No. __-____

IN THE

Supreme Court of the United States

DETECTIVE BRETT FERRIS,

Petitioner,

v.

CHRYSTAL SCISM, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOSHUA SCISM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the doctrine of qualified immunity shield a police officer from suit (not merely from judgment) where his/her split-second decision to deploy lethal force was made after being confronted by a suspect who, while disregarding commands to get on the ground, pulls a semi-automatic handgun from his waistband just feet away from the officer?

In this matter, three plain clothes Detectives of the Schenectady Police Department were seated in a van in a high crime neighborhood preparing for a controlled narcotics buy when an unknown male confronted them on evening of June 13, 2016, telling them to get off his street. After the Detective in the driver's seat verbally placated the male, he proceeded to the front of the van where he lifted his shirt revealing a 9MM semi-automatic handgun tucked in his rear waistband and grabbed the handle with his right hand. During the next five (5) seconds, two Detectives exited the van, drew their weapons, exposed their badges and yelled three (3) commands for the male to get on the ground. The male suspect did not comply with any of the commands while crossing the street. Instead, he reached back with his right hand and pulled the handgun from his shorts prompting the Detective who was in the middle of the street nearest the male suspect (Petitioner herein) to fire six shots, one of which struck the male suspect in the back of the head.

The questions presented are:

1. Does the Fourth Amendment require a police officer to wait until an armed suspect points the barrel of his handgun in the officer's direction before the officer can deploy lethal force to protect himself and innocents in the area?

2. Did the Second Circuit err in denying Petitioner qualified immunity without even identifying what material facts defined the immunity questions?

3. Did the Second Circuit err in deferring the qualified immunity questions to the "post-verdict" stage of the trial so that immunity would only be addressed in the event a jury issued a verdict against Petitioner?

4. Did the Second Circuit's decision below disregard this Court's repeated holdings that qualified immunity is immunity from suit, not merely immunity from judgment, when it declined to define or decide the immunity questions despite a robust record containing undisputed facts?

PARTIES TO THE PROCEEDING

Petitioner, Bret Ferris, is a member of the Schenectady Police Department who was a Detective on the date of the June 13, 2016, incident. Petitioner was a Defendant in the district court and the Petitioner before the Second Circuit.

Respondent, Crystal Scism, is the wife and Administratrix, of the Estate of Joshua Scism. Respondent was the Plaintiff in the district court and the Respondent before the Second Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Crystal Scism, Individually and as Administratrix of the Estate of Joshua Scism v. Detective Brett Ferris*, No. 21-2622-CV (2nd Cir.)(Summary Order, affirming the order of the district court to the extent it denied Petitioner qualified immunity, issued February 21, 2022); and
- *Crystal Scism, Individually and as Administratrix of the Estate of Joshua Scism v. City of Schenectady, Detective Brett Ferris, Detective Ryan Kent* No. 18-CV-672-TWD (N.D.N.Y)(Order granting in part Defendants' motion for summary judgment, but denying Petitioner qualified immunity as to his deployment of lethal force, issued September 29, 2021).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case as defined by this Court's Rule 14.1(b)(iii).

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This Court has repeatedly reminded federal Courts that the doctrine of qualified immunity is intended to provide immunity from suit—and the accompanying burdens of litigation—not merely immunity from judgment. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (". . . as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.' ") quoting *Pearson v. Callahan,* 555 U.S. 223, 231 (2009); *see also Plumhoff v. Rickard,* 572 U.S. 765, 772 (2014). The decisions by the Second Circuit and the District Court in this case run afoul of this Court's repeated rulings prescribing how (and when) the doctrine of qualified immunity is to be applied in law enforcement cases.

During the last six years, this Court has issued a series of qualified immunity rulings in law enforcement cases addressing a trend among federal courts that frustrate the timely application of the doctrine in § 1983 litigation. *See, Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Plumhoff v. Rickard*, 572 U.S. 765 (2014). The trend addressed in those rulings involved federal courts framing the "clearly established law" question under the second prong of the qualified immunity test at a "high level of generality" which this Court held "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced."

*Wesby,*138 S. Ct. p. 590 *quoting Plumhoff*, 134 S. Ct. p. 2023.

This Court's decision in *Graham v. Connor*, (490 U.S. 386 [1989]) instructed federal courts that identifying what facts are *material* in the Fourth Amendment context requires the application of the "objective reasonableness" test. *Id.,* p. 396. Under the objective reasonable test, a police officer's use of force is evaluated "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Accordingly, the subjective intentions or subjective perceptions of the suspect being seized—which a "reasonable officer" could not know—are not *material* facts that inform the Fourth Amendment analysis nor frame the qualified immunity questions.

The immunity rulings in this case, or the avoidance thereof, exemplify another trend among federal courts which frustrates and undermines the objectives of the qualified immunity doctrine. This case illustrates the trend of avoiding or deferring immunity questions until trial (or the post-verdict stage of the trial), because some disputed questions of fact exist in the case (albeit immaterial to the immunity question), which trend is even more problematic since courts never even reach or frame the immunity questions.

OPINIONS BELOW

The Second Circuit's opinion is reported at 2022 U.S. App. LEXIS 2844, 2022 WL 289314 and reproduced as App 1a – 6a. The District Court's decision denying Petitioner qualified immunity at the post-discovery summary judgment stage, is reported at 2021 U.S. District LEXIS 186413, 2021 WL 4458819 and reproduced as App. 28a – 58a.

JURISDICTION

The Second Circuit issued its decision (Summary Order) on February 1, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Legal Background

In *Graham v. Connor,* (490 U.S. 386 [1989]), this Court held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard.' " *Id.* at 395. When determining what force is reasonable under the Fourth Amendment, this Court instructed

federal courts to pay "careful attention to the facts and circumstances of each particular case" including whether the suspect poses an immediate threat to the safety of the officers and others. *Id.* at 396. Importantly, this Court has repeatedly emphasized that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, not through the lens of 20/20 hindsight. *Id; see also Kisela v. Hughes*, 138 S. Ct. at 1152 (2018); and *Plumhoff v. Rickard*, 572 U.S. at 774-5. This approach to assessing the reasonableness of force deployed by police recognizes 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." *Graham*, at p. 397.

When evaluating the reasonableness of lethal force, this Court has consistently focused on "the circumstances at the moment when the shots were fired," assessing whether the individual against whom force was used was, at that moment, posing a threat to officer and/or public safety. *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014); *see also, e.g., Scott v. Harris,* 550 U.S. 372, 385-86 (2007). Thus, the consistent rulings by this Court over the past thirty-three years have provided clear guidance to federal courts regarding which facts are material—and which are not immaterial—when evaluating use of force claims under the Fourth Amendment. During that same time period, this Court has repeatedly held that qualified immunity is an immunity from

suit—not merely immunity from an adverse judgment—and the protections of the doctrine are lost if the case erroneously proceeds to trial. *Plumhoff v. Rickard,* 572 U.S. 765, 772 (2019); *White v. Pauly*, 137 S. Ct. 548 (2017); *Pearson v. Callahan,* 555 U.S. 223, 231 (2009).

B. Factual Background

Shortly after 5:00PM on June 13, 2016, three undercover Detectives of the Schenectady Police Department (hereinafter "SPD"), including Petitioner (who was seated in the driver's seat), were located in a van parked in a high crime area preparing for an undercover narcotics buy using a Confidential Informant ("CI") who was located in the third row of the van. Since the Detectives were preparing for an undercover narcotics operation, they were dressed in plain clothes and had no protective equipment (e.g., ballistics vest). Similarly, neither Petitioner nor his fellow Detectives were wearing body worn cameras, although the Detective in a second-row seat was in the process of activating a recording device to be worn by the CI when the encounter with Decedent (Joshua Scism) began. That device produced an audio recording of the entire twenty-two (22) second encounter.

The undisputed record evidence demonstrates that the encounter with Decedent–lasting a total of twenty-two (22) seconds—was initiated by Decedent approaching the van and confronting Petitioner. Prior to Decedent confronting Petitioner, Decedent was a stranger to him (as well as the other

Detectives) and was not the target of their operation. During the first fifteen (15) seconds of the encounter, Decedent approached the van and verbally confronted the Petitioner who responded by verbally pacifying Decedent in the hope of continuing the undercover operation without Decedent's interference or compromising the identity of the CI. The five (5) second street encounter which followed the verbal confrontation was promoted by Decedent walking in front of the van and displaying and grabbing his 9MM semi-automatic handgun, which all four witnesses in the van observed. Decedent's display of his handgun and grabbing the gun's handle led the Detectives to exit the van, reveal their badges while drawing their firearms, and prompting the Detectives to run into the street creating a strategic "L" position relative to Decedent while commanding that Decedent get on the ground. After disregarding three police commands to get on the ground, Decedent extracted his semi-automatic handgun from his waistband with his right hand and began to turn towards Petitioner[1] at which point both Detectives made the split-second decisions to deploy lethal force. The last two seconds of the encounter consisted of the rapid succession of six rounds fired by Petitioner with a single round fatally striking Decedent in the back of the head.

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[1] Respondent contends that Decedent's movement of turning towards Petitioner is "disputed" on the basis that the CI testified he did not see such movement. However, whether or not Decedent turned is not necessary to resolve Petitioner's entitlement to immunity as a matter of law.

C. Proceedings Below.

Respondent commenced this action by filing a Complaint on June 7, 2018, with the United States District Court for the Northern District of New York against Petitioner and two other defendants. In response to defendants' demand that Respondent correct the false allegation that Decedent was "unarmed" at the time of the encounter (following Respondent's pre-suit sworn testimony about Decedent arming himself before confronting the SPD Detectives and the position of Decedent's 9MM handgun to the right of his body after the encounter) Plaintiff filed her October 31, 2018 Amended Complaint —omitting that false allegation—which Complaint became the operative pleading. Relevant to this appeal, Respondent's Amended Complaint alleges (under 42 U.S.C. § 1983) that Petitioner's use of lethal force during the seven-second street encounter on June 13, 2016 constituted excessive force in violation of the Fourth Amendment.

By Memorandum-Decision and Order dated September 29, 2021, the District Court granted Defendants' summary judgment motion in part (e.g., confirming the termination of all state law claims, dismissing all claims against the City and Detective Ryan Kent, and dismissing the "initial engagement claim" against Petitioner), but denied such motion as to the Fourth Amendment excessive force claim arising from Petitioner's use of lethal force. The District Court's September 29, 2021, Order rejected Petitioner's argument that he is immune from suit

under the doctrine of qualified immunity as a matter of law for his split-second decision to deploy lethal force. However, the District Court never answered or even framed the qualified immunity questions presented by the undisputed record evidence before it.

Petitioner's appeal was timely pursued before the Second Circuit on October 6, 2021 pursuant to 28 U.S.C. § 1292(b) and the collateral order doctrine. After granting Petitioner's motion for an expedited appeal, the Second Circuit heard oral argument on January 25, 2022 and issued a Summary Order affirming the "deferral" of the immunity question (to the post-verdict stage of the trial) on February 1, 2022.

The District Court has scheduled a Jury trial for August 8, 2022.

REASONS FOR GRANTING THE PETITION

The failure of the Second Circuit (and the District Court) to answer, address, or even frame the legal questions regarding Petitioner's entitlement to qualified immunity in this case is illustrative of a recent and growing trend among federal courts which frustrates the doctrine of qualified immunity and is contrary to this Court's consistent rulings defining the doctrine. Within the past six years, this Court has issued multiple opinions identifying and responding to a similar trend among federal courts that frustrates the application of qualified immunity

in law enforcement cases. *See, District of Columbia v. Wesby,* 138 S. Ct. 577, 590 (2018); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). The trend addressed in those cases was the framing of the "clearly established law" question (or prong) at a "high level of generality" which had the effect of frustrating the application of the doctrine. *Id.* This Petition seeks to have this Court to address a different trend, which similarly frustrates the application of the qualified immunity doctrine.

Specifically, failing to identify what facts are material to the qualified immunity questions and simply "deferring" the immunity question to trial based upon the existence of "some disputed facts" (irrespective of whether they are material or necessary to resolving the immunity questions) frustrates the application of the immunity question and ignores this Court's repeated formulation of the doctrine and the public policies it is designed to advance.

The record before the Second Circuit (and the District Court) in this case consisted of a robust evidentiary record, including those facts that are material to the qualified immunity questions, which were undisputed by any record evidence, and which enabled the lower courts to address and resolve the immunity question as a matter of law. Yet, both lower Courts denied Petitioner immunity without even: identifying what facts are material to the immunity questions in this excessive force case; framing the immunity questions as a matter of law; or attempting to answer the immunity questions presented.

Instead, both lower Court's "deferred" the immunity question to the trial stage reasoning that if a jury issued a verdict against Petitioner, then and only then, factual interrogatories will be presented to the Jury and the trial court would then address Petitioner's entitlement to immunity based upon the Jury's post-verdict factual findings. (App 20a) While such an approach might very well be appropriate in difficult cases where the immunity questions turn on material facts that are disputed in the record, this case is not such a case.

The record evidence in this case contains undisputed facts—including an audio recording of the encounter—reflecting the limited circumstances that Petitioner confronted during the five seconds of the seven-second street encounter during which he (and Detective Kent) decided to deploy lethal force. Based upon those undisputed facts, the record evidence leads to the conclusion that Petitioner's split-second decision to deploy lethal force did not run afoul of the Fourth Amendment and most clearly did not violate any "clearly established law" as of June 13, 2016. The undisputed audio recording reflects this sequence of events, the duration of the encounter and the split-second decision-making of Petitioner. Moreover, every witness and the undisputed physical evidence confirm the following: it was Decedent's initial display of his handgun which prompted the seven second street encounter; Decedent never complied with the Detectives' commands to get on the ground; Decedent pulled his handgun out of his

waistband with his right hand before shots were fired.

