APPENDIX

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-1154

[Filed July 18, 2023]

JOHN JORDAN,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
ADAMS COUNTY SHERIFF'S OFFICE,	)
DEPUTY CHAD JENKINS, and	)
DEPUTY MICHAEL DONNELLON	)
	)
Defendants - Appellees.	)
	)

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 20-CV-02297-STV)

Robert M. Liechty (Terrell M. Gaines, Littleton, Colorado, with him on the briefs), Robert M Liechty PC, Denver, Colorado, for Plaintiff-Appellant.

Michael A. Sink (Kerri A. Booth with him on the brief), Assistant County Attorneys, Adams County Attorney's Office, Brighton, Colorado, for Defendants-Appellees.

Before **HARTZ**, **EBEL**, and **MATHESON**, Circuit Judges.

EBEL, Circuit Judge.

According to Plaintiff John Jordan's allegations, he was thrown to the ground and arrested for criticizing the police. Moments before the arrest, Mr. Jordan stood across the street from Deputies Michael Donnellon and Chad Jenkins (collectively, the "Deputies"), listening as the Deputies questioned his nephew about a car accident involving a truck owned by Mr. Jordan's company. Mr. Jordan grew frustrated with what he was hearing and started criticizing the two Deputies. The Deputies retaliated with their own disparaging remarks about Mr. Jordan. Eventually, Deputy Jenkins became fed up with Mr. Jordan's criticisms and performed a takedown maneuver on Mr. Jordan, placing him under arrest for obstruction of justice. As relevant to this appeal, Mr. Jordan sued under 42 U.S.C. § 1983 for unlawful arrest, malicious prosecution, and excessive force. The magistrate judge granted the Deputies' motion for summary judgment on the basis of qualified immunity and dismissed each of these claims.

Exercising jurisdiction under 28 U.S.C § 1291 and 28 U.S.C. § 636(c)(3), we REVERSE the order granting

summary judgment and REMAND for further proceedings.

I. BACKGROUND

In early September 2018, plaintiff John Jordan received word that his nephew, J.J., had been in a car accident while driving Mr. Jordan's company truck. Mr. Jordan traveled to the scene of the accident and, upon arrival, learned that J.J. was unable to locate the truck's insurance card. To help, Mr. Jordan called his office to see if someone could track down the insurance information.

The accident was being covered by defendant Deputy Michael Donnellon who, upon arriving at the scene, began questioning J.J. He was then joined by defendant Deputy Chad Jenkins. Mr. Jordan remained on the phone between twenty to forty feet away as the officers questioned J.J. While on the call with his office, Mr. Jordan became annoyed at the questions that J.J. was being asked and began to engage in a verbal altercation with the Deputies. This interaction was recorded by his phone. The relevant part of this exchange goes as follows:

> **Mr. Jordan**: Well, are you taking a statement or are you giving a statement?
> **Deputy Donnellon**: What?
> **Mr. Jordan** [in raised voice]: Okay. Are you taking a statement from them or are you giving a statement? Okay. And they're saying that's not the point of impact. That's what you're saying. [Inaudible] witnesses with him.
> **Deputy Donnellon**: [Inaudible]

Mr. Jordan: Those guys are independent.
Deputy Donnellon: [Inaudible]
Mr. Jordan: Okay. I'm just wondering if you're making a statement or are you gonna let them do it?
Deputy Donnellon: [Inaudible]
Mr. Jordan: You're way too high strung, man.
Deputy Donnellon: No, I'm not.
Mr. Jordan: You're way too high strung, man.
Deputy Donnellon: I'm not going to give your [inaudible] because of your attitude and your behavior. You are being a complete . . . you are a complete disgrace to your son.
Mr. Jordan [in a mocking tone]: Don't shoot me, man.
Deputy Donnellon: That's a great way to show your son how to act.
Mr. Jordan: Don't shoot me, man.
Deputy Donnellon: You're a terrible father.
Mr. Jordan: Don't shoot me.
Deputy Donnellon: An embarrassment.
Mr. Jordan: How can you tell those skidmarks are from that car? This whole road is full of skidmarks.
Deputy Jenkins: Sir, you better go away.
Mr. Jordan [in raised voice]: Quit making statements. If you guys want their statements.
Deputy Jenkins [in raised voice]: [Inaudible]
Mr. Jordan: If you guys want their statements, let them give their statements.
Deputy Jenkins: Are you done?
Mr. Jordan: Yeah.
Deputy Jenkins: Good. Go. Go.

> **Mr. Jordan**: I'm not going anywhere. I'm going to stay right here.
> **Deputy Jenkins**: [Inaudible] Put your hands behind your back.

App'x at 115. At the moment that Deputy Jenkins commanded Mr. Jordan to put his hands behind his back, Mr. Jordan can be heard speaking on the phone with someone at his office. When Mr. Jordan did not immediately comply with the command, Deputy Jenkins grabbed his arm and used a takedown maneuver to bring Mr. Jordan to the ground.

The parties dispute exactly how these events played out. Deputy Jenkins claims that Mr. Jordan "pulled away" from his grip after his arm was grabbed, Aple. Br. 3 (citing App'x at 64), but Mr. Jordan denies this. Furthermore, although the parties agree that Deputy Jenkins told Mr. Jordan to put his hands behind his back three more times after the events recorded in the transcript above unfolded, they disagree about when these commands happened. Mr. Jordan contends that these commands came after the takedown maneuver was performed, as there were only a few seconds between the initial command and the takedown. The Deputies disagree with this on appeal.

After Deputy Jenkins knocked Mr. Jordan down, Mr. Jordan stuck out his right arm to catch the ground. The Deputies contend that this was done to resist arrest and that Mr. Jordan used this arm to push back against Deputy Jenkins, but Mr. Jordan claims that this was done to prevent his face from hitting the ground. Either way, once Mr. Jordan was on his knees, he had one extended arm holding himself off the

ground. Deputy Jenkins then kicked out this arm, causing Mr. Jordan's face to hit the dirt. Deputy Jenkins placed his knee on Mr. Jordan's cheek and handcuffed him. Mr. Jordan was arrested and charged with obstruction of justice and resisting arrest under Colo. Rev. Stat. §§ 18-8-103, 104. Per § 18-8-104, an individual commits obstruction of a peace officer when, "by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority." These charges were eventually dropped.

Mr. Jordan initiated this lawsuit in August 2020. He brought four claims under 42 U.S.C. § 1983: (1) unlawful arrest, (2) malicious prosecution, (3) excessive force, and (4) violation of religious freedom. The parties agreed to litigate the dispute before a magistrate judge and the Deputies moved for summary judgment on the basis of qualified immunity on all four claims. The magistrate judge granted summary judgment for defendants on the first three claims based on qualified immunity but denied summary judgment on the religious freedom claim.[1] On the unlawful seizure and malicious prosecution claims, the magistrate judge concluded that the Deputies had probable cause for arrest under Colo. Rev. Stat. § 18-8-104—which prohibits obstruction of a peace officer—and the Deputies were therefore entitled to qualified

[1] There are additional facts and proceedings that pertain to Mr. Jordan's religious liberty claim, but since this claim is not at issue on appeal, we do not discuss them here.

immunity on both claims. Both below and on appeal, Jordan makes no argument that Colo. Rev. Stat. § 18-8-104 does not by its terms make his protest illegal. Rather, he is arguing only that he had a First Amendment right under the U.S. Constitution to engage in the conduct for which he was arrested and prosecuted, and so § 18-8-104 could not constitutionally be applied to him.[2] On the excessive force claim, the magistrate judge declined to decide whether excessive force was applied because the judge concluded that there was not a clearly established right under the sole case cited by Mr. Jordan, and thus qualified immunity was appropriate.

Mr. Jordan now appeals the summary judgment ruling for each of those three claims, arguing that the magistrate judge erred in granting qualified immunity to the Deputies.

