No.

IN THE

Supreme Court of the United States

JAYNE SWINFORD,

Petitioner,

v.

JOSHUA SANTOS *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Seventh Amendment and Due Process:

Whether the lower courts violated the Seventh Amendment's guarantee of a jury trial and the Fifth Amendment's Due Process Clause by dismissing Petitioner's civil rights action at the pleading stage based on their own interpretation of video evidence, thereby resolving factual disputes that should have been reserved for a jury, in direct conflict with this Court's reaffirmation of the right to a jury trial in *SEC v. Jarkesy*, 603 U.S. 109 (2024).

2. Violation of Federal Procedural Rules:

Whether the lower courts' failure to adhere to the Federal Rules of Civil Procedure—by treating extrinsic video footage as part of the pleadings (contrary to Rule 10(c)'s limitation to "written instruments"), considering matters outside the complaint without converting the motion to summary judgment (in defiance of Rule 12(d)), and effectively granting judgment as a matter of law despite genuine disputes of material fact (undercutting the standards of Rule 56)—deprived Petitioner of the procedural safeguards and fair process that due process and the Rules are designed to protect.

Each question presents an unaddressed but fundamental constitutional conflict: can courts deprive a plaintiff of her day in court and jury trial by short-circuiting established procedure, and will this Court permit the erosion of Seventh Amendment and due process protections under the guise of qualified immunity and judicial efficiency?

PARTIES TO THE PROCEEDINGS

Petitioner

- Jayne Swinford, individually and as surviving spouse and personal representative of the Estate of Thomas Swinford, deceased.

Respondents

- Joshua Santos, individually and in his official capacity as a Police Officer for Athens-Clarke County, Georgia
- Charles Bidinger, individually and in his official capacity as a Police Officer for Athens-Clarke County, Georgia
- Roger Oliver Williams, Jr., individually and in his official capacity as a Police Officer for Athens- Clarke County, Georgia
- Jonathan McIlvaine, individually and in his official capacity as a Police Officer for Athens-Clarke County, Georgia
- Richard Alexander Leder, individually and in his official capacity as a Police Officer for Athens- Clarke County, Georgia
- Claude Johnson, individually and in his official capacity as a Police Officer for Athens-Clarke County, Georgia
- William Greenlow, individually and in his official capacity as a Police Officer for Athens-Clarke County, Georgia

- Cleveland Spruill, individually and in his official capacity as Chief of Police for Athens-Clarke County, Georgia

- Unified Government of Athens-Clarke County, Georgia

All parties listed above were parties in the United States Court of Appeals for the Eleventh Circuit and in the United States District Court for the Middle District of Georgia.

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The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit was entered on November 4, 2024. (Appendix A). The Eleventh Circuit denied rehearing on December 13, 2024. This petition is timely filed pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) as Petitioner seeks review of a final decision of a United States court of appeals that adjudicated federal constitutional claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V (Due Process Clause). "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. Const. amend. VII. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

Federal Rule of Civil Procedure 10(c). "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

Federal Rule of Civil Procedure 12(b)(6) & (d). Rule 12(b)(6) authorizes a motion to dismiss for "failure to state a claim upon which relief can be granted." Rule 12(d) provides: "If, on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."

Federal Rule of Civil Procedure 56(a). "The court shall 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."

STATEMENT OF THE CASE

Factual Background

This case arises from the fatal police shooting of Thomas Swinford, who was the husband of Petitioner Jayne Swinford. On March 8, 2019, Thomas Swinford experienced a severe mental health crisis. His father called 911 and reported that Thomas "is on drugs and talked about killing himself" and was threatening "suicide by cop." (Dist. Ct. Order at 1). Thomas displayed a handgun (only later discovered to be a BB gun pistol) and a standoff ensued in the parking lot of a vacant church near his residence. (Dist. Ct. Order at 1–2).

By approximately 6:08 p.m., at least fifteen officers had surrounded Thomas in the parking lot with guns drawn. None of the officers on scene had "less lethal" alternatives (such as beanbag rounds), and officers could

be heard saying, "We're going to need [a less lethal weapon] as soon as you can get one. . . ." (Dist. Ct. Order at 2). Although officers continually ordered Thomas to disarm, they did not warn that deadly force would be used if he failed to comply. (Dist. Ct. Order at 2).

At about 6:28 p.m., Thomas **walked toward the officers** and raised what appeared to be a handgun "toward a patrol vehicle" behind which two officers were taking cover. (Dist. Ct. Order at 2). In response, one of the officers armed with a scoped rifle, McIlvaine, "dropped" Thomas with one shot to his chest, causing him to release grip on the BB pistol and collapse face-down on the pavement with the pistol well out of his reach. Although Thomas was incapacitated and lay face-down on the pavement, as alleged in the complaint and amended complaint, the officers "continued to fire upon him when he was flat on his face in the parking lot," shooting Thomas as many as four to five seconds in his back *after* he was motionless, defenseless, and disarmed. (Dist. Ct. Order at 2–3 (quoting Complaint ¶¶ 73–79). Thomas died from his injuries at the scene, including two bullet wounds fired well long after any plausible immediate threat was eliminated.

At the time of his death, Thomas's firearm (the BB pistol) had been dropped or thrown such that it was **out of his reach**. (Complaint ¶ 77) Petitioner alleges that officers nonetheless kept shooting him after any perceivable threat had subsided, using "**gratuitous lethal force**" against a man who was already down in the absence of an "immediate" threat. (Dist. Ct. Order at 3 (quoting Proposed Am. Complaint)). According to Petitioner, the officers had **no reasonable basis** to believe Thomas posed a continuing threat four or five seconds after he

was "dropped" face-down and disarmed, and their use of deadly force under those circumstances was excessive and unreasonable. (Complaint ¶¶ 80–85)

Procedural History

Initial Complaint and Claims. Mrs. Swinford filed suit in July 2021 in the State Court of Athens-Clarke County, Georgia. She asserted (1) a claim under 42 U.S.C. § 1983 for use of excessive force in violation of the Fourth Amendment (applicable via the Fourteenth Amendment) against the **seven officers** who fired at Thomas, each in his "**individual capacity**" and against the Athens-Clarke County Chief of Police (Chief Cleveland Spruill) in his supervisory capacity; (2) a state-law wrongful death claim against those same defendants; and (3) a *Monell* claim against the Athens-Clarke County Unified Government (the municipal entity) and Chief Spruill (as a policymaker) for maintaining policies or customs that led to the death. (11th Cir. Op. at 182; Dist. Ct. Order at 1). Although the original complaint mentioned "bodycam videos", Petitioner, who had not yet received certification or authentication of videos or other evidence without initial disclosures or discovery, did not attach any video to the complaint11th Cir. Op. at 183–84).

Respondents (the officers, the Chief, and the County) removed the case to federal court based on federal question jurisdiction. Once in the U.S. District Court for the Middle District of Georgia, Respondents moved to dismiss all claims under Fed. R. Civ. P. 12(b)(6). (D. Ct. Docket Entry 2). The individual officers asserted **qualified immunity**, arguing that (a) their actions did not violate any constitutional right (because the use of force was

reasonable under the Fourth Amendment), and (b) even if a right was violated, it was not "clearly established" in law at the time. (Dist. Ct. Order at 1–2; 11th Cir. Op. at 184).

In support of their motion, the officers submitted approximately **three minutes** of select body-camera video capturing the end of the standoff and the shooting itself from vantage points of non-defendant officers, rather than video recorded from the point of view of the seven officers who shot and killed Swinford. They contended this video conclusively disproved Petitioner's allegations that Thomas was unjustifiably shot while incapacitated. (11th Cir. Op. at 184). Respondents also moved to dismiss the claims against the County and Chief Spruill for failure to state a plausible claim of supervisory or municipal liability, and they invoked official immunity under state law to bar the wrongful death claim. (11th Cir. Op. at 184–85).

In opposition to the motion to dismiss, Petitioner urged the district court **not** to consider the defendants' video evidence at the Rule 12 stage. She argued the bodycam recordings were **not "written instruments"** subject to judicial notice or incorporation-by-reference under Rule 10(c), and that her complaint's passing references to the footage to **different body-camera videos**—recorded by the seven officers who shot Thomas—did not make the defendants' cherry-picked clips "central" to her claims. (11th Cir. Op. at 184–85). She further noted that the defense video was incomplete, recorded by the wrong officers from the wrong point of view, and misleading if taken in isolation. (*Id.*). While Petitioner did have initial disclosures, the opportunity to conduct discovery, or any hearing to glean facts that might allow her to either stipulate, or challenge, the authenticity of the videos

defendants provided the trial court. Petitioner interposed objection to the video, maintaining that the court should not conduct a qualified immunity analysis of each of the seven police officers without, at a minimum, watching each bodycam video recorded by each officer.

Petitioner filed a motion to amend her complaint before the trial court decided the motion to dismiss, providing for an officer-by-officer and shot-by-shot account of the incident. Petitioner also attached her expert's report citing to the bodycam videos of each defendant who shot, their location relative to Thomas, their weapon, number of shots, admissions in post-incident debriefing, and the number of shots fired after Thomas was "dropped" face-down, motionless, and disarmed while at least 12 shots were fired at his back while he was down, causing his death.

Dismissal of Claims and Denial of Amendment. The district court held that the officers' use of force was **objectively reasonable and constitutionally justified.** (*Id.* at *7–*10). Accepting the video's depiction as truth over Petitioner's objection, the court concluded that Thomas posed an imminent deadly threat when he pointed a gun at police, and that the officers' split-second decision to shoot was a reasonable use of force under the Fourth Amendment. (*Id.* at 8 (citing *Graham v. Connor* standards)). Because the court determined no constitutional violation occurred, it held the officers were entitled to qualified immunity at the threshold. (*Id.* at 10 ("the bodycam footage conclusively demonstrates the individual Defendants are entitled to qualified immunity")). The court dismissed the excessive force claims with prejudice. It also dismissed the supervisory liability and *Monell* claims against Chief Spruill and the

County for failure to state a plausible claim, noting a lack of specific factual allegations linking any policy or deliberate action by those defendants to the shooting. (*Id.* at 10–12). Finally, with all federal claims gone, the court declined supplemental jurisdiction over the state wrongful death claim. (*Id.* at 13).

Appeal to the Eleventh Circuit. Petitioner appealed, arguing that the district court had violated basic pleading-stage principles and her constitutional rights by acting as a factfinder. She contended that the court's reliance on a few minutes of the incorrect video to reject her well-pleaded allegations was improper under Rule 12 and incompatible with the Seventh Amendment. She further argued that the court erred in denying leave to amend, which prevented her from curing any pleading defects and mooting the issue of video incorporation.

On November 4, 2024, the Eleventh Circuit affirmed in a published opinion. *Swinford v. Santos*, 121 F.4th 179 (11th Cir. 2024) The court of appeals acknowledged that this case raised "unique issues" about the use of video evidence at the motion to dismiss stage, noting that during the pendency of the appeal two other Eleventh Circuit panels had issued decisions addressing that very topic. *Id.* at 193–94 (Calvert, J., concurring). In particular, in *Baker v. City of Madison*, 67 F.4th 1268 (11th Cir. 2023), the Eleventh Circuit held that police body-camera footage *can* be considered on a motion to dismiss via incorporation-by- reference, and in *Johnson v. City of Atlanta*, 107 F.4th 1292 (11th Cir. 2024), the court even held that the incorporation doctrine "does not require the complaint to refer to the document [or video] at issue or to attach it." 121 F.4th at 193 (Calvert, J., concurring)

(summarizing holdings). Bound by these precedents, the panel in Mrs. Swinford's case found no error in the district court's consideration of the bodycam video. *Id.* at 185. The Eleventh Circuit agreed that the video was effectively incorporated into the complaint and could "override" the complaint's factual allegations where the two conflicted. *Id.* at 185 n.3 (citing *Baker*, 67 F.4th at 1278, for the rule that when a video "clearly and obviously contradicts the plaintiff's alleged facts, we accept the video's depiction instead of the complaint's account"). In short, the appellate court fully sanctioned the district court's approach of viewing the facts "in the light depicted by the video" rather than in the light most favorable to the plaintiff, at the pleadings stage before Petitioner was provided access to initial disclosures or any discovery relating to the affirmative defenses of qualified immunity by the seven officers sued in their individual capacity. *Id.* at 185.

In connection with a collective de novo review based on a review of the same incorrect video the trial court reviewed, and while ignoring the videos in the appellate record recorded by the seven officers who shot Thomas that formed the basis of the excessive force claims, the Eleventh Circuit held that the officers' use of deadly force was reasonable under the Fourth Amendment as a matter of law. *Id.* at 186–90. The court emphasized that Thomas had threatened officers with what appeared to be a firearm and refused to surrender it, thereby posing an immediate threat of serious harm. *Id.* at 187–88. The panel reasoned that once Thomas raised the gun toward officers at close range, the officers were justified in using deadly force to protect themselves. *Id.* at 188 ("An objectively reasonable officer in the same circumstances would have perceived Swinford's actions—raising a gun in

the direction of officers who had guns drawn on him—as an immediate lethal threat."). The fact that Thomas was shot in the back while he was face-down was allegedly immaterial, because those shots were fired in "one volley" following the perceived threat. *Id.* at 188–89. Thus, the Eleventh Circuit concluded no Fourth Amendment violation occurred; accordingly, the officers were entitled to qualified immunity without the need to reach whether any law was clearly established. *Id.* at 189–90.

While affirming the dismissal of all claims, the court held that the district judge did not abuse his discretion in denying reconsideration. (Petitioner had filed a post- judgment motion raising, inter alia, that the court misapplied precedent by considering the video; the court denied that motion, and the Eleventh Circuit upheld that refusal, finding no new arguments beyond what had been raised). *Id.* at 192–93.

Concurring Opinion Highlighting the Issue. Judge Victoria Calvert, a district judge sitting by designation, wrote a special concurrence to the Eleventh Circuit opinion. (App. ; 121 F.4th at 193–95 (Calvert, J., concurring)). While agreeing that circuit precedent compelled the outcome, Judge Calvert expressed **"practical issues"** and concerns with applying incorporation-by-reference to bodycam footage at the motion to dismiss stage. *Id.* at 193. She observed that on a typical Rule 12(b)(6) motion, courts must *accept the complaint's facts as true* and draw inferences in the plaintiff's favor, but **"when a video is incorporated by reference, [our precedent] instructs that 'we accept the video's depiction instead of the complaint's account.'"** *Id.* (Calvert, J., concurring) (quoting *Baker*, 67 F.4th at 1278). Unlike a written contract or document—which says

what it says—a video can be subject to interpretation: it "can depict numerous subjects moving independently at varying distances and speaking over each other," and different cameras offer different perspectives. *Id.* Given these complexities, Judge Calvert noted that resolving a case on video alone at the pleading stage forces a judge to "editorialize" the facts without the structured process that Rule 56 provides (where parties submit **specific** factual assertions with pinpoint citations to evidence, allowing the court to focus on genuine disputes). *Id.* at 194. In this case, for example, the district court had to **"transcribe the footage and cite directly to portions of the video"** to justify dismissal—an exercise more akin to fact-finding than the usual task at the pleadings stage. *Id.* That process, Judge Calvert observed, afforded "no opportunity for the parties to weigh in on what made the 'final cut'" of facts the court considered relevant from the video. *Id.* at 195.

Judge Calvert suggested that, despite Eleventh Circuit precedent not *requiring* conversion to summary judgment, a district court retains discretion to convert a Rule 12 motion to a Rule 56 motion when video evidence is involved. *Id.* at 195. Doing so would "lead to a more orderly presentation of the merits and facilitate appellate review," she wrote, while also addressing any legitimate qualified immunity concerns by narrowly tailoring discovery to the video-related facts. *Id.* In short, the concurring opinion flagged the tension between the current practice (disposing of cases via video at Rule 12) and the fundamental values of the adversarial process and jury trial. Judge Calvert's concerns echo the crux of this petition: that Petitioner was denied the normal process of fact development and trial by jury guaranteed by the Constitution.

Having exhausted her options in the lower courts, Petitioner Jayne Swinford now seeks this Court's review to vindicate her constitutional rights and to resolve the profoundly important questions raised by this case.

