No. _____

In The
SUPREME COURT OF THE UNITED STATES

RICHARD DOPKE and JANE DOE DOPKE,

Petitioner,

v.

KEN and MARY LOU ROGERS,

Respondent.

On Petition For a Writ of Certiorari
To The United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) **Has a seizure under the Fourth Amendment taken place when a police canine accidentally and unknowingly escapes the control of its handlers and contrary to the intent of officers, bites and holds an individual who is not a suspect?**

2) **Was the law "clearly established" as of July 13, 2003 that the authorization of a canine track of a fleeing misdemeanant was unconstitutional?**

LIST OF PARTIES

Richard Dopke is a sergeant with the City of Kennewick Police Department.

Ken and Mary Lou Rogers are the respondents in this matter.

City of Kennewick is a Municipal corporation.

Jeff Quackenbush was a Benton County Deputy Sheriff at the time of the incident.

Ryan Bonnalie was a police officer for the City of Kennewick Police Department at the time of the incident.

John Doe Kohn was a police officer for the City of Kennewick Police Department at the time of the incident.

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The United States District Court for the Eastern District of Washington denied Sergeant Richard Dopke's motion for summary judgment (*Pet.App. 68a-85a and 7a-18a*), and subsequent motion for reconsideration. (*Pet.App. 19a-67a*) In its memorandum opinion, the 9th Circuit Court of Appeals affirmed the District Court's opinion. (*Pet.App. 1a-6a)*

STATEMENT OF JURISDICTION

The United States Court of Appeals for the 9th Circuit entered a decision on this matter August 3, 2006. *Pet.App. 1a-6a.* The United States Supreme Court has proper jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

U.S. Const. Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…"

U.S. Const. Amend. XIV:

Section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983: "Civil Action for Deprivation of Rights"

Every Person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law…

STATEMENT OF THE CASE

On July 13, 2003 at approximately 12:55 a.m., while on duty with the Kennewick Police Department (KPD), Sergeant Richard Dopke observed a man riding a "mini-moped" without lights and without a helmet. (*Pet.App. 69a*) Sgt. Dopke radioed dispatch and activated his overhead lights and video camera in an effort to effectuate a traffic stop. The driver failed to stop, and instead continued traveling at a rate of 25-30 miles per hour. (*Pet.App. 69a*) When the driver refused to stop, he was in violation of RCW 46.61.022, a misdemeanor. (*Pet.App. 21a*) Sgt. Dopke then activated his siren and followed the moped another block, whereupon the driver turned into the driveway of a residence. (*Pet.App. 69a*) The driver then proceeded into the garage, at which point the garage door closed behind him. (*Pet.App. 69a*)

Sgt. Dopke called for backup units. (*Pet.App. 70a*) After the arrival of the additional units, Sgt. Dopke made contact with two women at the residence. (*Pet.App. 70a*) Sgt. Dopke told the women that if the person driving the moped would identify himself, he would merely issue a citation and leave. (*Pet.App. 70a*) The two women, and two men who were also present, advised Sgt. Dopke that the individual on the moped, whom they claimed to know only as "Troy," had fled out the back door and into the night. (*Pet.App. 70a*)

In an effort to check the veracity of the witnesses' story, Sgt. Dopke instructed the canine handler to use the canine to determine whether someone had in fact fled from the back of the house. At the time, Sgt. Dopke suspected that the witnesses were not being truthful, and he hoped to confront them about their story should the canine not be able to detect the scent of someone fleeing out of the house. Sgt. Dopke therefore directed Officer Bradley Kohn, the canine handler, to use KPD canine "Deke" to determine whether anyone had in fact fled the residence.

