

Application No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS MANGINO, *Petitioner*

v.

VICKI MCKENNEY, individually and as next friend of Stephen McKenney, and as personal
representative of the Estate of Stephen McKenney, *Respondent*

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

APPLICATION FOR STAY OF PROCEEDINGS

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APPLICATION FOR STAY OF PROCEEDINGS

To the Honorable Stephen Breyer, Associate Justice of the United States Supreme Court
and Circuit Justice for the United States Court of Appeals for the First Circuit:

Petitioner respectfully moves for a stay of proceedings in the district court pending this Court's consideration of petitioner's pending petition for a writ of certiorari. *See* Rule 23.1; 28 U.S.C. § 2101(f). The petition raises fundamental questions concerning the scope of appellate jurisdiction and the clearly established prong of the qualified immunity analysis.

Rather than await this court's decision on whether to grant certiorari, the district court ordered this case to proceed to trial. Trial is scheduled for April 2018.

Petitioner has satisfied the requirements of Supreme Court Rule 23 for seeking a stay from the courts below. He has sought relief in the First Circuit, and that request was denied by order dated December 4, 2017. *Addendum*, p. A-2. He has also sought relief in the district court, and that relief was denied by order dated January 17, 2018. *Addendum*, p. A-1.

STATEMENT

This case is an action brought by Vicky McKenney, individually, and as Personal Representative of the Estate of Stephen McKenney, against the Petitioner alleging a deprivation of Stephen McKenney's Fourth Amendment rights pursuant to 42 U.S.C. § 1983 for the fatal shooting of Stephen McKenney. Much of the interaction between Stephen McKenney and law enforcement officers is captured on a video recording. *See DVD attached to this application.*¹ The Petitioner moved the District Court for summary judgment on the basis of qualified immunity. The Petitioner argued that there was no clearly established law that would have put him on notice that his conduct violated the constitution.

The District Court denied the Petitioner's motion for summary judgment. The District Court held that the Petitioner's conduct violated clearly established law precluding summary judgment. The District Court made this determination without identifying a case from this Court or the First Circuit that was sufficiently similar to the facts of this case, or a robust consensus of

¹ The audio and video recordings from Officers Cook and Fournier's dashboard cameras are included in the Addendum. The video from Officer Cook's cruiser visually shows the activity directly outside a portion of the garage, but the audio portion is of poor quality. While the video from Fournier's cruiser does not show any of the events visually, it provides a clearer audio recording of the communications, including information Fournier was relaying about McKenney's movements and the threat he posed to Petitioner.

cases from other jurisdictions which would have placed the constitutional query beyond doubt and provided the Petitioner with the required fair warning that his conduct was constitutionally infirm.

The First Circuit dismissed portions of the appeal for want of appellate jurisdiction because it found that the qualified immunity argument was “factbound.” Relying on case law identified by the District Court, the First Circuit further held that the Petitioner had fair warning that his actions violated clearly established Fourth Amendment law. In its decision the First Circuit failed to identify any controlling authority or a consensus of cases of persuasive authority sufficient to give notice to the Petitioner that his actions violated the constitution.

REASONS FOR GRANTING THE APPLICATION

A. The requirements for a stay of proceedings pending certiorari are satisfied in this case.

“In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.” 28 U.S.C. § 2101(f). “[T]hree conditions . . . must be met before issuance of a § 2101(f) stay is appropriate. There must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed.” *Barnes v. E-Systems*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers) (citing *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers)). “In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Because the petitioner has satisfied each of the prerequisites, a stay of proceedings is warranted.

1. There is a reasonable probability that this Court will grant certiorari and a fair prospect that it will reverse the decision below.

There is a “reasonable probability” that the Court will set this case for consideration on the merits and a “fair prospect” that it will reverse or vacate the decision below. *See Hollingsworth*, 558 U.S. at 190. This case deals with important issues of the appealability of qualified immunity denials and the clearly established prong of qualified immunity. The lower court’s decision directly conflicts with Supreme Court precedent on both of these issues.

The lower court’s decision below conflicts with Supreme Court precedent that decisions denying qualified immunity are immediately appealable, even when resolution of the legal issues will require consideration of factual allegations. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1986). Qualified immunity is “conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.” *Id.* at 526. This Court has recognized that “the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff’s claim for relief.” *Id.* at 526, 528-529. “[A] reviewing court must consider the plaintiff’s factual allegations in resolving the immunity issue.” *Id.* The First Circuit’s decision converts this requirement that interlocutory review of qualified immunity denials be “essentially legal,” while allowing for the consideration of facts that are integrated into the qualified immunity analysis, into a requirement that the argument be “purely legal.”

With regard to the clearly established prong of qualified immunity, the lower court’s decision is a fundamental departure from Supreme Court precedent. “A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (citations and quotations omitted). While the Court “do[es] not require a case directly on point, . . . existing

precedent must have placed the statutory or constitutional question beyond debate.” *Id.* “Absent controlling authority a robust consensus of cases of persuasive authority” is required. *Id.* Neither the First Circuit, nor the district court cited to any controlling cases or a robust consensus of cases that would give the Petitioner notice that using deadly force against Stephen McKenney would violate McKenney's Fourth Amendment rights. Yet, the court found that the Petitioner was not entitled to qualified immunity at the summary judgment phase.

Given the important issues placed before this Court there is a reasonable probability this Court will review this case on the merits and reverse the lower court’s decision and hold that an immediate appeal is available under the collateral order doctrine in the circumstances of this case and that the lower court incorrectly denied qualified immunity to the Petitioner.

2. There is a likelihood of irreparable harm if proceedings in the district court are not stayed and the balance of the equities favors the Petitioner.

For the purposes of this inquiry, the Court “assume[s] the correctness of the applicant’s position,” on the merits. *Barnes*, 501 U.S. at 1302. Making this assumption, denying the stay would irreparably harm the Petitioner by denying him immunity to which he is entitled. “[Q]ualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017)(citations and quotations omitted). “As a result, [this Court has] repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). “[P]ublic officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.” *Harlow v. Fitzgerald*, 457 U.S. 800, 806, (1982). A delay will not cause undue prejudice to the Respondent. If a stay is not granted, the Petitioner will have to proceed to trial before this

Court has an opportunity to consider his petition for certiorari because the district court has already scheduled the trial to begin in April 2018. Given the gravity of the issues at stake, the Court should grant a brief stay which will have the effect of preserving the rights of all parties.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests a stay of proceedings in the district court pending this Court's disposition of the petition for a writ of certiorari in this matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "Peter T. Marchesi". The signature is written in dark ink and is positioned above a horizontal line.

PETER T. MARCHESI

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Attorney for Petitioner Nicholas Mangino

February 13, 2018

ADDENDUM

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Excerpt from Officer Cook's Dashboard Camera and Excerpt from Officer Fournier's Dashboard Camera	

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

VICKI McKENNEY, individually,)
and as Next Friend of Stephen)
McKenney, and as Personal)
Representative of the Estate of)
Stephen McKenney)

Plaintiff,)

v.)

NICHOLAS MANGINO,)

Defendant.)

) 2:15-cv-0073-JDL

ORDER

Defendants Nicholas Mangino and Cumberland County have moved the Court to stay this proceeding pending the resolution by the United States Supreme Court of a *certiorari* petition that Defendant Mangino intends to file (ECF No. 80). Plaintiff objects to the motion (ECF No. 81).

The Defendants have not filed a *certiorari* petition, nor have they provided the Court with a copy of a *certiorari* petition they intend to file. Thus, it is not possible for me to fully evaluate the stay request in relation to the criteria that govern the issuance of a stay. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Accordingly, I am not persuaded that the Defendants have met their burden of establishing grounds for a stay. The motion is **DENIED**.

SO ORDERED.

Dated: January 17, 2018

/s/ JON D. LEVY
U.S. DISTRICT JUDGE

A-1

United States Court of Appeals For the First Circuit

No. 17-1378

VICKI MCKENNEY, individually, and as next friend of Stephen McKenney, and as personal representative of the Estate of Stephen McKenney

Plaintiff - Appellee

v.

NICHOLAS MANGINO

Defendant - Appellant

CUMBERLAND COUNTY; TOWN OF WINDHAM, ME; CUMBERLAND COUNTY
SHERIFF'S OFFICE; WINDHAM POLICE DEPARTMENT

Defendants

Before

Howard, Chief Judge,
Selya and Lipez, Circuit Judges.

ORDER OF COURT

Entered: December 4, 2017

Upon consideration of defendant-appellant Nicholas Mangino's motion to recall mandate, that request is denied. See Calderon v. Thompson, 523 U.S. 529, 550 (1998).

By the Court:

/s/ Margaret Carter, Clerk

cc:

Peter T Marchesi

Cassandra S. Shaffer

Jamesa J. Drake

Amber L. Tucker

Edward R. Benjamin Jr.

Kasia Soon Park

United States Court of Appeals For the First Circuit

No. 17-1378

VICKI MCKENNEY, individually, and as next friend of Stephen McKenney, and as personal representative of the Estate of Stephen McKenney

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v.

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Defendant - Appellant

CUMBERLAND COUNTY; TOWN OF WINDHAM, ME; CUMBERLAND COUNTY
SHERIFF'S OFFICE; WINDHAM POLICE DEPARTMENT

Defendants

Before

Howard, Chief Judge,
Torruella, Selya, Lynch, Lipez, Thompson,
Kayatta and Barron,

Circuit Judges.

ORDER OF COURT

Entered: November 15, 2017

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Peter T Marchesi

Cassandra S. Shaffer

Jamesa J. Drake

Amber L. Tucker

Edward R. Benjamin Jr.

Kasia Soon Park

United States Court of Appeals For the First Circuit

No. 17-1378

VICKI McKENNEY, individually and as next friend of
STEPHEN McKENNEY, and as personal representative of the
ESTATE OF STEPHEN McKENNEY,
Plaintiff, Appellee,

v.

NICHOLAS MANGINO,

Defendant, Appellant,

CUMBERLAND COUNTY ET AL.,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Jon D. Levy, U.S. District Judge]

Before

Howard, Chief Judge,
Selya and Lipez, Circuit Judges.

Peter T. Marchesi, with whom Cassandra S. Shaffer and Wheeler & Arey, P.A. were on brief, for appellant.

Jamesa J. Drake, with whom Drake Law, LLC, Amber L. Tucker, and The Law Office of Amber L. Tucker, LLC were on brief, for appellee.

October 6, 2017

SELYA, Circuit Judge. This is a tragic case in which a man died at the hands of a police officer who was trying to do his job. The underlying suit alleges, in relevant part, that the officer violated 42 U.S.C. § 1983 through the precipitous use of deadly force. In a pretrial ruling, the district court held that the officer was not entitled to qualified immunity at the summary judgment stage. See McKenney v. Mangino, No. 2:15-cv-00073, 2017 WL 1365959, at *13 (D. Me. Apr. 12, 2017). The officer challenges that ruling. After careful consideration, we dismiss portions of this interlocutory appeal for want of appellate jurisdiction and otherwise affirm.

I. BACKGROUND

Because we are tasked with reviewing a summary judgment ruling, we rehearse the facts in the light most hospitable to the nonmovant, consistent with record support. See Foote v. Town of Bedford, 642 F.3d 80, 82 (1st Cir. 2011).