II. STANDARD OF REVIEW

Here, we review a "grant of summary judgment de novo, applying the same legal standard as the district court." Schaffer v. Salt Lake City Corp., 814 F.3d 1151, 1155 (10th Cir. 2016). In so doing, we view the evidence and any reasonable inferences from that evidence in the light most favorable to the non-moving party. Kaufman v. Higgs, 697 F.3d 1297, 1300 (10th Cir. 2012). In general, the movant bears the burden of establishing that "there is no genuine dispute as to any

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[2] Since Mr. Jordan does not argue that his conduct didn't violate § 18-8-104, we assume for this appeal that his conduct fell within the ambit of the statute, and consider only whether his arrest violated his constitutional rights.

material fact and the movant is entitled to judgment as a matter of law." Schaffer, 814 F.3d at 1155 (quoting Fed. R. Civ. P. 56(a)).

However, in the qualified immunity context, the plaintiff bears the burden of proving that (1) the defendants' actions violated plaintiff's federal rights, and (2) that the federal rights were clearly established at the time of the conduct. PJ ex rel. Jensen v. Wagner, 603 F.3d 1182, 1196 (10th Cir. 2010). To show that the law is clearly established, a plaintiff must normally point to a "Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts." Cortez v. McCauley, 478 F.3d 1108, 1114 (10th Cir. 2007) (en banc) (quoting Medina v. City of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)). In the rare obvious case, though, "the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." McCoy v. Meyers, 887 F.3d 1034, 1053 (10th Cir. 2018) (quoting D.C. v. Wesby, 138 S. Ct. 577, 590 (2018)).

III. DISCUSSION

A. Did the magistrate judge err in granting summary judgment for the Deputies on Mr. Jordan's claim for unlawful arrest?

We first address the grant of qualified immunity on Mr. Jordan's unlawful arrest claim. "In the context of a false arrest claim, an arrestee's constitutional rights were violated if the arresting officer acted in the absence of probable cause that the person had committed a crime." Kaufman, 697 F.3d at 1300. To

overcome qualified immunity in the unlawful arrest context, the first prong requires a plaintiff to show that the "arresting officer acted in the absence of probable cause that the person had committed a crime." Id. at 1300. For the second prong, the plaintiff must "show that 'it would have been clear to a reasonable officer that probable cause was lacking under the circumstances[.]'" Id. at 1300 (quoting Koch v. City of Del City, 660 F.3d 1228, 1238 (10th Cir. 2011)). Put another way, the plaintiff must show that there was not even "arguable probable cause" for the arrest. Id. (quoting Cortez, 478 F.3d at 1121).

We conclude that, when the facts are viewed in the light most favorable to Mr. Jordan at this stage in the proceedings, he meets both prongs of the qualified immunity analysis because his verbal criticism was clearly protected by the First Amendment, thereby meaning that there could be no arguable probable cause for his arrest based on that conduct. It was therefore erroneous to grant summary judgment in favor of the Deputies.

1. Prong One: Was there probable cause for the arrest?

Starting with the first prong, we conclude that Mr. Jordan's conduct was protected by the First Amendment, as established by City of Houston v. Hill, 482 U.S. 451, 453–54 (1987). There, Hill's friend was "intentionally stopping traffic on a busy street," prompting police officers to approach the friend and begin speaking to him. Id. at 453. To divert the officers' attention away from the friend stopping traffic, Hill "began shouting at the officers." Id. One of the officers

asked Hill if he was interrupting the officer in his official capacity, to which Hill replied in the affirmative. Id. at 454. Hill was then arrested pursuant to a local ordinance that rendered it unlawful to "interrupt any policeman in the execution of his duty." Id. at 455 (quoting Houston, Texas, Code of Ordinances § 34–11(a) (1984)).

The Supreme Court in Hill held that this ordinance was unconstitutionally broad. Id. at 467. In so holding, the Court stated that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." Id. at 461. The Court made clear that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Id. at 462–63; see also Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (declaring a statute unconstitutional after the appellant was arrested for screaming obscenities at an officer who was speaking to her husband). Like in Hill, Mr. Jordan here was arrested for merely criticizing an officer while the officer was questioning another party. "The Constitution does not allow such speech to be made a crime." Hill, 482 U.S. at 462.

Hill is relevant to an unlawful arrest claim under the Fourth Amendment, like the one here, even though it involved a First Amendment challenge to a local ordinance. We made this clear in Guffey v. Wyatt, where we relied on Hill (and other similar First Amendment cases) to deny qualified immunity against a Fourth Amendment challenge premised on conduct

protected by the First Amendment. 18 F.3d 869, 870, 873 (10th Cir. 1994). For this reason, the Deputies miss the mark when they argue that Hill is distinguishable because it involved a First Amendment claim in the face of an anti-harassment statute, rather than an unlawful arrest claim under the Fourth Amendment.[3] Together, Hill and Guffey both establish that criticism directed at police is protected by the First Amendment and cannot justify adverse police action.[4] Indeed, the

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[3] The Deputies also argue that Mr. Jordan forfeited reliance on Hill because he cited it for the first time on appeal. This is factually incorrect because Mr. Jordan did cite Hill below when opposing the Deputies' motion for summary judgment. App'x at 85. Even if he had not, though, we would not need to ignore Hill because "[a] court engaging in review of a qualified immunity judgment should [] use its 'full knowledge of its own [and other relevant] precedents.'" Elder v. Holloway, 510 U.S. 510, 516 (1994) (quoting Davis v. Scherer, 468 U.S. 183, 192 n.9 (1984)); see also Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin., 864 F.3d 738, 748 n.6 (D.C. Cir. 2017) ("Indeed, a party cannot forfeit or waive recourse to a relevant case just by failing to cite it.").

[4] We also recently addressed the right to criticize and film police in Irizarry v. Yehia, 38 F.4th 1282 (10th Cir. 2022). There, we held that the plaintiffs "did not impede officers from performing their duties" when the plaintiffs stood "on a public street" and "loudly criticize[d]" one of the officers while filming him. Id. at 1292 n.10. In concluding that the plaintiffs had engaged in protected speech, we emphasized the importance of citizens acting "as 'a watchdog of government activity.'" Id. at 1289 (quoting Leathers v. Medlock, 499 U.S. 439, 447 (1991)). The right of citizens "verbally to oppose or challenge police activity" similarly serves this critical function "by which we distinguish a free nation from a police state." Hill, 482 U.S. at 462–63. Because the facts of Irizarry occurred after the facts before us, we discuss Irizarry merely to illustrate how the Tenth Circuit has recently addressed the right at issue here—not to show that the law was clearly established at the time of the arrest below.

First Amendment does not protect only quiet and respectful behavior towards police; it protects loud criticism that may annoy or distract the officer. See Hill, 482 U.S. at 453–54 (officer arrested the defendant because he admitted to "interrupting" the officer); see also Guffey, 18 F.3d at 870 (plaintiff engaged in a "heated exchange" with officer).

Moreover, since the First Amendment protects the right to criticize police, then a fortiori it protects the right to remain in the area to be able to criticize the observable police conduct. Otherwise, an officer could easily stop the protected criticism by simply asking the individual to leave, thereby forcing them to either depart (which would effectively silence them) or face arrest. This would render the right to criticize hollow and would implicate various other protected rights, like the right to film public police activity. See Irizarry, 38 F.4th at 1289. If police could stop criticism or filming by asking onlookers to leave, then this would allow the government to "'simply proceed[] upstream and dam[] the source' of speech"—i.e., it would allow the government to "bypass the Constitution." W. Watersheds Project v. Michael, 869 F.3d 1189, 1196 (10th Cir. 2017) (quoting Buehrle v. City of Key W., 813 F.3d 973, 977 (11th Cir. 2015)).

Of course, the right to criticize police has important limits. First, if criticism is accompanied by a physical act which interferes with an officer's official duties, then the officer may take measures to stop that physical act. See Hill, 482 U.S. at 462 n.11 (noting that the Court's decision "does not leave municipalities powerless to punish physical obstruction of police

action"). For example, if an individual is physically blocking the officer from accessing a crime scene while criticizing the officer, then the officer may stop this physical obstruction. Or if the act of criticizing itself is so loud that an officer is prevented from executing his or her duties, then the officer may restrict the speech based on this physical act, which does not rely on the content of the speech. Second, if criticism of an officer has the function of coaching a witness, then an officer may take measures to prevent this coaching.[5] In such a situation, the preventive measures are not based on the criticism itself, but on the active interference with the investigation.

