

Nos. 23-1070

**In the United States Court of Appeals
For the Tenth Circuit**

ESTATE OF JEFFREY MELVIN,

Plaintiff-Appellee,

v.

CITY OF COLORADO SPRINGS, COLORADO;
DANIEL PATTERSON, in his individual capacity,
JOSHUA ARCHER, in his individual capacity,

Defendants-Appellants.

**On Appeal from the United States
District Court for the District of Colorado
Civil Action No. 1:20-cv-00991-CMA-MDB
Honorable Judge Christine M. Arguello**

PLAINTIFF-APPELLEE'S ANSWER BRIEF

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ORAL ARGUMENT IS REQUESTED

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STATEMENT REGARDING PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Defendants’ appeal of the district court’s order denying summary judgment to Defendants Archer and Patterson (“Individual Defendants” or “Defendants”), only to the extent this appeal focuses on purely legal issues. However, as discussed below, and consistent with this Court’s admonitions regarding jurisdiction in its Order for specific briefing on this issue, *see* March 28, 2023, Order for Specific Briefing, Defendants’ appeal relies heavily on factual disputes beyond the “abstract issues of law” over which this Court has jurisdiction, and this Court lacks jurisdiction to review such arguments. This Court must reject Defendants’ attempt to circumvent established appellate jurisdictional limits.

Further, this Court lacks jurisdiction to consider Defendants’ appeal of the claim against Defendant City of Colorado Springs. Since “municipalities are not entitled to qualified immunity,” they “cannot invoke the collateral order doctrine to justify appeal of an otherwise nonappealable decision.” *Paugh v. Uintah Cty.*, 47 F.4th 1139, 1171-72 (10th Cir. 2022) (citation omitted). Nor is Colorado Springs’ appeal entitled to pendent appellate jurisdiction, because its appellate claim is not “inextricably intertwined” with Individual Defendants’ appellate assertions regarding the § 1983 claims; the resolution of the latter will not necessarily resolve the former. *Cf. Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995).

Moreover, “[e]ven when [this Court has] jurisdiction to consider pendent appellate claims, doing so is generally disfavored.” *Brown v. City of Colo. Springs*, 709 F. App'x 906, 916 (10th Cir. 2017). Accordingly, this Court should dismiss Defendants’ appeal of the district court’s order denying summary judgment to Colorado Springs.

ISSUES PRESENTED FOR REVIEW

Although Plaintiff does not contest Defendants’ statement of the issues presented for review, Plaintiff disagrees with Defendants’ factual recitation and assumptions contained therein. The Court lacks jurisdiction to consider any of the Defendants’ quarrels with the District Court’s factual findings, as well as Defendant Colorado Springs’ argument regarding Plaintiffs’ municipal liability claim, for which neither qualified immunity nor an interlocutory appeal are available.

STATEMENT OF THE CASE

A. Facts

1. Whether Individual Defendants used excessive force against Melvin depends on the resolution of hotly disputed material facts.

On April 26, 2018, Colorado Springs Police Department (“CSPD”) Officers Patterson and Archer killed Jeffrey Melvin. Defendants met Melvin, a Black man, when they were responding to a reported disturbance which had occurred earlier in the evening; Melvin was merely a visitor who arrived after them. He was unarmed,

posed no threat to the officers, and they had no cause to suspect him of any crime beyond, at most, a municipal offense; even so, the officers, pepper sprayed him in the face and deployed a Taser on him between 5 *and* 8 times in 2 minutes, causing Melvin's death. Because disputed issues of material fact exist regarding whether Defendants used excessive force, the district court denied Defendants' motion for summary judgment.

On April 26, 2018, Defendants responded to a report of a "cold" disturbance, meaning that the alleged disturbance had already occurred and was not ongoing. Aplt. Appx. 314-15, Archer dep. 57:23, 58:7, 67:6-68:6. Dispatch informed the responding officers that people had been fighting in the apartment below the reporting party's, but no known weapons were involved, and the description of the "susp[ect]" was unknown. Aplt. Appx. 345, CAD Log 1.

At the apartment, Jordan Bruno, the apartment's resident, answered the door and was "completely cooperative." He said that "he and his 'homeboys' had a verbal disagreement earlier," but everyone involved had since left. Aplt. Appx. 302, Incident Reports 5. Bruno further stated that there were no continuing problems or concerns, no one was hurt, and nothing was broken. A.S., a then-sixteen-year-old girl present in the apartment, gave the same answers and told Defendants she was okay. Neither A.S. nor any other occupant displayed any signs of distress, and none of them gave Defendants reason to objectively believe that

they posed any danger to Defendants or anyone else, or that they were engaged in criminal activity. *See* Patterson BWC 1 2:10-2:40.¹ Nothing Bruno, A.S., or Nancy Dorado, another individual present in the apartment, said indicated that the individual involved in the earlier fight was Melvin. *See* Archer BWC 1:20-17:50; Patterson BWC 1; Aplt. Appx. 328-29, Archer dep. 226:8-227:10, 229:11-230-14.

Bruno explained that he had invited A.S. and Dorado to hang out, and he knew A.S. through a friend from high school. In response to Defendants' observations about their ages, A.S. said that she was in Colorado Springs with her father, and currently she was living with Dorado. She denied being a runaway. A.S. further told Patterson that her uncle lived in Colorado Springs, and she was going to call him. Patterson BWC 1 2:20-2:30, 3:30-4:00, 8:05-8:15, 11:30-13:30.

After approximately 16 minutes of discussion with Bruno, A.S., and Dorado, Melvin arrived. Defendants thus had plenty of time to search the apartment and persons of those present, or take other actions, if Defendants had in fact legitimately believed there were weapons or that any of the occupants were committing some other criminal offense. *See* Archer BWC 1:20-17:50.

Plaintiff disputes Defendants' assertions that Melvin denied to Patterson that he was going to Bruno's apartment, that he slammed the door shut, or that he locked it; no body-worm camera footage shows such conduct, and only

¹ Defendants conventionally submitted the BWC recordings to this Court.

Defendants' self-serving statements support it.

Once Melvin entered the apartment and closed the door, Archer ordered Melvin away from the door, and Melvin immediately complied. At most, 5-10 seconds elapsed between Melvin running into the apartment and the door being re-opened to allow Patterson to re-enter. Archer BWC 17:58-18:08; Aplt. Appx. 318-319, 324, Archer dep. 119:2-24, 123:20-124:4, 152:5-13. After Melvin entered the apartment, Neither Melvin nor anyone else made any comments indicating that Melvin was an individual whom had fought with Bruno or anyone else earlier. *See* Aplt. Appx. 323, 328, Archer dep. 147:7-148:10, 225:12-22.

Without any objective reason to believe Melvin committed any crime, posed any danger to anyone, or had a weapon, Patterson ordered Melvin to turn around and put his hands behind his back. At no point during the encounter with Melvin in the apartment did Defendants tell Melvin that he was under arrest. *See* Archer BWC 17:58-21:30; Patterson dep. 190:19-25 (testifying Melvin was not visibly armed). Defendants began aggressively yelling and grabbing for Melvin in the entryway, and then Patterson grabbed Melvin's arm and chest and pointed his OC canister at Melvin, while threatening him. *See* Archer BWC 18:35-18:55. Over the next minute, at least one Defendant and at times both together had hands on Melvin. *See* Archer BWC 18:35-19:53.

As conceded by Defendants and stated by Plaintiff's police practices expert,

“[Defendants] struggl[ed] with Melvin after they attempt[ed] to go hands on with him; Melvin [did] not initiate any physical contact.” Aplt. Appx. 369, 372, Alpert Report 1, 4; *see also* Aplt. Appx. 340, Patterson dep. 226:1-227:10 (testifying he put his hands on Melvin first, initiating the “physical altercation” and Melvin then tried to pull away from him). Defendants also conceded that Melvin never attempted to hit, kick, bite, or spit at them and never threatened anyone. Aplt. Appx. 320-22, 327, Archer dep. 134:7-136:24, 138:17-19, 141:6-21, 221:2-224:13; Aplt. Appx. 341, Patterson dep. 223:22-224:25. The district court determined that the facts were sufficient to allow a jury to conclude that “Mr. Melvin did not resist or fight back in such a way to place the officers in immediate danger or otherwise justify the severe force ultimately used,” Aplt. Appx. 528, MSJ Order 23, and that determination cannot be challenged on appeal.

Patterson ordered Archer to tase Melvin, even though both Defendants were holding him. *See* Archer BWC 19:48-19:53. Before this command, Defendants had not warned Melvin that if he did not comply, they were going to tase him. Archer BWC 19:47-21:25. Defendant Archer deployed his first Taser cartridge at Melvin while Patterson kept hold of him. *See* Archer BWC at 19:52-19:57. Melvin screamed in pain at the beginning of this 5-second Taser cycle and calls for help; this Taser deployment indisputably had “a good connection.” *Id.*; *see* Patterson BWC 2 1:17-1:22; Aplt. Appx. 410, IA Taser memo 14. Archer testified that

Melvin reacted by “gritting his teeth during the five-second deployment.” Supp. Appx. 62, Archer Disc. Responses 11.

