No. 24-

IN THE

Supreme Court of the United States

JARED COSPER, IN HIS INDIVIDUAL CAPACITY, THE CITY OF LAS CRUCES, AND LAS CRUCES POLICE CHIEF MIGUEL DOMINGUEZ,

Petitioners,

v.

PERLA ENRIQUEZ BACA, AS THE PERSONAL REPRESENTATIVE OF AMELIA BACA, DECEASED,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit may establish a bright line rule for an officer's use of deadly force against a suspect armed with an edged weapon as in *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015), in place of the "totality of the circumstances" analysis endorsed by this Court?

2. In excessive force claims involving a suspect armed with an edged weapon, does the Tenth Circuit's bright line *Tenorio* rule provide the proper test or does the "totality of the circumstances" test govern this case, as three other circuits have held?

3. Given that the facts of *Tenorio* stand in stark contrast to those of this case, does *Tenorio* provide the clearly established case law which abrogates Officer Cosper's qualified immunity defense?

PARTIES TO THE PROCEEDING

Las Cruces Police Officer Jared Cosper, Las Cruces Police Chief Miguel Dominguez, and the City of Las Cruces were the Defendants-Appellees below and are the Petitioners in this Court.

Perla Enriquez Baca, as the personal representative of Amelia Baca, deceased, was the Plaintiff-Appellant below and is the Respondent in this Court.

STATEMENT OF RELATED CASES

All proceedings directly related to this Petition include:

- *Baca v. Cosper*, No. 23-2159, U.S. Court of Appeals for the Tenth Circuit. Judgment entered February 24, 2025.

- *Baca v. Cosper*, No. 22-CV-0552, U.S. District Court for the District of New Mexico. Final Order entered September 20, 2023.

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JURISDICTION

The Tenth Circuit entered judgment on February 24, 2025. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in the relevant part:

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

U.S. Const. amend. IV.

INTRODUCTION

On April 16, 2022, Amelia Baca ("Baca"), an elderly woman, became aggressive and threatened to kill her daughter and granddaughter at their home. Pet. App. 2a. Baca's daughter called 911 and relayed the situation to a dispatcher. Las Cruces Police Department Officer Jared Cosper ("Officer Cosper"), responded to the call for

service involving Baca. Officer Cosper captured the entire encounter with Baca on his body worn camera. From the dispatch, Officer Cosper learned that Baca threatened to kill the caller (daughter), who barricaded herself and her child in a bedroom. As he walked up the driveway, Officer Cosper "heard the sound of metal tinging as if a piece of metal was being struck several times in succession against a metal or ceramic surface." Pet. App. 3a. Officer Cosper reached the door of the residence which was partially enclosed by a wall to his right. Through the screen door, Officer Cosper saw two (2) women standing in the living room near Baca. The two (2) women complied with Officer Cosper's instructions to exit the residence.

Baca stood approximately ten (10) feet from Officer Cosper, holding a knife in each hand, both knives pointed at the floor. Pet. App. 5a. Officer Cosper drew his firearm to a low ready position and instructed Baca to drop the knives. After Officer Cosper instructed her to drop the knives, Baca moved the knife in her left hand to right hand, so that both knives were in her right hand. Officer Cosper continued to instruct Baca to drop the knives. Baca thrust her chin up, stared Officer Cosper squarely in the eye, and puffed her chest out as she moved toward the officer. Baca closed to the distance between herself and Officer Cosper to approximately six (6) to seven (7) feet. Pet. App. 27a. Officer Cosper, with his back against a wall, fired his weapon twice into Baca's chest as Baca reached the threshold of the entry door. Baca died as a result of being shot.

The Estate of Baca (the "Estate") filed a complaint in the United States District Court for the District of New Mexico, alleging that Officer Cosper used excessive force in violation of Baca's Fourth Amendment rights.

Pet. App. 7a. The District Court found that Officer Cosper was entitled to qualified immunity, based on the lack of a constitutional violation and the Estate's failure to show a violation of the clearly established case law. The Tenth Circuit reversed the District Court's finding on both prongs of the qualified immunity test. In reversing the District Court, the Tenth Circuit relied on a bright line rule used to analyze the reasonableness of an officer's use of force. More specifically, the Tenth Circuit relied on its decision in *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015), which held that it is unreasonable for an officer to use deadly force where the "officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him." Pet. App. 11a (citing *Tenorio*, 802 F.3d at 1165-66).

This Court's intervention is necessary for two (2) reasons. First, the "*Tenorio* rule" violates this Court expansive "totality of the circumstances" test to a meager two (2) questions: 1) did the suspect charge the officer (as opposed to walking), and 2) did the suspect swing their knife in a sufficient manner. Second, the *Tenorio* rule creates a circuit split. As stated by Judge Phillips in his dissent, the *Tenorio* rule's "quick punch to qualified immunity absent charging, slashing, and stabbing precludes officers from firing shots even when a knife-wielding man gets within, or extremely close to stabbing range so long as he gets there by walking . . . and positioned his knife for a quick thrust (without the fanfare of menacingly waving it before striking). *Tenorio*, 802 F.3d at 1170. In making this observation in his dissent, Judge Phillips foresaw Officer Cosper's predicament when he confronted Baca.

Prior to the Tenth Circuit's decision in *Tenorio*, this Court rejected bright line rules in Fourth Amendment cases, explaining that when analyzing an excessive force claim, courts must "slosh [their] way through the fact bound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007). Bright line rules "prevent[] that sort of attention to context, and thus conflict[] with this Court's instruction to analyze the totality of the circumstances." *Barnes v. Felix*, No. 23-1239, 2025 U.S. LEXIS 1834, at *3 (May 15, 2025).

Further, "[t]he 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." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (the "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application"). Other circuits, namely the Sixth, Ninth, and Eleventh Circuits, have issued opinions applying this "totality of the circumstances" analysis to cases involving a suspect armed with an edged weapon. *See Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998); *Napouk v. Las Vegas Metro. Police Dep't*, 123 F.4th 906 (9th Cir. 2024); *Smith v. LePage*, 834 F.3d 1285 (11th Cir. 2016). Accordingly, the Tenth Circuit's *Tenorio* rule both departs from this Court's clear instructions, and establishes a split among the federal circuit courts.

The Tenth Circuit compressed the entire encounter into two (2) facts: 1) that Baca only stepped toward Officer Cosper; and 2) Baca did not waive or thrust her knives

through the air as she approached the officer. Pet. App. 12a. The Tenth Circuit made irrelevant all other facts which gave Officer Cosper probable cause to believe that Baca posed a threat to himself and others. Indeed, the *Tenorio* rule rejects the consideration of such facts, including Baca's deliberate approach toward Officer Cosper, the knives held by Baca, the short distance between Officer Cosper and Baca, the threats made by Baca against her family members, and Officer Cosper's commands to drop her knife given to Baca. Therefore, Petitioners request that the Court grant certiorari based on the circuit split and the Tenth circuit's failure to follow this Court's binding precedent.

STATEMENT OF THE CASE

I. Statement of Facts

On April 16, 2022, Officer Cosper heard a radio transmission from Mesilla Valley Regional Dispatch Authority about a call at 825 Fir Avenue. Pet. App. 2a. Dispatch reported a behavioral issue involving a female suspect, later identified as Baca. Dispatch further reported the following: Baca was now armed with a knife; Baca was stabbing the floor with the knife; Baca had a history of outbursts; Baca threatened to kill the reporting party; and the caller barricaded herself in a room of the house with a child.

As he approached Fir Avenue, Office Cosper noticed two (2) women who appeared to be walking into 825 Fir Avenue, the location of the reported disturbance. *Id.* at 3a. Officer Cosper reviewed a Computer Aided Dispatch ("CAD") alert from the 911 operator that indicated the

caller's end of the line went silent and the operator heard a child crying in the background.

Before exiting his patrol vehicle, Officer Cosper activated his body worn camera. *Id.* Upon arrival at the residence, Officer Cosper saw that there were no other emergency vehicles at the residence. Officer Cosper noted that the residence was a duplex, with 825 Fir Ave. on the west end of the duplex. Due to Baca's threat of violence to the caller and her child, Officer Cosper proceeded to enter the property without a backup officer. As he walked up the driveway, Officer Cosper heard "the sound of metal tinging as if a piece of metal was being struck several times in succession against a metal or ceramic surface." *Id.*

The enclosed entryway presented a constricted space. *Id.* at 28a. The front door was located along the right side of the porch. There was a wall immediately to the right of the front door that extended out a few feet to form a corner with another wall that ran along the right side of the front porch. A green tarp ran from the wall near the front door to the driveway, further enclosing the corridor. The front door was not visible from the patio or the landing of the porch. A stack of cleaning supplies sat on either side of a door on the far side of the entryway. There was a refrigerator on the wall to the left side of the front door.

Officer Cosper entered the corridor, with the screen front door to his right, a wall directly in front of him, and a wall directly to his left. *Id.* at 4a. Rotating to his right, Officer Cosper saw two (2) figures standing inside through the screen door. Officer Cosper announced his presence and asked the individuals to step outside. Two (2) women exited the home. Officer Cosper thought those women might be the same individuals he saw on the street walking

towards the home. This caused Officer Cosper to believe that the safety of the 911 caller and other occupants was still at risk as these visitors would not have been there long. *Id.* at 24a. The first woman exited the door and said something to Officer Cosper in a low voice, but he could not make out the words. The second woman exited, stating "please be very careful with her." *Id.* at 23a. It appeared to Officer Cosper—from the second woman's tone of voice and her hurried manner—that she was passing him a warning about someone inside. *Id.*

Officer Cosper moved into the entryway immediately opposite the front door. The women remained to Officer Cosper's right, crowding the officer in the enclosed porch. The women blocked the only egress from the front porch, pinning Officer Cosper. *Id.* at 29a.

Baca stepped into view through the doorway, approximately ten (10) feet from Officer Cosper. *Id.* at 24a. Baca held a knife in her left hand down at her side. Officer Cosper pointed his firearm at Baca, yelling "Set it down. Set it down, now!" *Id.* Baca mouthed, "No." *Id.* Officer Cosper noticed a second knife in Baca's other hand. Officer Cosper thought "Baca appeared angry that he was ordering her to put the knives down." *Id.* Over the next thirty-five (35) seconds, Officer Cosper issued fourteen more loud, clear commands at Baca to drop the knives. *Id.* at 27a. Officer Cosper remained exactly where he stood when Baca first appeared, with one foot braced against the back wall of the entryway, for the entire encounter. *Id.* at 29a.

The two (2) women remained beside Officer Cosper, pressing against his right side and arm. *Id.* These

bystanders waved their hands close to Officer Cosper's outstretched firearm. Officer Cosper could not clearly hear Baca or the two (2) bystanders "over the sound of [his] own voice, which was amplified by the narrow entry corridor." *Id.* at 25a. Baca shook her head "no" from side to side when asked to drop the knives. Officer Cosper ordered the bystanders to step back twice. Officer Cosper moved his left hand under his outstretched right arm to try and push them back while he kept his firearm trained on Baca. After Officer Cosper pushed the women back a second time, Officer Fierro arrived and moved the women down to the patio.

Officer Cosper continued to order Baca to drop the knives. *Id.* at 26a. Baca moved the knife in her left hand to right hand and briefly turned to her right. Officer Cosper ordered Baca to "put 'em on the ground." *Id.* at 26a. Baca took a step or two backward, her hands up around chest or shoulder height. Baca lowered her arms to her sides and waved her left hand several times toward the ground, still holding the knives in her right hand. Officer Cosper believed that Baca was motioning for him to lower his gun and that she was going to comply and set the knives down onto the sofa at the same time. Officer Cosper stated that Baca " . . . appeared resigned as though she had decided to end the standoff." *Id.*

Cosper yelled "put it down now," gesturing with his left hand. *Id.* at 27a. Baca's sudden change in posture and facial demeanor was captured on video. Baca thrust her chin up, stared Officer Cosper squarely in the eye, and puffed out her chest as she approached Officer Cosper. *Id.* at 6a, 27a. Baca closed the distance between herself and Officer Cosper. Officer Cosper yelled, "Put the fucking

knife-" *Id.* at 27. Officer Cosper's left hand went up to his firearm, and he fired two (2) shots, hitting Baca in the chest as she took a third step toward Officer Cosper. When Officer Cosper fired at Baca, Baca's foot was almost on the threshold of the front door, approximately six (6) to seven (7) feet away from the officer. *Id.* Over the course of thirty-nine (39) seconds, Officer Cosper issued sixteen (16) clear commands for Baca to drop her knives.

After he fired his weapon, Officer Cosper directed Officer Fierro to handcuff Baca and located the knives. *Id.* at 28. Officer Cosper entered the home to ensure the safety of the other occupants. Officer Appelzoller arrived and began first aid for Baca.

II. Procedural History.

A. United States District Court for the District of New Mexico.

On July 25, 2022, the Estate filed the present lawsuit under 42 U.S.C. § 1983. *Id.* at 29a. The Estate brought Count I (excessive use force claim) and Count II (deprivation of life without due process claim) against Officer Cosper. The Estate brought Count III (municipal liability claim) against the City of Las Cruces. Finally, the Estate brought Count IV (supervisory liability claim) against Las Cruces Police Chief Miguel Dominguez. Officer Cosper moved for summary judgment on Counts I and II on the basis of qualified immunity. In its response brief, the Estate conceded that Count II should be dismissed. *Id.* at 30a. Accordingly, the District Court analyzed only Count I (excessive force claim) of the Estate's Complaint.

As outlined by this Court in *Graham*, courts must 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 or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396 (enumeration added). Following *Graham*, the District Court found the severity of the crime weighed in favor of Officer Cosper, explaining that "[Officer] Cosper had information from Dispatch that a female subject was armed with a knife and was threatening the reporting party's life." Pet. App. 35a. "[Officer] Cosper also knew that the subject was striking a knife against the floor of the house, and he heard sounds of the same as he approached the entryway." *Id.* "Finally, [Officer] Cosper knew that the reporting party barricaded herself into a room of the house and that there was a child hiding in another room." *Id.* As to the third factor, Officer Cosper acknowledged that Baca was standing inside her own home, and was neither attempting to flee nor physically resisting apprehension. *Id*.

The second *Graham* factor examines "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Pauly v. White*, 874 F.3d 1197, 1215 (10th Cir. 2017). Courts within the Tenth Circuit make this determination through the use of the *Larsen* factors. These non-exhaustive factors include: "(1) whether the officers ordered the suspect to drop his weapon, and the suspects 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. *Est. of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008).