Like in Guffey and Hill, Mr. Jordan's criticism was constitutionally protected by the First Amendment. Accordingly, there was no probable cause to arrest him. See Mink v. Knox, 613 F.3d 995, 1003–04 (10th Cir. 2010). Mr. Jordan has therefore successfully made out the first prong of the qualified immunity analysis at this stage of the proceeding.

2. Prong Two: Did the Deputies violate clearly established law?

"In the context of a qualified immunity defense on an unlawful arrest claim, we ascertain whether a

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[5] In most cases, there will be a clear distinction between an act of criticism and an act of coaching a witness. In some cases, though, this line may become blurred. At a later stage of this case, a factfinder may determine that Mr. Jordan's speech crossed this line from criticism to coaching. As we discuss further below, however, we construe the facts most favorably to Mr. Jordan at this time because this case comes before us as an appeal from the Deputies' motion for summary judgment.

defendant violated clearly established law by asking whether there was arguable probable cause for the challenged conduct." Stonecipher v. Valles, 759 F.3d 1134, 1141 (10th Cir. 2014) (quotation omitted). "Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." Id. (citing Cortez, 478 F.3d at 1120); see also Figueroa v. Mazza, 825 F.3d 89, 100 (2d Cir. 2016) ("A police officer has arguable probable cause 'if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'" (quoting Zalaski v. City of Hartford, 723 F.3d 382, 389, 390 (2d Cir. 2013))). "A defendant 'is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff.'" Stonecipher, 759 F.3d at 1141 (quoting Cortez, 478 F.3d at 1120). Thus "[i]n the § 1983 qualified-immunity context, an officer may be mistaken about whether he possesses actual probable cause to effect an arrest, so long as the officer's mistake is reasonable." A.M. v. Holmes, 830 F.3d 1123, 1140 (10th Cir. 2016) (emphasis in original). Applying these standards, we hold that Mr. Jordan's First Amendment rights were clearly established at the time of his arrest such that there was no arguable probable cause to arrest him for such conduct.

As we have discussed, the First Amendment right to criticize police is well-established, see Hill, 482 U.S. at 461 (" . . . the First Amendment protects a significant amount of verbal criticism and challenge

directed at police officers."), and it is clearly established that "a government official may not base her probable cause determination on . . . speech protected by the First Amendment." Mink, 613 F.3d at 1003–04. Taking "all the facts in the light most favorable to" Mr. Jordan—as we must do at summary judgment, Emmett, 973 F.3d at 1135—it was clearly established that his conduct did not go beyond the bounds and protection of the First Amendment. On his version of the facts, he was standing twenty to forty feet away from the officers (on a public sidewalk or street), voicing his disagreement with the questions the Deputies were asking his youthful nephew. This was protected conduct. See Hill, 482 U.S. at 461; see also Guffey, 18 F.3d at 870, 872. And, as explained above, his refusal to leave when asked to do so could not have provided arguable probable cause for his arrest because, if it did, officers could quickly silence any criticism simply by asking criticizers to leave.

Nor, under his account of the facts, did Mr. Jordan's criticism fall outside the bounds of the First Amendment's protections due to physical interference or coaching. Although Deputy Jenkins claims that he could not hear the nephew over Mr. Jordan's criticism, see App'x at 64, this is irreconcilable with a view of the record most favorable to Mr. Jordan, see App'x at 115 (phone recording of interaction), see also App'x at 97–98 (Deputy Donnellon's report reviewing his conversation with the nephew, including what they both said), App'x at 94–95 (declarations of Mr. Jordan and his nephew). And even though the Deputies claim that Mr. Jordan was "attempting to direct the interviews and suggest answers to his nephews," Aple.

Br. 13, this is also unsupported by the transcript recording when viewed most favorably to Mr. Jordan. At this procedural juncture, there are too many outstanding factual questions to grant summary judgment for the Deputies.

Assuming these facts, we hold that no reasonable officer could have believed they had arguable probable cause for arrest, and it was therefore improper to grant summary judgment for the Deputies on Mr. Jordan's claim of unlawful arrest.

B. Did the magistrate judge err in granting summary judgment for the Deputies on Mr. Jordan's claim for malicious prosecution?

We next address Mr. Jordan's claim of malicious prosecution. Below, the magistrate judge's conclusion that the Deputies had probable cause was treated as dispositive for the malicious prosecution claim, since a plaintiff must show a lack of probable cause as an element of malicious prosecution. See Shrum v. Cooke, 60 F.4th 1304, 1310 (10th Cir. 2023); see also Thompson v. Clark, 142 S. Ct. 1332, 1337 (2022) (lack of probable cause is the "gravamen" of the Fourth Amendment claim for malicious prosecution and the tort of malicious prosecution). As we held above, though, this probable cause determination—on summary judgment review—was erroneous and unconstitutional. Since this determination was the only basis for the magistrate judge's summary judgment ruling dismissing the malicious prosecution claim, this judgment was erroneous.

C. Did the magistrate judge err in granting summary judgment for the Deputies on Mr. Jordan's claim of excessive force, again on the basis of qualified immunity?

Finally, we consider Mr. Jordan's excessive force claim. The qualified immunity analysis here follows the standard formula—we first determine whether there was a constitutional violation and then determine whether the constitutional right was clearly established. See Jensen, 603 F.3d at 1196. We conclude that Mr. Johnson successfully made out both prongs of this analysis, rendering summary judgment improper.

1. Prong One: Was the force applied to Mr. Jordan unconstitutionally excessive?

The first prong of the qualified immunity analysis asks whether the force applied to Mr. Jordan was "excessive" under the Fourth Amendment such that it was unconstitutional. Graham v. Connor, 490 U.S. 386, 394 (1989). Whether force is excessive is a question of "reasonableness," which "requires [a] balancing of the individual's Fourth Amendment interests against the relevant government interests." Cnty. Of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546 (2017). This is an "objective" inquiry that looks at "whether the totality of the circumstances justifie[s] a particular sort of search or seizure." Id. (first quoting Graham, 490 U.S. at 396; then quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)). There are three non-exclusive factors that are weighed in determining whether force was excessive: (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.[6]

Under the first Graham factor, "a minor offense supports only the use of minimal force." Wilkins v. City of Tulsa, 33 F.4th 1265, 1273 (10th Cir. 2022). "A misdemeanor committed in a 'particularly harmless manner . . . reduces the level of force that [is] reasonable for [the officer] to use.'" Id. (quoting Casey v. City of Fed. Heights, 509 F.3d 1278, 1281 (10th Cir. 2007)). This factor weighs in favor of Mr. Jordan. Section 18-8-104(1)(a) is punishable as a class two misdemeanor, meaning that this factor weighs against the use of "anything more than minimal force." Id. According to Mr. Jordan's presentation of the facts,[7] the Deputies tackled Mr. Jordan to the concrete, kicked out his supporting arm so that his head hit the concrete, and placed a knee on his cheek. In Surat v. Klamser, we recently held that the first Graham factor weighed against use of a takedown maneuver against a plaintiff charged with the same two misdemeanors as Mr. Jordan. 52 F.4th 1261, 1274–75 (10th Cir. 2022) (first factor favored plaintiff when officer used a takedown

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[6] Mr. Jordan argues that "the use of non-trivial force of any kind was unreasonable" when the plaintiff made no threats nor attempted to resist the officer. Rice v. Morehouse, 989 F.3d 1112, 1126 (9th Cir. 2021) (emphasis in original) (quoting Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1094 (9th Cir. 2013)). Because we conclude that he has satisfied the Graham factors without this argument, we do not address it.

[7] Because Mr. Jordan's account of the facts is not contradicted by the audio recording, we must "credit his version of the events on summary judgment." Wilkins, 33 F.4th at 1275.

maneuver for violation of the misdemeanor at issue here); see also Koch, 660 F.3d at 1246–47 (first factor favored the plaintiff when the officer grabbed her arm and threw her to the ground after she resisted his grab). This force was therefore more than "minimal," and so the first Graham factor favors Mr. Jordan. See Wilkins, 33 F.4th at 1273.

