No. 20-17403

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRESTON SEIDNER,

Plaintiff-Appellee,

v.

JONATHAN DE VRIES,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Arizona, Case No. 2:19-cv-05394-DLR

APPELLEE'S RESPONSE BRIEF

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Statement of Jurisdiction

This Court has jurisdiction to review the district court's interlocutory order denying qualified immunity under 28 U.S.C. § 1291. However, interlocutory review is "circumscribed," *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018), and "limited to resolving a defendant's 'purely legal . . . contention that [their] conduct did not violate the Constitution and, in any event, did not violate clearly established law.'" *Estate of Anderson v. Marsh*, 985 F.3d 726, 730–31 (9th Cir. 2021). This Court lacks jurisdiction to entertain an interlocutory appeal "where the district court denies summary judgment based on qualified immunity because material facts remain in dispute," *Thomas v. Gomez*, 143 F.3d 1246, 1248 (9th Cir. 1998), and must assume all factual disputes are resolved and construe all reasonable inferences in the plaintiff's favor in resolving the legal questions presented, *Marsh*, 985 F.3d at 731.

Issue Presented for Review

Whether a police officer violates a bicyclist's constitutional rights by using his patrol car to erect a roadblock directly in the path of the bicyclist—who was travelling at a "high rate of speed" and did not have

a reasonable opportunity to avoid colliding with the patrol car—where the bicyclist was not suspected of any crime, did not pose any risk to the officer or to the public, and was not actively resisting or evading arrest, and, if so, whether the law clearly proscribed the officer's conduct as of February 25, 2019.

Statement of the Case[1]

Shortly before midnight on February 25, 2019, Preston Seidner was pedaling his bicycle on a well-lit residential street within a block of his home. *See* Vid. 0:01–0:08; 1-ER-006, 2-ER-027 ¶ 2 (describing "the area in question" as a "well[-]lit area, only within a block of the Plaintiff's residence"), 028 ¶ 6 (describing the street as a "well[-]lit residential street"), *cf.* 2-ER-029 (explaining that Mr. Seidner was "turning on the last leg of his evening ride home"). There were no pedestrians or other vehicles around him. *See* Vid. 0:01–0:08; *see also* 2-ER-027 ¶ 2

[1] This factual recitation is based on the evidence in the record—including Mr. Seidner's verified Complaint, which the district court construed as an affidavit in opposition to Officer de Vries's Motion for Summary Judgment, *see* 1-ER-003 n.2, Mr. Seidner's Opposition to Officer de Vries's Motion for Summary Judgment made and submitted under penalty of perjury, 2-ER-027–029, *see Carrasco v. Metro Police Dept.*, 4 F. App'x 414, 416 (9th Cir. 2001) (accepting *pro se* plaintiff's papers opposing summary judgment, made under penalty of perjury, as admissible summary judgment evidence), and the Axon Body Worn Camera (BWC) footage depicting the incident giving rise to Mr. Seidner's claim—and is construed in the light most favorable to Mr. Seidner. *Marsh*, 985 F.3d at 730–31. All citations to "Vid." refer to the BWC footage filed in support of Officer de Vries's Motion for Summary Judgment. *See* ECF No. 19 on the district court docket.

(describing "the area in question" as "very lightly travelled"), 028 ¶ 6 (describing the street as "otherwise deserted"). As Mr. Seidner was riding, a police cruiser pulled in front of him and attempted to stop and cite him for riding his bicycle without a bike light, a civil traffic infraction under Arizona law. *See* 2-ER-003; *see also* 2-ER-020–021 ¶¶ 4–6 (Officer de Vries explaining that he observed Mr. Seidner riding without any front-end lights in violation of Arizona law, and he attempted to pull Mr. Seidner over "for riding his bicycle without the proper lighting equipment"). Mr. Seidner had not committed a crime and was not suspected of having done so. *See* 1-ER-003, 006; *see also* 2-ER-003.

The officer in the cruiser, Jonathan de Vries, activated the police cruiser's overhead lights while still ahead of Mr. Seidner. Vid. 0:09–0:14; 1-ER-003. Officer de Vries then stopped the vehicle and started to get out of the cruiser. *Id.* He did not activate the police cruiser's siren, did not verbally command Mr. Seidner to stop, and did not otherwise signify his intention to stop Mr. Seidner, who continued pedaling past Officer de Vries. *See* 1-ER-003 & n.3. The record does not suggest that Mr. Seidner

accelerated past Officer de Vries after he activated the patrol car's overhead lights.

After Mr. Seidner cycled past the police cruiser, Officer de Vries got back into his vehicle and followed Mr. Seidner, lights activated, for approximately 10–15 seconds. Vid. 0:16–0:31; 1-ER-004. Officer de Vries then abruptly sped past Mr. Seidner, who was travelling at a "high rate of speed," 2-ER-003, veered directly in front of him, and slammed on the brakes. Vid. 0:32–0:35. "Almost immediately after Officer de Vries stopped his car," 1-ER-004 n.4, Mr. Seidner crashed into the back of the squad car. Vid. 0:35–0:38. Mr. Seidner's chest slammed into the handlebars and he hit the squad car headfirst before falling off the bike. *See* 2-ER-003, 028 ¶ 6. Mr. Seidner was not wearing a helmet. *See* Vid. 0:39–0:41. As a result of the impact, Mr. Seidner dislocated his wrist, sprained his forearm, and sustained additional injuries to his head and chest. *See* 2-ER-003, 028 ¶ 6.

Officer de Vries got out of his car and ran to the back of the squad car, where Mr. Seidner lay crumpled on the ground, writhing in pain and screaming, "I can't breathe." Vid. 0:38–0:53. Despite Mr. Seidner's obvious physical distress, Officer de Vries repeatedly demanded that Mr.

Seidner pull out his hands so Officer de Vries could handcuff him. *Id.*; *cf.* 1-ER-004 n.5 (the district court observing that Officer de Vries did not ask Mr. Seidner about injuries prior to handcuffing him). Mr. Seidner eventually lost consciousness, at which point Officer de Vries forced Mr. Seidner's limp arms from underneath his body and handcuffed him. Vid. 0:53–1:15. Mr. Seidner remained unconscious for several seconds as Officer de Vries stood over him. Vid. 1:16–1:22. After Mr. Seidner came to, Officer de Vries propped Mr. Seidner's body up into a sitting position, Vid. 1:25–1:29, dragged Mr. Seidner's injured body from the middle of the street to the sidewalk, and dropped him there. 2-ER-003. Mr. Seidner was later transported by ambulance to the hospital, where he received X-rays and CT scans and was treated for injuries to his head, wrist, and chest. 2-ER-003, 028 ¶ 6.[2]

Procedural History

On October 10, 2019, Mr. Seidner, proceeding *pro se*, filed a civil rights complaint in the United States District Court for the District of

[2] Officer de Vries's brief recounts additional facts that are irrelevant to the resolution of this appeal, including facts regarding Mr. Seidner's history and arrest following the encounter described in this brief. It is undisputed that Officer de Vries did not know any information about Mr. Seidner when he erected a roadblock that knocked Mr. Seidner off his bike. At that point, all Officer de Vries knew was that Mr. Seidner was riding his bike without a light.

