

No. 21-

IN THE
Supreme Court of the United States

THE ESTATE OF DILLON TAYLOR,
CODY TAYLOR, JERRAIL TAYLOR, TEESHA
TAYLOR, AND ADAM THAYNE,

Petitioners,

v.

SALT LAKE CITY AND BRON CRUZ,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

MARK J. GERAGOS
Counsel of Record
GERAGOS & GERAGOS, APC
644 South Figueroa Street
Los Angeles, California 90017
(213) 625-3900
geragos@geragos.com

Counsel for Petitioners

311460



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Tenth Circuit impermissibly expanded the judicially-created doctrine of qualified immunity to shield an officer where there is a substantial and material dispute in the evidence.
2. Whether the Tenth Circuit majority impermissibly usurped the role of the jury by resolving material factual disputes in favor of the *moving* party on a motion for summary judgment.
3. Whether the Tenth Circuit erred in holding that an officer is entitled to qualified immunity on summary judgment where there is a genuine dispute of fact as to whether his use of excessive force was the result of his own reckless or deliberate actions.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Estate of Dillon Taylor, Cody Taylor, Jerrail Taylor, Teesha Taylor, and Adam Thayne (collectively, “Taylor”¹) are the Petitioners in this Court. Taylor was a Plaintiff in the United States District Court for the District of Utah and an Appellant in the United States Court of Appeals for the Tenth Circuit.

Salt Lake City and Bron Cruz are Respondents in this Court. Both were Defendants in the District Court proceedings and Appellees in the proceedings in the Court of Appeals.

In accordance with this Court’s Rule 29.6, it is hereby stated that The Estate of Dillon Taylor has no parent or publicly held company owning 10% or more of the entity’s stock.

1. When a specific reference to any person falling under this collective label or to the Decedent is necessary, that person’s first name will be used.

RELATED CASES

- *Est. of Taylor v. Salt Lake City*, No. 2:15-cv-00769-DN-BCW, United States District Court for the District of Utah. Judgment in favor of Defendants entered on May 17, 2019.
- *Est. of Taylor v. Salt Lake City*, No. 19-4085, United States Court of Appeals for the Tenth Circuit. Judgment affirming the District Court entered on October 26, 2021; rehearing denied on December 6, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Taylor respectfully submits this Petition for a Writ of Certiorari for review of the majority opinion of the Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The District Court's May 17, 2019 order granting summary judgment in favor of Bron Cruz and Salt Lake City, App. 97a., is not published in the Federal Supplement but is available at 2019 WL 2164098. The October 26, 2021 decision of the Court of Appeals affirming the District Court, App. 1a., is published and is available at 16 F.4th 744. The December 6, 2021 order of the Court of Appeals denying rehearing, App. 176a., is unpublished.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its decision on October 26, 2021 and denied Taylor's petition for rehearing on December 6, 2021. App. 176a. This Petition timely follows. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This Petition arises from an action brought by Taylor on behalf of Decedent Dillon Taylor against Salt Lake City and Officer Bron Cruz. Taylor's complaint asserts multiple causes of action for the violation of Dillon's civil rights under 42 U.S.C. § 1983.

On August 11, 2014, Respondent Bron Cruz shot and killed Dillon after responding to a report of a Hispanic

male walking on the street who “looked suspicious.” Dillon had been walking to a 7-Eleven in Salt Lake City with his brother, Jerrail, and his cousin, Adam. The three men were peaceful and unarmed. Dillon was walking away from Officer Cruz at the time of the shooting. After being ordered by Officer Cruz to show his hands, Dillon turned around, briefly bringing his hands to his waist to pull up his baggy pants. Though Dillon carried no weapon, Officer Cruz believed he could be reaching for one and thus fired the deadly shots.

On October 28, 2015, Taylor filed a complaint in the District Court alleging that Cruz had wrongfully killed Dillon and violated his civil rights through the unjustified use of deadly force. On November 28, 2016, Cruz and Salt Lake City filed a motion for summary judgment. The District Court granted their motion on May 17, 2019, finding that Cruz was entitled to qualified immunity as a matter of law because his use of force had been objectively reasonable under the circumstances. Taylor appealed.

On October 26, 2021, the Court of Appeals issued a majority opinion affirming the judgment of the District Court. Notably, the Court of Appeals also issued a dissenting opinion. In the dissent’s view, the majority “impermissibly usurp[ed] the role of the jury by resolving material factual disputes, and flipping the summary judgement standard on its head to interpret the record in the light most favorable to Officer Cruz.” *Est. of Taylor v. Salt Lake City*, 16 F.4th 744, 778 (10th Cir. 2021) (Lucero, J., dissenting). Taylor promptly filed a petition for rehearing which the Court of Appeals denied on December 6, 2021.

STATEMENT OF THE CASE

On August 11, 2014, Cruz responded to a radio transmission from Salt Lake City’s emergency dispatch. *Est. of Taylor v. Salt Lake City*, 16 F.4th 744, 748 (10th Cir. 2021). The emergency dispatch had received a 911 call from someone who reported seeing two Hispanic men, one of whom possessed a gun but did not make any threats with it. *Id.* at 778 (Lucero, J., dissenting). The dispatcher noted that the caller did not cooperate and did not identify herself and that she hung up on the 911 operator. *Id.* (Lucero, J., dissenting).

Cruz investigated the call with two colleagues from the Salt Lake City Police Department. *Id.* at 749. Though Dillon did not match the description of the person with the gun mentioned in the dispatch call, Cruz pursued Dillon and his companions, following them for nearly five minutes and observing only innocuous conduct. *Id.* at 784–85 (Lucero, J., dissenting). Cruz then prepared to confront Dillon’s party. *Id.* at 785 (Lucero, J., dissenting). Before Cruz exited his patrol car, however, Dillon put in a pair of headphones and began walking away from the scene. *Id.* at 778, 780 (Lucero, J., dissenting). Cruz pursued Dillon, commanding him to turn around and show his hands. *Id.* at 749–50. Dillon turned to face Cruz, briefly putting his hands to his waist to adjust his baggy pants. *Id.* at 781–82 (Lucero, J., dissenting). Cruz then shot Dillon, killing him. *Id.* at 750–51.

On October 28, 2015, Taylor filed a complaint in the District Court, alleging that Cruz had violated Dillon’s civil rights through the use of unjustified deadly force. Cruz and Salt Lake City moved for summary judgment,

arguing that Cruz was entitled to qualified immunity because his use of force was objectively reasonable under the circumstances. After reviewing the evidence, which included a video of the fatal shots and the moments immediately preceding them, the District Court granted the motion for summary judgment. Taylor appealed. *See Taylor*, 16 F.4th at 747.

The case came before a three-judge panel in the Court of Appeals. *Id.* The Court of Appeals affirmed the District Court's judgment via a majority opinion issued on October 26, 2021. *Id.* at 748. The majority found that Cruz had been objectively reasonable in his use of deadly force because the record showed that (1) Dillon “ignored or disobeyed Officer Cruz,” *Taylor*, 16 F.4th at 765; (2) Dillon’s movements were such that “a reasonable officer would believe that [Dillon] made a hostile motion with a weapon towards the officers,” *Id.* at 766; (3) Dillon was physically close to Cruz at the time of the shooting, *Id.* at 769–70; and (4) “a reasonable officer could have perceived from [Dillon’s] actions not only that his intentions were hostile, but also that they were malevolent,” *Id.* at 770.

The Court of Appeals’ decision was not unanimous, however. *Id.* at 777 (Lucero, J., dissenting). A dissent was issued along with the majority opinion that pointed out serious flaws in each of the majority’s findings of fact. *See id.* at 777–90 (Lucero, J., dissenting). As the dissenting judge explained, the evidence was anything but clear:

22 seconds.

That is precisely the time elapsed—22 seconds—from the moment Officer Bron Cruz stopped

his police cruiser in a Salt Lake City 7-Eleven parking lot to the point at which he fatally shot twenty-year-old-innocent-unarmed Dillon Taylor. Dillon’s crimes? Walking away from an unconstitutional police stop and pulling up his pants. The majority concludes, as a matter of law, that it was objectively reasonable, based on qualified immunity, to free Officer Cruz from any liability without a trial. This cannot be right. It is not the place of this court to resolve factual disputes as to the reasonability of Officer Cruz’s actions. I am concerned about the extension of the judicially created doctrine of qualified immunity to shield officers even when there is a substantial and material dispute in the evidence as I explain below. I most respectfully dissent.

Id. at 777 (Lucero, J., dissenting).

The majority’s determination that Dillon ignored or disobeyed Cruz was premised on the majority’s finding that (1) Dillon began walking away from Cruz instead of following his commands; (2) Dillon ignored multiple commands from Cruz to “get [his] hands out”; and (3) when Dillon finally did respond to Cruz’s commands, he did so by “turning around and continuing to separate himself from Officer Cruz by walking backwards.” *Id.* at 765–66. As the dissent recognized, however, the video of the shooting paints a very different picture. *See id.* at 780–81 (Lucero, J., dissenting). Not only is it clear from the footage that Dillon began walking away from Cruz before Cruz even got out of his car (and thus may not have realized that Cruz’s commands were directed at him), but

the video also shows that after Dillon turned to face Cruz, Cruz did not even complete two commands before firing the fatal shots. *Id.* (Lucero, J., dissenting).

As to the majority's determination that Dillon's motions would have caused a reasonable officer to believe that Dillon was making a hostile motion with a weapon, the record once again makes clear that an alternative conclusion is entirely supported. *See id.* at 780–84. The majority's determination was based on its findings that (1) Dillon's party matched the description of the party of the man reported to have possessed a gun; (2) Dillon walked away from the officers at the scene instead of putting up his hands as his colleagues did; (3) Dillon yelled verbal challenges at the officers; and (4) Dillon put his hands into his waistband and appeared to dig for something in a manner “consistent with the drawing of a gun.” *Id.* at 766–67. First, not only was the dispatch report known to be unreliable, but also, nobody in Dillon's party wore clothing that matched that of either man described in the dispatch report. *Id.* at 784 (Lucero, J., dissenting). Second, as already mentioned, the video shows Dillon walking away before Cruz exited his car and is anything but clear regarding Dillon's alleged defiance of officer commands. *Id.* at 780–81 (Lucero, J., dissenting). Third, the verbal challenges referred to by the majority are not captured in the video, but rather described only in subjective officer testimony. *Id.* at 782 n.3 (Lucero, J., dissenting). Finally, the majority's conclusions that Dillon appeared to dig for something and move in a manner “consistent with the drawing of a gun” do not find support anywhere in the record and instead result from the majority's own subjective interpretation of a few seconds of unclear video footage. *See id.* at 781 (Lucero, J., dissenting).

Regarding the majority's determination that the proximity between Cruz and Dillon further supported the reasonableness of the shooting, the dissent once again offers poignant counterpoints: not only did the video footage fail to reveal whether cover was available to Cruz, but it also showed that Dillon was walking away from Cruz and that it was Cruz who was closing the distance between them. *Id.* at 782 (Lucero, J., dissenting).

Finally, the majority's conclusion that "a reasonable officer could have perceived from [Dillon]'s actions not only that his intentions were hostile, but also that they were malevolent," *Id.* at 770, suffers from the same flaws as many of the majority's other determinations. This conclusion was premised on the majority's finding that Dillon made verbal challenges to the officers and that his actions were consistent with the drawing of a gun. *Id.* at 771. As has been explained, however, the video of the shooting does not reflect any verbal challenges and is not a clear illustration of the nature of Dillon's hand movements. *See id.* at 781, 782 n.3 (Lucero, J., dissenting). Further bolstering the case against the majority's findings is the fact that the video is plainly inconsistent with officer testimony. *Id.* at 783 (Lucero, J., dissenting).

Further, even if it were assumed for the sake of argument that Cruz's use of deadly force against Dillon was entirely reasonable under the circumstances, the majority's opinion would still be defective, as Tenth Circuit law requires more: an officer cannot have unreasonably created the need for use of deadly force through reckless or deliberate conduct. *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995). The majority essentially glossed over this critical element, stating "there is no

basis for concluding that Officer Cruz acted recklessly and unreasonably in the circumstances surrounding his seizure of (i.e., use of lethal force against) [Dillon], or that any such actions by Officer Cruz ‘immediately connected with the seizure’ ‘creat[ed] the need for force.’” *Id.* at 772 (quoting *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001)). Indeed, the majority seemed to simply rubber-stamp the District Court’s determination on this point. *See id.*

As the dissent recognizes, however, the record is replete with evidence that could support a reasonable conclusion that Cruz recklessly created the need for deadly force even if use of such force was ultimately reasonable under the circumstances: (1) the dispatch report was known to be unreliable and nobody in Dillon’s party matched the description of anyone mentioned in the report, *Id.* at 784 (Lucero, J., dissenting); (2) the conduct reported in the dispatch report—flashing a gun without making a threat—did not constitute any kind of violation of law, *Id.* (Lucero, J., dissenting); (3) Cruz spent nearly five minutes following Dillon’s party before accosting them, during which time, he did not observe a gun or any suspicious activity, *Id.* (Lucero, J., dissenting); and (4) though Cruz spent several minutes preparing for his confrontation with Dillon, he did not fully activate his bodycam until seconds before the shooting, *Id.* at 785 (Lucero, J., dissenting).

Further, Cruz’s initial stop of Dillon’s party was unconstitutional under well-established Supreme Court precedent. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Fla. v. J.L.*, 529 U.S. 266, 268 (2000) (“[A]n anonymous tip that a person is carrying a gun is, without more, [in]sufficient

to justify a police officer's stop and frisk of that person."); *see also Taylor*, 16 F.4th at 785 (Lucero, J., dissenting). Moreover, Cruz's actions were clearly reckless under Tenth Circuit precedent. *See Taylor*, 16 F.4th at 787–88 (citing *Est. of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019) (officers who shot an intoxicated man wielding a baseball bat after the man had shouted obscenities at them instead of following their commands were found reckless because they had approached the man quickly, screamed at him to drop his bat, and refused to give him ground as he approached them); *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) (material issue of fact existed as to recklessness of officers who shot an armed man known to have made threats and been suicidal because evidence showed that an officer ran screaming up to the man's car and immediately began shouting at him).

Taylor filed a timely petition for rehearing following the issuance of the Court of Appeals' decision, but the court denied this petition on December 6, 2021. App. 176a.

REASONS FOR GRANTING CERTIORARI

I. The Court of Appeals Deviated from the Objective Reasonableness Inquiry Set Forth in *Graham v. Connor* by Relying on the Subjective Interpretation of the Shooting Officer in Determining that the Fatal Shooting Was Reasonable.

This Court should intervene to deter the expansive effects that the Court of Appeal's decision could have on people across the United States, not just in the Tenth Circuit. This Court's guidance is necessary to establish clear standards and prevent lower courts from rendering

judgment in excessive force cases when genuine issues of material fact exist.

It is obvious from the record that the Court of Appeals improperly relied on the shooting officer's subjective interpretation of events to supplant the objective facts contained in video evidence, in contravention of *Graham v. Connor*, 490 U.S. 386 (1989). It is well known that determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake. *Tennessee v. Garner*, 471 U.S. 1 at 8 (1985), quoting *United States v. Place*, 462 U.S. 696, 703 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. *See Terry v. Ohio*, 392 U.S., at 22–27 (1968). Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559, (1979), its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8–9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of ... seizure"). *Graham v. Connor*, 490 U.S. 386, 397 (1989).

Most importantly, under the Fourth Amendment, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *See Scott v. United States*, 436 U.S. 128, 137–139 (1978); *see also Terry v. Ohio, supra*, 392 U.S., at 21 (in analyzing the reasonableness of a particular search or seizure, “it is imperative that the facts be judged against an objective standard”). An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional. *See Scott v. United States, supra*, 436 U.S., at 138, citing *United States v. Robinson*, 414 U.S. 218 (1973). *Graham v. Connor*, 490 U.S. 386, 397 (1989).

Here, the Court of Appeals majority first concluded “the record clearly establishes that Mr. Taylor ignored or directly disobeyed Officer Cruz and Officer Sylleoglou’s commands.” *Taylor*, 16 F.4th at 765. The majority based this determination on its view that the video of Dillon being shot shows Dillon (1) ignoring repeated commands from Officer Sylleoglou and walking away; (2) ignoring repeated commands from Officer Cruz to “get [his] hands out;” and (3) ultimately responding to Officer Cruz’s commands by “turning around and continuing to separate himself from Officer Cruz by walking backwards.” *Id.* at 765–66. As the dissent points out, however, the record is far from clear on these matters and, in fact, includes significant evidence to support a conclusion diametric to the one reached by the majority.

The video shows that Dillon began walking away *before* Officer Cruz exited his police cruiser. Furthermore, Officer Downes admitted that the officers' conflicting commands at the scene of the shooting created an atmosphere of confusion; also, Dillon was wearing headphones at the time. *Id.* at 780–81 (Lucero, J., dissenting). Thus, the record plainly supports an inference that Dillon began walking away before the police had begun to accost him and that he did not initially realize the officers' commands were directed at him. Second, the video shows that Officer Cruz made only two commands to Dillon after Dillon turned around to face him, and that Officer Cruz did not even complete the second command before firing. *Id.* at 781 (Lucero, J., dissenting). Thus, the video of the shooting is far from the definitive record of defiance that the majority paints it to be; rather, it is at best ambiguous, and its ambiguity should have been resolved in Taylor's favor.

Notably, Officer Cruz claimed that as he approached Dillon and his companions, Adam and Jerrail quickly put their hands up, while Dillon glared at Cruz with “complete and total defiance in his eyes.” *Id.* (Lucero, J., dissenting). This assertion is plainly contradicted by the video evidence, which shows Dillon walking away before Officer Cruz even exited his car. *Id.* (Lucero, J., dissenting). Given that this and other inconsistencies cast doubt on the credibility of the officers' statements regarding Dillon's manifest intentions at the scene, this is yet another disputed issue that should have been decided by a jury. But it is clear from the opinion that the majority factored in much of Officer Cruz' subjective interpretation of events to misinterpret the video and fill in gaps, in direct contravention of the objective reasonableness standard set forth in *Graham*.

All of the above illustrates that the majority's decision was based on impermissible weighing of disputed evidence. The majority improperly usurped the jury's role by factoring in Officer Cruz' subjective interpretation of the events leading up to the shooting to find that the shooting was in fact reasonable, and in other words, that no reasonable jury could have concluded otherwise.

II. The Court of Appeal's Decision Threatens to Extend the Judicially-Created Doctrine of Qualified Immunity to Shield Officers Even When There Is a Substantial and Material Dispute in the Evidence.

Review should be granted because the majority opinion improperly interprets the record in a light that favors Officer Cruz rather than Taylor, the non-moving party. The *Gutierrez* Court stated that summary judgment should not be granted based on qualified immunity where "a reasonable jury could find facts supporting a violation of a [clearly established] constitutional right." *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016). It is a fundamental principle of summary judgment that "all evidence must be construed in the light most favorable to the party opposing summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) at 261 n.2. In other words, the "non-moving party." *Gutierrez*, 841 F.3d 895, 900 (10th Cir. 2016).

Given that video evidence of Dillon's death is available, the Tenth Circuit has repeatedly held that where such evidence can reasonably be interpreted to support a plaintiff's version of the facts, a triable issue exists, and it is the responsibility of the jury—not the court—to resolve this factual dispute. *Bond v. City of Tahlequah*, 981 F.3d

808, 819 (10th Cir. 2020). Rather than act in accordance with clearly established precedent, the majority drew its own conclusions about the interpretation of the video footage of the Dillon shooting based upon the responding officer’s subjective testimony—not viewing the evidence in the light most favorable to the non-moving party.

Under a qualified immunity analysis, it must first be determined whether Officer Cruz violated the decedent’s Fourth Amendment rights. According to *Gutierrez*, the plaintiff does not need to conclusively prove a constitutional violation at the summary judgment stage. All the plaintiff needs to show is “a reasonable jury could find facts supporting a violation of a constitutional right.” *Gutierrez*, 841 F.3d at 900. In this matter, the issue is whether Officer Cruz unreasonably used excessive force.

In its opinion, the majority erroneously concluded that “the record clearly establishes that Mr. Taylor ignored or directly disobeyed Officer Cruz and Officer Sylleloglou’s commands.” *Taylor*, 16 F.4th at 765. The majority based its views in light most favorable to the testimony of Officer Cruz, the moving party. In its determination, the court stated that the video shows Dillon: (1) ignoring repeated commands from Officer Sylleloglou and walking away; (2) ignoring repeated commands from Officer Cruz to “get [his] hands out;” and (3) ultimately responding to Officer Cruz’s commands by “turning around and continuing to separate himself from Officer Cruz by walking backwards.” *Id.* at 765-66.

In the video, Dillon began walking away before Officer Cruz exited his police vehicle as he was wearing headphones. *Id.* at 780-81 (Lucero, J., dissenting). Officer

Cruz made only two commands to Dillon after Dillon turned around to face him. Officer Cruz did not even complete the second command before firing his weapon. The majority regarded Dillon's movements as definitive acts of defiance. This interpretation required the majority to erroneously and favorably rely upon officer testimony to fill in gaps and provide the necessary context for the video. Consequently, the majority ignored key facts which were favorable to the non-moving party including Officer Downes' statements that the conflicting commands were creating an atmosphere of confusion at the scene, and the fact that Dillon's headphones potentially impeded his ability to comply with the various commands.

These two facts make it unclear whether Dillon's movements were definite acts of defiance or reflective of his inability to comply. Regardless, the conflicting accounts should have been viewed most favorably to Taylor and thus genuine issues of material fact were created and should have been left to a jury to determine whether Officer Cruz was unreasonable in his use of excessive force.

In this matter, the majority not only ignored well-established precedent that a jury, not a court, is to decide genuine issues of material fact, but it inexplicably misapplied *Gutierrez*, *Graham*, and *Sevier* in doing so.

This Court should grant this petition and definitively set out the standards for applying qualified immunity so the bewildering patchwork of circuits will have clear guidance unlike the present muddled, incongruous state of the law.

III. The Court of Appeal's Decision Misapplies *Sevier*.

Not only did the Court of Appeal deny a jury from deciding genuine issues of material fact, but it also erred in its application of *Sevier* to the facts of this case.

In *Sevier*, the Tenth Circuit explained that the reasonableness of Defendants' actions is two-fold: (1) whether the officers were in danger at the precise moment that they used force; and (2) whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force. *Sevier v. City of Lawrence*, 60 F.3d at 699. Here, the Court of Appeals rested its decision solely on the first prong and it wholly disregarded whether Officer Cruz unreasonably created the need to use such force based upon his own reckless and deliberate conduct.

Assuming *arguendo* that Officer Cruz's perception of danger and use of force was objectively reasonable at the time of the shooting, Officer Cruz would still not be entitled to qualified immunity because there is a genuine dispute of fact as to whether Officer Cruz violated Dillon's Fourth Amendment rights by using force as a result of his own reckless or deliberate actions.

In its ruling, the majority summarily determined that "there is no basis for concluding that Officer Cruz acted recklessly and unreasonably in the circumstances surrounding his seizure of (i.e., use of lethal force against) Mr. Taylor, or that any such actions by Officer Cruz 'immediately connected with the seizure' 'creat[ed] the need for force.'" *Taylor*, 16 F.4th at 772, quoting *Medina*

v. Cram, 252 F.3d 1124, 1132 (10th cir. 2001). As the dissent points out, however, there is much in the record to support a finding that Officer Cruz's perceived use of deadly force resulted from his own reckless or deliberate conduct: (1) the suspect descriptions in the dispatch report to which Officer Cruz responded were not only known to be unreliable, but also did not match Dillon and his companions, *Id.* at 784 (Lucero, J. dissenting); (2) the reported conduct by the main suspect—flashing a gun without making a threat—did not constitute any kind of violation of law, *Id.* (Lucero, J., dissenting); (3) Officer Cruz spent nearly five minutes following Dillon and his companions and preparing for confrontation, during which time, he did not observe a gun or any suspicious activity, *Id.* (Lucero, J., dissenting); and (4) though Officer Cruz spent several minutes preparing for confrontation with Dillon, he did not fully activate his bodycam until seconds before shooting *Id.* at 785 (Lucero, J., dissenting).

Not only was Officer Cruz's initial stop of Dillon's party unconstitutional under well-established Supreme Court precedent. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Fla. V. J.L.*, 529 U.S. 266, 268 (2000), but Officer Cruz's actions following the unconstitutional stop were reckless under Tenth Circuit precedent.

In *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997), officers were dispatched to a visibly armed man who had threatened to harm his family. *Id.* As officers approached, the male suspect was inside his vehicle, holding a firearm in his right hand. *Id.* Officers yelled commands and attempted to open the passenger-side door as the male suspect then aimed his firearm towards officers. *Id.* Consequently, shots were exchanged, and the

male suspect was killed. *Id.* The *Allen* court still found that genuine issues of material fact existed as to whether the officers had recklessly created a need to use force because the records included evidence that one of the officers ran screaming up to the man's car and immediately began shouting at him. *Id.* at 840-41.

Here, the circumstances are much more favorable to the Plaintiff. First, officers never observed Dillon to be armed as they spent over five minutes trailing him to the local convenience store. Second, the video footage makes it clear that Dillon tried to walk away from officers — not approach them. It was the officers who were relentless in contacting Dillon. Third, Officer Cruz failed to approach Dillon in a reasonable and sensible manner intended to avoid escalation. Instead, Officer Cruz created an atmosphere of immediate tension and hostility with aggressive commands while pointing a firearm at Dillon. Case law is clear that it is a jury, not a court, who should ultimately decide whether Officer Cruz's actions were reckless and caused the need to use deadly force; and violated Dillon's clearly established right to be free from unlawful seizure under the Fourth Amendment.

Ultimately, the Court of Appeal failed to satisfy the second prong in *Sevier*, namely that Officer Cruz did not unreasonably create the need to use such force when firing at Dillon, and the decision of the Court of Appeal must be overturned.

CONCLUSION

For the foregoing reasons, Taylor respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

MARK J. GERAGOS
Counsel of Record
GERAGOS & GERAGOS, APC
644 South Figueroa Street
Los Angeles, California 90017
(213) 625-3900
geragos@geragos.com

Counsel for Petitioners

APPENDIX

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE TENTH
CIRCUIT, FILED OCTOBER 26, 2021**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

October 26, 2021, Filed

No. 19-4085

THE ESTATE OF DILLON TAYLOR; CODY
TAYLOR; JERRAIL TAYLOR; TEESHA TAYLOR;
ADAM THAYNE,

Plaintiffs-Appellants,

v.

SALT LAKE CITY; BRON CRUZ,

Defendants-Appellees.

**Appeal from the United States District Court
for the District of Utah.
(D.C. No. 2:15-CV-00769-DN).**

Before **HOLMES**, Circuit Judge, **LUCERO**, Senior
Circuit Judge, and **McHUGH**, Circuit Judge.

HOLMES, Circuit Judge.

Appendix A

Over thirty years ago, the Supreme Court recognized the cold reality that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). And, regarding such circumstances, the Fourth Amendment is clear: officers need not wait until they see the gun’s barrel or the knife’s blade before using deadly force to protect themselves or those around them. *See, e.g., Est. of Larsen ex rel. Sturdivan v. Murr* (“*Est. of Larsen*”), 511 F.3d 1255, 1260 (10th Cir. 2008). They must simply act reasonably. *See, e.g., Kisela v. Hughes*, U.S. __, __ 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018).

We are constrained to apply these principles today in deciding this appeal, which arises from the tragic death of Dillon Taylor (“Mr. Taylor”), who was shot and killed by Salt Lake City Police Officer Bron Cruz. Officer Cruz and two fellow officers were following up on a 9-1-1 call reporting that a man had flashed a gun. The caller described the man and noted that he was accompanied by another male whom the caller also described. The officers attempted to stop Mr. Taylor and two male companions because two of the three men matched the caller’s descriptions. While Mr. Taylor’s companions immediately complied with the responding officers’ commands to stop and show their hands, Mr. Taylor did not. Instead, he made a 180-turn and walked away. Firearms in hand, but not pointed at Mr. Taylor, Officer Cruz and another responding officer followed Mr. Taylor. The officers repeatedly ordered him

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to stop and show his hands. Mr. Taylor did not. Instead, he verbally challenged the officers, kept walking, and placed at least one of his hands in his waistband.

A short time later, Mr. Taylor turned to face Officer Cruz, but continued walking backwards. Both of Mr. Taylor's hands were then concealed in the front of his waistband; they appeared to be digging there, as if Mr. Taylor were manipulating something. Officer Cruz trained his firearm on Mr. Taylor and ordered him to stop and show his hands. Mr. Taylor verbally refused and kept walking backward. Then, without any verbal warning, Mr. Taylor quickly lifted his shirt with his left hand—exposing his lower torso—and virtually simultaneously withdrew his right hand from his waistband. The motion took less than one second and was consistent with the drawing of a gun. Reacting to Mr. Taylor's rapid movement, Officer Cruz shot Mr. Taylor twice—firing in quick succession. Mr. Taylor died at the scene. When he was searched, Mr. Taylor was unarmed; in particular, he did not have a gun.

Mr. Taylor's estate and family members (collectively, "Plaintiffs") filed this lawsuit under 42 U.S.C. § 1983, asserting claims against Salt Lake City and Officer Cruz—as well as multiple others, including other Salt Lake City police officers and Salt Lake County employees. The primary question before us is whether Officer Cruz's decision to shoot Mr. Taylor was reasonable based on the totality of the circumstances. We conclude that it was. Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's judgment.

*Appendix A***I****A¹**

At approximately 7:00 p.m. on the evening of August 11, 2014, Officer Cruz heard a radio transmission from Salt Lake City’s 9-1-1 Call Dispatch (“Dispatch”). Dispatch stated that a man located at the intersection of 1900 South Street and 200 East Street “flashed a gun” but did not make a threat. *See Apls.’ Suppl. App., Ex. 1, at 0:05-0:09* (Dispatch Recording, dated Aug. 11, 2014) (hereinafter

1. Guided by *Graham* and its progeny, “[t]his factual [background] recitation focuses on the information the officers had at the time of the encounter.” *Bond v. City of Tahlequah*, 981 F.3d 808, 812 n.3 (10th Cir. 2020), *rev’d on other grounds*, __ U.S. __, No. 20-1668, 2021 U.S. LEXIS 5310, 2021 WL 4822664 (per curiam), at *3 (Oct. 18, 2021); *see Graham*, 490 U.S. at 396 (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene”). Accordingly, unlike Plaintiffs, we disregard the supposed “tipsy” state of the 9-1-1 caller and the apparent fact that Mr. Taylor “had been wearing earphones” during his encounter with Officer Cruz and the other officers. *Apls.’ Opening Br.* at 3, 13. Likewise, we decline Defendants’ invitation to consider “[e]vidence of Mr. Taylor’s mental state,” *Aplees.’ Resp. Br.* at 9 (bolding and underlining omitted)—specifically, in the form of communications that Mr. Taylor supposedly had with his associate, Adam Thayne, on the day of the shooting, but *prior to* his encounter with Officer Cruz and the other officers, and posts that Mr. Taylor put on his Facebook page *days before* this encounter. The foregoing information would not have been available to the officers when they had their tragic interaction with Mr. Taylor on the evening of August 11, 2014. *See Bond*, 981 F.3d at 812 n.3 (disregarding specific information “not available to the officers, such as what happened earlier that day”).

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“Ex. 1”). Dispatch added that the man was accompanied by an associate, and described the two suspects. The first was a “male Hispanic wearing [a] white shirt, red pants, [and a] red baseball cap.” *Id.* at 0:08-0:14. The second was “another male Hispanic wearing a striped shirt.” *Id.* at 0:14-0:18. Dispatch did not specify which individual “flashed” the firearm, but stated that “both suspects [we]re now going west bound on 2100 South from 200 East.” *Id.* at 0:38-0:45. Because the caller hung up, Dispatch had no further information.

Officer Cruz responded that he was “in the area.” *Id.* at 0:33-0:35. In his next transmission, Officer Cruz identified three individuals whom he believed matched Dispatch’s description; they turned out to be Adam Thayne, Jerrail Taylor, and Mr. Taylor. Adam Thayne was wearing a blue striped shirt and white shorts; Jerrail Taylor was wearing a red Miami Heat basketball jersey, a red hat, and red striped pants; and Mr. Taylor was wearing a white t-shirt and black pants. The three men were walking west on the south side of 2100 South Street, approximately two blocks west of 200 East Street.

Before stopping the three men, Officer Cruz waited for help from additional officers. During that time, Mr. Taylor and his two male associates—who were then subjects of Officer Cruz’s investigation—entered a 7-Eleven convenience store on the southwest corner of 2100 South Street and South State Street. Soon after, Salt Lake City Police Officers Andrew Sylleloglou (“Officer Sylleloglou”) and Uppsen Downes (“Officer Downes”) arrived. Officer Sylleloglou parked on Major Street—the street just west

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of the 7-Eleven. Officer Downes parked next to Officer Cruz across from the 7-Eleven. The following exhibit indicates the approximate location of Mr. Taylor's party and the officers at this point:



Aplt's. App. at 510 (with additions for clarity).