On April 12, 2014, a clear, sunny day in Windham, Maine, plaintiff-appellee Vicki McKenney called 911 at 6:14 a.m. to report that her husband, 66-year-old Stephen McKenney, was threatening suicide and had been "aggressive" and "physical" with her. She told the dispatcher that her home contained firearms. Within a matter of minutes, Windham police officers James Cook and Seth Fournier arrived at the McKenney residence and met Mrs. McKenney (who was standing outside). She explained that her husband had

been experiencing severe back pain and had "snapped" that morning. Almost immediately thereafter, a Cumberland County deputy sheriff, defendant-appellant Nicholas Mangino, drove up in his cruiser to serve as backup.

The three officers entered the front room of the house at 6:22 a.m. and encountered McKenney, who appeared to have a gun in his hand. When asked what he was holding, McKenney replied ".357 Magnum." Although the officers twice directed McKenney to put the gun down, McKenney did not comply. Still, he never pointed his weapon at any of them inside the dwelling, nor did he utter anything resembling a threat.

The officers retreated outdoors, leaving McKenney inside the house. Officer Fournier placed Mrs. McKenney in his patrol car, which he then drove to a cul-de-sac at the end of the street a few hundred yards away. He maintained a clear line of sight, though, to the garage and driveway of the McKenney home. Meanwhile, the defendant, armed with his AR-15 rifle, his Taser, and pepper spray, took cover behind his cruiser (which was parked roughly 100 feet from the McKenneys' garage).¹

The defendant peeked over his car from time to time to observe the garage and driveway, while simultaneously receiving

¹ For the sake of completeness, we note that Zachary Welch, a civilian who had been invited by the defendant as a ride-along, was crouched in the defendant's parked cruiser.

updates about McKenney's movements from Officer Fournier. Between 6:24 a.m. and 6:31 a.m., McKenney ambled nonchalantly around and about his open garage, driveway, and house. He entered and exited the dwelling around six times during that seven-minute span. At about 6:26 a.m., McKenney left the house with his gun dangling from his hand. The defendant yelled at him three times to "drop the gun." A few seconds later, McKenney – who was approximately 100 feet away from the defendant – raised the gun over his head.² By all accounts, McKenney had a vacant stare and appeared "not at home" mentally. In short order, he lowered the gun without firing it and continued to weave haphazardly into and out of his house between 6:26 a.m. and 6:31 a.m.

At approximately 6:31 a.m., Officer Fournier radioed to the defendant that McKenney, who was still dangling his firearm and walking leisurely, was in front of the garage. Fournier stated: "I can't tell, but he might be pointing that, so be careful." Within seconds, McKenney began walking (still in his

² At his deposition, the defendant testified that he believed that McKenney was pointing the weapon in his direction. Because we are reviewing a summary judgment ruling, however, we recount the facts in the light most favorable to the nonmovant (here, the plaintiff). See Foote, 642 F.3d at 82. The district court seems to have assumed the truth of the fact that the defendant "reasonably believed" that McKenney "had pointed his gun at him." McKenney, 2017 WL 1365959, at *12. Any such assumption was, of course, made only for the sake of argument; otherwise, it would have been unwarranted. The court was obliged to view the summary judgment record in the light most hospitable to the plaintiff. See Foote, 642 F.3d at 82.

driveway) in the direction of the defendant's parked cruiser. He was not making any sudden or evasive movements and was not pointing his gun at anyone. Officer Fournier alerted the defendant that McKenney was "walking toward your car right now." When McKenney had reached a point 69 feet away from the cruiser, the defendant fired an errant shot at McKenney's central mass. Seconds later, he fired a second shot at McKenney's head, which struck and killed McKenney. None of the officers had warned McKenney that they would use deadly force if he refused to drop his weapon.

We fast-forward to February of 2015, when Mrs. McKenney, qua plaintiff, suing individually and as the personal representative of McKenney's estate, brought a civil action in a Maine state court against the defendant and several other persons and entities.³ As relevant here, the plaintiff sued the defendant under 42 U.S.C. § 1983, which authorizes suit against any person who, while acting under color of state law, violates another person's federally assured constitutional or statutory rights. See Kalina v. Fletcher, 522 U.S. 118, 123 (1997). Specifically, the plaintiff's complaint alleged that the defendant's use of deadly force transgressed McKenney's Fourth Amendment right to be free from unreasonable seizures.

³ Given the narrowly circumscribed scope of this interlocutory appeal, it would serve no useful purpose to enumerate the other parties and causes of actions limned in the complaint.

The action was seasonably removed to the federal district court. See 28 U.S.C. §§ 1331, 1441(a). Following pretrial discovery, the defendant sought summary judgment on, inter alia, qualified immunity grounds. See Fed. R. Civ. P. 56(a).

The district court denied the motion. Construing the record in the light most favorable to the plaintiff, the court ruled that a rational jury could find that it was unreasonable for the defendant to believe that McKenney "posed an immediate threat to the safety of the [defendant] or others at the time he was shot." McKenney, 2017 WL 1365959, at *12. In explaining this ruling, the court noted that at the time of the shooting, McKenney was ambulating nonchalantly around his driveway with his gun dangling by his side and was nearly 70 feet away from the defendant's cruiser. See id. By the time the defendant pulled the trigger, it had been approximately six minutes since the defendant thought he had seen McKenney pointing the gun at him. See id. Viewing the facts in the requisite light, the court concluded that a rational jury could find that the defendant "had ample opportunity to observe [McKenney's] actions and movements over the course of several minutes, and acted with knowledge of all of the relevant circumstances." Id. Other facts, such as McKenney's suicidality, the fact that the last order directing him to drop his weapon had come approximately six minutes earlier, and the fact that no one had ever warned McKenney that deadly force

would be used if he failed to comply with the officers' orders, "militate[d] against the reasonableness" of the defendant's use of deadly force. Id. In a nutshell, the court below held that on the plaintiff's supportable version of the facts, an objectively reasonable police officer would have understood, at the moment the shot was fired, that employing deadly force against McKenney would contravene clearly established law. See id. at *12-13.

This appeal ensued. Notwithstanding the general prohibition against interlocutory appeals, see 28 U.S.C. § 1291, the defendant asserts that we have jurisdiction because his appeal rests on a denial of qualified immunity and his arguments are purely legal. See Johnson v. Jones, 515 U.S. 304, 319-20 (1995); Camilo-Robles v. Hoyos, 151 F.3d 1, 8 (1st Cir. 1998).

II. ANALYSIS

A district court may only grant summary judgment when the record, construed in the light most congenial to the nonmovant, presents no genuine issue as to any material fact and reflects the movant's entitlement to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Schiffmann v. United States, 811 F.3d 519, 524 (1st Cir. 2016). We review rulings granting or denying summary judgment de novo. See DePoutot v. Raffaelly, 424 F.3d 112, 117 (1st Cir. 2005).

Subject to only a handful of carefully circumscribed exceptions, our appellate jurisdiction is restricted to review of

final orders and judgments. See Johnson, 515 U.S. at 309-10. Consequently, an interlocutory order denying summary judgment is typically not appealable when first entered. See 28 U.S.C. § 1291; Plumhoff v. Rickard, 134 S. Ct. 2012, 2018 (2014).

But an exception to the general requirement of finality is potentially applicable here. Qualified immunity is a doctrine that shelters government officials from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Courts long have recognized that qualified immunity consists of both an immunity from suit and an immunity from damages. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Thus, claims of qualified immunity ought to be resolved at the earliest practicable time. See Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987). Consistent with this principle, we have held that, notwithstanding the absence of a final judgment, we have jurisdiction to review interlocutory rulings implicating qualified immunity as long as those rulings are purely legal in nature (say, a ruling that a given body of facts will support a claimed violation of clearly established law). See Stella v. Kelley, 63 F.3d 71, 74 (1st Cir. 1995) (citing Johnson, 515 U.S. at 316-17). But we may not review, on interlocutory appeal, an order denying qualified immunity "to the extent that [the order] turns on either an issue of fact or an

issue perceived by the trial court to be an issue of fact." Id. By virtue of this prohibition, we lack jurisdiction to consider a defendant's argument "that the facts asserted by the plaintiffs are untrue, unproven, warrant a different spin, tell only a small part of the story, and are presented out of context." Díaz v. Martínez, 112 F.3d 1, 5 (1st Cir. 1997).

It follows that defendants who invoke our limited power of interlocutory review to redress denials of qualified immunity must be prepared to accept the facts in the light most favorable to the plaintiff and "develop the argument that, even drawing all the inferences as the district court concluded a jury permissibly could, they are entitled to judgment as a matter of law." Cady v. Walsh, 753 F.3d 348, 359-60 (1st Cir. 2014). In other words, an appellant must explain why he is entitled to qualified immunity even if one assumes that the district court properly analyzed the facts.⁴ See id. at 361; see also Morse v. Cloutier, 869 F.3d 16, 25 (1st Cir. 2017).

Having erected this jurisdictional framework, we turn next to the qualified immunity standard. When a defendant invokes

⁴ The Supreme Court has carved out an isthmian exception to this rule, instructing courts to disregard the nonmovant's version of the facts if that version is "blatantly contradicted by the record." Scott v. Harris, 550 U.S. 372, 380 (2007); see Penn v. Escorsio, 764 F.3d 102, 105 n.2 (1st Cir. 2014). Here, however, the defendant does not argue that this exception applies and, in all events, the record belies its applicability.

qualified immunity, an inquiring court typically engages in a "two-step pavane." Alfano v. Lynch, 847 F.3d 71, 75 (1st Cir. 2017). First, the court must determine "whether the plaintiff's version of the facts makes out a violation of a protected right." Id. Second, the court must determine "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Id. (quoting Matalon v. Hynnes, 806 F.3d 627, 633 (1st Cir. 2015)). This second step is itself divisible into two components. To begin, the plaintiff must point to "'controlling authority' or a 'consensus of cases of persuasive authority'" that broadcasts "a clear signal to a reasonable official that certain conduct falls short of the constitutional norm." Id. at 76 (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)). Then, the court must evaluate "whether an objectively reasonable official in the defendant's position would have known that his conduct violated that rule of law." Id. These inquiries are carried out with the understanding that qualified immunity is meant to shield "all but the plainly incompetent or those who knowingly violate the law." White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam) (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam)).

Before proceeding further, we lay the relevant constitutional foundation. Here, the background law is supplied by the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures." U.S. Const. amend. IV. A police officer's use of deadly force is deemed a seizure under the Fourth Amendment, and such an extreme action is reasonable (and, therefore, constitutional) only when "at a minimum, a suspect poses an immediate threat to police officers or civilians." Jarrett v. Town of Yarmouth, 331 F.3d 140, 149 (1st Cir. 2003) (per curiam) (citing Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

Timing is critically important in assessing the reasonableness of an officer's decision to use lethal force. Our case law is "comparatively generous" to officers facing "potential danger, emergency conditions or other exigent circumstances," and we have fashioned "a fairly wide zone of protection" for the police in borderline cases. Roy v. Inhabitants of City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994) (citing Graham v. Connor, 490 U.S. 386, 396-97 (1989)); see Berube v. Conley, 506 F.3d 79, 85 (1st Cir. 2007). But that zone of protection has shifting boundaries. Everything depends on context, and the use of deadly force, even if "reasonable at one moment," may "become unreasonable in the next if the justification for the use of force has ceased." Lytle v. Bexar Cty., 560 F.3d 404, 413 (5th Cir. 2009). Put another way, "[a] passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect." Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999).