Arizona. His complaint included a single claim of excessive force arising both from his collision with Officer de Vries's patrol car and from Officer de Vries's use of force in dragging Mr. Seidner's body from the street to the sidewalk;[3] Mr. Seidner sought monetary damages arising from the encounter. *See* 2-ER-006. On August 20, 2020, before the completion of fact discovery, Officer de Vries sought summary judgment on Mr. Seidner's excessive force claim arguing that (1) he never "seized" Mr. Seidner within the meaning of the Fourth Amendment, (2) assuming Officer de Vries did effect a Fourth Amendment seizure, the seizure was objectively reasonable, and (3) assuming the seizure was objectively unreasonable, Officer de Vries's conduct was not proscribed under clearly established law at the time, thus entitling him to qualified immunity. *See* 2-ER-008–018. Officer de Vries did not seek summary judgment on the portion of Mr. Seidner's claim alleging that he used excessive force by dragging Mr. Seidner's injured body across the road after placing him in handcuffs.

[3] Mr. Seidner's Original Complaint did not name Officer de Vries as a defendant in the action. Mr. Seidner amended his complaint on January 17, 2020, to add Officer de Vries as a named defendant.

On November 13, 2020, the district court denied Officer de Vries's motion. The district court concluded that under *Brower v. County of Inyo*, 489 U.S. 593 (1989), Officer de Vries's intentional act of imposing a roadblock in a way likely to cause a crash in order to stop Mr. Seidner constituted a seizure under the Fourth Amendment, even assuming Officer de Vries did not intend for a collision to occur.[4] 1-ER-005.

The district court also concluded that a reasonable jury could find that Officer de Vries's use of force was excessive. 1-ER-005–008. That holding rested on two key determinations. First, the district court found that there remained a disputed issue of material fact whether Officer de Vries cut Mr. Seidner off so sharply and so abruptly that Mr. Seidner did not have enough time to stop his bicycle even assuming his brakes were working. 1-ER-007–008. Second, the district court observed that Officer de Vries did not attempt any less forceful means of stopping Mr. Seidner before forcing a collision with him. 1-ER-007. For these reasons, the court denied Officer de Vries's motion for summary judgment. 1-ER-007–009.

[4] Officer de Vries did not appeal the district court's determination that he seized Mr. Seidner under the Fourth Amendment. That argument is therefore waived. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

The district court also determined that, viewing the facts in the light most favorable to Mr. Seidner, Officer de Vries's conduct was proscribed by clearly established law. The district court held that *Brower* gave Officer de Vries fair notice that unreasonably erecting a roadblock in a way that is likely to cause a collision violates the Fourth Amendment's prohibition on excessive force. 1-ER-008. The district court also agreed that the law was clearly established as of 2019 that vehicles are potentially deadly weapons, that striking someone with a vehicle could inflict deadly force, and that an officer can use deadly force to apprehend a fleeing suspect only when the officer has probable cause to believe that the suspect poses a threat of physical harm to himself or others. 1-ER-008–009 (citing *Gonzales v. City of San Jose*, No. 19-cv-08195-NC, 2020 WL 5407993, at *5–*6 (N.D. Cal. Sept. 9, 2020)).

Officer de Vries filed a notice of interlocutory appeal on December 8, 2020.

Summary of the Argument

The district court properly denied Officer de Vries qualified immunity. Officer de Vries's use of his patrol car to cut Mr. Seidner off — while Mr. Seidner was travelling "at a high rate of speed" —and to force

a collision between his patrol car and Mr. Seidner's bike created a substantial risk of serious bodily injury, and thus constituted deadly or lethal force. *Smith v. City of Hemet*, 394 F.3d 689, 693 (9th Cir. 2005) (en banc) (defining "deadly force" as "force that creates a substantial risk of causing death or serious bodily injury"). Under clearly established precedent, Officer de Vries's use of deadly force was justified only if he believed Mr. Seidner posed a substantial risk of harm to the public or to himself. *Id.* Based on the record and construing the evidence in the light most favorable to Mr. Seidner, Mr. Seidner did not pose *any* risk, let alone a substantial or immediate risk, to anyone. *See* 1-ER-007. When Officer de Vries used his patrol car to collide with Mr. Seidner, Mr. Seidner was riding his bicycle on an empty residential street, had not committed any crime, and had not actively resisted or attempted to evade arrest. *See* 1-ER-006–007. There was simply no reason for Officer de Vries to use deadly force, or even significant force, to seize Mr. Seidner for a minor traffic violation. In doing so, Officer de Vries bypassed less intrusive measures he could have used to stop Mr. Seidner, including activating the patrol unit's siren, giving Mr. Seidner clear orders to stop, or verbally warning that he intended to use force if Mr. Seidner did not stop. Based

on the facts as viewed in a light most favorable to Mr. Seidner and drawing all inferences in his favor, a reasonable jury could find that Officer de Vries's use of force was objectively unreasonable.

The unlawfulness of Officer de Vries's conduct at the time was clear to any reasonable officer and had been for decades. Since 1989, the Supreme Court's decision in *Brower* has clearly established that imposing a roadblock that does not provide a driver a reasonable opportunity to voluntarily stop to avoid a collision is unconstitutional. *See Brower*, 489 U.S. at 598–99. Other circuits have applied *Brower* in rejecting qualified immunity defenses in analogous cases. *See, e.g., Buckner v. Kilgore*, 36 F.3d 536, 539–40 (6th Cir. 1994), *Hawkins v. City of Farmington*, 189 F.3d 695, 697–98 (8th Cir. 1999). Officer de Vries's attempts to distinguish the facts of *Brower* from this case do not undermine the longstanding principle prohibiting officers from erecting roadblocks that do not provide a reasonable opportunity to avoid a collision and that could lead to serious bodily harm; this principle holds across different roadblock constructions and does not turn on the subjective question whether the officer intended to cause harm when they erected the roadblock. *See id.*

Beyond *Brower*, the law has clearly limited use of deadly or significant force to instances where the force is necessary under the circumstances. Regarding deadly force, Supreme Court and Ninth Circuit precedent have (1) long characterized vehicle strikes as deadly force, and (2) prohibited the use of force deadly force on fleeing, unarmed persons who pose no risk or threat of harm. *See, e.g.*, *City of Hemet*, 394 F.3d at 704 (citing *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)) (confirming that an officer may not use deadly force unless it is necessary to prevent escape and the officer has probable cause to believe the person poses a significant threat of death or serious physical injury to the officer or others); *Saetrum v. Vogt*, 673 F. App'x 688, 690 (9th Cir. 2016) (recognizing that an automobile can inflict deadly force and can be used as a deadly weapon). This Court has also clearly prohibited use of significant, but less-than-deadly, force where the use of force was not justified under the circumstances, even in the absence of a factually identical case. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 480–81 (9th Cir. 2007); *cf. Bryan v. MacPherson*, 630 F.3d 805, 832–33 (9th Cir. 2010). Under these principles, Officer de Vries's use of his vehicle to cut off Mr. Seidner, who was travelling at a "high rate of speed," 2-ER-003,

and did not have a reasonable opportunity to stop before colliding with Officer de Vries, was the equivalent of employing unjustified deadly, or at least significant, force and was therefore proscribed under these circumstances by clearly established law.