When Mr. Taylor and the two other men exited the 7-Eleven, all three officers converged on the store. The officers were in uniform and driving marked police vehicles. With overhead lights flashing, Officers Cruz and Sylleoglou approached the front of the 7-Eleven, from opposite directions, and parked next to each other. Officer Downes went to the building's rear and then soon thereafter returned to the front. As they exited their vehicles, Officers Cruz and Sylleoglou immediately began ordering the three men to stop and to show their hands. Adam Thayne, for example, heard the officers command them to "stop" and "put [their] hands above [their] head[s]."

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Aplts.' Suppl. App., Ex. 3A, Doc. 44-3, at 3:34:51-35:06 (Recording of Adam Thayne's Interview, dated Aug. 11, 2014) (hereinafter "Ex. 3A"). Adam Thayne and Jerrail Taylor put their hands up and complied with the officers' commands. And, subsequently, they were detained by Officer Downes.

Mr. Taylor looked at Officers Cruz and Sylleloglou as they approached. However, unlike Adam Thayne and Jerrail Taylor, Mr. Taylor made a 180-degree turn, and started walking west along the north side of the 7-Eleven—away from the officers. Officer Sylleloglou yelled more than once at Mr. Taylor, "Hey, you in the white shirt, stop," but Mr. Taylor did not stop. Aplts.' App. at 548 (Tr. Andrew Sylleloglou Dep., dated Apr. 10, 2017). Both officers followed Mr. Taylor with their guns drawn but not pointed at him. Officer Sylleloglou moved parallel to Mr. Taylor and continued ordering him to stop and show his hands. But Mr. Taylor did not comply. Officer Cruz was behind Mr. Taylor. Mr. Taylor was wearing a baggy t-shirt and baggy pants; his shirt was hanging outside of his pants. His hands were by his sides. Shortly after he started walking, Mr. Taylor appeared to pull up his pants by reaching his hands down on either side of his pants and tugging them upwards.

Approximately nine seconds after he started walking away from Officer Cruz and Officer Sylleloglou, Mr. Taylor raised his hands to waist level—with the position of his elbows extended on either side—with his long, baggy t-shirt raised to waist level. He appeared to have one or both of his hands in the front of his pants' waistband. It was at this moment that both Officer Cruz and Officer

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Sylleloglou pointed their firearms at Mr. Taylor; neither officer, however, had his finger on his gun's trigger. Officer Cruz was now ten to twenty feet directly behind Mr. Taylor, while Officer Sylleloglou walked parallel to Mr. Taylor at approximately the same distance. Officer Sylleloglou recalls that around this time—in apparent response to his repeated commands to show his hands—Mr. Taylor starting verbally challenging him, saying things like, “What are you going to do? Come on, . . . shoot me.” *Id.* at 551.

About two seconds after Mr. Taylor placed his hands in his waistband, Officer Cruz stated “[g]et your hands out now.” Apls.’ Opening Br. at 8; Apls.’ Suppl. App., Ex. 6, at 0:31-0:33 (Officer Bron Cruz’s Body Camera Video, dated Aug. 11, 2014) (hereinafter “Ex. 6”). At this point, Mr. Taylor turned around and faced Officer Cruz. He continued moving away from Officer Cruz by walking backwards. Both of his hands were in his waistline and concealed, and Mr. Taylor appeared to be moving his hands in a “digging” motion, like he was “manipulating” something. Apls.’ App. at 455-57 (Tr. Bron Cruz Dep, dated Feb. 24, 2017). At that point, Officer Cruz maintained a steady pace and continued ordering Mr. Taylor to show his hands.

Specifically, as soon as Mr. Taylor faced him, Officer Cruz stated a second time, “get your hands out.” Ex. 6 at 0:33-0:34. Mr. Taylor responded, “Nah, fool.” *Id.* at 0:35; *see* Apls.’ App. at 564. And, he continued to move his concealed hands in a way that suggested he was manipulating something in the waistline of his pants. Officer Cruz had started ordering Mr. Taylor to remove his hands a third time when, without verbal warning,

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Mr. Taylor rapidly removed his left hand from his waistband—lifting his shirt and exposing his torso—and, virtually simultaneously, withdrew his right hand from his waistband but lower than his left hand. The motion took less than one second and was consistent with the drawing of a gun.²

2. Plaintiffs contend, however, that Mr. Taylor was simply pulling up his pants or complying (albeit belatedly) with the officers' commands to show his hands. *See, e.g.*, Aplts.' Opening Br. at 37 ("Viewing the facts in the light most favorable to Mr. Taylor would require the Court consider his hand movement simply pulling up his pants as opposed to reaching for a weapon or failing to comply to orders to raise his hands."); *id.* at 42 ("When Mr. Taylor did put his hands up to show Officer Cruz he did not have a weapon, Officer Cruz shot him."). However, like the district court, we believe that, viewed in the totality, the record evidence—especially the video evidence—"blatantly contradict[s]" these contentions. *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *see Est. of Taylor v. Salt Lake City*, No. 2:15-cv-00769-DN-BCW, 2019 U.S. Dist. LEXIS 84464, 2019 WL 2164098, at *23 (D. Utah May 17, 2019) ("The undisputed material facts and video and photographic evidence of the moments when Mr. Taylor was shot demonstrate that a reasonable officer would believe that Mr. Taylor made a hostile motion with a weapon towards the officers."); *see also Thomas v. Durastanti*, 607 F.3d 655, 659 (10th Cir. 2010) (noting that a plaintiff's version of the facts need not be accepted "to the extent that there is clear contrary video evidence of the incident at issue"). More specifically, as the video evidence clearly reveals, Mr. Taylor's rapid motion to lift his shirt with his left hand and withdraw his right hand from his waistband did not resemble—when viewed through any reasonable lens—an effort to pull up his pants. Indeed, this assessment finds some confirmation in the video's depiction of an earlier motion by Mr. Taylor that appears to reflect his effort to pull up his baggy pants.

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As the district court rightly observed, “[i]t is clear from the video and photographic evidence that the ‘drawing’ motion of Mr. Taylor’s hands is not similar to when Mr. Taylor earlier put his hands on his waist to pull up his pants.” *Est. of Taylor*, 2019 U.S. Dist. LEXIS 84464, 2019 WL 2164098, at *24; *see also* 2019 U.S. Dist. LEXIS 84464, [WL] at *23 (noting that Mr. Taylor’s earlier motion to pull up his pants was “a separate, distinct movement with his hands” than the one Mr. Taylor subsequently undertook when “he put his hands inside the front waistband of his pants, and made digging motions with them”).

Furthermore, irrespective of whether Mr. Taylor subjectively intended to belatedly comply with the officers’ commands by showing his hands, his rapid motion, as the district court found, was objectively consistent with an effort to draw a gun. *See* 2019 U.S. Dist. LEXIS 84464, [WL] at *24 (noting that Mr. Taylor “made a sudden motion with his hands that from the video and photographic evidence is consistent with a ‘draw stroke’”). Officer Cruz described Mr. Taylor’s motion as a “drawing stroke”—involving “very quickly drawing your hand from a location . . . where you keep a firearm,” Apls.’ App. at 458—and Officer Sylleloglou similarly spoke of the motion as an “appendix draw,” *id.* at 556. Both officers testified that—based on their training and experience relating to carrying concealed firearms—they were familiar with a motion such as the one Mr. Taylor used and had indeed practiced such a motion themselves, involving the drawing of firearms from their waistlines. *See id.* at 459 (Officer Cruz, noting that, “when I draw, we—when we conceal carry practice and train, you use one hand to lift a shirt, get that out of the way”); *id.* at 556 (Officer Sylleloglou, stating, “I practice my appendix draw all the time, being that I carry off duty and this is where I carry my gun”). Our own caselaw points to the objective reasonableness of the factual determination that Mr. Taylor’s rapid movement in removing his hands from his waistline was consistent with drawing a gun. *Cf. United States v. Briggs*, 720 F.3d 1281, 1283, 1287-88 (10th Cir. 2013) (relying on an officer’s testimony “that, in his training and experience, people who illegally carry weapons

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“At that moment, Mr. Taylor was approximately 10 to 12 feet away from Officer Cruz” *Est. of Taylor v. Salt Lake City*, No. 2:15-cv-00769-DN-BCW, 2019 U.S. Dist.

often keep them at their waistline and touch or grab at the weapon when they encounter police”); *id.* at 1288 n.4 (stating that “[c]ommon sense suggests that pockets are often used to carry all manner of items,” but “[t]he same cannot be said of a person’s waistline”); *accord Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) (“[T]he [§ 1983] plaintiff’s brief suggests that [the suspect] was simply complying with the order that he show his hands when he pulled his hand out of his waistband. But . . . the undisputed evidence shows that [the suspect] pulled his hand out of his waistband, not as if he were surrendering, but abruptly and as though he were drawing a pistol [W]e are compelled to hold that the troopers reasonably believed that [the suspect] was drawing a gun, not complying with their command that he show his hands.”).

In any event, even when the record is viewed in the light most favorable to them, Plaintiffs have not identified evidence that creates a genuine dispute regarding whether Mr. Taylor’s rapid motion could be interpreted as a belated effort to comply with the officers’ directive to show his hands, rather than being consistent with a drawing stroke motion. *See, e.g., McCoy v. Meyers*, 887 F.3d 1034, 1044 (10th Cir. 2018) (noting that “[a]ll disputed facts must be resolved in favor of the party resisting summary judgment” (alteration in original) (emphasis added) (quoting *White v. Gen. Motors Corp.*, 908 F.2d 669, 670 (10th Cir. 1990))). Indeed, as support for their assertion that, “in compliance” with Officer Cruz’s directive to show his hands, Mr. Taylor “pulled up his hands, and showed them,” Aplt. Opening Br. at 7, Plaintiffs only reference their complaint. At the summary-judgment phase, however, that will not do. *See, e.g., Thomson v. Salt Lake County*, 584 F.3d 1304, 1312 (10th Cir. 2009) (noting, in the qualified-immunity context, that “because at summary judgment we are beyond the pleading phase of the litigation, a plaintiff’s version of the facts must find support in the record”).

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LEXIS 84464, 2019 WL 2164098, at *14 (D. Utah May 17, 2019). In immediate response, Officer Cruz placed his finger on his gun’s trigger and shot Mr. Taylor twice in the chest—firing in quick succession and killing him. One bullet hit Mr. Taylor’s heart. The other cut Mr. Taylor’s left hand and entered his abdomen. Officer Sylleloglou recalled seeing Mr. Taylor make the same rapid motion with his hands. In response, he placed his finger on the trigger of his drawn gun and recalled that—aside from doing so on a firing range—it was the first time in his approximately nine years in law enforcement that he had ever placed his finger there. Officer Sylleloglou indicated that he was trained not to put his finger on his gun’s trigger unless he was prepared to shoot.

When Mr. Taylor was subsequently searched, he was found to be unarmed. After the shooting, Salt Lake City Police detained Jerrail Taylor and Adam Thayne for more than five hours and interviewed them extensively.

B

Plaintiffs commenced this action in the United States District Court for the District of Utah under 42 U.S.C. § 1983, asserting claims against Salt Lake City and Officer Cruz—as well as multiple others, including other Salt Lake City police officers and employees of Salt Lake County. Based on a series of stipulations, the court dismissed all of Plaintiffs’ claims, except for their claim of Fourth Amendment excessive force against Officer Cruz and their claim of deliberate indifference against Salt Lake City based on its policies, training, and

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investigation procedures. Salt Lake City and Officer Cruz (collectively, “Defendants”) moved for summary judgment on the remaining claims. They argued Officer Cruz was entitled to qualified immunity because he did not violate Mr. Taylor’s federal statutory or constitutional rights and that, because Officer Cruz committed no such violation, no liability could attach to Salt Lake City. Plaintiffs opposed this motion, contending that genuine issues of material fact prevented summary judgment.

The district court granted Officer Cruz and Salt Lake City’s motion for summary judgment. Notably, the court found:

Because the undisputed material facts demonstrate that Officer Cruz’s use of deadly force in the August 11, 2014 encounter . . . was objectively reasonable under the circumstances, Officer Cruz did not violate a statutory or constitutional right and is entitled to qualified immunity as a matter of law. And because Officer Cruz’s conduct did not violate a statutory or constitutional right, Salt Lake City cannot, as a matter of law, be held liable for Officer Cruz’s conduct.

Est. of Taylor, 2019 U.S. Dist. LEXIS 84464, 2019 WL 2164098, at *1. Plaintiffs filed a timely notice of appeal.

*Appendix A***II**

Plaintiffs present two issues on appeal. First, they argue that the Fourth Amendment's exclusionary rule precludes us from using Jerrail Taylor and Adam Thayne's statements to the Salt Lake City Police in resolving this lawsuit. Second, they contend that the district court erred by finding Officer Cruz's actions were objectively reasonable, and thus constitutional, under the Fourth Amendment. For the reasons discussed below, we hold that the exclusionary rule does not apply to Jerrail Taylor and Adam Thayne's statements. Furthermore, we affirm the district court's grant of summary judgment because Officer Cruz's conduct did not violate Mr. Taylor's Fourth Amendment rights, and, consequently, there is no basis for holding Salt Lake City liable.

A

Plaintiffs maintain that, because Salt Lake City Police violated the Fourth Amendment by unconstitutionally searching and seizing Jerrail Taylor and Adam Thayne, their statements should be excluded in this 42 U.S.C. § 1983 lawsuit. They advance this argument despite the fact that Plaintiffs undisputedly have relied on statements from these same two men in support of their summary-judgment opposition. We reject this challenge. And, in doing so, we join "federal courts of appeals [that] have widely held that the exclusionary rule does not apply in § 1983 cases." *Lingo v. City of Salem*, 832 F.3d 953, 959 (9th Cir. 2016).

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The Fourth Amendment offers people the right to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. AMEND. IV. However, the amendment is silent as to what repercussions should follow a violation of that right. To enforce the Fourth Amendment, courts have crafted the exclusionary rule, under which “evidence obtained in violation of the Fourth Amendment cannot be used in a *criminal proceeding* against the victim of the illegal search and seizure.” *United States v. Knox*, 883 F.3d 1262, 1273 (10th Cir. 2018) (emphasis added) (quoting *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)). However, significantly, “the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.” *Calandra*, 414 U.S. at 348; accord *United States v. Graves*, 785 F.2d 870, 876 (10th Cir. 1986). Its “prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.” *Calandra*, 414 U.S. at 347; accord *United States v. Hill*, 60 F.3d 672, 677 (10th Cir. 1995). “Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process” *Pa. Bd. of Prob. & Parole v. Scott* (“Keith Scott”), 524 U.S. 357, 364, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998); see *Davis v. United States*, 564 U.S. 229, 237, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) (“Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy

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evidence And its bottom-line effect, in many cases, is to suppress the truth” (citations omitted)).

“As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” *Calandra*, 414 U.S. at 348; accord *United States v. Janis*, 428 U.S. 433, 447, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976); *Hill*, 60 F.3d at 677. Thus, “the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.” *Calandra*, 414 U.S. at 348; accord *Stone v. Powell*, 428 U.S. 465, 486-87, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). “Th[e] deterrence rationale has guided the [Supreme] Court in its attempt to answer questions about the exclusionary rule’s scope.” *Hill*, 60 F.3d at 677; *see Knox*, 883 F.3d at 1273 (“[W]hether to apply the exclusionary rule in a given case turns on whether such application will be an effective deterrent against future Fourth Amendment violations.”).

And the Supreme Court has “generally held the exclusionary rule to apply only in criminal trials” and “significantly limited its application even in that context.” *Keith Scott*, 524 U.S. at 364 n.4. Indeed, “[t]he Supreme Court has never held that the benefits of the exclusionary rule outweigh its costs in a civil case.” *Black v. Wigington*, 811 F.3d 1259, 1267-68 (11th Cir. 2016); *see Lingo*, 832 F.3d at 958; *see also Townes v. City of New York*, 176 F.3d 138, 145-46 (2d Cir. 1999) (“The Supreme Court has refused . . . to extend the exclusionary rule to non-criminal contexts”). In particular, “the [Supreme] Court has

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held that the rule generally does not apply to grand jury proceedings, civil tax proceedings, civil deportation proceedings, or parole revocation proceedings.” *Lingo*, 832 F.3d at 958; *see, e.g., Janis*, 428 U.S. at 454 & n.28 (civil tax proceedings); *Powell*, 428 U.S. at 493-95 (habeas proceedings); *INS v. Lopez—Mendoza*, 468 U.S. 1032, 1050-51, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) (civil deportation proceedings); *Keith Scott*, 524 U.S. at 364-69 (parole revocation proceedings); *Calandra*, 414 U.S. at 349-52 (grand jury proceedings).

Whether the exclusionary rule bars the use of Adam Thayne and Jerrail Taylor’s statements to the Salt Lake City Police for purposes of a § 1983 action is a legal question. Consequently, we review it *de novo*. *See, e.g., United States v. Paetsch*, 782 F.3d 1162, 1168 (10th Cir. 2015) (“We review *de novo* the district court’s conclusions of law”).

We have not yet determined whether the exclusionary rule applies in § 1983 cases. However, several of our sister circuits have addressed this issue. And they uniformly have concluded that the exclusionary rule—including its component, the fruit-of-the-poisonous-tree doctrine³—

3. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (“[T]his Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. The exclusionary prohibition extends as well to the *indirect* as the direct products of such invasions.” (emphasis added) (citation omitted)); *Murray v. United States*, 487 U.S. 533, 536-37, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988) (“[T]he exclusionary rule also prohibits the introduction of

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does not apply in § 1983 cases and, more specifically, those arising from alleged Fourth Amendment violations. *See Lingo*, 832 F.3d at 959; *Black*, 811 F.3d at 1268; *Townes*, 176 F.3d at 145-46; *Wren v. Towe*, 130 F.3d 1154, 1158 (5th Cir. 1997) (per curiam).

In joining its sister circuits in adopting this position, the Ninth Circuit in *Lingo* wrote persuasively:

[T]he need to deter unlawful conduct is strongest when that conduct could result in criminal sanction for the victim of the search.

derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes ‘so attenuated as to dissipate the taint[.]’” (quoting *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)); *United States v. Jarvi*, 537 F.3d 1256, 1259 (10th Cir. 2008) (“The poisonous tree doctrine allows a defendant to exclude evidence ‘come at by exploitation’ of violations of his Fourth Amendment rights.” (quoting *Wong Sun*, 371 U.S. at 487-88)); *see also Black*, 811 F.3d at 1267 (“The fruit-of-the-poisonous-tree doctrine is a component of the exclusionary rule.”); 3 Wayne R. LaFave et al., CRIMINAL PROCEDURE § 9.3(a) (4th ed.), Westlaw (database updated Dec. 2020) (“In the simplest of exclusionary rule cases, the challenged evidence is quite clearly ‘direct’ or ‘primary’ in its relationship to the prior arrest, search, interrogation, lineup or other identification procedure Not infrequently, however, challenged evidence is ‘secondary’ or ‘derivative’ in character In these situations, it is necessary to determine whether the derivative evidence is ‘tainted’ by the prior constitutional or other violation. To use the phrase coined by Justice Frankfurter, it must be decided whether that evidence is the ‘fruit of the poisonous tree.’” (footnote omitted) (quoting *Nardone*, 308 U.S. at 341)).

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Moreover, preventing the government from using evidence in such settings takes away an obvious incentive—the successful prosecution of crime—that may otherwise induce the government to ignore constitutional rights.

Conversely, in a § 1983 suit, the need for deterrence is minimal. Here, application of the exclusionary rule would not prevent the State from using illegally obtained evidence *against* someone, but instead would prevent state actors merely from *defending themselves* against a claim for monetary damages. Exclusion of evidence in this context would not remove any preexisting incentive that the government might have to seize evidence unlawfully. It would simply increase state actors' financial exposure in tort cases that happen to involve illegally seized evidence. In effect, § 1983 plaintiffs would receive a windfall allowing them to prevail on tort claims that might otherwise have been defeated if critical evidence had not been suppressed. Even if such application of the rule might in some way deter violative conduct, that deterrence would impose an extreme cost to law enforcement officers that is not generally countenanced by the doctrine.

832 F.3d at 958 (citations omitted).

And, the Eleventh Circuit in *Black* cogently reasoned to like effect:

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We now join our sister circuits and hold that the exclusionary rule does not apply in a civil suit against police officers. The cost of applying the exclusionary rule in this context is significant: officers could be forced to pay damages based on an overly truncated version of the evidence. And the deterrence benefits are minuscule. Police officers are already deterred from violating the Fourth Amendment because the evidence that they find during an illegal search or seizure cannot be used in a criminal prosecution—the primary “concern and duty” of the police. Moreover, plaintiffs can still sue a police officer for the illegal search or seizure, regardless whether the officers can rely on illegally obtained evidence to defend themselves against other types of claims. This threat of civil liability will adequately deter police officers from violating the Fourth Amendment, whether or not the exclusionary rule applies in civil cases.

811 F.3d at 1268 (citations omitted) (quoting *Jonas v. City of Atlanta*, 647 F.2d 580, 588 (5th Cir. 1981), abrogated in part on other grounds as recognized by *Lindsey v. Storey*, 936 F.2d 554 (11th Cir. 1991)); see also *Townes*, 176 F.3d at 146 (observing that permitting application of the exclusionary rule’s fruit-of-the-poisonous-tree doctrine in § 1983 actions “would vastly overdeter state actors”); *Wren*, 130 F.3d at 1158 (declining to apply the exclusionary rule in a § 1983 action “[b]ased on the deterrent rationale and the precedent”).

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In their appellate briefing, Plaintiffs cite no on-point authority that supports their position. They simply cite to the Supreme Court’s seminal case, *Wong Sun v. United States*, 371 U.S. 471, 484-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), which generally defines the contours of the exclusionary rule’s fruit-of-the-poisonous-tree doctrine in the context of criminal cases. *See supra* note 3. But *Wong Sun* tells us nothing about whether this doctrine is appropriately applied in a civil § 1983 lawsuit, and Plaintiffs do not meaningfully argue to the contrary. Furthermore, though Plaintiffs acknowledge that the circuit law is against them, they make no effort to engage with these circuit decisions or to explain why they are not persuasive on these facts. At bottom, they simply assert in conclusory fashion that “Mr. Taylor is still dead, and there has been no deterrence effect from the actions that happened on the night of” his shooting, and that “[t]here would be a sufficient deterrence effect if [Defendants] were not able to use Adam and Jerrail’s statements taken in violation of their constitutional rights to shield them from liability now.” Aplts.’ Opening Br. at 59.

However, we are not convinced. Instead, we believe, as the Ninth Circuit opined in *Lingo*, that “in a § 1983 suit, the need for deterrence [through application of the exclusionary rule] is minimal” and “that deterrence would impose an extreme cost to law enforcement officers that is not generally countenanced by the doctrine.” 832 F.3d at 958; *see Black*, 811 F.3d at 1268 (noting, as to application of the exclusionary rule in the § 1983 civil context, that “the deterrence benefits are minuscule”).

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Having independently considered the question, we join the “federal courts of appeals [that] have widely held that the exclusionary rule does not apply in § 1983 cases,” *Lingo*, 832 F.3d at 959, and particularly embrace in this regard the persuasive reasoning of the Ninth Circuit in *Lingo* and the Eleventh Circuit in *Black*. Accordingly, we reject Plaintiffs’ first challenge to the district court’s judgment.

B**1**

“We review grants of summary judgment based on qualified immunity *de novo*.” *McCoy v. Meyers*, 887 F.3d 1034, 1044 (10th Cir. 2018) (quoting *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014)); *accord Bond v. City of Tahlequah*, 981 F.3d 808, 814 (10th Cir. 2020), *rev’d on other grounds*, U.S. , No. 20-1668, 2021 U.S. LEXIS 5310, 2021 WL 4822664, at *3 (Oct. 18, 2021) (per curiam). We affirm “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). “A fact is ‘material’ if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is ‘genuine’ if a rational jury could find in favor of the nonmoving party on the evidence presented.” *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000) (citation omitted); *accord Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1215 (10th Cir. 2013).

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“In applying this standard, we view the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party.” *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016) (quoting *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 997 (10th Cir. 2011)). “In qualified immunity cases, this usually means adopting . . . the plaintiff’s version of the facts.” *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *accord Emmett v. Armstrong*, 973 F.3d 1127, 1130 (10th Cir. 2020).

More specifically, where the record does not unequivocally point in one direction and allows for a genuine dispute concerning the facts, “[a]ll disputed facts must be resolved in favor of the party resisting summary judgment.” *McCoy*, 887 F.3d at 1044 (alteration in original) (quoting *White v. Gen. Motors Corp.*, 908 F.2d 669, 670 (10th Cir. 1990)); *see Tolan v. Cotton*, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam) (noting that “under either prong” of the qualified-immunity analysis, “courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment”); *Scott*, 550 U.S. at 380 (“At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party *only* if there is a ‘genuine’ dispute as to those facts.” (emphasis added) (quoting FED. R. CIV. P. 56(c), an earlier, substantively identical iteration of FED. R. CIV. P. 56(a)); *cf. Thomson v. Salt Lake County*, 584 F.3d 1304, 1312 (10th Cir. 2009) (“[B]ecause at summary judgment we are beyond the pleading phase of the litigation, a plaintiff’s version of the facts must find support in the record . . . ”)).

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However, the general proposition that we accept plaintiff’s version of the facts in the qualified-immunity summary-judgment setting “is not true to the extent that there is *clear contrary* video evidence of the incident at issue.” *Thomas v. Durastanti*, 607 F.3d 655, 659 (10th Cir. 2010) (emphasis added); *see Emmett*, 973 F.3d at 1131 (noting the appropriateness of relying on video evidence that clearly contradicts plaintiff’s “story”); *cf. Bond*, 981 F.3d at 813 n.7 (“Because this is an appeal from a grant of summary judgment, we describe the facts viewing the video in the light most favorable to the Estate, as the nonmoving party.”). “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should *not* adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott*, 550 U.S. at 380 (emphasis added).

2

“The doctrine of qualified immunity shields officials from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)); *see Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013) (“[T]he Supreme Court has recognized that public officials enjoy qualified immunity in civil actions that are brought against them in their individual capacities and that arise out of the performance of their duties.”). In applying this protective doctrine, we have recognized that

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[d]amages actions against public officials under § 1983 . . . impose “substantial social costs.” They threaten potentially significant personal liability for actions that arise out of the performance of official duties, and they can subject officials to burdensome and distracting litigation. This could lead to undesirable *ex ante* effects: reticence of officials in carrying out important public functions and, perhaps worse, a general disaffection with public service, rooted in the calculation that its costs simply outweigh its benefits.

Pahls, 718 F.3d at 1226-27 (citation omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

Indeed, “[a] defendant’s assertion of qualified immunity from suit under 42 U.S.C. § 1983 results in a presumption of immunity.” *Bond*, 981 F.3d at 815; *accord Est. of Smart ex rel. Smart v. City of Wichita* (“*Smart*”), 951 F.3d 1161, 1168 (10th Cir. 2020). A plaintiff “can overcome this presumption only by ‘show[ing] that (1) the officers’ alleged conduct violated a constitutional right, and (2) it was clearly established at the time of the violation, such that “every reasonable official would have understood,” that such conduct constituted a violation of that right.’” *Reavis ex rel. Est. of Coale v. Frost* (“*Reavis*”), 967 F.3d 978, 984 (10th Cir. 2020) (alteration in original) (quoting *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016)). “The plaintiff must satisfy both prongs to overcome a qualified immunity defense, and we may exercise our discretion

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as to which prong to address first.” *Bond*, 981 F.3d at 815; *see Tolan*, 572 U.S. at 656 (noting that “[c]ourts have discretion to decide the order in which to engage the[] two prongs” of the qualified-immunity standard).

Here, we begin our analysis with the first prong—specifically, the question of whether Officer Cruz violated Mr. Taylor’s constitutional rights—and we conclude that he did not. Accordingly, Plaintiffs cannot overcome the presumption of immunity as to the first prong, and that failing is fatal.⁴ *See, e.g., Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) (“When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff, who *must clear two hurdles* in order to defeat the defendant’s motion.” (emphasis added)); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996) (“Unless

4. On October 18, 2021, the Supreme Court decided *City of Tahlequah v. Bond* (“*Bond II*”), ___ U.S. ___, No. 20-1668, 2021 U.S. LEXIS 5310, 2021 WL 4822664 (Oct. 18, 2021) (per curiam), which reversed our prior *Bond* decision. Though we rely significantly throughout this opinion on our *Bond* decision, importantly, the Court’s analysis in *Bond II* centered on the clearly established law prong of the qualified-immunity standard, and the Court expressly purported to limit the reach of its decision to that prong. *See Bond II*, 2021 U.S. LEXIS 5310, 2021 WL 4822664, at *2 (“We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place On this record, the officers plainly did not violate any clearly established law.”). Because our decision here ends its analysis (as controlling precedent allows) at the first prong of the qualified-immunity standard (i.e., at the question of whether there was a Fourth Amendment violation) and does not reach the standard’s second, clearly established law prong (i.e., the prong at issue in *Bond II*), *Bond II*’s holding and analysis have no direct or material impact on this decision. And, relatedly, we are comfortable relying throughout this opinion on those portions of our prior *Bond* decision that the *Bond II* Court did not invalidate.

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the plaintiff carries its twofold burden, the defendant prevails.”).⁵

5. Plaintiffs contend that “many issues of material fact are still in dispute” and that the district court erred because it “claimed [them] as undisputed.” Apls.’ Opening Br. at 46-47. The reasoning that tacitly underlies Plaintiffs’ contention, however, is misguided. Specifically, Plaintiffs seem to believe that, through the identification of material disputes of fact, they may demonstrate that the court’s grant of summary judgment was erroneous. But “[a]t the summary-judgment phase, a federal court’s factual analysis relative to the qualified-immunity question is distinct”: the dispositive inquiry of the court is not whether plaintiff (as non-movant) has identified genuine disputes of material fact, but rather whether plaintiff has satisfied his or her two-fold burden of (1) demonstrating a violation of a federal constitutional or statutory right, that (2) was clearly established at the time of the alleged violation. *Cox v. Glanz*, 800 F.3d 1231, 1243 (10th Cir. 2015) (“The court’s analysis was not consonant with our settled mode of qualified-immunity decisionmaking. Specifically, the court’s central focus was on the existence *vel non* of genuinely disputed issues of material fact, and that focus is counter to our established qualified-immunity approach.” (emphasis removed)); *see also Riggins*, 572 F.3d at 1107 (discussing the two-fold burden); *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (“Because of the underlying purposes of qualified immunity, we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions.”). Indeed, in discussing the operative standards, Plaintiffs appear to recognize the truth of this proposition. *See, e.g.*, Apls.’ Opening Br. at 45 (“When the plaintiff *meets* the two-part qualified immunity test a defendant *then* bears the traditional burden of the movant for summary judgment” (emphases added)). And, in conducting the inquiry regarding whether plaintiff has satisfied the two-fold qualified-immunity burden, insofar as there are material disputes of fact, they are construed in the light most favorable to the plaintiff. *See, e.g.*, *Tolan*, 572 U.S. at 656-57. That is, generally, courts accept a plaintiff’s evidence-supported version of the facts in resolving these disputes. *See, e.g.*, *Scott*, 550 U.S. at 378; *McCoy*, 887 F.3d at 1044. Therefore, even if there are genuine disputes of material fact, they do not prejudice a plaintiff

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3

In factual circumstances such as these, involving the use of force during a law enforcement investigation, “[w]e treat excessive force claims as seizures subject to the reasonableness requirement of the Fourth Amendment. To establish a constitutional violation, the plaintiff must demonstrate the force used was objectively unreasonable.” *Est. of Larsen*, 511 F.3d at 1259 (citation omitted); *accord Thomson*, 584 F.3d at 1313; *see also Saucier v. Katz*, 533 U.S. 194, 207, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (“Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.”), *overruled on other grounds by Pearson*, 555 U.S. at 227; *Graham*, 490 U.S. at 393-94 (“We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard In most instances, that will be either

in the qualified-immunity summary-judgment context. Finally, to the extent that the gravamen of Plaintiffs’ concern is actually that the district court did not properly construe material disputed facts in its favor, we underscore that our review is *de novo*, and we need not defer to the district court’s performance of this task. *See Bond*, 981 F.3d at 813 n.9 (declining to defer to the district court’s “view [of] the video as showing that [the shooting victim] backed away and the officers followed him into the garage”); *see also Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018) (“In reviewing a grant of summary judgment, ‘we “need not defer to factual findings rendered by the district court.”’” (quoting *Ampran v. Lake Powell Car Rental Cos.*, 882 F.3d 943, 947 (10th Cir. 2018))); *cf. Rivera v. City & County of Denver*, 365 F.3d 912, 920 (10th Cir. 2004) (“Because our review is *de novo*, we need not separately address Plaintiff’s argument that the district court erred by viewing evidence in the light most favorable to the City and by treating disputed issues of fact as undisputed.”)).