ARGUMENT

The decision below is an affront to constitutional rights and due process, one that warrants this Court's intervention. By allowing judges to act as **judge, jury, and factfinder** at the motion-to-dismiss stage, the lower courts have effectively nullified Petitioner's Seventh Amendment right to a civil jury trial and her Fifth Amendment right to fair procedure and due process. In *SEC v. Jarkesy*, 603 U.S. 109 (2024), this Court forcefully reaffirmed that the Constitution does not permit a **sidestep of the jury-trial right or traditional judicial process** for the sake of efficiency or expediency. Yet that is exactly what happened here. The judiciary itself—not an agency, but Article III judges—created a **shortcut around the jury** by treating disputed facts as adjudicated based on a review of evidence that did not form the basis of Petitioner's claims that was unauthenticated and unvetted. This case squarely presents an unresolved constitutional conflict: whether the ever-expanding practice of resolving factual controversies in civil rights cases via pre-trial rulings (often under the guise of qualified immunity) has run amuck, undermining the **"fair trial in a fair tribunal"** that the Constitution promises. (*Jarkesy*, 603 U.S. at 141 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).) The Petition respectfully submits that it has—and that if this Court does not step in to correct course, it will tacitly endorse and abet the erosion of bedrock rights.

This petition is not merely about a single police shooting case; it implicates **systemic issues of constitutional dimension.** The lower courts flouted fundamental rules of civil procedure designed to safeguard fairness (Part II, infra). In doing so, they deprived Petitioner of any chance to present her evidence to a jury of her peers (Part I). Such a result cannot be reconciled with the Framers' insistence—recently vindicated in *Jarkesy*—that the right of trial by jury **"shall be preserved"** in suits at common law. U.S. Const. amend. VII. Nor can it be squared with due process, which demands adherence to the "regular course of trial" and the time-honored procedures of the common law before an individual is deprived of life, liberty, or property. *Jarkesy*, 603 U.S. at 143–44 (internal quotation marks omitted).

The courts below essentially gave Petitioner's husband a **trial by judge (indeed, by paper and video) after his death**, with the judge deciding that the killing was justified—without any jury ever hearing a single witness. This end-run around the jury right is as offensive to the Constitution as the executive agency overreach that *Jarkesy* condemned. In some ways, it is worse: rather than Congress or an agency denying a jury, here the **judiciary has self-abdicated** the jury's role, raising separation-of- powers concerns within the judicial branch itself that could only deepen eroding public trust.

At stake is more than just the outcome for Mrs. Swinford—it is the **integrity of the civil justice system** when addressing official wrongdoing. The Seventh Amendment was enshrined to prevent exactly what occurred here: government officials being effectively immunized from accountability by removing the dispute

from the hands of the community's conscience (the jury). As this Court recognized in *Jarkesy*, the founders saw the denial of jury trials as an instrument of tyranny; indeed, the Declaration of Independence specifically protested the Crown "depriving us, in many Cases, of the benefits of Trial by Jury." 603 U.S. at 121 (citing Declaration of Independence ¶ 20). The Eleventh Circuit's approach—echoed by some other courts eager to dispose of civil rights cases on the papers—makes a mockery of that constitutional guarantee. If left unchecked, it signals open season for courts to **bypass juries** whenever a piece of evidence (like a video) seems compelling, even if that evidence is incomplete or contested. Such a practice is antithetical to the Seventh Amendment and to the very concept of a jury trial, where jurors, not judges, weigh conflicting evidence and determine the truth of what happened.

Moreover, the **procedural irregularities** in this case amount to a denial of due process (Part II). The Federal Rules of Civil Procedure are not mere technicalities—they are the embodiment of due process in civil litigation, carefully calibrated to ensure fairness. Rule 12(d) commands that if a court considers matters outside the pleadings, it "must" convert the motion to summary judgment and give all parties a reasonable chance to present pertinent material. The district court and Eleventh Circuit circumvented that rule by expansively misusing the incorporation-by-reference doctrine. In effect, they treated a raw video clip as if it were part of the complaint itself (despite Rule 10(c)'s limitation to "written instruments"), thereby **evading Rule 12(d)**. Petitioner was never afforded any opportunity to gather and present all the material evidence—for example, the **hours of other**

bodycam footage and witness testimony that could have provided context to the 3-minute clip. She was denied any initial disclosures, any discovery, any ability to cross-examine the officers who claim they perceived a threat, and any chance to present expert analysis of the video or forensic evidence of the scene. This is trial by qualified-immunity ambush on a paper record, not the "due process of law" that the Fifth Amendment commands.

Finally, this case highlights a pressing need for the Court to address the **conflict between the Seventh Amendment and the doctrine of qualified immunity** as it is currently applied (Part III). Time and again, officials invoke qualified immunity to seek early dismissal of lawsuits, and lower courts—often sympathetic to the burdens of litigation on officers—oblige by resolving factual doubts in favor of the defense. This trend has effectively shifted many jury questions (such as whether an officer's conduct was objectively unreasonable) into the province of judges, at summary judgment and ever increasingly at the pleading stage. The result is an inconsistency in this Court's own jurisprudence: on one hand, the Court extols the jury right and warns against depriving individuals of a jury determination (*Jarkesy*; *Terry v. Ohio* discussion; *Duncan v. Louisiana* lineage); on the other hand, the Court's qualified immunity doctrine has been interpreted by lower courts in an overly broad manner that often pretermits any jury fact-finding. The courts below exemplified this inconsistency by effectively giving the benefit of every doubt to the officers in the name of qualified immunity, thereby robbing a widow of her day in court after police killed her husband by shooting him in the back well after any immediate threat was eliminated. If this Court does not grant review, it will

send a message that such inconsistency is tolerable—that the Constitution's bold promise of a jury trial can be quietly subverted by procedural sleight-of-hand. That message would undermine public confidence in the Court's commitment to constitutional rights and would worsen the erosion of accountability for government officials.

I. The Lower Courts Eviscerated Petitioner's Seventh Amendment Right to a Jury Trial, in Conflict with *Jarkesy* and Foundational Principles

The Seventh Amendment declares that in suits at common law, "the right of trial by jury shall be preserved." This Court in *Jarkesy* underscored that this guarantee is not a relic but an active restraint on governmental power: even Congress cannot simply opt for "efficient" administrative adjudication when a legal claim resembling common-law suits is at issue, because doing so would unlawfully circumvent the jury right. 603 U.S. at 122-23. The Court traced how deeply the jury trial was valued by the Founders—so much so that British denial of jury trials in the colonies was listed as a grievance justifying independence. *Id.* at 121 (citing Declaration of Independence). The Seventh Amendment was the constitutional response to that grievance, ensuring that **citizens, through juries, check official power** in civil disputes as well as criminal ones.

Yet here, through a judicial maneuver, Petitioner's Seventh Amendment right was snuffed out. If Mrs. Swinford's claims are not "Suits at common law," nothing is. She seeks damages for wrongful death and excessive force—causes of action that have clear analogues in tort law (battery, wrongful death) that historically were tried

to juries. Indeed, Section 1983 suits for damages are exactly the kind of legal actions to which the Seventh Amendment applies. There is no "public rights" exception or other carve-out that would take a police brutality claim out of the jury's realm. By law, Mrs. Swinford was entitled to demand a jury trial (which she did). And, had the case proceeded normally, a jury would eventually have been tasked with deciding the many factual questions in dispute—for example, **did Thomas pose a threat at the moment of each shot? was he effectively subdued earlier? did the officers continue shooting after an immediate threat ceased?** These are quintessential jury questions in a Fourth Amendment excessive force case. See *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (reasonableness of force must be judged under totality of circumstances—typically a fact-intensive inquiry)

But Mrs. Swinford never got near a jury, or even near the courthouse for discovery conference or a hearing. The district court's dismissal (rubber-stamped by the Eleventh Circuit based on the same failure to conduct a defendant-by-defendant review) **deprived her of due process.** The judge decided, based on watching the video, that no reasonable jury *could* find excessive force—essentially taking the decision out of the jury's hands by declaring the facts indisputable. In doing so at the *pleading* stage, the courts below went even further than short-circuiting a trial: they cut off Mrs. Swinford's right to even obtain initial disclosures, reach discovery, or the summary judgment stage where evidence is viewed with inferences in her favor.

To the degree qualified immunity should be determined at the earliest "possible" stage, it was exceedingly clear

that lower courts determined it before it was ever possible to so without violating due process. It is difficult to imagine a more direct abridgment of the Seventh Amendment's "preservation" of jury trial. This Court's precedent makes clear that when material facts are in dispute, the case must go to a jury. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (if evidence is such that a reasonable jury could return a verdict for the non-movant, summary judgment must be denied).

Here, at best, the district court *found* facts (by choosing to believe the video over contrary well-pled facts and inferences) to avoid what it apparently saw as an unnecessary jury trial. At worst, the lower courts mistakenly believed they were entitled to disregard the traditional process of law to summarily adjudicate Petitioner's claims because they were asserted against police officers.

That is exactly the kind of reasoning the Seventh Amendment forbids. As Justice Story observed, the value of the jury is that it interposes the community's judgment and prevents judges—agents of the State—from simply decreeing the outcome in favor of the State's interests. (Indeed, many excessive force cases pit a private citizen against government officers, making the independence of the jury particularly vital).

Crucially, *Jarkesy* confirms that the Seventh Amendment's jury right is not an isolated protection; it "operates together with Article III and the Due Process Clause of the Fifth Amendment" to ensure fair adjudications. 603 U.S. at 141. Article III guarantees an independent judge, the Seventh Amendment a jury of one's

peers, and due process the "time-honored" procedural fairness of a judicial trial. *Id.* When any of these elements is removed, the legitimacy of the proceeding diminishes.

In *Jarkesy*, the Court objected to executive branch tribunals deciding fraud cases without juries, noting that this concentrate power in one set of hands (prosecutor, judge, jury all in an agency). *Id.* at 140–41. But what happened to Mrs. Swinford is disturbingly analogous: the *judiciary* concentrated all roles in its own hands, excluding the jury and even normal adversarial evidence testing, to produce a summary exoneration of government officers. That may not implicate Article II power, but it certainly implicates the *separation of powers between judge and jury* that the Seventh Amendment and common-law tradition demand. As *Jarkesy* put it, **"with a jury out of the picture, [the adjudicator] decides not just the law but the facts as well."** 603 U.S. at 142. There, it referred to an ALJ usurping the fact-finding role. Here, it was a judge doing the same. The difference is one of form, not substance: in both cases, the essential constitutional injury is that **no jury of citizens ever weighed in on disputed facts.**

The Seventh Amendment problem in this case is especially acute because of the nature of the claim—an excessive force/deadly force claim. This Court has observed that such cases often involve split-second judgments and messy factual scenarios that are ill-suited to resolution as a matter of law. See *Scott*, 550 U.S. at 383 (noting that in deadly force cases, courts should be cautious on summary judgment, but finding video in that case left no factual dispute). Indeed, in *Scott v. Harris*, the Court took the unusual step of viewing a videotape and

granting summary judgment to an officer *only because* the video evidence was utterly clear and blatantly contradicted the plaintiff's version, such that no reasonable jury could believe the plaintiff's story. *Id.* at 380–81. But *Scott* was decided at summary judgment, after discovery, and with the Court explicitly emphasizing that its ruling was appropriate only where the video's depiction was beyond reasonable dispute.

Here, by contrast, the video evidence was used at the **motion to dismiss stage**, before any discovery, and despite Petitioner's argument that the video was **incomplete and potentially misleading**. Unlike *Scott*, where the entirety of a high-speed chase was caught on film by a dashboard camera, the footage here was different from the footage forming the basis of Petitioner's claims. Petitioner's allegations did not describe a fanciful scenario; they were plausible claims that officers continued shooting a downed man or that the threat had passed, as evidenced by the fact that he died from gunshot wounds in his back fired by front-facing officers. The lower courts nonetheless treated the video as conclusive, effectively making a **credibility determination** (that the officers' narrative on film was trustworthy and plaintiff's contrary inference was not). That is forbidden territory for a judge deciding a motion to dismiss or even summary judgment. See *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (per curiam) (reversing lower court for improperly crediting the police officer's testimony over plaintiff's evidence at summary judgment; the court must not "weigh the evidence" or resolve factual disputes). *Tolan* stands for the proposition that when there is any uncertainty or dispute about material facts in an excessive force case, the benefit of the doubt goes to the non-movant (the citizen), not to the officer—at least

at summary judgment. But in Mrs. Swinford's case, the opposite happened: every uncertainty was resolved in favor of the officers, thanks to the courts' inexplicable overconfidence in a short video. This directly conflicts with *Tolan*'s insistence on preserving the jury function.

It also conflicts with *Jarkesy*'s broader message: **courts cannot simply prioritize "efficiency and reducing public costs" over constitutional trial protections.** 603 U.S. at 140. As *Jarkesy* warned, if slight gains in efficiency sufficed to dispense with the Seventh Amendment, then "evading the Seventh Amendment would become nothing more than a game" where the government (or here, government defendants) just point to some convenience or expedience to "strip [the litigant] of the protections of the Seventh Amendment." *Id.* This case presents exactly such a scenario: the desire to efficiently dispose of a lawsuit against police (and to spare officers the burdens of litigation) was elevated above Mrs. Swinford's right to have a jury hear her case. The Constitution does not tolerate that trade-off, which is what the concurring judge on the 11th Circuit Panel appeared to imply. Her concurrence signaled a dissonance between the principles of fairness and the bastardization of a judicial doctrine that should never compared to the Bill of Rights, much less be allowed to nullify it.

In sum, review is warranted because the Eleventh Circuit's decision cannot be reconciled with the Constitution's guarantee that **civil juries, not judges alone, determine contested facts in suits for damages**. The decision below effectively guts the Seventh Amendment in the context of §1983 excessive force claims, many of which will involve video evidence nowadays. If left standing, it

empowers courts to resolve those cases themselves under the auspices of qualified immunity, shutting courthouse doors to plaintiffs no matter how egregious the facts, so long as the defense can produce some video and a narrative a receptive and savvy judge might sign off on. Such a tyrannical regime is antithetical to the Seventh Amendment. It also undermines the very purpose of §1983, which Congress enacted as a vehicle for citizens to hold state actors accountable—with the **people's voice (the jury)** as a check against abuse. The Eleventh Circuit's approach removes that check. Only this Court can restore it by granting certiorari and correcting the course.

II. The Lower Courts Denied Petitioner Due Process by Flouting Fundamental Procedural Rules Meant to Ensure Fairness and Accuracy, Creating an Unresolved Conflict with *Jarkesy*'s Emphasis on Common-Law Process

Due process is not an abstract concept; it is embodied in the procedural rules and practices that ensure a fair hearing. Here, the lower courts **ignored or circumvented multiple Federal Rules of Civil Procedure** that exist to protect litigants from exactly the sort of railroaded outcome that befell Petitioner. In doing so, the courts violated Petitioner's Fifth Amendment right to due process of law. This violation is closely intertwined with the Seventh Amendment issue, as *Jarkesy* observed: the Seventh Amendment, Article III, and due process "limit how the government may go about" adjudications depriving life, liberty or property. 603 U.S. at 141. When any one of these safeguards (jury trial, independent judge, or fair procedure) is undermined, the overall promise of a "fair trial in a fair tribunal" is broken. *Id.* The court below

broke that promise on the procedural side by abandoning the **"regular course of trial"** required by due process (quoting 3 Story's Commentaries §1783). See *Jarkesy*, 603 U.S. at 143-44 (due process demands "nothing less" than the common-law trial process when the government seeks to deprive someone of property via penalties).

Here, although a private defendant (officers) moved to dismiss, the effect was to deprive Petitioner of her cause of action—her property interest in her legal claim—without the usual process. The Federal Rules provided a clear path that should have been followed: if the court wished to consider the video evidence outside the pleadings, Rule 12(d) **required** converting the motion to one for summary judgment under Rule 56 and giving Petitioner a "reasonable opportunity" to present all material pertinent to the motion. Fed. R. Civ. P. 12(d). That rule is mandatory ("must be treated as one for summary judgment"). There is a sound reason for this: it is fundamentally unfair for a defendant to smuggle in evidence outside the complaint on a motion to dismiss and have the case decided on that evidence, when the plaintiff has neither had any chance to vet that evidence nor gather rebuttal evidence. Rule 12(d) ensures that if matters outside the complaint are considered, both sides get to put their evidentiary cards on the table (through the summary judgment process, which itself is structured to favor the non-movant when facts are disputed).

