-targeting finding. 1-ER-19–20.

But Johnston's own testimony shows that the skip-fire premise cannot be true. During exercises, he explained, officers would affix a piece of paper at waist height to gauge how high they could get a skip-fired round to bounce. 2-ER-169. Johnston "never cleared the top of the paper." *Id.* His colleague concurred: The highest he'd seen a skip-fired Stinger bounce was "about two and a half feet." 4-ER-661. And the defense expert confirmed that the "highest" he would expect a skip-fired round to "hit somebody" was "in the legs." 4-ER-767; *see also* 4-ER-760.

McCrae is not a short person. In fact, she's "very tall compared to everybody else." 2-ER-109. Johnston himself testified that there was "literally zero chance" a skip-fired round could have bounced high

enough to hit her in the eye. 2-ER-161. Yet the jury found he did hit her in the eye. 5-ER-933. Only the direct-fire premise fits both that finding and the evidence.

It is also the only premise under which the jury's findings are internally consistent. Recall that the district court adopted the skip-fire premise as an interpretation of the jury's no-targeting finding. But if Johnston had skip-fired the Stingers at the crowd's shins, he might not have violated the Fourth Amendment at all. *See, e.g.*, *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994) (holding that use of "pain compliance techniques" under similar circumstances was reasonable). The jury found that he *did* violate McCrae's Fourth Amendment rights. 5-ER-933. So under the skip-fire premise, the two findings conflict. As a result, adopting the skip-fire premise "results in a collision with the Seventh Amendment." *Zhang*, 339 F.3d at 1038 (quotation marks omitted).

The direct-fire premise does not suffer from this defect. Shooting projectiles into a crowd, even without a specific target in mind, can still violate the Fourth Amendment rights of those hit. *Nelson*, 685 F.3d at 876–78; *see Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989) ("[A] seizure occurs even when an unintended person or thing is the object of

the detention or taking[.]").[8] In other words, it can be true that Johnston didn't target McCrae *and* that he violated her Fourth Amendment rights, but only if he direct-fired his Stingers into the crowd at head height without aiming at McCrae in particular.

In short, there is a readily available interpretation of the verdict sheet under which all three of the jury's findings—Johnston did shoot McCrae, he did violate her Fourth Amendment rights, but he didn't target her—are true. That interpretation also views the facts and draws inferences in McCrae's favor. *Cf A.D.*, 712 F.3d at 453. And so it is the interpretation that controls. No "exegesis" is required. *Cf. Zhang*, 339 F.3d at 1038 (quotation marks omitted). Johnston shot his second round of Stingers at protesters' heads, and one of his bullets hit McCrae.

2.1.2. This Court had clearly established that shooting rubber bullets into a crowd at head height was a serious—if not deadly—use of force.

Johnston's use of force is strikingly similar to that in *Nelson*. There, police shot Nelson in the eye with a pepperball—a small, less-lethal projectile fired at 350 to 380 feet per second. 685 F.3d at 873. Here, Johnston shot McCrae in the eye with a Stinger—a small, less-lethal projectile fired at 325 feet per second. 3-ER-517. Nelson had to

[8] Indeed, were the rule otherwise the Stinger would be uniquely insulated from Fourth Amendment scrutiny, because it is rarely shot with a specific individual in mind. *See* 4-ER-765.

endure surgery, suffered a permanent loss of visual acuity, lost his athletic scholarship, and was forced to withdraw from school. 685 F.3d at 874, 879. McCrae also had to endure surgery, suffered a permanent loss of visual acuity, lost her athletic scholarship, and was forced to withdraw from school. 3-ER-403–09; 3-ER-372; 3-ER-367. The officers in *Nelson* knew they risked causing serious injury because California's use-of-force guidelines instructed them not to shoot people in the head with pepperballs. 685 F.3d at 879. Johnston also knew he risked causing serious injury because Salem PD's use-of-force directives instructed him not to shoot people in the head with "flexible impact rounds," which include Stingers. 4-ER-896; 2-ER-156.