Officer Kohn, an experienced canine handler, sensitized Deke, a properly trained canine, to the back door and yard, whereupon Deke picked up a scent, indicating to his handler that someone had in fact fled out the back of the residence, just as the witnesses had claimed. Based upon the witnesses' report of a person fleeing out the back of their house in an effort to evade law enforcement, and upon Deke's "confirmation" of the story, Sgt. Dopke authorized a track of the fleeing suspect. As Sgt. Dopke waited in the driveway, KPD Officers Kohn and Ryan Bonnalie and Benton County Deputy Jeff Quackenbush began tracking the suspect using Deke. (*Pet.App. 70a*)

During the track, Deke became free of his lead. Unbeknownst to the officers, after becoming free of his lead, Deke jumped through a hole in a fence and made contact with Mr. Ken Rogers. (*Pet.App. 70a*) Mr. Rogers was visiting his family, but had been locked out of the house, and was therefore sleeping in the back yard. (*Pet.App. 23a*) Upon hearing Deke make contact with an individual, Officers Kohn and Bonnalie and Deputy Quackenbush entered the back yard in which Mr. Rogers had been sleeping, whereupon they subdued and arrested Mr. Rogers. (*Pet.App. 23a*)

Mr. Rogers was thereafter released once it was determined that he was not the driver of the moped that Sgt. Dopke had attempted to stop.

REASONS FOR ALLOWANCE OF THE WRIT

A. A seizure under the Fourth Amendment does not occur when a police canine accidentally and unknowingly escapes the control of its handlers and contrary to the intent of officers, bites and holds an individual who is not a suspect.

The Petition for a Writ of Certiorari should be granted because the 9th Circuit Court of Appeals' decision is in direct conflict with decisions from this Court and from other United States Courts of Appeals on the important subject matter of what constitutes "intent" for the purpose of establishing a Fourth Amendment seizure. The 9th Circuit erroneously concluded that because a canine track is itself an intentional act, any unintended events that occur during that track (i.e., an accidental biting of an unintended third-party) are

"intentional" for Fourth Amendment purposes. The 9th Circuit's decision in that regard is contrary to clearly established law holding that the Fourth Amendment does not apply to claims seeking remuneration for physical injuries *inadvertently inflicted upon innocent third parties* by police officers' use of force while attempting to seize a perpetrator, as the officers could not and can not "seize" any person other than one who was a deliberate object of their exertion of force.

In reaching its decision, the 9th Circuit held that it was of "no consequence" to a Fourth Amendment analysis whether the officers were "looking for Rogers specifically" or whether the officers were looking for someone else. (*Pet.App. 3a*) Rather, since the officers' actions in tracking an unidentified suspect were "intentional," whether the officers "intended to restrain Rogers specifically," or instead intended to restrain someone else, is of "no legal consequence." *Id*. The 9th Circuit's finding in this regard is in error.

In *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989), this Court made it clear that unintentional acts cannot be the basis for claims alleging an unconstitutional seizure. Rather, to be a Fourth Amendment seizure, the restraint of liberty must be effectuated through "means intentionally applied." As such, the unintentional consequences of lawful government action cannot form the basis of a Fourth Amendment violation. Subsequent to *Brower v. County of Inyo*, this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) held that when police officers intend to seize a perpetrator, and in the process unintentionally injure a third party, no Fourth Amendment seizure has occurred.

In holding that it was "of no legal consequence" that the officers herein were searching for, and intended to restrain, a fleeing suspect, and that Mr. Rogers, although he was an unintended and accidental victim, was unconstitutionally seized, the 9th Circuit improperly transferred the intent the officers had to arrest the fleeing suspect to Mr. Rogers. In so doing, the 9th Circuit's decision is contrary to and in conflict with the law of this Court and other circuits.

B. Case law as of July 13, 2003 did not "clearly establish" that a canine track of a fleeing misdemeanant was unconstitutional, and as such, Sgt. Dopke was entitled to a finding of qualified immunity.

Qualified immunity protects law enforcement officials who are required to make split second decisions within the course of their duties by insulating them from claims other than those for the violation of constitutional rights, where such rights were sufficiently clear at the time they were violated. Officers develop expectations, policies, and procedures based upon developed constitutional principles. One such expectation is that officers are not held accountable for "seizing" an individual when they do not intend to do so. The 9th Circuit has abrogated this security by refusing to find that Sgt. Dopke is entitled to qualified immunity despite the undisputed fact that his sole involvement in this matter was the authorizing of a legal and proper canine track.