The second Graham factor is the "most important," and requires us to look at "whether the officers or others were in danger at the precise moment that they used force." Id. at 1273 (first quoting Pauly v. White, 874 F.3d 1197, 1215–16 (10th Cir. 2017); then quoting Emmett v. Armstrong, 973 F.3d 1127, 1136 (10th Cir. 2020)). This factor also favors Mr. Jordan, given that there is no evidence that he "had access to a weapon or that []he threatened harm to [him]self or others." Davis v. Clifford, 825 F.3d 1131, 1135 (10th Cir. 2016). At the time he was taken down, Mr. Jordan was simply talking on the phone to get insurance information to assist the deputies. Even in a case where a suspect had a small knife, we concluded that the suspect did not pose an immediate threat because he neither made threats nor advanced at anyone. See Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006). This factor therefore also weighs against the takedown.

As for the third Graham factor, we consider whether there was "any resistance during the suspect's encounter with officers," or whether the suspect attempted to flee. Wilkins, 33 F.4th at 1273. This factor supports Mr. Jordan as well. In Davis, we held that this factor favored the plaintiff when the plaintiff responded to officers approaching her car by locking

the doors, rolling up the windows, and refusing to exit. 825 F.3d 1131, 1136 (10th Cir. 2016). There, we determined that the plaintiff could not be considered "actively resisting arrest or attempting to flee" just because "she did not immediately obey the officers' orders." Id.

Like in Davis, this factor favors Mr. Jordan. Under his account of the facts, Deputy Jenkins asked Mr. Jordan to put his hands behind his back just one time —a command which Mr. Jordan says he did not hear —before Deputy Jenkins grabbed his arm and then tackled him to the ground around four to six seconds later.[8] There is no evidence that Mr. Jordan was attempting to flee, since one of the bases for the arrest was the fact that Mr. Jordan refused to leave. As for potential resistance, the Deputies claim that after Mr. Jordan was taken to the ground, he used his right arm to push back in an attempt to resist arrest. Mr. Jordan disagrees with these facts, claiming that he used his right arm to prevent his face from hitting the ground. Since we must "tak[e] all the facts in the light most favorable to" Mr. Jordan at summary judgment, Emmett, 973 F.3d at 1135, this factor favors Mr. Jordan.[9]

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[8] From the recording, it is unclear whether the second instruction comes before, during, or after the tackle. There is a scuffle in the audio before the second instruction, and so this is consistent with the tackle beginning before the second instruction. So, like above, we must "credit [Mr. Jordan's] version of the events on summary judgment." Wilkins, 33 F.4th at 1275.

[9] Even if Mr. Jordan did throw out his arm, this happened after the takedown maneuver, so this potential resistance could not retroactively justify the takedown.

In sum, we conclude that all three of the Graham factors favor Mr. Jordan and that he has established a constitutional violation of excessive force under the Fourth Amendment, thereby satisfying the first prong of the qualified immunity analysis.

2. Prong Two: Was the excessive force violation under the Fourth Amendment one of clearly established law?

The next issue is whether the law was clearly established. We conclude that, under Mr. Jordan's account of the facts, his constitutional right was clearly established. Thus, it was erroneous to grant summary judgment for the Deputies.

Our decision in Morris v. Noe, 672 F.3d 1185, 1190 (10th Cir. 2012), is particularly relevant here.[10] In Morris, following a verbal exchange between the plaintiff's ex-boyfriend and the plaintiff's husband, the husband stepped backwards towards the police officers with his hands up. Id. This led the officers to grab the

[10] We agree with the district court that Cortez, 478 F.3d at 1113, does not clearly establish the law here. There, we concluded that it was unconstitutional to grab one of the plaintiff's arms and lock her in a police car for nearly an hour because she was not the target of the arrest (rather, the police were in her home to arrest her husband). Id. at 1130. Cortez thus did not clearly establish the level of force that is permissible for the target of an arrest. Because Mr. Jordan was the target of the arrest, this case is more like Morris than Cortez. And, although Mr. Jordan did not cite Morris, we state again that "[a] court engaging in review of a qualified immunity judgment should [] use its 'full knowledge of its own [and other relevant] precedents.'" Elder, 510 U.S. at 516 (1994) (quoting Davis, 468 U.S. at 192 n.9).

husband, twist him around, and throw him to the ground. Id. They then put their knees on his midsection and handcuffed him. Id. We concluded that this forceful takedown was unconstitutional under Graham because the husband posed no threat to others and neither resisted nor attempted to flee. Id. at 1195–98. Morris thus establishes that a takedown maneuver is unconstitutional when the arrestee poses no threat, puts up no resistance, and does not attempt to flee.[11]

As explained above, the parties dispute whether Mr. Jordan pulled away from Deputy Jenkins' grip and threw out his arm during the takedown to resist arrest. However, taking the facts in the light most favorable to Mr. Jordan, Emmett, 973 F.3d at 1135, Mr. Jordan did not pull away from Deputy Jenkins and did not use his arm to push back against Deputy Jenkins, and thus did not resist arrest. As such, under the Graham factors, it was clearly established that the takedown maneuver utilized by the Deputies here was excessive as applied

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[11] In Surat, we recently extended the holding of Morris and held that minor resistance similarly does not justify a takedown maneuver. 52 F.4th at 1277. Specifically, the takedown maneuver there was held to be unconstitutional when the plaintiff merely attempted to pry the officer's fingers off her and pawed at the officer's arm. Id. However, we held that that this takedown maneuver was not clearly unconstitutional under Morris because Morris had only established that a takedown maneuver is unconstitutional when there is no resistance. Id. Surat was decided in November 2022, and so at the time of Mr. Jordan's September 2018 arrest, it was only clearly established that a takedown maneuver is unconstitutional when there is no resistance whatsoever. Morris, 672 F.3d at 1198. Thus, whether Mr. Jordan did or did not resist arrest remains a key factual question for the application of qualified immunity.

to Mr. Jordan at the time of his arrest. It was therefore improper to grant summary judgment for the Deputies.

IV. CONCLUSION

For the foregoing reasons, we REVERSE the magistrate judge's grant of summary judgment on the unlawful arrest, malicious prosecution, and excessive force claims, and REMAND for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02297-STV

[Filed January 17, 2022]

JOHN D. JORDAN,

Plaintiff,

v.

ADAMS COUNTY SHERIFF'S OFFICE, DEPUTY CHAD JENKINS, and DEPUTY MICHAEL DONNELLON,

Defendants.

ORDER

Magistrate Judge Scott T. Varholak

This matter is before the Court on Defendant's Motion for Summary Judgment (the "Motion"). [#18] The parties have consented to proceed before the undersigned United States Magistrate Judge for all proceedings, including entry of a final judgment. [##6, 7] The Court has carefully considered the Motion and related briefing, the entire case file, and the applicable

case law, and has determined that oral argument would not materially assist in the disposition of the Motion. For the following reasons, the Motion is **GRANTED IN PART** and **DENIED IN PART**.

I. Background

This case arises out of a 2018 encounter between Plaintiff and two Adams County Sheriff's Deputies investigating an accident involving Plaintiff's nephew. [*See generally* #1] The undisputed facts are as follows.[1]

On September 6, 2018, seventeen year-old J.J. was involved in an automobile accident at the intersection of Palmer Avenue and 6th Street in the town of Bennett, Colorado. [##1, ¶ 11; 9, ¶ 11] Plaintiff is J.J.'s uncle, and J.J. was driving Plaintiff's company truck. [#23-1, SOF1, 19] Plaintiff had arrived at the scene of the accident and was calling his office to obtain the truck's insurance information because J.J. could not find the insurance card. [*Id.* at SOF19]

Defendant Deputy Michael Donnellon was the first officer to arrive on the scene, and he began questioning J.J. about the accident. [##1, ¶¶ 13-14; 9, ¶¶ 13-14] At some point, Defendant Deputy Chad Jenkins arrived. [##1, ¶ 16; 9, ¶ 16] During the subsequent encounter, Plaintiff remained on the sidewalk, approximately

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[1] The undisputed facts are drawn from the Separate Statement of Facts filed with Defendant's reply in support of the Motion. [#23-1] The Court refers to the sequentially numbered facts set forth in the Statement of Facts as "SOF#." The Court periodically cites directly to the exhibits cited by the parties in the Statement of Facts to provide additional context.

thirty feet away from where the officers were speaking with J.J. [#23-1, SOF20]

