No.

IN THE

Supreme Court of the United States

ESTATE OF ALLAN GEORGE, *et al.*,

Petitioners,

v.

CITY OF RIFLE, COLORADO, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This published Tenth Circuit opinion conflicts with this Court's and other United States circuit courts of Appeals' longstanding precedent limiting appellate review of denials of qualified immunity. *Johnson v. Jones*, 515 U.S. 304 (1995), made clear that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319-20. For nearly three decades, circuit courts have correctly taken this holding to mean that they do not have jurisdiction to contradict factual findings in an interlocutory appeal of a district court's denial of qualified immunity.

In *Scott v. Harris*, 550 U.S. 372, 380-81 (2007), this Court created an exception to the jurisdictional limitations of *Johnson* for cases in which available video "blatantly contradicts" the non-movant's factual allegations, meaning that the video rendered non-movant's allegations "visible fiction" that "no reasonable jury could believe." *Id.*

The Tenth Circuit's opinion imperils the continued application of *Johnson* to interlocutory appeals of district court qualified immunity decisions, creating different jurisdictional limits in the Tenth Circuit than in other Circuits. Accordingly, the question presented is as follows:

1. Whether the Tenth Circuit erred in expanding this Court's decision in *Scott v. Harris* to swallow the rule of limited jurisdiction on interlocutory appeals of qualified immunity established in *Johnson v. Jones*, creating a circuit split with other Circuits' correct application of *Scott*.

PARTIES TO THE PROCEEDING

Petitioners, Estate of Allan George, Sarra George, and Allan George's children, were the plaintiffs-appellees in the court of appeals. Respondents, Rifle Police Department Officer Dewey Ryan, Rifle Chief of Police Tommy Klein, and the City of Rifle, Colorado, were the defendants-appellants in the court of appeals.

STATEMENT OF RELATED CASES

Estate of Allan George, et al. v. City of Rifle, et al., No. 1:20-cv-00522-CNS-KAS, U.S. District Court for the District of Colorado. Order Denying Summary Judgment entered October 3, 2022.

Estate of Allan George, et al. v. City of Rifle, et al., No. 22-1355, U.S. Court of Appeals for the Tenth Circuit. Judgment entered November 9, 2023.

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PETITION FOR WRIT OF CERTIORARI

The Estate of Allan George, his widow Sarra George, and Allan George's children petition for a writ of certiorari to review the Tenth Circuit's judgment in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is published at *Estate of George v. City of Rifle*, 85 F.4th 1300 (10th Cir. 2023), and is reproduced in the appendix hereto ("App") at App. 1-50. The Tenth Circuit's Order denying the petition for rehearing is reproduced at App. 67-68.

The transcript of the oral opinion of the United States District Court for the District of Colorado denying the defendants' motions for summary judgment is unreported and is reproduced at App. 51-66.

JURISDICTION

The district court had jurisdiction over Petitioners' federal civil rights claims pursuant to 28 U.S.C. § 1331. The Tenth Circuit Court of Appeals had limited jurisdiction on appeal pursuant to 28 U.S.C. § 1291 and *Johnson*, as Respondents took an interlocutory appeal from the district court's denial of qualified immunity.

The district court entered an oral order from the bench denying in its entirety Respondents' motion for summary judgment. Respondents took an interlocutory appeal, and the Tenth Circuit entered its opinion reversing on November 9, 2023. The Tenth Circuit denied rehearing and rehearing en banc on February 20, 2024. This petition

is timely filed, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

28 U.S.C. § 1291 provides, in relevant part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Allan George was killed after being shot twice in the back by Defendant Rifle Police Department officer Dewey Ryan. The family of Allan George respectfully implores you to watch this short video of the shooting, which was the

basis of the District Court's and Tenth Circuit's decision below:

https://youtu.be/2HO7a2Y2hX8[1]

Based on the video, the district court denied summary judgment to Defendants, concluding that a reasonable jury could readily find that Mr. George "made no hostile moves; [ ] never pointed a gun at anyone but himself; [ ] never threatened an officer or anyone else; [and] remained . . . suicidal . . . throughout the entire encounter." App. 17 (Tenth Circuit quoting the district court's order). The Tenth Circuit disagreed with certain findings of the district court regarding the video—though not the indisputable points that Mr. George made no hostile moves, never pointed a gun at anyone but himself, and seemed for all to see to be suicidal. Because of its disagreements with the district court's view of the video, the Tenth Circuit embarked on its own contradictory fact-finding, relying substantially on Defendants' expert and not the video itself. Ultimately, the Tenth Circuit reversed and deprived the George family of the jury trial that they were entitled to.

The case presents a prime opportunity for this Court to resolve the split in the circuit courts regarding interlocutory jurisdiction on appeal of a denial of summary judgment based on qualified immunity, as the facts present the farthest reach of how the circuits have applied *Scott*. This Court should clarify the interplay of *Johnson* and *Scott* and correct the Tenth Circuit's extreme departure

1. The video portion of this clip begins at 5:26. This link is hereinafter cited as "Video."

from the correct rule followed by the other circuits: that interlocutory appeals of qualified immunity denials must be based on legal disputes and not disagreement with a district court's well-supported factual findings. This Court should reiterate the very limited circumstances in which *Scott*'s "blatant contradiction" exception applies, as summed up by the Eleventh Circuit: "*Scott* stands for the commonsense proposition that when a video proves that the plaintiff can't be telling the truth, we don't accept the facts as he alleges them, even for purposes of deciding a summary-judgment motion." *Brooks v. Miller*, 78 F.4th 1267, 1271 (11th Cir. 2023).

I. While Standing on a Bridge over the Colorado River, Allan George Never Threatened Anyone But Himself.

On August 5, 2019, Rifle Police Department ("RPD") Officer Ryan shot Allan George twice in the back, killing him. The video of this incident shows that in the minutes preceding the killing, Mr. George had not threatened Officer Ryan, RPD Officer Shelby Beitzel, nor any other person. George was clearly suicidal—he had pointed a gun at his own chest for an extended period and indicated he would jump off the bridge—but even given every opportunity to do so, he had not threatened anyone. When George turned and started to jog away from the scene, he had pocketed his gun and his hands were empty; Defendant Ryan knew that the gun was in George's jeans pocket; and George made no move to reach for it. Despite no reason to believe that George was a threat to either officer or any other person, Officer Ryan shot Mr. George twice in the back, killing him.

George never pointed a gun at anyone but himself during his almost ten-minute long interaction with Officer Ryan and Officer Beitzel on the bridge. George had every opportunity to engage in a shootout with officers or to point the gun at the officers or passerby, but he chose not to. Nor did George make any threats against anyone else, including the officers. The only "threats" George made were threats to harm himself, including by indicating he would jump off the bridge. *See generally* Video.

After George put the gun in his pants pocket (which Defendant Ryan clearly saw at the time), he did not reach for his pocket at any point and made no hostile move toward anyone else as he slowly jogged away from the officers. The officers had no evidence, no probable cause, and absolutely no reason to believe that George intended to run into the town of Rifle and begin shooting people. It is nothing but pure speculation to assert that Defendant Ryan had any reason to believe George would have harmed anyone if he reached the end of the bridge or town. No reasonable basis existed for Defendant to doubt that George was suicidal and only suicidal. *See generally* Video.

II. The District Court Correctly Found That a Reasonable Jury Could View the Video as Showing Mr. George Not Threatening Anyone But Himself.

Based on the video and the other evidence presented by the parties, the district court denied Defendants' motion for summary judgment in its entirety, including denying Defendant Ryan qualified immunity. The court concluded that the jury could find that Defendant Ryan's conduct was unreasonable and constituted excessive force. *See* App. 55-60. The court found that a jury could

determine that "George did not pose any serious risk of harm to [Defendant Ryan] or anybody else other than himself ": "he made no hostile moves; he never pointed a gun at anyone but himself; he never threatened an officer or anyone else;" and "he never once made a move for the gun," which "remained in his pant pocket," "while he turned . . . and jogged towards town." App. 57-58. A jury could also find that George never would have made it to the town, as "he was not an able man." *Id.* at 58.

The court emphasized that a jury could find that Defendant Ryan did not have probable cause to believe George posed a threat of serious physical harm to him or others. *See* App. 56. The court explained that Defendant Ryan and Officer Beitzel did not subjectively believe George posed a threat based on the facts that the officers made "no effort to control any level of traffic," by, for example, positioning a car to block traffic; the officers made "no effort to . . . remotely stop people from passing by [the] scene" during the encounter; and none of the comments the officers made to George indicated they believed he posed any threat. *Id.* at 56-57.

The court found that eight seconds after George began jogging away, Defendant Ryan fired the first shot without warning that he would shoot, even though there was time to give a warning. *See* App. 57-58. The court concluded that this conduct by Defendant Ryan constituted "an obvious violation" of the Fourth Amendment under *Tennessee v. Garner*, 471 U.S. 1 (1985): "[y]ou have a suicidal person pointing a gun [at himself]; he never pointed the weapon at the officers; never made a threatening or provocative gesture; and the officers, importantly, had time and opportunity to give a warning before using deadly force."

App. 59. The court determined that these facts were substantially similar to several previous cases—including *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019), *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013), *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006), and *Cordova v. Aragon*, 569 F.3d 1183, (10th Cir. 2009)—thus satisfying the clearly established law prong of the qualified immunity standard. *See* App. 59-60.

The district court then denied summary judgment to Defendant Klein, who was the RPD Chief of Police, based on a supervisory liability theory. *See* App. 60-61. The district court likewise concluded that Defendant Rifle was not entitled to summary judgment on Plaintiffs' municipal liability claim. *Id.* at 61. Lastly, the district court denied summary judgment on Plaintiffs' wrongful death claim against Defendant Ryan. *See* App. 61-62.

All Defendants then took an interlocutory appeal to the Tenth Circuit, which is where *Johnson v. Jones* and *Scott v. Harris* enter the picture.

III. *Johnson v. Jones* and *Scott v. Harris*.

In 1995, this Court presided over an interlocutory appeal surrounding an alleged excessive use of force. *Johnson v. Jones*, 515 U.S. 304 (1995). The appeal was based on fact-specific arguments regarding evidence sufficiency. *Id.* at 308. This Court noted that jurisdiction to hear such an appeal was governed by 28 U.S.C. § 1291 and required that federal appellate courts review only "final decisions" of district courts. *Id.* That said, this Court cited *Mitchell v. Forsyth*, 472 U.S. 511 (1985), as providing for immediate interlocutory appeal when a

public official appealed a denial of qualified immunity on the basis of clearly established law, rather than an appeal based on disputes over the facts as found by the district court. *Johnson*, 515 U.S. at 311. This Court highlighted *Mitchell*'s insistence that the qualified immunity legal issue be distinct from the parties' disputes over facts to the extent that the appeal was "conceptually distinct" and "separate" from the merits of the case. *Id.* at 312.

> [An] appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff 's version of the facts, nor even determine whether the plaintiff 's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated. clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Id. (quoting *Mitchell*, 472 U.S. at 528).

The *Johnson* Court refused to extend *Mitchell*. The Court first noted that "the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters." *Johnson*, 515 U.S. at 316. Moreover, "considerations of delay, comparative expertise of trial

and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of 'qualified immunity' matters to cases presenting more abstract issues of law." *Id.* at 317. Ultimately, this Court unanimously held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319-20.

Just over ten years later, this Court was presented with the question "whether a law enforcement officer can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind." *Scott v. Harris*, 550 U.S. 371, 374 (2007). Certiorari had been granted from the Eleventh Circuit's affirmance of the district court's denial of summary judgment, which found "material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." *Id.* at 376 (citation omitted).

When this Court viewed the video, however, it was convinced that the lower courts' description of the facts was "blatantly contradicted by the record, so that no reasonable jury could believe it." *Id.* at 380. Specifically, the lower courts had described the high-speed car chase underlying the case as posing "little, if any, actual threat" to others. *Id.* at 378. However, this Court viewed the video and determined:

> The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night

> at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379-380.

This Court reasoned that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380. Applying that reasoning to the facts at issue, this Court determined "[t]hat was the case here with regard to *the factual issue whether respondent was driving in such fashion as to endanger human life.* Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction." *Id.* 380-81 (emphasis added).

In the seventeen years since *Scott*, Circuits around the country have struggled to determine *Scott*'s proper application and its limitations, especially as it relates to *Johnson*'s jurisdictional limitations on interlocutory appeals of qualified immunity. *See*, *e.g.*, *Heeter v. Bowers*, No. 23-3296, ___ F.4th ___, 2024 U.S. App. LEXIS 10299, at *17-20 (6th Cir. Apr. 29, 2024) ("A particularly thorny question is how to properly square *Johnson* with the Supreme Court's decision in *Scott v. Harris*, which reversed a district court's denial of summary judgment as 'blatantly contradicted by the record,' but did not discuss appellate jurisdiction whatsoever."); *see also Est. of Anderson v. Marsh*, 985 F.3d 726, 735 (9th Cir. 2021) (Fletcher, J., dissenting) (collecting cases and emphasizing that "the law in this area is extraordinarily confused").[2]

This Court has continued to uphold and apply *Johnson* in cases since *Scott*. "[I]mmediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a 'purely legal issue,' illustratively, the determination of what law was 'clearly established' at the time the defendant acted." *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011) (cleaned up). "However, instant appeal is not available, *Johnson* held, when the

2. "This uncertainty has consequences. It invites defendants to appeal whenever they have a non-frivolous argument that a blatant contradiction exists. That means more qualified-immunity appeals and additional issues in those appeals. Granted, courts often stress the rarity of the exception and the extreme circumstances in which it applies. But litigants often think that theirs is the rare, exceptional case. That gives them a reason to try." Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 Ga. L. Rev. 959, 999 (Spring 2021).

district court determines that factual issues genuinely in dispute preclude summary adjudication." *Id.*

IV. The Tenth Circuit Expanded *Scott* Beyond Meaningful Limitation.

After Defendants took an interlocutory appeal, which ought to have been governed first and foremost by *Johnson*, the Tenth Circuit reversed and granted summary judgment to all Defendants. The court ostensibly based this decision on the video of the incident, thus triggering the exception to re-finding facts from the *Scott v. Harris* line of cases, even though the Tenth Circuit only found a few minor facts that it deemed were "contradicted" by the video. *See* App. 27-30.

In particular, the Tenth Circuit disputed the district court's findings that a reasonable jury could (1) view George as a frail, older man; (2) find that at the time the officers decided to pull him over, they did not stop traffic on the bridge; (3) find the officers subjectively did not believe George posed a threat of harm to others; and (4) find that Ryan did not warn George to stop when he started jogging away. *See* App. 27-30. On their face, none of these issues is of substantial import to the central question in this case: whether a reasonable officer objectively would have had probable cause to believe that George was a threat to anyone but himself.

Asserting that these peripheral facts were "blatantly contradicted," the Tenth Circuit assumed license to re-determine every fact the district court found and then applied the factors from *Graham v. Connor*, 490 U.S. 386 (1989), to its own factual findings. However, the video does

not "blatantly contradict" the conclusion that a reasonable jury could readily find, as the district court found, that George "made no hostile moves; [ ] never pointed a gun at anyone but himself; [ ] never threatened an officer or anyone else; [and] remained hopelessly . . . suicidal . . . throughout the entire encounter." App. 17-18 (quoting the district court's order). Indeed, the Tenth Circuit never concluded that the video "blatantly contradicted" these district court findings, yet it nonetheless made its own factual findings, unsanctioned by the holding of *Scott*.

Most importantly, the Tenth Circuit found the second *Graham* factor—whether George posed an immediate threat to the safety of the officers or others—weighed in favor of Defendants as a matter of law. *See* App. 33-41. Rather than determining whether the district court had evidentiary support for its conclusion that this factor favored Plaintiffs, the Tenth Circuit—having already given itself license to find facts itself—made its own factual findings.

Completely separate from any findings that the district court made, in determining whether George made any hostile motions with the gun towards the officers, the Tenth Circuit proceeded to speculate that because George ignored orders to drop the gun, it must mean he intended to use it, *see* App. at 40-42—even though there was no evidence George had ever threatened anyone but himself with the gun, did not have the gun in his hand, and never reached for the gun as he jogged away. The Tenth Circuit deferred completely to Defendants' expert report to make this finding, *see id.* at 37-42, even though an expert report is not and could not be the type of evidence to blatantly contradict a factual finding. The Tenth Circuit emphasized

that George was running toward the City of Rifle, and thus even though video did not blatantly contradict the finding that George posed no immediate threat to any members of the public, the Tenth Circuit still weighed this fact in favor of Defendant Ryan. *See* App. 33-41.

Accordingly, the Tenth Circuit found "it was objectively reasonable for [D]efendant Ryan to use deadly force against George," and Defendant Ryan did not violate George's Fourth Amendment rights. App. 41. The Tenth Circuit thus did not consider the clearly established prong of the qualified immunity test, and the finding of no constitutional violation meant the claims against Defendants Klein and the City of Rifle (as well as the state law claims) failed as well. *See id.* at 42-45.