This Court should affirm the district court's denial of Officer de Vries's motion for summary judgment.

Argument

"Under the Fourth Amendment, officers may only use such force as is 'objectively reasonable' under the circumstances." *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001) (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)). An officer's failure to act reasonably exposes them to civil liability unless their actions are protected by the doctrine of qualified immunity, which "protects government officials . . . from civil liability unless their conduct violates clearly established . . . constitutional rights of which a reasonable official would have known." *Tubar v. Clift*, 286 F. App'x 348, 350 (9th Cir. 2008). Qualified immunity does not apply where "a reasonable officer under the circumstances would have had fair notice that the force employed was unlawful," such that "any mistake to the contrary would have been unreasonable." *Drummond*

ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003).

Courts employ a two-part test to determine whether an officer is entitled to qualified immunity, first deciding whether the officer violated a plaintiff's constitutional rights and, if so, determining whether the constitutional right was clearly established at the time of the events in question. *See Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc). In conducting this analysis on interlocutory appeal from the denial of summary judgment, this Court "view[s] the evidence in the light most favorable to the plaintiff." *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003). This Court has consistently held that "[b]ecause the excessive force inquiry nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, . . . summary judgment . . . in excessive force cases should be granted sparingly." *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

Here, viewing the evidence in the light most favorable to Mr. Seidner, a reasonable jury could find that Officer de Vries violated Mr. Seidner's right to be free from excessive force. Officer de Vries used his patrol car to erect a roadblock that did not provide Mr. Seidner, who was

riding his bicycle at a "high rate of speed," 2-ER-003, with a reasonable opportunity to avoid collision with Officer de Vries. When Officer de Vries erected the roadblock, Mr. Seidner had not committed any crime, *see* 1-ER-006, did not pose any risk of harm to anyone, *see* 1-ER-007, and was not actively attempting to evade arrest, *see* 1-ER-007. Officer de Vries's use of force—whether characterized as deadly or significant—was completely unjustified under the circumstances, and the law, which clearly confines an officer's use of reasonable force to the need for any such force, made this plain. The district court properly denied Officer de Vries qualified immunity.

I. Officer De Vries's use of his vehicle to erect a roadblock that did not give Mr. Seidner an opportunity to avoid collision was objectively unreasonable.

This Court examines claims of excessive force under the Fourth Amendment's prohibition on unreasonable seizures, *Bryan*, 630 F.3d at 823, balancing the "amount of force applied against the need for that force." *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003). This Court has repeatedly confirmed that an officer's use of significant force is justified only when necessary to "bring[] a *dangerous situation* to a swift end." *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001)

(emphasis added). The facts surrounding Officer de Vries's use of force did not present a dangerous situation.

When Officer de Vries came upon Mr. Seidner, he suspected Mr. Seidner of riding his bicycle without a light, a civil traffic violation under Arizona law. Officer de Vries had no basis to suspect Mr. Seidner of having committed any crime. 1-ER-006. Mr. Seidner did not pose any threat to the public or to Officer de Vries. 1-ER-007; *cf. Bryan*, 630 F.3d at 826 (noting that "the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public" to justify a use of significant force). And Mr. Seidner did not ride aggressively or actively attempt to evade arrest. 1-ER-007. Construing the summary judgment record in the light most favorable to Mr. Seidner, a reasonable jury could find that Officer de Vries's use of deadly or significant force under these circumstances was objectively unreasonable.

A. The amount of force Officer de Vries deployed was not commensurate with the need to use the force.

In evaluating use of force in a Fourth Amendment unreasonable seizure claim, courts consider "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting

them." *Graham v. Connor*, 490 U.S. 386, 397 (1989). This evaluation requires courts to carefully "balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against 'the countervailing government interests at stake.'" *Miller v. Clark Cty.*, 340 F.3d 959, 964 (9th Cir. 2003) (quoting *Graham*, 490 U.S. at 396). In undertaking this inquiry, courts consider the *Graham* factors, which include "(1) how severe the crime at issue was, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Mattos*, 661 F.3d at 443. Among these considerations, the "most important" is the second factor—whether the suspect posed an immediate threat to others. *Isayeva v. Sacramento Sherriff's Dep't*, 872 F.3d 938, 947 (9th Cir. 2017). Courts can also consider the availability of less intrusive alternatives to the force employed and whether proper warnings were given. *Glenn v. Washington Cty.*, 673 F.3d 864, 872 (9th Cir. 2011). An officer's use of force is unconstitutional if, based on the totality of the circumstances at the time of arrest, the officer used greater force than was objectively reasonable to make the arrest. *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997) ("[T]he force which

is applied must be balanced against the need for that force.") (emphasis omitted).

1. Officer de Vries did not need to use deadly or significant force to seize Mr. Seidner.

As the district court held, a reasonable jury could find facts establishing that, based on the totality of the circumstances, Officer de Vries's use of force was objectively unreasonable. 1-ER-007–008. The *Graham* factors support this conclusion.

First, at the time of the encounter, Mr. Seidner was unarmed and was not suspected of committing any crime. *See* 1-ER-006. The district court found, and Officer de Vries admits, that when Officer de Vries gave chase and cut Mr. Seidner off, Mr. Seidner was merely suspected of riding his bicycle without a front light in a well-lit residential area, a minor civil traffic violation. *See* 2-ER-021 ¶ 6 (Officer de Vries declaring that he attempted to pull Mr. Seidner over "for riding his bicycle without the proper lighting equipment"); 2-ER-028 ¶¶ 6, 7 (Mr. Seidner saying that he had not been charged with any offense and was only suspected of a "lighting infraction"). This factor cuts in Mr. Seidner's favor. 1-ER-006; *see also Bryan*, 630 F.3d at 828 ("Traffic violations generally will not support the use of a significant level of force.").

Second, Mr. Seidner did not pose *any* threat, let alone an immediate threat, to Officer de Vries or to others. *See* 1-ER-007.When Officer de Vries erected a roadblock directly in Mr. Seidner's path, Mr. Seidner was riding his bike near his home. 2-ER-027, 029. The street was well-lit and empty; other than Mr. Seidner and Officer de Vries, there were no other drivers, cyclists, or pedestrians on or near the road. *See generally* Vid. 0:01–0:08; *see also* 2-ER-027 ¶ 2 (describing the street as "very lightly travelled residential, well[-]lit area"); 2-ER-028 ¶ 6 (describing the area as a "deserted[,] well[-]lit street"). And Mr. Seidner did not ride his bicycle erratically or in a manner that threatened Officer de Vries. *See* 1-ER-007 (the district court finding that Mr. Seidner did not pose any threat by the way he rode his bicycle). As the district court concluded, this "most important" factor also favors Mr. Seidner. 1-ER-007; *Isayeva*, 872 F.3d at 947.