Petitioner's entitlement to immunity begins with consideration of the specific factual circumstances he encountered when he (and the other three occupants of the van) were confronted by Decedent on June 13, 2016 and attempted to control his use of the semi-automatic handgun which he undisputedly displayed and then grabbed with his right hand after the Detectives yelled multiple commands to get on the ground. As this Court has made clear, those specific circumstances must be considered—not through the lens of 20/20 hindsight or quiet contemplation of alternative means Petitioner might have used to control Decedent— but rather considered in light of his split-second judgment made in a fluid situation and the clearly established law that existed on June 13, 2016. *Plumhoff,* 572 S. Ct. pp. 774-5. Similarly, what Decedent may have subjectively intended by his initial display of his handgun and/or Decedent's subjective perceptions about the commands which he did not comply with, are not facts which are material to the Fourth Amendment immunity questions under the objective reasonableness standard *See, Nieves v. Bartlett,* 139 S. Ct. 1715, 1714-25 (2019) [holding that even the police officer's subjective state of mine is irrelevant].

There are two additional undisputed aspects of the June 13, 2016 street encounter which are unusual—both of which clarify Petitioner's entitlement to immunity. First, unlike many use of force scenarios in reported cases where police engage and/or

pursue suspects and thus possess some advance information or observations about the suspect, on June 13, 2016, it was Decedent who approached and confronted Petitioner and his fellow detectives while they were seated in a parked van. Thus, during the first fifteen seconds of the encounter, when neither force nor detention were even considerations, Petitioner possessed no advance information about Decedent and had only seconds to observe his behavior. Second, the use of force decisions by Petitioner and his fellow detective were split-second decisions made within the span of five (5) seconds while they responded to Decedent displaying his semi-automatic handgun on a public street and failing to comply with commands to get on the ground. During those five (5) seconds before force was deployed, Decedent grabbed his handgun from his waistband with his right hand. These sudden and chaotic circumstances afforded the detectives (or a reasonable police officer in their shoes) no opportunity to consider Decedent's background, violent history, or alternative means of controlling him and his handgun.

The five (5) living witnesses to the seven-second street encounter on June 13, 2016 included: Petitioner and Detective Kent, who both were in the street with Decedent and had an unobstructed view of the entire encounter; Detective Pardi, who was located in the second row of the van and had an obstructed view of the first fifteen (15) seconds of the encounter which preceded the seven (7) second street encounter which he only heard; the CI who was located in the third row of the van with an

obstructed view of the encounter; and Plaintiff who was located in the second floor apartment across the street where she could not see Petitioner or Decedent but heard the sounds of the street encounter before exiting the structure to observe Decedent lying next to his handgun.

The specific undisputed material facts regarding the situation Petitioner encountered on June 13, 2016, that enabled the Courts below to frame and answer the immunity question as a matter of law, include the following:

- Shortly after 5PM on June 13, 2016, Petitioner, who was seated in the driver's seat of a van parked on the right side of the street, was accompanied by Detective Kent (seated in the van's front passenger seat), Detective Pardi (seated in the second row of the van) and the CI (who was seated in the third row of the van).
- Because the Detectives were preparing the CI for an undercover operation, they were dressed in plain clothes, had no protective equipment (e.g., ballistics vest), and no body-worn cameras.
- Just after Detective Pardi activated a recording device to be worn by the CI, Decedent approached the driver's side window and verbally confronted Petitioner and his fellow Detectives.

- At the time Decedent confronted the Detectives they had no knowledge about Decedent's criminal history, the location of his residence or the fact that he had a loaded 9MM semi-automatic handgun tucked in the back waistband of his shorts.
- After Petitioner verbally pacified Decedent, Decedent proceeded towards the front of the van where all four occupants of the van saw him lift up his shirt displaying a semi-automatic handgun tucked into the rear waistband of his shorts and observed Decedent grab the grip of the handgun.
- Petitioner yelled a warning about Decedent's handgun followed by all three Detectives scrambling to open the doors and try to exit the van.
- Within the five (5) seconds after Petitioner yelled the warning about Decedent's gun: Petitioner exited the van, pulled his shirt back behind his holstered firearm revealing his badge and enabling him to access his firearm while running to his left into the middle of the street and ordering Decedent to get on the ground.
- Simultaneously Detective Kent exited the front Passenger door of the van, pulled his badge (on a lanyard around

his neck) out of his outer shirt and accessed his holstered firearm while running along the curb past the sedan parked in front of the van before turning left into the street behind Decedent while yelling for him to get on the ground.

- While Petitioner and his fellow Detectives were yelling commands to Decedent to get on the ground, Decedent disregarded all three commands, moved across the street towards masonry steps and bushes and then grabbed his semi-automatic handgun with his right hand pulling it out of his waistband prompting Petitioner to fire six rounds in rapid succession—within two (2) seconds—and a single round struck Decedent in the back of his head causing him to fall forward onto the sidewalk.
- As Petitioner discharged his firearm, Detective Kent, also decided to fire upon Decedent, but never fired a round because he heard Petitioner's shots.
- Decedent landed face down, slightly on his right side, with his semi-automatic handgun visibly under the right side of his body.

The testimony by Petitioner and Detective Kent and an enhanced audio recording also demonstrated that, just before shots were fired, Decedent began to

turn his body and right hand (holding his handgun) to his left towards Petitioner and declared *"You don't fucking tell me. . ."*, neither of these facts were necessary for the resolution of Petitioner's entitlement to qualified immunity as a matter of law.

The District Court initially denied Petitioner immunity, reasoning *". . .there are genuine issues of material fact regarding the reasonableness of Ferris' use of force. . ."* (App 52a) Yet, the single paragraph which the District Court devoted to discussing Petitioner's entitlement to qualified immunity regarding his use of lethal force did not identify which disputed facts, if any, were material to Petitioner's entitlement to immunity under the first prong of the doctrine. As to the "second prong", the District Court did not discuss or identify any "clearly established law" that existed as of June 13, 2016 that would have informed a reasonable police officer in the particular circumstance which Petitioner encountered that his deployment of lethal force violated the Fourth Amendment. (App 52a)

Similarly, the Second Circuit devoted a single paragraph of analysis to discussing the record evidence and referenced two facts that the Court characterized as material and disputed: (i) whether "Decedent brandished a loaded handgun" and (ii) whether Decedent "ignored police commands" (*Scism*, *4). While Plaintiff may have disputed the use of the terms "brandished" and "ignored", the record evidence undisputedly established that: (i) Decedent displayed and grabbed the grip of his handgun and

(ii) Decedent never got to the ground as the Detectives commanded.

This Court has consistently described the public policy foundations of the qualified immunity doctrine as immunity that "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. 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' " *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), quoting in part *Groh v. Ramirez*, 540 U.S. 551, 567 (2004). Those same balancing concerns underly the absolute immunity doctrines that shield prosecutors, judges and legislatures from both liability and litigation. *Bogan v. Scott-Harris,* 523 U.S. 44, 49 (1998)[confirming that the absolute immunity afforded local legislatures precluded racial discrimination claims against them]; *Burns v. Reed,* 500 U.S. 478, 492 (1991)[holding that the absolute immunity afforded prosecutors extends to presentation of evidence in support of a search warrant]*; Stump v. Sparkman,* 435 U.S. 349, 364 (1978)[noting that the absolute immunity afforded judges is even more critical when "the issue before the judge is a controversial one. . ."].

The qualified immunity rulings made in the present case effectively defer and delay answering the immunity question until the post-verdict stage. The lower courts effectively propose that if, following a

plenary trial a jury returns a verdict against Petitioner, then, and only then, will the Court present interrogatories to the jury—the answers to which would then be considered by the Court to determine whether Petitioner is entitled to immunity as a matter of law. While such a procedure might be appropriate in some cases where there exists competing evidence regarding material facts that are necessary for resolution of the qualified immunity questions; such a procedure is inappropriate in the present case where the undisputed evidence enables the Court to frame and answer the immunity questions as a matter of law. For example, if Decedent's possession of a semi-automatic handgun or his grabbing such gun with his right hand were disputed facts, pre-trial resolution of the immunity questions might be inappropriate. But there are no such disputes in this case.

Moreover, the deferral approach taken by the lower Courts in this action runs afoul of this Court's consistent and clear directives that qualified immunity should be decided at the earliest possible stage, not deferred to the trial or post-verdict stage. *Pearson v. Callahan*, 555 U.S. 223, 231-2 (2009). As this Court stated in *Pearson*: "[b]ecause 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." *Id., p. 231;* quoting in part *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This Court in *Pearson* emphasized this critical point, stating "[i]ndeed, we have made clear that the, 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." *Anderson v. Creighton*, 483 U.S. 635, 640, n. 2 . . . (1987). Accordingly, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.' " *Hunter v. Bryant,* 502 U.S. 224, 227 (1991). *Id*.

The reasoning of Justice Burger, who argued against extending only qualified (as distinguished from absolute) immunity to officials in the executive branch of government in his dissent in *Harlow v. Fitzgerald* forty years ago is noteworthy.

> In this Court we witness the new filing of as many as 100 cases a week, many utterly frivolous and even bizarre. . . .When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Those potential risks inevitably will be a factor in discouraging able men and women from entering public service.
>
> We—judges collectively—have held that the common law provides us with absolute immunity for ourselves with respect to judicial acts, however erroneous or ill-advised. See, e. g., Stump v. Sparkman, 435 U.S. 349 (1978). Are the lowest ranking of 27,000 or more judges, thousands of prosecutors, and thousands of congressional aides . . .

> entitled to greater protection than two senior aides of a President?

Harlow Fitzgerald, 457 U.S. 800, 827 (1982)(dissenting opinion)

Within the last eight years, this Court has issued several significant decisions applying the qualified immunity doctrine in law enforcement cases which decisions specifically provide clarification and instruction on how the doctrine is to be applied. *See*, *City of Tahlequah v. Bond*, 142 S. Ct. 9, *6 (2021); *City of Escondido*, *Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019); *Kisela v. Hughes*, 138 S. Ct. 1148, 1154-55 (2018); *White v. Pauly*, 137 S. Ct. 548, 551 (2017). In *White*, this Court noted the erroneous trend amongst some Courts in misapplying the "clearly established law" standard in a manner that improperly limited the important protections which the qualified immunity doctrine was designed to provide to public officials, not merely from liability judgments, but to protect them from lawsuits. *Id.* at 551.

As this Court emphasized in *Kisela* "'[S]pecificity is especially important in the Fourth Amendment context, where this Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts'. . .Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." 138 S.

Ct. 1148, 1152-53 (2018) (internal citations omitted) quoting in part *Mullenix v. Luna*, 577 US 7 (2015) *see also*, *Stephenson v. Doe*, 332 F.3d 68, 77 (2d Cir. 2003).

The current trend of deferring the immunity questions to trial even when the material facts are undisputed exemplified by the lower Court rulings in this case is even more problematic since deferring the immunity questions to the post-verdict stage of the trial because "some facts" are disputed avoids framing the immunity questions altogether. In this case, Petitioner's split-second decision to deploy lethal force in response to the deadly threat he reasonably perceived Decedent presented during an undisputedly unsecure and chaotic five-second street encounter, did not violate any clearly established law as of June 13, 2016. There simply was no controlling case as of June 13, 2016, holding that a police "officer acting under similar circumstances as [Petitioner] . . . was held to have violated the Fourth Amendment." *White,* 137 S. Ct. 552. Significantly, neither Plaintiff nor either of the lower Courts—which chose to defer Petitioner's immunity arguments—even attempted to identify a single case or controlling law that held that a reasonable police officer in Petitioner's shoes that his deployment of lethal force under the undisputed circumstance he encountered violated the Fourth Amendment.

This Court's recent qualified immunity rulings make clear that the existence of "some disputed facts" does not preclude federal courts from framing and addressing the immunity questions as a matter

of law based upon the undisputed facts that are material (as defined by the objective reasonableness standard). For example, in *City of Tahlequah v. Bond* (981 F. 3d 808) there were questions of fact regarding whether the suspect raised a hammer in his defense, how many times the suspect raised the hammer over his head and whether he posed any threat after the first officer deployed lethal force. *Id., @pp. 820-21.* In *Kisela v. Hughes* (862 F. 3d 775) there were questions of fact regarding the way the suspect raised her knife, whether the suspect made any aggressive or threatening actions, whether the suspect heard or perceived the police warnings and whether the suspect was seeking attention rather than posing any threat towards her roommate. *Id., pp. 780-81.* In the *City & Cnty. Of San Francisco v. Sheehan* (743 F. 3d 1211) there were questions of fact regarding how far the suspect was from the officers when they deployed lethal force, the reasons for her advance towards the officers and what actions the suspect took with the kitchen knife she possessed. *Id., pp. 1219-20.* Yet, despite the existence of "some disputed questions of fact", this Court utilized the objective reasonableness standard to identify which facts were material, framed the immunity questions and found in each of those cases that the police officers were entitled to immunity as a matter of law. *City of Tahlequah v. Bond,* 142 S. Ct. 9 (2021); *Kisela v. Hughes,* 138 S. Ct. 1148 (2018); *City & Cnty. Of San Francisco v. Sheehan,* 575 U.S. 600 (2015).

Moreover, it is settled law that the Fourth Amendment does not bar a police officer from protecting himself—including the use of lethal force—when confronting risks of harm—even harm that is far less significant than an armed suspect who responds to repeated commands to get to the ground by pulling his handgun from his waistband. *See Sheehan*, 575 U.S. 600, 611 n. 3 (2005) (citing *Plumhoff,* 572 U.S. 765 (2014); *see also*, *City of Tahlequah v. Bond,* 142 S. Ct. 9 *6 (2021) (involving an intoxicated subject in possession of a hammer).