But in this case, Rule 12(d) was effectively nullified. The district court did not exclude the video (so outside matter was considered), yet it refused to formally convert to summary judgment. It justified this by a dubious expansion of Rule 10(c)'s incorporation doctrine, claiming

the video was "central" to the complaint and thus part of it. This is a perversion of Rule 10(c). By its text, Rule 10(c) only makes **"a copy of a written instrument"** attached to a pleading into part of that pleading. A video file is not a "written instrument." Petitioner's complaint did not attach the video provided by defendants, which was not the same video central to her claims. Courts have sometimes held that documents heavily referenced in a complaint (like a contract in a contract dispute) can be deemed incorporated by reference, but stretching that to cover raw video footage is extraordinary. Indeed, it creates an end-run around Rule 12(d): any time a complaint mentions evidence (as most complaints do to some extent), a clever defendant can claim that evidence is "incorporated" and then introduce their own version of it to defeat the plaintiff's allegations.

The Eleventh Circuit doubled down on this end-run, citing *Baker* and *Johnson* to hold that even a video not explicitly referenced in the complaint might be considered if it's deemed "central" to the claim. (121 F.4th at 193 (Calvert, J., concurring)). This broad view is at odds with many other courts, which hesitate to expand incorporation-by-reference too far. Notably, the Fifth Circuit—whose decision in *Jarkesy* was affirmed by this Court—also had a case involving bodycam footage at the pleading stage. In *Hodge v. Engleman* (5th Cir. Jan. 16, 2024), the district court used a bodycam video to grant a 12(b)(6) motion much like here. The Fifth Circuit **treated that as an implicit summary judgment conversion** and affirmed only after saying it would view the facts in the light favorable to the plaintiff (even assuming conversion). In other words, the Fifth Circuit acknowledged that considering video beyond the pleadings

triggered Rule 12(d)'s protections. The Eleventh Circuit's rule, by contrast, avoids those protections by sleight of hand—calling the video part of the pleadings. This is a legal manipulation that deprives plaintiffs of the basic procedural fairness the Rules promise.

Petitioner was gravely prejudiced by this manipulation. Had the motion been treated as one for summary judgment, Petitioner would have been entitled *at least* to submit affidavits, obtain **certified** and comprehensive disclosure of the full universe of bodycam videos (not just the cherry-picked 3 minutes), perhaps depose the officers about what happened and what training/policies were in place, and present expert testimony (for example, on police tactics or forensic analysis of bullet trajectories showing shots to the back likely occurred after Thomas was down). She could have submitted additional evidence to create genuine disputes of fact that a jury should resolve. But none of that happened. The case was terminated **before discovery even began**, on the basis of an incomplete factual picture.

This **truncated process** is exactly what *Jarkesy* contrasted with the robust process of a court trial. See 603 U.S. at 142-44. In *Jarkesy*, the defendant lost out on discovery rights, evidentiary rules, and other trial safeguards because he was forced into an administrative tribunal. Here, Mrs. Swinford lost those same safeguards because the courts simply never let the case advance to the stage where the Rules would provide them. Functionally, the harm is the same: Mrs. Swinford was subjected to a deprivation of property (the wrongful death claim) without **"the process and proceedings of the common law."** *Id.* at 144 (quoting 3 Story §1783).

If due process "demands nothing less" than the regular trial process when the government is seeking penalties (*Jarkesy*, 603 U.S. at 144), surely it also demands at least the regular civil process when a citizen is trying to hold the government liable for a killing. The regular process would include a complaint, an answer, discovery, potential summary judgment with all evidence in view, and if disputes of fact remain, a trial by jury. Petitioner was denied that regular process. No answer was ever filed (because the case was tossed at 12(b)(6)). No discovery occurred. Instead of the structured summary judgment procedure where evidence is presented with specific factual assertions (Fed. R. Civ. P. 56(c)), the court below was left to its own devices to sift through a video and the complaint's allegations. Judge Calvert's concurrence sharply observed how **unmoored from the orderly process** this was: without Rule 56 procedures, the court had to itself decide what facts to extract from the video, with no guidance beyond partisan briefing. 121 F.4th at 194-95 (Calvert, J.). This is unfair—the plaintiff has no opportunity to counter the defendant's narrative with additional evidence, and no opportunity to emphasize which facts from the video (or beyond it) support her case.

In Petitioner's case, for example, the defense focused on the moment Thomas raised the gun. But Petitioner would have focused the court (or jury) on other facts: that shots were fired at the back of a disarmed and motionless man as many as four or five seconds after a reasonable officer would cease fire; and, **it was the shots fired at Thomas' back in the absence of an immediate threat that killed him, needlessly widowing Mrs. Swinford to raise their two children without their father.** That was either discounted or ignored in the lower courts' rush

to declare the officers' actions reasonable. Due process entitled Petitioner to have these points heard and properly considered through adversarial procedure.

Additionally, the denial of leave to amend the complaint compounded the procedural unfairness. The Federal Rules encourage courts to allow amendment "freely . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Petitioner moved to amend promptly after briefing the motion to dismiss, precisely to address the district court's concerns—she proposed removing references to the video (to avoid incorporation) and adding an ADA claim to cover another legal theory of recovery. The district court summarily denied this as futile. In doing so, the court presumed that no set of facts Petitioner could allege (or develop) would change the outcome given the court's view of the video. But that is a premature merits judgment that short-circuited the flexible, corrective purpose of Rule 15. Particularly where, as here, the law on considering videos at Rule 12 was unsettled (indeed, Petitioner's case was raising it as a question), fundamental fairness counseled in favor of allowing an amended pleading and adjudicating the case on a full record rather than dismissing with prejudice. The lower courts' rigid stance shut down any possibility to adapt the pleadings to meet the court's standards, leaving Petitioner out of court entirely. This Court has repeatedly said that *disposition of cases on technical pleading grounds* is disfavored when the substantive rights at stake are important. E.g., *Forman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend should be freely given absent strong justification). Here, denial of amendment cemented the due process violation by refusing Petitioner any avenue to proceed.

In *Jarkesy*, the Court contrasted the extensive tools of civil litigation (discovery, rules of evidence, etc.) with the sparse process in agency adjudication, noting how the latter left the defendant at a marked disadvantage. 603 U.S. at 142-44. The parallel to Mrs. Swinford's situation is striking: by effectively truncating the process at the pleading stage, the courts left her with none of the usual tools to establish her case. If anything, her position was worse than Jarkesy's—he at least got a hearing before an ALJ (flawed as it was), whereas Mrs. Swinford got her case tossed without any evidentiary hearing—or even a non-evidentiary hearing allowing for oral argument—at all. Shockingly, the district court took on faith the defendants' evidence and story, even after Mrs. Swinford pointed out that it was both misleading and in some respects, patently wrong. That is incompatible with the notion of *adversarial testing* that is central to due process.

A core component of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Petitioner was certainly not heard in a meaningful manner regarding the factual issues—she was not allowed to present contrary evidence or challenge the interpretation of the video at a hearing, which the district court denied following Mrs. Swinford's formal request for it in the form of a motion for evidentiary hearing.

The summary dismissal here raises alarms about the judiciary's commitment to the Rules that govern it. If courts can ignore Rule 12(d) and refuse to follow Rule 56's requirements simply by re-labeling evidence as "part of the complaint," then the integrity of the civil procedural system is at risk. Lower courts are split or at

least inconsistent on how to handle such situations, and litigants (especially civil rights plaintiffs) are left guessing whether their well-pleaded allegations will be credited or summarily negated by a judge's viewing of extrinsic evidence. This Court should grant certiorari to make clear that **the Rules mean what they say**: outside evidence requires summary judgment (and thus full procedural protections), and judges must not deprive litigants of those protections in the rush to grant qualified immunity, or any other reason. To do otherwise is to invite exactly what happened here—a procedurally unfair shortcut that produces a one-sided result.

In sum, the Fifth Amendment due process violation in this case is too stark to ignore or forgive. Petitioner was entitled to the ordinary procedural path of a civil lawsuit, which itself embodies centuries of due process traditions. As soon as the words "qualified immunity" appeared in the record, she did not receive it. Instead, she faced a truncated process engineered to produce dismissal before she could fairly present her case. This Court's intervention is needed to realign lower courts with the basic procedural requirements of fairness—requirements that this Court reaffirmed against an executive agency in *Jarkesy*, and which apply with equal *if not greater* force to Article III courts themselves.

III. Only this Court's Review Can Resolve the Conflict Between the Lower Courts' Approach and This Court's Precedents, and Prevent Further Erosion of Constitutional Rights Under the Guise of Qualified Immunity

This case presents an ideal and urgent vehicle for this Court to address a growing inconsistency in the law: the

tension between **qualified immunity doctrine as applied by lower courts and the preservation of constitutional trial rights** that this Court has recently championed. The opinion below illustrates how some lower courts, in their zeal to grant officials immunity, have developed practices that undermine Seventh Amendment and due process protections. Meanwhile, this Court in *Jarkesy* (and other cases like *Tolan*) has spoken powerfully about the importance of those very protections. The result is the glaring perception of a judiciary speaking out of both sides of its mouth—extolling the jury right in theory but undercutting it in practice. If the Court denies review here, that inconsistency will deepen, and public trust in the courts—especially in their willingness to hold government actors accountable—should be expected to decline further.

Qualified immunity was intended as a shield against insubstantial claims, not a sword to slay meritorious ones before trial. Yet, as many have observed, the doctrine in practice often leads courts to dismiss cases **even when a jury should arguably weigh in**, simply because the court deems the law not "clearly established" or the officer's actions "understandable" under the circumstances. This has led to concerning outcomes and criticisms. Members of this Court have noted the need to recalibrate qualified immunity. See, e.g., *Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017) (Thomas, J., concurring) (questioning the alignment of modern qualified immunity with the statute's text and history). The inconsistency is also evident in how the Court handles qualified immunity petitions: sometimes the Court summarily reverses a denial of immunity to protect officers (often noting the need to respect jury factfinding less, focusing on clearly established law), while in other

instances (like *Tolan*) the Court corrects a grant of immunity because the lower court encroached on the jury's role. These mixed signals have yielded confusion. Lower courts like the Eleventh Circuit increasingly err on the side of granting immunity at the earliest juncture—even if it requires contorting procedure and even facts—lest they be accused of subjecting officers to the burden of trial in a close case.

What suffers in this equation is the Seventh Amendment and the public's interest in accountability. If every close call is resolved by a judge in favor of the officer, the **jury's function is completely excised** from an entire class of cases—police excessive force cases—which are among the most significant for constitutional governance and public confidence. The Eleventh Circuit has essentially institutionalized this excision: its message is that video evidence will be used to favor officers and cases will be dismissed. This Court's message in *Jarkesy*, however, was that **efficiency and convenience** (even the government's interest in not having its officers face trial) **do not override constitutional mandates**. 603 U.S. at 140 ("increasing efficiency and reducing public costs are not enough to trigger the exception" to Seventh Amendment; otherwise evading the jury would become a mere "game"). The conflict could not be clearer. The Eleventh Circuit's jurisprudence (and similar decisions elsewhere) essentially treat the Seventh Amendment as a nuisance to be circumvented in the name of efficiency (here, the efficiency of resolving officer liability without trial). *Jarkesy* flatly rejects such reasoning. There is thus a direct conflict in principle that only this Court can resolve: Are lower courts permitted to **sacrifice jury trials on the altar of qualified immunity and judicial economy?** Or

must the judiciary adhere to the Constitution's guarantees even if it means public officials sometimes have to face a jury of citizens?

As *Jarkesy* notes, the Framers thought juries were crucial to prevent oppression and errors by judges who might be beholden to the state. 603 U.S. at 140-41. When judges today preempt juries, especially to protect fellow government agents, it creates a perception (and reality) of the **judiciary insulating the government from accountability**. In an era where public trust in impartial justice has been shaken worse than any time in history, this is a dangerous trend that must be reversed for the well-being of this Democracy.

Conversely, granting certiorari and reversing here would powerfully reaffirm the Court's commitment to the Seventh Amendment and due process, wholly consistent with *Jarkesy*. It would resolve the tension by clarifying that **qualified immunity must be applied in harmony with, not in derogation of, the right to a jury trial and proper procedure**. The Court can clarify *Scott*—a case misconstrued as permission to disregard the Bill of Rights and due process for years—and set guidelines for how courts handle evidence like videos: for example, it can instruct that considering such evidence requires converting to summary judgment and that judges should be cautious not to invade the jury's province by adjudicating qualified immunity on a heightened pleadings standard that does not even exist. The Court can remind that the standard on a motion to dismiss or summary judgment is to credit the plaintiff's evidence and reasonable inferences, not to pick and choose facts that favor the defendant. And the Court can emphasize

that *the Seventh Amendment is not an inconvenience to be waived aside* even in difficult, emotionally charged cases like police shootings. This would correct course in the lower courts and restore the constitutional balance.

Finally, denying review in this case would amount to what Petitioner can only describe as a **constitutional abdication**. The courts below have effectively announced a method by which constitutional rights can be side-stepped. If this Court declines to even review that approach, it will be seen as acquiescence. That would contradict the Court's own recent precedent and pronouncements. It would send a mixed (if not hypocritical) message: that the Court waxes eloquent about jury trials when striking down administrative processes installed by Congress (as in *Jarkesy*), but sits idle when the judicial branch itself undermines those trials through procedural artifice. Such inconsistency would invite criticism that the judiciary protects jury trials, as long as they are not sought in cases asserting claims against police for killing a man by shooting him in the back in the absence of a continued immediate threat. It might appear that the Court is willing to champion the jury right in the abstract, but not when the result might inconvenience fellow judges or officers of the state in civil litigation. That perception would erode public trust deeply. People are watching how courts handle cases of alleged police misconduct. If they see the system bend over backwards to excuse officers without a public trial—all while courts cite obtuse judge-created doctrines and procedures that function to hold police unaccountable no matter what they do—they will conclude that the system is rigged against ordinary citizens. The Seventh Amendment was meant to reassure the populace that **justice would ultimately rest in the hands of the**

people (the jurors), not of government officials. Failing to enforce that promise here may serve to validate cynicism about the judiciary's neutrality and commitment to civil rights, as well as the judiciary's commitment to the rule of law and the Constitution, itself.

This Court's intervention is thus not only legally warranted—to resolve the important questions presented—but morally and institutionally necessary. It must be made clear that the Constitution's guarantees are not paper tigers leaving civil rights claimants with genuine claims tilting at "clearly established" windmills. A widow like Jayne Swinford, whose husband was killed at the hands of the state, is entitled to her day in court and a chance to have a jury of her peers decide whether that loss was at the hands of a wrongdoer. She was denied that chance. Moreover, was denied the truth in the form of comprehensive evidence relating to the death of her husband. The Supreme Court should not permit such denials in contravention of the rule of law to stand unchecked, for her sake and for the sake of all Americans who rely on the courts to uphold their rights.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the petition for a writ of certiorari be **granted**. By taking this case, the Court can vindicate core constitutional rights, resolve urgent conflicts in the law, and reaffirm that in the United States of America, **no one—particularly not those in positions of power who might be willing to abuse it—is above the Constitution**. The Seventh Amendment will wither to lip service unless this Court gives it meaning by refusing to abide

interference with it. Petitioner asks this Court to give it that meaning by granting the instant Petition, and in doing so, to honor the memory of Thomas Swinford by ensuring that his widow's pursuit of justice receives the fair hearing that our Constitution guarantees.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED NOVEMBER 4, 2024

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13675

JAYNE SWINFORD,

Plaintiff-Appellant,

versus

OFFICER JOSHUA SANTOS, IN HIS INDIVIDUAL CAPACITY, OFFICER CHARLES BIDINGER, IN HIS INDIVIDUAL CAPACITY, OFFICER ROGER OLIVER WILLIAMS, JR., IN HIS INDIVIDUAL CAPACITY, SERGEANT JONATHAN MCILVAN, IN HIS INDIVIDUAL CAPACITY, CORPORAL RICHARD ALEXANDER LEDER, IN HIS INDIVIDUAL CAPACITY, *et al.*,

Defendants-Appellees.

Filed November 4, 2024

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 3:21-cv-00090-CAR

Before BRANCH, GRANT, Circuit Judges, and CALVERT,* District Judge.