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the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct.” (footnote and citations omitted)). “[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”⁶ *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

The reasonableness of a particular use of force must be “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁷ *Bond*, 981 F.3d at 815 (quoting *Graham*, 490

6. “Deadly force is ‘force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person . . . constitutes deadly force.’” *Jiron v. City of Lakewood*, 392 F.3d 410, 415 n.2 (10th Cir. 2004) (omission in original) (quoting *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987)).

7. In the course of defining the universe of undisputed facts for purposes of its summary-judgment determination, the district court explicitly recognized the need to exclude matters “not supported by the cited evidence; not material; or [that were] not facts, but rather, [] characterization of facts or legal argument.” *See Est. of Taylor*, 2019 U.S. Dist. LEXIS 84464, 2019 WL 2164098, at *3 n.17. Nevertheless, the district court repeatedly referenced (in large part through quotations from officer interviews and other parts of the record) the officers’ subjective characterizations and speculative thoughts concerning the factual circumstances that they confronted. *See, e.g.*, 2019 U.S. Dist. LEXIS 84464, [WL] at *7, *12-13, *15, *22 (including Officer Cruz’s comments about (a) when he experienced fear in his encounter with Mr. Taylor and his companions; (b) his belief, from looking in Mr. Taylor’s eyes, that Mr. Taylor was completely defiant

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U.S. at 396); *see Medina v. Cram*, 252 F.3d 1124, 1131 (10th Cir. 2001) (“The reasonableness of an officer’s conduct must be assessed ‘from the perspective of a reasonable

and filled with hatred; (c) his belief that Mr. Taylor’s face displayed the message that he was going to kill him; and (d) his conviction or certain belief that Mr. Taylor had a gun and was retrieving the gun to kill him or one of the other officers; and also Officer Sylleloglou’s belief that Mr. Taylor looked at him with a “hostile and defiant” expression). However, under the Fourth Amendment’s controlling, analytical framework—which is centered on objective reasonableness—these matters are irrelevant. *See, e.g., Graham*, 490 U.S. at 397 (“[T]he ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”); *Cortez v. McCauley*, 478 F.3d 1108, 1117 n.8 (10th Cir. 2007) (en banc) (applying the Fourth Amendment objective-reasonableness construct in the arrest context). Consequently, we have disregarded these subjective matters in our statement of the relevant facts, *supra*, and we do not rely on them in our legal analysis. *Cf. Pahls*, 718 F.3d at 1232 (“[I]f the district court commits legal error en route to a factual determination, that determination is thereby deprived of any special solicitude it might otherwise be owed on appeal.”(emphasis removed)). Seemingly with such matters in mind, the district court acknowledged that certain identified undisputed facts were “not material”; however, the court nevertheless reasoned that they should be included to “provide a more complete background of the events and circumstances and [to] give context to the parties’ arguments.” *Est. of Taylor*, 2019 U.S. Dist. LEXIS 84464, 2019 WL 2164098, at *3 n.17. However, we think this approach is ill-advised: even when a court does not actually run afoul of the Fourth Amendment’s objective standard in its summary-judgment analysis—by relying on such legally irrelevant matters—incorporating them into its statement of undisputed facts may create confusion or uncertainty among litigating parties, and indeed the public at large, regarding what law enforcement conduct may be permissibly considered in a court’s determination of whether a citizen’s constitutional rights have been infringed by the use of force.

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officer on the scene,’ recognizing the fact that the officer may be ‘forced to make split-second judgments’ under stressful and dangerous conditions.” (quoting *Graham*, 490 U.S. at 396-97); *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009) (“We are not well-suited to act as a police supervisory board, making finely calibrated determinations of just what type of misbehavior justifies just what level of response.”); *see also Mullins v. Cyranek*, 805 F.3d 760, 767 (6th Cir. 2015) (holding that a police officer’s “decision to use deadly force” was “reasonable,” when “faced with a rapidly escalating situation” and “severe threat to himself and the public,” even though it “may appear unreasonable in the ‘sanitized world of our imagination’” (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996))); *Lamont v. New Jersey*, 637 F.3d 177, 183 (3d Cir. 2011) (noting that a use of force must be viewed through the lens of a reasonable officer on the scene and “Monday morning quarterbacking is not allowed”).⁸ However, “[o]ur precedent recognizes that the

8. Plaintiffs argue that the “only crime” that Mr. Taylor and his two companions were committing when the police made contact with them was “being . . . Hispanic and young” and urge us to “provide clear direction to the district courts that shooting unarmed men and women of color will not be objectively reasonable under most circumstances.” Aplts.’ Opening Br. at 13, 56 (capitalization and bold-face font omitted). At bottom, Plaintiffs appear to invite us to modify the Fourth Amendment’s objective-reasonableness standard to take into account the race of the citizen interacting with law enforcement—and, more specifically, a given police officer’s subjective perception of the race of a citizen and the officer’s possible racial bias (implicit or otherwise). *Id.* at 15-16 (noting that the “objectively reasonable officer standard . . . should be scrutinized within the context of police shootings of unarmed,

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reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Est. of Valverde ex rel. Padilla v. Dodge* ("Valverde"), 967 F.3d 1049, 1060 (10th Cir. 2020) (quoting *Pauly v. White*, 874 F.3d 1197, 1219 (10th Cir. 2017)).⁹

minority men across the nation that have become more and more objectively unreasonable"). However, we decline this invitation: in the Fourth Amendment objective-reasonableness analysis related to seizures, we have no reason to believe that these are legally relevant considerations. *Cf. United States v. Mercado-Gracia*, 989 F.3d 829, 837 (10th Cir. 2021) ("This court has rejected interjecting race into the objective reasonable person test" (citing *United States v. Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018))); *id.* at 837-38 ("Indeed, the Tenth Circuit has specifically disclaimed considerations that could inject the objective reasonable person analysis with subjective considerations: '[W]e reject any rule that would classify groups . . . according to gender, race, religion, national origin, or other comparable status.'" (alteration in original) (quoting *Easley*, 911 F.3d at 1081)). And Plaintiffs cite no authority—controlling or persuasive—that might give us reason to adopt their view. Therefore, we reject Plaintiffs' argument based on the "national concern and awareness surrounding police violence against unarmed men and women of color." Aplts.' Opening Br. at 56.

9. Our earliest decision to expressly articulate the "reckless or deliberate conduct" dimension of the Fourth Amendment excessive-force, reasonableness analysis appears to be *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995). *See id.* at 699 (inquiring "whether [the officers'] own reckless or deliberate conduct during the seizure unreasonably created the need" for the use of deadly force"). In reversing our *Bond* decision on clearly established law grounds, the Supreme Court in *Bond II* reasoned that *Sevier* categorically

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This “calculus of reasonableness must [also] embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015) (quoting *Graham*, 490 U.S. at 396-97); *see Valverde*, 967 F.3d at 1060 (“The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay would gravely endanger their lives or

could not qualify as clearly established law for this proposition. *See Bond II*, 2021 U.S. Dist. LEXIS 5310, 2021 WL 4822664, at *2 (“As for *Sevier*, that decision merely noted in dicta that deliberate or reckless preseizure conduct can render a later use of force excessive before dismissing the appeal for lack of jurisdiction. To state the obvious, a decision where the court did not even have jurisdiction cannot clearly establish substantive constitutional law.” (citation omitted)). However, since *Sevier*, the “reckless or deliberate conduct” inquiry has become a standard feature of our excessive-force analysis. *See, e.g.*, *Valverde*, 967 F.3d at 1067; *Pavly*, 874 F.3d at 1219; *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *see also Medina*, 252 F.3d at 1132 (“An officer’s conduct before the suspect threatens force is therefore relevant provided it is ‘immediately connected’ to the seizure and the threat of force. This approach is simply a specific application of the ‘totality of the circumstances’ approach inherent in the Fourth Amendment’s reasonableness standard.” (citations omitted) (quoting *Allen*, 119 F.3d at 840)). Because the *Bond II* Court did not “decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment,” we do not feel obliged in this case—where the outcome turns on the existence *vel non* of a Fourth Amendment violation—to revisit our well-settled precedent that incorporates a “reckless or deliberate conduct” dimension into the excessive-force analysis. *See also supra* note 4.

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the lives of others. This is true even when, judged with the benefit of hindsight, the officers may have made some mistakes. The Constitution is not blind to the fact that police officers are often forced to make split-second judgements.” (quoting *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 612, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015)); *id.* at 1062 (“The Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately.”); *cf. Brown v. United States*, 256 U.S. 335, 343, 41 S. Ct. 501, 65 L. Ed. 961 (1921) (Holmes, J.) (“Detached reflection cannot be demanded in the presence of an uplifted knife.”).

“[I]f a reasonable officer in [the] [d]efendant[’s] position would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others,” that officer’s use of force is permissible. *Est. of Larsen*, 511 F.3d at 1260 (emphasis omitted) (quoting *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004)); *see Garner*, 471 U.S. at 11 (“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”); *Valverde*, 967 F.3d at 1060 (“Courts are particularly deferential to the split-second decisions police must make” in situations involving deadly threats.” (quoting *Smart*, 951 F.3d at 1177)).

“[P]robable cause doesn’t require an officer’s suspicion . . . be ‘more likely true than false.’” *United States v. Ludwig*, 641 F.3d 1243, 1252 (10th Cir. 2011) (quoting *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct.

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1535, 75 L. Ed. 2d 502 (1983)). “It requires only a ‘fair probability,’ a standard understood to mean something more than a ‘bare suspicion’ but less than a preponderance of the evidence at hand.” *United States v. Denson*, 775 F.3d 1214, 1217 (10th Cir. 2014) (quoting *Ludwig*, 641 F.3d at 1252 & n.5); *see also Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003) (noting that the probable-cause standard “deals with probabilities and depends on the totality of the circumstances”).

4

The proper application of qualified immunity in the Fourth Amendment context “requires careful attention to the facts and circumstances of each particular case.” *Graham*, 490 U.S. at 396. In *Graham v. Connor* the Supreme Court provided three factors to help structure this inquiry: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *See id.* “Our precedents instruct that the *Graham* factors are applied to conduct which is ‘immediately connected’ to the use of deadly force.” *Bond*, 981 F.3d at 816 (quoting *Romero v. Bd. of Cnty. Comm’rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995)). But, officer conduct prior to the seizure is also relevant to this inquiry. *Id.* (citing *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)). “[E]ven when an officer uses deadly force in response to a clear threat of such force being employed against him, the *Graham* inquiry does not end there.” *Id.* (citing *Allen v. Muskogee*, 119 F.3d 837, 839, 841 (10th

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Cir. 1997)). Specifically, we properly inquire “whether the officer[‘s] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.” *Valverde*, 967 F.3d at 1067 (quoting *Pauly*, 874 F.3d at 1219).

Construed in the light most favorable to Plaintiffs, the undisputed facts in this case—including the clear video evidence—indicate that the first and third factors favor Plaintiffs. However, “[a]lthough the first and third [Graham] factors can be particularly significant in a specific case, the second factor—whether there is an immediate threat to safety—is undoubtedly the *most important* . . . factor in determining the objective reasonableness of an officer’s use of force.” *See Valverde*, 967 F.3d at 1060-61 (omission in original) (emphasis added) (footnote omitted) (quoting *Pauly*, 874 F.3d at 1216); *see Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1170 (10th Cir. 2021); *Bond*, 981 F.3d at 820; *see also Est. of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1005-06 (9th Cir. 2017) (observing that, while the first and third *Graham* factors weigh in plaintiff’s favor, the “‘most important’ factor,” and the determinative one in a deadly force case, was “whether the suspect posed an ‘immediate threat to the safety of the officers or others’” (quoting *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013))).

“That is particularly true when the issue is whether an officer reasonably believed that he faced a threat of serious physical harm.” *Valverde*, 967 F.3d at 1061. And, not only is the second factor of singular importance, it also is the most “fact intensive factor.” *Pauly*, 874 F.3d at

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1216; *see Reavis*, 967 F.3d at 985 (finding that the second *Graham* factor is “undoubtedly the ‘most important’ and fact intensive factor,” and “[t]his is particularly true in a deadly force case, because ‘deadly force is justified only if a reasonable officer in the officer’s position would have had probable cause to believe that there was a threat of serious physical harm to himself or others.’” (first quoting *Pauly*, 874 F.3d at 1216, then quoting *Cordova*, 569 F.3d at 1192)).

At bottom, then, “it [is] insignificant whether [an individual was] arrested for a minor crime or was not even a criminal suspect if it reasonably appeared that he was about to shoot a gun at an officer from close range.” *Valverde*, 967 F.3d at 1061; *see Reavis*, 967 F.3d at 985; *Cordova*, 569 F.3d at 1190. And the truth of this proposition is on full display here. We conclude that *Graham*’s second factor favors Defendants and controls the outcome of this case. In particular, considering the totality of the circumstances, we conclude that Officer Cruz used deadly force in response to a reasonably perceived mortal threat from Mr. Taylor. Thus, his decision to shoot Mr. Taylor was objectively reasonable and, consequently, he did not violate Mr. Taylor’s Fourth Amendment rights. This holding provides a sufficient basis for affirming the district court’s grant of qualified immunity. *See, e.g., McCoy*, 887 F.3d at 1048 (observing that if a plaintiff fails to allege sufficient facts to abrogate qualified immunity on one prong, we need not address the other); *cf. Riggins*, 572 F.3d at 1107 (noting that, to defeat an assertion of qualified immunity, “[t]he plaintiff must demonstrate on the facts alleged *both* that the defendant violated his constitutional or statutory

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rights, *and* that the right was clearly established at the time of the alleged unlawful activity” (emphases added)).

“For purposes of discussion, we consider the first and third [*Graham*] factors before turning to the crucial second factor.” *Bond*, 981 F.3d at 819.

a

The first *Graham* factor—the severity of the crime in question—weighs against the use of significant force. Officer Cruz was responding to a report that an unidentified male “flashed” a gun. Depending on the circumstances, this activity could have been a misdemeanor or a felony—or it could have been no crime at all. *See UTAH CODE ANN. §§ 76-10-500-532*. Based on the 9-1-1 call, a reasonable officer would have been aware that the suspect did not make a threat. Accordingly, viewing the facts in the light most favorable to Plaintiffs, such an officer would likely have been investigating to determine whether or not the suspect had committed a potential non-violent misdemeanor. And, where the offense is a misdemeanor, the first *Graham* factor ordinarily would weigh against the use of significant force. *See Bond*, 981 F.3d at 819 (“When the severity of the crime is low, such as when the alleged crime was a misdemeanor or unaccompanied by violence, this factor weighs against an officer’s use of force.”); *Lee v. Tucker*, 904 F.3d 1145, 1149 (10th Cir. 2018) (observing that using the felony/misdemeanor distinction is “consistent with the many cases in which we have held that the first *Graham* factor may weigh against the use of significant force if the crime at issue is a misdemeanor”);

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Davis v. Clifford, 825 F.3d 1131, 1135 (10th Cir. 2016) (“The severity of [the plaintiff’s] crime weighs against the use of anything more than minimal force because the charge underlying her arrest . . . is a misdemeanor.”); *cf. Henry v. Storey*, 658 F.3d 1235, 1239 (10th Cir. 2011) (observing that a higher level of force is appropriate for a felony arrest because there is a strong incentive to evade arrest and threaten public safety).

b

The third *Graham* factor—active resistance or evasion of arrest—also weighs in favor of Plaintiffs. At the time the officers approached and interacted with Mr. Taylor and his two companions, they did not have probable cause to make an arrest, nor could they reasonably have intended to make an arrest. Although the description that Dispatch provided of the men associated with the gun closely resembled Mr. Taylor and at least one of his associates, a reasonable officer at this point would know that the reported activity was non-violent and, in fact, could have been lawful. *See, e.g., Pauly*, 874 F.3d at 1222 (holding that the third *Graham* factor “supports plaintiffs” because “when the officers . . . went to the [suspects’] residence, they were not there to make an arrest because no grounds existed to do so”). As a result, because “the officers did not intend to arrest [Mr. Taylor] when they first encountered him[,] . . . he could not have been actively resisting arrest or attempting to evade arrest by flight” *Bond*, 981 F.3d at 820.

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Despite the likely low-level of the crime under investigation (if a crime at all) and the lack of a reasonable basis to arrest Mr. Taylor (or intent to do so), the totality of the circumstances indicates that—by the time Officer Cruz discharged his gun—he reasonably perceived that Mr. Taylor posed an immediate, mortal threat to his safety or the safety of others. More specifically, *Graham*'s second factor weighs heavily in Defendant's favor and is determinative. *See Valverde*, 967 F.3d at 1060-61; *see also Cordova*, 569 F.3d at 1190 (“The threat to the officers themselves—if actual and imminent—could of course shift the calculus in the direction of reasonableness.”). We conclude that Officer Cruz “acted reasonably even if he ha[d] a mistaken belief as to the facts establishing the existence of exigent circumstances.” *Smart*, 951 F.3d at 1171 (quoting *Thomas*, 607 F.3d at 666); *see Valverde*, 967 F.3d at 1062 (“The Constitution permits officers to make reasonable mistakes.”); *see also Bond*, 981 F.3d at 822 (“Even if the officers misperceived [the suspect’s] defensive movements as aggressive, they are entitled to qualified immunity if the misperception was reasonable.”).

Although Mr. Taylor “was unarmed,” that “does not resolve whether the officers violated his constitutional rights. The salient question is whether the officers’ mistaken perceptions that [Mr. Taylor] was [about to use a firearm] were reasonable.” *Smart*, 951 F.3d at 1170-71; *see Thomas*, 607 F.3d at 666, 670 (concluding that an officer’s decision to shoot at a suspect’s car as the car started driving away was “reasonable, even if mistaken,”

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and explaining that “reasonable perceptions are what matter[]”). “[T]he use of deadly force is only justified if the officer ha[s] ‘probable cause to believe that there was a threat of serious physical harm to [himself] or others.’” *Pauly*, 874 F.3d at 1216 (emphasis omitted) (quoting *Est. of Larsen*, 511 F.3d at 1260); *see also Valverde*, 967 F.3d at 1065 (“[T]he issue is whether a reasonable officer in [the Defendant’s] position would have believed [the suspect] was armed and dangerous.” (emphasis omitted)).

Recall that when we assess whether a suspect poses an immediate threat permitting the use of deadly force, we consider the totality of the circumstances from the perspective of a reasonable officer. *See Reavis*, 967 F.3d at 988 (“[T]he question of whether there is no threat, an immediate deadly threat, or that the threat has passed, at the time deadly force is employed must be evaluated based on what a reasonable officer would have perceived under the totality of the circumstances.”); *see also Scott*, 550 U.S. at 383 (observing that there is no easy-to-apply legal test for whether an officer’s use of deadly force is excessive and concluding that “we must still slosh our way through the factbound morass of ‘reasonableness’”).

“[T]he totality of the circumstances includes application of the *Graham* and *Estate of Larsen* factors to the *full encounter*, from its inception through the moment the officers employed force.” *Bond*, 981 F.3d at 818 (emphasis added). Though we must consider the totality of the circumstances, *Estate of Larsen* lists four factors designed to assist us in evaluating the degree of threat perceived by an officer: “(1) whether the officers

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ordered the suspect to drop his weapon, and the suspect’s compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.” 511 F.3d at 1260; *accord Bond*, 981 F.3d at 820. These factors are “aids in making the ultimate determination, which is ‘whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force.’ The [officer’s] belief need not be correct—in retrospect the force may seem unnecessary—as long as it is reasonable.” *Tenorio*, 802 F.3d at 1164 (citation omitted) (quoting *Est. of Larsen*, 511 F.3d at 1260); *see also Reavis*, 967 F.3d at 985 (observing that the factors provided by *Estate of Larsen* are “[s]ome of the factors we consider”). Resolving all factual ambiguities and reasonable inferences in Plaintiffs’ favor, we nevertheless conclude that Officer Cruz could have reasonably believed that Mr. Taylor posed a mortal threat to him or others—even though Officer Cruz was tragically mistaken.

i

As to the first *Estate of Larsen* factor, the record clearly establishes that Mr. Taylor ignored or directly disobeyed Officer Cruz and Officer Sylleologlou’s commands.

Officer Sylleologlou repeatedly ordered Mr. Taylor to stop and show his hands. During this same time, video evidence records Mr. Taylor ignoring these commands and walking away. Soon after, Mr. Taylor concealed his hands in his waist band. Mr. Taylor then ignored Officer

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Cruz's repeated commands to "get [his] hands out." Ex. 6 at 0:31-0:35. Indeed, Mr. Taylor responded to Officer Cruz's command not by removing his hands but, rather, by turning around and continuing to separate himself from Officer Cruz by walking backwards. *Id.* at 0:32-0:34. Even when Officer Cruz repeated the instruction, Mr. Taylor continued to face Officer Cruz and walk backwards with his hands concealed. *Id.* at 0:35-0:36. These facts are sufficient to resolve the first *Estate of Larsen* factor in favor of Defendants. When a "suspect is not holding a gun when the confrontation begins, officers can do little more than what they did in this case: order the suspect to raise his hands and get to the ground." *Valverde*, 967 F.3d at 1061-62 (citing *Garner*, 471 U.S. at 11-12).

ii

As for the second *Estate of Larsen* factor, like the district court, we conclude that "[t]he undisputed material facts and video and photographic evidence of the moments when Mr. Taylor was shot demonstrate that a reasonable officer would believe that Mr. Taylor made a hostile motion with a weapon towards the officers." Aplts' App. at 883. Remember that our inquiry here is a very fact-intensive one, and context is key. *Cf. Pauly*, 874 F.3d at 1216 (noting that *Graham*'s second factor—the overarching rubric for our *Estate of Larsen* inquiry—is the most "fact intensive factor").

Preceding their interaction with Mr. Taylor, Officers Cruz and Sylleologlou had received a transmission from Dispatch indicating that a man had flashed a gun and that

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this man was accompanied by one other male. Dispatch's description of the man and his male companion fit the description of members of Mr. Taylor's party. When the officers arrived on the scene, Adam Thayne and Jerrail Taylor immediately put their hands above their heads and stayed in place. However, in stark contrast, Mr. Taylor made a 180-degree turn and walked away from the officers. Mr. Taylor refused to follow the officers' repeated commands to stop and show his hands, and he continued walking away.

Observing this conduct, a reasonable officer could conclude that, for some reason—including possibly a nefarious one—Mr. Taylor was seeking to evade law enforcement. *See United States v. Briggs*, 720 F.3d 1281, 1287 (10th Cir. 2013) (noting that “[b]olting’ from officers is not the only relevant and obvious form of evasion” and that “circumstances that reasonably suggest evasion” include “[a] sudden change of direction upon seeing law enforcement” and “an apparent attempt to create distance from the officers”); *cf. United States v. Madrid*, 713 F.3d 1251, 1257 (10th Cir. 2013) (“Both this court and the Supreme Court have held that a suspect’s . . . evasive behavior upon noticing police officers is a pertinent factor in determining reasonable suspicion.”); *United States v. Salazar*, 609 F.3d 1059, 1069 (10th Cir. 2010) (noting that “a suspect’s evasive behavior as an officer approaches may be considered in determining [whether] reasonable suspicion” existed); *cf. also Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) (stating that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion”). And, having heard a Dispatch

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communication that someone in a group matching the description of Mr. Taylor and his companions was carrying a gun, and then observing Mr. Taylor’s evasive behavior, Officer Cruz (as well as Officer Sylleloglou) reasonably could have concluded that, if anyone in the group had a firearm, it was Mr. Taylor.

Moreover, the quantum of reasonable belief that Mr. Taylor actually possessed a firearm would likely have been significantly increased when—less than ten seconds after he started walking away from Officers Cruz and Sylleloglou—Mr. Taylor raised his hands from his sides, appeared to place one or both of his hands in the front of his pants’ waistband, and continued to refuse to comply with the officers’ commands to show his hands. *See Briggs*, 720 F.3d at 1283, 1288 n.4 (stating that “[c]ommon sense suggests that pockets are often used to carry all manner of items,” but “[t]he same cannot be said of a person’s waistline,” and relying on an officer’s testimony “that, in his training and experience, people who illegally carry weapons often keep them at their waistline and touch or grab at the weapon when they encounter police”); *see also United States v. Dubose*, 579 F.3d 117, 122 (1st Cir. 2009) (Ebel, J., sitting by designation) (“[Police officer] testified that after [the suspect] turned around with his hand still in his pocket, he became fearful that [the suspect] was carrying a weapon. He stated that drug dealers often carry weapons concealed in their waistbands [The officer’s] concerns were further compounded by [the suspect’s] initial refusal to remove his hand from his pocket”). Indeed, it was at this moment—seemingly evincing their reasonable concern that Mr. Taylor had a

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firearm—that both Officer Cruz and Officer Sylleloglou pointed their firearms at Mr. Taylor.

In addition, Mr. Taylor “was not merely walking away.” *Briggs*, 720 F.3d at 1287. Rather, he was verbally challenging the officers—as to Officer Sylleloglou, saying things like, “What are you going to do? Come on, . . . shoot me.” Apls.’ App. at 551. And, only a few seconds after Mr. Taylor placed one or both of his hands in his waistband, Mr. Taylor turned around and faced Officer Cruz and continued moving away by walking backwards. Both of his hands were in his waistline then and concealed, and Mr. Taylor appeared to be moving his hands in a “digging” motion, like he was “manipulating” something. *Id.* at 455-57.

As soon as Mr. Taylor faced him, Officer Cruz stated a second time, “get your hands out.” Ex. 6 at 0:33-0:34. Yet Mr. Taylor responded, “Nah, fool.” *Id.* at 0:35; *see* Apls.’ App. at 564. Mr. Taylor continued to move his concealed hands in a way that suggested he was manipulating something in the waistline of his pants. Officer Cruz had started ordering Mr. Taylor to remove his hands a third time when, without verbal warning, Mr. Taylor rapidly removed his left hand from his waistband—lifting his shirt and exposing his torso—and, virtually simultaneously, withdrew his right hand from his waistband but lower than his left hand. The motion took less than one second and was consistent with the drawing of a gun. *See supra* note 2.

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More specifically, in this context—even construing all of the factual circumstances in the light most favorable to Plaintiffs—a reasonable officer could well conclude that Mr. Taylor’s drawing motion was hostile and that he sought to use a firearm against Officer Cruz or the other officers, even though this risk assessment ultimately proved to be mistaken. *See Reese v. Anderson*, 926 F.2d 494, 500-01 (5th Cir. 1991) (concluding, where the unarmed suspect displayed “defiance” of the officer’s orders to “raise his hands” and was repeatedly “reach[ing]” below the officer’s line of sight, that the officer “could reasonably believe that [the suspect] had retrieved a gun and was about to shoot,” that it was “irrelevant . . . that [the suspect] was actually unarmed” because the officer “did not and could not have known this,” and that the suspect’s “actions alone could cause a reasonable officer to fear imminent and serious physical harm”); *Valverde*, 967 F.3d at 1062 (“The Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately.”); *see also Slattery v. Rizzo*, 939 F.2d 213, 214-17 (4th Cir. 1991) (Powell, J., sitting by designation) (concluding that an officer’s decision to shoot an unarmed suspect seated in his car during a buy-bust operation was constitutional, where the suspect ignored the officer’s commands to “put up his hands” and appeared to have his left hand “partially closed around an object,” and then “turned his entire upper body towards the officer, who could still not see [the suspect’s] left hand”—leaving the officer “believing that [the suspect] was coming at him with a weapon”); *Lamont*, 637 F.3d at 183-84 (concluding that an officer’s use of deadly force against an unarmed suspect was reasonable and

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constitutional where “troopers repeatedly ordered him to show his hands and to freeze” but the suspect “refused to comply” and, instead, “stood with his right hand concealed in his waistband, apparently clutching an object”; when the suspect “then suddenly pulled his right hand out of his waistband—a movement uniformly described by those on the scene as being similar to that of drawing a gun . . . the troopers were justified in opening fire”); *see also Pollard v. City of Columbus*, 780 F.3d 395, 403 (6th Cir. 2015) (deciding that the officers’ decision to shoot an unarmed suspect was reasonable “after [the suspect] regained consciousness and made gestures suggesting he had a weapon, gestures he continued to make even after officers told him to ‘Drop it’ and ‘Don’t do it’”); *Anderson v. Russell*, 247 F.3d 125, 130-32 (4th Cir. 2001) (concluding that an officer was not liable for shooting an unarmed suspect because a witness informed the officer that the suspect appeared to have a gun and the suspect reached for a bulge in his pocket against the officer’s commands; the court concluding that, when the suspect reached for the bulge, the officer could have “reasonably believed that [the suspect] posed a deadly threat to himself and others”).

Stated otherwise, at the culmination of this tense, rapidly-evolving interaction with Mr. Taylor—when, without verbal warning, Mr. Taylor rapidly used his left hand to lift his shirt, while removing his right hand from his waistband—a reasonable officer could have well decided that Mr. Taylor’s conduct was hostile and, indeed, involved a mortal threat of gun violence, even if that judgment ultimately was mistaken. *See Jiron*, 392 F.3d at 415 (“If an officer reasonably, but mistakenly, believed that

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a suspect was likely to fight back [rather than surrender,] the officer would be justified in using more force than in fact was needed.” (citation omitted)); *cf. Reavis*, 967 F.3d at 988 (“[T]he question of whether there is no threat, an immediate deadly threat, or that the threat has passed, at the time deadly force is employed must be evaluated based on what a reasonable officer would have perceived under the totality of the circumstances.”); *Lamont*, 637 F.3d at 183 (noting that “[a]n officer is not constitutionally required to wait until he sets eyes upon [a] weapon before employing deadly force to protect himself against a fleeing suspect who . . . moves as though to draw a gun” and that “[w]aiting in such circumstances could well prove fatal” (omission and second alteration in original) (quoting *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001))).

Indeed, Officer Sylleloglou’s almost immediate response to Mr. Taylor’s rapid hand motions bolsters this conclusion. For the first time in his approximately nine years in law enforcement, Officer Sylleloglou felt compelled, in real-world circumstances, to place his finger on the trigger of his firearm, and he testified that he had been trained not to do so, unless he was prepared to shoot. Consequently, a reasonable jury could infer from this circumstance that, like Officer Cruz, Officer Sylleloglou also was prepared to use deadly force against Mr. Taylor. We have previously reasoned that the fact that a fellow officer “was also prepared to use force” is one factor in the totality-of-the-circumstances analysis that “support[s] the heightened immediacy of the threat [the officers] faced and the objective reasonableness of the use of deadly force.” *Est. of Larsen*, 511 F.3d at 1260.

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Plaintiffs point to Officer Sylleloglou's decision not to fire his weapon as evidence that a reasonable officer on the scene would have elected not to shoot Mr. Taylor. But whether Officer Sylleloglou actually fired his weapon is largely irrelevant. *See Valverde*, 967 F.3d at 1065 ("[T]he failure of the other officers to fire is of little relevance."). The critical indicator for this factor, as shown in *Estate of Larsen*, is how Officer Sylleloglou assessed the situation. *See* 511 F.3d at 1260. That is, for the first time in his nine years in law enforcement, Officer Sylleloglou had his finger on the trigger of his weapon and was ready to shoot Mr. Taylor. If anything, these facts cut against Plaintiffs because they show that Officer Sylleloglou and Officer Cruz's assessments of the threat were (in all material respects) identical. *See id.* at 1263 n.4.

Furthermore, "[t]he [central] issue is whether a reasonable officer *in [Officer Cruz's] position* would have believed [Mr. Taylor] was armed and dangerous." *Valverde*, 967 F.3d at 1065. Mr. Taylor concealed his hands and then faced Officer Cruz, while Officer Sylleloglou was positioned some ten to twenty feet to Mr. Taylor's left. As a result, Officer Sylleloglou had less direct information. More importantly, because Officer Cruz was directly in front of Mr. Taylor, Mr. Taylor's actions, which were consistent with rapidly attempting to draw a firearm, placed Officer Cruz, and not Officer Sylleloglou, in the most immediate danger. *See id.*; *Est. of Larsen*, 511 F.3d at 1263 n.4 (observing that the calculus was different for the officer's partner, who did not shoot, because the suspect was not approaching the partner with a knife). Thus, Officer Sylleloglou's position, while still precarious

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from the perspective of a reasonable responding officer, was safer than Officer Cruz’s location. *See Est. of Larsen*, 511 F.3d at 1263 n.4; *cf. Jordan v. Howard*, 987 F.3d 537, 547 (6th Cir. 2021) (observing that when two officers are in different positions with respect to a suspect, their information and respective risk assessments will be different). And yet, even with this additional margin of safety, Officer Sylleologlou, for the first time in his nine years as a police officer, had his finger on his weapon’s trigger and was prepared to shoot Mr. Taylor—lending further credence to the conclusion that in the “tense, uncertain, and rapidly evolving” circumstances facing Officer Cruz, *Valverde*, 967 F.3d at 1064 (quoting *Thomson*, 584 F.3d at 1318), his decision to shoot Mr. Taylor was reasonable.