This Court has never sanctioned anything like what happened here: a law enforcement officer shooting twice in the back someone who is clearly only suicidal, jogging away, and not reaching for the gun that the officer knew was stowed in the person's pocket. In fact, "federal courts have afforded a special solicitude to suicidal individuals in lethal force cases when those individuals have resisted police commands to drop weapons but pose no real security risk to anyone other than themselves." *McKenney v. Mangino*, 873 F.3d 75, 82 (1st Cir. 2017); *see also Weinmann v. McClone*, 787 F.3d 444, 450 (7th Cir. 2015) (collecting precedents holding that clearly established law prevented officers from using "deadly force against suicidal people unless they threaten harm to others"). The Tenth Circuit's embarking on its own fact-finding is especially problematic, given that the facts were diametrically opposite of the district court's own conclusions. Absent reversal, future litigants in the

Tenth Circuit will rely on this case to reargue any and every factual finding and inference therefrom made by a district court in a qualified immunity denial, no matter how well-supported by the record.

ARGUMENT

I. Summary of Reasons for Granting Petition.

Full review by this Court is necessary to prevent the expansion of *Scott* beyond reasonable limits. The Tenth Circuit's opinion in this case is the furthest that expansion has been stretched in a deadly force case; if it is allowed to stand this is only the beginning of the end of *Johnson*'s rule of limited jurisdiction. *Scott* has been described as representing "the outer limit of the principle of *Johnson*." *Williams v. City of York*, 967 F.3d 252, 258 (3d Cir. 2020) (quoting *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007)). The Tenth Circuit's opinion stretches *Scott* to the point that it snaps and eliminates the clear, workable, and correct limit set by *Johnson* and applied by the other circuit courts.

The Tenth Circuit's opinion here has created a circuit split with every other Circuit that has spoken on the issue and has done so in a way that ignores and/or implicitly overrules *Johnson*. The Circuit did so by deeming Mr. George a threat, relying not on the video itself but by deferring entirely to Defendants' expert. Not only was the Tenth Circuit's opinion manifestly erroneous and unjust, but it is a harbinger of coming decisions if this Court does not act.

It is imperative that this Court clarify and cabin *Scott* for the video-based reasons described above, but also

for its expansion into other areas. "While *Scott* involved dashcam video footage, courts have since applied its logic to other types of evidence capable of objectively disproving witness testimony. *See Coble v. City of White House*, 634 F.3d 865, 868-69 (6th Cir. 2011) (audio from dashcam footage); *Curran v. Aleshire*, 800 F.3d 656, 663 (5th Cir. 2015) (still photographs); *McManemy v. Tierney*, 970 F.3d 1034, 1038 (8th Cir. 2020) (taser log); *White v. Georgia*, 380 F. App'x 796, 797 (11th Cir. 2010) (uncontradicted medical testimony)." *Hughes v. Rodriguez*, 31 F.4th 1211, 1218 (9th Cir. 2022); *see also Garcia v. Orta*, 47 F.4th 343, 350 n.2 (5th Cir. 2022).

This Court needs to make clear that the exception in *Scott* does not apply to other types of evidence, like expert reports and eyewitness testimony. If *Scott* is expanded to every type of evidence and finding one disagreement with the district court in the record empowers an appellate court to re-find every fact in a case, then *Johnson* is a dead letter.

II. The Tenth Circuit Has Created a Circuit Split Regarding the Scope of *Scott's* Exception to the Jurisdictional Limits on Interlocutory Appeal Elucidated in *Johnson*.

As explained above, the Tenth Circuit used the existence of video in this case to make its own findings of fact, contradicting the district court. It did so not based on a false finding regarding the threat Mr. George did or did not pose that was objectively disproved by the video, but rather by nitpicking the district court's view of the video, and then substituting its own view, as well as the view of Defendants' expert. This expansion of *Scott* would

swallow the rule of *Johnson*—whenever an appellate court could find one aspect of a video on which it disagreed with the district court, it could contradict the universe of facts found in the court below.

This conclusion is contrary to the clear weight of authority in other circuits. "*Scott* was not an invitation for trial courts to abandon the standard principles of summary judgment by making credibility determinations or otherwise weighing the parties' opposing evidence against each other any time a video is introduced into evidence. Rather, *Scott* was an exceptional case with an extremely limited holding." *Estate of Aguirre v. City of San Antonio*, 995 F.3d 395, 410-11 (5th Cir. 2021) (citation omitted); *see also Harris v. Pittman*, 927 F.3d 266, 276 (4th Cir. 2019) (holding that "*Scott* is the exception, not the rule" and that it "does not abrogate the proper summary judgment analysis"); *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) ("In *Scott*, the Supreme Court did not tinker with the summary judgment standard.").

"The mere existence of video footage of the incident does not foreclose a genuine factual dispute as to the reasonable inferences that can be drawn from that footage." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028 (9th Cir. 2018). "Factual 'inferences' capable of being drawn from the evidence are still inherently factual determinations about what parties 'may, or may not, be able to prove at trial.'" *Kindl v. City of Berkley*, 798 F.3d 391, 400-401 (6th Cir. 2015) (quoting *Johnson*, 515 U.S. at 313). "Embracing appellate jurisdiction over 'inferences' offers no principled limit to appellate review of factual disputes relevant to qualified immunity because in many cases, including this one, the 'inferences' at issue are

nothing more than aggregate factual questions." *Id.* at 400-401.

Contrary to the Tenth Circuit's opinion, "*Scott*'s holding is cabined to situations where documentary evidence '*blatantly contradict[s]*' a plaintiff's account." *Lewis v. Caraballo*, 98 F.4th 521, 529 (4th Cir. 2024) (emphasis added) (quoting *Witt v. W.V. State Police*, 633 F.3d 272, 276 (4th Cir. 2011), and *Scott*, 550 U.S. at 380). "Thus, where a video only 'offers *some* support for [an] officer's version of events,' [appellate courts] do not allow the officer to 'rehash[ ] the factual dispute below.'" *Lewis*, 98 F.4th at 529. As the Seventh Circuit has correctly described it:

> Video evidence, however, can eviscerate a factual dispute only when the video is so definitive that there could be no reasonable disagreement about what the video depicts. *Scott*, 550 U.S. at 380. It is a "narrow, pragmatic exception allowing appellants to contest the district court's determination that material facts are genuinely disputed," but only where the video "utterly discredit[s]" the non-movant's version of the facts. *Gant v. Hartman*, 924 F.3d 445, 449 (7th Cir. 2019). *Gant* further explained that
>
> > *Scott* does not hold that courts should reject a plaintiff's account on summary judgment whenever documentary evidence, such as a video, offers some support for a governmental officer's version of events. Instead, *Scott*

> holds that where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review.

Kailin v. Vill. of Gurnee, 77 F.4th 476, 481 (7th Cir. 2023) (quoting *Gant*, 924 F.3d at 450). "It should be considered a rare case where video evidence leaves no room for interpretation by a fact finder." *Id.*

III. All Other Circuits Continue to Correctly Rely on *Johnson* as Establishing Clear Limits on Interlocutory Appeals.

Though the Courts of Appeals have struggled to consistently apply *Scott* and have reached some divergent results, all Circuits are in agreement that the fundamental jurisdictional limit on interlocutory appeals laid down in *Johnson* remains the law. "The crucial distinction between appealable and non-appealable summary judgment orders denying qualified immunity is this: '[p]urely legal rulings implicating qualified immunity are normally reviewable on an interlocutory appeal,' . . . but rulings 'turn[ing] on either an issue of fact or an issue perceived by the trial court to be an issue of fact' are not." *Norton v. Rodrigues*, 955 F.3d 176, 184 (1st Cir. 2020). "[W]e lack jurisdiction to consider a defendant's argument 'that the facts asserted by the plaintiffs are untrue, unproven, warrant a different spin, tell only a small part of the story, and are presented out of context.'" *McKenney v. Mangino*, 873 F.3d 75, 80-81 (1st Cir. 2017) (quoting *Diaz v. Martinez*, 112 F.3d 1, 5 (1st Cir. 1997)).

Similarly, the Second Circuit has "routinely followed *Johnson*'s rule and has observed, '[t]he Supreme Court has made it clear that we lack appellate jurisdiction to decide an interlocutory appeal from a district court's denial of a claim of qualified immunity to the extent that the denial involves only a question of evidence sufficiency.'" *Franco v. Gunsalus*, 972 F.3d 170, 175 (2d Cir. 2020); *see also Swain v. Town of Wappinger*, 805 F. App'x 61, 62 (2d Cir. 2020) (summary order) ("If the District Court says the evidence was sufficient to create a jury issue, then that is the end of our review.").

"Our review is limited to issues of law. . . . If the denial of qualified immunity turns on a genuine issue of fact, we lack jurisdiction to review the qualified-immunity order." *Minor v. River*, 70 F.4th 168, 174 (3d Cir. 2023). "Whether we agree or disagree with the district court's assessment of the record evidence . . . is of no moment in the context of this interlocutory appeal. This conclusion is required because the Supreme Court and this court have made clear" that defendants' interlocutory appeals cannot be based on fighting the district court's finding of facts. *Culosi v. Bullock*, 596 F.3d 195, 201 (4th Cir. 2010).

"[A]ny arguments on appeal challenging the district court's determination as to 'which facts a party may, or may not, be able to prove at trial,' are not reviewable. Similarly, 'a defendant may not challenge the inferences the district court draws from those facts, as that too is a prohibited fact-based appeal.'" *Browning v. Edmonson Cty.*, 18 F.4th 516, 523 (6th Cir. 2021) (cleaned up and quoting *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015)).

Scott's "exception to the final decision rule is . . . a very narrow one. The denial of qualified immunity is only appealable to the extent that it turns on an issue of law . . . our review is therefore confined to abstract issues of law, *see Johnson v. Jones*, 515 U.S. 304, 317, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). We may not reconsider the district court's determination that certain genuine issues of fact exist." *Alhadji F. Bayon v. Berkebile*, 29 F.4th 850, 854 (7th Cir. 2022).

IV. Mr. George's Level of Threat Is Not Conclusively and Indisputably Proven, One Way or the Other, By the Video.

Here, Defendants' interlocutory appeal was a direct attack on the district court's factual findings. This is exactly the type of appeal *Johnson* prohibits.

The central factual and inferential dispute of this case (as in any deadly force case) is whether a reasonable officer could reach no other conclusion than that George was threatening, despite the fact that the video clearly shows him threatening no one but himself at any point and no other evidence established he had ever threatened anyone else with the gun.

The threat posed by a suspect is generally a factual and inferential dispute. *See*, *e.g.*, *Rush v. City of Philadelphia*, 78 F.4th 610, 617-618 (3d Cir. 2023) ("[W]e lack jurisdiction over factual challenges to the definition of the right at issue in evaluating qualified immunity—including as to whether a victim of excessive force was a threat to officers or the public."). "Whether [a suspect] continued to present a threat, [and] how immediate the

threat was . . . are uncertainties and unresolved material questions of fact." *Smith v. Finkley*, 10 F.4th 725, 741 (7th Cir. 2021). "To resolve these disputes, [an appellate court] would need to consider inferences from the facts which the parties dispute. . . . Considering inferences is something we cannot do without going beyond our jurisdiction on . . . interlocutory appeal." *Id.* The Tenth Circuit's refusal to follow these well-settled principles of summary judgment and appellate jurisdiction, in a published opinion, opens the door to a flood of future appellants arguing about factual findings that are not "blatantly contradicted" by any objective evidence.

In contrast to the facts here, the "blatant contradiction" line of cases was born of an obvious concern: in *Scott* the video showed the suspect's embarking on a reckless high-speed car chase that was objectively threatening and dangerous to the general public, which belied the lower court's conclusion that the high-speed chase posed little threat to anyone else. George jogging away with a gun in his jeans pocket that he never once pointed at dozens of bystanders or any officer, or reached for, is plainly not the same level of objectively indisputable threat. It is simply wrong to view the video in this case and conclude, as the Tenth Circuit did, that it is a "visible fiction" that a jury could find that George posed no threat to anyone was merely suicidal.

Most importantly, none of the facts that the Tenth Circuit determined were blatantly contradicted conclusively establish the level of threat George posed, which a jury reasonably might find was none. Asserting that these facts were "blatantly contradicted," the Tenth Circuit assumed license to re-determine every fact the

district court found, including that George posed no threat, even though it did not find—and could not have found—that all those facts were blatantly contradicted by the video. In doing so, the Tenth Circuit's opinion conflicts with *Scott* and precedent from other Circuits that each fact found by the district court must be accepted by this Court unless that fact is blatantly contradicted by the record.

The Tenth Circuit also set precedent inconsistent with other decisions of this Court on the "blatant contradiction" exception by deferring completely to Defendants' expert report to conclude George posed a threat of harm, most notably the expert's conclusion that because George kept the gun, he must necessarily have intended to use it to harm someone other than himself—a disputed assertion based on nothing but rank speculation given that George indisputably never threatened anyone. *See* Slip Op. at 34-35. Contrary to the Tenth Circuit's assertion, the defense expert's statements were not unopposed; Plaintiffs submitted their own expert report that concluded a reasonable officer could not have concluded George posed a threat of harm to the officers or others. The Tenth Circuit's acceptance of a hired expert's opinion to resolve an inherently disputed fact—George's manifest intentions while jogging away—violates basic principles of summary judgment and interlocutory appellate review.

Other Circuits have addressed excessive force cases with video evidence and determined that when the level of threat is a disputed fact and available video could be viewed in favor of either side, Courts of Appeals lack jurisdiction to contradict a district court's findings on interlocutory appeal.

For example, the Sixth Circuit recently decided an appeal disputing a police shooting of a suicidal man who may have been armed. *Heeter*, ___ F.4th at ___, 2024 U.S. App. LEXIS 10299, at *26-27. The court examined the available video and summarized it as follows:

> Consider what we can see from the video: The officers knew they had been called to the home because Mr. Heeter was suicidal and armed. When they arrived, Mr. Heeter was sitting alone at a table smoking a cigarette. While there may have been a concern of self-harm, Mr. Heeter did not tell the officers in his home he intended to shoot his family or any of the officers. While not dispositive, that Mr. Heeter had not acted aggressively towards the officers and had not committed a crime suggests the use of deadly force against him was unreasonable.
>
> Eventually, Mr. Heeter put his gun down and asked the officers to leave. A group of officers then walked inside with their guns drawn; Officer Bowers had his large assault rifle at his shoulder. In response, Mr. Heeter stood up and took a few steps toward the wall to retreat from the officers. Just after an officer asked him to "show us your hands," Mr. Heeter began to take his hands out of his pockets and started some sort of movement toward the ground. It was at this moment that Bowers shot Mr. Heeter.

Id. (cleaned up).

The Sixth Circuit reasoned that "[w]hile it may have been reasonable for Officer Bowers to believe the weapon

was within reach, whether it was also reasonable for him to believe Mr. Heeter would use his weapon against the officers is a different—and critical—question." *Id.* at *29-30. "Something else about the situation must have reasonably indicated to Officer Bowers not only that Mr. Heeter was armed, but that he planned to shoot the officers or otherwise posed a serious threat to their safety." *Id.* Ultimately, the Sixth Circuit concluded that "any officer would have known it violated the Constitution to shoot a suicidal individual that had moved slightly, even if the person held a gun in their pocket or could grab a gun within reach." *Id.* at *33. Like Mr. Heeter, Allan George was suicidal and never threatened anyone but himself. The Sixth Circuit properly analyzed the available video; if the Tenth Circuit had done so, this case would be headed for trial.

Similarly, in *Rush v. City of Philadelphia*, the Third Circuit held that it "lack[ed] jurisdiction over factual challenges to the definition of the right at issue in evaluating qualified immunity—including as to whether a victim of excessive force was a threat to officers or the public." 78 F.4th 610, 617-618 (3d Cir. 2023). In reaching this conclusion, the court cited a previous case in which it had rejected an officer's view of a suspect's gesture as "threatening" as only "one interpretation of what happened" *Id.* (discussing *El v. City of Pittsburgh*, 975 F.3d 327, 337-38 (3d Cir. 2020)). "Having found specifically that 'the District Court's finding that [plaintiff] was non-threatening is not blatantly contradicted by the video,' the majority concluded that an articulation of the right at issue which would have found the victim of police force to be threatening, 'is not available to us within the limits of our jurisdiction.'" *Rush*, 78 F.4th 610, 617-618 (quoting *El*,

975 F.3d at 337-38). The Third Circuit thus concluded that the officer's similar argument in *Rush* must be rejected because "he is likewise unable to show that the District Court made 'demonstrably false findings about how the events [in question] unfolded.' . . . As such, he cannot pry open the door to factual interlocutory review under the *Scott v. Harris* exception." *Id.* at 618 (cleaned up) (quoting *El*, 975 F.3d at 337).