Third, nothing in the record supports that Mr. Seidner was actively resisting arrest or attempting to flee arrest. For example, there is no evidence that Mr. Seidner sped up when Officer de Vries tried to stop him.[5] And as the district court found, Mr. Seidner did not take evasive

[5] Officer de Vries contends that Mr. Seidner "quickly pedaled away on his bicycle" after Officer de Vries activated his overhead lights and stopped his vehicle the first time. AOB 5.

action to avoid arrest. *See* 1-ER-007. When Officer de Vries initiated pursuit, Mr. Seidner kept pedaling along the same street he had been riding on; he did not turn into an area that Officer de Vries could not access or get off his bike to escape by foot. *See* Vid. 0:22–0:32 (Mr. Seidner riding his bicycle along the road in front of Officer de Vries); 1-ER-007 ("In the video, Plaintiff is riding up the street and does not appear to be attempting to flee into an area that Defendant could not access with his car."). And the record is devoid of any fact to the contrary. The third factor thus does not support Officer de Vries's use of force against Mr. Seidner. *See* 1-ER-007; *see also City of Hemet*, 394 F.3d at 703 (where a person is not perfectly passive, but where any resistance was not "particularly bellicose," the third factor offers little support for the use of force).

2. Officer de Vries used deadly force to seize Mr. Seidner.

Office de Vries does not challenge the district court's conclusions regarding any of the *Graham* factors; he altogether avoids addressing the governing legal framework outlined in *Graham* and universally applied in this Court's excessive force jurisprudence. *See generally* AOB 11–18

But the BWC footage does not suggest Mr. Seidner was not quickly pedaling before Officer de Vries activated his overhead lights. Notwithstanding Officer de Vries's implication that Mr. Seidner accelerated past him, this is not supported by the BWC footage.

(not grappling with the *Graham* factors or the governing legal framework). Instead, Officer de Vries attempts to minimize the nature and extent of the force he used to stop Mr. Seidner. *See* AOB 13 (arguing that Officer de Vries's conduct was not unconstitutionally excessive "because it posed very little risk of harm to the plaintiff"); AOB 15 (arguing that the technique he used to stop Mr. Seidner "was likely the least forceful way he could have stopped the plaintiff"); AOB 17 (arguing that "[i]f officers are justified in using deadly force to stop fleeing motorcyclists, they are surely justified in using *minor force* . . . to stop fleeing bicyclists.") (emphasis added); *id.* ("Officer de Vries's conduct . . . posed no risk of serious harm to the plaintiff."); *id.* (arguing that because Mr. Seidner was riding a bicycle, and not travelling on a motorcycle or other high-speed motorized vehicle, the risk of serious injury was minimal).

Officer de Vries's refrain ignores that the law requires consideration of the *need* for any use of force, not simply the nature of the force in the abstract. *See, e.g.*, *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003) (emphasizing that the amount of force used is balanced

against the need for that force). As explained above, there was absolutely no need for any use of significant force here.

Furthermore, Officer de Vries's characterization of the amount of force he used in this case is inconsistent with this Court's precedent, which has generally characterized the nature of force employed as "deadly" if the force creates a substantial risk of death or serious injury. *City of Hemet*, 394 F.3d at 693 (defining "deadly force" as "force that creates a substantial risk of causing death or serious bodily injury"). And this Court and other circuits have long recognized that using a vehicle as an impact weapon can inflict deadly force. *See United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987) ("It is indisputable that an automobile can inflict deadly force on a person and that it can be used as a deadly weapon."); *Acosta v. City and Cty. of S.F.*, 83 F.3d 1143, 1146 n.9 (9th Cir. 1996) ("There is no question that an automobile *can* inflict deadly force . . .") (emphasis in original) (abrogated on other grounds as recognized in *Monzon v. City of Murrieta*, 966 F.3d 946, 958 (9th Cir. 2020; *Saetrum*, 673 F. App'x at 690 (concluding that an automobile can inflict deadly force on a person) (collecting cases); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (concluding that "an attempt to hit an

individual with a moving squad car is an attempt to apprehend by use of deadly force"); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949–50 (7th Cir. 1994) (holding that intentionally striking a motorcycle with a patrol car was "an application of deadly force"). The lethal potential of a vehicle has been recognized even where an officer used their patrol car as a stationary or moving roadblock and the plaintiff did not have an opportunity to voluntarily stop before colliding with it. *See Brower v. County of Inyo*, 884 F.2d 1316, 1317–18 (9th Cir. 1989) (on remand from the Supreme Court, concluding that a roadblock constructed by positioning an 18-wheeler truck across a highway in a manner that made it impossible for the driver to stop was deadly force); *Buckner*, 36 F.3d at 539–40 (characterizing as deadly force an officer's use of his patrol car as a roadblock where a motorcyclist did not have time or the ability to stop or to safely avoid colliding with the car).

Officer de Vries used deadly force here. When he erected a roadblock in Mr. Seidner's path, Mr. Seidner was riding his bicycle—which provided far less protection from impact than a car would—at a "high rate of speed," 2-ER-003, when he slammed head-first into Officer de Vries's multi-ton metal vehicle. *See* 2-ER-028 ¶ 6 (Mr. Seidner

explaining that he crashed "without recourse" and hit his head on "the flank of the squad car"). Officer de Vries's use of his vehicle as a makeshift roadblock to force a collision placed Mr. Seidner at substantial risk of serious injury. This risk was realized when Mr. Seidner did, in fact, sustain serious bodily injury because of the collision, including injuries to his head, wrist, and chest, and loss of consciousness. 2-ER-003.

Officer de Vries's use of deadly force was improper and unjustified under the circumstances. An officer may only use deadly force where a person poses a significant threat of death or serious bodily injury to others. *See City of Hemet*, 394 F.3d at 704 (affirming that a police officer may not use deadly force "'unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others'") (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). Mr. Seidner did not meet that criteria when he was cut off by Officer de Vries. Officer de Vries's conduct was thus objectively unreasonable. *Meredith*, 342 F.3d at 1061 (in the excessive force context, the amount of force used is balanced against the need for that force).

Notably, even when an officer does not use deadly force like Officer de Vries did here, this Court has repeatedly held that an officer's use of significant or "intermediate" force requires adequate justification. *Bryan*, 630 F.3d at 826 (a "significant level of force . . . must be justified by the governmental interest involved"). And this Court has characterized less lethal forms of force as "intermediate" and "significant," based in part on their potential to cause pain as compared with other types of force. *See Id.* at 1280 (characterizing a cloth-cased shot designed to knocking down a target and causing serious injury as less-than-lethal but high on the schedule of force); *Bryan*, 630 F.3d at 825–26 (characterizing stun guns and similar devices "intermediate" and "significant" force where they cause intense pain); *see id.* (recognizing this circuit's characterization of pepper spray as "more than a minimal intrusion" as it caused "intense pain," among other pain-compliance effects); *Silva v. Chung*, 740 F. App'x 883, 886–87 (9th Cir. 2018) (characterizing tasers in dart-mode as a significant use of force, and characterizing pepper spray as intermediate force). Officer de Vries's use of his vehicle to force a collision with Mr. Seidner at least meets these lower thresholds of severity and significance, where the potential for bodily injury to Mr. Seidner was serious. *See*

Bryan, 630 F.3d at 814–15 (Wardlaw, J., concurring in the denial of rehearing en banc).