Importantly, the clearly established law under the Fourth Amendment regarding the use of lethal force by police officers as of June 13, 2016 actually made clear that Petitioner's use of lethal force clearly entitled him to immunity under the second prong of the doctrine. In other words, Petitioner's entitlement to immunity under the second prong of the qualified immunity doctrine was not a "difficult question". For example, precedent as of June 13, 2016 made clear that: (a) the use of lethal force by police (e.g., firing 15 rounds at close range in the span of 5 seconds) to be reasonable under the Fourth Amendment where police shot a suicidal man who was lying on his bed in an evacuated trailer with a shotgun under his chin after the man sat up and began to lower his weapon towards the officers (*Brothers v. Akshar*, 2007 U.S. Dist. LEXIS 103474 *2-9 (N.D.N.Y. 2007) *aff'd*, 383 Fed. Appx. 47, 49 (2d Cir. 2020) (Summary Order)); and (b) a police officer's use of lethal force on an unarmed suspect whose vehicle was boxed in between two police vehicles where the officer

deploying lethal force anticipated the suspect might put his car in reverse jeopardizing another officer was reasonable under the Fourth Amendment. *Costello v. Town of Warwick*, 273 Fed. Appx. 118, 119-120 (2d Cir 2008) (Summary Order); *see also Mullenix v. Luna*, 577 U.S. 7 (2015) (granting immunity to a police officer who fired six shots at a fleeing motorist, striking the motorist four times); *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) (granting to immunity to police officers who shot an emotionally disturbed female in possession of a kitchen knife after the officers chose to re-enter the woman's apartment); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (granting immunity to multiple police officers who fired a total of 15 shots during a ten second span at a fleeing driver in order to avoid public safety); *O'Brien v. Barrows*, 556 Fed. Appx. 2 (2d Cir. 2014) (". . . it is well established that '[w]here 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' ") (quoting *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 [1985]); *Cowan ex rel. Estate of Cooper v. Breen,* 352 F.3d 756, 764 (2d Cir. 2003); *Costello v. Town of Warwick*, 273 Fed. Appx. 118 (2nd Cir. 2008).

This case provides the Court an opportunity to once again address a trend among lower courts which frustrates the application of the qualified immunity doctrine defined by this court. Moreover, at a time in this Country where police officers operate

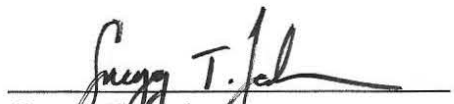
in an environment where they are subjected to heightened scrutiny and increased hostility, those officers, like Petitioner, who make split-second decisions with life-or-death consequences, deserve the qualified immunity which this court has prescribed. The risks to public safety and officer safety that would result from police officers hesitating, or waiting to see what direction a suspect points his semi-automatic handgun, are precisely the consequences the immunity doctrine is designed to prevent.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Dated: April 27, 2022

Respectfully Submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of February, two thousand twenty-two.

PRESENT: PIERRE N. LEVAL,
RAYMOND J. LOHIER, JR.,
MYRNA PÉREZ,
Circuit Judges.

No. 21-2622-cv

CHRYSTAL SCISM, INDIVIDUALLY
AND AS ADMINISTRATRIX OF
THE ESTATE OF JOSHUA SCISM,

Plaintiff-Appellee,

v.

DETECTIVE BRETT FERRIS,

Defendant-Appellant.[*]

FOR PLAINTIFF-APPELLEE:

MARIE M. DUSAULT, Finkelstein & Partners LLP, Newburgh, NY

FOR DEFENDANT-APPELLANT:

GREGG TYLER JOHNSON, Johnson & Laws, LLC, Clifton Park, NY

Appeal from an order of the United States District Court for the Northern District of New York (Thérèse Wiley Dancks, *Magistrate Judge).*

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

Detective Brett Ferris appeals from a September 29, 2021 order of the United States District Court for the Northern District of New York (Dancks,

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* The Clerk of Court is respectfully directed to amend the caption as set forth above.

M.J.) denying his motion for summary judgment on the ground that he was entitled to qualified immunity. On June 13, 2016, Ferris, a member of the Schenectady Police Department who was preparing for an undercover drug buy, shot and killed Joshua Scism, a local resident who was not involved in the buy. Joshua Scism's wife, Chrystal Scism ("Plaintiff"), brought suit against Ferris, his colleague Detective Ryan Kent (who was present at the shooting), and the City of Schenectady (together, "Defendants") under 42 U.S.C. § 1983.[1] In October 2020, Defendants moved for summary judgment. The District Court granted Defendants' motion with respect to Plaintiff's *Monell*-based claim against the City of Schenectady, as well as the claim against Kent, whom the court found was entitled to qualified immunity, but it denied the motion with respect to Plaintiff's excessive force claim against Ferris. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

Plaintiff argues that we lack jurisdiction to hear this appeal because Ferris's "brief on appeal is replete with his own versions of the events and his

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[1] Plaintiff also initially brought claims against the "Schenectady Police Department," *see* App'x 488, but the parties subsequently stipulated that all claims against the department would be discontinued, as it was "not a legal entity distinct from the City of Schenectady," *see* D. Ct. Dkt. No. 41. In addition, the complaint initially included various state law claims, but these were also later dismissed pursuant to a stipulation by the parties, *see* D. Ct. Dkt. No. 19.

interpretations of the evidence." Pl.'s Br. at 4 (quotation marks omitted). We have held that "[a] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is deemed an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Lynch v. Ackley,* 811 F.3d 569, 576 (2d Cir. 2016) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985)). "[A]s long as the defendant can support an immunity defense on stipulated facts, facts accepted for purposes of the appeal, or the plaintiff's version of the facts that the district judge deemed available for jury resolution, an interlocutory appeal is available to assert that an immunity defense is established as a matter of law." *Id.* (quotation marks omitted). We thus have jurisdiction over the appeal so long as we base our analysis not on any disputed facts that may appear in Ferris's brief "but on an independent review of the record, including the district court's explanation of facts in dispute." *Lennox v.* Miller, 968 F.3d 150, 154 n.2 (2d Cir. 2020).

We therefore turn to the District Court's denial of Ferris's summary judgment motion based on a defense of qualified immunity, which we review *de novo.* See *Jones v. Parmley,* 465 F.3d 46, 55 (2d Cir. 2006). To determine whether a public official is entitled to qualified immunity, which shields federal and state officials from money damages, "[t]he dispositive inquiry 'is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Vasquez v. Maloney,* 990 F.3d 232, 237–38 (2d Cir. 2021)

(quoting *Hernandez v. Mesa,* 137 S. Ct. 2003, 2007 (2017)). "Defendants moving for summary judgment on the basis of qualified immunity bear the burden of demonstrating that no rational jury could conclude (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." *Vasquez,* 990 F.3d at 238 (quotation marks omitted); *see also id.* (explaining when a right is clearly established).

Ferris argues that the undisputed facts make clear that he reasonably believed that his life was in danger when he shot Scism and that his actions were therefore objectively reasonable. See *Cowan ex rel. Est. of Cooper v. Breen,* 352 F.3d at 756, 762 (2d Cir. 2003). The record, however, is filled with disputes as to material facts. And Ferris's brief does at times "treat[ ] disputed facts . . . as undisputed," *Lennox,* 968 F.3d at 154 n.2—such as when he asserts that Scism "brandished a loaded handgun" and "ignored police commands," Def.'s Br. at 29, 41, facts that Plaintiff's evidence disputes. Given these factual disputes, we are unable to reach a conclusion based on "stipulated facts, facts accepted for purposes of the appeal, or the plaintiff's version of the facts that the district judge deemed available for jury resolution," *Lynch,* 811 F.3d at 576 (quotation marks omitted), whether "it would be clear to a reasonable officer [in Ferris's shoes] that his conduct was unlawful in the situation he confronted," *Vasquez,* 990 F.3d at 238 (quotation marks omitted). We conclude that, given the version of the full encounter advanced by Plaintiff's

witnesses, Ferris cannot at this stage meet "the burden of showing that [his decision to use lethal force] was objectively reasonable in light of the law existing at that time." *Id*. at 238 n.5 (quotation marks omitted).

We therefore agree with the District Court that summary judgment must be denied. Although the question of qualified immunity cannot be resolved at this stage, Ferris will have the opportunity to pursue this argument as the case proceeds to trial. We note that although the jury must resolve the factual disputes concerning both excessive force and qualified immunity, "the qualified immunity issue is a question of law better left for the court to decide." *Cowan,* 352 F.3d at 764 (quotation marks omitted). If the jury finds that Ferris used excessive force against Scism, "the court should then decide whether [Ferris] is entitled to qualified immunity," aided by interrogatories that present the key factual disputes to the jury. *Id*.

We have considered Ferris's remaining arguments and conclude that they are without merit. For the foregoing reasons, the order of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

[SEAL]

/s/ CATHERINE O'HAGAN WOLFE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

21-2622-cv

CHRYSTAL SCISM, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOSHUA SCISM,

Plaintiff

v

DETECTIVE BRETT FERRIS,

Defendant

DATE: January 25, 2022

TIMES REQUESTED TO BE TRANSCRIBED:

10:06 a.m. - 10:22 a.m.
10:40 a.m. - 10:55 a.m.

DIGITALLY RECORDED PROCEEDING
TRANSCRIBED BY: Terri Bain
ASSOCIATED REPORTERS INT'L., INC.
10 River Drive
Massena, NY 13662

(On the record 10:06 a.m.)

THE COURT DEPUTY: . . . and we'll hear argument next in Scism v Ferris, 21-2622.

MR. JOHNSON: Good morning, may it please the Court. Gregg Johnson I represent Brett Ferris from

the Law Firm of Johnson and Laws. I'd first like to start by thanking the Court for expediting this appeal. Currently Brett Ferris is facing a—a jury trial date of May 31st. Officer Ferris brought this appeal after twenty-two months of discovery by a motion for summary judgment on a robust evidentiary record and sought to have the qualified-immunity issue addressed as a matter of law and has pursued this appeal to—to do exactly that.

Before I raise my issues about the—the errors and the omissions by the lower court, I just want to point out a—a couple of issues relative to this case that make it somewhat unique in terms of the excessive-force cases that are in reported case law. This—this incident and this excess—this use-of-force decision was undisputedly—undisputedly made within a five-second interval at about five p.m. on June 13th, 2016.

As the audio recording reflects, and there's no dispute about the authenticity of that audio recording, the entire encounter, street encounter, took place over the course of twenty-two seconds. The first fifteen of those seconds involved a verbal exchange prompted by the decedent, and there was absolutely no use-of-force or even threatened use-of-force during that fifteen seconds. In fact, the record makes very clear that the officers were hoping that decedent would just move-on so they could continue with their undercover operation.

The last two seconds of this twenty-two second encounter involved the deployment of lethal force by Ferris. So the use-of-force decision here is made within the span of five seconds which is an impor-

tant starting place for—for the Fourth Amendment analysis in the qualified-immunity question.

And one other feature about this case that makes it somewhat unique from other cases is that this encounter wasn't prompted by the police. The police weren't—had no plan concerning decedent. They were not pursuing decedent. In fact, the entire encounter was prompted by plaintiff approaching and confronting them.

So as a matter of law, the district court erred, first of all—.

JUDGE PEREZ: May I ask what prompted the plaint—what prompted the officers to get out of the car when he was walking away?

MR. JOHNSON: Sure. As—as reflected by all of the witness testimony, as the decedent was located near the driver's side of the van, he then—and—and the verbal encounter ended, and he walked in front of the van, okay, not across the street, walked in front of the van, lifted up his shirt and displayed or brandished, whatever word you want to use, his nine millimeter semiautomatic gun that was tucked in his waistband. And—.

JUDGE PEREZ: So are you asking us to—to conclude that the possession of a firearm is a per se probable cause of a threat? Is that what we have to decide here?

MR. JOHNSON: No, Judge. At that point lethal force was not warranted at that moment in time when he initial—initially brandishes his gun. I am

not contending that lethal force was warranted and, in fact, it wasn't used.

The—the audio and the facts reflect that there was that next five-second interval. What that brandishing did was it initiated an engagement where both officers scrambled to get out of the car and gave verbal commands.

And then, of course, we have the behavior of the decedent which involved two important and undisputed facts that are material to the Fourth Amendment analysis and the qualified-immunity analysis.

Number one, he disregarded those commands. And, number two, he removed the—the handgun from his waistband and had it in his right hand.

JUDGE PEREZ: Well, that's disputed though, right? Isn't the—didn't the C.I. say that he had his hand on it but there's a debate about whether or not he was tucking it in versus pulling it out?

MR. JOHNSON: No, Judge, it's—it's a fact that's ignored by the district court, and it's denied by the—.

JUDGE PEREZ: But that means it's disputed though right?

MR. JOHNSON: Well, no, it's—.

JUDGE PEREZ: So are you asking us to find that it's not material?

MR. JOHNSON: No, absolutely not, Judge. What I'm—what I'm asking is that—that you—we look at the record and that that fact is absolutely undis-

puted. First of all there's no evidence from any witness or any material evidence that the gun remained in his waistband. And I refer you to the following portions of the record which clearly—clearly establish that—that the—the handgun went from his waistband to his right hand in those five seconds. And when he was shot it dropped from his right hand and the handgun ended up not at his waistband but on his right-hand side next to his body.

And I refer the Court specifically to A 799. That's a statement given by the C.I. That's the primary witness that the plaintiff relies on. The plaintiff didn't offer any of her own testimony in opposition to summary judgment but she relied on the C.I. And in that he very specifically says, the guy started to run and stopped trying to tuck it in. And the gun was on his right—on his side, excuse me, on his side in his right hand. And then we go four years later—.

JUDGE PEREZ: Not trying to tuck it in?

MR. JOHNSON: Right.

JUDGE PEREZ: That's not—?

MR. JOHNSON: That he has it on his—on his side in his right hand. That's—that's the explicit testimony given by the C.I. two hours after the incident. The record reflects that the plaintiff deposed the C.I. four years later in 2020. And he repeatedly—repeatedly he confirmed that. In fact, if—if we look at pages 837 to 852 in response to plaintiff's ques-

tions he confirmed that he had the gun in his right hand.

If we look at A seven—873 in response to my questions, between 872 and 874 in his deposition, he confirmed three times that—that decedent had the gun in his right hand and specifically said on page 873, line 3, he dropped it after he got hit. In addition to that, during his 2020 sworn testimony, the plaintiff's deposition of the C.I. he confirmed four times and that's at record cite A 64, eight—864 and 867 that his June 13, 2016 sworn statement was truthful. That he understood it was made under oath, and that his recollection of the events was better on that date. So the lower court basically didn't even address decedent's behavior during that five-minute window. It had—.

JUDGE LEVAL: And that points you to A 835 of the appendix with the C.I. as I understand it? Question: At any time before Detective Ferris fired his gun at Mr. Scism—it's—am I pronouncing that correctly? I want to make sure I am.

MR. JOHNSON: I think it is Scism, Judge, yeah.

JUDGE LEVAL: Did you see Mr. Scism point a gun at Detective Ferris?

Answer, no.

Question, at any time before Detective Ferris shot Mr. Scism did you ever see Mr. Scism turn towards Detective Ferris with a gun in hand?