Also recently, the Eleventh Circuit has rejected attempts to second guess a district court's determination that there were disputes of fact in a deadly force case as to the threat a suspect posed. *Chisesi v. Hunady*, No. 21-11700, 2024 U.S. App. LEXIS 9158, at *13-14 (11th Cir. Apr. 16, 2024). The Court cited a previous case in which "police officers appealed a denial of qualified immunity, arguing that their actions were justified because a suspect 'posed an immediate threat of serious physical harm.'" *Id.* (quoting *English v. City of Gainesville*, 75 F.4th 1151, 1156 (11th Cir. 2023)). However, the parties disputed whether the suspect had posed a threat, and after reviewing the video, the district court "concluded that a reasonable jury could watch the videos and agree with either side." *Id.* The Sixth Circuit clearly stated that "this is the type of ruling we lack jurisdiction to review." *Id.* Turning to the appeal before it in *Chisesi*, the Sixth Circuit held that "the only purported error Officer Hunady asks us to review—whether the district court correctly interpreted the video—is a factual one. Under *English*, and entirely consistent with *Scott*, we lack jurisdiction to make that call at this stage of the litigation." *Chisesi*, 2024 U.S. App. LEXIS 9158, at *14.

Based on the above law in this section and the previous sections, this interlocutory appeal would have resulted in a correct affirmance in at least the First, Third, Sixth, Seventh, Ninth, and Eleventh Circuits, and the surviving family of Allan George would have had their day(s) in front of a jury. This Court must grant certiorari or summarily reverse to correct this manifest injustice.

V. *Scott* Should Be Cabined to Situations In Which A Nonmovant's Description of the Factual Circumstances is Conclusively Disproven by Video.

The proper scope for *Scott* is relatively easy to describe. "*Scott* stands for the commonsense proposition that when a video proves that the plaintiff can't be telling the truth, we don't accept the facts as he alleges them, even for purposes of deciding a summary-judgment motion." *Brooks*, 78 F.4th at 1271. In *Scott* itself, the plaintiff claimed that his actions did not threaten anyone, but this Court reviewed the dashcam video of the "Hollywood-style" high-speed car chase and determined that it was simply not true that the plaintiff 's actions had not threatened others.

The proper application of *Scott* to a deadly force case that does not involve a high-speed car chase would be, for example, a plaintiff 's assertion that he was no threat because he did not have a gun in his hand, but video clearly shows he did, or that the plaintiff 's story was that he did not raise the gun in his hand, but video clearly shows that he did. These are objective indications of a threat, whereby the plaintiff 's story means there was no threat, but the video makes clear that these discreet facts/actions actually took place.

Circuits have easily applied *Scott* to such situations. *See*, *e.g.*, *Hodge v. Engleman*, 90 F.4th 840, 846 (5th Cir. 2024) (concluding that video "show[ed] Hodge raising a gun and pointing it at Engleman, as well as the gun lying on the ground next to his hand after the officers had shot him," which contradicted plaintiff 's claims that he had attempted to comply with officers commands to show his hands and posed no threat to the officers); *Est. of Hernandez v. City of L.A.*, 96 F.4th 1209, 1215 & n.2 (9th Cir. 2024) (claim that suspect was unarmed was blatantly contradicted by bodycam video of an officer taking the gun out of his hand after being shot by officers); *Dockery v. Blackburn*, 911 F.3d 458, 466 (7th Cir. 2018) ("Dockery's claim that he made no aggressive moves toward the officers after the first Taser shock and did not try to stand up is 'utterly discredited' by the video, *Scott*, 550 U.S. at 380, which clearly depicts his physical resistance to the officers' attempts to handcuff him both before and after the first Taser shock."); *Shaw v. City of Selma*, 884 F.3d 1093, 1100 n.6 (11th Cir. 2018) ("The estate asserts that when the shot was fired Williams was walking towards Shaw, but the video clearly shows that he was not."); *Aipperspach v. McInerney*, 766 F.3d 803, 808 (8th Cir. 2014) (video of suspect with a gun raised above his head contradicted claim that he was not a threat).

As a matter of common sense, running away is simply nowhere near the same degree of threat as leading police on an extended high-speech car chase, and Petitioners have never once asserted a fact that was contradicted by the video in a similar way. This Court should clarify the scope of *Scott* to arrest the erosion (and eventual eradication) of the jurisdictional limits established by *Johnson*.

VI. The Tenth Circuit's Decision Involves Matters of Exceptional Public Importance: Law Enforcement's Use of Deadly Force and the Inviolability of the Jury's Role in our Civil Justice System.

This proceeding involves matters of great public importance. At substantive issue here, is law enforcement's use of deadly force to kill members of the public. As this Court stressed in its seminal deadly force opinion, "[th] he intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Garner*, 471 U.S. at 9.

Moreover, denying families like the Georges their opportunity to put their case before a jury is profoundly damaging to our system of justice. Usurping the fact-finding and inferential duties of the jury has deleterious "political ramifications":

> One commentator laments the loss of the civil jury trial's role as a "safeguard against tyranny." Equally important is the loss of the jury's power to add a gloss to a rule of decision. For example, when jurors are permitted to exercise their inference-drawing power, they apply principles such as "reasonable speed" and "ordinary care" to particular disputes. . . . Jury verdicts thus serve as an expression of the community's tolerance or intolerance for certain kinds of conduct and, in so doing, significantly influence the national character.

> Individually, juries resolve discrete disputes; collectively, their verdicts are "a reflection of community values and norms." When judges take inference-drawing duties away from juries, they necessarily substitute their own values and norms for those that the jury would bring to bear in reaching their verdicts. This result undermines the jury's political function and skews the way in which we shape and perceive community standards.

Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. Rev. 435, 477 (March 2014).

A law enforcement officer took the George family's husband and father away from them and yet, absent this Court's intervention, the community, through a jury trial, will never be able to speak to the appropriateness of this killing.

CONCLUSION

The Tenth Circuit's decision creates a Circuit split expanding *Scott's* exception to swallow the rule of limited jurisdiction on interlocutory appeal described in *Johnson*. Accordingly, Petitioners respectfully request that the decision of the Tenth Circuit be summarily reversed, or alternatively, that a writ of certiorari be issued so full review can be had by this Court.

Respectfully submitted,

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May 20, 2024

APPENDIX

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APPENDIX A — UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT OPINION, DATED NOVEMBER 9, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-1355

ESTATE OF ALLAN GEORGE, BY AND THROUGH ITS PERSONAL REPRESENTATIVE SARRA GEORGE; SARRA GEORGE, INDIVIDUALLY; KENNETH ALLAN GEORGE, INDIVIDUALLY; NICOLE LYNN WALLACE INDIVIDUALLY; M.E.G., A MINOR, BY AND THROUGH THEIR LEGAL GUARDIAN SARRA GEORGE; T.A.G, A MINOR, BY AND THROUGH THEIR LEGAL GUARDIAN SARRA GEORGE,

Plaintiffs-Appellees,

v.

CITY OF RIFLE, COLORADO, A MUNICIPALITY; DEWEY RYAN, POLICE CORPORAL, IN HIS INDIVIDUAL CAPACITY; TOMMY KLEIN, POLICE CHIEF, IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellants.

November 9, 2023, Filed

Appeal from the United States District Court for the District of Colorado. (D.C. No. 1:20-CV-00522-CNS-GPG).

Appendix A

Before **ROSSMAN**, **KELLY**, and **BRISCOE**, Circuit Judges.

BRISCOE, Circuit Judge.

The plaintiffs in this case, which include the estate and surviving family members of Allan Thomas George, filed this 42 U.S.C. § 1983 action against the City of Rifle, Colorado (the City), Tommy Klein, the chief of the Rifle Police Department (RPD), and Dewey Ryan, a corporal with RPD, alleging that the defendants violated George's Fourth Amendment rights by employing excessive and deadly force against him in the course of attempting to arrest him on a felony warrant. Plaintiffs also asserted a Colorado state law claim of battery causing wrongful death against Ryan.

Defendants moved for summary judgment with respect to all of the claims asserted against them. Defendants Ryan and Klein asserted, in particular, that they were entitled to qualified immunity from the § 1983 excessive force claim. The district court denied defendants' motion in its entirety. Defendants have now filed an interlocutory appeal challenging the district court's ruling. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse and remand with directions to enter summary judgment in favor of defendants as to all of the plaintiffs' claims.[1]

1. Judge Rossman would remand the plaintiffs' state law wrongful death claim to the district court with instructions to dismiss for lack of supplemental jurisdiction. *See* 28 U.S.C. § 1367.

Appendix A

I

Factual history

The facts of this case are, in large part, undisputed. In 2009, George, a Colorado resident, pleaded guilty in the District Court of Lake County, Colorado, to one count of Sexual Exploitation of a Child, in violation of Colo. Rev. Stat. § 18-6-403, a class five felony. George was placed on probation and was required to register as a sex offender for four years. George successfully completed the terms and conditions of his sentence. As a result, his original felony case was dismissed and no felony conviction entered.

On April 10, 2019, a Federal Bureau of Investigation (FBI) Child Exploitation and Human Trafficking Task Force reported that during a recent criminal investigation of suspected illegal possession and distribution of child pornography by individuals using "Kik Messenger," a "cross-platform mobile application used for instant messaging," George, who at that time was a resident of Rifle, Colorado, was positively identified as an active participant in those illegal activities. Aplt. App., Vol. I at 112. Following the Task Force's report, a local FBI agent and an investigator with the 9th Judicial District Attorney's Office in Colorado performed a follow-up investigation into George's activities, including obtaining and executing search warrants for George's home. As a result, they determined George to be in possession of pornographic and/or sexually exploitive images of children.

On June 20, 2019, the same day the search warrants were executed at George's home in Rifle, Colorado, law enforcement officers personally contacted George at a construction site in Vail, Colorado. When law enforcement officers informed George of the investigation, he told them he "knew it was wrong," but that he "explored several groups on Kik" looking for images of child pornography. *Id.* at 113.

At some point after June 20, 2019, George's wife, Sarra George (Sarra), left Colorado with George's two minor children and traveled to another state. Sarra informed multiple people, including members of George's family, that George was being criminally investigated for possessing child pornography.

On July 12, 2019, George purchased a .45 caliber handgun from a licensed firearms dealer. Because George's 2009 Colorado state felony conviction had been dismissed, the background check that the firearms dealer ran did not reveal anything that would disqualify George from purchasing the firearm.

On or about July 30, 2019, Sarra contacted the RPD and requested what the RPD classified as a "welfare check" due to a "suicidal party" at George's residence in Rifle. *Id.* Sarra, who was still out of state, informed the RPD that George was being investigated for child pornography and had recently made suicidal statements to her. Sarra also informed the police that George had recently purchased a gun and had told her "that he was not 'going back to jail without a fight.'" *Id.* The information

that Sarra conveyed on the phone call to the RPD was in turn conveyed to RPD officers during a "pass-down," which "is a routine beneficial practice" that "occurs at the end of each shift so that officers from a previous shift can update and inform other officers of critical information at the time such other officers take over a follow-on subsequent shift." *Id.*

On August 5, 2019, a judge in the 9th Judicial District in Colorado determined that there was probable cause to conclude that George committed the criminal offense of sexual exploitation of a child, in violation of Colo. Rev. Stat. § 18-6-403, and, as a result, issued a warrant for George's arrest. That same day, officers from the Vail Police Department attempted to contact George at his jobsite to make the arrest. George's supervisor informed the officers that George failed to show up for work that day.

On the afternoon of August 5, 2019, officers from the RPD visited George's residence and spoke with Sarra. Sarra told the officers that George had a firearm that he carried at work and at home, and that he recently returned from a trip out of state. Sarra also told the officers that George recently told her that he was "not going to be a sex offender" and "wasn't going to jail." *Id.* Sarra told the officers that she interpreted these statements to mean that George would not be arrested without a fight. In addition, Sarra told the officers that, while she was out of state, George had installed a video surveillance camera at their home that fed video directly to his cell phone and would allow him to observe visitors approaching the residence.

At approximately 6 p.m. on August 5, 2019, a dayshift RPD officer who was concluding her shift conducted a "pass-down" of information to Corporal Dewey Ryan (Ryan) and Officer Shelby McNeal (McNeal), the two (and only) officers who were scheduled for that evening's night shift. *Id.* at 83, 92, 114. This "pass-down" included "the information regarding the arrest warrant for . . . George and the statements relayed to law enforcement earlier that day by" his wife. *Id.* at 114. "At or near the time of this pass-down, Corporal Ryan and Officer McNeal both viewed a photograph of . . . George." *Id.* Ryan subsequently obtained a copy of the arrest warrant and reviewed it.

Based upon the information they received during the pass-down, Ryan and McNeal decided to conduct a felony traffic stop if George returned to Rifle that evening, rather than waiting for him to return to his residence. Accordingly, Ryan and McNeal each drove their own marked patrol cars and parked at the intersection of I-70 and Colorado State Highway 13.[2] To the south of that intersection lies a small portion of the City of Rifle, comprised mostly of businesses. To the north of that intersection lies the main portion of the City of Rifle.

At approximately 7:11 p.m. that evening, Ryan observed a white Ford F-150 truck exit from I-70 westbound at Exit 90. The truck, which was clearly

2. Ryan requested assistance from a Garfield County Sheriff's deputy who parked his patrol vehicle near Ryan's and McNeal's vehicles. That deputy, however, was subsequently dispatched to another location, leaving Ryan and McNeal alone to attempt to arrest George.

marked with the name of the company where George worked, matched the description of George's truck given to law enforcement by his wife. Ryan was also able to positively identify George as the driver of the truck.

Upon positively identifying George, both Ryan and McNeal activated the emergency lights on their patrol vehicles and positioned their vehicles directly behind George's truck as soon as he exited I-70 and turned northward onto Colorado State Highway 13. Within seconds, George pulled his truck to the side of the road and stopped approximately 200 yards from the offramp. When stopped, George's truck was on a bridge that spans the Colorado River, which is commonly referred to as the "River Bridge." *Id.* at 25, 84. Ryan parked his patrol vehicle approximately five to ten yards behind George's truck and McNeal parked her patrol vehicle less than five to ten yards from Ryan's vehicle.

Ryan retrieved his patrol rifle, got out of his patrol vehicle, and stood in the gap between his open driver's-side door and the main vehicle frame of his patrol vehicle. Ryan then began giving loud verbal commands to George to place his hands outside of the driver's side window of his truck. George used his driver's side mirror several times to look directly at Ryan, but did not place his hands outside of his truck as directed by Ryan. George then, without being directed to do so by Ryan, got out of his truck and walked towards the rear of his truck and Ryan's vehicle. Although Ryan ordered George "to stop walking toward" Ryan's vehicle "and return to his" truck, George ignored those commands. *Id.* at 85. While he was walking

towards the back of his truck and the front of Ryan's vehicle, George reached behind his back and retrieved a handgun. Ryan could see that George's handgun had an extended magazine that provided for a larger capacity of ammunition.

George, continuing to ignore verbal commands from Ryan to put the handgun down, moved the handgun up to his chest area. George then, again in defiance of verbal commands from both Ryan and McNeal, walked between the rear of his truck and the front of Ryan's patrol vehicle and towards a guardrail on the east side of the River Bridge. George engaged in conversation with Ryan and McNeal and repeatedly stated to them, "It's over!" and "I'm not going to jail!" *Id.* at 117. According to Ryan, McNeal, and citizen witnesses passing by in their vehicles, George appeared agitated and angry. On at least two occasions, George began to verbally count down by saying "3, 2, 1," as if demonstrating the intent to shoot himself. *Id.* at 116.

When he got to the guardrail, George stepped over it, turned around (with his back towards the river below and his head and chest facing towards the road), and pressed the front of his calves against the guardrail. Using his right hand, George held the gun at or near his upper chest area with the muzzle pointing at his chest and his thumb on the trigger while he continued talking to Ryan and McNeal. Ryan and McNeal continued to urge George to put his handgun down, to climb back over the guardrail, and to speak with them. In response to Ryan and McNeal's pleas, George continued to state, "It's all over!" and "It's over!" *Id.* at 117.

After remaining in the same position by the guardrail for several minutes while talking to Ryan and McNeal, George turned around and faced the river below. Initially after doing so, George continued to hold the handgun in his right hand as he peered down at the river. After a brief period, however, George placed his handgun in the right front pocket of his jeans with the butt of the handgun protruding outside and never again held it in his hand for the remainder of the encounter. George then stared down at the river, bent down slightly, and appeared to be getting ready to jump into the river. George did this several times, interspersed with talking to the officers and refusing to obey their commands. At some point, George removed from his jeans pockets his wallet, some cash, two knives, and his glasses and threw these items on the ground.

Up to this point in the encounter, Ryan and McNeal had together ordered George approximately forty-six times to drop his handgun. Despite these orders, and despite disposing of other personal items on his person, George never surrendered possession of his handgun. And, during the entire encounter, there was a steady stream of traffic in both directions over the River Bridge.