Less than 5 seconds after the end of the Taser cycle, Archer deployed his second Taser cartridge for another 5 seconds; Melvin cried out in pain and explained that he had asthma. This deployment also had a “good connection.” Archer BWC at 20:02-20:07; Patterson BWC 2 1:27-1:32; Aplt. Appx. 412, IA Taser memo 16.

20 seconds later, while Patterson was holding Melvin’s arms behind his back, Archer tased him a third time, sending 5 seconds of charge through the already connected probes, while Melvin jerked and grimaced in pain. As this third deployment “still [had] a good connection” and clearly caused Melvin pain, the second deployment also would have connected with Melvin, since the third used the same probes embedded in Melvin. Aplt. Appx. 413, IA Taser memo 17; Archer BWC 20:27-20:32.

After 12 more seconds, during which Patterson was holding Melvin’s hands behind his back with one arm and had his second arm around the front of Melvin’s neck, Archer deployed his Taser for a fourth 5-second cycle. Archer BWC 20:27-20:49; Aplt. Appx. 413, IA Taser memo 17.

About 11 seconds later, while Patterson continued to hold Melvin, Archer tased him a fifth time. Archer BWC 21:00-21:05; Aplt. Appx. 415, IA Taser memo

19. During this minute-long period of 5 tasings, Melvin repeatedly cried for help and begged, “you can’t do this!” Archer BWC 19:52-21:05. The close duration between each Taser deployment and the next meant that Melvin did not have time to comply with Defendants’ commands before each deployment.

Less than 15 seconds after Archer’s fifth Taser deployment, Patterson pushed Melvin away from him and deployed OC (pepper spray) into Melvin’s face. Aplt. Appx. 303, Incident Reports 6; Patterson BWC 2 2:40; Archer BWC 21:15. To escape Defendants’ violence, Melvin attempted to flee.

Approximately five seconds after deploying the OC, Patterson deployed his first Taser cartridge at Melvin, and then, without waiting to evaluate its effects, immediately deployed his second Taser cartridge one second later. Aplt. Appx. 404-05, IA Taser memo 8-9; Archer BWC 21:19-21:25; Patterson BWC 2 2:43-2:48. While it is difficult to differentiate the first deployment from the second deployment one second later, at least one of the deployments connected with Melvin’s upper torso, forced Melvin to the ground, and incapacitated him for five seconds. *See id.* At this point, if not before, Defendants had the chance to handcuff Melvin, yet inexplicably did not do so. *See* Aplt. Appx. 376, Alpert Report 8 (The second deployment by Officer Patterson incapacitated Mr. Melvin for the full 5-seconds, but no attempt was made to handcuff Mr. Melvin while he was “under power.” “Officers are or should be trained to handcuff during the electrical shock

of the Taser, if possible. Failure to do so violates accepted police practice.”).

Defendants deployed their Tasers 8 times, and “there were a total of four [Taser] cartridges and eight prongs that made connection and five deployments with good connections” relying only on CSPD’s own internal affairs report. Aplt. Appx. 373, Alpert Report 5 (citing IA Taser Memo); Aplt. Appx. 398, IA Taser Memo 2. The district court found that a jury could readily conclude that the force used under the circumstances was excessive. Aplt. Appx. 529-30, MSJ Order, 24-25, a finding that cannot be challenged on appeal.

After regaining the use of his muscles, Melvin stood up, batted away some of the Taser wires from his skin, and escaped the apartment, with Defendants giving chase. Archer BWC 21:30. Melvin ran down the street a short way, and about 35 seconds after leaving the apartment, he collapsed. Patterson BWC 2 2:53-3:36; Aplt. Appx. 373, Alpert Report 5. Defendants then held Melvin down, and he repeatedly cried things like, “You’re honestly killing me”; “I can’t breathe. You’ve gotta get off. You’ve gotta get off”; “I’ve honestly got asthma!” Patterson BWC 2 3:44-4:50. Two more CSPD officers arrived at the scene, and Officer Gonzalez easily handcuffed Melvin. *See* Aplt. Appx. 363-65, Gonzalez dep. 17:19-18:9, 32:5-33:6, 46:1-6; Aplt. Appx. 354-55, Evenson dep. 28:9-29:16.

Melvin was in obvious medical distress, and after handcuffing, he began slurring his words and clearly needed medical attention. *See* Aplt. Appx. 378,

AMR Records 1. After arriving at the hospital, Melvin never regained consciousness, and he was pronounced dead on May 2, 2018, at age 27. Blood drawn the morning he arrived at the hospital tested negative for all illicit substances. The coroner determined that the manner of Melvin’s death was homicide, and Melvin “died as a result of complications of sickle cell trait and extreme exertion during confrontation with police and associated *Taser* deployment.” Aplt. Appx. 381, 387, Autopsy Report 1, 7.

While Melvin was in a coma in the hospital, Patterson charged him with the municipal code violation of “resisting/interference with a public official” based on Melvin’s alleged “obstructing the investigation” into the reported disturbance. Aplt. Appx. 418, Summons. Plaintiff’s expert explained that there was not reasonable suspicion to believe Melvin committed this offense: when Melvin entered the apartment, “[t]here does not appear to be any evidence that Melvin knew any official investigation was even underway,” and “other than closing the door, Melvin did not do anything that indicated he was trying to prevent Officer Patterson from entering the apartment or from doing anything else.” Aplt. Appx. 371, Alpert Report 3.

As the district court determined, the facts are disputed regarding defendants’ assertion that Melvin attempted to jump out of the window; the most that Melvin’s actions showed was that after Defendants went hands-on, he leaned toward the

window, held onto the windowsill, and attempted to put a foot up only as part of his resistance as Patterson pulled him back. *See* Archer BWC 18:55-20:25; Aplt. Appx. 528 MSJ Order 23. Nor did Melvin behave erratically or irrationally, and there is no indication that any reasonable officer in Defendants’ position would have believed he possessed “superhuman strength.” *See* Archer BWC 18:00-24:00; *see also* Aplt. Appx. 356, Evenson dep. 36:12-14. Further, no evidence supports the assertion that any reasonable officer would have been afraid Melvin would grab a weapon from his person, elsewhere in the apartment, or from Defendants’ belts. Patterson conceded Melvin never reached for his gun, it was holstered, and the holster had a “retention system”—one would need to depress a knob to remove the gun from the holster. *See* Archer BWC 18:00-24:00; Aplt. Appx. 342-43, Patterson dep. 328:13-330:25. Defendants merely repackage their view of the disputed facts and ignore the district court’s determination that the facts are either disputed or don’t support defendants’ narrative. This is improper ground upon which to base an interlocutory appeal.

A jury could readily determine that Defendants did not have a reasonable belief that Melvin posed a threat or that he committed any felony. Indeed, it is disputed that Defendants held *any* belief that Melvin was involved in trafficking A.S. or similar crimes; had they actually been concerned about these offenses, they would have followed up on this line of investigation, which neither Defendant nor

anyone else ever did. Further, Defendants did not tell others at the scene that they suspected trafficking. See Aplt. Appx. 316-17, 326, Archer dep. 110:6-111:5, 115:8-13, 220:4-19; Aplt. Appx. 337-38, 341, Patterson dep. 103:14-105:7, 236:10-18; Aplt. Appx. 357, Evenson dep. 41:22-42:3; Aplt. Appx. 362, Gonzalez dep. 14:15-15:2. A jury will likely conclude that these assertions are pretextual *post hoc* justifications attempting to legitimize their conduct.

Plaintiff's police practices expert concluded: "[T]he use of a Taser was disproportional to the alleged offenses committed by Melvin" because "[he] did not commit a serious crime, the officers had no probable cause to believe he had committed or was going to commit any other crime [besides the alleged offense based on slamming the door and not complying with Patterson's order to turn around and put his hands behind his back],...[he] presented no threat or risk to the officers or anyone else, [and] ...[t]here was no immediate need to apprehend Melvin." Defendants "used a disproportionate amount of force compared to the potential harm of Melvin fleeing the scene." Aplt. Appx. 377, Alpert Report 9.

2. Disputed facts exist whether the City of Colorado Springs is liable for violating Melvin's constitutional rights.

Individual Defendants' use of force was excessive, but fully consistent with the training Defendant Colorado Springs ("the City" or "Colorado Springs") provided to CSPD officers. Despite knowing of the dangers of repeated (and/or simultaneous) Taser deployments on the same individual and CSPD's history of

using force discriminatorily against Black people, the City recklessly failed to adequately train its officers on Tasers and on avoiding racially biased policing. Because disputed issues of material fact exist regarding whether the City is liable for the violation of Melvin's constitutional rights, the district court denied it summary judgment.

Defendant Colorado Springs does not challenge any of the bases of the district court's denial of summary judgment other than asserting that there was no constitutional violation. Accordingly, this is the only issue properly before this Court regarding municipal liability (which it should refuse to decide for jurisdictional reasons), so Plaintiff will omit some salient facts supporting Colorado Springs' liability for the sake of brevity. However, some of the facts relating to CSPD's training are relevant.