The question of whether Sgt. Dopke is entitled to qualified immunity is the subject of a two pronged analysis. First, it must be established that Sgt. Dopke violated a constitutional right of Mr. Rogers. Second,

the constitutional right allegedly violated must have been so "clearly established" that "in the light of pre-existing law the unlawfulness [of the challenged action was] apparent."

As set forth herein, since Sgt. Dopke did not intend to seize Mr. Rogers, Sgt. Dopke did not violate any of Mr. Rogers' constitutional rights. In addition, under the second prong of the qualified immunity analysis, the law as of July 13, 2003 was not "clearly established" that a canine track of a fleeing misdemeanant was unconstitutional.

In performing the qualified immunity analysis, the 9th Circuit held that the law was clearly established that a "supervisor can be held liable for the actions of subordinates if he 'sets in motion a series of acts by others, or knowingly refused to terminate a series of acts of others, which he knew or reasonably should have known, would cause others to inflict constitutional injury.'" (*Pet.App. 5a*). The 9th Circuit's identification of the "clearly established law" that should have given Sgt. Dopke "fair warning" that this actions were allegedly unconstitutional was in error. The proper inquiry was whether or not there existed "clearly established law" that the authorization of a canine track of a fleeing misdemeanant was unconstitutional. As there was and is no such law, the 9th Circuit's decision is in error.

ARGUMENT

A. THE 9th CIRCUIT'S HOLDING THAT IT IS OF "NO LEGAL CONSEQUENCE" THAT THE OFFICERS WERE SEARCHING FOR A SUSPECT OTHER THAN MR. ROGERS WHEN THE

CANINE ESCAPED THE CONTROL OF THE HANDLERS AND CONTACTED ROGERS IS CONTRARY TO CASES FROM THIS COURT AND MANY OTHER CIRCUIT COURTS.

A Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. at 597. *Brower* provides that: "[a] seizure occurs even when an unintended person or thing is the object of the detention or undertaking, but the detention or taking itself must be willful. This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act." *Id.* at 597. This Court in *Brower*, clearly explained that at the very least, an officer must have knowledge of actions taken to effectuate a seizure. *Id.* As noted by the Court: The "Fourth Amendment addresses misuse of power, not the accidental effects of otherwise lawful government conduct." *Id.* at 596-97.

Nine years after deciding *Brower v. County of Inyo*, this Court again addressed the "intent" element of the Fourth Amendment in *County of Sacramento v. Lewis, supra.* That case involved a high-speed chase between the police and a motorcyclist that resulted in the death of a passenger on the motorcycle. This Court held that the passenger's death did not constitute a "seizure" under the Fourth Amendment because the collision that caused the death was unintentional. 523 U.S. at 844. The Court reaffirmed its earlier Fourth Amendment jurisprudence, holding that a seizure occurs from the "governmental termination of freedom of movement through means intentionally applied." *Id*.

Similar to the officers in this matter, the police officer in *County of Sacramento v. Lewis* was involved in the "intentional" pursuit of a fleeing suspect. Similar to Mr. Rogers, the injured person in *County of Sacramento v. Lewis* was not the subject of the police pursuit, but instead was the unintended victim of an accident that occurred during an intentional pursuit. Citing *Brower*, this Court noted that its prior cases "foreclose finding a seizure" in such situations where police action causes unintended injury to "the innocent passerby." *County of Sacramento v. Lewis*, 523 U.S. at 844. Mr. Rogers was an "innocent passerby," who, like the injured person in *County of Sacramento v. Lewis*, was not the suspect being pursued, but who, like the injured person in *County of Sacramento v. Lewis*, was accidentally injured during the pursuit. By holding that it was of "no legal consequence" that the officers were not pursuing Mr. Rogers, the 9th Circuit's decision is in direct conflict with both *Brower v. County of Inyo* and *County of Sacramento v. Lewis*.