After crouching several times while facing the river, George stood up straight, looked to his left towards downtown Rifle, stepped back over the guardrail, first with his left leg and then with his right leg, and effectively positioned himself facing away from the two officers and towards downtown Rifle. George then began walking along the shoulder of the road next to the guardrail in a northerly direction towards downtown Rifle and away

from the two officers. As George did so, both Ryan and McNeal shouted at George to stop. More specifically, Ryan shouted, "Allan, stay, don't do it," and McNeal shouted, "Stay on that side." *Id.* at 156; Combined audio/video of stop at approx. 9:25-9:28. George, however, continued walking away and, after taking approximately five steps, began jogging or running. Ryan twice yelled, "Allan," in an attempt to get George to stop. Aplt. App., Vol. I at 156. McNeal yelled, "Just stop right there. Stop. Stop." Combined audio/video of stop at approx. 9:28-9:33.

As George began walking and then running away, Ryan responded by moving forward around his patrol car to the shoulder of the road by the guardrail and following George. Using his patrol rifle, Ryan then shot George two times in the back. According to Ryan, "[t]he fact that George had the opportunity to attempt suicide by either shooting himself or jumping off the bridge, but did not, . . . led [him] to believe that [George] was not suicidal but would instead use the gun against [the police] or the public." Aplt. App., Vol. I at 87. Ryan alleges that he "fired at the last possible opportunity to safely do so given that George was running into an area where [Ryan's] backstop would have been the populated area of the City." *Id.* at 88. McNeal similarly stated that she was "worried that [George] was running towards . . . more people and residences" and "d[id]n't know what his plan was there." *Id.* at 199.

George, who at that point was approximately fifty-five feet in front of his own truck and approximately thirty yards or less north of Ryan's location, immediately fell

to the ground upon being struck by the two bullets. The distance from where George fell to the nearest populated area of Rifle at 1st Street and Riverwhite Avenue was approximately four hundred and twenty-two yards. In addition, the place where George fell to the ground was past the northern edge of the Colorado River, meaning there was only a small drop from the River Bridge to the land below.

After George fell to the ground, Ryan and McNeal moved forward and performed a pat-down search of George's body. Ryan removed the handgun from George's right front jeans pocket and placed it on the curb underneath the guardrail. A Garfield County Sheriff's deputy who had arrived on the scene during the encounter inspected the handgun taken from George's pocket and determined that it was locked and loaded, with a round loaded inside the firing chamber.

After disarming George, Ryan placed George into handcuffs and began to provide George with emergency medical treatment, including applying pressure to the bullet wounds on his torso. The officers called for an ambulance and, while waiting for the ambulance to arrive, continued to talk to George. Emergency medical providers then arrived on the scene. Despite the efforts of the officers and the emergency medical providers, George died at approximately 7:38 p.m. and was pronounced dead at Grand River Hospital in Rifle. An autopsy concluded that George suffered two gunshot wounds "on the right aspect of [his] back" and that "[b]oth gunshot wounds perforated [his] right lung and resulted in internal bleeding in [his] right chest cavity." *Id.* at 121.

Klein, the Chief of Police for RPD at the time of the incident, "was at home asleep during the incident and received a phone call from a telecommunicator letting [him] know there were officers on the [R]iver [B]ridge, a subject with a firearm, and that they requested [he] respond to the scene." *Id.* at 97. Klein subsequently "heard on [his] police radio that shots were fired." *Id.* Klein "arrived at the scene approximately 10 minutes later and observed a deputy blocking traffic on the north side of the [R]iver [B]ridge." *Id.* "George had already been transported away from the scene." *Id.* Klein "conducted a safety briefing with . . . Ryan . . . who gave [him] a broad overview of what had happened." *Id.*

Klein then "contacted the Sheriff and the District Attorney to have the Critical Incident Team ('CIT') respond." *Id.* "CIT is a group of local law enforcement agencies who, along with the Colorado Bureau of Investigation, investigates officer-involved shootings on behalf of the District Attorney's Office." *Id.* On November 4, 2019, the District Attorney for the Ninth Judicial District of Colorado issued a lengthy letter outlining the CIT's investigatory findings and explaining his decision to "decline to charge anyone with a crime for the death of . . . George." *Id.* at 129.

Procedural history

On February 25, 2020, several of George's family members—Sarra, two of George's adult children (Kenneth Allan George and Nicole Lynn Wallace), and two of George's minor children (T.A.G. and M.E.G.)—

initiated these federal proceedings by filing a complaint against the City, Ryan, and Klein. On February 26, 2020, plaintiffs filed an amended complaint correcting certain errors in the original complaint. The first claim for relief, which was asserted solely by the Estate of Allan George pursuant to 42 U.S.C. § 1983, alleged that defendant Ryan "seized . . . George by means of objectively unreasonable and excessive, deadly force when he shot him to death without any prior warning without having reasonable belief [that] . . . George posed a significant threat to . . . Ryan, . . . McNeal, or any other person if not immediately apprehended." *Id.* at 34. The first claim further alleged that Ryan's use of deadly force "was excessive under the circumstances" and "objectively unreasonable in light of the facts and circumstances confronting him." *Id.* The first claim also alleged that Ryan's "acts and omissions . . . were because of and pursuant to the custom, policy, training, and/or practice of Defendants Rifle and Klein." *Id.* at 35.

The second claim for relief, which was asserted by the individual plaintiffs (i.e., Sarra, Kenneth Allan George, Nicole Lynn Wallace, M.E.G., and T.A.G.), alleged that defendant Ryan committed battery causing wrongful death, in violation of Colorado state law, by "intentionally sh[ooting] . . . George twice in the back with the intent to inflict harmful contact on . . . George, and which such contact caused injury to . . . George, namely his death." *Id.* at 37.

On April 25, 2022, defendants filed a motion for summary judgment. Defendants argued that defendants Ryan and Klein were entitled to qualified immunity.

Defendants also argued that plaintiffs' wrongful death claim should be dismissed, "[g]iven the lack of evidence rising to the level of willful and wanton conduct." *Id.* at 76. Lastly, defendants argued that plaintiffs' claim against the City should also be dismissed.

The district court held a hearing on defendants' motion for summary judgment on October 3, 2022. Counsel for both parties agreed that the material facts were not in dispute. After hearing argument from both sides, the district court orally ruled in favor of plaintiffs and denied defendants' motion for summary judgment. The following is a complete recitation of the district court's ruling:

> In defendants' motion for summary judgment, the defendant moves for summary judgment as to the two claims brought by the plaintiff in this case. We will deal with the first claim first, excessive force in violation of the Fourth Amendment. This claim was brought against all three defendants, which are Officer Ryan, Sheriff Klein, and the City of Rifle.
>
> It's clear—the law that defines the boundaries of this claim is clear, and that is, to use deadly force, an officer must believe that the suspect poses a serious threat to the officer or others around the officer.
>
> In looking at that threat and in assessing the objective reasonableness of that threat, the Court must look at the severity of the crime

underlying the seizure, the immediate threat to the safety of officers or others, and whether with [sic] the suspect resisted or evaded seizure. That doesn't end the inquiry, however. And this Court believes, as I think the parties do believe, that the key issue is, what was the level of the threat faced by Officer Ryan at the time?

In reviewing that threat, other factors come into play, as identified by the parties, including whether there were hostile motions attributed to George at the time, the distance between the parties, the intentions of the subject—which is George, here. And those three factors the Court finds most compelling.

As with respect to Officer Ryan, he needed to have probable cause to believe that the suspect posed a threat of serious physical harm to him or others. And he did not have that, and I believe a jury could find that he did not have that. If we look at the video—which I did several times and outlined what went on in the video—here is what we have: We have a 58-year-old man, clearly frail. He looks to be, frankly, to this Court's view, in his 60s, with some sort of physical disability. Officer Ryan and Officer [McNeal] pleaded with him for minutes to put down the gun and not take his own life. It is clear from the video, at no time did this turn from a potential suicide to a potential homicide.

Indeed, throughout the entire nine minutes before—before George left the guardrail, he was looking up at the sky, seeming to be pleading with a higher power, making utterances of, he doesn't know what to do, he's embarrassed for his family, his family won't talk to him. These are clearly signs this individual is suicidal, not homicidal.

That the officers did not believe there was a serious threat is evidenced in several ways. One, traffic was not stopped; and there was no effort to control any level of traffic. Granted, there may not have been time to get backup; but certainly they could have positioned a car to stop traffic, and that was not done. During the nine minutes where—well, I guess it's only seven minutes where George was wielding a gun, pointed always at himself, there was no effort to even remotely stop people from passing by this scene. That defeats the argument that there was some level of threat at that time.

You can also tell the officers did not believe there was a threat of harm to others by the comments they were making to George, which included, 'Don't shoot yourself.' 'You have kids.' 'It's not over.' 'Put the gun away.' 'Let's talk about this.' None of that indicated any level of threat posed by George.

At seven minutes into the video, he puts the gun into his pocket. He still looks like he's going to jump. And, in fact, Officer Ryan makes a call indicating that he's going to jump. He calls into the station, saying, 'He's going to jump.' He continues this way for another two minutes, again, gun in pocket, actively looking like he's going to take his own life, making no hostile movements towards the officers, until at 9 minutes and 27 seconds, he steps over the rail, gun in pocket, no hostile leanings, no words of hostility, no threats made, and begins jogging towards town, apparently. A mere eight seconds later, the first shot was fired.

Officer Ryan waited eight seconds before using deadly force on the suspect. There was no warning by Officer Ryan to stop; there was no effort to get him to stop. A second shot was fired, apparently ending George's life.

Viewing those facts, a reasonable jury could determine that Officer Ryan did not possess—that George did not pose any serious risk of harm to the officer or anybody else other than himself. He made no hostile moves; he never pointed a gun at anyone but himself; he never threatened an officer or anyone else; he remained hopelessly resigned with only suicidal statements throughout the entire encounter. The gun remained in his pant pocket throughout the encounter; he never once made

a move for the gun while he turned and ran—jogged towards town.

And, again, let me say, he was not running. Again, from my view of the video, this looks like a gentleman who would never have made it to town. So I know there has been evidence that in a minute and some seconds he would have got there. I think a jury could find, he never would have made it to town. This was not an able man.

Again, Ryan did not warn or even tell George to stop. And there was time to warn. There was absolutely no reason the shot needed to be fired at eight seconds. Additional efforts could have been made to negotiate and get him to stop.

So in that regard, unlike what is represented in the defendants' brief, this gun was not fired at the last possible moment. This gun was fired at the first possible moment when George turned and ran.

Regarding the training in this case, it appears that all defendants agree that what Ryan did was completely in accord with policy of the City of Rifle, that he had actually been trained for just this sort of encounter and to lead to just this sort of result. So unlike defendants' argument, I don't find this to be a hazy case; it's not a close call; and the jury could find that the conduct above was not reasonable and

constituted excessive force in violation of the Fourth Amendment.

Having found that, the issue then becomes, was the law clearly established? The Court finds it was clearly established. If this does not fit within the direct confines of *Tennessee v. Garner*, [471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985),] the plaintiff has cited additional cases from which we could find clearly established, including *Walker v. City of Orem*, [451 F.3d 1139 (10th Cir. 2006),] including [*Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019)]. Though understanding that was issued after the fact, it is clear to me that the analysis that the Court undertook there is directly relevant. And as plaintiffs' counsel noted, the Court found that to be an obvious violation; and the facts are dramatically similar. You have a suicidal person pointing a gun to his own head, where it remained; he never pointed the weapon at the officers; never made a threatening or provocative gesture; and the officers, importantly, had time and opportunity to give a warning before using deadly force.

Given the similarity of those facts, the Court's conclusion there that that was clearly established law that would be a violation of the suspect's right to the Fourth Amendment is not surprising.

Additional support is found in *Cooper v. Sheehan*, [735 F.3d 153 (4th Cir. 2013),] again, where the officers fired on a suspect when he was holding a shotgun in one hand with its muzzle pointed at the ground, had made no sudden moves and no sudden threats.

I do want to talk about *White v. City of Topeka*, [489 F. Supp. 3d 1209 (D. Kan. 2020),] which was raised by the defendant on this regard. The Court, even though that's a District Court case, does find it important to distinguish that case. I think the important distinguishment there is that the suspect was using more aggressive means to defy the police officers there. He had reached toward the gun at one point; reluctantly complied and put it away; he refused to lay down; and then picked up and ran and did make a gesture towards the gun. Those facts are not here. Again, this is a situation where a clearly suicidal man in desperate straits has turned, given up all hope, jogged towards town with a gun in his pocket, with no objective intent to use it on officers or anyone else.

Cordova v. Aragon[, 569 F.3d 1183 (10th Cir. 2009)] I find has some limited relevance in terms of clearly established. The facts are quite different, but it does highlight a more dramatic situation where the law was found to be clearly established. And the suspect there engaging in more dangerous behavior, and the

Tenth Circuit found that the—that the officers were not entitled to qualified immunity. So in that regard, Defendant Ryan may not get the benefit of qualified immunity.

And we will turn to Defendant Klein. In looking at the link for supervisory liability for a constitutional violation, the focus can be on personal involvement and causation and state of mind, but it can also be on the failure to train or negligent training. And this Court concludes it's the latter factors that matter most. Defendant Klein is responsible for training in the department regarding use of deadly force and confirmed in his deposition that what happened here is what the training that he conducted mandates. In fact, he was so sure of that, this court questions whether this incident could replay itself over and over, given that apparently officers in the City of Rifle are not being trained properly that the use of deadly force is only available when there is an imminent and serious risk of bodily harm to the officer or others.

Officer Ryan similarly testified that his decision was dictated by that training. And there is some reference to Officer Ryan having shot a fleeing suspect before. The Court finds that has limited relevance, but it does highlight the concern that the level of training at the City of Rifle is not in accord with the Fourth Amendment.

> In that regard, summary judgment is denied as to Defendant Klein's motion.
>
> Turning to municipal liability, the analysis really is identical. Clearly, there was a policy or custom in the form of this training on the use of deadly force that led to this incident. Defendant ratified Officer Ryan's conduct by refusing to discipline him and, in fact, finding no discipline was warranted because this—the result here was dictated by the training, and the training was appropriate in this instance. In terms of the wrongful death claim, summary judgment is also denied on that claim. It appears the parties are simply arguing over whether this could be construed as a willful and wanton violation. The Court concludes that under Colorado state law, conscious disregard of the danger of the conduct is sufficient to demonstrate a question of fact as to willful and wanton. In this Court's opinion, what occurred here is the definition of a conscious disregard of the danger. Officer Ryan fired a shot eight seconds after an unarmed man jogged in the other direction with no sign of immediate threat whatsoever. That is conscious disregard of the conduct.
>
> So given those findings of fact, defendants' motion for summary judgment is denied in its entirety.

Id., Vol. II at 303-311.

Defendants Ryan and Klein filed a notice of appeal on October 19, 2022. On November 2, 2022, all of the defendants filed an amended joint notice of appeal.

II

Defendants argue in their appeal that the district court erred in denying summary judgment in their favor on each of the claims asserted against them by plaintiffs. For the reasons that follow, we agree with defendants.

A. Plaintiffs' § 1983 excessive force claim against defendant Ryan

In their first issue on appeal, defendants argue that the district court erred in denying defendant Ryan's motion for summary judgment on qualified immunity grounds with respect to plaintiffs' § 1983 excessive force claim. More specifically, defendants argue that "[t]he District Court erred in its analysis of whether Officer Ryan's decision to use deadly force violated George's Fourth Amendment rights, given its consideration of various subjective factors, its narrow focus on the threat facing officers as opposed to the public, as well as its failure to consider the totality of the circumstances." Aplt. Br. at 16.

1) Qualified immunity principles

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 142

S. Ct. 4, 7, 211 L. Ed. 2d 164 (2021) (quoting *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (per curiam)) (internal quotation marks omitted). "Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Surat v. Klamser*, 52 F.4th 1261, 1270 (10th Cir. 2022) (quoting *White*, 580 U.S. at 73) (internal quotation marks omitted). "To overcome a qualified immunity defense, the onus is on the plaintiff to demonstrate (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." *Id.* at 1270-71 (quoting *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015)) (internal quotation marks omitted).

"We have discretion to decide the order in which to engage the two prongs of the qualified immunity standard." *Andersen v. DelCore*, 79 F.4th 1153, 1163 (10th Cir. 2023) (cleaned up). "If we conclude that the plaintiff[s] ha[ve] not met [their] burden as to either part of the two-prong inquiry, we must grant qualified immunity to the defendant." *Id.*

2) The scope of our appellate jurisdiction and our standard of review

Before we address defendants' arguments on the merits, we must first determine the scope of our appellate jurisdiction. "Generally, we may exercise jurisdiction only over appeals from final decisions of the district courts of the United States[,] 28 U.S.C. § 1291," which means that "[o]rders denying summary judgment are ordinarily not appealable final decisions for purposes of § 1291." *Surat*,

52 F.4th at 1269 (quoting *Duda v. Elder*, 7 F.4th 899, 909 (10th Cir. 2021)) (internal quotation marks omitted). "Under the collateral order doctrine, however, we may also review decisions that are conclusive on the question decided, resolve important questions separate from the merits, and are effectively unreviewable if not addressed through an interlocutory appeal." *Id.* (quoting *Duda*, 7 F.4th at 909) (internal quotation marks omitted). "This doctrine allows us to review interlocutory appeals from the denial of qualified immunity to a public official to the extent it involves abstract issues of law." *Id.* (quoting *Duda*, 7 F.4th at 909) (internal quotation marks omitted). "Abstract issues of law are limited to (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation and (2) whether that law was clearly established at the time of the alleged violation." *Id.* (internal quotation marks omitted). "Because of this limitation, we generally lack jurisdiction to review factual disputes in this interlocutory posture, including the district court's determination that the evidence could support a finding that particular conduct occurred." *Id.* (quoting *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1162 (10th Cir. 2021)) (internal quotation marks omitted).