Individual Defendants testified that they kept deploying their Tasers against Melvin because their previous Taser deployments were not "effective." *See* Supp. Appx. 6, Archer dep. 167:11-20; Supp. Appx. 91, 93, Patterson dep. 36:3-15, 175:3-20. This is a definitional problem. In Defendants' view, a taser could well discharge huge doses of electricity through a subject's body, causing extreme pain and injury, but not be "effective" if the subject is not apprehended. The City trains its officers that an "effective" Taser deployment achieves "neuromuscular incapacitation" ("NMI"). *See* Aplt. Appx. 401, IA Taser Memo 5; Supp. Appx. 9,

Archer dep. 180:17-24; Supp. Appx. 91, Patterson dep. 35:8-13; Supp. Appx. 34-35, Vasquez dep. 100:4-22, 108:1-11. Patterson testified that he was trained to use a Taser for NMI, and pain compliance was not effective nor the goal. Supp. Appx. 93-94, Patterson dep. 176:5-13, 180:14-181:5. However, Taser deployments can cause significant pain on the subject even when the taser does not obtain NMI. Aplt. Appx. 376, Alpert Report 8. Thus, it is objectively incorrect to assert that a Taser deployment that does not obtain NMI is “ineffective” or of “limited effect”; as CSPD itself observed and Individual Defendants conceded, “[e]ven if the Taser deployment is ineffective and NMI does not occur, officers might still see some type of pain compliance by the suspect.” Aplt. Appx. 401, IA taser memo 5; Aplt. Appx. 325, Archer dep. 176:7-19; Aplt. Appx. 335-336, Patterson dep. 27:19-28:5, 30:25-31:11. And, as happened here, a taser can cause grievous injury or even death, even if the officer supposes the taser was “ineffective.” *See* Aplt. Appx. 381, Autopsy 1.

Accordingly, even when a Taser deployment against Melvin had a “good connection” and was obviously making contact with Melvin—and causing him substantial pain—Defendant’s training meant that they refused to concede it was “effective,” and consequently they kept repeatedly tasing Melvin. *See, e.g.*, Supp. Appx. 10-11, Archer dep. 189:3-192:3, 193:20-196:14; *see also* Supp. Appx. 37, Vasquez dep. 157:10-158:14. Individual Defendants were trained to ignore that

Archer's tasings were causing Melvin substantial pain and physical reaction and to continue tasing him, even though they recognized he was in pain. For example, Patterson testified that "Melvin stated, 'Ahhh!' with respect to two of the tasings, indicating that he felt discomfort from the deployment. But only one taser deployment was effective in causing[NMI]." Supp. Appx. 111, Patterson Disc. Responses 12.

Accepted national guideline for police state that "[t]raining protocol should emphasize that multiple applications or continuous cycling of [a Taser] resulting in an exposure longer than 15 seconds (whether continuous or cumulative) increase the risk of serious injury or death and should be avoided." Aplt. Appx. 375, Alpert Report 7. Since each Taser deployment cycle lasted for 5 seconds, Melvin was exposed to 25 to 40 seconds of electrical current. The district court correctly found that a jury could base a Plaintiff's verdict on these facts. Aplt. Appx. 529, MSJ Order 24.

CSPD's own training provided that the more and longer deployments of a Taser on one individual, the higher the medical risks, including death, with "15 seconds of [Taser] exposure (multiple applications or continuous)" noted "as a significant safety point." Supp. Appx. 147-48, CSPD Taser Training 9-10. Yet such training was so deemphasized that Archer testified that he was *not trained* it was unsafe for someone to be tased more than 3 times (addressing 3 Taser

deployments of 5 seconds each, totaling fifteen seconds of exposure). Supp. Appx. 13, Archer dep. 258:7-18.

Thus regardless of any written “policy” or training materials, CSPD officers were not trained to seriously consider 3 Taser deployments or 15 seconds of tasing as a real limit. For instance, Defendant Archer testified that “there wasn’t like any specific number saying that this is the exact amount of times you can tase someone....[T]here was no set limit on the amount of times [an officer could] tase someone.” Supp. Appx. 13, Archer dep. 257:10-21, 258:7-21. Current CSPD Chief Adrian Vasquez, who at the time was Deputy Chief and oversaw the internal affairs (“IA”) investigation into Individual Defendants’ conduct, testified that CSPD policy allowed for multiple tasings, beyond even the 8 deployments Individual Defendants used against Melvin, until the tasings cause a change in the subject’s behavior. Supp. Appx. 32, Vasquez dep. 72:9-75:2; *see also* Supp. Appx. 41-43, Evenson dep. 78:10-23, 81:14-22, 87:14-88:8 (indicating CSPD did not officers to try to limit tasings to 15 seconds or 3 deployments).

CSPD Taser training and policy is thus weaker and inconsistent with widely accepted police practices, which limit Taser deployments to 3. “Officers are or should be trained not to deploy a Taser more than three times...as it is well known that Taser exposure raises health risks and can cause death.” Apl. Appx. 375-76, Alpert Report 7-8.

Indeed, training on justification for repeated Taser deployments was so broad that Patterson explained during his IA interview that his justification for using his Taser after Archer had already tased Melvin five times was because Patterson was “tired”—even though at the time Patterson used his Taser, Melvin was not even struggling with the officers and was “was running towards the front door” of the apartment. Supp. Appx. 164, IA Case Summary 3. “Going to a Taser so early in a confrontation is known as the ‘Lazy Cop Syndrome’ and is unreasonable.” Aplt. Appx. 376, Alpert Report 8. Due to CSPD’s vague and almost meaningless (and hence inadequate) training, Archer, who deployed his Taser 5 times, could not explain his justification “other than Officer Patterson had told him to.” Supp. Appx. 163, IA Case Summary 2.

Individual Defendants’ training permitted them to be so indifferent as to the number of times they tased someone that when they killed Melvin, they did not even know how many times they alone or together had deployed their Tasers; they both testified, wrongly, they thought the number of deployments was significantly less than 8. *See* Supp. Appx. 7-8, Archer dep. 171:1-13, 174:7-18; Supp. Appx. 92, 96-97, Patterson dep. 140:1-21, 275:16-276:12, 305:4-306:10; *see also* Supp. Appx. 185, Patterson UOF Report 1 (stating that he tased Melvin only once and Archer had tased Melvin only twice).

The City’s investigation into Individual Defendants’ conduct exonerated

both for their use of force and specifically their use of Tasers, meaning Defendant found that their conduct was pursuant to CSPD training. Supp. Appx. 195, IA Decision Letter. In other words, the City argues forcefully that Individual Defendants' conduct was pursuant to municipal policy and training, while simultaneously arguing that the City should bear no responsibility for that conduct.

B. District Court Order

Based on these facts, the district court denied Defendants' motions for summary judgment in their entirety.

1. Individual Defendants' Motion for Summary Judgment

The court noted numerous material factual disputes and specifically relied on these disputed issues of material fact in denying Individual Defendants for summary judgment. *See* Aplt. Appx. 506-38, Summary Judgment Order ("MSJ Order"). Among other disputes, the Court found that the following significant disputed facts precluded summary judgment:

- Whether Melvin twice attempted to jump head-first out of the window, *id.* at 511, MSJ Order 6;
- How many of the undisputed 8 Taser deployments against Melvin had a "good connection" or were "effective," *id.* at 514, MSJ Order 9;
- Whether Melvin had time and ability to comply with Defendants' commands before every separate Taser deployment, given "the rapid sequence of the deployments and that, at times, [Defendants] were holding him so tightly that it was impossible for him to move to comply," *id.* at 513, MSJ Order 8;
- Whether Melvin was acting erratically and irrationally and possessed

superhuman strength and stamina, *id.*;

- Whether Defendants had reasonable suspicion to believe that Melvin had committed or was going to commit multiple of felonies and other crimes, including burglary, trespass, human trafficking of a minor for sexual servitude, procurement of a child for sexual exploitation, and contributing to the delinquency of a minor, *id.* at 522, MSJ Order 17.

See also id. at 529, MSJ Order 24 (finding “that there are genuine disputes of material fact precluding summary judgment with respect to the 8 Taser deployments, including but not limited to (1) whether the Officers reasonably perceived only one of the Taser deployments to be ‘effective’; (2) how many of the Taser deployments had a ‘good connection’; and (3) whether Mr. Melvin had adequate time or ability to comply with the Officers’ orders prior to each Taser deployment”).

The court determined that drawing all reasonable inferences in Plaintiff’s favor, a reasonable jury could conclude that Defendants used excessive force against Melvin: “a reasonable jury could conclude that [Defendants’] actions in deploying their tasers 8 times in less than two minutes violated Mr. Melvin’s rights under the Fourth Amendment.” *Id.* at 527, MSJ Order 22. The court *assumed*—but, contrary to Defendants’ argument, did not decide—that some use of force was lawful to detain Melvin, but found that “even if the initial detention was lawful and the first Taser deployment was justified by the physical struggle and Mr. Melvin’s resistance to being handcuffed,...the repeated Taser deployments over the next 90

seconds—several of which occurred within mere seconds of each other, allowing little time for Mr. Melvin to recover and comply with orders—were not justified by the totality of the circumstances based upon the undisputed facts.” *Id.* at 529, MSJ Order 24; *see also id.* at 527-28, MSJ Order 22-23 (“[A]ssuming without deciding that the detention was lawful, the use of *some force* was reasonable to subdue and detain Mr. Melvin.”).