So *Nelson*'s analysis of the pepperball applies to Johnston's use of the Stinger in full: a "significant" degree of force that "risked causing serious harm" and which therefore must be "justified by substantial government interests." *See* 685 F.3d at 878–89, 885–86. The biggest difference is that the pepperball had a "dual nature"—it was both a projectile and a chemical irritant. *Id.* at 884–85. But *Nelson* explained that even considering the pepperball "as a purely projectile object," *Deorle* and other cases had clearly established that it was a serious use of force because of its "capacity for causing serious harm." *Id.* at 885 (emphasis omitted). Stinger bullets, especially when shot at the head, have the same "capacity." Johnston's use of a marginally "novel" weapon does not shield him from liability. *See id.* at 884 (quoting

Deorle, 272 F.3d at 1286). He had ample warning that *Nelson* would apply.

For that matter, Johnston had fair warning that this Court's deadly force precedents would apply. Force that "creates a substantial risk of causing death or serious bodily injury" is deadly force. *Smith*, 394 F.3d at 693, 705–06. In *Deorle*, this Court had held that a less-lethal beanbag round fired at the plaintiff's head "f[ell] short of deadly force," but only because the Court at that time used an "extremely high" standard out of line with the other circuits. 272 F.3d at 1280 & n.15, 1284–85. Four years later, in *Smith*, this Court sitting en banc adopted the more inclusive test for deadly force "employed by all other circuits that have defined the term." 394 F.3d at 705. So since 2005, officers in this circuit have had fair warning that force that creates a "substantial risk" of "serious bodily injury" is deadly force. *Id*.

Under that test, Johnston used deadly force. Just like a beanbag round, a rubber bullet might not normally "rip through soft tissue and bone" but it can "obviously . . . cause grave physical injury" when aimed at the head. *See Deorle*, 272 F.3d at 1279–80.[9] The Salem Police Department's use-of-force directives agree. They forbid officers to fire "flexible impact rounds" like Stingers at the head or neck. 4-ER-896; 2-ER-156. Such use, they explain, incurs an "unacceptable" risk of

[9] In fact, *Deorle* explained that the beanbag round at issue was "something akin to a rubber bullet." 272 F.3d at 1279 & n.13.

"death or serious physical injury." 4-ER-896. They warn officers, explicitly, that "[i]mpacts to any area that would substantially increase the probability of a fatality are to be considered as using deadly force[.]" *Id.*[10]

When Johnston shot McCrae in the head with a rubber bullet, he caused a serious, life-altering physical injury. *See supra* pp.19–20. Under the test clearly established in *Smith*, he used deadly force—an "unmatched" intrusion on McCrae's liberty. 394 F.3d at 693; *Longoria v. Pinal Cnty.*, 873 F.3d 699, 705 (9th Cir. 2017) (quotation marks omitted). It has long been clearly established that officers may not use deadly force unless a suspect poses a "threat of serious physical harm." *Longoria*, 873 F.3d at 709–10. McCrae undisputedly did not. 2-ER-163. That alone is enough to deny Johnston qualified immunity. The analysis should end there.

But even if it doesn't, McCrae's right to hold Johnston accountable doesn't turn on a taxonomy of force. "[A]ll force—lethal and non-lethal—must be justified by the need for the specific level of force employed." *Bryan v. MacPherson*, 630 F.3d 805, 825 (9th Cir.

[10] Police departments all over the country prohibit "head strikes with an impact weapon" unless "circumstances justify the use of deadly force." *See, e.g.*, *Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1162 (9th Cir. 2011) (cleaned up) (Los Angeles Sheriff's Department and Chicago Police Department policies); *Mercado v. City of Orlando*, 407 F.3d 1152, 1160 (11th Cir. 2005) (Orlando Police Department policy).

2010). Whether or not this Court calls Johnston's use of force "deadly," it was "capable of causing serious injury" and it did cause serious injury, so he must justify it with an equally serious need to use such force. *See Deorle*, 272 F.3d at 1284, 1280.

2.2. Shooting at protesters' heads was not justified by a commensurately serious state interest.

On the opposite side of the balance from the "type and amount" of force is the state's interest in using such force. *See Young*, 655 F.3d at 1161 (quotation marks omitted). The state's interest is evaluated under the totality of the circumstances, including the victim's conduct, whether "less intrusive alternatives" would have sufficed, and whether "proper warnings were given." *Rice*, 989 F.3d at 1121–22.

All McCrae had done was disobey the order to disperse, which weighs heavily in her favor. So too for the protesters near her. Neither they nor McCrae had done anything to justify a rubber bullet to the head without warning. And Johnston had plenty of alternatives open to him—including skip-firing the round as he had just done, or using a different, targetable round against specific threatening individuals. As a result, under clearly established law, he had no legitimate interest in direct-firing a round of rubber bullets at protesters' heads.

2.2.1. McCrae herself posed no threat and had committed minor offenses at most.

The classic factors that justify the use of force are the severity of the crime the plaintiff was suspected of committing, whether she posed an immediate threat to the safety of officers or others, and whether she was attempting to evade arrest. *Graham*, 490 U.S. at 396. On these factors, Johnston obviously could not have used significant force against McCrae. The police didn't arrest her, accuse her of committing a crime, or even give her a ticket. 3-ER-462. The *Graham* factors "weigh[] heavily" in her favor. *Nelson*, 685 F.3d at 879.

Johnston didn't dispute this at trial. When asked why McCrae was an "acceptable target," his only answer was that she "was in the crowd that was told to disperse." 2-ER-163. But failure to disperse is not a serious crime. *See, e.g.*, *Mattos v. Agarano*, 661 F.3d 433, 444 (9th Cir. 2011) (en banc) ("trespassing and obstructing a police officer were not severe crimes"); *see also Senn v. Smith*, 2022 WL 822198, at *2 (9th Cir. 2022). It justifies, "at most, only a minimal use of force." *Nelson*, 685 F.3d at 880. It could not justify a less-lethal round to the head.

2.2.2. The conduct of the protesters near McCrae also did not justify serious force, much less deadly force.

Although the plaintiff's own conduct is the "most important" factor, the excessive-force inquiry ultimately depends on the totality of the circumstances. *See Rice*, 989 F.3d at 1121 (quotation marks omitted). Accordingly, the behavior of the crowd was "hotly contested"

at trial and figured heavily in the district court's reasons for setting aside the jury's verdict. 1-ER-16–18; 1-ER-31–32.

But a crowd is a "they," not an "it." This Court clearly established in *Nelson* that the "general disorder" of a scene cannot legitimize the use of significant force against non-threatening individuals. 685 F.3d at 881. In *Nelson*, members of the crowd were "hurling both bottles and expletives at officers," but this Court held that because "Nelson and his companions were not among" the bottle-throwers, launching projectiles "towards them" was unreasonable. *Id.* at 883, 881. It follows that here, too, the question is whether Johnston reasonably perceived a threat from the people he fired at—the members of the crowd directly in front of him, not the crowd en masse. *See id.* at 880. And, as always, that question must be answered by construing the evidence and drawing inferences in McCrae's favor. *See Morales*, 873 F.3d at 826.

Johnston could not reasonably have perceived a threat from the people directly in front of him. As recounted in some detail above, although some officers testified they saw an astonishing variety of dangerous projectiles, Johnston did not. *See supra* pp.11–15; 2-ER-209. All he saw were plastic water bottles and one glass bottle—and McCrae's witnesses vigorously disputed the glass bottle. 2-ER-209; *e.g.*, 2-ER-292. The jury wasn't "required to believe" him over them. *Cf. Reeves*, 530 U.S. at 151. So for purposes of his motion, the *only* things

thrown before he shot McCrae were "water bottles. Plastic ones." 3-ER-448.[11] And even those came from the "back" or middle of the group—not the front line. 2-ER-111; *see* Ex. 110/201 at 1:51–2:00.

A few plastic bottles hurled from somewhere deep within a crowd cannot justify the use of serious force, much less deadly force, against people in the front. *Nelson*, 685 F.3d at 880–83. It cannot justify shooting rubber bullets at their heads. Neither McCrae nor the protesters near her had done anything to justify that. Even if Johnston could reasonably have used "some force," the "amount [he] actually used" was excessive. *See Glenn*, 673 F.3d at 871 (quotation marks omitted).

2.2.3. Johnston had alternatives to shooting at protesters' heads.

As well as the considerations above, this Court has long established that when "less painful and potentially injurious measures" are available and feasible, the state's interest in using significant force is "extremely limited, if not altogether non-existent." *Young*, 655 F.3d at 1166; *see also Barnard v. Theobald*, 721 F.3d 1069, 1076 (9th Cir. 2013) (even when officers encounter some resistance, that doesn't give them the right to use "*any* amount of force"). Johnston had at least

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[11] Soon *after* Johnston fired his second Stinger and hit McCrae, one person threw back a gas canister. *See* Ex. 110/201 at 2:09–11. But that cannot retroactively justify Johnston's actions. *See infra* p.50 & n.18.

two reasonable, feasible, less injurious alternatives at his disposal. Instead, he resorted directly to severe force, even though the protesters had no warning that force would be used at all.

First, most obviously, Johnston could have done what he'd done only seconds earlier—skip-fire the round so it hit the protesters' legs. 2-ER-142–43; 2-ER-160. With one skip-fired round and one canister of tear gas, he had managed to collapse the entire left side of the crowd:

Ex. 110/201 at 1:52 (before Johnston fired his first shot).

Ex. 110/201 at 2:10 (shortly before the second shot). In other words, Johnston had used lesser means to disperse the crowd, and it had worked. *See* 2-ER-160. He could have done it again.

Second, Johnston testified that as well as Stingers, he carried "baton rounds" or "BIP rounds" that he could fire at specific targets. 2-ER-159; 2-ER-172; 2-ER-197. McCrae's expert explained that a BIP round would have been the "ideal round" to use against "isolated individuals" exhibiting "aggressive, assaultive behavior." 3-ER-532; 3-ER-535. So if Johnston mistakenly believed he'd seen someone throw a glass bottle, *cf.* 2-ER-208, he could have used a BIP round to neutralize that specific person. Instead, he kept loading his launcher with Stingers. *See* 2-ER-204. The jury could rely on the availability of the BIP round and McCrae's expert evidence to conclude that even if Johnston had seen someone throwing a glass bottle, his decision to fire Stingers at the crowd's heads rather than use a BIP round against that individual was unreasonable. *See Glenn*, 673 F.3d at 877.

Another consideration often discussed in this Court's cases is "whether proper warnings were given." *Rice*, 989 F.3d at 1121–22 (citing *Glenn*, 673 F.3d at 872). Here, while the officers instructed the crowd to disperse and warned them they could be arrested for disorderly conduct, *see* Ex. 204 at 4:04–10:11, they never warned the crowd that "force would be used against them if they did not [disperse]." *Cf. Nelson*, 685 F.3d at 882–83. Their failure to do so is another "factor" that the jury could consider. *See Bryan*, 630 F.3d at 831. Of course, Johnston himself was wearing a gas mask and didn't make any announcements. 2-ER-163. But the fact that officers never warned that force would be used at all "makes clear just how limited was [Johnston's] interest in the use of significant force." *Young*, 655 F.3d at 1166.

2.3. In shooting at protesters' heads and hitting McCrae in the eye, Johnston violated clearly established Fourth Amendment law.

2.3.1. McCrae's right not to be shot in the eye at a peaceful protest was clearly established long before 2020.

Johnston shot McCrae in the eye in May 2020. 3-ER-434. Her right not to be shot while taking part in a largely peaceful protest was established long before that. On every element of the excessive-force analysis, McCrae's authorities date from well before 2020.

Degree of force. By 2005, this Court had clearly established that when an officer's use of force creates a "substantial risk of causing . . . serious bodily injury," it is deadly force. *Smith*, 394 F.3d at 693. And even if the Court declines to classify Johnston's use of force as deadly, it had clearly established by 2001 that shooting a less-lethal projectile at the head is impermissible unless "a strong governmental interest compels the employment of such force." *Deorle*, 272 F.3d at 1280.

Failure to disperse. 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 amount of force." *Nelson*, 685 F.3d at 881–82 (collecting much earlier cases). And by 2011, it had clearly established that minor offenses like "trespassing and obstructing a police officer"—on par with failure to disperse—were "not severe" and could not justify significant force. *Mattos*, 661 F.3d at 444; *see also Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1091 (9th Cir. 2013) (failure to comply with an order to get back from an arrest, if an offense at all, was "far from severe").

Protest conditions. By 2010, this Court had clearly established that the government's interest in "resolv[ing] quickly a potentially dangerous situation" cannot justify force that may cause serious injury. *Bryan*, 630 F.3d at 826 (quotation marks omitted). In 2012, this Court decided *Nelson*, which clearly established two important rules: First, the government's interest in "stopping any and all disorderly

behavior" cannot justify force against persons who are not themselves posing a threat or actively resisting. 685 F.3d at 883. Second, the "general disorder" of a scene cannot legitimize the use of significant force against non-threatening individuals. *Id.* at 880–83. And although the riot in *Nelson* arose out of a college party, this Court has held that *Nelson* clearly established the law for protests, too. *Senn*, 2022 WL 822198, at *2 (applying *Nelson* to a 2016 protest).[12]

Alternatives and warnings. By 2011, this Court had clearly established that when an officer has less injurious ways to accomplish an objective, the state's interest in using significant force instead is "extremely limited, if not altogether non-existent." *Young*, 655 F.3d at 1166; *Bryan*, 630 F.3d at 831. These cases also explain that resorting to force without offering a warning—specifically, a warning *that force will be used*—will make it less likely that the force is found reasonable. *Young*, 655 F.3d at 1165–66, *Bryan*, 630 F.3d at 831; *see also Nelson*, 685 F.3d at 883.

Balancing the force used against the state's interests. The balancing analysis in *Nelson* largely controls here. As there, Johnston's "general interest in clearing the [streets]" here was insufficient to

[12] *Senn* was decided after the events here, but it analyzed the state of clearly established law in 2016, which helps show what was clearly established in 2020. *See Tan Lam*, 976 F.3d at 1001–02; *Jones v. Treubig*, 963 F.3d 214, 227 (2d Cir. 2020).

"justify the use of the force" he used. 685 F.3d at 883. Even if some protesters "hurl[ed] . . . bottles" at officers, the evidence at trial viewed in the light most favorable to McCrae shows that McCrae and the people around her "were not among them, and the individuals causing the problems were not so numerous that the two categories of [protesters] were indistinguishable." *Id.* And even if the behavior of the protesters as a whole could justify *some* force, it could not justify the force Johnston used—firing projectiles at protesters' heads, causing "serious and permanent injury to [McCrae]." *See id.*[13]

*   *   *

In sum, a reasonable officer in Johnston's position would have been on notice that "the firing of a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors," was an unreasonable use of force in violation of the Fourth Amendment. *See Nelson*, 685 F.3d at 886. So Johnston is not entitled to qualified immunity. The district court should not have set the jury's verdict aside.

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[13] In the passage quoted, the Court discusses the chemical effect of the pepperball as well as the kinetic impact of the projectile, but elsewhere it makes clear that its analysis would not change "even if [it] considered [the pepperball] as a purely projectile object." *Nelson*, 685 F.3d at 883, 885.

2.3.2. The district court misinterpreted the jury's verdict and ignored the deferential evidentiary standard.

As explained above, the factual premise from which all the district court's legal errors flowed was its assumption that Johnston skip-fired the round. *See supra* Part 2.1.1, pp.29–32. It repeated that view throughout its analysis, from top to bottom. 1-ER-4; 1-ER-20; 1-ER-30. And the effect of that error naturally carried over into its analysis of clearly established law: Because Johnston (in the district court's view) skip-fired the round, the quantum of force he used was an order of magnitude lower, the state's interest in using force was comparatively stronger, and *Nelson* no longer applied with such obvious clarity. 1-ER-28–33.

But adopting the skip-fire theory was error. The jury found that Johnston hit McCrae in the eye, and Johnston testified there was "literally zero chance" a skip-fired round could have hit McCrae in the eye. 5-ER-933; 2-ER-161. The necessary corollary of those two propositions is that Johnston did not skip-fire the round.[14] In adopting the skip-fire premise anyway, the district court relied on evidence "that

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[14] Given the jury's verdict, if Johnston wanted to argue that he skip-fired the round, he should have brought a sufficiency-of-the-evidence challenge. *Cf. A.D.*, 712 F.3d at 458–59. But he didn't, so he must "defer to the facts as they were reasonably found by the jury." *See id.* And even if he had brought a sufficiency challenge, qualified immunity is an affirmative defense, so he would have had the burden to affirmatively prove that he skip-fired the round. *See Tan Lam*, 976 F.3d at 997. Nothing in the trial evidence supports such a finding.

the jury [was] not required to believe," drew inferences that cut against rather than "in favor of the jury's verdict," and interpreted the verdict sheet in a way that made the jury's findings internally inconsistent. *Cf. Reeves*, 530 U.S. at 151; *Ace*, 139 F.3d at 1247; *Zhang*, 339 F.3d at 1038. In short, it "sp[u]n [the] evidence" in Johnston's favor. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001). Had it applied the "deferen[tial]" evidentiary standard correctly, it would have inferred instead that Johnston direct-fired the Stingers into the crowd at head height. *See A.D.*, 712 F.3d at 453.

On that view of the facts, the argument for qualified immunity falls apart. The district court faulted McCrae for failing to identify "precedent involving . . . the use of a Stinger round" and distinguished *Nelson*'s pepperballs as "point-of-aim-point-of-impact" projectiles. 1-ER-22; 1-ER-29 (quoting Defendants' briefing). But Johnston himself testified that Stingers—like most bullets, including pepperballs—"fly in [the] direction that you point them." 2-ER-177; 4-ER-661 ("They would all go in the same direction."). In other words, if you aim at the ground, they impact the ground—but if you aim at people, they impact people. *Nelson* cannot be distinguished on this ground.

Closer to the mark was the district court's observation that Stingers are "necessarily indiscriminate" because they "spread out when the round is fired." 1-ER-29. But pepperballs, as they were used in *Nelson*, also "could not be accurately targeted." 685 F.3d at 879. As

this Court explained, "the inability to accurately target" the pepperballs made their use *less* reasonable, because it increased the "risk of hitting individuals in vulnerable areas." *Id.* at 885–86. If Stingers differ from pepperballs in this regard, it is only because direct-fired Stingers run an even higher risk of hitting individuals in vulnerable areas, and so using them that way is even less reasonable. Johnston can hardly be said to have lacked fair warning on this ground.

The district court also distinguished *Nelson* on the ground that "Officer Johnston used the Stinger round in accordance with his training." 1-ER-22. Johnston was trained to skip-fire Stingers. 2-ER-164. He had never trained to direct-fire Stingers. *Id.* So he did not, in fact, use the Stinger round in accordance with his training. And again, *Nelson* gave fair warning: Just as there, Johnston "could have altered [his] tactics to bring them in compliance with [his] own training" and thus avoided violating the Fourth Amendment. *See* 685 F.3d at 882.

In every material way, this Court's analysis of the pepperballs in *Nelson* put Johnston on notice that direct-firing Stingers at the crowd's heads would be unreasonable. He is not entitled to qualified immunity just because he used a "novel method . . . to inflict injury."[15] *Id.* at 884 (quotation marks omitted).

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[15] Indeed, the district court itself expressed doubt initially that "the distinction of weapon is enough." 2-ER-65.

Next, the district court asserted that "unlike any of Plaintiff's cases, the officers provided multiple audible dispersal warnings." 1-ER-22; 1-ER-30. But just as in *Nelson*, the officers here *didn't* warn protesters that if they failed to disperse, "force would be used" against them. 685 F.3d at 883; *see* Ex. 204 at 4:04–10:11 (recording all the warnings). For the most part, they just ordered the protesters to disperse, and this Court's cases make clear that issuing an order does not suffice to warn that failure to obey will "lead [to the use of] force." *Young*, 655 F.3d at 1165; *see also Bryan*, 630 F.3d at 831 (no immunity where officer failed to warn plaintiff "that he would be shot" with taser if he didn't comply with order to remain in his car). The only warning officers offered here was that protesters who failed to disperse would be "subject to arrest." *E.g.*, Ex. 110/201 at 1:07–1:53. Even if that might have sufficed to use tear gas and skip-fired Stingers, it could not license direct-firing Stingers at the crowd's heads.

The district court next asserted that "unlike any of Plaintiff's cases, there was a public safety exigency motivating Officer Johnston's conduct"—namely, keeping the bridge between Salem and West Salem open. 1-ER-22–23. But once the officers blocked the protesters' path, the protesters "stopped marching." 2-ER-246; 2-ER-252. The exigency evaporated. Any residual public-safety interest in dispersing the crowd "quickly" could not legitimize the degree of force Johnston

used. *Cf. Nelson*, 685 F.3d at 880. In short, Johnston had no public-safety reason to direct-fire his weapon.

Finally, the district court asserted that "unlike any of Plaintiff's cases, the crowd presented at least some threat to officer safety." 1-ER-23. But "the crowd" in *Nelson* presented at least as great a threat—it "threw bottles or other debris at [the officers]." 685 F.3d at 880. This Court made clear then that the "general disorder" of the scene could not legitimize firing projectiles at "non-threatening individuals." *Id.* at 880–81. So too here.

The district court relied on video evidence showing a person near McCrae throwing a smoking tear-gas canister back at the officers. 1-ER-32. But crucially, that happened *after* Johnston shot McCrae. *See* Ex. 110/201 at 2:09–11. As the video shows, by the time the canister is thrown, McCrae has already doubled over in pain and is clutching her eye. *Id.*

In any event, Johnston never testified that he was aiming at a threatening individual when he hit McCrae. He never admitted that he shot the second round of Stingers at all. *See* 2-ER-195; 2-ER-141–42; 2-ER-148. Nothing in the record supports the inference that Johnston was secretly aiming at the canister-thrower. And even if it did, "[w]hen two sets of inferences find support in the record, the inferences that support the jury's verdict of course win the day." *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1287 (9th Cir. 2001).

Here, the inference that supports the jury's verdict is that Johnston fired blindly into the crowd at head height.[16] Even if he "*could have*" reasonably aimed at the canister-thrower, finding that he did—and granting qualified immunity on that basis—fails to give the jury's view the "deference" it is due. *A.D.*, 712 F.3d at 453.

In sum, this case is "largely controlled by [the] deferential [evidentiary standard]." *See Tan Lam*, 976 F.3d at 1007. When disputes are resolved and inferences drawn in favor of the jury's verdict, very little about this case is distinguishable from *Nelson*. Tack on cases like *Bryan*, *Young*, and *Glenn*, and any reasonable officer would have known not to fire rubber bullets at the protesters' heads. Because he did so anyway, Johnston is not entitled to qualified immunity.

3. The district court erred in dismissing McCrae's negligence claim.

In the alternative to her excessive-force claim, McCrae pleaded that Johnston shot her negligently and that Johnston's employer, the

[16] If Johnston had been aiming at the canister-thrower, he wouldn't have hit McCrae in the eye. The canister is thrown half a second after the second bang. Ex. 110/201 at 2:09–11. That means that when Johnston fired the shot, the thrower would have been bending down to pick up the canister. McCrae is "very tall," 2-ER-109, so just as a skip-fired round would not have hit her in the eye, neither would a round direct-fired at a person picking up a canister. But this sort of minute parsing of possibilities is not "appropriate . . . once litigation has ended with a jury's verdict." *A.D.*, 712 F.3d at 457. After that, "the jury's view of the facts must govern." *Id.*

City of Salem, was vicariously liable. 5-ER-1002–03. That claim survived summary judgment. 5-ER-980. But Defendants moved in limine to dismiss it, and the district court—with a different judge presiding—granted the motion. 1-ER-39–40. It based its decision on an idiosyncratic District of Oregon practice that forbids alternative theories of negligence and excessive force. *See Shilo v. City of Portland*, 2005 WL 3157563, at *1 (D. Or. 2005). This Court has never approved such a rule and the supposed rationale for it makes no sense. The Court should take this opportunity to rectify a recurring error in the District of Oregon's jurisprudence.

3.1. The district court precluded McCrae from trying "inconsistent" alternative theories of negligence and excessive force.

In *Shilo*, the District of Oregon applied an Eleventh Circuit case to hold that a plaintiff with an excessive-force claim may not also bring a negligence claim unless it "pertain[s] to *something other than* the actual application of force." 2005 WL 3157563, at *2 (quoting *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1263 (11th Cir. 2001)) (emphasis added in original). Thus a plaintiff could state an excessive-force claim for use of a "flash-bang device" and a separate negligence claim that the flash-bang caused a fire, but not a claim that police threw the flash-bang negligently. *See id.* Other courts in the district began to treat *Shilo* as establishing some kind of district-wide rule. *See, e.g.*, *Barringer v.*

Clackamas Cnty., 2010 WL 5349206, at *9 (D. Or. 2010) (collecting cases).

The Federal Rules of Civil Procedure explicitly permit a plaintiff to state alternative theories of liability. Fed. R. Civ. P. 8(d)(2). They explicitly permit alternative theories that are inconsistent. Fed. R. Civ. P. 8(d)(3). Realizing this, the District of Oregon later cabined *Lewis* and *Shilo* to apply only after the pleading stage. *Rodriguez v. City of Portland*, 2009 WL 3518004, at *2 (D. Or. 2009). Under this modification, a plaintiff may plead alternative theories of liability, but must elect one at summary judgment. *See, e.g.*, *Woods v. Gutierrez*, 2012 WL 6203170, at *12 (D. Or. 2012).[17]

Applying this supposed rule, the district court here held that "because Plaintiff's negligence claim is inconsistent with her § 1983 claims, . . . [she] cannot proceed any further on both theories and the negligence claim is dismissed." 1-ER-40.

3.2. The ostensible "rule" applied by the district court is idiosyncratic and mistaken. This Court should reject it.

Forbidding alternative theories of negligence and excessive force might seem sensible at first glance. After all, on the one hand, "there is

[17] That alone should raise an eyebrow. If allegations can permit alternative inferences of intentional conduct and negligence, why can't evidence?

no cause of action for 'negligent' use of excessive force"; and on the other hand, "intentional conduct does not support a claim for negligence." *Johnson v. Tillamook Cnty.*, 2016 WL 11383939, at *11 (D. Or. 2016), *report and rec. adopted*, 2016 WL 3946919 (D. Or. 2016); *Woods*, 2012 WL 6203170, at *12. Or, as the Oregon Court of Appeals put it, "there is no such thing as a negligent fist fight." *Kasnick v. Cooke*, 842 P.2d 440, 441 (Or. App. 1992).[18]

But while fists are rarely swung negligently, guns are often fired negligently—and the mental state of the shooter is rarely the subject of direct evidence. At least two District of Oregon decisions have rejected the *Shilo* principle for exactly this reason: "[W]hen the facts underlying a negligence and excessive force claim fairly could support an inference of liability on *either* claim, the negligence claim may proceed." *Johns v. City of Eugene*, 2018 WL 634519, at *13 (D. Or. 2018), *rev'd on other grounds*, 771 F. App'x 739 (9th Cir. 2019); *Kaady v. City of Sandy*, 2008 WL 5111101, at *26 (D. Or. 2008). The *Johns* court noted that Oregon courts do permit, for instance, negligent infliction of emotional distress and intentional infliction of emotional distress claims to proceed to trial together, because "the same evidence often could support competing inferences of intentional conduct and negligence." 2018 WL 634519, at *13 (citing *Hamlin v. Wilderville Cemetery Ass'n*, 313 P.3d

[18] Although *Shilo* borrowed its rule from *Lewis*, later courts recruited *Kasnick* to bolster *Lewis* with Oregon law.

360, 367 n.3 (Or. App. 2013)). By greater force, it reasoned, "there certainly is no state-law bar to claims based on the same (or at least complementary) inferences moving forward together." *Id.* (emphasis omitted).

Indeed, Oregon law specifically provides that "when the character of plaintiff's right depends upon . . . the mental condition of the defendant at the time of his wrongful act, the plaintiff may plead both . . . negligence and intentional injury." *Cook v. Kinzua Pine Mills Co.*, 293 P.2d 717, 728–29 (Or. 1956). That is why, for example, when a physician performs an unauthorized operation, he can be liable both for a battery and for negligently violating the standard of care. *See Mayor v. Dowsett*, 400 P.2d 234, 251 (Or. 1965). So despite the seemingly categorical "fistfight" language of *Kasnick*, the better interpretation of that case is that evidence "solely" of intentional conduct cannot support a claim for negligence. *Kaady*, 2008 WL 5111101, at *26. But that just restates the ordinary rule at summary judgment. If a plaintiff's evidence can't support an inference of negligence, no special rule is required.

The District of Oregon's special rule is idiosyncratic. *See, e.g.*, *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (under California law, a jury can hold an officer liable under both excessive-force and negligence theories for the same misconduct). It is the subject of disagreement within the district. This Court has been

skeptical of it. *See Daley v. McKoy*, 773 F. App'x 387, 388 (9th Cir. 2019) (assuming, without deciding, that a plaintiff "may pursue a state-law claim of negligence premised on the same facts that underlie a Fourth Amendment claim"). And the supposed rationale behind it just doesn't wash. The Court should take this opportunity to clarify the law, hold that plaintiffs may plead and seek to prove alternative theories of negligence and excessive force, and reverse the district court's dismissal of McCrae's negligence claim.

CONCLUSION

For all these reasons, this Court should reverse the district court's judgment and remand with directions to reinstate the jury's verdict and enter judgment for McCrae. In the alternative, it should remand for trial on McCrae's negligence claim.

Dated: October 11, 2023 Respectfully submitted,

By: */s/Athul K. Acharya*
Athul K. Acharya

PUBLIC ACCOUNTABILITY
Counsel for Plaintiff-Appellant

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FOR THE NINTH CIRCUIT

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