Among other things, a suspect's physical proximity and the speed of his movements are highly relevant to this inquiry. See Kirby v. Duva, 530 F.3d 475, 482-83 (6th Cir. 2008); Walker v. City of Orem, 451 F.3d 1139, 1160-61 (10th Cir. 2006). When feasible, a police officer must give some sort of warning before employing deadly force. See Garner, 471 U.S. at 11-12; see also Young v. City of Providence ex rel. Napolitano, 404 F.3d 4, 23 (1st Cir. 2005) (concluding that officer violated Fourth Amendment by firing "extraordinarily quickly" and without "adequate warning" at armed man whose gun was "pointed downwards"). Moreover, federal courts have afforded a special solicitude to suicidal individuals in lethal force cases when those individuals have resisted police commands to drop weapons but pose no real security risk to anyone other than themselves. See Weinmann v. McClone, 787 F.3d 444, 450 (7th Cir. 2015) (collecting appellate precedents holding that, as of 2007, clearly established law prevented police officers from employing "deadly force against suicidal people unless they threaten harm to others"); Mercado v. City of Orlando, 407 F.3d 1152, 1160-61 (11th Cir. 2005) (similar).

Here, the defendant concentrates on the second step of the qualified immunity paradigm and faults the district court for failing to identify a sufficiently similar case that would have served to place him on notice that his use of deadly force violated

clearly established Fourth Amendment law.⁵ In his view, the contours of the relevant Fourth Amendment law were so blurred at the time that he shot McKenney that he is deserving of qualified immunity. We have jurisdiction to consider this purely legal asseveration. See Johnson, 515 U.S. at 316-17; Morse, 869 F.3d at 24.

Jurisdiction notwithstanding, this argument lacks force. Although the district court frankly acknowledged that it could not find "[a] case presenting a nearly identical alignment of facts," McKenney, 2017 WL 1365959, at *9, such an exacting degree of precision is not required to thwart a qualified immunity defense.

To be sure, "the clearly established law" employed in a qualified immunity analysis "must be particularized to the facts of the case." White, 137 S. Ct. at 552 (internal quotation marks omitted). This instruction fits hand in glove with the Supreme Court's warning that, when dealing with qualified immunity, we should not over-rely on precedents that are "cast at a high level of generality." Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (per curiam). Even so, there need not be "a case directly on point" to satisfy the second step of the qualified immunity paradigm. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); see Anderson, 483

⁵ In this appeal, the defendant does not challenge the district court's finding of a constitutional violation at step one of the qualified immunity paradigm.

U.S. at 640; Limone v. Condon, 372 F.3d 39, 48 (1st Cir. 2004). The test is whether existing case law has "placed the statutory or constitutional question beyond debate." al-Kidd, 563 U.S. at 741. In some cases, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." United States v. Lanier, 520 U.S. 259, 271 (1997). What counts is whether precedents existing at the time of the incident "establish the applicable legal rule with sufficient clarity and specificity to put the official on notice that his contemplated course of conduct will violate that rule." Alfano, 847 F.3d at 76; see Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (per curiam); Hope v. Pelzer, 536 U.S. 730, 741 (2002).

The Court's landmark decisions in Graham and Garner, which articulate generalized standards for excessive force liability under the Fourth Amendment, "do not by themselves create clearly established law outside an obvious case." White, 137 S. Ct. at 552 (internal quotation marks omitted). But taking the facts and the reasonable inferences therefrom in the light most favorable to the plaintiff, the threat presented lacked immediacy and alternatives short of lethal force remained open. Seen in that light, this was a case in which the feasibility of a more measured approach was apparent. Moreover, the district court did precisely what the Supreme Court has instructed courts to do: it focused on "the specific context of the case." Brosseau, 543 U.S.

at 198 (internal quotation marks omitted). With that context in mind, it relied on well-settled precedents addressing the lawfulness of using deadly force against an individual who was suicidal, armed, slow in gait, some distance away from the officer, and had received no commands or warnings for several minutes. See McKenney, 2017 WL 1365959, at *9-11. We conclude, without serious question, that the precedents identified by the district court and those discussed supra gave the defendant fair warning that, if the facts were as the plaintiff claimed them to be, his use of deadly force against McKenney offended clearly established Fourth Amendment law – and an objectively reasonable officer would have realized as much. Therefore, the district court properly concluded that the absence of a precedent on all fours was not dispositive.

In an effort to dull the force of this reasoning, the defendant makes a series of factbound arguments. Most notably, the defendant repeatedly insists – contrary to the inferences drawn by the district court – that he reasonably perceived McKenney as an imminent danger at the time of the shooting, such that he was left with no real choice but to fire his weapon. In turn, he urges reversal in light of evidence that he maintains the district court either overlooked or insufficiently considered. These facts include data points such as that McKenney had ignored police commands to drop his loaded weapon, had at one time raised his

gun, and was approaching the defendant (and the unarmed civilian in the defendant's cruiser) at the time he was shot.

But there is a rub: the defendant's characterization of the summary judgment record collides head-on with the district court's synthesis of the facts. The defendant either ignores or gives unduly short shrift to evidence that was central to the district court's conclusion that, on the version of the facts most hospitable to the plaintiff, the defendant had "ample opportunity to observe [McKenney's] actions and movements" before pulling the trigger and that the defendant's decision to shoot McKenzie was "unreasonably precipitous." McKenney, 2017 WL 1365959, at *12-13. These facts include McKenzie's suicidality, the slowness of his gait, the clear visibility, the fact that six minutes had elapsed since any officer had last ordered McKenzie to drop his weapon, the fact that nobody had warned McKenzie that deadly force would be used if he failed to follow police commands, and the six-minute gap between when McKenzie raised his gun skywards and when the defendant pulled the trigger. Rather than accept *arguendo* that McKenzie never came close to pointing his gun in the defendant's direction, the defendant devotes much sound and fury to the proposition that he reasonably perceived McKenzie to be aiming his weapon at him. In short, the defendant has woven factbound arguments regarding both the immediacy of the threat posed by McKenzie and the feasibility of less drastic action into

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the warp and woof of his challenge to the district court's qualified immunity analysis. Such an intertwining of disputed issues of fact and cherry-picked inferences, on the one hand, with principles of law, on the other hand, places these arguments beyond our jurisdictional reach on interlocutory appeal. See Cady, 753 F.3d at 359-60; cf. Whitfield v. Meléndez-Rivera, 431 F.3d 1, 8 (1st Cir. 2005) (concluding that the question of whether a suspect appeared threatening before officer employed lethal force was properly resolved by the jury).

To sum up, the precedents make pellucid that the most relevant factors in a lethal force case like this one are the immediacy of the danger posed by the decedent and the feasibility of remedial action. See Garner, 471 U.S. at 11-12; Whitfield, 431 F.3d at 8; Young, 404 F.3d at 23. Taking the facts in the light most amiable to the plaintiff (as the law required it to do), the district court concluded that a rational jury could reasonably infer both that McKenney did not pose an imminent threat and that viable remedial measures had not been exhausted. The court also concluded that these facts should have been obvious to an objectively reasonable officer in the defendant's position. Although the defendant invites us to adopt a spin on the summary judgment record different from that taken by the district court, we lack jurisdiction to accept that invitation under Johnson and its progeny. See Goguen v. Allen, 780 F.3d 437, 455-56 (1st Cir.

2015) (dismissing appeal for lack of jurisdiction when "defendants repeatedly ignore[d] evidence, and reasonable inferences therefrom" on which the court below premised its interlocutory denial of qualified immunity); Penn v. Escorsio, 764 F.3d 102, 110 (1st Cir. 2014) (dismissing appeal from interlocutory denial of qualified immunity after "peel[ing] away the facade by which" defendants portrayed "purely factual disputes" as legal arguments); Cady, 753 F.3d at 361 (concluding similarly when defendant failed to concede arguendo that the court below "was correct in its determinations regarding what inferences were permissible on the summary judgment record"); Díaz, 112 F.3d at 5 (dismissing appeal for lack of jurisdiction when defendant merely attempted to take "a different spin" on the facts). Accordingly, we dismiss the defendant's factbound challenges to the district court's order for lack of jurisdiction.

III. CONCLUSION

We need go no further. For the reasons elucidated above, we dismiss the appeal in part for want of appellate jurisdiction and otherwise affirm the district court's denial of summary judgment. Costs shall be taxed in favor of the plaintiff.

Of course, our words here are not the end of the matter. The pretrial denial of qualified immunity is but "a way station in the travel of a case." Camilo-Robles, 151 F.3d at 9. Depending on the facts proven at trial and the inferences drawn by the jury,

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the defendant may or may not ultimately prevail on his qualified immunity defense.⁶ We hold today simply that the defendant's purely legal challenge is devoid of merit and that his factbound arguments are inappropriate for interlocutory appeal.

So Ordered.

⁶ We recognize that the defendant faced a challenging situation. On this scumbled record, though, it is for the jury to decide whether McKenney presented a sufficiently serious and imminent threat, such that the defendant's ultimate decision to use lethal force was objectively reasonable or, at least, belongs within the "zone of protection" afforded to police officers in borderline cases. Roy, 42 F.3d at 695.

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

VICKI MCKENNEY, individually,)
and as Next Friend of Stephen)
McKenney, and as Personal)
Representative of the Estate of)
Stephen McKenney,)
)
Plaintiff,)
)
v.) **2:15-cv-00073-JDL**
)
NICHOLAS MANGINO,)
)
CUMBERLAND COUNTY, and)
)
TOWN OF WINDHAM,)
)
Defendants.)

ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Vicki McKenney brings this action against Defendants Nicholas Mangino, Cumberland County, and the Town of Windham alleging claims arising out of the fatal shooting of her late husband, Stephen McKenney, by Mangino, a Deputy Sheriff employed by the Cumberland County Sheriff's Office.¹ ECF No. 3-2 at 1. Defendants have moved for summary judgment on all claims. ECF No. 43; ECF No. 45. For the reasons explained below, I grant the Town of Windham's motion to dismiss, and grant in part and deny in part Deputy Mangino and Cumberland County's motion to dismiss.

¹ For the sake of clarity, this opinion will refer to the Plaintiff as “Mrs. McKenney” or “McKenney” and to her deceased husband as “Stephen.”

I. FACTUAL BACKGROUND

On April 12, 2014, Windham Police Officers James Cook and Seth Fournier were dispatched to the McKenney residence in Windham, in response to Mrs. McKenney's call to the police indicating that her husband was possibly suicidal. Officers Cook and Fournier were advised by dispatch that Stephen wanted to shoot himself, that the residence contained multiple firearms that were not locked up, and that Stephen had become increasingly "physical" or "aggressive" with Mrs. McKenney.

Officers Cook and Fournier arrived at the McKenney residence at approximately 6:20 a.m. and parked their cruisers in the driveway. Cumberland County Sheriff's Deputy Nicholas Mangino also responded to the residence to serve as backup to the Windham officers, arriving shortly after Cook and Fournier. Deputy Mangino had a civilian riding along with him in his cruiser at the time he responded to the call, though he did not advise the Windham officers of that fact. The civilian remained in Mangino's cruiser throughout the incident.

Officers Cook and Fournier met Mrs. McKenney in the driveway and she informed them that her husband was emotionally disturbed and had "snapped" that morning after months of dealing with severe back pain. She also told the officers that the guns were located in a back bedroom, while her husband was in the front room, and that there was no one else in the house. There are two doors leading into the house: a front door and a door leading from the house into the garage. The overhead garage door was open when the officers arrived. The house is part of a condominium development, and is connected to an adjacent home.