In the years since this Court's decisions in *Brower v. County of Inyo and County of Sacramento v. Lewis*, there has been no shortage of cases further defining what level and form of "intent" is required to effectuate a seizure under the Fourth Amendment. Case law in that regard is very clear and very uniform – a seizure simply does not occur for Fourth Amendment purposes when an unknown or unintended person is accidentally injured by the unintended consequences of police action. As such, when the 9th Circuit's holding that "it is of no legal consequence whether Kohn and his fellow officers intended to restrain Rogers specifically, or merely intended to restrain an unidentified person the officers

were tracking," is in direct conflict with numerous other Circuit Court decisions.

The case of *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003) is on point. In that case, the plaintiff driver of an automobile, for himself and on behalf of the estates of his deceased wife and child, brought suit against law enforcement alleging a violation of the Fourth Amendment arising from an accident that occurred during a high speed chase when officers attempted to stop a fleeing vehicle using a tire-deflation device. The plaintiff argued that the officers had unreasonably seized him and his family by intentionally deploying the tire-deflation device in an effort to catch a fleeing suspect. *Bublitz*, 327 F.3d at 488-89. The 7th Circuit rejected the plaintiff's "transferred intent argument:"

> The police officers involved in the high-speed pursuit of Kevin James did not intentionally apply any means in an attempt to terminate the freedom of movement of the Bublitz family-the unfortunate collision between James and the Bublitzes was not a means intended by police to stop the family, but rather an unintended consequence of an attempt to seize James. This would seem to preclude any finding that the Bublitz family was "seized" by the police as a result of the crash.
>
> Mr. Bublitz attempts to distinguish these cases by making a kind of transferred intent argument. He notes that James's car was stopped or "seized" by Officer Durant's deployment of the Stinger Spike System-a "means intentionally applied." Because that intentional act had the further consequence of

> stopping the Bublitz vehicle, the argument goes, Durant must have intended to seize the Bublitz car as well. But it does not follow that because Durant intended to stop James's car, he therefore intended to stop any other car that could potentially become involved in a subsequent collision. The subsequent collision was instead the accidental and wholly unintended consequence of an act that happened to be committed by a government official. The Bublitz family was simply not the intended object of the defendant officers' attempts to seize the fleeing James, so the Fourth Amendment is not implicated and cannot provide the basis for a § 1983 claim.

Bublitz, 327 F.3d at 489.

In *Dunigan v. Noble*, 390 F.3d 486, (6th Cir. 2004), the plaintiff was mistakenly bit by a police canine who had been brought into the plaintiff's home to effectuate an arrest of the plaintiff's son. The 6th Circuit held that notwithstanding the dog bites, the dog handler had not seized the plaintiff through "means intentionally applied," as the dog handler had not intended to seize the plaintiff. *Dunigan v. Noble*, 390 F.3d at 492. In so holding, the Court rejected the plaintiff's argument that she was "seized" as a result of the dog handler having brought "a dangerous animal" into her home. *Id*.

In the 4th Circuit case of *Schultz v. Braga*, FBI agents attempting to stop a vehicle shot a passenger in the case. The Court held that no seizure had taken place. *Schultz v. Braga*, 455 F.3d 470 (4th Cir.2006). Specifically, the Court held that while the means applied (the gunfire) was intentional, there was no

actual intent to seize the hostage. *Id.* Similarly in *Childress v. City of Arapaho*, the 10th Circuit ruled that hostages who were accidentally shot while law enforcement officers were in pursuit of prison inmates were not "seized" under the Fourth Amendment. *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir.2000).

It is undisputed in this case that Sgt. Dopke did not intend to seize Mr. Rogers. Rather, Sgt. Dopke merely authorized the canine track of a believed fleeing suspect. Sgt. Dopke's intentional act of authorizing a canine track simply does not result in a Fourth Amendment seizure when the canine, unbeknownst to Sgt. Dopke, escapes the control of the handler and mistakenly bites and holds an unintended and unknown person. Case law is very uniform on that issue. For example, in *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000), the plaintiff, Quintana Claybrook, was the victim of an officer's errant bullet during a shootout involving her father-in-law, Royal Claybrook. The police were unaware that she was hiding inside her parked car during the shootout. The *Claybrook* Court held that there was no seizure because the officers had no idea that they were exerting force on the plaintiff. *Claybrook*, 199 F.3d at 359. See also, *Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir.2003) ("As we have held, a Fourth Amendment seizure occurs as a result of a car collision only where the police officer intended the collision to be the result."); *Rucker v. Harford County*, 946 F.2d 278 (4th Cir.1991) (bystander not seized by police bullet aimed at fleeing vehicle); *Medeiros v. O'Connell*, 150 F.3d 164 (2nd Cir.1998) (same); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir.1990); *Roach v. City of Fredericktown, Missouri*, 882 F.2d 294, 296 (8th Cir.1989) (officer

