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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

THE ESTATE OF DILLON TAYLOR; CODY TAYLOR; JERRAIL TAYLOR; TEESHA TAYLOR; ADAM THAYNE, Plaintiffs - Appellants, v. SALT LAKE CITY; BRON CRUZ, Defendants - Appellees.	No. 19-4085

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:15-CV-00769-DN)

Mark J. Geragos, Geragos & Geragos, Los Angeles, California, for Plaintiffs-Appellants.

Catherine L. Brabson (John E. Delaney and Mark E. Kittrell with her on the brief), Salt Lake City Corporation, Salt Lake City, Utah, for Defendants-Appellees.

Before **HOLMES**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **McHUGH**, Circuit Judge.

HOLMES, Circuit Judge.

Over thirty years ago, the Supreme Court recognized the cold reality that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). And, regarding such circumstances, the Fourth Amendment is clear: officers need not wait until they see the gun's barrel or the knife's blade before using deadly force to protect themselves or those around them. *See, e.g.*, *Est. of Larsen ex rel. Sturdivan v. Murr ("Est. of Larsen")*, 511 F.3d 1255, 1260 (10th Cir. 2008). They must simply act reasonably. *See, e.g.*, *Kisela v. Hughes*, --- U.S. ----, 138 S. Ct. 1148, 1152 (2018).

We are constrained to apply these principles today in deciding this appeal, which arises from the tragic death of Dillon Taylor ("Mr. Taylor"), who was shot and killed by Salt Lake City Police Officer Bron Cruz. Officer Cruz and two fellow officers were following up on a 9-1-1 call reporting that a man had flashed a gun. The caller described the man and noted that he was accompanied by another male whom the caller also described. The officers attempted to stop Mr. Taylor and two male companions because two of the three men matched the caller's descriptions. While Mr. Taylor's companions immediately complied with the responding officers' commands to stop and show their hands, Mr. Taylor did not. Instead, he made a 180-turn and walked away. Firearms in hand, but not pointed at Mr. Taylor, Officer Cruz and another responding officer followed Mr.

Taylor. The officers repeatedly ordered him to stop and show his hands. Mr. Taylor did not. Instead, he verbally challenged the officers, kept walking, and placed at least one of his hands in his waistband.

A short time later, Mr. Taylor turned to face Officer Cruz, but continued walking backwards. Both of Mr. Taylor's hands were then concealed in the front of his waistband; they appeared to be digging there, as if Mr. Taylor were manipulating something. Officer Cruz trained his firearm on Mr. Taylor and ordered him to stop and show his hands. Mr. Taylor verbally refused and kept walking backward. Then, without any verbal warning, Mr. Taylor quickly lifted his shirt with his left hand—exposing his lower torso—and virtually simultaneously withdrew his right hand from his waistband. The motion took less than one second and was consistent with the drawing of a gun. Reacting to Mr. Taylor's rapid movement, Officer Cruz shot Mr. Taylor twice—firing in quick succession. Mr. Taylor died at the scene. When he was searched, Mr. Taylor was unarmed; in particular, he did not have a gun.

Mr. Taylor's estate and family members (collectively, "Plaintiffs") filed this lawsuit under 42 U.S.C. § 1983, asserting claims against Salt Lake City and Officer Cruz—as well as multiple others, including other Salt Lake City police officers and Salt Lake County employees. The primary question before us is whether Officer Cruz's decision to shoot Mr. Taylor was reasonable based on the

totality of the circumstances. We conclude that it was. Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's judgment.

I

A[1]

At approximately 7:00 p.m. on the evening of August 11, 2014, Officer Cruz heard a radio transmission from Salt Lake City's 9-1-1 Call Dispatch ("Dispatch"). Dispatch stated that a man located at the intersection of 1900 South Street and 200 East Street "flashed a gun" but did not make a threat. *See* Aplts.' Suppl. App., Ex. 1, at 0:05–0:09 (Dispatch Recording, dated Aug. 11, 2014) (hereinafter "Ex. 1"). Dispatch added that the man was accompanied by an

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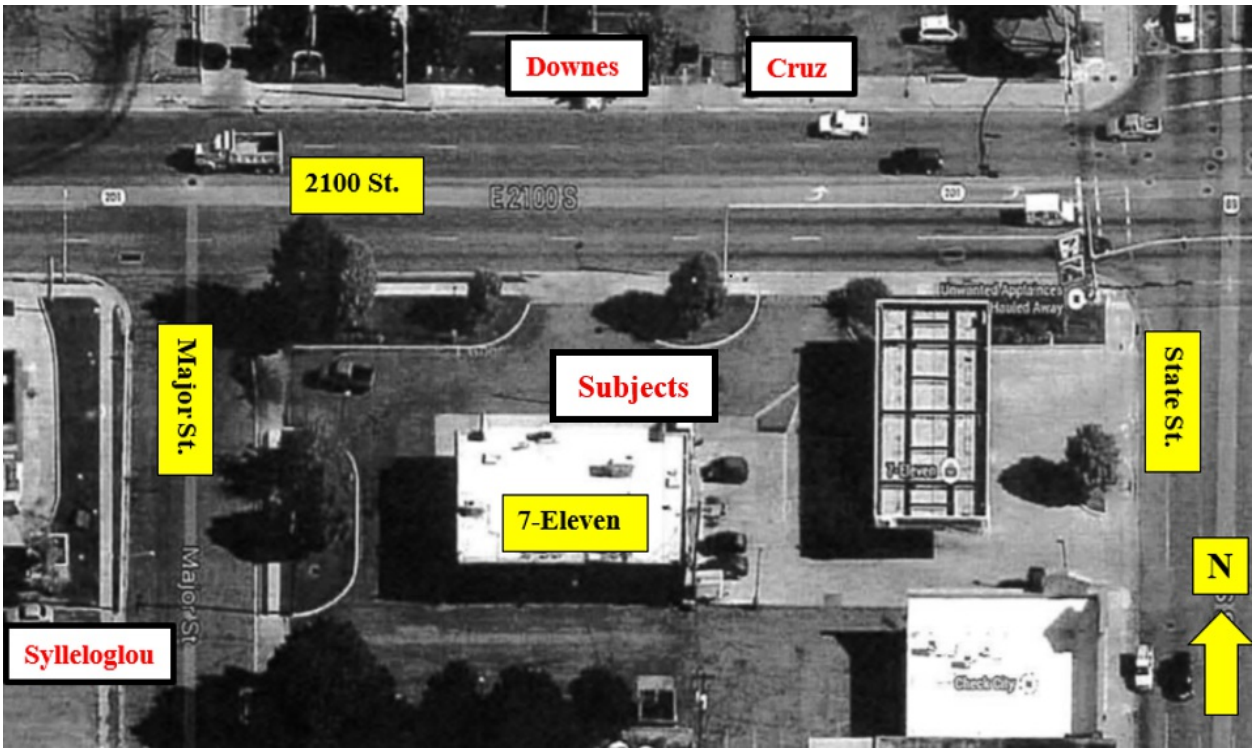
[1] Guided by *Graham* and its progeny, "[t]his factual [background] recitation focuses on the information the officers had at the time of the encounter." *Bond v. City of Tahlequah*, 981 F.3d 808, 812 n.3 (10th Cir. 2020), *rev'd on other grounds*, --- U.S. ----, No. 20-1668, 2021 WL 4822664 (per curiam), at *3 (Oct. 18, 2021); *see Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . ."). Accordingly, unlike Plaintiffs, we disregard the supposed "tipsy" state of the 9-1-1 caller and the apparent fact that Mr. Taylor "had been wearing earphones" during his encounter with Officer Cruz and the other officers. Aplts.' Opening Br. at 3, 13. Likewise, we decline Defendants' invitation to consider "[e]vidence of Mr. Taylor's mental state," Aplees.' Resp. Br. at 9 (bolding and underlining omitted)—specifically, in the form of communications that Mr. Taylor supposedly had with his associate, Adam Thayne, on the day of the shooting, but *prior to* his encounter with Officer Cruz and the other officers, and posts that Mr. Taylor put on his Facebook page *days before* this encounter. The foregoing information would not have been available to the officers when they had their tragic interaction with Mr. Taylor on the evening of August 11, 2014. *See Bond*, 981 F.3d at 812 n.3 (disregarding specific information "not available to the officers, such as what happened earlier that day").

associate, and described the two suspects. The first was a "male Hispanic wearing [a] white shirt, red pants, [and a] red baseball cap." *Id.* at 0:08–0:14. The second was "another male Hispanic wearing a striped shirt." *Id.* at 0:14–0:18. Dispatch did not specify which individual "flashed" the firearm, but stated that "both suspects [we]re now going west bound on 2100 South from 200 East." *Id.* at 0:38–0:45. Because the caller hung up, Dispatch had no further information.

Officer Cruz responded that he was "in the area." *Id.* at 0:33–0:35. In his next transmission, Officer Cruz identified three individuals whom he believed matched Dispatch's description; they turned out to be Adam Thayne, Jerrail Taylor, and Mr. Taylor. Adam Thayne was wearing a blue striped shirt and white shorts; Jerrail Taylor was wearing a red Miami Heat basketball jersey, a red hat, and red striped pants; and Mr. Taylor was wearing a white t-shirt and black pants. The three men were walking west on the south side of 2100 South Street, approximately two blocks west of 200 East Street.

Before stopping the three men, Officer Cruz waited for help from additional officers. During that time, Mr. Taylor and his two male associates—who were then subjects of Officer Cruz's investigation—entered a 7-Eleven convenience store on the southwest corner of 2100 South Street and South State Street. Soon after, Salt Lake City Police Officers Andrew Sylleloglou ("Officer Sylleloglou") and Uppsen Downes ("Officer Downes") arrived. Officer Sylleloglou parked on

Major Street—the street just west of the 7-Eleven. Officer Downes parked next to Officer Cruz across from the 7-Eleven. The following exhibit indicates the approximate location of Mr. Taylor's party and the officers at this point:



Aplts.' App. at 510 (with additions for clarity).

When Mr. Taylor and the two other men exited the 7-Eleven, all three officers converged on the store. The officers were in uniform and driving marked police vehicles. With overhead lights flashing, Officers Cruz and Sylleloglou approached the front of the 7-Eleven, from opposite directions, and parked next to each other. Officer Downes went to the building's rear and then soon thereafter returned to the front. As they exited their vehicles, Officers Cruz and Sylleloglou immediately began ordering the three men to stop and to show their hands. Adam

Thayne, for example, heard the officers command them to "stop" and "put [their] hands above [their] head[s]." Aplts.' Suppl. App., Ex. 3A, Doc. 44-3, at 3:34:51–35:06 (Recording of Adam Thayne's Interview, dated Aug. 11, 2014) (hereinafter "Ex. 3A"). Adam Thayne and Jerrail Taylor put their hands up and complied with the officers' commands. And, subsequently, they were detained by Officer Downes.

Mr. Taylor looked at Officers Cruz and Sylleloglou as they approached. However, unlike Adam Thayne and Jerrail Taylor, Mr. Taylor made a 180-degree turn, and started walking west along the north side of the 7-Eleven—away from the officers. Officer Sylleloglou yelled more than once at Mr. Taylor, "Hey, you in the white shirt, stop," but Mr. Taylor did not stop. Aplts.' App. at 548 (Tr. Andrew Sylleloglou Dep., dated Apr. 10, 2017). Both officers followed Mr. Taylor with their guns drawn but not pointed at him. Officer Sylleloglou moved parallel to Mr. Taylor and continued ordering him to stop and show his hands. But Mr. Taylor did not comply. Officer Cruz was behind Mr. Taylor. Mr. Taylor was wearing a baggy t-shirt and baggy pants; his shirt was hanging outside of his pants. His hands were by his sides. Shortly after he started walking, Mr. Taylor appeared to pull up his pants by reaching his hands down on either side of his pants and tugging them upwards.

Approximately nine seconds after he started walking away from Officer Cruz and Officer Sylleloglou, Mr. Taylor raised his hands to waist level—with the

position of his elbows extended on either side—with his long, baggy t-shirt raised to waist level. He appeared to have one or both of his hands in the front of his pants' waistband. It was at this moment that both Officer Cruz and Officer Sylleloglou pointed their firearms at Mr. Taylor; neither officer, however, had his finger on his gun's trigger. Officer Cruz was now ten to twenty feet directly behind Mr. Taylor, while Officer Sylleloglou walked parallel to Mr. Taylor at approximately the same distance. Officer Sylleloglou recalls that around this time—in apparent response to his repeated commands to show his hands—Mr. Taylor starting verbally challenging him, saying things like, "What are you going to do? Come on, . . . shoot me." *Id.* at 551.

About two seconds after Mr. Taylor placed his hands in his waistband, Officer Cruz stated "[g]et your hands out now." Aplts.' Opening Br. at 8; Aplts.' Suppl. App., Ex. 6, at 0:31–0:33 (Officer Bron Cruz's Body Camera Video, dated Aug. 11, 2014) (hereinafter "Ex. 6"). At this point, Mr. Taylor turned around and faced Officer Cruz. He continued moving away from Officer Cruz by walking backwards. Both of his hands were in his waistline and concealed, and Mr. Taylor appeared to be moving his hands in a "digging" motion, like he was "manipulating" something. Aplts.' App. at 455–57 (Tr. Bron Cruz Dep, dated Feb. 24, 2017). At that point, Officer Cruz maintained a steady pace and continued ordering Mr. Taylor to show his hands.

Specifically, as soon as Mr. Taylor faced him, Officer Cruz stated a second time, "get your hands out." Ex. 6 at 0:33–0:34. Mr. Taylor responded, "Nah, fool." *Id.* at 0:35; *see* Aplts.' App. at 564. And, he continued to move his concealed hands in a way that suggested he was manipulating something in the waistline of his pants. Officer Cruz had started ordering Mr. Taylor to remove his hands a third time when, without verbal warning, Mr. Taylor rapidly removed his left hand from his waistband—lifting his shirt and exposing his torso—and, virtually simultaneously, withdrew his right hand from his waistband but lower than his left hand. The motion took less than one second and was consistent with the drawing of a gun.[2]

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[2] Plaintiffs contend, however, that Mr. Taylor was simply pulling up his pants or complying (albeit belatedly) with the officers' commands to show his hands. *See, e.g.*, Aplts.' Opening Br. at 37 ("Viewing the facts in the light most favorable to Mr. Taylor would require the Court consider his hand movement simply pulling up his pants as opposed to reaching for a weapon or failing to comply to orders to raise his hands."); *id.* at 42 ("When Mr. Taylor did put his hands up to show Officer Cruz he did not have a weapon, Officer Cruz shot him."). However, like the district court, we believe that, viewed in the totality, the record evidence—especially the video evidence—"blatantly contradict[s]" these contentions. *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *see Est. of Taylor v. Salt Lake City*, No. 2:15-cv-00769-DN-BCW, 2019 WL 2164098, at *23 (D. Utah May 17, 2019) ("The undisputed material facts and video and photographic evidence of the moments when Mr. Taylor was shot demonstrate that a reasonable officer would believe that Mr. Taylor made a hostile motion with a weapon towards the officers."); *see also Thomas v. Durastanti*, 607 F.3d 655, 659 (10th Cir. 2010) (noting that a plaintiff's version

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of the facts need not be accepted "to the extent that there is clear contrary video evidence of the incident at issue"). More specifically, as the video evidence clearly reveals, Mr. Taylor's rapid motion to lift his shirt with his left hand and withdraw his right hand from his waistband did not resemble—when viewed through any reasonable lens—an effort to pull up his pants. Indeed, this assessment finds some confirmation in the video's depiction of an earlier motion by Mr. Taylor that appears to reflect his effort to pull up his baggy pants. As the district court rightly observed, "[i]t is clear from the video and photographic evidence that the 'drawing' motion of Mr. Taylor's hands is not similar to when Mr. Taylor earlier put his hands on his waist to pull up his pants." *Est. of Taylor*, 2019 WL 2164098, at *24; *see also id.* at *23 (noting that Mr. Taylor's earlier motion to pull up his pants was "a separate, distinct movement with his hands" than the one Mr. Taylor subsequently undertook when "he put his hands inside the front waistband of his pants, and made digging motions with them").