Plaintiff was irritated at the officers and told the officers to allow J.J. to make a statement and stop telling J.J. how the accident occurred. [*Id*. at SOF2] In relevant part, the following exchange then took place between the deputies and Plaintiff:

> **Plaintiff:** Well, are you taking a statement or are you giving a statement?
> **Deputy Donnellon:** What?
> **Plaintiff** [in raised voice]: Okay. Are you taking a statement from them or are you giving a statement? Okay. And they're saying that's not the point of impact. That's what you're saying. [Inaudible] witnesses with him.
> **Deputy Donnellon:** [Inaudible]
> **Plaintiff:** Those guys are independent.
> **Deputy Donnellon:** [Inaudible]
> **Plaintiff:** Okay. I'm just wondering if you're making a statement or are you gonna let them do it?
> **Deputy Donnellon:** [Inaudible]
> **Plaintiff:** You're way too high strung, man.
> **Deputy Donnellon:** No, I'm not.
> **Plaintiff:** You're way too high strung, man.
> **Deputy Donnellon:** I'm not going to give your [inaudible] because of your attitude and your behavior. You are being a complete . . . you are a complete disgrace to your son.
> **Plaintiff** [in raised voice]: Don't shoot me, man.
> **Deputy Donnellon:** That's a great way to show your son how to act.

> **Plaintiff:** Don't shoot me, man.
> **Deputy Donnellon:** You're a terrible father.
> **Plaintiff:** Don't shoot me.
> **Deputy Donnellon:** An embarrassment.
> **Plaintiff** [in raised voice]: How can you tell those skidmarks are from that car? This whole road is full of skidmarks.
> **Deputy Jenkins:** Sir, you better go away.
> **Plaintiff** [in raised voice]: Quit making statements. If you guys want their statements.
> **Deputy Jenkins** [in raised voice]: [Inaudible]
> **Plaintiff:** If you guys want their statements, let them give their statements.
> **Deputy Jenkins:** Are you done?
> **Plaintiff:** Yeah.
> **Deputy Jenkins:** Good. Go. Go.
> **Plaintiff:** I'm not going anywhere. I'm going to stay right here.
> **Deputy Jenkins:** [Inaudible] Put your hands behind your back.

[*Id.* at SOF29; *see also* SOF21 (describing which officer is speaking during the encounter)][2] At this point, Deputy Jenkins grabbed Plaintiff's arm and applied weight to subdue Plaintiff and take Plaintiff to the

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[2] In Defendants' response to Plaintiff's separate fact containing this transcript of the recording, Defendants state that "[t]he transcription provided by Plaintiff is not certified to be true and correct by a shorthand reporter." [*Id.* at SOF29] However, Defendants do not appear to actually dispute the content of the transcription provided by Plaintiff, and based upon the Court's review of both the transcript and the recording, the transcript appears to accurately reflect the content of the encounter between Plaintiffs and the officers. [*Id.*; *see also* #21]

ground. [*Id.* at SOF6-7, 25, 29] Plaintiff attempted to protect his face from injury by putting out his right hand and bracing his right arm on the ground. [*Id.* at SOF7, 26] Plaintiff alleges that Deputy Donnellon then kicked out Plaintiff's right hand, causing Plaintiff's face to plow into the dirt. [*Id.* at SOF7, 26; *see also* #1, ¶ 26] The officers then were able to handcuff Plaintiff. [#23-1, SOF7] Once they handcuffed Plaintiff, Deputies Jenkins and Donnellon did not use any further force against Plaintiff.[3] [*Id.* at SOF8] Plaintiff was arrested and charged with obstruction of justice and resisting arrest.[4] [*Id.* at SOF9]

At the time of his arrest, Plaintiff was wearing specific undergarments as part of his sincerely held Mormon religious beliefs. [*Id.* at SOF11, 17] The undergarments are distributed through Plaintiff's church, and the Adams County Sheriff's Office ("ACSO") could not have independently obtained the garments. [*Id.* at SOF14] During booking at the Adams County Detention Facility ("ACDF"), Plaintiff told the guards that his Mormon faith requires him to wear the undergarments at all times. [*Id.* at SOF17] Nonetheless, the guards required Plaintiff to change out of the garments and into a standard issue prison

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[3] During the course of the handcuffing, Deputy Jenkins instructed Plaintiff on three additional occasions to put his hands behind his back. [*Id.* at SOF29]

[4] The prosecutor ultimately dismissed all charges against Plaintiff. [*Id.* at SOF30]

uniform.[5] [*Id.* at SOF10, 15, 17] Plaintiff was not permitted to retain his religious garments because ACSO's inmate handbook states that inmates are not permitted to keep any of their own personal items when booked into the ACDF. [*Id.* at SOF18]

On August 4, 2020, Plaintiff initiated this lawsuit. [#1] The Complaint brings four claims, all pursuant to 42 U.S.C. § 1983: (1) excessive force [*id.* at ¶¶ 36-44]; (2) unlawful seizure [*id.* at ¶¶ 45-49]; (3) malicious prosecution [*id.* at ¶¶ 50-58]; and (4) violation of religious freedom [*id.* at ¶¶ 59-62]. On July 9, 2021, Defendants filed the instant Motion seeking summary judgment on all four claims. [#18] Plaintiff has responded to the Motion [#22], and Defendants have replied [#23].

II. LEGAL STANDARD

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter–Chem Coal Co.*, 41 F.3d 567, 569 (10th Cir. 1994). If the moving party bears the burden of proof at trial, "the moving party must establish, as a matter of law, all essential elements of the [claim or defense upon which summary judgment is sought]

[5] Plaintiff was searched before changing into the standard issue prison uniform. [*Id.* at SOF10] ACSO has a written policy that states that custody searches are to be conducted "in a professional and respectful manner and in the least intrusive manner possible consistent with security needs." [*Id.* at SOF16]

before the nonmoving party can be obligated to bring forward any specific facts alleged to rebut the movant's case." *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir. 2008). In other words, the moving party "must support its motion with credible evidence showing that, if uncontroverted, the moving party would be entitled to a directed verdict." *Rodell v. Objective Interface Sys., Inc.*, No. 14-CV-01667-MSK-MJW, 2015 WL 5728770, at *3 (D. Colo. Sept. 30, 2015) (citing *Celotex Corp.*, 477 U.S. at 331).

"[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury. *See Anderson*, 477 U.S. at 248–49; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000); *Carey v. U.S. Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987). Evidence, including testimony, offered in support of or in opposition to a motion for summary judgment must be based on more than mere speculation, conjecture, or surmise. *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable juror could return a verdict for either party. *Anderson*, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for

trial.'" *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). In reviewing a motion for summary judgment, the Court "view[s] the evidence and draw[s] reasonable inferences therefrom in the light most favorable to the non-moving party." *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002).

III. ANALYSIS

Through the Motion, Defendants seek summary judgment on each of Plaintiff's claims. [#18] Specifically, Deputies Jenkins and Donnellon maintain that they are entitled to qualified immunity on Plaintiff's first three claims, and Defendant ACSO argues that it cannot be held liable on Plaintiff's fourth claim because Plaintiff has failed to establish that ACSO had a policy or custom that caused injury to Plaintiff. [*Id.*] The Court begins with an analysis of the qualified immunity doctrine, then turns to each of Plaintiff's claims.

A. Qualified Immunity

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation omitted). Once a defense of qualified immunity is asserted, "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.'" *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (emphasis in original)). "If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity." *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001).

The requirement that the right be clearly established presents a "demanding standard" intended to ensure the protection of "all but the plainly incompetent or those who knowingly violate the law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). In determining whether the constitutional right was clearly established at the time of the misconduct, the Tenth Circuit has explained:

> A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although plaintiffs can overcome a qualified-immunity defense without a favorable case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate. The dispositive question is whether the violative nature of the *particular conduct* is clearly established. In the Fourth Amendment context, the result depends very much on the facts of each case, and the precedents must squarely govern the present case.

Aldaba v. Pickens, 844 F.3d 870, 877 (10th Cir. 2016) (quotations and citations omitted) (emphasis in

original). The Supreme Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *Wesby*, 138 S. Ct. at 591 n.8. The Tenth Circuit, however, has stated that "[o]rdinarily this standard requires either that there is a Supreme Court or Tenth Circuit decision on point, or that the 'clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.'" *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017) (quoting *Klen v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011)).

The Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Wesby*, 138 S. Ct. at 590 (quotation omitted). "[T]he 'specificity' of the rule is especially important in the Fourth Amendment context." *Id.* (quotation omitted).

Courts have "discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236. And, in certain cases, "a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all." *Id.* at 239.

B. Claim One – Excessive Force

Claim One alleges that Deputies Jenkins and Donnellon applied excessive force in arresting

Plaintiff.[6] [#1, ¶¶ 36-44] "[C]laims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989). "The reasonableness of the use of force is evaluated under an 'objective' inquiry that pays 'careful attention to the facts and circumstances of each particular case.'" *Cnty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (quoting *Graham*, 490 U.S. at 396). In particular, *Graham* identified the following factors the Court should consider: "[(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 operative question in excessive force cases is whether the totality of the circumstances justifie[s] a particular sort of search or seizure." *Mendez*, 137 S. Ct. at 1546 (quotation omitted).

Here, the Court need not determine whether Deputies Jenkins and Donnellon applied excessive force in arresting Plaintiff because Plaintiff has failed to sustain his burden to identify a clearly established right regarding his excessive force claim and therefore

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[6] "Section 1983 provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting under color of state law." *Pierce v. Gilchrist*, 359 F.3d 1279, 1285 (10th Cir. 2004) (quoting 42 U.S.C. § 1983). The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV.

fails to overcome the second prong of the deputies' qualified immunity defense. *Quinn*, 780 F.3d at 1004 ("[T]he 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." (quotation omitted)). The only case cited by Plaintiff in support of his argument that the unlawfulness of Defendants' use of force was clearly established is *Cortez v. McCauley*. [#22 at 9-10] *Cortez* involved an excessive force claim brought by two plaintiffs, Rick and Tina Cortez. 478 F.3d 1108, 1113-14 (10th Cir. 2007). Plaintiff Rick Cortez had been the subject of an investigation for sexual assault on a child. *Id.* at 1113. Plaintiff Tina Cortez was Rick Cortez's wife. *Id.* at 1113 n.1.

At approximately 1:00 a.m., the officers made contact with the plaintiffs at their home. *Id.* at 1113. Wearing only a pair of shorts, Rick Cortez opened the front door and saw two police officers through the closed screen door. *Id.* He repeatedly inquired about what was happening. *Id.* The officers did not answer and instead instructed him to exit the house. *Id.* As he began to exit, the officers seized him, handcuffed him, and placed him in the back of a patrol car for questioning. *Id.* As Rick Cortez was being handcuffed and escorted to the patrol car, Tina Cortez headed to the bedroom to make a telephone call. *Id.* Before she could complete the call, an officer entered the home, seized her by the arm, and physically escorted her from the home. *Id.* The officer placed her in a separate patrol car and subjected her to questioning. *Id.*

Both Rick and Tina Cortez filed suit alleging several claims against the officers, including use of excessive force. *Id.* at 1112. With respect to Rick Cortez, the Tenth Circuit found that he had not stated a claim for excessive force. *Id.* at 1129. The *Cortez* court acknowledged that Mr. Cortez was cooperative and did not pose an immediate threat to the safety of the defendant officers. *Id.* at 1128. It further acknowledged that, despite this cooperation, Mr. Cortez was "grabbed and pulled out of the house" by one of the officers, placed in handcuffs that he complained were too tight, and "haul[ed] (clad only in shorts) into the patrol car in the middle of the night without any explanation." *Id.* at 1128-29. Nonetheless, because Rick Cortez had failed to present evidence of an actual injury, the *Cortez* court found that he had failed to state an excessive force claim. *Id.* at 1129. Given that determination, this Court fails to see how the *Cortez* court's discussion of Rick Cortez's excessive force claim could clearly establish the unlawfulness of Defendant's use of force in the instant case.[7]

With respect to Tina Cortez's excessive forced claim,[8] the *Cortez* court found that she had "alleged a constitutional violation concerning excessive force that survives summary judgment." 478 F.3d at 1130. In

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[7] Plaintiff, for his part, does not compare the facts in *Cortez* to Plaintiff's arrest, nor does he provide any analysis of the *Cortez* court's excessive force determination.

[8] Plaintiff only cites to the portion of the *Cortez* opinion discussing Rick Cortez's claim. [#22 at 9-10] Nonetheless, the Court will also analyze the *Cortez* court's discussion of Tina Cortez's excessive force claim.

reaching this conclusion, however, the *Cortez* court emphasized that Tina Cortez was subject only to an investigative detention, "was never the target of the investigation, [and] no evidence suggest[ed] that a reasonable law enforcement officer would suspect she posed a threat." *Id.* Given that Tina Cortez "did not resist and was escorted to the locked patrol car," the *Cortez* court concluded that "no evidence suggest[ed] that [the officers'] level of intrusiveness was warranted for officer safety concerns." *Id.*

The facts of Tina Cortez's case and Plaintiff's case are too dissimilar to allow *Cortez* to clearly establish the unlawfulness of Defendants' use of force against Plaintiff. Tina Cortez was merely subject to an investigative detention whereas Plaintiff was under arrest. Similarly, Tina Cortez did not resist and allowed officers to escort her to the locked patrol car, whereas Plaintiff refused to put his hands behind his back as ordered.[9] Given the dissimilarity of the two cases, the Court concludes that *Cortez* did not clearly establish the unlawfulness of Defendants' arrest. Thus, because *Cortez* is the only case Plaintiff cites for the clearly established prong of Defendants' qualified immunity defense,[10] the Court finds that Plaintiff has

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[9] The Court finds unpersuasive Plaintiff's argument that "it was impossible for [him] to comply with the request to put both his hands behind his back [because] he was talking on the phone." [#22 at 9] He could have simply ended his conversation and complied with Deputy Jenkins' order.

[10] Plaintiff does not analyze the *Graham* factors or argue that Defendants' violation of the Fourth Amendment is clear from *Graham* itself.

not satisfied his burden of overcoming that defense and, accordingly, the Motion is GRANTED as to Claim One.

C. Unlawful Seizure/Malicious Prosecution

Claims Two and Three—for unlawful seizure and malicious prosecution—are also alleged against Deputies Jenkins and Donnellon. [#1, ¶¶ 45-58] "[C]ourts . . . use[ ] the common law of torts as a 'starting point' for determining the contours of claims of constitutional violations under § 1983." *Pierce v. Gilchrist*, 359 F.3d 1279, 1286 (10th Cir. 2004) (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978). However, "[a]lthough the common law tort serves as an important guidepost for defining the constitutional cause of action, the ultimate question is always whether the plaintiff has alleged a constitutional violation." *Id.* at 1289.

Colorado common law prescribes only three elements for a claim of false arrest:[11] "(1) The defendant intended to restrict the plaintiff's freedom of movement; (2) The defendant, directly or indirectly, restricted the plaintiff's freedom of movement for a period of time, no matter how short; and (3) The plaintiff was aware that [her] freedom of movement was restricted." Colo. Jury Instr.-Civ. ("CJI-Civ.") § 21:1 (2018). Even if these three elements are met,

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[11] Plaintiff's second claim is entitled "unlawful seizure under § 1983" and appears to be premised upon his arrest. [#1 at ¶¶45-49] Accordingly, the Court analyzes Claim Two as a false arrest claim.

