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22 UNITED STATES DISTRICT COURT

23 DISTRICT ARIZONA

24 J.K., a single woman, )

25 Plaintiff, )

26 v. )

27 ARIZONA BOARD OF REGENTS, a )

28 public entity, ARIZONA STATE )

29 UNIVERSITY, a Title IX funding )

30 recipient, DARNEL HENDERSON, a )

31 single man, GENE SMITH, a married )

32 man, DIRK KOETTER, a married man, )

33 CASSANDRA ASKA, a married )

34 woman, and STEVE RIPPON, a married )

35 man, )

36 Defendants. )

No. CV06-916 PHX-MHM

**PLAINTIFF'S MOTION FOR  
CERTIFICATION THAT  
DEFENDANT KOETTER'S  
INTERLOCUTORY APPEAL IS  
FRIVOLOUS**

1 Plaintiff, by and through counsel, hereby moves the Court to certify that  
2 Defendant Koetter's interlocutory appeal is frivolous. This Court has jurisdiction to  
3 issue such a certification and, for several reasons, Plaintiff urges the Court to do so in  
4 this case.  
5

6 Defendant Koetter's interlocutory appeal is frivolous and a transparent attempt to  
7 delay the trial of this matter. Indeed, the only qualified immunity issue that Defendant  
8 Koetter may even arguably appeal as a matter of right is the legal question of whether it  
9 was clearly established that a state official could be held liable where he affirmatively  
10 and with deliberate indifference placed an individual in danger she would not otherwise  
11 have faced at the time of the actions at issue. As the Court has already observed,  
12 "Plaintiff's right not to be affirmatively placed in danger by a state actor's deliberate  
13 indifference to a known or obvious danger was clearly established in 2003." *J.K. v.*  
14 *Arizona Board of Regents*, No. CV 06-916, 2008 WL 4446712 \*9 (D.Ariz. Sept. 30,  
15 2008).  
16  
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18 Second, to the extent Defendant Koetter's interlocutory appeal seeks review of  
19 any issues of fact, his appeal would be, at best, discretionary.  
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21 For these reasons and the reasons set forth below, Plaintiff respectfully request  
22 that the Court certify in writing that Defendant Koetter's appeal is frivolous to permit  
23 the matter to proceed to trial on March 3, 2009. Given the current deadlines set by the  
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1 Court for the parties to complete prior to the upcoming pretrial conference, Plaintiff also  
2 requests that the Court resolve these issues on an expedited basis.<sup>1</sup>

3  
4 **I. DEFENDANT KOETTER’S APPEAL IS FRIVOLOUS AND UNJUSTIFIED**

5 **A. This Court Has Jurisdiction To Certify That Defendant Koetter’s**  
6 **Appeal Is Frivolous**

7 Initially, in *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d  
8 411 (1985), the Supreme Court held that a district court’s rejection of a claim of  
9 qualified immunity, “to the extent that it turns on an issue of law,” is a final decision  
10 subject to immediate appeal under 28 U.S.C. § 1291. In the Ninth Circuit, the filing of  
11 an interlocutory appeal of the denial of qualified immunity divests the district court of  
12 jurisdiction to proceed to trial on the merits of those claims on appeal, unless the district  
13 court finds “that the defendants’ claim of qualified immunity is frivolous or has been  
14 waived.” *Chuman v. Wright*, 960 F.2d 104, 105 (9<sup>th</sup> Cir. 1992). If the district court  
15 concludes that the appeal is frivolous, it must “certify, in writing, that defendants have  
16 forfeited their right to pretrial appeal, and may proceed with trial.” *Id.* The certification  
17 entitles the district court to retain jurisdiction over all of the claims in the case, including  
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24 <sup>1</sup> The interlocutory appeal does not divest this Court of jurisdiction to rule on  
25 pretrial and case-management issues, including discovery. “[A]n appeal of an  
26 interlocutory order does not ordinarily deprive the district court of jurisdiction except  
with regard to the matters that are the subject of the appeal.” *Britton v. Co-op Banking  
Group*, 916 F.2d 1404, 1412 (9<sup>th</sup> Cir. 1990); *see also Griggs v. Provident Consumer  
Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982).

1 those related to the appeal, and empowers the district court to deny a motion for stay  
2 over all claims. *See Marks v. Clarke*, 102 F.3d 1012, 1017 n.8 (9<sup>th</sup> Cir. 1996).

3  
4 **B. Defendant Koetter’s Appeal is Frivolous**

5 This Court’s jurisdiction to certify that Defendant Koetter’s appeal is frivolous is  
6 critical to promoting the fair and efficient resolution of this dispute. The certification  
7 process promotes fairness by protecting litigants against baseless appeals of qualified  
8 immunity and protracted delays in litigation. *See, e.g. Behrens v. Pelletier*, 516 U.S.  
9 299, 310-11 (1996) (concluding District Court properly “certified petitioner’s immunity  
10 appeal as ‘frivolous’” in order to “minimize [the] disruption of the ongoing  
11 proceedings.”). It also promotes efficiency by permitting the Ninth Circuit to dispose of  
12 frivolous appeals summarily. *See, e.g., Marks*, 102 F.3d at 1017 (“Ordinarily, if the  
13 district court deems the appeal frivolous and the court of appeals agrees, the appeal can  
14 be disposed of summarily.”).