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* The Honorable Victoria Calvert, United States District Judge for the Northern District of Georgia, sitting by designation.

Appendix A

BRANCH, Circuit Judge:

This appeal arises out of the death of Thomas Swinford. Thomas was shot and killed by Athens-Clarke County ("ACC") police officers after he refused officers' commands to drop a gun[1] and instead raised and pointed it at police officers. Thomas's widow, Jayne Swinford, filed a lawsuit in Georgia state court alleging claims under 42 U.S.C. § 1983 and Georgia's wrongful death statute against seven individual officers who shot Thomas after he raised his gun, the ACC police department's chief of police in his official and individual capacities, and the county government. Mrs. Swinford's complaint referenced, but did not attach, body camera footage, which she asserted supported her claims. The case was timely removed to federal court.

Defendants moved to dismiss the complaint on qualified and official immunity grounds, relying primarily on body camera footage from two officers that showed the sequence of events leading up to the shooting. The district court considered the body camera footage over Mrs. Swinford's objections and granted defendants' motion to dismiss, finding that the footage established that the officers acted reasonably in light of the circumstances they faced and thus they did not violate Thomas's constitutional rights. Accordingly, the district court also denied Mrs. Swinford's motion to amend her complaint on futility grounds. The district court subsequently denied her motion to reconsider, and she timely appealed.

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1. The gun was actually a BB gun, but Appellant concedes "for all purposes of this appeal that the gun Thomas Swinford held . . . reasonably appeared to be real to those on the scene."

On appeal, she again argues that the district court improperly considered the contents of the body camera footage as well as that the district court erred in denying her motion to amend and motion for reconsideration. We disagree. For the following reasons, we determine that the district court properly considered the body camera footage under our incorporation-by-reference doctrine and properly granted defendants' motion to dismiss. Accordingly, after careful review and with the benefit of oral argument, we affirm the district court's orders.

I. Background

Mrs. Swinford's initial complaint alleged the following facts, which she based in part off of body camera footage.[2]

Around 4:15 p.m., on March 8, 2019, the ACC police department received reports from Thomas's father and Mrs. Swinford that Thomas was threatening to commit suicide by police and was under the influence of drugs. The ACC police department had responded to three prior suicide threats involving Thomas. In response to the threat on March 8, 2019, the ACC police department dispatched units to Thomas's home in Athens, Georgia. One of the officers who responded communicated to dispatch that Thomas had a handgun. Accordingly, the police department established a perimeter for a "barricaded gunman" situation.

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2. Mrs. Swinford titled an entire section of her initial complaint "*Comprehensive Facts from Bodycam Videos and Reports.*"

Mrs. Swinford alleged that once the officers were dealing with a barricaded gunman situation, the police department was required, per its own policy, to dispatch a Strategic Response Team ("SRT"), whose members have advanced training and special equipment to respond to situations involving mental health crises. Nevertheless, the police department did not deploy an SRT, instead it deployed regular units who created a perimeter around the residence. At 5:55 p.m., the police department received a report that Thomas had fled in his mother's car and was outside the perimeter. Thomas returned to his parents' home shortly thereafter, and the police department, for the second time, created a perimeter around the house using non-SRT units. The police used spike strips when creating the perimeter with the intent to disable Thomas's vehicle should he choose to flee a second time. Despite the implementation of the spike strips, at 6:02 p.m., Thomas again broke the perimeter by driving over the spike strips. He drove "approximately one-half mile to a vacant church parking lot, where he parked the disabled vehicle."

Mrs. Swinford's initial complaint described the following events immediately preceding Thomas's death:

- Police units established a perimeter around the church parking lot and took cover as they aimed firearms at Thomas.

- Police spent the next twenty minutes ordering Thomas to put down his gun as he paced near his mother's vehicle.

- Thomas informed the police he would come out if he were permitted to speak to his wife, but the police directed Mrs. Swinford not to speak to him.

- None of the police units on scene were equipped with "less lethal" weapons, such as beanbag or sponge rounds, although officers repeatedly mentioned that they needed these rounds while on scene.

- At 6:13 p.m., dispatch advised the units on scene that they may need an SRT commander, but an SRT commander was never deployed to the scene.

- At 6:25 p.m., Thomas kissed a photo of his family.

- At 6:28 p.m., Thomas walked in the direction of two police officers who had taken cover behind their patrol vehicle and raised his gun toward them.

- At the time Thomas raised his gun, the SRT was not on the scene.

- The seven officer defendants opened fire on Thomas after he raised his gun, firing a total of twenty-one shots.

- Ultimately, six shots struck Thomas—including two in the back—and Thomas died of his injuries.

- Mrs. Swinford alleged that "[a]ccording to bodycam footage" Thomas fell face down immediately after the first shots were fired, but that the officers continued to fire on Thomas after he was already on the ground with his gun out of reach.

- Mrs. Swinford alleged that all officers who fired on Thomas knew that he "had expressed the intention to commit suicide by enticing [the police] to kill him by employing lethal force."

Based on the above allegations Mrs. Swinford filed the instant lawsuit in July 2021, bringing the following three claims: Count I—violations of the Fourth and Fourteenth Amendment under 42 U.S.C. § 1983 against the chief of police and the seven individual officers;[3]Count II—a Georgia wrongful death claim against the chief of police and the individual officers; and Count III—a claim for *Monell*[4] liability against the chief of police and the county. The defendants timely removed Mrs. Swinford's lawsuit to the U.S. District Court for the Middle District of Georgia based on federal question jurisdiction.

3. Mrs. Swinford's complaint names only the individual officers who shot Thomas at the church. The complaint does not allege that the chief of police was present at the perimeter or at the church where Thomas was eventually shot. Instead, her allegations against the chief pertain to comments he made at a press conference post-shooting and his alleged failure to ensure officers were equipped with less than lethal weapons.

4. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Thereafter, they filed a motion to dismiss arguing that the individual officers were entitled to qualified immunity, both because their actions did not constitute excessive force and because the law was not clearly established at the time of Thomas's death that their actions violated the Constitution. In making this argument, they relied on body camera footage that showed the events leading up to the officers shooting Thomas as well as the moment that officers discharged their weapons. Defendants also argued that the *Monell* claims against the county and police chief should be dismissed for failure to state a claim and that the individual officers were entitled to official immunity on the Georgia wrongful death claim.[5]

In opposition to the motion, Mrs. Swinford argued that the district court could not consider the bodycam videos because: (1) they were not written instruments; (2) they showed only approximately three minutes of Thomas's interaction with the police whereas her complaint relied on facts gleaned from hours of video across fifteen different body cameras and thus the videos were not central to Mrs. Swinford's claims; and (3) she did not "stipulate" to the videos' authenticity. Notably, however, she did not argue that the defendants' bodycam videos were inauthentic or had been doctored in some manner, only that they were not "comprehensive" or "complete" because they showed only approximately three minutes of the interaction. She

5. Defendants also argued that Mrs. Swinford's claims were barred by Georgia's two-year statute of limitations because her claims accrued on March 8, 2019, and she did not file her complaint until July 7, 2021. That issue is not before us on appeal, and we need not reach it to resolve this case.

also argued that the individual officers were not entitled to qualified immunity.[6] She also did not respond to the defendants' arguments regarding the *Monell* claims against the county and the chief of police.

More than three months after defendants filed their reply brief, Mrs. Swinford filed a motion to amend her complaint. The proposed amended complaint would have, among other things, dropped her references to body camera footage and added a claim alleging a violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a), against the county. Defendants opposed the request to amend the complaint, arguing that amendment would be futile because any ADA claim failed as a matter of law, and Mrs. Swinford's claims for excessive force failed for the same reasons raised in their motion to dismiss—namely that the defendants' bodycam footage proved no constitutional violation occurred, regardless of how Mrs. Swinford attempted to frame that evidence. Mrs. Swinford filed a reply brief, again arguing that the district court should not consider the videos relied on by the defendants because they "are a mere fraction of what forms the basis" of her claims, and thus the court should grant her leave to amend.

In a comprehensive order, the district court granted defendants' motion to dismiss and denied Mrs. Swinford's request to amend her complaint. The district court relied

6. In making this argument, she argued that the individual officers had failed to establish they were acting within their discretionary authority—a dubious position that she abandons on appeal.

on the incorporation-by-reference doctrine to consider the body camera footage in reaching its decision. In relying on this doctrine, the district court determined that the initial—and operative—complaint directly referenced the bodycam footage at issue, including by having an entire section titled "*Comprehensive Facts from Bodycam Videos and Reports.*" Next, it determined that the videos were authentic because Mrs. Swinford had disputed their completeness, not their authenticity. As to that dispute, the district court noted that the body camera footage "depict[ed] the [i]ndividual [o]fficers' use of deadly force—the moment central to [Mrs. Swinford's] claims."

After determining it could consider the defendants' body camera footage, the district court summarized the contents. As the district court emphasized, the defendants' body camera footage tells a different story than the complaint regarding the moment that officers started shooting at Thomas. Here is what the footage shows.

For nearly three minutes prior to the shooting, Thomas can be seen pacing around his vehicle. An officer utilizing a speaker repeatedly told Thomas to put his gun down while also expressing concern for his well-being. For example, the officer told Thomas that they could get him help and that his family was concerned about him and wanted to know he was "alright." The officer instructed Thomas to "set the gun down on the hood" and to talk with him. He told Thomas to put down the gun and come to the front of his vehicle. He told Thomas that he knew there was a lot going on, but that they could work through it. He implored Thomas to "give [the police] a chance." He

told Thomas that he knew that Thomas was feeling alone but that he was not alone.

Immediately after the officer told Thomas that he was not alone, Thomas started walking toward officers with his gun in hand and the officer on the loudspeaker stated, "Don't do that Thomas. Thomas do not do that. Drop the gun." Thomas lifted the gun and aimed it at some of the officers and, as a result, the officers opened fire on Thomas. In total, the shooting consisted of one volley of fire lasting approximately four seconds. Thomas fell face down and raised his head after the firing had stopped, and officers shouted to Thomas to not move. One officer asked others where Thomas's gun was, and they answered that it was right in front of him. Officers approached Thomas, who was still lying face down, and instructed him not to move. They then placed Thomas in handcuffs and called for medical help. Following the shooting, one of the officers stated, "[W]e probably shouldn't have shot him."

After considering the video evidence, the district court determined that the individual officers were entitled to qualified immunity because their use of force was reasonable in light of the circumstances, namely Thomas's raising of the gun and pointing it at some of the officers, and thus they had not committed a constitutional violation. And because the defendants' bodycam footage established that no constitutional violation occurred, the district court determined that any amendment would be futile. The district court also concluded that Mrs. Swinford had failed to state a failure-to-supervise claim against the police chief because she did not allege any facts

that showed either that the chief directly participated in the alleged unconstitutional conduct or that a causal connection existed between the chief's actions and the alleged violation. Similarly, the district court found that the complaint failed to plead facts to plausibly establish any causal connection between the county's policies or customs and the alleged constitutional violation. As to Mrs. Swinford's proposed ADA claim in the proposed amended complaint, the district court determined that even assuming that officers could be held liable under the ADA, she had failed to adequately allege facts to show that an ACC official acted with the required discriminatory intent or to otherwise make out a *prima facie* ADA claim. After disposing of the federal claims, the district court declined to exercise supplemental jurisdiction over the Georgia wrongful death claim and dismissed it without prejudice. The district court thereafter entered judgment in favor of the defendants.

After the district court issued its dismissal order and entered judgment against Mrs. Swinford, she moved the district court to reconsider under Federal Rule of Civil Procedure 59(e), again asserting that the district court erred in considering the defendants' body camera footage. She also argued that the district court erred in (1) considering the allegations in the complaint instead of her proposed amended complaint; (2) failing to conduct an individualized qualified immunity analysis as to each officer; (3) considering the defendants' body camera footage (which came from only two officers) rather than the body camera footage she relied upon, which

came from all seven officers;[7] and (4) granting qualified immunity to the individual officers because, in her view, our decision in *Hunter v. Leeds*, 941 F.3d 1265 (11th Cir. 2019), established that the officers' shooting of Thomas violated his constitutional rights. Finally, she argued that newly discovered evidence—in the form of ACC policies, manuals, and agendas—supported her *Monell* claims against ACC and the police chief.

The district court denied Mrs. Swinford's motion to reconsider, determining that (1) she was largely attempting to relitigate matters already decided by presenting new arguments and new evidence (including body camera footage from other officers); (2) it would not consider her new arguments; (3) it would not consider the new evidence she submitted because she did not allege that this evidence was unavailable to her when the district court was considering the motion to dismiss; and (4) the situation in *Hunter* was factually distinct from the instant one. Mrs. Swinford timely appealed the district court's orders.[8]

II. Standard of Review

We review the district court's grant of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil

7. In support of this argument, Mrs. Swinford submitted all body camera footage in her possession from the March 8, 2019, shooting.

8. Mrs. Swinford does not appeal the district court's decision to not exercise supplemental jurisdiction over her Georgia wrongful death claims.

Procedure *de novo*. *Davis v. City of Apopka*, 78 F.4th 1326, 1331 (11th Cir. 2023), *cert. denied sub nom., Davis v. Apopka*, — U.S. —, 144 S. Ct. 2528, — L.Ed.2d — (2024). "Although we ordinarily review district court orders denying leave to amend a complaint for abuse of discretion . . . we review such decisions *de novo* when the denial is based on a legal determination that amendment would be futile." *Taveras v. Bank of Am., N.A.*, 89 F.4th 1279, 1285 (11th Cir. 2024) (quotations omitted). "We review the denial of a Rule 59(e) motion for abuse of discretion." *Berry v. Crestwood Healthcare LP*, 84 F.4th 1300, 1313 (11th Cir. 2023).

III. Discussion

Mrs. Swinford raises three primary arguments on appeal. First, she argues that the district court improperly considered the defendants' body camera footage when ruling on defendants' motion to dismiss and thus erred in finding that the individual officers had not committed a constitutional violation and were entitled to qualified immunity. Second, she argues that the district court erred in denying her motion to amend. Finally, she argues that the district court erred in denying her motion to reconsider. We address and reject each argument in turn.

A. Motion to Dismiss

1. The district court properly considered the defendants' body camera footage.

In general, district courts must limit their consideration to the pleadings and any exhibits attached to the pleadings

when ruling on a motion to dismiss. *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000). If a party presents, and the court considers, evidence outside of the pleadings, the general rule requires the district court to convert the motion to dismiss into a motion for summary judgment. *See* Fed R. Civ. P. 12(d); *Finn v. Gunter*, 722 F.2d 711, 713 (11th Cir. 1984). However, there are two exceptions to the general rule: (1) the incorporation-by-reference doctrine and (2) judicial notice. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). At issue here is the incorporation-by-reference doctrine.

Under the incorporation-by-reference doctrine, a district court may consider evidence attached to a motion to dismiss without converting the motion into a motion for summary judgment "if the document is (1) central to the plaintiff's claim; and (2) undisputed, meaning that its authenticity is not challenged." *Johnson v. City of Atlanta*, 107 F.4th 1292, 1300 (11th Cir. 2024).

As to the first requirement—the centrality of the bodycam footage to Mrs. Swinford's claims—the defendants' bodycam videos clearly depict the events central to her excessive force claim—the events surrounding the individual officers shooting her husband. The footage shows all the relevant conduct, namely officers' attempts to de-escalate the situation, Thomas ignoring the officers' instructions to put down his gun, Thomas walking toward officers while raising the gun, and the officers firing upon Thomas. This sequence of events is what forms the basis of Mrs. Swinford's claims against the defendants.

Mrs. Swinford appears to argue that the centrality requirement is not satisfied in this case because, according to her, the incorporation-by-reference doctrine applies only to written instruments, and the defendants' bodycam videos are not written instruments. This argument is foreclosed by our decision in *Baker v. City Madison*, where we applied the incorporation-by-reference doctrine to police bodycam footage like the footage at issue in this case.[9] 67 F.4th 1268, 1277-78 (11th Cir. 2023); *see also Johnson*, 107 F.4th at 1298. Mrs. Swinford attempts to distinguish *Baker* by arguing that an examination of the trial docket in *Baker* indicates that initial disclosures had already occurred in that case when the district court considered the police bodycam footage. But we said nothing in *Baker* regarding initial disclosures, and instead held that the centrality requirement was met because—like defendants' bodycam footage in this case—the police bodycam footage in that case "show[ed] all the relevant conduct" giving rise to plaintiff's claims. *Baker*, 67 F.4th at 1277. Accordingly, we determine that the centrality requirement for the incorporation-by-reference doctrine is met in this case.