In regard to the *Larsen* factors, the District Court first noted that Baca did not comply with Officer Cosper's orders to drop her knives. Pet. App. 36a. Second, Baca did not make any hostile motions with her knives toward Officer Cosper. *Id.* Third, "[Officer] Cosper stood stationary with one foot braced against the back wall of the entryway for the entire encounter." *Id.* at 37a. "Given the layout of the entryway and the bystanders pressed against his right side, [Officer] Cosper was essentially hemmed in without a clear exit until [Officer] Fierro pushed the bystanders back prior to the last fourteen (14) seconds of the incident." *Id.* Officer Cosper "could not have backed away in an effort to de-escalate because if he left the entryway, he would no longer have had Baca in sight. As [Officer] Cosper had not been able to confirm whether caller and other occupants were safe, it was important to keep . . . Baca in sight." *Id.* at 38a-39a. (internal quotes omitted). Finally, as to Baca's manifest intentions, "Baca's expression changed, she straightened her stance, and she took two slow steps toward [Officer] Cosper, closing the distance between them by several feet." *Id.* at 39a. Officer Cosper "understood the change in her demeanor, body language, and position in the last several seconds of the encounter to be a hostile motion." *Id.* at 39a. (internal quotes omitted). Accordingly, the District Court concluded that Officer Cosper did not violate Baca's constitutional rights.

The District Court also found that Officer Cosper did not violate clearly established law. The Estate relied on several cases, "focus[ing] on whether [Officer] Cosper's conduct escalated the situation, thereby causing the need for deadly force." *Id.* at 42a. The District Court rejected each of the cases provided by the Estate, focusing on the

threat posed by Baca to Officer Cosper and others, and the inability of Officer Cosper to retreat from the enclosed corridor. Accordingly, the District Court found that Officer Cosper was entitled to qualified immunity based on the Estate's failure to show that Officer Cosper violated the clearly established law. *Id.* at 52a.

The Estate appealed the District Courts grant of summary judgment to the Tenth Circuit Court of Appeals. *Id.* at 8a.

B. Tenth Circuit Court of Appeals.

The Tenth Circuit reversed the District Court on both prongs of qualified immunity. *Id.* at 18a. The Tenth Circuit agreed with the District Court that the first *Graham* factor, the severity of the crime at issue, favors Officer Cosper. *Id.* at 10a. The Tenth Circuit also agreed that the third *Graham* factor favors the Estate because Baca was not trying to resist arrest or flee. *Id.* at 11a.

The Tenth Circuit performed little to no analysis on the second *Graham* factor, which the Tenth Circuit has termed the "most important" *Graham* factor. *Est. of Taylor v. Salt Lake City*, 16 F.4th 744, 763 (10th Cir. 2021). Instead, the Tenth Circuit imposed its holding in the *Tenorio* line of cases. The Tenth Circuit stated, "We have held that it is unreasonable for an officer to use deadly force where the officer had reason to believe that suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him." Pet. App. 11a (quoting *Tenorio*, 802 F.3d at 1165-66). The Tenth Circuit performed its entire analysis of the second *Graham* factor with only

the following two (2) sentences: "it is undisputed that . . . Baca was holding only knives and that she made no slicing or stabbing motions toward Officer Cosper . . . Because a jury could find that . . . Baca was holding only a knife, was not charging Officer Cosper, and made no slicing motion toward him, we conclude that the district court erred by granting summary judgment. . . ." *Id.* at 12a.

The second prong of qualified immunity requires courts to determine whether the right at issue was "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). In making this determination, the Tenth Circuit again relied on the *Tenorio* line of cases. Pet. App. 13a. The Tenth Circuit recited the *Tenorio* rule "as clearly establishing that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." *Id.* at 15a (internal quotes omitted).

This petition follows.

REASONS FOR GRANTING THE PETITION

I. Application of the *Tenorio* Rule to the Case at Bar Violates this Court's Long Standing "Totality of the Circumstances" Standard.

Forty years ago, this Court articulated the "totality of the circumstances" standard used to analyze law enforcement's use of force in *Tennessee v. Garner*, 471 U.S. 1 (1985). *Garner* involved an officer shooting a fleeing

suspect as the suspect climbed a fence. *Garner*, 471 U.S. at 1-4. The suspect's father brought a 42 U.S.C. § 1983 lawsuit against the officer, among other defendants. *Id.* at 5. Following an initial appeal and remand from the Sixth Circuit, the case reached this Court. *Id.* at 6-7.

This Court interpreted its opinions pertaining to search and seizure. *Id.* at 8-9. The Court explained that in such cases, "the question [is] whether the totality of the circumstances justified a particular sort of search and seizure." *Id.* The Court engaged in this totality of the circumstances analysis, illustrating situations in which the seizure, would be constitutional and unconstitutional. On one hand, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* at 11. On the other hand, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent the escape by using deadly force." *Id.*

In *Graham v. Conner*, this Court rejected the "single generic standard" used to analyze excessive force claims under the "substantive due process" test. *Graham*, 490 U.S. at 393. *Graham* involved an investigatory stop, which resulted in officers throwing the man "headfirst into [a] police car." *Id.* at 389. The man commenced a lawsuit under 42 U.S.C. § 1983 for the officer's use of excessive force. *Id.* at 390. The district court applied the four-part "substantive due process" test, which identifies the following "factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983": (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used;

(3) the extent of the injury inflicted; and (4) whether the force as applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm. *Id.* Following an appeal, the Fourth Circuit affirmed the district court's decision and use of the "substantive due process" test for all § 1983 excessive force claims. *Id.* at 391.

This Court flatly "reject[ed] this notion that all excessive force claims brought under § 1983 are governed by a single generic standard." *Id.* at 393. After explaining its holding in *Garner*, this Court made "explicit what was implicit in *Garner*'s analysis, . . . that all claims 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, rather than under a 'substantive due process' approach." *Id.* at 395. This Court then created the "totality of the circumstances" test, explaining that because "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, ... *its proper application requires careful attention to the facts and circumstances of each particular case*." *Id.* at 396 (internal citations omitted) (emphasis added). This Court exemplified the totality of the circumstances test with its non-exhaustive *Graham* factors, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

In *Scott v. Harris*, this Court again rejected a "magical on/off switch" analysis of excessive force claims. 550 U.S.

at 382. *Scott* involved an officer's use of force which brought a high speed pursuit to an end. *Id.* at 375. The plaintiff filed a lawsuit under 42 U.S.C. § 1983, alleging that the officer used excessive force during the chase. *Id.*

The plaintiff in *Scott* argued that *Garner* prescribed certain preconditions that must be met before an officer's actions can survive Fourth Amendment scrutiny: "(1) the suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning." *Id.* at 382. This Court rejected plaintiffs' argument, stating that it "falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* This Court highlighted the case-by-case nature of the Fourth Amendment "reasonableness" test, stating:

> Whatever *Garner* said about the factors that might have justified shooting the suspect in that case, such preconditions have scant applicability to this case, which has vastly different facts. *Garner* had nothing to do with one car striking another or even with car chases in general. A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person. Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by respondent in this case.

Id. at 383. (internal citations omitted).

This Court did not accept the plaintiff's "attempt to craft an easy-to-apply legal test in the Fourth Amendment context." *Id.* Rather, the Court "must still slosh [its] way through the factbound morass of 'reasonableness.'" *Id.*

Very recently, in *Barnes v. Felix*, this Court struck down the "moment-of-threat" rule used by the Fifth Circuit to analyze excessive force claims. "Under that rule, . . . the inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in his use of deadly force. Any prior events leading up to the shooting, . . . were simply not relevant." 2025 U.S. LEXIS 1834, at *7 (internal quotes omitted). In *Barnes*, a traffic stop resulted in the death of the driver when the driver attempted to flee and the officer jumped onto the car's doorsill. *Id.* at *4-6. The officer, still on the car's door sill, shot the driver as the car began moving. *Id.* at *5.

After the driver's mother brought suit under 42 U.S.C. § 1983, the district court concluded that the "officer could reasonably think himself 'at risk of serious harm'" in the two seconds before he shot the driver. *Id.* at *6. The district court "explained that it could not consider 'what had transpired up until' those last two seconds, including [the officer's] decision to jump onto the sill." *Id.* at *7. The Fifth Circuit affirmed, agreeing that "the inquiry is confined to whether the officer was in danger at the moment of threat that resulted in his use of deadly force." *Id.*

This Court flatly rejected the Fifth Circuit's "moment of threat" test, stating that "[a] court deciding a use-of-force case cannot review the totality of the circumstances if it has put on chronological blinders." *Id.* at *12. This Court explained:

> [T]he "totality of the circumstances" inquiry into a use of force has no time limit. Of course, the situation at the precise time of the shooting will often be what matters most; it is, after all, the officer's choice in that moment that is under review. But earlier facts and circumstances may bear on how a reasonable officer would have understood and responded to later ones . . . "[I]n-the moment" facts cannot be hermetically sealed off from the context in which they arose. The history of the interaction, as well as other past circumstances known to the officer, thus may inform the reasonableness of the use of force.

Id. at *9.

This Court concluded, holding that "no rule that precludes consideration of prior events in assessing a police shooting is reconcilable with the fact-dependent and context-sensitive approach [this Court] [has] proscribed. *Id.* at *12.

II. The Sixth, Seventh, and Eleventh Circuits Apply the "Totality of the Circumstances" Analysis to Excessive Force Cases Involving a Suspect Who Threatened an Officer's Life with an Edged Weapon, Creating a 3-1 Circuit Split with the Tenth Circuit.

The Sixth, Seventh, and Eleventh Circuits issued opinions in which they applied "totality of the circumstances" analysis to excessive force cases in which an officer used deadly force against a suspect armed with

an edged weapon. *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998); *Napouk v. Las Vegas Metro. Police Dep't*, 123 F.4th 906 (9th Cir. 2024); *Smith v. LePage*, 834 F.3d 1285 (11th Cir. 2016).

In *Sova*, 142 F.3d at 901, the Sixth Circuit applied the totality of the circumstances analysis to a case in which officers shot a suicidal man wielding knives. In *Sova*, officers arrived at a home where the suicidal man confronted them on the lawn, with two knives "pointing skyward." *Id.* After the man retreated into the house, the officers advanced to a porch, witnessing the man drag broken glass across his arms. *Id.* The officers yelled at the man to drop his knives before coming outside. *Id.* When the man opened the door, still holding the knives, one officer sprayed mace in his face. *Id.* Officers fired their weapons when the man attempted to open the door again. *Id.* The district court granted summary judgment to the officers on the basis of qualified immunity. *Id.* at 900. The Sixth Circuit ultimately reversed this decision, stating that "the District Court failed to view the evidence about how the shooting happened in plaintiffs' favor and overlooked contentious factual disputes concerning the officers' actions." *Id.* at 903. The Ninth Circuit further explained that "[t]he proper application of Fourth Amendment reasonableness requires careful attention to the facts and circumstances of each particular case. . . ." *Id.* at 903 (quoting *Graham*, 490 U.S. at 396).

In *Napouk*, the Ninth Circuit determined that an officer's use of force was reasonable as "the totality of the circumstances . . . show[ed] that [a suspect] posed an immediate threat to the officers. . . ." 123 F.4th at 919. In that case, officers made contact with the suspect, who was

reported to possess a "machete," "big tool," or "piece of metal." *Id.* at 912. The suspect repeatedly approached the officers, telling the officers twice to "get out of here." *Id.* at 913. The officers "spent more than more than five minutes attempting to engage with him and convince him to drop his weapon." *Id.* at 918. The officers shot the suspect "[o]nly when he deliberately advanced on them a final time. . . ." *Id.* It was later determined that the suspect was high on methamphetamine and possessed a homemade "plastic toy fashioned to appear as a blade." *Id.* at 914.

The Ninth Circuit summarized its totality of the circumstances analysis, explaining that the suspect "may not have been a threat if he simply possessed what [the officers] believed was a bladed weapon, or stood in one place, or merely failed to comply with their commands to drop the weapon." *Id.* at 922. "But [the suspect] deliberately advanced toward the officers with what they believed was a long, bladed weapon and repeatedly ignored their commands to drop it and to stop moving. Viewed holistically, these facts justified the officer's use of force." *Id.*

In *Smith*, the Eleventh Circuit performed a totality of the circumstances analysis of officers who shot a father who broke into his own home. 834 F.3d at 1292. In that case, Ms. Smith instructed a babysitter not to allow Mr. Smith into their home until Mr. Smith sought counseling. *Id.* at 1289. Mr. Smith broke a window to enter the home after the babysitter refused him entry. *Id.* The babysitter walked out the front door and called the police. *Id.* at 1289-90. Officers arrived, entered the home, and saw Mr. Smith standing on the stairs holding a kitchen knife. *Id.* at 1290. An officer tased Mr. Smith after he refused to drop the

knife several times. *Id*. Mr. Smith dropped the knife and ran into the bathroom to hide.[1] Officers tried but failed to convince Mr. Smith to exit the bathroom. *Id*. Eventually, one officer kicked the bathroom door down and another officer tased Mr. Smith. *Id*. at 1291. Mr. Smith left the bathroom, heading toward the hallway when officers shot and killed him. *Id*.

The Eleventh Circuit found a constitutional violation, performing the following totality of the circumstances analysis:

> The officers did not have probable cause to believe Mr. Smith posed a threat of serious physical harm when he left his bathroom without a weapon and moved toward the only exit. To the contrary, Mr. Smith had never made physical contact with the officers or explicitly threatened them; he asked them to put down their weapons and told them he was afraid; and he appeared to be trying to get out of the area after hiding in his bathroom and closet. The officers had no reason to believe that deadly force was necessary to prevent Mr. Smith's escape, given that he had merely committed misdemeanor offenses and was completely surrounded. And despite having time to do so while Mr. Smith was barricaded in the bathroom, the offices did not warn him that they might use deadly force.

Id. at 1296-97.

1. Conflicting evidence existed as to whether Mr. Smith dropped the knife.

A. The Tenth Circuit established a bright-line rule for an officer's use of deadly force against a suspect armed with an edged weapon in *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015).