had not "seized" the innocent bystanders because he had not intended for the pursuit to result in an accident); *Dodd v. City of Norwich*, 287 F.2d 1, 3 (2d Cir.1987) (holding that negligence principles do not apply to Fourth Amendment claim since it "makes little sense to apply a standard of reasonableness to an accident"); *Clark v. Buchko*, 936 F.Supp. 212, 218 (D.N.J.1996) (holding that "the Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful government conduct"); *Troublefield v. City of Harrisburg*, 789 F.Supp. 160, 166 (M.D.Pa.1992), *aff'd*. 980 F.2d 724 (3d Cir.1992) (holding that no Fourth Amendment rights were violated when officer "did not intend the bullet to bring plaintiff within his control"); *Glasco v. Ballard*, 768 F.Supp. 176, 180 (E.D.Va.1991) (stating "a more appropriate understanding of the case law, as well as the history of the Fourth Amendment, suggests that a wholly accidental shooting is not a 'seizure' within the meaning of the Fourth Amendment").

The 3rd Circuit, in *Berg v. County of Allegheny*, 219 F.3d 261 (3rd Cir. 2000) succinctly stated the law:

> For example, if a police officer fires his gun at a fleeing robbery suspect and the bullet inadvertently strikes an innocent bystander, there has been no Fourth Amendment seizure. If, on the other hand, the officer fires his gun directly at the innocent bystander in the mistaken belief that the bystander is the robber, then a Fourth Amendment seizure has occurred.

Berg v. County of Allegheny, 219 F.3d at 269 (citations omitted)

In the instant case, Sgt. Dopke engaged in the intentional act of authorizing a canine track. Sgt. Dopke did not, however, authorize a canine track of Mr. Rogers. Rather, similar to the innocent bystander who is injured by the "inadvertent bullet" shot at a bystander, Mr. Rogers was inadvertently injured when Deke escaped the control of his handler. The 9th Circuit's holding that it was of "no legal consequence" that the officers were not searching for Mr. Rogers is clearly in error and clearly contrary to well-established law.

Although from lower courts, the following cases are illustrative of the 9th Circuit's error in this case, and how far the 9th Circuit departed from well-established case law regarding "accidental" dog bites. In *Cardona v. Connolly*, 361 F.Supp.2d 25 (D.Conn. March 28, 2005), the Court held that an officer (Connolly) did not seize the plaintiff (Cardona) when the officer's canine (Kemo) bit the plaintiff, because the officer never "meant to use this particular 'instrumentality' (*i.e.,* Kemo) in order to effect Cardona's seizure." *Cardona,* 361 F.Supp.2d at 33.

> Cardona has not shown that the dog bite was the result of Connolly's intentional act. Although Connolly had seized Cardona through the use of handcuffs, there is no indication that Connolly intended for Kemo to bite Cardona. That is, Connolly never meant to use this particular "instrumentality" (i.e., Kemo) in order to effect Cardona's seizure. There is no evidence that Connolly gave Kemo an order to attack Cardona, nor is there evidence that Connolly actually saw Kemo approach Cardona. In fact, Cardona admitted in her deposition that she did not hear

> Connolly order the attack and that she did not know if Connolly saw the dog's approach…"

Cardona v. Connolly, 361 F.Supp.2d at 33.