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16  
17 A qualified immunity claim may be certified as frivolous if it is “so baseless that  
18 it does not invoke appellate jurisdiction.” *Id.* at 1017 n.8 (citations omitted); *see also*  
19 *Wilson v. Maricopa County*, 484 F.Supp.2d 1015, 1021 (D.Ariz.2006) (in certifying a  
20 qualified immunity interlocutory appeal as frivolous, Judge Campbell notes: “An appeal  
21 is frivolous if the results are obvious, or the arguments of error are wholly without  
22 merit.”). As discussed further below, *see infra* at Section B(1), Koetter’s appeal appears  
23 to present exactly the same issues resolved by the district court’s recent opinion in  
24 *Wilson*, where Judge Campbell elected to certify the case as frivolous. Here, for several  
25  
26

1 reasons, it is in the best interest of fairness and efficiency for the Court to exercise its  
2 authority and certify that Defendant Koetter’s appeal is frivolous.

### 3 4 **1. The Constitutional Right at Issue was Clearly Established**

5 Although Defendant Koetter has yet to explain the specific nature of the issues on  
6 which he appeals the Court’s denial of qualified immunity, it is well-settled that the right to  
7 immediate interlocutory review of the denial of qualified immunity only applies to  
8 questions of law, not fact. *See, e.g., Lee v. Gregory*, 363 F.3d 931, 932 (9<sup>th</sup> Cir. 2004)  
9 (“Our review is limited to issues of law[.]” The district court’s determination that the  
10 parties’ evidence presents genuine issues of material fact **is not reviewable on an**  
11 **interlocutory appeal.**”) *Id.* (emphasis added); *see also Johnson v. Jones*, 515 U.S. 304,  
12 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (noting that appellate review is generally limited  
13 to issues of law affirming that summary judgment determinations are appealable when they  
14 resolve a dispute concerning an ‘abstract issue[e] of law’ relating to qualified immunity,  
15 ...-typically, the issue whether the federal right allegedly infringed was ‘clearly  
16 established’”); *Behrens, supra* at 306.

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20 The United States Supreme Court has explained that the appealable question of law  
21 under qualified immunity is typically limited in scope to a determination of whether or not  
22 the **“legal norms allegedly violated by the defendant were clearly established at the**  
23 **time of the challenged actions** or whether the law clearly proscribed the actions the  
24 defendant claims he took.” *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (emphasis  
25 added). The Court in *Mitchell* further noted that the “appellate court need not consider the  
26

1 correction of the plaintiff's version of the facts, nor even determine whether the plaintiff's  
2 allegations actually state a claim." *Id.*

3  
4 Here, the only issue of law on which this Court has ruled in the context of qualified  
5 immunity is that "Plaintiff's right to not be affirmatively placed in danger by a state actor's  
6 deliberate indifference to a known or obvious danger was clearly established in 2003." *J.K.*  
7 *v. Arizona Board of Regents*, No. CV 06-916, 2008 WL 4446712 \*9 (D.Ariz. Sept. 30,  
8 2008). That is, therefore, the only issue that Defendant Koetter could argue is  
9 immediately appealable as a matter of right.  
10

11 But Defendant Koetter's interlocutory appeal of whether or not the constitutional  
12 right at issue was clearly established would be frivolous given longstanding Ninth  
13 Circuit law. With controlling precedent like *Kennedy v. City of Ridgefield*, 439  
14 F.3d1055, 1066 (9<sup>th</sup> Cir. 2006), *Munger v. City of Glasgow*, 227 F.3d 1082, 1086 (9<sup>th</sup>  
15 Cir. 2000), *L.W. v. Grubbs*, 974 F.2d 11, 122 (9<sup>th</sup> Cir. 1992); and *Wood v. Ostrander*,  
16 879 F.2d 583, 589-90 (9<sup>th</sup> Cir 1989), this legal issue cannot be legitimately debated. The  
17 right to not be affirmatively placed in danger by a state actor's deliberate indifference to a  
18 known or obvious danger such as a sexual assault was clearly established as early as  
19 1989—long before the acts of Koetter that provide the basis for the claims against him in  
20 this action. *See Kennedy, supra* at 1065-66 (citing *Wood, supra*).  
21  
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23 As noted above, this very issue was previously decided by Judge Campbell in  
24 *Wilson, supra*. Like the present case, the defendant, Sheriff Joe Arpaio, sought an  
25 interlocutory appeal of the denial of summary judgment on the issue of qualified  
26

1 immunity with regard to the issue surrounding an inmate death while in custody at “tent  
2 city.” The Court held the appeal frivolous for various reasons. Initially, just as with the  
3 constitutional right at issue in this case, the Court noted that the right to be free from  
4 inmate-inmate assaults was well established prior to the incident in question. But Judge  
5 Campbell also recognized that the appeal was based upon issues of fact relating to  
6 Sheriff’s conduct, not a legal issue, which further supported a finding that the appeal  
7 was frivolous. *See also Estate of Gonzales v. Hickman*, 2007 WL 3238722 \*2 (C.D.Cal.  
8 June 11, 2007) (court finds appeal filed frivolous, in part, because state-created danger  
9 in the prison context was clearly established in 2005).

10  
11  
12 Consequently, given the existence of undisputed, longstanding law that  
13 individuals have a right not to be affirmatively placed in danger by a state actor’s  
14 deliberate indifference to a known or obvious danger (such as a sexual assault), any  
15 interlocutory appeal of this legal issue is certifiably frivolous.

16  
17 **2. The Court’s Ruling Finding Disputed Fact Issues Is Not Subject**  
18 **to Interlocutory Appeal**

19 In *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), the  
20 Supreme Court delineated the type of qualified immunity questions that were  
21 immediately appealable. It held that a district court’s determination that the summary  
22 judgment record raised a genuine issue of fact concerning the existence of the  
23 underlying constitutional violation was not a “final decision” that could be immediately  
24 appealed. *Compare id.* at 313, *with Lee*, 363 F.3d at 935 (noting, with respect to the  
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26

1 district court’s finding of fact disputes precluding qualified immunity, “We may not  
2 review that determination.”).

3  
4 Other than the legal issue of whether the constitutional right was established as  
5 discussed *supra*, any other ruling by the Court would not be subject to an interlocutory  
6 appeal as a matter of right, because it would be based on disputed issues of fact. This  
7 Court determined that factual issues remain as to whether Koetter acted affirmatively in  
8 creating the danger; was deliberately indifferent to the danger he was creating; and  
9 whether his conduct was the proximate cause of the assault of Plaintiff. *J.K., supra* at  
10 \*7, \*9 and \*11. As the Court specifically found:

- 11
- 12 • [T]hat the evidence in the record does in fact support a reasonable inference that  
13 Coach Koetter affirmatively facilitated Henderson's return to ASU after the  
14 Summer Bridge program...Accordingly, viewing the evidence in the light most  
15 favorable to Plaintiff and drawing all reasonable inferences in her favor, the  
16 Court finds that Defendant Koetter’s conduct amounted to affirmative conduct  
17 that enhanced the danger to which J.K. was exposed;
  - 18 • Whether Koetter’s actions were objectively reasonable and not deliberately  
19 indifferent is for the fact-finder.
  - 20 • “[W]hether the injury alleged was a ‘fairly direct’ result of Koetter's alleged  
21 conduct is likewise a question for the jury.”

22 As correctly recognized by the Court, each one of these is an issue of fact. They  
23 are clearly not appropriate for interlocutory appeal.

## 24 **II. CONCLUSION**

25 For the foregoing reasons and based upon the foregoing authorities, Plaintiff  
26 respectfully requests that the Court certify Defendant Koetter’s appeal as frivolous and

1 allow the parties to proceed to trial as planned and without needless delay on March 9,  
2 2009. This Court has previously and correctly concluded that the Ninth Circuit cases on  
3 the “state-created danger” exception unequivocally established such a right prior to  
4 2003. As in *Wilson*, 484 F.Supp. at 1021, Defendant Koetter’s interlocutory appeal of  
5 whether or not the constitutional right at issue was clearly established is without  
6 reasonable basis in fact and law and is merely intended to delay Plaintiff’s day in court.  
7

8 Plaintiff respectfully requests, therefore, that her Motion be granted.  
9

10 DATED this 28th day of October, 2008.

11 SCHLEIER LAW OFFICES, P.C.

12 s/ Tod F. Schleier \_\_\_\_\_

13 Tod F. Schleier

14 Attorney for Plaintiff

15 I hereby certify that on this 28<sup>th</sup> day of October,  
16 2008, I electronically filed the foregoing with the  
17 U.S. District Court Clerk using the CM/ECF  
18 system, which shall send notification of such  
19 filing to the following:

20 Michael K. Goodwin  
21 Assistant Attorney General  
22 TERRY GODDARD  
23 ATTORNEY GENERAL  
24 1275 West Washington  
25 Phoenix, Arizona 85007-2997  
26 Attorneys for State Defendants

Copy mailed this 28<sup>th</sup> day of October, 2008 to:

Darnel Henderson  
P.O. Box 99422  
Emeryville, California 94662

s/ Charolette A. Wilson \_\_\_\_\_