Turning now to the second requirement of the incorporation-by-reference doctrine—that the bodycam footage be undisputed—Mrs. Swinford argues that (1) she did not stipulate that the footage was authentic; and (2) the footage was incomplete because it showed only excerpts of the officers' body camera footage and did not

9. In fairness to Mrs. Swinford, we issued our opinion in *Baker* after she submitted her initial brief.

include footage from every officer on the scene that day. Both of her arguments fail.

As to her first contention, nothing in our precedent mandates that a plaintiff stipulate that a video is authentic for the district court to properly consider it. All that is required is that its authenticity is not challenged. *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). She has not done so. She did not argue below and has not argued on appeal that "the footage has been altered in any way," nor does she contend "that what the footage depicts differs from what actually happened." *Baker*, 67 F.4th at 1277.

As to her second contention regarding the video footage being incomplete, Mrs. Swinford relies on our decision in *Horsley*, wherein we determined that the district court could not consider transcript excerpts from a CNN broadcast attached to the defendant's motion to dismiss in a defamation case because the excerpts "did not contain the statements the complaint insist[ed] that [the defendant] made" and that "for all we kn[e]w" those statements were intentionally left out of the excerpts that the defendant selected. *Horsley*, 304 F.3d at 1135. We face a very different situation here. While the defendants' bodycam videos may be "incomplete" in the sense that they do not show every angle of Thomas's death or the hours of footage leading up to his death, they clearly show unedited footage of the event underlying Mrs. Swinford's excessive force claim. Accordingly, the district court did not err in concluding that the video footage was authentic.

Because the requirements of the incorporation-by-reference doctrine were met, the district court properly

considered the defendants' body camera footage when ruling on the motion to dismiss. We now assess whether this video footage established that the officers were entitled to qualified immunity.[10]

2. The individual officers are entitled to qualified immunity.

Qualified immunity shields government employees from suit against them in their individual capacities for discretionary actions they perform in carrying out their duties. *Brooks v. Miller*, 78 F.4th 1267, 1279 (11th

10. Mrs. Swinford also argues that the district court should have considered the allegations in her proposed amended complaint, as opposed to the allegations in the initial complaint, in ruling on the motion to dismiss. Her contention is incorrect. The initial complaint was the operative complaint in this case and was the complaint that the defendants moved to dismiss. It is true that Mrs. Swinford sought the court's leave to amend her complaint and attached a proposed amended complaint. She sought the court's permission because more than twenty-one days had passed since defendants filed their motion to dismiss—indeed, more than four months had passed—and therefore she could no longer amend her complaint as a matter of course. *See* Fed R. Civ. P. 15(a)(1)(B). Thus, Mrs. Swinford's filing of a proposed amended complaint did not operate to replace her initial complaint without leave first being given by the district court. Because the district court chose to rule on the merits of defendants' motion to dismiss, it was required to consider the allegations in the initial complaint, not the proposed amended complaint. And, as discussed in more detail above, the district court subsequently ruled on her motion to amend, properly determining based on defendants' bodycam footage that no constitutional violation occurred and therefore any amendment would be futile.

Cir. 2023). To determine whether qualified immunity applies, we engage in a burden-shifting analysis. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). The first step requires a defendant to show that he was acting within the scope of his discretionary authority when committing the challenged act. *Id.* "Once the defendant does that, the burden shifts to the plaintiff, who must show that qualified immunity is not appropriate" by establishing: "(1) the defendant violated a constitutional right, and (2) that constitutional right was 'clearly established' at the time of the defendant's actions." *Brooks*, 78 F.4th at 1280 (citing *Powell v. Snook*, 25 F.4th 912, 920 (11th Cir. 2022)). "Courts have 'discretion to decide which of the two prongs of the qualified-immunity analysis to tackle first.'" *Id.* (alterations adopted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)).

Mrs. Swinford concedes on appeal that the individual officers were acting within their respective discretionary authority when they shot Thomas. Accordingly, she must establish both that the individual officers violated Thomas's constitutional rights and that the right was clearly established at the time of the officers' actions. We begin and end our qualified immunity analysis by addressing the first requirement.

The Fourth Amendment provides a "right of the people to be secure in their persons . . . against unreasonable . . . seizures." U.S. Const. amend. IV. This right "encompasses the plain right to be free from excessive force." *Lee*, 284 F.3d at 1197. Excessive force claims are judged under the Fourth Amendment's objective reasonableness standard.

Graham v. Connor, 490 U.S. 386, 395-96, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "That standard requires us to ask 'whether the officer's conduct was objectively reasonable in light of the facts confronting the officer.'" *Patel v. City of Madison*, 959 F.3d 1330, 1338-39 (11th Cir. 2020) (alterations adopted) (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002)). Accordingly, we must "examine the totality of the circumstances, '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 the suspect is actively resisting arrest or attempting to evade arrest by flight.'" *Baker*, 67 F.4th at 1279 (alterations adopted) (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865). "Other considerations are the need for the application of force, the relationship between the need and the amount of force used, the extent of the injury inflicted, and whether the force was applied in good faith or maliciously and sadistically." *Id.* We have held that deadly force is reasonable when an officer:

> (1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, *if feasible.*

Hunter v. Leeds, 941 F.3d 1265, 1279 (11th Cir. 2019) (emphasis added) (quoting *Robinson v. Arrugueta*, 415 F.3d 1252, 1255 (11th Cir. 2005)).

Based on our precedent and the contents of the defendants' body camera footage, we conclude that the individual officers' use of deadly force was reasonable in light of the circumstances they faced. Once Thomas approached some of the officers and pointed his gun at them, the individual officers clearly had probable cause to believe that he posed a serious threat to the officers on scene. Accordingly, they did not use excessive force in shooting Thomas.

Mrs. Swinford makes four arguments as to why we should reach a different conclusion, none of which are convincing. First, she argues that statements that the officers made *after* the shooting expressing regret establishes a doubt as to their probable cause. But these after-the-fact statements are irrelevant to the inquiry of whether the officers had probable cause. *Cf. Patel*, 959 F.3d at 1339 (explaining that "we must be careful not to Monday-morning quarterback" the reasonableness of an officer's use of force). As discussed above, the defendants' body camera footage clearly established that they had probable cause to believe Thomas posed a threat to the lives of the officers on the scene. Thus, her first argument fails.

Second, Mrs. Swinford argues that even assuming the officers had probable cause to believe Thomas posed a threat when he raised his gun, this probable cause dissipated once the first shot was fired because Thomas immediately began to fall. According to her version of events, the initial shot was a separate and distinct event followed by other officers firing additional shots after

Thomas was already on the ground with his gun out of reach. In making this argument she relies on our decision in *Hunter*, where we determined that an officer was not entitled to qualified immunity at summary judgment for firing a second round of seven shots after his initial round of three shots caused the suspect to drop his firearm and obey the officers' commands. 941 F.3d at 1279-80.

The problem for Mrs. Swinford is the body camera footage shows an entirely different series of events than what she describes. Although Mrs. Swinford describes a separate round of fire after Thomas is already incapacitated on the ground, the footage clearly shows that there was only one round of fire from the officers that lasted approximately four seconds in total, not two distinct rounds of fire. "[W]here a video is clear and obviously contradicts the plaintiff's alleged facts, we accept the video's depiction instead of the complaint's account and view the facts in the light depicted by the video." *Baker*, 67 F.4th at 1277-78 (internal citation omitted). Thus, the events are starkly different from Mrs. Swinford's recitation, which she makes in an attempt to bring this case within the confines of *Hunter*. Unlike the officer in *Hunter*, the officers in the instant case began firing simultaneously and ceased firing shortly thereafter. Once Thomas was on the ground, officers approached him and began administering first aid. They never opened fire a second time like the officer in *Hunter*. Accordingly, *Hunter* does not help her case.

We now turn to Mrs. Swinford's third argument. She argues that Thomas was not "warned of [the officers']

intention to use deadly force . . . as he paced outside his vehicle." But we have never held that an officer must always warn someone of his intent to use deadly force. *Davis v. Waller*, 44 F.4th 1305, 1315 (11th Cir. 2022) ("[W]e have declined to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing—particularly where, as here, such warning might easily have cost the officer his life." (quotations omitted)), *cert. denied*, — U.S. —, 143 S. Ct. 2434, 216 L.Ed.2d 416 (2023). And there is no indication that the officers intended to use deadly force as their interaction began with Thomas pacing outside his vehicle. Indeed, the officers continued to instruct him to put down his firearm and told him they were concerned for his well-being. The officers did not use deadly force until Thomas raised his gun in their direction. At that point it was not feasible for them to warn Thomas because they were forced to act. Given the circumstances and the split second that officers had to decide whether to fire their weapons, we find no error in the officers' failure to verbally warn Thomas that they would open fire.[11]

Mrs. Swinford's final argument is that the district court erred in conducting the qualified immunity analysis in a collective manner rather than looking at each of the officers' individual actions as viewed from their respective vantage points. It is true that "each defendant is entitled to

11. Further supporting our conclusion on this issue is the fact that officers repeatedly instructed Thomas to drop his gun, all while having their own weapons drawn and pointed at Thomas. It would defy common sense to believe that Thomas did not know that the officers would open fire on him if he pointed his gun at them.

an independent qualified-immunity analysis as it relates to his or her actions and omissions" and thus courts "must be careful to evaluate a given defendant's qualified-immunity claim, considering only the actions and omissions in which that particular defendant engaged." *Alcocer v. Mills*, 906 F.3d 944, 951 (11th Cir. 2018). Unfortunately for Mrs. Swinford, however, she invited this error by continually referring to the officers' actions collectively, rather than individually, and she failed to preserve such an argument for appeal because she did not raise it in opposing the motion to dismiss. *F.T.C. v. AbbVie Prods. LLC*, 713 F.3d 54, 65 (11th Cir. 2013) ("It is a cardinal rule of appellate review that a party may not challenge as error a ruling invited by that party." (quotations and ellipses omitted)).

When Mrs. Swinford filed her complaint, she brought her excessive force claim against the officers based on their collective actions, rather than individually. Accordingly, the individual officers argued in their motion to dismiss that all of them were entitled to qualified immunity based on the contents of the body camera footage. In opposing the motion to dismiss, Mrs. Swinford never argued that the officers' actions had to be assessed on an individualized basis and instead continued to refer to the officers as a group arguing that their collective actions did not entitle them to qualified immunity.[12] The first time that she argued to the district court that the officers' actions had

12. For example, Mrs. Swinford argued below that "ACCPD Officers shot Thomas in the absence of a threat because he had nothing but a BB gun, as opposed to ACCPD Officers who were shielded by cover" and "ACCPD shot many times after Thomas had dropped the gun out of reach and fallen on his face."

to be assessed individually was when she filed her motion to reconsider. The district court declined to consider this argument, and the late raising of the issue did not preserve the argument for appeal. Accordingly, we will not consider it.[13] *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957-58 (11th Cir. 2009) (refusing to consider an argument raised for the first time to the district court in a motion to reconsider).

Because we conclude that the officers did not use excessive force—and thus did not commit a constitutional violation—they are entitled to qualified immunity, and we end our qualified immunity analysis. Furthermore, because we determine that no underlying constitutional violation occurred, Thomas's supervisory liability claim against the chief of police and his *Monell* claim against the county fail as a matter of law. *Paez v. Mulvey*, 915 F.3d 1276, 1291 (11th Cir. 2019) ("[B]ecause [the officers] committed no constitutional violations, their supervisors . . . cannot be found liable . . . for violating § 1983."); *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (noting that the city of Los Angeles and the Police Commission could not be held liable under § 1983 if the individual officer "inflicted no constitutional injury" on the plaintiff).

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13. Even if we were to consider such an argument, Mrs. Swinford does not explain how an individualized inquiry would have changed the outcome of the qualified immunity analysis for any of the officers.

B. Motion to Amend

We now turn to Mrs. Swinford's argument that the district court erred in denying her motion to amend the complaint, which would have dropped her references to the body camera footage and added a claim alleging a violation of the ADA, 42 U.S.C. § 12112(a), against the county. Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that when, as here, a party cannot amend its complaint as a matter of course under Rule 15(a)(1), it may "amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "[A] district court may properly deny leave to amend the complaint . . . when such amendment would be futile." *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262-63 (11th Cir. 2004). Amendment would be futile when a proposed amended complaint would still be dismissed. *Id.*

Mrs. Swinford argues in a conclusory manner on appeal that the district court erred in denying her leave to amend because (1) she filed a motion to amend her complaint before the trial court issued an order on the motion to dismiss; (2) the district court cited to the original complaint in deeming that her proposed amended complaint was futile; and (3) the district based its finding of futility on the body camera footage that defendants attached to their motion to dismiss. Her arguments fail. To start, as discussed in footnote 10, the district court cited to the original complaint because it was ruling on defendants' motion to dismiss and the original complaint was the operative complaint. And in ruling on the motion to dismiss, the district court properly considered the

defendants' body camera footage which established that the officers had not violated Thomas's constitutional rights. Accordingly, the district court properly concluded that any amendment to Mrs. Swinford's claims of excessive force would be futile because the video evidence established no constitutional violation had occurred. Thus, we find no error in the district court's futility determination.[14]

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14. In arguing that the district court erred in denying her leave to amend, Mrs. Swinford does not mention her proposed ADA claim. However, she did argue in another section of her brief that the district court erred in "dismissing" this claim because it overlooked statements made by the chief of police to the effect that the police had an SRT—which was tasked with handling individuals suffering mental health crises—and was aware of Thomas's history of threatened suicides. She also points to allegations in the proposed amended complaint that the chief of police was the county's designated official and policymaker. Thus, Mrs. Swinford contends that she was entitled to an inference that the police department had a policy behind the actions that led to Thomas's death.

Setting aside the fact that the district court never dismissed Mrs. Swinford's ADA claim—because no ADA claim was in the original complaint—we find no error in the district court's determination that she failed to state a viable ADA claim in her proposed amended complaint. The district court determined that Mrs. Swinford failed to "allege sufficient facts to support [an inference that the chief of police] had actual knowledge that ACCPD's dispatch program discriminated against mentally ill individuals in deciding whether to deploy [the SRT] or that he failed adequately to respond." On appeal, she does not make any argument as to why this determination was incorrect. Accordingly, she has waived any argument to this effect. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014).

C. Motion to Reconsider

Finally, Mrs. Swinford argues that the district court committed manifest error in denying her motion to reconsider. Her entire argument on this point is that the district court failed to properly apply our decision in *Hunter* to the facts of this case in ruling on the motion to dismiss. As we explained above, however, *Hunter* is factually distinct from the instant case and does not control. Accordingly, we find no error under our abuse of discretion review of the district court's order denying Mrs. Swinford's motion to reconsider.

IV. Conclusion

For the reasons above, we conclude that the district court properly considered the body camera footage when ruling on the defendants' motion to dismiss under our incorporation-by-reference doctrine and properly granted qualified immunity to the individual officers. Furthermore, we find no error in the district court's denial of Mrs. Swinford's request for leave to amend her complaint or its order denying her motion for reconsideration. Accordingly, we affirm the district court's orders.

AFFIRMED.

Appendix A

CALVERT, District Judge, Concurring:

During the pendency of this appeal, other panels of this Court decided *Baker v. City of Madison, Alabama*, 67 F.4th 1268, 1277 (11th Cir. 2023), which held that the incorporation-by-reference doctrine applies to police body camera footage, and *Johnson v. City of Atlanta*, 107 F.4th 1292, 1300 (11th Cir. 2024), which held that the incorporation-by-reference doctrine does not require the complaint to refer to the document at issue or to attach it. Under the prior panel precedent rule, this panel is bound by these rulings, and accordingly I join the majority opinion in full.[1] *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

As a district judge who regularly handles motions to dismiss raising qualified immunity, I write separately to point out some practical issues with applying the incorporation by reference doctrine to body camera footage within the motion to dismiss framework, and offer some guidance on resolving them.

When reviewing a motion to dismiss, we are instructed to "accept[] the facts alleged in the complaint as true and draw[] all reasonable inferences therefrom in the

1. If not bound by *Baker* and *Johnson*, I would have further explored Judge Brasher's cogent concerns about expanding the incorporation by reference doctrine to cover audiovisual evidence. *J.I.W. by & through T.W. v. Dorminey*, No. 21-12330, 2022 WL 17351654, at *8 (11th Cir. Dec. 1, 2022) (Brasher, J., concurring) ("I don't believe the doctrine of incorporation by reference is as simple as the parties believe it to be.").

plaintiff's favor." *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001). In the case of incorporation by reference involving a document, this is straightforward. The parties can dispute what a given clause was intended to mean, but there is generally no dispute as to what the document says. In the paradigmatic example of a contract, the district court determines whether the well-pleaded allegations of the complaint constitute a breach of the incorporated contract.

But when a video is incorporated by reference, *Baker* instructs that "we accept the video's depiction instead of the complaint's account . . . and view the facts in the light depicted by the video." 67 F.4th at 1278 (citations omitted). Unlike a document, a video can depict numerous subjects moving independently at varying distances and speaking over each other at varying degrees of audibility. When there are multiple videos providing different viewpoints of the same event, the task is even more complicated.

At the motion to dismiss stage, the district court usually has only a complaint, the videos, and the parties' briefs, the latter of which by design are structured around competing narratives and theories of the case and thus do not neatly map to each other. Compare this with the more orderly summary judgment framework where the parties would have been required to organize their arguments as to the contents of the videos into discrete factual assertions, permitting the district court to engage in the more familiar process of disregarding portions of the record not cited and focusing on whether the record actually supports a given factual assertion. Fed. R. Civ. P. 56(c).

Turning to this case, unmoored from the framework of the summary judgment process, the district court below was essentially forced to transcribe the footage and cite directly to portions of the video in formulating its opinion. To do so required some degree of editorial judgment with no opportunity for the parties to weigh in on what made the "final cut."

While motions to dismiss governed by *Baker* and *Johnson* do not require conversion to summary judgment, my read of those cases is that they do not foreclose conversion as an exercise of discretion. Exercising this discretion will often lead to a more orderly presentation of the merits and facilitate appellate review. Any concerns about subjecting a defendant to discovery prior to a ruling on the motion can be avoided by sharply narrowing the scope of discovery to those issues necessary for resolution of the converted motion under Federal Rule of Civil Procedure 26(b) and (c).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION, FILED MARCH 31, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA,
ATHENS DIVISION

CIVIL ACTION No. 3:21-CV-90 (CAR)

JAYNE SWINFORD,

Plaintiff,

v.

JOSHUA SANTOS; CHARLES BIDINGER; ROGER WILLIAMS, JR; JONATHAN MCILVANE; RICHARD LEDER; CLAUDE JOHNSON; CHIEF CLEVELAND SPRUILL; ATHENS-CLARKE COUNTY, GEORGIA;

Defendants.

Filed March 31, 2022

ORDER ON DEFENDANTS' MOTION TO DISMISS AND PLAINTIFF'S MOTION TO AMEND

Currently before the Court are Plaintiff's Motion to Amend and Defendants' Motion to Dismiss. Having considered the relevant facts, applicable law, and the parties' arguments, Defendants' Motion to Dismiss [Doc.

2] is **GRANTED**, and Plaintiff's Motion to Amend [Doc. 12] is **DENIED as futile** because it fails to state a claim.

BACKGROUND

Plaintiff Jayne Swinford originally filed this action against the Athens-Clarke County Unified Government ("ACC") and ACC police officers in the State Court of Athens-Clarke County, and asserted claims for excessive force and wrongful death after the officers shot and killed her husband, Thomas Swinford ("Swinford").

On March 8, 2019, Athens-Clarke County Police Department ("ACCPD") responded to a call from Thomas Swinford's father who reported Thomas "is on drugs and talked about killing himself"[1] and "threaten[ed] suicide by cop."[2] Before the incident, ACCPD had responded to three prior suicide threats involving Swinford.[3]

When officers arrived at the Swinford residence, they notified dispatch that Swinford was armed—although the gun was actually a BB gun pistol—and ACCPD dispatched additional officers to help establish a perimeter in response to the report.[4] Swinford fled the scene in a vehicle, which officers attempted to disable with spike strips, but Swinford was able to drive the car to a nearby

1. Plaintiff's Complaint, Doc. 1-1 ¶ 27.

2. *Id.* at ¶ 29.

3. *Id.* at ¶ 28.

4. *Id.* at ¶ 31.

parking lot where a standoff with police ensued. The standoff ultimately ended when the officers shot and killed Swinford.

Defendants Joshua Santos, Charles Bidinger, Roger Williams, Jr., Jonathan McIlvane, Richard Leder, Claude Johnson, William Greenlow (collectively, the "Individual Officers"); Chief Cleveland Spruill; and ACC timely removed the action to this Court and moved to dismiss Plaintiff's Complaint. Thereafter, Plaintiff filed a motion to amend her Complaint.

LEGAL STANDARD

The Court analyzes Plaintiff's Motion to Amend under Federal Rule of Civil Procedure 15(a).[5] Because more than twenty-one days have passed since Plaintiff served her original Complaint and Defendants oppose the Motion, Plaintiff may only amend her complaint with leave of Court. In such circumstances, leave of court should be "freely give[n] when justice so requires."[6]

The decision whether to grant leave to amend a complaint is within the sound discretion of the district court.[7] Reasons justifying a denial of a timely filed motion

5. Under Rule 15(a), a party may amend its pleading "once as a matter of course" within twenty-one days of serving it.

6. *Id.*; *Nat'l Indep. Theatre Exhibitors, Inc. v. Charter Fin. Grp., Inc.*, 747 F.2d 1396, 1404 (11th Cir. 1984).

7. *Nat'l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 249 (11th Cir. 1982).

for leave to amend include "undue delay, bad faith, dilatory motive on the part of the movant, [] undue prejudice to the opposing party by virtue of allowance of the amendment [and] futility of allowance of the amendment."[8] The standard for futility is akin to a motion to dismiss; a proposed amendment may be denied for futility "when the complaint as amended would still be properly dismissed."[9]

On a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff and accept as true all well-pled facts in a plaintiff's complaint.[10] To avoid dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[11] A claim is plausible where the plaintiff alleges factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[12] The plausibility standard requires that a plaintiff allege sufficient facts "to

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8. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

9. *Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir. 2010) (citing *Cockrell*, 510 F.3d at 1310).

10. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009).

11. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

12. *Id.*

raise a reasonable expectation that discovery will reveal evidence" that supports a plaintiff's claims.[13]

DISCUSSION

For the reasons discussed herein, Plaintiff's original Complaint and Amended Complaint fail to state a viable claim against ACC, and the bodycam footage conclusively demonstrates the individual Defendants are entitled to qualified immunity. Thus, Defendants' Motion to Dismiss is **GRANTED**, and Plaintiff's Motion to Amend is **DENIED** as futile.

I. § 1983 Excessive Force Claims

Plaintiff asserts excessive force claims under the Fourth Amendment against the Individual Officers in their individual capacities and a supervisory liability claim against Chief Spruill individually.[14] Because bodycam footage demonstrates the Individual Officers are entitled to qualified immunity, and Plaintiff failed to state a claim

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13. *Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

14. Plaintiff's original Complaint asserts claims for "Fourth and Fourteenth Amendment Violation[s]," but "All claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *See Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *Hunter v. City of Leeds*, 941 F.3d 1265, 1278-79 (11th Cir. 2019).

for supervisory liability against Spruill, both claims must be dismissed.

A. Claims Against Individual Officers

In her original complaint, Plaintiff alleges the following. When Swinford exited his vehicle in the parking lot, a standoff ensued.[15] At least fifteen officers surrounded Swinford with their guns drawn, and "[f]or approximately twenty minutes, ACCPD personnel used a loudspeaker system to repeatedly command [Swinford] to put down his 'gun.'"[16] Swinford informed officers he would "come out" if he was permitted to speak to his wife, but officers prevented him from doing so.[17]

None of the officers deployed were equipped with "less lethal" weapons, but officers allegedly stated "[w]e're going to need [a less lethal weapon] [. . .] as soon as you can get one back here."[18] Although officers ordered Swinford to drop the gun, they did not issue a warning of their intention to use deadly force if he failed to comply.[19]

Despite the officer's instructions to drop the gun, Swinford "walked [towards the officers] and raised the

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15. Plaintiff's Complaint, [Doc. 1-1] at ¶ 43.

16. *Id.* at ¶ 43-45.

17. *Id.* at ¶ 47.

18. *Id.* at ¶ 48-50.

19. *Id.* at ¶ 52.

alleged 'handgun' [. . .] toward a patrol vehicle shielding two ACCPD Officers."[20] The Individual Officers shot at Swinford twenty-one times and "continued to fire upon him when he was flat on his face in the parking lot."[21] Swinford was struck six times and died from his injuries.[22]

Plaintiff contends the Individual Officers "lacked a reason to believe that [Swinford] was armed or dangerous" or if the Individual Officers had such reason it was lacking when the Individual Officers engaged in "contagious fire"; the Individual Officers "had no probable cause to believe that [Swinford] posed a threat of serious physical harm to either the officers or others" and thus, violated Swinford's constitutional rights and clearly established law.[23]

Plaintiff's allegations in the Amended Complaint are materially similar to those in her original Complaint. In the Amended Complaint, Plaintiff alleges ACCPD ignored their policy which "required" ACCPD to deploy a specialized team.[24] Plaintiff alleges the officers were "behind cover and protected from a threat of death or injury."[25] Plaintiff alleges the Individual Officers

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20. *Id.* at ¶ 54-55.

21. *Id.* at ¶ 59.

22. *Id.* at ¶ 66-67.

23. *Id.* at ¶ 86-101.

24. Plaintiff's Proposed Amended Complaint, [Doc. 12-2] at ¶ 42.

25. *Id.* at ¶ 68.

fired at Swinford after he "was already on the ground defenseless and far out of reach of the BB pistol," thus, using "gratuitous lethal force."[26] Plaintiff alleges liability on the basis that officers fired upon Swinford "despite a serious crime or threat of danger," the Individual Officers shot Swinford after he was "nonresisting and subdued," and "the Officers ha[d] more than sufficient time to stop shooting in response to any perceived threat presented by the BB pistol he previously held."[27]

Officers at the scene were wearing body cameras that recorded the event. Although Plaintiff directly references the bodycam videos in her Complaint, she did not submit any of the videos. Defendants filed the bodycam footage with their Motion to Dismiss and with their Response to Plaintiff's Motion to Amend.[28]

i. Bodycam Footage

The allegations in Plaintiff's original Complaint and Amended Complaint are wholly contradicted by the bodycam footage. Despite Plaintiff's argument to the contrary, the Court may consider the bodycam videos attached to Defendants' motions in ruling on the Motion to Dismiss and the Motion to Amend. The Eleventh Circuit has adopted the "incorporation by reference"

26. *Id.* at ¶ 58, 69-71.

27. *Id.*

28. Defendant's Motion to Dismiss, Exhibits A and B [Doc. 2-2]; Defendants' Response to Plaintiff's Motion to Amend, Exhibits C and D, [Docs. 14-3, 14-4].

doctrine, by which a court may use extrinsic evidence without converting a motion to dismiss into a motion for summary judgment when "a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss."[29] Throughout her original Complaint, Plaintiff directly references the bodycam footage—including an entire section titled "Comprehensive Facts from Bodycam Videos and Reports."[30] In the Amended Complaint, Plaintiff removed most direct references to the bodycam footage. But Plaintiff adopts her expert's report—which directly relies on the bodycam footage—by reference and incorporates it in her complaint.[31]

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29. *Davis v. Clayton*, No. 7:17-cv-02076-LSC, 2018 U.S. Dist. LEXIS 120666, at *6-7 (N.D. Ala. July 19, 2018) (citing *Financial Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007) (concluding the bodycam footage attached to Defendant's motion to dismiss was incorporated by reference in Plaintiff's complaint and could be considered by the Court)); *see also Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002).

30. Plaintiff's Complaint, [Doc. 1-1] at p. 9; *See also* ¶ 26, 60.

31. Plaintiff's Motion to Amend, [Doc. 12-1] at fn. 1 (*See Generally* Pl.'s Expert Report, adopted herein by reference as Exhibit "B"); *Id.* at p. 7 ("Plaintiff adopts her proposed "First Amended Complaint" herewith as an exhibit; and, adopts all averments in her "First Amended Complaint" herein [. . .]. Plaintiff also adopts all conclusions and findings in the "Expert Report" of William Harmening herein, which is proposed to be filed as an exhibit to her First Amended Complaint."); Exhibit B – Expert Report, [Doc. 12-3], at p.7 ("The report that follows was completed using the following: [. . .] All officer body cam videos."). Plaintiff's

Plaintiff's argument that the contents of the bodycam videos are in dispute fails. "'[U]ndisputed' means that the authenticity of the document is not challenged."[32] Plaintiff does not dispute the authenticity of the video—only the completeness. But, the Court need not consider hours of bodycam footage for the footage to be complete or "undisputed." Defendants supplied the Court with certified bodycam footage, obtained from ACC through an open records request, depicting the Individual Officers' use of deadly force—the moment central to Plaintiff's claims.

"When the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern."[33] Where the video "obviously contradicts [Plaintiff's] version of the facts, [the Court] accept[s] the video's depiction instead of [Plaintiff's] account,"[34] and "view[] the facts in the light depicted by the videotape."[35] The Court views any ambiguities in the light most favorable to Plaintiff. Because Plaintiff failed to articulate

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expert also cites to specific time markers in the bodycam videos, some of which share almost identical titles to the videos filed by Defendants. *Id.* at fns. 1, 2, 3; p. 13, 17.

32. *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005).

33. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007).

34. *Pourmoghani-Esfahani v. Gee*, 625 F.3d 1313, 1315 (11th Cir. 2010).

35. *Scott v. Harris*, 550 U.S. 372, 380-81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

a cognizable argument to dispute the authenticity of the attached videos, the videos are central to Plaintiff's claims, and the videos are incorporated by reference in Plaintiff's original and Amended Complaints, the Court may consider the videos in ruling on both motions.[36]

The bodycam footage demonstrates the following.[37] For almost three minutes[38] before the Individual Officers shot Swinford, an officer repeatedly ordered Swinford to "put the gun down," "raise your hands above your head," "put down the gun and talk with me," and "put your hands up and come to the front of the vehicle."[39] During the exchange, two officers discussed how the bystanders across the street "are still in range of that pistol. [. . .]

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36. *See McDowell v. Gonzalez*, 820 F. App'x 989, 992 (11th Cir. 2020) ("In reviewing McDowell's complaint to determine whether it should be dismissed under Rule 12(b)(6), the district court properly considered both the amended complaint and body camera footage that was attached to the motion to dismiss because the body camera footage was central to the amended complaint and was undisputed.").

37. Defendant's Motion to Dismiss, Exhibits A and B [Doc. 2-2]; Defendants' Response to Plaintiff's Motion to Amend, Exhibits C and D, [Docs. 14-3, 14-4].

38. Referring to the three minutes before the shooting in the bodycam footage. Plaintiff's Complaint, however, alleges "[f]or approximately twenty minutes, ACCPD personnel used a loudspeaker system to repeatedly command Thomas to put down his 'gun.'"

39. Exhibit A [Doc. 2-2] at 0:25 to 3:24; Exhibit D [Doc. 14-4] at 0:00 to 0:28.

We can't force them, but we can highly encourage them to at least back up."[40] One officer then approaches the bystanders and explains "our concern is this man is armed with a gun and y'all are in almost a direct line [of fire]."

Over the loudspeaker, the officer tells Swinford, "I know you want some help, and we can get that help for you. I know your [inaudible] family is thinking about you. They want to know you're alright,"[41] "I know there's a lot going on man, but we can work this out. We can work through it," "you've got to give us a chance," and "I know you might be feeling alone, but you're not."[42]

Despite the officer's orders to put the gun down and raise his hands, Swinford walked towards the officers with the gun in his hand while the officer yelled "don't do that Thomas" and "drop the gun" multiple times.[43] Seconds later, Swinford raised the gun and pointed it at the officers.[44] The officers then fired at him.[45] Over a four to five second interval, the Individual Officers fired

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40. Exhibit B [Doc. 2-2] at 0:06 to 1:22.

41. Exhibit A [Doc. 2-2] at 0:36 to 0:53.

42. Exhibit A [Doc. 2-2] at 2:37 to 3:14; Exhibit D [Doc. 14-4] at 1:30 to 2:07.

43. Exhibit A [Doc. 2-2] at 3:17 to 3:25; Exhibit D [Doc. 14-4] at 2:09 to 2:18.

44. *Id.*

45. Exhibit A [Doc. 2-2] at 3:22 to 3:25; Exhibit D [Doc. 14-4] at 2:15 to 2:21.

multiple shots, six of which struck Swinford.[46] After the shooting stopped, officers ordered Swinford to "stay down" and "don't move";[47] one officer asked "where is the gun?" to which another officer responded, "it's right there in front of him."[48] As a team of officers approached Swinford, another officer instructs them to "slow down," "do not rush him," and "secure him."[49]

ii. Qualified Immunity

The bodycam footage establishes the Individual Officers are entitled to qualified immunity, and Plaintiff's claims against them must be dismissed. In cases brought under §1983, qualified immunity "offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[50]

Qualified immunity shields "all but the plainly incompetent or those who knowingly violate the law."[51]

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46. Exhibit A [Doc. 2-2] at 3:25 to 3:28; Exhibit D [Doc. 14-4] at 2:17 to 2:21.

47. Exhibit A [Doc. 2-2] at 3:33 to 3:43.

48. Exhibit D [Doc. 14-4] at 2:24 to 2:30.

49. Exhibit A [Doc. 2-2] at 0:00 to 0:28; Exhibit C [Doc. 14-3] at 0:51 to 0:58.

50. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

51. *Gates v. Khokhar*, 884 F.3d 1290, 1296 (11th Cir. 2018) (citation omitted).

Appendix B

The Eleventh Circuit has adopted a multi-step, burden shifting analysis for qualified immunity:

> In order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. . . . Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate.[52]

The Individual Officers were undoubtedly acting within the scope of their discretionary authority in responding to the Swinford family's 911 calls and later pursuing Swinford.[53] Thus, Plaintiff must state sufficient facts to show the Individual Officers use of force violated clearly established law or "that the violation was so obvious that every reasonable officer would know that his actions were unconstitutional."[54] She fails to carry her burden.

Whether an officer's use of deadly force was reasonable turns on "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

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52. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citations and internal quotation marks omitted).

53. *Crosby v. Monroe Cty.*, 394 F.3d 1328 (11th Cir. 2004).

54. *Washington v. Warden*, 847 F. App'x 734, 737 (11th Cir. 2021).

arrest or attempting to evade arrest by flight."[55] The "standard asks whether the force applied 'is objectively reasonable in light of the facts confronting the officer,' a determination [the Court] make[s] 'from the perspective of a reasonable officer on the scene' and not 'with the 20/20 vision of hindsight.'"[56]

To determine whether a suspect poses an imminent threat to the safety of officers or others, the Court asks "whether, given the circumstances, [Swinford] would have appeared to reasonable police officers to have been gravely dangerous."[57] The Eleventh Circuit views this factor as the most important, and the Circuit has consistently held that "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or others, use of deadly force does not violate the Constitution."[58] In other words, "[i]t is axiomatic that when an officer is threatened with deadly force, he may respond with deadly force to protect himself."[59]

Here, the bodycam footage shows, the Individual Officers' use of deadly force was objectively reasonable

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55. *Hunter*, 941 F.3d at 1279 (quoting *Graham*, 490 U.S. at 396).

56. *Mobley v. Palm Beach Cty. Sheriff Dep't*, 783 F.3d 1347, 1353 (11th Cir. 2015) (citing *Crenshaw v. Lister*, 556 F.3d 1283, 1290 (11th Cir. 2009)).

57. *Long*, 508 F.3d at 581 (quoting *Pace v. Capobianco*, 283 F.3d 1275, 1281 (11th Cir. 2002)).

58. *Penley*, 605 F.3d at 851 (citing *Garner*, 471 U.S. at 11).

59. *Hunter*, 941 F.3d at 1279.

under the clearly established law. The officers responded to a report of an armed individual, observed Swinford behaving erratically, and ordered him repeatedly to put down the gun. Officers recognized the danger of the situation, both in how they attempted to shield themselves from potential fire and by warning bystanders that they were in the line of fire. Swinford escalated an already gravely dangerous situation when he refused to comply with the officer's orders, walked towards the officers, raised the gun, and aimed towards them.[60]

Although Plaintiff's Complaint concedes officers ordered Swinford to put down the gun for approximately twenty minutes, Eleventh Circuit precedent indicates officers were not required to wait until Swinford had "[taken aim at] officer[s] or others before using deadly force"[61] because "[t]he law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect."[62] Both Swinford's behavior before he raised the gun—and by pointing the gun directly at officers—supports the Court's conclusion that, under the circumstances, Swinford would have appeared to have been gravely

60. The officer's statements over the loudspeaker illustrate the officers attempts to deescalate the situation and reason with Swinford. The Individual Officers did not use deadly force until the moment they encountered Swinford's perceived use of deadly force.

61. *Thorkelson v. Marceno,* 849 F. App'x 879, 882 (11th Cir. 2021) (citing *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997)).

62. *Jean-Baptiste v. Gutierrez*, 627 F.3d at 821 (citing *Long*, 508 F.3d at 581).

dangerous to a reasonable police officer. During the four seconds of shooting, and even after Swinford fell to the ground, his head was still raised, his body appeared to move, and officers had not yet located the gun. Plaintiff's argument that no officer was at risk of injury from possible gun fire because they were behind vehicles, walls, trees, or shields is without merit.

The seriousness of Swinford's conduct, along with his failure to follow the officers' commands, also supports a finding of reasonableness. The first officer to arrive on scene observed Swinford retreat into the house holding a firearm and advised dispatch that he was armed. Swinford was behaving erratically, brandishing a gun,[63] and when the officers made contact, he failed to comply with the officers' commands to "drop the gun" and "put [his] hands up." Instead, Swinford walked towards the officers, raised his gun, and pointed it at them.

Even viewing ambiguities in the bodycam footage and well-plead factual allegations in a light most favorable to Plaintiff, precedent dictates that the Individual Officers used reasonable force. The Eleventh Circuit has held officers were entitled to qualified immunity where a decedent "had time to comply with [an officer's]

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63. The gun was later determined to be a BB gun, but there is nothing in the record to support the Individual Officers knew Swinford was not brandishing a "real" gun before he was shot. On the contrary, the reports to dispatch, precautions taken by the officers, and recorded communications between officers, Swinford, and civilian bystanders establish the officers believed Swinford was armed with a "real" gun.

command . . . but instead he defied the officer's command by turning back toward the gun lying in the open trailer doorway: a movement the officers reasonably perceived as threatening."[64] Additionally, the Eleventh Circuit has found that "threatening the lives of others, and refusing to comply with officers' commands to drop the weapon are undoubtedly serious crimes," and concluded "non-compliance of this sort supports the conclusion that use of deadly force was reasonable".[65] Thus, the Individual Officers are entitled to qualified immunity, and Plaintiff's claims against them—in both her original and Amended Complaints—are **DISMISSED**.

B. Supervisory Liability Claim—Chief Spruill

Plaintiff asserts a supervisory liability claim against Chief Spruill. But, "[i]t is well established in this Circuit that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis

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64. *Mercado v. City of Orlando*, 407 F.3d 1152, 1154-57 (11th Cir. 2005); *see e.g. Kenning v. Carli*, 648 F. App'x 763, 770-71 (11th Cir. 2016) (citing *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016).

65. *Compare Fils v. City of Aventura*, 647 F.3d 1272, 1288 (11th Cir. 2011) (finding that use of force was unreasonable in part because "[d]isorderly conduct is not a serious offense" and the plaintiff "did not ignore any verbal instructions"), with *Penley*, 605 F.3d at 851 (holding that "threatening the lives of others, and refusing to comply with officers' commands to drop the weapon are undoubtedly serious crimes," and "non-compliance of this sort supports the conclusion that use of deadly force was reasonable").

of *respondeat superior* or vicarious liability."[66] "To hold a supervisor liable a plaintiff must show that the supervisor either directly participated in the unconstitutional conduct or that a causal connection exists between the supervisor's actions and the alleged constitutional violation."[67] "The standard by which a supervisor is held liable in [his] individual capacity for the actions of a subordinate is extremely rigorous."[68]

Plaintiff failed to plead facts to show that Spruill either directly participated in the unconstitutional conduct or that a causal connection exists between Spruill's actions and the alleged constitutional violation. Instead, Plaintiff asserts multiple conclusory allegations devoid of factual support. In her original Complaint, Plaintiff alleges Spruill, "knew, or should have known, of the repeated threats of suicide by Swinford";[69] "was to ensure the deployment of the Department's Strategic Response Team"[70]; "was tasked with ensuring that ACCPD personnel were equipped with less lethal [. . .] means";[71] "Spruill is liable to Plaintiff based on his failure

66. *Keith v. Dekalb Cty.*, 749 F.3d 1034, 1047 (11th Cir. 2014) (citing *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (internal quotation marks omitted)).

67. *Id.* at 1047-48.

68. *Cottone*, 326 F.3d at 1360.

69. Plaintiff's Complaint, Doc. 1-1 at ¶ 79.

70. *Id.* at ¶ 80.

71. *Id.* at ¶ 81.

to perform the ministerial task to deploy the Strategic Response Team in accordance with ACCPD's stated policy 'requiring' it to do so";[72] "Spruill failed to take reasonable steps to protect Swinford from Defendants' use of excessive force";[73] and "[i]n the alternative, Spruill is liable to Plaintiff for the performance of discretionary duties with malice or intent to injure Swinford"[74].

In the Amended Complaint, Plaintiff continues to assert conclusory allegations which are either devoid of factual support or misrepresent documents in the record.[75] Plaintiff focuses on deficiencies in ACCPD's crisis response systems and training, and alleges Spruill: "was aware of the tactical dispatching deficiency identified by CALEA 2016 relating to the ACCPD Communication Division's lack of participation in tactical dispatch communications operations"; "had knowledge of [Swinford's previous suicide threats]"; "ignored the deficiencies and did nothing until [Swinford's death]"; "directed subordinates to act

72. *Id.* at ¶ 83.

73. *Id.* at ¶ 84.

74. *Id.* at ¶ 85.

75. For the same reasons the Court can consider the attached bodycam footage, the Court can also consider the attached 2016 CALEA Report. *Compare* Plaintiff's Amended Complaint [Doc 12-2] at ¶ 208 *with* 2016 CALEA Report, [Doc. 14-1] at p. 29-30. The 2016 CALEA report noted that ACCPD was in compliance with all CALEA standards except one which is not relevant to Plaintiff's case. Plaintiff's claim that the 2016 report "confirmed a deficiency with 'Tactical Dispatching'" is unfounded and a misrepresents the report's findings.

unlawfully"; "knew that his subordinated would act unlawfully and failed to stop them from doing so"; and "is liable [. . .] based on a causal connection between his deliberate indifference to ACCPD's deficiencies and the violation of [Swinford's] constitutional rights."[76]

None of Plaintiff's allegations meets the "extremely rigorous" standard established by the Eleventh Circuit. Additionally, Plaintiff cannot rely on his allegation that Spruill breached department policy by failing to deploy the Strategic Response Team to state a supervisor liability claim. "[N]o cases hold that a government official's violation of facility or department policy, without more, constitutes a constitutional violation."[77] Furthermore, there is no constitutional right to have a specially trained response team deployed. Thus, Plaintiff failed to state a supervisor liability claim against Spruill, and her claim must be **DISMISSED**.

II. Claim Against ACC

Plaintiff fails to state a claim against ACC[78] because she fails to allege "a direct causal link between a municipal policy or custom and the alleged constitutional

76. Plaintiff's Amended Complaint, [Doc. 12-2] at

77. *Dolihite v. Maughon by & Through Videon*, 74 F.3d 1027, 1044 (11th Cir. 1996).

78. In her original complaint, Plaintiff asserts duplicative *Monell* claims against both ACC and Spruill in his official capacity. *See McMillian v. Monroe County*, 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997) (a suit against an individual in his official capacity is the functional equivalent of a suit against the government entity the official represents).

deprivation."[79] The original Complaint provides no factual basis to support Plaintiff's conclusory allegations against ACC. In the Complaint, Plaintiff alleges that ACC "employed customs or policies that constituted deliberate indifference to Plaintiff's Constitution [sic] Rights"; "implemented policies, directives, ordinances, regulations, or decisions officially adopted and promulgated by Chief Spruill and ACC resulting in the violation of Plaintiff's Constitutional Rights"; "engaged in unofficial customs or practices shown through the repeated acts of the Chief of Police and County Commissioners, who acted as final policymakers for the city"; "ACC and Spruill's customs and practices were the moving force behind the constitutional violations identified in this Complaint"; "ACC and Spruill are liable based on a pattern of similar conduct to the conduct in this case, including, but not limited to, prior shooting incidents involving those with mental illness or threats of suicide"; and multiple boilerplate failure to train allegations.[80]

The allegations in Plaintiff's Amended Complaint shift from a bare and factually devoid recitation of the elements of a *Monell* liability claim to allegations of ACC's failure to train and supervise, departmental deficiencies, and deliberate indifference to Swinford's constitutional rights. Plaintiff alleges ACC "was aware of deficiencies with ACCPD's crisis response capabilities involving persons in need of mental health treatment" and of the "limited

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79. *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

80. Plaintiff's Original Complaint, [Doc. 1-1] at ¶ 114-123.

training opportunities for direct responders to individuals in crisis"; "given the prior notice of deficiencies directly related to the deployment of [specialized] teams [. . .] the likelihood for constitutional violation[s] was so high that [. . .] the need for corrective training and supervision was patently obvious"; and alleges ACC is liable "based on their deliberate indifference to the very high likelihood for constitutional violations and the resulting violation of [Swinford's] rights", or in the alternative, "based on evidence of [Swinford's prior incidents] involving the need for mental health crisis intervention and effective tactical deployment" and "for hiring Spruill."[81]

A local government entity may not be found liable under § 1983 for an injury inflicted solely by its employees or agents, even when that injury results in a constitutional violation.[82] Instead, a local government entity "is liable only when [its] 'official policy' causes a constitutional violation."[83] To establish this, a plaintiff must "identify either (1) an officially promulgated county policy or (2) an unofficial custom or practice of the county shown through the repeated acts of a final policymaker for the county."[84]

Plaintiff's allegations are mere recitations of the bare elements of a *Monell* claim and only offer conclusory

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81. Plaintiff's Amended Complaint [Doc. 12-2] at ¶ 205-235.

82. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

83. *Id.*

84. *Grech v. Clayton Cnty., Ga.*, 335 F.3d 1326, 1329 (11th Cir. 2003).

allegations devoid of factual support. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement."[85] Additionally, the vague allegations fail to "specifically identify which policy or practice, if any, caused the alleged injuries."[86] "Alleging vaguely that a policy, custom or practice exists is not enough; rather plaintiff must specifically identify which policy or practice, if any, caused the alleged injuries."[87] Additionally, an allegation of an isolated incident, without more, is insufficient to establish *Monell* liability.[88]

Plaintiff's failure to train allegations of likewise fail. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and

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85. *Ashcroft v. Iqbal* , 556 U.S. 662, 687, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)) (internal citations omitted).

86. *Searcy v. Ben Hill Cnty. Sch. Dist.*, 22 F. Supp. 3d 1333, 1341 (M.D. Ga. 2014) (internal quotation marks and citation omitted).

87. *Id.*

88. *Grech*, 335 F.3d at 1330, n.6 (2003) (quoting *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) ("A single incident would not be so pervasive as to be a custom or practice" and "proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*.").

causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."[89]

> The Supreme Court has explained that there are only "limited circumstances" in which an allegation of a failure to train or supervise can be the basis for liability under § 1983. The Supreme Court has instructed that these "limited circumstances" occur only where the municipality inadequately trains or supervises its employees, this failure to train or supervise is a city policy, and that city policy causes the employees to violate a citizen's constitutional rights.[90]

The Eleventh Circuit has "repeatedly has held that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise."[91] For example, the Eleventh Circuit concluded "a sheriff's department was not liable for a deputy's acts when 'no evidence of a history of widespread prior abuse . . . put the sheriff on notice of the need for improved training or supervision.'"[92]

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89. *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

90. *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998) (internal citations omitted).