In *Andrade v. City of Burlingame*, 847 F.Supp. 760, 763-65 (N.D.Cal.1994), *aff'd sub nom. Marquez v. Andrade*, 79 F.3d 1153 (9th Cir.1996), a police officer pulled over a vehicle that fit the description of a suspect in an assault. While the officer was trying to subdue the driver of the vehicle, his police dog crawled out of the police vehicle and bit two of the passengers in the suspect vehicle (who turned out not to be suspects in the assault). *Andrade*, 847 F.Supp. at 762. The two passengers who were bit by the police dog brought suit, alleging a violation of the Fourth Amendment. In granting the defendants' motion for summary judgment, the Court noted:

> In the instant case, it is undisputed that Officer Harman did not intend to use his police dog to subdue the plaintiffs. Indeed, the officer had already halted the plaintiffs' movement when the dog escaped from the car and bit Rocio Andrade and Jackie Marquez. The plaintiffs had already been seized. Plaintiffs attempt to argue that because the *dog* intended to bite the two girls, its actions were "intentional" and thus a seizure within the meaning of *Brower*. The dog is not a defendant in this suit nor could it be. Nor is the dog a government actor. At other times in their papers, plaintiffs make a more appropriate analogy: that the dog was essentially one "weapon" in Officer Harman's arsenal. Because Officer Harman did not intend to seize plaintiffs by this means, however, there can be no fourth amendment

> violation. The key question is whether *Officer Harman* intended to seize plaintiffs by means of the dog and the answer is indisputably "no."

Andrade, 847 F.Supp. at 764.

As to Sgt. Dopke, it cannot be said that he intended to, or even had knowledge of, the alleged seizure of Mr. Rogers. Sgt. Dopke was not present during the pursuit, did not authorize Deke to be taken off his lead, and did not even know that Deke was off his lead. Sgt. Dopke was not present when, or aware that, Deke escaped the control of his handler and entered the backyard where Mr. Rogers was sleeping. Sgt. Dopke merely authorized the track of a fleeing misdemeanant – someone other than Mr. Rogers. Under those facts, Sgt. Dopke did not seize Mr. Rogers through "means intentionally applied." Since Sgt. Dopke did not violate Mr. Rogers' Fourth Amendment rights, the 9th Circuit was in error in affirming the trial court's denial of Sgt. Dopke's motion for summary judgment. Review is warranted by this Court because in affirming the trial court, the 9th Circuit ruled in a manner entirely contrary to decisions from both this Court and from numerous other Circuit Courts.

B. THERE EXISTED NO CASE LAW AS OF JULY 13, 2003 THAT CLEARLY ESTABLISHED THAT A CANINE TRACK OF A FLEEING MISDEMEANANT WAS UNCONSTITUTIONAL.

The second prong of the qualified immunity analysis asks whether, assuming Sgt. Dopke's actions violated Mr. Rogers' constitutional rights, those rights were so

"clearly established," *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), that "in the light of pre-existing law the unlawfulness [of the challenged action was] apparent," *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), that Sgt. Dopke should answer in tort. Sgt. Dopke is entitled to immunity unless "the law clearly proscribed" his actions. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Accordingly, qualified immunity protects those officials "who are required to exercise their discretion," *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894 (1978), and who "routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them." *Davis v. Scherer,* 468 U.S. 183, 196, 104 S.Ct. 3012 (1984).

In the instant case, the 9th Circuit erroneously focused on whether the law was "clearly established" that Sgt. Dopke could be liable for the actions of his subordinates for setting in motion a series of acts which he should have reasonably known would cause others to inflict constitutional injury. Sgt. Dopke does not dispute that the law was clearly established as identified by the 9th Circuit. That, however, is not the proper inquiry. The proper inquiry is whether the law was clearly established that the authorization of a canine track was unconstitutional. There was and is no law which establishes that Sgt. Dopke's actions of authorizing a canine track of a fleeing misdemeanant was unconstitutional.

For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the

very action in question has previously been held unlawful ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-37 (9th Cir.2003) ("In order to find that the law was clearly established ... we need not find a prior case with identical, or even 'materially similar' facts."). "Thus, the alleged conduct need not explicitly have been previously deemed unconstitutional, but existing case law must make it clear that the conduct violated constitutional norms." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 10-65-66, (9th Cir. 2006). Moreover, the plaintiff bears the burden of showing that the right at issue was clearly established under this second prong. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir.2002).