In reaching this conclusion, the court emphasized its doubt that Defendants had a reasonable basis to suspect Melvin of any criminal activity; the lack of any evidence showing that Melvin posed a threat to the safety of himself or others; that Melvin’s resistance was not aggressive or violent toward Defendants; and that the repeated Taser deployments were not justified. *Id.* at 526, 528-29, MSJ Order 21, 23-24; *see also id.* at 523, MSJ Order 18 (“The Court is skeptical that [Defendants] had reasonable suspicion of any illegal conducting involving [the minor present].”); *id.* (“The Court...finds that there is insufficient evidence to support Individual Defendants’ asserted suspicions of felony burglary, felony trespass, assault, and harassment.”); *id.* at 524-25, MSJ Order 19-20 (finding “there [was] no evidence linking Mr. Melvin to the fight that had occurred in [the] apartment,” and that “the evidence does not support reasonable suspicion that Mr. Melvin entered with intent to commit a crime or assault or menace any person”); *id.* at 525-26, MSJ Order 20-21 (finding that it was not reasonable for Defendants to

suspect Melvin of obstructing a peace officer); *id.* at 526, MSJ Order 21 (“There is no evidence showing that Mr. Melvin posed an immediate threat to the safety of himself or others before [Defendants] attempted to detain him.”); *id.* at 528, MSJ Order 23 (“Mr. Melvin did not resist or fight back in such a way to place [Defendants] in immediate danger or otherwise justify the severe force ultimately used.”); *id.* (“The body worn camera shows that Mr. Melvin’s resistance was not aggressive or violent toward [Defendants] or anyone else in the apartment.”). The district court further determined that “[a] reasonable jury could... find that [Defendants] unreasonably and immediately escalated the situation at several critical junctures, thus creating the need to use force and causing Mr. Melvin to instinctively attempt to flee from repeated Taser shocks.” *Id.* at 529, MSJ Order 24. A jury could draw conclusions in favor of Mr. Melvin on all of these issues, and this Court must do so for purposes of this interlocutory appeal.

The district court denied qualified immunity to Individual Defendants, finding that “[this Court’s] cases have clearly established that disproportionate use of a Taser on a nonviolent arrestee not suspected of a serious crime constitutes excessive force.” *Id.* at 532, MSJ Order 27 (citing *Perea v. Baca*, 817 F.3d 1198, 1203 (10th Cir. 2016); *Waters v. Coleman*, 632 F. App’x 431, 438 (10th Cir. 2015); *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 667 (10th Cir. 2010)). While the court acknowledged that the cases from this Court on which it relied

were distinguishable in part because the suspects were either subdued or not resisting arrest, it explained that “the critical issue in this case arises from the *multiple, repeated* deployments of a Taser against Mr. Melvin in quick succession and under circumstances in which it is disputed whether he had adequate time or ability to comply with orders and avert the next Taser deployment.” *Id.* at 531-32, MSJ Order 26-27. The court concluded “that a reasonable officer would have understood that deploying a Taser 8 times in approximately 90 seconds at Mr. Melvin, under the circumstances of this case, was violative of the Fourth Amendment.” *Id.* at 532, MSJ Order 27.

2. City of Colorado Springs’ Motion for Summary Judgment

The district court found that “summary judgment in favor of the City [was] not warranted as to whether the City’s training on use of force and Taser use was adequate.” *Id.* at 534, MSJ Order 29. It explained that “[a] reasonable jury could determine that CSPD did not adequately train [Individual Defendants] on the dangers of repeated Taser deployments and instead trained [Individual Defendants] that repeated tasings are appropriate if ‘justified,’ with ‘additional justification’ apparently undefined and left to the Officer’s individual discretion.” *Id.* at 535, MSJ Order 30. The court also found “unclear whether CSPD trained its officers that the three deployments [allowed before additional justification is needed] include only ‘effective’ Taser deployments (using the NMI definition) or *any* Taser

deployments, including those which clearly cause pain but do not achieve NMI.”

Id.

SUMMARY OF ARGUMENT

Defendants’ use of eight Taser deployments against Melvin, who was not reasonably suspected of a crime, posed no danger to Defendants, himself, or anyone else, and at most engaged in non-violent resistance, violated clearly established Fourth Amendment law.

Defendants’ main argument rests on circular logic. Defendants’ argument is that because Defendants’ use of force did not allow these Defendants to immediately detain Melvin, the use of force could not have been more than would be required to arrest him. The logical consequence of this argument is that a police officer’s use of force against an individual, no matter what offense, if any, the individual committed and how excessive the force might otherwise seem, is reasonable unless it results in the immediate detention of the suspect. No case from the Supreme Court or this Court supports such an extreme proposition. In fact, this argument, which would have this Court examine solely the result of the use of force, is contrary to *Graham*, which requires a totality of the circumstances analysis based on conditions existing at the time of the use of force. Defendants’ argument is also contrary to the recent Supreme Court case that determined a “seizure by force” occurs during the time force is being applied, whether or not the

force results in submission. *Torres v. Madrid*, 141 S. Ct. 989, 999 (2021).

Further, Defendants repeatedly misstate the evidence by asserting that Melvin “actively resisted” and had time to comply with their commands. Defendants’ five (at a minimum) Taser deployments against Melvin within 90 seconds created Melvin’s instinctive need to get away, and he did not have sufficient time to consider whether to comply with Defendants’ orders. He also, at most, committed only non-violent resistance, which is not the type of resistance this Court and other federal circuit courts of appeal have held justifies the use of a Taser. The district court recognized that a jury might well conclude that defendants “unreasonably and immediately escalated the situation at several critical junctures, thus creating the need to use force and causing Mr. Melvin to instinctively attempt to flee from repeated Taser shocks.” Aplt. Appx. 529, MSJ Order 24. Defendants cannot challenge this determination on appeal.

Accordingly, this Court must reject Defendants’ arguments and affirm the court below.

ARGUMENT

I. Standard of Review

“On an interlocutory appeal of a denial of qualified immunity, [this Court] can review only questions of law,” it is “not at liberty to review a district court's factual conclusions.” *Finch v. Rapp*, 38 F.4th 1234, 1240 (10th Cir. 2022) (citation

omitted). This Court must “only review the district court’s legal conclusions that the facts, in the light most favorable to [Plaintiff], establish a clear violation of the Fourth Amendment, and [Defendants] therefore [were] not entitled to qualified immunity.” *Id.*

Defendants’ contradictory and unfounded attacks on the district court’s factual conclusions are beyond this Court’s jurisdiction on interlocutory appeal. Defendants’ Opening Brief relies on statements of “fact” that contradict the district court’s factual findings or reasonable inferences in Plaintiffs’ favor; this Court has no jurisdiction to consider those arguments. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (“[I]nferences [must be drawn] in favor of [Plaintiff as] the nonmovant, even when...[this Court] decides...the clearly-established prong of the standard.”). Defendants attempt to evade this Court’s jurisdictional limits by putting forth their narrative by stating what they argued below and framing their version of facts as that which Defendants perceived. For example, Defendants assert that Patterson “perceived that [his first Taser deployment] missed Melvin entirely”; that “[f]rom [Defendants’] perspective, Melvin twice had tried to jump head-first out of the apartment’s second story window”; and that “*from [Defendants’] perspective...having their hands on Melvin did not render him subdued or under their control such that he could be handcuffed.*” Op. Br. 13, 16, 31.

The question at issue, however, is whether the facts, as an objectively reasonable officer in Defendants' position would have reasonably perceived them, support the use of force: the "reasonableness [of a defendant's use of force] must be judged from the perspective of a *reasonable* officer on the scene." *Graham v. Connor*, 490 U.S. 386, 388 (1989) (emphasis added); *see also, e.g., Reavis v. Frost*, 967 F.3d 978, 992-93 (10th Cir. 2020) (defining the excessive force question as based on whether "an objectively reasonable officer in [the defendant's] position could have perceived that any threat posed by [the suspect] had abated before [using force]"). More to the point for this interlocutory appeal, viewing the facts in the light most favorable to Melvin, could a jury reject defendants' arguments that they reasonably perceived such danger.

Accordingly, to the extent that Defendants' argument rests on facts contrary to the district court's order or the reasonable inferences drawn from the order, this Court lacks jurisdiction to consider it. This Court has repeatedly emphasized that on an interlocutory appeal from a district court's denial of qualified immunity, this Court lacks jurisdiction over challenges to a lower court's factual determinations. *See Ralston v. Cannon*, 884 F.3d 1060, 1066-67 (10th Cir. 2018). "[A]llowing appeals from district court determinations of evidentiary sufficiency simply does not advance the goals of the qualified-immunity doctrine in a sufficiently weighty way to overcome the delay and expenditure of judicial resources that would

accompany such appeals.” *Id.* at 1067. Defendants’ factual arguments should be disregarded and cannot play any role in this Court’s consideration of whether Defendants violated Melvin’s clearly established constitutional rights.

II. Defendants violated Melvin’s clearly established Fourth Amendment right to be free from excessive force.

A. The district court correctly concluded that a reasonable jury could find that Individual Defendants violated Melvin’s constitutional rights.

Under the Fourth Amendment, “[a] police officer violates an arrestee’s clearly established Fourth Amendment right to be free of excessive force during an arrest if the officer’s arresting actions were not objectively reasonable in light of the facts and circumstances confronting him.” *Maresca v. Bernalillo Cty.*, 804 F.3d 1301, 1313 (10th Cir. 2015). Determining whether a use of force was objectively reasonable depends on the totality of the circumstances, with particular focus on (1) the severity of the suspected crime; (2) whether the suspect posed an immediate threat; (3) and whether the suspect was “actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396. Also relevant is whether the “officers’ own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.” *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (citation omitted); *Rosales v. Bradshaw*, No. 22-2027 (10th Cir. July 5, 2023) at 11-12 (“[This Court] consider[s] the extent to which an officer’s reckless

conduct prior to the use of force during the seizure provoked the suspect's actions.")

1. Defendants did not reasonably believe that Melvin committed a crime.

Defendants would have this Court ignore consideration of this factor; apparently, according to Defendants and contrary to *Graham*, it does not matter what offense a suspect commits; any officer may use any force necessary to effect an arrest for any offense, whether based on probable cause or reasonable suspicion or not. Contrary to this proposition, "*Graham* establishes generally that more force is appropriate for a more serious offense and less force is appropriate for a less serious one." *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002). "[A] minor offense supports only the use of minimal force." *Wilkins v. City of Tulsa*, 33 F.4th 1265, 1273 (10th Cir. 2022).

Defendants' dramatic assertions that they had reasonable suspicion to believe Melvin had committed felony burglary, felony trespass, assault, harassment, human trafficking of a minor for sexual servitude, procurement of a child for sexual exploitation, contribution to the delinquency of a minor, or harboring a minor are disingenuous. A jury may (and almost certainly will) conclude that Defendants had no such suspicions at the time, and the "suspicions" they now assert were fabricated after the fact, amounting to no more than wild speculation that falls well short of objective reasonableness. Reasonable suspicion

must be based on “specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual.” *Brown v. Texas*, 443 U.S. 47, 51 (1979). “[I]nchoate and unparticularized suspicion or ‘hunch[es]’” are not sufficient. *Terry v. Ohio*, 392 U.S. 1, 22, 27 (1968).

Beyond Melvin’s mere presence in the building earlier, there was no evidence he was involved in any fight with Bruno. Neither the reporting party nor the apartment’s occupants described the participant in the fight, thus providing no basis to match a description to Melvin. Once Melvin entered the apartment, the failure of any of the occupants to make any statement indicating he had been there earlier or been kicked out undermines the assertion that he was involved.

Even more improbable is Defendants’ assertion that they had reasonable suspicion to believe Melvin had committed offenses involving A.S. Not only did they have no evidence of any illegal conduct involving A.S., they had no reason to believe Melvin was even remotely involved in any such conduct. A.S.’s mere presence in the apartment, given that she provided a reasonable explanation for her presence, did not rise to the level of reasonable suspicion, much less indicate that Melvin had anything to do with her. *See, e.g., Graham v. Kenny*, No. CIV07-258 MCA/DJS, 2008 U.S. Dist. LEXIS 131431, at *30-31 (D. N.M. Sept. 17, 2008); *accord Riley v. State*, 892 A.2d 370, 375-78 (Del. 2006) (the presence of two underage girls in a car with an adult at a location known for selling liquor to

minors was insufficient on its own to establish reasonable suspicion). Even assuming arguendo that Defendants had reasonable suspicion to believe Bruno or Ms. Dorado had committed offenses relating to A.S. (which they did not), no evidence reasonably supported any belief that Melvin was involved. “[C]ourts have long recognized that an individual’s mere proximity to questionable or illegal conduct does not imply involvement in that conduct, and may not be used to justify police intrusion.” *United States v. Nicholas*, No. 96-4022, 1996 U.S. App. LEXIS 33323, at *9 (10th Cir. Dec. 20, 1996) (collecting cases). “Detaining officers must have a *particularized* and objective basis for suspecting the *particular person* stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (emphasis added). Defendants had no such particularized basis here.

Further, that Melvin’s entry into the apartment may have been odd does not provide reasonable suspicion to believe he committed any crime—including burglary or trespassing—or had any intent to hurt anyone in the apartment. *See United States v. Cortez*, 965 F.3d 827, 836 (10th Cir. 2020) (“[N]ot every odd decision warrants suspicion simply because it indicates a choice that the typical person, or the officer, would not make.” (citation omitted)).

Ultimately, Defendants charged Melvin with none of the above offenses and instead cited him for the municipal code violation of “interference”:

It is unlawful for any person to intentionally, knowingly or recklessly, by use or threatened use...of violence, force or physical interference or

obstacle, to obstruct, interfere with or impair any member of the Police Department...while the official is in the discharge or apparent discharge of the person's duty.

City Code of Colo. Springs § 9.3.101(B). But a jury could conclude that Defendants did not have probable cause to believe Melvin committed this offense, and therefore they had no justification to use *any* force to detain Melvin. Contrary to Defendants' assertions that Melvin violently interjected himself into the investigation, no evidence suggests he even knew or realized there was an investigation, and he thus did not "intentionally, knowingly or recklessly" interfere with such investigation. Probable cause is an objective test, and no reasonable officer would have believed that Melvin knew Patterson was investigating events in apartment 211, much less that another police officer was in the apartment. Additionally, Melvin did not in fact interfere with any "investigation," because any hypothetical infinitesimal impediment to Patterson's investigation once Melvin closed the apartment door was eliminated when Melvin immediately voluntarily moved away from door, allowing Patterson to enter.

Importantly, the district never found that reasonable suspicion existed to believe Melvin had committed obstruction. *See* Aplt. Appx. 525-26, MSJ Order 20-21. Rather, the court *assumed* without deciding that Melvin committed obstruction, stating that "even if the [c]ourt were to find that [Defendants] ha[d] reasonable suspicion of 'obstruction,' obstructing a peace officer is only a class 2

misdemeanor”; “[t]he Tenth Circuit has made clear that a ‘minor offense—at most—support[s] the use of minimal force’”; and thus “[t]he first *Graham* factor...weighs in Plaintiff’s favor.” *Id.* at 526, MSJ Order 21.

No reasonable suspicion, much less probable cause, existed that Melvin committed any criminal offense, and consequently, Defendants had no right to detain him and therefore no right to use force to do so. However, even if *arguendo* Defendants had probable cause for the offense of interference, such offense is a minor, non-violent violation. City Code of Colo. Springs § 1.1.201(B); *see also Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281 (10th Cir. 2007) (finding obstruction a minor crime). “A minor offense—at most—support[s] the use of minimal force.” *Davis v. Clifford*, 825 F.3d 1131 (10th Cir. 2016).

2. Melvin posed no threat to the safety of Defendants or others.

It is undisputed that Melvin was unarmed, threatened no one, and made no efforts to harm anyone even when the officers were aggressively trying to detain him. Defendants would also have this Court skip this factor in analyzing the use of force, even though this Court has explained it is the most important *Graham* factor. *See, e.g., Vette v. Sanders*, 989 F.3d 1154, 1170 (10th Cir. 2021). Critically, as the district court found and Defendants ignore, there is no evidence that Melvin posed any threat to anyone in the apartment. That Defendants speculated he could possibly have a weapon—just like anyone on the street could—is irrelevant

because the question is whether Melvin “posed an objective threat” or was “objectively unthreatening.” *Autin v. City of Baytown*, 174 Fed. Appx. 183, 185-86 (5th Cir. 2005). The evidence is unequivocal that there was no reason to believe Melvin had a weapon and that Melvin posed no threat; indeed, Defendants conceded that Melvin had made no attempt to hurt them or physically or verbally threaten them. Even if Melvin’s manner of entry was “volatile [and] erratic,” which “could lead an officer to be wary,” it “[did] not, by itself, justify the use of significant force.” *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010).

3. Defendants’ initial, unreasonable use of force caused Melvin to try to flee.

Plaintiff concedes that Melvin was attempting to get away from Defendants starting the moment they attempted to wrongfully handcuff him. Melvin attempted to evade Defendants so that he could escape the apartment and Defendants’ wrongful uses of force against him, but his resistance was not violent: he did not swing his arms or kick his feet at Defendants nor threaten them in anyway; rather, he tried to pull away from them. As this Court has explained: “Resistance...should not be understood as a binary state being either completely passive or active. Rather it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer.” *Aldaba v. Pickens*, 777 F.3d 1148, 1158 (10th Cir. 2015) (rev’d on other grounds) (quoting *Bryan*, 630 F.3d at 830). “[T]he level of force an individual’s resistance will

support is dependent on the factual circumstances underlying that resistance.”

Bryan, 630 F.3d at 830. “[P]hysical resistance is not synonymous with risk of immediate danger.” *Estate of Armstrong*, 810 F.3d at 905. “[D]ischarging a taser on a non-threatening individual who [has] not committed a serious crime and [has] not engaged in aggressive or violent resistance...violate[s] the Fourth Amendment.” *Del Valle v. Thorne*, 790 F. App’x 868, 870 (9th Cir. 2020); *Casey*, *infra*, 49-50.

The excessive force standard asks how much force a reasonable officer would have reasonably perceived as necessary, considering the totality of circumstances. Because the first two *Graham* factors weighed against the use of force, or at most, anything more than minimal force, the mere fact that Melvin did not submit to Defendants’ commands would not have given a reasonable officer in Defendants’ position to believe that the extreme amount of force used—8 Taser deployments in 90 seconds—was justified.

Defendants’ argument that the uses of force did not immediately subdue Melvin and thus must not have been excessive, is misplaced. “A rule limiting taser use to situations involving a proportional safety threat does not countenance use in situations where an unrestrained arrestee, though resistant, presents no serious safety threat.” *Estate of Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 904 (4th Cir. 2016). Otherwise, the rule would be as Defendants argue, and “use of a taser would

be justified at the outset of every lawful seizure, before an arrestee has been restrained.” *Id.* “This, of course, is not the law.” *Id.* The increased level of force must be tied to an objectively reasonable determination of threat, and there was none here—an officer may not use any amount of force merely to stop a suspect from getting away. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

Similarly undermining Defendants’ argument, an excessive force analysis evaluates the moment an officer applies force with intent to restrain and does not turn on the outcome of the use of force. *See Torres*, 141 S. Ct. at 993-94 (“The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.”). Here, each time Defendants deployed Tasers, as found by the district court, Melvin was not acting threatening or violent and posed no threat to himself or others. For multiple applications of the Taser, Defendants did not provide Melvin with the opportunity to submit before resorting to another application or other use of force. These are the relevant facts that show the eight Taser deployments (or at least some of them) were unconstitutional, not the fact they did not immediately stop Melvin from trying to flee.

Importantly, a jury will be entitled to conclude that Defendants’ wrongful and immediate use of substantial physical force *caused* Melvin’s desire to flee. This Court has explained that “[a]n officer’s conduct before the suspect threatens

force is...relevant provided it is immediately connected to the seizure.” *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (citation omitted). This Court thus considers “whether [the officers’] own reckless or deliberate conduct during the seizure unreasonably created the need to use force.” *Id.* (quoting *Allen*, 119 F.3d at 840). While Melvin never threatened force, the only actions he performed that could have justified the use of some force is refusing to submit to handcuffing and attempting to get away from the officers. This Court must therefore examine Defendants’ conduct before Melvin engaged in these actions, and this inquiry is at least disputed, and could well lead to a jury’s determination favorable to Plaintiff.

First, without justification because he had no reasonable basis to arrest Melvin—and importantly, without telling Melvin that he was under arrest—Patterson suddenly grabbed Melvin. Defendants conceded that they initiated the physical contact with Melvin, and at no point did Melvin attempt to put his hands on them. When Melvin attempted to pull away from Patterson, Defendants began tasing him. At that point, Melvin attempted to get away from the painful, unreasonable, and unjustified infliction of force. That was the full extent of Melvin’s “resistance.” Defendants labeling Melvin’s resistance as “active” has no significance because “active resistance” is a term of art used by the police that might mean anything from shouting at officers to hitting and kicking them. Here, Melvin merely attempted to escape by moving away from Defendants.

Accordingly, the multiple painful tasings accentuated Melvin's desire to escape. Nothing about Melvin's conduct justified Patterson's going hands-on within 30 seconds of Patterson's entering the apartment after Melvin. Rather than attempting to deescalate the situation, Defendants' actions in immediately manhandling Melvin "took a situation where there obviously was no need for the use of any significant force and yet took an unreasonably aggressive tack that quickly escalated it to [a physical] exchange when [Melvin] instinctively attempted to defend himself" by trying to pull away. *Smith v. Ray*, 781 F.3d 95, 104 (4th Cir. 2015); accord *Casey*, 509 F.3d at 1283 ("[The] arrest was transformed from 'a routine encounter' only by [the] use of force."). "Not only did that violent response subject [Melvin] to an obvious risk of immediate injury, it also created the very real possibility that...the attack would continue to meet with frightened resistance." *Smith*, 781 F.3d at 103. The repeated Taser deployments also weaken the significance of the resistance because differentiating between Melvin's involuntarily reacting to the Taser and his intentional attempts to refuse to comply with orders and pull away from Defendants is almost impossible. Only the jury can sort through these disputed facts for determination.

Thus, to the extent this factor weighs against Plaintiff in any way, Defendants' unreasonable conduct caused Melvin's response, neutralizing this factor. As the Tenth Circuit stated in a similar case, while resisting in the manner

Melvin did may support “the use of *some* force,” the “relevant inquiry is whether the taser use was reasonable and proportionate given [the] resistance.” *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016). “[Melvin’s] resistance...did not justify [Defendants’] severe response.” *Id.*

4. Defendants used excessive force against Melvin.

Viewing the facts in the light most favorable to Plaintiff, within less than 90 seconds, Defendants tased Melvin 8 times and also sprayed OC into his face, constituting excessive force. “[A] Taser [is] a weapon that sends up to 50,000 volts of electricity through a person’s body, causing temporary paralysis and excruciating pain,” and “their use unquestionably ‘seizes’ the victim in an abrupt and violent manner.” *Cavanaugh*, 625 F.3d at 665. Accordingly, “the ‘nature and quality’ of the intrusion into the interests of [Melvin] protected by the Fourth Amendment was quite severe.” *Id.* (citation omitted).

Even assuming *arguendo* that the first Taser deployment may have been reasonable (which Plaintiff disputes), the repeated deployments were not. “[A]s the threat changes, so too should the degree of force,” and “[f]orce also becomes increasingly severe the more often it is used.” *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010) “It’s the totality of the circumstances, not the first forcible act, that determines objective reasonableness.” *Id.*

Before and during Archer’s deployments, at least one Defendant had their

hands on Melvin. Defendants' assertion that their force did not enable them to handcuff Melvin is misleading, because the question is what a reasonable officer would have perceived in the same position. Since a reasonable officer would not have put hands on Melvin and immediately resorted to the significant force, causing Melvin to attempt to get away, a reasonable inference can be drawn that Defendants could have handcuffed Melvin had they not created the need to use force. Additionally, Defendants did not take the time in between their Taser deployments to evaluate the effects each had on Melvin before immediately deploying the Taser again; had they done so, it is very possible they—or a more competent officer—could have handcuffed Melvin without the need to use a Taser on him 8 times in 90 seconds.

Defendants' resort to an argument that *they* perceived Melvin could not be handcuffed is unsuccessful, since the *Graham* inquiry asks “consider[s] how a reasonable officer in [the defendant's] position would have perceived [the suspect's] conduct.” *Rowell v. Bd. of Cty. Comm'rs*, 978 F.3d 1165, 1172 (10th Cir. 2020). At the very latest, Defendants could have—and should have—handcuffed Melvin when NMI was achieved, but a reasonable inference arises that handcuffing could have occurred much earlier had Defendants, as a reasonable officer would have done, told Melvin he was under arrest before putting their hands on him, warned him they were going to use a Taser and gave him time to

comply before doing so, and did not immediately keep tasing him merely because the previous Taser deployment did not achieve NMI to their satisfaction. Thus, the fact that Defendants failed to handcuff Melvin is not dispositive, especially because, as explained above, it fails to take into account the totality of the circumstances including the first two *Graham* factors.

Defendants' citation to this Court's unpublished *Youbyoung Park v. Gaitan* case is similarly deficient; in *Youbyoung Park*, this Court explained “[i]f 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” to effect an arrest. 680 F. App'x 724, 739 (10th Cir. 2017). The determination whether the suspect was likely to fight back, however, is made pursuant to an evaluation of the totality of the circumstances, including all three *Graham* factors. *See id.*

Defendants' argument ignores the reasonable inference that must be drawn in Plaintiff's favor from applying the *Graham* factors here, which is that, as the district court found, Plaintiff posed no danger to himself or anyone else—he did not “fight” back nor would a reasonable officer have thought he was probably going to do so. At most, he pulled away when Defendants attempted to detain him and tried to get away from them. *Youbyoung Park* is also inapplicable because it did not address the situation at issue here, in which the officers recklessly created the need to use force themselves.

Accordingly, on balance, the relentless and overwhelming amount of force Defendants used was disproportionate to any need to use force. The same conclusion was reached in a similar case in which the plaintiff was tased after being stopped for speeding. *See Jackson v. Gatto*, No. 13-cv-02516-CBS, 2014 U.S. Dist. LEXIS 82263, at *13-14 (D. Colo. June 17, 2014). The court held that although the plaintiff “physically resisted [the officer’s] efforts to remove her from [her] vehicle” and then was not “compliant when told to place her hands behind her back” and “physically struggled” with the officer, she did not “strike or attack” him, and a reasonable jury could conclude the Taser discharge violated the Fourth Amendment. *Id.* at *19-20, 29-30.

Hinton v. City of Elwood, cited by Defendants, is distinguishable because in that case the plaintiff initially shoved an officer, the officer informed him he was under arrest, and then he wrestled with the officers when they attempted to handcuff him, going so far as to kick at and bite the officers, before he was tased. 997 F.2d 774, 776-77, 781 (10th Cir. 1993). *Hinton* is useful, however, because it shows what this Court considers to be “active resistance”: the plaintiff “shoved [an officer] after [another officer] told him to calm down and go home,” and “[the plaintiff] admit[ted]...that he was actively and openly resisting [the officers’] attempts to handcuff him, even to the extent of biting the officers.” *Id.* at 781. This Court has summarized the significant facts in *Hinton* that justified the Taser use as

“the suspect was actively resisting by kicking and biting the officer (who had provided the suspect with sufficient warning).” *Emmett*, 973 F.3d at 1138.

Edwards v. City of Muskogee is also distinguishable; there, officers reasonably suspected plaintiff of driving under the influence of PCP, a felony; the plaintiff “had an imposing physical stature and exhibited both incoherence and PCP-enhanced effort and imperviousness to pain, *at times grabbing [officers]*”; and the officers tased the plaintiff. 841 F. App'x 79, 80-81 & n.4, 84 (10th Cir. 2021) (emphasis added). Here, Defendants conceded that at no time did Melvin put his hands on them, making the nature of his resistance (and the threat to their safety) markedly different than that in *Edwards*. Defendants’ use of eight Taser deployments and pepper spray against Melvin was not “commensurate with the level of resistance offered by [Melvin].” *Hinton*, 997 F.2d at 781.

B. The district court correctly determined that Mr. Melvin’s constitutional right not to be subject to the use of force under these circumstances was clearly established.

The Supreme Court has stressed that a finding of clearly established law does “not require a case directly on point, [as long as] existing precedent...[has] placed the statutory or constitutional question beyond debate.” *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015). “It is not necessary...for plaintiffs to find a case with exact corresponding factual circumstances; defendants are required to make reasonable applications of the prevailing law to their own circumstances.” *Currier*

v. Doran, 242 F.3d 905, 923 (10th Cir. 2001) (citation omitted). Fundamentally, this Court has stressed that courts “cannot find qualified immunity wherever [they have] a new fact pattern.” *Casey*, 509 F.3d at 1284. “Accordingly, a constitutional right is clearly established for qualified immunity purposes not only when it has been specifically adjudicated but also when it is manifestly included within more general applications of the core constitutional principle invoked.” *Sims v. Labowitz*, 885 F.3d 254, 257 (4th Cir. 2018) (citation omitted).

“Because the existence of excessive force is a fact-specific inquiry, . . . there will almost never be a previously published opinion involving exactly the same circumstances.” *Morris v. Noe*, 672 F.3d 1185, 1196-97 (10th Cir. 2012) (citation omitted). For a denial of qualified immunity, “[t]here need not be a case precisely on point.” *Wise v. Caffey*, ___ F.4th ___, No. 22-5069, *16 (10th Cir. July 11, 2023) (citation omitted). “[T]he salient question is whether the state of the law gave the defendants fair warning that their alleged treatment of the plaintiffs was unconstitutional.” *Id.* (citation omitted). “[T]he notice requirement can be discerned from a range of excessive force cases that illustrate the types of objective circumstances potentially relevant to a determination of excessive force.” *Id.* (citation omitted).

Under clearly established Tenth Circuit law, and viewing the facts in the light most favorable to Plaintiff, a reasonable officer in Individual Defendants’

positions would have known that they were not legally justified in their multiple use of Tasers against Melvin. Melvin’s right to be free from the excessive force used by Individual Defendants was “sufficiently clear that every reasonable official would have understood that what he [was] doing violate[d] that right.” *Mullenix*, 577 U.S. at 11 (citation omitted).

A series of cases from the Tenth Circuit shows that no reasonable officer in Defendants’ position could have believed their actions were lawful. Most analogously, in *Lee v. Tucker*, 904 F.3d 1145, 1147-50 (10th Cir. 2018), officers responded to a report that a couple was engaged in a physical struggle. While one officer was in the living room with the husband, the husband stood up and moved toward the kitchen (with disputed facts regarding, among other things, whether the officer ordered him to stay seated or move away from the kitchen). The officer attempted to detain him, and a struggle broke out. *Id.* at 1147-48. Another officer “drew his Taser and applied it three to five times to [the husband’s] back, with each application lasting approximately three, five, and eight seconds respectively.” *Id.* This Court affirmed the district court’s denial of qualified immunity, finding that a reasonable jury could find a violation of clearly established law from this Court, **as of July 4, 2014**—meaning this case with very similar facts would also violate the same clearly established law. *Id.* at 1149-1150.

This Court concluded that “*Cavanaugh* [from 2010] was sufficiently

analogous to the scenario at issue in [*Lee*]” to clearly establish that the defendants in *Lee* violated the Fourth Amendment”:

In [*Cavanaugh*], a man called police for help finding his wife, who had stormed off after a fight...He told officers that she had been drinking, had taken pain medication, attempted to put him in a closet during their fight, and left home with a kitchen knife....An officer quickly found her outside the home....Although he could see that her hands were empty, he drew his Taser and discharged it into her back without warning...We concluded the law was clearly established that ***an officer may not use a “Taser against a non-violent misdemeanor who appeared to pose no threat and who was given no warning or chance to comply with the officer’s demands.”***

Lee, 904 F.3d at 1149-50 (quoting and citing *Cavanaugh*, 625 F.3d at 662-63, 667) (emphasis added). Here, Defendants did exactly what *Cavanaugh* proscribed by using a Taser against Melvin, “a non-violent misdemeanor who appeared to pose no threat and who was given no warning or chance to comply with the officer’s demands.” *Cavanaugh*, 625 F.3d at 667.²

In another analogous case, *Aldaba* from 2015, this Court refused to hold resistance alone justified the use of a Taser, explaining that the analysis whether the use of a Taser was excessive force “turns to whether the officers’ use of force was commensurate with [the suspect’s] level of resistance.” 777 F.3d at 1158. In that case, this Court found that the defendants’ initial decision to use a Taser

² Defendants assert that *Cavanaugh* is materially distinguishable because the plaintiff was not suspected of a crime; however, in fact a reasonable officer could have suspected the plaintiff of a non-injurious assault. *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010).

against a resistant subject was excessive force because “nothing suggest[ed] the subject’s resistance”—refusing to comply with the officers’ orders to calm down and get on his knees and walking away even when they warned him he would be tased—“was anything more than passive,” and distinguishing *Hinton*. *Id.* at 1158-59 (citing *Hinton*, 997 F.2d at 781).

In *Perea*, a police officer performing a welfare check pushed Perea off his bicycle—the officer later claimed he saw him ride through a stop sign without slowing down—and then grabbed his hands to detain him. Perea “struggled and thrashed while holding a crucifix.” 817 F.3d at 1201. The officer tased him once using probes and then 9 more times in drive-stun mode in less than two minutes, causing Perea’s death. *Id.* The Tenth Circuit concluded the minor offense “weigh[ed] heavily against the use of anything more than minimal force,” and the second *Graham* factor did as well because “any threat posed stemmed from Perea’s physical reaction resisting arrest after the officers pushed him from his bicycle without warning or explanation.” *Id.* at 1202-03. The court concluded Perea’s “thrashing and swinging a crucifix” did “not justify the officers’ severe response,” which continued after he fell to the ground until officers could handcuff him and violated clearly established law in the Tenth Circuit. *Id.* at 1203-04.

Defendants attempt to make much of the fact that at some point, Perea became subdued and the defendants continued to use the Taser against him.

However, the Taser deployment began and continued before and while he continued to struggle against the defendants:

After pushing Perea off his bicycle, [one of the defendants] reached for Perea's hands in an attempt to detain him. Perea struggled and thrashed while holding a crucifix...After Perea began to struggle, [one defendant] told [the other] to use his taser against Perea.

[That defendant] complied and first shot Perea in the chest with his taser on “probe” mode.... *When the initial shot proved ineffective*, [the defendant] put the taser in “stun” or “contact” mode, which is used to gain the target's compliance through the administration of pain. [The defendant] tasered Perea nine additional times, for a total of ten taserings in less than two minutes. At some point before the taserings stopped, [the defendants] were able to get Perea on the ground on his stomach, with both officers on top of him, effectively subduing him.

Id. at 1201. In affirming the district court’s analysis on the third *Graham* factor, this Court explained: “Though some force would be justified to get Perea under the [defendants’] control, the district court determined that a reasonable jury could find that [the defendant] continued to use the taser on Perea even after the point where it could be considered necessary or even debatably reasonable.” *Id.* at 1203.³ Thus,

³ Contrary to Defendants’ assertion, Op. Br. 27, this Court did *not* conclude in *Perea* that the Taser deployments that occurred during the period in which Perea was resisting were reasonable. Rather, this Court explained resisting arrest weighed in favor of “the use of some force”—not necessarily use of a Taser, however—but “Perea's resistance (thrashing and swinging a crucifix) did not justify the officers’ severe response. Perea was pushed off of his bicycle by police and then tasered repeatedly without explanation.” *Perea v. Baca*, 817 F.3d 1198, 1203 (10th Cir. 2016). Nor did this Court hold that only the continued taserings after Perea was under control was excessive, but rather merely assumed that even if the initial Taser use was justified, the ten deployments were excessive. *See id.* at 1204.

while admittedly some of the language in *Perea* refers to using a Taser on a subdued suspect, the actual facts of *Perea* are almost identical to those here. As in this case, “[r]epeated use of the taser exceeded the minimal force that would be proportional to Perea’s crime,” and “[b]ecause the officers do not argue that Perea posed a threat before they initiated the arrest, the second *Graham* factor weighs in Perea’s favor.” *Id.* at 1203.

In *Casey*, after an individual suspected of being a nonviolent misdemeanor was tackled by a police officer, with whom he initially struggled, another officer arrived and immediately deployed her Taser once for a five-second cycle. 509 F.3d at 1280-81. In concluding that the Taser use constituted excessive force, this Court emphasized that Casey was not told he was under arrest, and that he was not “actively” resisting by kicking and biting. *Id.* at 1282, 1286. This Court explained that the defendant’s use of a Taser “could not be justified by Mr. Casey’s resistance to her commands because she did not give him any commands to obey.” *Id.* at 1286. As this Court explained in a later case, *Casey* emphasized Casey’s lack of “active resistance,” and even though Casey “initially struggled with the officer,” neither a warning nor “violence of the victim [Casey]” existed so as to “justify the use of the Taser.” *Emmett*, 973 F.3d at 1138 (quoting and citing *Casey*, 509 F.3d at 1286).

Casey’s crime was also not severe: if it was a crime at all, it was a

misdemeanor, meaning the defendant was “faced with somebody who had committed a misdemeanor in a particularly harmless manner, which reduces the level of force that was reasonable for him to use.” 509 F.3d at 1281. Further, the defendant “[had no] reason to believe that Mr. Casey posed ‘an immediate threat to the safety’ of anybody present.” *Id.* at 1282 (citation omitted). “Mr. Casey’s arrest was transformed from ‘a routine encounter’ only by [the defendant’s] use of force.” *Id.* at 1283 (citation omitted). This Court held that the defendant who used her Taser against Casey was not entitled to qualified immunity because “an officer’s violation of the *Graham* reasonableness test is a violation of clearly established law if there are ‘no substantial grounds for a reasonable officer to conclude that there was legitimate justification’ for acting as she did”; “[e]ach factor in *Graham* counseled against the use of a large amount of force”; the defendant’s...use of the Taser was without any legitimate justification in light of *Graham*”; and this Court “[did] not know of any circuit that has upheld the use of a Taser immediately and without warning against a misdemeanant like Mr. Casey.” *Id.* (citation omitted). “*Casey* clearly established that use of a taser without adequate warning on a nonviolent misdemeanant who is not actively resisting is unreasonable.” *Emmett*, 973 F.3d at 1138.

Accordingly, the facts and holdings of *Cavanaugh*, *Lee*, *Aldaba*, *Perea*, and *Casey* clearly establish that under *Graham*, Defendants’ use of force was not

commensurate with Melvin's level of resistance, and no reasonable officer in Defendants' position could conclude there was legitimate justification to use a Taser against Melvin eight times.

Moreover, "[t]he consensus of persuasive authority from [other] circuits...places the constitutional question in this case beyond debate." *Ullery v. Bradley*, 949 F.3d 1282, 1294 (10th Cir. 2020). For example, in *Mattos v. Agarano*, 661 F.3d 443, 451 (9th Cir. 2011), the Ninth Circuit found excessive force when an officer tased a woman who posed no threat to officers but minimally resisted arrest. The Fourth Circuit has held that an officer may only use a taser in response to resistance "when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force," and thus "taser use is unreasonable force in response to resistance that does not raise a risk of immediate danger." *Estate of Armstrong*, 810 F.3d at 904-05. "A rule limiting taser use to situations involving a proportional safety threat does not countenance use in situations where an unrestrained arrestee, though resistant, presents no serious safety threat." *Id.* at 904. Therefore, Fourth Circuit precedent from before 2016 established that the use of a Taser is only justified if "[the suspect's] resistance raise a risk of immediate danger that outweighs the *Graham* factors militating against harming [him]." *Id.* at 906.

Other circuits have held that "taser use can constitute excessive force when

used in response to non-violent resistance” when “the subject ‘[i]s unarmed and there [i]s little risk [he] could access a weapon.’” *Id.* (quoting *Cyrus*, 624 F.3d at 863 (7th Cir. 2010)); *see also id.* (citing *Mattos*, 661 F.3d at 446; *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009)). Similarly, the Sixth Circuit has explained, relying on 2012 and 2015 law, that “it is settled in this Circuit that noncompliance alone, without ‘other acts of defiance,’ ...is not sufficiently ‘active opposition to justify the use of a Taser to subdue a subject who does not otherwise present any immediate threat to officer safety. Indeed, ‘the fact that a suspect does not immediately surrender does not inherently mean that he is resisting.’” *Shumate v. City of Adrian*, 44 F.4th 427, 447 (6th Cir. 2022) (citation omitted). The Fifth Circuit, in putting forth the state of the law as of February 7, 2017, explained that even if a plaintiff struggled by “pushing himself off from [a] car and back into the officers,” this “type of ‘struggle’ did not rise to the level of ‘active resistance.’” *Joseph v. Bartlett*, 981 F.3d 319, 339 (5th Cir. 2020) (citing *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012)). As such, the defendants in a 2013 case committed excessive force by “immediately tasing and forcing to the ground a person whose only resistance was merely failing to comply with orders to put his hands behind his back and pulling his arm away when an officer grabbed his hand,” concluding the plaintiff “posed so little threat that tasing him before he was handcuffed was excessive.” *Id.* (citing *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013)).

Lastly, this Court’s precedent disposes of Defendants’ argument, which they did not make below, that each should only be liable for the deployments of his own Taser. “Defendants actively participated in a coordinated use of force on [Melvin],” and thus “[i]f excessive force occurred, [both Defendants] contributed to it.” *Walton v. Gomez (In re Estate of Booker)*, 745 F.3d 405, 422 (10th Cir. 2014). “[A] police officer may be responsible for another officer’s use of excessive force if the officer...actively participated in the use of excessive force. *Id.* (quoting *Bletz v. Gribble*, 641 F.3d 743, 754 (6th Cir. 2011)). Accordingly, it is clearly established that when a defendant “engage[s] in a group effort” use of force, he will be “liable for any underlying finding of excessive force.” *Id.*

Further, even if a single Defendant’s use of force was not excessive, he would still be liable for failing to intervene to prevent the other Defendant’s use of excessive force. *See id.* Patterson—who directed Archer to fire his Taser—is liable for the five excessive Taser deployments by Archer, and Archer—who did not intervene to attempt to stop Patterson from deploying his Taser a subsequent three times—is liable for Patterson’s deployments. *See id.* “Thus, even if one of the Defendants] did not use excessive force, a reasonable jury could nonetheless find on this record that he...violated [Melvin’s] clearly established rights by not taking steps to prevent [the other Defendant’s] excessive force.” *Id.*

III. The District Court correctly denied Defendant City of Colorado Springs summary judgment on Plaintiff’s municipal liability claim.

As stated in Plaintiff’s jurisdictional statement above, “municipalities are not entitled to qualified immunity,” they “cannot invoke the collateral order doctrine to justify appeal of an otherwise nonappealable decision.” *Paugh*, 47 F.4th at 1171-72. Moreover, Plaintiff’s municipal liability claim is not inextricably intertwined with the interlocutorily appealable claims—Plaintiff could proceed on its municipal liability claim even if this Court were to grant qualified immunity on Plaintiff’s against Individual Defendants. *Heard v. Dulayev*, 29 F.4th 1195, 1207-08 (10th Cir. 2022). This Court should again make clear that municipalities have no jurisdictional basis for an interlocutory appeal of municipal liability after one of their law enforcement officers is denied qualified immunity for an underlying constitutional violation.

If, however, this Court chooses to consider Defendant City of Colorado Springs’ jurisdictionally deficient interlocutory appeal, it must affirm the district court because Defendants committed a constitutional violation against Plaintiff. Because the only basis on which Defendant Colorado Springs’ appeals the district court’s denial of summary judgment is its argument regarding lack of a constitutional violation, this Court may not consider any other basis on which the district court based its decision.

Further, even were this Court to find that neither of the Individual

Defendants committed an actionable constitutional violation, this is not dispositive of Plaintiff's claim against Colorado Springs because this Court has held that successful municipal liability claims do not always depend on a finding that an individual municipal employee committed a constitutional violation. *See Crowson v. Wash. Cty.*, 983 F.3d 1166 (10th Cir. 2020). For instance, “[w]here the sum of multiple officers’ actions taken pursuant to municipal policy results in a constitutional violation, the municipality may be directly liable. That is, the municipality may not escape liability by acting through twenty hands rather than two.” *Id.* Here, the combined eight Taser deployments, taken pursuant to Colorado Springs’ policy for the reasons the district court found—which Defendant does not challenge on appeal—resulted in a constitutional violation against Melvin.

CONCLUSION

Accordingly, this Court should affirm the district court’s denial of Defendants’ motions for summary judgment.

Respectfully submitted this 28th day of July 2023.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist the Court in resolving the issues on appeal.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **12,952** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Date: July 28, 2023.

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CERTIFICATE OF SERVICE

I certify that on this 28th day of July 2023, I filed this **PLAINTIFF-APPELLEE'S ANSWER BRIEF** via CM/ECF which will generate a Notice of Electronic Filing to the following:

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