Turning now to the rule at issue, the Tenth Circuit created the *Tenorio* rule by interpreting two (2) cases: *Zuchel v. City & Cnty. of Denver, Colo.*, 997 F.2d 730 (10th Cir. 1993) and *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006). The *Tenorio* rule provides that "where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." *Tenorio*, 802 F.3d at 1165-66 (quoting *Zuchel*, 451 F.3d at 1160).

Tenorio involved a woman who called 911 to report her sister-in-law's husband, Tenorio, was intoxicated and holding a knife to his own throat. *Id.* at 1161-62. She said that she was afraid that Tenorio would hurt himself or his wife. *Id.* Officer Pitzer and two other officers arrived at the home identified in the 911 call. *Id.* at 1162. The caller met the officers outside and stated that "He's got a knife. He's been drinking. . . ." *Id.* Officer Pitzer prepared to enter the home with his handgun drawn, another officer had a taser, a third officer had his handgun, and the fourth officer had a shotgun loaded with bean bag rounds. *Id.* at 1162. From his position outside the front door, Officer Pitzer could see the doorway to the kitchen across the fourteen (14) feet by sixteen (16) feet living room. *Id.* The kitchen was partially obscured by the living-room wall. *Id.* The officers entered the living room, where Officer Pitzer stated, "Please step out here." *Id.* Ms. Tenorio stepped out the kitchen and told

Tenorio to "put that down." *Id.* Tenorio stepped out into the living room, holding a kitchen knife loosely in his right hand, his arm hanging by his right side. *Id.* at 1163. One officer removed Ms. Tenorio from the home. *Id.* Officer Pitzer instructed Tenorio to drop the knife several times. *Id.* When Tenorio was about two and one-half steps into the living room, Officer Pitzer shot him. *Id.*

Tenorio brought a 42 U.S.C. § 1983 lawsuit, asserting that Officer Pitzer violated his Fourth Amendment rights by using excessive force. *Id.* at 1161. The district court denied Officer Pitzer's motion for summary judgment on the basis of qualified immunity, in part concluding that there was evidence that Officer Pitzer violated clearly established law as he did not have probable cause to believe that Tenorio presented a threat of serious physical harm to Officer Pitzer or another person. *Id.* Officer Pitzer appealed. *Id.*

The Tenth Circuit affirmed, relying on *Zuchel* and *Walker*. The Tenth Circuit explained that in *Zuchel*, a police officer shot a man who took "three wobbly steps" at the officer after a teenager shouted that the man had a knife. *Id.* at 1165. In *Zuchel*, the Tenth Circuit held that the evidence was sufficient for the jury to find that the use of force was not objectively reasonable. *Id.* In *Walker*, the Tenth Circuit interpreted *Zuchel* to "specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." *Id.* at 1165-66 (quoting *Zuchel*, 451 F.3d at 1160)

In his dissenting opinion in *Tenorio*, Judge Phillips observed that the majority reduced its "totality of the circumstances" analysis to two factors: 1) that the suspect was not charging; and 2) that the suspect made no slicing or stabbing motions. *Id*. at 1167 (Judge Phillips dissenting). "Rather than narrowing a robust totality of the circumstances inquiry to two meager factors, [Judge Phillips] beleive[d] *Walker* simply recognized the importance of those factors as part of evaluating qualified immunity. *Id*. Judge Phillips further attacked the logic behind the two (2) factor test advanced by the majority, predicting the case at hand. Specifically, "[a]s [Judge Phillips] understood the majority's new approach, Tenorio was free to get right up to the officers so long as he did not 'charge' them while making stabbing or slashing motions with the knife." *Id*. at 1170.

Judge Phillips' concerns about the future application of the *Tenorio* rule manifested in the case at hand. Baca was a mere six (6) feet from Officer Cosper, and walked closer as opposed to "charging" Officer Cosper. Pet. App. 6a. "In assessing danger to self and others, a reasonable officer and a reviewing court must account for far more than what's highlighted in the single sentence" *Tenorio* rule. *Tenorio*, 802 F.3d at 1167. "This ill-conceived approach ignores how quickly a knife-wielding man can thrust a knife and kill or grievously wound an officer or a bystander." *Id.* at 1170 (Judge Phillips dissenting).

The Tenth Circuit's meager two (2) factors runs contrary to the *Tenorio* case itself. In *Tenorio*, the Tenth Circuit noted several facts identified by the trial court that supported Tenorio's claims. The number of these facts undermine the fundamental idea of the two factor *Tenorio* test. In particular, the *Tenorio* court noted that:

> (1) Tenorio did not 'refuse' to drop the knife because he was not given sufficient time to comply with Pitzer's order; (2) that Tenorio made no hostile motions toward the officers but was merely holding a small kitchen knife loosely by his thigh and made no threatening gestures toward anyone; (3) that Tenorio was shot before he was within striking distance of [Officer] Pitzer; and (4) that, for all [Officer] Pitzer knew, Tenorio had threatened only himself and was not acting or speaking hostilely at the time of the shooting."

802 F.3d at 1164-65 (enumeration added).

The Tenth Circuit stated that it was "comfortable that the evidence viewed in this light, suffices for Tenorio's claims." *Id.* at 1165. Accordingly, even the *Tenorio* case identifies factors outside its narrow two factor rule that are relevant to proper excessive force analysis.

B. The *Tenorio* rule is profoundly wrong.

The *Tenorio* rule was profoundly wrong at its inception, as reflected by Judge Phillips' dissent, and is profoundly wrong as applied to this case. The precedent established by this Court in *Garner*, *Graham*, *Scott*, and *Barnes* expressly established the "totality of the circumstances" approached to excessive force analysis. The Court established the non-exclusive *Graham* factors to help guide such a holistic analysis. *See Graham*, 490 U.S. at 396. Accordingly, "totality of the circumstances" test provides the lower courts with a test that covers all situations in which deadly force may occur. Such a test has

properly guided other courts, such as the Sixth Circuit in *Sova*, the Ninth Circuit in *Napouk*, and the Eleventh Circuit in *Smith*.

In opposite to the "totality of the circumstances" test is the *Tenorio* rule. Whereas the "totality of the circumstances" test is nonexhaustive, the *Tenorio* rule applies a one-size fits all approach based only on two (2) exclusive factors for determining whether a use of force was reasonable. As observed by Judge Phillips, an officer cannot fire upon a knife wielding suspect so long as the suspect slowly approaches without theatrically waving his knife. *Tenorio*, 802 F.3d at 1170. In that way, the Tenth Circuit established a rule reminiscent of the "magical on/off switch," "single generic standard," or "moment of threat" analysis of excessive force claims rejected in *Scott*, *Graham*, and *Barnes*. *Scott*, 550 U.S. at 372; *Graham*, 490 U.S. at 390; *Barnes*, 2025 U.S. LEXIS 1834, at *11-14.

The "magical on/off switch" used by *Tenorio* prevents courts in the Tenth Circuit from analyzing relevant facts, and thus "is [not] reconcilable with the fact-dependent and context-sensitive approach" proscribed by this Court. *Barnes,* at *12. Whereas the "moment-of-threat" rule reduced a shooting to a two-second time frame, the *Tenorio* rule reduces a shooting to a mere two fact analysis. In the case at hand, it did not matter that Baca wielded two (2) knives, puffed out her chest, stepped towards Officer Cosper (as opposed to charging), or that Officer Cosper was within an enclosed environment, six (6) to eight (8) feet from Baca, and not wearing a stab-proof vest. Pet. App. 29a; 23a. Given that the *Tenorio* rule "precludes consideration of prior events in assessing a police shooting," *Barnes* at *12 this Court should reject

the *Tenorio* rule, just as it has rejected similar bright line rules for excessive claims in the past.

III. *Tenorio* Did Not Serve As Clearly Established Case Law In This Case.

A. *Tenorio* attempts to establish law at a high level of generality.

In addition to violating this Courts prescription on Fourth Amendment analysis, *Tenorio* did not provide Officer Cosper with a clearly established right. 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." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. at 664. In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Accordingly, qualified immunity "protects all but the plainly incompetent who knowingly violate the law." *White v. Pauly*, 580 U.S. 73, 79 (2017).

On many occasions, the Court repeated "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White*, 580 U.S. at 79. "As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of

virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639.

As explained by the Court in *Mullenix,* "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." 577 U.S. at 12. "Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.*

In *Mullenix*, the Court rejected a "clearly established rule" that "a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Id.* Similarly in *Brosseau v. Haugen*, 543 U.S. 194 (2004), the Court rejected a "clearly established rule" made by the Ninth Circuit. *See Haugen v. Brosseau*, 339 F.3d 857, 873 (9th Cir. 2003) (establishing that "deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others"). This Court explained that the formulation of this rule failed to address the actual question at issue: "whether the circumstances with which [an officer] was confronted constituted probable cause and exigent circumstances." *Mullenix*, 577 U.S. at 13 (quoting *Anderson*, 483 U.S. at 640-41).

In the case at bar, the *Tenorio* rule attempts to establish law at "high level of generality" contrary to this Court's instructions. *Kisela v. Hughes*, 584 U.S. 100,

104 (2018). Indeed, the Tenth Circuit correlated the facts of *Tenorio* with the case at hand, stating merely that " . . . Baca was not charging Officer Cosper and made no slicing or stabbing motions toward him . . . So it was clearly established that Officer Cosper's use of deadly force against . . . Baca was unreasonable." Pet. App. 16a-17a. This analysis entirely omits every other facet of the encounter when determining if the *Tenorio* line of cases applies.

B. The Facts of *Tenorio* are not sufficiently similar to the case at bar to abrogate Officer Cosper's qualified immunity defense.

This Court found that existing case law did not clearly establish the law and abrogate an officer qualified immunity in *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9 (2021). In *Bond*, 595 U.S. at 10, several officers responded to a woman's call to 911 that her intoxicated ex-husband would not leave her home, and that "it's going to get ugly real quick." The officers arrived, following the ex-husband at a distance of more than six (6) feet, as he retrieved a hammer from the garage. *Id.* at 6. After the ex-husband raised the hammer as if he was about to the throw the hammer or charge at the officers, the officers fired their weapons, killing the ex-husband. *Id.* at 11.

The ex-husband's estate filed suit under 42 U.S.C. § 1983. *Id.* The estate appealed after the district court found that the officers were entitled to qualified immunity. *Id.* The Tenth Circuit reversed on the grounds that its case law clearly "allows an officer to be held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly

force." *Id.* at 11-12. The Tenth Circuit relied mainly on *Allen v. Muskogee, Okla.*, 119 F.3d 837 (10th Cir. 1997). *Bond*, 595 U.S. at 13.

This Court found that the "facts of *Allen* are dramatically different from the facts [of *Bond*]." *Id.* Specifically, the officer in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands." *Id.* The officers in *Bond*, "by contrast, engaged in a conversation with [the ex-husband], followed him into the garage a distance of 6 to 10 feet, and did not yell until after he picked up a hammer." *Id.*

Tenorio is similarly different from the facts of the case a hand. In that case, "Tenorio did not refuse to drop the knife because he was not given sufficient time to comply with Pitzer's order; . . . Tenorio made no hostile motions toward the officers but was merely holding a small kitchen knife loosely by his thigh and made no threatening gestures toward anyone; . . . Tenorio was shot before he was within striking distance of [Officer] Pitzer; and . . . for all [Officer] Pitzer knew, Tenorio had threatened only himself and was not acting or speaking hostilely at the time of the shooting." *Tenorio*, 802 F.3d at 1164-65.

The case at hand stands in opposite to *Tenorio*. First, Officer Cosper instructed Baca to drop her knives a total of sixteen (16) times, surely giving Baca sufficient time to comply with his order. Second, Baca did make hostile motions toward Officer Cosper, though not with her knives as the *Tenorio* rule requires. Baca thrust her chin up, stared Officer Cosper squarely in the eye, puffed out her chest, and took two (2) deliberate strides at Officer Cosper,

standing a mere six (6) to seven (7) feet away. Given the close distance between Officer Cosper and Baca, Baca was well within striking distance. Finally, Baca threatened to kill her family members, and substantiated this threat by stabbing the floor with her knives. Pet. App. 21a. Other factors such as the fact that Officer Cosper remained in place within the enclosed corridor "with one foot braced against the back wall" throughout the entire encounter, *id*. at 29, and was not wearing a stab proof vest. *Id*. at 23a. Given that the facts of *Tenorio* stand in stark contrast to this case, this Court should find that *Tenorio* did not provide clearly established case law which abrogated Officer Cosper's qualified immunity.

THE QUESTIONS PRESENTED HEREIN ARE CRITICALLY IMPORTANT, AND THIS CASE OFFERS AN IDEAL VEHICLE TO ADDRESS THEM.

This Court should grant this petition for certiorari as the Tenth Circuit, in fashioning the *Tenorio* rule, has created a split among three (3) federal circuits, decided an important federal question in a way that conflicts with decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* Rule 10(a); Rule 10(c). The Tenth Circuit undermined the foundational cases of this Court which establish the "totality of the circumstances" analysis for excessive force claims, namely *Garner*, *Graham*, *Scott*, and *Barnes*. This Court's supervisory power is necessary to protect the totality of the circumstances doctrine and qualified immunity within the six (6) states in which the Tenth Circuit has jurisdiction over appeals: New Mexico, Utah, Wyoming, Colorado, Kansas, and Oklahoma.

This Court noted the importance of qualified immunity, stating that "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The *Tenorio* rule "disserves the purpose of qualified immunity when it forces the parties to endure additional burdens of suit—such as the cost of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily." *Id.* at 237.

This case serves an ideal vehicle to resolve the issues presented by the *Tenorio* rule. Judge Phillips envisioned this case in which the *Tenorio* rule allows Baca to be "free to get right up to the officers so long as [s]he did not 'charge' them while making stabbing or slashing motions with the knife." *Tenorio*, 802 F.3d at 1170. This case highlights the absurdity of the *Tenorio* rule as it prevents an officer from defending themselves from a person approaching them with knives. Instead, the *Tenorio* rule places the "chronological blinder" of the "moment of threat" doctrine, over the eyes of the court. As Judge Phillips explained, "[t]his ill-conceived approach ignores how quickly a knife-wielding man can thrust a knife and kill or grievously wound an officer or a bystander." *Id.* at 1170. As such, petitioners request that the Court grant certiorari to protect the lives of law enforcement officers.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 24, 2025

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-2159

PERLA ENRIQUEZ BACA, AS THE PERSONAL REPRESENTATIVE OF AMELIA BACA, DECEASED,

Plaintiff-Appellant,

v.