Furthermore, irrespective of whether Mr. Taylor subjectively intended to belatedly comply with the officers' commands by showing his hands, his rapid motion, as the district court found, was objectively consistent with an effort to draw a gun. *See id.* at *24 (noting that Mr. Taylor "made a sudden motion with his hands that from the video and photographic evidence is consistent with a 'draw stroke'"). Officer Cruz described Mr. Taylor's motion as a "drawing stroke"—involving "very quickly drawing your hand from a location . . . where you keep a firearm," Aplts.' App. at 458—and Officer Sylleloglou similarly spoke of the motion as an "appendix draw," *id.* at 556. Both officers testified that—based on their training and experience relating to carrying concealed firearms—they were familiar with a motion such as the one Mr. Taylor used and had indeed practiced such a motion themselves, involving the drawing of firearms from their waistlines. *See id.* at 459 (Officer Cruz, noting that, "when I draw, we—when we conceal carry practice and train, you use one hand to lift a shirt, get that out of the way"); *id.* at 556 (Officer Sylleloglou, stating, "I practice my appendix draw all the time, being that I carry off duty and this is where I carry my gun"). Our own caselaw points to the objective reasonableness of the factual determination that Mr. Taylor's rapid movement in removing his hands from his waistline was consistent with drawing a gun. *Cf. United States v. Briggs*, 720 F.3d 1281, 1283, 1287–88 (10th Cir. 2013) (relying on an officer's testimony "that, in his training and experience, people who illegally carry weapons often keep them at their waistline and touch or grab at the weapon when they encounter
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"At that moment, Mr. Taylor was approximately 10 to 12 feet away from Officer Cruz . . . ." *Est. of Taylor v. Salt Lake City*, No. 2:15-cv-00769-DN-BCW, 2019 WL 2164098, at *14 (D. Utah May 17, 2019). In immediate response, Officer Cruz placed his finger on his gun's trigger and shot Mr. Taylor twice in the chest—firing in quick succession and killing him. One bullet hit Mr.

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[2](...continued)
police"); *id.* at 1288 n.4 (stating that "[c]ommon sense suggests that pockets are often used to carry all manner of items," but "[t]he same cannot be said of a person's waistline"); *accord Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) ("[T]he [§ 1983] plaintiff's brief suggests that [the suspect] was simply complying with the order that he show his hands when he pulled his hand out of his waistband. But . . . the undisputed evidence shows that [the suspect] pulled his hand out of his waistband, not as if he were surrendering, but abruptly and as though he were drawing a pistol. . . . [W]e are compelled to hold that the troopers reasonably believed that [the suspect] was drawing a gun, not complying with their command that he show his hands.").

In any event, even when the record is viewed in the light most favorable to them, Plaintiffs have not identified evidence that creates a genuine dispute regarding whether Mr. Taylor's rapid motion could be interpreted as a belated effort to comply with the officers' directive to show his hands, rather than being consistent with a drawing stroke motion. *See, e.g.*, *McCoy v. Meyers*, 887 F.3d 1034, 1044 (10th Cir. 2018) (noting that "[a]ll *disputed* facts must be resolved in favor of the party resisting summary judgment" (alteration in original) (emphasis added) (quoting *White v. Gen. Motors Corp.*, 908 F.2d 669, 670 (10th Cir. 1990))). Indeed, as support for their assertion that, "in compliance" with Officer Cruz's directive to show his hands, Mr. Taylor "pulled up his hands, and showed them," Aplts.' Opening Br. at 7, Plaintiffs only reference their complaint. At the summary-judgment phase, however, that will not do. *See, e.g.*, *Thomson v. Salt Lake County*, 584 F.3d 1304, 1312 (10th Cir. 2009) (noting, in the qualified-immunity context, that "because at summary judgment we are beyond the pleading phase of the litigation, a plaintiff's version of the facts must find support in the record").

Taylor's heart. The other cut Mr. Taylor's left hand and entered his abdomen. Officer Sylleloglou recalled seeing Mr. Taylor make the same rapid motion with his hands. In response, he placed his finger on the trigger of his drawn gun and recalled that—aside from doing so on a firing range—it was the first time in his approximately nine years in law enforcement that he had ever placed his finger there. Officer Sylleloglou indicated that he was trained not to put his finger on his gun's trigger unless he was prepared to shoot.

When Mr. Taylor was subsequently searched, he was found to be unarmed. After the shooting, Salt Lake City Police detained Jerrail Taylor and Adam Thayne for more than five hours and interviewed them extensively.

B

Plaintiffs commenced this action in the United States District Court for the District of Utah under 42 U.S.C. § 1983, asserting claims against Salt Lake City and Officer Cruz—as well as multiple others, including other Salt Lake City police officers and employees of Salt Lake County. Based on a series of stipulations, the court dismissed all of Plaintiffs' claims, except for their claim of Fourth Amendment excessive force against Officer Cruz and their claim of deliberate indifference against Salt Lake City based on its policies, training, and investigation procedures. Salt Lake City and Officer Cruz (collectively, "Defendants") moved for summary judgment on the remaining claims. They

argued Officer Cruz was entitled to qualified immunity because he did not violate Mr. Taylor's federal statutory or constitutional rights and that, because Officer Cruz committed no such violation, no liability could attach to Salt Lake City. Plaintiffs opposed this motion, contending that genuine issues of material fact prevented summary judgment.

The district court granted Officer Cruz and Salt Lake City's motion for summary judgment. Notably, the court found:

> Because the undisputed material facts demonstrate that Officer Cruz's use of deadly force in the August 11, 2014 encounter . . . was objectively reasonable under the circumstances, Officer Cruz did not violate a statutory or constitutional right and is entitled to qualified immunity as a matter of law. And because Officer Cruz's conduct did not violate a statutory or constitutional right, Salt Lake City cannot, as a matter of law, be held liable for Officer Cruz's conduct.

Est. of Taylor, 2019 WL 2164098, at *1. Plaintiffs filed a timely notice of appeal.

II

Plaintiffs present two issues on appeal. First, they argue that the Fourth Amendment's exclusionary rule precludes us from using Jerrail Taylor and Adam Thayne's statements to the Salt Lake City Police in resolving this lawsuit. Second, they contend that the district court erred by finding Officer Cruz's actions were objectively reasonable, and thus constitutional, under the Fourth Amendment. For the reasons discussed below, we hold that the exclusionary rule

does not apply to Jerrail Taylor and Adam Thayne's statements. Furthermore, we affirm the district court's grant of summary judgment because Officer Cruz's conduct did not violate Mr. Taylor's Fourth Amendment rights, and, consequently, there is no basis for holding Salt Lake City liable.

A

Plaintiffs maintain that, because Salt Lake City Police violated the Fourth Amendment by unconstitutionally searching and seizing Jerrail Taylor and Adam Thayne, their statements should be excluded in this 42 U.S.C. § 1983 lawsuit. They advance this argument despite the fact that Plaintiffs undisputedly have relied on statements from these same two men in support of their summary-judgment opposition. We reject this challenge. And, in doing so, we join "federal courts of appeals [that] have widely held that the exclusionary rule does not apply in § 1983 cases." *Lingo v. City of Salem*, 832 F.3d 953, 959 (9th Cir. 2016).

The Fourth Amendment offers people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. However, the amendment is silent as to what repercussions should follow a violation of that right. To enforce the Fourth Amendment, courts have crafted the exclusionary rule, under which "evidence obtained in violation of the Fourth Amendment cannot be used in a *criminal proceeding* against the victim of the illegal search and seizure." *United States v.*

Knox, 883 F.3d 1262, 1273 (10th Cir. 2018) (emphasis added) (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)). However, significantly, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Calandra*, 414 U.S. at 348; *accord United States v. Graves*, 785 F.2d 870, 876 (10th Cir. 1986). Its "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Calandra*, 414 U.S. at 347; *accord United States v. Hill*, 60 F.3d 672, 677 (10th Cir. 1995). "Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process . . . ." *Pa. Bd. of Prob. & Parole v. Scott ("Keith Scott")*, 524 U.S. 357, 364 (1998); *see Davis v. United States*, 564 U.S. 229, 237 (2011) ("Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence . . . . And its bottom-line effect, in many cases, is to suppress the truth . . . ." (citations omitted)).

"As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348; *accord United States v. Janis*, 428 U.S. 433, 447 (1976); *Hill*, 60 F.3d at 677. Thus, "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all

proceedings or against all persons." *Calandra*, 414 U.S. at 348; *accord Stone v. Powell*, 428 U.S. 465, 486–87 (1976). "Th[e] deterrence rationale has guided the [Supreme] Court in its attempt to answer questions about the exclusionary rule's scope." *Hill*, 60 F.3d at 677; *see Knox*, 883 F.3d at 1273 ("[W]hether to apply the exclusionary rule in a given case turns on whether such application will be an effective deterrent against future Fourth Amendment violations.").

And the Supreme Court has "generally held the exclusionary rule to apply only in criminal trials" and "significantly limited its application even in that context." *Keith Scott*, 524 U.S. at 364 n.4. Indeed, "[t]he Supreme Court has never held that the benefits of the exclusionary rule outweigh its costs in a civil case." *Black v. Wigington*, 811 F.3d 1259, 1267–68 (11th Cir. 2016); *see Lingo*, 832 F.3d at 958; *see also Townes v. City of New York*, 176 F.3d 138, 145–46 (2d Cir. 1999) ("The Supreme Court has refused . . . to extend the exclusionary rule to non-criminal contexts . . . ."). In particular, "the [Supreme] Court has held that the rule generally does not apply to grand jury proceedings, civil tax proceedings, civil deportation proceedings, or parole revocation proceedings." *Lingo*, 832 F.3d at 958; *see, e.g.*, *Janis*, 428 U.S. at 454 & n.28 (civil tax proceedings); *Powell*, 428 U.S. at 493–95 (habeas proceedings); *INS v. Lopez–Mendoza*, 468 U.S. 1032, 1050–51 (1984) (civil deportation proceedings); *Keith Scott*, 524 U.S. at 364–69 (parole revocation proceedings); *Calandra*, 414 U.S. at 349–52 (grand jury proceedings).

Whether the exclusionary rule bars the use of Adam Thayne and Jerrail Taylor's statements to the Salt Lake City Police for purposes of a § 1983 action is a legal question. Consequently, we review it de novo. *See, e.g.*, *United States v. Paetsch*, 782 F.3d 1162, 1168 (10th Cir. 2015) ("We review de novo the district court's conclusions of law . . . .").

We have not yet determined whether the exclusionary rule applies in § 1983 cases. However, several of our sister circuits have addressed this issue. And they uniformly have concluded that the exclusionary rule—including its component, the fruit-of-the-poisonous-tree doctrine[3]—does not apply in § 1983

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[3] *See, e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) ("[T]his Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. The exclusionary prohibition extends as well to the *indirect* as the direct products of such invasions." (emphasis added) (citation omitted)); *Murray v. United States*, 487 U.S. 533, 536–37 (1988) ("[T]he exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so attentuated as to dissipate the taint[.]'" (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939))); *United States v. Jarvi*, 537 F.3d 1256, 1259 (10th Cir. 2008) ("The poisonous tree doctrine allows a defendant to exclude evidence 'come at by exploitation' of violations of his Fourth Amendment rights." (quoting *Wong Sun*, 371 U.S. at 487–88)); *see also Black*, 811 F.3d at 1267 ("The fruit-of-the-poisonous-tree doctrine is a component of the exclusionary rule."); 3 Wayne R. LaFave et al., CRIMINAL PROCEDURE § 9.3(a) (4th ed.), Westlaw (database updated Dec. 2020) ("In the simplest of exclusionary rule cases, the challenged evidence is quite clearly 'direct' or 'primary' in its relationship to the prior arrest, search, interrogation, lineup or other identification procedure. . . . Not infrequently, however, challenged evidence is 'secondary' or 'derivative' in character. . . . In these situations, it is necessary to determine

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cases and, more specifically, those arising from alleged Fourth Amendment violations. *See Lingo*, 832 F.3d at 959; *Black*, 811 F.3d at 1268; *Townes*, 176 F.3d at 145–46; *Wren v. Towe*, 130 F.3d 1154, 1158 (5th Cir. 1997) (per curiam).

In joining its sister circuits in adopting this position, the Ninth Circuit in *Lingo* wrote persuasively:

> [T]he need to deter unlawful conduct is strongest when that conduct could result in criminal sanction for the victim of the search. Moreover, preventing the government from using evidence in such settings takes away an obvious incentive—the successful prosecution of crime—that may otherwise induce the government to ignore constitutional rights.
>
> Conversely, in a § 1983 suit, the need for deterrence is minimal. Here, application of the exclusionary rule would not prevent the State from using illegally obtained evidence *against* someone, but instead would prevent state actors merely from *defending themselves* against a claim for monetary damages. Exclusion of evidence in this context would not remove any preexisting incentive that the government might have to seize evidence unlawfully. It would simply increase state actors' financial exposure in tort cases that happen to involve illegally seized evidence. In effect, § 1983 plaintiffs would receive a windfall allowing them to prevail on tort claims that might otherwise have been defeated if critical evidence had not been suppressed. Even if such application of the rule might in some way deter violative conduct, that deterrence would impose an extreme cost to law enforcement officers that is not generally countenanced by the doctrine.

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[3](...continued)
whether the derivative evidence is 'tainted' by the prior constitutional or other violation. To use the phrase coined by Justice Frankfurter, it must be decided whether that evidence is the 'fruit of the poisonous tree.'" (footnote omitted) (quoting *Nardone*, 308 U.S. at 341)).

832 F.3d at 958 (citations omitted).

And, the Eleventh Circuit in *Black* cogently reasoned to like effect:

> We now join our sister circuits and hold that the exclusionary rule does not apply in a civil suit against police officers. The cost of applying the exclusionary rule in this context is significant: officers could be forced to pay damages based on an overly truncated version of the evidence. And the deterrence benefits are miniscule. Police officers are already deterred from violating the Fourth Amendment because the evidence that they find during an illegal search or seizure cannot be used in a criminal prosecution—the primary "concern and duty" of the police. Moreover, plaintiffs can still sue a police officer for the illegal search or seizure, regardless whether the officers can rely on illegally obtained evidence to defend themselves against other types of claims. This threat of civil liability will adequately deter police officers from violating the Fourth Amendment, whether or not the exclusionary rule applies in civil cases.

811 F.3d at 1268 (citations omitted) (quoting *Jonas v. City of Atlanta*, 647 F.2d 580, 588 (5th Cir. 1981), *abrogated in part on other grounds as recognized by Lindsey v. Storey*, 936 F.2d 554 (11th Cir. 1991)); *see also Townes*, 176 F.3d at 146 (observing that permitting application of the exclusionary rule's fruit-of-the-poisonous-tree doctrine in § 1983 actions "would vastly overdeter state actors"); *Wren*, 130 F.3d at 1158 (declining to apply the exclusionary rule in a § 1983 action "[b]ased on the deterrent rationale and the precedent").

In their appellate briefing, Plaintiffs cite no on-point authority that supports their position. They simply cite to the Supreme Court's seminal case, *Wong Sun v. United States*, 371 U.S. 471, 484–88 (1963), which generally defines the contours of the exclusionary rule's fruit-of-the-poisonous tree

doctrine in the context of criminal cases. *See supra* note 3. But *Wong Sun* tells us nothing about whether this doctrine is appropriately applied in a civil § 1983 lawsuit, and Plaintiffs do not meaningfully argue to the contrary. Furthermore, though Plaintiffs acknowledge that the circuit law is against them, they make no effort to engage with these circuit decisions or to explain why they are not persuasive on these facts. At bottom, they simply assert in conclusory fashion that "Mr. Taylor is still dead, and there has been no deterrence effect from the actions that happened on the night of" his shooting, and that "[t]here would be a sufficient deterrence effect if [Defendants] were not able to use Adam and Jerrail's statements taken in violation of their constitutional rights to shield them from liability now." Aplts.' Opening Br. at 59.

However, we are not convinced. Instead, we believe, as the Ninth Circuit opined in *Lingo*, that "in a § 1983 suit, the need for deterrence [through application of the exclusionary rule] is minimal" and "that deterrence would impose an extreme cost to law enforcement officers that is not generally countenanced by the doctrine." 832 F.3d at 958; *see Black*, 811 F.3d at 1268 (noting, as to application of the exclusionary rule in the § 1983 civil context, that "the deterrence benefits are minuscule").

Having independently considered the question, we join the "federal courts of appeals [that] have widely held that the exclusionary rule does not apply in § 1983 cases," *Lingo*, 832 F.3d at 959, and particularly embrace in this regard

the persuasive reasoning of the Ninth Circuit in *Lingo* and the Eleventh Circuit in *Black*. Accordingly, we reject Plaintiffs' first challenge to the district court's judgment.

B

1

"We review grants of summary judgment based on qualified immunity de novo." *McCoy v. Meyers*, 887 F.3d 1034, 1044 (10th Cir. 2018) (quoting *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014)); *accord Bond v. City of Tahlequah*, 981 F.3d 808, 814 (10th Cir. 2020), *rev'd on other grounds*, --- U.S. ----, No. 20-1668, 2021 WL 4822664, at *3 (Oct. 18, 2021) (per curiam). We affirm "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). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is 'genuine' if a rational jury could find in favor of the nonmoving party on the evidence presented." *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000) (citation omitted); *accord Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1215 (10th Cir. 2013).

"In applying this standard, we view the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th

Cir. 2016) (quoting *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 997 (10th Cir. 2011)). "In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007); *accord Emmett v. Armstrong*, 973 F.3d 1127, 1130 (10th Cir. 2020).