Thus, under *Graham*, Officer de Vries would need to show that a "strong governmental interest" compelled the use of force. *Glenn*, 673 F.3d at 871–72 (stating that use of less-than-lethal force, "though less than deadly, . . . is permissible only when a strong governmental interest compels the employment of such force"); *Deorle*, 272 F.3d at 1280 (same); *Bryan*, 630 F.3d at 825 (same); *Santos*, 287 F.3d at 853–54 (concluding that an officer's use of a takedown maneuver is a "quite severe" intrusion that was not justified under the *Graham* factors even where the plaintiff did not comply with commands to place his hands on his head, where the crime at issue—public intoxication—was not at all serious, the plaintiff did not pose a significant or immediate safety risk, and the plaintiff didn't struggle with officers though he did not comply with commands to put his hands on top of his head). Where, as here, there is no public danger or harm justifying the use of force, the use of even non-lethal force is objectively unreasonable and excessive.

3. Officer de Vries had less intrusive means at his disposal to stop Mr. Seidner but failed to use them.

Unable to justify his use of force, Officer de Vries argues that he lacked any alternative means to stop Mr. Seidner from fleeing. AOB 14–15. But the district court identified several less-intrusive steps Officer de Vries could have taken—but did not—in attempting to stop Mr. Seidner from pedaling away. For example, Officer de Vries could have verbally instructed Mr. Seidner to stop and warned him that failure to do so would result in some use of force. *See* 1-ER-007 (finding that Officer de Vries did not attempt to warn Mr. Seidner); *cf. Deorle*, 272 F.3d at 1283–84 (holding that even "[l]ess than deadly force that may lead to serious injury . . . should be preceded by a warning . . .."). Officer de Vries also could have activated his siren to more clearly signify that he was attempting to stop Mr. Seidner. *See* 1-ER-007 (finding that Officer de Vries did not use his siren before erecting a roadblock in Mr. Seidner's path). These "clear, reasonable and less intrusive alternatives" were available to Officer de Vries, and his failure to use them "militates

against finding the use of reasonable force." *Glenn*, 673 F.3d at 876–78 (internal quotation omitted).

4. This Court lacks jurisdiction to consider Officer de Vries's argument that the accident would not have happened but for Mr. Seidner's allegedly malfunctioning brakes.

Officer de Vries reiterates on appeal that he did not intend to collide with Mr. Seidner, and he would not have collided with Mr. Seidner if his bike had working brakes. *See* AOB 13. This argument fails for at least three reasons.

First, this Court lacks jurisdiction to consider the argument. The district court concluded that "even assuming [Mr. Seidner's] bicycle had working brakes," there remains a disputed issue of fact whether Officer de Vries gave Mr. Seidner enough time to stop his bicycle and avoid colliding with Officer de Vries. 1-ER-007. This dispute turns on factual issues that are clearly within the province of the factfinder to resolve, and this Court lacks jurisdiction to disturb the district court's determination on appeal. *See, e.g.*, *Thomas*, 143 F.3d at 1248–49 ("[W]e lack jurisdiction to hear an interlocutory appeal where the district court denies summary judgment based on qualified immunity because material facts remain in dispute."); *id.* at 1248 (characterizing the officers'

contention that "they did not have the intent to inflict pain on" the plaintiff as one that "turns exclusively on factual issues").[6]

Second, assuming the Court has jurisdiction, Officer de Vries's arguments require a construction of the facts in his (the movant's) favor, which is inappropriate at the summary judgment stage. *See Martinez*, 323 F.3d at 1184. The BWC footage and Mr. Seidner's pleadings recount that Officer de Vries slammed on his brakes right in front of Mr. Seidner while he was travelling at a high rate of speed. 2-ER-003. Mr. Seidner collided with Officer de Vries's vehicle "almost immediately" after Officer de Vries's vehicle came to an abrupt stop. 1-ER-004 n.4 (the district court observing that Mr. Seidner hit Officer de Vries's car "almost immediately after Defendant stopped his car"). The amount of time that elapsed was plainly not sufficient for Mr. Seidner to (1) register that the patrol car—which had just zoomed past him and cut him off while he was travelling "at a high rate of speed"—had stopped, (2) hit his brakes or to otherwise

[6] Officer de Vries cites *Seekamp v. Michaud*, 109 F.3d 802, 807 (1st Cir. 1997), and *Montanez v. City of Orlando*, 678 F.App'x 905, 909–11 (11th Cir. 2017), two out-of-circuit cases, for the proposition that it was reasonable for him to assume Mr. Seidner's bicycle had functioning brakes. AOB 13. This argument, too, asks this Court to resolve the question of causation in his favor, which it lacks the jurisdiction to do. *See Thomas v. Gomez*, 143 F.3d 1246, 1248–49 (9th Cir. 1998) ("[W]e lack jurisdiction to hear an interlocutory appeal where the district court denies summary judgment based on qualified immunity because material facts remain in dispute.").

change course, and (3) stop his fast-moving bike or successfully reroute to avoid collision with Officer de Vries's patrol unit. *Cf.* 1-ER-007 (a reasonable jury could find that Mr. Seidner did not have enough time to stop "even assuming his bicycle had working brakes"). Based on this proper construction of the facts, a reasonable jury could conclude that Mr. Seidner would have collided with Officer de Vries's unit no matter what. Officer de Vries's arguments to the contrary are based on facts that, if true, would favor him, and the Court should not adopt them.

Finally, this Court has recognized that an officer's subjective intent is irrelevant to the objective reasonableness inquiry under the Fourth Amendment. *See Gregory v. County of Maui*, 523 F.3d 1103, 1106 (9th Cir. 2008) (observing that the pertinent question is whether the force used was objectively reasonable in light of the facts and circumstances confronting the officer, without regard to their underlying intent or motivation) (citing *Graham*, 490 U.S. at 397); *Brower*, 489 U.S. at 598 ("It may well be that respondents here preferred, and indeed earnestly hoped, that Brower would stop on his own, without striking the barrier, but we do not think it practicable to conduct such an inquiry into subjective intent."). Thus, whether Officer de Vries intended to collide

with and injure Mr. Seidner is irrelevant at this stage. In any event, Officer de Vries's claim that he did not intend to collide with Mr. Seidner is wholly inconsistent with Officer de Vries's prior representations in the district court. In his Motion for Summary Judgment, Officer de Vries, in attempting to justify his use of force, posited that "[t]he only reasonably safe way to stop the suspect is to pull ahead, stop, *and have the suspect crash into you*." 2-ER-015–016 (emphasis added). As the district court observed, this position presents "a direct contradiction" with his arguments on appeal that he did not intentionally collide with Mr. Seidner. 1-ER-005 (quoting 2-ER-015–016).