JARED COSPER, IN HIS INDIVIDUAL CAPACITY; THE CITY OF LAS CRUCES; LAS CRUCES POLICE CHIEF MIGUEL DOMINGUEZ,

Defendants-Appellees.

Filed February 24, 2025

OPINION

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 2:22-CV-00552-RB-GJF)

Before HARTZ, PHILLIPS, and EID, Circuit Judges.

PHILLIPS, Circuit Judge.

Appendix A

This case arises from the fatal shooting of Amelia Baca, a 75-year-old, mentally diminished woman in Las Cruces, New Mexico. The Estate filed a complaint alleging that the police officer who shot her acted with excessive force in violation of the Fourth Amendment. The district court granted the officer summary judgment on qualified-immunity grounds, reasoning that the Estate had not raised a genuine dispute of material fact about the officer's claim that he in fact perceived that Ms. Baca presented an immediate danger of serious bodily harm to himself and others. We conclude that the district court erred. Viewing the evidence in the light most favorable to the Estate, a reasonable jury could find a Fourth Amendment excessive-force violation. We also conclude that such a violation would have been clearly established under controlling law on the date of the shooting. So exercising our jurisdiction under 28 U.S.C. § 1291, we reverse the district court's grant of summary judgment and remand for proceedings consistent with this opinion.

BACKGROUND

I. Factual Background

On April 16, 2022, one of Amelia Baca's daughters called 911, reporting that Ms. Baca, her 75-year-old mother who was suffering from dementia, had become aggressive and threatened to kill her and her daughter. Officer Jared Cosper, who was less than one-minute away, heard the dispatcher's description of the scene, and seeing how close he was to the Bacas' home, responded to the call. He testified that he learned the following information

while he was driving to the Bacas' home: (1) that the 911 call concerned a domestic "behavioral issue"; (2) that Ms. Baca had a history of behavioral issues; (3) that Ms. Baca had threatened to kill the caller; (4) that the caller had barricaded herself and a child in a bedroom; (5) that Ms. Baca had been making stabbing motions at the floor with a knife; (6) that during the call, the caller had gone silent; and (7) that the 911 operator had at some point heard a child crying in the background. As he arrived on the Bacas' street, he saw two women walking toward the Bacas' home, but he was unsure if they entered it.

Officer Cosper parked outside the Bacas' home with his body camera activated, which captured video-audio recording of his entire interaction with Ms. Baca. As we understand it, the Bacas' home housed Ms. Baca and some other family members. The home was one-half of an A-frame duplex. The Bacas' part of the duplex that faced the street had an open, covered structure outside the front window, which contained, among other things, two religious statues, live greenery, and small pieces of hanging laundry. The structure extended about eight feet into the driveway with a tarp as its left side. So as Officer Cosper approached the Bacas' residence, he walked up the driveway and down the tarp-lined path toward the front door positioned on the side of the house. He says that as he walked up her driveway, he "hear[d] the sound of metal tinging as if a piece of metal was being struck several times in succession against a metal or ceramic surface." Amend. Supp. App. at 16 ¶ 26; *see* Media Ex. A at 1:11-1:13. Here's Officer Cosper's view from his body camera:

Appendix A

Media Ex. A at 1:11. As he walked past the outside of the duplex building itself, Officer Cosper arrived at the residence's "front" door on his right and saw into the living room through the screen door. Again, the view from Officer Cosper's body camera best sets the scene:

Id. at 1:18. Peering through the screen door, he saw two women standing beside Ms. Baca in the living room

and talking calmly with her. By then, he had already unholstered his firearm and was holding it down along his right-hand side.

Officer Cosper announced himself in an ordinary tone and told the two women to step outside. As they passed by him, the first woman said something to Officer Cosper that he didn't hear clearly, and the second said to him, "Please be very careful with her." *Id.* at 1:24-1:26. Now alone in the living room, Ms. Baca came more fully into Officer Cosper's view. Ms. Baca stood stationary about ten feet from Officer Cosper. *Baca v. Cosper*, No. 2:22-CV-00552-RB-GJF, 2023 WL 5725427, at *2 (D.N.M. Sept. 5, 2023). In each hand, Ms. Baca held a knife pointed toward the floor.

After Officer Cosper saw Ms. Baca, the calm scene he encountered ended. Officer Cosper immediately pointed his firearm at Ms. Baca and began yelling at her to drop the knives. The flashlight attached to Officer Cosper's firearm was turned on, shining light on Ms. Baca's chest and face. The women who had left the house hovered nearby and became frantic at the deteriorating situation. One of the women stressed to him that Ms. Baca "was mentally sick" to which Officer Cosper responded, "Okay." Media Ex. A 1:26-1:37. Officer Cosper continued to yell at Ms. Baca to drop the knives. *E.g.*, *id.* at 1:41-1:43 ("Drop the fucking knife!"), 2:04-2:05 ("Put the fucking knife down!"). After being told that Ms. Baca was "mentally sick," Officer Cosper yelled at the two frantic women to back away, while keeping his eyes and firearm on Ms. Baca.

About then another Las Cruces police officer, Officer Fierro, arrived and moved the two women out past the tarp-lined entryway and into the open driveway. That left Officer Cosper an unobstructed retreat to the same area.

About thirty seconds after Officer Cosper started yelling at Ms. Baca, she moved the knife in her left hand to her right hand, so that both knives were in her right hand. Amid the now-intense scene, Ms. Baca lifted her right arm toward the inside of the house, removing the knives from Officer Cosper's view, and then turned her head that way too. While keeping her right arm extended, she turned back to Officer Cosper, raised her empty left hand to shoulder level toward him and pointed her hand toward the floor, and then lowered her head. Throughout the encounter, Ms. Baca was speaking to Officer Cosper, but he later reported in a declaration he submitted once the litigation began, that he was unable to tell what language she was speaking.

Officer Cosper continued to yell at her to put the knives down, and Ms. Baca lowered her right arm so the knives in her hand were again pointing to the floor and visible to him. After this, she made eye contact with Officer Cosper, and with the two knives in her right hand still pointing at the floor, she tilted her head back some and took two slow steps toward Officer Cosper. As her foot landed on the second step, when she was about six feet from Officer Cosper, he shot her twice in the chest, and she fell to the floor. As her face lay in the collecting pool of blood, Officer Cosper ordered another officer to pull her out into the pathway and handcuff her. Only 45 seconds

elapsed from Officer Cosper's arriving at her doorway to his firing the fatal shots.

II. Procedural Background

Ms. Baca's estate filed a complaint in federal court against Officer Cosper, Miguel Dominguez (Las Cruces's chief of police), and the City of Las Cruces.[1] Complaint, *Baca v. Cosper*, No. 2:22-CV-00552-RB-GJF (D.N.M. July 25, 2022), ECF No. 1. The Estate sued Officer Cosper for using excessive force in violation of the Fourth Amendment.[2] It also brought a claim of supervisory liability against Chief Dominguez and a claim of municipal liability against Las Cruces based on Officer Cosper's allegedly unconstitutional conduct.

The district court concluded that Officer Cosper was entitled to qualified immunity and thus granted him summary judgment. *Baca*, 2023 WL 5725427, at *14. Given that ruling, the parties agreed that Chief Dominguez and Las Cruces's joint motion for summary judgment was moot because the claims against those defendants depended on the excessive-force claim against Officer Cosper. So the parties also agreed that the order granting Officer Cosper

1. The complaint is not in the record, but we can take judicial notice of publicly filed court records. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007).

2. The Estate also brought a deprivation-of-life-without-due-process claim under the Fourteenth Amendment but abandoned that claim at summary judgment. *Baca*, 2023 WL 5725427, at *5, *14. So the only claim against Officer Cosper is the excessive-force claim under the Fourth Amendment.

summary judgment "resolved this matter so that entry of a final and appealable judgment is proper." Amend. Supp. App. at 70. The Estate timely appealed the order.

DISCUSSION

We review de novo a district court's grant of summary judgment. *Sanchez v. Guzman*, 105 F.4th 1285, 1292 (10th Cir. 2024). In doing so, we view the evidence in the light most favorable to the Estate and draw all reasonable inferences in its favor as the non-moving party at summary judgment. *Tolan v. Cotton*, 572 U.S. 650, 656-67, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014). But we accept facts clearly depicted in the officers' body camera video footage if they dispel any genuine dispute about those facts. *See Scott v. Harris*, 550 U.S. 372, 380-81, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). If the recording does not clearly depict an action, and the evidence can reasonably be interpreted to support either party's version of what happened, then we must take the Estate's version of what happened. *See id.*

"When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018) (internal quotation marks omitted). To satisfy that burden, the Estate must show that (1) Officer Cosper's alleged conduct violated Ms. Baca's constitutional rights, and (2) that Supreme Court or published Tenth Circuit cases, or the weight of authority from other courts, existing at the time of the violation, clearly established that such

conduct constituted a violation of that right. *See Sanchez*, 105 F.4th at 1292; *Flores v. Henderson*, 101 F.4th 1185, 1197 (10th Cir. 2024). "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." *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (per curiam).

A. The Constitutional Violation

The Estate asserts that Officer Cosper violated Ms. Baca's Fourth Amendment right to be free from excessive force by fatally shooting her when she posed no immediate threat of serious bodily injury or death to Officer Cosper or others. "We review Fourth Amendment claims of excessive force under a standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene." *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015); *accord Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "The reasonableness of an officer's actions depends both on whether the officers were in danger at the precise moment that they used force and on whether the officer's own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Tenorio*, 802 F.3d at 1164 (cleaned up); *Arnold v. City of Olathe*, 35 F.4th 778, 790 (10th Cir. 2022) (noting that "binding Tenth Circuit precedent requires us to consider whether the officers' alleged reckless conduct created the need to use deadly force").

In considering whether force was reasonable, we look to three nondispositive factors, known as the *Graham*

factors: (1) the severity of the crime; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or trying to flee. *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. In a deadly-force case, we also consider whether the officer had "probable cause to believe that there is a *threat of serious physical harm to the officer* or to others." *Tenorio*, 802 F.3d at 1164 (quoting *Est. of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008)) (alterations accepted).

To determine whether a reasonable officer would have probable cause to believe the suspect presented an immediate threat of serious physical harm, we are guided by four nonexclusive sub-factors, known as the *Larsen* factors: (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." *Larsen*, 511 F.3d at 1260. But those are only guides in determining "whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force." *Tenorio*, 802 F.3d at 1164 (quoting *Larsen*, 511 F.3d at 1260).

Here, addressing the first *Graham* factor, we agree with the district court that the reported crime was a serious one—the 911 caller stated that Ms. Baca had knives and had threatened to kill her and her daughter. *Baca*, 2023 WL 5725427, at *7; *see* N.M. Stat. Ann. § 30-

3-2 (2024) (noting aggravated assault is a felony); *Palacios v. Fortuna*, 61 F.4th 1248, 1256 (10th Cir. 2023) ("When the crime at issue is a felony . . . the crime is considered to have a high degree of severity which weighs against the plaintiff."). So that factor weighs against the Estate. We also agree with the district court that the third *Graham* factor favors the Estate because Ms. Baca was not trying to resist arrest or flee. *Baca*, 2023 WL 5725427, at *7.

That leaves us with what we've termed the "most important" *Graham* factor. *Est. of Taylor v. Salt Lake City*, 16 F.4th 744, 763 (10th Cir. 2021) (cleaned up). In a deadly-force case, that factor asks whether Ms. Baca posed an immediate threat of serious physical harm to Officer Cosper or others. *See id.* That means Officer Cosper's use of deadly force was unreasonable unless at the instant he fired his shots, a reasonable officer on the scene would have believed that Ms. Baca posed an immediate threat of serious physical harm to himself or others. *See Larsen*, 511 F.3d at 1260.

And our case law answers that question. We have held that it is unreasonable for an officer to use deadly force where the "officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him." *Tenorio*, 802 F.3d at 1165-66 (quoting *Walker v. City of Orem*, 451 F.3d 1139, 1160 (10th Cir. 2006)); *accord Zuchel v. City & Cnty. of Denver*, 997 F.2d 730, 735-36 (10th Cir. 1993). Here, it is undisputed that Ms. Baca was holding only knives and that she made no slicing or stabbing motions toward Officer

Cosper.[3] And we agree with the district court that a jury could conclude that Ms. Baca was not charging Officer Cosper.[4] *Baca*, 2023 WL 5725427, at *9.

Because a jury could find that Ms. Baca was holding only a knife, was not charging Officer Cosper, and made no slicing or stabbing motions toward him, we conclude that the district court erred by granting summary judgment against the Estate. We now turn to the district court's conclusion that Officer Cosper's conduct did not violate clearly established law.

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3. Officer Cosper concedes that "[t]echnically, [Ms. Baca] did not make a 'hostile motion with the weapon' " because "she did not bring her right arm up into a position from which she could immediately execute a slicing, stabbing, or thrusting motion at [Officer Cosper] with the knives." App. vol. I, at 32. Despite that concession, he argues a reasonable officer "could construe" her stepping toward him to be "a hostile motion." *Id.* That may be so. But we agree with the district court that a jury could also find that a reasonable officer could construe her stepping toward him as a *non*-hostile motion. *Baca*, 2023 WL 5725427, at *9. And that's what matters at summary judgment.

4. Though the district court agreed with the Estate that a reasonable jury could construe Ms. Baca's actions as an attempt to comply, it reasoned that Officer Cosper was entitled to summary judgment because the Estate "fail[ed] to demonstrate a factual dispute regarding [Officer] Cosper's *impression* of [Ms.] Baca's conduct." *Baca*, 2023 WL 5725427, at *9. Though an officer can use deadly force even under a mistaken belief that a person poses an immediate threat of serious physical harm to the officer or others, that mistaken belief must still be an *objectively* reasonable one. *Larsen*, 511 F.3d at 1260. In other words, it doesn't matter what Officer Cosper's subjective impressions were; it matters only whether a reasonable jury could find that a reasonable officer in Officer Cosper's position could think Ms. Baca posed an immediate threat to himself or others. *See id.*

B. Clearly Established Law

Though we have determined that a reasonable jury could find that Officer Cosper's shooting of Ms. Baca violated the Fourth Amendment, Officer Cosper is still entitled to qualified immunity unless the Estate shows that the violation was clearly established at the time of the shooting. *See Sanchez*, 105 F.4th at 1292. Though we don't require a "scavenger hunt for a prior case with identical facts," *id.* at 1292-93 (internal quotation marks omitted), we consider a case on point "if it involves materially similar conduct or applies with obvious clarity to the conduct at issue," *Lowe v. Raemisch*, 864 F.3d 1205, 1208 (10th Cir. 2017). Similarity between the cases is "especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix*, 577 U.S. at 12, 136 S.Ct. 305 (cleaned up).