Approximately one minute after arriving at the house and speaking with Mrs. McKenney, the officers entered the house to make contact with Stephen. Officers Cook and Fournier entered through the door to the garage, while Deputy Mangino entered through the front door. Fournier was armed with a Taser, while Cook and Mangino carried their drawn service pistols. The officers announced their presence to Stephen by saying “police department” and requested him to “come out.” Approximately 30 seconds later, Stephen appeared on the far side of the living room from where the officers were taking cover behind a wall in the front hallway, approximately 12 or more feet from the officers. Stephen was holding an object in his right hand, and when asked by the officers what the object was, he replied “.357 Magnum.” The officers told Stephen to put the gun down, and told him that they wished to get him help. At this point, Officer Fournier holstered his Taser and drew his handgun, based on his belief that a Taser was not an appropriate response to the threat posed by Stephen’s firearm. McKenney contends that the Taser would have been an appropriate response to the threat. Throughout the encounter inside the house, Officers Cook and Fournier kept their service pistols by their sides at the “low ready” position, and never aimed their firearms at Stephen. Stephen likewise never pointed his gun at any of the officers while inside the house.

The officers decided to back out of the house, and Officer Cook told Stephen that they were “going to go outside” and would call him. The officers left the house through the door to the garage and met Mrs. McKenney, who was waiting outside. As the officers left the house, Deputy Mangino headed down the driveway to his

cruiser and advised the others that he was going to get his long gun. Cook directed Officer Fournier to put Mrs. McKenney in his cruiser and take her away for her safety. Mrs. McKenney was distraught and in tears. Approximately 10 seconds after the officers left the house, Officer Fournier was escorting Mrs. McKenney to his cruiser when he observed Stephen in the doorway leading from the house to the garage and alerted the other officers to Stephen's presence. Fournier then put Mrs. McKenney in his cruiser, backed out of the driveway, and drove to a cul-de-sac at the end of the street, a few hundred yards from the McKenney residence. From this location, Fournier was the only officer on the scene who had a view into the McKenneys' garage.

At this point, Officer Cook had retreated behind the McKenneys' house and Deputy Mangino had taken cover behind his cruiser, which was parked at the end of the driveway away from the house. Officer Fournier could see Stephen throughout the incident. From his position behind his cruiser, Deputy Mangino could see Stephen at times, but also relied on Fournier to relay information about Stephen's location. The civilian in Mangino's cruiser remained crouched down in the front seat throughout the incident. Officer Cook was dependent upon Fournier to relay information about Stephen's location and activities. Shortly after the officers left the house, Sergeant James Boudreau of the Windham Police was dispatched to the scene, in response to a request from Officer Cook. Cook also informed Fournier that he was to transport Mrs. McKenney away from the scene as soon as another unit arrived to replace him.

Approximately two minutes after the officers left the inside of the McKenney residence, Officer Fournier saw Stephen, who was still holding his handgun, come out of the house and head in the direction of Officer Cook, who was at the rear of the building. Fournier radioed to Cook and told him that Stephen was “heading right toward you.” At this time Officer Cook, who was behind the building, did not know the exact location of either Deputy Mangino or Stephen, but heard Mangino yell three times at Stephen to “drop the gun.” The parties agree that Stephen had a vacant stare and acted as though he had not received or acknowledged the commands to drop the gun. ECF No. 61 at 12, ¶ 62. For the next two to three minutes, Stephen walked around in the driveway in the vicinity of Officer Cook’s cruiser and the garage area, and he entered and exited the house several times. It is disputed whether, as the Town of Windham claims, this forced Officer Cook to retreat further to the rear of the building to avoid being seen by Stephen. During this time, Officer Fournier kept Mangino and Cook apprised of Stephen’s location and activities, including at one point telling Deputy Mangino to “stay down, he’s looking right at you.” At one point, Stephen pointed his gun up into the air, and Deputy Mangino asserts that he thought Stephen was pointing the gun at him. Mangino said he wanted to move his cruiser from its position on the street in front of the residence, but Fournier advised him to “hold tight, he’s back at the front of the garage.”

Officer Cook retreated further along the back of the house to the adjacent street, where he met with Sergeant Boudreau and Sergeant Marc Marion of the Cumberland County Sheriff’s Office, who arrived at the scene approximately five

minutes after the officers had first exited the house. Their position on the adjacent street did not afford them a view of Deputy Mangino, Officer Fournier, or Stephen, so Cook explained where each person was located. Shortly thereafter, Windham Police Officer Ernest MacVane arrived at the scene, and was directed by Sergeant Boudreau to block traffic on the adjacent street to prevent any vehicle from accessing the street where the McKenney house was located.

Officer Fournier continued to apprise the other officers of Stephen's location and activities. He also spoke with Mrs. McKenney, who was still in his cruiser, about the police wanting to make phone contact with Stephen, and conveyed the phone number she provided to Officer Cook. Approximately one and a half minutes after Cook met with Sergeants Boudreau and Marion on the adjacent street, Officer Fournier reported that Stephen was right inside the front of the garage. Thirty seconds later, Fournier radioed to Deputy Mangino and said "I can't tell, but he might be pointing that," and told Mangino to be careful. Thirty seconds after that, Fournier observed Stephen walking down the driveway in the direction of Deputy Mangino's cruiser, as Mangino continued to crouch on the opposite side of his vehicle and the civilian continued to crouch in the front seat. Throughout this time, Deputy Mangino had his rifle aimed at Stephen.

Officer Fournier radioed Deputy Mangino that Stephen was "walking toward your car right now." As Stephen was walking down the driveway, he had a vacant stare and appeared to be "not at home" mentally. ECF No. 61 at 15, ¶ 75. He walked down the driveway in a nonchalant manner, and held his handgun dangling at his

side. *Id.* at 15, ¶ 77. Stephen did not raise his gun or point it in the direction of Mangino's cruiser; nor did he make any sudden or evasive movements. *Id.* at 15, ¶¶ 78-80. Approximately six minutes had elapsed since Stephen raised the gun above his head by the garage, and Deputy Mangino thought that Stephen pointed the gun at him. It had also been approximately six minutes since Deputy Mangino ordered Stephen three times to drop his gun. ECF No. 61 at 16-17, ¶¶ 86, 88.²

Officer MacVane, who had parked his cruiser on the adjacent street to block traffic, took his patrol rifle and began walking between houses toward Deputy Mangino's cruiser. As he approached, Officer MacVane saw Stephen walking from his home and down the driveway in the direction of Mangino's cruiser. MacVane was approximately 100 feet from Stephen at this time. Because Stephen continued to walk in the direction of the cruiser, Officer MacVane believed that Stephen was going to kill Deputy Mangino. McKenney contends that this belief was not reasonable. When Stephen was approximately halfway down the driveway, Officer MacVane stopped walking and aimed his patrol rifle at Stephen. At the same time, Deputy Mangino came around to the front of his vehicle and fired his rifle two times in quick succession at Stephen, who fell to the ground. The first shot missed Stephen, but the second shot struck him in the head and killed him. Stephen's gun remained at his side at the time he was shot.

² The Defendants assert that there is evidence that Deputy Mangino gave additional commands to Stephen to drop his gun. The Defendants concede, however, that this fact is disputed, and recognize that it is therefore not part of the summary judgment record of undisputed facts. ECF No. 45 at 11 n.7.

To summarize the events leading up to the shooting, after the officers spoke with Stephen inside and then left the McKenney residence, they first saw Stephen in the doorway leading to the garage at approximately 6:24 a.m. They observed Stephen walk in and out of his house and around the driveway for approximately seven and a half minutes, between 6:24 a.m. and 6:32 a.m. At approximately 6:26 a.m., Deputy Mangino yelled at Stephen three times and ordered him to drop his gun. A few seconds later, Mangino observed Stephen raise the gun over his head, and thought Stephen was pointing the gun at him. Approximately five minutes later, at 6:31 a.m., Officer Fournier radioed to Deputy Mangino and said “I can’t tell, but he might be pointing that.” At 6:31:30 a.m., Stephen began walking down the driveway in the direction of Deputy Mangino’s cruiser. Deputy Mangino testified that Stephen was walking nonchalantly, and held his gun dangling down by his side. Stephen did not make any sudden movements or point the gun in the direction of Mangino’s cruiser. At 6:31:41 a.m., Deputy Mangino fired two shots at Stephen, hitting him once and killing him. At the moment he was shot and killed, Stephen was 69 feet away from Deputy Mangino.

Officer MacVane approached Stephen as he lay on the ground and observed that he had a firearm in his right hand. MacVane asserts that the gun was cocked and loaded, but McKenney contends that the gun was not cocked. Stephen was in lawful possession of his gun at all times leading up to the shooting. Officer MacVane removed the gun from Stephen’s hand, handcuffed him, and then rolled him over so he could begin resuscitative efforts, but quickly realized the shooting was fatal.

Approximately ten minutes elapsed between the time the officers first arrived on the scene, and when Deputy Mangino shot Stephen.

II. LEGAL ANALYSIS

The Complaint³ asserts a total of ten claims against Defendants: (1) violation of the Fourth Amendment's prohibition on use of excessive force, under 42 U.S.C. § 1983; (2) violation of the Maine Civil Rights Act, 5 M.R.S.A. § 4682; (3) violation of the Fourteenth Amendment's due process guarantee, under § 1983;⁴ (4) negligence, based on violation of the duty to protect; (5) violation of the Fourth Amendment for failure to train law enforcement officers, under § 1983; (6) violation of the Americans with Disabilities Act;⁵ (7) assault; (8) intentional infliction of emotional distress; (9) negligent infliction of emotional distress; and (10) wrongful death under 18-A M.R.S.A. § 2-804. ECF No. 3-2. Defendants have moved for summary judgment on all claims. ECF No. 43; ECF No. 45.

A. Summary Judgment Standard

Summary judgment is appropriate only if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Ahmed v. Johnson*, 752 F.3d 490, 495 (1st Cir. 2014). In making that determination, a court must view the evidence in the light

³ The Plaintiff amended her complaint once in state court before the Defendants removed the case to federal court. For simplicity's sake, this opinion refers to the operative First Amended Complaint as “the Complaint.”

⁴ McKenney confirmed at oral argument that she is not pressing her Fourteenth Amendment claim against the Defendants stated in Count III of the Complaint. This claim is therefore waived, and this opinion will not address it.

⁵ Plaintiff's ADA claim is asserted against the Town of Windham and Cumberland County, but not against Deputy Mangino. ECF No. 39 at 2.

most favorable to the non-moving party. *Johnson v. Univ. of P.R.*, 714 F.3d 48, 52 (1st Cir. 2013). “[A] judge’s function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (citations and quotations omitted).

Local Rule 56 defines the evidence that this court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment. First, the moving party must file a statement of material facts that it claims are not in dispute, with each fact presented in a numbered paragraph and supported by a specific citation to the record. *See* Loc. R. 56(b). Second, the non-moving party must submit its own short and concise statement of material facts in which it admits, denies, or qualifies the facts alleged by the moving party, making sure to reference each numbered paragraph of the moving party’s statement and to support each denial or qualification with a specific citation to the record. Loc. R. 56(c). The non-moving party may also include its own additional statement of facts that it contends are not in dispute. *Id.* These additional facts must also be presented in a numbered paragraph and be supported by a specific citation to the record. *Id.*

Third, the moving party must then submit a reply statement of material facts in which it admits, denies, or qualifies the non-moving party’s additional facts, if any. Loc. R. 56(d). The reply statement must reference each numbered paragraph of the non-moving party’s statement of additional facts and each denial or qualification must be supported by a specific citation to the record. *Id.*

The court may disregard any statement of fact that is not supported by a specific citation to the record, Loc. R. 56(f), and the court has “no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statement of facts.” *Id.*; see also, e.g., *Packgen v. BP Exploration, Inc.*, 754 F.3d 61, 70 (1st Cir. 2014); Fed. R. Civ. P. 56(e)(2). Properly supported facts that are contained in a statement of material or additional fact are deemed admitted unless properly controverted. Loc. R. 56(f).

B. Claims against the Town of Windham

1. Claims under § 1983 and the Maine Civil Rights Act

McKenney asserts that the Town of Windham’s conduct during the incident that led to her husband’s death violated the Fourth Amendment to the United States Constitution, as well as the Maine Civil Rights Act, 5 M.R.S.A. § 4682 *et seq.* ECF No. 3-2 at 6-12. Windham asserts that there is no basis for liability on the part of the Town in the evidentiary record and that it is entitled to summary judgment in its favor.

As an initial matter, I note that the outcome of McKenney’s claim under the Maine Civil Rights Act will follow from the disposition of the federal constitutional claims under 42 U.S.C.A. § 1983. *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007) (“The disposition of a 42 U.S.C. § 1983 claim also controls a claim under the MCRA.”). I therefore address the § 1983 claims first.

Count I of McKenney’s Complaint alleges that the Defendants violated Stephen’s Fourth Amendment rights by using excessive force against him. It is

undisputed that the only physical force applied to Stephen by any Windham officer occurred after the shooting, when Officer MacVane handcuffed Stephen and removed the gun from his hand. See ECF No. 51 at 7, ¶¶ 74-75. For liability to attach to Windham, McKenney must show that one of the Windham officers violated Stephen's constitutional rights. See *Wilson v. Town of Mendon*, 294 F.3d 1, 6 (1st Cir. 2002) ("If, however, the officer has inflicted no constitutional harm, neither the municipality nor the supervisor can be held liable.").

Viewed in the light most favorable to the Plaintiff, there is no factual basis in the record for finding that any of the Windham officers used excessive or unreasonable force against Stephen. The only force used by a Windham officer was when Officer MacVane handcuffed Stephen, removed his gun from his hand, and turned him over to begin resuscitative efforts. ECF No. 51 at 7, ¶ 75. The actions taken by Officer MacVane do not rise to the level of excessive force required to violate the Fourth Amendment. See *Fernández-Salicrup v. Figueroa-Sancha*, 790 F.3d 312, 327 (1st Cir. 2015) (finding no excessive force where officer, pursuant to "standard police practice," shoved suspect against wall and handcuffed her).

Based on the foregoing, the Town of Windham is entitled to summary judgment on Count I of the Complaint.

Count V of the Complaint asserts a failure to train claim against Windham under the Fourth Amendment. ECF No. 3-2 at 10-12. McKenney contends that Windham's failure to adequately train its officers amounted to deliberate indifference to the rights of the persons with whom the officers came into contact. ECF No. 52 at

8. It is established, however, that “the inadequate training of a police officer cannot be a basis for municipal liability under section 1983 unless a constitutional injury has been inflicted by the officer or officers whose training was allegedly inferior.” *Calvi*, 470 F.3d at 429. As discussed above, the undisputed facts establish that none of the Windham officers violated Stephen’s constitutional rights. Thus, because the Town of Windham cannot be liable on a failure-to-train theory, it is entitled to summary judgment on Count V of the Complaint.

As mentioned above, McKenney’s claim asserted in Count II under the Maine Civil Rights Act is controlled by the outcome of her § 1983 claims. *See Berube*, 506 F.3d at 85. Because I conclude that the Town of Windham is entitled to summary judgment on the § 1983 claims asserted against it, the Town is also entitled to summary judgment on Count II of the Complaint.

2. Americans with Disabilities Act Claim

Count VI of the Complaint alleges that Windham discriminated against Stephen and denied him benefits and services due to his status as a disabled individual. ECF No. 3-2 at 12-13. Windham responds that there is no evidence that Stephen’s disability played a role in any denial of benefits, and that the emergency circumstances exception to the duty to accommodate applies in this case. ECF No. 43 at 16-18.

To make out a claim under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, McKenney must show that Stephen was discriminated against or not provided services “by reason of his disability.” *Buchanan v. Maine*, 469 F.3d

158, 176 (1st Cir. 2006) (quotation marks omitted); *see also Higgins v. Reed*, 2012 WL 3150813, at *12 (D. Me. Aug. 2, 2012) (granting summary judgment where plaintiff failed to show that challenged actions were motivated by animus on account of plaintiff's mental illness). McKenney does not point to any specific facts in the record that suggest that the Windham officers treated Stephen as they did *because* he was disabled. *See* ECF No. 52 at 8-10; *cf. Vincent v. Town of Scarborough*, 2003 WL 22757940, at *24 (D. Me. Nov. 20, 2003) (“While one could speculate that the standoff might have been resolved differently [had officers taken further steps to accommodate suspect’s disability], one can only reasonably conclude that the officers trained their weapons on [the suspect] because he was carrying a high-powered rifle in a crowded shopping plaza—not because of misperceptions stemming from his disability.”).

Moreover, any duty the officers might have had to accommodate Stephen’s disability did not arise until after the emergency the officers faced had ended. *See Buchanan ex rel. Estate of Buchanan v. Maine*, 417 F. Supp. 2d 45, 73 (D. Me. 2006) (“[T]he duty to reasonably accommodate does not come into play until the area is secure and there is no threat to human safety”). The area in question was not secure in this case, as Stephen was carrying a gun and had ignored commands to drop his weapon. Therefore, a duty to accommodate Stephen’s disability did not arise before he was fatally shot.

For the foregoing reasons, the Town of Windham is entitled to summary judgment on Count VI of the Complaint.

3. State Law Tort Claims

Counts IV and VII to X of the Complaint assert state law tort claims, including negligence, assault, intentional infliction of emotional distress, negligent infliction of emotional distress, and wrongful death. Windham asserts that it is immune from all of these claims due to the protections of the Maine Tort Claims Act, 14 M.R.S.A. § 8103. ECF No. 43 at 19.

The Maine Tort Claims Act provides that “all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages.” 14 M.R.S.A. § 8103 (2016). “Governmental entities” are defined by the statute to include political subdivisions, such as cities and towns. 14 M.R.S.A. § 8102(3) (2016). The Maine Tort Claims Act contains a limited number of exceptions to immunity, which are to be “strictly construed.” *New Orleans Tanker Corp. v. Dep’t of Transp.*, 1999 ME 67, ¶ 5, 728 A.2d 673. These exceptions are for torts related to: (1) the use of vehicles, machinery, and equipment; (2) public buildings; (3) discharge of pollutants; and (4) road construction and street cleaning or repair. 14 M.R.S.A. § 8104-A(1)-(4) (2016). McKenney does not explain how the claims she asserts fit within any of the exceptions to immunity, and the record does not provide a basis for inferring that any exception applies.⁶ Windham also has not waived its tort immunity through the purchase of liability insurance. Windham is a member of the Maine Municipal

⁶ Although Officer Fournier used a car to transport Mrs. McKenney away from the scene prior to her husband’s shooting, such incidental use of a vehicle does not implicate the vehicle exception to immunity under 14 M.R.S.A. § 8104-A(1). See *Day’s Auto Body, Inc. v. Town of Medway*, 2016 ME 121, ¶ 9, 145 A.3d 1030 (“we have made clear that the mere fact that a vehicle or piece of equipment or machinery is involved in the conduct that allegedly caused harm does not, in itself, implicate the exception to immunity”).

Association Property and Casualty Pool, and its liability insurance coverage is limited to areas where it is not immune from tort liability. ECF No. 43 at 21-22. The parties agree that this insurance does not provide coverage for the instant suit. ECF No. 51 at 7, ¶ 71. Windham's immunity under the Maine Tort Claims Act is therefore preserved. *See Doucette v. City of Lewiston*, 1997 ME 157, ¶ 10, 697 A.2d 1292. The Town of Windham is therefore entitled to summary judgment on Counts IV and VII to X of the Complaint.

C. Claims against Deputy Nicholas Mangino

1. Claims Under § 1983 and the Maine Civil Rights Act

As discussed above with respect to the claims against the Town of Windham, the outcome of McKenney's Maine Civil Rights Act claim, asserted in Count II of the Complaint, will be determined by the disposition of her claims asserted in Count I under § 1983.⁷ *See Berube*, 506 F.3d at 85.

Count I alleges that Deputy Mangino violated Stephen's rights under the Fourth Amendment by using excessive force against him. ECF No. 3-2 at 6-7. Mangino argues that he is entitled to qualified immunity on this claim. ECF No. 45 at 5.

A law enforcement officer is entitled to qualified immunity from claims brought under § 1983 unless the plaintiff can show: (1) that the officer violated the plaintiff's constitutional rights; and (2) "that these rights were so clearly established that a

⁷ Count V of the Complaint, which asserts a claim for failure to train, does not, by its terms, apply to Deputy Mangino. Count III, which asserts a claim under the Fourteenth Amendment's due process guarantee, has been waived.

reasonable officer should have known how they applied to the situation at hand.” *Belsito Commc’ns, Inc. v. Decker*, 845 F.3d 13, 23 (1st Cir. 2016). Courts have discretion “in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Deputy Mangino focuses his argument on the second, “clearly established” prong. ECF No. 45 at 7-8. The clearly established prong itself encompasses two questions: (1) whether the contours of the right were sufficiently clear; and (2) whether a reasonable defendant, acting under the specific facts of the case, would have understood that he was violating the right. *Hunt v. Massi*, 773 F.3d 361, 368 (1st Cir. 2014). The Supreme Court recently stated that “it is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality.” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quotation omitted). Instead, the “clearly established law must be ‘particularized’ to the facts of the case.” *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Furthermore, courts are only to consider facts that were “knowable to the defendant officers.” *Id.* at 550.

Thus, the question presented here is whether a reasonable officer in Deputy Mangino’s position would have understood that it violated the Fourth Amendment to use deadly force against an apparently disturbed and suicidal individual who was walking in the direction of the officer while carrying a loaded gun dangling at his side, was approximately 70 feet away from the officer, had been warned approximately six minutes earlier to drop his gun, and who the officer believed had briefly pointed his

gun at the officer approximately six minutes earlier. To answer this question, it is necessary to survey the case law and determine the contours of Stephen's Fourth Amendment right to be free from the excessive use of force. Clearly establishing the existence of the right does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also Pauly*, 137 S. Ct. at 551.

Deputy Mangino asserted at oral argument that the Supreme Court's recent decision in *Pauly* stands for the proposition that in order to demonstrate that the law was "clearly established," a plaintiff must identify a published opinion addressing nearly identical facts that concludes that an officer violated the Constitution. In *Pauly*, the Supreme Court stated:

The panel majority [of the court below] misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham*, *Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers, but in the light of pre-existing law the unlawfulness must be apparent. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case.