B. Other circuits' conclusions that similar uses of force were justified in more dangerous contexts do not sanction Officer de Vries's use of force.

Officer de Vries finally relies on two out-of-circuit cases—*Abney v. Coe*, 493 F.3d 412 (4th Cir. 2007), and *Coitrone v. Murray*, 642 F. App'x 517 (6th Cir. 2016) (unpublished)—to argue that his use force was objectively reasonable because the Fourth and Sixth Circuits, respectively, have sanctioned the use of deadly force in motorcycle chases in other cases. *See* AOB 15–17. But *Abney* and *Coitrone* concerned officer-induced collisions that the courts found necessary to terminate

chases that posed a substantial risk to the public and to the officers involved. Because there was no such risk here, the cases are inapposite.

In *Abney*, the Fourth Circuit held that the officer's use of his cruiser to stop a high-speed motorcycle chase was reasonable where the motorcyclist's flight posed an immediate danger to the public and to the officers. 493 F.3d at 417. In that case, the officer attempted to stop the plaintiff for suspicion of driving while intoxicated. *Id.* at 414. The plaintiff, who was riding on his motorcycle, led the officers on an eight-mile high-speed chase, during which he committed multiple dangerous traffic violations, including illegally passing vehicles by crossing the double yellow line more than five times, running other vehicles off the road, and running stop signs. *Id.* at 416–17. The Fourth Circuit concluded that the record was "replete" with evidence that the plaintiff's driving behavior "put other motorists at substantial risk of serious harm," and it was therefore "eminently reasonable to terminate the chase in order to avoid further risks to the lives of innocent motorists." *Id.*

Similarly, in *Coitrone*, the Sixth Circuit, in an unpublished opinion, held that an officer's use of deadly force to stop the plaintiff from fleeing was reasonable under the circumstances. In *Coitrone*, an officer ran the

plaintiff's motorcycle's license plate and discovered the plaintiff had outstanding warrants "for kidnaping, rape, sodomy, and bail jumping." 642 F. App'x at 518. The court observed that the plaintiff—who "drove recklessly during the pursuit by driving his motorcycle as fast as 65 to 70 miles per hour, exceeding the speed limit by as much as 25 miles per hour, crossing the double-yellow line, and driving in the left lane of a two-lane road in order to pass vehicles traveling in the right lane"—posed an immediate and substantial danger to the public, and officers were justified in using deadly force to nullify the risk. *Id.* at 521–22.

Officer de Vries's argument that the outcomes in *Abney* and *Coitrone* are controlling here ignores two fundamental principles of Fourth Amendment excessive force jurisprudence: first, that officers' use of force must be commensurate with the need for the force, *Meredith*, 342 F.3d at 1061 (emphasizing that the amount of force used is balanced against the need for that force); and second, that use of potentially deadly force, like that employed by the officers in *Abney* and *Coitrone*, is only reasonable when a person poses a substantial risk of harm to the public or to the officer, *City of Hemet*, 394 F.3d at 704. The use of force employed in *Abney* and *Coitrone* was not necessary here, where, as the district

court found, Mr. Seidner did not present any risk to the public or to Officer de Vries. *See* 1-ER-007 ("There is simply no evidence in this record that Plaintiff posed any threat to Defendant or to others.").

* * *

This Court has made clear that "the desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Glenn*, 673 F.3d at 876–77. This principle is especially true regarding uses of force in situations that are not dangerous to the officer or to others. Though an officer may use some force in effecting an arrest, he cannot use excessive force. *See Drummond*, 343 F.3d at 1058–1060. Officer de Vries's use of his vehicle under these circumstances—where there was no danger to the officer—was unconstitutionally excessive.

II. Officer de Vries's use of his vehicle to erect a roadblock that Mr. Seidner could not reasonably avoid, and that was likely to cause a collision, violated clearly established law.

For a right to be clearly established, "the contours of the allegedly violated right" must be "sufficiently clear that a reasonable official would understand that what he was doing violated that right." *P.B. v. Koch*, 96 F.3d 1298, 1301 (9th Cir. 1996) (internal brackets omitted) (citation

omitted). As the district court correctly recognized, factually identical prior precedent is not required; "in light of pre-existing law, the unlawfulness [of Officer de Vries's conduct] must be apparent." 1-ER-008 (citing *Hardwick v. County of Orange*, 844 F.3d 1112, 1117 (9th Cir. 2017)). General statements of the law can supply a "fair and clear warning" that an officer's conduct is unconstitutional, and "in [some] instances a general constitutional rule already identified in decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hardwick*, 844 F.3d at 1117 (quotation omitted). Viewing the summary judgment evidence in the light most favorable to Mr. Seidner, that standard is satisfied here.

First, the law has clearly established since at least 1989 that an officer's erection of a roadblock that leaves no reasonable opportunity for a person to voluntarily stop or otherwise avoid collision with the roadblock can constitute unreasonable force. *See Brower*, 498 U.S. 593.

Second, the Supreme Court and this Court have long recognized that the use of deadly force to forcefully subdue a fleeing person who poses no risk of deadly harm or substantial injury to themselves, to the

officer or to the public, violates clearly established law. *See, e.g.*, *City of Hemet*, 394 F.3d at 704 (citing *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)) (confirming that an officer may not use deadly force unless it is necessary to prevent escape and the officer has probable cause to believe the person poses a significant threat of death or serious physical injury to the officer or others); *Saetrum*, 673 F. App'x at 690 (recognizing that an automobile can inflict deadly force and can be used as a deadly weapon). Officer de Vries's use of deadly force to seize Mr. Seidner violated this clear precedent, which clearly proscribed Officer de Vries's obviously unconstitutional conduct. Further, this Court has clearly prohibited use of significant, but less-than-deadly, force where the use of force was not justified under the circumstances. *See e.g., Blankenhorn*, 485 F.3d at 480–81 (holding that *Graham* clearly established that force is only justified where there is a need for force, and this principle put officers on notice that tackling a relatively calm suspect violated the Fourth Amendment). Long-standing case law has established clear principles limiting an officer's use of significant force to instances of true need, which was lacking here. Officer de Vries's use of his vehicle to cut off Mr. Seidner in a manner likely to cause a collision "at a high rate of speed"

was the equivalent of employing unjustified deadly, or at least significant, force and was therefore proscribed under these circumstances by clearly established law.

A. The law is clearly established that constructing a roadblock that does not provide a person with a meaningful opportunity to avoid collision violates the Fourth Amendment.

The district court concluded that "*Brower* [*v. County of Inyo*, 498 U.S. 593 (1989)] gives notice that unreasonably erecting a roadblock in a way that is likely to cause a crash would support a claim for excessive force." 1-ER-008. That determination was correct, both based on *Brower*'s own terms and on subsequent interpretations of *Brower* by the circuit courts. Officer de Vries's reliance on immaterial factual distinctions between this case and *Brower*, and his invocation of a single distinguishable out-of-circuit opinion are no reason to reverse the district court's holding.