More specifically, where the record does not unequivocally point in one direction and allows for a genuine dispute concerning the facts, "[a]ll disputed facts must be resolved in favor of the party resisting summary judgment." *McCoy*, 887 F.3d at 1044 (alteration in original) (quoting *White v. Gen. Motors Corp.*, 908 F.2d 669, 670 (10th Cir. 1990)); *see Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (noting that "under either prong" of the qualified-immunity analysis, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment"); *Scott*, 550 U.S. at 380 ("At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party *only* if there is a 'genuine' dispute as to those facts." (emphasis added) (quoting FED. R. CIV. P. 56(c), an earlier, substantively identical iteration of FED. R. CIV. P. 56(a))); *cf. Thomson v. Salt Lake County*, 584 F.3d 1304, 1312 (10th Cir. 2009) ("[B]ecause at summary judgment we are beyond the pleading phase of the litigation, a plaintiff's version of the facts must find support in the record . . . .").

However, the general proposition that we accept plaintiff's version of the facts in the qualified-immunity summary-judgment setting "is not true to the

extent that there is *clear contrary* video evidence of the incident at issue." *Thomas v. Durastanti*, 607 F.3d 655, 659 (10th Cir. 2010) (emphasis added); *see Emmett*, 973 F.3d at 1131 (noting the appropriateness of relying on video evidence that clearly contradicts plaintiff's "story"); *cf. Bond*, 981 F.3d at 813 n.7 ("Because this is an appeal from a grant of summary judgment, we describe the facts viewing the video in the light most favorable to the Estate, as the nonmoving party."). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should *not* adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380 (emphasis added).

2

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)); *see Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013) ("[T]he Supreme Court has recognized that public officials enjoy qualified immunity in civil actions that are brought against them in their individual capacities and that arise out of the performance of their duties."). In applying this protective doctrine, we have recognized that

> [d]amages actions against public officials under § 1983 . . . impose "substantial social costs." They threaten potentially significant personal liability for actions that arise out of the performance of official duties, and they can subject officials to burdensome and distracting litigation. This could lead to undesirable *ex ante* effects: reticence of officials in carrying out important public functions and, perhaps worse, a general disaffection with public service, rooted in the calculation that its costs simply outweigh its benefits.

Pahls, 718 F.3d at 1226–27 (citation omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

Indeed, "[a] defendant's assertion of qualified immunity from suit under 42 U.S.C. § 1983 results in a presumption of immunity." *Bond*, 981 F.3d at 815; *accord Est. of Smart ex rel. Smart v. City of Wichita ("Smart")*, 951 F.3d 1161, 1168 (10th Cir. 2020). A plaintiff "can overcome this presumption only by 'show[ing] that (1) the officers' alleged conduct violated a constitutional right, and (2) it was clearly established at the time of the violation, such that "every reasonable official would have understood," that such conduct constituted a violation of that right.'" *Reavis ex rel. Est. of Coale v. Frost ("Reavis")*, 967 F.3d 978, 984 (10th Cir. 2020) (alteration in original) (quoting *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016)). "The plaintiff must satisfy both prongs to overcome a qualified immunity defense, and we may exercise our discretion as to which prong to address first." *Bond*, 981 F.3d at 815; *see Tolan*, 572 U.S. at 656 (noting that "[c]ourts have discretion to decide the order in which to engage the[] two prongs" of the qualified-immunity standard).

Here, we begin our analysis with the first prong—specifically, the question of whether Officer Cruz violated Mr. Taylor's constitutional rights—and we conclude that he did not. Accordingly, Plaintiffs cannot overcome the presumption of immunity as to the first prong, and that failing is fatal.[4] *See, e.g.*, *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) ("When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff, who *must clear two hurdles* in order to defeat the defendant's motion." (emphasis added)); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996) ("Unless the plaintiff carries its twofold burden, the defendant prevails.").[5]

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[4] On October 18, 2021, the Supreme Court decided *City of Tahlequah v. Bond ("Bond II")*, --- U.S. ----, No. 20-1668, 2021 WL 4822664 (Oct. 18, 2021) (per curiam), which reversed our prior *Bond* decision. Though we rely significantly throughout this opinion on our *Bond* decision, importantly, the Court's analysis in *Bond II* centered on the clearly established law prong of the qualified-immunity standard, and the Court expressly purported to limit the reach of its decision to that prong. *See Bond II*, 2021 WL 4822664, at *2 ("We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place . . . . On this record, the officers plainly did not violate any clearly established law."). Because our decision here ends its analysis (as controlling precedent allows) at the first prong of the qualified-immunity standard (i.e., at the question of whether there was a Fourth Amendment violation) and does not reach the standard's second, clearly established law prong (i.e., the prong at issue in *Bond II*), *Bond II*'s holding and analysis have no direct or material impact on this decision. And, relatedly, we are comfortable relying throughout this opinion on those portions of our prior *Bond* decision that the *Bond II* Court did not invalidate.

[5] Plaintiffs contend that "many issues of material fact are still in dispute" and that the district court erred because it "claimed [them] as undisputed." Aplts.' Opening Br. at 46–47. The reasoning that tacitly underlies

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Plaintiffs' contention, however, is misguided. Specifically, Plaintiffs seem to believe that, through the identification of material disputes of fact, they may demonstrate that the court's grant of summary judgment was erroneous. But "[a]t the summary-judgment phase, a federal court's factual analysis relative to the qualified-immunity question is distinct": the dispositive inquiry of the court is not whether plaintiff (as non-movant) has identified genuine disputes of material fact, but rather whether plaintiff has satisfied his or her two-fold burden of (1) demonstrating a violation of a federal constitutional or statutory right, that (2) was clearly established at the time of the alleged violation. *Cox v. Glanz*, 800 F.3d 1231, 1243 (10th Cir. 2015) ("The court's analysis was not consonant with our settled mode of qualified-immunity decisionmaking. Specifically, the court's central focus was on the existence *vel non* of genuinely disputed issues of material fact, and that focus is counter to our established qualified-immunity approach." (emphasis removed)); *see also Riggins*, 572 F.3d at 1107 (discussing the two-fold burden); *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) ("Because of the underlying purposes of qualified immunity, we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions."). Indeed, in discussing the operative standards, Plaintiffs appear to recognize the truth of this proposition. *See, e.g.*, Aplts.' Opening Br. at 45 ("When the plaintiff *meets* the two-part qualified immunity test a defendant *then* bears the traditional burden of the movant for summary judgment . . . ." (emphases added)). And, in conducting the inquiry regarding whether plaintiff has satisfied the two-fold qualified-immunity burden, insofar as there are material disputes of fact, they are construed in the light most favorable to the plaintiff. *See, e.g.*, *Tolan*, 572 U.S. at 656–57. That is, generally, courts accept a plaintiff's evidence-supported version of the facts in resolving these disputes. *See, e.g.*, *Scott*, 550 U.S. at 378; *McCoy*, 887 F.3d at 1044. Therefore, even if there are genuine disputes of material fact, they do not prejudice a plaintiff in the qualified-immunity summary-judgment context. Finally, to the extent that the gravamen of Plaintiffs' concern is actually that the district court did not properly construe material disputed facts in its favor, we underscore that our review is de novo, and we need not defer to the district court's performance of this task. *See Bond*, 981 F.3d at 813 n.9 (declining to defer to the district court's "view [of] the video as showing that [the shooting victim] backed away and the officers followed him into the garage"); *see also Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018) ("In reviewing a grant of summary judgment, 'we "need not defer to factual findings rendered by the district court."'" (quoting *Amparan v.*
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In factual circumstances such as these, involving the use of force during a law enforcement investigation, "[w]e treat excessive force claims as seizures subject to the reasonableness requirement of the Fourth Amendment. To establish a constitutional violation, the plaintiff must demonstrate the force used was objectively unreasonable." *Est. of Larsen*, 511 F.3d at 1259 (citation omitted); *accord Thomson*, 584 F.3d at 1313; *see also Saucier v. Katz*, 533 U.S. 194, 207 (2001) ("Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred."), *overruled on other grounds by Pearson*, 555 U.S. at 227; *Graham*, 490 U.S. at 393–94 ("We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. . . . In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental

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Lake Powell Car Rental Cos., 882 F.3d 943, 947 (10th Cir. 2018))); *cf. Rivera v. City & County of Denver*, 365 F.3d 912, 920 (10th Cir. 2004) ("Because our review is de novo, we need not separately address Plaintiff's argument that the district court erred by viewing evidence in the light most favorable to the City and by treating disputed issues of fact as undisputed.").

conduct." (footnote and citations omitted)). "[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[6] *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

The reasonableness of a particular use of force must be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[7] *Bond*, 981 F.3d at 815 (quoting *Graham*, 490 U.S. at 396); *see*

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[6] "Deadly force is 'force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person . . . constitutes deadly force.'" *Jiron v. City of Lakewood*, 392 F.3d 410, 415 n.2 (10th Cir. 2004) (omission in original) (quoting *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987)).

[7] In the course of defining the universe of undisputed facts for purposes of its summary-judgment determination, the district court explicitly recognized the need to exclude matters "not supported by the cited evidence; not material; or [that were] not facts, but rather, [] characterization of facts or legal argument." *See Est. of Taylor*, 2019 WL 2164098, at *3 n.17. Nevertheless, the district court repeatedly referenced (in large part through quotations from officer interviews and other parts of the record) the officers' subjective characterizations and speculative thoughts concerning the factual circumstances that they confronted. *See, e.g.*, *id.* at *7, *12–13, *15, *22 (including Officer Cruz's comments about (a) when he experienced fear in his encounter with Mr. Taylor and his companions; (b) his belief, from looking in Mr. Taylor's eyes, that Mr. Taylor was completely defiant and filled with hatred; (c) his belief that Mr. Taylor's face displayed the message that he was going to kill him; and (d) his conviction or certain belief that Mr. Taylor had a gun and was retrieving the gun to kill him or one of the other officers; and also Officer Sylleloglou's belief that Mr. Taylor looked at him with a "hostile and defiant" expression). However, under the Fourth Amendment's controlling, analytical framework—which is centered on objective reasonableness—these matters are irrelevant. *See, e.g.*, *Graham*, 490 U.S. at 397 ("[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are

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Medina v. Cram, 252 F.3d 1124, 1131 (10th Cir. 2001) ("The reasonableness of an officer's conduct must be assessed 'from the perspective of a reasonable officer on the scene,' recognizing the fact that the officer may be 'forced to make split-second judgments' under stressful and dangerous conditions." (quoting *Graham*, 490 U.S. at 396–97)); *Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009) ("We are not well-suited to act as a police supervisory board, making finely calibrated determinations of just what type of misbehavior justifies just what level of response."); *see also Mullins v. Cyranek*, 805 F.3d 760, 767 (6th Cir. 2015) (holding that a police officer's "decision to use deadly force" was

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'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."); *Cortez v. McCauley*, 478 F.3d 1108, 1117 n.8 (10th Cir. 2007) (en banc) (applying the Fourth Amendment objective-reasonableness construct in the arrest context). Consequently, we have disregarded these subjective matters in our statement of the relevant facts, *supra*, and we do not rely on them in our legal analysis. *Cf. Pahls*, 718 F.3d at 1232 ("[I]f the district court commits legal error en route to a factual determination, that determination is thereby deprived of any special solicitude it might otherwise be owed on appeal."(emphasis removed)). Seemingly with such matters in mind, the district court acknowledged that certain identified undisputed facts were "not material"; however, the court nevertheless reasoned that they should be included to "provide a more complete background of the events and circumstances and [to] give context to the parties' arguments." *Est. of Taylor*, 2019 WL 2164098, at *3 n.17. However, we think this approach is ill-advised: even when a court does not actually run afoul of the Fourth Amendment's objective standard in its summary-judgment analysis—by relying on such legally irrelevant matters—incorporating them into its statement of undisputed facts may create confusion or uncertainty among litigating parties, and indeed the public at large, regarding what law enforcement conduct may be permissibly considered in a court's determination of whether a citizen's constitutional rights have been infringed by the use of force.

"reasonable," when "faced with a rapidly escalating situation" and "severe threat to himself and the public," even though it "may appear unreasonable in the 'sanitized world of our imagination'" (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996))); *Lamont v. New Jersey*, 637 F.3d 177, 183 (3d Cir. 2011) (noting that a use of force must be viewed through the lens of a reasonable officer on the scene and "Monday morning quarterbacking is not allowed").[8]

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[8] Plaintiffs argue that the "only crime" that Mr. Taylor and his two companions were committing when the police made contact with them was "being . . . Hispanic and young" and urge us to "provide clear direction to the district courts that shooting unarmed men and women of color will not be objectively reasonable under most circumstances." Aplts.' Opening Br. at 13, 56 (capitalization and bold-face font omitted). At bottom, Plaintiffs appear to invite us to modify the Fourth Amendment's objective-reasonableness standard to take into account the race of the citizen interacting with law enforcement—and, more specifically, a given police officer's subjective perception of the race of a citizen and the officer's possible racial bias (implicit or otherwise). *Id.* at 15–16 (noting that the "objectively reasonable officer standard. . . . should be scrutinized within the context of police shootings of unarmed, minority men across the nation that have become more and more objectively unreasonable"). However, we decline this invitation: in the Fourth Amendment objective-reasonableness analysis related to seizures, we have no reason to believe that these are legally relevant considerations. *Cf. United States v. Mercado-Gracia*, 989 F.3d 829, 837 (10th Cir. 2021) ("This court has rejected interjecting race into the objective reasonable person test . . . ." (citing *United States v. Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018))); *id.* at 837–38 ("Indeed, the Tenth Circuit has specifically disclaimed considerations that could inject the objective reasonable person analysis with subjective considerations: '[W]e reject any rule that would classify groups . . . according to gender, race, religion, national origin, or other comparable status.'" (alteration in original) (quoting *Easley*, 911 F.3d at 1081)). And Plaintiffs cite no authority—controlling or persuasive—that might give us reason to adopt their view. Therefore, we reject Plaintiffs' argument based on the "national concern and awareness surrounding police violence against unarmed men and women of color." Aplts.' Opening Br. at 56.

However, "[o]ur precedent recognizes that the reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Est. of Valverde ex rel. Padilla v. Dodge ("Valverde")*, 967 F.3d 1049, 1060 (10th Cir. 2020) (quoting *Pauly v. White*, 874 F.3d 1197, 1219 (10th Cir. 2017)). [9]

[9] Our earliest decision to expressly articulate the "reckless or deliberate conduct" dimension of the Fourth Amendment excessive-force, reasonableness analysis appears to be *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995). *See id.* at 699 (inquiring "whether [the officers'] own reckless or deliberate conduct during the seizure unreasonably created the need" for the use of deadly force"). In reversing our *Bond* decision on clearly established law grounds, the Supreme Court in *Bond II* reasoned that *Sevier* categorically could not qualify as clearly established law for this proposition. *See Bond II*, 2021 WL 4822664, at *2 ("As for *Sevier*, that decision merely noted in dicta that deliberate or reckless preseizure conduct can render a later use of force excessive before dismissing the appeal for lack of jurisdiction. To state the obvious, a decision where the court did not even have jurisdiction cannot clearly establish substantive constitutional law." (citation omitted)). However, since *Sevier*, the "reckless or deliberate conduct" inquiry has become a standard feature of our excessive-force analysis. *See, e.g.*, *Valverde*, 967 F.3d at 1067; *Pauly*, 874 F.3d at 1219; *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *see also Medina*, 252 F.3d at 1132 ("An officer's conduct before the suspect threatens force is therefore relevant provided it is 'immediately connected' to the seizure and the threat of force. This approach is simply a specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard." (citations omitted) (quoting *Allen*, 119 F.3d at 840)). Because the *Bond II* Court did not "decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment," we do not feel obliged in this case—where the outcome turns on the existence *vel non* of a Fourth Amendment violation—to revisit our well-settled precedent that incorporates a "reckless or deliberate conduct" dimension into the excessive-force analysis. *See also supra* note 4.

This "calculus of reasonableness must [also] embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015) (quoting *Graham*, 490 U.S. at 396–97); *see Valverde*, 967 F.3d at 1060 ("The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others. This is true even when, judged with the benefit of hindsight, the officers may have made some mistakes. The Constitution is not blind to the fact that police officers are often forced to make split-second judgements." (quoting *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 612 (2015))); *id.* at 1062 ("The Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately."); *cf. Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.) ("Detached reflection cannot be demanded in the presence of an uplifted knife.").

"[I]f a reasonable officer in [the] [d]efendant['s] position would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others," that officer's use of force is permissible. *Est. of Larsen*, 511 F.3d at 1260 (emphasis omitted) (quoting *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004)); *see Garner*, 471 U.S. at 11 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm,

either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."); *Valverde*, 967 F.3d at 1060 ("'Courts are particularly deferential to the split-second decisions police must make' in situations involving deadly threats." (quoting *Smart*, 951 F.3d at 1177)).

