Case Nos. 23-6128

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LORENZO CLERKLEY, JR.,
Plaintiff/Appellee

v.

KYLE HOLCOMB,
Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
CIV-20-465-F
HONORABLE STEPHEN P. FRIOT, DISTRICT JUDGE

PLAINTIFF/APPELLEE'S RESPONSE TO DEFENDANT/APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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I. STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2(C)(1), Plaintiff-Appellee Lorenzo Clerkley, Jr. ("Plaintiff," "Mr. Clerkley," or "Lorenzo") notifies the Court that no other prior or related appeals have been filed in this case.

II. PLAINTIFF'S JURISDICTIONAL STATEMENT

This Court does not have jurisdiction. "'The denial of qualified immunity to a public official ... is immediately appealable under the collateral order doctrine to the extent it involves abstract issues of law.'" *Henderson v. Glanz*, 813 F.3d 938, 947 (10th Cir. 2015) (quoting *Fancher v. Barrientos*, 723 F.3d 1191, 1198 (10th Cir. 2013)). Interlocutory jurisdiction may be established "when the defendant does not dispute the facts alleged by the plaintiff" and raises only legal challenges to the denial of qualified immunity based on those facts. *Farmer v. Perrill*, 288 F.3d 1254, 1258 n. 4 (10th Cir. 2002). "[I]f the defendant does dispute the plaintiff's allegations [,] 'the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal.'" *Id.* (quoting *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir.1998)) (emphasis added).

Here, Defendant-Appellant Kyle Holcomb ("Sgt. Holcomb" or "Holcomb") relies on *disputed* facts *and* does *not* concede the most favorable view of the facts to Plaintiff. Sgt. Holcomb's entire appeal turns on whether,

immediately prior to the shooting at issue, Lorenzo was pointing an object -- that reasonably appeared to be handgun -- at Holcomb. *See, e.g.,* Opening Brief at 15-16. Holcomb specifically argues that the "district court's finding that a reasonable jury could conclude the [Body Worn Camera or 'BWC'] video and stills from the video 'do not show that Clerkley was holding something black in his hand' is contrary to the video evidence" and that the "zoomed still from Holcomb's [Body Worn Camera] clearly shows a black object in or near Clerkley's right hand…." *Id.* at 16; *see also id.* at 33 (Holcomb asserts the District Court's finding "'that a reasonable jury could conclude the footage and still-framed photographs do not show that Clerkley was holding something black in his hand' … is contrary to the video evidence because the zoomed still-frame from Holcomb's BWC clearly shows a black object in or near Clerkley's right hand.") (quoting Aplt. Appx. 512). But the "zoomed still" shows no such thing. *See* Aplt. Appx. 212. Indeed, even with the benefit of the enlarged screenshot of the body-worn camera footage, it does not appear that Lorenzo was holding anything in his hand at the time of the shooting, and he *certainly was not pointing anything in Holcomb's direction. Id.* This is the very definition of a disputed fact. As the District Court correctly found, "Holcomb's body camera footage and the still-framed photographs of Clerkley from the footage … do not plainly contradict Clerkley's evidence that he did not possess

a gun during his initial brief encounter with Holcomb." Aplt. Appx. at 510-511. The Court further, and correctly, found that "the evidence, viewed in Clerkley's favor, indicates that he did not have a gun or anything in his hand." *Id.* at 512.

It is clear that Holcomb's appeal is centered on disputed factual issues and Holcomb does not concede the most favorable view of the facts to Plaintiff.[1] Therefore, this Court has no jurisdiction. *See, e.g., Farmer,* 288 F.3d at 1258 n. 4. The appeal should be dismissed.

III. STATEMENT OF ISSUES ON APPEAL

Rule 28(b) of the Federal Rules of Appellate Procedure provides that an appellee may include a statement of issues on appeal in his brief if he/she is "dissatisfied" with the appellant's statement. Plaintiff asserts that the Statement of the Issues on Appeal should read as follows:

1. Whether this Court has jurisdiction over Holcomb's appeal (*i.e.*, whether Holcomb's appeal is impermissibly premised on disputed facts such that this Court has no interlocutory jurisdiction); and

2. Assuming *arguendo* that the Court has jurisdiction, whether the District Court erred in holding that Holcomb violated Lorenzo's clearly established Fourth Amendment right to be free from the excessive use of deadly force.

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[1] Of course, Holcomb could not concede the most favorable view of the facts to Plaintiff and hope to prevail on the merits. If Holcomb did concede the most favorable view of the facts to Plaintiff, he would be conceding that he shot a clearly unarmed and non-threatening teenage boy in violation of his Fourth Amendment rights.

IV. STATEMENT OF THE CASE / STATEMENT OF FACTS

A. Factual Summary

As of March 10, 2019, Lorenzo was minor, just 14 years old. *See, e.g.*, Aplt. Appx. 354. Defendant admits -- on that day -- Lorenzo and a group of his friends were "playing" at an unoccupied house. *Id.* at 488. Earlier that day, Lorenzo's friends had purchased some "airsoft" guns (also hereinafter referred to as "CO2" or "BB" guns) at a sporting goods store. *See* "Exhibit 8" (Filed Conventionally) at 16:04 – 16:40.[2] The boys shot the airsoft guns at various times while they were on the vacant property. However, the airsoft guns were not even loaded; when they were "shooting" them, they were simply discharging CO2. *See* Aplt. Appx. at 388-389, 390-392.

The only time Lorenzo shot one of the "airsoft" guns was inside of the unoccupied house; he then set it down in the kitchen, and never picked it up again. *See* Aplt. Appx. at 388-389, 390-92, 412. The airsoft gun Lorenzo discharged and set down in the kitchen "had silver on it. It had a silver, like, top on it." *Id.* at 395. After setting the airsoft gun down in the kitchen, Lorenzo climbed out of a window and walked into the backyard. *Id.*

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[2] The electronic file name, as provided to Plaintiff, is "Ex 20-7-A Minor with Guardians Interview (Video).mp4."