"[I]n *Johnson v. Jones*," 515 U.S. 304, 313, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), "the Supreme Court indicated that, at the summary judgment stage at least, it is generally the district court's exclusive job to determine which *facts* a jury could reasonably find from the evidence presented to it by the litigants." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010). In other words, the district

court outlines "the 'version of events'" that it "holds a reasonable jury could credit." *Id.* at 1225-26 (quoting *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)). "After doing so, the district court and we may then consider the 'abstract' *legal* questions whether those facts suffice to show a violation of law and whether that law was clearly established at the time of the alleged violation." *Id.* at 1225. "Ordinarily speaking, it is only these latter two questions—and not questions about what facts a jury might reasonably find—that we may consider in appeals from the denial of qualified immunity at summary judgment." *Id.*

There are, however, exceptions to the rule announced by the Supreme Court in *Johnson*. In particular, "when the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' we may assess the case based on our own *de novo* view of which facts a reasonable jury could accept as true." *Id.* at 1225-26 (quoting *Scott*, 550 U.S. at 380); *see Ching as Trustee for Jordan v. City of Minneapolis*, 73 F.4th 617, 620-21 (8th Cir. 2023) (applying the same exception based on the appellate court's own review of a video of the shooting incident at issue); *Finch v. Rapp*, 38 F.4th 1234, 1241 (10th Cir. 2022) (discussing the exception); *Vette*, 989 F.3d at 1162 ("This standard is 'a very difficult one to satisfy.' We will not 'look beyond the facts found and inferences drawn by the district court' unless those findings 'constitute visible fiction.'" (internal citation omitted)); *see also Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015) (holding, in the context of an interlocutory appeal involving an issue of qualified immunity, that an

appellate court must "view the facts in the light depicted by the videotape").

We conclude that this narrow exception applies in the case at hand. The district court, in its oral ruling denying summary judgment in favor of defendant Ryan, focused much of its discussion on whether Ryan "ha[d] probable cause to believe that [George] posed a threat of serious harm to him or others." Aplt. App., Vol. II at 304. And, in discussing that question, the district court made a number of statements of purported fact that we conclude are "blatantly contradicted by the record" in this case. *Lewis*, 604 F.3d at 1226 (quoting *Scott*, 550 U.S. at 380).

To begin with, the district court described George as "clearly frail" and "with some sort of physical disability." Aplt. App., Vol. II at 304. The district court also stated, relatedly, that "this looks like a gentleman who would never have made it to town." *Id.* at 307. Those descriptions, however, are clearly contradicted by the record. According to the record, George worked at a construction site in Vail, Colorado. More importantly, the combined audio/video of the attempted arrest of George indicates he was a tall, relatively thin man who had no trouble walking, running, or physically maneuvering his body over the railing of the River Bridge. In short, nothing in the combined audio/video, or any other part of the record, would allow a jury to reasonably find that George was frail, physically disabled, or would have been unable to make it to the town had he been allowed to keep running away from Ryan and McNeal.[3]

3. Notably, plaintiffs do not assert that George was physically disabled in any way.

The district court also stated that "there was no effort" by Ryan or McNeal "to control any level of traffic" over the River Bridge. *Id.* at 305. In fact, however, the record is undisputed that Ryan requested assistance from a Garfield County Sheriff's deputy who initially parked his patrol vehicle near Ryan's and McNeal's vehicles on the River Bridge. That deputy, however, was subsequently dispatched to another location, leaving Ryan and McNeal alone to attempt to arrest George, and with no real way to control traffic over the River Bridge during the course of the attempted stop.

Further, the district court stated that it could "tell the officers did not believe there was a threat of harm to others" based upon the statements they made to George during the attempted arrest, including "You have kids," "It's not over," "Put the gun away," and "Let's talk about this." *Id.* We reject this statement for two reasons. First, it was not the district court's role, in determining whether defendant Ryan was entitled to summary judgment on his qualified immunity defense, to make factual findings. Rather, the district court's task was "to determine which *facts* a jury could reasonably find from the evidence presented to it by the litigants." *Lewis*, 604 F.3d at 1225. Second, even if the district court's statement was intended as a determination of a fact the jury could reasonably find based upon the officers' statements to George, we reject that determination as contrary to the record. In our view, a jury could not reasonably infer, based on the statements that Ryan and McNeal made to George during the stop, that Ryan and McNeal did not believe that George posed a threat of harm to them or others.

Lastly, and perhaps most significantly, the district court stated that after George stepped back over the rail and began "jogging towards town," "Ryan waited eight seconds before using deadly force on" George, and during those eight seconds "[t]here was no warning by . . . Ryan [to George] to stop" and "no effort to get [George] to stop." Aplt. App., Vol. II at 306. A review of the combined audio/video of the attempted arrest, however, reveals that during the time period referred to by the district court, both Ryan and McNeal repeatedly yelled at George to stop before Ryan fired the two shots at George. Ryan initially yelled, "Allan, stay, don't do it," and then yelled, "Allan" twice as he ran after George. McNeal, for her part, yelled, "Stay on that side," "Just stay right there," and "Stop" twice. Combined audio/video of stop at approx. 9:25-9:33. Thus, contrary to the district court's statements, a jury could not reasonably find that Ryan or McNeal made no effort to get George to stop after he stepped back over the railing and began running away from the officers.

Ordinarily, when a district court denies summary judgment on qualified immunity grounds, we "accept the version of facts the district court assumed true" and "our review [is] limited to purely legal issues." *Surat*, 52 F.4th at 1270 (first quoting *Quinn*, 780 F.3d at 1004; and then quoting *Vette*, 989 F.3d at 1162). Here, however, because the version of facts the district court assumed true is belied in key respects by the record, we conclude that our appellate jurisdiction in this unusual situation is more expansive. Specifically, it "falls on us to review [de novo] the entire record, construing the evidence in the light most favorable to" the plaintiffs. *Lewis*, 604 F.3d at

1228. Relatedly, we must "ask *de novo* whether sufficient evidence exists for a reasonable jury to conclude that" defendant Ryan violated George's constitutional rights. *Id.* Lastly, if we conclude that sufficient evidence exists for a reasonable jury to conclude that defendant Ryan violated George's constitutional rights, we must then determine de novo whether "the rights in question were clearly established at the time of the[] alleged violation." *Id.* at 1226. Only by doing so can we properly "undertake the job of answering the question whether [defendant Ryan] is entitled to qualified immunity" from the plaintiffs' excessive force claim. *Id.*

3) Did Ryan violate George's Fourth Amendment rights?

"In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "Where, as here, the excessive force claim arises in the context of an arrest . . . of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment." *Id.*; *accord Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). Under the Fourth Amendment, "the 'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Graham*, 490 U.S. at 395.

"To establish a constitutional violation, the plaintiff must demonstrate the force used was objectively unreasonable." *Estate of Taylor v. Salt Lake City*, 16 F.4th 744, 759 (10th Cir. 2021) (quoting *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008) (*Larsen*)). "Under this standard, we carefully balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Andersen*, 79 F.4th at 1163 (quoting *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 664 (10th Cir. 2010)) (internal quotation marks omitted).

"We assess the reasonableness of an officer's use of force by applying the three nonexclusive factors first set forth by the Supreme Court in *Graham*." *Id.* These include "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "The *Graham* factors are nonexclusive and not dispositive; the inquiry remains focused on the totality of the circumstances." *Palacios v. Fortuna*, 61 F.4th 1248, 1256 (10th Cir. 2023).

"Our 'calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" *Andersen*, 79 F.4th at 1163 (quoting *Graham*, 490 U.S. at 396-97). "So, we assess the reasonableness

of 'a particular use of force' from 'the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Id.* (quoting *Graham*, 490 U.S. at 396). "Our review . . . looks at the facts and circumstances as they existed at the moment the force was used, while also taking into consideration the events leading up to that moment." *Id.* (quoting *Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020)).

Graham Factor 1: The severity of the crime at issue

"[O]ur binding precedent indicates the first *Graham* factor weighs against the plaintiff when the crime at issue is a felony, irrespective of whether that felony is violent or nonviolent." *Vette*, 989 F.3d at 1170 (collecting cases); *see Surat*, 52 F.4th at 1274 (holding that plaintiff's criminal offenses "were not severe crimes" because they were "both class 2 misdemeanors"); *Arnold v. City of Olathe*, 35 F.4th 778, 792 (10th Cir. 2022) (holding that plaintiff's "warrants for felony supervision violations and aggravated escape from custody [we]re serious because the latter is a felony"). Here, it is undisputed that an arrest warrant had been issued for George based on a probable cause showing that he had committed the criminal offense of sexual exploitation of a child, in violation of Colo. Rev. Stat. § 18-6-403. It is further undisputed that this criminal offense is a felony. *See* Colo. Rev. Stat. § 18-6-403(5) (providing that sexual exploitation of a child is either a class 3 or class 4 felony, depending on the specific details of the crime). Thus, we conclude that the first *Graham* factor, severity of the crime, favors defendant Ryan as a matter of law.

Graham Factor 3: Was George actively resisting or attempting to evade arrest?

The third *Graham* factor asks "whether [the individual] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Here, there is no question that George was fleeing and thereby attempting to evade arrest at the time force was used against him. Consequently, we conclude as a matter of law that the third *Graham* factor weighs in favor of defendant Ryan.

Graham Factor 2: Was there an immediate threat to the safety of the officers or others?

The second, and what we have deemed the "most important," *Graham* factor focuses on whether George posed an immediate threat to the safety of the officers or others. *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017). "[T]he use of deadly force," such as that employed by defendant Ryan in this case, "is only justified if the officer had probable cause to believe that there was *a threat of serious physical harm to [himself] or others*." *Id.* (quoting *Larsen*, 511 F.3d at 1260) (internal quotation marks omitted). "To determine whether" an officer had probable cause to believe that "there was an immediate threat to the officers or to others," a court must "consider the four nonexhaustive *Larsen* factors." *Palacios*, 61 F.4th at 1258 (citing *Larsen*, 511 F.3d at 1260); *Arnold*, 35 F.4th at 789 (noting that the *Larsen* factors are non-exclusive). "These factors are (1) whether the suspect was given orders and the suspect's compliance with the orders; (2) whether any

hostile motions were made toward the officers; (3) the physical distance between the officers and the suspect; and (4) the manifest intentions of the suspect." *Palacios*, 61 F.4th at 1258. We proceed to consider the *Larsen* factors in light of the evidence before us in this case.

(a) Orders and compliance

"If a suspect was given orders and did not comply, this weighs in the officers' favor." *Id.* at 1259. Here, it is undisputed that Ryan and McNeal initially stopped George by pulling behind his truck and activating the emergency lights on their marked patrol cars. It is further undisputed that George initially complied by pulling his truck to the side of the road on the River Bridge. The combined audio/video of the stop shows, indisputably, that George thereafter repeatedly refused to comply with the verbal orders issued by the two officers. To begin with, Ryan initially ordered George to show his hands out of his truck window. George failed to comply with that order and instead exited his truck, walked towards Ryan's vehicle, pulled out a handgun from behind his back, and then turned and walked towards and stepped over the guardrail on the River Bridge. After that point, George was ordered to drop his weapon by Ryan and McNeal approximately thirty-three times but refused to do so. Ryan also told George, "Don't do it," or similar phrases, approximately thirty-nine times, and George refused to comply by dropping the gun and allowing himself to be arrested. Lastly, after George stepped back over the guardrail and began walking and then running towards downtown Rifle, both Ryan and McNeal shouted at

George multiple times in an attempt to get him to stop, but he refused to do so. Thus, the undisputed evidence establishes that after George stopped his vehicle, he was given numerous warnings over the course of the ensuing encounter and failed to comply with all of them.

Notably, we "ha[ve] held the warning does not need to be specifically that officers are about to open fire." *Id.* (citing *Thomson v. Salt Lake City*, 584 F.3d 1304, 1318-19 (10th Cir. 2009)). Therefore, the fact that Ryan did not warn George that he was about to fire his weapon does not alter our analysis of this factor.

We therefore conclude as a matter of law that this factor weighs in favor of defendant Ryan.

(b) Hostile motions

The second *Larsen* factor asks "whether any hostile motions were made with the weapon towards the officers." *Larsen*, 511 F.3d at 1260. The undisputed evidence in this case establishes that George never pointed his handgun at either officer or anyone besides himself. Thus, viewed in isolation, this factor would weigh in favor of the plaintiffs.

But, as we have noted, the *Larsen* factors are "non-exclusive" and we must always consider "the totality of the circumstances." *Id.* Despite the fact that George never pointed his handgun at anyone besides himself, it is undisputed that George ignored numerous verbal orders from both Ryan and McNeal to drop his weapon. And, despite discarding other personal items at the scene

before attempting to flee, George intentionally kept his gun with him during his attempted flight. Notably, we have recognized that "simply because a suspect has not yet fired a weapon does not mean that he will not do so in the future, particularly when intentionally keeping his gun with him." *Palacios*, 61 F.4th at 1259. Lastly, it is undisputed that George's wife, Sarra, had informed the RPD that George told her "that he was not 'going back to jail without a fight,'" and that this information was passed along to Ryan and McNeal prior to their encounter with George. Aplt. App., Vol. I at 113. We therefore conclude as a matter of law that, although the lack of a hostile motion weighs in favor of plaintiffs, the other related circumstances weigh in favor of defendant Ryan.

(c) Physical distance

The third factor identified in *Larsen* focuses on "the distance separating the officers and the suspect." *Larsen*, 511 F.3d at 1260. Notably, *Larsen* involved a situation where two police officers approached a suspect on foot and found him to be in possession of a long knife. One of the officers, who came within seven to twelve feet of the suspect, told the suspect at least four times to drop the knife, but the suspect refused to do so. Fearing for his life, the officer who gave those commands shot the suspect twice in the chest and killed him. Thus, *Larsen* involved a situation where the suspect posed a threat of serious physical harm to the officer who fired the gun. Naturally, then, the court in *Larsen* focused on the distance between the shooting officer and the suspect at the time of the shooting.

Here, in contrast, there was not a close-range confrontation between George and Ryan that led to Ryan discharging his weapon. Instead, it is undisputed that when Ryan shot George, George was running in a northerly direction along the side of the River Bridge and attempting to flee from Ryan and McNeal and evade arrest.

Because the facts of this case are significantly different than *Larsen*, we conclude that we must modify the physical distance factor to take into account other considerations relevant to this case. To begin with, unlike the situation in *Larsen*, this case involved a suspect who, while armed and fleeing, was physically close to members of the general public. More specifically, it is undisputed that George, as he fled in a northerly direction along the River Bridge, was within feet of a steady stream of passing motorists. It is also undisputed that George was approximately four hundred and twenty-two yards away from the nearest populated area of Rifle at 1st Street and Riverwhite Avenue. Had George continued running unabated, he likely could have reached the nearest populated area of Rifle within approximately two to three minutes.

The undisputed evidence in this case also indicates that George, by fleeing in the direction that he did, effectively gained access to a location that could have provided him with cover from the officers. Defendants' expert witness, Charles Key, Sr., a retired member of the Baltimore Police Department who now works as an independent consultant and expert witness in police misconduct litigation, states in his declaration that, prior to being shot by Ryan,

> George had run past the northern edge of the Colorado [R]iver, which is significant because the drop from the bridge to land decreases rapidly to the point where . . . George would have been able to step over the bridge rail onto the land and use the steel rail as cover while firing on responding officers.

Aplt. App., Vol. I at 158. Plaintiffs offered no evidence that contradicts this statement.

We therefore conclude that George's proximity to members of the general public, combined with his access to locations on the River Bridge that would have provided him with cover from Ryan and McNeal, weighs in favor of defendant Ryan as a matter of law.