Defendants can defeat a false arrest claim if there was probable cause for the arrest.[12]

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[12] Under Colorado common law, lack of probable cause is not an element of the false arrest claim but rather is considered in connection with the affirmative defense of privilege. *See Carani v. Meisner*, No. 08-cv-02626-MSK-CBS, 2010 WL 3023805, at *5 (citing CJI-Civ. § 21:11 ("Privilege of Peace Officer to Arrest without a Warrant")). The Court acknowledges, however, that the common law serves only as "a guidepost for defining the constitutional cause of action," *Pierce*, 359 F.3d at 1289, and the Tenth Circuit has often defined a claim for false arrest under Section 1983 simply as an arrest made without probable cause. *See, e.g.*, *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012) ("In the context of a false arrest claim, an arrestee's constitutional rights were violated if the arresting officer acted in the absence of probable cause that the person had committed a crime"); *Cottrell v. Kaysville City*, 994 F.2d 730, 733 (10th Cir. 1993) ("A plaintiff may recover damages under § 1983 for wrongful arrest if she shows she was arrested without probable cause."). Although this would indicate that lack of probable cause is an element of the claim that must be alleged and proven by the plaintiff, in other decisions, the Tenth Circuit has indicated that the defendant has the burden of proving probable cause for the arrest. *See Karr v. Smith*, 774 F.2d 1029, 1031 (10th Cir. 1985) ("The burden of going forward with evidence establishing the existence of probable cause is on the defendant in a 1983 action."); *Martin v. Duffie*, 463 F.2d 464, 468 (10th Cir. 1972) (holding that defenses of good faith and privilege available at common law are available in Section 1983 cases, but "must be put forward by the officers as defenses"). For purposes of deciding the Motion, however, the Court need not resolve whether probable cause is an essential element of the claim on which Plaintiff bears the burden of proof or whether it is an affirmative defense on which Defendants bear the burden of proof. Even if construed as an affirmative defense, Defendants have raised it and offered evidence in support of their contention that probable cause existed.

A Section 1983 malicious prosecution[13] claim consists of the following elements: "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages." *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008). The Tenth Circuit has "repeatedly recognized" that "the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be 'the Fourth Amendment's right to be free from unreasonable seizures.'" *Becker v. Kroll*, 494 F.3d 904, 914 (10th Cir. 2007) (quoting *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996)).

Here, Defendants argue that they are entitled to qualified immunity and focus their argument on the probable cause element of Plaintiff's false arrest and malicious prosecution claims. [#18 at 9-11] "In the context of a qualified immunity defense on an unlawful arrest claim, [the Court] ascertain[s] whether a defendant violated clearly established law by asking whether there was arguable probable cause for the

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[13] "[A] false imprisonment ends once the victim becomes held pursuant to [legal] process." *Wallace v. Kato*, 549 U.S. 384, 389 (2007) (emphasis omitted). "If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more." *Id*. at 390 (quotation omitted). "From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself." *Id*. (quotation omitted).

challenged conduct."[14] *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) (quotation omitted). "Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Id*. (citing *Cortez*, 478 F.3d at 1120). In other words, a defendant is entitled to qualified immunity if he "*could* have reasonably believed that probable cause existed in light of well-established law." *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 879 (10th Cir. 2014) (emphasis in original) (quotation omitted).

The Court concludes that Defendants have established arguable probable cause. In determining whether arguable probable cause existed under clearly established law, this Court must look to interpretation of the Colorado criminal statute under which Plaintiff was arrested. *Kaufman v. Higgs*, 697 F.3d 1297, 1300-01 (10th Cir. 2012) ("The basic federal constitutional right of freedom from arrest without probable cause is undoubtedly clearly established by federal cases. . . . But the precise scope of that right uniquely depends on the contours of a state's substantive criminal law in this case because the Defendants claim to have had probable cause based on a state criminal statute." (citation omitted)). Colorado law provides:

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[14] As with Plaintiff's excessive force claim, because the Court finds that Plaintiff has failed to identify a clearly established right allegedly violated by Deputies Jenkins and Donnellon with respect to Plaintiff's unlawful seizure and malicious prosecution claims, the Court does not address the first prong of the qualified immunity analysis—*i.e.*, whether Plaintiff has sufficiently alleged a constitutional violation.

> A person commits obstructing a peace officer . . . when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority.

Colo. Rev. Stat. § 18-8-104. Here, there is no indication that Plaintiff used or threatened violence. The question, therefore, is whether there was arguable probable cause to believe that Plaintiff used or threatened "physical interference or an obstacle."

The Colorado Supreme Court has made clear that the "obstacle or physical interference may not be merely verbal opposition." *Dempsey v. People*, 117 P.3d 800, 810 (Colo. 2005). And "mere remonstration does not constitute obstruction." *Id.* at 811. Instead, "a combination of statements and acts by the defendant, including threats of physical interference or interposition of an obstacle" is required. *Id.*

Here, Defendants argue that two actions by Plaintiff contributed to their probable cause determination: (1) Plaintiff's yelling, which they assert prevented them from interviewing witnesses, and (2) Plaintiff's refusal to leave the scene when ordered to do so. [#18 at 10]

Defendants have submitted Deputy Jenkins' police report[15] in which he asserts that Plaintiff's actions forced Deputy Donnellson to stop his portion of the investigation. [#18-2 at 3] Deputy Jenkins further asserts that Plaintiff's yelling was so loud that the officers could neither be heard by witnesses, nor hear witnesses' answers to their questions. [*Id.*] Finally, Deputy Jenkins asserts that Plaintiff refused to leave the area when ordered to do so. [*Id.*] The Court thus concludes that these facts, if true, provided the deputies with arguable probable cause to believe that Plaintiff had "interpos[ed] . . .an obstacle" to their investigation. *Dempsey*, 117 P.3d at 810; *see also id*. at 812-813 (looking to the totality of the circumstances to determine whether plaintiff presented an obstacle or interference to officers).

The only evidence Plaintiff submits in opposition to Deputy Jenkins' observation that Plaintiff interfered with the deputies' ability to investigate the incident is

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[15] "In a civil case, police reports may be admissible as public records under rule 803(8)(A)(ii) of the Federal Rules of Evidence." *Walker v. Spina*, No. CV 17-0991 JB\SCY, 2018 WL 6519133, at *10 (D.N.M. Dec. 11, 2018) (quotation omitted). "Rule 803(8)(A)(ii) renders admissible 'a record or statement of a public office' setting out 'a matter observed while under a legal duty to report,' although it excludes from the exception, 'in a criminal case, a matter observed by law-enforcement personnel.'" *Id.* (quoting Fed. R. Evid. 803(8)(A)(ii)). "This exception, however, covers only information that the officer observed and recorded in the police report, and not information that the officer received from third parties." *Id.* (quotation omitted). "It is well established that entries in a police report which result from the officer's own observations and knowledge may be admitted but that statements made by third persons under no business duty to report may not." *Id.*

a declaration by J.J. and an audio recording of the incident. [#23-1 at SOF3 (citing #22-3)] In the declaration, J.J. states: "Although the officer and my uncle were yelling back and forth, my uncle never interfered with the officer's ability to hear what I was saying, principally because the officer was not allowing me to say much of anything." [#22-3] J.J.'s conclusory statement that Plaintiff did not interfere with the deputies is insufficient to create a genuine issue of material fact. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 674 (10th Cir. 1998) ("Vague, conclusory statements do not suffice to create a genuine issue of material fact."). And the remainder of J.J.'s statement appears to concede that Plaintiff was yelling loud enough to impact the deputies' ability to hear, but simply argues that the officers were not allowing J.J. to tell his version of events. [#22-3 (stating that Plaintiff "never interfered with the officer's ability to hear what [J.J.] was saying, *principally* because the officer was not allowing [J.J.] to say much of anything" (emphasis added))] What's more, in the audio recording Plaintiff can clearly be heard yelling loudly at the officers. [*See generally* #22-2; *see also* #23-1 SOF 29] Thus, the Court concludes that the undisputed facts demonstrate that Plaintiff's yelling and refusal to leave the scene interfered with the deputies' ability to conduct their interviews. This interference constituted arguable

probable cause to arrest Plaintiff for obstructing a peace officer.[16]

Plaintiff's response barely addresses the clearly established prong of the qualified immunity analysis for these claims. [*See generally* #22] The response neither addresses the above arguable probable cause standard nor attempts to identify an on-point case that would define the clearly established law with the specificity required by Supreme Court and Tenth Circuit precedent. And of the four cases cited by Plaintiff in his qualified immunity analysis, two are cited for the unremarkable proposition that summary judgment should be denied when there are disputed facts related to the qualified immunity determination. [#22 at 7 (citing *Tolan v. Cotton*, 572 U.S. 650, 657 (2014); *Granieri v. Burnham*, No. 2:03 CV 771 DAK, 2004 WL 966300, at *5 (D. Utah Apr. 28, 2004))]

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[16] "Where an arrest is predicated on multiple charges, the sufficiency of probable cause with regard to any of the charges defeats any claim arising from the fact that other charges may not have been supported by probable cause." *Martinez v. Lochbuie Police Dep't*, No. 04-CV-00020-MSK-BNB, 2006 WL 295391, at *3 (D. Colo. Feb. 6, 2006); *see also Morales v. Herrera*, No. 215CV00662MCALAM, 2017 WL 4251683, at *4 (D.N.M. Sept. 25, 2017), *aff'd*, 778 F. App'x 600 (10th Cir. 2019) ("When a suspect is arrested for multiple charges, an officer is immune if there is probable cause to arrest for a single charge."). "This is so because '[a]n arrested individual is no more seized when he is arrested on three grounds rather than one; and so long as there is *a* reasonable basis for the arrest, the seizure is justified on that basis even if any other ground cited for the arrest was flawed.'" *Morales*, 2017 WL 4251683, at *4 (quoting *Holmes v. Vill. of Hoffman Estates,* 511 F.3d 673, 682 (7th Cir. 2007)) (emphasis in original).