91. *Id.* at 1351.

92. *Id.* (citing *Wright v. Sheppard*, 919 F.2d 665 (11th Cir. 1990)). *See also Popham v. City of Talladega*, 908 F.2d 1561,

Plaintiff makes no allegations of widespread history of excessive force, let alone a specific widespread history of excessive force resulting from interactions with mentally ill or intoxicated individuals. Thus, Plaintiff's failure to train allegations fail to establish liability for ACC.

Plaintiff's *Monell* claims fail to state a claim and fail to meet the pleading requirements set forth in FRCP Rule 8. Therefore, her claims must be **DISMISSED**.

III. Americans with Disabilities Act ("ADA") Claim

Plaintiff also seeks to amend her complaint to add a claim for damages under Title II of the ADA. In the Amended Complaint, Plaintiff alleges "Swinford was an individual with a disability due to mental illness involving suicidal ideations"; ACC was aware Swinford's prior incidents and therefore on notice he required an accommodation; all ACCPD personnel present "were aware Swinford was mentally ill and therefore legally required to be treated as an individual with a disability pursuant to the ADA"; "ACC's [. . .] had access to the special teams that were required and available to be deployed to handle an incident involving a mentally ill and suicidal individual"; and ACC and Spruill were deliberately indifferent to the risk of an ADA violation by failing to deploy the Strategic Response Team and the Crisis Intervention Team.[93]

1564-65 (11th Cir.1990) (finding no liability for failure to train when no pattern of incidents put the City on notice of a need to train).

93. Plaintiff's Proposed Amended Complaint, [Doc. 12-2] at ¶ 236-254.

Appendix B

Title II of the ADA prohibits a "public entity" from discriminating against "a qualified individual with a disability" on account of the individual's disability, as follows:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[94]

To state a claim under Title II, plaintiff must allege (1) that the decedent was a qualified individual with a disability; (2) that the decedent was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the decedent's disability.[95] In the ordinary course, proof of a Title II violation entitles a plaintiff only to injunctive relief.[96]

The Eleventh Circuit "has never addressed whether police officers can violate Title II of the ADA."[97] But

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94. 42 U.S.C. § 12132.

95. *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1083 (11th Cir. 2007).

96. *Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824, 831 (11th Cir. 2017).

97. *Osorio v. Miami Dade Cty.*, 717 F. App'x 957 (11th Cir. 2018) (per curiam).

"assuming, arguendo, that such a claim is cognizable, [the Eleventh Circuit has] held that a plaintiff seeking compensatory damages under the ADA must show 'discriminatory intent.'"[98] A plaintiff may prove discriminatory intent by showing that a defendant was deliberately indifferent to his statutory rights. Deliberate indifference is an exacting standard, which requires showing more than gross negligence.[99] It requires proof that "the defendant knew that harm to a federally protected right was substantially likely and . . . failed to act on that likelihood."[100]

To hold ACC liable, Plaintiff must demonstrate that an "official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [ACC's] behalf" had "actual knowledge of discrimination in the [ACC's] programs and fail[ed]

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98. *Id. See also McCullum v. Orlando Reg'l Healthcare Sys.*, 768 F.3d 1135, 1147 (11th Cir. 2014) (To prevail on a claim for compensatory damages under the ADA, a plaintiff must show that a defendant violated his rights under the statutes and did so with discriminatory intent).

99. *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019).

100. *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012) (citation omitted). See also *Connick v. Thompson*, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) ("[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.") (internal citations omitted).

adequately to respond."[101] To qualify, that "official" must be "high enough up the chain-of-command that his [or her] acts constitute an official decision by [ACC] not to remedy the misconduct."[102]

Plaintiff fails to allege sufficient facts to support Spruill had actual knowledge that ACCPD's dispatch program discriminated against mentally ill individuals in deciding whether to deploy specially trained teams or that he failed adequately to respond. Plaintiff does not allege Spruill knew that deploying the Individual Officers, rather than a specialized team, would "substantially likely" result in harm to a federally protected right. Furthermore, Plaintiff fails to cite to any case law supporting the proposition Swinford was legally entitled to have the Strategic Response Team or the Crisis Negotiation Team deployed, or that these two teams were the only ADA-compliant manner ACCPD could encounter an individual with a mental illness. Because Plaintiff's Amended Complaint fails to establish a *prima facie* case for a both a violation under Title II of the ADA and the required showing of discriminatory intent, her claim for damages fails on both grounds.

IV. State Law Wrongful Death Claim

With all federal claims dismissed, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law wrongful death claim. "A district court may decline

101. *Silberman*, 927 F.3d at 1134 (citations omitted).

102. *Id.*

to exercise supplemental jurisdiction if it 'has dismissed all claims over which it has original jurisdiction.'"[103] Furthermore, the Eleventh Circuit has "encouraged district courts to dismiss any remaining state claims when . . . the federal claims have been dismissed prior to trial[.]"[104] Thus, Plaintiff's wrongful death claim is **DISMISSED without prejudice**.

CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss [Doc. 2] is **GRANTED**, and Plaintiff's Motion to Amend [Doc. 12] is **DENIED as futile** because it fails to state a claim.

SO ORDERED, this 31st day of March, 2022.

/s/ C. Ashley Royal
C. ASHLEY ROYAL, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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103. *Marshall v. Washington*, 487 F. App'x 523, 527 (11th Cir. 2012) (citing 28 U.S.C. § 1367(c)(3)).

104. *Id.* (citing *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1089 (11th Cir. 2004)).

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION, FILED APRIL 1, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Case No. 3:21-cv-90 (CAR)

JAYNE SWINFORD,

Plaintiff,

v.

JOSHUA SANTOS; CHARLES BIDINGER; ROGER WILLIAMS, JR.; JONATHAN MCILVANE; RICHARD LEDER; CLAUDE JOHNSON; CHIEF CLEVELAND SPRUILL; ATHENS-CLARKE COUNTY, GEORGIA,

Defendants.

Filed April 1, 2022

JUDGMENT

Pursuant to this Court's Order dated March 31, 2022, and for the reasons stated therein, JUDGMENT is hereby entered in favor of Defendants. Plaintiff shall recover nothing of Defendants. Defendants shall also recover costs of this action.

This 1st day of April, 2022.

David W. Bunt, Clerk

/s/ Gail G. Sellers, Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION, FILED OCTOBER 13, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA,
ATHENS DIVISION

CIVIL ACTION No. 3:21-CV-90 (CAR)

JAYNE SWINFORD,

Plaintiff,

v.

JOSHUA SANTOS; CHARLES BIDINGER; ROGER WILLIAMS, JR; JONATHAN MCILVANE; RICHARD LEDER; CLAUDE JOHNSON; CHIEF CLEVELAND SPRUILL; ATHENS-CLARKE COUNTY, GEORGIA,

Defendants.

Filed October 13, 2022

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION AND MOTION FOR EVIDENTIARY HEARING

Before the Court are Plaintiff Jayne Swinford's Motion for Reconsideration [Doc. 20] and Motion for Evidentiary Hearing [Doc. 25]. For the reasons discussed,

Plaintiff failed to show she is entitled to reconsideration or an evidentiary hearing. Thus, Plaintiff's Motions are **DENIED**.

Plaintiff Jayne Swinford originally filed this action against the Athens-Clarke County Unified Government ("ACC"), the Chief of ACC Police Department and five individual ACC police officers in the State Court of Athens-Clarke County. She asserts claims for excessive force and wrongful death after the officers shot and killed her husband, Thomas Swinford ("Swinford"). Defendants timely removed the action to this Court and moved to dismiss Plaintiff's Complaint. Plaintiff later filed a motion to amend her complaint. In its Order entered on March 31, 2022, the Court granted Defendants' motion to dismiss and denied Plaintiff's motion to amend.[1] Plaintiff now moves the Court for reconsideration under Federal Rule of Civil Procedure 59(e).

STANDARD OF REVIEW

Rule 59(e) of the Federal Rules of Civil Procedure authorizes district courts, upon motion, to alter or amend a judgment.[2] Local Rule 7.6 cautions that "[m]otions for reconsideration shall not be filed as a matter of routine practice."[3] "[I]t is well-settled that motions for

1. Order Granting Motion to Dismiss and Denying Motion to Amend, [Doc. 17].

2. Fed. R. Civ. P. 59(e).

3. M.D. Ga., L.R. 7.6.

reconsideration are disfavored and that relief under rule 59(e) is an extraordinary remedy to be employed sparingly."[4] Accordingly, the Court should only grant these motions in three limited circumstances: (1) there has been an intervening change in controlling law; (2) new evidence has been discovered; or (3) reconsideration is needed to correct clear error or prevent manifest injustice.[5] A motion for reconsideration cannot be used "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment."[6] Ultimately, "[w]hether to grant a motion for reconsideration is within the sound discretion of the district court."[7]

DISCUSSION

Plaintiff failed to provide any legitimate reason for reconsideration. Instead, Plaintiff attempts to relitigate multiple legal issues already decided by the Court and contends the Court committed various reversible errors which entitle her to reconsideration. The Court disagrees.

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4. *Krstic v. Princess Cruise Lines, Ltd. (Cor)*, 706 F.Supp.2d 1271, 1282 (S.D. Fla. 2010) (internal quotation marks omitted).

5. *Ctr. for Biological Diversity v. Hamilton*, 385 F. Supp. 2d 1330, 1337 (N.D. Ga. 2005).

6. *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005).

7. *Hankerson v. Drew*, No. 1:13-cv-1790-WSD, 2014 U.S. Dist. LEXIS 84055, 2014 WL 2808218, at *3 (N.D. Ga. June 20, 2014) (citing *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 805-806 (11th Cir. 1993)).

Plaintiff's contention that the Court committed reversible error each time it considered Plaintiff's original complaint is without merit. In its Order, the Court denied Plaintiff's motion to amend. The Court was then required to rule on Defendants' pending motion to dismiss. In doing so, the Court logically had to consider Plaintiff's original—and the operative—complaint.[8]

In her Motion, Plaintiff attempts to relitigate the Court's conclusions that the Individual Officers' use of force was reasonable and the Court's consideration of the bodycam footage attached to Defendants' motion to dismiss. "[A] motion for reconsideration does not provide an opportunity to simply reargue an issue the Court has once determined. Court opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure."[9] The Court considered the parties' extensive briefing on both issues and rejected Plaintiff's arguments. The Court will not grant reconsideration to relitigate already decided matters.

After reviewing the body camera footage depicting the Individual Officers' interactions with Swinford and the four to five seconds of shooting, the Court concluded none

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8. *See Saho v. Equifax, Inc.*, 2020 U.S. Dist. LEXIS 240901, *9 (N.D. Ga. Feb. 28, 2020) (denying motion for leave to amend and recognizing that, as a result, the original complaint remained the operative pleading).

9. *Am. Ass'n of People with Disabilities v. Hood*, 278 F.Supp.2d 1337, 1340 (M.D. Fla. 2003) (internal citations and quotation marks omitted).

of the Individual Officer's conduct under the circumstances violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[10] Thus, the Court found each of the Individual Officers were entitled to qualified immunity. Plaintiff now attempts to relitigate the Individual Officers' use of force and cites *Hunter v. City of Leeds*, 941 F.3d 1265 (11th Cir. 2019). Plaintiff's argument fails. The Eleventh Circuit decided *Hunter* on November 1, 2019. Swinford was shot by ACC officers on March 8, 2019. Therefore, *Hunter* cannot possibly serve as clearly established law putting officers on notice on March 9, 2019—as it had not yet been decided.

Nevertheless, the present case is distinguishable from *Hunter*. Here, "[d]espite the officer's orders to put the gun down and raise his hands, Swinford walked towards the officers with the gun in his hand while the officer yelled 'don't do that Thomas' and 'drop the gun' multiple times. Seconds later, Swinford raised the gun and pointed it at the officers."[11] The Individual Officers fired shots in a singular four to five second interval, whereas in *Hunter*, the officers fired multiple intervals of shots.[12]

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10. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002).

11. Court's Order, [Doc. 17] at p. 10.

12. *Hunter v. Leeds*, 941 F.3d 1265, 1280 (11th Cir. 2019) ("After Kirk fired his first three shots, Hunter recoiled back into his vehicle. Then, apparently in compliance with Kirk's commands to drop his weapon, Hunter dropped his gun through the opening in the car door. Kirk then, without further warning, fired seven more shots at Hunter, who was now unarmed.").

Additionally, in its Order, the Court did not find Swinford was "compliant, cooperative, under control, or otherwise subdued" before or during the four to five seconds of shooting.[13] The Court concluded in its Order that "[d]uring the four seconds of shooting, and even after Swinford fell to the ground, his head was still raised, his body appeared to move, and officers had not yet located the gun."[14] Likewise, the Court found the bodycam videos attached to Defendants' motion to dismiss were incorporated by reference. Plaintiff's arguments to the contrary are without merit.

With her Motion for Reconsideration, Plaintiff submits "all videos" from March 8, 2019.[15] "[W]here a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion."[16] Plaintiff referenced bodycam videos in her original complaint, her expert reviewed and directly referenced bodycam videos in her proposed amended complaint, yet she chose not to submit the videos or supplement the record. Therefore, Plaintiff cannot show the bodycam evidence was not available during the pendency of the motion to dismiss.

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13. *Contrast with Hunter, Id.* ("Then, apparently in compliance with Kirk's commands to drop his weapon, Hunter dropped his gun through the opening in the car door.).

14. Court's Order, [Doc. 17] at p. 14.

15. Notice of Manual Filing, [Doc. 21], Exhibits A-G.

16. *Mays v. United States Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997).

Finally, Plaintiff seeks to introduce other new evidence including ACC policies, manuals, and agendas which she attached to her Motion. Like the previously unsubmitted bodycam footage, Plaintiff does not allege the evidence was unavailable during the pendency of the motion or that she could not have discovered it before the entry of judgment. The Court finds that the disfavored and extraordinary remedy of relief under Rule 59(e) is unwarranted.

Accordingly, Plaintiff's Motion for Reconsideration [Doc. 20] and Motion for Evidentiary Hearing [Doc. 25] are **DENIED**.

SO ORDERED, this 13th day of October, 2022.

/s/ C. Ashley Royal
C. ASHLEY ROYAL, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED DECEMBER 13, 2024

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13675

JAYNE SWINFORD,

Plaintiff-Appellant,

versus

OFFICER JOSHUA SANTOS, IN HIS INDIVIDUAL CAPACITY, OFFICER CHARLES BIDINGER, IN HIS INDIVIDUAL CAPACITY, OFFICER ROGER OLIVER WILLIAMS, JR., IN HIS INDIVIDUAL CAPACITY, SERGEANT JONATHAN MCILVAN, IN HIS INDIVIDUAL CAPACITY, CORPORAL RICHARD ALEXANDER LEDER, IN HIS INDIVIDUAL CAPACITY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 3:21-cv-00090-CAR

Filed December 13, 2024

Appendix E

ORDER

Before BRANCH, GRANT, Circuit Judges, and CALVERT,* District Judge.

PER CURIAM:

The Petition for Panel Rehearing filed by Jayne Swinford is DENIED.

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* The Honorable Victoria Calvert, United States District Judge for the Northern District of Georgia, sitting by designation.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MARCH 17, 2025

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13675

JAYNE SWINFORD,

Plaintiff-Appellant,

versus

OFFICER JOSHUA SANTOS, IN HIS INDIVIDUAL CAPACITY, OFFICER CHARLES BIDINGER, IN HIS INDIVIDUAL CAPACITY, OFFICER ROGER OLIVER WILLIAMS, JR., IN HIS INDIVIDUAL CAPACITY, SERGEANT JONATHAN MCILVAN, IN HIS INDIVIDUAL CAPACITY, CORPORAL RICHARD ALEXANDER LEDER, IN HIS INDIVIDUAL CAPACITY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 3:21-cv-00090-CAR

Filed March 17, 2025

Appendix F

ORDER

Before BRANCH, GRANT, Circuit Judges, and CALVERT, District Judge.*

BY THE COURT:

Appellant's "Emergency Motion to Recall Mandate and Consider Rehearing En Banc" is DENIED.

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* The Honorable Victoria Calvert, United States District Judge for the Northern District of Georgia, sitting by designation.