1. The Supreme Court's decision in Brower *clearly proscribed Officer de Vries's conduct.*

The Supreme Court's decision in *Brower* clearly established Mr. Seidner's right to be free from a roadblock erected such that he would be unable to voluntarily avoid collision with it. In *Brower*, the petitioners sued county officers under the Fourth Amendment for the officers'

unreasonable erection of a roadblock that left the decedent without a meaningful ability to stop before crashing into it. 498 U.S. at 594. In reversing the entry of summary judgment for the officers, the Court unequivocally confirmed that the "character" of the roadblock would bear on its reasonableness: "Petitioners can claim the right to recover . . . because the unreasonableness they allege consists precisely of setting up the roadblock in such as manner as to be likely to kill [the decedent]." *Id.* at 599. From this, the governing principle is easily distilled: A roadblock erected in a manner likely to employ deadly force violates the Fourth Amendment. *See id.*

Officer de Vries repeatedly protests that because the primary issue in *Brower* was whether the erection of the roadblock was a "seizure" under the Fourth Amendment, the court's language regarding the reasonableness of the roadblock is dicta. *See* AOB 7, 20, 23 n. 4. But the Supreme Court expressly noted that its decision would have been different "if Brower had had the opportunity to stop voluntarily at the roadblock, but had negligently or intentionally driven into it[.]" *Brower*, 489 U.S. at 599. And on remand, this Court declined to dismiss the plaintiffs' Fourth Amendment claim, reasoning that plaintiffs had stated

a plausible claim that the erection of the blockade was an unreasonable application of deadly force. *Brower v. County of Inyo*, 884 F.2d 1316 (9th Cir. 1989). Thus, even accepting Officer de Vries's argument that "[t]he *Brower* Court did not even rule on the reasonableness of the roadblock in that case," AOB 22, it does not matter because this Court squarely did.

Multiple circuits to consider the question have likewise treated the proposition that an officer acts unreasonably when he erects a roadblock that will cause a collision as the central holding of *Brower*. *See Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1095 (9th Cir. 2013) (noting that this Court "look[s] to all available decisional law, including the law of other circuits and district courts, to determine whether [a] right was clearly established") (citation omitted).

In *Buckner v. Kilgore*, for example, the Sixth Circuit confronted a similar situation. In *Buckner*, police chased two unarmed young men who fled on motorcycles. 36 F.3d at 538. One of the officers swung his cruiser in front of the two men to create a roadblock without using his sirens or lights. *Id.* The plaintiffs presented evidence that the crash occurred approximately two seconds after the officer created the roadblock—creating questions about whether the plaintiffs could have reasonably

stopped in time to avoid the cruiser. *Id.* In affirming the denial of qualified immunity, the Sixth Circuit found *Brower* controlled: "We hold that an officer violates a clearly established right under *Brower* if he pulls his squad car onto a highway with knowledge or reason to know that an approaching motorcyclist will not have time or the ability to stop or otherwise safely avoid collision with the car." *Id.* at 540.

Similarly, in *Hawkins v. City of Farmington*, an officer attempted to stop a motorcyclist—without suspecting him of any particularized criminal offense—by pulling his cruiser in front of the motorcyclist to form a partial roadblock. 189 F.3d at 698. "A second or two" later, the motorcyclist ran into the cruiser, sustaining serious injuries. *Id.* at 699–700. In reversing the district court's grant of qualified immunity to the officer, the Eighth Circuit found *Brower* dispositive of the "clearly established right question," reasoning that sufficient evidence existed to support a finding that the motorcyclist could not have avoided the crash—and that, if a jury so found, the officer committed a clear violation of the Fourth Amendment. *Id.* at 702–03.

Courts within this circuit, too, have concluded that *Brower* clearly prohibits an officer from erecting a roadblock that is likely to cause death

or serious bodily injury. *See, e.g.*, *Jacobs v. United States*, No. 10-cv-0479, 2012 WL 12870249, at *1, *4 (D. Ariz. July 23, 2012) (Tashima, J.) (concluding that as of 1989, *Brower* clearly established that unreasonable roadblocks violate the Fourth Amendment and denying qualified immunity to Border Patrol Agent who swung his car to block both lanes of traffic, causing a motorcyclist travelling approximately 75 miles per hour on an empty road to swerve and crash).

Viewing the evidence in the light most favorable to Mr. Seidner, the law clearly proscribed Officer de Vries's conduct here. Officer de Vries abruptly sped past Mr. Seidner, pulled directly in front of him, and slammed on the brakes while Mr. Seidner was riding "at a high rate of speed," leaving Mr. Seidner only one or two seconds to brake before crashing into the cruiser. Contrary to Officer de Vries's characterization, this conduct did not afford Mr. Seidner a reasonable opportunity to avoid collision and "was likely to result in serious injury to [Mr. Seidner]," *Buckner*, 36 F.3d at 540—and in fact did so. 2-ER-003 (describing injuries to head, chest, and wrist); 2-ER-028 ¶ 6 (same). *Brower*, *Buckner*, and *Hawkins* make clear—and have made clear for decades—that such conduct violates the Fourth Amendment.

2. Officer de Vries's attempt to distinguish the facts of Brower *from this case is futile, and his reliance on* Morrow v. Meachum *is misplaced.*

In resisting *Brower*'s clear statement of the law, Officer de Vries attempts to muddy the waters in two ways. *First*, Officer de Vries quibbles with immaterial differences between the facts in *Brower* and those present here. *See* AOB 21–22 (arguing that *Brower* is not like this case because in *Brower*, the driver was "fleeing in a high-speed automobile," the "police used an 18-wheel semitruck to stop the suspect," the "suspect was driving on a curvy, unlit highway," the "police placed the roadblock around a blind curve so the suspect wouldn't see it as he approached," and "the police knew their roadblock had a good chance of killing the suspect"). But Officer de Vries's granular focus on detailed distinctions between the types of obstruction used as roadblocks and where the roadblocks were set up deflects from the point of *Brower* bearing on reasonableness: an officer violates a clearly established right under *Brower* if he erects a roadblock with knowledge or reason to know that a person will not have the time or ability to stop or otherwise safely avoid collision. *See Buckner*, 36 F.3d at 540. Officer de Vries has offered no reason the principle does not hold in this case.

Further, that "the police [in *Brower*] knew their roadblock had a good chance of killing the suspect" and Officer de Vries alleges he did not is immaterial. *Brower* itself confirmed that the officers' intent in erecting the roadblock was not the proper subject of inquiry on appeal. *See Brower*, 489 U.S. at 598–99. And where an officer acts in a way that is likely to cause substantial bodily harm, even if not necessarily death, he has used deadly force. *See City of Hemet*, 394 F.3d at 693 (defining "deadly force" as "force that creates a substantial risk of causing death or serious bodily injury").