The third case cited by Plaintiff is *Cortez*. [#22 at 7-8] In *Cortez*, the officers arrested Rick Cortez in the middle of the night for sexually assaulting a child, despite never interviewing the alleged victim, her mother, or the medical staff who examined her, or even inspecting the girl's clothing for signs of a possible sexual assault. *Cortez*, 478 F.3d at 1113, 1116-17. Indeed, the officers "conducted no investigation" but instead "relied on the flimsiest information conveyed by telephone call." *Id.* at 1117-18. Thus, *Cortez* has no application to the establishment of the clearly defined law here, where the deputies' probable cause determination was based entirely upon their own observations of Plaintiff's conduct. *Wesby*, 138 S. Ct. at 590 (stating that the Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced" (quotation omitted)).

The final case is *Stearns v. Clarkson*. 615 F.3d 1278 (10th Cir. 2010). In *Stearns*, the plaintiff went to an officer's home in the middle of the night, was confronted some hours later by that officer, and ultimately was arrested under a disorderly conduct statute for being "loud, belligerent, smell[ing] of alcohol, and point[ing] his finger at [the officer]" during the confrontation. *Id*. at 1280-81, 1283. The *Stearns* court determined that the plaintiff's "use of profanity and his criticism of police did not provide probable cause to arrest him for disorderly conduct" because those actions did not amount to fighting words or threats under the Kansas disorderly conduct statute.

Id. at 1283-84. Thus, unlike in this case, the *Stearns* court considered neither the Colorado obstruction statute, nor allegations that the plaintiff interfered with an ongoing investigation. *Stearns* therefore also fails to define clearly established law sufficiently analogous to the facts of this case.

Plaintiff has failed to meet his burden of demonstrating on Claims Two and Three that the law was clearly established at the time of the challenged conduct and Defendants are entitled to summary judgement as to these claims. *Quinn*, 780 F.3d at 1004. Accordingly, Defendant's Motion is GRANTED as to Claims Two and Three.

D. Violation of Religious Freedom

Finally, Claim Four alleges that ACSO violated Plaintiff's First Amendment right to religious freedom by prohibiting him from wearing his religious undergarments at the jail. [#1, ¶¶ 59-62] Defendants argue that Plaintiff "cannot establish that there was some policy or custom in existence of Adam's County that directly caused injury to Plaintiff." [#18 at 12] The Court disagrees.

"[M]unicipalities and municipal entities . . . are not liable under 42 U.S.C. § 1983 solely because their employees inflict injury on a plaintiff." *Fofana v. Jefferson Cnty. Sheriff's*, No. 11-cv-00132-BNB, 2011 WL 780965, at *2 (D. Colo. Feb. 28, 2011) (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993)). Instead, to establish a county's liability, the plaintiff must demonstrate that a

municipal policy or custom directly caused his injury. *Id.* "A challenged practice may be deemed an official policy or custom for § 1983 municipal-liability purposes if it is a formally promulgated policy, a well-settled custom or practice, a final decision by a municipal policymaker, or deliberately indifferent training or supervision." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013). After identifying an official policy or custom, the plaintiff must demonstrate causation by showing that the policy or custom "is the moving force behind the injury alleged." *Cacioppo v. Town of Vail*, 528 F. App'x 929, 931 (10th Cir. 2013) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (same). Finally, the plaintiff must demonstrate "that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury." *Cacioppo*, 528 F. App'x at 931 (quoting *Schneider*, 717 F.3d at 769).

Here, it is undisputed that the ACSO's "inmate handbook says that inmates are not permitted to keep any of their own personal clothing or items when booked into the Adams County Detention Facility" and that "[p]ersonal clothing of any kind is not permitted in the jail." [#23-1 at SOF18] And while the handbook does indicate that the ACDF permits inmates to practice their religion, there is nothing in the handbook—or any other evidence presented by Defendants—that would indicate that an exception to the rule prohibiting personal clothing exists for religious undergarments. Thus, Plaintiff has demonstrated that ACSO's official policy prohibiting inmates from keeping personal clothing caused the

ACDF guards to prohibit Plaintiff from retaining his religious undergarments.[17] Accordingly, Defendants' Motion is DENIED as to Claim Four.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment [#18] is **GRANTED IN PART** and **DENIED IN PART**. Specifically, the Motion is **GRANTED** as to Claims One, Two, and Three, and Judgment shall enter in favor of Defendants on those claims. The Motion is **DENIED** as to Claim Four, and Claim Four shall proceed to trial against Defendant ACSO.

DATED: January 17, 2022

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

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[17] In their reply, Defendants argue that the policy was related to a legitimate penological interest, and therefore did not violate Plaintiff's constitutional rights. [#23 at 7-10] But Defendants did not raise this argument in their Motion and "arguments raised for the first time in a reply brief are generally deemed waived." *United States v. Harrell*, 642 F.3d 907, 918 (10th Cir. 2011). Indeed, it would be unfair to grant summary judgment to Defendants based upon an issue not raised in their Motion and therefore not responded to by Plaintiff. *See Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) ("When a party moves for summary judgment on Ground A, his opponent is not required to respond to Ground B—a ground the movant might have presented but did not.").

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 20-cv-02297-STV

[Filed January 18, 2022]

JOHN D. JORDAN

Plaintiff,

v.

ADAMS COUNTY SHERIFF'S OFFICE
DEPUTY CHAD JENKINS, and
DEPUTY MICHAEL DONNELLON

Defendants.

JUDGMENT

PURSUANT to and in accordance with Fed. R. Civ. P. 58(a) and the Order entered by the Honorable Scott T. Varholak on January 17, 2022, and incorporated herein by reference as if fully set forth, it is

ORDERED that the Defendants' Motion for Summary Judgment [#18] is GRANTED IN PART and DENIED IN PART. Specifically, the Motion is GRANTED as to Claims One, Two, and Three, and

Judgment shall enter in favor of Defendants on those claims. It is

FURTHER ORDERED that the Motion is DENIED as to Claim Four, and Claim Four shall proceed to trial against Defendant Adams County Sheriff's Office.

DATED at Denver, Colorado this 18th day of January, 2022.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

By: s/ M. Ortiz
M. Ortiz,
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 20-cv-02297-STV

[Filed May 5, 2022]

JOHN D. JORDAN

Plaintiff,

v.

ADAMS COUNTY SHERIFF'S OFFICE

Defendant.

FINAL JUDGMENT

This action was tried before a jury of nine duly sworn to try the issues herein with United States Magistrate Judge Scott T. Varholak presiding, and the jury has rendered a verdict. It is

ORDERED that judgment is entered on behalf of the Defendant, Adams County Sheriff's Office and against the Plaintiff, John Jordan.

DATED May 5th, 2022, at Denver, Colorado.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By: s/ M. Ortiz
M. Ortiz,
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-1154
(D.C. No. 1:20-CV-02297-STV)
(D. Colo.)

[Filed August 17, 2023]

JOHN JORDAN,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
ADAMS COUNTY SHERIFF'S OFFICE, et al.,	)
	)
Defendants - Appellees.	)
	)

ORDER

Before **HARTZ**, **EBEL**, and **MATHESON**, 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 F

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. IV

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

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.