(d) Manifest intentions of suspect

The fourth *Larsen* factor focuses on "the manifest intentions of the suspect." *Larsen*, 511 F.3d at 1260. It is beyond dispute in this case that George knew that two police officers in separate marked patrol cars stopped him as he exited I-70 on his way home from work. Although it is not clear from the record whether George was aware that an arrest warrant had been issued for him, it is undisputed that he was aware that he was under investigation by law enforcement officials for possessing child pornography. Further, it is undisputed that, prior to the encounter, George had told his wife Sarra that he was not going back to prison, and he repeated that sentiment, as well as saying that his life was over, to Ryan and McNeal

during the course of the encounter. All of this set the stage for what transpired during the course of George's encounter with Ryan and McNeal. Between the beginning of the encounter and just before he stepped back over the guardrail and began walking and then running away from the officers, George's manifest intentions appear to have been to commit suicide, either by shooting himself in the chest or by jumping from the River Bridge into the Colorado River. Conversely, during that time period, it does not appear that George intended to harm the officers or members of the public who were driving by on the River Bridge. But, importantly, the combined audio/video of the incident reveals that George's manifest intentions changed near the end of the encounter. At or just before the moment when George stepped back over the guardrail and began walking and then running away from the officers and in the direction of downtown Rifle, he clearly abandoned, at least temporarily, any intention of killing himself. We conclude as a matter of law that a reasonable officer in Ryan's position, observing George's actions, would have concluded that George's intention had shifted to escaping and evading arrest.

(e) Other evidence

Because the *Larsen* factors are non-exclusive, we must take into account additional evidence in the record relevant to whether a reasonable officer in Ryan's position would have had probable cause to believe that George posed a threat of harm to the officers or the public.

Appendix A

The declaration from defendants' expert witness Key includes several relevant statements that were unopposed by the plaintiffs. First, Key states: "Any objectively reasonable officer would interpret [George] retaining possession of the gun as an indication that he intended to use it." *Id.* at 157. Key further states, in the same vein:

> Any objectively reasonable and well trained officer would . . . assess the risks of pursuing a fleeing, armed felony suspect who had rebuffed multiple pleas and commands to surrender peacefully and drop the gun in an environment that exposed them to gunfire without the advantage of cover as presenting a significant, imminent risk of serious injury or death to themselves or passing, uninvolved citizens.

Id. at 158. Key also states, relatedly, that "when George continued to run" after being told to stop by Ryan, Ryan

> had to make the split second decision to stop him by using lethal force to prevent him from initiating a gun battle on the bridge and subjecting passing motorist[s] to potential injury or advancing so close to Rifle that innocent persons would be put at risk should a gunfight ensue in a densely populated area of Rifle.

Id. at 156. In addition, Key notes that "the bridge curved toward the northwest, which prompted Ryan to shoot prior to George reaching a place on the bridge which would

create a hazardous backstop from his rifle fire for traffic traveling on Route 13 and/or people in Rifle." *Id.* Lastly, Key notes that, prior to being shot by Ryan,

> George had run past the northern edge of the Colorado [R]iver, which is significant because the drop from the bridge to land decreases rapidly to the point where . . . George would have been able to step over the bridge rail onto the land and use the steel rail as cover while firing on responding officers.

Id. at 158.

(f) Summary

Considering the *Larsen* factors in this case as a whole, we conclude as a matter of law that a reasonable officer in Ryan's position would have had probable cause to believe that George, as he began running away from Ryan and McNeal, posed a threat of serious bodily injury both to the officers and to the public at large. We in turn conclude that the second *Graham* factor weighs in favor of defendant Ryan as a matter of law.

Totality of the circumstances and conclusion

As we have discussed, all three *Graham* factors favor defendant Ryan. We therefore conclude as a matter of law that defendant Ryan's action in shooting George was objectively reasonable and did not violate George's Fourth Amendment right against unreasonable seizures.

In reaching this conclusion, we emphasize, as we recently did in *Palacios*, that "pursuing a fleeing felon does not automatically mean that a decision to use deadly force is objectively reasonable." 61 F.4th at 1262. Nevertheless, under the totality of the circumstances unique to this case, i.e., an armed fleeing felon who had repeatedly refused to comply with officers' commands, was determined not to be arrested, and who represented a threat of bodily harm to both the officers and the general public, we conclude that it was objectively reasonable for defendant Ryan to use deadly force against George.

4) Clearly established law

"Having determined that" defendant Ryan did not violate George's Fourth Amendment rights, "it is unnecessary" for us "to consider whether the law was clearly established at the time of the incident." *Id.* at 1263.

B. Plaintiffs' § 1983 claim against defendant Klein

In their second issue on appeal, defendants challenge the district court's denial of summary judgment in favor of defendant Klein with respect to his claim of qualified immunity from plaintiffs' § 1983 claim.

A § 1983 defendant sued in an individual capacity may be subject to personal liability and/or supervisory liability." *Estate of Booker v. Gomez*, 745 F.3d 405, 435 (10th Cir. 2014) (quoting *Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011)) (internal quotation marks omitted). "Section 1983, however, does not authorize liability under

a theory of respondeat superior." *Id.* (quoting *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013)) (internal quotation marks omitted). Instead, supervisory liability may be imposed under § 1983 only "when a supervisor's subordinates violated the Constitution and the plaintiff can demonstrate an affirmative link between the supervisor and the violation, which includes showing (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind." *Valdez v. Macdonald*, 66 F.4th 796, 834 (10th Cir. 2023) (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1195-98 (10th Cir. 2010)) (internal quotation marks omitted).

Having concluded as a matter of law that defendant Ryan did not violate George's Fourth Amendment rights, we conclude that plaintiffs' § 1983 supervisory liability claim against defendant Klein necessarily lacks merit. That is because, without an underlying constitutional violation, a claim of supervisory liability is fatally infirm. *Cf. Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers.").

We therefore conclude that the district court erred in denying Klein's motion for summary judgment with respect to plaintiffs' § 1983 claim.

C. Plaintiffs' § 1983 claim against the City

In their third issue on appeal, defendants argue that the district court erred in denying summary judgment to the City with respect to plaintiffs' § 1983 claim.

We briefly note, as a threshold matter, that because the City did not, and indeed cannot, assert qualified immunity, the collateral order doctrine does not afford us appellate jurisdiction over the district court's denial of the City's motion for summary judgment. *See Crowson v. Washington Cnty. Utah*, 983 F.3d 1166, 1185, 1192 (10th Cir. 2020). But we nevertheless conclude that we may properly exercise pendent appellate jurisdiction over that ruling because the record firmly establishes that plaintiffs' § 1983 claim against the City depends on Ryan having violated George's constitutional rights.[4] *See id.*

"Because municipalities act through officers, ordinarily there will be a municipal violation only where an individual officer commits a constitutional violation." *Id.* at 1191. In other words, "[t]he general rule . . . is that there must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable." *Id.* Thus, "[i]n most cases, this makes the question of whether a municipality is liable dependent on whether a specific municipal officer violated an individual's constitutional rights." *Id.*

Having determined that defendant Ryan did not violate George's Fourth Amendment rights, we conclude that plaintiffs' § 1983 municipal liability claim against the

4. Plaintiffs' complaint alleged two alternative theories of municipal liability, i.e., that (a) there was a direct causal link between a City policy and Ryan's alleged use of excessive force against George, and (b) that the City failed to adequately train its police officers, including Ryan, in the use of deadly force, and that this inadequate training resulted in Ryan depriving George of his constitutional rights.

City necessarily fails. *See Palacios*, 61 F.4th at 1263. We therefore conclude that the district court erred in denying summary judgment in favor of the City.

D. Plaintiffs' wrongful death claim against defendant Ryan

In their final issue on appeal, defendants argue that the district court erred in denying summary judgment in favor of defendant Ryan on plaintiffs' wrongful death claim.

Typically, a district court's denial of summary judgment on a state law tort claim is not "immediately appealable under the collateral order[] doctrine." *Hensley on behalf of N.C. v. Price*, 876 F.3d 573, 586 n.7 (4th Cir. 2017); *see Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008). That general rule does not apply, however, where the summary judgment motion was based on state-law immunity from suit. *See Sawyers v. Norton*, 962 F.3d 1270, 1287 (10th Cir. 2020). In this case, Ryan argued in his motion for summary judgment that the wrongful death claim was effectively barred by the Colorado Governmental Immunity Act (CGIA), Colo. Rev. Stat. Ann. § 24-10-102. The district court rejected that argument. We therefore conclude that the collateral order doctrine affords us with appellate jurisdiction over the district court's denial of Ryan's motion for summary judgment on the wrongful death claim. *See Sawyers*, 962 F.3d at 1287.

In their complaint, plaintiffs alleged a claim against defendant Ryan for "Battery Causing Wrongful Death"

in violation of Colorado state law. Aplt. App., Vol. I at 37. The claim alleged that "Ryan's shooting of . . . George *did not constitute the use of reasonable force because the shooting was in excess of the amount of force that an officer in . . . Ryan's position would have reasonably believed necessary to arrest . . . George or prevent his escape*." *Id.* (emphasis added). In addition, the claim alleged that "Ryan's intentional infliction of physical harm upon . . . George, causing his death, was without legal authorization, privilege, or consent." *Id.* The claim also alleged that "Ryan consciously disregarded a substantial and unjustifiable risk of danger of death or serious bodily injury to . . . George" and "Ryan's willful and wanton conduct caused . . . George's death and the Plaintiffs' damages." *Id.* at 37-38. Finally, the claim alleged that "Ryan's conduct was attended by circumstances of malice, or willful and wanton conduct, which . . . Ryan must have realized was dangerous, or that was done heedlessly and recklessly, without regard to the consequences to . . George or his family, his safety and life and their lives." *Id.* at 38.

Ryan argued in his motion for summary judgment that the wrongful death claim was barred by the CGIA. The CGIA provides, in relevant part, that "no public employee shall be liable for injuries arising out of an act or omission occurring during the performance of his or her duties and within the scope of his or her employment, unless such act or omission was willful and wanton." Colo. Rev. Stat. § 24-10-105(1). As Ryan noted in his motion, the CGIA does not define the phrase "willful and wanton," but the Colorado Supreme Court has held that "willful and

wanton conduct is not merely negligent," but rather "must exhibit a conscious disregard for the danger." *Martinez v. Estate of Bleck*, 2016 CO 58, 379 P.3d 315, 323 (Colo. 2016). Ryan argued that "[t]he undisputed facts" in this case "establish[ed] that [his] conduct d[id] not rise to the level of willful and wanton" because he "attempted all means to peacefully end the situation by ordering George to drop the gun numerous times over a roughly nine-minute period" and then, "[w]hen George ignored those commands and started to escape," he "waited until the last possible moment to use deadly force hoping that George would stop." Aplt. App., Vol. I at 76.

Plaintiffs argued in their response to Ryan's motion for summary judgment that "[t]he fact that . . . Ryan tried to talk George out of killing himself d[id] not mean that his subsequent act of shooting George in the back was not willful and wanton." *Id.* at 186. Plaintiffs argued that "[a]ny reasonable officer in . . . Ryan's position would have known that shooting George was unjustified and nearly certain to result in George's serious bodily injury or death." *Id.* at 186-87. Plaintiffs further argued that "after ample time to deliberate and choose various non-deadly options that would have comported with George's clearly established constitutional rights, . . . Ryan . . . intentionally pulled the trigger, intentionally shot [George] in the back, intending to kill him." *Id.* at 187. Plaintiffs also argued that "Ryan did so in conscious disregard of the fact his actions were unjustified and the danger his actions inflicted upon George." *Id.* Ultimately, plaintiffs argued that the district court should deny Ryan's motion for summary judgment "[b]ecause a jury could reasonably

determine that . . . Ryan willfully and wantonly killed George." *Id.*

The district court, in its oral ruling, denied Ryan's motion for summary judgment with respect to the wrongful death claim:

> In terms of the wrongful death claim, summary judgment is also denied on that claim. It appears the parties are simply arguing over whether this could be construed as a willful and wanton violation. The Court concludes that under Colorado state law, conscious disregard of the danger of the conduct is sufficient to demonstrate a question of fact as to willful and wanton. In this Court's opinion, what occurred here is the definition of a conscious disregard of the danger. Officer Ryan fired a shot eight seconds after an unarmed man jogged in the other direction with no sign of immediate threat whatsoever. That is conscious disregard of the conduct.

Id., Vol. II at 310-311.

We conclude that our resolution of defendant Ryan's appellate challenge to the district court's denial of his motion for summary judgment with respect to plaintiffs' § 1983 excessive force claim effectively resolves the plaintiffs' wrongful death claim against defendant Ryan. As we have noted, plaintiffs' wrongful death claim hinges, in relevant part, on plaintiffs' allegation that "Ryan's

shooting of . . . George did not constitute the use of reasonable force because the shooting was in excess of the amount of force that an officer in . . . Ryan's position would have reasonably believed necessary to arrest . . . George or prevent his escape." Aplt. App., Vol. I at 37. That allegation, however, is incompatible with, and effectively undercut by, our conclusion that defendant Ryan's shooting of George was objectively reasonable and did not violate George's Fourth Amendment right against unreasonable seizures.

We also conclude, relatedly, that where, as here, a police officer's employment of deadly force against a fleeing felony suspect was objectively reasonable under the Fourth Amendment, the officer's use of force cannot, as a matter of law, be deemed to be in "conscious disregard of the danger" for purposes of the CGIA. *Martinez*, 379 P.3d at 323; *see Duke v. Gunnison Cnty. Sheriff's Office*, 2019 COA 170, 456 P.3d 38, 44 (Colo. Ct. App. 2019) ("For willful and wanton conduct to subject a public employee to liability for a tort claim, the conduct must be more than merely negligent; the conduct must exhibit a conscious disregard of the danger to another."). More specifically, we conclude that if a police officer's exercise of force was objectively reasonable under the Fourth Amendment, the officer necessarily cannot be deemed to have acted in conscious disregard of the danger posed by that exercise of force. *See Rodeman v. Foster*, 767 F. Supp. 2d 1176, 1187-88 (D. Colo. 2011) ("as the Court has found that Sgt. Foster employed only reasonable force in arresting plaintiff, no reasonable jury could find that Sgt. Foster acted willfully and wantonly in tasing her").

We therefore conclude that the district court erred in denying summary judgment in favor of defendant Ryan with respect to plaintiffs' wrongful death claim.[5]

III

The district court's decision denying defendants' motion for summary judgment is REVERSED and the matter is REMANDED to the district court with directions to enter summary judgment in favor of defendants as to all claims asserted against them.

5. Judge Rossman would remand this state law claim to the district court with instructions to dismiss for lack of supplemental jurisdiction. *See* 28 U.S.C. § 1367.

APPENDIX B — MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED OCTOBER 3, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE CHARLOTTE N. SWEENEY

Civil Action: 20-cv-00522-CNS-GPG
Date: October 3, 2022
Courtroom Deputy: Julie Dynes
Court Reporter: Terri Lindblom

Parties	*Counsel*
ESTATE OF ALLAN GEORGE SARRA GEORGE KENNETH ALLAN GEORGE NICOLE LYNN WALLACE M.E.G. T.A.G., **Plaintiffs**, v. CITY OF RIFLE DEWEY RYAN TOMMY KLEIN, **Defendants**.	*David Lane* *Liana Orshan* *Jonathan Eddy* *Eric Ziporin*

COURTROOM MINUTES

Appendix B

ORAL ARGUMENT

Court in Session: 9:00 a.m.

Appearance of counsel.

Argument given as to [126] Defendants' Motion for Summary Judgment by Mr. Ziporin with questions from the Court.

Argument given as to [126] Defendants' Motion for Summary Judgment by Mr. Lane with questions from the Court.

Rebuttal argument given by Mr. Ziporin.

The Court makes findings of fact, conclusions of law. As outlined on the record it is

ORDERED: [126] Defendants' Motion for Summary Judgment is DENIED in its entirety.

Discussion held on filing of a motion in limine and trial readiness.

Court in Recess: 10:16 a.m.
Hearing concluded.
Total time in Court: 01:16

APPENDIX C — APPENDIX C — TRANSCRIPT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED DECEMBER 21, 2022

[1]IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00522-CNS-GPG

ESTATE OF ALLAN GEORGE,
BY AND THROUGH ITS PERSONAL
REPRESENTATIVE SARRA GEORGE;

SARRA GEORGE, INDIVIDUALLY;
KENNETH ALLAN GEORGE, INDIVIDUALLY;
NICOLE LYNN WALLACE, INDIVIDUALLY;
M.E.G., A MINOR, BY AND THROUGH THEIR
LEGAL GUARDIAN SARRA GEORGE; T.E.G.,
A MINOR, BY AND THROUGH THEIR LEGAL
GUARDIAN SARRA GEORGE,

Plaintiffs,

v.

CITY OF RIFLE, COLORADO, A MUNICIPALITY;
POLICE CORPORAL DEWEY RYAN, IN HIS
INDIVIDUAL CAPACITY; AND POLICE CHIEF
TOMMY KLEIN, IN HIS INDIVIDUAL CAPACITY,

Defendants.

Appendix C

REPORTER'S TRANSCRIPT
HEARING ON MOTION FOR SUMMARY
JUDGMENT COURT'S RULING ONLY

Proceedings before the HONORABLE CHARLOTTE N. SWEENEY, Judge, United States District Court for the District of Colorado, commencing at 9:00 a.m., on the 3rd day of October, 2022, in Courtroom C204, Byron G. Rogers United States Courthouse, Denver, Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

[2]APPEARANCES

DAVID A. LANE and LIANA GERSTLE ORSHAN, Attorneys at Law, Killmer Lane & Newman, LLP, 1543 Champa Street, Suite 400, Denver, Colorado, 80202, appearing for the Plaintiffs.

ERIC M. ZIPORIN and JONATHAN N. EDDY, Attorneys at Law, SGR, LLC, 3900 East Mexico Avenue, Suite 700, Denver, Colorado, 80210, appearing for the Defendants.

* * * * *

PROCEEDINGS

(The following excerpt contains the Court's ruling only.)

Appendix C

* * * * * * *

THE COURT: All right. Thank you both. I'm prepared to issue a ruling on the motion at this time.

In defendants' motion for summary judgment, the defendant moves for summary judgment as to the two claims brought by the plaintiff in this case. We will deal with the first claim first, excessive force in violation of the Fourth Amendment. This claim was brought against all three defendants, which are Officer Ryan, Sheriff Klein, and the City of Rifle.

It's clear -- the law that defines the boundaries of this claim is clear, and that is, to use deadly force, an officer must believe that the suspect poses a serious threat to the officer or others around the officer.

[3]In looking at that threat and in assessing the objective reasonableness of that threat, the Court must look at the severity of the crime underlying the seizure, the immediate threat to the safety of officers or others, and whether with the suspect resisted or evaded seizure. That doesn't end the inquiry, however. And this Court believes, as I think the parties do believe, that the key issue is, what was the level of the threat faced by Officer Ryan at the time?

In reviewing that threat, other factors come into play, as identified by the parties, including whether there were hostile motions attributed to George at the time, the distance between the parties, the intentions of the subject

which is George, here. And those three factors the Court finds most compelling.

As with respect to Officer Ryan, he needed to have probable cause to believe that the suspect posed a threat of serious physical harm to him or others. And he did not have that, and I believe a jury could find that he did not have that. If we look at the video -- which I did several times and outlined what went on in the video -- here is what we have: We have a 58-year-old man, clearly frail. He looks to be, frankly, to this Court's view, in his 60s, with some sort of physical disability. Officer Ryan and Officer Beitzel pleaded with him -- and I think the plaintiff rightly admits that they did their job -- they pleaded with him for minutes to put down [4]the gun and not take his own life. It is clear from the video, at no time did this turn from a potential suicide to a potential homicide.

Indeed, throughout the entire nine minutes before before George left the guardrail, he was looking up at the sky, seeming to be pleading with a higher power, making utterances of, he doesn't know what to do, he's embarrassed for his family, his family won't talk to him. These are clearly signs this individual is suicidal, not homicidal.

That the officers did not believe there was a serious threat is evidenced in several ways. One, traffic was not stopped; and there was no effort to control any level of traffic. Granted, there may not have been time to get backup; but certainly they could have positioned a car to stop traffic, and that was not done. During the nine

minutes where -- well, I guess it's only seven minutes where George was wielding a gun, pointed always at himself, there was no effort to even remotely stop people from passing by this scene. That defeats the argument that there was some level of threat at that time.

You can also tell the officers did not believe there was a threat of harm to others by the comments they were making to George, which included, "Don't shoot yourself." "You have kids." "It's not over." "Put the gun away." "Let's talk about this." None of that indicated any level of threat posed by George.

[5]At seven minutes into the video, he puts the gun into his pocket. He still looks like he's going to jump. And, in fact, Officer Ryan makes a call indicating that he's going to jump. He calls into the station, saying, "He's going to jump." He continues this way for another two minutes, again, gun in pocket, actively looking like he's going to take his own life, making no hostile movements towards the officers, until at 9 minutes and 27 seconds, he steps over the rail, gun in pocket, no hostile leanings, no words of hostility, no threats made, and begins jogging towards town, apparently. A mere eight seconds later, the first shot was fired.

Officer Ryan waited eight seconds before using deadly force on the suspect. There was no warning by Officer Ryan to stop; there was no effort to get him to stop. A second shot was fired, apparently ending George's life.

Viewing those facts, a reasonable jury could determine that Officer Ryan did not possess -- that George did not

pose any serious risk of harm to the officer or anybody else other than himself. He made no hostile moves; he never pointed a gun at anyone but himself; he never threatened an officer or anyone else; he remained hopelessly resigned with only suicidal statements throughout the entire encounter. The gun remained in his pant pocket throughout the encounter; he never once made a move for the gun while he turned and ran -- jogged towards town.

[6]And, again, let me say, he was not running. Again, from my view of the video, this looks like a gentleman who would never have made it to town. So I know there has been evidence that in a minute and some seconds he would have got there. I think a jury could find, he never would have made it to town. This was not an able man.

Again, Ryan did not warn or even tell George to stop. And there was time to warn. There was absolutely no reason the shot needed to be fired at eight seconds. Additional efforts could have been made to negotiate and get him to stop.

So in that regard, unlike what is represented in the defendants' brief, this gun was not fired at the last possible moment. This gun was fired at the first possible moment when George turned and ran.

Regarding the training in this case, it appears that all defendants agree that what Ryan did was completely in accord with policy of the City of Rifle, that he had actually been trained for just this sort of encounter and to lead to just this sort of result. So unlike defendants' argument, I

don't find this to be a hazy case; it's not a close call; and the jury could find that the conduct above was not reasonable and constituted excessive force in violation of the Fourth Amendment.

Having found that, the issue then becomes, was the law clearly established? The Court finds it was clearly [7] established. If this does not fit within the direct confines of *Tennessee v.* Garner, the plaintiff has cited additional cases from which we could find clearly established, including *Walker v. City of Orem,* including *Carson v. Cole.* Though understanding that was issued after the fact, it is clear to me that the analysis that the Court undertook there is directly relevant. And as plaintiffs' counsel noted, the Court found that to be an obvious violation; and the facts are dramatically similar. You have a suicidal person pointing a gun to his own head, where it remained; he never pointed the weapon at the officers; never made a threatening or provocative gesture; and the officers, importantly, had time and opportunity to give a warning before using deadly force.

Given the similarity of those facts, the Court's conclusion there that that was clearly established law that that would be a violation of the suspect's right to the Fourth Amendment is not surprising.

Additional support is found in *Cooper v. Sheehan,* again, where the officers fired on a suspect when he was holding a shotgun in one hand with its muzzle pointed at the ground, had made no sudden moves and no sudden threats.

Appendix C

I do want to talk about *White v. City of Topeka,* which was raised by the defendant on this regard. The Court, even though that's a District Court case, does find it important to distinguish that case. I think the important distinguishment [8]there is that the suspect was using more aggressive means to defy the police officers there. He had reached toward the gun at one point; reluctantly complied and put it away; he refused to lay down; and then picked up and ran and did make a gesture towards the gun. Those facts are not here. Again, this is a situation where a clearly suicidal man in desperate straits has turned, given up all hope, jogged towards town with a gun in his pocket, with no objective intent to use it on officers or anyone else.

Cordova v. Aragon I find has some limited relevance in terms of clearly established. The facts are quite different, but it does highlight a more dramatic situation where the law was found to be clearly established. And the suspect there engaging in more dangerous behavior, and the Tenth Circuit found that the -- that the officers were not entitled to qualified immunity. So in that regard, Defendant Ryan may not get the benefit of qualified immunity.

And we will turn to Defendant Klein. In looking at the link for supervisory liability for a constitutional violation, the focus can be on personal involvement and causation and state of mind, but it can also be on the failure to train or negligent training. And this Court concludes it's the latter factors that matter most. Defendant Klein is responsible for training in the department regarding use of deadly force and confirmed in his deposition that what happened [9]here is what the training that he conducted mandates.

In fact, he was so sure of that, this court questions whether this incident could replay itself over and over, given that apparently officers in the City of Rifle are not being trained properly that the use of deadly force is only available when there is an imminent and serious risk of bodily harm to the officer or others.

Officer Ryan similarly testified that his decision was dictated by that training. And there is some reference to Officer Ryan having shot a fleeing suspect before. The Court finds that has limited relevance, but it does highlight the concern that the level of training at the City of Rifle is not in accord with the Fourth Amendment.

In that regard, summary judgment is denied as to Defendant Klein's motion.

Turning to municipal liability, the analysis really is identical. Clearly, there was a policy or custom in the form of this training on the use of deadly force that led to this incident. Defendant ratified Officer Ryan's conduct by refusing to discipline him and, in fact, finding no discipline was warranted because this -- the result here was dictated by the training, and the training was appropriate in this instance.

In terms of the wrongful death claim, summary judgment is also denied on that claim. It appears the parties are [10]simply arguing over whether this could be construed as a willful and wanton violation. The Court concludes that under Colorado state law, conscious disregard of the danger of the conduct is sufficient to

demonstrate a question of fact as to willful and wanton. In this Court's opinion, what occurred here is the definition of a conscious disregard of the danger. Officer Ryan fired a shot eight seconds after an unarmed man jogged in the other direction with no sign of immediate threat whatsoever. That is conscious disregard of the conduct.

So given those findings of fact, defendants' motion for summary judgment is denied in its entirety.

Let me ask the parties in terms of where you are at in terms of readiness for trial.

First, the plaintiff.

MR. LANE: Your Honor, it's an interesting question also. We have engaged in some settlement discussions.

The real issue here -- and this is my suggestion. I don't know if they're going to appeal this ruling or not. But we are ready for trial, but the -- there is a motion *in limine* that plaintiffs have to file here, which is going to be very outcome determinative in terms of disposing of this case. And that is, Mr. George was wanted for possession of child pornography. We want to file a motion *in limine* with the Court under Rule 403 of the rules of evidence saying, it is relevant, because if he was going to go to prison as a result of this -- [11]assuming he was going to get convicted, that would impact his future earnings. We concede that fact.

We have an expert who says, no, he wasn't going to go to prison. They have an expert who says, yeah, he's going

to go to prison. It's relevant in that regard. But what is not relevant under 403 is what the crime was, because that will be so overwhelmingly prejudicial to a jury that they would say, oh, well, if he's in possession of child pornography, then I'm giving him a dollar. His life's value is not determined by the crime that he was wanted for.

So we're going to make a motion to exclude the underlying name of the crime that he was wanted for, the facts of that, and simply argue under 403 that it's -- it may be probative slightly, but the prejudice is so overwhelming that it's got to stay out. They can then respond to that. And I think if this Court decides that issue -- because just in informal discussions, I think that's going to be the real issue that decides whether we settle this case or not.

What I'd like to do is set it for briefing on that issue. I haven't discussed this with counsel, so I don't know what their feelings are on this. But I'd like to set that issue for briefing, and then we can go from there.

But as it stands right now, that's the only issue remaining on the table from plaintiffs' perspective. We are ready for trial.

[12]*THE COURT:* Okay. Response.

MR. ZIPORIN: Discovery is complete, Your Honor; so, essentially, we are also ready for trial.

One quick clarification. Will a written order be forthcoming, or do we need to order the transcript?

THE COURT: It will just be the transcript. And just so you both know -- and I know Mr. Lane has been here before -- because of what I've inherited from prior judges, I am trying to do more things from the bench, just to speed cases along, because I know people have been waiting a long time for rulings. So you'll need to order a transcript.

MR. ZIPORIN: Understood. Thank you, Your Honor.

THE COURT: Any response on the motion *in limine* issue? Do you think that's helpful to potential resolution or --

MR. ZIPORIN: I'm not -- I don't know how Your Honor works. Maybe once we get a trial date, I assume that triggers motion *in limine* deadlines and other pretrial deadlines. We can go from that perspective.

THE COURT: Okay. Well, we've got a pretrial conference set on November 10. I believe that is when I typically give a trial date, and I will do that in this case. I was kind of feeling around for the prospect.

I will tell you, though, it would likely be in February. So it is not a long time out once we get to [13]November. So I would expect a trial date to be set in early February. You can check my procedures for the deadlines on motions in *limine.*

Honestiy, Mr. Lane, if you -- if somebody in your office had the time, it wouldn't be bad to file that sooner rather than later. There is a potential I could rule on it at the pretrial conference.

MR. LANE: I think that would be very important. I mean, just in the interest of judicial economy, I honestly think that is the big sticking point to resolving this case, but that is just me. Counsel can take whatever attitude he wants to about that. I do have the best briefer in the entire universe sitting right here, and we will get that done expeditiously, Your Honor.

The deadline is not to say we have to wait for the deadline.

THE COURT: Right.

MR. LANE: We want to file that pretty quickly.

THE COURT: Exactly. And if it's fully briefed by the time of the pretrial conference, I will try to rule on it from the bench at that conference.

MR. LANE: Great.

THE COURT: I will tell both parties that. Anything further from either side?

MR. LANE: Nothing from plaintiff, Your Honor.

[14]*MR. ZIPORIN:* Nothing from defendants, Your Honor. Thank you.

THE COURT: Okay. Thank you.

(Recess at 10:16 a.m.)

Appendix C

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 10th day of October, 2022.

/s/Therese Lindblom
Therese Lindblom, CSR, RMR, CRR

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-1355
(D.C. No. 1:20-CV-00522-CNS-GPG)
(D. Colo.)

ESTATE OF ALLAN GEORGE, BY AND THROUGH ITS PERSONAL REPRESENTATIVE SARRA GEORGE, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF RIFLE, COLORADO, A MUNICIPALITY, *et al.*,

Defendants-Appellants.

ORDER

Before Rossman, Kelly, and Briscoe, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX E — PETITION FOR REHEARING EN BANC TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED DECEMBER 5, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-1355

ESTATE OF ALLAN GEORGE, BY AND THROUGH ITS PERSONAL REPRESENTATIVE SARRA GEORGE, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF RIFLE, COLORADO; DEWEY RYAN; AND TOMMY KLEIN,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado
Civil Action No. 1:20-cv-00522-CNS-GPG
Honorable Judge Charlotte N. Sweeney

PETITION FOR REHEARING EN BANC

David A. Lane
Darold W. Killmer
Liana G. Orshan
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Attorneys for Plaintiffs-Appellees

Appendix E

[TABLES INTENTIONALLY OMITTED]

PETITION FOR REHEARING *EN BANC*

Plaintiffs-Appellees, pursuant to Fed R. App. P. 35(b), respectfully submit this Petition for Rehearing *En Banc*, and states as follows.

SUMMARY OF REASONS FOR GRANTING PETITION

From my heart, in order to avoid a gross injustice, undersigned counsel respectfully implores you to watch this short video.[1] If upon watching it, you determine that it doesn't "blatantly contradict" the district court's clear finding that a reasonable jury could find George posed no material threat to anyone but himself, you must grant this petition, or this precedent will greatly enlarge this Court's limited jurisdiction for interlocutory appeals.

As you will see, the video does not "blatantly contradict" the conclusion that a reasonable jury could readily find, as the District Court found, that George "made no hostile moves; [ ] never pointed a gun at anyone but himself; [ ] never threatened an officer or anyone else; [and] remained hopelessly . . . suicidal . . . throughout the entire encounter." Slip. Op. 15 (quoting the district court's order). Nothing in the video establishes that these observations constituted "visible fiction," nor that

1. Conventionally submitted at ECF 126-1 (video starts at 5:25).

as a matter of law, such a nonthreatening person could be shot in the back as he jogged away with a gun in his pants pocket.

The panel had a different view of the video, but one needs only watch it (and read the District Court's order) to determine that a reasonable jury could go either way under the circumstances. Importantly, the panel's review of the facts of the case breaches the proper summary judgment standard, as well as this Court's limited appellate jurisdiction on interlocutory appeal. *See*, *e.g.*, *Est. of Booker v. Gomez*, 745 F.3d 405, 409-410 (10th Cir. 2014) ("[I]f a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law." (cleaned up)). In abandoning this Court's well-defined jurisdictional limits, the panel invites future appellants to file interlocutory appeals that merely attempt to relitigate the evidentiary sufficiency ruled on by the District Court.

The panel's decision fundamentally conflicts with prior precedent in two ways: (1) the panel enlarged the narrow *Scott v. Harris*[2] exception, expanding the exception to swallow the rule of limited appellate jurisdiction on interlocutory appeal; and (2) it contradicted the well-established *Larsen*[3] factors to conclude that George was a threat despite his only manifest intention being suicide

2. *Scott v. Harris*, 550 U.S. 372 (2007).

3. *Estate of Larsen v. Murr*, 511 F.3d 1255 (10th Cir. 2008).

and his complete lack of hostile actions toward the officers or anyone else.

This Court has never sanctioned anything like what happened here: a law enforcement officer shooting twice in the back someone who is clearly only suicidal, jogging away, and not reaching for the gun that the officer knew was stowed in the person's pocket. In fact, "federal courts have afforded a special solicitude to suicidal individuals in lethal force cases when those individuals have resisted police commands to drop weapons but pose no real security risk to anyone other than themselves." *McKenney v. Mangino*, 873 F.3d 75, 82 (1st Cir. 2017); *see also Weinmann v. McClone*, 787 F.3d 444, 450 (7th Cir. 2015) (collecting precedents holding that clearly established law prevented officers from using "deadly force against suicidal people unless they threaten harm to others."). The panel's embarking on its own fact-finding is especially problematic, given that the panel's facts were diametrically opposite of the district court's own conclusions. Absent rehearing, future litigants will rely on this case to reargue any and every factual finding and inference therefrom made by a district court in a qualified immunity denial, no matter how well-supported by the record.

Because of the import of this case for the state of the law in this Circuit, and for the George family, Appellees respectfully request that this Court vacate the panel's opinion and rehear the case *en banc*. Consideration by the full court is necessary to maintain clarity and fidelity to the Supreme Court's and this Court's previous decisions.

Appendix E

ARGUMENT

1. The panel blew past this Court's jurisdictional limits on interlocutory appeals by expanding the narrow *Scott* exception beyond any reasonable limit.

This Court has previously remained faithful to the principle that when considering a denial of qualified immunity on interlocutory appeal, it "lacks jurisdiction . . . to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff 's evidence is sufficient to support a particular factual inference." *Fancher v. Barrientos*, 723 F.3d 1191, 1199 (10th Cir. 2013) (quotations omitted); *see also Johnson v. Jones*, 515 U.S. 304, 307, 313 (1995).

"[I]f a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated [this Court] usually must take them as true—and do so even if [its] own *de novo* review of the record might suggest otherwise as a matter of law." *Booker*, 745 F.3d at 409-10 (quotations omitted). This Court has stressed that panels "must scrupulously avoid second-guessing the district court's determinations regarding whether [the appellee] has presented *evidence* sufficient to survive summary judgment." *Fancher*, 723 F.3d at 1199 (quotations omitted).

> A narrow exception to this jurisdictional limitation exists "when the 'version of events' the district court holds a reasonable jury could

> credit 'is blatantly contradicted by the record.'" *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). This standard is "**a very difficult one to satisfy**." *Crowson [v. Wash. Cty.]*, 983 F.3d [1166], 1177 [(10th Cir. 2020)] (quotation marks omitted). This Court does not "look beyond the facts found **and inferences drawn** by the district court" unless those findings "constitute **visible fiction**." *Id.*

Vette v. Sanders, 989 F.3d 1154, 1162 (10th Cir. 2021) (emphasis added).

"*Scott* was not an invitation for trial courts to abandon the standard principles of summary judgment by making credibility determinations or otherwise weighing the parties' opposing evidence against each other any time a video is introduced into evidence. Rather, *Scott* was an exceptional case with an extremely limited holding." *Estate of Aguirre v. City of San Antonio*, 995 F.3d 395, 410-11 (5th Cir. 2021) (internal citation omitted); *see also Harris v. Pittman*, 927 F.3d 266, 276 (4th Cir. 2019) (holding that "*Scott* is the exception, not the rule" and that it "does not abrogate the proper summary judgment analysis"); *Morton v. Kirkwood*, 707 F.3d 1276, 1284 (11th Cir. 2013) ("In *Scott*, the Supreme Court did not tinker with the summary judgment standard."). This is all the more true on interlocutory appellate review of a district court's denial of summary judgment.

The panel never concluded that the video "blatantly contradicted" the district court's finding that George posed

no threat to anyone but himself, yet it nonetheless made its own factual findings, unsanctioned by the holding of *Scott*. While the panel was correct that the video generally shows what happened, the panel failed as a matter of law by concluding that the video shows a threatening person who could constitutionally be shot twice in the back while jogging away with a gun in his pocket. The panel's error is founded on a refusal to draw the inferences from the facts in the light most favorable to Plaintiffs, as the district court properly did. "The mere existence of video footage of the incident does not foreclose a genuine factual dispute as to the reasonable inferences that can be drawn from that footage." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028 (9th Cir. 2018). "Factual 'inferences' capable of being drawn from the evidence are still inherently factual determinations about what parties 'may, or may not, be able to prove at trial.'" *Kindl v. City of Berkley*, 798 F.3d 391, 400-401 (6th Cir. 2015) (citing *Johnson*, 515 U.S. at 313). "Embracing appellate jurisdiction over 'inferences' offers no principled limit to appellate review of factual disputes relevant to qualified immunity because in many cases, including this one, the 'inferences' at issue are nothing more than aggregate factual questions." *Kindl*, 798 F.3d at 400-401.

The central, hotly disputed inference of this case is whether a reasonable officer ***must conclude*** that George was threatening, despite the fact that the video clearly shows him threatening no one but himself at any point and no other evidence established he had ever threatened anyone else with the gun. The threat posed by a suspect is generally a factual and inferential dispute. *See*, *e.g.*,

Rush v. City of Philadelphia, 78 F.4th 610, 617-618 (3d Cir. 2023) ("[W]e lack jurisdiction over factual challenges to the definition of the right at issue in evaluating qualified immunity—including as to whether a victim of excessive force was a threat to officers or the public."). "Whether [a suspect] continued to present a threat, [and] how immediate the threat was . . . are uncertainties and unresolved material questions of fact." *Smith v. Finkley*, 10 F.4th 725, 741 (7th Cir. 2021). "To resolve these disputes, [an appellate court] would need to consider inferences from the facts which the parties dispute. . . . Considering inferences is something we cannot do without going beyond our jurisdiction on . . . interlocutory appeal." *Id.* The panel's refusal to follow these well-settled principles of summary judgment and appellate jurisdiction, in a published opinion, opens the door to a flood of future appellants arguing about factual findings that are not "blatantly contradicted" by any objective evidence.

In contrast to the facts here, the "blatant contradiction" line of cases was born of an obvious concern: in *Scott* the video showed the suspect's embarking on a reckless high-speed car chase that was objectively threatening and dangerous to the general public, in contrast to the lower court's finding that the high-speed chase posed little threat to anyone else. George jogging away with a gun in his jeans pocket that he never once pointed at dozens of bystanders or any officer, or reached for, is plainly not the same level of objectively indisputable threat. It is simply wrong to view the video in this case and conclude, as the panel did, that it is a "visible fiction" that a jury could find that George posed no threat to anyone was merely suicidal.

In particular, the panel disputed the District Court's findings that a reasonable jury could (1) view George as a frail, older man, (2) find that at the time the officers decided to pull him over, they did not stop traffic on the bridge, and (3) find that the officer who shot George did not warn him to stop. *See* Slip Op. at 22-25. Of course, on their face, none of these issues is of substantial import to the central question in this case: whether a reasonable officer would have had probable cause to believe that George was a threat to anyone but himself. And as to the second and third of these, the panel essentially split hairs to disagree with factually correct statements the District Court made about the video.

Most importantly, none of these facts that the panel determined were blatantly contradicted conclusively establish the level of threat George posed, which a jury reasonably might find was none. Asserting that these facts were "blatantly contradicted," the panel assumed license to re-determine ***every*** fact the district court found, including that George posed no threat, even though the panel did ***not*** find—and could not have found—that all those facts were blatantly contradicted by the video. In doing so, the panel's opinion conflicts with *Scott* and Tenth Circuit precedent that each fact found by the district court must be accepted by this Court unless that fact is blatantly contradicted by the record. *See Emmet v. Armstrong*, 973 F.3d 1127, 1131 (10th Cir. 2020) (making clear that this Court should accept the nonmovant's story to the extent it is not blatantly contradicted and only rely on video footage for aspects of the story that the video contradicts).

Appendix E

The panel also set precedent inconsistent with other decisions of this Court on the "blatant contradiction" exception by deferring completely to Defendants' expert report to conclude George posed a threat of harm, most notably the expert's conclusion that because George kept the gun, he must necessarily have intended to use it to harm someone other than himself—a disputed assertion based on nothing but rank speculation given that George indisputably never threatened anyone. *See* Slip Op. at 34-35. Contrary to the panel's assertion, the defense expert's statements were not unopposed; Plaintiffs submitted their own expert report that concluded a reasonable officer could not have concluded George posed a threat of harm to the officers or others. The panel's acceptance of a hired expert's opinion to resolve an inherently disputed fact—George's manifest intentions while jogging away—violates basic principles of summary judgment and interlocutory appellate review. Consider, what if Plaintiffs did not have an expert? Would that mean Defendants automatically win summary judgment? What if Plaintiffs had an expert and Defendants did not? Would Plaintiffs automatically win summary judgment? Neither can be the case, because an expert is a witness like any other witness, and their credibility is assessed by the jury not the court. "[I]t is solely within the province of the jury to weigh . . . expert testimony." *United States v. Oliver*, 278 F.3d 1035, 1043 (10th Cir. 2001). "The credibility and weight of expert testimony are matters within the jury's province and need not be accepted as conclusive even though uncontradicted" by a counter expert. *United States v. Coleman*, 501 F.2d 342, 346 (10th Cir. 1974). "The general rule is that juries are not bound to believe opinions of witnesses, even if they

are qualified as experts." *Diestel v. Hines*, 506 F.3d 1249, 1268 (10th Cir. 2007).

Most importantly, because an expert's testimony depends on whether the jury credits it—and a jury may reject all of it, or some of it, just like with any other witness—it's not the type of evidence that can "blatantly contradict" the district court's findings. Another panel of this Court has declined, based on prior cases' refusals, to extend the "blatant contradiction" exception to instances when a defendant asserts witness testimony conclusively establishes the contradiction. *See Vette*, 989 F.3d at 1164-65. By using witness testimony to "blatantly contradict" the district court's findings, the panel's decision conflicts with prior precedent of this Court and leaves unsettled whether expert testimony can and should be able to override a district court's plausible contrary findings.

Accordingly, by misapplying *Scott* so the exception swallows the rule of limited appellate jurisdiction on interlocutory appeal, the panel's opinion in this case conflicts with Supreme Court and this Court's precedent and leaves uncertain the scope of such jurisdiction for future cases.

2. The panel contradicted longstanding precedent that determining the threat posed by a suspect requires consideration of the *Larsen* factors.

The panel refused to apply this Court's well-settled *Larsen* factors, as well as fifteen years of caselaw that applied the factors unchanged. *Larsen* distilled key factors

for a court to consider in assessing the threat posed by a suspect against whom an officer had used deadly force: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008). This Court has explained that in determining the threat posed by the suspect, "[t]hese four factors . . . are quite significant." *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015).

The panel, consistently with other cases, recognized that "a court ***must*** 'consider the four nonexhaustive *Larsen* factors'" in determining whether "an officer had probable cause to believe 'there was an immediate threat to the officers or to others.'" Slip Op. at 28 (emphasis added) (quoting *Palacios v. Fortuna*, 61 F.4th 1248, 1258 (10th Cir. 2023)); *see also Simpson v. Little*, 16 F.4th 1353, 1361 (10th Cir. 202 1) ("[This Court] rel[ies] on the four *Estate of Larsen* factors to assess the threat posed by the suspect."). Yet despite fifteen years of cases that did exactly that—considered the *Larsen* factors—the panel did not, torturing the *Larsen* factors until they were unrecognizable. In doing so, the panel failed to follow this Court's prior precedent, and left the state of the law following its decision uncertain.

The panel flipped on its head the crucial "hostile motions" factor, which it first correctly admitted would otherwise weigh in favor of Plaintiffs since George never

pointed his handgun at either officer or anyone besides himself. The panel nevertheless proceeded to speculate that because George ignored orders to drop the gun, it **must mean** he intended to use it—even though there was no evidence George had ever threatened anyone but himself with the gun. Slip Op. at 30-31. In doing so, the panel relied solely on a distinct case, which involved a suspect armed with a handgun who had threatened other people with that handgun, ran away from officers with the gun in his hand, and repeatedly picked the gun up when he dropped it while running away. Slip Op. 30-31 (citing *Palacios*, 61 F.4th at 1253-1255). In contrast, George never threatened anyone, did not have the gun in his hand, and never reached for the gun as he jogged away. This *Larsen* factor heavily favors Plaintiffs; however, the panel found this factor in favor of Defendant only by refusing to apply this factor at all. *See* Slip Op. at 31. Further, the panel improperly resolved a significantly disputed fact.

The panel then modified the "physical distance" factor, which also weighed in favor of Plaintiffs given that George was running ***away*** from the officer who shot him. *Id.* at 31-33. The panel emphasized that George was running toward Rifle, even though no evidence ever established that George posed a threat to any members of the public, making the panel's modification of this factor nonsensical. Lastly, despite the fact that the panel recognized that George's manifest intention was to kill himself not to harm others, the panel still weighed this factor in favor of Defendants. *See id.* at 33-34. By ignoring the only intention that George had ever manifested, the panel refused to apply this disputed factor as prescribed, and instead resolved it favorably to defendants.

The panel's modifications were based on its conclusion that this case had different facts than that of *Larsen*. However, every case from this Court that applied the *Larsen* factors without modification had different facts than *Larsen*, and no other panel felt empowered to completely upend or ignore the factors. In *Larsen*, the suspect called 911 threatening to kill someone or himself. 511 F.3d at 1258. When officers arrived, the suspect stood on his porch with a large knife; the shooting officer believed the suspect was around 7-12 feet from him. *Id.* When the suspect refused to follow commands to "drop the knife or [the officer would] shoot," and took a step toward the officer, the officer fired twice, killing the suspect. *Id.* This combination of facts does not appear in any other case from this Court that applied *Larsen*.

For example, *Rosales v. Bradshaw* involved very similar facts to this case: an officer aimed his gun at and threatened to shoot the suspect even though the suspect had his gun in his pocket at the time (the difference being that the officer did not actually shoot the suspect). 72 F.4th 1145, 1149 (10th Cir. 2023). In concluding that all but one of the *Larsen* factors favored the suspect, the panel faithfully applied the factors: physical distance weighed in the officer's favor because the suspect was not far away from the officer and a gun could have fired across the distance; the suspect complied with commands because he put the gun in his pocket; "importantly, [the suspect] made absolutely no hostile motions with his gun towards [the officer]" with the allegations showing the suspect was "armed but not at all hostile"; and "a reasonable officer would have known [the suspect's] 'manifest intentions'

were to protect himself and his home, to deescalate the situation, and not to cause harm." *Id.* at 1152-54. Thus, the panel considered different facts than those in *Larsen* but still applied the *Larsen* factors to determine the suspect did not pose an immediate threat to the officer. *Id.* at 1154.

Many other cases from this Court have done the same, without modifying the *Larsen* factors to reach their conclusion. *See*, *e.g.*, *Palacios*, 61 F.4th at 1258-60 (applying *Larsen* including considering the "hostile motion" prong and concluding that it favored the officer because the suspect had possession of a gun in his hand and was suspected of having just used it to threaten at least two people—unlike in this case in which George's weapon remained in his pocket and he had never used it to threaten anyone but himself); *Estate of Taylor v. Salt Lake City*, 16 F.4th 744, 765-69 (10th Cir. 2021) (resolving the "hostile motions" prong against the suspect because the way he rapidly removed his hands from his waistband was consistent with the drawing of a gun); *Reavis v. Frost*, 967 F.3d 978, 985-988 (10th Cir. 2020) (concluding that because, among other things, there was no evidence regarding the suspect's intentions, this Court could not say that the general risks created by reckless driving were sufficient to justify a shooting).[4]

4. *See also*, *e.g.*, *Ibarra v. Lee*, No. 22-5094, 2023 U.S. App. LEXIS 27895, at *27-31 (10th Cir. Oct. 20, 2023); *Arnold v. City of Olathe*, 35 F.4th 778, 792 (10th Cir. 2022); *Lennen v. City of Casper*, No. 21-8040, 2022 U.S. App. LEXIS 5513, at *24-26 (10th Cir. Mar. 2, 2022); *Estate of Harmon v. Salt Lake City*, No. 20-4085, 2021 U.S. App. LEXIS 39942, at *9-13 (10th Cir. Nov. 10, 2021); *Bond v. City of Tahlequah*, 981 F.3d 808, 820-21 (10th Cir.

Accordingly, the panel's decision rewriting several of the *Larsen* factors is inconsistent with many other decisions of this Court that applied and relied on the *Larsen* factors, leaving future litigants and lower courts uncertain whether and when to use *Larsen*. This decision has put the state of the law in this Circuit in this area, which had been settled for fifteen years, in doubt.

CONCLUSION

Because the panel's decision conflicts with precedent from the Supreme Court and Tenth Circuit, Plaintiffs respectfully request that this Circuit vacate the panel's judgment and rehear the case *en banc*.

DATED this 5th day of December 2023.

KILLMER LANE, LLP

/s/ David A. Lane
DAVID A. LANE
DAROLD W. KILLMER
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2023) (*rev'd on other grounds by City of Tahlequah v. Bond*, 595 U.S. 9 (2021)); *Estate of Valverde v. Dodge*, 967 F.3d 1049, 1061-66 (10th Cir. 2020); *Pauly v. White*, 874 F.3d 1197, 1215-19 (10th Cir. 2017); *Clark v. Bowcutt*, 675 F. App'x 799, 806, 810 (10th Cir. 2017); *Tenorio v. Pitzer*, 802 F.3d 1160, 1163-66 (10th Cir. 2015); *Zia Tr. Co. v. Montoya*, 597 F.3d 1150, 1154-55 (10th Cir. 2010); *Thompson v. Salt Lake Cty.*, 584 F.3d 1304, 1313-15, 1317-20 (10th Cir. 2009).

Appendix E

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