This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. Of note, the majority did not conclude that White's conduct—such as his failure to shout a warning—constituted a run-of-the-mill Fourth Amendment violation. Indeed, it recognized that this case presents a unique set of facts and circumstances in light of White's late arrival on the scene. This alone should have been an important indication to the majority that White's conduct did not violate a "clearly established" right. Clearly established

federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed.

Pauly, 137 S. Ct. at 552 (quotations and citations omitted). The Supreme Court faulted the lower court for failing to identify a case with similar factual circumstances, but did so in the context of discussing the “unique set of facts and circumstances” presented by the case. *Id.* Because Officer White’s conduct did not amount to a “run-of-the-mill” constitutional violation, a case with similar facts would be required to put the officer on notice that his conduct violated clearly established law. *Id.* Moreover, the “similar circumstances” language used by the Supreme Court does not support Mangino’s assertion that a case with “nearly identical” facts is required. According to Merriam-Webster, “similar” means “having characteristics in common.” *Similar*, Merriam-Webster Dictionary (online edition 2017), <https://www.merriam-webster.com/dictionary/similar>. The Oxford English Dictionary defines “similar” as “[h]aving a marked resemblance or likeness; of a like nature or kind.” *Similar*, Oxford English Dictionary (online edition 2017), <http://www.oed.com/view/Entry/179873?redirectedFrom=similar#eid>. It is possible for a case to analyze similar circumstances without presenting a nearly identical factual scenario. And cases analyzing similar circumstances can clearly establish a right even without addressing a nearly identical factual scenario. Indeed, the Supreme Court gave no indication that its decision in *Pauly* was intended to repudiate the proposition that “officials can still be on notice that their conduct violates established law even in novel factual circumstances,” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

As a practical matter, the standard advanced by Deputy Mangino fails to account for the reality that the factual circumstances of each case are, by their nature, unique, and two cases seldom involve nearly identical facts. Courts should therefore look to cases that analyze similar circumstances, such as whether a suspect is armed, the suspect's conduct and proximity to the officer, and warnings given by the officer, to determine whether a reasonable officer would be on notice that his or her actions in a particular factual scenario would fall outside the bounds of the Constitution. A case presenting a nearly identical alignment of facts is not required so long as the existing cases would enable an officer, as a matter of reason and common sense, to understand that his or her conduct in a specific situation crossed the constitutional line. Accordingly, I turn to consider the relevant precedent.

a. Case Law

In *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), the Supreme Court held that the use of deadly force was constitutionally unreasonable where the suspect poses no immediate threat to officers or others. *See also Estate of Bennett v. Wainwright*, 548 F.3d 155, 175 (1st Cir. 2008) (noting deadly force only justified in cases where “an individual posed a threat of serious physical harm either to the officer or others”) (internal quotations omitted). Starting from this baseline, the question becomes whether a reasonable officer would have understood that the circumstances facing Deputy Mangino did not justify the use of deadly force, such that the use of that force was unconstitutional. The application of *Garner*'s general rule to specific factual situations by the courts helps to illuminate this inquiry.

In *White v. Pauly*, the Supreme Court held that an officer was entitled to qualified immunity after shooting the plaintiff's decedent, Pauly. 137 S. Ct. at 552. Two officers responded to Pauly's house late one evening following a report that Pauly's brother had been engaged in a road rage incident and was intoxicated. *Id.* at 549. The officers demanded that Pauly and his brother come outside, but failed to identify themselves as police officers. *Id.* at 550. The two men instead armed themselves, and shouted "[w]e have guns." *Id.* A third officer, who was not aware that the men had not been told that they were confronting police officers, arrived on the scene at the moment when one of the men yelled that they had guns, and took shelter behind a stone wall. *Id.* A few seconds later, Pauly's brother stepped out the back door of the house and fired two shotgun blasts, while screaming loudly. *Id.* A few seconds after that, Pauly opened a front window and pointed a handgun in the direction of the third officer. *Id.* One of the first officers to arrive shot at Pauly but missed, and then the third officer shot and killed Pauly. *Id.* The Court held that the third officer's conduct did not violate clearly established law, despite his failure to shout a warning before using deadly force, in light of the "unique" circumstances surrounding the officer's late arrival on the scene. *Id.* at 552. The Court went on to say that clearly established law does not prohibit a reasonable officer who arrives late to an ongoing police action from assuming that proper procedures were followed before his arrival. *Id.* The Court expressed no opinion on whether the other two officers on the scene were entitled to qualified immunity. *Id.* at 552-53.

The First Circuit held that officers who used deadly force against the plaintiff in *Berube v. Conley* were entitled to qualified immunity. 506 F.3d at 85. The plaintiff in that case, Berube, attempted to commit suicide while parked in his truck in a vacant lot. *Id.* at 81. After being interrupted, he drove to the local police station and began smashing the windows of police cruisers with a large hammer, while yelling and screaming. *Id.* A female officer confronted Berube and yelled at him to put the hammer down, an order which he ignored. *Id.* Believing that Berube was about to attack her with the hammer, the officer fired her gun at him until he fell to the ground. *Id.* At the time she fired the shots, Berube was approximately ten feet from her, and had the hammer raised. *Id.* Two other officers, hearing the first officer's yell and the gunshots, arrived on the scene. *Id.* They did not know which person had fired the shots. *Id.* Berube was lying on the ground with his back to the officers, his hands not visible. *Id.* The officers ordered him to stay down and show his hands, but Berube instead rolled toward them and attempted to rise, still holding the hammer. *Id.* The officers thought that the metallic object they saw in his hands was a gun, and that Berube was positioning himself to fire at them. *Id.* The officers ordered him again to stop moving, and when he did not comply, they fired on him until he stopped trying to get up. *Id.* The incident took place in the dark on a rainy night, and approximately ten seconds elapsed between when the first officer called for help and when the officers stopped firing. *Id.* The court determined that the officers were entitled to qualified immunity because their actions were reasonable given their need to "mak[e] a split-second judgment on a rainy night" in response to the "tense and uncertain

situation” and the need to “neutralize the threat they perceived from Berube.” *Id.* at 85.

In *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994), officers were determined to be entitled to qualified immunity following the shooting of a man armed with two knives. At 9:00 p.m., two officers were sent to investigate a domestic violence report at the home of the plaintiff, Roy. *Id.* at 693. Roy’s wife advised the officers when they arrived that Roy had been drinking and was armed with two knives which he threatened to use against any police officer who approached him. *Id.* A third officer arrived on the scene intending to serve Roy with a summons stemming from an unrelated complaint by another woman who Roy had struck earlier in the day. *Id.* When the third officer attempted to serve the summons and advise Roy of his *Miranda* rights, Roy became upset, said “I’ll show you,” and went into his home and retrieved two steak knives. *Id.* The officers drew their weapons and ordered Roy to put down the knives, but Roy continued to advance on them with the knives in his hands while flailing his arms. *Id.* The officers retreated, attempting to distract Roy and repeating their warnings that he drop the knives. *Id.* Roy then made a “kicking-lunging motion” toward two of the officers, one of whom shot him twice, seriously injuring him. *Id.*

The court found that the officer’s decision to shoot Roy rather than retreat further or use non-lethal means to subdue him, while possibly “mistaken” or “wrong,” was nonetheless constitutional under the qualified immunity doctrine. *Id.* at 696. The court noted that the officers had good reasons for thinking Roy capable of assault;

in addition to his attempt to lunge at the officers with the knives, Roy had been implicated in two separate assaults that day, and his wife had warned the officers that he had threatened to use his knives against the police. *Id.* at 693, 696.

In *Partlow v. Stadler*, 774 F.3d 497, 503 (8th Cir. 2014), a divided panel of the Eighth Circuit held that officers were entitled to qualified immunity after shooting and severely injuring the plaintiff, Partlow. At the end of a night of drinking, Partlow locked himself in his apartment with a shotgun, having decided to end his life. *Id.* at 499. His aunt contacted the police, who responded to the scene and positioned themselves outside the apartment building. *Id.* at 500. As the officers prepared to make contact with Partlow, he came out of the front door of the building, carrying the shotgun. *Id.* The officers yelled at him to drop the gun. *Id.* In response, Partlow made a quick motion with the gun, which all four officers interpreted to be Partlow raising the gun and aiming it at the officers. *Id.* The officers opened fire, shooting Partlow multiple times. *Id.* Partlow and a witness claimed that he was attempting to put the gun down in response to the order from the officers when they opened fire. *Id.* The court held that even if the officers were mistaken about Partlow's intention when he quickly moved the gun, any such mistake was objectively reasonable in light of the circumstances, including the fact that "[m]ere seconds" had passed between the moment Partlow "forcefully pushed open the door" and the moment the officers believed he aimed the gun at them. *Id.* at 502-503.

In *Weinmann v. McClone*, 787 F.3d 444, 450 (7th Cir. 2015), the Seventh Circuit ruled that a police officer was not entitled to qualified immunity following the

shooting of the plaintiff, Weinmann. Following an argument with his wife, Weinmann went to his garage, drank half a bottle of vodka, and threatened to kill himself with a shotgun. *Id.* at 446. His wife called the police, and a deputy sheriff responded to the call. *Id.* The officer, who had been told that Weinmann had access to a long gun, looked in through the windows of the garage, but did not see Weinmann. *Id.* He then knocked on the door to the garage, but received no answer. *Id.* The officer did not try to speak with Weinmann, but instead kicked in the door and entered the garage. *Id.* According to Weinmann, he was sitting in a lawn chair with the shotgun lying across his lap. *Id.* at 447. The officer contended that he perceived the shotgun as being pointed in his direction. *Id.* The officer then opened fire on Weinmann, hitting him four times. *Id.* The court rejected the officer's argument that he had an objectively reasonable belief that he was in imminent danger, holding that any such belief on the officer's part was unreasonable under the circumstances. *Id.* at 449. The court further held that a suicidal person's right to be free from the use of deadly force unless they threaten to harm others was clearly established by existing precedent. *Id.* at 451.