Answer, he had—when he—when he—after he walked away from the gun he had in his back.

Question, okay. Well, my question is did you ever see him turn around and face Detective Ferris with gun in hand?

Answer, no.

Why isn't that at 835, understanding what you said about other things that the C.I. has said, why isn't that something upon which the plaintiff can rely to show a genuine dispute of fact at the critical time that I agree with you that that's the critical time?

MR. JOHNSON: Yes. Well, Judge, I—I guess I would say two things about that. First—first of all, most importantly that we could—even if that is disputed fact, if you—if you stop the analysis at the point in time when he clears his gun out of his waistband, during that five-second interval, at that point in time, irrespective of his body movements in the—in the last instant, as a matter of law he clearly—a reasonable officer in Ferris's position would have considered that to be a—a significant threat to his—to his life and safety.

JUDGE LEVAL: Well, if—if—it's so—so—I—this is such a tragic case.

MR. JOHNSON: Absolutely.

JUDGE LEVAL: You understand? And I appreciate what you're saying, but it is one thing for a police officer to shoot someone who's turning around. And another thing this—this, it seems to me, may be the dispute. Another thing entirely to shoot someone as that person is walking away and is not

turned around even with a gun in the back. And I hope you understand that.

And that, it seems to me at least, there's a dispute about that. And, you know, ultimately it—the dispute may be resolved in a way that and yours to—to your client, to Mr. Ferris—to Officer Ferris. But right now, unless I have misread A 835 there seems to be a factual dispute.

MR. JOHNSON: No, Judge. I don't—I don't think you have. And I acknowledge, I'm well aware that when the C.I. was deposed in 2020 he was asked a series of questions if—if he had seen Scism turn in the very last moment. Absolutely. And the—and the C.I. said he didn't see that.

So setting aside the issue of whether or not that's a dispute about his movements, because he was never asked a question what were Scism's movements at the last instant because the—the C.I. was looking at various things.

But setting that aside, even if we stop the—stop the facts at the point when he's in this five-second interval a—a suspect is disregarding three commands. And—and undisputedly pulls his weapon from his waistband and has it in his right hand, he most certainly presents the kind of threat that justifies use-of-lethal-force under the Fourth Amendment. And I very—I see my time is out. But let me just briefly—can I finish that thought?

JUDGE LEVAL: Of course. Of course.

MR. JOHNSON: Would be that—that we're here talking about a semiautomatic handgun which, of

course, is—is capable of within a matter of a second or two, discharging multiple rounds. It's not a rifle. It doesn't require two hands. It requires one hand.

He's—.

JUDGE PEREZ: That's why I asked if you're asking us to find that the possession of a firearm is a per se reasonable threat.

MR. JOHNSON: I'm not—I'm not suggesting that mere possession, Judge, was sufficient to justify the lethal force. I am saying that disregarding commands to get to the ground and then drawing that handgun out of your waistband is absolutely, under the Fourth Amendment, justification under those circumstances.

JUDGE PEREZ: Is there, I'm sorry, is there any dispute that they didn't announce themselves as police officers?

MR. JOHNSON: They didn't use the word police. There's—the—the audio reflects that even though most of the witnesses who recounted it actually understood it to be police commands. You're correct, Judge. The audio does not reflect—.

JUDGE PEREZ: And what is the legal significance of that? About whether or not it was reasonable for him to not comply when the police didn't identify themselves?

MR. JOHNSON: Well, for the—for the question that's before this court, I don't—I don't think it has relevance because we're asking if we're—we're dealing with a situation of whether or not Ferris

was justified in responding to what he saw in the street by use-of-lethal-force. But if—to back up, I certainly understand that in—when it's feasible, when it's feasible before lethal force is used, it's clear that a police warning would be appropriate. Clearly, if you listen to the audio—.

JUDGE LOHIER: Not just appropriate. Not just appropriate but the—a police warning could have averted the entire thing.

MR. JOHNSON: There—there's a lot of what-ifs, Judge. Absolutely. I'm—I'm not—I'm not minimizing the fact that—that when it's feasible a—a warning, a police warning is to be used before—before lethal force is deployed. What I'm saying is that the—.

JUDGE PEREZ: Did one of the officers—did one of the officers say that they thought that there was time to announce themselves? Am I recalling that correctly from the record?

MR. JOHNSON: In—in the record I think both—all three officers on the scene, Judge, were asked hypothetical questions as to whether or not they could say, announce police in a five-second interval. Sure, yes.

JUDGE LOHIER: What did they say? Didn't they say that they—that they—that they somehow showed their—showed their badges which is kind of odd because it would be a—an ineffectual way to—to reveal yourself to be police to a man who's running away from you. But didn't they say that they—that they tried to show their—that they lift-

ed their—lifted their—their, whatever it was, shirt to show the badge on the—on the shirt that was under the exterior garment?

MR. JOHNSON: Yes. There's a distinction between two officers, Judge. Yes. Officer Kent did not deploy force, didn't have an opportunity to but made the same decision. He had his badge on a lanyard and as he got out of the car he pulled that out. There's no dispute about that. But more importantly as to Ferris, Judge, you—you make a very good point. His handgun was located behind his badge on his hip. So in order for him to actually reach back and get his handgun, he displays his badge. And there's—there's photographic evidence and testimony, evidence of that fact as well.

JUDGE LOHIER: Is there—my understanding is that there's some—I don't want to—I'm not describing what I think is true. I'm just describing as you know, Mr. Johnson, what the potentially conflicting evidence is. But seems that Mr. Scism is moving away at that point. And the question would be was he in a position as he's retreating assuming that that's the version of events as—as we'll hear from the other side I'm sure? As he's retreating, can he see—he doesn't hear the word police. Can he see these badges? And that's yet another wrinkle in this tragic case. But can you shed any light on that?

MR. JOHNSON: Well, you're right, Judge. I can't—I don't think anyone can answer the question as to whether he saw that. I can tell you that in the

record the—the enhanced version of the audio reflects him actually saying at the last second, you don't F-ing tell me, which would indicate—would indicate that, you know, he was looking back. But I, you know, I understand that's a—that's a—that's not a—a fact that's undisputed.

JUDGE LOHIER: Right.

MR. JOHNSON: Clearly I think people said—some people say they listened to that audio they can't hear it. So I—I don't think this record definitively can answer the question as to what Scism's motives were or his thought process, where he was headed or what his objectives were.

But as to the retreat issue, and I know I'm well over my time, I just would cite to the following cases by the Supreme Court. Mullinex versus Luna, Plumhoff versus Rickard, Scott versus Harris and Russo versus Haught [phonetic spelling]. In each one of those cases officers were granted immunity and in situations where there was an unarmed suspect retreating away from the officer who deployed force.

So I submit to you as a matter of law the lower court erred in concluding that because—because the direction of movement by Scism was not directed at the—at the officer he didn't—he didn't present a significant threat of death or physical injury. And with that I'll—I'll hope to speak to you on rebuttal.

JUDGE LOHIER: Thank you. Thank you very much.

MR. JOHNSON: Thank you.

JUDGE LOHIER: Well past your time just a little bit. That was based on our questioning. We'll hear from your—your friend on the other side, Ms. DuSault.

(Transcription excerpt concluded at 00:16:10 minutes)

(Transcription excerpt resumed at 00:33:56 minutes)

JUDGE LEVAL: Was the—was the—his—his house on the driver's side of the vehicle?

MS. DUSAULT: No, it was on the other side. It was—oh, I'm sorry, yes,it was on the driver's side. The driver's side was in—.

JUDGE LEVAL: It was on—it was on the driver's side?

MS. DUSAULT: Yes. I apologize, yes.

JUDGE LEVAL: So he's running away from that door?

MS. DUSAULT: Right. He was running—he was walking away going towards the front of the vehicle, going—and it was like, you know, veering to the left. Because they described him walking to the middle and then going towards the left. That's what they saw as he was walking away. And then he just proceeded to run in the direction that he was walking when they came out with their guns drawn.

JUDGE LOHIER: So it was the driver's side and ahead?

MS. DUSAULT: Yes.

JUDGE LEVAL: Okay. Thank you very much. We'll hear from Mr. Johnson on rebuttal. Mr. Johnson you've got two minutes of rebuttal. You're on mute.

MR. JOHNSON: I guess I didn't click hard enough. Thank you.

I—I guess two things in response to plaintiff's counsel's argument. Number one, it appears that now the theme is a provocation argument which, of course, has been rejected by the U.S. Supreme Court trying to criticize the police work leading up to the incident.

And—and secondly, her—the plaintiff's analysis is replete with looking at subjective facts and not applying the objective reasonableness from the perspective of a reasonable police officer in Ferris's shoes. And I just want to bring us back to the—the relevant time period because—.

JUDGE LEVAL: Okay. Let me—let me just be—

MR. JOHNSON: Sure.

JUDGE LEVAL:—I think fair a little bit to—to both sides. As I understand the argument or the—really the factual arguments, for lack of a better term, the version of events that Ms. DuSault wants us to embrace or to look at is the following. That Mr. Scism leaves, starts walking away from the driver's side of that car. The police officer, Mr.—Officer Ferris takes out his gun while he is in the car and opens—and gets out of the car, starts to move towards Mr. Scism. Mr. Scism has a gun in the back of, you know, his I guess pants or whatever,

his waist. But he starts to run. And eventually what happens is that he is shot in the back of the head and never really is in a position to turn around at the critical moment when he's shot. Never turns around and—and is killed. That's the version of events that I just—I believe that we all—all heard. So would you address that?

MR. JOHNSON: Certainly, Judge. The—the—the—there—well, let's start with the clearly established law question that—that one of the justices raised. Looking at those particularized facts, even as you lay them out, there—there are—there is no clearly established laws of June 13, 2016 that would have informed an officer who's in the middle of the street with no cover, with no ballistic protection, who observes a suspect be noncompliant and grab his semiautomatic handgun with his right hand.

That—those facts alone, right there, Judge, as a—as a matter of law entitle my client to qualified immunity. And I just want to add a couple of quick thoughts because I know I'm beyond my time. There is—the record evidence is—it's very clear that none of the officers, most importantly Ferris, had any idea where Scism had come from or where Scism resided.

So the notion that he's running over towards bushes and an area where there's a stone wall is somehow to a reasonable officer, in Ferris's shoes, would have meant that he was surrendering or retreating and not being aggressive is simply not—is simply not supported by the record or the law.

And when you compare his movements—let's assume for the sake of discussion, accepting plaintiff's argument that he was moving away and not turning towards the officer, when he has a semiautomatic handgun that—that could be deployed without turning and squaring off at your target. And when you compare that to the retreat cases, that I spoke about earlier that are in my brief, in—and you compare the immediacy of the danger, that is, someone firing a semiautomatic handgun from approximately thirty feet away as opposed to a erratic driver unarmed driving out on the roadway and—and presenting a risk to the public.

And you—when you consider the specificity of this danger, you've got at least one citizen in the back of the van. You've got three police officers, two of them in the middle of the street without protection, the—the nature of the danger that Scism presented in grabbing his gun at that moment is far, far more grave than the kind of dangers that face police officers in those three cases decided by the U.S. Supreme Court where the officer deployed lethal force from behind a retreating motorist.

JUDGE PEREZ: And so if I could just maybe—maybe put a finesse then to a question that I've asked now twice. You have stated very clearly that you're not asking us to find that per se possession of a gun presents a reasonable threat. Are you asking us to find that per se placement of a hand on a gun provides the kind of reasonable fear of threat?

MR. JOHNSON: Judge, I'm going to try and answer your question. Judge, you—you phrased it as a per

se rule so I don't—I don't know. I don't know. I guess I'd have to research that issue. But I can say this. That—that it's very clearly not in violation of clearly- established law that when a suspect in possession of a semiautomatic handgun disregards commands to get to the ground and then grabs his handgun with his hand that that gives rise to the exact kind of threat that justifies the use-of-lethal force under the precedents of this court and the U.S. Supreme Court.

JUDGE LOHIER: A couple of questions I have. One, is if I understand correctly none of your argument depends on any contention that Scism was in violation of any law does it? Respect to the possession of the gun.

MR. JOHNSON: Not—I mean, not—not necessarily other than the fact that he's brandishing—yeah, brandishing of a gun certainly, you know, prompted the police officers to get out and get him to the ground so they could control that gun. So, no, I—.

JUDGE LOHIER: Possession of the gun was not illegal.

MR. JOHNSON: In and of itself, possession—someone can lawfully possess a handgun, sure.

JUDGE LOHIER: All right. So next question is what happens here if—if we affirm the district court? What happens thereafter? They go to a trial and is it a jury question? Does the—does the question of qualified immunity persist to be answered in some form or other under quite-detailed instructions by the jury? He still gets to argue not on summary

judgment but in the trial context qualified immunity, does he not?

MR. JOHNSON: Yes, Judge. As a matter of law I think based on what the trial judge's outline of the trial process will be for this—in this case and this qualified-immunity issue, if there is a verdict, as I understand her at our—our conference, if there is a verdict in favor of the plaintiff, she will then submit interrogatories to the jury to have them ascertain—answer certain questions of fact.

And then she as a matter of law will reconsider the immunity question. So—so but obviously the reason we're here and the reason this court exercises jurisdiction is the Supreme Court and this Court most recently in (unintelligible) made very clear that having to stand trial, of course, when the immunity question can be answered as a matter of law, frustrates the qualified-immunity doctrine. And that's why—that's why we are here on appeal. And I thank you for your indulgence.

JUDGE LOHIER: Do you want to stop litigation now? I—we understand that?

MR. JOHNSON: Absolutely, Judge. Thank you. I see I'm way over my time.

JUDGE LOHIER: What is your—what is your best case for the proposition that a—that someone who's fleeing and who has his hand on a gun represents such a threat of deadly force to the police officer that it justifies the use of deadly force by the police officer? What's your best authority for that proposition?

MR. JOHNSON: Well, I—I guess I would say two things. Legally speaking, compare it to the decision recently by the Supreme Court in Casella [phonetic spelling]. You had a—a suspect who was acting erratically. Suspected of no—no crime. Had a kitchen knife in their hand, was on the other side of a chain link fence from the officer who fired lethal force, and the—the officer's rationale was that they were moving towards another—a roommate who the roommate had testified they didn't consider that a threat. That they thought that the person was acting out. So legally speaking that would be my answer. But—but factually in this case—.

JUDGE LOHIER: But that was not a deadly threat to the police. That was a deadly—that was the officer's justification was a deadly threat to some other person.

MR. JOHNSON: Right. That that person didn't perceive.

JUDGE LOHIER: Yeah.

MR. JOHNSON: And then the—what factually—.

JUDGE LOHIER: What's your best case for—what's your best case as to why these facts represented a—a deadly threat, a threat of deadly force to the—against the police notwithstanding that he was running away from the—the police?

MR. JOHNSON: Even—even assuming he—.

JUDGE LOHIER: Running away with his hand on a gun.

MR. JOHNSON: Right. Judge, even a—even assuming he's moving away from the police at the time he grabs his gun it's a—and I would point the Court to the last two seconds of the audio recording in this very case that shows unequivocally that a semiautomatic nine millimeter in less than two seconds can fire six rounds.

So you're talking about the lethality of the threat posed by Mr. Scism in pulling his hand gun? I think the record evidence in this case directly shows how lethal and dangerous that situation was. And—.

JUDGE LOHIER: Yeah, well, that's a good answer but it's not the answer to the question I asked. The question I asked was the for your best case.

MR. JOHNSON: Oh, my—my best legal case I guess would be compare this case to—to the Casella case. I think—.

JUDGE LOHIER: No, no. But I—I said the Casella case is a case where the threat was to a third person. I'm talking about a threat to the—to the police officer. Your best case as to why—as to the proposition that a suspect who was fleeing with a gun, let's say, with his hand on it or in his possession represents a deadly threat to the police officers justifying the police officer to use deadly force.

MR. JOHNSON: Judge, I don't—I don't have a case with those particularized facts. I—I don't. I've—I certainly have searched, and I think that's the reason why on the second prong Detective Ferris is entitled to immunity.

JUDGE LOHIER: Right. Okay. Seeing no other questions from my colleagues. Thank you.

MR. JOHNSON: Thank you.

JUDGE LOHIER: It's submitted. We'll reserve decision. That concludes today's argument calendar and I'll ask the deputy to adjourn court.

(Transcription excerpt concluded at 00:45:30 minutes)

(The proceeding concluded.)

CERTIFICATION

I, Terri Bain, certify that the foregoing transcript excerpt of the proceedings in the State of New York, Court of Appeals, Scism v Ferris, Case #21-2622-cv, was prepared using digital transcription equipment and is a true and accurate record of the proceedings to the best of our skill and ability using an audio provided by the Law Firm of Johnson & Laws, LLC.

/s/ TERRI BAIN / DATED: 4/22/2022
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:18-CV-672 (TWD)

CHRYSTAL SCISM, *individually and as administratrix of the Estate of Joshua Scism,*

Plaintiff,

v.

CITY OF SCHENECTADY, DETECTIVE BRETT FERRIS, DETECTIVE RYAN KENT,

Defendants.

APPEARANCES:	OF COUNSEL:
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Thérèse Wiley Dancks, United States Magistrate Judge

MEMORANDUM DECISION AND ORDER

On June 13, 2016, Joshua Scism ("Scism") was shot and killed during an interaction with Schenectady Police Department ("SPD") detectives Brett Ferris ("Ferris") and Ryan Kent ("Kent"). Scism's surviving spouse, Chrystal Scism ("Plaintiff"), brought this action against Ferris, Kent, and the City of Schenectady ("City") (collectively, "Defendants") alleging that each officer's conduct violated the United States Constitution.[1] Currently before the Court is Defendants' motion for summary judgment. (Dkt. No. 95.) As part of her response to Defendants' motion, Plaintiff moved to strike certain portions of Defendants' statement of material facts. (Dkt. No. 102.) Thereafter, Defendants moved to strike portions of Plaintiff's attorney affidavit and to preclude testimony from Plaintiff's

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[1] As Defendants point out, Plaintiff stipulated to the dismissal of all her pleaded state law claims—including her wrongful death claim. (Dkt. No. 19.) Therefore, the only remaining claims in this action are her 42 U.S.C. § 1983 claims against Kent, Ferris, and the City.

proposed expert. (Dkt. No. 118.) Finally, the parties have moved for a Court order to seal certain documents. (Dkt. Nos. 91, 107.)

After carefully considering the record, the Court: (1) grants Defendants' motion for summary judgment (Dkt. No. 95) with respect to Plaintiff's claim against the City and against Kent on qualified immunity grounds and denies the motion *(id.)* with respect to Plaintiff's claim against Ferris; (2) denies Plaintiff's motion to strike (Dkt. No. 102) as moot; (3) denies Defendants' motion to strike (Dkt. No. 118) as moot; (4) denies Defendants' motion to seal (Dkt. No. 91) with respect to the audio/visual files but grants it with respect to personal information related to the confidential informant; and (5) denies Plaintiff's motion to seal (Dkt. No. 107) except as it relates to personal information of the police officers or the confidential informant.

I. BACKGROUND[2]

On June 13, 2016, at approximately 5:14 p.m., Scism approached a van parked in front of his residence. (Dkt. No. 95-35 at ¶ 36.) In that van, Ferris sat in the driver seat, Kent in the front passenger seat, Detective Pardi ("Pardi") sat in the middle seat, and a confidential informant ("CI") sat in the rear. (Dkt. No. 95-27 at ¶ 15.) The individuals in

[2] The facts are drawn from Defendants' statement of material facts, (Dkt. No. 95-35), Plaintiff's responses thereto (Dkt. No. 102-23), and the attached affidavits, declarations, exhibits, and depositions. The facts are taken in the light most favorable to Plaintiff.

the van were parked in that location to prepare the CI for an undercover drug buy. *Id.* Scism approached the driver side window and said something to the effect that he did not want the occupants in the van to sell drugs on this street because there were kids around. (Dkt. No. 102-23 at ¶37, (Plaintiff's response to Defendants' statement of material facts describing what the audio recorded).) Ferris responded to Scism and said, "alright bro, alright." *Id.* at ¶38. After this interaction, Scism started to walk away from the van in the direction of the opposite side of the street. (Dkt. No. 95-35 at ¶39.)

As he was walking away, Ferris noticed a handgun tucked in Scism's back waistband. *Id.* Ferris stated "He's got a heater," in reference to Scism's gun. *Id.* at ¶41. Ferris and Kent then exited the vehicle. *Id.* at ¶42. Kent testified that he pulled his badge from under his shirt, unholstered his gun, and started moving around the front of the van near the car in front. (Dkt. No. 95-32 at ¶21.) Ferris testified that he lifted up his shirt to expose his badge and remove his gun from its holster and as soon as he left the car he "drew [his] firearm" on Scism. (Dkt. No. 95-27 at ¶23.) In an audio/video recording of the incident, each officer individually yelled to Scism to "get on the [fucking] ground." (Dkt. No. 95-2 (the audio/visual recording of the interaction, currently filed under seal).) Within seconds, the audio recorded the sound of Ferris firing six shots at Scism, one of which hit him in the back of his head and caused his death. *Id.*

The above stated facts are undisputed with video/audio evidence or uncontradicted deposition testimony. However, there is contradictory evidence regarding Scism's final acts. To that end, Kent testified that he saw Scism start to make a move towards Ferris with his gun in his hand. (Dkt. No. 95-32 at ¶25.) Ferris, likewise, testified that he saw Scism stop running, grab his handgun with his right hand, pull it out of his waistband, and begin to turn towards him. (Dkt. No. 95-27 at ¶27.)[3] The CI, on the other hand, testified that he did not see Scism turn or make any movement towards Ferris or Kent before he was shot. (Dkt. No. 102-7 at 11-14, 47, (the CI Deposition transcript, currently filed under seal).) Furthermore, the medical evidence demonstrates Scism was struck in the back of his head and the medical examiner testified that it would be "extremely unlikely" that it would have hit the back of his head if he had been facing Ferris shortly before he was shot. (Dkt. No. 102-14 (deposition excerpt from Zhongxue Hua, M.D., Ph.D.); Dkt. No. 95-13 (the autopsy report noting the entrance site is "along the right posterior parietal scalp").)

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[3] For his part, Pardi explained in a declaration that he was in the process of exiting the van when the shooting took place and did not see Scism or Ferris the moments before the shooting. (Dkt. No. 95-31.)

II. DISCUSSION

A. Motions to Seal

Both parties have filed motions to seal certain exhibits attached to their respective filings. (Dkt. Nos. 91, 107.) To that end, Defendants seek to seal three audio/visual files (the "AV files")[4] from June 13, 2016, that recorded the interaction between Kent, Ferris, Pardi, the CI, and Scism. (Dkt. No. 91.) Defendants also seek to seal an Affidavit from the CI and certain excerpts from the CI's deposition. *Id.* For her part, Plaintiff seeks to seal the entire deposition transcripts of the CI, Ferris, Kent, Pardi, Assistant Police Chief Seber, Sergeant Detective Savoia, and Lieutenant Sanders, along with Supporting Deposition Statements from Kent, Ferris, and Detective Savoia, each post-incident investigation statement from June 13, 2016, and SPD training records. (Dkt. No. 107.) For the reasons stated below, with some limited exceptions, both parties' motions are denied.

There is a general presumption in favor of public access to judicial documents. *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 119 (2d Cir. 2006). In *Lugosch,* the Second Circuit described a three-step inquiry to be used by district courts prior to permitting judicial documents to be withheld from public view. The first step is to determine whether the document in question is, in fact, a judicial doc-

[4] The three files include a full-unedited copy of the audio/visual recording, an enhanced version, and a copy with reduced speed.

ument. *Id.* "[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access. . . . In order to be designated a judicial document, the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *Id.* (citations and internal quotation marks omitted). However, "documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches." *Id.* at 121.

After the Court has determined the document in question is a "judicial document," the second step involves considering "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* at 119 (citations and internal quotation marks omitted). Finally, the Court must "balance competing considerations," such as the impairment of law enforcement methods or information and the privacy interests of litigants. *Id.* at 120. The party seeking to file a document under seal bears the burden of demonstrating that sealing is warranted. *DiRussa v. Dean Witter Reynolds, Inc.,* 121 F.3d 818, 826 (2d Cir. 1997).

As noted above, Plaintiff and Defendants seek a sealing order as to four main categories of docu-

ments: (1) deposition transcripts and statements of SPD police officers (Plaintiff's Exhibits 4-9, 11-14; Dkt. Nos. 102-8 through 102-13, 102-15 through 102-18); (2) the deposition transcript and statement from the CI (Defendants' Exhibit D; Dkt. No. 95-7; Plaintiff's Exhibit 3; Dkt. No. 102-7); (3) AV files related to the incident (Defendants' Exhibits A-1 through A-3; Dkt. Nos. 95-2 through 95-4); and (4) SPD training records (Plaintiff's Exhibit 16; Dkt. No. 102-20). The Court will consider each in turn.

With respect to the deposition transcripts and statements of SPD officers, Plaintiff argues the documents were produced pursuant to a Protective Order agreed to by the parties and should therefore remain confidential. (Dkt. No. 107.) However, "that a document was produced in discovery pursuant to a protective order has no bearing on the presumption of access that attaches when it becomes a judicial document." *Collado v. City of New York,* 193 F. Supp. 3d 286, 289–90 (S.D.N.Y. 2016) (citing *Raffaele v. City of New York,* No. 13–CV–4607, 2014 WL 2573464, at *2 (E.D.N.Y. June 9, 2014)). Plainly, under the standards set forth above, those documents are judicial documents subject to a strong presumption of public access. The documents comprise a significant portion of the factual record before the Court and they pertain to matters that "directly affect" the Court's adjudication of Defendants' motion for summary judgment. Indeed, it would be difficult for a member of the public to get a full picture of the Court's reasoning without access to those documents. Therefore, the Court

denies Plaintiff's motion to seal to the extent that it seeks to file Plaintiff's Exhibits 4-9, 11-14; Dkt. Nos. 102-8 through 102-13, 102-15 through 102-18, under seal. The Court will, however, permit Plaintiff to redact any irrelevant personal information from these exhibits such as dates of birth, addresses or related information.[5]

Similarly, Plaintiff and Defendants only suggest the CI's deposition transcript and his statement should be sealed pursuant to the protective order. However, as noted above, the protective orders have no bearing on whether the Court should seal these documents when they become a part of the record at summary judgment. Nevertheless, the Court is mindful of the safety interests regarding the identity of the CI and concludes that the parties may redact any of the CI's personal information in his affidavit and in his deposition transcript that could lead to his identification.

With respect to AV files, Defendants argue these documents are only "arguably" judicial and do not implicate the Court's exercise of its Article III judicial power. (Defendants' October 27, 2020, Letter, not filed on CM/ECF). The Court is befuddled by Defendants' position as the law in the Second Circuit is quite clear that "documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial docu-

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[5] Plaintiff could largely avoid the need for redactions with respect to the deposition transcripts as she does not need to file the entire transcript with the Court but only the relevant excerpts that she uses to support her arguments.

ments to which a strong presumption of access attaches, under both the common law and the First Amendment." *Lugosch,* 435 F.3d at 121. The Court recognizes the important safety considerations related to protecting the CI's personal information and, as stated above, will permit redactions to protect his identity. However, there is no such concern with respect to the AV files because they do not identify the CI or show his face. Accordingly, the Court finds the AV files cannot be filed under seal and denies Defendants' motion in this respect.

Finally, Plaintiff offers no justification to file the training records under seal beyond its putative confidentiality in the protective order. However, as noted above, the existence of a protective order has no bearing on whether a Court may order a document sealed from public access under *Lugosch.*

In sum, the Court denies Plaintiff's and Defendants' motions to seal except as they relate to the name and personal information of the CI and to personal information related to each police officer. The parties are directed to—within ten (10) days of this Order—file complete versions of the relevant documents on CM/ECF with redactions as provided above.

B. Motions to Strike

At the time she filed her opposition to Defendants' motion for summary judgment, Plaintiff filed a motion to strike certain portions of Defendants' Statement of Material Facts. (Dkt. No. 102-2.) To that end, Plaintiff asserts that many of the

asserted facts in Defendants' Statement of Material facts are irrelevant to the motion for summary judgment and should be disregarded. *Id.* at 2. Specifically, Plaintiff asserts paragraphs 1-10, 12, 14-31, 33, 52, 57, 59, and 61-66 "pertain to information Defendants gathered after-the-fact of Defendant Ferris's use of deadly force on Mr. Scism." *Id.* at 3. Here, the Court generally agrees with Plaintiff that the cited facts alleged in Defendants' Statement of Material Facts are irrelevant to the pertinent issues to be considered on this motion, namely whether Defendants' use of force against Scism on June 13, 2016, was objectively reasonable. Nonetheless, because the Court can rule on the motion without reference to these so-called "material" facts, it denies Plaintiff's motion as moot.

Defendants, for their part, seek to preclude Plaintiff's expert, Dr. Shane, from offering testimony in response to their motion for summary judgment. (Dkt. No. 118.) Defendants also seek to strike Plaintiff's attorney's affidavit filed with her opposition to Defendants' motion for summary judgment. *Id.*

With respect to the attorney affidavit, Defendants argue it contains legal argument and, therefore, does not comply with Local Rule 7.1(b)(2).[6] *Id.* at 30-32. Here, the Court agrees that many of the statements within the affidavit include legal argu-

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[6] That rule provides that, "[a]n affidavit must not contain legal arguments but must contain factual and procedural background that is relevant to the motion the affidavit supports." L.R. 7.1(b)(2).

ment and are therefore inappropriately included in an attorney affidavit. However, the Court declines to strike the attorney affidavit for the same reason it declines to strike portions of Defendants' statement of material facts. Namely, the Court need not refer to, or consider, Plaintiff's attorney affidavit to consider the motion for summary judgment.

With respect to Dr. Shane's report, Defendants contend Plaintiff improperly uses Dr. Shane to present facts regarding the June 13, 2016, incident and opine about the ultimate issue of whether Defendants used excessive force. (Dkt. No. 118-2 at 9-12.) Defendants also assert Dr. Shane is not qualified to offer an opinion regarding the use of deadly force. *Id.* at 13-15. Furthermore, they argue his proffered testimony is unreliable and would not aid the trier of fact. *Id.* at 15-25. Additionally, they allege some of Dr. Shane's opinions must be stricken as he lacks personal knowledge. *Id.* at 25-26. Finally, Defendants contend Dr. Shane's opinions should be disregarded as the danger of unfair prejudice outweighs their probative value and they are irrelevant in any event. *Id.* at 26-29.

Here, after carefully considering Defendants' arguments, the Court finds no reason at this stage of the litigation to make a ruling on Dr. Shane's report or the use of his opinions as evidence at trial. As discussed in more detail below, the facts the Court finds that create a genuine dispute are supported by other admissible evidence. Therefore, Defendants' motion to strike Dr. Shane's report is denied as moot and with leave to renew before trial.

C. Motion for Summary Judgment

i. The Pending Motions

Defendants move for summary judgment with respect to all of Plaintiff's claims. (Dkt. No. 95.) First, Defendants argue Kent did not violate Scism's constitutional rights because he indisputably did not fire his weapon. Defendants also contend the undisputed facts reveal Ferris's decision to fire his weapon at Scism was objectively reasonable. In any event, Defendants argue they are entitled to qualified immunity. Finally, Defendants contend Plaintiff has failed to adduce sufficient evidence to raise a question of fact regarding the City's putative liability.

ii. Standard of Review

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248; *see*

also Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson).* The movant may meet this burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U. S. at 322.

If the moving party meets this burden, the nonmoving party must "set forth specific facts showing a genuine issue for trial." *Anderson,* 477 U. S. at 248, 250; *see also Celotex,* 477 U.S. at 323-24; *Wright v. Goord,* 554 F.3d 255, 266 (2d Cir. 2009). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the nonmoving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.,* 352 F.3d 775, 780 (2d Cir. 2003).

iii. Plaintiff's Fourth Amendment Claims[7]

The core issue is whether Ferris's and Kent's engagement with Scism was an unconstitutional exercise of force. As an initial matter, Defendants argue Plaintiff's "excessive force claim is premised

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[7] The parties appear to assume that the Fourth Amendment—as opposed to the Fourteenth Amendment—applies in this case as they concede that Scism was seized as soon as two detectives exited their vehicle with guns drawn and yelled at him to get on the ground.

upon the discrete act of firing upon [Scism] causing him to suffer a single fatal injury." (Dkt. No. 95-1 at 16.) In other words, Defendants contend the *only* relevant inquiry is whether Ferris's split-second decision to fire his weapon at Scism was justified and the Court ought to disregard the moments leading up to the shooting. In support of their position, Defendants cite to Plaintiff's amended complaint and suggest the only unconstitutional act alleged therein was the shots fired at Scism. *Id.* (citing Dkt. No. 6 at 12-13, 21, 23, 28, 33).

The record does not support Defendants' myopic reading of Plaintiff's amended complaint. Rather, the amended complaint describes Scism's interaction with Ferris and Kent and discusses the lead-up to the eventual shooting. Specifically, the amended complaint alleges Scism "was not a suspect in any crime, he had not engaged in criminal or suspicious activity, he was not under arrest, and he was not being detained." (Dkt. No. 6 at ¶ 28.) Undoubtedly, Ferris's split-second determination to fire upon Scism is one of the claims. However, the Court construes Plaintiff's amended complaint as asserting a separate claim that Defendants' actions leading up to the shooting—including getting out of an unmarked van with guns trained on Scism and yelling at him to get on the ground—violated his constitutional rights. *See Plakas v. Drinski,* 19 F.3d 1143, 1150 (7th Cir. 1994) ("[W]e carve up the incident into segments and judge each

on its own terms to see if the officer was reasonable at each stage."), *cert. denied,* 513 U.S. 820 (1994).[8]

With this background understanding, the Court must consider whether the undisputed facts, taken in light most favorable to Plaintiff, could support a jury's verdict that Defendants violated Scism's constitutional rights when: (1) they exited the parked van with their weapons drawn and commanded Scism to get on the ground without verbally announcing that they were police; and/or (2) Ferris fired his weapon at Scism ultimately causing his death.[9]

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[8] Defendants' misunderstanding of the claims in front of the Court animates one of their arguments for summary judgment. Specifically, Defendants assert the undisputed facts demonstrate Kent never fired his weapon, so he was not involved in the use of excessive force. However, the Court construes the amended complaint as asserting Kent's decision to draw his gun upon Scism and yell at him to get on the ground violated his constitutional rights.

[9] The Court finds, contrary to Defendants' position, that Plaintiff does not invoke the so-called "provocation rule." Under that rule, "an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation." *Cnty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1545 (2017). In Mendez, two police officers entered a shack in the rear of a residence without a search warrant and without knocking or announcing their presence. *Id.* at 1544–45. One of the plaintiffs, who mistakenly believed the noise was made by a fellow resident, reached for a BB gun to help lift himself out of bed. The officers, seeing the BB gun, mistook it for a rifle, and fired several rounds, injuring the plaintiffs. The district court concluded, and the Ninth Circuit

1. Controlling Law

"The Fourth Amendment prohibits the use of excessive force in making an arrest, and whether the force used is excessive is to be analyzed under that Amendment's 'reasonableness' standard." *Brown v. City of New York,* 798 F.3d 94, 100 (2d Cir. 2015) (quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989)). A police officer's use of force is "excessive" in violation of the Fourth Amendment if it is objectively unreasonable in light of the facts and circumstances known to the officer. *Lennon v. Miller,* 66 F.3d 416, 425–26 (2d Cir. 1995). To determine whether the amount of force applied to a plaintiff was unreasonable, courts consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 396.

"[E]ven if defendants' actions were unreasonable under current law, qualified immunity protects officers from the sometimes-hazy border between

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affirmed, that, although the officers' shooting was otherwise reasonable under the applicable standard for excessive force, the officers had engaged in excessive force under the provocation rule due to the prior warrantless entry. The Supreme Court reversed rejecting the provocation rule. Specifically, the Court reasoned that the provocation rule "mistakenly conflates distinct Fourth Amendment claims." Id. at 1547. Here, therefore, rather than conflating two distinct Fourth Amendment claims, the Court will treat them separately in evaluating whether summary judgment is appropriate.

excessive and acceptable force." *Kerman v. City of New York,* 261 F.3d 229, 239 (2d Cir. 2001) (internal quotation marks, ellipsis, and citation omitted). "If the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense." *Id.* (citation omitted). However, "[g]iven the fact-specific nature of the inquiry, granting summary judgment against a plaintiff on an excessive force claim is not appropriate unless no reasonable factfinder could conclude that the officers' conduct was objectively unreasonable." *Amnesty Am. v. Town of West Hartford,* 361 F.3d 113, 123 (2d Cir. 2004); *see also Kayo v. Mertz,* No. 19-Civ., 2021 WL 1226869, at *14-15 (S.D.N.Y. Mar. 31, 2021). Indeed, the Second Circuit has consistently held that summary judgment is inappropriate if "determination of [a constitutional violation] 'turns on which of two conflicting stories best captures what happened on the street.'" *Cowan ex rel. Estate of Cooper v. Breen,* 352 F.3d 756, 763 (2d Cir. 2003) (quoting *Saucier v. Katz,* 533 U.S. 194, 216 (2001)); *see also Thomas v. Roach,* 165 F.3d 137, 144 (2d Cir. 1999) ("Because the district court could not determine whether the officers reasonably believed that their force was not excessive when several material facts were still in dispute, summary judgment on the basis of qualified immunity was precluded."); *Hemphill v. Schott,* 141 F.3d 412, 416–18 (2d Cir. 1998) (holding that the district court erred by entering summary judgment on qualified immunity when there were disputes remaining about "material factual issues").

2. Defendants' initial interaction with Plaintiff

Here, the facts establish Kent and Ferris exited an unmarked vehicle with their guns drawn and yelled at Scism to get on the ground. Undoubtedly, *Garner* establishes that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v.* Garner, 471 U.S. 1, 7 (1985). Here, when considering the *Graham* factors, the Court finds—viewing the evidence in light most favorable to Plaintiff— it weighs in favor of finding that their conduct could have been unreasonable. To that end, Scism was not a suspect of any crime when Kent and Ferris engaged him with their guns drawn. Indeed, by his own account, Ferris did not believe Scism was involved in illegal activity when he exited the car. (Dkt. No. 95-27 at ¶24 (Ferris stating he "did not have time to analyze which crimes [Scism] had engaged in"); Ferris Deposition at 77-79 (stating he "menaced everybody in the vehicle" and maybe committed an "attempted assault.").) Indisputably, it is not *per se* illegal in New York to carry a concealed firearm. Defendants do not claim they knew Scism's firearm was unlicensed or that he was a felon and prohibited from carrying a gun. Thus, at the moment they saw the gun, there were no facts tending to show that Scism had committed any crime, let alone a serious one.

Furthermore, there is at best contradictory evidence that Scism was a threat at the time they first

engaged him. To wit, the CI testified that Scism merely told Ferris that they should not be selling drugs in this area. (Dkt. No. 102-7, CI Deposition at 25.) Furthermore, the AV recording leaves room for a juror to interpret the interaction. Specifically, it is at least arguable, as Plaintiff notes, that Scism said "If you're meeting somebody don't be selling no drugs on my block, I've got kids." (Dkt. No. 102-23 at ¶ 37.) Indeed, Kent and Ferris each testified that it was their opinions that Scism thought they were dealing drugs. (Dkt. No. 102-9, Kent Deposition at 46; Dkt. No. 102-8, Ferris Deposition at 28.) The parties offer starkly different interpretations of how to consider this interaction,[10] but the Court finds it is the jury's role to review the evidence and determine whether Scism approached the vehicle in a threatening manner or whether he approached the vehicle as a concerned citizen.

The last factor, whether Scism was actively resisting arrest or fleeing arrest, weighs in Scism's favor. It is not seriously contested that Scism did not know Ferris and Kent were police officers when he spoke with them at the car. As stated above, Ferris testified he thought Scism believed he was there to sell drugs. (Dkt. No. 102-8, Ferris Deposition at 28.) Ferris and Kent each testified that their badges were covered until they exited the vehicle, and the AV recording demonstrates they did not announce that they were police when they

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[10] Specifically, Ferris testified that Scism was "angry," "tense," and "agitated" when he approached the car. (Dkt. No. 102-8, Ferris Deposition at 29.)

yelled at Scism to get on the ground. (Dkt. No. 95-2.) Therefore, a jury could easily conclude that Scism's retreat from the car was not an attempt to flee an arrest but was rather him simply walking away.

In sum, the Court finds a reasonable juror could find Kent's and Ferris's decision to leave the van and engage Scism with their guns drawn was an unreasonable use of force.

However, that is not the end of the inquiry as the Court finds Kent and Ferris are entitled to qualified immunity for their actions leading up to the shooting as most cases within the Second Circuit hold that merely drawing weapons when effectuating an arrest does not constitute excessive force as a matter of law. *See Cabral v. City of New York,* No. 12–CV–4659, 2014 WL 4636433, at *11 (S.D.N.Y. Sept. 17, 2014) ("[The defendant's] approach with his gun drawn does not constitute excessive force as a matter of law."); *Mittelman v. Cnty. of Rockland,* No. 07-CV-6382, 2013 WL 1248623, at *13 (S.D.N.Y. Mar. 26, 2013) ("Likewise insufficient is [the] [p]laintiff' s assertion that the officers pointed guns at him. A threat of force does not constitute excessive force."); *Askins v. City of New York,* No. 09–CV–10315, 2011 WL 1334838, at *3 (S.D.N.Y. Mar. 25, 2011) ("While the Second Circuit has noted that circuit law could very well support a claim that a gunpoint death threat issued to a restrained and unresisting arrestee represents excessive force, [the] plaintiff's assertion that a gun was pointed at his head cannot be the basis of a claim for excessive force." (alterations and inter-

nal quotation marks omitted)); *Aderonmu v. Heavey,* No. 00–CV–9232, 2001 WL 77099, at *3 (S.D.N.Y. Jan. 26, 2001) (dismissing excessive force claim based on an interrogation at gunpoint because the plaintiff "fail[ed] to allege that any physical force was used against him during his interrogation, or that any injuries resulted from [the] defendants' allegedly unconstitutional conduct"); *Shaheed v. City of New York,* 287 F. Supp. 3d 438, 454 (S.D.N.Y. 2018), *aff'd sub nom. Shaheed v. Kroski,* 833 F. App'x 868 (2d Cir. 2020) (holding that the allegation that the officers pointed their rifles at the plaintiffs did not constitute excessive force); *but see DiSorbo v. Hoy,* 343 F.3d 172, 184 (2d Cir. 2003) (stating that a jury could reasonably find and award damages for psychological injuries in an excessive force case, though finding the award excessive in that case); *Kerman,* 261 F.3d at 232, 239–40 (finding that officers' name-calling and threat to "blow [arrestee's] brains out" amounted to "verbal abuse [and] humiliation" which "might well be objectively unreasonable and therefore excessive").

Therefore, the Court cannot say as a matter of law that that Kent and Ferris's actions—even viewed in light most favorable to Plaintiff—violated clearly established law before Ferris fired his weapon. Accordingly, Plaintiff's excessive force claim based on Ferris and Kent drawing their guns at Scism is dismissed.

3. When Ferris Fired his Weapon at Scism[11]

On the initial inquiry of whether a constitutional violation occurred, an officer's decision to use deadly force is objectively reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *O'Bert ex rel Estate of O'Bert v. Vargo,* 331 F.3d 29, 36 (2d Cir. 2003); *see Garner,* 471 U.S. at 11 ("Where the sus-

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[11] Though the Court finds Plaintiff did not plead a failure to intervene claim in her amended complaint, even if she had, it would be dismissed against Kent. "It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen,* 17 F.3d 552, 557 (2d Cir. 1994); *see also Snead v. City of New York,* 463 F. Supp. 3d 386, 400 (S.D.N.Y. 2020) ("Law enforcement officers have an affirmative duty to intervene to prevent fellow officers from infringing on citizens' constitutional rights." (citation omitted)). "Liability may attach only when (1) the officer had a realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer's position would know that the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene." *Jean-Laurent v. Wilkinson,* 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008) (citing *O'Neill v. Krzeminski,* 839 F.2d 9, 11-12 (2d Cir. 1988)), *aff'd sub nom. Jean-Laurent v. Wilkerson,* 461 F. App'x 18 (2d Cir. 2012). Here, no reasonable juror could conclude Kent had a "realistic opportunity" to intervene before Ferris shot at Scism because there simply was not enough time between when they exited the vehicle and Ferris shot at Scism. (Dkt. No. 95-2.) Therefore, even if a failure to intervene claim had been pled, it would be dismissed.

pect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). The reasonableness of the officer's decision "depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force." *Salim v. Proulx,* 93 F.3d 86, 92 (2d Cir. 1996). In this case, resolution of whether a constitutional violation occurred centers on whether at the moment Ferris decided to fire at Scism, he reasonably believed that Scism put his life or others in danger. Ferris argues the undisputed facts demonstrate he reasonably believed that his life was in danger; therefore, as a matter of law, no constitutional violation occurred. (Dkt. No. 95-1 at 20-25.) However, to accept Ferris's argument that, as a matter of law, his actions were objectively reasonable, one would have to accept, as a matter of fact, that Scism posed an immediate threat and was turning towards him with his gun in his hand about to fire at Ferris. Such facts are in dispute.

Specifically, though Ferris and Kent both testified they saw Scism grab his gun and turn towards Ferris before Ferris shot at him, there is evidence that Scism was still retreating at the time he was shot. Specifically, Scism was indisputably shot in the back of his head—demonstrating that he was faced away from Ferris when he was struck in the back of his head. (Dkt. No 95-13.) Importantly, Plaintiff's medical expert testified that it would be "extremely unlikely" that Scism could have been

facing Ferris with his gun drawn at one instance and then had time to completely turn and be struck in the back of the head. (Dkt. No. 102-14 at 5.)[12]

Furthermore, the CI testified that he never saw Scism stop or turn towards Ferris before he was shot. (CI Deposition at 11-14; 57.) Moreover, as discussed above, there is contradictory evidence in the record regarding the initial interaction with Scism and whether he was acting in a threatening manner or if he was simply concerned that Ferris and Kent were dealing drugs on his street. In sum, though the jury may ultimately credit Ferris's and Kent's testimony and find that shooting Scism was objectively reasonable, it is at least possible, given the other record evidence, that a jury could find Ferris shot Scism as he was retreating and that Scism was not posing an immediate threat. Therefore, the Court finds summary judgment is not appropriate with respect to Plaintiff's excessive force claim against Ferris.

Relatedly, because there are genuine issues of material fact regarding the reasonableness of Ferris's use of force, summary judgment must also be denied on qualified immunity grounds. *See Cowan,* 352 F.3d at 764-65 (denying summary

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[12] Defendants argue Scism must have turned away from the gun shots and that is the reason he was not facing Ferris when he was shot. (Dkt. No. 95-1 at 24.) Though that is one permissible inference to be drawn from the location of the entry wound, the Court is required—at this stage—to view the facts in a light most favorable to Plaintiff and it is arguable that an entry wound on the rear of Scism's head indicates he was retreating as Ferris fired at him.

judgment on a qualified immunity claim after determining in the excessive force analysis that there were genuine issues of material fact regarding the reasonableness of the officers' conduct); *see also Gjenashaj v. City of New York,* No. 19 Civ. 4142, 2020 WL 7342723, at *4 (S.D.N.Y. Dec. 14, 2020) (denying summary judgment on defendants' qualified immunity claim because material facts remain in dispute as to plaintiff's excessive force claim); *Bennett v. Falcone,* No. 05 Civ. 1358, 2009 WL 816830, at *6 (S.D.N.Y. Mar. 25, 2009) ("For the same reasons Plaintiff's excessive force claim survives summary judgment, the Court holds Defendants' qualified immunity claim insufficient.").

iv. Municipal Liability

"For the purpose of Section 1983, a municipality is not vicariously liable for the acts of its employees," *Green v. City of New York,* 465 F.3d 65, 80 (2d Cir. 2006) (citing *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694 (1978)), but a municipality is liable when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury," *Monell,* 436 U.S. at 694. "To hold a municipality liable in such an action, 'a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right.'" *Zahra v. Town of Southold,* 48 F.3d 674, 685 (2d Cir. 1995) (quoting

Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983)).

A municipal policy or custom may be established where the facts show: (1) a formal policy, officially promulgated by the municipality, *Monell,* 436 U.S. at 690; (2) action taken by the official responsible for establishing policy with respect to a particular issue, *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483–84 (1986); (3) unlawful practices by subordinate officials so permanent and widespread as to practically have the force of law, *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127–30 (1985); or (4) a failure to train or supervise that amounts to "deliberate indifference" to the rights of those with whom the municipality's employees interact, *City of Canton v. Harris,* 489 U.S. 378, 388 (1989). "[A] municipal policy may be inferred from the informal acts or omissions of supervisory municipal officials." *Zahra,* 48 F.3d at 685.

In this case, in response to Defendants' motion for summary judgment, Plaintiff asserts that sufficient evidence suggests the City failed to train its employees to address how to properly use deadly force. (Dkt. No. 102-24 at 11-17.) However, as Defendant correctly points out, Plaintiff failed to allege this theory of liability in her amended complaint. Indeed, the amended complaint is completely devoid of any allegations related to the City's training procedure and how any deficiency therein caused the shooting at issue here. Rather, Plaintiff generally argued that the City failed to adequately address or punish misconduct and has therefore "acquiesced to" misconduct. (Dkt. No. 6 at ¶ 39.)

"Generally, courts will not consider, on a motion for summary judgment, allegations that were not pled in the complaint and raised for the first time in opposition to a motion for summary judgment." *Mahmud v. Kaufmann,* 607 F. Supp. 2d 541, 555 (S.D.N.Y.), *aff'd,* 358 F. App'x 229 (2d Cir. 2009) (citing *Alali v. DeBara,* 2008 WL 4700431, *3 n. 6 (S.D.N.Y. Oct. 24, 2008)); *Southwick Clothing LLC v. GFT (USA) Corp.,* 2004 WL 2914093, at *6 (S.D.N.Y. Dec. 15, 2004) ("A complaint cannot be amended merely by raising new facts and theories in plaintiffs' opposition papers, and hence such new allegations and claims should not be considered in resolving the motion."). Thus, because Plaintiff has seemingly abandoned the pleaded theory of *Monell* liability she put forward in her amended complaint in favor of a failure to train theory she never pled, the Court grants Defendants' motion for summary judgment against the City.

In any event, even were the Court to look past Plaintiff's failure to properly draft or amend her complaint, it would still find that she failed to present evidence showing the City is liable. To that end, Plaintiff's theory of municipal liability in her opposition papers is that the City's failure to adequately train their officers regarding the use of deadly force amounted to deliberate indifference to the rights of those with whom those officers would interact. (Dkt. No. 102-24 at 11-12.) To demonstrate that a failure to train constitutes "deliberate indifference," a plaintiff must satisfy three elements: (1) that a policymaker knows to a "moral certainty" that employees will confront a given sit-

uation; (2) that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation; and (3) that the wrong choice by the employee will frequently cause the deprivation of a citizen's constitutional rights. *Jenkins v. City of New York,* 478 F.3d 76, 94 (2d. Cir. 2007) (internal quotation marks and citation omitted). "In addition, at the summary judgment stage, plaintiffs must identify a specific deficiency in the city's training program and establish that that deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation." *Green,* 465 F.3d at 81 (internal quotation marks and citation omitted).

Here, Plaintiff failed to identify any evidence demonstrating "a specific deficiency in the city's training program," much less explain how that alleged deficiency "is 'closely related to the ultimate injury,' such that it 'actually caused' the constitutional deprivation." *Amnesty Am.,* 361 F.3d at 129 (quoting *City of Canton,* 489 U.S. at 391). Rather, Plaintiff's arguments amount to general and conclusory claims that the City's training was insufficient. *(See e.g.,* Dkt. No. 102-24 at 14 (alleging Defendants participated in training "in which 'review and understand use of deadly force policy' was one of eleven topics to be discussed"); *id.* at 15 (claiming "[t]he respective deposition testimonies of the SPD witnesses demonstrate that any instruction or training provided on the use of deadly force policy did not make learning the use of

deadly force policy a priority, much less a requirement").) In sum, Plaintiff has failed to proffer evidence that would allow a reasonable juror to conclude the City was deliberately indifferent to Scism's constitutional rights based on its training program related to the use of deadly force. Accordingly, the Court grants Defendants' motion for summary judgment regarding any claims against the City.

III. CONCLUSION

For the reasons set forth above, the Court grants Defendants' motion for summary judgment except as it relates to Plaintiff's claim against Ferris for excessive force. The remaining claim against Ferris will be scheduled for trial where the jury will consider whether his conduct was objectively reasonable. The Court further denies Plaintiff's and Defendants' motions to strike certain parts of the record as moot. Finally, the Court denies Plaintiff's and Defendants' motions to seal except as noted herein and orders the parties to file these documents on the Court's CM/ECF system (with redactions, where necessary) within ten (10) days from this Order. The Court will set a trial date in a separate Order.

ACCORDINGLY, it is hereby

ORDERED that Defendants' motion to seal (Dkt. No. 91) is **DENIED** in part and **GRANTED** in part as discussed herein and Defendants will have ten (10) days from the date of this Decision and Order to file complete versions of the relevant documents

(with redactions as necessary) with the Court; and it is further

ORDERED that Plaintiff's motion to seal (Dkt. No. 107) is **DENIED** in part and **GRANTED** in part as discussed herein and Plaintiff will have ten (10) days from the date of this Decision and Order to file complete versions of the relevant documents (with redactions as necessary) with the Court; and it is further

ORDERED that Plaintiff's motion to strike (Dkt. No. 102) is **DENIED** as moot; and it is further

ORDERED that Defendants' motion to strike (Dkt. No. 118) is **DENIED** as moot; and it is further

ORDERED that Defendants' motion for summary judgment (Dkt. No. 95) is **DENIED** in part and **GRANTED** in part as discussed herein.

IT IS SO ORDERED.

Dated: September 29, 2021
Syracuse, New York

/s/ THERÈSE WILEY DANCKS
Therèse Wiley Dancks
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Index No.: 1:18-cv-672
(LEK/TWD)

CHRYSTAL SCISM, Individually and as Administratrix of the Estate of Joshua Scism,

Plaintiff,

v.

CITY OF SCHENECTADY, SCHENECTADY POLICE DEPARTMENT, DETECTIVE BRETT FERRIS and DETECTIVE RYAN KENT,

Defendants.

AMENDED COMPLAINT

JURY TRIAL DEMANDED

The Plaintiff, Chrystal Scism, as Administratrix of the Estate of Joshua Scism, by and through her attorney, Trevor W. Hannigan, complains and alleges of the Defendants as follows:

INTRODUCTION

1. This action seeks redress for the deprivation by Defendants, acting under color of law, of rights guaranteed to the Plaintiff under the United

States Constitution and federal law. The Defendants deprived the Plaintiff of these guaranteed rights by unjustifiably shooting the Decedent, resulting in his ultimate death.

JURISDICTION

2. This action is brought pursuant to 42 U.S.C. § 1983. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 2201 because it is brought to seek relief and damages for the deprivation, under color of state law, of the rights guaranteed by the

3. Pursuant to New York State Court of Claims Act § 10, the Plaintiff timely filed a Notice of Intention to File a Claim, more than thirty (30) days have elapsed since the service of the Notice, payment has been neglected or refused, and the state law claims are brought within two years of accrual.

4. Plaintiff was appointed Administratrix of the Estate of Joshua Scism on September 7, 2016. A copy of the Orders so appointing her are attached as Exhibit "A".

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because the events giving rise to the claims herein occurred in this judicial district.

PARTIES

6. Plaintiff **CHRYSTAL SCISM** is a citizen of the United States and currently resides in Schenectady County, New York. Ms. Scism is the duly appointed Administratrix of the Estate of Joshua Scism, the Decedent. Mr. Scism died on the evening of June 13, 2016.

7. At all times relevant herein, Defendant **CITY OF SCHENECTADY** was a municipal corporation duly incorporated under the laws of the State of New York, with its principal place of business being City Hall 105 Jay Street Schenectady, New York 12305.