At around 5:43 p.m., a neighbor called 911 and reported that several males were at the vacant house with guns. *See* "Exhibit 1"[3] (Filed Conventionally). The caller advised 911 dispatch that she saw one subject with a gun, whom she described as a Black male with dreadlocks in jeans and a gray hoodie. *Id.* Notably, however, the 911 caller stated multiple times that she was not sure whether the "guns" were real or not. *Id.*

At the time the 911 call came in, Sgt. Holcomb was working an overtime shift. Sgt. Holcomb heard over his radio that several Black men with guns had gone into the house across the street from the 911 caller's home. *See* Aplt. Appx. 166. Sgt. Holcomb and Officer Carlton Tschetter were the first officers to arrive at the house. *See* "Exhibit 3"[4] (Filed Conventionally) at 00:35 to 1:00.

As Officer Tschetter arrived on the scene, he walked around in the street for approximately thirty (30) seconds before giving dispatch the license plate number of a car parked on the street. *See* "Exhibit 4"[5] (Filed Conventionally) at 0:30 – 1:06. Just a few seconds later, he heard a noise and

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[3] The electronic file name, as provided to Plaintiff, is "Ex. 2 – 911 Call (Audio).WAV."

[4] The electronic file name, as provided to Plaintiff, is "Ex 5 - 3-C Holcomb BWC #1 (Video).mp4."

[5] The electronic file name, as provided to Plaintiff, is "Ex 6 – 5-C-10 Tschetter BWC.mp4."

reported to dispatch over the radio, ***"cap gun."*** *Id.* at 1:06 – 1:10. After noting that the sounds coming from the house resembled a "cap gun," Officer Tschetter approached the house with his gun drawn, and shouted "Hey! Police department! Come on out!" *Id.* at 1:10 – 1:20. Officer Tschetter then announced that the noises he heard ***"could be paint ball."*** *Id.* at 1:22 – 1:27.

While Officer Tschetter was approaching the front of the house, Sgt. Holcomb -- with his gun drawn -- moved toward the tattered wooden fence along the side of the house; he notified radio dispatch, "***I think it's a cap gun***, but they are shooting something off." "Exhibit 3" (Filed Conventionally) at 1:09 – 1:15. Seconds later, Holcomb came to a hole in the fence and looked into the yard with his gun still pointing outward. *Id.* at 1:25 to 1:26.[6] On the video, one can briefly see Lorenzo through the opening in the fence. *Id.* at 1:27 - 1:30; *see also* Aplt. Appx. 212. Lorenzo appears to be walking into the house. *Id.* Without identifying himself as a police officer, Sergeant Holcomb then screamed, "Show me your hands! Drop it!"; Lorenzo turned his head toward the hole in the fence with a surprised look on his face. *See* "Exhibit 3" at 1:27

[6] A photograph of the scene shows that the fence, along with overgrown, dead foliage in the yard, would have concealed Sgt. Holcomb -- from Lorenzo's field of vision -- at the time of the shooting. *See* Aplt. Appx. at 426.

- 1:30. At the time, Lorenzo's hands were by his side, and he did not appear to be holding a gun, or anything else. *Id.*

Indeed, even with the benefit of the enlarged screenshot of the body-worn camera footage, **it does not appear that Lorenzo was holding anything in his hand, and he *certainly was not pointing anything in Holcomb's direction.*** *See* Aplt. Appx. 212.

No more than six hundredths of a second passed between the time Sgt. Holcomb finished his command of "Show me your hands! Drop it!" and when he began firing his weapon at Lorenzo. *See* "Exhibit 3" at 1:27 – 1:30. Lorenzo testified that as soon as he came around the side of the house from the window from which he had exited, he heard a voice yell "drop it, drop it" and the sounds of gun shots immediately thereafter. Aplt. Appx. at 398, 400. Additionally, Holcomb admitted that he actually didn't even tell Lorenzo to drop the "gun" until *after* he shot. *Id.* at 418.

Holcomb fired four shots, hitting Lorenzo twice: once in his left leg and once in his right upper hip. *See* "Exhibit 3" (Filed Conventionally) at 1:27 – 1:30; and Aplt. Appx. at 410-411. After the shots were fired, Lorenzo fell back towards the window, and one of his friends helped him back through the window into the house. *See* Aplt. Appx. at 401-402. Lorenzo and his friend then walked towards the front of the house. *Id.* at 402. Once the boys were in

the adjacent bedroom, Lorenzo realized he had been shot. *Id.* at 403. Lorenzo was able to walk, but his legs started giving out, and he involuntarily urinated on himself. *Id.* Lorenzo looked down at his pants, saw a large hole, and said to his friends, "I think I got shot." *Id.* at 404-405.

Lorenzo had no idea that there were police officers on the scene until after he'd been shot. *See* Aplt. Appx. at 393-394.

After Lorenzo realized he was shot, two of the boys present at the house went out the window into the backyard, while the others walked towards the front door. *See* Aplt. Appx. at 405-406. Lorenzo and his friend Coby were the last two to exit the house. *Id.* Lorenzo, badly wounded, leaned up against the front door because his legs were giving out. *Id.* at 407. Coby got on the ground and put his hands behind his back, as ordered by Officer Tschetter. *See* "Exhibit 3" (Filed Conventionally) at 2:20 – 2:30. Officer Tschetter then shouted at the compliant and unarmed Coby, "don't you move! You're gonna get shot, you understand?!" *Id.* Lorenzo then got down on the ground and showed Officer Tschetter his hands to let him know he was coming out and was unarmed. *See* "Exhibit 4" (Filed Conventionally) at 2:40 – 3:40; Aplt. Appx. at 406. Officer Tschetter commanded Lorenzo to crawl towards him, which he did, despite there being broken glass on the ground. *See* Aplt. Appx. at 407-408; "Exhibit 4" (Filed Conventionally) at 3:39 – 3:50. Apparently

dissatisfied with the speed at which Lorenzo was crawling through broken glass, Officer Tschetter grabbed him by his hood and pulled him towards him. *Id.*

While Officer Tschetter was handcuffing Lorenzo, Sgt. Holcomb stated, "that looks like the one I shot at… he's the one that had a gun"; Lorenzo replied, ***"I didn't have a gun."*** "Exhibit 3" (Filed Conventionally) at 4:10 – 4:20; "Exhibit 4" (Filed Conventionally) at 4:22 – 4:27. Seconds later, both Holcomb and Tschetter asked Plaintiff who had the gun. "Exhibit 3" (Filed Conventionally) at 4:15 – 4:24; "Exhibit 4" (Filed Conventionally) at 4:25 – 4:34.

Officer Tschetter began to check Lorenzo's gunshot wounds. Officer Tschetter again asked Lorenzo if he had a gun and Lorenzo replied, "no, sir." "Exhibit 4" (Filed Conventionally) at 5:04 – 5:35.

After the Oklahoma City police officers searched the premises, a total of four airsoft guns were found: one in a closet on a shelf, one in a bedroom, one in a bathroom, and one in the backyard, near where two of Lorenzo's friends were arrested. *See* "Exhibit 7"[7] (Conventionally Filed) at 5:14 – 5:30;

[7] The electronic file name, as provided to Plaintiff, is "Ex 16 - 6-C-9 BWC Jesse McRay.mp4".

6:44 – 6:55. The gun found in the backyard was a TDP 45" BB Pistol, not a Glock replica. *See* Aplt. Appx. 303.

Lorenzo later sat for an interview with the Oklahoma City Police Department ("OCPD"). During his interview with OCPD -- just hours after he was shot -- Lorenzo stated that he had an airsoft gun "before he went out the window," but that he dropped it before he exited the house through the window. *See* "Exhibit 8" (Filed Conventionally) at 13:10 – 13:37. He reiterated, unequivocally, that he did not have a gun in his hand when he was shot. *Id.* at 14:17 – 14:35. During his subsequent deposition, Lorenzo testified under oath that he did not have an airsoft gun in his hand when he went outside of the vacant house or when he was shot by Holcomb. *See, e.g.,* Aplt. Appx. at 390-392, 409, 412.

B. Procedural Background

Plaintiff filed his Complaint in this matter on May 19, 2020. *See* Aplt. Appx. at 012-26. Pertinently, Plaintiff brought a claim against Sgt. Holcomb, pursuant to 42 U.S.C. § 1983, alleging that Holcomb violated Lorenzo's Fourth Amendment right to be free from excessive use of force. *Id.*

Sgt. Holcomb filed his Motion for Summary Judgment on December 29, 2022. *See* Aplt. Appx. at 118-350. Sgt. Holcomb specifically argued that he is entitled to qualified immunity. *Id.* 137-153.

Plaintiff filed his Response in Opposition to Sgt. Holcomb's Motion for Summary Judgment on February 17, 2023. *See* Aplt. Appx. at 357-426.

On August 14, 2023, the District Court filed its Order denying Sgt. Holcomb's request for summary judgment on qualified immunity grounds. *See* Aplt. Appx. at 498-523. Importantly, for our purposes here, the District Court found, held and reasoned as follows:

> [I]f Clerkley's version of events is believed, a reasonable jury could find that he did not have a gun in his hand when he was shot by Holcomb and that there was no threat of serious physical harm to Holcomb or others. Although Holcomb contends and testified that Clerkley had a gun and pointed the gun at him, that is a fact question for the jury. Holcomb's body camera footage and the still-framed photographs of Clerkley from the footage … do not plainly contradict Clerkley's evidence that he did not possess a gun during his initial brief encounter with Holcomb.
> ***
> [T]he evidence, viewed in Clerkley's favor, indicates that he did not have a gun or anything in his hand. Therefore, he could not drop "it" if he did not have anything in his hand. Further, the evidence, viewed in Clerkley's favor, shows that Holcomb shot Clerkley immediately after giving the commands.
> ***
> A reasonable jury could find that a reasonable officer in Holcomb's position would have recognized that Clerkley did not have a gun or anything in his hand and that Clerkley was not making any hostile motions or threatening gestures towards him.
> ***
> [a] reasonable jury could conclude that Holcomb's mistaken perceptions—that Clerkley was pointing a gun at him at the precise moment he fired his gun and that Clerkley posed a serious threat of physical harm to Holcomb or others—were not reasonable.

Aplt. Appx. at 510-514. The District Court ultimately concluded that "a

reasonable jury could find that Holcomb's use of deadly force was in violation of the Fourth Amendment." *Id.* at 514. As to the second prong of the qualified immunity analysis, the Court held that "a reasonable jury could conclude that Holcomb shot Clerkley 'even when a reasonable officer would have known [Clerkley] was unarmed and posed no threat,' and thus, Holcomb 'violated clearly established law.'" *Id.* at 517 (quoting *Finch v. Rapp,* 38 F.4th 1234, 1243-44 (10th Cir. 2022).

Sgt. Holcomb subsequently filed this appeal. *See* Aplt. Appx. at 498-523.

V. SUMMARY OF THE ARGUMENT

This Court does not have interlocutory jurisdiction. In appealing the denial of qualified immunity, Sgt. Holcomb impermissibly relies on disputed facts and does ***not*** concede the most favorable view of the facts to Plaintiff. *Henderson v. Glanz,* 813 F.3d 938, 947 (10th Cir. 2015); *Farmer v. Perrill,* 288 F.3d 1254, 1258 n. 4 (10th Cir. 2002). In particular, Holcomb's entire appeal turns on whether, immediately prior to the shooting at issue, Lorenzo was pointing an object -- that reasonably appeared to be handgun -- at Holcomb. *See, e.g.,* Opening Brief at 15-16. As shown *supra*, there are serious and genuine disputes as to this issue. Thus, the appeal should be dismissed for want of jurisdiction.

Assuming *arguendo* that the Court has jurisdiction, the denial of qualified immunity at issue should be affirmed on the merits.

On March 10, 2019, Plaintiff Lorenzo Clerkley, Jr., who was 14 years old at the time, went to play basketball with some friends at an outdoor hoop in Oklahoma City. As teenagers sometimes do, Lorenzo and his friends explored the vacant house on the property. Lorenzo's friends opened four airsoft guns/BB guns that they had obtained earlier in the day. The boys wandered around the house and discharged carbon dioxide (CO2) from the airsoft guns. Lorenzo picked up one of the airsoft guns in the kitchen of the house, discharged some CO2 from it, and set it down on a cabinet.

By this time, unbeknownst to the boys, a neighbor had called 911 and reported that the boys had gone into the vacant house with guns, although she admitted she didn't know if they were real or not. Lorenzo was continuing to explore the property when Defendant Sgt. Holcomb arrived on the scene. As Sgt. Holcomb walked up to the house, he heard faint popping noises that he admitted sounded like a "cap gun." As Sgt. Holcomb moved toward the tattered fence enclosing the back yard of the house, Lorenzo, who was unaware that police had arrived – or had even been called – was simultaneously stepping into the backyard. Lorenzo had nothing in his hands, as he had left the airsoft gun back in the kitchen of the house. Lorenzo had only taken two or three steps into the backyard when Defendant Holcomb, concealed by the house's back fence, spotted Lorenzo, and yelled "Show me

your hands! Drop it! Drop it!" Less than one second after shouting these commands, Holcomb fired four shots through a small hole in the fence, striking Lorenzo twice. Sgt. Holcomb would later claim that he perceived that Lorenzo pointed a gun at him.

Much of the incident was captured by Holcomb's body worn camera. In denying Holcomb's Motion for Summary Judgment, on qualified immunity grounds, the District Court held that "[a] reasonable jury could conclude … Holcomb's mistaken perceptions—that Clerkley was pointing a gun at him at the precise moment he fired his gun and that Clerkley posed a serious threat of physical harm to Holcomb or others—were not reasonable." *See* Aplt. Appx. at 513-514. The District Court ultimately concluded that "a reasonable jury could find that Holcomb's use of deadly force was in violation of the Fourth Amendment." *Id.* at 514. As to the second prong of the qualified immunity analysis, the Court held that "a reasonable jury could conclude that Holcomb shot Clerkley 'even when a reasonable officer would have known [Clerkley] was unarmed and posed no threat,' and thus, Holcomb 'violated clearly established law.'" *Id.* at 517

The District Court's rulings are well-supported by the evidence and applicable law. If this Court assumes jurisdiction, it should affirm the District Court's denial of qualified immunity.

VI. ARGUMENT

A. The Appeal Should be Dismissed as This Court Does *Not* Have Jurisdiction

Plaintiff's "Jurisdictional Statement" is adopted and incorporated as if fully stated herein. *See* Section II, *supra.* For the reasons stated in Plaintiff's "Jurisdictional Statement", this Court does not have jurisdiction over this appeal, and the appeal should be dismissed accordingly.

B. Assuming *Arguendo* that the Court has Jurisdiction, the District Court did Not Err in Holding that Holcomb's Use of Force Violated Plaintiff's Clearly Established Fourth Amendment Right

Even if the Court assumes jurisdiction, the District Court's Order, with respect to Sgt. Holcomb's assertion of qualified immunity, should be affirmed.

1. Standard of Review – Summary Judgment and Qualified Immunity

"When the defendant has moved for summary judgment based on qualified immunity, [the court must] still view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in its favor." *Estate of Booker v. Gomez,* 745 F.3d 405, 411 (10th Cir. 2014). *See also Henderson v. Glanz,* 813 F.3d 938, 952 (10th Cir. 2015). In cases where a qualified immunity defense is adequately raised, at the summary judgment stage, courts will grant qualified immunity unless "the plaintiff can show (1) a reasonable jury could find facts supporting a violation

of a constitutional right, which (2) was clearly established at the time of the defendant's conduct." *Estate of Booker*, 745 F.3d at 411 (citing *Saucier v. Katz*, 533 U.S. 194, 201–02, (2001)).

Here, as discussed more fully *infra*, Plaintiff has shown, and the District Court correctly concluded, that a reasonable jury could find facts supporting violation of a clearly-established constitutional right.

2. A Reasonable Jury Could Find Facts Supporting a Violation of Lorenzo's Fourth Amendment Right to be Free from Excessive Use of Force

On appeal, Sgt. Holcomb argues that, while the District Court "analyzed the reasonableness of the force by applying" the familiar *Graham* and *Larsen* factors, it "made several mistakes in its analysis." Opening Brief at 24. Sgt. Holcomb's argument lacks merit.

When a plaintiff alleges excessive force, the court applies the reasonableness test announced in *Graham v. Conner*, 490 U.S. 386 (1989). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397 (emphasis added). Under this test, the court considers the totality of the circumstances. *Plumhoff v. Rickard*, 143 S.Ct. 2012, 2020 (2014). In evaluating the totality of the

circumstances, courts weigh three factors: 1. the severity of the crime at issue, 2. the immediate threat that the suspect posed to officers and others, and 3. any active resistance or attempt to flee by the suspect. *Graham*, 490 U.S. at 396.

■ **Second *Graham* Factor and *Larsen* Factors**

While Sgt. Holcomb asserts that the District Court erred with respect to the second *Graham* factor, his arguments are easily vanquished. Indeed, the arguments border on frivolousness.

In the context of the use of *deadly* force, the second and third *Graham* factors, particularly the second, will weigh more heavily in the analysis. The Supreme Court held -- in *Tennessee v. Garner,* 471 U.S. 1, 11 (1985) -- that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." "'The use of deadly force is justified under the Fourth Amendment if a reasonable officer in the Defendant's position would have had ***probable cause*** to believe that there was a ***threat of serious physical harm*** to themselves or others.'" *Zia Trust Co. ex rel. Causey v. Montoya,* 597 F.3d 1150, 1154 (10th Cir. 2010) (quoting *Walker v. City of Orem,* 451 F.3d 1139, 1159 (10th Cir. 2006)) (emphasis added); *see also Estate of Ceballos v. Husk,* 919 F.3d 1204, 1213–14 (10th Cir. 2019) ("Officers are not justified in using deadly force unless objectively reasonable officers in the same position 'would have had probable cause to believe that there was a threat of serious physical harm

to themselves or to others.'") (quoting *Thomson v. Salt Lake Cty.,* 584 F.3d 1304, 1313 (10th Cir. 2009)). This Court has previously held that "deadly force cannot be used when it is unnecessary to restrain a suspect or secure the safety of officers, the public, or the suspect himself…." *Weigel v. Broad,* 544 F.3d 1143, 1155 (10th Cir. 2008).

As noted by the District Court, "the Tenth Circuit enunciated four nonexclusive factors in … *Estate of Larsen ex rel. Sturdivan v. Murr*, [511 F.3d 1255, 1260 (10th Cir. 2008)], for assessing the threat posed by a suspect. These factors, referred to as the *Larsen* factors, are: "(1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and suspect; and (4) the manifest intentions of the suspect." Aplt. Appx. 507.

There was no probable cause to believe that Lorenzo posed a threat of serious physical harm to Holcomb or anyone else. The District Court applied both *Graham* and *Larsen* factors in holding that "a reasonable jury could find that Holcomb's use of deadly force was in violation of the Fourth Amendment." Aplt. Appx. at 514. The District Court did not err.

The two primary cases relied on by Sgt. Holcomb -- *Estate of Valverde v. Dodge,* 967 F.3d 1049 (10th Cir. 2020) and *Estate of Taylor v. Salt Lake City,* 16

F. 4th 744 (10th Cir. 2021) -- are clearly and demonstrably distinguishable. In fact, one need look no further than the face of Sgt. Holcomb's Brief to see that *Valverde* and *Taylor* do not apply here. As Sgt. Holcomb states, "Valverde had discarded his firearm and was in the process of raising his hands when he was shot." Opening Brief at 26-27 (citing *Valverde,* 967 F.3d at 1057). By contrast, here, as the Court held, "[a] reasonable jury could find that a reasonable officer in Holcomb's position would have recognized that Clerkley ***did not have a gun or anything in his hand and that Clerkley was not making any hostile motions*** or threatening gestures towards him." Aplt. Apx. at 512-513 (emphasis added). This holding is fully supported by the evidence. *See, e.g., id.* at 212; "Exhibit 3" at 1:27 - 1:30.

> As Holcomb himself describes the facts in *Taylor*:
>
> > The defendant officer told the suspect three times to remove his hand from his waist band. Taylor then rapidly removed his left hand from his waistband, lifting his shirt and exposing his torso, and simultaneously withdrew his right hand from his waistband *in a motion that was "consistent with the drawing of a gun."*

Opening Brief at 29 (citing *Taylor,* 16 F. 4th at 750). In the case-at-bar, however, there is no evidence, other than Holcomb's self-serving statements, that Lorenzo made any hostile or threatening motion toward Holcomb. Rather, the video evidence refutes Holcomb's account. *See, e.g.,* Aplt. Appx. at 212; "Exhibit 3" at 1:27 - 1:30. And quite unlike Lorenzo in this case, "Mr.

Taylor refused to follow the officers' repeated commands to stop and show his hands, and he continued walking away." *Taylor,* 16 F. 4th at 766. Of course, Lorenzo was given no time to comply before Holcomb began shooting. And contrary to Taylor, Lorenzo was not "verbally challenging the officers" nor concealing his hands. *Id.* at 767. This case bears little resemblance to *Taylor*.

In another strawman argument, Holcomb avers that "[i]f it is reasonable to mistake a beer bottle or a crack pipe for a gun, it is certainly reasonable to mistake a BB gun for a real firearm." Opening Brief at 28. But the evidence here is that Lorenzo was not holding a beer bottle, crack pipe, or anything else when Holcomb fired his gun. Again, even with the benefit of a zoomed in screenshot of Sgt. Holcomb's body-worn camera footage, it does not appear that Lorenzo was holding anything in his hand at the time of the shooting, and he certainly was not pointing anything in Sgt. Holcomb's direction. *See* Aplt. Appx. at 212.

The District Court did not err in ruling that "[a] reasonable jury could conclude that Holcomb's mistaken perceptions—that Clerkley was pointing a gun at him at the precise moment he fired his gun and that Clerkley posed a serious threat of physical harm to Holcomb or others—were not reasonable." *See* Aplt. Appx. at 513-514.

The District Court also correctly held that the *Larsen* factors favor Plaintiff. Aplt. Appx. at 511-514. Relying on *Valverde*, Holcomb notes that "[i]f a suspect is drawing a gun to fire at an officer, the second, third and fourth [*Larsen*] factors 'would obviously be satisfied.'" Opening Brief at 31 (quoting *Valverde*, 967 F.3d at 1061). While this principle of law might be helpful to some other defendant in some other case, it is not helpful to Holcomb under the circumstances of *this* case. At the risk of beating the proverbial dead horse, there is no evidence that Lorenzo ever drew a gun to fire at *anyone*.

Addressing the first *Larsen* factor, Holcomb once again underscores that his appeal would require this Court to resolve genuine factual disputes. Holcomb argues that he "gave all the warning the circumstances reasonably permitted when he saw a suspect with what appeared to be a gun pointed in his direction." Opening Brief at 32. This argument is, as Holcomb's entire appeal is, based on the false premise that there is no genuine dispute of fact as to whether Lorenzo pointed what appeared to be a gun in Holcomb's direction. The evidence is that Holcomb gave Plaintiff effectively no time to comply with any commands. *See* "Exhibit 3" at 1:27 - 1:30. Thus, it cannot be said that Lorenzo failed to comply with, or ignored, the commands. And as the District Court determined, because "the evidence, viewed in Clerkley's favor, indicates that he did not have a gun or anything in his hand" he could

not drop "it" as commanded by Holcomb. Aplt. Appx. at 512. There was no error with respect to the first *Larsen* factor.

As to the second *Larsen* factor -- whether any hostile motions were made with the weapon towards the officers -- Holcomb asserts District Court's finding "'that a reasonable jury could conclude the footage and still-framed photographs do not show that Clerkley was holding something black in his hand' … is contrary to the video evidence because the zoomed still-frame from Holcomb's BWC clearly shows a black object in or near Clerkley's right hand." Opening Brief at 33 (quoting Aplt. Appx. 512). This is just another iteration of a tired theme. And a theme that takes this appeal outside of the Court's limited jurisdiction to review interlocutory orders. As stated *ad nauseum* herein, the "zoomed still-frame from Holcomb's BWC" does not "clearly" show a black object, or any other object that could be reasonable perceived as a gun, in Lorenzo's right hand. *See* Aplt. Appx. at 212. His hands appear empty. *Id.* More pertinently, despite Holcomb's claim that Lorenzo's "right hand [was] pointed forward", the evidence does not depict any "hostile" motions toward Holcomb. *See* "Exhibit 3" at 1:27 - 1:30. This is the epitome of a disputed material fact. At minimum, "[a] reasonable jury could find that a reasonable officer in Holcomb's position would have recognized that Clerkley did not have a gun or anything in his hand and that Clerkley was not

making any hostile motions or threatening gestures towards him." Aplt. Appx. at 512-13. There was no error.[8]

On the fourth *Larsen* factor, the District Court found that "a reasonable jury could conclude … Clerkley did not manifest any intentions that were hostile and malevolent towards Holcomb." Aplt. Appx. at 513. Holcomb chides the District Court for purportedly failing to focus on "the totality of the information known to Sgt. Holcomb." Opening Brief at 35. Reading the Court's Order, as a whole, however, it is evident the analysis of "manifest intentions" went well beyond Holcomb's lack of knowledge that Lorenzo had climbed through the back window. Most importantly, the District Court found that the "the body camera footage doesn't show that Clerkley made any hostile motions or threatening gestures with a weapon, or anything else, toward the officer." Aplt. Appx. at 512.

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[8] Sgt. Holcomb relies on inapposite -- and non-binding -- authority in support of his argument concerning the second *Larsen* factor. *See* Opening Brief at 34 (citing and quoting *Estate of Harmon v. Salt Lake City,* 2023 WL 5334118 (D. Utah August 18, 2023). The *Estate of Harmon* court found that the bodycam video in that case depicted the decedent, Harmon, "in a position that looks very much like an individual brandishing a knife…." 2023 WL 5334118 at *6. The video evidence here does not depict Lorenzo brandishing, or appearing to brandish, anything. Moreover, Lorenzo has consistently and vehemently denied that he was holding one of the airsoft guns when Holcomb began shooting. It should also be noted that an appeal is pending in the *Estate of Harmon* case.

Holcomb sums up his argument concerning the second *Graham* factor and the *Larsen* factors by urging that "*Taylor* and *Valverde* make clear, the appellate court is not bound by a district court's ruling that the evidence presented would support a particular finding of fact when there is clear contrary video evidence of the incident at issue." Opening Brief at 36. If there was video evidence clearly contrary to the District Court's Order, this argument would be well taken. But, as shown throughout this Response, the video and photographic evidence fully *supports* the Court's Order. There was no error.

- **Third *Graham* Factor**

Regarding the third *Graham* factor, Sgt. Holcomb claims that the District Court "incorrectly held there was no evidence from which a reasonable jury could conclude Clerkley was trying to evade arrest by climbing out the back window because there was no evidence Sgt. Holcomb had probable cause to arrest Clerkley." *Id.* at 24-25. To begin with, this is yet another disputed issue of fact evincing a want of jurisdiction. Further, while the Court was correct in finding that there was no probable cause that Lorenzo had committed the crime of second-degree burglary, there is other evidence that that Lorenzo did not actively resist or evade arrest. The evidence shows that Lorenzo did not know there were police outside the house and was

unaware of Holcomb's presence until less than a second prior to the shooting. *See, e.g.,* Aplt. Appx. at 393-394, 398, 400; "Exhibit 3" at 1:27 – 1:30. No more than six hundredths of a second passed between the time Sgt. Holcomb finished his command of "Show me your hands! Drop it!" and when he began firing his weapon. *See* "Exhibit 3" at 1:27 – 1:30. Lorenzo was not even given the opportunity to comply, let alone resist or evade arrest.

Even in cases where a plaintiff *does* passively resist arrest, it is well-established that that using violent force to quell such passive resistance constitutes excessive force. *See, e.g., Bridges v. Yeager,* 352 Fed. Appx. 255, 259 (10th Cir. 2009) ("The fact that a suspect was non-compliant or resisted arrest in isolation does not authorize the use of excessive force."); *Abbott v. Sangamon Cnty.,* 705 F.3d 706, 730 (7th Cir. 2013) (holding that passive non-compliance without active resistance does not justify substantial escalation of force); *Griffith v. Coburn,* 473 F.3d 650, 659 (6th Cir.2007) (holding that it is clearly established that when a suspect refuses to follow officer orders, but otherwise poses no safety threat, use of significant force is unreasonable); *Bryan v. MacPherson,* 630 F.3d 805, 832-33 (9th Cir. 2010) ("Officer MacPherson's desire to quickly and decisively end an unusual and tense situation is understandable. His chosen

method for doing so [i.e., use of a taser] violated Bryan's constitutional right to be free from excessive force.").

Again, Holcomb gave Plaintiff effectively ***no time to comply with any commands.*** In *Emmett,* 973 F.3d at 1136-37, the Tenth Circuit held that an officer's use of a taser on a passively resisting suspect before the officer had completed his warning was unreasonable because, *inter alia,* the officer gave the suspect "no time to modify his behavior and comply" with the officer's requests. In *Tenoria v. Pitzer,* 802 F.3d 1160, 1162-65 (10th Cir. 2015), the Tenth Circuit affirmed the district court's finding that an officer used unreasonable deadly force on a suspect when the officer commanded him to drop a knife and then shot him two to three seconds after issuing the command.

Similar to the events in *Emmett* and *Tenorio,* here, Sgt. Holcomb approached the fence of the backyard, and immediately after he spotted Lorenzo, shouted at him and began shooting before he even finished his commands.

The District Court did not err in finding that the third *Graham* factor weighs in Plaintiff's favor.

- **Summary**

Overall, the District Court held that "a reasonable jury could find … Holcomb's use of deadly force was in violation of the Fourth Amendment." Aplt. Appx. 514. This holding, as to the first element of the qualified immunity test, is well-supported by the evidence an applicable law. The District Court did not err.

3. The Constitutional Right at Issue Was "Clearly Established" at the Time of the Violation

The District Court also concluded that "a reasonable jury could conclude … Holcomb shot Clerkley 'even when a reasonable officer would have known [Clerkley] was unarmed and posed no threat,' and thus, Holcomb 'violated clearly established law.'" Aplt. Appx. at 517 (quoting *Finch v. Rapp,* 38 F.4th 1234, 1243-44 (10th Cir. 2022). The District Court's analysis is sound and supported by applicable law. Holcomb is not entitled to qualified immunity.

"'To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent.'" *Wise v. Caffey,* 72 F.4th 1199, 1208 (10th Cir. 2023) (quoting *District of Columbia v. Wesby,* 138 S. Ct. 577, 589 (2018)). However, "[a] prior case *need not have identical facts." See Patel v. Hall,* 849 F.3d 970, 980 (10th Cir. 2017) (emphasis added). The Supreme Court has maintained that its case law *"does not require a case directly on point for a right to be clearly established," Kisela v. Hughes,* 138 S. Ct. 1148, 1152 (2018). "[T]here is

no need that 'the very action in question [have] previously been held unlawful.'" *Safford Uni-fied Sch. Dist. #1 v. Redding,* 557 U.S. 364, 377 (2009) (quoting *Wilson v. Layne,* 526 U.S. 603, 615 (1999)). *"'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning.'" White,* 137 S. Ct. at 552 (quoting *United States v. Lanier,* 520 U.S. 259, 271 (1997))

"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." *Saucier v. Katz,* 533 U.S. 194, 201–02, (2001).

It is clearly established that using deadly force on a suspect, like Lorenzo, who does not have a firearm, does not make any hostile or threatening movements like he is drawing a firearm, and makes no motion indicating he is about to shoot is a violation of the Fourth Amendment. *See, e.g., Finch,* 38 F.4th at 1242.

In *Finch,*[9] the decedent, Mr. Finch, was tragically the victim of a "swatting" prank. *Finch,* 38 F.4th at 1238. A Los Angeles resident who had no

[9] While *Finch* was decided after the use of deadly force at issue here, as the District Court noted, "the shooting in *Finch* took place on December 28, 2017, prior to the shooting in this case, and [the *Finch* Court] relied upon cases decided before December 28, 2017, to conclude that the officer's shooting in that case had violated clearly established law." Aplt. Appx. at 515. Thus, the District Court permissibly relied on *Finch* in conducting its analysis. *See, e.g., McCoy v. Meyers,* 887 F.3d 1034, 1053, n. 24 (10th Cir. 2018).

connection to Mr. Finch called 911 and falsely reported that he had shot his father and was holding his mother at gunpoint, and gave the dispatcher Mr. Finch's Wichita, KS address. *Id.* As a result of the 911 call, numerous City of Wichita officers rushed to Mr. Finch's address, believing it to be a hostage situation. *Id.* Wichita Police Officer Justin Rapp, a member of a special team that regularly responded to high-risk incidents, arrived on the scene and set up his long-distance rifle approximately forty yards from Mr. Finch's house. *Id.* at 1239. About forty seconds after Rapp had gotten into position, Mr. Finch opened his front door and stepped onto his porch. *Id.* Another officer yelled at Finch to show his hands while other officers shouted other commands. *Id.* None of the officers identified themselves as police. *Id.* Finch stood on his porch, raised his hands to ear level, showing that he was not holding anything in his hands. *Id.* Conflicting testimony indicates that Finch then either raised his hands and lowered them again, moved his hand towards the small of his back and moved back into the doorway, or grabbed the right side of his hoodie and lifted it up, making a motion that appeared as if he was drawing a firearm. *Id.* "Approximately ten seconds after Finch first opened the door and stepped onto the porch, Rapp fired a single shot from his rifle, hitting Finch in the chest." *Id.*

The Tenth Circuit affirmed the district court's denial of qualified immunity to Rapp, holding that prior precedent, including *Zuchel v. Spinharney.*, 890 F.2d 273 (10th Cir. 1989), *Zia Trust, Walker, Huff,* and *King v. Hill,* 615 F.Appx 470 (10th Cir. 2015) clearly established the right not to be subjected to deadly force. *Finch,* 38 F.4th at 1242-44.

Holcomb's attempts to distinguish *Finch* are unavailing. For instance, Holcomb argues that "[u]nlike Officer Tschetter in the instant case, none of the officers in Finch identified themselves as police officers when they approached Finch's residence." Opening Brief at 41. But the evidence is that Holcomb did not identify himself as an officer and that Lorenzo did not know officers were present prior to being shot. Holcomb further avers that "Finch walked out on to his front porch when the police approached, rather than crawl out a window as Clerkley did." *Id.* However, the evidence is that Holcomb did not see Lorenzo exit out of the window and only witnessed him standing in the back yard, unarmed. And while Holcomb emphasizes that he heard "shots" when approaching the house, he -- accurately -- believed those "shots" to be from a BB gun.

In *Zuchel*, the Circuit affirmed the denial of summary judgment in favor of the plaintiff who claimed that officers used unreasonable deadly force on a man who was carrying a pair of nail clippers. The man, Leonard Zuchel, had

created a disturbance at a fast-food restaurant and left before police arrived. *Zuchel*, 890 F.3d at 274. When the officers exited the restaurant, they found Mr. Zuchel in a heated exchange with four teenagers. *Id.* When the officers approached Mr. Zuchel and the teenagers, one of them shouted that Mr. Zuchel had a knife. *Id.* As the officers walked toward Mr. Zuchel and he turned toward them with nail clippers in his hand, defendant Officer Spinharney shouted at Mr. Zuchel and then shot him four times. *Id.* A witness testified that Mr. Zuchel "was neither charging Spinharney nor stabbing at him, but instead was shot after Zuchel stopped and was trying to 'explain what was going on.'" *Id.* at 275. And at least one witness testified that Officer Spinharney fired the four shots "[a]s fast as he could pull the trigger." *Id.* The Circuit concluded that there were "genuine issues of material fact precluding a judicial determination of whether Officer Spinharney's conduct was objectively reasonable." *Id.* at 275.

While, as Holcomb notes, the factual scenarios between *Zuchel* and this case are not identical, the officer in *Zuchel* had more justification to shoot than Holcomb did in the case-at-bar. The evidence in *Zuchel* established that the suspect had *something* in his hand -- albeit nail clippers -- when he turned to face the police. Here, the evidence, read in the light most favorable to Plaintiff,

is that Lorenzo's hands were visibly empty when Holcomb starting shooting. Therefore, Lorenzo posed even less of an arguable "threat" than Zuchel.

In *Zia Trust,* officers responded to a report of a dispute between a caller and his adult son, who had mental health issues. The defendant, an Officer Montoya, exited his vehicle with his weapon already drawn and proceeded to a position in front of a van in which the decedent was seated. *Zia Trust,* 597 F.3d at 1154-55. While the tires of the van were pointed in Montoya's direction, the van appeared to be stuck on a retaining wall. When the decedent revved the van's engine, it jumped about a foot, and Montoya, standing about 15 feet away from the van, fired a single shot, striking the decedent in the neck and killing him. *Id.* at 1155. The Circuit affirmed the district court's denial of qualified immunity to Officer Montoya. *Id.*

Zia Trust also involved a potentially more "threatening" situation than this case. There, the decedent revved his engine and moved a large vehicle toward the officer. Lorenzo made no arguably threatening move toward Holcomb.

Walker involved officers responding to a residence at which they found a suicidal man, David, holding a box cutter to his wrist. "His hands were about chest height, straight out. His left wrist was bent to expose the wrist. He was facing at an angle somewhat but not directly facing toward Officer Peterson,"

who was about 21 feet away. *Walker,* 451 F.3d at 1158. Officer Peterson claimed that he shouted commands at David to stop, freeze, and drop his weapon, but other witnesses testified that they did not hear any such commands. *Id.* Officer Peterson testified that he thought David was holding a .38 special with a two-inch barrel. *Id.* Officer Peterson stepped backwards and shot David. *Id.* The Tenth Circuit affirmed the district court's denial of qualified immunity, holding that David "did not pose an immediate threat to the safety of the officers or others" and had "made no threats and was not advancing on anyone with the small knife." *Id.* at 1160-61.

The officer in *Walker* was also confronted with a more dangerous situation than Holcomb. The decedent in *Walker* was holding knife. And because the decedent was indisputably holding a weapon, Officer Peterson had a more viable argument than Holcomb of a reasonable and mistaken belief that the suspect had a gun. Holcomb attempts to distinguish *Walker* by arguing that "the decedent was reported to be suicidal, but not to be threatening anyone else, and was holding a small knife to his wrist." Opening Brief at 40. But, just like Holcomb, Officer Peterson mistakenly -- and unreasonably -- *perceived* that the suspect was holding a gun.

In *Huff,* 996 F.3d, officers were chasing suspected bank robber who had taken a female hostage. When the suspect stopped his car, the hostage, Ms.

Huff, got out and ran towards the officers with her hands in the air in a surrendering pose. In reversing the district court's granting the defendants' motions for summary judgment, the Tenth Circuit found that the officer's use of deadly force on Ms. Huff "was contrary to clearly established Fourth Amendment law." *Id.* at 1090-91.

In applying the principles from *Zia Trust, Walker, Huff,* and *King,* the *Finch* court reasoned that prior precedent clearly established that "***an officer, even when responding to a dangerous reported situation, may not shoot an unarmed and unthreatening suspect."*** *Finch,* 38 F.4th at 1243 (citing *King,* 615 F.Appx. at 479, *Zia Trust,* 597 F.3d at 1155, *Walker,* 451 F.3d at 1160, *Harris v. Roderick,* 126 F.3d 1189, 1201 (9th Cir. 1997)). Because a "jury could find [the officer] shot Finch even when a reasonable officer would have known Finch was unarmed and posed no threat," the Tenth Circuit found that the facts, viewed in a light most favorable to Finch, violated "clearly established law." *Id.* at 1243-44. The evidence here, viewed in the light most favorable to Plaintiff, demonstrates that while Sgt. Holcomb was responding to a *potentially* dangerous situation, he unreasonably used deadly force on Lorenzo, who was unarmed and unthreatening. Based on *Finch*, and the *Finch* Court's application of the above-discussed pre-incident authorities, the District Court concluded that Holcomb "violated clearly established law."

Aplt. Appx. 517. This was not erroneous.[10] It would be "clear to a reasonable officer that his conduct was unlawful in the situation [Holcomb] confronted." *Saucier,* 533 U.S. at 201–02. Lorenzo's Constitutional right, under the circumstances of this case, was clearly established.

CONCLUSION

For the reasons stated herein, the District Court's denial of Sgt. Holcomb's request for qualified immunity should be affirmed and upheld.

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[10] Sgt. Holcomb raises an odd argument that the District Court committed reversible error by using language arguably suggesting that the jury could decide the "clearly established law" issue. Opening Brief at 44. This is a matter of semantics. It is clear that the District Court did a separate analysis of the two qualified immunity prongs. It is presumed that if the Court were to later propose a jury instruction giving the "clearly established law" decision to the jury, both Holcomb *and Plaintiff* would object.

CERTIFICATE OF DIGITAL SUBMISSION

The undersigned hereby certifies that this brief as submitted in Digital Form is an exact copy of the written document filed with the Clerk, that no privacy redactions were required and the digital submission has been scanned for viruses with Intego Virus Barrier Software Version 10.9.82, and is free from viruses.

/s/ Robert M. Blakemore
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STATEMENT REGARDING ORAL ARGUMENT

In the event that this appeal is not dismissed for want of jurisdiction, Plaintiff believes that oral argument would materially assist in the determination of this appeal and, therefore, request the opportunity for oral argument.

/s/Robert M. Blakemore
Robert M. Blakemore

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 8,584 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December 2023, I electronically served this Response Brief, through the Court's CM/ECF system, on all counsel of record in compliance with 10th Circuit Rule 25.4.

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