With those requirements in mind, we rely on the same clearly established law as *Tenorio* did, as well as the clearly established law announced in *Tenorio* itself.[5] 802 F.3d at

5. Though the Estate did not cite *Tenorio* before the district court, Officer Cosper spent pages of his summary-judgment opening brief arguing against its application. The district court noted that the Estate had not addressed *Tenorio*, and otherwise did not comment on it. *Baca*, 2023 WL 5725427, at *9 n.11. On appeal, the Estate has not addressed *Tenorio*. But more broadly, the Estate has always maintained that Officer Cosper violated the Fourth Amendment by using deadly force when Ms. Baca presented no threat of serious bodily injury or death to others.

"When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). Though we are restricted from "*raising* new issues," once a party raises an issue, we are not required to "render [our] decision in accordance with the position of one of the parties." *United States v. Cortez-Nieto*, 43 F.4th 1034, 1052 (10th Cir. 2022).

And in qualified immunity cases, the Supreme Court has instructed a reviewing court to "use its full knowledge of its own and other relevant precedents." *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (cleaned up). That's so because "[w]hether an asserted federal right was clearly established at a particular time . . . presents a question of law, not one of 'legal facts.'" *Id.* We've applied *Elder* in our circuit, explaining that "[w] hile it is true that Plaintiffs should cite to what constitutes clearly established law, we are not (*footnote continued*) restricted to the cases cited by them." *Cortez v. McCauley*, 478 F.3d 1108, 1122 n.19 (10th Cir. 2007) (en banc); *accord Williams v. Hansen*, 5 F.4th 1129, 1132-33 (10th Cir. 2021) ("In determining whether a right is clearly established, we are conducting de novo review of a legal issue, which requires consideration of all relevant case law."). And our sister circuits have similarly applied *Elder*. *E.g.*, *Joseph on Behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 337-38, 338 n.78 (5th Cir. 2020) (identifying clearly established law not cited by the plaintiff, reasoning that though "[i]nadequate briefing can cause parties to forfeit claims and arguments . . . we must apply settled case law"); *Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) (conducting a clearly established law analysis despite neither party addressing the analysis "in any helpful way"); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994) (describing plaintiff 's concession that she failed to find an on-point case for the clearly established law prong of the analysis as a deficiency that was "not fatal by itself because we must determine qualified immunity in light of all relevant precedents—both those cited by the parties and those we discover ourselves").

So we conduct our clearly established analysis with full knowledge of settled case law.

1165-66. In *Tenorio*, we interpreted two of our decisions—*Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006) and *Zuchel v. City & Cnty. of Denver*, 997 F.2d 730 (10th Cir. 1993)—as clearly establishing "that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." *Id.* (quoting *Walker*, 451 F.3d at 1160); *accord Zuchel*, 997 F.2d at 735-36.

In *Tenorio*, police were called to the home of a man (Russell Tenorio) who was intoxicated, waving a knife around, holding a knife to his own throat, and threatening self-harm. 802 F.3d at 1161-62. The 911 caller said she was afraid Tenorio was going to hurt himself or his wife. *Id.* at 1162. The dispatcher told the responding officers that Tenorio had a history of violence and that other family members, including the caller, were inside the home. *Id.* When the officers arrived, they were met in the front yard by the 911 caller, who was still speaking to the dispatcher and appeared frightened. *Id.* After speaking briefly with her, the officers walked through the front door and into the living room, which was about 14 feet by 16 feet. *Id.* The officers heard no raised voices or other sounds that suggested a disturbance. *Id.*

Tenorio, his wife, and another man were inside the kitchen, which was partially visible from the living room where the officers were standing. *Id.* at 1162-63. As the officers entered the living room, one officer said, "Please step out here." *Id.* at 1162. Tenorio's wife stepped out of

the kitchen first and said, "Russell, put that down." *Id.* Tenorio followed her out of the kitchen, and the other man in the kitchen followed him. *Id.* at 1163. An officer assisted Tenorio's wife from the house. *Id.* When Tenorio appeared to the officers, he had a blank stare on his face and was holding a santoku-style kitchen knife with a three-and-a-quarter-inch blade. *Id.* "He was holding the knife loosely in his right hand, his arm hanging by his side . . . ." *Id.* As Tenorio entered the living room, he kept walking at an unbroken "average speed." *Id.* (internal quotation marks omitted). The lead officer saw the knife in his hand and yelled at him four times in rapid succession to put the knife down. *Id.* But Tenorio continued another two and one-half steps into the 14-by-16-foot living room without dropping the knife. *Id.* at 1162-63. With the doorway congested with law- enforcement officers, the lead officer shot him and another officer tased him, causing nonfatal but life-threatening injuries. *Id.* at 1163.

On those facts, we affirmed the denial of summary judgment because Tenorio had made no aggressive move or hostile action toward the officer (*i.e.*, the suspect was holding only a knife, was not charging, and was not making slicing or stabbing motions toward the officer), meaning that *Zuchel* and *Walker* compelled our conclusion that the officer's use of deadly force violated clearly established law. *See id.* at 1165-66.

Tenorio, *Zuchel*, and *Walker* compel the same result in this case. Ms. Baca was not charging Officer Cosper and made no slicing or stabbing motions toward him. *See id.*; *Walker*, 451 F.3d at 1160; *Zuchel*, 997 F.2d at 735-36.

So it was clearly established that Officer Cosper's use of deadly force against Ms. Baca was unreasonable.

Before we conclude, we note that the district court's analysis credited Officer Cosper's argument that he had no realistic option to retreat because if he stepped to his right, he'd lose sight of Ms. Baca and put the other people in the home at risk. *Baca*, 2023 WL 5725427, at *12-13. This overstates the risks that Officer Cosper faced. If Ms. Baca moved toward him, he could step to his right and back down the pathway and into the driveway. If she followed, she would pose no risk to the people inside the home and Officer Cosper would not lose sight of her. Indeed, he would lead her down the driveway, where another officer with a taser would be waiting. If she did not follow him, he would still have an angle to see whether she crossed the room toward the area of the house in which the daughter and granddaughter were barricaded in the bedroom. And Officer Cosper wasn't without additional backup; less than three minutes after the shooting, there were at least six additional police cruisers at the Bacas' home. He or other officers could then intervene with less-than-lethal force while outside her knife-striking distance.[6] So we are not persuaded that Officer Cosper

6. The district court credited Officer Cosper's impression that if he lost sight of Ms. Baca, she would have posed a danger to the barricaded daughter and granddaughter and to the bystanders in the driveway. *See Baca*, 2023 WL 5725427, at *5, *8, *12. But in assessing risk to others, the district court failed to weigh the counter risk to the barricaded family members and the adjoining-duplex residents from Officer Cosper firing two shots into the residence. And common sense has a place here too. The asserted danger to the barricaded

was as confined as he represents himself to be, nor do we think that fact distinguishes his case away from clearly established law. *See Tenorio*, 802 F.3d at 1165-66; *Walker*, 451 F.3d at 1160; *Zuchel*, 997 F.2d at 735-36.

Taking the facts in the light most favorable to the Estate, a reasonable jury could conclude that Officer Cosper violated Ms. Baca's clearly established constitutional rights by shooting her. As a result, we conclude the district court erred in finding Officer Cosper was entitled to summary judgment based on qualified immunity.

CONCLUSION

For the reasons stated, we reverse the district court's decision to grant Officer Cosper summary judgment on the § 1983 excessive-force claim. The case is remanded for further proceedings consistent with this opinion.

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family members ignores that Ms. Baca was a 75-year-old woman of diminished mental capacity armed with two knives with no explained ability to break down a barricaded bedroom door. And any risk to the bystanders in the driveway, who were standing with a second officer, is an even greater stretch.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, FILED SEPTEMBER 5, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

September 5, 2023, Filed

No. 2:22-cv-0552 RB/GJF

PERLA ENRIQUEZ BACA, AS THE PERSONAL REPRESENTATIVE OF AMELIA BACA, DECEASED,

Plaintiff,

v.

JARED COSPER, IN HIS INDIVIDUAL CAPACITY, THE CITY OF LAS CRUCES, AND LAS CRUCES POLICE CHIEF MIGUEL DOMINGUEZ,

Defendants.

MEMORANDUM OPINION AND ORDER

On April 13, 2022, Las Cruces Police Department (LCPD) Dispatch radioed officers about a 911 call regarding a female subject armed with a knife. The 911 caller stated that the female was threatening to kill her and was stabbing at the floor with the knife. LCPD Officer Jared Cosper was the first officer to respond. Just prior

to arriving at the home, Cosper learned that Dispatch could hear a child crying on the line but that the caller had stopped talking.

Cosper's Body-Worn Camera (BWC) recorded the events. Cosper announced his presence at the entryway of the home, and two women quickly exited. Decedent Amelia Baca stepped into view and stood in the front room of the home eight to ten feet away from Cosper. Baca held kitchen knives, one in each hand, and Cosper immediately drew and pointed his firearm at her.

What followed was brief and chaotic: Cosper repeatedly yelled at Baca to put the knives down, the two women frantically pleaded with Baca, and Baca talked back and shook her head no. Thirty-nine seconds after Cosper first encountered Baca, she took two steps toward him, knives in hand, and he fired two shots, hitting her in the chest. Baca died from the gunshot wounds.

Perla Enriquez Baca, as Baca's Personal Representative, now brings suit against Cosper, LCPD Chief Miguel Dominguez, and the City of Las Cruces for violations of Baca's constitutional rights. Before the Court is Cosper's Motion for Partial Summary Judgment on the Basis of Qualified Immunity as to Counts I and II. (Doc. 25.) As discussed below, Cosper is entitled to qualified immunity as to Count I because Plaintiff fails to demonstrate a constitutional violation or that the law was clearly established that Cosper's conduct would violated Baca's right to be free from excessive force. Plaintiff concedes that Count II should be dismissed. Thus, the Court will **grant** Cosper's motion for summary judgment.

Appendix B

I. Statement of Facts[1]

A. The Incident

On April 16, 2022, at approximately 6:38 p.m., Cosper, an officer with the LCPD patrol division, was on duty with his K-9 dog. (Doc. 25-C ¶¶ 1, 4, 10 (citing Doc. 25-C-2 at 9-10).) Cosper heard a radio transmission from LCPD Dispatch "regarding a call about a 'behavioral issue' at 825 Fir Avenue in Las Cruces." (*Id.* ¶ 4.) Dispatch stated that a female subject, armed with a knife, was stabbing at the floor with the knife and threatening to kill the reporting party. (*Id.* ¶ 11.) The reporting party "was barricaded in a room of the house with a child." (*Id.* (citing Doc. 25-B at 9:16-38).) Cosper later learned that there was a second child sheltering in another room without an adult. (*See* Doc. 25-C-2 ¶ 24.)

Cosper radioed that he was en route to the address. (*See id.* ¶¶ 12-16.) When he approached the house, he saw two women walking into what he believed to be 825 Fir Avenue. (*Id.* ¶¶ 17-18.) Before he exited his vehicle, he learned that the 911 operator could hear a child crying, but the caller was no longer speaking. (*Id.* ¶¶ 19-20 (citing Doc. 25-C-2 at 2).) Cosper activated his BWC before he exited the vehicle. (*See* Doc. 25-A.)

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1. In accordance with summary judgment standards, the Court recites all admissible facts in a light most favorable to Plaintiff. Fed. R. Civ. P. 56; *see also Garrison v. Gambro, Inc.*, 428 F.3d 933, 935, 150 Fed. Appx. 819 (10th Cir. 2005). The facts are undisputed unless noted.

Appendix B

LCPD Policy General Order 245.04, which provides guidelines and procedures for officers assisting a mentally ill person, outlines certain responses that "may be taken" in such situations, including:

> 1. Ensure that backup officers are present before taking any action.
>
> 2. If possible, try to obtain any information on the subject from family or friends.
>
> 3. Attempt to calm the situation:
>
> a. Cease emergency lights and sirens if practical. . . .
>
> c. Approach the person in a quiet, non-threatening manner. . . .
>
> e. Move slowly, being careful to avoid exciting the person.
>
> f. Use appropriate communication to . . . [p]rovide reassurance that the police are there to help and that appropriate care will be provided[and to a]ttempt to find out what is bothering the person. . . .
>
> i. Do not threaten the person with arrest or physical harm.

(Doc. 32-2-A at 8-9.)

Cosper saw that he was the first officer to respond and that Emergency Medical Services personnel had not arrived. (*Id.* ¶¶ 21-22.) Cosper attested that "[i]t was not consistent with [his] training as a patrol officer to wait for backup in" such a situation: *i.e.*, where Dispatch "was reporting an individual was armed with a deadly weapon, threatening to kill other occupants," which "included a child who was not sheltering with an adult, and the individual was physically acting out stabbing motions with a knife." (*Id.* ¶ 24.) As Cosper approached the front door of 825 Fir, he heard a metal tinging sound, which he believed to be the subject "acting out with a knife." (*Id.* ¶¶ 26-27; *see also* Doc. 25-A at 01:14.) Consequently, Cosper, who was not wearing a "stab proof" vest, unholstered his firearm. (Doc. 25-C ¶¶ 28-29 (citing Doc. 25-C-4).)

Cosper stepped into the entryway and could see two figures standing inside the home through a screen door. (*Id.* ¶ 32.) He could hear people inside talking but could not hear what was being said. (*Id.* ¶ 33.) He announced his presence and asked the people to step outside. (Doc. 25-A at 01:19-21.) Two women immediately exited through the front door, leaving the screen door open with a view of the front room. (*See id.* at 01:22-26; *see also* Doc. 25-C ¶¶ 35-38.) As the women quickly and quietly exited the house, the first said something indistinguishable in a low voice; the second quietly said "please be very careful with her." (Doc. 25-A at 01:22-26.) Cosper recalls that the "second woman's tone of voice and her hurried manner made it sound like she was passing along a quick warning to me to watch an individual inside the house and that she (this second woman) wanted to get out of there quickly." (Doc.

25-C ¶ 44.) Cosper thought these women may have been the same individuals he had seen on the street walking toward the home and believed that "the safety of the 911 caller and other occupants was likely still at risk." (*Id.* ¶ 40.)