8. At all times relevant herein, Defendant **SCHENECTADY POLICE DEPARTMENT** was a department of the City of Schenectady, with its principal place of business being 531 Liberty Street Schenectady, New York 12305.

9. Upon information and belief, and at all times relevant herein, Defendant **BRETT FERRIS** was employed as a Detective with the Schenectady Police Department with his principal place of business being 531 Liberty Street Schenectady, New York 12305. Defendant Ferris is being sued in his individual capacity.

10. Upon information and belief, and at all times relevant herein, Defendant **RYAN KENT** was employed as a Detective with the Schenectady Police Department, with his principal place of business being 531 Liberty Street Schenectady,

New York 12305. Defendant Kent is being sued in his individual capacity.

11. At all times relevant herein, the individual Defendants acted under color of law, to wit, under the color of the Constitution, statutes, laws, rules, regulations, ordinances, charters, customs, policies, and usages of the State of New York.

FACTS

12. At approximately 5:15 p.m. on June 13, 2016, the Decedent, Joshua Scism, was killed by Defendants Schenectady Police Department detectives Brett Ferris and Ryan Kent near his home at 1339 First Avenue in Schenectady, New York.

13. Specifically, Defendants Ferris and Kent shot at Mr. Scism numerous times, causing his ultimate death.

14. The Detectives, who were in plain clothes and sitting in an unmarked car were, upon information and belief, conducting an investigation near Mr. Scism's home. The investigation did not involve Mr. Scism or any member of his family or household.

15. This area of Schenectady was the subject of many complaints by both Mr. and Mrs. Scism, as well as other members of their neighborhood, regarding persistent prostitution, illegal

drug sales, and illegal drug use occurring at all hours of the day and night.

16. Upon information and belief, despite these numerous complaints, the illegal activity continued unabated.

17. Mr. Scism, who was a married father of three (3) young children, the oldest of which was born in 2011, and the youngest of which was born in 2015, and a stepchild, was known by his neighbors as quiet and polite. He was also the primary financial provider for his young family.

18. In light of the lack of assistance from the City of Schenectady or the Schenectady Police Department regarding the persistent illegal activities in the neighborhood, Mr. Scism, in an effort to protect his family, would often ask the people involved in the activities to leave the neighborhood.

19. When Mr. Scism noticed the parked, unmarked car lingering near his home on June 13, 2016, he grew concerned that the occupants were involved in illegal activities.

20. Upon information and belief, he approached the car where the two (2) men were sitting and asked them to move along. He then turned away from the men, who did not identify themselves as police officers, and walked back towards his home.

21. The officers, Defendants Ferris and Kent, got out of their unmarked car and one or both of them shot several rounds at Mr. Scism.

22. Upon information and belief, so many shots were fired that there were bullet holes in the homes near where Mr. Scism was shot.

23. One of the bullets struck Mr. Scism in the back of his head, as he was retreating from the firing plainclothes police officers.

24. When Mrs. Scism heard the commotion, she went outside and saw blood pouring out of her husband's head—like a fountain. Mr. Scism was lying face down. Mrs. Schism was told to go back into the house or otherwise she too would be shot.

25. Mr. Scism was brought to the hospital and pronounced dead at 5:53 p.m. that evening.

26. An autopsy determined that Mr. Scism's manner of death was homicide and the cause of his death was severe skull fractures and brain injuries due to the gunshot wound to his head.

27. The death shot entered Mr. Scism at the back of his head, and traveled a nearly straight line before exiting out the front of his head, causing a large exit wound. The evidence showed that the bullet was not fired at close range, which is consistent with the fact that Mr. Scism was turned *away and walking away* from the police towards his home when they shot him in the back of his head.

28. The shooting of Mr. Scism was unjustified and unprovoked, and the Defendant detectives had no reason to use any force against him, let alone deadly force. Mr. Scism was not a suspect in any crime, he had not engaged in criminal or suspicious activity, he was not under arrest, he was not being detained. In fact, he was being a good citizen and good neighbor by asking the occupants of the lingering car to leave the neighborhood.

29. Additionally, Mr. Scism was retreating and walking away from the officers and towards his home when they shot and killed him.

30. Mr. Scism was just thirty-three (33) years old when he was killed. His wife, Chrystal, and their young children, are now deprived of his love, affection, and guidance, as well as the primary financial and other support he provided for his family.

CAUSES OF ACTION

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

Violation of Constitutional Rights Under Color of State Law Excessive Use of Force

31. Plaintiff incorporates by reference and realleges each and every allegation as stated in paragraphs 1 to 30.

32. The Fourth and Fourteenth Amendments of the United States Constitution prohibits police officials from using excessive, unreasonable force against citizens.

33. As heretofore described, one or both of the Defendant Detectives shot Mr. Scism in the back of his head as he was returning to his home, causing his death. Mr. Scism was not engaged in any criminal or suspicious behavior and did not pose a threat to these Detectives at all, let alone one sufficient to justify the use of deadly force.

34. The actions and inactions of the above-named Defendants were objectively unreasonable, motivated by malice and/or gross negligence, and subjected Mr. Scism to unnecessary, prolonged, and severe pain and injury, and death.

35. The aforementioned actions and inactions of the above-named Defendants, taken under color of state law, violated Mr. Scism's right to be free from excessive and unreasonable force, and are also a violation of 42 U.S.C. § 1983.

36. As a direct and proximate result of the unconstitutional acts described above, the Mr. Scism has been seriously and irreparably injured, in that he is deceased.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS CITY OF SCHENECTADY AND SCHENECTADY POLICE DEPARTMENT

Violation of Constitutional Rights Under Color of State Law Municipal Liability for Implementation of Policies, Customs, or Practices Violative of the Constitutional Rights of Citizens, and/or Failure to Implement Policies, Customs, or Practices to Avoid Such Violations, and/or Failure to Train or Supervise Employees

37. Plaintiff incorporates by reference and realleges each and every allegation as stated in paragraphs 1 to 36.

38. Upon information and belief, the City of Schenectady and Schenectady Police Department have a history of misconduct in their police department and among their police officers, and a history of ignoring or failing to properly address and punish any alleged misconduct.

39. In failing to properly address or punish such misconduct, these Defendants have implicitly authorized and acquiesced to the misconduct and sent the message to its officers that such conduct is tolerated and acceptable.

40. This practice of looking the other way, failing to take corrective action, and failing to impose additional training and supervision in the face

of numerous and grievous violations of citizens' Constitutional rights throughout the last several years directly paved the way for Mr. Scism's death at the hands of Defendants Ferris and Kent.

41. As a direct and proximate result of the unconstitutional acts described above, Mr. Scism was seriously and irreparably injured, in that he is deceased.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

Violation of State Laws

Negligence

42. Plaintiff incorporates by reference and realleges each and every allegation as stated in paragraphs 1 to 41.

43. The above-named Defendants are liable for negligence because, as heretofore described, they fired their guns at him, without cause or justification, and while he was returning to his home, resulting in his death. Upon information and belief, several bullet holes were found in houses near where Mr. Scism was killed by the police.

44. As a direct and proximate result of the acts described above, Mr. Scism was seriously and irreparably injured, in that he is deceased.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

Violation of State Laws

Wrongful Death & Conscious Pain and Suffering

45. Plaintiff incorporates by reference and realleges each and every allegation as stated in paragraphs 1 to 44.

46. Defendants Farris and/or Kent are liable for wrongful death because their heretofore described actions in shooting Mr. Scism were clearly and grossly negligent, reckless, and unjustified, and caused his death.

47. Defendants City of Schenectady and Schenectady Police Department are also liable for the wrongful death and conscious pain and suffering of Mr. Scism because they are directly responsible for the actions of their employees, namely Defendants Ferris and Kent, taken in the scope of employment.

48. As a direct and proximate result of the Defendants' actions and inactions, Mr. Scism has been irreparably injured in that he is deceased.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

Violation of State Laws

Negligent Infliction of Emotional Distress

49. Plaintiff incorporates by reference and realleges each and every allegation as stated in paragraphs 1 to 48.

50. The above-named Defendants are liable for negligent infliction of emotional distress because their heretofore described failures to discharge their duties properly, and their grossly negligent and reckless actions caused Mr. Scism's death.

51. As discussed above, upon hearing the commotion outside of her home, Mrs. Scism ran outside to discover her husband lying face down with blood spurting out of the back of

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff Chrystal Scism requests that this Court grant her the following relief:

A. A judgment in her favor against all Defendants for compensatory damages in an amount to be determined by a properly charged jury;

B. A judgment in her favor against all individual Defendants for punitive damages in an amount to be determined by a properly charged jury;

C. A monetary award for attorney's fees and the costs of this action pursuant to 42 USC § 1988; and

D. Any other relief this Court finds to be just, proper, and equitable.

Dated: Albany, New York
August 24, 2018

Respectfully submitted,

/s/ TREVOR W. HANNIGAN
Trevor W. Hannigan
USDC NDNY Bar Roll No: 517850
Attorney for Plaintiff
311 State Street
Albany, New York 12210
T: (518) 729-5211
F: (518) 621-0500
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A

At a Surrogate's Court of the State of New York held in and for the County of Schenectady at Schenectady, New York.

File No. 2016-445

Filed September 07, 2016

Schenectady County
Surrogate's Court

PRESENT: Hon. Vincent W. Versaci, Surrogate

Administration Proceeding,
Estate of Joshua E. Scism

Deceased.

DECREE GRANTING ADMINISTRATION WITH LIMITATIONS

A verified petition having been filed by Chrystal M. Scism praying that administration of the goods, chattels and credits of the above-named decedent be granted to Chrystal M. Scism and all persons named in such petition, required to be cited, having been cited to show cause why such relief should not be granted, have either failed to appear in response to a served citation or having waived the issuance of such citation and consented thereto; and it appearing that Chrystal M. Scism is in all respects

competent to act as administrator of the estate of said deceased; now it is

ORDERED AND DECREED, that Letters of Administration issue to Chrystal M. Scism upon proper qualification and the filing of a bond be and hereby is dispensed with; and it is further

ORDERED AND DECREED, that the authority of such administrator be restricted in accordance with, and that the letters herein issued contain, the limitation(s) as follows:

Limitations/Restrictions: Bond dispensed with and all moneys and property belonging to decedent shall be collected and received jointly with Trevor W. Hannigan, Esq., and, so far as the same are capable of deposit, shall be deposited in an account in any bank and/or Savings and Loan Association in the County of Schenectady, New York and all withdrawals therefrom shall be subject to the countersignature of Trevor W. Hannigan, Esq.

No distribution to distributees shall be made until judicial settlement of the estate accounts which shall be filed within two (2) years of the date of this Decree, at which time a guardian ad litem will be appointed for any parties under a disability.

DATED: September 7, 2016

/s/ VINCENT W. VERSACI
Vincent W. Versaci
Surrogate

On the Date Written Below LETTERS OF ADMINISTRATION are Granted by the Surrogate's Court of Schenectady County, State of New York as follows:

File #: 2016-445

Name of Decedent: Joshua E. Scism

Date of Death: June 13, 2016

Domicile of Decedent: Schenectady, New York

Fiduciary Appointed:

Chrystal M. Scism – 1339 First Avenue,
Schenectady, New York 12303

Letters Issued: LETTERS OF ADMINISTRATION

Limitations: Bond dispensed with and all moneys and property belonging to decedent shall be collected and received jointly with Trevor W. Hannigan, Esq., and, so far as the same are capable of deposit, shall be deposited in an account in any bank and/or Savings and Loan Association in the County of Schenectady, New York and all withdrawals therefrom shall be subject to the countersignature of Trevor W. Hannigan, Esq.

No distribution to distributees shall be made until judicial settlement of the estate accounts which shall be filed within two (2) years of the date of this Decree, at which time a guardian ad litem will be appointed for any parties under a disability.

THESE LETTERS, granted pursuant to a decree entered by the court, authorize and empower the above-named fiduciary or fiduciaries to perform all acts requisite to the proper administration and disposition of the estate/trust of the Decedent in accordance with the decree and the laws of New York State, subject to the limitations and restrictions, if any, as set forth above.

Dated: September 7, 2016

IN TESTIMONY WHEREOF, the seal of the Schenectady County Surrogate's Court has been affixed.

WITNESS, Hon Vincent W. Versaci, Judge of the Schenectady County Surrogate's Court.

/s/ GISELE A. VAN WORMER
GISELE A. VAN WORMER,
Deputy Chief Clerk

These Letters are Not Valid Without the Raised Seal of the Schenectady County Surrogate's Court.

Attorney: Trevor W. Hannigan – 311 State Street, Albany, New York 12210

Certificate# 21900

Surrogate's Court of the State of New York
Schenectady County
Certificate of Appointment of Administrator

File #: 2016-445

IT IS HEREBY CERTIFIED that Letters in the estate of the Decedent named below have been granted by this court, as follows:

Date of Death: June 13, 2016

Name of Decedent:	**Joshua E. Scism**
Domicile:	**Schenectady, NY**
Fiduciary Appointed:	**Chrystal M. Scism**
Mailing Address:	1339 First Avenue Schenectady NY 12303
Type of Letters Issued:	**Letters of Administration**
Letters Issued On:	**September 7, 2016**

Limitations: Bond dispensed with and all moneys and property belonging to decedent shall be collected and received jointly with Trevor W. Hannigan, Esq., and, so far as the same are capable of deposit, shall be deposited in an account in any bank and/or Savings and Loan Association in the County of Schenectady, New York and all withdrawals

therefrom shall be subject to the counter-signature of Trevor W. Hannigan, Esq.

No distribution to distributees shall be made until judicial settlement of the estate accounts which shall be filed within two (2) years of the date of this Decree, at which time a guardian ad litem will be appointed for any parties under a disability.

and such Letters are unrevoked and in full force as of this date.

Dated: September 9, 2016

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Schenectady County Surrogate's Court at Schenectady, New York

WITNESS, Hon. Vincent W. Versaci, Judge of the Schenectady County Surrogate's Court.

/S/ PAULA B. MILLER

PAULA B. MILLER, Chief Clerk
Schenectady County
Surrogate's Court

This Certificate is Not Valid Without the Raised Seal of the Schenectady County Surrogate's Court