In *Mercado v. City of Orlando*, 407 F.3d 1152, 1161 (11th Cir. 2005), the Eleventh Circuit held that an officer was not entitled to qualified immunity following the use of deadly force against the plaintiff, Mercado. Mercado became suicidal after an argument with his wife, tied a telephone cord around his neck, and cut himself with a kitchen knife. *Id.* at 1154. His wife called the police, and later told the two officers who responded to the apartment that Mercado had a knife. *Id.* The officers

attempted to talk to Mercado through the door to the apartment, but after twenty minutes entered the apartment with Mercado's wife's permission. *Id.* Mercado was sitting on the floor, holding the knife. *Id.* The officers ordered Mercado to drop the knife at least two times, in both English and Spanish, but did not warn him that they would use force if he refused to drop the knife. *Id.* Less than a minute after Mercado ignored the order to drop the knife, one of the officers fired a "less-lethal" polyurethane baton launcher at Mercado's head, a use of force that the court deemed to be deadly. *Id.* at 1155, 1160. Mercado suffered serious head injuries as a result. *Id.* at 1155. The court determined that the officer's use of deadly force was unconstitutional and "violated the clearly established principle that deadly force cannot be used in non-deadly situations." *Id.* at 1160. The court also held that the use of deadly force in this situation was so obviously unlawful that the constitutional violation should have been obvious to the officer, notwithstanding a lack of case law. *Id.*

In *Cooper v. Sheehan*, 735 F.3d 153, 160 (4th Cir. 2013), the Fourth Circuit held that officers were not entitled to qualified immunity following the shooting of the plaintiff, Cooper. Cooper was at home with his cousin late one evening, and after a long afternoon of drinking and using drugs, the two men got into a heated argument. *Id.* at 155. A neighbor called the police, and two officers arrived at the house around 11:30 p.m. *Id.* The officers did not have any information about whether Cooper was armed or otherwise dangerous. *Id.* They arrived at the house without engaging their sirens, and saw Cooper's cousin, who had been standing on the back porch, enter the

home. *Id.* They approached the home on foot, and heard an argument inside. *Id.* One of the officers tapped on a window with his flashlight, but did not identify himself as a police officer. *Id.* In response to the tap on the window, Cooper uttered an obscenity and peered out the back door, but saw nothing. *Id.* Cooper called out for anyone in the yard to identify themselves, but the officers did not respond. *Id.* The officers had approached the yard behind the house, and were advancing toward the porch when Cooper came out the back door carrying a shotgun, which was pointed toward the ground. *Id.* When the officers saw Cooper with the gun, they opened fire on him, without giving any warning. *Id.* at 156. The officers claimed that Cooper burst out of the door with the gun raised and fired a shot, but the court accepted Cooper's version of the events for purposes of resolving the qualified immunity question. *Id.* at 156 n.4. The court held that the officers, by firing on Cooper without warning while his gun was pointed at the ground, had violated his clearly established "right to be free from deadly force when posing no threat." *Id.* at 160. The court stated that "the mere possession of a firearm by a suspect is not enough to permit the use of deadly force," *id.* at 159, but also noted that "an armed suspect need not engage in some specific action—such as pointing, aiming, or firing his weapon—to pose a threat," *id.* at 159 n.9. The court also found it significant that the officers never identified themselves, and that no reasonable officer could have believed that Cooper was aware the police were present when he stepped outside with his gun. *Id.* at 159-60.

In *Glenn v. Washington Cty.*, 673 F.3d 864, 878 (9th Cir. 2011), the Ninth Circuit reversed a grant of summary judgment in favor of officers who shot and killed the plaintiff's decedent, Glenn, holding that the officers' use of force had violated the Constitution, though the court did not reach the "clearly established" prong of the qualified immunity analysis. Glenn, an 18-year-old male, returned home late one night from a football game, obviously intoxicated and agitated. *Id.* at 867. After getting into an argument with his parents, Glenn became violent, damaging property in the house and the driveway. *Id.* Glenn then took out a knife and held it to his own neck, threatening to kill himself. *Id.* His parents called the police, informing them that Glenn was very drunk and threatening to kill himself with a knife. *Id.* The first officer to arrive approached Glenn, who was standing in the driveway near his parents and a friend, and aimed his gun at him. *Id.* at 868. Glenn was not acting violently, but was standing still by the garage with his knife held to his own neck. *Id.* The officer ordered Glenn to "drop the knife or I'm going to kill you," but the court noted that Glenn may not have heard or understood the command due to his intoxication and the fact that many people on the scene were yelling at once. *Id.* A second officer arrived on the scene and likewise ordered Glenn to drop his knife, while aiming a gun at him. *Id.* The officers also ordered Glenn's parents and friend to get away from Glenn and either get behind the police or go into the house. *Id.* at 868-869. A third officer arrived with a beanbag gun, a "less-lethal" weapon consisting of a shotgun loaded with lead shot contained in small cloth sacks that are capable of causing death or serious injury if they hit a sensitive area, and one of the other officers

directed him to fire the beanbags at Glenn. *Id.* at 869, 871. When Glenn was hit with the beanbag rounds, he tried to escape and take cover by moving in the direction of the house, and the other two officers opened fire with their semiautomatic weapons, hitting Glenn eight times and killing him. *Id.* The court rejected the officers' argument that their use of force was justified by an objectively reasonable belief that Glenn posed an immediate threat to his parents, who were inside the house. *Id.* at 879. The court held that the officers' use of force was unreasonable because of the lack of evidence that Glenn posed a threat to anyone but himself at the time he was shot. *Id.* Despite the fact that Glenn had a weapon that he refused to drop, the court held that it was not reasonable to think he posed a threat to the officers or any bystanders because he had not made any threatening statements or movements. *Id.* at 875. The court also found the officers' response unreasonable in light of the fact that Glenn was clearly emotionally disturbed. *Id.* at 875-76.

b. Analysis Regarding Deputy Mangino

In light of the case law described above, a reasonable officer should have understood that using deadly force against Stephen in the particular circumstances presented by this case would violate the Fourth Amendment. Based on Stephen's words and actions, it was not reasonable to believe that he posed an immediate threat to the safety of the officer or others at the time he was shot. *Compare Weinmann*, 787 F.3d at 447 (force not justified where plaintiff was holding shotgun across his lap) *with Roy*, 42 F.3d at 693 (force justified where plaintiff verbally threatened officers and lunged at them with knives). Stephen was walking nonchalantly down the

driveway with his gun dangling by his side. Stephen never made any threats to the officers, and although Deputy Mangino believed that Stephen had briefly pointed his gun at him earlier, Stephen did not point his gun at Deputy Mangino or any of the officers in the minutes immediately preceding the shooting. Crediting Deputy Mangino's assertion that he reasonably believed Stephen had pointed his gun at him when Stephen was standing in front of the garage, that fact would not justify the use of deadly force approximately six minutes later. *See Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) (noting that an officer who is faced with a threat that may justify use of deadly force "does not retain the right to shoot at any time thereafter"). Furthermore, Stephen was approximately 69 feet away from Deputy Mangino's cruiser at the time he was shot. The lack of close physical proximity further undermines the immediacy of the perceived threat posed by Stephen. *Compare Berube*, 506 F.3d at 81, 85 (use of force reasonable where plaintiff was "charging" at officer from ten feet away).

In addition, Deputy Mangino was not forced to make a split-second decision on less than perfect information in a rapidly changing situation at the time he shot Stephen, ECF No. 61 at 20, ¶ 110, unlike several of the officers that were found to be entitled to qualified immunity. *See, e.g., Pauly*, 137 S. Ct. at 550; *Berube*, 506 F.3d at 83-84; *Partlow*, 774 F.3d at 502. This incident took place in the morning on a sunny day. The officers had briefly spoken with Stephen inside his home, and observed him walk around his driveway and enter and leave his house numerous times over the course of approximately seven minutes leading up to the shooting.

Unlike the officers in *Berube*, who were confronting an unknown situation on a dark and rainy night, and were forced to act within seconds without complete information about whether the plaintiff was armed and posing an immediate threat, *see Berube*, 506 F.3d at 83-84, Deputy Mangino had ample opportunity to observe Stephen's actions and movements over the course of several minutes, and acted with knowledge of all of the relevant circumstances.

Furthermore, as he walked down the driveway in the direction of Deputy Mangino, Stephen was not warned that he would face deadly force if he failed to drop his gun. While Stephen was told by the officers to drop his gun inside the house, and Mangino yelled three times at Stephen to drop his gun when Stephen was standing outside by the garage, the last order was given approximately six minutes prior to the use of force. The Cumberland County Sheriff's Office's Standard Operating Procedure on the use of deadly force states that "[i]f feasible, the deputy must give some warning prior to the use of deadly force." ECF No. 41-54 at 5. Yet at no time did the officers warn Stephen that they would use force if he did not comply with their orders. *See Mercado*, 407 F.3d at 1154 (noting that officers failed to warn plaintiff that they would use force if he did not drop weapon, in context of finding use of force unreasonable); *see also Irish v. Maine*, 849 F.3d 521, 527-28 (1st Cir. 2017) (emphasizing the importance of police protocols and standard practices in evaluating whether an officer is entitled to qualified immunity).

Stephen's apparent emotional and mental distress is also a factor that militates against the reasonableness of Deputy Mangino's use of force. *See Glenn*,

673 F.3d at 875-76 (noting that government's interest in using force is diminished when dealing with a mentally ill individual). Mangino knew that Stephen was suicidal, Mrs. McKenney had informed the officers that Stephen had "snapped" after months of dealing with back pain, and the officers acknowledge that Stephen appeared to be "not at home mentally." See ECF No. 61 at 15, ¶ 75. Deputy Mangino also acknowledges that when he had yelled at Stephen to drop his gun, Stephen had a vacant stare, "and it was like he was not receiving Mangino's message." ECF No. 61 at 12, ¶ 62; see *Glenn*, 673 F.3d at 875 (finding significant the fact that plaintiff's decedent may not have heard or understood command to drop weapon).

Finally, Deputy Mangino's use of deadly force was unreasonably precipitous when viewed in context with the officers' prior attempts to gain Stephen's compliance. Deputy Mangino yelled three times at Stephen to drop his gun as Stephen stood by the garage. Over the course of the next six minutes, no attempts were made, verbally or otherwise, to persuade Stephen to drop his gun. There is no Constitutional requirement that the police use the least intrusive means available to respond to a situation, but the availability and feasibility of non-lethal force options is a factor that courts consider in assessing the reasonableness of a use of deadly force. *Cf. Roy*, 42 F.3d at 696; *Glenn*, 673 F.3d at 876. Here, the fact that Deputy Mangino progressed from a verbal command shouted from a distance to the use of deadly force six minutes later, without any intervening attempt to gain Stephen's compliance, militates against finding that his use of deadly force was reasonable.

The established case law discussed above demonstrates that Stephen had a right to be free from the use of deadly force at the time he was shot by Deputy Mangino. As Stephen walked down his driveway, holding his gun down at his side, he did not present a sufficiently serious and immediate threat to justify the use of deadly force. He had made no threats or threatening movements, was not pointing his gun at anyone, was approximately 69 feet from an officer crouched behind his cruiser, and did not fail to heed any warnings or orders immediately before the shooting. Viewing the summary judgment record in the light most favorable to McKenney, Stephen's clearly established rights under the Fourth Amendment were violated.

This conclusion does not diminish the danger associated with the situation confronting Deputy Mangino. Stephen appeared mentally unstable and was carrying a firearm that he had refused to drop. On this record, there is no question that the potential threat posed by Stephen was serious. At the time Stephen was shot, however, that threat was not immediate. The clearly established law on this point is such that a reasonable officer would have understood that the threat posed by Stephen did not justify deadly force. Deputy Mangino's subjective belief to the contrary does not alter this analysis. *See Weinmann*, 787 F.3d at 449 ("It does not matter for purposes of the Fourth Amendment that [the officer] subjectively believed that his life was in danger. The test is an objective one, and taking the facts as [the plaintiff] presents them, it is not met."). Deputy Mangino is therefore not entitled to qualified immunity.

Based on the foregoing, Deputy Mangino is not entitled to summary judgment on Count I of the Complaint. Accordingly, he is also not entitled to summary judgment on Count II, which alleges a violation of the Maine Civil Rights Act.

2. State Law Tort Claims

Deputy Mangino argues that he is entitled to discretionary function and intentional act immunity from McKenney's state law tort claims (Counts IV and VII to X) under the Maine Tort Claims Act. ECF No. 45 at 13-14. A law enforcement officer's use of force is a discretionary act, but immunity under the Maine Tort Claims Act is inapplicable to the extent that an officer's conduct is so egregious that it exceeds the scope of his or her authority. *Steeves v. City of Rockland*, 600 F. Supp. 2d 143, 183 (D. Me. 2009). "The Law Court has clarified that the standard for deciding whether an officer accused of use of excessive force is entitled to MTCA immunity is the same as that for analyzing whether he or she is entitled to qualified immunity with respect to a parallel federal Fourth Amendment claim." *Id.* (citing *Richards v. Town of Eliot*, 2001 ME 132, ¶ 32, 780 A.2d 281). Therefore, because Deputy Mangino is not entitled to summary judgment based on qualified immunity from McKenney's Fourth Amendment claims, he is also not entitled to immunity from her state law claims under the Maine Tort Claims Act.