While there need not have been an identical case explicitly holding that Sgt. Dopke's authorization of the canine track was unconstitutional, the law must have been established such that it gave Sgt. Dopke "fair warning" that his actions were prohibited. While Sgt. Dopke can be said to have had "fair warning' that he could be liable for setting in motion acts which he reasonably should have known would result in constitutional violations, the 9th Circuit identified no case law that could be said to give Sgt. Dopke "fair warning" that the act he was authorizing itself was unconstitutional. There being no law clearly proscribing Sgt. Dopke's authorization of a canine track, he was entitled to a finding of qualified immunity.

In addition, even if the proper inquiry is whether the law was clearly established that Sgt. Dopke could be liable for setting in motion a series of acts that lead to

a constitutional violation, Sgt. Dopke was nonetheless entitled to a finding of qualified immunity, as there was no evidence that Sgt. Dopke had reason to believe that a constitutional violation may result from his authorization of the track. "There are innumerable situations where the use of a properly trained and utilized dog, even one trained only in bite and hold technique, will not result in physical interaction with the suspect, most obviously because the dog remains on a leash until his handler releases him." *Kuha v. City of Minnetonka*, 365 F.3d 590, 599-600 (8th Cir. 2002). When Sgt. Dopke authorized the canine track, he had every reason and right to believe that the tracking officers would abide by Kennewick Police Department regulations, which required that no more force than is necessary be used. Sgt. Dopke had the right to believe that nobody but the subject of the track might be contacted by the canine. Sgt. Dopke likewise had no reason to know that Deke would ever be off his lead, or that Deke would escape the control of his handlers and make contact with an unintended third party. As such, Sgt. Dopke had no reason to know or believe that the act he was setting in motion (a canine track) might result in a constitutional violation. Sgt. Dopke was thus entitled to a finding of qualified immunity. The 9th Circuit's decision is therefore contrary to decisions from both this Court and from other Circuit Courts.

CONCLUSION

The 9th Circuit's decision is contrary to decisions from this Court and from other Circuit Courts in two important respects. First, the 9th Circuit erroneously concluded that for Fourth Amendment purposes, it is of "no legal consequence" that officers accidentally injure innocent third parties while conducting police

pursuits. Second, in analyzing the second prong of the qualified immunity analysis, the 9th Circuit erroneously focused on whether the law was clearly established that Sgt. Dopke could be liable for the acts of his subordinates, as opposed to whether Sgt. Dopke's action in authorizing a canine track was itself unconstitutional.

In order for Sgt. Dopke to have "seized" Mr. Rogers, he had to have intended to do so. Sgt. Dopke had no such intent. Instead, Sgt. Dopke intended to have the canine officers track and apprehend a suspect Sgt. Dopke believed had fled through a private residence after refusing Sgt. Dopke's lawful commands to stop. The fact that Sgt. Dopke intended to track and apprehend someone other than Mr. Rogers is of significant legal consequence in analyzing whether a Fourth Amendment seizure has occurred. The 9th Circuit's holding to the contrary thus merits acceptance by this Court of this Petition for Writ of Certiorari.

The 9th Circuit also erred by incorrectly identifying what "clearly established" law gave Sgt. Dopke "fair warning" that his actions were unconstitutional. Sgt. Dopke cannot be denied qualified immunity because of the general and basic principle of law that a person can be liable for setting in motion acts which he or she should know might result in a constitutional violation. That clearly established principle of law could not give Sgt. Dopke "fair warning" that a canine track of a fleeing misdemeanant was unconstitutional. The relevant inquiry is whether there was any clearly established law that would have put Sgt. Dopke on notice that the canine track he ordered was unconstitutional. There was no such law. The 9th Circuit's misidentification of what law was "clearly

established" on July 13, 2003 thus merits acceptance by this Court of this Petition for Writ of Certiorari.