Second, Officer de Vries asserts that the Fifth Circuit's decision in *Morrow v. Meachum*, 917 F.3d 870 (5th Cir. 2019), requires judgment in his favor. In so arguing, Officer de Vries again invokes an out-of-circuit case with materially different facts, where the amount of force deployed was deemed reasonable because of the substantial risk the driver posed to the public and to the officer. *See* discussion supra (regarding *Abney* and *Coitrone*). In *Morrow*, the fleeing suspect was traveling at 150 miles per hour on a highway with "many other motorists on the road," which "pose[d] an obvious threat to the pursuing officers and the public." *Morrow*, 917 F.3d at 878. In an effort to stop the high-speed chase, the

officer started out already in front of the suspect, then halved his speed over seven seconds—and did not come to a full stop—at which point the suspect crashed into him. *Id.* at 873. Here, by contrast, Mr. Seidner was pedaling on his bicycle "on an otherwise deserted[,] well[-]lit residential street," 2-ER-028, when Officer de Vries sped ahead of Mr. Seidner, "cut [Mr. Seidner] off at a high rate of speed," and then came to an abrupt stop—leaving less than two second before Mr. Seidner crashed into him. 2-ER-003. In other words, *Morrow* involved a more dangerous chase *and* a more reasonable attempt to stop the suspect. It provides no defense for Officer de Vries here.[7]

B. Beyond *Brower*, the law is clearly established that using deadly or significant force when it is not necessary violates the Fourth Amendment.

Assuming *Brower* does not control—though it does—Officer de Vries is still not entitled to qualified immunity because his use of deadly, or at least significant, force on an unarmed, fleeing suspect who does not

[7] To the extent *Morrow* suggested that *Brower* "[did not] say anything about the *reasonableness* of the seizure," 917 F.3d at 878, it is simply incorrect. As detailed above, *Brower* expressly stated the parameters that would govern the reasonableness of the officer's use of a roadblock—which this Court, on remand, paid care to follow. Further, *Morrow* ignored this Court's decision in *Brower* (which is the controlling law in this circuit) and the Sixth Circuit's decision in *Kilgore*. *Id.* at 879–80. And while it acknowledged the Eighth Circuit's decision in *Hawkins*, it provided no explanation for why that case's interpretation of *Brower* was wrong. *Id.* at 880.

pose any risk of harm to anyone was unreasonable. *See* 1-ER-007 ("There is simply no evidence in this record that Plaintiff posed any threat to Defendant or to others.").

This circuit's law is clear that (1) use of force is characterized as "deadly" if the force could cause death or serious bodily injury, *City of Hemet*, 394 F.3d at 693; and (2) using a vehicle as an impact weapon can inflict deadly force, *see Aceves-Rosales*, 832 F.2d at 1157 ("It is indisputable that an automobile can inflict deadly force on a person and that it can be used as a deadly weapon."); *Acosta*, 83 F.3d at 1146 n.9 ("There is no question that an automobile *can* inflict deadly force . . .") (emphasis in original); *Saetrum*, 673 F. App'x at 690 (concluding that an automobile can inflict deadly force on a person) (collecting cases); *see also Toscano v. City of Fresno*, 1:13-cv-01987-SAB, 2015 WL 4508582, at *6–7 (E.D. Cal. July 24, 2015) (characterizing as deadly force an officer's use of his car as an impact weapon to stop a fleeing bicyclist).

And for at least 35 years, the limitations on an officer's authority to use deadly force have been clear: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."

Tennessee v. Garner, 471 U.S. 1, 11 (1985). This Court has recognized the strength and clarity of this principle in denying qualified immunity to officers who deploy excessive force against nonthreatening suspects. *See Tam Lam v. City of Los Banos*, 976 F.3d 986, 1001 (9th Cir. 2020) (recognizing as "forceful" the *Garner* use-of-force principle and denying qualified immunity); *Longoria v. Pinal Cty.*, 873 F.3d 699, 709–710 (9th Cir. 2017) (holding that *Garner* clearly established a nonthreatening suspect's right to be free from use of deadly force). *Garner*'s deadly force principle applies here, where any reasonable officer would have known it was constitutionally impermissible to run down and erect a roadblock likely to cause a collision with a bicyclist because of a minor civil traffic infraction. *See Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (observing that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question") (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *cf. Toscano*, 2015 WL 4508582, at *7 (in case where officer collided with fleeing bicyclist, holding that it is clearly established that "where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to

apprehend him does not justify the use of deadly force to do so" and denying officer qualified immunity).

Here, Officer de Vries created a substantial risk of serious injury, and thus used deadly force, when he used his squad car to erect a roadblock directly in Mr. Seidner's path, all but promising a violent collision with Mr. Seidner. *See supra*, Section I(A)(2); *City of Hemet*, 394 F.3d at 693 (defining "deadly force" as "force that creates a substantial risk of causing death or serious bodily injury"). Any reasonable officer would know that, under these circumstances, Officer de Vries could use such force only if "it [wa]s necessary to prevent [Mr. Seidner's] escape *and* [Officer de Vries] ha[d] probable cause to believe that [Mr. Seidner] pose[d] a significant threat of death or serious physical injury to the officer or others." *Ting v. United States*, 927 F.2d 1504, 1513 (9th Cir. 1991) (emphasis added). By contrast, such deadly force is impermissible "[w]here the suspect poses no immediate threat to the officer and no threat to others . . . ." *Garner*, 471 U.S. at 11; *accord Bradford v. City of Los Angeles*, 1994 WL 118091, at *3–4 (affirming jury verdict against officer who drove vehicle into unarmed fleeing suspect when "unnecessary to prevent [the plaintiff] from escaping").

But beyond its proscription on the use of deadly force, which Officer de Vries applied here, the law also clearly prohibits the use of significant, but less-than-deadly, force where the use of force was not justified under the circumstances, even in the absence of a factually identical case. Courts have readily relied on *Graham* for this proposition, particularly in cases where the offensive conduct was obviously unconstitutional. *See Taylor*, 141 S. Ct. at 53–54 (observing that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question") (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

For example, in *Blankenhorn v. City of Orange*, this Court held that an officer violated clearly established law when they tackled a trespassing suspect who was not actively resisting arrest. 485 F.3d at 480–81. In so holding, the court concluded that *Graham* supplied adequate notice "that force is only justified when there is a need for force," and that this "clear principle" would have put a prudent officer on notice that his conduct violated the Fourth Amendment. *Id.* Similarly, in *Bryan v. MacPherson*, this Court agreed that the *Graham* factors, as well as this circuit's precedent, placed an officer on notice that use of

intermediate force is unreasonable where the suspect was stopped for a minor offense and the suspect did not pose any threat to the officer or to the public. 630 F.3d at 832–33.

This "general constitutional rule" was enough to put Officer de Vries on notice that his use of significant force against an unexpecting, defenseless bicyclist who had not committed any crime, who posed no threat to the officer or to the public, and who was not actively resisting arrest, was unjustified and violated clearly established law.

Conclusion

For the foregoing reasons, this Court should affirm the district court's denial of qualified immunity to Officer de Vries.

April 9, 2021

Respectfully Submitted,

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Certificate of Service

I certify that, pursuant to Federal Rule of Appellate Procedure 31, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on April 9, 2021.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and this circuit's Local Rules 29.1(c) and 32.1 (a)(4)(A) because it contains 10,521 words.

This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, and is in Century, 14-point font.

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Statement of Related Cases

There are no related cases pending before the Ninth Circuit Court of Appeals.

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