D. Claims against Cumberland County

1. Claims under § 1983 and the Maine Civil Rights Act

Count I, which alleges excessive force in violation of the Fourth Amendment, does not apply to Cumberland County. A municipality is not vicariously liable for its

employees' actions; it can only be held responsible for its own illegal acts. *Connick v. Thompson*, 563 U.S. 51, 60 (2011). McKenney does not argue that Cumberland County itself somehow used excessive force against Stephen. See ECF No. 50 at 21-22. Therefore, Cumberland County is entitled to summary judgment on Count I of the Complaint.

Count II asserts a violation of the Maine Civil Rights Act. The outcome of this claim is governed by the disposition of McKenney's claims under § 1983, and therefore will be determined by the viability of her federal claims. See *Berube*, 506 F.3d at 85.

As noted earlier, Count III, which alleges a violation of the Fourteenth Amendment, has been waived by the Plaintiff and summary judgment will therefore be granted in favor of Cumberland County.

Count V alleges a violation of the Fourth Amendment under § 1983 for failure to train police officers. Cumberland County asserts that McKenney must demonstrate a pattern of similar past violations in order to sustain a failure-to-train claim. ECF No. 45 at 20; ECF No. 60 at 9 n.7. But this assertion is contradicted by the precedent Cumberland County relies on. See *Thompson*, 563 U.S. at 63-64 (noting that a single incident may be enough to support liability where that incident is an obvious consequence of a failure to train). Indeed, the hypothetical situation posited by the Court in *Thompson* as an example where a single incident could support liability for a failure to train involved a city arming its police officers but failing to properly train them regarding the constitutional limitations on the use of deadly force. *Id.*

In order to impose § 1983 liability on a municipality, a plaintiff must show that the municipality's deliberate conduct was the moving force behind a constitutional violation. *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404 (1997). As noted above, liability cannot be imposed on a municipality under a respondeat superior theory. *Id.* at 403. To be successful, therefore, a claim that a municipality has violated the Constitution through its failure to train its employees requires a showing that the failure to provide training demonstrated "deliberate indifference to the rights of persons with whom the untrained employees come into contact." *Thompson*, 563 U.S. at 61 (quotation omitted). Deliberate indifference is a "stringent standard of fault," which requires proof that the municipality disregarded a known or obvious consequence of its actions. *Id.*

Here, McKenney argues that Deputy Mangino's "action beats reaction" training, his training to "stop and eliminate the threat," and his alleged lack of training on dealing with suicidal individuals evinced a deliberate indifference on the part of Cumberland County because it created an obvious risk that Deputy Mangino would violate a citizen's Fourth Amendment rights. ECF No. 50 at 21. McKenney also suggests that Cumberland County's custom of allowing deputies to decide for themselves whether to bring civilian ride-alongs to a potentially dangerous scene contributed to Deputy Mangino's decision to shoot Stephen. *Id.* at 21-22.

As an initial matter, the record does not support McKenney's assertion that Deputy Mangino did not have training on dealing with suicidal individuals. In his deposition testimony, Mangino stated that he had received crisis intervention

training, which included training on how to handle suicidal individuals. ECF No. 41-35 at 61-62, 235:10-236:18. While Deputy Mangino apparently did not follow Cumberland County's Sheriff's Office policy that a "CIT deputy," if available, be called in to all situations involving subjects suspected to be mentally ill, ECF No. 61 at 26, ¶ 137, Deputy Mangino's failure to follow a policy that Cumberland County had in place cannot be a basis for liability on the part of the County, *see City of Canton, Ohio v. Harris*, 489 U.S. 378, 391 (1989) (noting that a mistake made by an adequately trained officer does not provide a basis for holding a municipality liable).

The record also does not support McKenney's assertion that Cumberland County's policy or custom regarding civilian ride-alongs amounts to deliberate indifference to Stephen's constitutional rights. While it is undisputed that the presence of the civilian ride-along contributed to Deputy Mangino's decision to shoot Stephen, the causal connection between the custom and the constitutional harm is too attenuated to support liability on the part of Cumberland County. *See Canton*, 489 U.S. at 391 ("the identified deficiency . . . must be closely related to the ultimate injury"). It was not foreseeable that the custom regarding ride-alongs would result in an exercise of deadly force against a person who did not pose a threat to the officers, the civilian, or anyone else. To hold otherwise would require too much prescience from the County. Stephen's death was far from the sort of "highly predictable" consequence of the ride-along policy that is needed to show deliberate indifference on the part of the County. *See Thompson*, 563 U.S. at 71.

Cumberland County argues that it did not provide the “action beats reaction” training that McKenney objects to, contending that this training was provided by the Maine Criminal Justice Academy. ECF No. 60 at 10. In support of this argument, Cumberland County cites to Deputy Mangino’s deposition testimony, where he stated that “[g]iven my training and experience that I’ve had at the academy, et cetera, I’ve been trained that action beats reaction.” ECF No. 41-35 at 28, 102:25-103:2. Deputy Mangino was not asked, and did not explain, what his use of the phrase “et cetera” refers to. *See id.* Given that the facts must be viewed in the light most favorable to the plaintiff at this stage, I find that this statement does not establish that Cumberland County had no involvement in Deputy Mangino’s “action beats reaction” training. Especially in light of Deputy Mangino’s use of the word “experience,” it is plausible to infer from this evidence that the “training and experience” that Mangino referenced in his testimony includes his training and experience with the Cumberland County Sheriff’s Office, and does not simply refer to the training he received at the Academy.

The question, then, is whether the training Deputy Mangino received on “action beats reaction” and “stop and eliminate the threat” was a moving force behind the alleged constitutional violation, and demonstrates deliberate indifference on the part of Cumberland County to Stephen’s constitutional rights. *See Brown*, 520 U.S. at 403-04; *Thompson*, 563 U.S. at 61. McKenney argues that Deputy Mangino was trained to use deadly force in situations where such force was not justified by an immediate threat, and to that extent the training created an obvious risk of

constitutional violations. ECF No. 50 at 21. In his deposition testimony, Deputy Mangino explained that his decision to shoot Stephen when he did stemmed from his training that action beats reaction, and that it was proper for him to try to stop and eliminate the threat. ECF No. 41-35 at 28, 102:25-103:2; 29, 104:9-20; 29, 106:5-11; 30, 108:24-109:6; ECF No. 41-36 at 17, 56:13-17. This testimony provides evidence of the causal connection needed to establish municipal liability under a failure-to-train theory. *See Canton*, 489 U.S. at 391 (noting that plaintiff “must still prove that the deficiency in training actually caused” the constitutional violation). Deputy Mangino himself identified his training as the reason behind his decision to use deadly force against Stephen at the moment he did. Drawing all inferences from the evidence in favor of the Plaintiff, as I must at this stage, there is adequate support in the record for the conclusion that Deputy Mangino’s inadequate training caused the violation of Stephen’s constitutional rights.

It is important to note that it is quite possible that the training provided by Cumberland County was in fact appropriate and adequate, and that Deputy Mangino simply misunderstood or misapplied his training. The record includes Cumberland County’s policy regarding the use of deadly force. *See* ECF No. 41-54. But Cumberland County has not made this argument, and does not point the Court to any evidence in the record suggesting that Deputy Mangino incorrectly applied his training. At the summary judgment stage, where I must view the evidence in the light most favorable to the Plaintiff and draw all reasonable inferences in her favor, it would not be appropriate to draw this inference in favor of the County. Given the

record and the arguments made by the parties, I instead must assume, for purposes of this motion, that Deputy Mangino's training was inadequate, rather than misapplied.

If, as discussed above, Deputy Mangino violated Stephen's Fourth Amendment rights when he shot him, it is plausible to infer from the evidence that his training was the moving force behind his decision to employ deadly force at a time when Stephen did not pose a sufficient threat to justify that force. Furthermore, a failure to adequately train police officers on the situations that justify the use of deadly force creates an obvious risk that an officer will violate the Constitution. *See Canton*, 489 U.S. at 390 n.10 (suggesting that failing to train police officers on the use of deadly force could be characterized as deliberate indifference to a highly predictable violation of constitutional rights); *see also Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784, 796 (9th Cir. 2016) (reversing grant of summary judgment to county on single-incident failure to train claim because inadequacy in training of social workers was so likely to result in constitutional violation as to constitute deliberate indifference); *Shadrick v. Hopkins Cty., Ky.*, 805 F.3d 724, 739-40 (6th Cir. 2015) (reversing grant of summary judgment to county on single-incident failure to train claim because risk of constitutional harm arising from allegedly deficient training of prison medical staff was "obvious"); *Thomas v. Cumberland Cty.*, 749 F.3d 217, 225 (3d Cir. 2014) (reversing grant of summary judgment to county on single-incident failure to train claim because alleged deficiency in prison staff's training created high likelihood of constitutional violation). Therefore, there is sufficient evidence in the record to

support the inference that Cumberland County may be liable for failing to adequately train Deputy Mangino.

Based on the foregoing, Cumberland County is not entitled to summary judgment on Count V of the Complaint. Cumberland County is accordingly not entitled to summary judgment on Count II. *See Berube*, 506 F.3d at 85.

2. Americans with Disabilities Act Claim

As discussed above with respect to the claims against Windham, McKenney's claims under the ADA must fail, both because the undisputed facts do not support an inference that Stephen was discriminated against or denied any service "by reason of" his disability, *see Buchanan*, 469 F.3d at 176, and because the emergency circumstances exception to ADA liability applies in this case, *see Estate of Buchanan*, 417 F. Supp. 2d at 73. Cumberland County is therefore entitled to summary judgment on Count VI of the Complaint.

3. State Law Tort Claims

Finally, as discussed with respect to Windham, the state law tort claims alleged by McKenney do not fit within any of the narrowly-construed exceptions to the tort immunity granted to municipalities by the Maine Tort Claims Act. *See* 14 M.R.S.A. § 8104-A(1)-(4). Cumberland County has not waived this immunity through the purchase of liability insurance; the parties agree that its insurance coverage specifically excludes from coverage tort claims from which the county is immune. ECF No. 49 at 3, ¶¶ 26-29. Therefore, Cumberland County is entitled to summary judgment on Counts IV and VII to X of the Complaint.

III. CONCLUSION

Based on the foregoing, it is hereby **ORDERED** that:

- Defendant Town of Windham's motion for summary judgment (ECF No. 43) is **GRANTED**.
- Defendant Nicholas Mangino's motion for summary judgment (ECF No. 45) is **GRANTED** with respect to Counts III and V, and **DENIED** with respect to Counts I, II, IV, VII, VIII, IX, and X.
- Defendant Cumberland County's motion for summary judgment (ECF No. 45) is **GRANTED** with respect to Counts I, III, IV, VI, VII, VIII, IX, and X, and **DENIED** with respect to Counts II and V.

SO ORDERED.

Dated this 12th day of April 2017.

/s/ Jon D. Levy
U.S. DISTRICT JUDGE