"[P]robable cause doesn't require an officer's suspicion . . . be 'more likely true than false.'" *United States v. Ludwig*, 641 F.3d 1243, 1252 (10th Cir. 2011) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983)). "It requires only a 'fair probability,' a standard understood to mean something more than a 'bare suspicion' but less than a preponderance of the evidence at hand." *United States v. Denson*, 775 F.3d 1214, 1217 (10th Cir. 2014) (quoting *Ludwig*, 641 F.3d at 1252 & n.5); *see also Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (noting that the probable-cause standard "deals with probabilities and depends on the totality of the circumstances").

4

The proper application of qualified immunity in the Fourth Amendment context "requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. In *Graham v. Connor* the Supreme Court provided three factors to help structure this inquiry: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *See id.* "Our precedents instruct that the

Graham factors are applied to conduct which is 'immediately connected' to the use of deadly force." *Bond*, 981 F.3d at 816 (quoting *Romero v. Bd. of Cnty. Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995)). But, officer conduct prior to the seizure is also relevant to this inquiry. *Id.* (citing *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)). "[E]ven when an officer uses deadly force in response to a clear threat of such force being employed against him, the *Graham* inquiry does not end there." *Id.* (citing *Allen v. Muskogee*, 119 F.3d 837, 839, 841 (10th Cir. 1997)). Specifically, we properly inquire "whether the officer['s] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Valverde*, 967 F.3d at 1067 (quoting *Pauly*, 874 F.3d at 1219).

Construed in the light most favorable to Plaintiffs, the undisputed facts in this case—including the clear video evidence—indicate that the first and third factors favor Plaintiffs. However, "[a]lthough the first and third [*Graham*] factors can be particularly significant in a specific case, the second factor—whether there is an immediate threat to safety—'is undoubtedly the *most important* . . . factor in determining the objective reasonableness of an officer's use of force.'" *See Valverde*, 967 F.3d at 1060–61 (omission in original) (emphasis added) (footnote omitted) (quoting *Pauly*, 874 F.3d at 1216); *see Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1170 (10th Cir. 2021); *Bond*, 981 F.3d at 820; *see also Est. of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1005–06 (9th Cir. 2017) (observing

that, while the first and third *Graham* factors weigh in plaintiff's favor, the "'most important' factor," and the determinative one in a deadly force case, was "whether the suspect posed an 'immediate threat to the safety of the officers or others'" (quoting *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013))).

"That is particularly true when the issue is whether an officer reasonably believed that he faced a threat of serious physical harm." *Valverde*, 967 F.3d at 1061. And, not only is the second factor of singular importance, it also is the most "fact intensive factor." *Pauly*, 874 F.3d at 1216; *see Reavis*, 967 F.3d at 985 (finding that the second *Graham* factor is "undoubtedly the 'most important' and fact intensive factor," and "[t]his is particularly true in a deadly force case, because 'deadly force is justified only if a reasonable officer in the officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others.'" (first quoting *Pauly*, 874 F.3d at 1216, then quoting *Cordova*, 569 F.3d at 1192)).

At bottom, then, "it [is] insignificant whether [an individual was] arrested for a minor crime or was not even a criminal suspect if it reasonably appeared that he was about to shoot a gun at an officer from close range." *Valverde*, 967 F.3d at 1061; *see Reavis*, 967 F.3d at 985; *Cordova*, 569 F.3d at 1190. And the truth of this proposition is on full display here. We conclude that *Graham*'s second factor favors Defendants and controls the outcome of this case. In particular, considering the totality of the circumstances, we conclude that Officer Cruz used

deadly force in response to a reasonably perceived mortal threat from Mr. Taylor. Thus, his decision to shoot Mr. Taylor was objectively reasonable and, consequently, he did not violate Mr. Taylor's Fourth Amendment rights. This holding provides a sufficient basis for affirming the district court's grant of qualified immunity. *See, e.g.*, *McCoy*, 887 F.3d at 1048 (observing that if a plaintiff fails to allege sufficient facts to abrogate qualified immunity on one prong, we need not address the other); *cf. Riggins*, 572 F.3d at 1107 (noting that, to defeat an assertion of qualified immunity, "[t]he plaintiff must demonstrate on the facts alleged *both* that the defendant violated his constitutional or statutory rights, *and* that the right was clearly established at the time of the alleged unlawful activity" (emphases added)).

"For purposes of discussion, we consider the first and third [*Graham*] factors before turning to the crucial second factor." *Bond,* 981 F.3d at 819.

a

The first *Graham* factor—the severity of the crime in question—weighs against the use of significant force. Officer Cruz was responding to a report that an unidentified male "flashed" a gun. Depending on the circumstances, this activity could have been a misdemeanor or a felony—or it could have been no crime at all. *See* UTAH CODE ANN. §§ 76-10-500–532. Based on the 9-1-1 call, a reasonable officer would have been aware that the suspect did not make a threat. Accordingly, viewing the facts in the light most favorable to Plaintiffs, such an

officer would likely have been investigating to determine whether or not the suspect had committed a potential non-violent misdemeanor. And, where the offense is a misdemeanor, the first *Graham* factor ordinarily would weigh against the use of significant force. *See Bond*, 981 F.3d at 819 ("When the severity of the crime is low, such as when the alleged crime was a misdemeanor or unaccompanied by violence, this factor weighs against an officer's use of force."); *Lee v. Tucker*, 904 F.3d 1145, 1149 (10th Cir. 2018) (observing that using the felony/misdemeanor distinction is "consistent with the many cases in which we have held that the first *Graham* factor may weigh against the use of significant force if the crime at issue is a misdemeanor"); *Davis v. Clifford*, 825 F.3d 1131, 1135 (10th Cir. 2016) ("The severity of [the plaintiff's] crime weighs against the use of anything more than minimal force because the charge underlying her arrest . . . is a misdemeanor."); *cf. Henry v. Storey*, 658 F.3d 1235, 1239 (10th Cir. 2011) (observing that a higher level of force is appropriate for a felony arrest because there is a strong incentive to evade arrest and threaten public safety).

b

The third *Graham* factor—active resistance or evasion of arrest—also weighs in favor of Plaintiffs. At the time the officers approached and interacted with Mr. Taylor and his two companions, they did not have probable cause to make an arrest, nor could they reasonably have intended to make an arrest.

Although the description that Dispatch provided of the men associated with the gun closely resembled Mr. Taylor and at least one of his associates, a reasonable officer at this point would know that the reported activity was non-violent and, in fact, could have been lawful. *See, e.g.*, *Pauly*, 874 F.3d at 1222 (holding that the third *Graham* factor "supports plaintiffs" because "when the officers . . . went to the [suspects'] residence, they were not there to make an arrest because no grounds existed to do so"). As a result, because "the officers did not intend to arrest [Mr. Taylor] when they first encountered him[,] . . . . he could not have been actively resisting arrest or attempting to evade arrest by flight . . . ." *Bond*, 981 F.3d at 820.

c

Despite the likely low-level of the crime under investigation (if a crime at all) and the lack of a reasonable basis to arrest Mr. Taylor (or intent to do so), the totality of the circumstances indicates that—by the time Officer Cruz discharged his gun—he reasonably perceived that Mr. Taylor posed an immediate, mortal threat to his safety or the safety of others. More specifically, *Graham*'s second factor weighs heavily in Defendant's favor and is determinative. *See Valverde*, 967 F.3d at 1060–61; *see also Cordova*, 569 F.3d at 1190 ("The threat to the officers themselves—if actual and imminent—could of course shift the calculus in the direction of reasonableness."). We conclude that Officer Cruz "acted reasonably even if he ha[d] a mistaken belief as to the facts establishing the

existence of exigent circumstances." *Smart*, 951 F.3d at 1171 (quoting *Thomas*, 607 F.3d at 666); *see Valverde*, 967 F.3d at 1062 ("The Constitution permits officers to make reasonable mistakes."); *see also Bond*, 981 F.3d at 822 ("Even if the officers misperceived [the suspect's] defensive movements as aggressive, they are entitled to qualified immunity if the misperception was reasonable.").

Although Mr. Taylor "was unarmed," that "does not resolve whether the officers violated his constitutional rights. The salient question is whether the officers' mistaken perceptions that [Mr. Taylor] was [about to use a firearm] were reasonable." *Smart*, 951 F.3d at 1170–71; *see Thomas*, 607 F.3d at 666, 670 (concluding that an officer's decision to shoot at a suspect's car as the car started driving away was "reasonable, even if mistaken," and explaining that "reasonable perceptions are what matter[ ]"). "[T]he use of deadly force is only justified if the officer ha[s] 'probable cause to believe that there was a threat of serious physical harm to [himself] or others.'" *Pauly*, 874 F.3d at 1216 (emphasis omitted) (quoting *Est. of Larsen*, 511 F.3d at 1260); *see also Valverde*, 967 F.3d at 1065 ("[T]he issue is whether a reasonable officer in [the Defendant's] position would have believed [the suspect] was armed and dangerous." (emphasis omitted)).

Recall that when we assess whether a suspect poses an immediate threat permitting the use of deadly force, we consider the totality of the circumstances from the perspective of a reasonable officer. *See Reavis*, 967 F.3d at 988 ("[T]he

question of whether there is no threat, an immediate deadly threat, or that the threat has passed, at the time deadly force is employed must be evaluated based on what a reasonable officer would have perceived under the totality of the circumstances."); *see also Scott*, 550 U.S. at 383 (observing that there is no easy-to-apply legal test for whether an officer's use of deadly force is excessive and concluding that "we must still slosh our way through the factbound morass of 'reasonableness'").

"[T]he totality of the circumstances includes application of the *Graham* and *Estate of Larsen* factors to the *full encounter*, from its inception through the moment the officers employed force." *Bond*, 981 F.3d at 818 (emphasis added). Though we must consider the totality of the circumstances, *Estate of Larsen* lists four factors designed to assist us in evaluating the degree of threat perceived by an officer: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect." 511 F.3d at 1260; *accord Bond*, 981 F.3d at 820. These factors are "aids in making the ultimate determination, which is 'whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force.' The [officer's] belief need not be correct—in retrospect the force may seem unnecessary—as long as it is reasonable." *Tenorio*, 802 F.3d at 1164 (citation

omitted) (quoting *Est. of Larsen*, 511 F.3d at 1260); *see also Reavis*, 967 F.3d at 985 (observing that the factors provided by *Estate of Larsen* are "[s]ome of the factors we consider"). Resolving all factual ambiguities and reasonable inferences in Plaintiffs' favor, we nevertheless conclude that Officer Cruz could have reasonably believed that Mr. Taylor posed a mortal threat to him or others—even though Officer Cruz was tragically mistaken.

i

As to the first *Estate of Larsen* factor, the record clearly establishes that Mr. Taylor ignored or directly disobeyed Officer Cruz and Officer Sylleloglou's commands.

Officer Sylleloglou repeatedly ordered Mr. Taylor to stop and show his hands. During this same time, video evidence records Mr. Taylor ignoring these commands and walking away. Soon after, Mr. Taylor concealed his hands in his waist band. Mr. Taylor then ignored Officer Cruz's repeated commands to "get [his] hands out." Ex. 6 at 0:31–0:35. Indeed, Mr. Taylor responded to Officer Cruz's command not by removing his hands but, rather, by turning around and continuing to separate himself from Officer Cruz by walking backwards. *Id.* at 0:32–0:34. Even when Officer Cruz repeated the instruction, Mr. Taylor continued to face Officer Cruz and walk backwards with his hands concealed. *Id.* at 0:35–0:36. These facts are sufficient to resolve the first *Estate of Larsen* factor in favor of Defendants. When a "suspect is not holding a gun when the

confrontation begins, officers can do little more than what they did in this case: order the suspect to raise his hands and get to the ground." *Valverde*, 967 F.3d at 1061–62 (citing *Garner*, 471 U.S. at 11–12).

ii

As for the second *Estate of Larsen* factor, like the district court, we conclude that "[t]he undisputed material facts and video and photographic evidence of the moments when Mr. Taylor was shot demonstrate that a reasonable officer would believe that Mr. Taylor made a hostile motion with a weapon towards the officers." Aplts' App. at 883. Remember that our inquiry here is a very fact-intensive one, and context is key. *Cf. Pauly*, 874 F.3d at 1216 (noting that *Graham*'s second factor—the overarching rubric for our *Estate of Larsen* inquiry—is the most "fact intensive factor").

Preceding their interaction with Mr. Taylor, Officers Cruz and Sylleloglou had received a transmission from Dispatch indicating that a man had flashed a gun and that this man was accompanied by one other male. Dispatch's description of the man and his male companion fit the description of members of Mr. Taylor's party. When the officers arrived on the scene, Adam Thayne and Jerrail Taylor immediately put their hands above their heads and stayed in place. However, in stark contrast, Mr. Taylor made a 180-degree turn and walked away from the officers. Mr. Taylor refused to follow the officers' repeated commands to stop and show his hands, and he continued walking away.

Observing this conduct, a reasonable officer could conclude that, for some reason—including possibly a nefarious one—Mr. Taylor was seeking to evade law enforcement. *See United States v. Briggs*, 720 F.3d 1281, 1287 (10th Cir. 2013) (noting that "'[b]olting' from officers is not the only relevant and obvious form of evasion" and that "circumstances that reasonably suggest evasion" include "[a] sudden change of direction upon seeing law enforcement" and "an apparent attempt to create distance from the officers"); *cf. United States v. Madrid*, 713 F.3d 1251, 1257 (10th Cir. 2013) ("Both this court and the Supreme Court have held that a suspect's . . . evasive behavior upon noticing police officers is a pertinent factor in determining reasonable suspicion."); *United States v. Salazar*, 609 F.3d 1059, 1069 (10th Cir. 2010) (noting that "a suspect's evasive behavior as an officer approaches may be considered in determining [whether] reasonable suspicion" existed); *cf. also Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (stating that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). And, having heard a Dispatch communication that someone in a group matching the description of Mr. Taylor and his companions was carrying a gun, and then observing Mr. Taylor's evasive behavior, Officer Cruz (as well as Officer Sylleloglou) reasonably could have concluded that, if anyone in the group had a firearm, it was Mr. Taylor.

Moreover, the quantum of reasonable belief that Mr. Taylor actually possessed a firearm would likely have been significantly increased when—less

than ten seconds after he started walking away from Officers Cruz and Sylleloglou—Mr. Taylor raised his hands from his sides, appeared to place one or both of his hands in the front of his pants' waistband, and continued to refuse to comply with the officers' commands to show his hands. *See Briggs*, 720 F.3d at 1283, 1288 n.4 (stating that "[c]ommon sense suggests that pockets are often used to carry all manner of items," but "[t]he same cannot be said of a person's waistline," and relying on an officer's testimony "that, in his training and experience, people who illegally carry weapons often keep them at their waistline and touch or grab at the weapon when they encounter police"); *see also United States v. Dubose*, 579 F.3d 117, 122 (1st Cir. 2009) (Ebel, J., sitting by designation) ("[Police officer] testified that after [the suspect] turned around with his hand still in his pocket, he became fearful that [the suspect] was carrying a weapon. He stated that drug dealers often carry weapons concealed in their waistbands . . . . [The officer's] concerns were further compounded by [the suspect's] initial refusal to remove his hand from his pocket . . . ."). Indeed, it was at this moment—seemingly evincing their reasonable concern that Mr. Taylor had a firearm—that both Officer Cruz and Officer Sylleloglou pointed their firearms at Mr. Taylor.

In addition, Mr. Taylor "was not merely walking away." *Briggs*, 720 F.3d at 1287. Rather, he was verbally challenging the officers—as to Officer Sylleloglou, saying things like, "What are you going to do? Come on, . . . shoot

me." Aplts.' App. at 551. And, only a few seconds after Mr. Taylor placed one or both of his hands in his waistband, Mr. Taylor turned around and faced Officer Cruz and continued moving away by walking backwards. Both of his hands were in his waistline then and concealed, and Mr. Taylor appeared to be moving his hands in a "digging" motion, like he was "manipulating" something. *Id.* at 455–57.

As soon as Mr. Taylor faced him, Officer Cruz stated a second time, "get your hands out." Ex. 6 at 0:33–0:34. Yet Mr. Taylor responded, "Nah, fool." *Id.* at 0:35; *see* Aplts.' App. at 564. Mr. Taylor continued to move his concealed hands in a way that suggested he was manipulating something in the waistline of his pants. Officer Cruz had started ordering Mr. Taylor to remove his hands a third time when, without verbal warning, Mr. Taylor rapidly removed his left hand from his waistband—lifting his shirt and exposing his torso—and, virtually simultaneously, withdrew his right hand from his waistband but lower than his left hand. The motion took less than one second and was consistent with the drawing of a gun. *See supra* note 2.

More specifically, in this context—even construing all of the factual circumstances in the light most favorable to Plaintiffs—a reasonable officer could well conclude that Mr. Taylor's drawing motion was hostile and that he sought to use a firearm against Officer Cruz or the other officers, even though this risk assessment ultimately proved to be mistaken. *See Reese v. Anderson*, 926 F.2d

494, 500–01 (5th Cir. 1991) (concluding, where the unarmed suspect displayed "defiance" of the officer's orders to "raise his hands" and was repeatedly "reach[ing]" below the officer's line of sight, that the officer "could reasonably believe that [the suspect] had retrieved a gun and was about to shoot," that it was "irrelevant . . . that [the suspect] was actually unarmed" because the officer "did not and could not have known this," and that the suspect's "actions alone could cause a reasonable officer to fear imminent and serious physical harm"); *Valverde*, 967 F.3d at 1062 ("The Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately."); *see also Slattery v. Rizzo*, 939 F.2d 213, 214–17 (4th Cir. 1991) (Powell, J., sitting by designation) (concluding that an officer's decision to shoot an unarmed suspect seated in his car during a buy-bust operation was constitutional, where the suspect ignored the officer's commands to "put up his hands" and appeared to have his left hand "partially closed around an object," and then "turned his entire upper body towards the officer, who could still not see [the suspect's] left hand"—leaving the officer "believing that [the suspect] was coming at him with a weapon"); *Lamont*, 637 F.3d at 183–84 (concluding that an officer's use of deadly force against an unarmed suspect was reasonable and constitutional where "troopers repeatedly ordered him to show his hands and to freeze" but the suspect "refused to comply" and, instead, "stood with his right hand concealed in his waistband, apparently clutching an object"; when the

suspect "then suddenly pulled his right hand out of his waistband—a movement uniformly described by those on the scene as being similar to that of drawing a gun. . . . the troopers were justified in opening fire"); *see also Pollard v. City of Columbus*, 780 F.3d 395, 403 (6th Cir. 2015) (deciding that the officers' decision to shoot an unarmed suspect was reasonable "after [the suspect] regained consciousness and made gestures suggesting he had a weapon, gestures he continued to make even after officers told him to 'Drop it' and 'Don't do it'"); *Anderson v. Russell*, 247 F.3d 125, 130–32 (4th Cir. 2001) (concluding that an officer was not liable for shooting an unarmed suspect because a witness informed the officer that the suspect appeared to have a gun and the suspect reached for a bulge in his pocket against the officer's commands; the court concluding that, when the suspect reached for the bulge, the officer could have "reasonably believed that [the suspect] posed a deadly threat to himself and others").

Stated otherwise, at the culmination of this tense, rapidly-evolving interaction with Mr. Taylor—when, without verbal warning, Mr. Taylor rapidly used his left hand to lift his shirt, while removing his right hand from his waistband—a reasonable officer could have well decided that Mr. Taylor's conduct was hostile and, indeed, involved a mortal threat of gun violence, even if that judgment ultimately was mistaken. *See Jiron*, 392 F.3d at 415 ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back [rather than surrender,] the officer would be justified in using more force than in fact was

needed." (citation omitted)); *cf. Reavis*, 967 F.3d at 988 ("[T]he question of whether there is no threat, an immediate deadly threat, or that the threat has passed, at the time deadly force is employed must be evaluated based on what a reasonable officer would have perceived under the totality of the circumstances."); *Lamont*, 637 F.3d at 183 (noting that "[a]n officer is not constitutionally required to wait until he sets eyes upon [a] weapon before employing deadly force to protect himself against a fleeing suspect who . . . moves as though to draw a gun" and that "[w]aiting in such circumstances could well prove fatal" (omission and second alteration in original) (quoting *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001))).

Indeed, Officer Sylleloglou's almost immediate response to Mr. Taylor's rapid hand motions bolsters this conclusion. For the first time in his approximately nine years in law enforcement, Officer Sylleloglou felt compelled, in real-world circumstances, to place his finger on the trigger of his firearm, and he testified that he had been trained not to do so, unless he was prepared to shoot. Consequently, a reasonable jury could infer from this circumstance that, like Officer Cruz, Officer Sylleloglou also was prepared to use deadly force against Mr. Taylor. We have previously reasoned that the fact that a fellow officer "was also prepared to use force" is one factor in the totality-of-the-circumstances analysis that "support[s] the heightened immediacy of the threat [the officers] faced and the objective reasonableness of the use of deadly force." *Est. of*

Larsen, 511 F.3d at 1260.

Plaintiffs point to Officer Sylleloglou's decision not to fire his weapon as evidence that a reasonable officer on the scene would have elected not to shoot Mr. Taylor. But whether Officer Sylleloglou actually fired his weapon is largely irrelevant. *See Valverde*, 967 F.3d at 1065 ("[T]he failure of the other officers to fire is of little relevance."). The critical indicator for this factor, as shown in *Estate of Larsen*, is how Officer Sylleloglou assessed the situation. *See* 511 F.3d at 1260. That is, for the first time in his nine years in law enforcement, Officer Sylleloglou had his finger on the trigger of his weapon and was ready to shoot Mr. Taylor. If anything, these facts cut against Plaintiffs because they show that Officer Sylleloglou and Officer Cruz's assessments of the threat were (in all material respects) identical. *See id.* at 1263 n.4.

Furthermore, "[t]he [central] issue is whether a reasonable officer *in [Officer Cruz's] position* would have believed [Mr. Taylor] was armed and dangerous." *Valverde*, 967 F.3d at 1065. Mr. Taylor concealed his hands and then faced Officer Cruz, while Officer Sylleloglou was positioned some ten to twenty feet to Mr. Taylor's left. As a result, Officer Sylleloglou had less direct information. More importantly, because Officer Cruz was directly in front of Mr. Taylor, Mr. Taylor's actions, which were consistent with rapidly attempting to draw a firearm, placed Officer Cruz, and not Officer Sylleloglou, in the most immediate danger. *See id.*; *Est. of Larsen*, 511 F.3d at 1263 n.4 (observing that

the calculus was different for the officer's partner, who did not shoot, because the suspect was not approaching the partner with a knife). Thus, Officer Sylleloglou's position, while still precarious from the perspective of a reasonable responding officer, was safer than Officer Cruz's location. *See Est. of Larsen*, 511 F.3d at 1263 n.4; *cf. Jordan v. Howard*, 987 F.3d 537, 547 (6th Cir. 2021) (observing that when two officers are in different positions with respect to a suspect, their information and respective risk assessments will be different). And yet, even with this additional margin of safety, Officer Sylleloglou, for the first time in his nine years as a police officer, had his finger on his weapon's trigger and was prepared to shoot Mr. Taylor—lending further credence to the conclusion that in the "tense, uncertain, and rapidly evolving" circumstances facing Officer Cruz, *Valverde*, 967 F.3d at 1064 (quoting *Thomson*, 584 F.3d at 1318), his decision to shoot Mr. Taylor was reasonable.

In sum, the second factor weighs in favor of Defendants.

iii

Turning to the third *Estate of Larsen* factor, the distance separating Officer Cruz and Mr. Taylor also weighs in Defendants' favor. When Officer Cruz exited his vehicle he was about thirty feet away from Mr. Taylor. And, from the moment that Mr. Taylor concealed his hands to the moment he was shot, Officer Cruz was between ten and twenty feet from him. As the district court found, at the moment when Mr. Taylor made a motion consistent with the drawing of a

gun—taking less than one second—Mr. Taylor was "approximately 10 to 12 feet away from Officer Cruz." Aplts.' App. at 865. And, at that point, Officer Cruz was exposed: he was standing in an open parking lot with Mr. Taylor. The short distance separating Mr. Taylor and Officer Cruz, compounded by the absence of immediately accessible cover that Officer Cruz could use to avoid potential harm, causes this third factor to weigh in Defendants' favor. *Cf. Hicks v. Scott*, 958 F.3d 421, 435–36 (6th Cir. 2020) (noting that the officer "reasonably perceived an immediate threat to her safety when a rifle was pointed at her face from five feet away" and "the threat perceived by [the officer] was further compounded" not only "by her close proximity to the rifle," but also by the "lack of a viable escape route," as "there was little space to maneuver and no obvious path for retreat"); *cf. also Pauly*, 874 F.3d at 1209 ("Given his cover [of a brick wall], the distance from the window [i.e., fifty feet], and the darkness, a reasonable jury could find that [the officer] was not in immediate fear for his safety or the safety of others.").

iv

As for the last *Estate of Larsen* factor—"the manifest intentions of the suspect," 511 F.3d at 1260—this factor, too, weighs in Defendants' favor. The term "manifest" is of central importance to the understanding and application of this factor. The term is consonant with the oft-stated, objective nature of the Fourth Amendment reasonableness analysis. *See, e.g.*, *Cordova*, 569 F.3d at 1188

("Reasonableness 'must be judged from the perspective of a reasonable officer on the scene,' who is 'often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" (quoting *Graham*, 490 at 396–97)). And, as the district court would seemingly agree, a key lesson here is that "the focus of the inquiry is not on . . . what Mr. Taylor *subjectively* intended"—be it "with his hand movements" or otherwise. Aplts.' App. at 883 (emphasis added). Accordingly, our inquiry's focus is on how a reasonable officer on the scene would have assessed the manifest indicators of Mr. Taylor's intentions—that is, Mr. Taylor's actions.

We have seen from the discussion in subpart (B)(4)(c)(ii), *supra*, that a reasonable officer could have perceived from Mr. Taylor's actions not only that his intentions were hostile, but also that they were malevolent. In particular, as we have detailed elsewhere, *see supra* note 2, the record does not support Plaintiffs' contentions that Mr. Taylor's hand movements at the end of his interaction with Officer Cruz are consistent with Mr. Taylor simply pulling up his pants or complying (albeit belatedly) with the officers' commands to show his hands. *See, e.g.*, Aplts.' Opening Br. at 37 ("Viewing the facts in the light most favorable to Mr. Taylor would require the Court consider his hand movement simply pulling up his pants as opposed to reaching for a weapon or failing to comply to orders to raise his hands."); *id.* at 42 ("When Mr. Taylor did put his

hands up to show Officer Cruz he did not have a weapon, Officer Cruz shot him."). Indeed, as the district court noted, "[t]he undisputed material facts . . . do not reasonably suggest that Mr. Taylor abruptly decided to become compliant with the officers' commands that he stop and show his hands." Aplts.' App. at 886.[10]

Rather, even viewing the facts in the light most favorable to Plaintiffs, the record indicates that Mr. Taylor's hand gestures immediately before he was shot were consistent with drawing a gun against Officer Cruz or the other officers, *see supra* note 2—that is, his conduct reflected bad intentions. Furthermore, recall that Mr. Taylor's actions before this ultimate moment when Officer Cruz shot him likewise were not indicative of benign intentions. In particular, not only did Mr. Taylor ignore commands from the officers to stop and show his hands—he also verbally challenged them, saying things like, "What are you going to do? Come on, . . . shoot me," and "Nah, fool." Aplts.' App. at 455–57, 551, 564.

In sum, we conclude that the record evidence indicates that—even if Mr. Taylor's *subjective* intentions were good or harmless—his *manifest* intentions

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[10] This case is distinguishable from *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006). In *Walker* we determined that, under plaintiff's version of the facts, "[t]he angle of [the suspect's] hands and the amount of light on the scene should have permitted [the officer] to ascertain that [the suspect] was not holding a gun in a shooting stance." *Id.* at 1160. As shown above, that was not the case here. Mr. Taylor's hands were concealed for much of the encounter, and Officer Cruz had a split second to decide whether Mr. Taylor was complying with an order to show his hands or attempting to draw and use a weapon.

were hostile and malevolent. Accordingly, this last *Estate of Larsen* factor also weighs in Defendants' favor.

d

Thus far, a key focus of our analysis has been the perception of danger that reasonable officers in Officer Cruz's position would have had at the precise moment that lethal force was used. But the Fourth Amendment excessive-force inquiry is not limited to such moments. *See Valverde*, 967 F.3d at 1066–67; *see also Bond*, 981 F.3d at 822 ("[O]ur review is not limited to [the precise moment an officer decides to shoot a suspect]. . . . [W]e [also] consider the totality of circumstances leading to the fatal shooting . . . ."). "[T]he reasonableness of [an officer's] use of force depends" also "on whether the officer['s] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Valverde*, 967 F.3d at 1067 (quoting *Pauly*, 874 F.3d at 1219); *accord Est. of Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019); *Allen*, 119 F.3d at 840; *see also Bond*, 981 F.3d at 824 (concluding that "the officers' role in [escalating the dynamics of the encounter with an impaired individual was] not only relevant, but determinative").

Thus, some of our key cases in this area "teach that the totality of the facts to be considered in determining whether the level of force was reasonable includes any immediately connected actions by the officers that escalated a non-lethal situation to a lethal one." *Bond*, 981 F.3d at 818 (analyzing these key

cases). Specifically, on prior occasions "we held officers violated the Fourth Amendment whe[n] they recklessly confronted armed and impaired individuals, creating the need for the use of deadly force." *Id.* at 823. However, it is important to underscore that "[m]ere negligent actions precipitating a confrontation would not, of course, be actionable under § 1983." *Jiron*, 392 F.3d at 415 (alteration in original) (quoting *Sevier*, 60 F.3d at 699 n.7); *see also Medina*, 252 F.3d at 1132 ("We emphasize, however, that, in order to constitute excessive force, the [officer's] conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence."). Moreover, "[e]ven if the officers misperceive[] [plaintiff's] defensive movements as aggressive, they are entitled to qualified immunity if the misperception [is] reasonable." *Bond*, 981 F.3d at 822; *cf. Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007) (en banc) ("Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." (quoting *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995))).

Here, even construing the record in the light most favorable to Plaintiffs, there is no basis for concluding that Officer Cruz acted recklessly and unreasonably in the circumstances surrounding his seizure of (i.e., use of lethal force against) Mr. Taylor, or that any such actions by Officer Cruz "immediately connected with the seizure" "creat[ed] the need for force." *Medina*, 252 F.3d at

1132; *see, e.g.*, *Thomas*, 607 F.3d at 667–68; *Thomson*, 584 F.3d at 1304. The district court expressly stated as much: "[v]iewing the undisputed material facts in their totality, and in a light most favorable to Plaintiffs, Officer Cruz's conduct before and during the encounter did not recklessly or deliberately create the need for his use of deadly force." Aplts.' App. at 893.

In their contrary arguments on appeal, Plaintiffs offer little more than conclusory assertions. *See* Aplts.' Opening Br. at 25 ("Officer Cruz created and exacerbated the situation that gave rise to Mr. Taylor's disputedly-threatening actions."); Aplts.' Reply Br. at 24 ("Officer Cruz's actions were reckless, and objectively unreasonable."); *see also* Aplts.' Opening Br. at 26 (noting that Officer Cruz and the other officers should have just "driv[en] away" when they observed Mr. Taylor's group "exit from [the] 7-Eleven without incident"). Indeed, highlighting the deficiency of their argument, Plaintiffs point to no evidence that would create a genuine dispute about the district court's finding.

Moreover, contrary to some of our seminal cases in this area, where the officers' conduct was deemed reckless, there is no evidence here that a reasonable officer in Officer Cruz's position would have had reason to believe—when he interacted with Mr. Taylor—that Mr. Taylor was impaired in any way by emotional or psychological problems. *Cf. Hastings v. Barnes*, 252 F. App'x 197, 206 (10th Cir. 2007) (unpublished) (holding that some of our key cases "clearly establish that an officer acts unreasonably when he aggressively confronts an

armed and suicidal/emotionally disturbed individual without gaining additional information or by approaching him in a threatening manner");[11] *accord Bond*, 981 F.3d at 823 (observing that "we [have] held officers violated the Fourth Amendment where they recklessly confronted armed and impaired individuals, creating the need for the use of deadly force."). Likewise, a reasonable officer in Officer Cruz's shoes would not have had any reason to believe that Mr. Taylor's judgment was impaired through ingestion of alcohol or other intoxicants. *Cf. Bond*, 981 F.3d at 823 (noting that, "[a]s in" some of our prior precedents that found reckless escalation, "the officers here advanced upon an impaired individual," who was likely drunk, "escalating the tension and fear"); *id.* at 824 ("Thus, a jury could reasonably determine that the officers here . . . unreasonably escalated a non-lethal situation into a lethal one through their own deliberate or reckless conduct.").

Indeed, nothing in this record could lead a reasonable jury to infer that Officer Cruz recklessly caused Mr. Taylor to take actions to threaten Officer Cruz or his fellow officers with serious injury or death. *Cf. id.* at 824 ("A jury could find that the officers recklessly created a lethal situation by driving [the shooting victim] into the garage and cornering him with his tools in reach"). It is a tragic

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[11] In our published decision in *Bond*, we discussed *Hastings* at some length and found its analysis of the reckless-escalation issue "persuasive"—even though *Hastings* is an unpublished decision. *Bond*, 981 F.3d at 817 & n.13, 818. We also find *Hastings* persuasive and informative regarding this issue.

and regrettable truth that Officer Cruz was mistaken in believing that Mr. Taylor posed a mortal threat to him when Mr. Taylor rapidly withdrew his hands from his waistband. But that does not mean Officer Cruz's conduct in shooting Mr. Taylor was unreasonable. *See, e.g.*, *id.* at 822 (observing that, even if officers misperceive a subject's defensive movements as aggressive, they are entitled to qualified immunity if the misperception is objectively reasonable); *Jiron*, 392 F.3d at 415 ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed." (omission in original) (quoting *Saucier*, 533 U.S. at 205)).

The critically important question is whether a reasonable officer standing in the shoes of Officer Cruz at the time of his encounter with Mr. Taylor would have felt justified in taking the steps that led to the use of deadly force. *See, e.g.*, *id.* at 418 (noting that, though waiting for backup rather than engaging an armed suspect might have led to a "more peaceful[] resol[ution]," such a "retrospective inquiry" is irrelevant and the officer "adequately performed her duties as a reasonable law enforcement officer by taking steps to prevent an armed and agitated suspect from escaping"). And, based on the totality of the circumstances, we answer this question in the affirmative.

In so doing, we are mindful that the Fourth Amendment does not require police to use "the least restrictive means as long as their conduct is reasonable." *Thomas*, 607 F.3d at 665: *accord Jiron*, 392 F.3d at 414; *see Medina*, 252 F.3d at

1133 ("[T]he reasonableness standard does not require that officers use 'alternative "less intrusive" means.'" (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647–48 (1983))); *see also Cortez*, 478 F.3d at 1146 (Gorsuch, J., concurring in part) ("[I]t is not the law that officers must always act in the least intrusive manner possible or employ only that force that might be deemed necessary in hindsight; indeed, we have repeatedly held otherwise . . . .").

And, in this regard, we are unpersuaded by Plaintiffs' specific contention that Officer Cruz and the other officers should have just "driv[en] away" when they observed Mr. Taylor's group "exit from [the] 7-Eleven without incident." Aplts.' Opening Br. at 26. While the 9-1-1 call reporting a male flashing a gun could have been describing a low-level misdemeanor, or even no crime at all, we are not aware of any precedent indicating that a reasonable officer would have been obliged to drive away and forgo an investigation, and Plaintiffs offer us none. *See, e.g.*, *United States v. Guardado*, 699 F.3d 1220, 1225 (10th Cir. 2012) ("Direct evidence of a specific, particular crime is unnecessary. The Fourth Amendment merely requires commonsense judgments and reasonable inferences. Even conduct that is lawful, when observed through the prism of experience and considered in light of the circumstances, may warrant further investigation." (citations omitted)); *cf. Adams v. Williams*, 407 U.S. 143, 145 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders

and allow a crime to occur or a criminal to escape."); *Briggs*, 720 F.3d at 1289 (observing that "weapons—guns, knives, or others—whether legally carried or not, can be used for unlawful purpose," and then concluding that officers need not "disregard indications that the suspect is carrying a concealed weapon at his waistline merely because it is possible the suspect has a concealed-carry permit").

Even if we assume that Officers Cruz and Sylleloglou lacked a reasonable basis to stop and detain Mr. Taylor under the well-settled principles of *Terry v. Ohio*, 392 U.S. 1, 21 (1968),[12] acting reasonably, they were nevertheless free to attempt to engage in a consensual interaction with Mr. Taylor and his companions in furtherance of their investigation into the circumstances surrounding the flashing of the gun. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Our

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[12] Defendants maintain that "[t]he use of firearms in connection with an investigative or '*Terry*' stop is permissible whe[n] the officer reasonably believes a weapon is necessary for protection." Aplees.' Resp. Br. at 30 (footnote omitted). However, that argument seems to assume that the officers had reasonable suspicion to effect a Fourth Amendment seizure of Mr. Taylor (i.e., to stop and detain him) under *Terry*. *Cf. Navarette v. California*, 572 U.S. 393, 396–401 (2014); *Arizona v. Johnson*, 555 U.S. 323, 330 (2009). Defendants, however, do not make a meaningful argument supporting this assumption. Indeed, they provide neither evidence from the record nor caselaw showing that the responding officers had a reasonable suspicion to stop and detain Mr. Taylor. Absent meaningful argument on this matter, we assume that the responding officers lacked reasonable suspicion to stop and detain Mr. Taylor. *See Bond*, 981 F.3d at 822 n.15. And the officers did not in fact seize Mr. Taylor through their "show of authority" and commands because there was no "voluntary submission" by him; he kept walking. *Torres v. Madrid*, --- U.S. ----, 141 S. Ct. 989, 1001 (2021); *see United States v. Roberson*, 864 F.3d 1118, 1121 (10th Cir. 2017); *accord Smith v. City of Chicago*, 3 F.4th 332, 340 (7th Cir. 2021).

cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions."); *see also Carpenter v. United States*, --- U.S. ----, 138 S. Ct. 2206, 2217 (2018) (observing that law enforcement officers can follow and surveil suspects in areas where those suspects do not have an expectation of privacy). And, in these types of interactions—not involving a Fourth Amendment seizure—a reasonable officer still must grapple with "the practical difficulties of attempting to assess [a] suspect's dangerousness," *Garner*, 471 U.S. at 20, and such an officer does not give up the "right to take reasonable steps to protect himself," *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993); *see also United States v. Carter*, 360 F.3d 1235, 1240 (10th Cir. 2004) (observing that an officer lawfully drew his weapon to protect himself when confronted by an aggressive defendant and his friend, despite not having probable cause or reasonable suspicion when the encounter began).

Unlike in circumstances where we have determined that officer-initiated conduct recklessly heightened the atmosphere of "tension and fear," *Bond*, 981 F.3d at 823, leading a suspect to respond in a manner necessitating the use of deadly force, Mr. Taylor was the primary initiator of the actions here that heightened the atmosphere of tension and fear. As soon as the officers approached him and his companions, Mr. Taylor made a 180-degree turn and walked away. And, as we have discussed, *see* subpart (B)(4)(c)(ii), *supra*, having

heard a Dispatch communication that someone in a group matching the description of Mr. Taylor and his companions was carrying a gun, and then observing Mr. Taylor's evasive behavior, Officer Cruz (as well as Officer Sylleloglou) reasonably could have concluded that, if anyone in the group had a firearm, it was Mr. Taylor. Thereafter, the officers took reasonable responsive actions to ensure their safety, while furthering their legitimate investigation into the flashing of the firearm. Specifically, Officers Cruz and Sylleloglou followed Mr. Taylor at a distance and ordered him to show his hands and stop. But Mr. Taylor did neither.

Not only did Mr. Taylor not show the officers his hands, but rather, less than ten seconds after he started walking away from Officers Cruz and Sylleloglou, Mr. Taylor raised his hands from his sides and appeared to place one or both of his hands in the front of his pants' waistband. This action likely would have had the effect on reasonable officers of significantly increasing their quantum of belief that Mr. Taylor actually possessed a firearm. *See, e.g.*, *Briggs*, 720 F.3d at 1283, 1288 n.4 (stating that "[c]ommon sense suggests that pockets are often used to carry all manner of items," but "[t]he same cannot be said of a person's waistline," and relying on an officer's testimony "that, in his training and experience, people who illegally carry weapons often keep them at their waistline and touch or grab at the weapon when they encounter police").

Moreover, Mr. Taylor "was not merely walking away," *id.* at 1287, and

declining to speak to the officers—as citizens are free to do, unless the officers possess reasonable suspicion to detain them. Instead, Mr. Taylor was verbally challenging the officers—initially, Officer Sylleloglou—saying things like, "What are you going to do? Come on, . . . shoot me." Aplts.' App. at 551. As the threatening situation developed, Mr. Taylor continued to refuse to comply with the officers' orders, and—without any provocative actions or other changes in the behavior of Officers Cruz and Sylleloglou—Mr. Taylor's initiated a new course of action that the officers reasonably could have viewed as escalating the tensions. That is, only a few seconds after Mr. Taylor placed one or both of his hands in his waistband, Mr. Taylor turned around and faced Officer Cruz and continued moving away by walking backwards. Both of his hands were then in his waistline and concealed, and Mr. Taylor appeared to be moving his hands in a "digging" motion, like he was "manipulating" something. *Id.* at 455–57.

These actions by Mr. Taylor—appearing to manipulate something in his waistband—would have heightened the atmosphere of tension and fear, to say the least. And, indeed, under the totality of the circumstances, a reasonable officer could have perceived that his conduct was threatening serious harm. *See, e.g.*, *Reese*, 926 F.2d at 500–01 (concluding, where the unarmed suspect displayed "defiance" of the officer's orders to "raise his hands" and was repeatedly "reach[ing]" below the officer's line of sight, that the officer "could reasonably believe that [the suspect] had retrieved a gun and was about to shoot," that it was

"irrelevant . . . that [the suspect] was actually unarmed" because the officer "did not and could not have known this," and that the suspect's "actions alone could cause a reasonable officer to fear imminent and serious physical harm"); *Slattery*, 939 F.2d at 214–17 (concluding that an officer's decision to shoot an unarmed suspect seated in his car during a buy-bust operation was constitutional, where the suspect ignored the officer's commands to "put up his hands" and appeared to have his left hand "partially closed around an object," and then "turned his entire upper body towards the officer, who could still *not* see [the suspect's] left hand"—leaving the officer "believing that [the suspect] was coming at him with a weapon" (emphasis added)); *see also* subpart (B)(4)(c)(ii), *supra*.

Yet, Officer Cruz and Officer Sylleloglou did not react to this conduct initiated by Mr. Taylor with the type of "reckless . . . police onslaught" that we have found characterized unconstitutional police actions. *See Valverde*, 967 F.3d at 1067. Nor did the officers box Mr. Taylor into a confined space and antagonize him into acting aggressively. *Cf. Bond*, 981 F.3d at 819, 822–24. Rather, Officers Cruz and Sylleloglou maintained their ten- to twenty-foot distance—with their guns pointed at Mr. Taylor—and repeated their calls for him to stop and show his hands. These actions were hardly reckless—and, indeed, were reasonable—responses to the actions of a non-compliant individual that the officers reasonably believed might be carrying, *and now manipulating*, a firearm.

Lastly, rather than simply continue to walk away, Mr. Taylor made rapid

gestures with his hands—while facing Officer Cruz—that reasonably led Officer Cruz to believe that Mr. Taylor was drawing a gun and presenting a mortal threat. *See Lamont*, 637 F.3d at 183 (concluding that an officer's use of deadly force against an unarmed suspect was reasonable and constitutional where "troopers repeatedly ordered him to show his hands and to freeze" but the suspect "refused to comply" and, rather, "stood with his right hand concealed in his waistband, apparently clutching an object"; when the suspect "then suddenly pulled his right hand out of his waistband—a movement uniformly described by those on the scene as being similar to that of drawing a gun. . . . the troopers were justified in opening fire"); *see also Pollard*, 780 F.3d at 403 (deciding that the officers' decision to shoot an unarmed suspect was reasonable "after [the suspect] regained consciousness and made gestures suggesting he had a weapon, gestures he continued to make even after officers told him to 'Drop it' and 'Don't do it'"); subpart (B)(4)(c)(ii), *supra*. Mr. Taylor's last action was *not* "in direct response to the officers' conduct," *Bond*, 981 F.3d at 824—that is, the officers took no new action to prompt this sudden movement by Mr. Taylor. Rather, it was an action initiated by Mr. Taylor that forced the officers to make a split-second judgment on how to respond, and we have concluded that Officer Cruz reasonably responded with deadly force. Tragically, Officer Cruz's perception that Mr. Taylor posed a mortal threat was mistaken. But Officer Cruz's perception was nevertheless reasonable. *See Anderson*, 247 F.3d at 132 ("[An officer's]

split-second decision to use deadly force against [the suspect] was reasonable in light of [the officer's] well-founded, though mistaken, belief that [the suspect] was reaching for a handgun."); *see also Valverde*, 967 F.3d at 1064 ("The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm." (quoting *Elliott v. Leavitt*, 99 F.3d 640, 641 (4th Cir. 1996))); *Lamont*, 637 F.3d at 183 ("[The suspect] then suddenly pulled his right hand out of his waistband—a movement uniformly described by those on the scene as being similar to that of drawing a gun. At that point, the troopers were justified in opening fire. . . . Waiting in such circumstances could well prove fatal." (citation omitted)).

Based on the foregoing, then, it cannot be said here that officer-initiated conduct recklessly heightened the atmosphere of "tension and fear," *Bond*, 981 F.3d at 823, which led Mr. Taylor to respond in a manner necessitating the use of deadly force. Instead, it was Mr. Taylor who was the primary initiator of actions that could have that effect. More generally, even construing the record in the light most favorable to Plaintiffs, there is no basis for concluding that Officer Cruz acted recklessly and unreasonably in the circumstances surrounding his seizure of (i.e., use of lethal force against) Mr. Taylor, or that any such actions by Officer Cruz "immediately connected with the seizure" "creat[ed] the need for force." *Medina*, 252 F.3d at 1132. Instead, Officer Cruz had probable cause to believe Mr. Taylor's last action was an attempt to use a firearm and presented a

serious threat of mortal harm to him or his fellow officers. And he could reasonably respond with deadly force.

C

Because Mr. Taylor's Fourth Amendment rights were not violated, there is no basis here for § 1983 municipal liability. *See Jiron*, 392 F.3d at 419 n.8; *see also Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers." (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986))). Therefore, Plaintiffs' claim against Salt Lake City cannot prevail, and the district court was correct to enter judgment against Plaintiffs on this claim.

IV

The events underlying this case are undoubtedly tragic: Officer Cruz was mistaken when he concluded that Mr. Taylor was a mortal threat to him or his fellow officers and, as a result, shot and killed Mr. Taylor. But "[t]he Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately." *Valverde*, 967 F.3d at 1062. And, based on the totality of the circumstances, we are constrained to conclude that Officer Cruz's split-second decision to use deadly force against Mr. Taylor was reasonable. Accordingly, we conclude that the district court properly granted Officer Cruz qualified immunity and entered judgment in his favor and

also in favor of Salt Lake City. We **AFFIRM** that judgment.

LUCERO, Senior Circuit Judge, dissenting:

22 seconds.

That is precisely the time elapsed—22 seconds—from the moment Officer Bron Cruz stopped his police cruiser in a Salt Lake City 7-Eleven parking lot to the point at which he fatally shot twenty-year-old-innocent-unarmed Dillon Taylor. Dillon's crimes? Walking away from an unconstitutional police stop and pulling up his pants. The majority concludes, as a matter of law, that it was objectively reasonable, based on qualified immunity, to free Officer Cruz from any liability without a trial. This cannot be right. It is not the place of this court to resolve factual disputes as to the reasonability of Officer Cruz's actions. I am concerned about the extension of the judicially created doctrine of qualified immunity to shield officers even when there is a substantial and material dispute in the evidence as I explain below. I most respectfully dissent.

I

On a hot August afternoon, Dillon Taylor, his brother Jerrail Taylor, and their cousin Adam Thayne stopped by a 7-Eleven following a day spent visiting friends and surfing the web at a public library.[1] After purchasing a 24-ounce soda and a beer, they walked out of the 7-Eleven as three police cars rolled into the parking lot, lights flashing, blocking their path. Perhaps baffled by the sudden police presence, and with no reason to believe he had done anything wrong, Dillon put in his headphones and turned to walk away. Within seconds, Officer Cruz shot him twice in the torso. Only then did police

[1] Because Dillon and Jerrail share the same last name, I refer to all three young men by their first names throughout the remainder of this dissent.

discover that Dillon was unarmed, finding only a cell phone, earbud headphones, wallet, purple lighter, Snickers bar, and nickel on his person. Far from the menacing figure the majority and Officer Cruz make him out to be, Dillon Taylor was nothing but a normal young American. Sixty-eight pages of the majority opinion do not and cannot establish that Dillon Taylor was anything other than that, I repeat, a normal young American.

Although most tragedies take hours to play out, Dillon Taylor's spanned a total of eight-and-a-half minutes. At 7:03 p.m., Salt Lake City police dispatch sent out a radio report of a "man with a gun." The report stated that a "Hispanic male" wearing a white shirt, red pants, and a red baseball cap flashed a gun at the 911 caller, but that no threats were made. The dispatch report added that this man was accompanied by another "Hispanic male" wearing a striped shirt. The dispatcher noted that the complainant was not cooperating, did not provide self-identifying information, and hung up on the 911 operator. At 7:06, Officer Cruz radioed that he had "eyes on" three men he, without providing any reason, believed to be the subject of the 911 call. Cruz began to follow these three young men, observing their innocuous behavior for several minutes before they entered 7-Eleven. About eight minutes after the initial 911 dispatch, Officer Cruz radioed that the three men were "walking out [of the store] right now." Seconds later, Dillon Taylor was dead.

In their haste to grant Officer Cruz amnesty for his wrongful and unconstitutional actions, my colleagues commit the same errors as the district court: conveniently ignoring and misconstruing aspects of the record, impermissibly usurping the role of the jury by resolving material factual disputes, and flipping the summary judgement standard on its

head to interpret the record in the light most favorable to Officer Cruz. Moreover, my colleagues myopically focus on the last moments of Dillon's life and ignore the nearly eight-minute period Officer Cruz had to investigate or deescalate the situation. With no regard for Officer Cruz's failure to do either, the majority abrogates its constitutional duty to evaluate the reckless and deliberate nature of Officer Cruz's actions. See Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995). I cannot support such a decision.

II

Although my colleagues pay lip service to the legal standard we use to evaluate qualified immunity at the summary judgment stage, they misapply it throughout. Rather than ask the operative question: what a reasonable jury could conclude about Officer Cruz's actions, the majority seats itself in the jury box and makes its own declaration that Officer Cruz acted objectively reasonably.

Summary judgment should not be granted based on qualified immunity where "a reasonable jury could find facts supporting a violation of a [clearly established] constitutional right." Gutierrez v. Cobos, 841 F.3d 895, 900 (10th Cir. 2016) (quotation omitted). As with all summary judgment motions, we are bound to view the facts in the light most favorable to the nonmoving party. Id. In qualified immunity cases, this standard generally requires "adopting . . . the plaintiff's version of the facts." (Op. at 22 (quoting Scott v. Harris, 550 U.S. 372, 378 (2007).) Given that a video of Dillon's death is available, we are not bound to accept Plaintiffs' facts to the extent they are "blatantly contradicted by the record, so that no reasonable jury could believe" them. Scott, 550 U.S. at 380. The majority seizes on Scott to discount Plaintiffs' version of events by

pointing to available body camera footage. Our circuit has repeatedly emphasized, however, that where video evidence is subject to multiple interpretations, it is the responsibility of the jury to resolve the dispute. Bond v. City of Tahlequah, 981 F.3d 808, 819 (10th Cir. 2020), rev'd on other grounds, 2021 WL 4822664, 595 U.S. __ (2021) (per curiam); Emmett v. Armstrong, 973 F.3d 1127, 1135 (10th Cir. 2020). Ignoring this admonition, the majority impermissibly utilizes subjective testimony from responding officers to interpret the footage, drawing conclusions that are not plainly established by the evidence.

A

I begin with the first prong of qualified immunity analysis: whether Officer Cruz violated Dillon's Fourth Amendment rights. At the summary judgement stage, Plaintiffs need not conclusively demonstrate a constitutional violation. They must only raise a genuine dispute of material fact such that a reasonable jury could find a violation. Gutierrez, 841 F.3d at 900. Where, as in this case, Plaintiffs allege excessive use of force, we apply "the Fourth Amendment standard of objective reasonableness." Jiron v. City of Lakewood, 392 F.3d 410, 414 (10th Cir. 2004). This standard requires "careful attention to the facts and circumstances of each particular case," assessed "from the perspective of a reasonable officer on the scene." Graham v. Connor, 490 U.S. 386, 396 (1989). Although the Supreme Court has instructed us to consider "the severity of the crime at issue, whether the suspect poses an immediate threat . . ., and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight," these factors are neither exhaustive nor dispositive. Id.; see also Est. of Redd v. Love, 848 F.3d 899,

908 (10th Cir. 2017) (declining to strictly apply the Graham factors where they did not capture relevant facts of the case). Rather, the objective reasonableness standard requires us to weigh an "individual's Fourth Amendment interests against the countervailing governmental interests" under "the totality of the circumstances." Graham, 409 U.S. at 396 (quotation omitted).

For a police officer's use of force to be objectively reasonable, our circuit imposes two requirements. First, the officer must have reasonably perceived "danger at the precise moment that they used force." Sevier, 60 F.3d at 699. Second, the officer must not unreasonably create the need to employ deadly force through their "own reckless or deliberate conduct." Id. For the reasons set forth below, I believe Plaintiffs have raised a genuine dispute of fact both as to whether Officer Cruz was reasonably fearful when he shot Dillon and whether Officer Cruz's reckless and deliberate conduct unreasonably created the "need" to shoot.

1

Turning to the first Sevier element, we ask whether Officer Cruz's fear was reasonable at the precise moment he shot Dillon. The majority applies the three Graham factors outlined above to conclude that Officer Cruz's fear was objectively reasonable as a matter of law. (Op. at 33-54.) I cannot agree.

Although I concur that the first and third Graham factors weigh against the use of deadly force, the majority largely discounts these findings in favor of the second factor. I consider it significant that Officer Cruz had neither a constitutional basis for stopping the three men nor factual grounds to suspect that Dillon had a gun or committed any crime

under Utah state law. See Pauly v. White, 874 F.3d 1197, 1222 (10th Cir. 2017) (finding that the third Graham factor weighs against the use of force where officers "did not have enough evidence or probable cause to make an arrest" (quotation omitted)). At the time he was shot, Dillon was merely exercising his right to walk away from an unconstitutional police stop. See Terry v. Ohio, 392 U.S. 1, 16 (1968). Indeed, the available body camera evidence shows that Dillon had turned and begun walking away from the police before Officer Cruz fully exited his vehicle. At that point, Dillon had no indication that he was the target of any investigation or that the officers were there to confront him. In the light most favorable to Plaintiffs, a jury could rely on these facts to support a conclusion that Officer Cruz lacked a reasonable basis to fear Dillon.

More egregious, however, is the majority's application of the second Graham factor. My colleagues rely on four "non-exclusive" factors outlined in Est. of Larsen v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008), to determine whether a suspect poses an immediate threat:

> (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.

Id. The majority contends that these factors support the reasonableness of Officer Cruz's decision to shoot Dillon. While a jury could draw this conclusion on the record before us, they certainly need not do so as a matter of law. In their haste to absolve Officer Cruz of constitutional liability, my colleagues resolve several factual disputes in Officer Cruz's favor and credit his subjective interpretation of the encounter, even when contradicted by

other testimony and objective evidence. I find it necessary to discuss each Larsen factor to explain why material questions of fact exist in this case. After reading the majority opinion, I am left to wonder whether I viewed the same video evidence as my colleagues.

a

According to the majority, "the record clearly establishes that [Dillon] Taylor ignored or directly disobeyed Officer Cruz and Officer Sylleloglou's commands." (Op. at 41.) Objective evidence does not support this proposition. Instead, the record shows that officers shouted confusing and contradictory commands at the three men to variously show their hands, put their hands up, and get on the ground. Because Dillon turned his back on the police officers before Officer Cruz exited his cruiser, it is unclear when Dillon understood that these commands were directed at him. The majority also inexplicably rejects evidence that Dillon had headphones in his ears for at least part of the encounter. Both Jerrail and Adam recounted in independent testimony that Dillon had earbuds in as he began walking away from the officers. Moreover, Officer Cruz's body camera footage clearly shows him moving the headphones away from Dillon's body after the shooting. The majority contends that it cannot consider this evidence because a reasonable officer in Cruz's position would have no way to know that Dillon was wearing headphones (Op. at 4 n.1), but this conclusion assumes its own premise. A jury could conclude that a reasonable officer would have or should have seen the headphones, even if Officer Cruz did not. Further, because music might have impaired Dillon's ability to hear, understand, or otherwise comply with commands, a jury would be entitled to discount evidence of Dillon's noncompliance.

Following the shooting, responding Officer Downes admitted that the conflicting commands created an atmosphere of confusion. Although Officer Cruz's body camera establishes that he shouted several orders as he pursued Dillon, only two such commands were issued after Dillon turned around to face Officer Cruz, about 4 seconds before the shooting. In fact, video evidence unequivocally demonstrates that Officer Cruz fired his weapon before even completing the second command. Considering the totality of the circumstances, it is unclear at best what impact Dillon's noncompliance should have had on a reasonable officer.

b

The second Larsen factor concerns the highly contested issue of Dillon's hand motions immediately before shots were fired. The majority adopts the district court's perplexing finding that "[t]he undisputed material facts and video and photographic evidence of the moments when [Dillon] Taylor was shot demonstrate that a reasonable officer would believe that Mr. Taylor made a hostile motion with a weapon towards the officers." (Op. at 42.) Without any support from the record, both the majority and district court variously describe Dillon's hand motions as "digging," consistent with "manipulating something," and "consistent with the drawing of a gun." (Op. at 45.)

These characterizations at once take the evidence in the light most favorable to Officer Cruz and invade the province of the jury by interpreting video evidence that is subject to multiple interpretations. The majority summarily rejects Plaintiffs' contention that Dillon was merely attempting to pull up his pants or comply with Officer Cruz's commands to raise his hands. Although this view is by no means conclusively

established by the record, it does enjoy evidentiary support. Both Adam and Jerrail independently testified after the shooting that Dillon was pulling up his pants when Officer Cruz pulled the trigger.[2] Moreover, the hand motions came only a few seconds after he turned around to see Officer Cruz pointing a gun at him, a fact that could be interpreted to support the view that Dillon was attempting to comply with a command to show his hands. At bottom, however, the video is ambiguous as to what Dillon was doing with his hands during the encounter. We can see only that Dillon's hands are in his waistband as he turned to face Officer Cruz and that he removed at least his left hand at the time he was shot dead. To draw any further inferences or conclusions, as the majority does, is to resolve a factual question and usurp the jury.

[2] I agree with the majority and our sibling circuits that the exclusionary rule does not operate outside the criminal context. But if any circumstances were to call for its extension to civil cases, this case would. Officers Cruz, Downes, and Sylleloglou placed Jerrail and Adam in handcuffs at the scene, after they had just been held at gunpoint by the police and seen their loved one shot dead. Then South Salt Lake City police officers left the men isolated in separate "interview rooms" for over four hours, with their arms handcuffed behind their backs, without any reason to believe they had engaged in criminal activity of any kind. The interview tapes do not show that anyone checked on them during the multiple hours they were made to wait. There is no indication that they were read their rights or provided the opportunity to ask for counsel. It was more important for the Police Department to obtain statements that they could use to justify Officer Cruz's shooting of Dillon than to treat the two survivors with humanity. Adam was left in handcuffs for the entire interview except for when the police needed him to draw a diagram. At the end of the interview, when he asked if his cousin was dead, the investigators told him yes, but put him back into handcuffs, leaving him to cry for his cousin, unable even to wipe the tears away or cover his face. One might wonder whether the young men were unresponsive, argumentative, or violent to merit such treatment. To the contrary, when the police finally got around to talking to Jerrail and Adam, after detaining them in handcuffs for more than five hours, they were polite in their responses, calling the officers "sir" and agreeing with their leading questions.

At the summary judgment stage, we must accept Plaintiffs' account of Dillon's hand motions because the video evidence is subject to competing interpretations. It is patently absurd to suggest that an officer's decision to shoot an unarmed young man for complying with an order or pulling up his pants could be objectively reasonable. Yet this is the result reached by application of the majority's legal error.

c

In my view, the third factor—the distance between the Officers and Dillon—is of little help in this case. The majority concludes that the close proximity between the two men and purported lack of cover available to Officer Cruz cut in favor of finding an immediate threat. (Op. at 50-51.) Although the video does tend to show that Officer Cruz was ten to twelve feet away from Dillon as he pulled the trigger, it does not show whether any cover was available to Officer Cruz on the western side of the 7-Eleven. It also clearly demonstrates that Officer Cruz was closing distance as Dillon continued walking away. I would leave it for the jury to decide the relevance and weight of this evidence.

d

The final Larsen factor asks us to evaluate Dillon's manifest intentions. The majority does so by essentially rehashing its second factor analysis. It again summarily concludes "the record does not support Plaintiffs' contentions that [Dillon's] hand movements at the end of his interaction with Officer Cruz are consistent with Mr. Taylor simply pulling up his pants or complying (albeit belatedly) with the officers' commands to show his hands." (Op. at 52.) Instead, they rely on their interpretation of Dillon's

hand motions and supposed verbal challenges[3] to conclude that "immediately before he was shot," Dillon's actions "reflected bad intentions." (Op. at 53.) I have already explained at length why the record is ambiguous on these points.

e

Even beyond the non-determinative Larsen factors, the record is replete with evidence a jury could use to conclude that a reasonable officer in Cruz's position would not have perceived Dillon as an immediate threat. First, the majority impermissibly credits testimony from the officers to conclude that they aimed their weapons at Dillon only after he put his hands in his waistband. (Op. at 8.) This finding contradicts testimony from Adam and Jerrail that officers had weapons drawn and pointed at the men from the moment they exited their vehicles and separate video from 7-Eleven surveillance cameras showing Officer Cruz aiming his weapon at Dillon for nearly the entirety of the encounter. Moreover, Officer Cruz's body camera appears to show Officer Sylleloglou pointing his weapon at Dillon before his hands were in his waistband. Although the video is unclear both as to when weapons are pointed and Dillon's hand movements, a jury could conclude that the officers drew and aimed their guns before

[3] Only after he turned around to face Officer Cruz, seconds before his death, can Dillon be heard responding to the officers. The majority concludes that he responded "Nah, fool" after Officer Cruz commanded him to remove his hands from his waistband, taking this response to be further evidence of noncompliance. (Op. at 53.) Although that construction is plausible, a reasonable jury could discount that aspect of the video because the audio is unclear. The majority also discusses another supposed "verbal challenge" from Dillon, but no such challenge is captured by the video. Rather, the majority again credits the subjective testimony of responding officers as undisputed fact.

having any indication that Dillon might have been armed or was reaching for a weapon, further discounting their narrative of fear.

Second, the majority omits any discussion of inconsistencies between Officer Cruz's testimony and his body camera footage. Most relevant here, Officer Cruz claimed in his interview just two weeks after the shooting that as he approached the 7-Eleven, Adam and Jerrail put their hands up without prompting as he exited his vehicle. At the same time, he recalls that Dillon "looks right at me, for a split second . . . he looked right at me, uh, with just complete and total defiance in his eyes." Officer Cruz claimed that both Adam and Jerrail's unprompted hand raising and Dillon's look of "defiance" heightened his fear that one of the men had a gun. But evidence contradicts both propositions in ways that would have been apparent to a reasonable officer on the scene. First, Adam and Jerrail independently testified that they raised their hands only after being ordered to do so and after guns were aimed at them. Second, Officer Cruz's body camera clearly shows that by the time he exited his vehicle, Dillon had already turned and walked away, leaving no time for the look of "complete and total defiance." Officer Sylleloglou also testified that Dillon was already walking away when Officer Cruz exited his police car, further contradicting Cruz's version of the events. A jury could rely on this evidence to question the degree of fear a reasonable officer would have felt in Officer Cruz's position, or to discount his credibility.

Finally, the majority makes much of Officer Sylleloglou's testimony that he was prepared to fire his weapon at Dillon, as indicated by his decision to place his finger on the trigger of his weapon (a fact not depicted on any video). The majority concludes on

this basis that "Officer Sylleloglou and Officer Cruz's assessments of the threat were . . . identical." (Op. at 49.) My colleagues summarily dismiss Plaintiffs' suggestion that Officer Sylleloglou's decision not to fire his weapon is evidence that Officer Cruz's fear was unreasonable, arguing that Officer Sylleloglou had a different vantage point and was not directly facing Dillon. Although true, it is not for the majority to weigh this evidence. Yet again, the majority removes the question of Officer Sylleloglou's actions from the jury by interpreting his actions and testimony in the light most favorable to Officer Cruz.

2

At this juncture, I would conclude under Graham and Larsen that Plaintiffs have met their burden of demonstrating a genuine dispute as to the reasonableness of Officer Cruz's fear. This finding alone is sufficient to meet the first prong of our qualified immunity inquiry. Yet even were the majority correct that the use of deadly force by Officer Cruz was objectively reasonable at the time he fired, Plaintiffs would still survive summary judgement under the second Sevier element. That is, Plaintiffs have also raised a material dispute as to whether Officer Cruz's "own reckless or deliberate conduct" created the "need" to use deadly force. Sevier, 60 F.3d at 699.[4]

[4] I agree with the majority that the second prong of Sevier remains applicable. (Op. at 31 n.9.) Although the Supreme Court recently described this prong as "dicta," City of Tahlequah v. Bond, 2021 WL 4822664 at *2, 595 U.S. ___ (2021) (per curiam), the Tenth Circuit has repeatedly held that reckless and deliberate conduct creating the need to use deadly force violates the Fourth Amendment. See, e.g., Reavis Est. of Coale v. Frost, 967 F.3d 978, 985 (10th Cir. 2020); Est. of Ceballos v. Husk, 919 F.3d 1204, 1214 (10th Cir. 2019); Tenorio v. Pitzer, 802 F.3d 1160, 1164 (10th Cir. 2015); Jiron v. City of Lakewood, 392 F.3d 410, 415 (10th Cir. 2004). In Bond, the Supreme Court expressly declined to overturn this precedent. Bond, 2021 WL 4822664 at *2.

To determine whether an officer's actions recklessly or deliberately created circumstances warranting the use of deadly force, we apply the same totality of the circumstances test as above, from the perspective of a reasonable officer on the scene. Id. The majority abrogates its constitutional duty to conduct this analysis by providing only a cursory account of Officer Cruz's actions leading up to his confrontation with Dillon. It uncritically adopts the district court's assertion that "[v]iewing the undisputed material facts in their totality, and in a light most favorable to Plaintiffs, Officer Cruz's conduct before and during the encounter did not recklessly or deliberately create the need for his use of deadly force." (Op. at 56.) This conclusion ignores both material disputes of fact and undisputed material facts that weigh in favor of Plaintiffs.

First, the dispatch report is illuminating. The dispatcher provided a description of two men, neither of which matched clothes worn by Dillon, Jerrail, or Adam. The report provided that a suspect had merely flashed a gun without making a threat, conduct that does not on its own violate Utah law. Further, the dispatcher told Officer Cruz that the 911 caller declined to provide self-identifying information, was generally uncooperative, and hung up on dispatch.[5] Taking these facts together, a reasonable jury could question whether Officer Cruz was justified in suspecting and following the three men. Given that being Hispanic is not a crime, and the conduct described by the complainant was not a

[5] This court's precedents make clear, and a reasonable officer in Cruz's position would have known, that such indicia of unreliability render a 911 call insufficient to create reasonable suspicion, even when the call alleges conduct that clearly amounts to a crime. See, e.g., United States v. Lovato, 950 F.3d 1337, 1343 (10th Cir. 2020); United States v. Gaines, 918 F.3d 793, 802-03 (10th Cir. 2019).

crime, there was nothing for Officer Cruz to proceed on. The majority declines to discuss the dispatch report at all when evaluating the recklessness or deliberateness of Officer Cruz's conduct.

Next, the majority omits any discussion of the nearly five minutes Officer Cruz spent following the men and preparing for confrontation, despite never observing a gun or any suspicious behavior. During his interview following the shooting, Officer Cruz claimed to have witnessed an "odd disturbance" involving Dillon and a fourth individual in a car stopped at a crosswalk. Adam and Jerrail testified that they were merely "high fiving" a childhood friend, an account corroborated by an independent eyewitness that described the interaction as friendly. Officer Cruz next radioed dispatch to clarify which reported suspect was carrying a gun, ignoring the initial dispatch report received just minutes earlier that the man with the gun wore a white shirt, red pants, and a red baseball cap – a description not matching Dylan.[6] Officer Cruz also recalls spending several minutes "running through scenarios" to mentally prepare for his confrontation with the men as he waited for backup to arrive, but delayed full activation of his body camera until just seven seconds before he shot Dillon.[7] Again, a jury could rely on these facts to discount Officer Cruz's narrative and conclude that a reasonable officer should have

[6] This report was also reproduced on Officer Cruz's in-car computer system, to which he had access and which a jury could determine he chose not to read or recheck.

[7] It is unclear from the record exactly when Officer Cruz turned his body camera on. Although it captured video for the duration of the 22 second encounter leading up to Dillon's shooting, it only captured audio for the last seven seconds. Officer Sylleloglou testified that body cameras only capture audio when deliberately engaged by the officer and retain video from the 30 seconds preceding manual activation.

realized in the minutes spent following the young men that an armed confrontation was unnecessary to respond to the incident reported by the anonymous, uncooperative 911 caller.

Perhaps the most critical factor supporting a finding of reckless or deliberate escalation on the part of Officer Cruz is the sheer lack of reasonable suspicion necessary to stop the three men in the first place. See Terry, 392 U.S. at 22 (conditioning officers' ability to "approach a person for purposes of investigating possibly criminal behavior" on governmental interest in "effective crime prevention and detection"). The Supreme Court has specifically held that "an anonymous tip that a person is carrying a gun is, without more, [in]sufficient to justify a police officer's stop and frisk of that person." Florida v. J.L., 529 U.S. 266, 268 (2000).[8] Between the 911 call and absence of any incriminating actions during Officer Cruz's five-minute "staging" period, he lacked any constitutional basis to stop the three men.

The majority concedes as much, and instead argues that Officer Cruz was "nevertheless free to attempt to engage in a consensual interaction with [Dillon] Taylor and his companions." (Op. at 60.) The obvious fallacy with this characterization is that the encounter was nonconsensual. Moreover, it disregards Dillon's constitutional right to walk away. See Terry, 392 U.S. at 16-17 (a seizure, requiring reasonable suspicion,

[8] In J.L. the Supreme Court explicitly declined to adopt a "firearm exception" to its "established reliability analysis" used when assessing tips supporting reasonable suspicion for an investigative stop, because "[s]uch an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." Id. at 272.

occurs where police limit the freedom to walk away); see also Florida v. Bostick, 501 U.S. 429, 434 (1991) (a police encounter triggers Fourth Amendment scrutiny when the suspect is not free to walk away, thereby ending the consensual nature of the engagement). Rather than acknowledge this right, the majority bizarrely cites Dillon's decision to walk away as evidence that "Mr. Taylor was the primary initiator of the actions here that heightened the atmosphere of tension and fear." (Op. at 61.) Under the majority's logic, simply exercising one's right to end or avoid a consensual encounter with the police can serve as the basis for reasonable fear justifying the use of deadly force. The implications of this suggestion are staggering.

Once Dillon exercised his right to walk away from a "consensual" encounter with police, it is further unclear why Officers Cruz and Sylleloglou chose to pursue him with weapons drawn. At this point, they had not one scintilla of evidence that Dillon was armed or posed a threat to anyone. As the Supreme Court has instructed, when a "suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Tennessee v. Garner, 471 U.S. 1, 11 (1985). Instead of heeding this bedrock principle of criminal procedure, Officer Cruz descended into a self-induced state of paranoia based on nothing more than a facially unreliable 911 call and his misinterpretation of facts viewed as innocuous by every other available witness. Regardless of how one interprets Dillon's hand motions after the encounter started, there was no constitutional basis for Officer Cruz to stop or pursue Dillon in the first instance. A jury could surely interpret Officer

Cruz's decision as a reckless or deliberate escalation that unreasonably created the "need" to use deadly force.[9]

Finally, even setting aside the objective evidence, a jury is entitled to consider inconsistencies in Officer Cruz's post-shooting statements. See Est. of Smart v. City of Wichita, 951 F.3d 1161, 1170 (10th Cir. 2020) ("[C]onsidering the physical evidence together with the inconsistencies in the officers' testimony, a jury will have to make credibility judgments . . . .") (quotation omitted). In various interviews and depositions between 2014 and 2017, Officer Cruz contradicted himself about the content and specificity of the 911 dispatch report, whether dispatch reported two or three men spotted with a gun, whether the anonymous complainant perceived a threat after seeing the gun, and whether he felt scared or calm when approaching the 7-Eleven, among numerous other inconsistencies. Because these contradictions go directly to whether Officer Cruz was reckless in confronting Dillon, they must be presented to a jury. Id. (courts evaluating "evidence that, if believed, would tend to discredit the police officer's story, [should] consider whether this evidence could convince a rational factfinder that the officer acted unreasonably"). As we held in Smart, "credibility determinations should not be made on summary judgment." Id.

On these grounds, I conclude that Plaintiffs have also established a genuine dispute as to whether Officer Cruz's reckless or deliberate actions created the

[9] The majority's conclusion that Dillon "was the primary initiator of the actions here that heightened the atmosphere or tension and fear," (Op. at 61), implicitly places the burden on a twenty-year old man to deescalate a violent encounter with highly trained professional police officers.

circumstances leading to the use of deadly force. Thus, even if Officer Cruz's use of force was objectively reasonable at the time of the shooting, Plaintiffs have nevertheless established a genuine dispute of fact as to whether Officer Cruz violated Dillon's Fourth Amendment rights.

B

Because the majority rests on the first prong of qualified immunity analysis, it did not address the second: whether the right of an unarmed man walking away from a "consensual" police encounter to be free from deadly force was clearly established at the time of Dillon's shooting. Upon concluding that Plaintiffs have raised a genuine dispute as to whether Officer Cruz violated Dillon's Fourth Amendment rights, I proceed to discuss whether such right was clearly established. The caselaw overwhelmingly answers in the affirmative.

"To be clearly established, ordinarily there must be prior Supreme Court or Tenth Circuit precedent, or the weight of authority from other circuits, that would have put an objective officer in [the officer's position] on notice that he was violating [the decedent's] Fourth Amendment rights." Est. of Ceballos v. Husk, 919 F.3d 1204, 1213 (10th Cir. 2019) (quotation omitted). Clearly established law "must be particularized to the facts" of the case, but we do not require that a case be directly on point. Id. at 1214.

In addition to his clear violation of Terry and J.L., the Fourth Amendment's prohibition of Officer Cruz's reckless creation of the need to use deadly force is clearly established. In Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997), we held that even where officers approached a visibly armed individual, the facts of that case—officers ran

"screaming" up to the suspect, shouting at Allen to get out of the car, and attempting to take the weapon—would have allowed a reasonable jury to conclude the officer's actions were reckless and precipitated the need to use deadly force. Id. at 841.

Prior to the case at bar, both Allen and Sevier clearly established the right to be free from reckless confrontations that result in deadly force. See Ceballos, 919 F.3d at 1217 (finding that Sevier and Allen "strengthen our conclusion that . . . a reasonable officer in [Defendant's] position would have known that his conduct . . . violated [Plaintiff's] Fourth Amendment right to be free from excessive force"). In Ceballos, we declined to apply qualified immunity where a police officer "shot and killed an emotionally distraught Ceballos within a minute of arriving on scene." Id. at 1216. We concluded that a police officer was reckless in confronting a visibly intoxicated man "pacing in [his] driveway, swinging a baseball bat, yelling and throwing his arms in the air." Id. at 1210. If Allen and Sevier were sufficient to put a reasonable officer on notice that confrontation under those circumstances is unconstitutionally reckless, then surely a reasonable officer in Cruz's position ought to have known that confronting an unarmed, nonthreatening young man without evidence of any crime is similarly unreasonable.

In Allen, Sevier, and Ceballos, the police had more reliable information regarding the reality of a potential threat to the officer than that apparent to Cruz: in Allen, a visible gun, in Sevier, a visible knife, and in Ceballos, a visible bat. The facts in Dillon's case are sufficiently analogous to those in Allen, Sevier, and Ceballos to place Cruz on notice that his conduct in shouting at, pursuing, drawing his weapon on, and shooting a

retreating, visibly unarmed person violated Dillon's clearly established right to be free from excessive force.

I am mindful that the Supreme Court recently found Allen, Sevier, and Ceballos insufficient to clearly establish Fourth Amendment rights in a different factual context. In City of Tahlequah v. Bond, 2021 WL 4822664, 595 U.S. ___ (2021), the Court reversed a Tenth Circuit judgment denying qualified immunity to police officers that fatally shot a man approaching them while holding a hammer in a threatening manner. Specifically, the Court found that Tenth Circuit precedent did not clearly establish that the officers' actions were reckless or deliberate. Id. at *2. The Court distinguished Allen because officers there ran towards a suspect while yelling, whereas in Bond the officers first had a calm conversation with the decedent. Id. It dismissed Ceballos as irrelevant because it was decided after the facts in Bond. Id. Finally, the Court differentiated Sevier because its general articulation of the rule that reckless and deliberate conduct can violate the Fourth Amendment was not sufficient to clearly establish the right in the specific factual context Bond presented. Id.

Dillon's case is materially different from the facts in Bond and is much closer to Allen and Sevier. Officer Cruz pursued Dillon, yelling with gun drawn, without observing a weapon or incriminating behavior. Indeed, he was responding to an unreliable 911 dispatch call that failed to even report a crime under Utah law. These facts are in accord with Allen, where police rushed a reportedly suicidal and visibly armed man in his car, attempting to wrest away a gun before shooting the man dead. Allen, 119 F.3d at 839. Dillon's case is also similar to Sevier, in which police

approached another reportedly suicidal man armed with a knife in his bedroom, yelling at the man to drop the knife, with their weapons drawn. Sevier, 60 F.3d at 698. In all three instances, police approached an individual that was either visibly armed or suspected to have a weapon. Without any affirmative threat from the suspect, the police in all three cases approached them rapidly, yelling, and with weapons drawn. Indeed, because the individuals in Allen and Sevier were both visibly armed, they posed a demonstrably greater threat to responding officers than Dillon.

By contrast, in Bond, officers calmly approached the suspect, had a brief conversation with him and calmly followed him, with weapons still holstered, into a garage before the suspect grabbed a hammer and threateningly gestured towards police. Bond, 2021 WL 4822664 at *1. Dillon was not afforded a similar calm conversation, nor did police calmly follow him with their weapons holstered in an attempt to deescalate the encounter. Thus, the Supreme Court's decision in Bond is inapposite to the facts of Dillon's case. I remain confident that Tenth Circuit precedent clearly established Dillon's right to be free from reckless and deliberate conduct creating the "need" for deadly force.

Accordingly, I conclude that Plaintiffs have established a genuine dispute of fact as to both the first and second prongs of qualified immunity analysis. Taking the record in the light most favorable to Dillon, a reasonable jury could find that Officer Cruz violated Dillon's clearly established right to be free from unlawful seizure under the Fourth Amendment. I would reverse the district court's grant of summary judgment in favor of Officer Cruz and remand for trial.

III

Because its absolution of Officer Cruz is the only reason the district court granted summary judgment with respect to Salt Lake City, Est. of Taylor v. Salt Lake City, 2019 WL 2164098, at *1 (D. Utah May 17, 2019), I would reverse summary judgement for the City and remand for consideration of Plaintiffs' municipal liability claims in the first instance.

IV

It is one of the most settled principles in American law that a motion for summary judgment may not be granted if a genuine dispute of material fact exists, after construing the record in a light most favorable to the non-moving party. Today, this court at once invades the province of the jury to resolve disputes of material fact and disregards decades of Supreme Court precedent when it bends over backward to draw all possible inferences in favor of Officer Cruz.

Although the majority's misapplication of the law is egregious on its own, we must not for one second lose sight of the behavior that the court rubber-stamps today. Officer Cruz is absolved of his constitutional obligation to reasonably investigate a plainly unreliable 911 complaint, the details of which he ignored. Three young Hispanic men were stopped without reasonable suspicion of any crime. Officers pursued an unarmed and non-threatening Dillon Taylor with guns drawn, ignoring his right to walk away from an unconstitutional stop. Adam and Jerrail were chastised for raising their hands too quickly, but Dillon was shot and killed for complying too slowly. As a result, yet another innocent young American is dead at the hands of police. That his family is

left without so much as a trial to assess the reasonableness of these actions is a travesty of justice that I cannot abide.

The resolution of this case by a panel of judges rather than a citizen jury is emblematic of profound structural issues with the judicially created doctrine of qualified immunity. Empirical evidence demonstrates that the doctrine as currently implemented fails to serve even its purported goal of protecting law-abiding government officials from the time and expense of frivolous litigation. See Joanna C. Schwartz, How Qualified Immunity Fails, 127 Yale L.J. 2, 71 (2018).[10] Rather, it functions to discourage the filing of meritorious civil rights claims and incents frivolous actions not subject to qualified immunity. See id. at 58-70. At the same time, police kill nearly 1,100 Americans each year, a figure more than thirty times greater than other wealthy countries. See Lynne Peeples, What the Data Say About Police Shootings, 573 Nature 24, 24 (Sept. 5, 2019).

Against this illogical backdrop, it is hard to avoid the conclusion that qualified immunity as currently constituted is broken. As Dillon's case so tragically illustrates, the doctrine precludes remedies for unconstitutional police actions while serving no discernible societal benefit. Of course, Dillon's family is not alone in bearing the costs of this confounding reality. See Jamison v. McClendon, 476 F. Supp.3d 386, 390-92 (S.D. Miss. 2020) (listing numerous other Americans impacted by qualified immunity and police excessive use of force); United States v. Curry, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring) ("[M]any of our fellow citizens already feel insecure . . .

[10] Particularly when police officers and other government actors are almost universally indemnified from adverse judgments. Schwartz, supra at 9.

when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles, " and now, buying a drink at 7-Eleven). So long as qualified immunity fails to serve any evident purpose, I am left to conclude that the reasonableness of governmental use of force is best assessed by juries comprised of citizens subjected to the police actions we are asked to judge. Particularly in cases like Dillon's, replete with disputed facts, it is clear that judicial adjudication of police use of force has failed to strike the appropriate balance between public safety and individual rights required by the Constitution.

Dillon had a phone, a Snickers bar, and a nickel in his pocket—not a gun. Officer Cruz had no basis to believe otherwise. After paying careful attention to the facts and circumstances of this case, I cannot conclude that Officer Cruz's actions were objectively reasonable under the Fourth Amendment when eight-and-a-half minutes after hearing the 911 dispatch, and 22 seconds after pulling up in his cruiser, he shot and killed Dillon Taylor for no crime at all. As Jerrail Taylor asks, as should we all: "what the [expletive] did I just do, . . . that I can't walk in America and buy a goddamn drink and a beer, like what am I doing wrong?"