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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Lisa Yearick, et al., Plaintiffs, vs. County of Maricopa, et al., Defendants.	No. CV-20-00545-PHX-SPL **ORDER**

On December 16, 2018, Decedent Edward Rudhman ("Decedent") was shot and killed during an incident outside his home involving Defendants Sergeants Robert Leatham and Ryan Kelleher, Deputy Philip Asiedu-Darkwa, and two non-party deputies, Robert Normile and William Brennan.[1] On December 12, 2019, Plaintiffs Lisa Yearick and Leigha Huber (together, "Plaintiffs") filed suit in state court against Leatham, Kelleher, Asiedu-Darkwa, and others[2] (together, "Defendants"), alleging two causes of action pursuant to

[1] Deputy Normile and Deputy Brennan were present and involved in the incident. They were not, however, named as defendants in this suit presumably because they did not fire any lethal rounds at Decedent. Deputy Normile was armed with a rifle that fired less-lethal beanbag rounds. (Doc. 31 at 3). Deputy Brennan was positioned behind Sergeant Leatham's vehicle—obstructing his view of Decedent—and did not fire his weapon at all. (Doc. 87 at 7, 11).

[2] The other named defendants in this dispute are: Morcelia Asiedu-Darkwa (wife of Deputy Asiedu-Darkwa); Kristy Leatham (wife of Sergeant Leatham); and Maricopa County Sheriff Paul Penzone (in his official capacity). (Doc. 31 at 1–2).

42 U.S.C. § 1983 and one claim for wrongful death under Arizona state law. (Doc. 1 at 2; Doc. 31). On March 16, 2020, the case was removed to this Court. (Doc. 1). Defendants now move for summary judgment on each of Plaintiffs' claims. (Doc. 83). The Motion is fully briefed and ready for review. (Docs. 83, 86, & 91). The Court's ruling is as follows.[3]

I. BACKGROUND

The parties agree on nearly all the underlying facts in this case. The only factual dispute relates to how Decedent handled the gun as he walked toward Defendants.

A. Undisputed Facts

At approximately 10:22 a.m. on December 16, 2018, five officers from the Maricopa County Sheriff's Office (MCSO)—Defendant Sergeant Leatham, Defendant Sergeant Kelleher, Defendant Deputy Asiedu-Darkwa, non-party Deputy Normile, and non-party Deputy Brennan—responded to a Mesa, Arizona home in which Lisa Yearick and her husband, Edward Rudhman, resided. (Doc. 31 at 3). Ms. Yearick had closed herself in a bedroom and called 9-1-1 to report that Mr. Rudhman had a gun and was suicidal. (*Id.*). The couple had been up all night, contemplating a potential move to Pennsylvania. (Doc. 87 at 3). Although Mr. Rudhman had been sober for over a year, he spent most of the night drinking and was intoxicated by the time the officers arrived that morning. (*Id.* at 3–4). The drinking was apparently triggered by Mr. Rudhman's recent employment termination and by several conversations with his mother, Leigha Huber. (*Id.* at 2). Ms. Huber, who owned the Mesa house, had told her son that she was selling the house and that he would have to move. (*Id.*). Aside from drinking, Mr. Rudhman was also behaving erratically, damaging the house, carrying around a gun, and threatening to harm himself and "his animals." (*Id.* at 4). While Ms. Yearick was on the phone with the 911 dispatcher, Mr. Rudhman fired his gun six times in the backyard. (*Id.*). At one point, Mr. Rudhman told Ms. Yearick—through the locked bedroom door—that he would give her

[3] Because it would not assist in resolution of the instant issues, the Court finds the pending motions are suitable for decision without oral argument. See LRCiv. 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

the gun "if she would shoot him." (*Id.* at 5). Ms. Yearick expressed to the dispatcher that she was "really, really worried about him" and "scared for his life," and that she wanted "nothing bad to happen to [him], I just want him to get help." (Doc. 31 at 3). There were other persons living on or near the property. Specifically, a family of four lived in a recreational vehicle on the property. (*Id.* at 8). They had heard the six gunshots fired by Mr. Rudhman in the backyard and took cover inside. (*Id.*). A next-door neighbor who was outside also heard the gunshots. (*Id.*). He took cover in a workshop located on his property. (*Id.*). None of these individuals were harmed during the incident.

Meanwhile, outside the house, the five officers—who had been made aware that Mr. Rudhman was inside with a loaded .357 in his hand (Doc. 87 at 7)—positioned themselves and their two police cruisers toward the end of the driveway. (Doc. 31 at 3). Sergeant Leatham stood behind the open driver's side door of the lead vehicle with his gun pointing toward the home. (*Id.*). Deputy Normile, who was armed with a rifle that fired less-lethal beanbag rounds, stood behind the open passenger's side door of the same vehicle. (*Id.*). Deputy Brennan stood behind the open driver's side door of the second vehicle, positioned behind Sergeant Leatham and Deputy Normile. (*Id.*). Deputy Asiedu-Darkwa was positioned to Deputy Normile's right, behind a boundary wall in a neighbor's yard, with his gun pointing toward the house. (*Id.*). Finally, Sergeant Kelleher was lying on the ground to the left of the lead vehicle, with his gun pointing toward the house. (*Id.*). The officers each wore body cameras that captured the entire incident.[4] (Doc. 87 at 6).

Once the officers were positioned outside the house, Sergeant Leatham made five announcements on the public address system of his vehicle, asking Mr. Rudhman to come out of the house without the gun. (Doc. 31 at 4; Doc. 87 at 8–9). During the fifth announcement, Deputy Normile saw Mr. Rudhman appear through the front door and shouted, "Front door, front door, front door." (*Id.*). The officers' body camera footage shows Mr. Rudhman exit the house and begin walking down the driveway toward the

[4] Sergeant Kelleher's body camera apparently failed to activate. (Doc. 87 at 7).

officers. (*Id.*). Each of the officers saw that Mr. Rudhman was holding the gun in his right hand. (*Id.*). Over the course of twenty-four seconds, Mr. Rudhman continued to walk directly toward the officers, closing the distance by approximately forty feet. (Doc. 87 at 11). Sergeant Leatham gave five non-amplified verbal commands, each approximately three to four seconds apart:

> 18:29 (first command): "Edward, drop the gun."
>
> 18:32 (second command): "Drop the gun, Edward."
>
> 18:35 (third command): "Drop the gun, Edward."
>
> 18:39 (fourth command): "Drop the gun, Edward."
>
> 18:43 (fifth command): "Stop where you're at."

(*Id.* at 9).[5] Mr. Rudhman ignored each command and continued walking toward the officers, with the gun still in his hand. (*Id.*). Although Plaintiffs dispute how Mr. Rudhman was handling the gun, they do *not* dispute that Mr. Rudhman never stopped walking and that he verbally responded to the commands, stating "I can't do that . . . no I'm not stopping right there" and "[t]hat's not going to happen." (*Id.* at 10).

Although Mr. Rudhman had walked approximately forty-feet closer to the officers, he was still several car lengths—or approximately sixty-six feet, according to Defendants' Forensic Video Analysis Report (Doc. 84-3 at 8)—from the officers when they fired their weapons. (Doc. 87 at 11). According to a MCSO Supplemental Report, Deputy Normile "was ready to call out 'less-lethal, less-lethal, and fire,'"[6] but "[w]hile in his thought process and in preparation to act," the other officers fired their lethal weapons almost

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[5] The body cameras worn by the officers "record video from the time they are activated until the time they are stopped." (Doc. 87 at 6). "After approximately 30 minutes of recording a new recording automatically begins and runs another 30 minutes unless stopped sooner." (*Id.*). The times for each of Sergeant Leatham's five commands are the times at which the commands were made on the recording captured by Sergeant Leatham's body camera.

[6] The announcement "less-lethal, less-lethal" is a trained announcement that is "made so less-lethal discharge will not be confused with lethal gunfire." (Doc. 84-2 at 43).

simultaneously. (Doc. 84-2 at 43). Sergeant Leatham and Sergeant Kelleher each fired two lethal rounds. (Doc. 87 at 11). Deputy Asiedu-Darkwa fired three lethal rounds. (*Id.*). Deputy Normile fired one less-lethal round. (*Id.*). Deputy Brennan did not fire his weapon. (*Id.*). Mr. Rudhman was struck multiple times in the torso and once in the head. (Doc. 31 at 4). He was still breathing at the scene, but later died at the hospital. (*Id.*).

On December 12, 2019, Plaintiffs Yearick and Huber brought this action against Defendants in Arizona state court. (Doc. 1 at 2). After Defendants were served, they timely removed the case to this Court. (*Id.*). Plaintiffs have since filed three Amended Complaints (Docs. 8, 24, 31). The operative Complaint (Doc. 31) includes three separate claims: (i) unreasonable use of force, in violation of Decedent's Fourth Amendment rights, pursuant to 42 U.S.C. § 1983 (Count I); (ii) wrongful death, pursuant to A.R.S. § 12-611 (Count II); and (iii) interference with familial relationship, in violation of Plaintiffs' Fourteenth Amendment rights, pursuant to 42 U.S.C. § 1983 (Count III).[7] (*Id.* at 5–6). Defendants now move for summary judgment as to all three claims. (Doc. 83).

B. Disputed Facts

As noted above, the only disputed facts in this case relate to the manner in which Decedent was carrying the gun as he walked toward the officers. (*See* Doc. 84, "Plaintiffs' Controverting and Separate Statement of Facts" (contesting *only* ¶¶ 39–41 and 44 of Defendants' Statement of Facts)). Defendants assert that Mr. Rudhman "raised the gun and began to swing it erratically," though the details of each officers' recollection differ. (Doc. 83 at 4). Sergeant Kelleher stated that he saw the gun "swinging above [Mr. Rudhman's] head." (Doc. 87 at 10). Sergeant Leatham stated that he saw Mr. Rudhman "[bring] the gun up at a 90% angle more than once." (*Id.*). Deputy Asiedu-Darkwa stated that Mr. Rudhman

[7] The Court notes that Plaintiffs' § 1983 claims (Counts I and III) are brought against only Defendants Leatham, Kelleher, and Asiedu-Darkwa. (Doc. 31 at 5–6). Plaintiffs' state-law wrongful death claim (Count II) is also brought against Defendants Leatham, Kelleher, and Asiedu-Darkwa, and additionally against Defendant Sheriff Penzone, who was sued in his official capacity. (*Id.*).

was "twirling the gun, with the muzzle going in all different directions." (*Id.*). Plaintiffs, on the other hand, assert that Mr. Rudhman was "dangling [the] gun loosely in his hand" and that he never raised, brandished, or pointed the gun toward the officers. (Doc. 86 at 1). Plaintiffs maintain that Mr. Rudhman's arms "were swinging loosely and gently at his side in the normal manner of one walking, and the gun hung from his right hand." (*Id.* at 8).

Having reviewed the available body camera recordings, this Court finds that the footage largely supports Plaintiffs' contentions. Mr. Rudhman's arms appear to stay at his side as he walked toward the officers. Although the quality of the footage makes it difficult to see Mr. Rudhman's gun, there is absolutely no indication that he was swinging it "erratically," "above his head," or "at a 90% angle," as the officers stated. That said, Defendants correctly point out that the footage does not *clearly* show the intricacies of Mr. Rudhman's right hand movement, nor the exact position or aim of the gun. (Doc. 91 at 4–5; *see also* Doc. 84-3 at 4–5, "Forensic Video Analysis Report"). In sum, although the body camera recordings are largely supportive of Plaintiffs' position, they do not *definitively* resolve the issue of exactly how Mr. Rudhman was handling the gun as he walked toward the officers. Nonetheless, for purposes of deciding this Motion, the Court will resolve this factual dispute in Plaintiffs' favor and assume that Mr. Rudhman's arms stayed by his side as he walked, that the gun was consistently aimed at the ground, and that he never raised or pointed the gun at the officers. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citation omitted) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

II. LEGAL STANDARD

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not

produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, *i.e.*, a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, *i.e.*, the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson*, 477 U.S. at 248, 250; *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. DISCUSSION

The Court will first address whether summary judgment is appropriate as to Plaintiffs' § 1983 claims for excessive force and interference with familial relations against Defendants Leatham, Kelleher, and Asiedu-Darkwa, and will then turn to the wrongful death claim against Defendants Leatham, Kelleher, Asiedu-Darkwa, and Penzone.

A. Excessive Force (Count I)

Whether force is excessive depends on "whether the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see Tatum v. City & Cnty. of S.F.*, 441 F.3d 1090, 1095 (9th Cir. 2006). "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." *Graham*, 490 U.S. at 396.

Defendants argue that summary judgment in their favor is appropriate because there is no genuine issue of material fact regarding Plaintiffs' excessive force claim and because—as a matter of law—Defendants' actions were objectively reasonable. (Doc. 83 at 5–11). Alternatively, Defendants argue that even *if* they violated Plaintiffs' constitutional rights, they are entitled to qualified immunity because it was not "clearly established" at the time of the incident that their actions were unconstitutional. (*Id.* at 11–15). Plaintiffs respond by arguing that Defendants' use of deadly force was objectively unreasonable under the circumstances and therefore unconstitutional, and that summary judgment in Defendants' favor is not appropriate. (Doc. 86 at 5–8). Plaintiffs additionally cite to caselaw purportedly demonstrating that it was "clearly established" that Defendants' actions were unlawful at the time of the incident, and that Defendants are therefore not entitled to qualified immunity. (*Id.* at 8–13).

The Court will first address whether Defendants are entitled to qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Est. of Lopez v. Gelhaus*, 871 F.3d 998, 1005 (9th Cir. 2017) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). In determining whether an officer is entitled to qualified immunity, the Court must consider (1) whether there has been a violation of a constitutional right, and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citing *Pearson*, 555 U.S. at 231). The Court may exercise its discretion "in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at

hand." *Pearson*, 555 U.S. at 236. Once a qualified-immunity defense is raised, the plaintiff bears the burden of proving the violation of a constitutional right and that the right was clearly established. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000).

Here, the Court will begin by focusing on the "clearly established" prong. "To find a clearly established right, the court must consider the right at issue in a particularized sense, rather than 'as a broad general proposition.'" *Cruz v. City of Tucson*, 2015 WL 11111305, at 3 (D. Ariz. July 14, 2015) (quoting *Dunn v. Castro*, 621 F.3d 1196, 1200–01 (9th Cir. 2010)). "This is because 'the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.'" *Id.* (quoting *Dunn*, 621 F.3d at 1200–01). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)); *see also Dunn*, 621 F.3d at 1200 (citation omitted) ("[T]he court must 'determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful.").

Therefore, this Court must consider the state of the clearly established law in December 2018, and whether it gave Defendants fair warning that their decision to use deadly force against Decedent under the circumstances presented was unconstitutional. The parties define the right at issue at different levels of generality. According to Plaintiffs, the Court may hold that "clearly established" law existed so long as it identifies cases "finding a constitutional violation when an officer used deadly force against someone without warning merely because they were armed, when that person hadn't made any threats or otherwise acted in a manner suggesting that they were going to harm the officer." (Doc. 86 at 12–13). Plaintiffs provide several cases which they argue are on point. (*Id.* at 9–11). Defendants define the right at issue in a comparably narrow manner, and assert that this Court may find that "clearly established" law existed only if it identifies cases finding a constitutional violation where an officer shoots a subject "when that subject (a) had scared his wife enough that she locked herself inside her bedroom and called 911; (b) had a large-caliber revolver; (c) threatened to shoot the family dogs; (d) fired the gun in the backyard;

(e) refused deputy commands to come out of the house *without* the gun; (f) refused at least five additional deputy commands to stop and/or drop the gun; (g) walked directly toward the deputies while carrying the loaded handgun; and (h) said 'I can't do that . . . no I'm not stopping right there' and/or 'that's not going to happen' in response to deputy commands." (Doc. 83 at 14 (emphasis in original)). Unsurprisingly, Defendants were unable to identify any cases finding constitutional violations under such factual parameters and therefore argue that it was not "clearly established" that Defendants' decision to use deadly force in this case was unlawful. (*Id.*).

The Court declines to adopt either parties' characterization of the right at issue and finds that it should instead be defined at a level of generality falling somewhere in the middle. Plaintiffs' characterization is too broad, as it omits critical facts that undoubtedly factored into Defendants' decision to use deadly force in this case. *See Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987) (stressing consequences of defining the right too generally because it would allow a plaintiff "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights"); *Ashcroft*, 563 U.S. at 742 ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality."). For example, Decedent was walking—with a gun in his hand—directly toward Defendants for twenty-four seconds, closing the distance between him and Defendants by approximately forty feet. Decedent's walk was continuous, and he ignored five specific commands from Sergeant Leatham to stop and drop his weapon. The Court expressly rejects Plaintiffs' contention that it need only identify cases where deadly force was used "without warning" and when the suspect "hadn't made any threats or otherwise acted in a manner suggesting that they were going to harm the officer[s]," (Doc. 86 at 13), because such facts are do not even accurately depict the circumstances of this case. *See Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that 'it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'").

On the other hand, Defendants' characterization of the right at issue is far too specific. Indeed, if the "clearly established" prong could only be met where there is a preexisting case with facts virtually identical to the circumstances presented in the case at issue, qualified immunity would transform into near-blanket immunity for officers. *See Bonivert v. City of Clarkson*, 883 F.3d 865, 872 (9th Cir. 2018) (citation omitted) ("[I]f qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment."). Thus, "[t]he question is not whether an earlier case mirrors the specific facts here [but rather] whether 'the state of the law at the time gives officials fair warning that their conduct is unconstitutional.'" *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) (quoting *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 1003 (9th Cir. 2010)). To demonstrate the existence of "clearly established" law in this case, Plaintiffs need not identify cases where the decedent's wife locked herself in the room out of fear, or where the decedent threated to kill the family dogs and fired his gun in the backyard. Rather, the Court finds that Plaintiffs must identify precedent establishing a constitutional violation where the officer uses deadly force when faced with a subject armed with a gun and walking directly at the officer while ignoring explicit commands to stop and drop his weapon. The Court finds that defining the right at issue in this manner appropriately tailors the scope of qualified immunity to the specific factual circumstances of this excessive-force case. *See Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) ("Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue.").

Plaintiffs have not provided the Court with caselaw "clearly establishing" the unconstitutionality of an officer's decision to use deadly force under such circumstances. Plaintiffs cite to *George v. Morris*, a case in which, as here, officers were dispatched to a residence "for a domestic disturbance involving a firearm." 736 F.3d 829, 832 (9th Cir. 2013). The officers set up a perimeter around the house and watched as the sixty-four-year-old decedent came outside with his walker and armed with a gun. *Id.* A factual dispute

existed as to whether the decedent turned and pointed the gun at the officers. *Id.* at 838. However, the court chose not to credit the deputies' testimony and assumed that the decedent did not turn, raise the gun, or aim the gun at the officers. *Id.* With those assumptions made, the court found that the decedent did not take any actions that would have been objectively threatening. *Id.* The court held that "a reasonable fact-finder could conclude" that the officers' decision to shoot the decedent "was constitutionally excessive," given that the decedent, while armed, did not make "a furtive movement, harrowing gesture, or serious verbal threat" that would create an immediate threat justifying the use of deadly force. *Id.*

Although the facts of *George* are similar to the present case in the abstract, there are important differences. Most notably, the decedent in *George* was not walking directly toward the officers with the gun. Quite to the contrary, he was using a walker and simply stepped outside of his house and onto the back patio. In this case, on the other hand, Decedent walked continuously and directly at the officers for twenty-four seconds with a gun in his hand. Additionally, in *George* there was at least a factual dispute as to whether the decedent ignored commands to drop the gun. Here, in contrast, Decedent likely heard and ignored five distinct commands to come out of the house without the gun. Once outside, it is undisputed that Decedent ignored—in fact, *verbally objected to*—five additional commands to stop walking and drop the gun. It was only after Decedent walked forty-feet closer to Defendants that they decided to use deadly force. The Court cannot overlook these important distinctions from *George*, as they undoubtedly raised the immediacy of the threat faced by Defendants in this case. Hence, the Court cannot find that *George* "clearly established" to a reasonable officer in Defendants' position that the use of deadly force in this case was unlawful.

Plaintiffs' citations to two other cases—*Lopez* and *Villegas*—fail to demonstrate the existence of "clearly established" law for similar reasons. In *Lopez*, the decedent—a thirteen-year-old with a toy gun that resembled an assault rifle—was walking *away* from the officers. *Lopez*, 871 F.3d at 1002. When one officer shouted at the decedent to drop the gun, the decedent—not knowing that anyone was behind him, let alone that it was an

officer—stopped walking and turned naturally toward the officers. *Id.* at 1002–03. The officer who had ordered the decedent to drop the gun fired his own weapon, killing the decedent. *Id.* at 1003. The parties disputed whether the decedent raised the toy gun as he turned, but the Court resolved the dispute in the decedent's favor and assumed that the barrel of the toy gun "might have raised slightly," but that it was never raised to a position that posed any threat to the officers. *Id.* at 1010–11. The facts of *Lopez* are thus distinctly different than those of the present case, where Decedent was fully aware of the officers' presence, walked directly toward the officers with his gun, and ignored at least five commands to stop and drop the gun.

In *Villegas*, officers were dispatched to an apartment complex where a man was thought to be loitering in the parking garage armed with a shotgun. *C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1253–54 (9th Cir. 2016). The officers rounded a corner and encountered two men, including the decedent, approximately twelve to fifteen yards away. *Id.* at 1254. The officers disputed whether the decedent was already holding the gun—which turned out to be a BB gun resembling a full-power long gun—or whether the gun was leaning against a wall next to the decedent. *Id.* The officers shouted multiple commands, including "show me your hands," or "put your hands up," and "drop the gun." *Id.* Another dispute centered around how the decedent reacted—whether he grabbed the gun from the wall or merely raised the gun because it was already in his hand. *Id.* Drawing inferences in the decedent's favor, the court held that a reasonable jury could conclude that the decedent was already holding the gun, that the decedent was *complying* with orders to put his hands up when he raised the gun, and that the officer who fired at the decedent resorted to deadly force "without providing a warning or sufficient time to comply" and without "observing [the decedent] pointing the long gun toward the officers or making any move toward the trigger." *Id.* at 1256. Again, *Villegas* differs from the present case in that the decedent was not walking toward the officers with the gun, nor was there undisputed evidence that he was blatantly ignoring commands to drop the weapon.

In sum, the cases cited to by Plaintiffs had "clearly established" the unlawfulness of an officer using deadly force "simply because [the suspect is] armed." *George*, 736 F.3d at

838 (quoting *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997)). The Court thus recognizes that—at the time of the incident in this case—a reasonable officer in Defendants' position would have known that it was unlawful to use deadly force against Decedent—even though he was armed—*unless* Decedent created a more immediate threat through "a furtive movement, harrowing gesture, or serious verbal threat." *Id.* Indeed, if Defendants in this case had used deadly force after Decedent merely exited his house with the gun and did nothing more—similar to the facts of *George*—this Court would be much more inclined to find that such use of deadly force was unlawful under clearly established law. However, such was not the case here. Decedent exited the house with the gun and began walking directly toward the officers. He continued the walk—for twenty-four seconds and approximately forty feet—despite clear verbal commands to stop and drop the weapon. It would be disingenuous for the Court to ignore or minimize these facts or to overlook what impact they had on the officers' decision to use deadly force. Plaintiffs have failed to provide any caselaw demonstrating the unlawfulness of an officer using deadly force under such facts.[8] Moreover, this Court's own review of the existing law failed to turn up such a case. Therefore, Plaintiffs have failed to meet their burden of demonstrating that preexisting, "clearly established" law would have provided fair warning to Defendants that the use of deadly force was unlawful in the situation they confronted. Defendants Leatham, Kelleher, and Asiedu-Darkwa are entitled to qualified immunity and summary judgment in their favor is appropriate as to Plaintiffs' excessive force claim.

Having found that no "clearly established" law existed that would have indicated to a reasonable officer in Defendants' position that the use of deadly force was unlawful, the

[8] Plaintiffs' parenthetical citations to three other cases also fail to demonstrate the existence of "clearly established" law. *See Shannon v. Cnty. of Sacramento*, No. 2:15-CV-00967 KJM DB, 2018 WL 3861604 (E.D. Cal. Aug. 14, 2018) (armed decedent not walking toward officers but standing still with gun); *Hayes v. Cnty. of San Diego*, 736 F.3d 1223 (9th Cir. 2013) (decedent armed with knife was complying with officer's command to raise hands and stated that they could take him to jail, but nonetheless shot when officers saw knife in hand and after he took two steps toward them, despite no order to stop or to drop the weapon); *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991) (decedent not facing officers, let alone walking toward them, when officers shot him first time).

Court need not address the other prong of the qualified immunity analysis, that is, whether there was a violation of a constitutional right. That said, even setting aside whether there was "clearly established law" on point, the facts of this case do not amount to a violation of Decedent's Fourth Amendment rights under the multi-factor test for excessive force, as laid out by *Graham* and its progeny because there are no material facts in dispute in this case and Defendants' use of deadly force was not objectively unreasonable.

The Ninth Circuit has repeatedly held that the reasonableness of force used is ordinarily a question for the jury because of its fact-intensive nature. *See Liston v. Cnty. of Riverside*, 120 F.3d 965, 976–77 (9th Cir. 1997) ("It is for the finder of fact to determine the reasonableness of the force used in this case, and that can be done only upon a fully developed record."); *see also Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc) ("Because [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth Circuit has] held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly."). However, this is not necessarily the case where there are no fact issues for the jury to decide. "At the summary judgment stage, once the Court has 'determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record,' the question of whether an officer's actions were objectively reasonable . . . is 'a pure question of law.'" *Cutler v. Nanos*, 546 F. Supp. 3d 856, 869 (D. Ariz. 2021) (quoting *Krause v. Cnty. of Mohave*, No. CV-17-08185-PCT-SMB, 2020 WL 2541728, at *5 (D. Ariz. May 18, 2020)). In other words, "where the essential facts are undisputed, the reasonableness of the officer's actions is properly determined by the court." *Whitaker v. Pima Cnty.*, 640 F. Supp. 2d 1095, 1102 (D. Ariz. 2009); *see also Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995) ("Even though reasonableness is traditionally a question of fact for the jury, defendant can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances.").

As noted above, the facts in the present case are almost entirely undisputed.

Moreover, the only facts that *are* in dispute—the details related to how Decedent was carrying the gun as he walked toward Defendants—are immaterial to the reasonableness analysis given the other *undisputed* facts in this case. Even assuming that Decedent was carrying the gun just as Plaintiffs assert—"loosely" at his side and never being raised or otherwise aimed toward Defendants—the use of deadly force by Defendants was objectively reasonable because of the immediate threat posed by Decedent. Given the absence of any material fact in dispute, this case presents the rather rare situation where the question of objective reasonableness is a "pure question of law" and where an entry of summary judgment by the Court is appropriate. *See Cutler*, 546 F. Supp. 3d at 869.

Whether the use of deadly force is objectively reasonable "depends on several factors, including the severity of the crime that prompted the use of force, the threat posed by a suspect to the police or to others, and whether the suspect was resisting arrest." *Tatum*, 441 F.3d at 1095 (citing *Graham*, 490 U.S. at 396). "The most important *Graham* factor is whether the suspect poses an immediate threat to the safety of the officer or others." *Cutler*, 546 F. Supp. 2d at 868–69 (citing *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011)). The Ninth Circuit Court of Appeals has noted that "[t]hese factors, however, are not exclusive" and that courts should consider "the totality of the circumstances and consider[] whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." *Mattos*, 661 F.3d at 441 (citations and internal quotations omitted); *see also Hughes v. Kisela*, 841 F.3d 1081, 1085 (9th Cir. 2016) ("Other relevant factors may include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force used was mentally disturbed.").

Here, the first *Graham* factor—the severity of the crime that prompted the use of force—likely weighs in Plaintiffs' favor. Although it is true that domestic violence situations are "particularly dangerous" because "more officers are killed or injured on domestic violence calls than on any other type of call," *Mattos*, 661 F.3d at 450, the Court recognizes Plaintiffs' contention that this case was not clearly a domestic violence dispute, given that Ms. Yearick's 911 call was, in large part, due to her concerns over Decedent's

mental crisis, intoxication, and the dangers he was posing to himself. (Doc. 86 at 7).

The third *Graham* factor—whether the suspect was resisting arrest or attempting to evade arrest by flight—weighs relatively neutral in this case. On one hand, there is no evidence that Decedent was actively resisting an arrest—indeed, Defendants were not even attempting to arrest Decedent so much as they were trying to gain control of the situation. Likewise, Decedent was not trying to evade Defendants either, as he was walking *toward* Defendants rather than away. On the other hand, however, it is undisputed that Decedent was completely ignoring—even verbally objecting to—commands to stop and drop his weapon from uniformed officers who had their own weapons aimed at him. As Defendants point out, such non-compliance with commands to stop and drop a weapon arguably falls within the scope of "resisting arrest" under Arizona law. *See* A.R.S. § 13-2508(A) ("A person commits resisting arrest by intentionally preventing or attempting to prevent [an officer] from effecting arrest by (1) [u]sing or threatening to use physical force against [the officer,] (2) [u]sing any other means creating a substantial risk of causing physical injury to [the officer, or] (3) [e]ngaging in passive resistance.").

Other relevant factors—specifically, the factors listed in *Hughes*—weigh in various ways. It is true that Deputy Normile had a less-lethal weapon and that he was considering calling out for its use when the other officers fired their lethal weapons. Thus, less intrusive force was undoubtedly available. That said, this factor is less relevant given that Decedent was walking in Defendants' direction with a lethal weapon in his hand. It is rather easy for the Court to find now, with the benefit of hindsight, that Defendants should have used less-lethal force and that, if they had, Decedent and the entire situation could have been more safely brought under control. It is not so easy, however, to find that Defendants' decision to bypass less-lethal force was objectively unreasonable, given the escalating situation Defendants were facing. This Court will not—indeed, it *cannot*—judge Defendants' decision "with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Moreover, the Ninth Circuit has specifically held that "[a] reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable." *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010).

It is true that Defendants failed to *explicitly* warn Decedent that deadly force was imminent. It is also true that Defendants likely had time to do so, given that they held off on employing deadly force for the twenty-four seconds Decedent was walking toward them. That said, this does not mean that Defendants' shooting of Decedent came out of nowhere or that Decedent had no way of anticipating it, as was the case in *Lopez*. In that case, the thirteen-year-old decedent was walking away from the officers when he heard one of them shout in his direction. He stopped and began to turn naturally in the direction of the voice, not knowing that it was an officer, let alone that deadly force was imminent. *Lopez*, which is discussed more extensively above, is an example of a case where the "adequate warning" factor weighed heavily in the objective reasonableness analysis. Here, in stark contrast, Decedent was walking toward five uniformed officers who each had weapons aimed at him. Moreover, although Defendants did not explicitly warn Decedent that they were about to use those weapons, they did make ten, clear, specific verbal commands throughout the incident—to come outside without the gun, to stop walking toward them, and to drop his weapon—that should have made that possibility clear.

The Court finds that the second *Graham* factor—the threat posed by the suspect to the officers or to others—is the decisive factor in this case. *See Mattos*, 661 F.3d at 441 (citations and internal quotations omitted) ("Ultimately, the most important [factor] is whether the suspect posed an immediate threat to the safety of the officers or others."). As this Court noted above, the Ninth Circuit has consistently held that an officer's use of deadly force is not automatically reasonable just because the suspect is armed with a deadly weapon. *See, e.g.*, *George*, 736 F.3d at 838. On the other hand, courts recognize that an officer is "undoubtedly entitle[d]" to respond with deadly force where the suspect points a gun in the officer's direction. *Id.* (citing *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007)). Here, Decedent was armed but did not point the gun at the officers or otherwise raise the gun in any sort of threatening manner. Therefore, the question is whether Decedent made a "furtive movement, harrowing gesture, or serious verbal threat" sufficient to create an immediate threat. *Id.* As this Court has noted several times, the fact that Decedent was walking directly toward the officers—for twenty-four seconds and

approximately forty feet—with a gun in his hand and while verbally objecting to Defendants' numerous commands to stop and drop the weapon is what distinguishes this case from others. Moreover, it was these actions that constituted the "furtive movement, harrowing gesture, or serious verbal threat" necessary to create an immediate threat and to justify the reasonable deployment of deadly force. As discussed above with respect to the "clearly established" prong, Plaintiffs failed to provide—and this Court itself has failed to discover—any legal authority for the proposition that deadly force is objectively unreasonable where an armed subject is walking directly at the officers and ignoring their repeated commands to stop and drop the weapon.

The Court finds that Defendants' use of deadly force in this case was objectively reasonable, and that they did not violate Decedent's constitutional rights under the Fourth Amendment. Even if their actions were unconstitutional, Defendants are entitled to qualified immunity given the absence of "clearly established" law. The Court grants summary judgment in Defendants' favor as to Plaintiffs' claim of excessive force.

B. Interference with Familial Relations (Count III)

Plaintiffs allege Defendants' actions deprived them of their Fourteenth Amendment substantive due process right of familial association and companionship with their son and husband. The right to familial association and companionship is a "long-recognized constitutional right" and a "basis for a § 1983 claim." *Ochoa v. City of Mesa*, No. CV-18-00905-PHX-JJT, 2020 WL 2097785, at *5 (D. Ariz. May 1, 2020) (citations omitted). "While this Fourteenth Amendment claim is often brought in conjunction with a claim of excessive force under the Fourth Amendment, the two are distinct and the former demands a higher standard of culpability from the Defendant Officers." *Id.* Namely, a § 1983 claim for deprivation of a familial relationship requires the plaintiff to prove that the defendant's use of force "shock[ed] the conscience." *Gonzalez v. City of Anaheim*, 747 F.3d 789, 797 (9th Cir. 2014) (citing *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)). To determine whether a defendant's actions "shock the conscience", a court must first ask "whether the circumstances [were] such that actual deliberation [by the officer was]

practical." *Wilkinson*, 610 F.3d at 554 (citing *Porter*, 546 F.3d at 1137). If the officer had time for actual deliberation, his actions shock the conscience if he acted with "deliberate indifference." *Id.* However, if the officer did *not* have time for actual deliberation—that is, if he made "a snap judgment because of an escalating situation"—his actions shock the conscience only if he acted "with a purpose to harm unrelated to legitimate law enforcement objectives." *Id.*

Here, Defendants assert that the December 16, 2018 incident took place "over a short period of time that necessitated fast action." (Doc. 83 at 19). Defendants argue that there was thus no time for actual deliberation, and that the "purpose to harm" standard is appropriate. (*Id.*). According to Defendants, there is no evidence to suggest that Defendants intended to cause harm unrelated to the legitimate object of arrest, and therefore summary judgement is appropriate. (*Id.*). Plaintiffs, on the other hand, argue that a reasonable jury could find that Defendants *did* have time to deliberate, and that the "deliberate indifference" standard is appropriate. (Doc. 86 at 13).

"A court may determine at summary judgment whether the officer had time to deliberate . . . or instead had to make a snap judgment because he found himself in a quickly escalating situation . . . 'so long as the undisputed facts point to one standard or the other.'" *I.A. v. City of Emeryville*, No. 15-cv-04973-DMR, 2017 WL 952894, at *10 (N.D. Cal. Mar. 13, 2017) (citations omitted). That said, "the determination of which situation the officer actually found himself in is a question of fact for the jury, so long as there is sufficient evidence to support both standards." *Id.* (citations omitted). Here, the Court finds that there is not sufficient evidence to support both standards and that the undisputed facts in this case show that Defendants were faced with an escalating situation requiring snap judgments. After Defendants waited for several minutes outside of the house, Decedent appeared suddenly with a large caliber revolver in his right hand. Over the course of twenty-four seconds, Decedent walked directly toward Defendants at a steady pace, closing the distance between them by approximately forty feet and ignoring four verbal commands from Sergeant Leatham to drop his weapon and one verbal command to stop where he was

at. Only after Decedent ignored commands—indeed, he ignored the commands *verbally* by stating "no" and "[t]hat's not gonna happen"—and continued walking toward Defendants did Defendants decide to fire their weapons. Defendants were not only concerned with their own safety, but also the safety of others in the immediate vicinity, including a family of four that lived in a trailer on the property and a neighbor who had been outside immediately prior to the incident.

As Plaintiffs point out, the fact that this incident played out in under thirty seconds is not dispositive on the question of whether there was time for actual deliberation. Courts have found evidence supporting a finding of actual deliberation—at least sufficient to raise a factual issue for the jury—in circumstances where events unfold in a matter of seconds. For example, Plaintiffs cite to *City of Emeryville*, a case in which the decedent had robbed a store and was fleeing the scene with a weapon. *City of Emeryville*, 2017 WL 952894, at *1. After the officers fired two volleys at her, she dropped her weapon and fell to the ground. *Id.* at *3. The decedent's gun was laying approximate six feet behind her back, and she made "no movement toward" the gun. *Id.* at *10. At that moment—while the decedent was "lay[ing] wounded and unarmed on the ground"—the court found that a reasonable juror could find that she was no longer an immediate threat to the officers' safety and that the officers had time to deliberate and consider alternative actions, "such as issuing a verbal warning" or waiting for assistance from back-up officers who were arriving on scene. *Id.* Instead of doing so, however, one officer fired a third volley and killed the decedent. *Id.* at *9–*10. The court concluded that a jury could find that actual deliberation was practical and denied the officers' request for summary judgment. *Id.* at *10–*11.

The Court finds the present case clearly distinguishable from *City of Emeryville*. Whereas the decedent in that case was initially running away from the officers and then lying wounded on the ground at the time the lethal shot was fired, Decedent here was advancing directly toward the officers at the time they fired their weapons. Decedent still had a weapon in his hands, and he was ignoring clear verbal warnings from Defendants as he moved closer and closer. The fact that Deputy Normile—who was armed with a less-

lethal weapon—was "in his thought process" and "ready to call out" for less-lethal fire is at least some evidence that there was a brief moment for deliberation. The Court finds, however, that such evidence is insufficient to establish that there was time for actual deliberation. The circumstances of this case presented the very essence of a "quickly escalating situation" that required snap judgments by Defendants. *See Ochoa v. City of Mesa*, 26 F.4th 1050, 1057 (9th Cir. 2022) ("The urgency of that moment—caused by [Decedent]'s failure to follow police commands—forced the officers to react instantly, without deliberation.").

Given that Defendants had no time for actual deliberation, the "purpose to harm" standard applies, and Plaintiffs must show that Defendants acted with purpose to harm Decedent for reasons unrelated to legitimate law enforcement objectives. "Legitimate objectives can include 'arrest, self-protection, and protection of the public.'" *Ochoa*, 26 F.4th at 1056 (quoting *Foster v. City of Indio*, 908 F.3d 1204, 1211 (9th Cir. 2018)). "Illegitimate objectives include 'whether the officer had any ulterior motives for using force against the suspect, such as to bully a suspect or "get even," or when an officer uses force against a clearly harmless or subdued suspect.'" *Id.* (citations and internal quotations omitted). Here, there is no indication in the record that Defendants had any improper or ulterior motives when they shot Decedent. Decedent was not "clearly harmless" or "subdued," as he was walking directly toward Defendants with a weapon in his right hand. Defendants acted with the legitimate objective of protecting themselves and the public. Thus, the Court finds that summary judgment is appropriate—in Defendants' favor—on Plaintiffs' § 1983 claim for interference with familial relationship.

C. State Law Claim—Wrongful Death (Count II)

Defendants also request summary judgment as to Plaintiffs' state-law claim for wrongful death, pursuant to A.R.S. § 12-611. Defendants argue that summary judgment is appropriate first because Plaintiffs' Complaint (Doc. 31 at 5–6) couches the wrongful death claim in terms of negligence only and fails to specify an intentional tort theory such as "battery, assault, or something else." (Doc. 83 at 16–17). Defendants are correct that, "[i]n

Arizona, plaintiffs cannot base a negligence claim on an intentional use of force nor on a law enforcement officer's negligent 'evaluation of whether to intentionally use force.'" *Liberti v. City of Scottsdale*, 816 Fed. App'x. 89, 90 (9th Cir. 2020) (quoting *Ryan v. Napier*, 245 Ariz. 54, 60 (2018)). Rather, "[a]ny negligence claim must be based on conduct independent of the intentional use of force." *Id.* (citing *Ryan*, 245 Ariz. at 62).

In their Response, Plaintiffs argue that "the evidence in this case clearly demonstrates that the officers committed a battery sufficient to support Plaintiffs' [wrongful death] claim." (Doc. 86 at 15). Thus, for purposes of this Motion, the Court assumes that the wrongful death claim in Plaintiffs' Complaint is based on the intentional tort theory of battery. However, Defendants further argue that—even assuming a properly pled intentional tort—the defenses of justification set forth under Arizona law apply to intentional tort claims like battery. (Doc. 83 at 17). Indeed, A.R.S. § 13-410 provides that "[t]he use of deadly force by a peace officer against another is justified" if the peace officer "reasonably believes that it is necessary . . . [t]o defend himself or a third person from what [the officer] reasonably believes to be the use or imminent use of deadly physical force." A.R.S. § 13-410(C)(1). Plaintiffs' only argument against the application of § 13-410 in this case is that "[f]or all the reasons discussed above [in their Response brief], fact issues preclude a finding in the officers' favor." (Doc. 86 at 15).

As the Court found above in the excessive force analysis, Defendants' use of deadly force in this case was objectively reasonable because of the immediate threat posed by Decedent being armed with a gun, walking toward Defendants, and verbally objecting to Defendants' commands to stop and drop the weapon. Such facts are undisputed in this case. Therefore, there are no fact issues for the jury to decide, and Plaintiffs do not otherwise argue that the reasonableness standard imposed by Arizona state statutes is any different than the reasonableness standard imposed by the Fourth Amendment. Therefore, the Court finds that Defendants' use of deadly force was justified under § 13-410. The Court grants summary judgment in Defendants' favor as to Plaintiffs' state-law wrongful death claim.

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IV. CONCLUSION

Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgment (Doc. 83) is **granted** as to Plaintiffs' § 1983 claims for excessive force (Count I) and interference with familial relations (Count III) and as to Plaintiffs' state-law wrongful death claim (Count II). These claims are dismissed.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment and terminate this action accordingly.

Dated this 19th day of August, 2022.

Honorable Steven P. Logan
United States District Judge