Once the women exited, Baca stepped into view in the open doorway, approximately ten feet away from Cosper. (Doc. 25-A at 01:26-27; *see also* Doc. 25-C ¶¶ 46-47, 62.) When Cosper saw that Baca held a knife in her left hand, he raised his right arm, pointed his firearm at Baca, and yelled at her in a loud voice to "set it down. Set it down, now!"[2] (*See* Doc. 25-A at 01:26-28; *see also* Doc. 25-C ¶¶ 48-49.) Cosper saw Baca mouth the word "'No' without any hesitation." (Doc. 25-C ¶ 54; *see also* Doc. 25-A at 01:28-30).) He noticed that Baca held "a long-bladed knife" in her right hand as well. (Doc. 25-C ¶ 50; *see also* Doc. 25-A at 01:31.) Cosper did not believe that Baca was "confused as to who [he] was or what [he] was ordering her to do." (Doc. 25-C ¶ 51.) Cosper did not think that Baca "appear[ed] distraught[,]" rather he thought she "appeared angry that [he] was ordering her to put the knives down." (*Id.* ¶¶ 52-53.)

The two women were still present; Cosper felt them pressing against his right side and arm. (*See* Docs. 25-C ¶ 55; 25-C-6; *see also* Doc. 25-A at 01:27-32.) The women

2. Cosper kept his firearm pointed at Baca throughout the incident. (Doc. 25-A at 01:26-02:05.) Cosper also had a flashlight pointed at Baca for the entire interaction. (*See id.*) The light was generally pointed at and illuminated Baca's chest and occasionally moved up toward her neck. (*See id.*)

were both speaking, presumably to Baca, and the video shows them waving their hands and arms close to Cosper. (Doc. 25-A at 01:27-32.) Cosper twice ordered the women to back away and motioned them away with his left hand.[3] (*Id.* at 01:31-33 ("back up, back up"), 01:37-39 ("ok back up, back up now").) Cosper noticed that as he ordered the bystanders to back up the first time, "Baca turned her head to her right to look down at the floor behind her and stepped back in apparent compliance with" his order. (Doc. 25-C ¶ 64; *see also* Doc. 25-A at 01:31-33.) After Cosper repeated his order to back up, a second officer, Fierro, arrived on the scene and ordered the women to get back.[4] (Doc. 25-A at 01:43-44 (Fierro in the background ordering the bystanders to "get back"); *see also* Doc. 25-D at 00:46 (Fierro's BWC recording of the same event.)

Cosper testified that he could not clearly hear what either Baca or the women were saying "over the sound of [his] own voice, which was amplified in the narrow entry corridor. (Doc. 25-C ¶ 68.) Nor could he distinguish whether Baca was speaking English or Spanish. (*Id.* ¶ 72.) He does "remember hearing one of the women . . . say something to the effect that Ms. Baca had mental health issues" as he was ordering the women to back up.[5] (*Id.* ¶ 69.)

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3. Plaintiff objects to Cosper's depiction of how the women interacted with him. (*See* Doc. 32 at 2.) The Court relies on the video evidence, rather than Cosper's assertions describing the video, to summarize the incident. Consequently, Plaintiff's objection is moot.

4. It took Fierro approximately 11 seconds to push the women away from Cosper. (*See* Doc. 25-D at 00:46-57.)

5. Plaintiff objects to UMF No. 43 on the basis that "it vaguely states 'at one point' one of the bystanders told him Ms. Baca was

As Fierro forcibly moved the women several feet away from the door, Cosper continued to order Baca to drop the knives. (*See* Docs. 25-A at 01:46-57; 25-D at 00:46-57.) Baca moved the knife from her left hand into her right hand and briefly turned to her right. (Doc. 25-A at 01:57-58.) Cosper ordered Baca to "put'em on the ground." (Doc. 25-D at 01:58.) Baca looked at him and motioned with her left hand downward. (*Id.*) She then took a step or two backward, her hands up around chest/shoulder height. (*Id.* at 01:59.) As Cosper continued shouting orders for Baca to put the knives down, Baca lowered her arms to her sides and waved her left hand several times toward the ground. (*Id.* at 01:59-02:03.) She still held the knives in her right hand. (*See id.*) Cosper believed that Baca "was motioning for [him] to lower [his] gun and that she was going to comply and set the knives down onto the sofa at the same time." (Doc. 25-C ¶ 88.) He thought that Baca "did not appear angry anymore; she appeared resigned as though she had decided to end the standoff."[6] (*Id.* ¶ 89.)

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mentally ill." (Doc. 32 at 3 (discussing Doc. 25 at 8).) Plaintiff notes that in his recorded interview, Cosper "indicated he was told of Ms. Baca's mental health issues 'when [he] drew down on her,' which means he was told at the very beginning of the encounter." (*Id.* (quoting Doc. 32-1 at 16:20-50, 21:30-58).) The video provides the best evidence. Immediately before Cosper tells the women to back up for the second time, one of the women says, "she is mentally sick." (*See* Doc. 25-A at 01:33-38.)

6. Plaintiff disputes Cosper's recitation of the events in UMF Nos. 51-65 and argues that the video evidence could be interpreted to mean that Baca thought Cosper was pointing at the ground to communicate that she should move toward him. (*See* Doc. 32 at 3.) While the Court agrees that this is a valid alternative explanation

Cosper yelled again to "put it down now," gesturing with his left hand toward the ground. (Doc. 25-A at 02:04.) At that moment, Baca's expression changed, she straightened her stance, and she took two slow steps toward Cosper, closing the distance between them by several feet. (*Id.* at 02:04-05.) Cosper yelled "put the fucking knife—"; his left hand went up to his firearm, and he fired two shots, hitting Baca in the chest as she took a third step. (*Id.* at 02:05.) When Cosper fired at Baca, "her left foot was almost on the threshold" of the front door, approximately six to seven feet away from him. (*See* Doc. 25-C ¶¶ 94-102.)

Over the course of 39 seconds, Cosper issued 16 loud, clear commands to Baca to drop her knives. (*See id.* at 01:26-02:05.[7]) Cosper fired at Baca approximately 14 seconds after Fierro moved the women away from his right side. (*See* Doc. 25-D at 00:57-01:12.) The two women spoke during the entire interaction, as did Baca, although

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for Baca's conduct, Plaintiff's assertion does not create a genuine dispute of fact regarding Cosper's impression of the events.

7. The timestamps for each of the commands are as follows: "Set it down" (Doc. 25-A at 01:26-27); "Set it down, now" (*id.* at 01:28); "Drop the knife" (*id.* at 01:33-34); "Drop the knife" (*id.* at 01:35); "Drop the knife" (*id.* at 01:40); "Drop the fucking knife" (*id.* at 01:42-43); "Drop the knife, do it now" (*id.* at 01:44-46); "Drop the fucking knife" (*id.* at 01:47-48); "Drop the fucking knife, do it now" (*id.* at 01:50-51); "Drop the fucking knife" (*id.* at 01:53-54); "Drop the knife, do it now" (*id.* at 01:55-57); "Put'em on the ground" (*id.* at 01:58); "Put'em on the ground" (*id.* at 01:59-02:00); "Put it down now" (*id.* at 02:01-02); "Put it down" (*id.* at 02:03); "Put the fucking knife down" (*id.* at 02:04-05).

in listening to Cosper's BWC video,[8] it is difficult or impossible to make out what the women are saying over Cosper's commands. (*See* Doc. 25-A at 01:26-02:05.)

Shortly after Cosper fired his weapon, he instructed Fierro to handcuff Baca and locate the knives, and Cosper entered the home to locate the other occupants. (*See id.* at 02:16-41; Doc. 25-C ¶ 106.) Cosper attests that he did not have the necessary medical equipment on him or in his police vehicle to render immediate first aid. (Doc. 25-C ¶¶ 109-13.) Officer Appelzoller, who arrived on scene only seconds after Cosper shot Baca, began first aid. (*See id.* ¶¶ 114-15..)

B. The Space

The entryway of the house was comprised of a small room or porch with one doorway that opened to the outside, a small wall to the right of the front door to the home, the front door itself, a wall opposite the open doorway, and another wall opposite the front door. (*See* Docs. 25-A at 01:12-23; 25-C-5.) A floor-to-ceiling green tarp was attached to the small wall on the right of the outside door. (*See* Doc. 25-A at 01:16-23.) A refrigerator stood against the wall to the left of the front door. (*See id.* at 01:16-19; Doc. 25-C-5.) A collection of cleaning supplies and wooden boards were stacked in front of and/or against the closed door and the wall opposite the front door to the home.[9] (Docs. 25-A at 01:16-18; 25-C ¶ 30; 25-C-5.)

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8. The bystanders' comments are more understandable in Fierro's BWC video. (*See* Doc. 25-D.)

9. Cosper did not believe that the closed door was in use due to the mops sitting against it. (Doc. 25-C ¶ 18.)

When the two women exited the front door, Cosper moved into the entryway immediately opposite the front door that led into the house. (*See* Doc. 25-A at 01:21-26.) The women moved to his right and essentially blocked the only clear exit—the doorway from the entry porch area that led into the front patio. (*See id.* at 01:27-32.) Cosper stood frozen "with one foot braced against the back wall of the cased in entry corridor" for the entire interaction. (Doc. 25-C ¶ 77; Doc. 25-A at 1:21-54.) Until the final 14 seconds of the brief interaction, at which point Fierro forcibly moved the women away from Cosper's side, Cosper was essentially penned into the entryway of 825 Fir.

Cosper testified that because of the layout of the entryway, he could not step back to create more distance between himself and Baca without losing sight of her. (Doc. 25-C ¶ 79.) Cosper believed it was important to keep Baca in sight, as he "had not been able to confirm whether the [911] caller and the other occupants were safe . . . ." (*Id.* ¶ 80.)

C. Plaintiff's Lawsuit

Plaintiff filed a Complaint for Civil Rights Violations and the Wrongful Death of Amelia Baca on July 25, 2022. (Doc. 1.) Plaintiff brings four claims: *Count I*: Excessive Use of Force in Violation of Baca's Fourth Amendment Rights and 42 U.S.C. § 1983 against Cosper; *Count II*: Deprivation of Life Without Due Process in Violation of Baca's Fourteenth Amendment Rights and § 1983 against Cosper; *Count III*: Municipal Liability under the Fourth

Amendment and § 1983 against the City of Las Cruces; and *Count IV*: Supervisory Liability under the Fourth Amendment and § 1983 against Dominguez. (*See id.* §§ 28-65.)

Cosper seeks summary judgment on Counts I and II on the basis of qualified immunity. (Doc. 25.) Plaintiff concedes, in her response brief, that Count II should be dismissed. (Doc. 32 at 1 n.1.) The Court will thus grant the motion as unopposed with respect to Count II and take up Count I in this Opinion.

II. Legal Standards for Motions for Summary Judgment on the Basis of Qualified Immunity

"Summary judgment is proper if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Halley v. Huckaby*, 902 F.3d 1136, 1143 (10th Cir. 2018) (citing *McCoy v. Meyers*, 887 F.3d 1034, 1044 (10th Cir. 2018)). "In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts." *Emmett v. Armstrong*, 973 F.3d 1127, 1130 (10th Cir. 2020) (quoting *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)). If there is video evidence that "blatantly contradicts the plaintiff's version of events[,]" however, the Court "will accept the version of the facts portrayed in the video . . . . *Id.* (quoting *Scott*, 550 U.S. at 378) (quotation marks, brackets, and subsequent citation omitted).

Appendix B

The Court reviews summary judgment motions based on a qualified immunity defense somewhat differently. *See id.* at 1132. "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *See Halley*, 902 F.3d at 1144 (quoting *Koch v. City of Del City*, 660 F.3d 1228, 1238 (10th Cir. 2011)). "A constitutional right is clearly established if it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015)). "A Supreme Court or Tenth Circuit decision on point or the weight of authority from other courts can clearly establish a right." *Id.* (citation omitted). "Generally, 'existing precedent must have placed the statutory or constitutional question beyond debate' to clearly establish a right." *Id.* (quoting *Redmond v. Crowther*, 882 F.3d 927, 935 (10th Cir. 2018)). "The question is not whether a 'broad general proposition' was clearly established, but 'whether the violative nature of particular conduct [was] clearly established.'" *Id.* (quoting *Redmond*, 882 F.3d at 935) (internal quotation marks omitted).

The Court may address the qualified immunity analysis in any order. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). In fact, where a court is "firmly convinced the law is not clearly established" and the "constitutional violation question is so factbound that the decision provides little guidance for future cases[,]" it is prudent to proceed directly to the clearly established prong of the analysis. *See Tanner*,

864 F. Supp. 2d at 1108 (quoting *Kerns v. Bader*, 663 F.3d 1173, 1180-81 (10th Cir. 2011) (quotation marks omitted)).

"If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment . . . ." *Id.* (quoting *Koch*, 660 F.3d at 1238). And while the "Court must construe the facts in the light most favorable to the plaintiff as the nonmoving party, 'a plaintiff's version of the facts must find support in the record.'" *Koch*, 660 F.3d at 1238 (quoting *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1312 (10th Cir. 2009)). If the plaintiff's "version of the facts is 'blatantly contradicted by the record, so that no reasonable jury could believe it,' then [the Court] 'should not adopt that version of the facts.'" *Halley*, 902 F.3d at 1144 (quoting *Thomson*, 584 F.3d at 1312).

III. Cosper is entitled to qualified immunity on the excessive force claim.

A. Legal Framework for Excessive Force Claims

Courts "treat excessive force claims as seizures subject to the reasonableness requirement of the Fourth Amendment." *Est. of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259-60 (10th Cir. 2008) (citing *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). "To establish a constitutional violation, the plaintiff must demonstrate the force used was objectively unreasonable." *Id.* "Thus the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the

20/20 vision of hindsight." *Id.* (quoting *Graham*, 490 U.S. at 396) (quotation marks omitted). "Moreover, because 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, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Id.* at 1259-60 (quoting *Saucier v. Katz*, 533 U.S. 194, 205, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)) (quotation marks omitted).

Courts "assess objective reasonableness based on whether the totality of the circumstances justified the use of force, and pay careful attention to the facts and circumstances of the particular case." *Id.* at 1260 (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)) (quotation marks omitted). When analyzing reasonableness, courts consider three factors the Supreme Court outlined in *Graham*: (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." *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1213 (10th Cir. 2019) (quoting *Graham*, 490 U.S. at 396).

The Tenth Circuit has further held that "officers are not justified in using deadly force unless objectively reasonable officers in the same position 'would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others.'" *Id.* at 1213-14 (quoting *Thomson*, 584 F.3d at 1313) (subsequent

citations omitted). "In assessing the threat" that a suspect posed to an officer, the Tenth Circuit directs courts to consider: "(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." *Larsen*, 511 F.3d at 1260 (citing *Walker v. City of Orem*, 451 F.3d 1139, 1159 (10th Cir. 2006); *Jiron v. City of Lakewood*, 392 F.3d 410, 414-15 (10th Cir. 2004); *Zuchel v. Spinharney*, 890 F.2d 273, 274 (10th Cir. 1989)).

"Deadly force is justified under the Fourth Amendment if a reasonable officer in [the officer's] position would have had probable cause to believe that there was a threat of serious physical harm to [himself] or to others." *Id.* (quoting *Jiron*, 392 F.3d at 415) (emphasis omitted). Indeed, even "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed." *Id.* (quoting *Jiron*, 392 F.3d at 415). "A reasonable officer need not await the glint of steel before taking self-protective action; by then, it is often too late to take safety precautions." *Id.* (quotation marks, ellipses, and citation omitted).

B. Cosper did not use excessive force under the circumstances.

Plaintiff's excessive force claim is grounded in her assertion that Cosper unreasonably escalated the situation

by immediately drawing his firearm on and yelling commands at Baca when he had information that she was mentally ill and could see that she was elderly. (*See* Doc. 32 at 7.) Although the determination of whether Cosper used excessive force is a close one, the Court finds that Cosper did not use excessive force when he shot Baca. The Court further finds that Cosper did not unreasonably escalate the situation.

1. Severity of Crime

Cosper had information from Dispatch that a female subject was armed with a knife and was threatening the reporting party's life. Cosper also knew that the subject was striking the knife against the floor of the house, and he heard sounds of the same as he approached the entryway. Finally, Cosper knew that the reporting party had barricaded herself into a room of the house and that there was a child hiding in another room. Cosper asserts that this information "would support a charge of aggravated assault, and the use of something beyond minimal force to detain someone suspected of committing such an offense . . . ." (Doc. 25 at 18 (discussing N.M. Stat. Ann. §§ 30-3-1-2, 30-1-12).) Plaintiff does not disagree. (*See* Doc. 32.)

2. Active Resistance or Attempts to Flee

Cosper acknowledges that the third *Graham* factor favors Plaintiff, as "Baca was standing inside her own home at the time of the shooting and was [neither] attempting to flee" nor "physically resisting apprehension." (Doc. 25 at 18.)

3. Degree of Threat

The second *Graham* factor examines "whether the suspect pose[d] an immediate threat to the safety of the officers or others," *Pauly v. White*, 874 F.3d 1197, 1215 (10th Cir. 2017) (quotation and emphasis omitted), and "is undoubtedly the most important and fact intensive factor in determining the objective reasonableness of an officer's use of force," *id.* at 1216 (quotation marks and citation omitted). "[D]eadly force 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 *Estate of Larsen*, 511 F.3d at 1260) (emphasis omitted). The Court turns now to the *Estate of Larsen* factors. Plaintiff failed to explicitly address these factors.

Baca did not comply with Cosper's orders to drop the knives: Cosper yelled at Baca 16 times to drop or put down the knives, and Baca never complied. Plaintiff asserts that "Cosper made no effort whatsoever . . . to understand why Ms. Baca might not have immediately complied." (Doc. 32 at 8-9.) Cosper attested, however, that he believed Baca *was* responding to his commands. (*See, e.g.*, Doc. 25-C ¶¶ 64, 71.) His impression was that when he ordered her to drop the knives, she said "no" and shook her head several times. (*Id.* ¶ 71.) The video evidence supports Cosper's impression that Baca was responding to him in the negative. (*See* Doc. 25-A at 01:28-30, 01:33-35, 01:37-38, 01:43-44.) He also believed that Baca looked behind her and then took a step back when he commanded the bystanders to "back up, back up." (Doc. 25-C ¶ 64.) Although it appears that Baca started to look

behind her at the same time Cosper gave the command to back up, the video evidence could be construed to support his impression.[10] (*See* Doc. 25-A at 01:31-33.) Thus, a reasonable officer could have believed that Baca understood his commands and refused to comply with his 16 separate orders to drop the knives.

Baca did not make any hostile motions with the knives toward Cosper: Cosper admits that Baca did not raise the knives toward him in any kind of "slicing, stabbing, or thrusting motion . . . ." (Doc. 25 at 21.) Thus, this factor weighs against the use of deadly force.

The distance between Baca and Cosper: Plaintiff does not disagree that Cosper stood stationary with one foot braced against the back wall of the entryway for the entire encounter. Nor does Plaintiff disagree with Cosper's estimate of the distances between himself and Baca throughout: when Baca first appeared in the front room, she was approximately ten feet away from Cosper. (*See* Doc. 25-C ¶ 62.) After Baca took steps toward Cosper in the final seconds, she was within six to seven feet of him. (*Id.* ¶ 102.) Given the layout of the entryway and the bystanders pressed against his right side, Cosper was essentially hemmed in without a clear exit until Fierro pushed the bystanders back prior to the last 14 seconds of the incident. (*See* Doc. 25-D at 00:57-01:12.)

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10. Regardless, Plaintiff does not dispute Cosper's impression on this point. (*See* Doc. 32 at 2-3 (disputing UMF Nos. 37-42 only to the extent that they suggest Cosper was being harassed by the bystanders).)

Plaintiff argues, however, that Cosper's conduct in immediately confronting and drawing his weapon on Baca was unreasonable, as he made no attempt to deescalate the situation. (Doc. 32 at 8-9.) Plaintiff cites LCPD General Order 245.04 in her recitation of the facts. (*Id.*at 5.) Plaintiff fails to flesh out any argument regarding LCPD policy (*see id.* at 7-10), but presumably believes that Cosper's conduct (*e.g.*, his failure to obtain additional information about Baca from the bystanders and his conduct in yelling orders to drop the knives) violated the policy and establishes that he violated Baca's constitutional rights.

It is unclear when Cosper would have stopped to gather such information, as he was immediately confronted with Baca standing in the doorway and holding two knives. Even so, Cosper argues that "the policy at issue is framed in discretionary terms and provides officers with a range of responses for dealing with a mentally ill person who many [sic] pose a threat to the officer or others." (Doc. 44 at 15 (citing Doc. 32-2-A at 8 ("the following responses may be taken")).) The Court agrees. Regardless, even if Cosper's conduct had violated the policy, it would not automatically result in the violation of a constitutional right. *See Tanberg v. Sholtis*, 401 F.3d 1151, 1160 (10th Cir. 2005); *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). Plaintiff offers no authority to the contrary.

Moreover, Cosper's undisputed testimony establishes that he could not have backed away in an effort to deescalate because if he left the entryway, he would no

longer have had Baca in sight. (*See* Doc. 25-C ¶ 79.) As Cosper "had not been able to confirm whether the caller and other occupants were safe, it was important to keep Ms. Baca in sight." (*Id.* ¶ 80.) Cosper also would have risked the safety of the two bystanders and Fierro if he had allowed Baca to continue moving outside.

Considering the circumstances, the close distance between Baca and Cosper does not support a finding that Cosper's conduct violated Baca's constitutional rights.

Baca's manifest intentions: Cosper argues that although Baca never made a hostile motion with her weapon, he understood the change in her demeanor, body language, and position in the last several seconds of the encounter "to be a hostile motion." (Doc. 25 at 21.) Two seconds before Cosper shot Baca, the video shows that Baca's expression changed, she straightened her stance, and she took two slow steps toward Cosper, closing the distance between them by several feet. (Doc. 25-A at 02:04-05.)

Plaintiff construes Baca's actions differently, noting that Baca moved toward Cosper shortly after Cosper pointed to the ground; thus, Baca could have understood that he had ordered her to move to that area. (Doc. 32 at 3, 9.) Plaintiff also characterizes Baca's steps as small and shuffling. (*Id.* at 3.) While a jury could agree with Plaintiff's characterization of Baca's movements and intent (*i.e.*, that Baca took small, shuffling steps toward Cosper to comply with his orders), Plaintiff fails to demonstrate a factual dispute regarding Cosper's *impression* of Baca's

conduct. Consequently, it is clear to the Court that Cosper understood Baca posed an immediate serious threat to his and/or the bystanders' safety. As the Tenth Circuit has found, even "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed." *Larsen*, 511 F.3d at 1260 (quotation omitted).

In rendering its decision, the Court finds helpful guidance in *Estate of Larsen*.[11] In *Larsen*, the decedent (Larsen) "called 911 threatening to 'kill someone or himself.'" *Id.* at 1258 (citation omitted). Officers approached Larsen's house and found him on the porch with a large knife in his hands. *Id.* The officers drew their firearms and ordered Larsen to put the knife down. *Id.* Larsen raised the knife with the blade pointed toward one of the officers; the officer told him several times to drop the knife. *Id.* Larsen took a step from the porch toward the officer standing below him on the sidewalk, and the officer shot and killed Larsen. *Id.* at 1258-59. The district court found that the officer's use of force was not unreasonable given the circumstances., and the Tenth Circuit affirmed *Id.* at 1259, 1264. The Tenth Circuit noted that the use of deadly force was made reasonable by "the heightened immediacy of the threat[,]" made clear by the following facts:

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11. In arguing that he is entitled to qualified immunity on Count I, Cosper discusses *Larsen* and several other cases in his opening brief. (*See* Doc. 25 at 20-29 (discussing, *e.g.*, *Larsen*, 511 F.3d at 1262; *Tenorio v. Pitzer*, 802 F.3d 1160 (10th Cir. 2015); *Zuchel*, 997 F.2d 730; *Walker*, 451 F.3d 1139).) Plaintiff does not respond to Cosper's arguments on these cases. (*See* Doc. 32.)

> (1) Larsen had already threatened violence against himself and others; (2) the officers responded to an emergency call late at night; (3) when the officers arrived, they encountered a man armed with a knife; (4) both officers repeatedly told Larsen to put down the knife; (5) the knife was a large weapon with a blade over a foot in length rather than a mere pocket knife or razor blade; (6) Larsen refused to cooperate with the officers' repeated orders to drop his weapon; (7) Larsen held the high ground vis-a-vis the officers; (8) Larsen raised the knife blade above his shoulder and pointed the tip towards the officers; (9) [a second officer] was also prepared to use force and was moving into position to be able to do so; (10) Larsen turned and took a step toward [the shooting officer]; (11) the distance between [the shooting officer] and Larsen at the time of the shooting, though disputed, was somewhere between 7 and 20 feet.

Id. at 1260-61.

Similarly, here, Baca threatened violence to occupants of the home; Cosper responded to the call in the evening and encountered Baca armed with two kitchen knives; Cosper repeatedly ordered Baca to put down the knives, at least one of which Cosper described as "long-bladed"; Baca seemingly refused to comply with Cosper's orders then took two steps toward him, closing the distance from approximately ten feet to approximately six feet. Finally,

Cosper understood that Baca's intent in moving toward him was hostile. As in *Larsen*, the circumstances here were "tense, uncertain, and rapidly evolving[,]" *see id.* at 1259 (quotation omitted), and Cosper was "forced to make split-second judgments . . . ." *Id.* at 1261. The Court finds that "even if [Cosper's] assessment of the threat was mistaken, it was not objectively unreasonable." *See id.* The Court concludes that, viewing the undisputed facts in a light most favorable to Plaintiff, a reasonable officer could have understood that Baca posed a serious and immediate threat, justifying the use of deadly force. Cosper is entitled to qualified immunity.

C. Cosper did not violate clearly established law.

Even if the Court found that Cosper used excessive force, Plaintiff fails to offer authority that would put Cosper on notice that his conduct was unconstitutional. Again, Plaintiff focuses on whether Cosper's conduct escalated the situation, thereby causing the need for deadly force. (*See, e.g.*, Doc. 32 at 7 (emphasizing the importance of "focus[ing] not on the shooting itself, but rather on the officers' actions preceding the shooting" where "the officers' actions unreasonably escalated the situation to the point deadly force was required") (citation omitted).) Plaintiff relies on five cases: *Stewart v. City of Prairie Village, Kansas*, 904 F. Supp. 2d 1143 (D. Kan. 2012); *Hastings v. Barnes*, 252 F. App'x 197 (10th Cir. 2007); *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019); *Allen v. Muskogee, Okla.*, 119 F.3d 837 (10th Cir. 1997); and *Teel v. Lozada*, 826 F. App'x 880 (11th Cir. 2020). The Court begins with *Teel* and *Stewart*, the cases Plaintiff discusses in the most depth. (*See* Doc. 32 at 7-10.)

Appendix B

In *Teel*, an officer (Lozada) "responded to a mental health crisis call at" a residence. 826 F. App'x at 881. Lozada was first on the scene and did not wait for backup to arrive. *See id.* at 882. Teel's husband told Lozada that Teel "was upstairs, was trying to kill herself, was under the influence of narcotics and/or alcohol, and was armed with a knife . . . ." *Id.* Lozada understood, though, that "Teel had not tried to harm" her husband and there was no indication "that she was a danger to anyone other than herself." *Id.* Lozada drew his gun as he headed upstairs. *Id.* He saw Teel, 60 years old, 5'2" tall, and 120 pounds, lying quietly on her bed. *Id.* at 882-83. Lozada announced his presence and ordered Teel to show him her hands. *Id.* at 883. Teel stood up, the bed between the two, and brought both hands from behind her back to reveal a kitchen knife. *Id.* "Lozada took 'two or three' steps inside the bedroom" but gave Teel no other instruction or warning. *Id.* After about ten seconds, Teel began to walk gradually in Lozada's direction and said in relevant part, "Kill me." *Id.* Lozada pointed his firearm at Teel, took a step back, and radioed to dispatch that Teel had a knife. *Id.* Teel said "Come on, just do it[,]" and Lozada responded, "don't come." *Id.* "Teel never made a sudden movement or ran or lunged" toward Lozada, "[n]or did she point the knife in his direction." *Id.* "Lozada never instructed [her] to drop the knife, never clearly instructed her to stop moving, and never warned that he would shoot her if she failed to comply." *Id.* At the time Lozada shot Teel, she was approximately ten feet from him. *See id.* (noting that the record showed Teel was six to ten feet from Lozada, but "accept[ing] the longer of these distances" for purposes of summary judgment). The evidence showed that "Lozada

was armed with pepper spray and a taser, yet he used neither." *Id.*

Plaintiff notes that the *Teel* court remarked on "the decedent's 'diminutive' size, that she never made any sudden movements, and that the officer could have backed up and coordinated with" other officers "or used a non-lethal method to subdue" Teel. (Doc. 32 at 9 (citing *Teel*, 826 F. App'x at 886).) *Teel* is distinguishable for several reasons. The Eleventh Circuit "conclude[d] that there [was] a genuine dispute as to whether Mrs. Teel posed a significant, immediate threat to Officer Lozada's safety" because, in relevant part, she had not threatened her husband or the officer and was ten feet away. *Teel*, 26 F. App'x at 886. In contrast, Cosper had information that Baca had both threatened to kill the 911 caller and was stabbing at the floor with her knife during the call and when he arrived, and Baca was six to seven feet away when Cosper shot her.

The Eleventh Circuit also stated that "[p]erhaps most tellingly, Officer Lozada was aware and conceded that alternative actions—retreating . . . or using a non-lethal method to subdue Mrs. Teel—were available means of resolving the situation." *Id.* (quotation marks, brackets, and citation omitted). Cosper attested to the opposite: he did not feel that it was safe to lose sight of Baca due to his concern for the other occupants of the house. Plaintiff fails to dispute Cosper's testimony on this point. And although Plaintiff points out that Fierro had a taser and could have used non-lethal means to subdue Baca, Plaintiff has not shown that Cosper was aware of this fact or had non-lethal means of his own.

Appendix B

In *Stewart*, the police department was familiar with the decedent (Stuckey), an individual with mental health problems. 904 F. Supp. 2d at 1150. On the day of her death, "Stuckey made several 911 calls . . . , demanding that the police" come to her residence and stating that "she was going to commit 'suicide by cop.'" *Id.* at 1150-51. At least 15 officers responded. *Id.* at 1151. Stuckey, who was barricaded in her home and was armed with a baseball bat, repeatedly yelled through the front door that she would kill herself. *Id.* at 1151-52. The following resources were available either on scene or with a phone call, and police declined to utilize them: mental health center staff; Critical Incident Response Team (CIRT) officers; an officer trained in hostage negotiation; and Stuckey's mother. *See id.* at 1151. Police planned to enter the residence and forcibly remove Stuckey without considering any other methods, including chemical munitions or non-lethal weapons. *Id.* at 1151-52. The plan violated department policy, which stated "that negotiations should be the primary tactic in [a] barricade situation." *Id.* A group of officers went into the residence with a battering ram. *Id.* Stuckey swung the bat, but they disarmed her. *Id.* An officer ordered Stuckey, "don't pick up that knife[,]" and shots were fired two seconds later, killing Stuckey. *Id.*

The court found that the factual allegations were sufficient to make out a claim for excessive force. *Id.* at 1154. In particular, the court noted that because one of the bullets entered Stuckey's back and the gun was fired from a distance, a reasonable officer would not have probable cause to believe Stuckey posed a serious threat of harm. *See id.* Even if the officers reasonably believed

there was such a threat, the court noted that it "would still have to determine whether [the officer] recklessly or deliberately brought about the need to use such force." *Id.* (quoting *Allen*, 119 F.3d at 840). The court held that the allegations concerning the repeated failures to comply with crisis intervention standards showed the officers "recklessly or deliberately brought about the need to use deadly force." *Id.*

The *Stewart* court noted that it was "clearly established that an officer acts unreasonably when he aggressively confronts an armed and suicidal/emotionally disturbed individual without gaining additional information or by approaching him in a threatening manner." *Id.* at 1156 (citing *Hastings*, 252 F. at 203). *Stewart* is inapposite because the circumstances there were vastly different from those confronting Cosper. There are no facts to show that officers were concerned about other occupants in Stuckey's residence or that she had threatened anyone prior to police arriving. And critically, the officers in *Stewart* had time and space to make decisions about how to approach Stuckey. Cosper, on the other hand, immediately encountered Baca in the doorway holding knives. He had neither the luxury of time nor the multiple resources offered to and rejected by the officers in *Stewart*. Consequently, *Stewart* cannot serve as clearly established law in this case.

In *Hastings*, the Tenth Circuit found that four officers acted in a reckless and deliberate manner, which "unreasonably escalated" an encounter with a suicidal individual (Hastings) "to the point deadly force was

required." 252 F. App'x at 203. There, the officers followed Hastings into his home and crowded into his bedroom "doorway (leaving no room for retreat), issued loud and forceful commands at him and pepper-sprayed him, causing him to become even more distressed." *Id.* Although Hastings picked up a Samurai sword in his bedroom, "a[t] the time they pepper-sprayed him, [Hastings] was not verbally or physically threatening [the officers]." *See id.* at 199-200, 203. The Court agrees that Cosper issued loud and forceful commands to Baca, which likely escalated the situation. The Court does not find, however, that Cosper was reckless when he approached the front entryway of the home. And again, Cosper encountered an individual who had threatened to kill other occupants in the home whose safety was still at issue, unlike Hastings, who was suicidal and had not threatened anyone else. In short, *Hastings* does not direct a finding that Cosper deliberately and recklessly escalated the incident here.

In *Allen*, police officers shot and killed a man (Allen) who was sitting in his vehicle holding a firearm. 119 F.3d at 839. Officers had information that Allen had threatened family members, was armed, and was threatening suicide. *Id.* The Tenth Circuit found that the officers may have escalated the situation, as a bystander reported that one officer "ran 'screaming' up to Mr. Allen's car and immediately began shouting at [him] to get out of his car . . . ." *Id.* at 841. The officer then "reached into the vehicle and attempted to seize [the] gun, while [a second officer] held Mr. Allen's left arm." *Id.* at 839. The Tenth Circuit found that "a reasonable jury could conclude . . . that the officers' actions were reckless and precipitated the need to use deadly force." *Id.* at 841 (citation omitted).

The circumstances were similar in *Ceballos*, where officers quickly approached a subject (Ceballos) "screaming at [him] to drop [a baseball] bat and refusing to give ground as Ceballos approached the officers." 919 F.3d at 1216. In that case, a woman called 911 to report that Ceballos was outside of their home with baseball bats, that he was drunk and probably on drugs, and that she was afraid and had an infant daughter. *Id.* at 1209. The responding officers also knew that Ceballos had walked away from a medical facility the previous night. *Id.* Officers spoke with the wife, who was parked in a car down the street, before approaching Ceballos. *Id.* at 1210. Although Ceballos had two friends with him who attempted to give officers information, the officers declined to speak with them and told them to back away. *See id.* When officers confronted Ceballos, there were no bystanders in the immediate vicinity. *See id.* Ceballos walked toward the officers, who ordered him to stop. *Id.* The officers shot Ceballos when he was between 12 and 20 feet away. *See id.* at 1227 (Bacharach, J., concurring in part and dissenting in part). The Tenth Circuit held that in light of the decisions in *Hastings* and *Allen*, Ceballos's "conduct in his own driveway, which posed harm to no one" and did not "become aggressive *toward the officers* until [they] approached him directly, . . . could not lead reasonable officers to believe they were justified in fatally shooting [him] within one minute of the initial encounter." *Id.* at 1217-18.

Cosper addresses *Allen* and *Ceballos* in his motion. (*See* Doc. 25 at 27.) He acknowledges that at "first glance it could appear [the] cases are similar[,]" because they

involve armed subjects who were emotionally distraught or impaired and had threatened family members. (*See* Doc. 25 at 27.) Cosper argues that the circumstances here are distinguishable because "in contrast to the suspects in *Allen* and *Ceballos*, [Baca] had threatened to *kill another occupant* of her home[] and *was simulating her threat* by stabbing at the floor of her home with a knife." (*Id.* at 28.) Moreover, unlike the officers in *Allen* and *Ceballos* who advanced on the subjects, Cosper did not continue to approach Baca once he saw her in the entryway; rather, he remained frozen outside the house. (*See id.*) Moreover, Cosper did not have a realistic option to retreat, as he knew that both the occupants' and bystanders' safety was at risk and thus he could not allow Baca to leave his sight. (*See id.*) The Court agrees with these distinctions and finds that neither *Allen* nor *Ceballos* gave notice to Cosper that his conduct would violate Baca's constitutional rights.

In considering whether the law was clearly established, the Court finds the decision in *Jackson v. City of Wichita Kan.* instructive. No. CV 13-1376-KHV, 2017 U.S. Dist. LEXIS 4836, 2017 WL 106838 (D. Kan. Jan. 11, 2017). There, officers responded to a call from a man who said that his wife (Jackson), who had obtained a protection from abuse order against him, was at his house and would not leave. 2017 U.S. Dist. LEXIS 4836, [WL] at *4. When officers arrived, the husband was waiting and verified that Jackson "had some mental issues and had trouble comprehending things . . . ." *Id.* Officers did not ask if Jackson was alone or inquire about her state of mind, whether she was intoxicated, had a weapon, or had been violent. *Id.* Although there was no emergency, the

officers "left immediately to go to the house to talk with [her] and have her leave." *Id.* Jackson stepped onto the front porch as the officers crossed the driveway. 2017 U.S. Dist. LEXIS 4836, [WL] at *7. Seeing that Jackson held a knife with a ten-inch long blade, one officer pointed his firearm at "Jackson and yelled repeated commands for her to drop the knife." *Id.* Jackson screamed at the officers, who were 30 to 35 feet away, to shoot her. *Id.* The officers saw Jackson stab herself with the knife. *See* 2017 U.S. Dist. LEXIS 4836, [WL] at *8. Jackson then "stepped down to the driveway and walked toward the officers" with "the knife . . . at stomach level with the blade pointing out." *Id.* She got within 15 feet from the officers and although the knife was pointed up, Jackson "did not swing it at the officers or threaten to hurt them." 2017 U.S. Dist. LEXIS 4836, [WL] at *9. The officers both fired at Jackson, killing her. *Id.*

"Although no emergency existed, the officers did not attempt to learn information about [her] condition" and instead approached her without a plan. *See* 2017 U.S. Dist. LEXIS 4836, [WL] at *12. "When they first saw . . . Jackson, she posed no threat to herself, to them or to any third parties . . . ." *Id.* Rather than "attempt to talk with and/or help [her] from a distance, [the officers] drew their guns, shined flashlights in her eyes and repeatedly yelled at her to drop the knife . . . ." *Id.* The officers "did not attempt to de-escalate the situation or form a plan to avoid the use of deadly force." *Id.* The court found that given the factual allegations, "a jury could reasonably find that [the officers] recklessly escalated the situation to a point which arguably required deadly force." *Id.* (citing

Hastings, 252 F. App'x at 203; *Allen*, 119 F.3d at 840-41; *Sevier*, 60 F.3d at 701; *Tenorio*, 2014 U.S. Dist. LEXIS 184826, 2014 WL 11429062, at *4). Thus, the Court denied the officers "qualified immunity on the ground that no constitutional violation occurred." *Id.*

The Court granted qualified immunity, however, on the basis that the facts of prior cases were "not sufficiently analogous to put [the officers] on fair notice that it was objectively unreasonable to use lethal force" given the undisputed facts. 2014 U.S. Dist. LEXIS 184826, [WL] at *13. The court held that, in light of the similarity to the facts in *Larsen*, the "plaintiffs cannot show that the asserted right was clearly established under Tenth Circuit law."[12] 2014 U.S. Dist. LEXIS 184826, [WL] at *15. The same is true here.

Although this case presents a close call, the Court sides with Cosper. Unlike the officers in the cases Plaintiff relies on, Cosper did not recklessly escalate the situation by needlessly getting closer to Baca. *See Allen*, 119 F.3d at 841 (noting that the officer "ran 'screaming' up to [the] car" and then reached in to try to seize the gun); *Ceballos*, 919 F.3d at 1217 (noting that the officers approached and yelled at Ceballos, who was not in danger of harming anyone, without stopping to get information from bystanders); *cf. City of Tahlequah, Okla. v. Bond*, 595 U.S. 9, 142 S. Ct. 9, 12, 211 L. Ed. 2d 170 (2021) (finding that officers'

12. The *Jackson* court also examined *Zuchel* and *Walker*, two cases Cosper addressed in detail, but Plaintiff did not mention in her response brief. *See* 2017 U.S. Dist. LEXIS 4836, 2017 WL 106838, at *13-14. (*See also infra* n.11.)

conduct in "engag[ing] in a conversation with [a subject], follow[ing] him into a garage at a distance of 6 to 10 feet, and" yelling only after the subject picked up a hammer was "dramatically different" from the officers in *Allen* who "sprint[ed] toward a parked car, scream[ed] at the suspect, and attempt[ed] to physically wrest a gun from his hands") (discussing *Allen*, 119 F.3d at 841). Rather, Cosper approached the house and engaged Baca only because she appeared in the doorway with knives after the bystanders exited. True, Cosper's tone and volume were loud and harsh. However, it does not appear from the video evidence that Cosper had time or space to talk to the bystanders (as the officers did in *Ceballos*) or could otherwise safely retreat to leave Baca alone without concern for the other occupants of the house. Cosper is entitled to qualified immunity because his conduct did not violate clearly established rights of which a reasonable officer would have known. *See White v. Pauly*, 580, U.S. 73, 78-79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017).

IV. Conclusion

Plaintiff fails to demonstrate that Cosper's conduct violated a constitutional right, and Cosper is therefore entitled to qualified immunity on that basis. Alternatively, even if Cosper did violate Baca's right to be free from excessive force, Plaintiff fails to show that the right was clearly established. Cosper is entitled to qualified immunity on the claim for excessive force and Count I is dismissed.

Plaintiff concedes that the due process claim may not proceed and Count II is dismissed.

THEREFORE,

IT IS ORDERED that Cosper's Motion for Partial Summary Judgment on the Basis of Qualified Immunity as to Counts I and II (Doc. 25) is **GRANTED** and Counts I and II are **DISMISSED**.

IT IS FURTHER ORDERED that the parties are directed to file a Joint Status Report within **10 days** of the entry of this Opinion, detailing whether the remaining motions (Docs. 48-50) are still at issue given the Court's decision on qualified immunity.

/s/ Robert C. Brack
ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE