No. 24-_____

In the Supreme Court of the United States

MARY DAWES, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF DECEDENT GENEVIVE A. DAWES; ALFREDO SAUCEDO; and VIRGILIO ROSALES,

Petitioners,

v.

CITY OF DALLAS; CHRISTOPHER HESS; and JASON KIMPEL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Shelby White
Counsel of Record
Thad D. Spalding
Durham, Pittard & Spalding, LLP
P.O. Box 224626
Dallas, TX 75222
(214) 946-8000
swhite@dpslawgroup.com
tspalding@dpslawgroup.com

Daryl K. Washington
Washington Law Firm, PC
325 N. St. Paul St., Suite 3950
Dallas, TX 75201
(214) 880-4883
dwashington@dwashlawfirm.com

November 18, 2024 *Counsel for Petitioners*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Petitioners, the plaintiffs in the underlying case, brought suit under 42 U.S.C. § 1983 against Officers Hess and Kimpel after the officers shot and killed Genevive Dawes during an incident where officers were responding to a report of a suspicious vehicle in an apartment complex parking lot. The summary judgment record includes numerous videos from officer body cameras showing that no one was in danger at the time Officers Hess and Kimpel decided to shoot. However, the district court and the Fifth Circuit considered the officers' subjective statements that they believed other officers were in danger from Dawes's vehicle, even though such belief was belied by the actual, objective video evidence. In considering that belief, the Fifth Circuit determined that the clearly established law did not prohibit the use of deadly force even when an officer *knows* that there is no danger.

The Question Presented Is:

In a qualified immunity determination on summary judgment, did the officer's testimony that he subjectively believed there was a danger justifying the use of deadly force negate the fact issue raised by the objective video evidence showing that there was no danger?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Mary Dawes, Individually and the Administrator of the Estate of Decedent Genevive A. Dawes
- Alfredo Saucedo
- Virgilio Rosales

Respondents and Defendants-Appellees below

- City of Dallas
- Christopher Hess
- Jason Kimpel

LIST OF PROCEEDINGS

U.S. Court of Appeals, Fifth Circuit

No. 22-10876

Mary Dawes, Individually and the Administrator of the Estate of Decedent Genevive A. Dawes; Alfredo Saucedo; Virgilio Rosales, *Plaintiffs-Appellants v.* City of Dallas; Christopher Hess; Jason Kimpel, *Defendants-Appellees.*

Original Opinion: April 3, 2024

Modified Opinion: May 20, 2024

Rehearing Denial: August 20, 2024

Judgment: August 29, 2024

U.S. District Court, Northern District of Texas

No. 3:17-CV-1424-X

Mary Dawes, Individually and the Administrator of the Estate of Decedent Genevive A. Dawes; Alfredo Saucedo; Virgilio Rosales, *Plaintiffs v.* City of Dallas; Christopher Hess; Jason Kimpel, *Defendants.*

Memorandum Opinion: August 11, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

JUDGMENT ISSUED AFTER OPINION DATE

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

INTRODUCTION

Mary Dawes, Individually and the Administrator of the Estate of Decedent Genevive A. Dawes; Alfredo Saucedo; *Virgilio Rosales v. City of Dallas*; Christopher Hess; Jason Kimpel ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit filed on May 20, 2024, is reported at *Dawes v. City of Dallas*, No. 22-10876, 2024 WL 2268529 (5th Cir. May 20, 2024). (App.1a-10a). This opinion modified and superseded the previous opinion filed on April 3, 2024, *Dawes v. City of Dallas*, No. 22-10876, 2024 WL 1434454 (5th Cir. Apr. 3, 2024). (App.24a-33a).

That court's order denying panel rehearing and rehearing en banc is not reported. (App.122a-123a).

The Northern District of Texas's opinion is reported at *Dawes v. City of Dallas*, No. 3:17-CV-1424-X, 2022 WL 3273833, at *1 (N.D. Tex. Aug. 11, 2022), *aff'd*, No. 22-10876, 2024 WL 1434454 (5th Cir. Apr. 3, 2024) and *aff'd*, No. 22-10876, 2024 WL 2268529 (5th Cir. May 20, 2024). (App.47a-86a).

JURISDICTION

The district court entered a final judgment in favor of the City of Dallas; Christopher Hess; Jason Kimpel on August 11, 2022. (App.47a). The plaintiffs timely appealed, and the Fifth Circuit issued its modified opinion on May 20, 2024 (App.1a) and entered judgment on August 29, 2024. (App.124a). Petitioners filed timely motions for rehearing and rehearing en banc, which were denied on August 20, 2024. (App.124a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3 because within 90 days of after the Fifth Circuit denied Petitioner's petition for rehearing, Petitioner filed this petition for a writ of certiorari.

Petitioner seeks the Court's review under Supreme Court Rule 10 because the Fifth Circuit decided important federal questions in a way that conflicts with the relevant decisions of this Court as well as other United States courts of appeal, and the Fifth Circuit decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV

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

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I. Factual Background

On January 18, 2017, Genevive Dawes and Virgilio Rosales were parked in the back corner of the parking lot of an apartment complex in Dallas, Texas. (App.48a). They parked in the very back corner and went to sleep, with a fence to the left and front of them and a white van immediately to the right. *Id*.

At approximately 5:00 a.m., six Dallas police officers, including Appellees Hess and Kimpel, were dispatched to the apartment complex in response to a report of a suspicious vehicle in the parking lot. *Id.* Zach Hopkins ("Hopkins") and Christopher Alisch ("Alisch") were the first to arrive, followed by Erin Evans ("Evans") and Peter Lickwar ("Lickwar"), and finally Hess and Kimpel. (App.3a-4a).

All six officers approached the vehicle where Dawes and Rosales were sleeping. They could not tell if the vehicle was occupied. *Id.* Condensation made the windows foggy and difficult to see inside. *Id.*

At that point, the officers were moving around the car, but Dawes and Rosales were not responding and the engine was not on. (App.49a, 98a).

Hess used the air horn and activated a short siren "yelp," but never activated the emergency lights or the car's public address system. (App.49a). The officers continued to shout commands, but still could not see clearly into the vehicle. (App.49a-50a).

Eventually, Dawes and Rosales woke up. Confused and disoriented, Dawes started the car, put it in

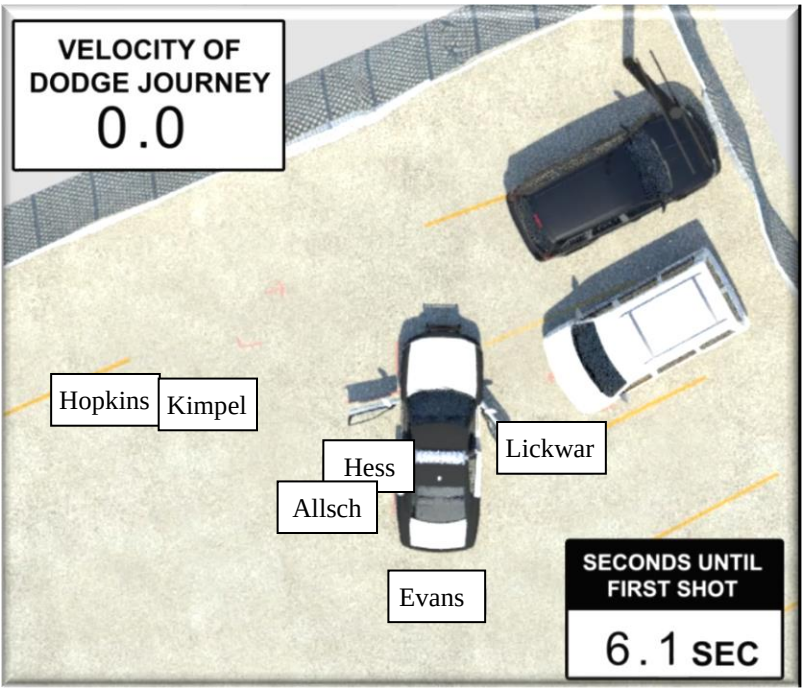
reverse, and attempted to back out at a slow speed. *Id.*

At that same time, Hess moved the squad car again, pulling it forward behind the Dodge Journey. (App.99a). As Dawes backed out at a slow speed, she turned at a slight angle but bumped into the squad car as Hess pulled closer. (App.50a). Upon bumping into the squad car, Dawes put her vehicle in drive and pulled forward slowly. She stopped when she hit the fence in front of the vehicle. *Id.* Before Dawes put the vehicle back in reverse a second time, everyone was positioned in the following locations:

Lickwar

Hopkins

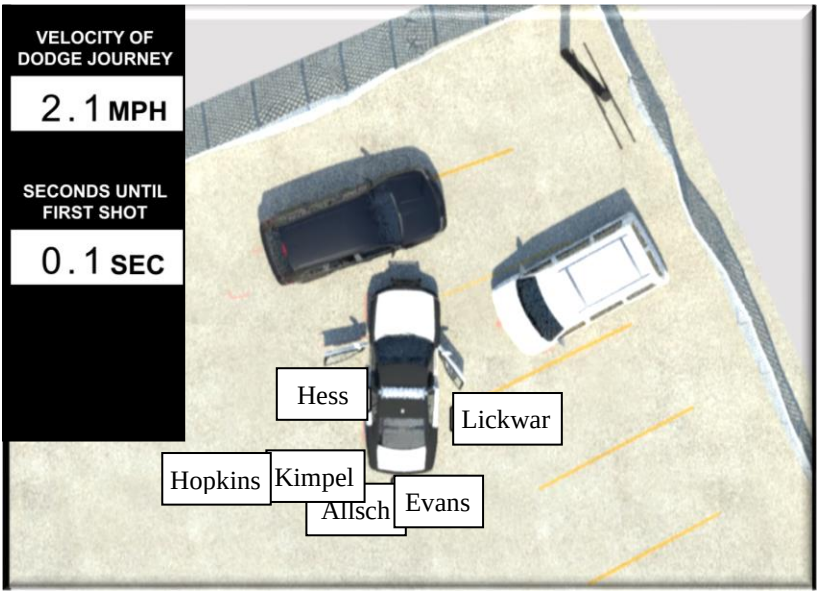
Hess



(App.51a-52a).

Dawes then straightened her vehicle to avoid Hess parked behind them, and attempted to back out of the spot again. (App.100a). Everyone—including the officers—agrees that Dawes backed out slowly. *Id.* Experts calculated the speed of the vehicle as at or below three miles per hour, less than the average walking speed. *Id.*

As Dawes begins to back out again, the objective evidence proves that all of the officers had moved to the right and were clear of her vehicle. One-tenth of a second before Officer Hess fired the first shot, the officers were positioned as follows:



(App.53a).

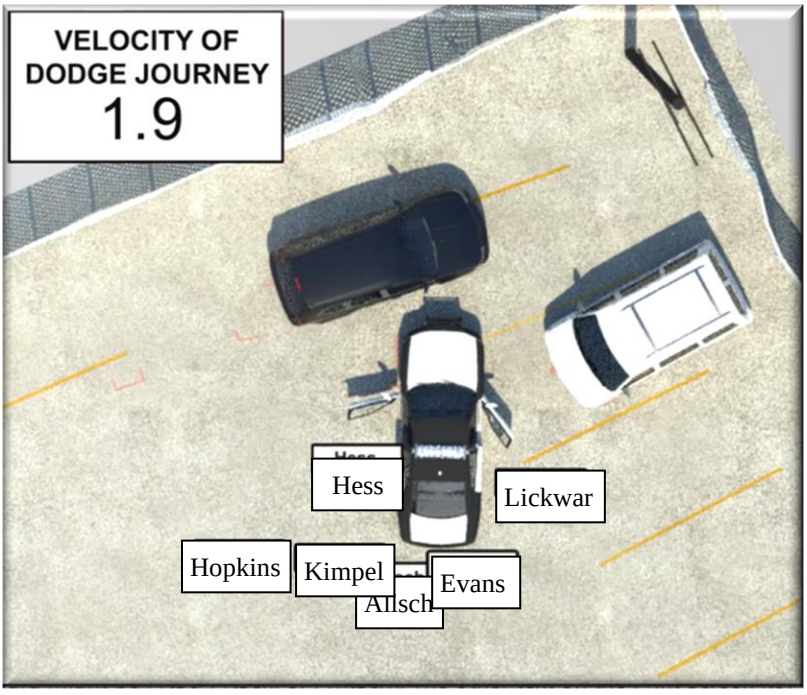
Even though the vehicle was moving slowly, Hess and Kimpel opened fire through the passenger window as the vehicle began to move. *Id.* Hess fired nine rounds and Kimpel fired one. (App.53a-54a). The vehicle momentarily stopped, and Officer Hess could then see inside the vehicle and observed that Dawes appeared to have been shot at least once. (App.54a). Her hands were no longer on the steering wheel, as she had one hand on her chest and one in her lap. *Id.* But then Dawes's vehicle started moving again, and Officer Hess fired three more shots before Dawes's vehicle came to rest. *Id.*

Objectively, no officer was in the path of Dawes's vehicle at the time the shots were fired. (App.53a). As shown here, the video evidence is clear that no officers were behind Dawes's vehicle.

Lickwar

Hopkins

Hess



(App.55a-56a). Rather, all are behind the squad car. Moreover, Hess and Kimpel both would have had a clear view that no one was in the vehicle's projected backward path. *Id.* Hess and Kimpel later testified that neither believed they were in danger when they discharged their weapons and neither actually saw anyone else behind the vehicle when they fired shots. (App.103a).

Tellingly, no other officers discharged their weapons. Hess fired a total of twelve shots into the vehicle *from the passenger side*, hitting Dawes four times. Kimpel fired once, striking the vehicle's passenger door frame. Dawes later died from her injuries. (App.101a).

The City investigated the conduct of both Hess and Kimpel. Hess was terminated by the City and indicted by a Dallas Grand Jury on the charge of aggravated assault by a public servant. (App.104a). Kimpel was suspended for 30 days. *Id.*

II. Proceedings in the District Court and Court of Appeals

Officers Hess and Kimpel filed motions for summary judgment on the basis of qualified immunity. The magistrate recommended that summary judgment be denied, finding the Officers violated Petitioners' constitutional rights and that the law was clearly established that Officers' conduct was unconstitutional. (App.87a). The district court rejected the magistrate's findings and conclusions and granted summary judgment, finding that Officers Hess and Kimpel were entitled to qualified immunity. (App.47a). Petitioners appealed the district court's judgment in favor of Hess and Kimpel, and on April 3, 2024, the Fifth

Circuit Court of Appeals affirmed that judgment, finding that the law was not clearly established that the Officers' use of deadly force was unconstitutional. (App.1a). *Dawes v. City of Dallas*, No. 22-10876, 2024 WL 1434454 (5th Cir. Apr. 3, 2024). Judge Dennis filed a concurrence in part, agreeing with the Panel's decision to remand Petitioners' claims against the City of Dallas, but dissenting with the Panel's holding that the law was not clearly established that the Officers' actions were unconstitutional. (App.11a). Petitioners' motion for rehearing and for en banc reconsideration were denied. (App.122a).

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Holding Improperly Elevates the Officers' Subjective Belief Over the Objective Truth of the Situation.

This case presents a new twist on a classic issue first delineated by this court in *Tolan v. Cotton*: in a summary judgment on qualified immunity, the facts must be taken in the light most favorable to the plaintiff. 572 U.S. 650, 660 (2014).

Within that framework, Petitioners were required to show that (1) the officers violated Dawes's and Rosales's constitutional right to be free from unreasonably excessive force; and (2) Dawes's and Rosales' right to be free from such force under these facts was both obvious and clearly established. Ultimately, the Fifth Circuit Court of Appeals held that there was no clearly established law. But that premise rests on faulty ground—in making that determination, the Court failed to take the facts in the light most favorable to the Petitioners and instead adopted the Officers' version of events.

The relevant inquiry in determining clearly established law is "the objective (albeit fact-specific) question whether a reasonable officer could have believed [his actions] to be lawful, in light of clearly established law and the information [he] possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

A. The Video Objectively Shows the Officers Were Not in Danger.

The new landscape of police technology, especially body cameras, has brought forth an issue that requires a recalibration of the qualified immunity standard. *See e.g., Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willet, J., concurring in part, dissenting in part) ("[Q]ualified immunity merits a refined procedural approach that more smartly—and fairly—serves its intended purpose."). In particular, can the district court, in considering a motion for summary judgment based on qualified immunity, accept an officer's "subjective" belief as to the danger posed when the objective video evidence can show that belief was not true or reasonable? This Court should hold that it cannot, if for no other reason than that the very nature of the dispute between a subjective belief and objective truth creates a fact issue for the jury precluding summary judgment.

Here, the Majority's opinion takes as true the Officers' claimed subjective belief that there was a danger posed by Dawes's vehicle. (App.7a). *Dawes*, 2024 WL 1434454, at *3. But considering *Petitioners'* objective evidence as true, as the summary judgment standard mandates, the Majority's construction of the facts was simply not correct. Regardless of where any officer had been standing, the video evidence proves that none were in the path of the vehicle when it began to reverse slowly at less than three miles per hour. This is objective, unassailable fact.

"The excessive force inquiry is confined to whether [anyone] was in danger *at the moment of the threat* that resulted in the [use of deadly force]." *Rockwell v. Brown,* 664 F.3d 985, 991 (5th Cir. 2011) (citation

omitted) (emphasis in original). It does not matter where the officers were prior to the shooting, as there is no evidence that there was any danger at the moment the shots were fired. In fact, the objective evidence proves the contrary.

B. Because the Officers' Subjective Belief of Danger Was Not Reasonable, There Is a Fact Issue Precluding Summary Judgment.

The Fifth Circuit incorrectly assumes the officers had at least some fear of danger that would have potentially justified the use of deadly force. This assumption is mistaken for two reasons.

First, this assumption violates the summary judgment standard by taking the facts in the light most favorable to the defendants, not the plaintiffs, and taking into account the Officers' alleged subjective belief rather than what an objectively reasonable officer would have known under the circumstances. *See e.g., Anderson v. Creighton,* 483 U.S. at 641 (an official's subjective beliefs about an action is irrelevant to the analysis); *Roque v. Harvel*, 993 F.3d 325, 335 (5th Cir. 2021) ("[A] court assessing the clearly established law cannot resolve disputed issues in favor of the moving party. And it must properly credit Plaintiffs' evidence").

Second, this assumption of a reasonable fear of danger is based on the location and actions of the Officers several seconds *before* the shots were fired, ignoring the fact that by the time Hess and Kimpel decided to shoot, the circumstances were much different, and objectively, no one was in danger from the reversing vehicle. *See, e.g., Tennessee v. Garner,* 471

U.S. 1, 11 (1985) ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003); *Reyes v. Bridgwater*, 362 F. App'x 403, 409 (5th Cir. 2010) ("The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others."). But what was happening in the time leading up to the moment of the shooting does not determine the analysis when, as here, there was no reasonable belief of danger at the time the deadly force was used.[1]

Rather, "[t]he excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force]." *Rockwell v. Brown,* 664 F.3d at 991 (citation omitted) (emphasis in original). The "threat" here was Dawes's decision to attempt to reverse the car a second time after pulling forward. At that point, there is no real debate about the risk posed by Dawes's vehicle. The videos definitively show that no one was behind Dawes's vehicle or otherwise in danger when she began to slowly back up immediately before Hess and Kimpel decided to shoot. All of the officers—including Hess and Kimpel—agreed with this objective truth. (App.103a).

This undisputed evidence then begs the question: can a district court take an officer's subjective belief as true for purposes of deciding summary judgment on

---

[1] Moreover, given how slowly Dawes's vehicle was moving, there is a fact issue as to whether her actions *ever* put anyone in danger, even before the shooting.

qualified immunity when the objective evidence does not support that belief?

As discussed above, this Court has consistently held that an officer's subjective belief is not even relevant to the issue. *Anderson,* 483 U.S. at 641; *see also Harlow v. Fitzgerald,* 457 U.S. 800, 815-20 (1982). Thus, the Fifth Circuit erred in considering that subjective belief as justification for what was objectively an unreasonable use of deadly force.

Hess and Kimpel both admitted that no one was in danger and no one was behind the vehicle when they chose to fire. (App.103a). Thus, if there was no *actual* danger, there is at least a fact issue on whether the subjective belief of danger was reasonable.

In other words, Hess and Kimpel did not have a reasonable, but mistaken, belief that there was a danger justifying the use of deadly force. *See e.g., Anderson*, 483 U.S. at 641 (speaking to qualified immunity protection for an officer's reasonable but mistaken belief). For whatever reason Hess and Kimpel decided to shoot, it was not because they had a subjective belief that anyone was in danger from Dawes.

Thus, when evaluating the clearly established law, while the Fifth Circuit makes much of distinguishing other cases on the basis of whether, for example, it was dark or light outside, or how many other officers were present, such distinctions are ultimately irrelevant. Clearly established law does not allow an officer to use deadly force when there is no threat. Full stop. Here, there was objectively no threat.

Admittedly, there is a danger that this Court and others have acknowledged in reviewing police action with the benefit of 20/20 hindsight. But here, the

actions of Hess and Kimpel can be contrasted with (1) the actual video evidence and (2) the actions of the other officers on the scene, all of whom did not believe deadly force was appropriate. Ultimately, this is a case that belongs before a jury to determine if Hess and Kimpel's claimed belief of danger was *actually* reasonable or if it is a belief that an objectively reasonable officer would hold under the same or similar circumstances.

To simply take Hess and Kimpel at their word here elevates the officer's alleged subjective belief of a threat over the objective fact that there was no threat. To do so subverts the summary judgment standard and creates an impossible burden in which an officers' subjective belief—no matter how it is controverted by objective evidence (video or otherwise)—carries the day. Under the Fifth Circuit's holding, the only way to prove a violation of clearly established law is for the officer to admit it. This is not the law, nor should it be the law.

CONCLUSION

This Court mandates that excessive force and immunity determinations be made based on objective, not subjective, evidence. Only in this way can a court avoid second-guessing the officers' conduct. The reasonable officer standard must measure whether the force used objectively reasonable based on the circumstances presented to the officer, "without regard to [] underlying intent or motivation." *Graham v. Connor,* 490 U.S. 386, 397 (1989). Here, the Fifth Circuit erred in

considering the Officers' subjective belief, and not what a reasonable officer would have believed under the same circumstances. Moreover, the objective evidence undercuts the reasonableness of the Officers' alleged belief.

The Court should grant certiorari, correct the Fifth Circuit's error by summary reversal, and enter judgment remanding this case in favor of Petitioners for trial on the merits.

Respectfully submitted,

Shelby White
Counsel of Record
Thad D. Spalding
Durham, Pittard & Spalding, LLP
P.O. Box 224626
Dallas, TX 75222
(214) 946-8000
swhite@dpslawgroup.com
tspalding@dpslawgroup.com

Daryl K. Washington
Washington Law Firm, PC
325 N. St. Paul St., Suite 3950
Dallas, TX 75201
(214) 880-4883
dwashington@dwashlawfirm.com

Counsel for Petitioners

November 18, 2024

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

JUDGMENT ISSUED AFTER OPINION DATE

MODIFIED OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (MAY 20, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY DAWES, Individually and the Administrator of THE ESTATE OF DECEDENT GENEVIVE A. DAWES; ALFREDO SAUCEDO; VIRGILIO ROSALES,

Plaintiffs—Appellants,

v.

CITY OF DALLAS; CHRISTOPHER HESS; JASON KIMPEL,

Defendants—Appellees.

No. 22-10876

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-1424

Before: DENNIS, ENGELHARDT, and OLDHAM, Circuit Judges.

PER CURIAM:*

---

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

On January 18, 2017, Dallas police shot and killed Genevieve Dawes. This federal civil rights suit followed. Defendants prevailed at summary judgment in the court below in a lengthy and careful decision. We agree with the district court that the officer defendants did not violate clearly established law, and so are entitled to qualified immunity. But we remand the claims against the City of Dallas for further consideration.

I

A

Qualified immunity cases present two questions. First, did the officers violate a constitutional right? And second, was the right at issue clearly established at the time of the officers' alleged violation? *See Morrow v. Meacham*, 917 F.3d 870, 874 (5th Cir. 2019). To reverse the district court in favor of plaintiffs, we must answer "yes" to both questions. We may approach them in either order, and we need not reach both if one proves dispositive. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

This case reaches us after summary judgment. We review a district court's grant of summary judgment de novo. *See Aguirre v. City of San Antonio*, 995 F.3d 395, 405 (5th Cir. 2021). Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "material" only when it could change the judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). And a dispute is "genuine" only when the evidence could

support a reasonable jury's decision to resolve that dispute against the movant. *See Westfall v. Luna*, 903 F.3d 534, 546 (5th Cir. 2018) (relying on *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)). Where, as here, facts are documented by video camera, we may take them "in the light depicted by the videotape." *See Scott v. Harris*, 550 U.S. 372, 381 (2007).

B

Because excessive force claims are "necessarily fact intensive," we narrate in some detail. *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009).

On the evening of January 17, 2017, Genevieve Dawes and her husband, Virgilio Rosales, parked a black Dodge Journey in the back corner of an apartment complex parking lot and went to sleep in the vehicle. A resident called police and reported a suspicious vehicle. Police ran the tag and were told the car was stolen.[1] Officers were dispatched to the scene around 5:00 AM on January 18.

Officers Christopher Alisch and Zachary Hopkins arrived at the complex first, shortly after 5:00 AM. They found the Journey vehicle boxed in on three of four sides—by fences to the front and left and by another car to the right. They approached with weap-

---

[1] Rosales would later say that Dawes purchased the car from someone else and did not know it was reported stolen, an assertion defendants do not contest. But our analysis centers on the perspective of responding officers at the time of the relevant confrontation. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (instructing that we consider the perspective of the "officer on the scene"). In other words, it does not matter whether the Journey was stolen or who stole it; it matters only that the officers were told the car was stolen.

ons drawn, calling to the driver and repeatedly demanding that the occupants "put your hands out the window." As they shouted, four more officers arrived, including Christopher Hess and Jason Kimpel.

The officers conferred, expressing uncertainty as to whether the Journey was still occupied. The windows of the car were fogged; one officer remarked that "you can't see shit." Around this time, Hess pulled a police cruiser closer to the Journey. He sounded the horn and turned on the cruiser's spotlight.

Hopkins tried to open the right rear door of the Journey and found it locked. Hopkins then moved around behind the Journey and stood near its rear left taillight. Meanwhile, another officer discerned and announced that the Journey was in fact occupied. During the first minute that elapsed after this discovery, officers shouted commands to the effect of "show your hands" eight times and twice identified themselves as Dallas police.

While the officers were shouting, Hopkins and Kimpel stood just behind the Journey. Hopkins decided to retreat and said, "C'mon Kimpel, back up a little bit." The officers retreated but remained in the path directly behind the Journey.

Eight seconds after Hopkins's statement, the Journey's engine ignited. Hess leapt into a police cruiser and said "watch out" as he pulled the cruiser behind the rear bumper of the otherwise boxed-in Journey.

The Journey reversed and collided with Hess's cruiser. The Journey then accelerated forward and hit the fence in front of it. This impact occurred at low speed, but the sound of the impact is audible on

Hopkins's body camera, and the jolt of the fence visibly shook the surrounding trees.

Kimpel and Hopkins still stood behind the Journey at the moment of the Journey's impact against the fence. Kimpel said "watch out watch out watch out," and moved laterally out of the Journey's path and towards other officers near the police cruiser. Kimpel passed in front of Hopkins (and could not see Hopkins) as Kimpel traveled.

Hess, after the Journey hit the cruiser, jumped out from the driver's seat and trained his weapon on the Journey. He and other officers shouted several more times for the Journey's occupants to show their hands.

After hitting the fence, the Journey immediately reversed. As it did so, Hess fired twelve rounds, all within a five second interval. Kimpel fired one round, simultaneous with Hess's sixth shot.

Kimpel later stated that he fired his weapon "in fear of Officer Hopkins' life." Hess said he fired to protect both Hopkins and Kimpel, who he believed were in the path of the reversing Journey.

Hopkins's bodycam reveals that, although he was not in Hess's or Kimpel's immediate field of view, he had moved out of the Journey's path several seconds before Hess first fired.

Four of Hess's bullets struck Dawes, who later died at the hospital. None struck Rosales. Kimpel's round struck neither person.

Rosales and Dawes's estate filed a 42 U.S.C. § 1983 excessive force suit against Hess, Kimpel, and the City of Dallas. *See Tennessee v. Garner*, 471 U.S. 1,

7 (1985) (an officer's use of deadly force is a "seizure" within the meaning of the Fourth Amendment). Hess and Kimpel prevailed on qualified immunity grounds at summary judgment. This appeal followed.

II

The Supreme Court's approach to qualified immunity reflects concern that, absent privilege for in-the-moment street decision-making, officers would be deterred from "the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quotation omitted). Accordingly, qualified immunity shields officers from civil suit unless they had "fair notice that [their] conduct was unlawful." *Nerio v. Evans*, 974 F.3d 571, 574 (5th Cir. 2020) (quotation omitted). That notice requirement means a § 1983 plaintiff must show that the defendant officer violated "clearly established law." *Id.*

To make that showing in the excessive force context, a plaintiff must "identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (quotation omitted).[2] That is not easy, because clearly established law cannot be defined "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Instead, a precedent must "squarely govern[]" the facts of the plaintiff's claim; facts that fall in the "hazy border between

---

[2] A plaintiff might also succeed without a governing precedent on extraordinarily egregious facts where the defendant officer faced a complete absence of exigency. *See Ducksworth v. Landrum*, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part) (discussing the current state of obvious-case doctrine).

excessive and acceptable force" result in qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) (quotation omitted).

How clear must fair warning be? "[F]or a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (quotation omitted). The law must be clear enough that, "in the blink of an eye, in the middle of a high-speed chase—*every* reasonable officer would know it immediately." *Morrow*, 917 F.3d at 876 (emphasis added); *see also Reichle v. Howards*, 566 U.S. 658, 664 (2012) (discussing the "every reasonable official" standard); *Harmon v. City of Arlington*, 16 F.4th 1159, 1165–66 (5th Cir. 2021) (same).

Plaintiffs here present several cases that they contend clearly established the law as applied to Hess and Kimpel's specific actions. In part, they rely on seminal Fourth Amendment cases like *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989). But neither of those cases involved a nighttime confrontation between officers and the occupants of a reportedly-stolen vehicle, much less did they involve suspects who backed their reportedly-stolen vehicle into a police cruiser after refusing numerous commands from police. The Supreme Court has repeatedly made clear that we may not rely on general rule statements in *Garner* and *Graham* to clearly establish the law in far-afield cases like ours. *See Mullenix v. Luna*, 577 U.S. 7, 12–13 (2015) (per curiam); *Kisela v. Hughes*, 584 U.S. 100, 105 (2018) (per curiam).

Plaintiffs also point to several circuit precedents. Even assuming our cases can clearly establish the

law, *see Boyd v. McNamara*, 74 F.4th, 662, 669–70 (5th Cir. 2023), the plaintiffs' citations are unavailing. One, *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012), concerned an alleged tasing and beating of a man not in a vehicle. *Id.* at 759–60. A second, *Edwards v. Oliver*, 31 F.4th 925 (5th Cir. 2022), post-dated the events of this case and so could not have given Hess and Kimpel fair notice of their legal obligations. *See Pearson*, 555 U.S. at 232 (the law must be clearly established "at the time of the defendant's alleged misconduct"). A third, *Baker v. Coburn*, 68 F.4th 240 (5th Cir. 2023), also post-dated the events of this case. In any event, *Baker* did not conclude that an official violated the Fourth Amendment, so it cannot clearly establish law. *See id.* at 251; *Wesby*, 583 U.S. at 64. Moreover, *Baker* involved several fact disputes, including whether shots were fired after a vehicle was, in daylight and in the plain view of every responding officer, traveling away from officers when they fired. *Id.* at 248−49. Here, the facts exhaustively documented by multiple cameras cannot be disputed. Shots were fired in the dead of night as a vehicle traveled towards a location an officer had stood in seconds before. *Baker* therefore cannot "squarely govern[]" today's facts. *Brosseau*, 543 U.S. at 201.

Plaintiffs rely most heavily on *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2019). Like *Baker*, *Lytle* did not find a constitutional violation, and so it did not clearly establish law. *Wesby*, 583 U.S. at 64; *see also Nerio*, 974 F.3d at 575. And *Lytle* featured significant fact disputes that distinguish it from this case. In *Lytle*, the panel resolved those disputes in favor of the plaintiff for the purposes of evaluating summary judgment. *Lytle*, 560 F.3d at 409 ("We

therefore adopt Lytle's version of the facts."). What were *Lytle*'s assumed facts? In broad daylight, with no other officers present, and without first giving a warning, an officer fired at a vehicle "three to four houses down the block." *Id*. This case could hardly be more different because officers gave several warnings, shot their weapons in close quarters, in the predawn darkness, and with officers in the harm's way just seconds before the shots were fired.

For its part, the dissenting opinion correctly recognizes that "*Lytle* itself cannot form the clearly established law in this case." *Post*, at 6 (Dennis, J., dissenting). The dissenting opinion instead points to two out-of-circuit precedents to clearly establish the relevant law. *Post*, at 7–8 (Dennis, J., dissenting). This contention is foreclosed by our precedent, however. In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002), we recognized that six circuits sanctioning "some version" of the question at issue was insufficient to give officers "fair warning." *Id.* at 330; *see also Vincent v. City of Sulphur*, 805 F.3d 543, 549 (5th Cir. 2015) ("[T]wo out-of-circuit cases and a state-court intermediate appellate decision hardly constitute persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity in this circuit."); *id.* at 550 ("[T]wo cases from other circuits and one from a stayed intermediate court do not, generally speaking, constitute persuasive authority defining the asserted right at the high degree of particularity that is necessary for a rule to be clearly established despite a lack of controlling authority."); *Morrow*, 917 F.3d at 879-80 (holding that two Sixth Circuit cases could not establish a robust consensus and relying in part on *McClendon*).

III

The district court's grant of summary judgment to the City of Dallas rested on its alternative holding that, if the law was clearly established, the officers nevertheless committed no constitutional violation. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (requiring a constitutional rights violation for § 1983 claims against a municipality). Because we do not reach the district court's alternative holding, we remand the claims against Dallas to the district court for further consideration. On remand, the district court may reiterate its no rights-violation finding, may reconsider that finding, or may consider any other aspect of the plaintiffs' claims against the City of Dallas.

* * *

The grant of summary judgment to the defendant officers is AFFIRMED. The grant of summary judgment to the City of Dallas is REMANDED.

JUDGE DENNIS, CONCURRING IN PART AND DISSENTING IN PART FROM MODIFIED OPINION

JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part:

While I concur in the majority opinion's remand of plaintiffs' claims against the City of Dallas, I dissent from the majority's decision to affirm the district court's entry of summary judgment in favor of the two individual officers. Plaintiffs' Fourth Amendment claims against Hess and Kimpel are based on the officers' use of deadly force against Dawes and Rosales in the absence of any danger to themselves or others. The majority's approval of the district court's misguided judgment extending qualified immunity to Hess and Kimpel is not only incorrect as a matter of law, but also serves to condone the inexcusable incompetence displayed by these two officers—both of whom were suspended or terminated from their positions as police officers for having violated their department's use-of-force policy. I respectfully dissent.

* * *

Taking the evidence in the light most favorable to them, plaintiffs have met their burden of demonstrating that: (1) the officers violated Dawes's and Rosales's constitutional right to be free from unreasonably excessive force; and (2) Dawes's and Rosales' right to be free from such force under these facts was both obvious and clearly established. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019); *Scott v. Harris*, 550 U.S. 372, 378 (2007) ("[C]ourts are required to view the facts and draw reasonable inferences in

the light most favorable" to the plaintiff when assessing assertion of qualified immunity at the summary judgment stage) (internal citation omitted). Here, we have the benefit of video footage capturing the incident, which makes clear that the "videotape quite clearly contradicts" the officers' dangerous belief that deadly force—indeed thirteen shots fired—was necessary to stop a boxed-in vehicle from reversing at a crawling speed of under three miles per hour when the officers could have, and in fact did, use a squad car to block Dawes's vehicle—making it impossible for her to flee. *Scott*, 550 U.S. at 378.

First, plaintiffs presented summary judgment evidence that could lead a reasonable jury to conclude that the officers violated Dawes's and Rosales's constitutional rights. To prevail on their Fourth Amendment excessive force claims, plaintiffs must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009). It is undisputed that the officers' use of deadly force caused injuries to Dawes and Rosales. The central inquiry is, accordingly, whether the officers exercised force that was unreasonably excessive. The Supreme Court has instructed courts to use the following factors to determine whether an officer used unreasonably excessive force: (1) "the severity of the crime at issue[;]" (2) "whether the suspect poses an immediate threat to the safety of the officers or others[;]" and (3) whether the suspect was "actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The reasonableness of the officers' use of force is

assessed under the "totality of the circumstances." *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

Here, the evidence, when construed in the light most favorable to plaintiffs, may lead a reasonable jury to conclude that the officers' use of force was excessive and unreasonable under the totality of the circumstances. While the severity of plaintiffs' suspected crime of stealing a vehicle—a felony under Texas law—may weigh in favor of the officers, the other two *Graham* factors weigh heavily against a finding that the officers' use of force was reasonable. The video footage, testimony, and expert analysis at the very least demonstrate the existence of genuine disputes of material facts that Dawes posed no immediate danger to officers and was not actively resisting or attempting to flee at the time she was killed. *See, e.g.*, *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004) ("It is objectively unreasonable to use deadly force 'unless it is necessary to prevent [a suspect's] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'") (quoting *Garner*, 471 U.S. at 3); *Lytle v. Bexar Cnty.*, 560 F.3d 404, 417-18 (5th Cir. 2009) (it is unreasonable to use deadly force against felony suspect who is fleeing by car if suspect does not pose immediate, substantial threat of harm to officer or others).

For example, far from "refusing" to follow the officers' commands, as the majority finds when it impermissibly puts on its "juror" hat, plaintiffs have presented evidence that they did not hear the officers' commands since they were asleep—it was around three in the morning and the officers only made their

commands at a distance. Even if the officers subjectively believed Dawes to be attempting to flee, the video evidence reveals that she was boxed in and would not have been able to escape—especially at the slow speed at which her vehicle was moving. Indeed, plaintiffs presented expert testimony—supported by the video footage—that Dawes was driving at a speed of under three miles per hour when the officers supposedly believed her to be fleeing. Hess testified that Dawes's vehicle was "slowly revving" and that he did not perceive her to be attempting to reverse at a high level of speed. Even if the officers believed Dawes to be making a slow, futile attempt to flee by reversing slowly while boxed-in by other cars, our caselaw is clear that it is unjustified to use deadly force against a fleeing felon who poses no safety risk. *Garner*, 471 U.S. at 11 (use of deadly force to prevent the escape of a felony suspect who poses no immediate threat to the officer or threat to others is unjustified).

The slow speed of Dawes's vehicle also belies the officers' assertion that they believed she posed any safety risk—much less the type of "substantial and immediate" threat required to justify use of deadly force. *Scott*, 550 U.S. at 386 (use of deadly force justified where suspect poses "a substantial and immediate risk of serious physical injury to others"); *see also Garner*, 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer . . . the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). It is undisputed that no one was in the path of Dawes's slow-moving vehicle at the time the officers killed Dawes and injured Rosales; indeed, both officers testified that when they used deadly force they did not observe anyone in danger

and did not tell anyone to get out of the way. In his deposition testimony, Hess agreed that Dawes's vehicle was moving at less than three miles per hour when he fired his first round of shots, and that any officer in the path of Dawes's vehicle could have moved out of the way by the time he fired his second round of shots. *Reyes v. Bridgwater*, 362 F. App'x 403, 409 (5th Cir. 2010) ("The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others.").

Even if the officers incorrectly believed other officers to be endangered, their subjective beliefs are wholly irrelevant to the Fourth Amendment inquiry into whether a "reasonable officer on the scene" would have believed that a boxed-in vehicle moving at less than three miles per hour presented an imminent, significant danger to other officers. *Graham*, 490 U.S. at 396–99. Moreover, the City of Dallas found Kimpel's claim that he believed other officers to be in danger untruthful and suspended him for thirty days—calling into question the reliability of the officers' after-the-fact assertion that they shot into the Dawes vehicle thirteen times to protect other officers from a car moving at slow, near walking speed.[1] While

[1] While the City's finding that the officers violated the police department's use-of-force policy after Dawes's death cannot alone establish a constitutional violation, the City's finding that one of the officers lied in asserting that he believed other officers to be in danger at the time he fired eleven shots at Dawes is certainly relevant to the credibility of the officers' supposed motives for using deadly force. Moreover, the City's finding that the officers acted unreasonably in using deadly force supports plaintiffs' contention that the officers' use of force was not reasonable. *Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002) (considering an Alabama Department of Corrections regulation in determining

the court "must 'be cautious about second-guessing [the] police officer's assessment' of the threat level[,]" we certainly should not be in the business of accepting implausible ad hoc explanations for an officer's objectively unreasonable use of deadly force. *Harmon v. City of Arlington*, 16 F.4th 1159, 1163 (5th Cir. 2021) (quoting *Ryburn v. Huff*, 565 U.S. 469, 477 (2012)). A jury—not judges—should hear the evidence and weigh the credibility of Kimpel's testimony. Here, the video footage, expert testimony, and the officers' admissions could lead a reasonable jury to conclude that the officers violated Dawes's and Rosales's Fourth Amendment rights by using deadly force in the absence of any objective threat to officer safety.

Second, "a body of relevant case law" gave the two officers notice that their unwarranted use of deadly force violated the Constitution. *Joseph v. Bartlett*, 981 F.3d 319, 330 (5th Cir. 2020) (internal citation omitted). While the majority is certainly correct that "[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," the "focus" of the qualified immunity analysis is

---

that conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known") (internal citation omitted); *Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1133 (5th Cir. 2014) ("[T]he fact that [the officer] allegedly failed to follow departmental policy makes his actions more questionable, because it is questionable whether it is objectively reasonable to violate such a departmental rule."); *see also Irish v. Fowler*, 979 F.3d 65, 77 (1st Cir. 2020) ("[W]hen an officer disregards police procedure, it bolsters the plaintiff's argument . . . that a reasonable officer in the officer's circumstances would have believed that his conduct violated the Constitution.") (cleaned up).

whether the officer had "fair notice" that his conduct was unlawful. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotation marks omitted) (internal citation omitted); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("focus" of qualified immunity analysis is "whether the officer had fair notice that her conduct was unlawful"); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc) ("The *sine qua non* of the clearly-established inquiry is 'fair warning.'") (citing *Hope*, 536 U.S. at 741). "The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017) (quoting *Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013)).

Here, clearly established law gave the officers ample warning that shooting a felony suspect in the absence of any danger to officers or others violates the Fourth Amendment. As our court noted in *Lytle*, "[i]t has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to [abruptly] use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle*, 560 F.3d at 417-18 (first citing *Kirby v. Duva*, 530 F.3d 475, 483–84 (6th Cir. 2008); and then citing *Garner*, 471 U.S. at 11-12); *see also Garner*, 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others . . . the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). While *Lytle* itself cannot form the clearly established law in this case, its rule state-

ment nonetheless reflects "a body of relevant case law"[2] clearly establishing that the use of deadly force against a suspect fleeing in a motor vehicle who poses no immediate, serious threat to others violates the Fourth Amendment. *Garner*, 471 U.S. 1, 8-9; *Kirby*, 530 F.3d at 483–84; *Vaughan v. Cox*, 343 F.3d 1323, 1333 (11th Cir. 2003); *see also Cooper v. Brown*, 844 F.3d 517, 525 n.8 (5th Cir. 2016) (where a case "does not constitute clearly established law for purposes of QI," it may still "aptly illustrate[] the established right").

In *Kirby v. Duva*, for example, the Sixth Circuit found the decedent's Fourth Amendment rights clearly established where officers fired thirteen rounds at a suspect that they said they believed to be fleeing despite the slow speed at which he had been reversing his car at the time he was killed by police. 530 F.3d at 483–84. Despite the significant differences in the narratives provided by plaintiffs and defendants, on summary judgment, the Sixth Circuit properly credited

---

[2] There is no bar on published circuit precedent constituting clearly established law. *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) ("assuming" without deciding "that controlling Circuit precedent clearly establishes law for purposes of § 1983"); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (plaintiffs must identify "controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely" or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful"). Moreover, the Fifth Circuit en banc court has said that clearly established law may be based on "controlling authority—or a 'robust consensus of persuasive authority.'" *Morgan*, 659 F.3d at 371–72 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011)); *see also In re Hidalgo Cnty. Emergency Serv. Found.*, 962 F.3d 838, 841 (5th Cir. 2020) ("[A] panel of this court is bound by circuit precedent.").

plaintiffs' version of events to find that it was clear enough to the officers that their use of deadly force during a roadside execution of a search warrant was unconstitutional where (1) it was unclear the suspect heard the officers' orders to exit the car; (2) the suspect's vehicle was sandwiched on the side of the road and reversed in an apparent attempt to pull out of the parallel parking position; (3) the vehicle was "not going very fast"(seven to eight miles per hour) at the time it allegedly reversed towards an officer; (4) and "none of the officers was ever in harm's way." *Id.* at 479, 484. Here, similarly, it was unclear that Dawes and Rosales heard the officers' commands delivered at a distance in the middle of the night, Dawes's vehicle was sandwiched between a patrol car, other vehicles, and a fence such that she could not flee, the vehicle was moving at under three miles per hour at the time the officers shot at her, and no officer was ever in harm's way.

In *Vaughan v. Cox*, similarly, the Eleventh Circuit found that it was objectively unreasonable for an officer to use deadly force to apprehend the occupant of an allegedly stolen vehicle fleeing at 85 miles per hour on a highway with a speed limit of 70 miles per hour. 343 F.3d at 1326, 1330. In "[a]pplying *Garner* in a common-sense way" to the facts of the case, the Eleventh Circuit determined that a reasonable officer could have known that the use of deadly force was unreasonable where: (1) the suspect did not present a "an immediate threat" to officers or bystanders by driving more than ten miles over the speed limit; (2) the suspect had made no menacing gestures at the officers or others besides accelerating; (3) a prior collision between the suspect's car and the officer's vehicle was

accidental; and (4) the suspect's vehicle was "easily identifiable and could have been tracked" and apprehended without the use of deadly force. *Id.* at 1330-31, 1333. Here, similarly, Dawes did not pose any "immediate" threat to officers, had made no "aggressive moves" besides attempting to back out of the parking spot at a snail's pace, accidentally bumped into the squad car positioned at an angle close behind her vehicle, and could have easily been apprehended without the use of deadly force since her vehicle was boxed-in by the squad car.

In light of *Kirby* and *Vaughan*'s guidance in interpreting *Garner*, it was clearly established on the date of Dawes's death that "police officers may not fire at non-dangerous fleeing felons" where, as here, there are genuine disputes of material fact as to whether the suspect heard the officers' prior commands, the at-issue vehicle was boxed-in such that the suspect could not flee, the vehicle was not moving fast enough to objectively present any immediate danger to officers, Dawes made no menacing gestures at the officers besides accelerating her car to a speed of approximately three miles per hour, and any prior collision between the suspect's vehicle and a police vehicle was accidental. *Garner*, 471 U.S. at 11 (in the absence of an "immediate" threat to officer or bystander safety the "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable"); *Kirby*, 530 F.3d at 483 ("*Garner* made plain that deadly force cannot be used against an escaping suspect who does not pose an immediate danger to anyone."); *Vaughan*, 343 F.3d at 1330 ("[A] reasonable jury could find that [the suspects'] escape did not present an immediate threat

of serious harm to [the police officer] or others on the road."); *Wilson*, 526 U.S. at 617 (explaining that clearly established law may consist of "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful").

Moreover, the officers' grotesque, unwarranted killing of Dawes presents such an egregious case of unreasonable use of deadly force so as to excuse plaintiffs' need to identify prior case law. In "an obvious case" like this one,[3] the *Graham* excessive-force factors themselves can clearly establish the right at issue without a body of relevant case law. *Cooper*, 844 F.3d at 524 ("*Graham* excessive-force factors themselves can clearly establish the answer, even without a body of relevant case law.") (internal citation omitted); *see also White v. Pauly*, 580 U.S. 73, 79 (2017) ("Of course,

---

[3] The majority opinion posits the obvious case exception as requiring both "extraordinarily egregious facts" and "a complete absence of exigency." Maj. Op. at 6 n.2 (citing *Ducksworth v. Landrum*, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part)). This is incorrect. In *Taylor v. Riojas*, the Supreme Court certainly noted the absence of "necessity or exigency" in determining that "any reasonable officer should have realized" that the conditions of confinement in that case were unconstitutional, yet nowhere did it purport to make a lack of necessity or exigency a requirement under the obvious case doctrine. 592 U.S. 7, 9 (2020). In any event, there was no exigency here justifying the use of deadly force against Dawes given that there was no "imminent risk of death or serious injury" or that "a suspect [would] escape." *Kentucky v. King*, 563 U.S. 452, 473 (2011) (Ginsburg, J., dissenting) ("Circumstances qualify as 'exigent' when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape . . . the exception should govern only in genuine emergency situations.") (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

general statements of the law are not inherently incapable of giving fair and clear warning to officers, but in the light of pre-existing law the unlawfulness must be apparent.") (internal citation omitted). As discussed above, a jury could conclude that no reasonable officer could have believed Dawes was resisting arrest or posed a safety threat by reversing her car at under three miles per hours. Therefore, viewing the facts in the light most favorable to Dawes, the defendant officers acted objectively unreasonable in light of clearly established law in shooting at an occupied vehicle thirteen times in the absence of any threat to officer safety.

In light of the use of deadly force deemed unreasonable by the Supreme Court in *Garner* and elaborated on by circuit courts, the defendant officers had "fair notice" that using deadly force against Dawes where no reasonable officer could conclude that she posed any immediate safety threat to anyone would violate her Fourth Amendment right to be free from unreasonably excessive force. *Garner*, 471 U.S. 1, 8-9; *Kirby*, 530 F.3d at 483–84; *Vaughan*, 343 F.3d at 1333; *see also Brosseau*, 543 U.S. at 198 ("focus" of qualified immunity analysis is "whether the officer had fair notice that her conduct was unlawful"); *Hope*, 536 U.S. at 731 ("Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful."). In light of clearly established law, as announced in *Garner* and elucidated in *Kirby* and *Vaughn*, it is "beyond debate" that the officers' use of deadly force against Dawes was unconstitutional. *Ashcroft*, 563 U.S. at 741. Moreover, the unconstitutionality of the officers' use of deadly force against Dawes was plainly obvious under

the factors laid out in *Graham*. 490 U.S. at 396. The panel should reverse and remand the district court's grant of qualified immunity in favor of the defendant officers. I respectfully, but emphatically, dissent.

ORIGINAL OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (APRIL 3, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY DAWES, *Individually and the Administrator of the Estate of* DECEDENT GENEVIVE A. DAWES; ALFREDO SAUCEDO; VIRGILIO ROSALES,

Plaintiffs—Appellants,

v.

CITY OF DALLAS;
CHRISTOPHER HESS; JASON KIMPEL,,

Defendants—Appellees.

No. 22-10876

United States District Court for the Northern District of Texas USDC No. 3:17-CV-1424

DENNIS, ENGELHARDT, and
OLDHAM, Circuit Judges.

PER CURIAM:*

On January 18, 2017, Dallas police shot and killed Genevieve Dawes. This federal civil rights suit followed. Defendants prevailed at summary judgment in the court below in a lengthy and careful decision.

---

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

We agree with the district court that the officer defendants did not violate clearly established law, and so are entitled to qualified immunity. But we remand the claims against the City of Dallas for further consideration.

I.

A.

Qualified immunity cases present two questions. First, did the officers violate a constitutional right? And second, was the right at issue clearly established at the time of the officers' alleged violation? *See Morrow v. Meacham*, 917 F.3d 870, 874 (5th Cir. 2019). To reverse the district court in favor of plaintiffs, we must answer "yes" to both questions. We may approach them in either order, and we need not reach both if one proves dispositive. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

This case reaches us after summary judgment. We review a district court's grant of summary judgment de novo. *See Aguirre v. City of San Antonio*, 995 F.3d 395, 405 (5th Cir. 2021). Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. Civ. P. 56(a). A dispute is "material" only when it could change the judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). And a dispute is "genuine" only when the evidence could support a reasonable jury's decision to resolve that dispute against the movant. *See Westfall v. Luna*, 903 F.3d 534, 546 (5th Cir. 2018) (relying on *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)). Where, as here, facts are documented

by video camera, we may take them "in the light depicted by the videotape." *See Scott v. Harris*, 550 U.S. 372, 381 (2007).

B.

Because excessive force claims are "necessarily fact intensive," we narrate in some detail. *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009). On the evening of January 17, 2017, Genevieve Dawes and her husband, Virgilio Rosales, parked a black Dodge Journey in the back corner of an apartment complex parking lot and went to sleep in the vehicle. A resident called police and reported a suspicious vehicle. Police ran the tag and were told the car was stolen.[1] Officers were dispatched to the scene around 5:00 AM on January 18.

Officers Christopher Alisch and Zachary Hopkins arrived at the complex first, shortly after 5:00 AM. They found the Journey vehicle boxed in on three of four sides—by fences to the front and left and by another car to the right. They approached with weapons drawn, calling to the driver and repeatedly demanding that the occupants "put your hands out the window." As they shouted, four more officers arrived, including Christopher Hess and Jason Kimpel.

---

[1] Rosales would later say that Dawes purchased the car from someone else and did not know it was reported stolen, an assertion defendants do not contest. But our analysis centers on the perspective of responding officers at the time of the relevant confrontation. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (instructing that we consider the perspective of the "officer on the scene"). In other words, it does not matter whether the Journey was stolen or who stole it; it matters only that the officers were told the car was stolen.

The officers conferred, expressing uncertainty as to whether the Journey was still occupied. The windows of the car were fogged; one officer remarked that "you can't see shit." Around this time, Hess pulled a police cruiser closer to the Journey. He sounded the horn and turned on the cruiser's spotlight.

Hopkins tried to open the right rear door of the Journey and found it locked. Hopkins then moved around behind the Journey and stood near its rear left taillight. Meanwhile, another officer discerned and announced that the Journey was in fact occupied. During the first minute that elapsed after this discovery, officers shouted commands to the effect of "show your hands" eight times and twice identified themselves as Dallas police.

While the officers were shouting, Hopkins and Kimpel stood just behind the Journey. Hopkins decided to retreat and said, "C'mon Kimpel, back up a little bit." The officers retreated but remained in the path directly behind the Journey.

Eight seconds after Hopkins's statement, the Journey's engine ignited. Hess leapt into a police cruiser and said "watch out" as he pulled the cruiser behind the rear bumper of the otherwise boxed-in Journey.

The Journey reversed and collided with Hess's cruiser. The Journey then accelerated forward and hit the fence in front of it. This impact occurred at low speed, but the sound of the impact is audible on Hopkins's body camera, and the jolt of the fence visibly shook the surrounding trees.

Kimpel and Hopkins still stood behind the Journey at the moment of the Journey's impact against the

fence. Kimpel said "watch out watch out watch out," and moved laterally out of the Journey's path and towards other officers near the police cruiser. Kimpel passed in front of Hopkins (and could not see Hopkins) as Kimpel traveled.

Hess, after the Journey hit the cruiser, jumped out from the driver's seat and trained his weapon on the Journey. He and other officers shouted several more times for the Journey's occupants to show their hands.

After hitting the fence, the Journey immediately reversed. As it did so, Hess fired twelve rounds, all within a five second interval. Kimpel fired one round, simultaneous with Hess's sixth shot.

Kimpel later stated that he fired his weapon "in fear of Officer Hopkins' life." Hess said he fired to protect both Hopkins and Kimpel, who he believed were in the path of the reversing Journey. Hopkins's bodycam reveals that, although he was not in Hess's or Kimpel's immediate field of view, he had moved out of the Journey's path several seconds before Hess first fired.

Four of Hess's bullets struck Dawes, who later died at the hospital. None struck Rosales. Kimpel's round struck neither person.

Rosales and Dawes's estate filed a 42 U.S.C. § 1983 excessive force suit against Hess, Kimpel, and the City of Dallas. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (an officer's use of deadly force is a "seizure" within the meaning of the Fourth Amendment). Hess and Kimpel prevailed on qualified immunity grounds at summary judgment. This appeal followed.

II.

The Supreme Court's approach to qualified immunity reflects concern that, absent privilege for in-the-moment street decision-making, officers would be deterred from "the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quotation omitted). Accordingly, qualified immunity shields officers from civil suit unless they had "fair notice that [their] conduct was unlawful." *Nerio v. Evans*, 974 F.3d 571, 574 (5th Cir. 2020) (quotation omitted). That notice requirement means a § 1983 plaintiff must show that the defendant officer violated "clearly established law." *Id.*

To make that showing in the excessive force context, a plaintiff must "identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (quotation omitted).[2] That is not easy, because clearly established law cannot be defined "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Instead, a precedent must "squarely govern[]" the facts of the plaintiff's claim; facts that fall in the "hazy border between excessive and acceptable force" result in qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) (quotation omitted).

---

[2] A plaintiff might also succeed without a governing precedent on extraordinarily egregious facts where the defendant officer faced a complete absence of exigency. *See Ducksworth v. Landrum*, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part) (discussing the current state of obvious-case doctrine).

How clear must fair warning be? "[F]or a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (quotation omitted). The law must be clear enough that, "in the blink of an eye, in the middle of a high-speed chase—*every* reasonable officer would know it immediately." *Morrow*, 917 F.3d at 876 (emphasis added); *see also Reichle v. Howards*, 566 U.S. 658, 664 (2012) (discussing the "every reasonable official" standard); *Harmon v. City of Arlington*, 16 F.4th 1159, 1165–66 (5th Cir. 2021) (same).

Plaintiffs here present several cases that they contend clearly established the law as applied to Hess and Kimpel's specific actions. In part, they rely on seminal Fourth Amendment cases like *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989). But neither of those cases involved a nighttime confrontation between officers and the occupants of a reportedly-stolen vehicle, much less did they involve suspects who backed their reportedly-stolen vehicle into a police cruiser after refusing numerous commands from police. The Supreme Court has repeatedly made clear that we may not rely on general rule statements in *Garner* and *Graham* to clearly establish the law in far-afield cases like ours. *See Mullenix v. Luna*, 577 U.S. 7, 12–13 (2015) (per curiam); *Kisela v. Hughes*, 584 U.S. 100, 105 (2018) (per curiam).

Plaintiffs also point to several circuit precedents. Even assuming our cases can clearly establish the law, *see Boyd v. McNamara*, 74 F.4th, 662, 669–70 (5th Cir. 2023), the plaintiffs' citations are unavailing. One, *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012), con-

cerned an alleged tasing and beating of a man not in a vehicle. *Id*. at 759–60. A second, *Edwards v. Oliver*, 31 F.4th 925 (5th Cir. 2022), post-dated the events of this case and so could not have given Hess and Kimpel fair notice of their legal obligations. *See Pearson*, 555 U.S. at 232 (the law must be clearly established "at the time of the defendant's alleged misconduct"). A third, *Baker v. Coburn*, 68 F.4th 240 (5th Cir. 2023), also post-dated the events of this case. In any event, *Baker* did not conclude that an official violated the Fourth Amendment, so it cannot clearly establish law. *See id.* at 251; *Wesby*, 583 U.S. at 64. Moreover, *Baker* involved several fact disputes, including whether shots were fired after a vehicle was, in daylight and in the plain view of every responding officer, traveling away from officers when they fired. *Id.* at 248–49. Here, the facts exhaustively documented by multiple cameras cannot be disputed. Shots were fired in the dead of night as a vehicle traveled towards a location an officer had stood in seconds before. *Baker* therefore cannot "squarely govern[]" today's facts. *Brosseau*, 543 U.S. at 201.

Plaintiffs rely most heavily on *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2019). Like *Baker*, *Lytle* did not find a constitutional violation, and so it did not clearly establish law. *Wesby*, 583 U.S. at 64; *see also Nerio*, 974 F.3d at 575. And *Lytle* featured significant fact disputes that distinguish it from this case. In *Lytle*, the panel resolved those disputes in favor of the plaintiff for the purposes of evaluating summary judgment. *Lytle*, 560 F.3d at 409 ("We therefore adopt Lytle's version of the facts."). What were *Lytle*'s assumed facts? In broad daylight, with no other officers present, and without first giving a warning,

an officer fired at a vehicle "three to four houses down the block." *Id*. This case could hardly be more different because officers gave several warnings, shot their weapons in close quarters, in the predawn darkness, and with officers in the harm's way just seconds before the shots were fired.

For its part, the dissenting opinion correctly recognizes that "*Lytle* itself cannot form the clearly established law in this case." *Post*, at 6 (Dennis, J., dissenting). The dissenting opinion instead points to two out-of-circuit precedents to clearly establish the relevant law. *Post*, at 7–8 (Dennis, J., dissenting). This contention is foreclosed by our precedent, however. In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002), we recognized that six circuits sanctioning "some version" of the question at issue was insufficient to give officers "fair warning." *Id.* at 330; *see also Vincent v. City of Sulphur*, 805 F.3d 543, 549 (5th Cir. 2015) ("[T]wo out-of-circuit cases and a state-court intermediate appellate decision hardly constitute persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity in this circuit."); *id.* at 550 ("[T]wo cases from other circuits and one from a stayed intermediate court do not, generally speaking, constitute persuasive authority defining the asserted right at the high degree of particularity that is necessary for a rule to be clearly established despite a lack of controlling authority."); *Morrow*, 917 F.3d at 879-80 (holding that two Sixth Circuit cases could not establish a robust consensus and relying in part on *McClendon*).

III.

The district court's grant of summary judgment to the City of Dallas rested on its alternative holding that, if the law was clearly established, the officers nevertheless committed no constitutional violation. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (requiring a constitutional rights violation for § 1983 claims against a municipality). Because we do not reach the district court's alternative holding, we remand the claims against Dallas to the district court for further consideration. On remand, the district court may reiterate its no rights-violation finding, may reconsider that finding, or may consider any other aspect of the plaintiffs' claims against the City of Dallas.

* * *

The grant of summary judgment to the defendant officers is AFFIRMED. The grant of summary judgment to the City of Dallas is REMANDED.

JUDGE DENNIS, CONCURRING IN PART AND DISSENTING IN PART FROM ORIGINAL OPINION

JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part:

While I concur in the majority opinion's remand of plaintiffs' claims against the City of Dallas, I dissent from the majority's decision to affirm the district court's entry of summary judgment in favor of the two individual officers. Plaintiffs' Fourth Amendment claims against Hess and Kimpel are based on the officers' use of deadly force against Dawes and Rosales in the absence of any danger to themselves or others. The majority's approval of the district court's misguided judgment extending qualified immunity to Hess and Kimpel is not only incorrect as a matter of law, but also serves to condone the inexcusable incompetence displayed by these two officers— both of whom were suspended or terminated from their positions as police officers for having violated their department's use-of-force policy. I respectfully dissent.

* * *

Taking the evidence in the light most favorable to them, plaintiffs have met their burden of demonstrating that: (1) the officers violated Dawes's and Rosales's constitutional right to be free from unreasonably excessive force; and (2) Dawes's and Rosales' right to be free from such force under these facts was both obvious and clearly established. *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019); *Scott v. Harris*, 550 U.S. 372, 378 (2007) ("[C]ourts are required to view the facts and draw reasonable inferences in the light

most favorable" to the plaintiff when assessing assertion of qualified immunity at the summary judgment stage) (internal citation omitted). Here, we have the benefit of video footage capturing the incident, which makes clear that the "videotape quite clearly contradicts" the officers' dangerous belief that deadly force—indeed thirteen shots fired—was necessary to stop a boxed-in vehicle from reversing at a crawling speed of under three miles per hour when the officers could have, and in fact did, use a squad car to block Dawes's vehicle—making it impossible for her to flee. *Scott*, 550 U.S. at 378.

First, plaintiffs presented summary judgment evidence that could lead a reasonable jury to conclude that the officers violated Dawes's and Rosales's constitutional rights. To prevail on their Fourth Amendment excessive force claims, plaintiffs must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009). It is undisputed that the officers' use of deadly force caused injuries to Dawes and Rosales. The central inquiry is, accordingly, whether the officers exercised force that was unreasonably excessive. The Supreme Court has instructed courts to use the following factors to determine whether an officer used unreasonably excessive force: (1) "the severity of the crime at issue[;]" (2) "whether the suspect poses an immediate threat to the safety of the officers or others[;]" and (3) whether the suspect was "actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The reasonableness of the officers' use of force is

assessed under the "totality of the circumstances." *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

Here, the evidence, when construed in the light most favorable to plaintiffs, may lead a reasonable jury to conclude that the officers' use of force was excessive and unreasonable under the totality of the circumstances. While the severity of plaintiffs' suspected crime of stealing a vehicle—a felony under Texas law—may weigh in favor of the officers, the other two *Graham* factors weigh heavily against a finding that the officers' use of force was reasonable. The video footage, testimony, and expert analysis at the very least demonstrate the existence of genuine disputes of material facts that Dawes posed no immediate danger to officers and was not actively resisting or attempting to flee at the time she was killed. *See, e.g.*, *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004) ("It is objectively unreasonable to use deadly force 'unless it is necessary to prevent [a suspect's] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'") (quoting *Garner*, 471 U.S. at 3); *Lytle v. Bexar Cnty.*, 560 F.3d 404, 417-18 (5th Cir. 2009) (it is unreasonable to use deadly force against felony suspect who is fleeing by car if suspect does not pose immediate, substantial threat of harm to officer or others).

For example, far from "refusing" to follow the officers' commands, as the majority finds when it impermissibly puts on its "juror" hat, plaintiffs have presented evidence that they did not hear the officers' commands since they were asleep—it was around three in the morning and the officers only made their commands at a distance. Even if the officers sub-

jectively believed Dawes to be attempting to flee, the video evidence reveals that she was boxed in and would not have been able to escape—especially at the slow speed at which her vehicle was moving. Indeed, plaintiffs presented expert testimony—supported by the video footage—that Dawes was driving at a speed of under three miles per hour when the officers supposedly believed her to be fleeing. Hess testified that Dawes's vehicle was "slowly revving" and that he did not perceive her to be attempting to reverse at a high level of speed. Even if the officers believed Dawes to be making a slow, futile attempt to flee by reversing slowly while boxed-in by other cars, our caselaw is clear that it is unjustified to use deadly force against a fleeing felon who poses no safety risk. *Garner*, 471 U.S. at 11 (use of deadly force to prevent the escape of a felony suspect who poses no immediate threat to the officer or threat to others is unjustified).

The slow speed of Dawes's vehicle also belies the officers' assertion that they believed she posed any safety risk—much less the type of "substantial and immediate" threat required to justify use of deadly force. *Scott*, 550 U.S. at 386 (use of deadly force justified where suspect poses "a substantial and immediate risk of serious physical injury to others"); *see also Garner*, 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer . . . the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). It is undisputed that no one was in the path of Dawes's slow-moving vehicle at the time the officers killed Dawes and injured Rosales; indeed, both officers testified that when they used deadly force they did not observe anyone in danger and did not tell anyone to get out of the way. In his

deposition testimony, Hess agreed that Dawes's vehicle was moving at less than three miles per hour when he fired his first round of shots, and that any officer in the path of Dawes's vehicle could have moved out of the way by the time he fired his second round of shots. *Reyes v. Bridgwater*, 362 F. App'x 403, 409 (5th Cir. 2010) ("The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others.").

Even if the officers incorrectly believed other officers to be endangered, their subjective beliefs are wholly irrelevant to the Fourth Amendment inquiry into whether a "reasonable officer on the scene" would have believed that a boxed-in vehicle moving at less than three miles per hour presented an imminent, significant danger to other officers. *Graham,* 490 U.S. at 396–99. Moreover, the City of Dallas found Kimpel's claim that he believed other officers to be in danger untruthful and suspended him for thirty days—calling into question the reliability of the officers' after-the-fact assertion that they shot into the Dawes vehicle thirteen times to protect other officers from a car moving at slow, near walking speed.[3] While the

[3] While the City's finding that the officers violated the police department's use-of-force policy after Dawes's death cannot alone establish a constitutional violation, the City's finding that one of the officers lied in asserting that he believed other officers to be in danger at the time he fired eleven shots at Dawes is certainly relevant to the credibility of the officers' supposed motives for using deadly force. Moreover, the City's finding that the officers acted unreasonably in using deadly force supports plaintiffs' contention that the officers' use of force was not reasonable. *Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002) (considering an Alabama Department of Corrections regulation in determining that conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have

court "must 'be cautious about second-guessing [the] police officer's assessment' of the threat level[,]" we certainly should not be in the business of accepting implausible ad hoc explanations for an officer's objectively unreasonable use of deadly force. *Harmon v. City of Arlington*, 16 F.4th 1159, 1163 (5th Cir. 2021) (quoting *Ryburn v. Huff*, 565 U.S. 469, 477 (2012)). A jury—not judges—should hear the evidence and weigh the credibility of Kimpel's testimony. Here, the video footage, expert testimony, and the officers' admissions could lead a reasonable jury to conclude that the officers violated Dawes's and Rosales's Fourth Amendment rights by using deadly force in the absence of any objective threat to officer safety.

Second, "a body of relevant case law" gave the two officers notice that their unwarranted use of deadly force violated the Constitution. *Joseph v. Bartlett*, 981 F.3d 319, 330 (5th Cir. 2020) (internal citation omitted). While the majority is certainly correct that "[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," the "focus" of the qualified immunity analysis is whether the officer had "fair notice" that his conduct was unlawful. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)

---

known") (internal citation omitted); *Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1133 (5th Cir. 2014) ("[T]he fact that [the officer] allegedly failed to follow departmental policy makes his actions more questionable, because it is questionable whether it is objectively reasonable to violate such a departmental rule."); *see also Irish v. Fowler*, 979 F.3d 65, 77 (1st Cir. 2020) ("[W]hen an officer disregards police procedure, it bolsters the plaintiff's argument . . . that a reasonable officer in the officer's circumstances would have believed that his conduct violated the Constitution.") (cleaned up).

(internal quotation marks omitted) (internal citation omitted); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("focus" of qualified immunity analysis is "whether the officer had fair notice that her conduct was unlawful"); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc) ("The *sine qua non* of the clearly-established inquiry is 'fair warning.'") (citing *Hope*, 536 U.S. at 741). "The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017) (quoting *Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013)).

Here, clearly established law gave the officers ample warning that shooting a felony suspect in the absence of any danger to officers or others violates the Fourth Amendment. As our court noted in *Lytle*, "[i]t has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to [abruptly] use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle*, 560 F.3d at 417-18 (first citing *Kirby v. Duva*, 530 F.3d 475, 483–84 (6th Cir. 2008); and then citing *Garner*, 471 U.S. at 11-12); *see also Garner*, 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others . . . the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). While *Lytle* itself cannot form the clearly established law in this case, its rule statement nonetheless reflects "a body of relevant case

law"[4] clearly establishing that the use of deadly force against a suspect fleeing in a motor vehicle who poses no immediate, serious threat to others violates the Fourth Amendment. *Garner*, 471 U.S. 1, 8-9; *Kirby*, 530 F.3d at 483–84; *Vaughan v. Cox*, 343 F.3d 1323, 1333 (11th Cir. 2003); *see also Cooper v. Brown*, 844 F.3d 517, 525 n.8 (5th Cir. 2016) (where a case "does not constitute clearly established law for purposes of QI," it may still "aptly illustrate[] the established right").

In *Kirby v. Duva*, for example, the Sixth Circuit found the decedent's Fourth Amendment rights clearly established where officers fired thirteen rounds at a suspect that they said they believed to be fleeing despite the slow speed at which he had been reversing his car at the time he was killed by police. 530 F.3d at 483–84. Despite the significant differences in the narratives provided by plaintiffs and defendants, on summary judgment, the Sixth Circuit properly credited plaintiffs' version of events to find that it was clear

---

[4] There is no bar on published circuit precedent constituting clearly established law. *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) ("assuming" without deciding "that controlling Circuit precedent clearly establishes law for purposes of § 1983"); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (plaintiffs must identify "controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely" or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful"). Moreover, the Fifth Circuit en banc court has said that clearly established law may be based on "controlling authority—or a 'robust consensus of persuasive authority.'" *Morgan*, 659 F.3d at 371–72 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011)); *see also In re Hidalgo Cnty. Emergency Serv. Found.*, 962 F.3d 838, 841 (5th Cir. 2020) ("[A] panel of this court is bound by circuit precedent.").

enough to the officers that their use of deadly force during a roadside execution of a search warrant was unconstitutional where (1) it was unclear the suspect heard the officers' orders to exit the car; (2) the suspect's vehicle was sandwiched on the side of the road and reversed in an apparent attempt to pull out of the parallel parking position; (3) the vehicle was "not going very fast"(seven to eight miles per hour) at the time it allegedly reversed towards an officer; (4) and "none of the officers was ever in harm's way." *Id.* at 479, 484. Here, similarly, it was unclear that Dawes and Rosales heard the officers' commands delivered at a distance in the middle of the night, Dawes's vehicle was sandwiched between a patrol car, other vehicles, and a fence such that she could not flee, the vehicle was moving at under three miles per hour at the time the officers shot at her, and no officer was ever in harm's way.

In *Vaughan v. Cox*, similarly, the Eleventh Circuit found that it was objectively unreasonable for an officer to use deadly force to apprehend the occupant of an allegedly stolen vehicle fleeing at 85 miles per hour on a highway with a speed limit of 70 miles per hour. 343 F.3d at 1326, 1330. In "[a]pplying *Garner* in a common-sense way" to the facts of the case, the Eleventh Circuit determined that a reasonable officer could have known that the use of deadly force was unreasonable where: (1) the suspect did not present a "an immediate threat" to officers or bystanders by driving more than ten miles over the speed limit; (2) the suspect had made no menacing gestures at the officers or others besides accelerating; (3) a prior collision between the suspect's car and the officer's vehicle was accidental; and (4) the suspect's vehicle was "easily

identifiable and could have been tracked" and apprehended without the use of deadly force. *Id.* at 1330-31, 1333. Here, similarly, Dawes did not pose any "immediate" threat to officers, had made no "aggressive moves" besides attempting to back out of the parking spot at a snail's pace, accidentally bumped into the squad car positioned at an angle close behind her vehicle, and could have easily been apprehended without the use of deadly force since her vehicle was boxed-in by the squad car.

In light of *Kirby* and *Vaughan*'s guidance in interpreting *Garner*, it was clearly established on the date of Dawes's death that "police officers may not fire at non-dangerous fleeing felons" where, as here, there are genuine disputes of material fact as to whether the suspect heard the officers' prior commands, the at-issue vehicle was boxed-in such that the suspect could not flee, the vehicle was not moving fast enough to objectively present any immediate danger to officers, Dawes made no menacing gestures at the officers besides accelerating her car to a speed of approximately three miles per hour, and any prior collision between the suspect's vehicle and a police vehicle was accidental. *Garner*, 471 U.S. at 11 (in the absence of an "immediate" threat to officer or bystander safety the "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable"); *Kirby*, 530 F.3d at 483 ("*Garner* made plain that deadly force cannot be used against an escaping suspect who does not pose an immediate danger to anyone."); *Vaughan*, 343 F.3d at 1330 ("[A] reasonable jury could find that [the suspects'] escape did not present an immediate threat of serious harm to [the police officer] or others on the

road."); *Wilson*, 526 U.S. at 617 (explaining that clearly established law may consist of "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful").

Moreover, the officers' grotesque, unwarranted killing of Dawes presents such an egregious case of unreasonable use of deadly force so as to excuse plaintiffs' need to identify prior case law. In "an obvious case" like this one,[5] the *Graham* excessive-force factors themselves can clearly establish the right at issue without a body of relevant case law. *Cooper*, 844 F.3d at 524 ("*Graham* excessive-force factors themselves can clearly establish the answer, even without a body of relevant case law.") (internal citation omitted); *see also White v. Pauly*, 580 U.S. 73, 79 (2017) ("Of course, general statements of the law are not

---

[5] The majority opinion posits the obvious case exception as requiring both "extraordinarily egregious facts" and "a complete absence of exigency." Maj. Op. at 6 n.2 (citing *Ducksworth v. Landrum*, 62 F.4th 209, 218 (5th Cir. 2023) (Oldham, J., concurring in part and dissenting in part)). This is incorrect. In *Taylor v. Riojas*, the Supreme Court certainly noted the absence of "necessity or exigency" in determining that "any reasonable officer should have realized" that the conditions of confinement in that case were unconstitutional, yet nowhere did it purport to make a lack of necessity or exigency a requirement under the obvious case doctrine. 592 U.S. 7, 9 (2020). In any event, there was no exigency here justifying the use of deadly force against Dawes given that there was no "imminent risk of death or serious injury" or that "a suspect [would] escape." *Kentucky v. King*, 563 U.S. 452, 473 (2011) (Ginsburg, J., dissenting) ("Circumstances qualify as 'exigent' when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape . . . the exception should govern only in genuine emergency situations.") (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

inherently incapable of giving fair and clear warning to officers, but in the light of pre-existing law the unlawfulness must be apparent.") (internal citation omitted). As discussed above, a jury could conclude that no reasonable officer could have believed Dawes was resisting arrest or posed a safety threat by reversing her car at under three miles per hours. Therefore, viewing the facts in the light most favorable to Dawes, the defendant officers acted objectively unreasonable in light of clearly established law in shooting at an occupied vehicle thirteen times in the absence of any threat to officer safety.

In light of the use of deadly force deemed unreasonable by the Supreme Court in *Garner* and elaborated on by circuit courts, the defendant officers had "fair notice" that using deadly force against Dawes where no reasonable officer could conclude that she posed any immediate safety threat to anyone would violate her Fourth Amendment right to be free from unreasonably excessive force. *Garner*, 471 U.S. 1, 8-9; *Kirby*, 530 F.3d at 483–84; *Vaughan*, 343 F.3d at 1333; *see also Brosseau*, 543 U.S. at 198 ("focus" of qualified immunity analysis is "whether the officer had fair notice that her conduct was unlawful"); *Hope*, 536 U.S. at 731 ("Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful."). In light of clearly established law, as announced in *Garner* and elucidated in *Kirby* and *Vaughn*, it is "beyond debate" that the officers' use of deadly force against Dawes was unconstitutional. *Ashcroft*, 563 U.S. at 741. Moreover, the unconstitutionality of the officers' use of deadly force against Dawes was plainly obvious under the factors laid out in *Graham*. 490 U.S. at 396. The

panel should reverse and remand the district court's grant of qualified immunity in favor of the defendant officers. I respectfully, but emphatically, dissent.

MEMORANDUM OPINION AND ORDER, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION (AUGUST 11, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY DAWES, individually and as the Administrator of the Estate of Decedent Genevive A. Dawes; ALFREDO SAUCEDO; and VIRGILIO ROSALES,

Plaintiffs,

v.

CITY OF DALLAS, CHRISTOPHER HESS, and JASON KIMPEL,

Defendants.

Civil Action No. 3:17-CV-1424-X

Before: Brantley STARR, United States District Judge.

MEMORANDUM OPINION AND ORDER

This case is about the 2017 shooting of Genevive Dawes by Dallas Police Department officers. Before the Court is the United States Magistrate Judge's findings, conclusions, and recommendation [Doc. No. 136] on

defendant-Officer Christopher Hess's and defendant-Officer Jason Kimpel's motion for summary judgment asserting qualified immunity [Doc. No. 104]. For the reasons explained below, the Court ACCEPTS IN PART and REJECTS IN PART the Magistrate Judge's report and GRANTS the defendants' motion for summary judgment.

I. Background

Around 5:00 am on January 18, 2017, Genevive Dawes and Virgilio Rosales were sitting in the front seats of a black Dodge Journey SUV that Dawes had parked in the back corner of an apartment complex's parking lot.[1] To the right side of Dawes's car was another vehicle.[2] There was a white trellis fence to the left and in front of Dawes's car.[3] Behind Dawes's car was a lane for accessing the parking spots and on the other side of that was a row of parked cars.[4]

Defendants Christopher Hess and Jason Kimpel and four other Dallas Police Department officers were dispatched to the location to investigate a report of a suspicious vehicle in the corner of the lot with a man and woman inside.[5] At some point during the incident, the officers learned that Dawes's car had been reported stolen.[6] Shortly after the officers arrived, they began

---

[1] Doc. No. 106-1 at 4; Doc. No. 126 at 6–7.

[2] Doc. No. 106-1 at 4; Doc. No. 126 at 7.

[3] Doc. No. 106-1 at 4; Doc. No. 126 at 7; Evans Bodycam at 3:56.

[4] Evans Bodycam at 0:53–1:05.

[5] Doc. No. 106-1 at 4.

[6] Doc. No. 106-1 at 4; Doc. No. 106-1 at 9; Doc. No. 126 at 40.

shining their flashlights into the car's windows and yelling commands such as "put your hands out the window."[7] The area was dark and poorly lit, and Dawes's car windows were tinted and steamed up, making it difficult to see inside.[8]

Dawes's car was not moving. An officer remarked that the officers had been informed that there "was a male and female inside."[9] Officer Hess retrieved the closest squad car and pulled it up diagonally, facing the right rear side of Dawes's vehicle.[10] Then, Officer Hess sounded the squad car's air horn, activated a short siren yelp, and turned on the car's spotlight, but did not turn on flashing emergency lights.[11] Officer Hess exited the squad car and walked to be near the rear left corner of Dawes's car, and stood beside two other officers for approximately 20 seconds.[12]

As officers stood nearby, Officer Hopkins slowly approached Dawes's car and pulled on the right rear door handle and the trunk handle, which appeared to be locked, and an officer announced that two people

---

[7] Evans Bodycam at 1:00–1:03, 1:32–2:00.

[8] Doc. No. 106-1 at 9; *see also* Doc. No. 126 at 7.

[9] Evans Bodycam at 1:48–52; Doc. No. 126 at 38; Kimpel Bodycam at 1:20–1:25.

[10] Doc. No. 106-1 at 4.

[11] Evans Bodycam at 1:58–2:11; Doc. No. 104-1 at 4.

[12] Hess Bodycam 0:14–0:35; Kimpel Bodycam at 1:32–1:58; Evans Bodycam at 2:00–2:04; Lickwar Bodycam at 2:00; Hopkins Bodycam at 4:17; Doc. No. 106-1 at 4; Doc. No. 126 at 119.

were asleep inside the car.[13] Officer Hess heard the statement.[14] A few seconds later, two officers yelled at Dawes and Rosales to show their hands.[15] After a short time, officers twice ordered them, again, to show their hands while another officer yelled, "Dallas police."[16] Another officer stated that someone was moving around inside the vehicle.[17] Officers again twice ordered Dawes and Rosales to show their hands, but they did not do so, although at least one of them started moving around inside the car.[18]

Less than thirty seconds later, Dawes started her car, at which point the officers again screamed commands for Dawes and Rosales to show their hands.[19] When Officer Hess observed Dawes's car turn on, he got back in the squad car, telling the other officers to "watch out" and "move move move," as he moved the squad car closer.[20] As Officer Hess moved the squad car, Dawes's car began moving backwards. Right after

---

[13] Hopkins Bodycam at 4:41–5:00; Doc. No. 126 at 40–41; Doc. No. 126 at 68; Kimpel Bodycam at 2:00–2:10; Evans Bodycam at 2:30–2:38; Doc. No. 126 at 119.

[14] Doc. No. 126 at 40–41.

[15] Kimpel Bodycam at 2:10–2:12.

[16] Kimpel Bodycam at 2:26–2:42.

[17] Kimpel Bodycam at 2:40–2:42.

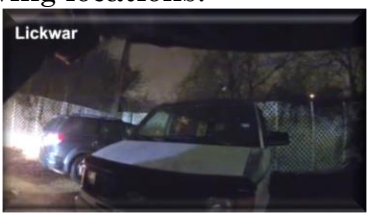
[18] Kimpel Bodycam at 2:45–2:57.

[19] Kimpel Bodycam at 3:11–3:14.

[20] Doc. No. 106-1 at 4; Hess Bodycam at 0:51-59; Kimpel Bodycam at 3:20; Evans Bodycam at 3:40.

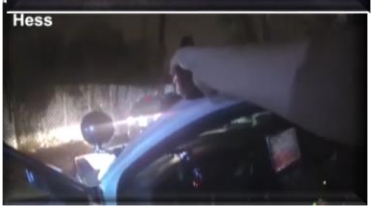
Officer Hess stopped, Dawes's car hit the squad car.[21] Dawes then changed directions, drove forward, and hit the fence in front of her car.[22] Then Dawes put the car back in reverse. At the moment that Dawes's reverse lights came on for the second time and 6.1 seconds before Officer Hess fired the first shot, the officers were in the following locations:[23]

Lickwar



Hopkins

Hess

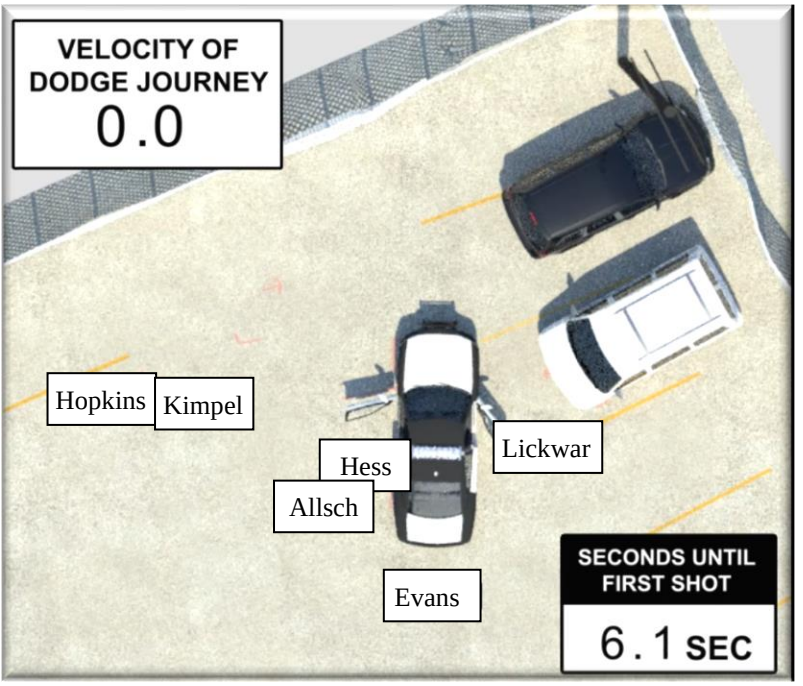


---

[21] Doc. No. 106-1 at 4; Kimpel Bodycam at 3:10–3:20; Evans Bodycam at 3:40; Doc. 126 at 8 (Rosales Decl.); Hess Bodycam at 1:00–1:02; Hopkins Bodycam at 6:04; Kimpel Bodycam at 3:19.

[22] Doc. No. 126 at 8 (Rosales Decl.); Hopkins Bodycam at 6:07–6:10; Kimpel Bodycam at 3:24–3:28.

[23] While screenshots are helpful and the Court therefore includes them in its written Order, the Court ultimately bases its findings on the video footage as a whole. Screenshots help the reader see the "facts evident from the video recordings"—and will have to suffice until technology advances enough to support paper that plays video. *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011).



24

"Watch out, watch out, watch out, watch out," Officer Kimpel said, as he and Officer Hopkins walked behind Dawes's vehicle toward the rear left side of the squad car.[25] As they walked, Officer Hopkins was behind Officer Kimpel.[26] Dawes's car began moving backwards.[27] The officers continued to yell commands.[28] By this point, Officer Hess had exited the squad car and stood behind the driver's door, with his

---

24 Video "2-C Sync_With_Camera_Views" at 0:22.

25 Kimpel Bodycam at 3:25–3:37; Hopkins Bodycam at 6:10–6:18.

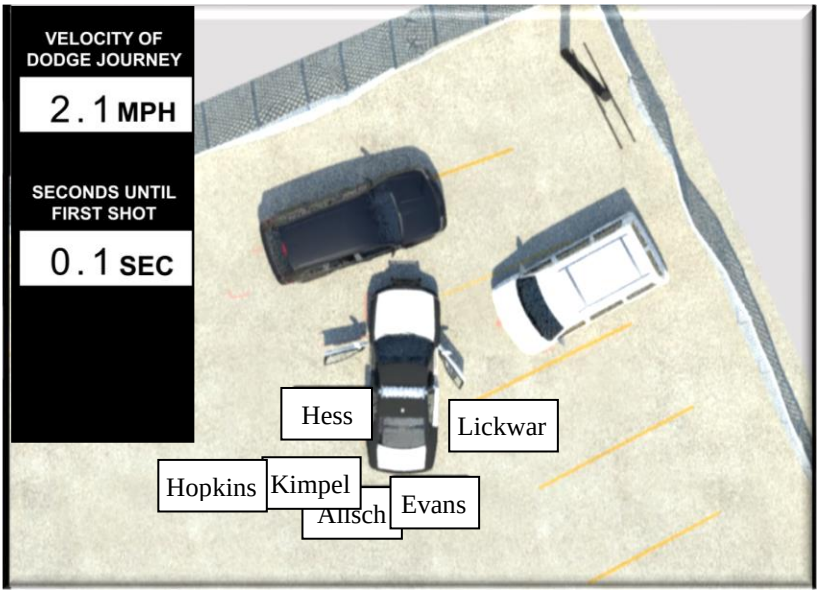
26 Hopkins Bodycam at 6:10–6:15.

27 Hess Bodycam 1:08–1:13.

28 *Id.*

weapon drawn and trained on Dawes's car.[29] Officer Hess told the other officers, "back up back up," and ordered Dawes and Rosales not to move.[30]

Dawes's car continued to move in reverse at a low rate of speed.[31] One-tenth of a second before Officer Hess fired the first shot, the officers' positions and the speed of Dawes's car was thus:



[32]

Then, in a span of about four seconds, Officer Hess fired nine rounds at the passenger side of Dawes's vehicle, shattering the passenger window.[33] At some

---

[29] Hess Bodycam at 1:07.

[30] Kimpel Bodycam at 3:25–3:37; Hess Bodycam 1:08–1:14.

[31] Hess Bodycam at 1:10–1:16.

[32] Video "2-D Velocity_Positions_Time_to_Shots" at 0:38.

[33] Doc. No. 106-1 at 5 (Hess Affid.); Doc. No. 126 at 44 (Hess Depo.); *see also* Hess Bodycam at 1:15–1:20; Kimpel Bodycam at

point during Officer Hess's firing his first nine rounds, Officer Kimpel fired his one and only round.[34]

Dawes's car momentarily stopped.[35] From when Dawes's car began moving backwards after hitting the fence in front of her car to when her car momentarily stopped after the initial shots were fired, Dawes's car's maximum speed was 3.2 miles-per-hour.[36]

When Dawes's car momentarily stopped, Officer Hess could then see inside the vehicle and observed that Dawes appeared to have been shot at least once.[37] Her hands were no longer on the steering wheel, as she had one hand on her chest and one in her lap.

But then Dawes's car started moving again, and Officer Hess fired three more shots before Dawes's car came to rest.[38] Officer Hess then approached Dawes's car where she was slumped in the reclined driver's seat with her left hand in her lap and her right hand next to her head.[39]

3:35–3:38; Hopkins Bodycam at 6:19–6:23; Evans Bodycam at 4:03–4:07.

[34] Doc. No. 126 at 120 (IA Brief).

[35] Hess Bodycam 1:13–1:17; Doc. No. 106-1 at 5 (Hess Affid.); Doc. No. 126 at 8 (Rosales Decl.).

[36] Video "2-D Velocity_Positions_Time_to_Shots" at 0:30–0:40.

[37] Doc. No. 126 at 45 (Hess Depo.).

[38] Hess Bodycam at 1:17–1:20. Because Dawes's car started moving again, this is not like cases where an officer shoots a "clearly incapacitated suspect" and thus violates the suspect's clearly established, constitutional rights. *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 278 (5th Cir. 2015).

[39] Hess Bodycam at 3:20–3:47.

Several minutes later Officer Hess asked Officer Kimpel "who was back there," and Officer Kimpel responded, "me and Hopkins, we moved."[40] Bodycam footage shows that both Officers Hopkins and Kimpel had moved out of Dawes's immediate, direct path as she moved backwards after hitting the fence—with Officer Kimpel moving in front of and/or to the right of Officer Hopkins.[41] At the moment that Officer Hess fired the first shot, no officer was directly behind Dawes's car—they were all located on the passenger side at varying distances and some officers had the patrol car positioned between Dawes's car and themselves:

Lickwar

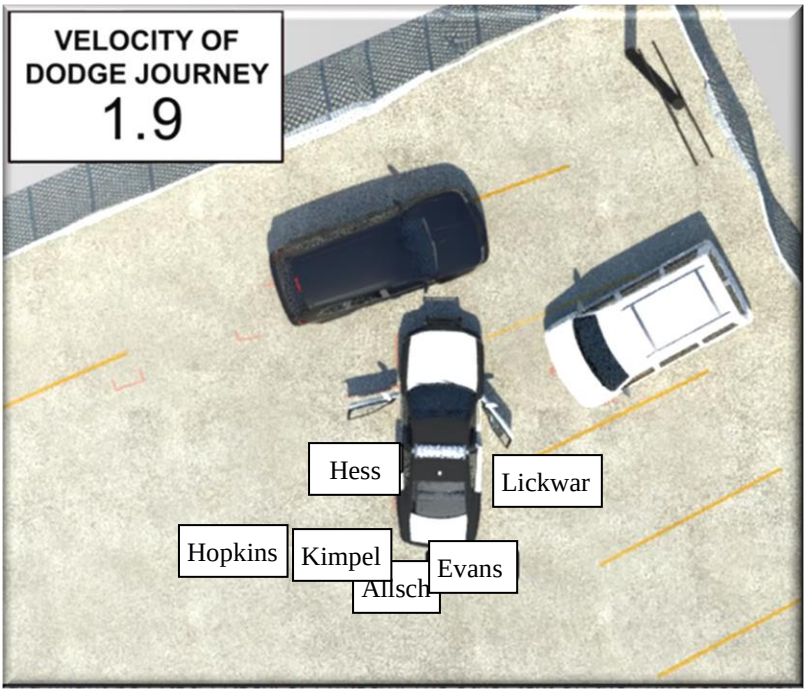
Hopkins

Hess

---

[40] Hess Bodycam at 4:48–4:53; Doc. No. 126 at 48 (Kimpel Depo.).

[41] Kimpel Bodycam at 3:25–3:37; Hopkins Bodycam at 6:14–6:18; Hess Bodycam at 1:17–1:22; Doc. 126 at 73 (Kimpel Depo.).



42

After the passenger window had been shot out, Rosales eventually exited Dawes's car at the officers' directions and was handcuffed until an ambulance arrived to assist Dawes, who later died at the hospital.[43] Officers searched Dawes's car and discovered a small handgun underneath a pillow between the driver and passenger seat behind the central console.[44] The defendants were not aware of the gun at the time

---

[42] Video "2-C Sync_With_Camera_Views" at 0:28.

[43] Doc. No. 126 at 8 (Rosales Decl.).

[44] Doc. No. 106-1 at 11 (Evans Affid.); Doc. No. 126 at 9 (Rosales Decl.).

of the shooting.[45] An investigation subsequently revealed that Officer Kimpel's bullet struck Dawes's car and four of Officer Hess's bullets struck Dawes.[46]

In her report and recommendation, the Magistrate Judge helpfully recounted some of the parties' subsequent testimony about that fateful night.[47] Here are some highlights: Rosales testified that Dawes awakened him and told him that she heard something outside the car.[48] He could hear voices and yelling, but says that the fogged-up windows and bright lights outside the car made it difficult to discern what was happening.[49]

Officer Hess testified that he pulled the squad car forward to provide cover for the officers and to limit the space available for Dawes to accelerate if she tried to run down the officers.[50] Officer Hess testified that he interpreted Dawes hitting the fence in front of her car as a failed attempt to escape.[51] He testified that he fired at Dawes because he believed that Officers Hopkins and Kimpel were in her path and that Dawes was trying to run over them.[52] Similarly, Officer

---

45 Doc. No. 126 at 43–44 (Hess Depo.); Doc. No. 126 at 74 (Kimpel Depo.).

46 Doc. No. 126 at 120 (IA Brief).

47 Doc. No. 136 at 13–15.

48 Doc. No. 126 at 7.

49 *Id.*

50 Doc. No. 106-1 at 4.

51 *Id.* at 5.

52 *Id.* at 4–5.

Kimpel testified that he shot because he thought that Officer Hopkins was in Dawes's path and that Dawes's vehicle posed a danger.[53] As it turned out, all officers were out of Dawes's direct, immediate path when Hess and Kimpel fired their rounds.

The plaintiffs filed this suit against the City of Dallas and Officers Kimpel and Hess under 42 U.S.C. § 1983.[54] The plaintiffs assert that Officers Hess and Kimpel violated Dawes's and Rosales's Fourth Amendment right to be free from excessive force.

Officers Hess and Kimpel filed a motion for summary judgment on the basis of qualified immunity.[55] The Magistrate Judge entered her findings, conclusions, and recommendations on the motion.[56] The Magistrate Judge found that there were at least four genuine disputes of material fact precluding summary judgment and recommended denying qualified immunity to both Officers Hess and Kimpel.

II. Summary Judgment Standard

Courts must grant summary judgment if the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[57] A material fact is one "that might affect the outcome of the suit under the

---

[53] Doc. No. 126 at 65–67.

[54] Doc. No. 91. This motion for summary judgment does not involve the City of Dallas.

[55] Doc. No. 104.

[56] Doc. No. 136.

[57] Fed. R. Civ. P. 56(a).

governing law."[58] And a "dispute is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"[59] Courts "resolve factual controversies in favor of the nonmoving party, but only where there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts."[60] "Summary judgment is not foreclosed by some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence."[61]

Before reaching the substantive qualified-immunity analysis, the Court addresses the four purported genuine disputes of material fact that the Magistrate Judge identified in her report and recommendation. The Magistrate Judge concluded that "many facts are disputed . . . which would significantly impact the analysis" such as (1) "whether Plaintiffs knew police officers were outside the vehicle," (2) "whether Dawes's car hit Hess's car or vice-versa," (3) "whether Dawes reversed out of the parking lot quickly or slowly," and (4) "where officers were located at various times during the interaction."[62]

In their objections to the Magistrate Judge's report, the defendants assert that none of these facts

---

[58] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[59] *Westfall v. Luna*, 903 F.3d 534, 546 (5th Cir. 2018) (quoting *Anderson*, 477 U.S. at 248).

[60] *Lexon Ins. Co. v. Fed. Deposit Ins. Corp.*, 7 F.4th 315, 321 (5th Cir. 2021) (cleaned up).

[61] *Id.* at 322 (cleaned up).

[62] Doc. No. 136 at 21–22.

are in dispute.[63] The defendants stress that "[t]he speed of Dawes's car and the locations of the officers . . . are not in dispute."[64] In response to the defendants' objections, the plaintiffs do not argue that there are genuine disputes of material fact. Rather, they argue that the undisputed, objective speeds and locations are more important for the qualified-immunity analysis than the officers' subjective perspectives.[65] Thus, it appears that the parties agree that there are no genuine disputes of material fact. Nevertheless, the Court will examine each of the Magistrate Judge's findings.

As for purported dispute (1) (whether the plaintiffs knew that police officers were outside the vehicle), even assuming that it is disputed, it is not material. The Magistrate Judge correctly acknowledges elsewhere in her report that the qualified-immunity inquiry focuses on the objective reasonableness of the officer-defendants' actions, not the subjective knowledge of the plaintiffs.

As for purported dispute (2) (whether Dawes's car hit Officer Hess's car or vice-versa), this fact is not actually disputed. The plaintiffs stated in their response to the defendants' motion for summary judgment: "As [Dawes] backed out of the parking spot, she bumped into something. . . . She had bumped into the squad car . . . ."[66] The defendants do not dispute the plaintiffs' characterization and, importantly, the plaintiffs

---

[63] Doc. No. 137 at 6.

[64] Doc. No. 137 at 2.

[65] *See* Doc. No. 138 at 8.

[66] Doc. No. 125 at 13.

do not say that this fact is disputed in their response to the defendants' objections to the Magistrate Judge's report. Plus, Officer Hopkins's bodycam shows that the squad car was not moving when Dawes's car hit the squad car.[67]

As for purported disputes (3) and (4) (whether Dawes reversed out of the parking lot quickly or slowly and where officers were located at various times during the interaction), the defendants and the plaintiffs agree as to the speed of Dawes's car at all times and the locations of all officers at all times. The record and briefs contain video recreations of the incident that track both the speed of Dawes's car and the officers' locations, and no party disputes their accuracy.[68]

Accordingly, the Court determines that none of these four topics amounts to a genuine dispute of material fact that would preclude summary judgment.

III. Qualified Immunity

Title 42 U.S.C. § 1983 authorizes plaintiffs to bring claims "against persons in their individual or official capacity, or against a governmental entity."[69] A party has a colorable claim under section 1983 if the plaintiff can "allege a violation of a right secured by the Constitution or laws of the United States and

---

67 Hopkins Bodycam at 6:01–6:06.

68 *See, e.g.*, Doc. No. 125 at 13. The defendants *do* object that the videos are irrelevant, but not that they are inaccurate. Doc. No. 131 at 6.

69 *Pratt v. Harris Cnty.*, 822 F.3d 174, 180 (5th Cir. 2016) (cleaned up).

demonstrate that the alleged deprivation was committed by a person acting under color of state law."[70]

The doctrine of qualified immunity provides a defense against these claims to government officials who "make reasonable but mistaken judgments about open legal questions" and shields "all but the plainly incompetent or those who knowingly violate the law."[71] Qualified immunity presents two questions. "The first question is whether the officer violated a constitutional right. The second question is whether the right at issue was clearly established at the time of the alleged misconduct."[72] A court can begin its inquiry with either prong.[73]

Once a defendant has made a good-faith assertion of the defense of qualified immunity, the burden shifts to the plaintiff to show that the defense is not available.[74] So the plaintiff has to deal with both prongs: (1) "the plaintiff must show that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief for a constitutional injury"; and (2) "the plaintiff's version of those disputed facts must also constitute a violation of clearly established law."[75]

---

[70] *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (cleaned up).

[71] *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

[72] *Jackson v. Gautreaux*, 3 F.4th 182, 186 (5th Cir. 2021) (cleaned up).

[73] *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

[74] *Joseph v. Bartlett*, 981 F.3d 319, 329–30 (5th Cir. 2020).

[75] *Id.* at 330.

A. Clearly Established Law[76]

Qualified immunity's second prong "requires the plaintiff to 'identify a case'—usually, a 'body of relevant case law'—in which 'an officer acting under similar circumstances . . . was held to have violated the [Con-

---

76 A brief preliminary note: The plaintiffs argue that the Court is bound by its determination at the motion-to-dismiss stage that *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), provided the clearly established law for Officers Hess and Kimpel to know that their conduct was unconstitutional. *See* Doc. No. 125 at 33 (Plaintiffs' Response to Defendants' Motion for Summary Judgment); Doc. No. 87 at 9–10 (Court's order on motion to dismiss finding that *Lytle* provided clearly established law in light of plaintiffs' allegations that no one was behind Dawes's car when she backed up and the officers did not have to react to an "abrupt change of direction"). When the Court made that finding at the motion-to-dismiss stage, it had not considered the video and bodycam footage of the incident. The Court did not have the parties' discovery to aid it in the qualified-immunity analysis. The Court did not have the benefit of the Fifth Circuit's recent guidance that it is "dubious" that *Lytle* stands for the proposition that "an officer lacks an objectively reasonable basis for believing his own safety is at risk and therefore cannot use concerns about his own safety to justify deadly force—when he is not in the path of the vehicle." *Harmon v. City of Arlington*, 16 F.4th 1159, 1166–67 (5th Cir. 2021). The Court considered only the limited context and allegations that the plaintiffs' complaint provided and accepted them as true. Summary judgment is very different, and the Court is not bound by its prior determination based only on the plaintiffs' allegations. Rather, at summary judgment, the Court will analyze all the evidence—without weighing evidence, evaluating the credibility of witnesses, or resolving factual disputes—and determine whether a reasonable jury drawing all inferences in favor of the nonmoving party could arrive at a verdict in that party's favor. *See Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021).

stitution].'"[77] "A right is 'clearly established' only if preexisting precedent 'ha[s] placed the . . . constitutional question beyond debate.'"[78] The burden is "heavy."[79] "[A]s the Supreme Court has repeatedly admonished lower courts, we must define [the] constitutional question with specificity."[80] "[T]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'"[81]

"The specificity requirement assumes special significance in excessive force cases, where officers must make split-second decisions to use force."[82] "[O]vercoming qualified immunity is especially difficult in excessive-force cases."[83] "[P]olice officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[84] "To overcome qualified immunity, the law must be so clearly established that *every* reasonable officer in this factual context . . . would have known he could not use deadly force."[85] And it is "the *plaintiff's* burden to find

---

77 *Joseph*, 981 F.3d at 330 (quoting *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)).

78 *Harmon*, 16 F.4th at 1165 (quoting *Ashcroft*, 563 U.S. at 741).

79 *Id.*

80 *Id.* at 1166.

81 *Id.* (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)).

82 *Id.*

83 *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019).

84 *Harmon*, 16 F.4th at 1166 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)).

85 *Id.*

a case in his favor that does not define the law at a high level of generality."[86]

Here, the Court chooses to begin with the second prong and asks: Could officers Hess and Kimpel have reasonably interpreted the law in existence as of January 18, 2017 to conclude that the perceived threat that Dawes posed was sufficient to justify deadly force?[87]

The clearly established prong requires the Court to place this case's specific facts against the backdrop of other cases where a court found that the defendant violated the Constitution.[88] The north star of excessive-force cases is the Supreme Court's decision in *Tennessee v. Garner*.[89] *Garner* is substantially different from this case because *Garner* involved a suspect fleeing on foot,[90] but *Garner* did establish a "framework" that "forbids deadly force unless the officer had probable cause to believe [a] suspect poses 'a threat of serious physical harm' to the officer or others."[91] In placing this case on the factual spectrum of others cases, the Court keeps the *Garner* framework in mind and also heeds the Supreme Court and Fifth Circuit's repeated, clear instructions to define clearly established law

---

86 *Vann v. City of Southaven*, 884 F.3d 307, 310 (5th Cir. 2018) (emphasis added) (cleaned up).

87 *See Reyes v. Bridgwater*, 362 F. App'x 403, 408 (5th Cir. 2010).

88 Doc. No. 136 at 25; *Joseph*, 981 F.3d at 330.

89 *Tennessee v. Garner*, 471 U.S. 1 (1985).

90 *Id.* at 3–4. Importantly, the "the Supreme Court has warned . . . against extending *Garner*." *Morrow*, 917 F.3d at 878.

91 *Goldston v. Anderson*, 775 F. App'x 772, 773 (5th Cir. 2019) (quoting *Garner*, 471 U.S. at 3).

with specificity—so much specificity that the officer's conduct must have been "clearly unreasonable . . . in the specific situation the officer confronted."[92]

In her report and recommendation, the Magistrate Judge first examined *Hathaway v. Bazany*.[93] There, "a police officer who was on foot fired at a vehicle immediately after it struck him."[94] The Fifth Circuit affirmed the district court's *grant* of qualified immunity to the officer. The Fifth Circuit "determined that the vehicle, which had accelerated toward the officer after he had attempted to pull it over, posed such a threat to the officer that the use of deadly force was objectively reasonable even if the officer had fired immediately after the vehicle struck him."[95] The Fifth Circuit "reasoned that the extremely brief period of time between when the car accelerated toward and struck the officer and the officer's firing of his weapon was insufficient for the officer to perceive new information indicating the threat was past."[96]

The Magistrate Judge also analyzed *Poole v. City of Shreveport*, a 2021 Fifth Circuit opinion arising from a March 31, 2017[97] incident in which a police officer shot a suicidal man after he exited his vehicle

---

92 *Goldston*, 775 F. App'x at 773; *see also Harmon*, 16 F.4th at 1166.

93 *Hathaway v. Bazany*, 507 F.3d 312 (5th Cir. 2007).

94 *Lytle*, 560 F.3d at 413 (describing *Hathaway*).

95 *Id.*

96 *Id.* at 413–14 (internal quotations omitted).

97 This case's incident occurred on January 18, 2017.

following a low-speed car chase.[98] The district court found genuine disputes of material fact as to whether the officer warned the suspect before the shooting, whether the suspect was turned away from the officer, and whether it was apparent that the suspect's hands were empty, and thus denied summary judgment.[99] The Fifth Circuit affirmed the denial of summary judgment and qualified immunity, agreeing with the district court that there were genuine disputes of material fact.[100] The Fifth Circuit noted that summary judgment was inappropriate in light of the disputed facts because—if a reasonable jury accepted the plaintiff's version of the facts—then it could reasonably conclude that the officer violated the plaintiff's rights.[101]

There are two reasons that *Poole* does not provide the clearly established law that the plaintiffs here need to overcome Officer Hess's and Officer Kimpel's assertion of qualified immunity. First, *Poole* presented significantly different facts from this case, the Fifth Circuit based its affirmance on the genuine disputes of material fact, and the underlying incident occurred after the incident in this case. So, for multiple reasons, *Poole* itself cannot provide the clearly established law for this case. Second, the *Poole* panel cited several

---

98 *Poole v. City of Shreveport*, 13 F.4th 420, 422 (5th Cir. 2021).

99 *Id.* at 423–24.

100 *Id.*

101 *Id.* at 426 ("If a jury views the disputed facts in favor of the plaintiff—concluding that Briceno shot Poole, without warning, seeing that he was empty-handed and turning away from the officer—then Briceno violated Poole's clearly established right to be free from unreasonable seizure.").

cases demonstrating in specific circumstances the clearly established law that deadly force is excessive unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.[102] But all of those cases present significantly different facts, and the Court cannot extrapolate from those very different cases a clearly established law for this case—without contravening the Supreme Court and Fifth Circuit's repeated and clear warnings that qualified-immunity's second prong is a high bar and must be defined with specificity.

The Magistrate Judge analyzed another Fifth Circuit case, *Goldston v. Anderson*, a 2019 opinion arising from a 2015 incident.[103] In *Goldston*, a police officer named Straten was surveilling the suspect, Goldston, at Goldston's girlfriend's house.[104] Goldston had several outstanding arrest warrants on him, one of which alleged that Goldston had attempted to run over and drag a police officer.[105] The Fifth Circuit recounted the facts:

> When Goldston arrived at the house, Straten notified Officer Anderson, who was waiting nearby to help if necessary. When Goldston began to back out of the driveway in his

---

[102] *Id.* at 425 (citing *Garner*, 471 U.S. at 11; *Roque v. Harvel*, 993 F.3d 325, 329 (5th Cir. 2021); *Waller v. Hanlon*, 922 F.3d 590, 601 (5th Cir. 2019); *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018); *Lytle*, 560 F.3d at 417).

[103] *Goldston v. Anderson*, 775 F. App'x 772 (5th Cir. 2019).

[104] *Id.*

[105] *Id.*

> pickup truck, Anderson blocked the vehicle with his patrol car. Goldston got out of his truck and Anderson ordered him to show his hands and get on the ground. Instead, Goldston got back into the truck and locked the doors. Straten positioned her unmarked minivan behind him at an angle, boxing him in. Apparently trying to escape, Goldston began to back up quickly toward Straten and Anderson fired into the cab, striking Goldston multiple times.[106]

The Fifth Circuit affirmed the district court's grant of qualified immunity to Officer Anderson. On the clearly established law prong, the Fifth Circuit rejected Goldston's argument that *Garner*'s "general standard" provided the clearly established law forbidding the specific actions that Officer Anderson took.[107] Instead, "[e]xisting precedent must place the conclusion that Anderson acted unreasonably in these circumstances beyond debate."[108] The Fifth Circuit found that Goldston had not met this "high bar."[109]

Like *Poole*, *Goldston* does not provide the clearly established law that the plaintiffs need. The officers in *Goldston* were *granted* qualified immunity because the plaintiff lost on both of qualified immunity's prongs. For the same reason, *Hathaway* didn't clearly establish

---

106 *Id.* at 772–73.

107 *Id.* at 773.

108 *Id.* (cleaned up).

109 *Id.*

the law putting Officers Hess and Kimpel on notice that their actions were unconstitutional.

For their part, the plaintiffs argue that "*Garner* provides clearly established law" "under these circumstances."[110] But the Fifth Circuit says no: "At most, *Garner* prohibits using deadly force against an unarmed burglary suspect fleeing on foot who poses no immediate threat."[111] *Garner* provides only the "general standard" for deadly force cases, and plaintiffs must go beyond *Garner* and identify a case with specificity.[112]

The plaintiffs also cite *Lytle*, where the Fifth Circuit viewed the facts in the light most favorable to the plaintiff and explained that—if the police officer in that case had indeed shot the suspect when the suspect was in a fleeing vehicle three-to-four-houses' distance away from the officer—then the officer violated the suspect's constitutional rights.[113] The facts in *Lytle* are significantly different from the facts of this case. Whereas, in *Lytle*, the Fifth Circuit assumed for summary-judgment purposes that the suspect was far away, here the suspects' vehicle was relatively close to the officers in a confined space in the corner of a parking lot.[114]

The plaintiffs also quote *Newman v. Guedry*, where the Fifth Circuit held that the plaintiff's "right to be free from excessive force . . . was clearly estab-

---

[110] Doc. No. 125 at 35.

[111] *Harmon*, 16 F.4th at 1167.

[112] *Goldston*, 775 F. App'x at 773.

[113] *Lytle*, 560 F.3d at 412–13.

[114] Hess Bodycam 1:00–1:20.

lished in August 2007."[115] That was true for the *Newman* plaintiff, but unfortunately for the plaintiffs here, that does not translate to clearly established law for this case because the facts are extremely different. The *Newman* plaintiff and officer essentially engaged in hand-to-hand combat after the suspect got out of his car during a traffic stop and consented to a pat-down search.[116] Nothing like that occurred here.

Irwin v. Santiago[117] is another relevant Fifth Circuit qualified-immunity case which arose from a June 8, 2018 incident.[118] In *Irwin*, one officer was standing toward the front driver's side of the suspect's vehicle and another was standing toward the back driver's side.[119] The suspect began to "slowly roll his vehicle forward."[120] Both officers fired their weapons.[121] The Fifth Circuit agreed with the district court's determination that the law was not clearly established on the date of the incident to give the officers notice that their conduct would have violated the Constitution.[122] The Fifth Circuit explained: "[W]e have only been able to find . . . circuit precedent establishing a Fourth Amendment violation where an officer

---

115 703 F.3d 757, 763 (5th Cir. 2012).

116 *Id.* at 759–60.

117 *Irwin v. Santiago*, 2021 WL 4932988, (5th Cir. Oct. 21, 2021).

118 *See Irwin v. Santiago*, No. 3:19-CV-2926-B, 2021 WL 75452 (N.D. Tex. Jan. 8, 2021) (Boyle, J.).

119 *Irwin*, 2021 WL 4932988, at *1.

120 *Id.*

121 *Id.*

122 *Id.* at *3.

was positioned *behind* a vehicle that was *moving away from him* as he fired."[123] That didn't cut it, so the Fifth Circuit affirmed the grant of qualified immunity. For similar reasons and considering the earlier date of the incident here (January 18, 2017), *Irwin* counsels against finding that the law was clearly established to give Officers Hess and Kimpel fair warning that their conduct was unconstitutional.

One exception to the requirement that a plaintiff identify clearly established law is when a case presents facts so grotesque, so egregious, so "obvious" that the defendant cannot claim immunity based on a lack of prior caselaw.[124] For example, the Supreme Court held in *Hope v. Pelzer* that a defendant would need no prior law to give him fair warning that handcuffing a prisoner to a hitching post for seven hours and depriving him of food and water would violate the Constitution's Eighth Amendment.[125]

The Fifth Circuit recently explained: "No doubt 'obvious' excessive force cases can arise. . . . But they are so rare that the Supreme Court has *never* identified one in the context of excessive force."[126] Here, the Magistrate Judge did not find this to be an "obvious" case, but the plaintiffs appear to argue that it is,[127] so

---

123 *Id.*

124 *See Reyes*, 362 F. App'x at 408 ("Indeed, unless the violation is 'obvious,' there must be relevant case law that 'squarely governs' the situation . . . ." (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004))).

125 *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

126 *Harmon*, 16 F.4th at 1167.

127 Doc. No. 125 at 35.

the Court briefly addresses it. The facts of this case are a *far* cry from tying a prisoner to a hitching post for seven hours. They are a far cry from defendant officers leaving prisoners in cells containing "massive amounts of feces over a period of six days."[128] They are a far cry from defendant public officials seeking to criminally prosecute a journalist for asking them questions.[129] This is not an "obvious-constitutional-violation" case and the Court rejects the plaintiffs' argument.

It is not the defendants' burden to identify clearly established law showing that they *did not* violate the plaintiffs' constitutional rights. Rather, it is the plaintiffs' burden to provide clearly established law that put the officers on notice that they *did* violate the plaintiffs' constitutional rights—and the plaintiffs' burden is heavy.[130] The plaintiffs have not carried their burden. The Court must obey the Supreme Court's and Fifth Circuit's recent, unequivocal, forceful instructions to define clearly established law with specificity. And that requires finding that Officers Hess and Kimpel deserve qualified immunity.

B. Constitutional Violation

Because the Court concludes that the plaintiffs fail on qualified immunity's second prong, it need not address the first prong, which asks whether the defendant officers violated the plaintiffs' constitutional rights

---

128 *Villarreal v. City of Laredo*, 17 F.4th 532, 539 (5th Cir. 2021) (describing *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (reversing Fifth Circuit's grant of qualified immunity)).

129 *Villarreal*, 17 F.4th at 540.

130 *Vann*, 884 F.3d at 310; *Harmon*, 16 F.4th at 1165.

to be free from excessive force. Nevertheless, the Court does so.

"To prevail on an excessive force claim, a plaintiff must establish injury which resulted directly and only from a use of force that was clearly excessive and the excessiveness of which was clearly unreasonable."[131] "[T]he relevant Fourth Amendment questions are whether the force was 'excessive' and 'unreasonable' as 'judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'"[132] "That calculus '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.'"[133]

"In evaluating whether the officer used 'excessive' force, courts consider the 'severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'"[134] The Fifth Circuit holds that "[a]n officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of

---

131 *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007) (cleaned up).

132 *Harmon*, 16 F.4th at 1163 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

133 *Id.* (quoting *Graham*, 490 U.S. at 396–97).

134 *Id.* (quoting *Graham*, 490 U.S. at 396).

serious harm to the officer or to others."[135] "A court must 'be cautious about second-guessing [the] police officer's assessment' of the threat level."[136]

Although this case presents a relatively close question of whether a constitutional violation occurred, the Court concludes that, on balance, Officers Hess and Kimpel reasonably believed that Dawes posed a threat of serious harm to themselves and the other officers.

Less than one minute before Officer Hess fired the first shot, he had walked over to and stood by Officers Kimpel and Hopkins, who were standing a few feet from the rear left corner of Dawes's vehicle, with the fence behind and to their left, and the row of parked cars behind and slightly to their right.[137] The view from Officer Hess's bodycam as he approached Officers Kimpel and Hopkins:

---

[135] *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009).

[136] *Harmon*, 16 F.4th at 1163 (quoting *Ryburn v. Huff*, 565 U.S. 469, 477 (2012)).

[137] Hess Bodycam at 0:07–0:20; *see also* Hess Bodycam at 1:24 (showing row of parked cars that was on the other side of the path that accessed the parking spots, and behind Dawes's car).

 [138]

After standing by Officers Kimpel and Hopkins for a few seconds, Officer Hess stood behind Dawes's car for a few seconds, shining his flashlight in the back window, yelling "Hands up!," and training his gun on Dawes's car.[139] When Dawes turned her car on, Officer Hess quickly got into the squad car and moved it forward as other officers continued to scream commands at Dawes and Rosales.[140] After Dawes hit the squad car while Officer Hess was in it, drove forward, and as she hit the fence, Officer Hess stepped out of the squad car and trained his gun on Dawes's car.[141] The view from Officer Hess's bodycam as Dawes's reverse lights came on for the second time:

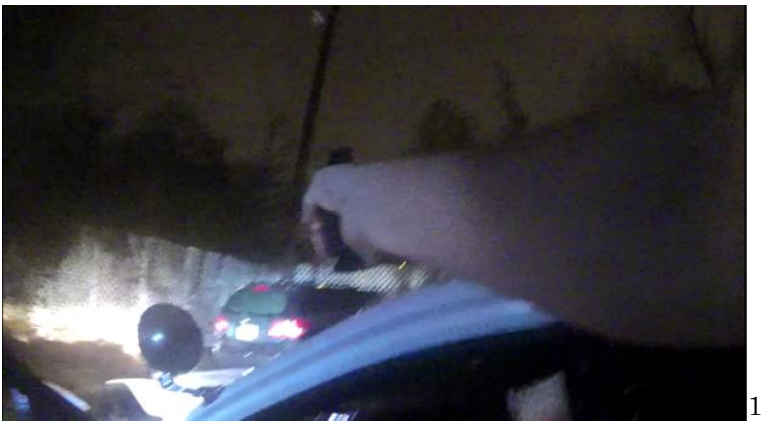
---

[138] Hess Bodycam at 0:15.

[139] Hess Bodycam at 0:27–0:40.

[140] Hess Bodycam at 0:48–1:02.

[141] Hess Bodycam at 1:00–1:07.

 [142]

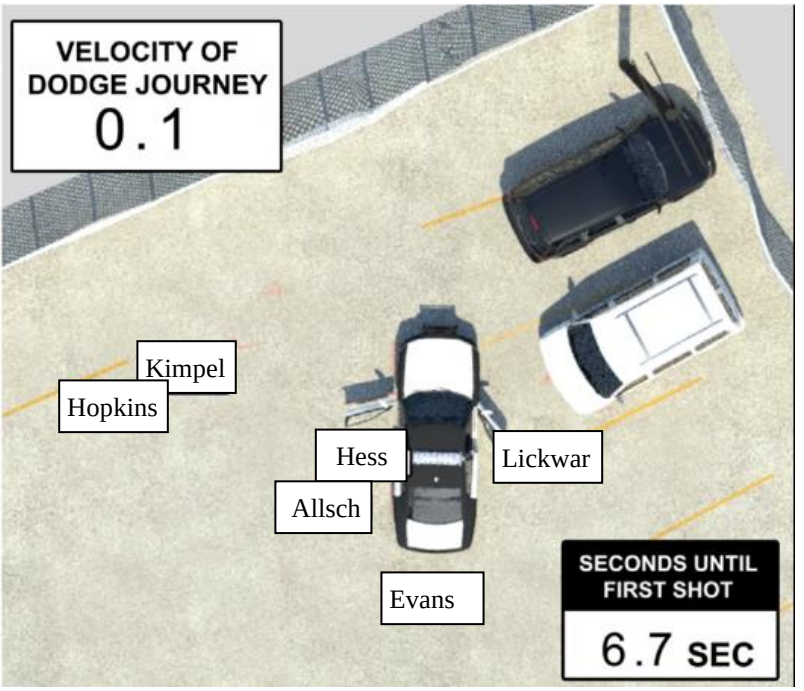
Officers Kimpel and Hopkins were, at that moment, in the direct path behind Dawes's car:

Lickwar

Hopkins

Hess

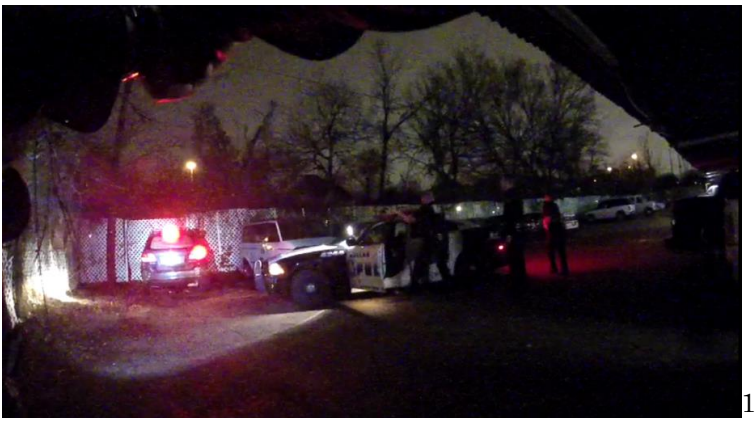
[142] Hess Bodycam at 1:07.



143

The view from Officer Hopkins's bodycam, as Officer Hess stood behind the squad car door with his gun drawn and trained on Dawes's car, and as Officers Hopkins and Kimpel were in Dawes's car's direct path:

143 Video "2-C Sync_With_Camera_Views" at 0:22.

 [144]

As Dawes drove her car backwards and the officers continued to scream commands, and after a few seconds, Officers Hess and Kimpel fired their weapons.

What matters for the constitutional inquiry is whether the officers believed—*on the scene*—that the suspect posed a threat of serious harm and whether that belief was objectively reasonable.[145] The contemporaneous, on-scene assessment (and its reasonableness or lack thereof) is determinative because we must never "allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day."[146] Indeed, "[w]hat constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure" or, for example, during a deposition months after the incident,

---

[144] Hopkins Bodycam at 6:09.

[145] *See Harmon*, 16 F.4th at 1163.

[146] *Malbrough v. Stelly*, 814 F. App'x 798, 806 (5th Cir. 2020) (quoting *Stroik v. Ponseti*, 35 F.3d 155, 158 (5th Cir. 1994)).

aided by the 20/20 vision of hindsight bestowed on the viewer by bodycam footage.[147]

Here, it is undisputed that both Officer Hess's and Officer Kimpel's on-scene assessment was that Dawes's vehicle posed a threat of serious harm to themselves and other officers. Officer Hess believed that "two officers [were] behind [Dawes's] vehicle"[148] and Officer Kimpel also "believe[d] there was somebody there"[149] behind Dawes's vehicle. Thus, the only remaining question is whether that belief was objectively reasonable.

On these facts, the Court concludes that Officers Hess and Kimpel reasonably believed that Dawes posed a threat of serious harm to themselves and other officers. Specifically, Officer Hess reasonably believed that Officers Kimpel and Hopkins were in danger, Officer Kimpel reasonably believed that Officer Hopkins was in danger, and the officers reasonably acted in accord with those reasonable beliefs.

---

147 *See Stroik*, 35 F.3d at 158–59 (cleaned up).

148 Doc. No. 126 at 40; *see also* Doc. No. 106-1 at 5 ("I believed at least two officers were positioned behind the suspects' vehicle . . . . I then witnessed the female suspect place the vehicle in reverse again, and back directly toward the location where I believed two officers remained.").

149 Doc. No. 126 at 64; *see also id.* at 73 ("When I fired, I believed [Dawes's vehicle] did pose a danger."); Doc. No. 106-1 at 9 ("Officer Hopkins and I backed up to a position behind [Dawes's] vehicle . . . . The suspect then placed the vehicle in reverse and I moved to the right while crossing in front of Officer Hopkins. The suspect then began backing up toward where I believed Officer Hopkins was still standing. I believed the suspect was going to strike Officer Hopkins . . . .").

Why? Because these tragic and chaotic events occurred in a relatively tight space in the corner of a parking lot in the dark of night. Because the officers were investigating a suspicious vehicle with two suspects inside, and they learned during the incident that the car had been reported stolen.[150] Because Dawes and Rosales had ignored the officers' countless, screamed commands. Because Dawes had hit Officer Hess's squad car while he was in it. Because Dawes had driven into the fence with enough force to crumple it. Because Officer Hess had stood beside and observed Officers Kimpel and Hopkins behind Dawes's car just seconds before Dawes cranked her car and began her apparent, chaotic attempt to flee.[151] Because Officer Hess's body was facing the corner of the parking lot and the rear right corner of Dawes's car with his gun trained on her car, while Officers Kimpel and Hopkins walked approximately behind and to Officer Hess's left.[152] Because, as shown by Officer Hopkins's body-cam footage, he and Officer Kimpel had barely moved out of Dawes's path by the time that Officer Hess fired the first shot.[153] Because, also from the viewpoint of Officer Hopkins's bodycam, Officer Kimpel was in front

---

150 *See Harmon*, 16 F.4th at 1163 (noting that courts consider the "severity of the crime at issue").

151 *See id.* (noting that courts consider whether the suspect was "attempting to evade arrest by flight").

152 *See* Hess Bodycam at 1:06–1:12; Hopkins Bodycam at 6:08–6:13.

153 Hopkins Bodycam at 6:12–6:19; *see also Lytle*, 560 F.3d at 413–14 (noting that the period of time in *Hathaway*, 507 F.3d 312, was "insufficient for the officer to perceive new information indicating the threat was past").

of and to the left of Officer Hopkins as Officer Kimpel moved out of Dawes's direct path.[154] Because, even after the officers had fired multiple times, Dawes continued to drive in reverse. Because the officers reasonably believed that Dawes was attempting to flee and had been unsuccessful at doing so through the fence in front of her car, leaving the only next possible route being the access path/road in which the officers stood by the squad car. Because Officers Hess and Kimpel reasonably believed that at least one other officer was "at least generally" in the "projected path of" Dawes's vehicle.[155]

The plaintiffs argue that Officers Hess and Kimpel should have chosen reasonable, alternative courses of action, such as turning on the squad car's flashing emergency lights. Even assuming that the plaintiffs' proposed alternatives are indeed reasonable, their argument misunderstands the constitutional question. The constitutional "question" is "whether the Fourth Amendment *require[d]*" the officers to do something *other than* what they did.[156] The "question is not what 'could have been achieved.'"[157] And "a *reasonable* search does not become *unreasonable* simply because the officer might've had other reasonable alterna-

---

[154] Hopkins Bodycam at 5:58–6:16.

[155] *Edwards v. Oliver*, 31 F.4th 925, 931 (5th Cir. 2022) (quoting *Irwin*, 2021 WL 4932988, at *3).

[156] *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983).

[157] *Id.*

tives."[158] For all of the reasons that the Court has explained, Officer Hess's and Officer Kimpel's actions were reasonable, and those actions do not become unreasonable just because the officers may have had other reasonable options. "If an officer has two reasonable alternatives . . . , she can choose either of them and behave reasonably."[159]

The plaintiffs also note that Officers Hess and Kimpel were later found to have contravened police-department policy. But "a law enforcement officer's violation of department policy 'is constitutionally irrelevant' for purposes of a claim brought under § 1983."[160]

"[T]he threat of harm must be 'judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'"[161] The Court's analysis must "allow[] for the fact that police officers are often forced to make split-second judgments" and the Court must be slow to second-guess the officers' on-scene assessment.[162] In light of the

---

158 *Ramirez v. Guadarrama*, 2 F.4th 506, 513 (5th Cir. 2021) (Oldham, J.) (concurring in denial of rehearing *en banc*), *cert. denied*, 142 S. Ct. 2571 (June 30, 2022).

159 *Id.*

160 *Craven v. Perry Cnty.*, No. 2:12-CV-99-KS-MTP, 2013 WL 4458771, at *9 (S.D. Miss. Aug. 16, 2013) (quoting *Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009)). *See also Scott v. Harris*, 550 U.S. 372, 375 n.1 (2007) ("It is irrelevant to our analysis whether Scott had permission to take the precise actions he took.").

161 *Harmon*, 16 F.4th at 1165 (quoting *Graham*, 490 U.S. at 396).

162 *Graham*, 490 U.S. at 397; *see also Ryburn*, 565 U.S. at 477.

facts and the law, the Court finds that only a Monday-morning quarterback could side with the plaintiffs.[163]

---

[163] The Fifth Circuit recently issued a qualified-immunity opinion in *Edwards v. Oliver*, 31 F.4th 925. In that case, suspects were slowly reversing their car away from two police officers as the officers commanded the suspects to stop. *Id.* at 928. Then, the suspects changed direction and began accelerating "past" one of the police officers. *Id.* The other officer opened fire, killing one of the car's passengers. *Id.* Unlike in this case, the district court in *Edwards* adopted the magistrate judge's finding that there was a genuine dispute of material fact precluding summary judgment. The Fifth Circuit agreed and said:

> [T]he extent of the car's threat to Officer Gross is the factual question at the heart of this case, and despite Oliver's argument to the contrary, it is a genuinely *disputed* question. Oliver describes that the car accelerated 'towards/near/by' Officer Gross, whereas plaintiffs assert that Officer Gross was never in the path of the vehicle. The magistrate judge identified this as the crux of the factual dispute warranting denial of summary judgment: '[T]he body-camera footage sufficiently raises a fact question . . . [about the car's] threat of harm to [Officer] Gross because it was moving away' from him.

Id. at 930.

First, *Edwards* is meaningfully different from this case because, here, the Court concludes that it simply cannot side with the plaintiffs without engaging in the Monday-morning quarterbacking that the Fifth Circuit repeatedly warns against. Second, another meaningful difference is that, in *Edwards*, the magistrate judge didn't mention or acknowledge in its findings, conclusion, and recommendation the officers' evidence about their perception that they "heard the window shatter right next to" one of the officers, which may have "sounded like a gunshot." *Id.* Because of that, the Fifth Circuit "d[id] not have jurisdiction to consider . . . an argument" based on that perception. *Id.* In contrast, here and for the reasons explained above the line, Officers Hess and Kimpel had a reasonable basis to believe that at least one officer was in the path of Dawes's vehicle as she reversed. Third, here

Therefore, the Court must grant Officers Hess and Kimpel qualified immunity on the additional ground that they did not violate the Constitution.

IV. Evidentiary Rulings

The Magistrate Judge made recommendations on various of the parties' evidentiary objections.[164] The Court finds no error in them and ACCEPTS the Magistrate Judge's recommendations.

---

and in contrast to *Edwards*, the Court finds that the officers reasonably interpreted the law in existence as of January 18, 2017 to conclude that the perceived threat was sufficient to justify deadly force. *Reyes*, 362 F. App'x at 408. Fourth, unlike in *Edwards*, the bodycam footage here does not "sufficiently raise[] a fact question." *Edwards*, 31 F.4th at 930. Finally, even if the plaintiffs were to win the *Edwards* battle, they would still lose the war—because they have not carried their burden on the clearly-established-law-prong. The Fifth Circuit has repeatedly affirmed grants of qualified immunity in equally factually analogous cases. *See, e.g.*, *Goldston*, 775 F. App'x 772; *Irwin*, 2021 WL 4932988. And "[c]ases cutting both ways do not clearly establish the law." *Morrow*, 917 F.3d at 879.

But if the Fifth Circuit ends up disagreeing with the Court on the above points, then *Edwards* controls. And it appears to the Court that *Edwards*—when it controls—might hold that every qualified-immunity case involving excessive force and a suspect in a vehicle must go to a jury if the plaintiffs and defendants disagree as to the extent of the harm that the suspect's vehicle posed—even if everyone agrees about what actually happened on the scene, *i.e.*, that the videos are accurate depictions of what occurred. But wouldn't that be every case in this category? Of course the plaintiffs think that their actions didn't pose a sufficient threat of harm to the officers, and of course the officers think the opposite.

164 Doc. No. 136 at 2–8.

V. Conclusion

The Court ACCEPTS IN PART and REJECTS IN PART the Magistrate

Judge's report and GRANTS the defendants' motion for summary judgment. IT IS SO ORDERED this 11th day of August, 2022.

/s/ Brantley Starr
United States District Judge

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (SEPTEMBER 24, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY DAWES, ET AL.,

Plaintiffs,

v.

CITY OF DALLAS, ET AL.,

Defendants.

Case No. 3:17-CV-1424-X-BK

Before: Renee HARRIS TOLIVER,
United States Magistrate Judge.

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the order of the district judge, Doc. 60, and 28 U.S.C. § 636(b), this case was referred to the United States magistrate judge for pretrial management, including the issuance of findings and a recommended disposition when appropriate. Before the Court are Defendants Christopher Hess and Jason

Kimpel's ("Defendants") *Motion for Summary Judgment Asserting Qualified Immunity*. Doc. 104. For the reasons that follow, the motion should be DENIED.

I. BACKGROUND

Plaintiffs filed suit against Dallas Police Department ("DPD") officers Christopher Hess ("Hess") and Jason Kimpel ("Kimpel") stemming from Genevive Dawes' ("Dawes") death and Virgilio Rosales' ("Rosales") (collectively, "Plaintiffs") injuries sustained during the police investigation of a report of suspicious persons in a parked car at an apartment complex. Doc. 91 at 1. After extensive motion practice, Defendants filed an amended answer, Doc. 94, and then this motion asking the Court to grant them summary judgment based on the doctrine of qualified immunity. Doc. 104 at 1. This motion does not concern or affect the third defendant in the case, the City of Dallas.

II. OBJECTIONS

Before addressing the facts pertinent to Plaintiffs' claims, the Court first considers the objections the parties raised to each other's supporting exhibits.

A. Plaintiffs' Objections

Plaintiffs object to paragraphs 6-8 of the affidavits Hess and Kimpel (collectively, "Defendants") submitted in support of their summary judgment motion. Doc. 125. These paragraphs aver that (1) their actions were in compliance with the law; (2) they did not violate Plaintiffs' rights; (3) they did not violate an established constitutional right; (4) their actions were reasonable; and (5) a reasonable officer could believe

their actions were lawful. Doc. 106-1 at 2-3 (Hess Affid.); Doc. 106-1 at 7-8 (Kimpel Affid.).

Plaintiffs argue that these assertions are impermissible legal conclusions, lack relevant facts, and should be stricken from the record. Doc. 125 at 25-27. Defendants did not respond to the objections. Accordingly, any arguments Defendants may have made in opposition are deemed abandoned. *See Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006) (holding party had abandoned argument by failing to address it). Moreover, these statements are in fact legal conclusions outside the bounds of a proper declaration. *See Renfroe v. Parker*, 974 F.3d 594, 598 (5th Cir. 2020) ("Reasonableness under the Fourth Amendment or Due Process Clause is a legal conclusion."); *United States v. Williams*, 343 F.3d 423, 435 (5th Cir. 2003) (holding that trial court erred in allowing police officers to testify about the reasonableness of a shooting because that is a legal conclusion). Plaintiffs' objections are SUSTAINED.

B. Defendants' Objections

Defendants move to strike certain evidence Plaintiffs filed in response to their summary judgment motion. Doc. 131 at 8. The objections are addressed seriatim *infra*.

1. Rosales Declaration (Plaintiff's Exh. 1)

Defendants object to the admissibility of Rosales' declaration statements in paragraphs 4, 6, 7, and 8 that refer to or describe Dawes' comments or alleged state of mind during the incident, arguing that the statements are inadmissible hearsay, speculative, not

within Rosales' personal knowledge, and unsupported opinions and conclusions. Doc. 131 at 5.

Plaintiffs respond that Rosales can testify as to what Dawes said to him in the moments that led up to the shooting because those statements fall within both the "present sense impression" and "excited utterance" exceptions to the hearsay rule. Doc. 134 at 5-6. Plaintiffs also contend that Rosales should be able to speak to Dawes' state of mind because he simultaneously experienced the same events. Doc. 134 at 7.

Defendants' objection is SUSTAINED IN PART. Rosales may testify about Dawes' statements, but not her personal knowledge and alleged state of mind. *See* Fed. R. Evid. 803(2) (excepting from the hearsay rule "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."); Fed. R. Evid. 803(1) (limiting "present sense impression" hearsay exception to "[a] *statement* describing or explaining an event or condition, made while or immediately after the declarant perceived it.") (emphasis added).

Additionally, Defendants object to Rosales' statements in paragraph 13 of his declaration which addresses why he thought Defendants fired their weapons and arrested him. Defendants argue that the statements are speculative, outside Rosales' personal knowledge, and constitute opinions and conclusions. Doc. 131 at 5. The Court agrees. Defendants' objections to paragraph 13 are SUSTAINED, and Rosales' statements that he was arrested "for no reason" and "wrongfully arrested and detained" will not be considered by the Court.

2. Plaintiffs' Exhibits 2, 2-B, 2-C, 2-D, and 3

Defendants object, as irrelevant to the qualified immunity issue, to certain statements made in the declaration of Plaintiff's photogrammetry/video science expert witness Mark Johnson.[1] In the declaration, Johnson describes how he used videos from five police officers' body cameras ("bodycams") to (1) conclude that Dawes' vehicle was traveling between 2.4 and 3.1 miles per hour at the time of the shooting, Doc. 126 at 12, ¶¶ 23-24 (Johnson Decl.); and (2) develop three video reconstructions of the event, Doc. 126 at 12, ¶¶ 27-30 (Johnson Decl.). Doc. 131 at 5-6 (referring to Plaintiffs' Exhibit 2-B, 2-C, 2-D, and 3). Defendants make the same objection to (1) the declaration of Mark Partain, who assisted Johnson, insofar as Partain testifies how he determined the speed of Dawes' vehicle, Doc. 126 at 28-29; and (2) the video reconstructions themselves in their entirety. Doc. 131 at 5-6.

Plaintiffs argue the exhibits have a "tendency to make a fact more or less probable" and thus are relevant because they show, *inter alia*, how fast Dawes' car was moving and where the officers were located during the incident, both of which are disputed points and could affect the outcome of the case. Doc. 134 at 8-9 (citing Fed. R. Evid. 401). The Court agrees for essentially the reasons Plaintiffs state. Defendants' objections to Plaintiffs' Exhibits 2, 2-B, 2-C, 2-D, and 3 are OVERRULED.

---

[1] Johnson was also retained by the prosecution to testify at Hess's criminal trial. Doc. 126 at 12.

3. Hess Deposition Testimony (Plaintiffs' Exhibit 4)

Defendants object to the relevance of a single question and answer from Hess' deposition, namely whether it was a violation of DPD policy for Hess to not activate his emergency lights under the circumstances. Doc. 131 at 6; *see* Doc. 126 at 41 (Hess Depo.). Plaintiff responds that the testimony is relevant because it corroborates Rosales' statement that he did not know there were police officers near Dawes' car. Doc. 134 at 10.

Whether Hess violated DPD policy does not directly relate to what Rosales actually knew at the time of the incident nor does it directly impact the constitutional analysis in this case. *See, e.g.*, *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009) ("Violations of non-federal laws cannot form a basis for liability under § 1983, and qualified immunity is not lost because an officer violates department protocol."). Nevertheless, a policy violation can serve as evidence that an act was objectively unreasonable. *See Anthony v. Morton*, No. SA-05-CA-0027-RF, 2007 WL 628750, *7 (W.D. Tex. Jan. 31, 2007) (stating that agency's finding that officer was reprimanded for violating prison policy about baton use was relevant to determining whether officer used excessive force and acted in an objectively unreasonable manner); *see also Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002) (holding that official's disregard of prison regulation "provides equally strong support for the conclusion that they were fully aware of the wrongful nature of their conduct."). Relatedly, a policy violation may show that a reasonable, alternative course of action was available to Defendants. *See Anthony*, 2007 WL 628750 at *7

(holding that reprimand for officer's violation of baton use policy "may be probative in determining if he subjected [plaintiff] to excessive force, and it is certainly probative in determining if [officer] acted in an objectively reasonable manner."). Defendants' objection to this testimony is OVERRULED.

4. Officer Lickwar's Deposition Testimony (Plaintiffs' Exhibit 6)

Next, Defendants summarily object to some questions and answers during fellow officer Peter Lickwar's ("Lickwar") deposition as irrelevant to the qualified immunity issue. Doc. 131 at 6-7. Specifically, Defendants object to Lickwar's testimony that addresses (1) the policy that officers are not supposed to fire into a moving vehicle, "if nobody is in the way," and the reasons for that policy, *see* Doc. 126 at 82; and (2) Lickwar's agreement with the DPD's conclusion that Hess violated the department's use-of-force policy based on the facts as he currently knew them, *see* Doc 126 at 92. Plaintiffs respond that Lickwar's testimony is relevant because it is probative of whether Defendants acted in an objectively reasonable manner. Doc. 134 at 10-11.

Upon consideration, the Court finds that Lickwar's testimony about DPD's policy and the results of the DPD investigation goes to the reasonableness of Defendants' actions. *See Anthony*, 2007 WL 628750 at *7 (holding that officer's reprimand for violating prison policy about baton use was relevant in determining whether officer used excessive force and acted in an objectively reasonable manner); *see also Hope*, 536 U.S. at 741-42 (holding that "[a] course of conduct that tends to prove that the [prison regulation] was

merely a sham, or that [defendants] could ignore it with impunity" supported plaintiff's assertion that prison officials were "fully aware" that their conduct was wrongful) (citation omitted). Further, Defendants have not provided any authority for their position that Lickwar should not be permitted to testify about whether he agreed with the DPD's findings, and the Court has found none. Defendants' objections are OVERRULED.

5. The Internal Affairs Division Brief (Plaintiffs' Exhibit 8)

Defendants object to the admissibility of the DPD's Internal Affairs Division brief to the acting chief of police (the "IA Brief") in its entirety, arguing that it is hearsay, the individual who drafted it lacks personal knowledge of the events, it contains unsupported opinions and conclusions, and it is irrelevant for purposes of Defendants' qualified immunity defense. Doc. 131 at 7. In the alternative, Defendants object to specific portions of the IA Brief on the same grounds. Doc. 131 at 8.

Plaintiffs respond that Defendants' production of the IA Brief during discovery shows *prima facie* that it is relevant, and it is also a public record capable of overcoming Defendants' remaining objections (citing Fed. R. Evid. 803(A)(iii)). Doc. 134 at 11-12. As an initial matter, the undersigned concurs that the IA Brief is relevant as the relevancy threshold is relatively low. *See* Fed. R. Evid. 401 ("Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action.") (internal

numbering omitted). Defendants' relevance objection is OVERRULED.

Federal Rule of Evidence 803(8) provides a hearsay exception for "[a] record or statement of a public office" if

> (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including . . . (iii) in a civil case, . . . factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Fed. R. Evid. 803(8). Rule 803(8) thus presumes the admissibility of factual statements in an investigative report unless the opposing party can show that the report is untrustworthy. *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991); *see also* Fed. R. Evid. 803(8) advisory committee note (stating that the rule "assumes admissibility in the first instance."). There is no dispute that the IA Brief satisfies the first prong of Rule 803(8). As such, the IA Brief presumptively falls within the public record hearsay exception. *Moss*, 933 F.2d at 1305.

As to the second prong — the trustworthiness of the IA Brief — the Advisory Committee proposed a nonexclusive list of four factors to be considered, including: (1) the timeliness of the investigation, (2) the expertise of the official, (3) whether a hearing was held and at what level, and (4) possible "motivation problems" of the proffering party. Fed. R. Evid. 803(8) advisory committee note. Due to the presumption that public records are admissible, the party opposing

admission "must prove the report's untrustworthiness." *Moss*, 933 F.2d at 1305 (collecting cases). Here, however, Defendants do not address the Advisory Committee factors or otherwise overtly challenge the trustworthiness of the IA Brief. Accordingly, any argument they may have had in that respect is waived. *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 255 (5th Cir. 2008) (stating that inadequately briefed arguments are deemed waived or abandoned).

Even in the absence of a waiver, "factually based conclusions or opinions" are admissible under Rule 803(8). *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162 (1988) (citing prior version of rule). "If the documents contain factual findings that qualify for 803(8), they are not rendered 'inadmissible merely because [the documents] state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report.'" *United States v. Gluk*, 831 F.3d 608, 613 n.3 (5th Cir. 2016) (quoting *Beech Aircraft Corp.*, 488 U.S. at 170).

Here, Defendants specifically object to (1) the IA Brief's five-page opening synopsis, Doc. 126 at 119-23; (2) the allegations against Defendants that constituted internal DPD violations, Doc. 126 at 5-6; (3) the findings of the DPD internal investigation, Doc. 126 at 123-24; and (4) the DPD's Use of Deadly Force Policy, Doc. 126 at 9-10. Doc. 131 at 7-8. While the Court will not endeavor to describe every statement in the IA Brief to which Defendants object, examples of "factually based conclusions or opinions" in the IA Brief include (1) the identities of the DPD officers who responded to the scene of the incident; (2) the contents

of the officers' bodycam footage; (3) which officers discharged their weapons; (4) the training DPD officers undergo; and (5) the IA investigator's conclusion that Defendants violated certain DPD policies and his recommended punishment. *See Beech Aircraft Corp.*, 488 U.S. at 162. Defendants' objections are OVERRULED.

III. FACTS

Turning to the merits, the parties' motions, briefs, and appendices establish the following facts: Early in the morning on January 18, 2017, Plaintiffs were asleep in their fully reclined seats in a black Dodge Journey that Dawes had parked in the back corner of an apartment complex. Doc. 106-1 at 4 (Hess Affid.); Doc. 126 at 6-7 (Rosales Decl.). Dawes had purchased the vehicle a month earlier. Doc. 126 at 7 (Rosales Decl.). To the right side of Dawes' car was another vehicle. Doc. 106-1 at 4 (Hess Affid.); Doc. 126 at 7 (Rosales Decl.). There was a white trellis fence to the left and in front of Dawes' car. Doc. 106-1 at 4 (Hess Affid.); Doc. 126 at 7 (Rosales Decl.); Evans Bodycam at 3:56. Behind the fence was a wooded area. Hopkins Bodycam at 5:55.

Shortly after the first officers arrived to investigate a complaint about the car, they began shining their flashlights in the car windows. Evans Bodycam at 1:32-2:00. The area was dark and poorly lit, and Dawes' car windows were darkly tinted and steamed up, making it difficult to see inside. Doc. 106-1 at 9 (Kimpel Affid.); *see also* Doc. 126 at 7 (Rosales Decl.) (stating that the windows of Dawes' car were fogged up). Around the same time, Defendants arrived upon hearing a call on their radio about a "suspicious vehicle"

containing a male and female in an apartment parking lot. Doc. 106-1 at 4 (Hess Affid.); Doc. 106-1 at 9 (Kimpel Affid.); Kimpel Bodycam at :29, 1:21; Hopkins Bodycam at 4:17. Dawes' car was not moving, and the officers were unsure whether it was occupied. Doc. 126 at 38 (Hess Depo.); Kimpel Bodycam at 1:20-1:25.

Hess retrieved the closest squad car and pulled it up diagonally, facing the right rear side of Dawes' vehicle. Doc. 106-1 at 4 (Hess Affid.). Hess "sound[ed] the squad car's air horn and activate[d] a short siren yelp," but did not turn on the emergency lights. Doc. 126 at 119 (IA Brief); Doc. 126 at 41 (Hess Depo.); Hopkins Bodycam at 4:14-4:17. He aimed the squad car's headlights at Dawes' car and exited the vehicle, moving behind and to the left of it. Kimpel Bodycam at 1:32-1:58; Evans Bodycam at 2:00-2:04; Lickwar Bodycam at 2:00; Hopkins Bodycam at 4:17; Doc. 106-1 at 4 (Hess Affid.); Doc. 126 at 119 (IA Brief). Other officers were positioned on Hess' right and left and at least two officers were next to a carport behind Dawes' vehicle. Doc. 106-1 at 4 (Hess Affid.). At some point, Defendants learned the suspect vehicle was possibly stolen. Doc. 106-1 at 4 (Hess Affid.); Doc. 106-1 at 9 (Kimpel Affid.); Doc. 126 at 40 (Hess Depo.).

As officers stood nearby, Officer Hopkins slowly approached Dawes' car and pulled on the right rear door handle, which appeared to be locked, and an officer announced there were two people asleep inside the vehicle, later determined to be Plaintiffs. *See* Doc. 126 at 40-41 (Hess Depo.); Doc. 126 at 68 (Kimpel Depo.); Kimpel Bodycam at 2:00-2:10; Evans Bodycam at 2:30 2:38; Hopkins Bodycam at 4:46; Doc. 126 at 119 (IA Brief). Hess heard the statement. Doc. 126 at 40-41 (Hess Depo.). A few seconds later, two officers told

Plaintiffs to show their hands. Kimpel Bodycam at 2:10-2:12. After a short time, officers twice ordered Plaintiffs to show their hands while someone else announced, "Dallas police." Kimpel Bodycam at 2:26-2:42. Another officer stated that someone was moving around in the vehicle. Kimpel Bodycam at 2:40-2:42. Dawes and Rosales were again ordered twice to show their hands, but they did not do so, although at least one of them started moving around in the car. Kimpel Bodycam at 2:45-2:57.

Less than 30 seconds later, Dawes started her car, at which point Plaintiffs were again ordered to show their hands. Kimpel Bodycam at 3:11-3:12; Hess Bodycam at :50-52. When Hess saw Dawes' car reversing, he got back in the patrol car, telling the other officers to "watch out" and "move move move," as he pulled the patrol car further forward at the same time Dawes was slowly backing up. Doc. 106-1 at 4 (Hess Affid.); *see also* Hess Bodycam at :51-59; Kimpel Bodycam at 3:20; Evans Bodycam at 3:40. Dawes' car bumped into the patrol car just as Hess moved the car forward. Doc. 126 at 8 (Rosales Decl.); Hess Bodycam at 1:00-1:02; Hopkins Bodycam at 6:04; Kimpel Bodycam at 3:19; Doc. 106-1 at 4-5 (Hess Affid.) (averring that Dawes made contact with the police car); Doc. 106-1 at 9 (Kimpel. Affid.) (stating that Hess moved the squad car "forward a few feet" when Dawes started her car and began to reverse); Doc. 126 at 41 (Hess Depo.); *see also* Doc. 126 at 110, 114 (Hopkins Affid.) (stating that when Dawes reversed her car, she barely made contact with the police car and it hardly moved); Doc. 126 at 121 (IA Brief, stating that Hess "moved the squad car into a blocking position.").

Dawes then accelerated back into her parking spot, bumping into and slightly crumpling the fence in front of her car. Doc. 126 at 8 (Rosales Decl.); Hopkins Bodycam at 6:07-6:10; Kimpel Bodycam at 3:24. When Dawes put the car in reverse again, Kimpel stated, "watch out, watch out, watch out, watch out," as he and Hopkins walked behind Dawes' vehicle to the rear left side of the patrol car. Kimpel Bodycam at 3:25-3:37; Hopkins Bodycam at 6:14-6:18. As Dawes slowly backed up and to her left, she and Rosales were ordered to show their hands twice more, while Hess told the other officers, "back up back up," and ordered Plaintiffs not to move. Kimpel Bodycam at 3:25-3:37; Hess Bodycam 1:05-1:10; Doc. 126 at 8 (Rosales Decl.); Doc. 126 at 42 (Hess Depo.) (affirming that Dawes' vehicle was slowly reversing and he did not observe her revving her engine or attempting to back up at a high rate of speed); Hess Bodycam at :51; *see also* Doc. 126 at 16 (Affid. of Plaintiffs' expert Mark Johnson, stating that the fastest Dawes' vehicle was moving was between 2.4 and 3.1 miles per hour, i.e., "walking speed").

Then, in a span of about four seconds, Hess fired his first round of nine shots at the passenger side of Dawes' vehicle, shattering the passenger window. Doc. 106-1 at 5 (Hess Affid.); Doc. 126 at 44 (Hess Depo.); *see* Hess Bodycam at 1:15; Kimpel Bodycam at 3:35; Hopkins Bodycam at 6:19-6:23; Evans Bodycam at 4:03-4:07. Hess was behind the open door of the squad car when he fired. Hess Bodycam at 1:09; Kimpel Bodycam 3:34. After Hess began shooting, Kimpel fired his weapon once. Doc. 126 at 120 (IA Brief). When the shots were fired, Dawes' car momentarily stopped. Hess Bodycam at 1:16-1:17; Doc. 106-1 at 5

(Hess Affid.); Doc. 126 at 8 (Rosales Decl.). Hess could then see inside the vehicle and observed that Dawes appeared to have been shot at least once. Doc. 126 at 45 (Hess Depo.). Her hands were no longer on the steering wheel as she had one hand on her chest and one in her lap. Doc. 126 at 45 (Hess Depo.). Dawes' car then continued to slowly roll back at which point Hess fired three more shots before Dawes' car came to rest. Hess Bodycam at 1:17-1:20; *cf.* Kimpel Bodycam at 3:40-3:41; Hopkins Bodycam at 6:22-6:25; Evans Bodycam at 4:10-4:15. Hess then approached Dawes' car where she was slumped in the reclined driver's seat with her left hand in her lap and her right hand next to her head. Hess Bodycam at 3:20-3:47.

Several minutes later Hess asked Kimpel "who was back there," and Kimpel responded, "Me and Hopkins, we moved." Hess Bodycam at 4:48; Doc. 126 at 72 (Kimpel Depo.). Bodycam footage shows that both Officer Hopkins and Kimpel had moved out of Dawes' path before she began to reverse the second time. Kimpel Bodycam at 3:25-3:37; Hopkins Bodycam at 6:14-6:18; Hess Bodycam at 1:17-1:22; Doc. 126 at 73 (Kimpel Depo.). No officer was behind Dawes' car—they were all located on the passenger side at varying distances and some officers had the patrol car positioned between Dawes' car and themselves. Hess Bodycam at 1:09-1:22.

After Rosales' window had been shot out, he eventually exited Dawes' car at the officers' direction and was handcuffed until an ambulance arrived to assist Dawes, who later died at the hospital. Doc. 126 at 8 (Rosales Decl.). Officers searched Dawes' car and discovered a small handgun underneath a pillow between the driver and passenger seat behind the

central console. Doc. 106-1 at 11 (Evans Affid.); Doc. 126 at 9 (Rosales Decl.). Defendants were not aware of the gun at the time of the shooting. Doc. 126 at 43-44 (Hess Depo.); Doc. 126 at 74 (Kimpel Depo.). An investigation subsequently revealed that Kimpel's bullet struck Dawes' car and four of Hess's bullets struck Dawes. Doc. 126 at 120 (IA Brief).

With this overview of the events in mind, the Court now summarizes the parties' accounts of the moments leading up to the shooting. On the early morning of the incident, Dawes woke up Rosales and told him she heard something outside the car. Doc. 126 at 7 (Rosales Decl.). Rosales could see bright lights and hear voices and yelling, but could not hear or understand what anyone was saying, and was not aware there were police officers behind the vehicle. Doc. 126 at 7 (Rosales Decl.). Plaintiffs had not fully awakened, and Rosales was startled and scared. Doc. 126 at 7 (Rosales Decl.). The fogged-up windows and bright lights outside the car made it difficult for him to see what was happening outside. Doc. 126 at 7 (Rosales Decl.). Rosales attests that once the passenger door window had been shot out, he could see police officers outside and to his right for the first time. Doc. 126 at 8 (Rosales Decl.). Rosales maintains he did not know Dawes' vehicle had been reported stolen, and they were not attempting to flee from the officers. Doc. 126 at 7 (Rosales Decl.).

Hess avers that when he initially pulled the squad car forward, he intended to provide cover for the other officers at the scene. Doc. 106-1 at 4 (Hess Affid.). Hess also said, "the suspects clearly heard the [officers'] commands, but failed to comply." Doc. 106-1 at 4 (Hess Affid.). As Dawes began to reverse, Hess

pulled the squad car further forward to provide additional cover for the officers on his left and to limit the space available for Dawes to speed up if she intended to use her vehicle as a weapon. Doc. 106-1 at 4 (Hess Affid.). When Dawes drove forward to the fence, Hess believed she intended to break through it to flee the scene but was unable to do so. Doc. 106-1 at 5 (Hess Affid.). Hess fired his weapon as Dawes backed up the second time because he thought Dawes intended to drive into two fellow officers he believed were in her path. Doc. 106-1 at 4-5 (Hess Affid.). It was later determined that Hess moved the car into a position that placed his fellow officers at a tactical disadvantage. Doc. 126 at 41 (Hess Depo.).

Kimpel averred that when he fired his sole shot, he thought Officer Hopkins was behind Dawes' car although he did not observe anyone in danger at the time. Doc. 126 at 65-67, 70, 73 (Kimpel Depo.) (stating that he did not see anyone in danger when he discharged his weapon and did not believe Dawes was trying to run him over, but believed her vehicle posed a danger); *cf.* Doc. 126 at 115 (Hopkins Depo.) (stating that he did not believe anyone was in danger when Kimpel and Hess fired their weapons). Kimpel averred that when he fired his shot, he did not look or see anyone in danger behind Dawes' car or tell anyone to get out of the way. Doc. 126 at 73 (Kimpel Depo.).

Hess and Kimpel later testified that neither of them believed they were in danger when they discharged their weapons. Doc. 126 at 42, 48 (Hess Depo.); Doc. 126 at 73 (Kimpel Depo.). Additionally, neither Hess nor Kimpel actually saw anyone standing behind Dawes' vehicle when they fired shots. Doc. 126 at 40, 45 (Hess Depo.); Doc. 126 at 66 (Kimpel Depo.).

Hess believed that even if there were other officers in Dawes' path, they could have moved out of the way by the time he fired his second round. Doc. 126 at 45 (Hess Depo.); *see also* Doc. 126 at 42 (Hess Depo.) (agreeing that Dawes' car was "slowly reversing," and he did not see her revving her engine or attempting to back up at a high rate of speed).

In accordance with DPD policy, during a felony traffic stop, officers are required to, among other things, activate their emergency lights and siren. Doc. 126 at 128-29 (DPD Standard Operating Procedure 1525). It is also a violation of DPD policy to fire a weapon at a moving vehicle unless an occupant is using or attempting to use deadly force against an officer or other persons. Doc. 126 at 126, 128 (DPD General Orders; Doc. 126 at 40 (Hess Depo.). Additionally, officers are trained to be sure of their target and background before discharging their duty weapon. Doc. 126 at 47 (Hess Depo.). Following an internal DPD investigation, Hess was terminated from his position and subsequently faced a felony criminal charge of which he was acquitted. Doc. 126 at 38-39, 50 (Hess Depo.); Doc. 126 at 123, 131 (IA Brief). Kimpel received a 30-day suspension for violating the DPD's use-of-force policy. Doc. 126 at 63 (Kimpel Depo.).

IV. APPLICABLE LAW

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judg-

ment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party moving for summary judgment has the initial burden of "informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (internal quotation marks omitted).

Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotations omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* Conclusory allegations are not competent summary judgment evidence and are thus insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994).

When ruling on a motion for summary judgment, the court is required to view all facts and inferences in the light most favorable to the nonmoving party and

resolve all disputed facts in favor of the nonmoving party. *Id.* When deciding whether this burden has been met, all inferences are drawn in plaintiff's favor. *Tucker v. City of Shreveport*, 998 F.3d 998 F.3d 165, 173 (5th Cir. 2021). Nevertheless, Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Id.* When ruling on a summary judgment motion, courts do not consider issues of disputed facts that are "irrelevant and unnecessary." *Anderson*, 477 U.S. at 248.

B. 42 U.S.C. § 1983 and Qualified Immunity

Section 1983 "provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal punctuation and citation omitted). When a defendant in a section 1983 action properly asserts qualified immunity as a defense, the burden shifts to the plaintiff to rebut it. *Tucker*, 998 F.3d at 173. A court must answer affirmatively two questions before an official is subject to liability: (1) whether the facts a plaintiff has alleged make out a violation of a consti-

tutional right and (2) whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct such that the conduct was objectively unreasonable. *Pearson*, 555 U.S. at 232. A court may begin its assessment with either prong. *Id.* at 236 (*overruling in part Saucier v. Katz*, 533 U.S. 194 (2001)).

C. Excessive Force

The Fourth Amendment grants free citizens "the right to be secure in their persons . . . against unreasonable seizures" by public officials. *Graham v. Connor*, 490 U.S. 386, 394 (1989). In *Graham*, the Supreme Court held that the question surrounding whether an officer used excessive force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. The court is required to judge the reasonableness of any given use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision imparted by hindsight. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). "The 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*, 490 U.S. at 396-97. This is a predominately objective inquiry. *Jackson v. Gautreax*, 3 F.4th 182, 186-87 (5th Cir. 2021) (quotations omitted). If "the circumstances, viewed objectively, justify the challenged action," then subjective intent is immaterial

because the Fourth Amendment regulates conduct, not thoughts. *Id.* at 187.

The primary consideration in determining whether a use of deadly force is unreasonable is whether the suspect posed an immediate threat of serious physical harm to the officer or to others when the force was applied. *Id.* at 186. An officer's use of deadly force is not excessive "when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or others." *Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009) (citation omitted). When deciding whether a use of deadly force is unreasonably excessive, the court must balance the intrusion into the individual's Fourth Amendment rights against the prevailing government interests. *Aguirre v. City of San Antonio*, 995 F.3d 395, 407, 412 (5th Cir. 2021). If the level of force used outweighs the needs of the situation, it is unreasonably excessive. *Id.* This is a fact-intensive inquiry—when making the determination, a court must consider the totality of the circumstances. *Id.*

In the context of the Fourth Amendment, specificity is especially important because "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." *Kisela*, 138 S. Ct. at 1152 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). Indeed, the outcome of any given excessive force case "depends very much on the facts of each case." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). To that end, police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Id.*

To establish that the use of excessive force violated a constitutional right, a plaintiff must show:

(1) an injury, (2) that resulted directly from an officer's use of force, and (3) that the force used was objectively unreasonable. *Aguirre*, 995 F.3d at 406 (citation omitted). "[A]n officer's conduct cannot be held 'unreasonable' under the Fourth Amendment in the absence of allegations or evidence regarding an 'alternative course the defendant officers should have followed that would have led to an outcome free of potential tragedy.'" *Ramirez v. Guadarrama*, 3 F.4th 129, 136 (5th Cir. 2021). In *Ramirez*, the appellate court rejected the plaintiffs' Fourth Amendment claim where it was "not apparent what might have been done differently to achieve a better outcome under these circumstances." *Id.*

V. ANALYSIS[2]

A. Violation of a Constitutional Right

Defendants do not dispute that Plaintiffs were injured as a direct result of their use of force. Doc. 105 at 12-13. Defendants only address whether the force they used was objectively unreasonable. Doc. 105 at 13. And they argue only briefly that they were justified, in light of the record evidence, in using the type and amount of deadly force involved. Doc. 105 at 13-14.

Plaintiffs respond that deadly force is objectively reasonable in only one circumstance—when the suspect poses an immediate threat to the officer or others. Doc. 125 at 29 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). Plaintiffs maintain that in this case, the

---

[2] Defendants initially argue that Plaintiffs have "failed to state a constitutional claim" for excessive force. Doc. 105 at 10-11. This argument is only appropriate in the context of a motion to dismiss. It is thus immaterial to the motion at hand.

record evidence demonstrates that no officer was in immediate danger when Defendants discharged their weapons. Thus, they continue, the force Defendants used was objectively unreasonable and violated Plaintiffs' clearly established rights. Doc. 125 at 30-33. Defendants reply that their actions were objectively reasonable — albeit mistaken — when judged from the perspective of a reasonable officer on the scene and without the benefit of hindsight.

"A suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable." *See Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 414, 416 (5th Cir. 2009) (noting that the Supreme Court has not declared "open season on suspects fleeing in motor vehicles."). "[A]bsent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Id.* at 417 (citation omitted).

If, when viewed in the light most favorable to the plaintiff, the evidence indicates that a reasonable officer would know the force was excessive, or at least there is a genuine dispute of facts as to whether a suspect posed an immediate threat to the officers or others, the motion for summary judgment should be denied. *See Aguirre*, 995 F.3d at 414-15 (holding that differences between plaintiffs' and officers' summary judgment evidence, such as whether the suspect was actively resisting, at least established a genuine issue of material fact and could lead a jury to conclude that no reasonable officer would think the suspect was an immediate threat). "The relevant, dispositive inquiry in determining whether a right is clearly established

is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau*, 543 U.S. at 199 (citation omitted).

Whether a police officer's use of force was objectively reasonable in light of the totality of the circumstances turns on three factors: (1) the severity of the alleged crime at issue; (2) whether the suspect poses an immediate threat of bodily harm to the officer or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *See Graham*, 490 U.S. at 396. Other relevant factors include: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015); *see also Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011) (holding that excessive force inquiry focuses on whether the officer or another person was "in danger *at the moment of the threat* that resulted in the [officer's use of deadly force].") (emphasis in original) (quoting *Bazan v. Hidalgo*, 246 F.3d 481, 489 (5th Cir. 2001)). If there is video recording of the event, the court is not required to accept factual allegations from either party that are "blatantly contradicted by the record." *Tucker*, 998 F.3d at 170 (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Rather, the court should "view the facts in the light depicted by the videotape." *Id.*

Here, many facts are disputed. For example, the parties disagree about whether Plaintiffs knew police officers were outside the vehicle, whether Dawes' car

hit Hess' car or vice-versa, whether Dawes reversed out of the parking spot quickly or slowly, and where officers were located at various times during the interaction. Decided one way or another, these facts could significantly impact the analysis of whether Plaintiffs were an immediate threat when Defendants discharged their weapons and whether a jury could decide in favor of either party. Thus, genuine issues of material fact exist.

Further, Plaintiffs' evidence could lead a jury to conclude that no reasonable officer would have thought they posed an immediate threat to the other officers when Defendants fired upon Dawes' car. Importantly, a number of Defendants' arguments are contradicted by their own bodycam footage with respect to the location of the officers and the speed of Dawes' car. The objective evidence, including Defendants' and other officers' depositions and bodycam footage, establish that no one was in front of or behind Dawes's car when Hess and Kimpel shot. Doc. 126 at 34-58, 60-75, 132-33. The car was moving slowly. Hess' and Kimpel's bodycams show that both had a clear line of vision to see where the other officers were and where they were not. Moreover, both admit no one was in immediate danger when they shot. Taken in the light most favorable to Plaintiffs, this summary judgment evidence indicates that reasonable officers in Defendants' position would have known that firing their weapons into a dark car with obscured windows and unknown occupants posed a substantial risk of causing Plaintiffs death or serious bodily injury. *Aguirre*, 995 F.3d at 414; *cf. Sanchez v. Edwards*, 433 Fed. Appx. 272, 273-75 (5th Cir. 2011) (concluding the defendant-officers acted reasonably when they shot at plaintiff's

car as it accelerated in the direction of one of the officers, who was "positioned near the front of the car").

Finally, Defendants had several reasonable alternatives to shooting at Dawes' car. *Jackson*, 3 F.4th at 187-88. First, Hess could have simply not moved his car into position behind Plaintiffs. DPD's own IA investigation determined that his "moving the squad car closer to the suspect vehicle is counter to a reasonable alternative that would avoid the use of deadly force." Doc. 126 at 121 (IA Brief); *see Anthony*, 2007 WL 628750, at *7) (stating that agency's investigation findings are relevant to determining excessive force). Hess could also have activated his emergency lights as, required by department policy, when he moved the squad car. If Hess had activated the emergency lights to further alert Plaintiffs to police presence, they may have realized law enforcement officers were present and Dawes may not have attempted to drive away. Defendants also admit they could not see into the vehicle when they fired and thus could not visualize their target, nor did they see any other officers in the path of Dawes' vehicle; and they ultimately acknowledged that no officer was in immediate danger when they fired their weapons. Doc. 126 at 47, 65-67, 73, 121. Under these circumstances, the reasonable alternative would have been for Defendants to follow DPD policy and to wait until they could verify whether anyone present was actually in danger.

The Court now turns to Hess' separate, second use of force — his three additional shots at Dawes' car. *See Tucker*, 998 F.3d at 175 (separating the analysis of the moment officers took suspect to the ground from the analysis of the moment they punched and kicked him as he lay there). There is a noticeable gap between the

two sets of shots. Between the first and second set of shots Hess fired, Dawes's car stopped, thus lessening any potential danger from the car's original motion. Additionally, the first set of shots broke the passenger window at which point Hess could see inside. He saw Dawes, including the position of her hands, which were not on the car's steering wheel, and he could see that she was not armed. The pause would allow a reasonable officer, even if he had originally, reasonably thought others were in immediate danger, to realize that this was not the case. In fact, it is clear from Hess' bodycam that no one was behind Dawes' car when he fired the second time. Hess Bodycam at 1:04-1:09. Taken together, these additional facts result in an even more unreasonable use of deadly force by Hess than the first rounds he fired.

B. Violation of Clearly Established Right

For the second prong of the qualified immunity analysis, Plaintiffs must show Defendants' conduct violated a clearly established constitutional right. *Tucker*, 998 F.3d at 173. In the sum of two sentences, Defendants summarily state in their brief that they did not violate clearly established law; however, they do not further elaborate on this complex issue and cite no authority in direct support of their argument. *See* Doc. 105 at 13. Defendants have arguably waived their argument for failing to adequately brief it. *Whittington v. Maxwell*, 455 Fed. Appx. 450, 456 (5th Cir. 2011) (holding that defendant waived his qualified immunity defense due to inadequate briefing) (citing *United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.2 (5th Cir. 2008)). In the interest of completeness, however, the Court will address the merits.

Plaintiffs argue the Fourth Amendment right to be free from the excessive use of force has been generally established since at least 1985. Doc. 125 at 34 (relying on *Garner*, 471 U.S. at 11 (holding that the use of deadly force to prevent the escape of a felony suspect who poses no immediate threat to the officer or threat to others is unjustified)). They further maintain the right has been further clarified by cases that resemble the specific facts here. *See, e.g.*, Doc. 125 at 34 (citing *Lytle*, 560 F.3d at 417-418 (holding that it is unreasonable to use deadly force against felony suspect who is fleeing by car if suspect does not pose sufficient threat of harm to officer or others)). In reply, Defendants do not directly attempt to distinguish Plaintiffs' cited cases, but instead seem to generally argue that not all reasonable officers would have understood that Defendants' conduct was unconstitutional. Doc. 131 at 11-12.

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." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). An officer's conduct violates that right when there is "controlling authority—or a robust consensus of persuasive authority—that defines the right in question with a high degree of particularity." *Clarkston v. White*, 943 F.3d 988, 993 (5th Cir. 2019) (citation omitted). Clearly established law should not be defined "at a high level of generality." *Aguirre*, 995 F.3d at 415 (citations omitted). Nevertheless, there need not be a previous case that presents identical facts for a right to be clearly established. *Id*. Rather, "[t]he law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then

before the Court, so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights." *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017) (citation omitted).

The case at bar must be considered against the backdrop of cases involving similar facts. One such case is *Hathaway v. Bazany*, 507 F.3d 312 (5th Cir. 2007). There, the officer was walking toward a car he had directed to pull over due to the possibility that the occupants were involved in a gang-related altercation. *Id*. at 315. When the officer had walked to within eight to ten feet of the right front corner of the vehicle, the driver "suddenly accelerated towards him, turning first to the right, then back to the left, and then finally back towards the center of the roadway as [the officer] attempted to get out of the way." *Id*. at 316. Realizing that he would not be able to get out of the car's path, the officer fired his weapon, killing the driver. *Id*. The car struck him, which caused him to "spin down the side" of the vehicle. *Id*. He could not thereafter recall whether he drew and fired before, during, or immediately after he was struck by the car and explained the events took place "in the snap of a finger." *Id*.

The court analyzed the reasonableness of the officer's use of deadly force by focusing on two factors: (1) the length of time the officer had to respond and (2) the officer's proximity to the vehicle's path. *Id*. at 321-22. The appellate court upheld the lower court's grant of qualified immunity given the "extremely brief period of time" the officer had to react to the perceived threat, finding that the use of deadly force was reasonable in that instance. *Id*. at 323.

A later case involved an officer who arrived at a house in an attempt to execute several arrest warrants

on a suspect, one of which charged him for previously attempting to run over and drag a police officer while the suspect tried to flee in his truck. *Goldston v. Anderson*, 775 Fed. Appx. 772, 772-73 (5th Cir. 2019). While the suspect was backing his truck out of the driveway, the defendant officer blocked the vehicle with his squad car. *Id.* The suspect got out of the truck, and the officer ordered him to show his hands and get on the ground. *Id.* Instead, the suspect got back into his truck and locked the doors. *Id.* The officer who had been trying to serve the warrants then boxed in the truck with her vehicle. *Id.* at 773-73. "Apparently trying to escape, [the suspect] began to back up quickly" toward her, and the defendant officer fired into the vehicle, killing him. *Id.* at 773.

The Court of Appeals for the Fifth Circuit held that the officer was entitled to qualified immunity because (1) he "knew that [his fellow officer] was behind [the suspect's] pickup truck, either inside or outside the vehicle. He knew that the suspect had disobeyed multiple commands and locked himself inside his truck. Additionally, [the officer] knew that [the suspect] was wanted on multiple warrants, including one for allegedly dragging a police officer with his truck. When [the suspect] began to back up suddenly, it was reasonable for [the officer] to believe that [his fellow officer] was in danger." *Id.* The court thus affirmed the district court's entry of summary judgment in the officer's favor. Unlike the officer defendant in *Hathaway*, however, here, a jury could find that no reasonable officer would have believed they or any fellow officers were in immediate danger at the time of the shooting, as the objective evidence—specifically the bodycam recordings—reveals. Indeed, after review-

ing their bodycam footage, Defendants here subsequently admitted at deposition that they had no reason to believe that anyone was in immediate danger from Dawes' movement of the car at the time of the shooting. Certainly, the events as captured on Defendants' own bodycam recordings constitute "facts that were knowable to" them. *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 550 (2017) (per curiam) ("When evaluating a qualified immunity defense, courts "consider[ ] only the facts that were knowable to the defendant officers.").

In this age of video evidence increasingly providing objective witness to police encounters with civilians, such evidence garners more weight. A recent Fifth Circuit case demonstrates such. In *Poole v. City of Shreveport*, the appellate court affirmed the denial of qualified immunity in circumstances similar to this case. There, Brian Steven Poole led the police on a low-speed chase through a neighborhood, violating various traffic laws along the way. *Poole v. City of Shreveport*, ___ F.4th ___, 2021 WL 4128238, at *1 (5th Cir. Sept. 10, 2021). When Poole finally came to a stop, he quickly got out of his truck and reached into the truck's bed but did not take anything out. *Id*. The defendant, Officer Briceno, got out of his vehicle and drew his weapon. *Id.* The stories diverged at that point: Briceno claimed he ordered Poole to show his hands, but Poole did not recall hearing any commands and attempted to get back into his truck. *Id*. As Poole opened the truck door and turned to get inside, Briceno fired six shots, striking Poole four times. *Id.* at *1-2. Briceno asserted that he could not see Poole's hands after he reached into the bed of his truck and thought Poole intended to harm him or other officers

on the scene. *Id.* at *1. The police bodycam footage revealed that Poole's hands were empty during the entire encounter. *Id.*

The district court found that the evidence, when viewed in the light most favorable to Poole, demonstrated material factual disputes as to (1) whether Briceno warned Poole before firing his gun, (2) whether Poole was turned away from Briceno during the shooting, and (3) whether Briceno could see that Poole's hands were empty when he fired his weapon. *Id.* at *3. Concluding a jury could find that Briceno shot Poole in the back, without warning and knowing his hands were empty, the district court determined that such conduct would violate clearly established law. *Id.* On appeal from the interlocutory order, the appellate court affirmed, agreeing that in light of the bodycam footage, a jury could find Briceno knowingly shot an unarmed man. *Id.* at *3-4.

The undersigned also finds the recent opinion of a judge of this Court in an analogous case to be particularly instructive. *See Edwards v. Oliver*, No. 3:17-CV-1208-M-BT, 2021 WL 881283 (N.D. Tex. Jan. 19, 2021) (Lynn, C.J.) (appeal filed Apr. 13, 2021). There, the plaintiff teenagers were attending a house party when two police officers, Oliver and Gross, arrived at the house in response to a report about possible underage drinking. *Id.* at *1-2. Plaintiffs returned to their car as the party dispersed. *Id.* at *2. When gunfire erupted nearby, the officers ran towards the sound as Plaintiffs were attempting to leave. *Id.* Despite Gross yelling at the car to stop, the driver departed. *Id.* Oliver asserted that the driver had accelerated, driving "at/by" the officers, and Gross was "extremely close" to Plaintiffs' car when he struck and

broke its rear passenger window. *Id.* Almost immediately after Gross broke the window, Oliver fired five shots, one of which killed one of the car's occupants. *Id.* at *2. Plaintiffs contended, however, that Oliver fired at the back of the car after it passed Gross and was heading in the opposite direction. *Id.*

The Court found that the plaintiffs' version of the facts was "not blatantly contradicted by the record, which include[d] video footage from the officers' bodycams." *Id.* at *8. Thus viewing the facts taken in the light most favorable to the plaintiffs, the Court found that a reasonable jury could conclude that the car full of teenagers presented no immediate threat to the officers' safety, making Oliver's use of deadly force unreasonable. *Id.* Additionally, the Court ruled that in light of prior precedent, the plaintiffs' right to be free from the use of deadly force was clearly established at the time of the incident. *Id.* at *9-10.

In the instant case, as in *Edwards*, the video footage is compelling. As discussed *supra*, the bodycam footage corroborates—or at least "does not blatantly contradict[ ]"—Plaintiffs' version of events. *Tucker*, 998 F.3d at 170 (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Here, the officers' bodycam footage can be interpreted as corroborating Rosales' account that Plaintiffs were blinded by the officers' lights and may not have been able to hear what they were saying or even realized that police officers, rather than others, were present. *See* Rosales Decl. at 8 (averring that when he saw the bright lights and heard voices, he assumed "there was possible trouble, or it was a resident of the apartment complex who was mad because we were in their parking spot."). The bodycam footage also reveals that Dawes did not accelerate

rapidly toward any officer or otherwise drive in an aggressive manner, as in *Hathaway* or *Goldston*.

Under the particular facts of this case, the Court finds that Plaintiffs have met their burden of showing that, when the facts are taken in the light most favorable to them, the unlawfulness of Defendants' conduct was clearly established at the time of the shooting. *See Edwards*, 2021 WL 881283, *10 (finding plaintiffs' right to be from excessive force in similar circumstances to have been established by April 2017). At a minimum, genuine issues of material fact exist in that regard. Thus, Defendants are not entitled to summary judgment on their claims of qualified immunity.

VI. CONCLUSION

For the reasons set forth above, Defendants' *Motion for Summary Judgment Asserting Qualified Immunity*, Doc. 104, should be DENIED.

SO RECOMMENDED on September 24, 2021.

/s/ Renee Harris Toliver
United States Magistrate Judge

ORDER DENYING PETITION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (AUGUST 20, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY DAWES, Individually and the Administrator of THE ESTATE OF DECEDENT GENEVIVE A. DAWES; ALFREDO SAUCEDO; VIRGILIO ROSALES,

Plaintiffs—Appellants,

v.

CITY OF DALLAS; CHRISTOPHER HESS; JASON KIMPEL,

Defendants—Appellees.

No. 22-10876

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-1424

Before: DENNIS, ENGELHARDT, and OLDHAM, Circuit Judges.

PER CURIAM:*

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

* Judge Irma Carrillo Ramirez, did not participate in the consideration of the rehearing en banc.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AUGUST 29, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARY DAWES, Individually and the Administrator of THE ESTATE OF DECEDENT GENEVIVE A. DAWES; ALFREDO SAUCEDO; VIRGILIO ROSALES,

Plaintiffs—Appellants,

v.

CITY OF DALLAS; CHRISTOPHER HESS; JASON KIMPEL,

Defendants—Appellees.

No. 22-10876

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-1424

Before: DENNIS, ENGELHARDT, and OLDHAM, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART and REMANDED IN PART.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *See* Fed. R. App. P. 41(b). The court may shorten or extend the time by order. *See* 5th Cir. R. 41 I.O.P.