In sum, the second factor weighs in favor of Defendants.

iii

Turning to the third *Estate of Larsen* factor, the distance separating Officer Cruz and Mr. Taylor also weighs in Defendants’ favor. When Officer Cruz exited his vehicle he was about thirty feet away from Mr. Taylor. And, from the moment that Mr. Taylor concealed his hands to the moment he was shot, Officer Cruz was between ten and twenty feet from him. As the district court found, at the moment when Mr. Taylor made a motion consistent with the drawing of a gun—taking less than one second—Mr. Taylor was “approximately 10 to 12 feet away from Officer Cruz.” Aplts.’ App. at 865. And, at that point, Officer Cruz was exposed: he was standing in

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an open parking lot with Mr. Taylor. The short distance separating Mr. Taylor and Officer Cruz, compounded by the absence of immediately accessible cover that Officer Cruz could use to avoid potential harm, causes this third factor to weigh in Defendants' favor. *Cf. Hicks v. Scott*, 958 F.3d 421, 435-36 (6th Cir. 2020) (noting that the officer "reasonably perceived an immediate threat to her safety when a rifle was pointed at her face from five feet away" and "the threat perceived by [the officer] was further compounded" not only "by her close proximity to the rifle," but also by the "lack of a viable escape route," as "there was little space to maneuver and no obvious path for retreat"); *cf. also Pauly*, 874 F.3d at 1209 ("Given his cover [of a brick wall], the distance from the window [i.e., fifty feet], and the darkness, a reasonable jury could find that [the officer] was not in immediate fear for his safety or the safety of others.").

iv

As for the last *Estate of Larsen* factor—"the manifest intentions of the suspect," 511 F.3d at 1260—this factor, too, weighs in Defendants' favor. The term "manifest" is of central importance to the understanding and application of this factor. The term is consonant with the oft-stated, objective nature of the Fourth Amendment reasonableness analysis. *See, e.g., Cordova*, 569 F.3d at 1188 ("Reasonableness 'must be judged from the perspective of a reasonable officer on the scene,' who is 'often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary

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in a particular situation.”” (quoting *Graham*, 490 at 396-97). And, as the district court would seemingly agree, a key lesson here is that “the focus of the inquiry is not on . . . what Mr. Taylor *subjectively* intended”—be it “with his hand movements” or otherwise. Apls.’ App. at 883 (emphasis added). Accordingly, our inquiry’s focus is on how a reasonable officer on the scene would have assessed the manifest indicators of Mr. Taylor’s intentions—that is, Mr. Taylor’s actions.

We have seen from the discussion in subpart (B)(4)(c) (ii), *supra*, that a reasonable officer could have perceived from Mr. Taylor’s actions not only that his intentions were hostile, but also that they were malevolent. In particular, as we have detailed elsewhere, *see supra* note 2, the record does not support Plaintiffs’ contentions that Mr. Taylor’s hand movements at the end of his interaction with Officer Cruz are consistent with Mr. Taylor simply pulling up his pants or complying (albeit belatedly) with the officers’ commands to show his hands. *See, e.g.*, Apls.’ Opening Br. at 37 (“Viewing the facts in the light most favorable to Mr. Taylor would require the Court consider his hand movement simply pulling up his pants as opposed to reaching for a weapon or failing to comply to orders to raise his hands.”); *id.* at 42 (“When Mr. Taylor did put his hands up to show Officer Cruz he did not have a weapon, Officer Cruz shot him.”). Indeed, as the district court noted, “[t]he undisputed material facts . . . do not reasonably suggest that Mr. Taylor abruptly decided to become compliant with the officers’ commands that he stop and show his hands.” Apls.’ App. at 886.¹⁰

10. This case is distinguishable from *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006). In *Walker* we determined that, under

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Rather, even viewing the facts in the light most favorable to Plaintiffs, the record indicates that Mr. Taylor's hand gestures immediately before he was shot were consistent with drawing a gun against Officer Cruz or the other officers, *see supra* note 2—that is, his conduct reflected bad intentions. Furthermore, recall that Mr. Taylor's actions before this ultimate moment when Officer Cruz shot him likewise were not indicative of benign intentions. In particular, not only did Mr. Taylor ignore commands from the officers to stop and show his hands—he also verbally challenged them, saying things like, “What are you going to do? Come on, . . . shoot me,” and “Nah, fool.” Apls.’ App. at 455-57, 551, 564.

In sum, we conclude that the record evidence indicates that—even if Mr. Taylor's *subjective* intentions were good or harmless—his *manifest* intentions were hostile and malevolent. Accordingly, this last *Estate of Larsen* factor also weighs in Defendants' favor.

d

Thus far, a key focus of our analysis has been the perception of danger that reasonable officers in Officer

plaintiff's version of the facts, “[t]he angle of [the suspect's] hands and the amount of light on the scene should have permitted [the officer] to ascertain that [the suspect] was not holding a gun in a shooting stance.” *Id.* at 1160. As shown above, that was not the case here. Mr. Taylor's hands were concealed for much of the encounter, and Officer Cruz had a split second to decide whether Mr. Taylor was complying with an order to show his hands or attempting to draw and use a weapon.

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Cruz's position would have had at the precise moment that lethal force was used. But the Fourth Amendment excessive-force inquiry is not limited to such moments. *See Valverde*, 967 F.3d at 1066-67; *see also Bond*, 981 F.3d at 822 ("[O]ur review is not limited to [the precise moment an officer decides to shoot a suspect] [W]e [also] consider the totality of circumstances leading to the fatal shooting"). "[T]he reasonableness of [an officer's] use of force depends" also "on whether the officer['s] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Valverde*, 967 F.3d at 1067 (quoting *Pauly*, 874 F.3d at 1219); *accord Est. of Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019); *Allen*, 119 F.3d at 840; *see also Bond*, 981 F.3d at 824 (concluding that "the officers' role in [escalating the dynamics of the encounter with an impaired individual was] not only relevant, but determinative").

Thus, some of our key cases in this area "teach that the totality of the facts to be considered in determining whether the level of force was reasonable includes any immediately connected actions by the officers that escalated a non-lethal situation to a lethal one." *Bond*, 981 F.3d at 818 (analyzing these key cases). Specifically, on prior occasions "we held officers violated the Fourth Amendment whe[n] they recklessly confronted armed and impaired individuals, creating the need for the use of deadly force." *Id.* at 823. However, it is important to underscore that "[m]ere negligent actions precipitating a confrontation would not, of course, be actionable under § 1983." *Jiron*, 392 F.3d at 415 (alteration in original) (quoting *Sevier*, 60 F.3d at 699 n.7); *see also Medina*, 252

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F.3d at 1132 (“We emphasize, however, that, in order to constitute excessive force, the [officer’s] conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence.”). Moreover, “[e]ven if the officers misperceive[] [plaintiff’s] defensive movements as aggressive, they are entitled to qualified immunity if the misperception [is] reasonable.” *Bond*, 981 F.3d at 822; *cf. Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007) (en banc) (“Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.” (quoting *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995))).

Here, even construing the record in the light most favorable to Plaintiffs, there is no basis for concluding that Officer Cruz acted recklessly and unreasonably in the circumstances surrounding his seizure of (i.e., use of lethal force against) Mr. Taylor, or that any such actions by Officer Cruz “immediately connected with the seizure” “creat[ed] the need for force.” *Medina*, 252 F.3d at 1132; *see, e.g., Thomas*, 607 F.3d at 667-68; *Thomson*, 584 F.3d at 1304. The district court expressly stated as much: “[v]iewing the undisputed material facts in their totality, and in a light most favorable to Plaintiffs, Officer Cruz’s conduct before and during the encounter did not recklessly or deliberately create the need for his use of deadly force.” Aplts.’ App. at 893.

In their contrary arguments on appeal, Plaintiffs offer little more than conclusory assertions. *See* Aplts.’ Opening Br. at 25 (“Officer Cruz created and

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exacerbated the situation that gave rise to Mr. Taylor’s disputedly-threatening actions.”); Aplts.’ Reply Br. at 24 (“Officer Cruz’s actions were reckless, and objectively unreasonable.”); *see also* Aplts.’ Opening Br. at 26 (noting that Officer Cruz and the other officers should have just “driv[en] away” when they observed Mr. Taylor’s group “exit from [the] 7-Eleven without incident”). Indeed, highlighting the deficiency of their argument, Plaintiffs point to no evidence that would create a genuine dispute about the district court’s finding.

Moreover, contrary to some of our seminal cases in this area, where the officers’ conduct was deemed reckless, there is no evidence here that a reasonable officer in Officer Cruz’s position would have had reason to believe—when he interacted with Mr. Taylor—that Mr. Taylor was impaired in any way by emotional or psychological problems. *Cf. Hastings v. Barnes*, 252 F. App’x 197, 206 (10th Cir. 2007) (unpublished) (holding that some of our key cases “clearly establish that an officer acts unreasonably when he aggressively confronts an armed and suicidal/emotionally disturbed individual without gaining additional information or by approaching him in a threatening manner”);¹¹ *accord Bond*, 981 F.3d at 823 (observing that “we [have] held officers violated the Fourth Amendment where they recklessly confronted armed and impaired individuals, creating the need for

11. In our published decision in *Bond*, we discussed *Hastings* at some length and found its analysis of the reckless-escalation issue “persuasive”—even though *Hastings* is an unpublished decision. *Bond*, 981 F.3d at 817 & n.13, 818. We also find *Hastings* persuasive and informative regarding this issue.

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the use of deadly force.”). Likewise, a reasonable officer in Officer Cruz’s shoes would not have had any reason to believe that Mr. Taylor’s judgment was impaired through ingestion of alcohol or other intoxicants. *Cf. Bond*, 981 F.3d at 823 (noting that, “[a]s in” some of our prior precedents that found reckless escalation, “the officers here advanced upon an impaired individual,” who was likely drunk, “escalating the tension and fear”); *id.* at 824 (“Thus, a jury could reasonably determine that the officers here . . . unreasonably escalated a non-lethal situation into a lethal one through their own deliberate or reckless conduct.”).

Indeed, nothing in this record could lead a reasonable jury to infer that Officer Cruz recklessly caused Mr. Taylor to take actions to threaten Officer Cruz or his fellow officers with serious injury or death. *Cf. id.* at 824 (“A jury could find that the officers recklessly created a lethal situation by driving [the shooting victim] into the garage and cornering him with his tools in reach”). It is a tragic and regrettable truth that Officer Cruz was mistaken in believing that Mr. Taylor posed a mortal threat to him when Mr. Taylor rapidly withdrew his hands from his waistband. But that does not mean Officer Cruz’s conduct in shooting Mr. Taylor was unreasonable. *See, e.g., id.* at 822 (observing that, even if officers misperceive a subject’s defensive movements as aggressive, they are entitled to qualified immunity if the misperception is objectively reasonable); *Jiron*, 392 F.3d at 415 (“If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed.” (omission in original) (quoting *Saucier*, 533 U.S. at 205)).

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The critically important question is whether a reasonable officer standing in the shoes of Officer Cruz at the time of his encounter with Mr. Taylor would have felt justified in taking the steps that led to the use of deadly force. *See, e.g., id.* at 418 (noting that, though waiting for backup rather than engaging an armed suspect might have led to a “more peaceful[] resol[ution],” such a “retrospective inquiry” is irrelevant and the officer “adequately performed her duties as a reasonable law enforcement officer by taking steps to prevent an armed and agitated suspect from escaping”). And, based on the totality of the circumstances, we answer this question in the affirmative.

In so doing, we are mindful that the Fourth Amendment does not require police to use “the least restrictive means as long as their conduct is reasonable.” *Thomas*, 607 F.3d at 665: *accord Jiron*, 392 F.3d at 414; *see Medina*, 252 F.3d at 1133 (“[T]he reasonableness standard does not require that officers use ‘alternative “less intrusive” means.’” (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647-48, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983))); *see also Cortez*, 478 F.3d at 1146 (Gorsuch, J., concurring in part) (“[I]t is not the law that officers must always act in the least intrusive manner possible or employ only that force that might be deemed necessary in hindsight; indeed, we have repeatedly held otherwise . . .”).

And, in this regard, we are unpersuaded by Plaintiffs’ specific contention that Officer Cruz and the other officers should have just “driv[en] away” when they observed Mr. Taylor’s group “exit from [the] 7-Eleven without incident.”

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Aplts.’ Opening Br. at 26. While the 9-1-1 call reporting a male flashing a gun could have been describing a low-level misdemeanor, or even no crime at all, we are not aware of any precedent indicating that a reasonable officer would have been obliged to drive away and forgo an investigation, and Plaintiffs offer us none. *See, e.g., United States v. Guardado*, 699 F.3d 1220, 1225 (10th Cir. 2012) (“Direct evidence of a specific, particular crime is unnecessary. The Fourth Amendment merely requires commonsense judgments and reasonable inferences. Even conduct that is lawful, when observed through the prism of experience and considered in light of the circumstances, may warrant further investigation.” (citations omitted)); *cf. Adams v. Williams*, 407 U.S. 143, 145, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972) (“The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.”); *Briggs*, 720 F.3d at 1289 (observing that “weapons—guns, knives, or others—whether legally carried or not, can be used for unlawful purpose,” and then concluding that officers need not “disregard indications that the suspect is carrying a concealed weapon at his waistline merely because it is possible the suspect has a concealed-carry permit”).

Even if we assume that Officers Cruz and Sylleloglou lacked a reasonable basis to stop and detain Mr. Taylor under the well-settled principles of *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968),¹² acting

12. Defendants maintain that “[t]he use of firearms in connection with an investigative or ‘Terry’ stop is permissible whe[n] the officer

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reasonably, they were nevertheless free to attempt to engage in a consensual interaction with Mr. Taylor and his companions in furtherance of their investigation into the circumstances surrounding the flashing of the gun. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (“Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions.”); *see also Carpenter v. United States*, U.S. , 138 S. Ct. 2206, 2217, 201 L. Ed. 2d 507 (2018) (observing that law enforcement officers can follow and surveil suspects in areas where those suspects do not have an expectation of privacy). And, in these types of interactions—not involving a Fourth Amendment seizure—a reasonable officer still must grapple with “the practical difficulties of attempting

reasonably believes a weapon is necessary for protection.” Aplees.’ Resp. Br. at 30 (footnote omitted). However, that argument seems to assume that the officers had reasonable suspicion to effect a Fourth Amendment seizure of Mr. Taylor (i.e., to stop and detain him) under *Terry*. Cf. *Navarette v. California*, 572 U.S. 393, 396-401, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014); *Arizona v. Johnson*, 555 U.S. 323, 330, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009). Defendants, however, do not make a meaningful argument supporting this assumption. Indeed, they provide neither evidence from the record nor caselaw showing that the responding officers had a reasonable suspicion to stop and detain Mr. Taylor. Absent meaningful argument on this matter, we assume that the responding officers lacked reasonable suspicion to stop and detain Mr. Taylor. *See Bond*, 981 F.3d at 822 n.15. And the officers did not in fact seize Mr. Taylor through their “show of authority” and commands because there was no “voluntary submission” by him; he kept walking. *Torres v. Madrid*, __ U.S. __, 141 S. Ct. 989, 1001, 209 L. Ed. 2d 190 (2021); *see United States v. Roberson*, 864 F.3d 1118, 1121 (10th Cir. 2017); accord *Smith v. City of Chicago*, 3 F.4th 332, 340 (7th Cir. 2021).

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to assess [a] suspect’s dangerousness,” *Garner*, 471 U.S. at 20, and such an officer does not give up the “right to take reasonable steps to protect himself,” *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993); *see also United States v. Carter*, 360 F.3d 1235, 1240 (10th Cir. 2004) (observing that an officer lawfully drew his weapon to protect himself when confronted by an aggressive defendant and his friend, despite not having probable cause or reasonable suspicion when the encounter began).

Unlike in circumstances where we have determined that officer-initiated conduct recklessly heightened the atmosphere of “tension and fear,” *Bond*, 981 F.3d at 823, leading a suspect to respond in a manner necessitating the use of deadly force, Mr. Taylor was the primary initiator of the actions here that heightened the atmosphere of tension and fear. As soon as the officers approached him and his companions, Mr. Taylor made a 180-degree turn and walked away. And, as we have discussed, *see* subpart (B)(4)(c)(ii), *supra*, having heard a Dispatch communication that someone in a group matching the description of Mr. Taylor and his companions was carrying a gun, and then observing Mr. Taylor’s evasive behavior, Officer Cruz (as well as Officer Sylleloglou) reasonably could have concluded that, if anyone in the group had a firearm, it was Mr. Taylor. Thereafter, the officers took reasonable responsive actions to ensure their safety, while furthering their legitimate investigation into the flashing of the firearm. Specifically, Officers Cruz and Sylleloglou followed Mr. Taylor at a distance and ordered him to show his hands and stop. But Mr. Taylor did neither.

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Not only did Mr. Taylor not show the officers his hands, but rather, less than ten seconds after he started walking away from Officers Cruz and Sylleloglou, Mr. Taylor raised his hands from his sides and appeared to place one or both of his hands in the front of his pants' waistband. This action likely would have had the effect on reasonable officers of significantly increasing their quantum of belief that Mr. Taylor actually possessed a firearm. *See, e.g., Briggs*, 720 F.3d at 1283, 1288 n.4 (stating that “[c]ommon sense suggests that pockets are often used to carry all manner of items,” but “[t]he same cannot be said of a person’s waistline,” and relying on an officer’s testimony “that, in his training and experience, people who illegally carry weapons often keep them at their waistline and touch or grab at the weapon when they encounter police”).

Moreover, Mr. Taylor “was not merely walking away,” *id.* at 1287, and declining to speak to the officers—as citizens are free to do, unless the officers possess reasonable suspicion to detain them. Instead, Mr. Taylor was verbally challenging the officers—initially, Officer Sylleloglou—saying things like, “What are you going to do? Come on, . . . shoot me.” Apls.’ App. at 551. As the threatening situation developed, Mr. Taylor continued to refuse to comply with the officers’ orders, and—without any provocative actions or other changes in the behavior of Officers Cruz and Sylleloglou—Mr. Taylor’s initiated a new course of action that the officers reasonably could have viewed as escalating the tensions. That is, only a few seconds after Mr. Taylor placed one or both of his hands in his waistband, Mr. Taylor turned around and

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faced Officer Cruz and continued moving away by walking backwards. Both of his hands were then in his waistline and concealed, and Mr. Taylor appeared to be moving his hands in a “digging” motion, like he was “manipulating” something. *Id.* at 455-57.

These actions by Mr. Taylor—appearing to manipulate something in his waistband—would have heightened the atmosphere of tension and fear, to say the least. And, indeed, under the totality of the circumstances, a reasonable officer could have perceived that his conduct was threatening serious harm. *See, e.g., Reese*, 926 F.2d at 500-01 (concluding, where the unarmed suspect displayed “defiance” of the officer’s orders to “raise his hands” and was repeatedly “reach[ing]” below the officer’s line of sight, that the officer “could reasonably believe that [the suspect] had retrieved a gun and was about to shoot,” that it was “irrelevant . . . that [the suspect] was actually unarmed” because the officer “did not and could not have known this,” and that the suspect’s “actions alone could cause a reasonable officer to fear imminent and serious physical harm”); *Slattery*, 939 F.2d at 214-17 (concluding that an officer’s decision to shoot an unarmed suspect seated in his car during a buy-bust operation was constitutional, where the suspect ignored the officer’s commands to “put up his hands” and appeared to have his left hand “partially closed around an object,” and then “turned his entire upper body towards the officer, who could still *not* see [the suspect’s] left hand”—leaving the officer “believing that [the suspect] was coming at him with a weapon” (emphasis added)); *see also* subpart (B) (4)(c)(ii), *supra*.

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Yet, Officer Cruz and Officer Sylleloglou did not react to this conduct initiated by Mr. Taylor with the type of “reckless . . . police onslaught” that we have found characterized unconstitutional police actions. *See Valverde*, 967 F.3d at 1067. Nor did the officers box Mr. Taylor into a confined space and antagonize him into acting aggressively. *Cf. Bond*, 981 F.3d at 819, 822-24. Rather, Officers Cruz and Sylleloglou maintained their ten- to twenty-foot distance—with their guns pointed at Mr. Taylor—and repeated their calls for him to stop and show his hands. These actions were hardly reckless—and, indeed, were reasonable—responses to the actions of a non-compliant individual that the officers reasonably believed might be carrying, *and now manipulating*, a firearm.

Lastly, rather than simply continue to walk away, Mr. Taylor made rapid gestures with his hands—while facing Officer Cruz—that reasonably led Officer Cruz to believe that Mr. Taylor was drawing a gun and presenting a mortal threat. *See Lamont*, 637 F.3d at 183 (concluding that an officer’s use of deadly force against an unarmed suspect was reasonable and constitutional where “troopers repeatedly ordered him to show his hands and to freeze” but the suspect “refused to comply” and, rather, “stood with his right hand concealed in his waistband, apparently clutching an object”; when the suspect “then suddenly pulled his right hand out of his waistband—a movement uniformly described by those on the scene as being similar to that of drawing a gun . . . the troopers were justified in opening fire”); *see also Pollard*, 780 F.3d at 403 (deciding that the officers’ decision to shoot an unarmed suspect was

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reasonable “after [the suspect] regained consciousness and made gestures suggesting he had a weapon, gestures he continued to make even after officers told him to ‘Drop it’ and ‘Don’t do it’”); subpart (B)(4)(c)(ii), *supra*. Mr. Taylor’s last action was *not* “in direct response to the officers’ conduct,” *Bond*, 981 F.3d at 824—that is, the officers took no new action to prompt this sudden movement by Mr. Taylor. Rather, it was an action initiated by Mr. Taylor that forced the officers to make a split-second judgment on how to respond, and we have concluded that Officer Cruz reasonably responded with deadly force. Tragically, Officer Cruz’s perception that Mr. Taylor posed a mortal threat was mistaken. But Officer Cruz’s perception was nevertheless reasonable. *See Anderson*, 247 F.3d at 132 (“[An officer’s] split-second decision to use deadly force against [the suspect] was reasonable in light of [the officer’s] well-founded, though mistaken, belief that [the suspect] was reaching for a handgun.”); *see also Valverde*, 967 F.3d at 1064 (“The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.” (quoting *Elliott v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996))); *Lamont*, 637 F.3d at 183 (“[The suspect] then suddenly pulled his right hand out of his waistband—a movement uniformly described by those on the scene as being similar to that of drawing a gun. At that point, the troopers were justified in opening fire Waiting in such circumstances could well prove fatal.” (citation omitted)).

Based on the foregoing, then, it cannot be said here that officer-initiated conduct recklessly heightened the atmosphere of “tension and fear,” *Bond*, 981 F.3d at 823,

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which led Mr. Taylor to respond in a manner necessitating the use of deadly force. Instead, it was Mr. Taylor who was the primary initiator of actions that could have that effect. More generally, even construing the record in the light most favorable to Plaintiffs, there is no basis for concluding that Officer Cruz acted recklessly and unreasonably in the circumstances surrounding his seizure of (i.e., use of lethal force against) Mr. Taylor, or that any such actions by Officer Cruz “immediately connected with the seizure” “creat[ed] the need for force.” *Medina*, 252 F.3d at 1132. Instead, Officer Cruz had probable cause to believe Mr. Taylor’s last action was an attempt to use a firearm and presented a serious threat of mortal harm to him or his fellow officers. And he could reasonably respond with deadly force.

C

Because Mr. Taylor’s Fourth Amendment rights were not violated, there is no basis here for § 1983 municipal liability. *See Jiron*, 392 F.3d at 419 n.8; *see also Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) (“A municipality may not be held liable where there was no underlying constitutional violation by any of its officers.” (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986))). Therefore, Plaintiffs’ claim against Salt Lake City cannot prevail, and the district court was correct to enter judgment against Plaintiffs on this claim.

*Appendix A***IV**

The events underlying this case are undoubtedly tragic: Officer Cruz was mistaken when he concluded that Mr. Taylor was a mortal threat to him or his fellow officers and, as a result, shot and killed Mr. Taylor. But “[t]he Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately.” *Valverde*, 967 F.3d at 1062. And, based on the totality of the circumstances, we are constrained to conclude that Officer Cruz’s split-second decision to use deadly force against Mr. Taylor was reasonable. Accordingly, we conclude that the district court properly granted Officer Cruz qualified immunity and entered judgment in his favor and also in favor of Salt Lake City. We **AFFIRM** that judgment.

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LUCERO, Senior Circuit Judge, dissenting:

22 seconds.

That is precisely the time elapsed—22 seconds—from the moment Officer Bron Cruz stopped his police cruiser in a Salt Lake City 7-Eleven parking lot to the point at which he fatally shot twenty-year-old-innocent-unarmed Dillon Taylor. Dillon’s crimes? Walking away from an unconstitutional police stop and pulling up his pants. The majority concludes, as a matter of law, that it was objectively reasonable, based on qualified immunity, to free Officer Cruz from any liability without a trial. This cannot be right. It is not the place of this court to resolve factual disputes as to the reasonability of Officer Cruz’s actions. I am concerned about the extension of the judicially created doctrine of qualified immunity to shield officers even when there is a substantial and material dispute in the evidence as I explain below. I most respectfully dissent.

I

On a hot August afternoon, Dillon Taylor, his brother Jerrail Taylor, and their cousin Adam Thayne stopped by a 7-Eleven following a day spent visiting friends and surfing the web at a public library.¹ After purchasing a 24-ounce soda and a beer, they walked out of the 7-Eleven as three

1. Because Dillon and Jerrail share the same last name, I refer to all three young men by their first names throughout the remainder of this dissent.

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police cars rolled into the parking lot, lights flashing, blocking their path. Perhaps baffled by the sudden police presence, and with no reason to believe he had done anything wrong, Dillon put in his headphones and turned to walk away. Within seconds, Officer Cruz shot him twice in the torso. Only then did police discover that Dillon was unarmed, finding only a cell phone, earbud headphones, wallet, purple lighter, Snickers bar, and nickel on his person. Far from the menacing figure the majority and Officer Cruz make him out to be, Dillon Taylor was nothing but a normal young American. Sixty-eight pages of the majority opinion do not and cannot establish that Dillon Taylor was anything other than that, I repeat, a normal young American.

Although most tragedies take hours to play out, Dillon Taylor's spanned a total of eight-and-a-half minutes. At 7:03 p.m., Salt Lake City police dispatch sent out a radio report of a "man with a gun." The report stated that a "Hispanic male" wearing a white shirt, red pants, and a red baseball cap flashed a gun at the 911 caller, but that no threats were made. The dispatch report added that this man was accompanied by another "Hispanic male" wearing a striped shirt. The dispatcher noted that the complainant was not cooperating, did not provide self-identifying information, and hung up on the 911 operator. At 7:06, Officer Cruz radioed that he had "eyes on" three men he, without providing any reason, believed to be the subject of the 911 call. Cruz began to follow these three young men, observing their innocuous behavior for several minutes before they entered 7-Eleven. About eight minutes after the initial 911 dispatch, Officer Cruz radioed

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that the three men were “walking out [of the store] right now.” Seconds later, Dillon Taylor was dead.

In their haste to grant Officer Cruz amnesty for his wrongful and unconstitutional actions, my colleagues commit the same errors as the district court: conveniently ignoring and misconstruing aspects of the record, impermissibly usurping the role of the jury by resolving material factual disputes, and flipping the summary judgement standard on its head to interpret the record in the light most favorable to Officer Cruz. Moreover, my colleagues myopically focus on the last moments of Dillon’s life and ignore the nearly eight-minute period Officer Cruz had to investigate or deescalate the situation. With no regard for Officer Cruz’s failure to do either, the majority abrogates its constitutional duty to evaluate the reckless and deliberate nature of Officer Cruz’s actions. *See Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995). I cannot support such a decision.

II

Although my colleagues pay lip service to the legal standard we use to evaluate qualified immunity at the summary judgment stage, they misapply it throughout. Rather than ask the operative question: what a reasonable jury could conclude about Officer Cruz’s actions, the majority seats itself in the jury box and makes its own declaration that Officer Cruz acted objectively reasonably.

Summary judgment should not be granted based on qualified immunity where “a reasonable jury could

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find facts supporting a violation of a [clearly established] constitutional right.” *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016) (quotation omitted). As with all summary judgment motions, we are bound to view the facts in the light most favorable to the nonmoving party. *Id.* In qualified immunity cases, this standard generally requires “adopting . . . the plaintiff’s version of the facts.” (Op. at 22 (quoting *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).) Given that a video of Dillon’s death is available, we are not bound to accept Plaintiffs’ facts to the extent they are “blatantly contradicted by the record, so that no reasonable jury could believe” them. *Scott*, 550 U.S. at 380. The majority seizes on *Scott* to discount Plaintiffs’ version of events by pointing to available body camera footage. Our circuit has repeatedly emphasized, however, that where video evidence is subject to multiple interpretations, it is the responsibility of the jury to resolve the dispute. *Bond v. City of Tahlequah*, 981 F.3d 808, 819 (10th Cir. 2020), *rev’d on other grounds*, 2021 U.S. LEXIS 5310, 2021 WL 4822664, 595 U.S. (2021) (per curiam); *Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020). Ignoring this admonition, the majority impermissibly utilizes subjective testimony from responding officers to interpret the footage, drawing conclusions that are not plainly established by the evidence.

A

I begin with the first prong of qualified immunity analysis: whether Officer Cruz violated Dillon’s Fourth Amendment rights. At the summary judgement

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stage, Plaintiffs need not conclusively demonstrate a constitutional violation. They must only raise a genuine dispute of material fact such that a reasonable jury could find a violation. *Gutierrez*, 841 F.3d at 900. Where, as in this case, Plaintiffs allege excessive use of force, we apply “the Fourth Amendment standard of objective reasonableness.” *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004). This standard requires “careful attention to the facts and circumstances of each particular case,” assessed “from the perspective of a reasonable officer on the scene.” *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Although the Supreme Court has instructed us to consider “the severity of the crime at issue, whether the suspect poses an immediate threat . . . , and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight,” these factors are neither exhaustive nor dispositive. *Id.*; *see also Est. of Redd v. Love*, 848 F.3d 899, 908 (10th Cir. 2017) (declining to strictly apply the *Graham* factors where they did not capture relevant facts of the case). Rather, the objective reasonableness standard requires us to weigh an “individual’s Fourth Amendment interests against the countervailing governmental interests” under “the totality of the circumstances.” *Graham*, 409 U.S. at 396 (quotation omitted).

For a police officer’s use of force to be objectively reasonable, our circuit imposes two requirements. First, the officer must have reasonably perceived “danger at the precise moment that they used force.” *Sevier*, 60 F.3d at 699. Second, the officer must not unreasonably create the need to employ deadly force through their “own reckless

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or deliberate conduct.” *Id.* For the reasons set forth below, I believe Plaintiffs have raised a genuine dispute of fact both as to whether Officer Cruz was reasonably fearful when he shot Dillon and whether Officer Cruz’s reckless and deliberate conduct unreasonably created the “need” to shoot.

1

Turning to the first *Sevier* element, we ask whether Officer Cruz’s fear was reasonable at the precise moment he shot Dillon. The majority applies the three *Graham* factors outlined above to conclude that Officer Cruz’s fear was objectively reasonable as a matter of law. (Op. at 33-54.) I cannot agree.

Although I concur that the first and third *Graham* factors weigh against the use of deadly force, the majority largely discounts these findings in favor of the second factor. I consider it significant that Officer Cruz had neither a constitutional basis for stopping the three men nor factual grounds to suspect that Dillon had a gun or committed any crime under Utah state law. *See Pauly v. White*, 874 F.3d 1197, 1222 (10th Cir. 2017) (finding that the third *Graham* factor weighs against the use of force where officers “did not have enough evidence or probable cause to make an arrest” (quotation omitted)). At the time he was shot, Dillon was merely exercising his right to walk away from an unconstitutional police stop. *See Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Indeed, the available body camera evidence shows that Dillon had turned and begun walking away from the

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police before Officer Cruz fully exited his vehicle. At that point, Dillon had no indication that he was the target of any investigation or that the officers were there to confront him. In the light most favorable to Plaintiffs, a jury could rely on these facts to support a conclusion that Officer Cruz lacked a reasonable basis to fear Dillon.

More egregious, however, is the majority's application of the second *Graham* factor. My colleagues rely on four "non-exclusive" factors outlined in *Est. of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008), to determine whether a suspect poses an immediate threat:

- (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.

Id. The majority contends that these factors support the reasonableness of Officer Cruz's decision to shoot Dillon. While a jury could draw this conclusion on the record before us, they certainly need not do so as a matter of law. In their haste to absolve Officer Cruz of constitutional liability, my colleagues resolve several factual disputes in Officer Cruz's favor and credit his subjective interpretation of the encounter, even when contradicted by other testimony and objective evidence. I find it necessary to discuss each *Larsen* factor to explain why material questions of fact exist in this case. After reading the majority opinion, I am

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left to wonder whether I viewed the same video evidence as my colleagues.

a

According to the majority, “the record clearly establishes that [Dillon] Taylor ignored or directly disobeyed Officer Cruz and Officer Sylleoglou’s commands.” (Op. at 41.) Objective evidence does not support this proposition. Instead, the record shows that officers shouted confusing and contradictory commands at the three men to variously show their hands, put their hands up, and get on the ground. Because Dillon turned his back on the police officers before Officer Cruz exited his cruiser, it is unclear when Dillon understood that these commands were directed at him. The majority also inexplicably rejects evidence that Dillon had headphones in his ears for at least part of the encounter. Both Jerrail and Adam recounted in independent testimony that Dillon had earbuds in as he began walking away from the officers. Moreover, Officer Cruz’s body camera footage clearly shows him moving the headphones away from Dillon’s body after the shooting. The majority contends that it cannot consider this evidence because a reasonable officer in Cruz’s position would have no way to know that Dillon was wearing headphones (Op. at 4 n.1), but this conclusion assumes its own premise. A jury could conclude that a reasonable officer would have or should have seen the headphones, even if Officer Cruz did not. Further, because music might have impaired Dillon’s ability to hear, understand, or otherwise comply with commands, a jury would be entitled to discount evidence of Dillon’s noncompliance.

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Following the shooting, responding Officer Downes admitted that the conflicting commands created an atmosphere of confusion. Although Officer Cruz's body camera establishes that he shouted several orders as he pursued Dillon, only two such commands were issued after Dillon turned around to face Officer Cruz, about 4 seconds before the shooting. In fact, video evidence unequivocally demonstrates that Officer Cruz fired his weapon before even completing the second command. Considering the totality of the circumstances, it is unclear at best what impact Dillon's noncompliance should have had on a reasonable officer.

b

The second *Larsen* factor concerns the highly contested issue of Dillon's hand motions immediately before shots were fired. The majority adopts the district court's perplexing finding that “[t]he undisputed material facts and video and photographic evidence of the moments when [Dillon] Taylor was shot demonstrate that a reasonable officer would believe that Mr. Taylor made a hostile motion with a weapon towards the officers.” (Op. at 42.) Without any support from the record, both the majority and district court variously describe Dillon's hand motions as “digging,” consistent with “manipulating something,” and “consistent with the drawing of a gun.” (Op. at 45.)

These characterizations at once take the evidence in the light most favorable to Officer Cruz and invade the province of the jury by interpreting video evidence

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that is subject to multiple interpretations. The majority summarily rejects Plaintiffs' contention that Dillon was merely attempting to pull up his pants or comply with Officer Cruz's commands to raise his hands. Although this view is by no means conclusively established by the record, it does enjoy evidentiary support. Both Adam and Jerrail independently testified after the shooting that Dillon was pulling up his pants when Officer Cruz pulled the trigger.² Moreover, the hand motions came only a

2. I agree with the majority and our sibling circuits that the exclusionary rule does not operate outside the criminal context. But if any circumstances were to call for its extension to civil cases, this case would. Officers Cruz, Downes, and Sylleloglou placed Jerrail and Adam in handcuffs at the scene, after they had just been held at gunpoint by the police and seen their loved one shot dead. Then South Salt Lake City police officers left the men isolated in separate "interview rooms" for over four hours, with their arms handcuffed behind their backs, without any reason to believe they had engaged in criminal activity of any kind. The interview tapes do not show that anyone checked on them during the multiple hours they were made to wait. There is no indication that they were read their rights or provided the opportunity to ask for counsel. It was more important for the Police Department to obtain statements that they could use to justify Officer Cruz's shooting of Dillon than to treat the two survivors with humanity. Adam was left in handcuffs for the entire interview except for when the police needed him to draw a diagram. At the end of the interview, when he asked if his cousin was dead, the investigators told him yes, but put him back into handcuffs, leaving him to cry for his cousin, unable even to wipe the tears away or cover his face. One might wonder whether the young men were unresponsive, argumentative, or violent to merit such treatment. To the contrary, when the police finally got around to talking to Jerrail and Adam, after detaining them in handcuffs for more than five hours, they were polite in their responses, calling the officers "sir" and agreeing with their leading questions.

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few seconds after he turned around to see Officer Cruz pointing a gun at him, a fact that could be interpreted to support the view that Dillon was attempting to comply with a command to show his hands. At bottom, however, the video is ambiguous as to what Dillon was doing with his hands during the encounter. We can see only that Dillon's hands are in his waistband as he turned to face Officer Cruz and that he removed at least his left hand at the time he was shot dead. To draw any further inferences or conclusions, as the majority does, is to resolve a factual question and usurp the jury.

At the summary judgment stage, we must accept Plaintiffs' account of Dillon's hand motions because the video evidence is subject to competing interpretations. It is patently absurd to suggest that an officer's decision to shoot an unarmed young man for complying with an order or pulling up his pants could be objectively reasonable. Yet this is the result reached by application of the majority's legal error.

c

In my view, the third factor—the distance between the Officers and Dillon—is of little help in this case. The majority concludes that the close proximity between the two men and purported lack of cover available to Officer Cruz cut in favor of finding an immediate threat. (Op. at 50-51.) Although the video does tend to show that Officer Cruz was ten to twelve feet away from Dillon as he pulled the trigger, it does not show whether any cover was available to Officer Cruz on the western side of the

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7-Eleven. It also clearly demonstrates that Officer Cruz was closing distance as Dillon continued walking away. I would leave it for the jury to decide the relevance and weight of this evidence.

d

The final *Larsen* factor asks us to evaluate Dillon's manifest intentions. The majority does so by essentially rehashing its second factor analysis. It again summarily concludes "the record does not support Plaintiffs' contentions that [Dillon's] hand movements at the end of his interaction with Officer Cruz are consistent with Mr. Taylor simply pulling up his pants or complying (albeit belatedly) with the officers' commands to show his hands." (Op. at 52.) Instead, they rely on their interpretation of Dillon's hand motions and supposed verbal challenges³ to conclude that "immediately before he was shot," Dillon's actions "reflected bad intentions." (Op. at 53.) I have already explained at length why the record is ambiguous on these points.

3. Only after he turned around to face Officer Cruz, seconds before his death, can Dillon be heard responding to the officers. The majority concludes that he responded "Nah, fool" after Officer Cruz commanded him to remove his hands from his waistband, taking this response to be further evidence of noncompliance. (Op. at 53.) Although that construction is plausible, a reasonable jury could discount that aspect of the video because the audio is unclear. The majority also discusses another supposed "verbal challenge" from Dillon, but no such challenge is captured by the video. Rather, the majority again credits the subjective testimony of responding officers as undisputed fact.

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Even beyond the non-determinative *Larsen* factors, the record is replete with evidence a jury could use to conclude that a reasonable officer in Cruz's position would not have perceived Dillon as an immediate threat. First, the majority impermissibly credits testimony from the officers to conclude that they aimed their weapons at Dillon only after he put his hands in his waistband. (Op. at 8.) This finding contradicts testimony from Adam and Jerrail that officers had weapons drawn and pointed at the men from the moment they exited their vehicles and separate video from 7-Eleven surveillance cameras showing Officer Cruz aiming his weapon at Dillon for nearly the entirety of the encounter. Moreover, Officer Cruz's body camera appears to show Officer Sylleloglou pointing his weapon at Dillon before his hands were in his waistband. Although the video is unclear both as to when weapons are pointed and Dillon's hand movements, a jury could conclude that the officers drew and aimed their guns before having any indication that Dillon might have been armed or was reaching for a weapon, further discounting their narrative of fear.

Second, the majority omits any discussion of inconsistencies between Officer Cruz's testimony and his body camera footage. Most relevant here, Officer Cruz claimed in his interview just two weeks after the shooting that as he approached the 7-Eleven, Adam and Jerrail put their hands up without prompting as he exited his vehicle. At the same time, he recalls that Dillon "looks right at me, for a split second . . . he looked right at me, uh, with

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just complete and total defiance in his eyes.” Officer Cruz claimed that both Adam and Jerrail’s unprompted hand raising and Dillon’s look of “defiance” heightened his fear that one of the men had a gun. But evidence contradicts both propositions in ways that would have been apparent to a reasonable officer on the scene. First, Adam and Jerrail independently testified that they raised their hands only after being ordered to do so and after guns were aimed at them. Second, Officer Cruz’s body camera clearly shows that by the time he exited his vehicle, Dillon had already turned and walked away, leaving no time for the look of “complete and total defiance.” Officer Sylleloglou also testified that Dillon was already walking away when Officer Cruz exited his police car, further contradicting Cruz’s version of the events. A jury could rely on this evidence to question the degree of fear a reasonable officer would have felt in Officer Cruz’s position, or to discount his credibility.

Finally, the majority makes much of Officer Sylleloglou’s testimony that he was prepared to fire his weapon at Dillon, as indicated by his decision to place his finger on the trigger of his weapon (a fact not depicted on any video). The majority concludes on this basis that “Officer Sylleloglou and Officer Cruz’s assessments of the threat were . . . identical.” (Op. at 49.) My colleagues summarily dismiss Plaintiffs’ suggestion that Officer Sylleloglou’s decision not to fire his weapon is evidence that Officer Cruz’s fear was unreasonable, arguing that Officer Sylleloglou had a different vantage point and was not directly facing Dillon. Although true, it is not for the majority to weigh this evidence. Yet again, the majority

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removes the question of Officer Sylleloglou’s actions from the jury by interpreting his actions and testimony in the light most favorable to Officer Cruz.

2

At this juncture, I would conclude under *Graham* and *Larsen* that Plaintiffs have met their burden of demonstrating a genuine dispute as to the reasonableness of Officer Cruz’s fear. This finding alone is sufficient to meet the first prong of our qualified immunity inquiry. Yet even were the majority correct that the use of deadly force by Officer Cruz was objectively reasonable at the time he fired, Plaintiffs would still survive summary judgement under the second *Sevier* element. That is, Plaintiffs have also raised a material dispute as to whether Officer Cruz’s “own reckless or deliberate conduct” created the “need” to use deadly force. *Sevier*, 60 F.3d at 699.⁴

To determine whether an officer’s actions recklessly or deliberately created circumstances warranting the

4. I agree with the majority that the second prong of *Sevier* remains applicable. (Op. at 31 n.9.) Although the Supreme Court recently described this prong as “dicta,” *City of Tahlequah v. Bond*, 2021 U.S. Dist. LEXIS 5310, 2021 WL 4822664 at *2, 595 U.S. (2021) (per curiam), the Tenth Circuit has repeatedly held that reckless and deliberate conduct creating the need to use deadly force violates the Fourth Amendment. See, e.g., *Reavis Est. of Coale v. Frost*, 967 F.3d 978, 985 (10th Cir. 2020); *Est. of Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019); *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015); *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004). In *Bond*, the Supreme Court expressly declined to overturn this precedent. *Bond*, 2021 U.S. Dist. LEXIS 5310, 2021 WL 4822664 at *2.

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use of deadly force, we apply the same totality of the circumstances test as above, from the perspective of a reasonable officer on the scene. *Id.* The majority abrogates its constitutional duty to conduct this analysis by providing only a cursory account of Officer Cruz’s actions leading up to his confrontation with Dillon. It uncritically adopts the district court’s assertion that “[v]iewing the undisputed material facts in their totality, and in a light most favorable to Plaintiffs, Officer Cruz’s conduct before and during the encounter did not recklessly or deliberately create the need for his use of deadly force.” (Op. at 56.) This conclusion ignores both material disputes of fact and undisputed material facts that weigh in favor of Plaintiffs.

First, the dispatch report is illuminating. The dispatcher provided a description of two men, neither of which matched clothes worn by Dillon, Jerrail, or Adam. The report provided that a suspect had merely flashed a gun without making a threat, conduct that does not on its own violate Utah law. Further, the dispatcher told Officer Cruz that the 911 caller declined to provide self-identifying information, was generally uncooperative, and hung up on dispatch.⁵ Taking these facts together, a reasonable jury could question whether Officer Cruz was justified in suspecting and following the three men. Given that being Hispanic is not a crime, and the conduct described by the

5. This court’s precedents make clear, and a reasonable officer in Cruz’s position would have known, that such indicia of unreliability render a 911 call insufficient to create reasonable suspicion, even when the call alleges conduct that clearly amounts to a crime. *See, e.g., United States v. Lovato*, 950 F.3d 1337, 1343 (10th Cir. 2020); *United States v. Gaines*, 918 F.3d 793, 802-03 (10th Cir. 2019).

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complainant was not a crime, there was nothing for Officer Cruz to proceed on. The majority declines to discuss the dispatch report at all when evaluating the recklessness or deliberateness of Officer Cruz's conduct.

Next, the majority omits any discussion of the nearly five minutes Officer Cruz spent following the men and preparing for confrontation, despite never observing a gun or any suspicious behavior. During his interview following the shooting, Officer Cruz claimed to have witnessed an "odd disturbance" involving Dillon and a fourth individual in a car stopped at a crosswalk. Adam and Jerrail testified that they were merely "high fiving" a childhood friend, an account corroborated by an independent eyewitness that described the interaction as friendly. Officer Cruz next radioed dispatch to clarify which reported suspect was carrying a gun, ignoring the initial dispatch report received just minutes earlier that the man with the gun wore a white shirt, red pants, and a red baseball cap – a description not matching Dylan.⁶ Officer Cruz also recalls spending several minutes "running through scenarios" to mentally prepare for his confrontation with the men as he waited for backup to arrive, but delayed full activation of his body camera until just seven seconds before he shot Dillon.⁷ Again, a jury could rely on these facts to discount

6. This report was also reproduced on Officer Cruz's in-car computer system, to which he had access and which a jury could determine he chose not to read or recheck.

7. It is unclear from the record exactly when Officer Cruz turned his body camera on. Although it captured video for the duration of the 22 second encounter leading up to Dillon's shooting, it only captured audio for the last seven seconds. Officer Sylleologlou

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Officer Cruz's narrative and conclude that a reasonable officer should have realized in the minutes spent following the young men that an armed confrontation was unnecessary to respond to the incident reported by the anonymous, uncooperative 911 caller.

Perhaps the most critical factor supporting a finding of reckless or deliberate escalation on the part of Officer Cruz is the sheer lack of reasonable suspicion necessary to stop the three men in the first place. *See Terry*, 392 U.S. at 22 (conditioning officers' ability to "approach a person for purposes of investigating possibly criminal behavior" on governmental interest in "effective crime prevention and detection"). The Supreme Court has specifically held that "an anonymous tip that a person is carrying a gun is, without more, [in]sufficient to justify a police officer's stop and frisk of that person." *Florida v. J.L.*, 529 U.S. 266, 268, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000).⁸ Between the 911 call and absence of any incriminating actions during Officer Cruz's five-minute "staging" period, he lacked any constitutional basis to stop the three men.

testified that body cameras only capture audio when deliberately engaged by the officer and retain video from the 30 seconds preceding manual activation.

8. In *J.L.* the Supreme Court explicitly declined to adopt a "firearm exception" to its "established reliability analysis" used when assessing tips supporting reasonable suspicion for an investigative stop, because "[s]uch an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." *Id.* at 272.

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The majority concedes as much, and instead argues that Officer Cruz was “nevertheless free to attempt to engage in a consensual interaction with [Dillon] Taylor and his companions.” (Op. at 60.) The obvious fallacy with this characterization is that the encounter was nonconsensual. Moreover, it disregards Dillon’s constitutional right to walk away. *See Terry*, 392 U.S. at 16-17 (a seizure, requiring reasonable suspicion, occurs where police limit the freedom to walk away); *see also Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (a police encounter triggers Fourth Amendment scrutiny when the suspect is not free to walk away, thereby ending the consensual nature of the engagement). Rather than acknowledge this right, the majority bizarrely cites Dillon’s decision to walk away as evidence that “Mr. Taylor was the primary initiator of the actions here that heightened the atmosphere of tension and fear.” (Op. at 61.) Under the majority’s logic, simply exercising one’s right to end or avoid a consensual encounter with the police can serve as the basis for reasonable fear justifying the use of deadly force. The implications of this suggestion are staggering.

Once Dillon exercised his right to walk away from a “consensual” encounter with police, it is further unclear why Officers Cruz and Sylleloglou chose to pursue him with weapons drawn. At this point, they had not one scintilla of evidence that Dillon was armed or posed a threat to anyone. As the Supreme Court has instructed, when a “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

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to do so.” *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). Instead of heeding this bedrock principle of criminal procedure, Officer Cruz descended into a self-induced state of paranoia based on nothing more than a facially unreliable 911 call and his misinterpretation of facts viewed as innocuous by every other available witness. Regardless of how one interprets Dillon’s hand motions after the encounter started, there was no constitutional basis for Officer Cruz to stop or pursue Dillon in the first instance. A jury could surely interpret Officer Cruz’s decision as a reckless or deliberate escalation that unreasonably created the “need” to use deadly force.⁹

Finally, even setting aside the objective evidence, a jury is entitled to consider inconsistencies in Officer Cruz’s post-shooting statements. *See Est. of Smart v. City of Wichita*, 951 F.3d 1161, 1170 (10th Cir. 2020) (“[C]onsidering the physical evidence together with the inconsistencies in the officers’ testimony, a jury will have to make credibility judgments”) (quotation omitted). In various interviews and depositions between 2014 and 2017, Officer Cruz contradicted himself about the content and specificity of the 911 dispatch report, whether dispatch reported two or three men spotted with a gun, whether the anonymous complainant perceived a threat after seeing the gun, and whether he felt scared

9. The majority’s conclusion that Dillon “was the primary initiator of the actions here that heightened the atmosphere or tension and fear,” (Op. at 61), implicitly places the burden on a twenty-year old man to deescalate a violent encounter with highly trained professional police officers.

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or calm when approaching the 7-Eleven, among numerous other inconsistencies. Because these contradictions go directly to whether Officer Cruz was reckless in confronting Dillon, they must be presented to a jury. *Id.* (courts evaluating “evidence that, if believed, would tend to discredit the police officer’s story, [should] consider whether this evidence could convince a rational factfinder that the officer acted unreasonably”). As we held in *Smart*, “credibility determinations should not be made on summary judgment.” *Id.*

On these grounds, I conclude that Plaintiffs have also established a genuine dispute as to whether Officer Cruz’s reckless or deliberate actions created the circumstances leading to the use of deadly force. Thus, even if Officer Cruz’s use of force was objectively reasonable at the time of the shooting, Plaintiffs have nevertheless established a genuine dispute of fact as to whether Officer Cruz violated Dillon’s Fourth Amendment rights.

B

Because the majority rests on the first prong of qualified immunity analysis, it did not address the second: whether the right of an unarmed man walking away from a “consensual” police encounter to be free from deadly force was clearly established at the time of Dillon’s shooting. Upon concluding that Plaintiffs have raised a genuine dispute as to whether Officer Cruz violated Dillon’s Fourth Amendment rights, I proceed to discuss whether such right was clearly established. The caselaw overwhelmingly answers in the affirmative.

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“To be clearly established, ordinarily there must be prior Supreme Court or Tenth Circuit precedent, or the weight of authority from other circuits, that would have put an objective officer in [the officer’s position] on notice that he was violating [the decedent’s] Fourth Amendment rights.” *Est. of Ceballos v. Husk*, 919 F.3d 1204, 1213 (10th Cir. 2019) (quotation omitted). Clearly established law “must be particularized to the facts” of the case, but we do not require that a case be directly on point. *Id.* at 1214.

In addition to his clear violation of *Terry* and *J.L.*, the Fourth Amendment’s prohibition of Officer Cruz’s reckless creation of the need to use deadly force is clearly established. In *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), we held that even where officers approached a visibly armed individual, the facts of that case—officers ran “screaming” up to the suspect, shouting at Allen to get out of the car, and attempting to take the weapon—would have allowed a reasonable jury to conclude the officer’s actions were reckless and precipitated the need to use deadly force. *Id.* at 841.

Prior to the case at bar, both *Allen* and *Sevier* clearly established the right to be free from reckless confrontations that result in deadly force. *See Ceballos*, 919 F.3d at 1217 (finding that *Sevier* and *Allen* “strengthen our conclusion that . . . a reasonable officer in [Defendant’s] position would have known that his conduct . . . violated [Plaintiff’s] Fourth Amendment right to be free from excessive force”). In *Ceballos*, we declined to apply qualified immunity where a police officer “shot and killed an emotionally distraught Ceballos within a minute of

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arriving on scene.” *Id.* at 1216. We concluded that a police officer was reckless in confronting a visibly intoxicated man “pacing in [his] driveway, swinging a baseball bat, yelling and throwing his arms in the air.” *Id.* at 1210. If *Allen* and *Sevier* were sufficient to put a reasonable officer on notice that confrontation under those circumstances is unconstitutionally reckless, then surely a reasonable officer in Cruz’s position ought to have known that confronting an unarmed, nonthreatening young man without evidence of any crime is similarly unreasonable.

In *Allen*, *Sevier*, and *Ceballos*, the police had more reliable information regarding the reality of a potential threat to the officer than that apparent to Cruz: in *Allen*, a visible gun, in *Sevier*, a visible knife, and in *Ceballos*, a visible bat. The facts in Dillon’s case are sufficiently analogous to those in *Allen*, *Sevier*, and *Ceballos* to place Cruz on notice that his conduct in shouting at, pursuing, drawing his weapon on, and shooting a retreating, visibly unarmed person violated Dillon’s clearly established right to be free from excessive force.

I am mindful that the Supreme Court recently found *Allen*, *Sevier*, and *Ceballos* insufficient to clearly establish Fourth Amendment rights in a different factual context. In *City of Tahlequah v. Bond*, 2021 U.S. Dist. LEXIS 5310, 2021 WL 4822664, 595 U.S. (2021), the Court reversed a Tenth Circuit judgment denying qualified immunity to police officers that fatally shot a man approaching them while holding a hammer in a threatening manner. Specifically, the Court found that Tenth Circuit precedent did not clearly establish that the officers’ actions were

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reckless or deliberate. 2021 U.S. Dist. LEXIS 5310, [WL] at *2. The Court distinguished *Allen* because officers there ran towards a suspect while yelling, whereas in *Bond* the officers first had a calm conversation with the decedent. *Id.* It dismissed *Ceballos* as irrelevant because it was decided after the facts in *Bond*. *Id.* Finally, the Court differentiated *Sevier* because its general articulation of the rule that reckless and deliberate conduct can violate the Fourth Amendment was not sufficient to clearly establish the right in the specific factual context *Bond* presented. *Id.*

Dillon's case is materially different from the facts in *Bond* and is much closer to *Allen* and *Sevier*. Officer Cruz pursued Dillon, yelling with gun drawn, without observing a weapon or incriminating behavior. Indeed, he was responding to an unreliable 911 dispatch call that failed to even report a crime under Utah law. These facts are in accord with *Allen*, where police rushed a reportedly suicidal and visibly armed man in his car, attempting to wrest away a gun before shooting the man dead. *Allen*, 119 F.3d at 839. Dillon's case is also similar to *Sevier*, in which police approached another reportedly suicidal man armed with a knife in his bedroom, yelling at the man to drop the knife, with their weapons drawn. *Sevier*, 60 F.3d at 698. In all three instances, police approached an individual that was either visibly armed or suspected to have a weapon. Without any affirmative threat from the suspect, the police in all three cases approached them rapidly, yelling, and with weapons drawn. Indeed, because the individuals in *Allen* and *Sevier* were both visibly armed, they posed a demonstrably greater threat to responding officers than Dillon.

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By contrast, in *Bond*, officers calmly approached the suspect, had a brief conversation with him and calmly followed him, with weapons still holstered, into a garage before the suspect grabbed a hammer and threateningly gestured towards police. *Bond*, 2021 U.S. Dist. LEXIS 5310, 2021 WL 4822664 at *1. Dillon was not afforded a similar calm conversation, nor did police calmly follow him with their weapons holstered in an attempt to deescalate the encounter. Thus, the Supreme Court's decision in *Bond* is inapposite to the facts of Dillon's case. I remain confident that Tenth Circuit precedent clearly established Dillon's right to be free from reckless and deliberate conduct creating the "need" for deadly force.

Accordingly, I conclude that Plaintiffs have established a genuine dispute of fact as to both the first and second prongs of qualified immunity analysis. Taking the record in the light most favorable to Dillon, a reasonable jury could find that Officer Cruz violated Dillon's clearly established right to be free from unlawful seizure under the Fourth Amendment. I would reverse the district court's grant of summary judgment in favor of Officer Cruz and remand for trial.

III

Because its absolution of Officer Cruz is the only reason the district court granted summary judgment with respect to Salt Lake City, *Est. of Taylor v. Salt Lake City*, 2019 U.S. Dist. LEXIS 84464, 2019 WL 2164098, at *1 (D. Utah May 17, 2019), I would reverse summary judgement for the City and remand for consideration of Plaintiffs' municipal liability claims in the first instance.

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It is one of the most settled principles in American law that a motion for summary judgment may not be granted if a genuine dispute of material fact exists, after construing the record in a light most favorable to the non-moving party. Today, this court at once invades the province of the jury to resolve disputes of material fact and disregards decades of Supreme Court precedent when it bends over backward to draw all possible inferences in favor of Officer Cruz.

Although the majority's misapplication of the law is egregious on its own, we must not for one second lose sight of the behavior that the court rubber-stamps today. Officer Cruz is absolved of his constitutional obligation to reasonably investigate a plainly unreliable 911 complaint, the details of which he ignored. Three young Hispanic men were stopped without reasonable suspicion of any crime. Officers pursued an unarmed and non-threatening Dillon Taylor with guns drawn, ignoring his right to walk away from an unconstitutional stop. Adam and Jerrail were chastised for raising their hands too quickly, but Dillon was shot and killed for complying too slowly. As a result, yet another innocent young American is dead at the hands of police. That his family is left without so much as a trial to assess the reasonableness of these actions is a travesty of justice that I cannot abide.

The resolution of this case by a panel of judges rather than a citizen jury is emblematic of profound structural issues with the judicially created doctrine of qualified

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immunity. Empirical evidence demonstrates that the doctrine as currently implemented fails to serve even its purported goal of protecting law-abiding government officials from the time and expense of frivolous litigation. *See Joanna C. Schwartz, How Qualified Immunity Fails*, 127 Yale L.J. 2, 71 (2018).¹⁰ Rather, it functions to discourage the filing of meritorious civil rights claims and incents frivolous actions not subject to qualified immunity. *See id.* at 58-70. At the same time, police kill nearly 1,100 Americans each year, a figure more than thirty times greater than other wealthy countries. *See Lynne Peeples, What the Data Say About Police Shootings*, 573 Nature 24, 24 (Sept. 5, 2019).

Against this illogical backdrop, it is hard to avoid the conclusion that qualified immunity as currently constituted is broken. As Dillon's case so tragically illustrates, the doctrine precludes remedies for unconstitutional police actions while serving no discernible societal benefit. Of course, Dillon's family is not alone in bearing the costs of this confounding reality. *See Jamison v. McClendon*, 476 F. Supp.3d 386, 390-92 (S.D. Miss. 2020) (listing numerous other Americans impacted by qualified immunity and police excessive use of force); *United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring) ("[M]any of our fellow citizens already feel insecure . . . when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public,

10. Particularly when police officers and other government actors are almost universally indemnified from adverse judgments. Schwartz, *supra* at 9.

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or walking home from a trip to the store to purchase a bag of Skittles,” and now, buying a drink at 7-Eleven). So long as qualified immunity fails to serve any evident purpose, I am left to conclude that the reasonableness of governmental use of force is best assessed by juries comprised of citizens subjected to the police actions we are asked to judge. Particularly in cases like Dillon’s, replete with disputed facts, it is clear that judicial adjudication of police use of force has failed to strike the appropriate balance between public safety and individual rights required by the Constitution.

Dillon had a phone, a Snickers bar, and a nickel in his pocket—not a gun. Officer Cruz had no basis to believe otherwise. After paying careful attention to the facts and circumstances of this case, I cannot conclude that Officer Cruz’s actions were objectively reasonable under the Fourth Amendment when eight-and-a-half minutes after hearing the 911 dispatch, and 22 seconds after pulling up in his cruiser, he shot and killed Dillon Taylor for no crime at all. As Jerrail Taylor asks, as should we all: “what the [expletive] did I just do, . . . that I can’t walk in America and buy a goddamn drink and a beer, like what am I doing wrong?”

**APPENDIX B — MEMORANDUM DECISION
AND ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF UTAH,
DATED MAY, 17, 2019**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Case No. 2:15-cv-00769-DN-BCW

THE ESTATE OF DILLON TAYLOR, CODY
TAYLOR, JERRAIL TAYLOR, TEESHA TAYLOR,
AND ADAM THAYNE,

Plaintiffs,

v.

SALT LAKE CITY, CITY OF SOUTH SALT
LAKE, SALT LAKE COUNTY, BRON CRUZ,
ANDREW SYLLELOGLOU; UPPSEN DOWNES,
CHRIS KOTRODIMOS, JAMES SPANGENBERG,
CHIEF MIKE BROWN, VAUGHN DELAHUNTY,
CRAIG HICKEN, CHASE HERMANSEN, JOE
SUTERA, CHIEF JACK CARRUTH, AND JOHN
AND JANE DOES 1-35,

Defendants.

District Judge David Nuffer

*Appendix B***MEMORANDUM DECISION AND
ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

This case arises from a police encounter with Dillon Taylor (“Mr. Taylor”), Jerrail Taylor (“Jerrail”), and Adam Thayne (“Adam”) on August 11, 2014.¹ The encounter resulted in the shooting death of Mr. Taylor and the detention of Jerrail and Adam.²

These events are a tragedy to everyone involved and to the community. The resulting impact undoubtedly remains deeply felt and weighs heavy on the hearts and minds of the parties and their families now several years later. On a broader scale, this case presents important issues to the community as a whole. The qualified immunity doctrine can lead to results that some may view as harsh or unjust, regardless of the outcome. But the law necessitates the doctrine’s application to the facts of this case. There is no way to reset or change the past. Yet being mindful of the past can guide future decisions and conduct to avoid similar unfortunate consequences.

Plaintiffs’ Complaint asserts several claims for violation of civil rights and wrongful death against multiple government entities and law enforcement

1. Complaint for Damages (Violation of Civil Rights) (“Complaint”) ¶¶ 1-4, 10, docket no. 2, filed Oct. 28, 2015.

2. *Id.* ¶¶ 1-4, 10, 36-37, 41-42, 53-54, 65.

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officers.³ Through a series of stipulations,⁴ the only remaining claims are Plaintiffs' first cause of action against Officer Bron Cruz for use of excessive force⁵ and Plaintiffs' fourth cause of action against Salt Lake City for deliberate indifference in its policies, training, and investigation relating to Officer Cruz's conduct.⁶ Officer Cruz and Salt Lake City seek summary judgment on these claims, arguing that Officer Cruz is entitled to qualified immunity, and that Salt Lake City cannot be held liable because Officer Cruz's conduct did not violate a statutory or constitutional right.⁷ Plaintiffs argue that genuine issues of material fact preclude summary judgment.⁸

Because the undisputed material facts demonstrate that Officer Cruz's use of deadly force in the August 11,

3. *Id.* ¶¶ 105-170.

4. Order Granting Stipulated Motion to Dismiss Certain Claims and Certain Defendants, docket no. 33, filed Apr. 28, 2016; Order Granting Stipulated Motion to Dismiss Defendants Andrew Sylleloglou, Uppsen Downes and Chief Mike Brown With Prejudice, docket no. 51, filed Feb. 10, 2017; Order Granting Stipulated Motion to Dismiss Certain Claims, docket no. 61, filed Aug. 7, 2017.

5. Complaint ¶¶ 105-113.

6. *Id.* ¶¶ 129-137.

7. Motion for Summary Judgment and Memorandum in Support ("Motion for Summary Judgement") at 21-34, 39, docket no. 44, filed Nov. 28, 2016.

8. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56(a) ("Response") at 71-90, docket no. 54, filed May 22, 2017.

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2014 encounter with Mr. Taylor was objectively reasonable under the circumstances, Officer Cruz did not violate a statutory or constitutional right and is entitled to qualified immunity as a matter of law. And because Officer Cruz's conduct did not violate a statutory or constitutional right, Salt Lake City cannot, as a matter of law, be held liable for Officer Cruz's conduct. Therefore, the Motion for Summary Judgment⁹ is GRANTED.

[TABLES INTENTIONALLY OMITTED]

EVIDENTIARY ISSUE

As a preliminary matter, Plaintiffs object to the admissibility of statements made by Jerrail and Adam while they were detained and interviewed by law enforcement officers on August 11, 2014.¹⁰ Plaintiffs argue that because the statements were obtained in violation of Jerrail and Adam's Fourth Amendment right against unreasonable searches and seizures, the statements are inadmissible.¹¹

“Although the Tenth Circuit has not weighed in on this precise issue, ‘federal courts of appeals have widely held that the exclusionary rule does not apply in § 1983 cases.’¹² These

9. Docket no. 44, filed Nov. 28, 2016.

10. Response ¶18 at 19-20, ¶¶ 20-23 at 20-22, ¶¶ 41-42 at 37, ¶ 55-56 at 43-44, ¶ 59-60 at 44-46.

11. *Id.*

12. *Wolfe v. Gray*, Case No. 13-CV-286-JED-JFJ, 2018 U.S. Dist. LEXIS 176703, 2018 WL 4964364, *5 (N.D. Okla. Oct. 15, 2018) (quoting *Lingo v. City of Salem*, 832 F.3d 953, 959 (9th Cir. 2016));

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“[c]ourts have been reluctant to extend the exclusionary rule beyond the criminal context because its purpose is to deter police misconduct and safeguard Fourth Amendment rights, rather than serve as [a] personal constitutional right of those aggrieved.”¹³ “Application of the exclusionary rule in the civil context [also] comes at a significant cost: ‘officers could be forced to pay damages based on an overly truncated version of the evidence.’”¹⁴ Indeed, “[r]ecognizing these substantial costs, the U.S. Supreme Court has ‘repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials.’”¹⁵

These authorities are persuasive. Moreover, Plaintiffs repeatedly rely on Jerrail and Adam’s statements to officers in support of their arguments and in attempting to establish genuine issues of material fact.¹⁶ It would be improper to invoke the exclusionary rule to shield statements that Plaintiffs believe are unfavorable, while

see also Vaughn v. Chapman, 662 Fed. App’x 464, 467 (7th Cir. 2016); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016); *Machado v. Weare Police Dep’t*, 494 Fed. App’x 102, 106 (1st Cir. 2012); *Townes v. City of New York*, 176 F.3d 138, 149 (2d Cir. 1999); *Wren v. Towe*, 130 F.3d 1154 (5th Cir. 1997).

13. *Howl v. Alvarado*, Case No. 2:17-cv-00380-PJK-SMV, 2017 U.S. Dist. LEXIS 150285, 2017 WL 4142588, *2.

14. *Id.* (quoting *Black*, 811 F.3d at 1268).

15. *Wolfe*, 2018 U.S. Dist. LEXIS 176703, 2018 WL 4964364, *6 (quoting *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998)).

16. Response at 5-70.

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disregarding the rule for statements that Plaintiffs believe favorable. The exclusionary rule will not apply to the statements made by Jerrail and Adam while they were detained and interviewed by law enforcement officers on August 11, 2014. The statements are admissible.

UNDISPUTED FACTS¹⁷

1. At approximately 7:00 p.m. on August 11, 2014, a 911 call was dispatched to Salt Lake City police officers by radio as a “report of a man with a gun” at 1900 South 200 East; “suspect flashed a gun at the complainant but no threat was made;” “male Hispanic wearing white shirt, red pants, red baseball cap; also another male Hispanic wearing a striped shirt; they were last seen southbound on 200 East.”¹⁸

17. The following Undisputed Facts are taken from the parties briefing on the Motion for Summary Judgment. Motion for Summary Judgment ¶¶ 1-62 at 5-16; Response ¶¶ 1-100 at 49-70. Those facts, or portions thereof, identified in the parties’ briefing that do not appear in these Undisputed Facts are either disputed; not supported by the cited evidence; not material; or are not facts, but rather, are characterization of facts or legal argument. Additionally, these Undisputed Facts contain facts that are not material, but nevertheless provide a more complete background of the events and circumstances and give context to the parties’ arguments.

18. Motion for Summary Judgment ¶ 1 at 5-6 (citing Dispatch Recording, docket no. 55, filed conventionally May 22, 2017, attached as Ex. 2 to Declaration of Robert B. Cummings in Support of Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56(a) (“Cummings Declaration”), docket no. 54-1, filed May 22, 2017).

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2. The dispatcher also informed officers that no shots had been fired; no one was in danger; the complainant was not cooperative and hung up on the call taker; and the complainant refused to provide her identifying information.¹⁹

3. The dispatcher asked officers if there was “any unit coming clear to handle a check?”²⁰

4. The call was not dispatched as a “brandishing” call.²¹

5. Officer Cruz was on patrol in the area and responded to the dispatch report to ensure that the suspects were not a threat to public safety and to determine whether any laws had been or were being violated, including a possible brandishing.²²

6. Officer Cruz did not notice the comments “no shots fired” or “no one in danger.”²³

19. Response ¶ 1 at 49 (citing Dispatch Recording; Salt Lake Police Department CAD Call Hardcopy (“SLPD CAD Call”) at 6, attached as Ex. 1 to Cummings Declaration).

20. *Id.* ¶ 2 at 49 (citing Dispatch Recording).

21. *Id.* ¶ 6 at 49 (citing SLCC CAD Call; Dispatch Recording).

22. Motion for Summary Judgment ¶ 2 at 6 (citing Dispatch Recording; Declaration of Bron Cruz (“Cruz Declaration”) ¶ 3, docket no. 44-2, filed Nov. 28, 2016).

23. Response ¶ 3 at 49 (citing Deposition of Bron Cruz (“Cruz Deposition”) at 73:4-7, attached as Ex. 3 to Cummings Declaration), ¶ 4 at 49 (citing Cruz Deposition at 74:16-18).

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7. Officer Uppsen Downes was the first (between Officers Andrew Sylleloglou, Cruz, and Downes) to respond to the dispatch call.²⁴

8. The first officer to respond was Sergeant Charly Goodman. Officer Downes responded to the call approximately 10 seconds after it was dispatched and responded, “back 160,” which is the number for Sergeant Goodman. Officer Cruz responded approximately 47 seconds later. Then Officer Sylleloglou asked Officer Cruz if he wanted help or backup.²⁵

9. Officer Cruz indicated that he wanted backup, and Officers Sylleloglou and Downes responded that they were en route.²⁶

10. Officer Cruz believed the call was dispatched as to a group of men, one of whom had “brandished” a weapon.²⁷

11. Neither Officers Downes nor Sylleloglou ever used the term “brandish” to describe the call.²⁸

24. *Id.* ¶ 9 at 50 (citing Dispatch Recording).

25. *Id.* ¶ 10 at 50 (citing Dispatch Recording).

26. Motion for Summary Judgment ¶ 3 at 6 (citing Dispatch Recording; Cruz Declaration ¶ 4).

27. Response ¶ 5 at 49 (citing Cruz Deposition at 37:17-19; Interview of Officer Bron Cruz (“Cruz Interview”) at SLCC 001367, attached as Ex. 4 to Cummings Declaration)

28. *Id.* ¶ 7 at 49 (citing Interview of Officer Uppsen Downes (“Downes Interview”), docket no. 55, filed conventionally May 22, 2017,

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12. Officer Downes did not believe the call warranted his emergency lights or siren when traveling to the area under department policy.²⁹

13. Upon approaching the area in his police vehicle, Officer Cruz saw three men walking together, who were later identified as Mr. Taylor, Jerrail, and Adam. Two of the men generally matched the descriptions provided by the dispatcher. The three men were proceeding along 2100 South at approximately 150 East and heading west.³⁰

14. Officer Cruz continued following the three men in his police vehicle while staying approximately a block away. He indicated to dispatch that he would wait for the arrival of backup officers before approaching the three men.³¹

attached as Ex. 11 to Cummings Declaration; Deposition of Uppsen Downes (“Downes Deposition”), attached as Ex. 8 to Cummings Declaration; Declaration of Uppsen Downes (“Downes Declaration”), docket no. 44-5, filed Nov. 28, 2016, ¶ 8 at 49 (citing Deposition of Andrew Sylleloglou (“Sylleloglou Deposition”), attached as Ex. 7 to Cummings Declaration; Interview of Officer Andrew Sylleloglou (“Sylleloglou Interview”), docket no. 55, filed conventionally May 22, 2017, attached as Ex. 9 to Cummings Declaration; Officer Sylleloglou’s Bodycam Video (“Sylleloglou Bodycam Video”), docket no. 55, filed conventionally May 22, 2017, attached as Ex. 10 to Cummings Declaration; Declaration of Andrew Sylleloglou (“Sylleloglou Declaration”), docket no. 44-4, filed Nov. 28, 2016).

29. *Id.* ¶ 26 at 54 (citing Downes Deposition at 21:3-7,16-21).

30. Motion for Summary Judgment ¶ 4 at 6 (citing Dispatch Recording; Cruz Declaration ¶ 5).

31. *Id.* ¶ 5 at 6 (citing Dispatch Recording; Cruz Declaration ¶ 6).

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15. Officer Cruz asked the dispatcher whether the report identified which of the three men flashed the gun, and was told that the log did not indicate which one.³²

16. Officer Cruz was 50 to 75 feet away from the three men, and facing them, when he observed them walk west toward him and cross State Street at 2100 South.³³

17. As the three men reached the west side of the intersection, Officer Cruz observed the male in the white shirt, later identified as Mr. Taylor, walk up to a car stopped at the red light and interact with the driver, while the other two males were “throwing their hands in the air, kind of making a big scene.” This interaction lasted five to 10 seconds.³⁴

18. Officer Cruz described the exchange as “some kind of distraction or disturbance” and possibly “harassing the driver.”³⁵ Officer Cruz stated the exchange was “not typical” and “unusual,” since “you don’t just walk up to people in a crosswalk, somebody that maybe you don’t know, and start engaging them while they are sitting in their car in traffic.”³⁶

32. *Id.* ¶ 6 at 6 (citing Dispatch Recording; Cruz Declaration ¶ 7).

33. Response ¶ 11 at 50 (citing Cruz Deposition 27:14-17; Aerial View of Intersection at 2100 South State Street, attached as Ex. 6 to Cummings Declaration).

34. Motion for Summary Judgment ¶ 7 at 6-7 (citing Cruz Declaration ¶ 8).

35. Response ¶ 12 at 50-51 (citing Cruz Interview at SLCC 001368).

36. *Id.* (citing Cruz Deposition at 28:7-17).

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19. Salt Lake City Police Crime Scene Technician Benjamin Bender also witnessed the exchange and described it as:

A male in a white t-shirt and blue jeans approached a red sedan that was waiting at the northbound red light. This Technician's view of the male was obstructed by passing vehicles, but the male appeared to high-five the driver of the vehicle and then jogged across the remainder of the intersection where he joined the other two males at the southwest corner.³⁷

20. Officer Cruz then observed the three men as they entered the 7-Eleven convenience store on the corner of 2100 South and State Street, and decided to wait until they exited the 7-Eleven before approaching them.³⁸

21. While watching from across the street in a Subway parking lot, Officer Cruz expressed to Officer Downes that he really hoped "those guys don't rob the store,"³⁹ and that he "hope[d] nothing bad is going to happen in

37. *Id.* ¶ 13 at 51 (citing Bender Statement at SLCC 001396). Though cited by Plaintiffs, the Bender Statement was not attached as an exhibit to the parties' briefing. However, Officer Cruz and Salt Lake City did not dispute the content of the Bender Statement. Reply Memorandum in Support of Motion for Summary Judgment ("Reply") at 70-71, docket no. 59, filed Aug. 2, 2017.

38. Motion for Summary Judgment ¶ 8 at 7 (citing Cruz Declaration ¶ 9).

39. Response ¶ 14 at 51 (citing Cruz Interview at SLCC 001360).

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the store.”⁴⁰ When asked what he meant by this, Officer Cruz stated in his deposition:

Well, it was a — it was a more personal conversation between Officer Downes and I. You go to — one of the first things you learn as an officer — you know, man with a gun calls, they are not uncommon. And when you are prepared, you run as many scenarios through your head as possible, just to be as prepared as possible. And one of those scenarios that had crossed my mind ever so briefly was something — you know, a convenience store robbery. They are very common. It’s just something that crossed my mind, just another scenario.⁴¹

22. Officer Downes noted at that time it was “[b]usiness as normal it appeared for the store.”⁴²

23. Surveillance video from the 7-Eleven shows the three men entering the store, making a purchase, and then exiting the store a short time later.⁴³

40. *Id.* (citing Cruz Deposition at 31:23-24).

41. *Id.* (citing Cruz Deposition at 33:8-22).

42. *Id.* ¶ 15 at 52 (citing Downes Deposition at 25:6-7).

43. Motion for Summary Judgment ¶ 9 at 7 (citing 7-Eleven Surveillance Video (“7-Eleven Video”), docket no. 45, filed conventionally Nov. 28, 2017, attached as Exhibit B to Declaration of Chase Hermansen (“Hermansen Declaration”), docket no. 44-3, filed Nov. 28, 2016).

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24. In the one or two minutes the three men were inside the 7-Eleven, they completed their purchases without incident and exited in a normal manner without having robbed the store, harassed any customers, or caused any disturbance.⁴⁴

25. The three men exited the 7-Eleven after Officer Downes arrived and as Officer Sylleoglou was arriving.⁴⁵

26. Mr. Taylor exited the 7-Eleven a few feet behind Jerrail and Adam.⁴⁶

27. Officer Cruz called out over the radio that the three men were leaving the 7-Eleven as Officers Downes and Cruz were already on their way across the street from where they were staged at the Subway parking lot.⁴⁷

44. Response ¶ 16 at 52 (citing 7-Eleven Video; Still Photos from 7-Eleven Surveillance Video (“7-Eleven Photos”), docket no. 44-8, filed Nov. 28, 2016; Officer Cruz’s Bodycam Video (“Cruz Bodycam Video”), docket no. 56, filed conventionally May 23, 2017, attached as Ex. 5 to Cummings Declaration).

45. Motion for Summary Judgment ¶ 10 at 7 (citing Cruz Declaration ¶ 10; Sylleoglou Declaration ¶ 6).

46. Response ¶ 17 at 52 (citing 7-Eleven Video; 7-Eleven Photos; Cruz Bodycam Video).

47. *Id.* ¶ 18 at 52 (citing Dispatch Recording).

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28. Officer Downes arrived at the 7-Eleven just ahead of Officer Cruz and drove his vehicle past the front of the store to cover the rear in case the three men ran away in that direction.⁴⁸

29. In his interview, Officer Cruz stated:

[Officer] Downes and I both went across the street. I anticipated I, I had the south position and for reasons I can't explain, [Officer] Downes, he said, "I'm going out back." Um, as these three just walked straight out into the parking lot. Um, and so he just kept driving. He drove around the building but I felt, felt good when I saw [Officer Sylleloglou].⁴⁹

30. At his deposition, Officer Cruz stated: "I — I don't remember hearing [Officer] Downes express that he would go around back."⁵⁰ And when asked how he felt when Officer Downes drove to the back, Officer Cruz stated: "It didn't make me feel — at the time, I don't know that it made me feel anything. I was focused on the suspects

48. Motion for Summary Judgment ¶ 11 at 7 (citing Cruz Declaration ¶ 11; Sylleloglou Declaration ¶ 7; Downes Declaration ¶ 6); *see also* Response ¶ 23 at 53 (citing Cruz Declaration ¶ 11), ¶ 28 at 54 (citing Cruz Bodycam Video).

49. Response ¶¶ 19-20 at 52-53 (citing Cruz Interview at SLCC 001369).

50. *Id.* ¶ 22 at 53 (citing Cruz Deposition at 36:19-20).

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in front of me;”⁵¹ “I would not say it worried me; not at the time.”⁵²

31. Neither Officers Sylleloglou nor Downes were concerned by Officer Downes’s decision to drive to the rear of the 7-Eleven, but rather saw it as a necessary move and standard procedure.⁵³

32. In his interview, Officer Cruz stated that when he initiated his red and blue emergency lights, “for a split second, I felt a little bit better about the situation.”⁵⁴

33. Although Officer Cruz had engaged the lights on his own vehicle, Officer Downes did not turn on his vehicle’s red and blue emergency lights at any time during the encounter.⁵⁵

34. Officer Sylleloglou was the first to arrive on the scene at the 7-Eleven, pulling directly in front of Jerrail and Adam as they exited the store.⁵⁶

51. *Id.* (citing Cruz Deposition at 39:20-23).

52. *Id.* (citing Cruz Deposition at 40:4-5).

53. *Id.* ¶ 21 at 53 (citing Downes Deposition at 26:2, 27:16-20; Sylleloglou Deposition at 26:23-25, 27:1, 28:21-25).

54. *Id.* ¶ 24 at 53-54 (citing Cruz Interview at SLCC 001369).

55. *Id.* ¶ 25 at 54 (citing Scene Photos, docket no. 45, filed conventionally Nov. 28, 2016, attached as Exhibit A to Cruz Declaration).

56. *Id.* ¶ 27 at 54 (citing 7-Eleven Photos).

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35. Officers Cruz and Sylleloglou approached the men in their marked police vehicles from opposite directions. Officer Cruz approached from the east and Officer Sylleloglou approached from the west, forming a barricade or “V” blocking the path of the three men as they walked alongside each other in the 7-Eleven’s parking lot.⁵⁷

36. Officer Cruz was wearing his dark tinted, department-issued, “duty Oakleys” throughout the encounter with the three men.⁵⁸

37. As the three men exited the 7-Eleven, Officer Cruz believed that all three of them looked at him and the other officers, and he stated in his interview:

But what eased tensions in my mind, slightly, because they all lined up perfectly for us. They were all perfectly lined up and that just made me feel so good inside. All their hands were just down at their sides. I could see their hands and the tensions just, I just felt it go down for a split second.⁵⁹

57. Motion for Summary Judgment ¶ 12 at 7-8 (citing Cruz Bodycam Video; Still Photos from Officer Cruz’s Bodycam Video (“Cruz Bodycam Photos”), docket no. 45, filed conventionally Nov. 28, 2016, attached as Ex. 7 to Motion for Summary Judgment, docket no. 44-7; 7-Eleven Video; 7-Eleven Photos; Cruz Declaration ¶ 12; Sylleloglou Declaration ¶ 8); *see also* Response ¶ 29 at 54 (citing Cruz Interview at SLCC 001369).

58. Response ¶ 52 at 60 (citing Cruz Interview; Cruz Deposition at 45:20-21; Citizen Cell Video Still, docket no. 55, filed conventionally May 22, 2017, attached as Ex. 12 to Cummings Declaration; Photos of Bron Cruz, attached as Ex. 13 to Cummings Declaration).

59. *Id.* ¶ 30 at 54 (citing Cruz Interview at SLCC 001369).

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38. Mr. Taylor appeared to look directly at Officer Cruz's police vehicle approaching from the east with its lights flashing as it moved in front of the path of the three men.⁶⁰

39. Officer Cruz described that moment as: "He looks right at me for a split second he turned around and he starts walking off."⁶¹

40. Officer Cruz also stated in his interview:

Um, and as soon as [the two men raised their hands] it was pretty much simultaneous in my mind. They did this and again, he looked dead at me and I looked dead at him and as soon as they did that, he turns around and this is what I see.⁶²

41. Officer Cruz stated in his deposition that the first time he felt somewhere on the "spectrum of fear" was "when [he] looked into [Mr. Taylor]'s eyes."⁶³

60. Motion for Summary Judgment ¶ 13 at 8 (citing Cruz Bodycam Video; Cruz Bodycam Photos); *see also* Response ¶ 51 at 59-60 (citing Cruz Bodycam Video; Cruz Bodycam Photos).

61. Response ¶ 51 at 59-60 (citing Cruz Interview at SLCC 001370), *see also id.* ¶ 53 at 60 (citing Cruz Bodycam Video; Cruz Bodycam Photos).

62. *Id.* ¶ 49 at 59 (citing Cruz Interview at SLCC 001375).

63. *Id.* ¶ 46 at 58 (citing Cruz Deposition at 35:9-12).

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42. In his interview, Officer Cruz explained:

Q: Um, you said on first contact two of them complied. Put their hands up just when you said the word, "Stop"?

A: Yes.

Q: But the third one looked at you — in the white shirt?

A: In the white shirt.

Q: And kept walking?

A: He looked directly at me and ah, he turned around and walked off with — and his hands, his hands is what, his hands is what did it.

Q: You said that he, ah, looked at you with defiance?

A: Yeah. He looked at me like, ah, he, I mean I don't know how to explain it. Um, you know but you can tell when you look into somebody's eyes when you're working with them. Um, that's when you know it's, it's, it's ah, it's one of the clues that we have when we're dealing with people. Um their eyes can tell you a lot. Um, and his eyes were just complete just 100% defiance. He had this, this, this look on his face like you know? Like I, ah, hate? Um, um, and ah, like he was, he was not going to do anything that I said. Um, and it was just a horrible feeling. Um, looking at him. Having him,

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you know just the, it was just horrible. Just hate, defiance, that he had in his eyes.

Q: And you've seen this kinda look before you're saying with, with work-related circumstances?

A; I've seen, ah, I don't know that I've seen it like that. I mean, I've seen a type of it before. I've seen it when people aren't gonna comply and they look at you like, "I'll fight you first."

Q: Umm, hmm.

A: "I'll do whatever I need to do but you're not, you're not taking me down."

Q: Okay.

A: Um, and, and that's yeah, it was an extreme version of that.⁶⁴

43. Mr. Taylor also appeared to look at Officer Sylleloglou's police vehicle approaching from the west as it moved in front of the three men.⁶⁵

44. Officers Cruz and Sylleloglou, wearing their patrol uniforms, exited their vehicles and gave commands to the three men to stop and show their hands.⁶⁶

64. *Id.* ¶ 48 at 58-59 (citing Cruz Interview at SLCC 001374-75).

65. Motion for Summary Judgment ¶ 14 at 8 (citing 7-Eleven Video; 7-Eleven Photos).

66. *Id.* ¶ 15 at 8 (citing Cruz Bodycam Video; 7-Eleven Video;

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45. Because one of the men was reportedly armed, Officer Sylleloglou drew his gun in a low ready position, but did not aim at the three men.⁶⁷

46. Two of the men, later identified as Jerrail and Adam, immediately stopped and raised their hands.⁶⁸

47. In his deposition, Officer Cruz described the initial encounter:

I exited my police car and all I did was tell the individuals to stop. I had already gotten that look of defiance from [Mr. Taylor]. The other two immediately put their hands in the air . . . Right when I'm stopping my car.⁶⁹

48. Officer Cruz explained in his interview that when he saw the two men with their hands in the air:

[I]t scared the crap out of me when those two raised their hands. Like they knew there was

Cruz Declaration ¶ 13; Sylleloglou Declaration ¶ 9); *see also* Response ¶ 32 at 55 (citing Sylleloglou Deposition at 33:16-34:1; Cruz Interview at SLCC 001370).

67. Motion for Summary Judgment ¶ 16 at 8 (citing Sylleloglou Declaration ¶ 9).

68. *Id.* ¶ 17 at 8 (citing Cruz Bodycam Video; Cruz Bodycam Photos; 7-Eleven Video; 7-Eleven Photos; Cruz Declaration ¶ 14; Sylleloglou Declaration ¶ 10); *see also* Response ¶ 33 at 55 (citing Cruz Bodycam Video; Cruz Interview at SLCC 001370; Sylleloglou Deposition at 29:20-23).

69. Response ¶ 50 at 59 (citing Cruz Deposition at 45:4-7, 13).

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a gun or weapon was involved, that's the only time they do that. They never put their hands up like that. Those two put their hands straight up in the air and that confirmed to me, even more, there was a gun involved.⁷⁰

So, the other two put their hands out, just like this. Um, and, and without any, without any prompting that, this is what they did. Which, again, was very, it was even more concerning. Uh, because people don't do this when we contact them unless we believe they have a gun. Or they're armed.⁷¹

49. Officer Downes stated in his deposition that in his experience the presence of officers makes people put their hands up "a lot of the time."⁷²

50. Jerrail and Adam acknowledged that they both saw the marked police vehicles approaching from opposite directions and uniformed police officers approaching the three men and giving commands to stop and show their hands.⁷³

70. *Id.* ¶ 34 at 55 (citing Cruz Interview at SLCC 001370).

71. *Id.* ¶ 35 at 55 (citing Cruz Interview at SLCC 001375).

72. *Id.* ¶ 36 at 56 (citing Downes Deposition at 39:21-40:13).

73. Motion for Summary Judgment ¶ 18 at 9 (citing Video Recording of Jerrail Taylor Interview ("Jerrail Taylor Interview") at 11:04, docket no. 45, filed conventionally Nov. 28, 2016, attached

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51. The third man, wearing a white shirt and later identified as Mr. Taylor, looked at the officers, but did not stop, and instead turned and walked in the opposite direction away from the officers and Jerrail and Adam, moving back towards the entrance of the 7-Eleven.⁷⁴

52. When Jerrail was asked if he thought there was any possible way that Mr. Taylor could not have seen the three police vehicles and the officers approaching with their guns drawn, he stated: “I don’t know how he didn’t see them.”⁷⁵

53. Immediately upon his arrival, Officer Sylleoglou exited and ran around the front of his vehicle in a south/west diagonal in pursuit of Mr. Taylor, who was walking away.⁷⁶

54. Officer Sylleoglou stated in his interview that he could not see Mr. Taylor clearly at first:

as Exhibit A to Declaration of Joe Sutera (“Sutera Declaration”), docket no. 44-9, filed Nov. 28, 2016; Video Recording of Adam Thayne Interview (“Adam Thayne Interview”) at 11:43, docket no. 45, filed conventionally Nov. 28, 2016, attached as Exhibit A to Hermansen Declaration; *see also* Response ¶ 40 at 56 (citing Jerrail Taylor Interview at 11:03:55).

74. Motion for Summary Judgment ¶ 19 at 9 (citing Cruz Bodycam Video; Cruz Bodycam Photos; 7-Eleven Video; 7-Eleven Photos; Cruz Declaration ¶ 15; Sylleoglou Declaration ¶ 11); *see also* Response ¶ 44 at 57 (citing Jerrail Taylor Interview at 11:05:06; Cruz Bodycam Video; 7-Eleven Photos).

75. Motion for Summary Judgment ¶ 22 at 9 (citing Jerrail Taylor Interview at 11:10-11:11).

76. Response ¶ 31 at 55 (citing 7-Eleven Photos; Cruz Bodycam Photos); ¶ 58 at 61 (citing 7-Eleven Video; 7-Eleven Photos).

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[Mr. Taylor] was kinda covered by the red truck . . . cause he was kind of, sort of, behind it.⁷⁷

I didn't, I don't remember seeing anything in his hands. Like I said, he was partially obstructed by the red truck.⁷⁸

55. Mr. Taylor was already walking away from Officer Cruz before Officer Cruz had fully exited his vehicle and cleared its door.⁷⁹

56. Officer Cruz initially followed some distance behind Mr. Taylor and Officer Sylleologlou.⁸⁰

57. After turning his attention to Mr. Taylor, Officer Cruz “wish[ed he] had another couple guys to watch the other two [men,]” except that “their eyes looked harmless.”⁸¹

58. Mr. Taylor can be seen on the 7-Eleven surveillance video and still photos walking back toward the 7-Eleven,

77. *Id.* ¶ 88 at 67 (citing Sylleologlou Interview at 4:35)

78. *Id.* (citing Sylleologlou Interview at 5:18).

79. *Id.* ¶ 56 at 61 (citing Cruz Bodycam Video; Cruz Bodycam Photos).

80. *Id.* ¶ 58 at 61 (citing 7-Eleven Video; 7-Eleven Photos).

81. *Id.* ¶ 68 at 63 (citing Cruz Interview at SLCC 001370).

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and around the front of a red truck before heading west along the front of the store.⁸²

59. As Mr. Taylor walked away, Officer Sylleloglou shouted several times: “Hey, you in the white shirt, stop.” Mr. Taylor did not stop or show his hands.⁸³

60. Jerrail saw that Mr. Taylor was walking away and told him to “stop.”⁸⁴

61. When Jerrail saw Mr. Taylor walking away, he figured that Mr. Taylor was avoiding contact with the officers. He stated in his interview: “I don’t know if he was ignoring the cops, like, ‘Fuck it, I’m gonna cut through here and walk to the Trax.”⁸⁵

62. Jerrail described the situation:

In my head, I’m thinking, my, my head’s, my adrenaline’s running, I’m thinking, “What the fuck did I just do? I can’t walk in America and buy a goddamn drink and a beer?” like, “What am I doing wrong here.” I’m all, “What the hell?” And [Dillon] was like, “Ah shit,” you know

82. *Id.* ¶ 57 at 61 (citing 7-Eleven Video; 7-Eleven Photos).

83. Motion for Summary Judgment ¶ 24 at 10 (citing Sylleloglou Declaration ¶ 12).

84. *Id.* ¶ 20 at 9 (citing Jerrail Taylor Interview at 11:18-11:19).

85. Response ¶ 42 at 57 (citing Jerrail Taylor Interview at 11:04:20).

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what I'm saying? Like, "What the fuck did we do." So he was, "alright, y'all, fuck this." He put his headphones in, walked away, the next thing you know the cop was all, "Hey, stop, stop." But he's got his headphones in, he can't hear him.⁸⁶

63. Jerrail saw Mr. Taylor's headphones were in and was concerned Mr. Taylor could not hear what the officers were saying behind him as he walked away. He stated in his interview: "I was like, 'What the fuck,' and as I'm getting on the ground, I see [Dillon] walking, I'm like, 'Oh fuck, here we go.' I'm like, 'Dude, just fuck stop,' but he had his headphones in."⁸⁷

64. As Officer Downes arrived on the east side of the 7-Eleven parking lot, he saw Jerrail and Adam standing by the police vehicles and that Officers Cruz and Sylleloglou were pursuing Mr. Taylor as he walked away along the sidewalk next to the 7-Eleven.⁸⁸

65. Officer Downes approached Jerrail and Adam where they were stopped and detained them.⁸⁹

86. *Id.* ¶ 41 at 57 (citing Jerrail Taylor Interview at 11:03:55-11:04:34); *see also* Motion for Summary Judgment ¶ 21 at 9 (citing Jerrail Taylor Interview at 11:04).

87. Response ¶ 43 at 57 (citing Jerrail Taylor Interview at 11:05:06); Motion for Summary Judgment ¶ 23 at 10 (citing Jerrail Taylor Interview at 11:05).

88. Motion for Summary Judgment ¶ 52 at 14 (citing Downes Declaration ¶ 8).

89. *Id.* ¶ 53 at 14 (citing Downes Declaration ¶ 9).

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66. Jerrail and Adam began arguing with Officer Downes, asking him what was happening and why the police were “hassling” them. The “back and forth” continued until Officer Downes heard Officer Cruz fire his weapon.⁹⁰

67. Officer Downes did not draw his gun on the two men. He explained in his deposition: “Because I could see their hands, and they were — those two individuals were essentially compliant. They were not fighting with me. We were just investigating. So, at that point, it was not a threat.”⁹¹ He noted further:

For me, the factors were we had information there was a possible weapon. The two that I was dealing with did not present as an initial threat. They were not playing with their waistband. They didn’t take a fighting stance. They stopped as if I were to stop you, kind of questioning why. So that doesn’t register to me as an initial threat.

Still we know there was a possible weapon. We don’t know if it was them or not because a lot of criminals will hide that fact and act like everyone else. So there was still caution.

I wanted to be close enough where I would be

90. Response ¶37 at 56 (citing Downes Deposition at 41:24-42:7).

91. *Id.* ¶ 38 at 56 (citing Downes Deposition at 39:5-9), ¶ 67 at 63 (citing Downes Deposition at 39:5-9).

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able to control the situation better because [Officer] Cruz was going towards the other individual, and there were civilians all around us, non-law enforcement personnel. So if they decided to produce a weapon, there is no telling where those rounds are going to go. If I'm standing too far back, I cannot maintain positive control.⁹²

68. As Mr. Taylor walked away with Officers Cruz and Sylleloglou in pursuit, Officer Downes remained with Jerrail and Adam. As the “backing officer,” he directed 20% of his attention toward Officer Cruz and 80% of his attention toward Jerrail and Adam.⁹³

69. Officer Downes continued to bounce back and forth between the two men and looking in the direction of Officer Cruz, but with his focus on Mr. Taylor.⁹⁴

70. Based on his understanding that one of the three men had a gun, Officer Cruz believed that the gun was very likely in the possession of Mr. Taylor, who was walking away and, unlike Jerrail and Adam, was not complying with the officers’ commands to stop.⁹⁵

92. *Id.* ¶ 38 at 56 (citing Downes Deposition at 59:17-60:10), *see also id.* ¶ 39 at 56 (citing Downes Deposition at 44:19-21).

93. *Id.* ¶ 66 at 63 (citing Downes Deposition at 45:5-9).

94. *Id.* ¶ 69 at 63 (citing Downes Deposition at 45:5-6, 17-18, 46:12-13).

95. Motion for Summary Judgment ¶ 30 at 10-11 (citing Cruz Declaration ¶ 16).

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71. In his deposition, Officer Cruz explained: “I was maintaining distance at that — yeah, I was not trying to close on somebody that I believed had a gun.”⁹⁶

72. Officer Cruz stated that closing the distance would not “make any sense.”⁹⁷

73. Officer Cruz’s body camera shows that Mr. Taylor was wearing a baggy t-shirt and baggy pants.⁹⁸

74. As Mr. Taylor walked along the side of the 7-Eleven away from Officers Cruz and Sylleloglou with his back to them, he can be seen raising his hands to the sides of his waist.⁹⁹

75. Mr. Taylor then put his hands inside the front waistband of his pants, and made digging motions with his hands, at which point Officer Cruz began training his weapon on Mr. Taylor.¹⁰⁰

96. Response ¶ 60 at 61-62 (citing Cruz Deposition at 55:8-13).

97. *Id.* ¶ 61 at 62 (citing Cruz Deposition at 55:8-13).

98. *Id.* ¶ 82 at 66 (citing Cruz Bodycam Video; Cruz Bodycam Photos).

99. *Id.* ¶ 81 at 65-66 (citing Cruz Bodycam Video).

100. Motion for Summary Judgment ¶ 33 at 11 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 19; Sylleloglou Declaration ¶ 19); *see also* Response ¶ 89 at 67-68 (citing Cruz Interview at SLCC 001370).

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76. Officer Cruz believed Mr. Taylor's hands were concealed in his waistband area due to the position of his elbows when viewed from behind.¹⁰¹

77. As Mr. Taylor continued walking along the sidewalk in front of the 7-Eleven, Officer Cruz followed directly behind him, and Officer Sylleloglou walked south and west towards him, both shouting commands to "stop, you in the white shirt," and "get your hands out."¹⁰²

78. Mr. Taylor did not stop but continued walking west along the sidewalk.¹⁰³

79. In his interview, Officer Cruz stated:

That was when I knew something was gonna be bad. Um, cause he looked right at me, um, with complete, total defiance in his eyes. Um, and when his hands disappeared that's when I drew my gun. Because I knew his hands, they were like this through his waistband.

And the way he looked at me? And then turned around? There was no doubt in my mind what he was doing with his hands.¹⁰⁴

101. Response ¶ 83 at 66 (citing Cruz Deposition at 49:7-14).

102. Motion for Summary Judgment ¶ 31 at 11 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 17; Sylleloglou Declaration ¶ 18; Adam Thayne Interview at 11:44; Downes Declaration ¶ 10).

103. *Id.* ¶ 32 at 11 (citing Cruz Declaration ¶ 18).

104. Response ¶ 47 at 58 (citing Cruz Interview at SLCC 001370).

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80. Mr. Taylor’s “look,” combined with his turning around and walking away led Officer Cruz to conclude that when Mr. Taylor’s hands went to his waistband:

I was 100%, 100% convinced when I saw him turn around that it was gonna be a gunfight. I know he had that gun that he’d be trying to kill us there was nothing else he could be doing than going for a gun.¹⁰⁵

81. Mr. Taylor “calmly walk[ing] away” and “creating distance” also heightened Officer Cruz’s distress at the situation:

Um, and it scared me even more that he wasn’t running away. He was buying time. He was buying time and he was creating distance. That’s all he was doing. Very calmly walked away. With his hands right in his waist band.¹⁰⁶

82. Officer Sylleloglou also began training his gun on Mr. Taylor when he saw that Mr. Taylor appeared to put his hands inside the front waistband of his pants.¹⁰⁷

83. Officer Sylleloglou was north of Mr. Taylor in the 7-Eleven parking lot and walked in Mr. Taylor’s direction

105. *Id.* ¶ 54 at 60 (citing Cruz Interview at SLCC 001370-71).

106. *Id.* ¶ 59 at 61 (citing Cruz Interview at SLCC 001370; 7-Eleven Video; 7-Eleven Photos).

107. Motion for Summary Judgment ¶ 26 at 10 (citing Sylleloglou Declaration ¶ 14).

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but staying perpendicular to Mr. Taylor as he walked westward, while shouting repeated commands to Mr. Taylor to stop and show his hands.¹⁰⁸

84. Mr. Taylor looked directly at Officer Sylleloglou with a “mean mug” look on his face, meaning that it appeared he heard Officers Sylleloglou and Cruz shouting commands and was deliberately ignoring their commands. Officer Sylleloglou described the look on Mr. Taylor’s face as hostile and defiant.¹⁰⁹

85. At this point, Mr. Taylor was no more than 15 feet in front of Officer Sylleloglou, looking at him, but still walking away.¹¹⁰

86. Officer Sylleloglou was 100% certain that Mr. Taylor saw him, heard his commands, and deliberately chose to ignore them.¹¹¹

87. Jerrail recalled hearing Mr. Taylor say something along the lines of “what did we do” in response to the officers’ commands.¹¹²

108. *Id.* ¶ 35 at 11 (citing Cruz Declaration ¶ 21; Sylleloglou Declaration ¶ 18).

109. *Id.* ¶ 25 at 10 (citing Sylleloglou Declaration ¶ 13).

110. *Id.* ¶ 28 at 10 (citing Sylleloglou Declaration ¶ 16).

111. *Id.* ¶ 29 at 10 (citing Sylleloglou Declaration ¶ 16).

112. *Id.* ¶ 41 at 12 (citing Jerrail Tayler Interview at 11:06); *see also* Response ¶ 65 at 62-63 (citing Jerrail Taylor Interview at 11:05:42, 11:16:10).

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88. At some point during the interaction, Mr. Taylor said something to Officer Sylleloglou about “shooting him.” When asked if he remembered exactly what Mr. Taylor said, Officer Sylleloglou responded: “He said, ‘What are you gonna do, shh, I think it was — this is as close to verbatim as I can get — ‘What are you gonna do, shoot me? What are you gonna do? You gonna shoot me? You gonna shoot me?’”¹¹³

89. Officer Cruz never reported hearing this exchange. Instead, he only reported hearing Mr. Taylor saying something about, “Make me,” after he turned around just before he was shot.¹¹⁴

90. Officer Cruz continued to yell repeated commands to Mr. Taylor. “get your hands out now, get your hands out, get your . . . get ‘em out!”¹¹⁵

91. Officer Sylleloglou stated in his interview, “[a]nd then I know I yelled at him too . . . ‘let me see your . . . I think I may have just said, ‘Hands! Hands! Hands!’” When the interviewer asked whether he remembered anything else Officer Cruz said, Officer Sylleloglou responded: “No,

113. Response ¶ 62 at 62 (citing Sylleloglou Interview at 6:00:00); *see also* Motion for Summary Judgment ¶ 27 at 10 (citing Sylleloglou Declaration ¶ 15).

114. Response ¶ 63 at 62 (citing Cruz Interview at SLCC 001371).

115. Motion for Summary Judgment ¶ 34 at 11 (citing Cruz Bodycam Video; Cruz Declaration ¶ 20); *see also* Response ¶ 84 at 66 (citing Sylleloglou Interview at 2:34).

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I couldn't, you know, I just . . . we were both kinda, I was just listening to him, and then I would say something, I would say 'hands,' and he would yell 'hey, hey, get your hands! Get your hands out of your pock' . . . I mean he was yelling at him to get his hands out of there.”¹¹⁶

92. Mr. Taylor did not respond and continued walking away from Officers Cruz and Sylleologlou with his hands remaining inside the front waistband of his pants.¹¹⁷

93. As Mr. Taylor reached the end of the sidewalk and began walking across the parking lot of the 7-Eleven with Officer Cruz telling him to “get your hands out,” Mr. Taylor turned around to directly face Officer Cruz, and Officer Cruz trained his weapon directly at Mr. Taylor.¹¹⁸

94. Officer Downs heard Officer Cruz give Mr. Taylor the command, “Show me your hands,” and saw Mr. Taylor continuing to walk backward.¹¹⁹

95. As Mr. Taylor faced Officer Cruz, he continued to walk backwards with both hands inside the loose

116. Response ¶ 85 at 66 (citing Sylleologlou Interview at 2:34).

117. Motion for Summary Judgment ¶ 36 at 12 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 22; Sylleologlou Declaration ¶ 19).

118. *Id.* ¶ 37 at 12 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 23; Sylleologlou Declaration ¶ 20); *see also* Response ¶ 86 at 66 (citing Cruz Deposition at 55:14-17).

119. Response ¶ 70 at 63 (citing Downes Deposition at 49:1-6).

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waistband of his pants, concealing his hands down to his wrists, and moving them in a digging motion.¹²⁰

96. When asked to describe the action of Mr. Taylor's hands, Officer Cruz remarked about Mr. Taylor's "baggy" pants. The investigator asked, "Baggy?" and Officer Cruz responded:

Like they usually are with people that we deal with when they're concealing things. But, ah, his hands were buried like this in his pants. Buried . . . And when they're buried way, wrists deep and his sh — you know, he's clawing at something then he's this. This is what I see. This is what I see in his baggy pants. This.

They're not just sitting there. They're just digging, digging and he has this look on his face like, you, "Come and get me. I'm gonna fricken kill you."¹²¹

97. While facing Officer Cruz, and as Officer Cruz continued to shout repeated commands to "get your hands out," Mr. Taylor said something which sounded like "what fool" or "nah fool" on Officer Cruz's bodycam video.¹²²

120. Motion for Summary Judgment ¶ 38 at 12 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 24; Sylleologlou Declaration ¶ 21).

121. Response ¶ 91 at 68-69 (citing Cruz Interview SLCC 001376-77).

122. Motion for Summary Judgment ¶ 39 at 12 (citing Cruz

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98. Officer Cruz's recollection was that Mr. Taylor said something at that moment along the lines of "come and make me."¹²³

99. When asked in his deposition how Mr. Taylor responded to his commands, Officer Cruz recounted:

He didn't. He responded by continually showing me that he was manipulating or retrieving something from his pants, from his waistband. That is how he responded . . . And he — sorry. He also responded with the look of defiance. He also responded verbally.¹²⁴

100. Suddenly and without warning, while facing Officer Cruz, Mr. Taylor quickly raised his left hand from inside the loose waistband of his pants, lifting his shirt and exposing his lower torso.¹²⁵

Bodycam Video); *see also* Response ¶ 64 at 62 (citing Cruz Bodycam Video).

123. Motion for Summary Judgment ¶ 40 at 12 (citing Cruz Declaration ¶ 25); *see also* Response ¶ 90 at 68 (citing Cruz Interview at SLCC 001375).

124. Response ¶ 87 at 67 (citing Cruz Deposition at 57:4-8,11-12).

125. Motion for Summary Judgment ¶ 43 at 13 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 26; Sylleologlou Declaration ¶ 22).

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101. Mr. Taylor simultaneously brought his right hand out of his loose waistband of his pants, but lower than his left hand.¹²⁶

102. At that moment, Mr. Taylor was approximately 10 to 12 feet away from Officer Cruz and 12 to 15 feet away from Officer Sylleloglou.¹²⁷

103. Officer Downes saw Mr. Taylor lifting up his shirt but could not make anything out.¹²⁸

104. In Officer Cruz's interview, the investigator asked whether Mr. Taylor had manipulated his shirt. Officer Cruz responded:

I mean yeah, his shirt was you know eh, you know, his shirt was raising with his pants. You know? It was this, this tugging motion. This drawing motion, whatever . . . you know, I'm not sure what to call it.¹²⁹

105. Believing that Mr. Taylor's movements indicated he was "drawing" or reaching for a gun, and that Mr.

126. *Id.* ¶ 44 at 13 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 26; Sylleloglou Declaration ¶ 22).

127. *Id.* ¶ 45 at 13 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 27; Scene Photos; Scaled Drawing of Scene, attached as Exhibit B to Cruz Declaration; Sylleloglou Declaration ¶ 23).

128. Response ¶ 71 at 63 (citing Downes Deposition at 49:7-11).

129. *Id.* ¶ 92 at 69 (citing Cruz Interview at SLCC 001379-80).

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Taylor intended to fire on the officers, Officer Cruz acted in self-defense by firing two shots in rapid succession, striking Mr. Taylor in the torso.¹³⁰

106. According to the medical examiner, two rounds hit Mr. Taylor, one in his “upper central chest” and a second one in the “right upper quadrant of [the] abdomen” which also grazed the third and fourth fingers of his left hand.¹³¹

107. When asked by the investigator if Mr. Taylor’s hand ever came toward him, Officer Cruz responded, “I could not — no, it didn’t because I could not wait that long.”¹³²

108. When the investigator asked Officer Cruz if he thought Mr. Taylor might have had a gun that could have caused harm to him or another, Officer Cruz responded:

I was convinced, 100% there was nothing else he was doing. Nothing else he could have been doing then getting a gun t-t-to try and kill one of us. To try and kill somebody. Nothing else. There was zero; nothing else made sense. Nothing else.¹³³

130. Motion for Summary Judgment ¶ 46 at 13 (citing Cruz Bodycam Video; Cruz Bodycam Photos; Cruz Declaration ¶ 28); *see also* Response ¶ 96 at 69 (citing Cruz Deposition at 60:12-17).

131. *Id.* ¶ 57 at 15 (citing Office of the Medical Examiner State of Utah Report of Investigation (“Medical Examiner’s Report”) at 1, 5-6, docket no. 44-10, filed Nov. 28, 2016).

132. Response ¶ 97 at 70 (citing Cruz Deposition at 60:1-3, 7-8).

133. *Id.* ¶ 93 at 69 (citing Cruz Interview at SLCC 001377).

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109. The investigator then asked how that made Officer Cruz feel. Officer Cruz responded:

I was scared to death. The last thought I had go through my mind when I pulled the trigger; and I'll never forget this. Was uh, was that "I was too late. I was too late. And because of that I was gonna get killed. Worse, my officer was gonna get killed" . . . And that was the shittiest feeling . . . And I was like, "I'm gonna get us killed."¹³⁴

110. Officer Cruz described the events to investigators:

I heard [Officer Sylleloglou], five to seven feet off to my right, I could see him in my peripheral. He was yelling at him too. "Show us your hands. Stop. Show us your hands."

Um, and he turned around. He didn't stop. He never stopped. He turned around. Um, and it was only worse because his hands they were dove in his pants. They were just completely wrist-deep in his pants and he wasn't just warming up his pants, his hands on a cold day. It wasn't even cold.

Um, he wasn't just hiding his hands. He was, he was digging at something. He was manipulating something. I knew there was a gun in those

134. *Id.* ¶ 94 at 69 (citing Cruz Interview at SLCC 001377).

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pants. And, ah, at that point I mean, my gun I've had it center-massed, trained on him and I was yelling at him and he was looking directly at me, directly at my eyes. And I looked directly in his eyes. And he looked at me like, "You're not gonna. You're not gonna stop me." Um, and, "I'm gonna kill you guys."

And I think he said something. I don't remember what he was saying. He was yelling, "You make me." Or, "you can't make me," or some crap. I, I can't remember. But we yelled at him. I yelled at him with every, as loud as I could. "Let me see your hands. Let me see your hands." And he looked down the barrel of my gun. It just felt like an eternity. Um, and he, he didn't. He kept digging. He kept digging. Digging. Manipulating something in his pants.

And I knew he, he was ju — he'd already made up his mind and he just — I was just giving him time to just kill one of us. I don't know if the gun was caught or it if was falling down? Or I, I don't know. He was taking off the safety? I don't know what he was manipulating, something.

And I knew it was a deadly force situation. No doubt in my mind, no doubt in my mind. I needed to see his damn hands. I couldn't take the chance of him shooting my officer or shooting me.

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And, ah, and after I yelled at him for what felt like an eternity with my gun trained right on him he did nothing but keep digging at that gun in his pants or whatever the hell it was. Without any hesitation. Without any reservation in the world I fired at him. And I would have kept firing until that deadly threat had stopped.¹³⁵

111. After firing his weapon, Officer Cruz called “shots fired” over the radio and immediately requested medical attention.¹³⁶

112. Officer Cruz then handcuffed Mr. Taylor, searched his pockets looking for a gun, and rendered first aid.¹³⁷

113. No gun was found.¹³⁸

114. Mr. Taylor died at the scene.¹³⁹

115. From the time Mr. Taylor turned around and came face-to-face with the officers until he was shot is approximately four seconds.¹⁴⁰

135. *Id.* ¶ 89 at 67-68 (citing Cruz Interview at SLCC 002371-72).

136. Motion for Summary Judgment ¶ 48 at 14 (citing Cruz Bodycam Video; Dispatch Recording; Cruz Declaration ¶ 29).

137. *Id.* ¶ 49 at 14 (citing Cruz Declaration ¶ 30).

138. *Id.* ¶ 50 at 14 (citing Complaint ¶ 60).

139. *Id.* ¶ 51 at 14 (citing Complaint ¶ 54).

140. Response ¶ 95 at 69 (citing Cruz Bodycam Video).

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116. Minutes after Mr. Taylor was shot, Officer Sylleloglou explained to another officer what had happened:

And uh, what happened was we found these two guys that are in our cars. The dude in the white over here, he kept walking, and then he ignored us. So [Officer Cruz] and I went up to him kind of, kind of cornered him like this. And he starts doing this and he starts backing up like digging into his pocket — like this, and then he, and then he's like, "get your hands out of your, get your hands out, get your hands out, get your hands out," and then as soon as he made an overt movement to, to pull something we didn't see it, and he just — he got a couple shots on him. And he's got his camera on.¹⁴¹

117. Officer Sylleloglou indicated that if Officer Cruz had not fired his weapon, he likely would have fired his weapon in self-defense under the circumstances.¹⁴²

118. From his position, Officer Downes heard gunshots but he did not see who fired the shots. Officer Downes was more than 50 feet away from Officers Cruz and Sylleloglou at that moment.¹⁴³

141. *Id.* ¶ 98 at 70 (citing Sylleloglou Bodycam Video at 3:09).

142. Motion for Summary Judgment ¶ 47 at 14 (citing Sylleloglou Declaration ¶ 25).

143. *Id.* ¶ 54 at 14 (citing Downes Declaration ¶¶ 11-12; Scene Photos; Scaled Drawing of Scene).

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119. Jerrail was already on the ground when he heard the two gunshots and did not see what happened.¹⁴⁴

120. When Jerrail was asked what he saw just before Mr. Taylor was shot, he commented:

[A]s I was going down on the ground, I seen [Dillon] grab his pants like this, and pull them up, you know pull his pants up, you know . . . we, we wear baggy ass clothes, you can see that. He's pullin' his pants up, like, 'shit what's up nigga, what'd we do?' Or something to that effect.¹⁴⁵

121. When Adam was asked what he saw just before Mr. Taylor was shot, he stated:

We went to 7-Eleven. We went in, we came out, the cops pulled their guns and um, [Dillon] started walking away and I look over and I seen him get shot. I see him, I see him, I think he tried to pull up his shorts or something, and they thought he was reaching for a gun and so, all I know is I heard two gun shots and then the officer screaming at me to get down.¹⁴⁶

144. *Id.* ¶ 55 at 15 (citing Jerrail Taylor Interview at 11:06).

145. Response ¶ 99 at 70 (citing Jerrail Taylor Interview at 11:05:42).

146. *Id.* ¶ 100 at 70 (citing Adam Thayne Interview at 11:38:30).

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122. Adam also stated to officers that based on Mr. Taylor's movements, he could see why the officers thought that Mr. Taylor might have had a gun.¹⁴⁷

123. When asked by investigators why Mr. Taylor failed to respond and what he might have been doing with his hands, Jerrail responded that Mr. Taylor had a cell phone he used to listen to music, and that "maybe [his hands were] in his pockets to get his damn phone, to change the song on his phone." When asked if Mr. Taylor had headphones, Jerrail answered, "Yeah, that's what he had when the cops were pulling their guns out and shot him."¹⁴⁸

124. Mr. Taylor's cell phone can be seen protruding from his pocket in a photo taken during the investigation following the shooting.¹⁴⁹

125. After Mr. Taylor was shot, he initially fell to the ground on his left side and back. Earbuds were still in his ears. After Officer Cruz had handcuffed Mr. Taylor and rolled him to his back, the earbuds were visible next to Mr. Taylor's head.¹⁵⁰

147. Motion for Summary Judgment ¶ 56 at 15 (citing Adam Thayne Interview at 11:58).

148. Response ¶ 72 at 64 (citing Jerrail Taylor Interview at 11:03:06).

149. *Id.* ¶ 80 at 65 (citing Photo, attached as Ex. 15 to Cummings Declaration).

150. *Id.* ¶ 73 at 64 (citing Cruz Bodycam Video).

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126. During this process, for approximately the first three minutes after Officer Cruz shot Mr. Taylor, Officer Cruz did not place on or otherwise wear any gloves.¹⁵¹

127. Officer Cruz straddled Mr. Taylor's body looking north. In this position, Officer Cruz bent his right knee forward, and reached his right arm behind his knee. His right arm and hand appear to manipulate Mr. Taylor's right pocket, where Mr. Taylor's phone and earbud cord were located.¹⁵²

128. In this position which partially blocked the body camera view of Officer Cruz's right arm reaching, Officer Cruz appears to have laid or thrown the earbuds onto the ground next to Mr. Taylor's body.¹⁵³

129. When Officer Cruz was asked during his interview if he saw the earbuds, he stated: "I never saw any during the whole time when I was kneeling down by him I never once say any kind of headphones."¹⁵⁴

130. In his deposition, Officer Cruz was asked about the earbuds, and stated:

Q: When you first pulled up, had you seen the white cord, the earphones anywhere on him?

151. *Id.* ¶ 74 at 64 (citing Cruz Bodycam Video).

152. *Id.* ¶ 75 at 64 (citing Cruz Bodycam Video; Still Bodycam Photos, attached as Ex. 14 to Cummings Declaration).

153. *Id.* ¶ 76 at 64-65 (citing Cruz Bodycam Video; Still Bodycam Photos).

154. *Id.* ¶ 77 at 65 (citing Cruz Interview at SLCC 001374).

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A: No.

Q: And maybe I can limit the number of questions.
At any point—

A: No. I did not.¹⁵⁵

STANDARD OF REVIEW

Summary judgment is appropriate if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹⁵⁶ A factual dispute is genuine when “there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way”¹⁵⁷ or “if a reasonable jury could return a verdict for the nonmoving party.”¹⁵⁸ A fact is material if “it is essential to the proper disposition of [a] claim.”¹⁵⁹ And in ruling on a motion for summary judgment, the factual record and all reasonable inferences drawn therefrom are viewed in a light most favorably to the nonmoving party.¹⁶⁰

155. *Id.* ¶ 78 at 65 (citing Cruz Deposition at 50:6-17).

156. Fed. R. Civ. P. 56(a).

157. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

158. *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994) (internal quotations omitted).

159. *Adler*, 144 F.3d at 670.

160. *Id.*

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The moving party “bears the initial burden of making a *prima facie* demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.”¹⁶¹ The movant “need not negate the nonmovant’s claim, but need only point out . . . that there is an absence of evidence to support the nonmoving party’s case.”¹⁶² If the moving party carries this initial burden, the nonmoving party “may not rest upon mere allegations or denials of [the] pleading[s], but must set forth *specific facts* showing that there is a *genuine issue* for trial as to those dispositive matters for which it carries the burden of proof.”¹⁶³ “The mere existence of a scintilla of evidence in support of the [nonmovant’s] position will be insufficient to defeat a properly supported motion for summary judgment.”¹⁶⁴

DISCUSSION

Officer Cruz is entitled to qualified immunity on Plaintiffs’ excessive force claim because his use of deadly force in the August 11, 2014 encounter with Mr. Taylor did not violate a statutory or constitutional right

Plaintiffs claim Officer Cruz used excessive force when he employed deadly force during the August 11,

161. *Id.* at 670-71.

162. *Universal Money Ctrs., Inc.*, 22 F.3d at 1529 (internal quotations omitted).

163. *Id.* (internal quotations and citations omitted; emphasis in original).

164. *Id.* (internal quotations omitted).

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2014 encounter with Mr. Taylor.¹⁶⁵ Office Cruz argues he is immune from suit under the qualified immunity doctrine.¹⁶⁶

“Public officials are immune from suit under 42 U.S.C. § 1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.”¹⁶⁷ “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”¹⁶⁸ “The protection of qualified immunity applies regardless of whether the government official’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.”¹⁶⁹ Thus, “[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal question,” and “protects all but the plainly incompetent or those who knowingly violate the law.”¹⁷⁰

165. Complaint ¶¶ 105-113.

166. Motion for Summary Judgment at 21-34.

167. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015) (internal quotations omitted).

168. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

169. *Id.* (internal quotations omitted).

170. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (internal quotations omitted).

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“Because qualified immunity is an immunity from suit rather than a mere defense to liability it is effectively lost if a case is erroneously permitted to go to trial.”¹⁷¹ “[T]he driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery.”¹⁷² And for this reason, the U.S. Supreme Court has repeatedly “stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”¹⁷³

“[A] plaintiff seeking to avoid summary judgment on qualified immunity grounds must satisfy a ‘heavy’ two-part burden.”¹⁷⁴ The plaintiff must show: “(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.”¹⁷⁵ The two prongs of qualified immunity may be analyzed in any sequence based on the circumstances of the particular case.¹⁷⁶ In this case, it is necessary to address only the first prong, *i.e.*, whether Officer Cruz’s use of deadly force in the August 11, 2014 encounter with Mr. Taylor violated a statutory or constitutional right.

171. *Pearson*, 555 U.S. at 231 (internal quotations and punctuation omitted).

172. *Id.* (internal quotations and punctuation omitted).

173. *Id.* at 232 (internal quotations omitted).

174. *Mecham v. Frazier*, 500 F.3d 1200, 1204 (10th Cir. 2007).

175. *Ashcroft*, 563 U.S. at 735 (internal quotations omitted).

176. *Pearson*, 555 U.S. at 236.

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Claims of excessive force are analyzed under the Fourth Amendment's objective reasonableness standard "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."¹⁷⁷ The objective reasonableness standard applies to any use of force by a law enforcement officer "in the course of an arrest, investigatory stop, or other seizure."¹⁷⁸

"[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."¹⁷⁹ "[I]ts proper application requires careful attention to the facts and circumstances of each particular case"¹⁸⁰ to determine "whether the totality of the circumstances justified the use of force."¹⁸¹ "[R]elevant factors include the crime's severity, the potential threat posed by the suspect to the officer's and others' safety, and the suspect's attempts to resist or evade arrest."¹⁸² And "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in

177. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

178. *Id.* at 395 (internal quotations omitted).

179. *Id.* at 396 (internal quotations omitted).

180. *Id.*

181. *Estate of Larsen ex rel. Studivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2009) (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)).

182. *Mecham*, 500 F.3d at 1204 (internal quotations omitted).

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circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”¹⁸³ Where the material facts are not in dispute, the objective legal reasonableness of the officer’s use of force is a question of law.¹⁸⁴

Officer Cruz’s use of deadly force was objectively reasonable in light of the dispatch report of a man with a gun and the unknown motivations of the suspects

The first factor to consider in determining whether an officer’s use of force was objectively reasonable is the crime’s severity.¹⁸⁵ Officer Cruz’s August 11, 2014 encounter with Mr. Taylor arose from a dispatch “report of a man with a gun.”¹⁸⁶ The dispatcher informed officers the “suspect flashed a gun at the complainant but no threat was made;” no shots had been fired; no one was in danger; the complainant was not cooperative and hung up on the call taker; and the complainant refused to provide her identifying information.¹⁸⁷

The nature of the dispatch report could have led to a number of potential crimes, ranging from misdemeanor

183. *Graham*, 490 U.S. at 396-97.

184. *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003).

185. *Mecham*, 500 F.3d at 1204.

186. *Supra* Undisputed Facts ¶ 1.

187. *Id.* ¶¶ 1-2.

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to felony.¹⁸⁸ In Utah, the crimes of carrying a concealed firearm, including an unloaded firearm, and openly carrying a loaded firearm on a public street are class B misdemeanors.¹⁸⁹ But if the individual in possession of the firearm is a Category I or II restricted person, the crime is a second or third degree felony.¹⁹⁰ The dispatch report could have also led to no crime being committed because in Utah, individuals may openly transport unloaded firearms.¹⁹¹ This wide range of possibilities necessitated the dispatcher asking for any officers “coming clear” to “check” the situation.¹⁹²

Officer Cruz mistakenly believed the dispatch report was for a group of men, one of whom had “brandished” a weapon.¹⁹³ But he ultimately responded to ensure the suspect was not a threat to public safety and to determine whether any laws had been or were being violated, including a possible brandishing.¹⁹⁴ This necessarily required Officer Cruz, and the other responding officers, to determine whether any of the suspects were armed, and if so, whether their reason for carrying a firearm was innocent or nefarious.

188. UTAH CODE ANN. §§ 76-10-500 through -532.

189. *Id.* § 76-10-504(1), -505(1)(b), (4).

190. *Id.* § 76-10-503(2)(a), (3)(a).

191. *Id.* § 76-10-500(1).

192. *Supra* Undisputed Facts ¶ 3.

193. *Id.* ¶¶ 4, 10.

194. *Id.* ¶ 5.

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Officer Cruz's response to the unknowns of these circumstances was heightened caution.¹⁹⁵ When he arrived in the area, he observed three men—Mr. Taylor, Jerrail, and Adam—two of whom generally matched the descriptions provided by the dispatcher.¹⁹⁶ He requested backup and decided to wait for that backup to arrive before approaching the suspects.¹⁹⁷ He asked the dispatcher whether the report identified which of the three men flashed the gun, and was told that the log did not indicate,¹⁹⁸ which added another unknown to the situation. Officer Cruz also observed the three men and ran scenarios through his mind to be as prepared as possible for the encounter with them.¹⁹⁹

While observing the three men, Officer Cruz saw Mr. Taylor walk up to a car stopped at a red light and interact with the driver, while Jerrail and Adam were “throwing their hands in the air, kind of making a big scene.”²⁰⁰ Officer Cruz was unsure of what occurred in the exchange and described it as “some kind of distraction or disturbance,” possibly “harassing the driver,” and “not

195. Officers Sylleloglou and Downes also approached the situation with heightened caution because the suspect was reportedly armed. *Id.* ¶¶ 45, 67.

196. *Id.* ¶ 13.

197. *Id.* ¶¶ 9, 14.

198. *Id.* ¶ 15.

199. *Id.* ¶¶ 14, 16-17, 20-21.

200. *Id.* ¶ 17.

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typical” and “unusual” since “you don’t just walk up to people in a crosswalk, somebody that maybe you don’t know, and start engaging them while they are sitting in their car in traffic.”²⁰¹ The exchange further heightened Officer Cruz’s caution regarding the three suspects.

A witness also viewed the exchange and indicated that it appeared Mr. Taylor gave the car’s driver a high-five.²⁰² This differing description of the exchange does not create a genuine issue of material fact or render Officer Cruz’s reaction to the exchange unreasonable. The witness observed the exchange from an obstructed vantage point²⁰³ that was different than Officer Cruz’s view. The witness also did not describe the actions of Jerrail and Adam during the exchange. And the witness was not viewing the exchange from the prospective of an officer responding to a dispatch report of a man with a gun. Moreover, what actually occurred during the exchange is not material. Rather, it is Officer Cruz’s observation of and reaction to the exchange that are material to determining whether his conduct was objectively reasonable.

Viewing the undisputed material facts in a light most favorable to Plaintiffs, the dispatch report was for a minor crime or no crime at all. The complainant, being unidentified and non-cooperative with the call taker,²⁰⁴

201. *Id.* ¶ 18.

202. *Id.* ¶ 19.

203. *Id.*

204. *Id.* ¶ 2.

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also casts doubt regarding whether a crime had been committed.²⁰⁵ And prior to making contact with the suspects, Officer Cruz did not observe anything suggestive of a more serious crime. But even so, a reasonable officer in the same circumstances would approach the situation with heightened caution—just as Officer Cruz did—based on the potential threat to safety posed by a firearm’s presence and a suspect’s unknown motivations. When this heightened caution is considered in the totality of the circumstances—and particularly in light of Mr. Taylor’s conduct after the officers made contact—the severity of the crime factor weighs in favor of a finding that Officer Cruz’s use of deadly force was objectively reasonable.

Officer Cruz’s use of deadly force was objectively reasonable in light of the potential threat of serious physical harm posed by Mr. Taylor

The second factor to consider in determining whether an officer’s use of force was objectively reasonable is the potential threat posed by the suspect to the officer and others’ safety.²⁰⁶ Specific to the use of deadly force, a defendant’s conduct is justified if a reasonable officer in the defendant’s position would have probable cause to believe that the suspect poses a potential threat of

205. *Florida v. J.L.*, 529 U.S. 266, 270, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (1999) (“Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity[.]”)(internal citations and quotations omitted).

206. *Mecham*, 500 F.3d at 1204.

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serious physical harm, either to the officer or to others.²⁰⁷ “[E]ven if an officer reasonably, but mistakenly, believed that a suspect was likely to fight back the officer would be justified in using more force than in fact was needed.”²⁰⁸ “A reasonable officer need not await the ‘glint of steel’ before taking self-protective action; by then, it is ‘often . . . too late to take safety precautions.’”²⁰⁹

In assessing the degree of threat facing an officer in deadly force cases, the following nonexclusive factors are considered: “(1) whether the officers ordered the suspect to drop his weapon, and the suspect’s compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.”²¹⁰ Each of these factors supports a finding that a reasonable officer on the scene would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

207. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *Murr*, 511 F.3d at 1260.

208. *Murr*, 511 F.3d at 1260 (internal quotations and punctuation omitted).

209. *Id.* (quoting *People v. Morales*, 198 A.D.2d 129, 603 N.Y.S.2d 319, 320 (N.Y. App. Div. 1993)).

210. *Id.*

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Mr. Taylor refused to comply with the officers' repeated commands that he stop and show his hands

Plaintiffs argue that material issues of fact exist regarding whether Mr. Taylor was aware of the officers' interest in him and whether he could hear their commands because he was wearing headphones.²¹¹ Plaintiffs' argument lacks merit. Viewing the undisputed material facts in a light most favorable to Plaintiffs, it cannot be reasonably questioned that Mr. Taylor was aware of the officers' presence; that he heard and verbally responded to the officers' commands; and that he deliberately refused to comply with their commands. And regardless, the qualified immunity analysis does not focus on Mr. Taylor's subjective understanding of the situation. Nor does it turn on whether Officer Cruz was aware that Mr. Taylor was wearing headphones.²¹² Rather, the focus of the inquiry is whether a reasonable officer under the circumstances would believe that Mr. Taylor was aware of the officers' presence, heard their commands, and refused to comply.²¹³

Officers Cruz, Sylleloglou, and Downes never saw a firearm in Mr. Taylor's possession,²¹⁴ and no gun was found

211. Response at 83-84; *supra* Undisputed Facts ¶¶ 62-63, 123-125.

212. Officer Cruz indicated that he did not see Mr. Taylor wearing headphones, but the video and photographic evidence shows that after Mr. Taylor was shot, Officer Cruz appeared to have laid or thrown the headphones onto the ground while he searched Mr. Taylor. *Supra* Undisputed Facts ¶¶ 124-130. This potential inconsistency is not material.

213. *Garner*, 471 U.S. at 11; *Murr*, 511 F.3d at 1260.

214. *Supra* Undisputed Facts ¶¶ 54, 103, 107, 110, 116.

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at the scene.²¹⁵ However, the officers were responding to a dispatch “report of a man with a gun.”²¹⁶ The suspects—Mr. Taylor, Jerrail, and Adam—were in the area of the report and two of them generally matched the descriptions provided by the dispatcher.²¹⁷ When the officers made contact, Jerrail and Adam immediately stopped and raised their hands.²¹⁸ Mr. Taylor, on the other hand, turned around, put his headphones in, and began walking away from the officers towards the entrance of the 7-Eleven.²¹⁹

Officer Cruz believed that Mr. Taylor looked directly at him and the other officers when they approached in their police vehicles as he exited the 7-Eleven.²²⁰ But Officer Cruz was wearing dark-tinted sunglasses,²²¹ which arguably might have obscured his ability to determine whether Mr. Taylor looked at him as Officer Cruz approached in his vehicle. However, the video and photographic evidence show that Mr. Taylor appeared to look directly at Officer Cruz’s police vehicle as it approached—with its red and blue emergency lights flashing—and blocked his path.²²²

215. *Id.* ¶ 113.

216. *Id.* ¶ 1.

217. *Id.* ¶ 13.

218. *Id.* ¶¶ 40, 42, 47.

219. *Id.* ¶¶ 39-40, 42, 51, 58, 62-63.

220. *Id.* ¶¶ 37, 39-42.

221. *Id.* ¶ 36.

222. *Id.* ¶¶ 32-33, 35, 38.

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Mr. Taylor also appeared to look directly at Officer Sylleoglou's police vehicle as it moved in front of the three men.²²³ And when Jerrail was asked if he thought there was any possible way that Mr. Taylor could not have seen the police vehicles and the officers approaching with their guns drawn, he stated: "I don't know how he didn't see them."²²⁴

By immediately turning and walking away when the police vehicles blocked his path,²²⁵ Mr. Taylor's conduct would suggest to a reasonable officer that Mr. Taylor was aware of the police presence, and that he was attempting to evade the officers. Officers Cruz and Sylleoglou pursued Mr. Taylor,²²⁶ shouting repeated commands that he stop and show his hands.²²⁷ But Mr. Taylor continued walking away from the officers and placed his hands "wrist-deep" inside the front waistband of his pants, moving them in a digging motion.²²⁸

Then, as Mr. Taylor continued walking away from the officers while they shouted commands for him to stop and show his hands,²²⁹ he looked directly at Officer

223. *Id.* ¶ 43.

224. *Id.* ¶ 52.

225. *Id.* ¶¶ 39-40, 42, 51, 58, 62-63.

226. *Id.* ¶¶ 53, 56, 64.

227. *Id.* ¶¶ 50, 59, 77; 83, 90-91, 93-94, 97, 110, 116.

228. *Id.* ¶¶ 59, 70, 75, 78, 92, 94-96, 99, 110, 116.

229. *Id.* ¶¶ 59, 77, 83.

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Sylleloglou with a “mean mug” look on his face and verbally responded.²³⁰ It is unknown exactly what Mr. Taylor said. But it is undisputed that he was speaking to Officer Sylleloglou and said something along the lines of “what did we do?”²³¹ and “what are you gonna do, shoot me? What are you gonna do? You gonna shoot me? You gonna shoot me?”²³² Officer Sylleloglou described the look on Mr. Taylor’s face as hostile and defiant.²³³ Mr. Taylor also later turned around to directly face Officer Cruz,²³⁴ indicating that he was aware of Officer Cruz’s presence behind him. Officer Cruz described the look on Mr. Taylor’s face as defiant, like “come and get me. I’m gonna fricken kill you.”²³⁵

Plaintiffs argue that Officer Cruz’s description of Mr. Taylor’s look is not credible because Officer Cruz was looking in the direction of the sun.²³⁶ But this argument lacks merit based on the undisputed material facts. Officer Cruz was wearing dark-tinted sunglasses,²³⁷ which would have ameliorated the effect of the sun. Moreover,

230. *Id.* ¶¶ 84, 87-88.

231. *Id.* ¶ 87.

232. *Id.* ¶ 88.

233. *Id.* ¶ 84.

234. *Id.* ¶¶ 89, 93-94, 97-98.

235. *Id.* ¶¶ 96, 99.

236. Response at 76; Cruz Bodycam Video.

237. *Supra* Undisputed Facts ¶ 36.

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Officer Sylleloglou described the look on Mr. Taylor's face as being hostile and defiant just seconds before Mr. Taylor turned to face Officer Cruz.²³⁸ And after turning to face Officer Cruz, while continuing to walk backwards away from the officers, Mr. Taylor verbally responded to Officer Cruz in a defiant tone.²³⁹ It is undisputed that he said something to Officer Cruz which sounded like "what fool" or "nah fool."²⁴⁰ It is also undisputed that during the verbal exchanges with Officers Sylleloglou and Cruz, Mr. Taylor continued walking away from the officers with his hands concealed in the front waistband of his pants, moving them in a digging motion.²⁴¹

Officers Cruz and Sylleloglou both believed that Mr. Taylor heard their commands and deliberately chose to ignore them.²⁴² A reasonable officer under these circumstances would also believe that Mr. Taylor was aware of the officers' presence, heard their commands, and refused to comply. This supports a finding that a reasonable officer would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

238. *Id.* ¶ 84; Cruz Bodycam Video.

239. *Supra* Undisputed Facts ¶ 97; Cruz Bodycam Video.

240. *Supra* Undisputed Facts ¶ 97.

241. *Id.* ¶¶ 75, 78, 84, 86, 92, 94-99, 110, 116.

242. *Id.* ¶¶ 84, 86, 99, 110.

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Mr. Taylor made a sudden and hostile “draw stroke motion” with his hands while refusing to comply with the officers’ commands, and while directly facing Officer Cruz

Plaintiffs argue that material issues of fact exist regarding whether Mr. Taylor made a hostile motion towards the officers.²⁴³ Plaintiffs rely on Jerrail and Adam’s statements that they believed Mr. Taylor was pulling up his pants,²⁴⁴ or that Mr. Taylor’s hands could have been in his pockets manipulating his phone.²⁴⁵ Plaintiffs also argue that Mr. Taylor could have been attempting to comply with the officers’ commands that he show his hands.²⁴⁶ However, the focus of the inquiry is not on what Jerrail and Adam believed Mr. Taylor was doing with his hands, or what Mr. Taylor subjectively intended with his hand movements. Rather, the focus is whether a reasonable officer under the circumstances would believe that Mr. Taylor was making a hostile motion with a weapon towards the officers.²⁴⁷ The undisputed material facts and video and photographic evidence of the moments when Mr. Taylor was shot demonstrate that a reasonable officer would believe that Mr. Taylor made a hostile motion with a weapon towards the officers.

243. Response at 82-83.

244. *Supra* Undisputed Facts ¶¶ 120-121, 123.

245. *Id.* ¶ 123.

246. Response at 78, 82-83.

247. *Garner*, 471 U.S. at 11; *Murr*, 511 F.3d at 1260.

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Based on his understanding that one of the three men had a gun, Officer Cruz reasonably believed that the gun was very likely in the possession of Mr. Taylor, who was walking away from the officers and, unlike Jerrail and Adam, was not complying with the officers' commands to stop.²⁴⁸ As Mr. Taylor walked along the side of the 7-Eleven away from Officers Cruz and Sylleloglou with his back to them, he raised his hands to the sides of his waist.²⁴⁹ It is clear from the video and photographic evidence that when Mr. Taylor did this, he was pulling up his baggy pants.²⁵⁰

However, Mr. Taylor then made a separate, distinct movement with his hands: he put his hands inside the front waistband of his pants, and made digging motions with them.²⁵¹ Officer Cruz reasonably believed Mr. Taylor's hands were concealed in his waistband area due to the position of his elbows as he viewed Mr. Taylor from behind.²⁵² It was not until this point—when Mr. Taylor concealed his hands in the front waistband of his pants—that Officers Cruz and Sylleloglou began training their weapons on Mr. Taylor.²⁵³ It was also at this point that Officer Cruz was convinced that Mr. Taylor had a gun, and that Mr. Taylor was “buying time” by “calmly walk[ing]

248. *Supra* Undisputed Facts ¶ 70.

249. *Id.* ¶ 74.

250. *Id.* ¶¶ 73-74.

251. *Id.* ¶ 75.

252. *Id.* ¶ 76.

253. *Id.* ¶¶ 75, 79, 82.

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away” and “creating distance” before a “gunfight” ensued.²⁵⁴ But instead of firing his weapon at Mr. Taylor, Officer Cruz continued to shout commands, along with Officer Sylleloglou, for Mr. Taylor to stop and show his hands.²⁵⁵

Mr. Taylor continued walking away from the officers with his hands “wrist-deep” in the front waistband of his pants, moving them in a digging motion.²⁵⁶ Viewing the undisputed material facts in a light most favorable to Plaintiffs, Mr. Taylor’s hands could have been manipulating his phone at this time.²⁵⁷ But the officers were responding to a dispatch report of a man with a gun.²⁵⁸ And they were faced with a suspect that was aware of their presence and interest in him, and who was not complying with their commands that he stop and show his hands.²⁵⁹ Under these circumstances, a reasonable officer would believe that Mr. Taylor was in possession of a weapon and a reasonable officer would take measures to be prepared to act in self-defense or the defense of others—just as Officers Cruz and Sylleloglou did by training their weapons on Mr. Taylor.²⁶⁰ As Officer Downes noted, “there were civilians all around

254. *Id.* ¶¶ 79-81.

255. *Id.* ¶¶ 77; 83, 90-91, 93-94, 97, 110, 116.

256. *Id.* ¶¶ 92, 95-96, 99.

257. *Id.* ¶¶ 123-124.

258. *Id.* ¶ 1.

259. *Supra* Discussion at 37-41.

260. *Supra* Undisputed Facts ¶¶ 75, 79, 82

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us, nonlaw enforcement personnel. So if they decided to produce a weapon, there is no telling where those rounds are going to go.”²⁶¹

Mr. Taylor’s conduct at this point further escalated the situation. He looked at Officer Sylleloglou with a “mean mug” look on his face, which Officer Sylleloglou described as hostile and defiant.²⁶² He also verbally responded to Officer Sylleloglou in a defiant manner.²⁶³ He then turned around to directly face Officer Cruz and, with a hostile look on his face, verbally responded to Officer Cruz in a defiant tone.²⁶⁴

While facing Officer Cruz, Mr. Taylor suddenly and without warning quickly raised his hands in a “draw stroke” motion.²⁶⁵ His left hand moved from inside the waistband of his pants, lifting his shirt and exposing his lower torso,²⁶⁶ while simultaneously he brought his right hand out of his waistband but lower than his left hand.²⁶⁷ It was at this point, believing that Mr. Taylor’s movements indicated he was “drawing” or reaching for a gun, and that Mr. Taylor intended to fire on the officers, Officer

261. *Id.* ¶ 67.

262. *Id.* ¶ 84.

263. *Id.* ¶¶ 87-88.

264. *Id.* ¶¶ 93, 96-97, 99; Cruz Bodycam Video.

265. *Supra* Undisputed Facts ¶¶ 100-101, 104-105, 116.

266. *Id.* ¶ 100.

267. *Id.* ¶ 101.

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Cruz acted in self-defense by firing two shots in rapid succession, striking Mr. Taylor in the torso.²⁶⁸

It is clear from the video and photographic evidence that the “drawing” motion of Mr. Taylor’s hands is not similar to when Mr. Taylor earlier put his hands on his waist to pull up his pants.²⁶⁹ That one of Officer Cruz’s rounds struck Mr. Taylor in the “right upper quadrant of [the] abdomen” also grazing the third and fourth fingers of his left hand is also inconsistent with the theory that Mr. Taylor was pulling up his pants.²⁷⁰ Moreover, although Jerrail suggested Mr. Taylor was pulling up his pants,²⁷¹ it is undisputed that Jerrail was already on the ground when he heard the two gunshots and did not see what happened.²⁷² Adam also stated to officers that based on Mr. Taylor’s movements, he could see why the officers thought Mr. Taylor might have had a gun.²⁷³ And Officer Sylleloglou indicated that he likely would have fired his weapon in self-defense under the circumstances, if Officer Cruz had not fired.²⁷⁴

The undisputed material facts also do not reasonably suggest that Mr. Taylor abruptly decided to become

268. *Id.* ¶¶ 105, 110.

269. *Compare id.* ¶ 74, with *id.* ¶ 100; Cruz Bodycam Video.

270. *Id.* ¶ 106.

271. *Id.* ¶ 120.

272. *Id.* ¶ 119.

273. *Id.* ¶ 122.

274. *Id.* ¶ 117.

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compliant with the officers' commands that he stop and show his hands. To the contrary, the undisputed material facts demonstrate that less than four seconds before he was shot,²⁷⁵ Mr. Taylor turned to directly face Officer Cruz and, with a hostile look on his face, verbally responded to Officer Cruz in a defiant tone.²⁷⁶ He then made a sudden motion with his hands that from the video and photographic evidence is consistent with a "draw stroke."²⁷⁷ And when he was shot, Mr. Taylor was continuing to walk backwards away from the officers.²⁷⁸

Although Mr. Taylor's hand did not ever come toward Officer Cruz,²⁷⁹ and no gun was found in Mr. Taylor's possession,²⁸⁰ the confirmed presence of a weapon is not required before a reasonable officer takes self-protective action.²⁸¹ Given all the facts now known, it could be assumed that Mr. Taylor was pulling up his pants, manipulating his phone with his hands, or attempting to comply with the officers' commands that he show his hands. But "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make

275. *Id.* ¶ 115.

276. *Id.* ¶¶ 93, 96-97, 99.

277. *Id.* ¶¶ 100-101, 104-105, 116.

278. *Id.* ¶ 95.

279. *Id.* ¶ 107.

280. *Id.* ¶ 113.

281. *Murr*, 511 F.3d at 1260 (quoting *Morales*, 603 N.Y.S.2d at 320).

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split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”²⁸² Officers are “justified in using more force than in fact was needed” if the officers “reasonably, but mistakenly, believed that a suspect was likely to fight back[.]”²⁸³

A reasonable officer under the circumstances of this case would believe that Mr. Taylor’s sudden “draw stroke” motion with his hands was a hostile motion made with a weapon towards the officers. And this supports a finding that a reasonable officer would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

Mr. Taylor and Officers Cruz and Sylleloglou were in close proximity during the encounter

Officers Cruz and Sylleloglou arrived at the scene in their police vehicles forming a barricade or “V” in the 7-Eleven parking lot blocking the path of Mr. Taylor, Jerrail, and Adam.²⁸⁴ Officer Sylleloglou immediately exited and ran around the front of his vehicle in a south/west diagonal in pursuit of Mr. Taylor, who was walking

282. *Graham*, 490 U.S. at 396-97.

283. *Murr*, 511 F.3d at 1260 (“[E]ven if an officer reasonably, but mistakenly, believed that a suspect was likely to fight back the officer would be justified in using more force than in fact was needed.”) (internal quotations and punctuation omitted).

284. *Supra* Undisputed Facts ¶ 35.

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away.²⁸⁵ Officer Cruz initially followed some distance behind Mr. Taylor and Officer Sylleloglou, but was closing the distance.²⁸⁶ This was because Mr. Taylor was already walking away from Officer Cruz before he had fully exited his vehicle and cleared its door.²⁸⁷ Officer Cruz then maintained his distance from Mr. Taylor after Mr. Taylor concealed his hands in the front waistband of his pants.²⁸⁸

When Mr. Taylor looked at Officer Sylleloglou with a “mean mug” look on his face and verbally responded to Officer Sylleloglou, the distance between the two was no more than 15 feet.²⁸⁹ Officers Cruz and Sylleloglou were five to seven feet apart when Mr. Taylor turned around to face Officer Cruz.²⁹⁰ And at the moment he was shot, Mr. Taylor was approximately 10 to 12 feet away from Officer Cruz, and 12 to 15 feet away from Officer Sylleloglou.²⁹¹ Officer Downes was detaining Jerrail and Adam in the parking lot in front of the 7-Eleven approximately 50 feet away from Officers Cruz and Sylleloglou.²⁹²

285. *Id.* ¶ 53.

286. *Id.* ¶ 56; Cruz Bodycam Video.

287. *Supra* Undisputed Facts ¶ 55.

288. *Id.* ¶ 71; Cruz Bodycam Video.

289. *Supra* Undisputed Facts ¶ 85

290. *Id.* ¶ 110.

291. *Id.* ¶ 102.

292. *Id.* ¶¶ 65, 118.

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The close proximity of Mr. Taylor and Officers Cruz and Sylleloglou further demonstrates that a reasonable officer would believe that Mr. Taylor was aware of the officers' presence and could hear their commands that he stop and show his hands.²⁹³ The close proximity also demonstrates that Officers Cruz and Sylleloglou were close enough to Mr. Taylor to observe his movements and facial expressions as they pursued him. And the close proximity demonstrates that Officer Cruz was faced with a split-second decision when Mr. Taylor made the sudden "draw stroke" motion with his hands.²⁹⁴ In that split-second, Officer Cruz fired his weapon,²⁹⁵ and Officer Sylleloglou likely would have fired his weapon had Officer Cruz not fired.²⁹⁶ Given these circumstances, the close proximity of Mr. Taylor and Officers Cruz and Sylleloglou supports a finding that a reasonable officer would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

Mr. Taylor manifested hostile and defiant intentions in relation to the officers

From the moment the officers arrived at the 7-Eleven parking lot until the time he was shot, Mr. Taylor's conduct demonstrated an intention to be hostile and defiant in relation to the officers. He immediately turned and walked

293. *Supra* Discussion at 37-41.

294. *Id.* at 41-47.

295. *Supra* Undisputed Facts ¶¶ 105, 110.

296. *Id.* ¶ 117.

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away when the police vehicles blocked his path.²⁹⁷ He then continued to walk away while Officers Cruz and Sylleoglou pursued him shouting commands that he stop and show his hands.²⁹⁸ Despite being aware of the officers' presence and interest in him, and hearing their commands, Mr. Taylor refused to comply.²⁹⁹ He defiantly concealed his hands in the front waistband of his pants, moving them in a digging motion;³⁰⁰ he looked at the officers with a hostile and defiant look on his face while the officers pursued him;³⁰¹ he verbally responded to the officers in a defiant manner and tone;³⁰² and he continued walking away from the officers.³⁰³ Finally, when directly facing Officer Cruz, being no more than 12 feet away and with Officer Cruz's weapon trained on him, Mr. Taylor made a sudden and hostile "draw stroke" motion with his hands.³⁰⁴

A reasonable officer under these circumstances would believe that Mr. Taylor's manifest intentions were hostile and defiant in relation to the officers. This supports a finding that a reasonable officer would have probable

297. *Id.* ¶¶ 39-40, 42, 51, 58, 62-63.

298. *Id.* ¶¶ 50, 59, 70, 77-78, 83, 90-95, 99, 110, 116.

299. *Supra* Discussion at 37-41.

300. *Supra* Undisputed Facts ¶¶ 75-76, 79-82, 84, 86, 92, 95-65, 99, 110, 116.

301. *Id.* ¶¶ 84, 96, 99, 110.

302. *Id.* ¶¶ 87-88, 97, 99, 110.

303. *Id.* ¶¶ 92, 94-95.

304. *Id.* ¶¶ 93, 100-102, 104-105, 116.

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cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others.

Conclusion: Mr. Taylor posed a potential threat of serious physical harm to the officers or others

A reasonable officer on the scene of the August 11, 2014 encounter with Mr. Taylor would believe that: (1) Mr. Taylor was aware of the officers' presence and interest in him, heard the officers' commands that he stop and show his hands, and refused to comply;³⁰⁵ (2) Mr. Taylor's sudden "draw stroke" motion with his hands was a hostile motion made with a weapon towards the officers;³⁰⁶ (3) the close proximity of Mr. Taylor and Officers Cruz and Sylleloglou necessitated a split-second decision by the officers when Mr. Taylor made the sudden "draw stroke";³⁰⁷ and (4) Mr. Taylor's manifest intentions were hostile and defiant in relation to the officers.³⁰⁸ Because of this, a reasonable officer under the circumstances would have probable cause to believe that Mr. Taylor posed a potential threat of serious physical harm to the officer or others. Therefore, this factor weighs in favor of a finding that Officer Cruz's use of deadly force was objectively reasonable.

305. *Supra* Discussion at 37-41.

306. *Id.* at 41-46.

307. *Id.* 46-47.

308. *Id.* 48-49.

*Appendix B***Officer Cruz's use of deadly force was objectively reasonable in light of Mr. Taylor's attempts to resist or evade arrest**

The third factor in determining whether an officer's use of force was objectively reasonable is the suspect's attempts to resist or evade arrest.³⁰⁹ Plaintiffs argue that material issues of fact exist regarding whether Mr. Taylor was resisting or evading arrest.³¹⁰ Plaintiffs argue that Mr. Taylor could not hear the officers' commands that he stop and show his hands because he was wearing headphones.³¹¹ Plaintiffs also argue that Mr. Taylor was not threatening or actively resisting arrest because he was slowly and calmly walking away from the officers.³¹² But these facts cannot be viewed in isolation. They must be considered in the totality of the circumstances "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."³¹³

Viewing the undisputed material facts in a light most favorable to Plaintiffs, it cannot be reasonably questioned that Mr. Taylor was aware of the officers' presence; that he heard and verbally responded to the officers' commands; and that he deliberately refused to comply

309. *Mecham*, 500 F.3d at 1204.

310. Response at 83-85.

311. *Id.; supra* Undisputed Facts ¶¶ 62-63, 123-125.

312. Response at 84; *supra* Undisputed Facts ¶ 81.

313. *Graham*, 490 U.S. at 396; *Murr*, 511 F.3d at 1259.

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with their commands.³¹⁴ A reasonable officer under the circumstances would believe that Mr. Taylor was aware of the officers' presence, heard their commands, and refused to comply.³¹⁵ Mr. Taylor immediately walked away from the officers when the police vehicles blocked his path.³¹⁶ When Jerrail saw Mr. Taylor walking away, he told Mr. Taylor to "stop," and figured that Mr. Taylor was avoiding contact with the officers.³¹⁷ Mr. Taylor continued walking away from the officers despite their pursuit and commands that he stop and show his hands, even when directly facing Officer Cruz with Officer Cruz's weapon trained on him.³¹⁸ Mr. Taylor's manifest intentions were hostile and defiant in relation to the officers throughout the encounter.³¹⁹ And Mr. Taylor made a sudden and hostile "draw stroke" motion with his hands while directly facing Officer Cruz in close proximity.³²⁰ A reasonable officer under these circumstances would believe that Mr. Taylor was attempting to resist or evade arrest. Therefore, this factor weighs in favor of a finding that Officer Cruz's use of deadly force was objectively reasonable.

314. *Supra* Discussion at 37-41.

315. *Id.*

316. *Supra* Undisputed Facts ¶¶ 39-40, 42, 51, 58, 62-63.

317. *Id.* ¶¶ 60-61.

318. *Id.* ¶¶ 50, 59, 70, 77-78, 83, 90-95, 99, 110, 116.

319. *Supra* Discussion at 48-49.

320. *Id* at 41-47.

*Appendix B***Officer Cruz's use of deadly force was objectively reasonable under the totality of the circumstances**

Viewing the totality of the circumstances, Officer Cruz's use of deadly force during the August 11, 2014 encounter with Mr. Taylor was objectively reasonable. He approached the situation with heightened caution based on the dispatch report of a man with a gun and the unknown motivations of the suspects.³²¹ He reasonably believed that Mr. Taylor was in possession of a firearm, and that Mr. Taylor posed a potential threat of serious physical harm to the officers or others.³²² And he reasonably believed that Mr. Taylor was attempting to resist or evade arrest.³²³

Plaintiffs argue that Officer Cruz unreasonably believed and acted as though the dispatch report was for a more serious crime; was overly fearful before and during the encounter; and that rather than taking cover or creating distance, Officer Cruz's conduct exacerbated the situation.³²⁴ But Plaintiffs' argument relies on statements Officer Cruz made after the encounter and their own selected facts,³²⁵ while ignoring the totality of the circumstances. Viewing the undisputed material facts in their totality, and in a light most favorable to Plaintiffs,

321. *Id.* at 32-36.

322. *Id.* at 36-48.

323. *Id.* at 48-50.

324. Response at 74-83.

325. *Supra* Undisputed Facts ¶¶ 6, 10, 18, 21, 29, 32-33, 37, 41-42, 48, 56-57, 71, 79-81, 96, 107-110.

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Officer Cruz's conduct before and during the encounter did not recklessly or deliberately create the need for his use of deadly force.

The undisputed material facts demonstrate that Officer Cruz requested backup, and waited for backup to arrive before approaching Mr. Taylor, Jerrail, and Adam.³²⁶ He asked the dispatcher whether the report identified which of the three men flashed the gun, and he ran scenarios through his mind to prepare himself for the encounter.³²⁷ And upon initiating contact, Officer Cruz ensured the three men were aware of the police presence and interest in them by activating the emergency lights on his police vehicle, blocking the men's path with his vehicle, and giving commands that the men stop and show their hands.³²⁸

Then, as Mr. Taylor walked away, Officer Cruz pursued while continually shouting commands that Mr. Taylor stop and show his hands.³²⁹ He initially followed some distance behind Mr. Taylor, but was closing the distance.³³⁰ However, after Mr. Taylor concealed his hands in the front waistband of his pants, Officer Cruz maintained his distance from Mr. Taylor and readied

326. *Supra* Undisputed Facts ¶¶ 9, 14.

327. *Id.* ¶¶ 15, 21.

328. *Id.* ¶¶ 32-33, 35, 38, 44.

329. *Id.* ¶¶ 50, 90-91, 93-94, 97, 110, 116.

330. *Id.* ¶ 56; Cruz Bodycam Video.

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himself to take self-protective measures by drawing his weapon and training it on Mr. Taylor.³³¹

Officer Cruz was convinced at this point that Mr. Taylor was armed and “creating distance” before engaging in a “gunfight,” but he continued shouting commands for Mr. Taylor to stop and show his hands.³³² It was not until after Mr. Taylor turned around to directly face him, verbally responded in a defiant tone and with a hostile look on his face, and made an sudden “draw stroke” motion with his hands, that Officer Cruz employed deadly force.³³³ It is neither helpful nor relevant to undergo a “retrospective inquiry” to suggest that “[p]erhaps the situation might have been more peacefully resolved” had Officer Cruz acted differently.³³⁴ Officer Cruz’s conduct must be evaluated “from the on-scene perspective, not with the advantage of 20/20 hindsight.”³³⁵ And the totality of the circumstances demonstrate that Officer Cruz adequately performed his duties as a reasonable law enforcement officer by taking steps to prevent a potentially armed suspect from causing serious physical harm to the officers or others.

331. *Supra* Undisputed Facts ¶¶ 71, 75, 79; Cruz Bodycam Video.

332. *Supra* Undisputed Facts ¶¶ 78-81, 90-91, 93-94, 97, 110, 116.

333. *Id.* ¶¶ 93, 96-97, 99, 100-101, 104-105, 100, 116; Cruz Bodycam Video.

334. *Jiron v. City of Lakewood*, 392 F.3d 410, 418 (10th Cir. 2004).

335. *Id.*

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Ultimately, Officer Cruz was in close proximity and directly facing Mr. Taylor—an individual whom a reasonable officer on the scene would believe is a potentially armed suspect that is noncompliant, hostile, and defiant.³³⁶ Officer Cruz was then forced to make a split-second decision to take self-protective action when Mr. Taylor made a sudden and hostile “draw stroke” motion with his hands.³³⁷ Although it is now clear that Mr. Taylor was not armed,³³⁸ Officer Cruz’s decision to employ deadly force was objectively reasonable under the totality of the circumstances. Therefore, Officer Cruz’s use of deadly force in the August 11, 2014 encounter with Mr. Taylor did not violate a statutory or constitutional right as a matter of law. Officer Cruz is entitled to summary judgment on Plaintiffs’ excessive force claim.

**Salt Lake City cannot be held liable
on Plaintiffs’ municipal liability claim relating
to Officer Cruz’s conduct**

“A municipality may not be held liable under § 1983 solely because its employees inflicted injury on the plaintiff.”³³⁹ Rather, “[t]o establish municipal liability, a plaintiff must show (1) the existence of a municipal

336. *Supra* Discussion at 33-51.

337. *Id.* at 41-47.

338. *Supra* Undisputed Facts ¶ 113.

339. *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) (citing *Monell v. New York City Dep’t of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)).

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custom or policy and (2) a direct causal link between the custom or policy and the violation alleged.”³⁴⁰ “But [a municipality] cannot ‘be held liable where there was no underlying constitutional violation by any of its officers.’”³⁴¹ Therefore, “a finding of qualified immunity . . . based on a conclusion that the officer has committed no constitutional violation . . . preclude[s] the imposition of municipal liability.”³⁴²

Because Officer Cruz’s use of deadly force in the August 11, 2014 encounter with Mr. Taylor did not violate a statutory or constitutional right, Salt Lake City cannot be held liable on Plaintiffs’ municipal liability claim relating to Officer Cruz’s conduct as a matter of law. Salt Lake City is entitled to summary judgment on Plaintiffs’ municipal liability claim relating to Officer Cruz’s conduct.

ORDER

IT IS HEREBY ORDERED that Officer Cruz and Salt Lake City’s Motion for Summary Judgment³⁴³ is

340. *Jenkins v. Wood*, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing *city of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989); *Hinton*, 997 F.2d at 782).

341. *Allen v. Lang*, 736 Fed. Appx. 934, 943 (10th Cir. 2018) (quoting *Hinton*, 997 F.2d at 782).

342. *Jiron*, 392 F.3d at 419 n. 8 (citing *Hinton*, 997 F.2d at 782-83).

343. Docket no. 44, filed Nov. 28, 2016.

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GRANTED. Plaintiffs' first cause of action³⁴⁴ against Officer Cruz and Plaintiffs' fourth causes of action³⁴⁵ against Salt Lake City relating to Officer Cruz's conduct are DISMISSED WITH PREJUDICE.

The Clerk is directed to close the case.

Signed May 17, 2019.

BY THE COURT

/s/ David Nuffer
David Nuffer
United States District Judge

344. Complaint ¶¶ 105-113.

345. *Id.* ¶¶ 129-137.

**APPENDIX C — ORDER DENYING REHEARING
OF THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT, FILED
DECEMBER 6, 2021**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-4085
(D.C. No. 2:15-CV-00769-DN)
(D. Utah)

THE ESTATE OF DILLON TAYLOR, *et al.*,

Plaintiffs - Appellants,

v.

SALT LAKE CITY, *et al.*,

Defendants - Appellees.

ORDER

Before **HOLMES, LUCERO**, Senior Circuit Judge, and
McHUGH, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

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Judge Lucero voted to grant panel rehearing.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk