IN THE

United States Court of Appeals for the Tenth Circuit

No. 20-3132

LISA G. FINCH; DOMINICA C. FINCH; as co-administrators of the Estate of Andrew Thomas Finch, deceased,
Plaintiffs-Appellees,

v.

JUSTIN RAPP,
Defendant-Appellant.

No. 20-3190

LISA G. FINCH; DOMINICA C. FINCH; as co-administrators of the Estate of Andrew Thomas Finch, deceased,
Plaintiffs-Appellants,

v.

CITY OF WICHITA, KANSAS,
Defendant-Appellee.

On Appeal from the U.S. District Court for the District of Kansas
No. 6:18-cv-01018; Hon. John W. Broomes

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ARGUMENT

I. The Trial Court Erred In Granting Summary Judgment On Plaintiffs' Failures-Of-Accountability Claim.

Plaintiffs presented evidence that Officer Justin Rapp's killing of Andrew Finch was the latest in a long series of Wichita Police Department (WPD) shootings for which no one was held accountable. Viewed in the light most favorable to the plaintiffs, the evidence below showed that in the six years leading up to Andrew Finch's death, officers shot at civilians in 21 separate incidents, more than half of which resulted in civilian deaths, and that WPD's "investigations" of such shootings were so cursory that they shouldn't be called "investigations" at all, per plaintiffs' expert. Even where those pro forma "investigations" revealed serious misconduct, Wichita never imposed more than a slap on the wrist to officers involved in those shootings.

In response, Wichita notes that it once terminated an officer (*after* the Finch killing, for a shooting that also occurred after the Finch killing), that Rapp signed a declaration claiming his "decision to shoot was not caused by any belief that the WPD would not hold him accountable," and that it's possible to read some of the investigative reports as describing shootings that were objectively reasonable (although doing so in many

cases would wrongly require drawing inferences in Wichita's favor, ignoring plaintiffs' expert's opinion, and disregarding various admissions by WPD's own officials). At most, Wichita's evidence suggests that a reasonable jury considering the totality of the evidence *could* find in Wichita's favor on the municipal liability claim, not that it *must*. This Court should reverse the district court's grant of summary judgment because plaintiffs have presented enough evidence to go to a jury on all three elements of municipal liability—a widespread practice, deliberate indifference on the part of Wichita, and a causal connection between that widespread practice and the killing of Andrew Finch.

A. Wichita's Failure To Investigate Shootings Or Meaningfully Discipline Officers Was Widespread.

To reiterate, "an informal custom that amounts to a widespread practice" fulfills the "policy" element of a municipal liability claim. *Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs*, 962 F.3d 1204, 1239-40 (10th Cir. 2020). In this case, plaintiffs presented evidence of four "widespread

practice[s]" that, together, amounted to a "policy" of declining to hold officers accountable for shooting civilians. PB45-69.[1]

1. First, plaintiffs presented evidence that criminal investigations of WPD officers who shoot civilians are deeply flawed. PB8-9. The investigations are conducted without any independent oversight. AA567. While the Kansas Bureau of Investigation (KBI) occasionally sits in on interviews to provide the "appearance of independence," AA567 (Expert Report), even KBI agents admit that their "role in Wichita is limited, to say the least," AA585 (Jacobs Dep. 128:17-18). Indeed, Wichita's Chief of Police expressed unease with the lack of independent oversight, explaining that he "would prefer that KBI did everything," but that "unfortunately," KBI's role is minor, because KBI lacks the resources to participate further. AA598 (Ramsay Dep. 13:12-22).

As a result, WPD officers are usually conducting criminal investigations of their own colleagues and work hard to vindicate them. For instance, Wichita doesn't dispute on appeal that WPD detectives

[1] Citations to plaintiffs' brief, the second brief on appeal, are denoted PB##. Citations to defendants' response-reply brief, the third brief on appeal, are denoted RRB##.

often ask leading questions designed to exonerate officers. AA568 (Expert Report).[2]

2. Second, plaintiffs presented evidence that administrative "investigations" of police shootings consist of merely reviewing the evidence amassed in those flawed criminal investigations, even though administrative and criminal investigations serve entirely different purposes and are based on entirely different standards. PB8-9. In most cases, the officer doing an administrative investigation doesn't interview a single witness, not even the shooting officer. AA563-64. WPD acknowledged that practice is unsound: After a 2013 audit suggested that the administrative investigation run in parallel to the criminal investigation, rather than reviewing it after the fact, WPD agreed to implement the auditor's recommendation. AA853. But by 2019, when

[2] Perhaps unsurprisingly, at the time of Andrew Finch's death, not a single officer had been prosecuted for their role in a shooting. AA615 (Bennett Dep.) (only prosecution for on duty shooting incident since 1997 was prosecution of Dexter Betts); AA129 (DeFoe Dep. 216:2-15, 217:13-15) (shooting involving Betts took place on Dec. 30, 2017, three days after Finch killing). Wichita protests that "whether officers are criminally charged is a decision by the District Attorney, not the Wichita police department or the City," but plaintiffs' claim isn't that WPD officers *should* have been prosecuted, only that WPD can't point to criminal prosecution as an alternative mechanism for officer accountability. *See* RRB29.

plaintiffs' expert assessed WPD, the practice remained unchanged, and plaintiffs' expert opined that such an after-the-fact review was tantamount to doing no investigation at all. AA563-64.

Wichita asserts that "additional interviews of the officers and witnesses involved are not required because the officers and witnesses have already been interviewed" for the criminal investigation. RRB30-31. But that argument ignores the critical distinctions between the two contexts, highlighted by plaintiffs' expert and conceded by WPD officers. Plaintiffs' expert explained that criminal investigations differ from administrative investigations in several respects. Criminal investigations are focused on violations of criminal statutes, whereas administrative investigations examine policy violations (including violations of the WPD policy requiring a shooting to be objectively reasonable, Wichita's effort to enforce the requirements of the Fourth Amendment). AA563-64. Criminal investigators are also looking to see whether a case can be proven beyond a reasonable doubt, whereas administrative investigations can and should sanction officers where the evidence shows a policy violation, whether or not it could be proven beyond a reasonable doubt. AA563; AA616 (Bennett Dep. 78:10-17). As

one administrative investigator for WPD put the point, "the crime investigators are looking at different facts than what I am. They're seeking different information than what I might need." AA563 (Expert Report, quoting deposition testimony of Detective Harty).

Plaintiffs' expert gave examples of the kinds of questions an administrative investigation might ask that a criminal investigation had not, describing as "confounding" some of the areas of inquiry that "were not explored" by administrative investigations. AA126-29; PB10-13, 48, 61-62. For instance, plaintiffs' expert pointed out several holes in the investigation of the [redacted] shooting. AA571. In that case, [redacted] SA353. [redacted] AA940-42; SA347. Plaintiffs' expert criticized the administrative investigation for not asking "for more information about why she didn't transition from her patrol rifle to a Taser." AA571. And he expressed bafflement at the

shooting officer's belief about the Taser's effectiveness (he pointed out that "Taser International would go out of business if they had a 50 percent success rate on their product"). AA381. Wichita protests that plaintiffs' expert's criticisms have "nothing to do with why force was used," but that assertion is downright puzzling—the decision to use a rifle rather than a Taser goes to the heart of why the shooting officer used deadly force. RRB8-9.

3. Third, plaintiffs' expert criticized the administrative "investigations" themselves, even apart from the fact that they rely, in most cases, entirely on the criminal investigations. By waiting to conduct the administrative investigation until the criminal investigation is complete, Wichita risks "undermining the availability of evidence" as witnesses' memories fade, "and delaying corrective action and discipline." AA567 (Expert Report). Moreover, there's no independent oversight of the administrative investigation process. AA605. Various WPD officials have conceded the validity of those criticisms. *See* AA853 (WPD pledged to change timing of administrative investigation in 2013); AA605 (Chief of Police admits that it would be "best practice" to have an "external agency conduct reviews into officer-involved shootings," but that "best

practice just isn't happening in the Wichita Police Department right now").

And while defendants claim that there are regulations governing the administrative investigation process, RRB32, these regulations merely require *an* investigation—they don't tell officers how to conduct the investigation or what evidence they should consider. AA565. Officers conduct their administrative "investigations" without guidance, and are left to learn "as they go." *Id.* There aren't even policies on such basics as conflicts of interest, compounding the lack of independent oversight. *Id.*

4. Fourth and finally, plaintiffs demonstrated that in the six years leading up to Andrew Finch's death, WPD officers used lethal force in at least 21 separate incidents, killing 12 civilians, yet never received meaningful discipline. In only two of the 21 shootings was there *any* discipline imposed, and the most discipline imposed in those two cases was a one-day suspension. AA570-71 (Expert Report); SA577 (Investigative Report) ([redacted]); SA623 (WPD Agreement on Grievance) ([redacted]).

Wichita claims that [redacted] and so

"[n]othing indicates the discipline 'maxed out'" at a one-day suspension. RRB4 (citing AA126-27, 129; SA225, 577-78), 29. This is, at best, seriously misleading. The only WPD officer termination that Wichita points to occurred *after* the Finch killing, for a shooting that itself took place after Andrew Finch's death. AA129 (DeFoe Dep. 216:2-15, 217:13-15). The other instances of "discipline" Wichita identifies were all addressed in plaintiffs' brief and in fact *prove* that discipline "maxed out" at a one-day suspension. Two of the citations are to [redacted]. AA126-27; SA577-78. As plaintiffs' brief explained, [redacted] PB13-14 (citing SA330, 577, 623; AA570-71). Wichita points to a note that [redacted] but that wasn't intended to discipline the officers; [redacted] SA225, 259-65.

Wichita also suggests that WPD investigations uniformly exonerate officers because in each case, "the use of force was objectively reasonable." RRB28-30. But whether each of the 21 shootings was "objectively reasonable" turns on a series of disputed material facts, and at this stage, that's enough to reverse the district court's grant of summary judgment. *See Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212 (10th Cir. 2003); *Torres v. City of Albuquerque ex rel. Albuquerque Police Dep't*, No. CIV 12-1048 RB/KBM, 2015 WL 13662387, at *10 (D.N.M. Apr. 22, 2015) (defendants' attempts to "argue that some of the shootings may have been justified" simply "support the finding that there is a genuine dispute of material fact" sufficient to defeat summary judgment); *see also* PB58-62 (pointing to evidence and cases that would allow a jury to find that the shootings here were not objectively reasonable).

Finally, Wichita asserts that any failures to discipline officers for policy violations have nothing to do with the use of force and therefore aren't relevant to this appeal. RRB29. Wichita derides, for instance, the policy violations that plaintiffs' expert labels "failures to communicate." *Id.* But even those "failures to communicate" are closely related to the use of force. For instance, plaintiffs' expert said that the officers who shot

Stacy Richard "failed to communicate" when they did not gather key facts, such as the fact that Richard was alone in his home and thus a threat only to himself. AA570-71. Fixing that "failure to communicate" might have prevented officers from storming Richards' house, saving Richards' life. *Id*.

And even policy violations that don't bear immediately on the use of force may well unreasonably escalate a situation and create the need for the use of deadly force. Such conduct violates the Fourth Amendment just as surely as the shot that is ultimately fired. *See Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (Fourth Amendment reasonableness inquiry considers not just reasonableness of force at the moment used, but "whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force").

In short, plaintiffs presented ample evidence that Wichita's failures of accountability were sufficiently widespread and entrenched to amount to a "policy" on which municipal liability can be predicated.

B. Wichita's Failures Of Accountability Reflect Deliberate Indifference To The Constitutional Rights Of Its Citizens.

Plaintiffs also presented evidence from which a jury could conclude that Wichita's failures of accountability reflected "deliberate indifference" to the constitutional rights of its citizens. *Connick v. Thompson*, 563 U.S. 51, 61-62 (2011). A municipality acts with "deliberate indifference" when it is on "actual or constructive notice" that its policy may lead to constitutional harm. *Id.*

Plaintiffs demonstrated that Wichita was on notice of the likelihood of a constitutional violation—the likelihood that an officer would shoot a civilian in violation of the Fourth Amendment—in two ways. First, the evidence amassed below showed a pattern of police shootings in recent years, each of which resulted in, at most, token discipline (and in most cases total exoneration) for the offending officer. PB51-52. A reasonable jury could find that those shootings should have put Wichita on "actual or constructive notice" that failing to hold its officers accountable would inevitably lead to additional shootings, some of which would surely violate the Constitution. Second, plaintiffs presented reports submitted to WPD by outside experts sounding the alarm about WPD's approach to

police shootings and recommending reforms that were never implemented. *Id.*

Wichita makes two sets of arguments in response. First, Wichita disputes the factual basis for plaintiffs' notice evidence. But Wichita's arguments on this score at most illustrate various genuine disputes of material fact that must go to a jury. For example, Wichita repeatedly claims that WPD officers have been terminated or criminally prosecuted for shooting civilians. *See* RRB4, 11, 28, 29, 37. But the very first time an officer was terminated and criminally prosecuted for shooting a civilian happened *after* the Finch shooting and was in response to an incident that *also* occurred after the Finch shooting. AA129 (DeFoe Dep. 216:2-15, 217:13-15); AA615 (Bennett Dep. 29:8-30:11). A reasonable jury could conclude, of course, that whatever accountability WPD began imposing after Andrew Finch's death did not bear on its failures of accountability leading up to that death.

To take another example, Wichita claims that "when recommendations were made for policy improvements, WPD implemented the recommendations," citing to a WPD statement that its staff "looks forward to final implementation of the recommended

changes." RRB37 (citing AA851-53). But though WPD may have said it "look[ed] forward to" implementing the changes, it never, in fact, made those changes. For instance, in January 2013, an external auditor recommended that WPD's administrative investigation should be conducted simultaneously with its criminal investigation. AA851-53. As of 2015, WPD claimed that they agreed with and had implemented the change. AA853. But when WPD officials were deposed in 2019, the change *still* had not been implemented—and, six-and-a-half years after the flaw in WPD's accountability process had been brought to its attention, plaintiffs' expert cited that same flaw in concluding that WPD "lack[ed] a functional, effective system of internal accountability." AA603 (Ramsay Dep. 74:13-76:14); AA562-67 (Expert Report). A reasonable jury could surely conclude that whatever WPD had said about planning to implement outside experts' recommendations, it did not, in fact, implement those recommendations and that its failure to do so reflected deliberate indifference. *Cf. Burke v. Regalado*, 935 F.3d 960, 1000 (10th Cir. 2019) (sheriff's failure to implement changes recommended by outside auditors for five years reflected deliberate indifference).

In addition to its factual arguments, Wichita also put forth various arguments that the 21 shootings and 12 civilian deaths could not, as a matter of law, have provided notice to Wichita. Wichita's first tack is to argue that only prior constitutional violations can provide municipalities with notice. But that argument ignores this Court's case law repeatedly finding that prior incidents provided sufficient notice that a constitutional violation might occur without even asking whether those prior incidents themselves violated the Constitution. In *Zuchel v. City & Cnty. of Denver, Colo.*, 997 F.2d 730, 740-41 (10th Cir. 1993), for instance, this Court found sufficient notice based on five shootings under circumstances that "var[ied] greatly" without asking whether those shootings violated the Fourth Amendment. In *Quintana v. Santa Fe Bd. of Comm'rs*, 973 F.3d 1022, 1034 (10th Cir. 2020), this Court found sufficient notice where plaintiffs alleged three withdrawal-related deaths without asking whether those deaths violated the Eighth Amendment. And in *Burke*, 935 F.3d at 1000-01, this Court found sufficient notice in a series of prison audits without asking whether those audits identified deficiencies that violated the Eighth Amendment. This Court's sister circuits are in accord. *See* PB55.

Wichita objects that those cases arose in a variety of procedural postures and covered a variety of different subject matters, *see* RRB33-34, but those distinctions just confirm how well-entrenched the rule is: Whatever the subject matter, and whatever the procedural posture, municipalities are liable where prior incidents provided notice that a constitutional violation was likely, and courts need not examine whether those prior incidents themselves violated the Constitution. *Quintana*, 973 F.3d at 1034.

In any event, even if Wichita were correct that only shootings that themselves violate the Constitution serve as adequate notice to a municipality, a jury in this case could find that many of the 21 WPD shootings fit that bill. As plaintiffs explained in their initial brief, courts have *already* concluded that a jury could find at least three of the shootings unconstitutional. PB58-59 (citing *Herington v. City of Wichita*, No. 6:14-cv-01094, 2017 WL 76930 (D. Kan. Jan. 9, 2017); *Jackson v. City of Wichita, Kan.*, No. 13-1376-KHV, 2017 WL 106838 (D. Kan. Jan. 11, 2017); and *Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161,

1169-72, 1175 (10th Cir. 2020)).[3] In other cases, the facts of the shooting, even on the telling of Wichita's flawed investigation, resemble facts held by this Court to violate the Fourth Amendment. PB59-60. In still other cases, a jury could find Wichita at the very least willfully blind to the possibility that a police shooting violated the Fourth Amendment. PB60-61.

Wichita then argues that even if some or all of the 21 prior shootings themselves violated the Constitution, they still didn't put Wichita on notice because they did not result in "admissions or adjudications" such as jury verdicts. RRB35-37. As plaintiffs explained in their first brief, that rule would create absurd consequences, both doctrinal and practical. PB53-58. Unsurprisingly, this Court's precedents foreclose such a rule: *Zuchel*, *Quintana*, and *Burke* didn't even ask whether the prior incidents that proved deliberate indifference were unconstitutional, let alone whether there had been "admissions or adjudications" showing they were unconstitutional. PB54. And neither

[3] Wichita protests that "[a]ll three cases involved defense motions for summary judgment in which all factual inferences were drawn in plaintiffs' favor," but of course, *this* appeal involves a "defense motion[] for summary judgment in which all factual inferences [a]re drawn in plaintiffs' favor." *See* RRB12.

this Court's sister circuits nor analogous bodies of case law nor Supreme Court precedent support the notion that plaintiffs must point to prior "admissions or adjudications" to establish a pattern for municipal liability purposes. PB53-58. Wichita argues that the absence of jury verdicts against the city should at the very least be "a factor" in evaluating deliberate indifference, but there isn't any published circuit court precedent for that proposition either. *See* RRB35.

In lieu of binding authority, Wichita points to the portion of *Calderon v. City of New York*, 138 F. Supp. 3d 593, 613 (S.D.N.Y. 2015), summarizing an unpublished S.D.N.Y. case, *Tieman v. City of Newburgh*, No. 13 Civ. 4178 (KMK), 2015 WL 1379652 (S.D.N.Y. Mar. 26, 2015). Even assuming an unpublished district court case from another circuit had persuasive authority, this one stands for the opposite of the proposition for which Wichita cites it: *Tieman* expressly *distinguishes* cases, like this one, where the "framework of deliberate indifference" applies and acknowledges that its jury-verdicts rule doesn't apply to such cases. 2015 WL 1379652, at *17.

Wichita finally argues that no jury could find the 21 recent shootings provided notice because they involved "different officers in

varying situations." RRB35-36. But this Court's prior cases make clear that "varying situations" may put a municipality on notice of the need for reform, which is all that's required to show deliberate indifference. In *Zuchel*, for instance, the "circumstances" of the police shootings that established deliberate indifference "var[ied] greatly," but each pointed to the need for the municipality to reconsider how it equipped officers to use deadly force. 997 F.2d at 738. So taken together, the shootings supported a conclusion of deliberate indifference. *Id.* In *Quintana*, the three prior inmate deaths weren't caused by the same medical condition—the three prior inmates had died from alcohol withdrawal, not from heroin withdrawal, which killed plaintiff—but nonetheless should have put the jail on notice that its intake policies would eventually result in an Eighth Amendment violation. 973 F.3d at 1034. Municipalities aren't entitled to qualified immunity; plaintiffs needn't point to a particular prior case on all fours with the constitutional violation to establish liability. *See Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980).

So Wichita is simply wrong to say that plaintiffs' evidence consists only of "three isolated cases." RRB35-36. But even if precedent foreclosed considering all but three of the incidents plaintiffs detailed below for

purposes of deliberate indifference, those three incidents would *still* suffice to overcome summary judgment on this element of municipal liability. In *Quintana*, for instance, three prior incidents sufficed to prove deliberate indifference. 973 F.3d at 1034. In *Zuchel*, that number was five. 997 F.2d at 737-38, 740-41 (five "instances in which citizens have been injured or killed by peace officers" sufficed to establish deliberate indifference).

In fact, even if plaintiffs had put on *no* evidence of any prior incidents, they would *still* be entitled to proceed to trial based on other evidence presented at summary judgment, as plaintiffs' initial brief explained. PB62-66. First, deliberate indifference may be shown without any prior incidents if a constitutional violation is a "highly predictable or plainly obvious consequence of a municipality's actions"; here, a shooting that violates the Fourth Amendment is a "plainly obvious consequence" of refusing to hold officers accountable for police shootings. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002); PB63-64. Second, deliberate indifference may be shown where a police department is "out of synch with the rest of the police profession"; here, plaintiffs' expert explained that WPD's investigations bore no resemblance to those

he'd seen in other departments, and even Wichita's chief of police acknowledged that "best practice" wasn't being followed. *See Allen*, 119 F.3d at 844; PB64-65. And third, deliberate indifference is inherent in the very nature of plaintiffs' claim: If Wichita's "efforts to evaluate" prior shootings were "so superficial as to suggest that its official attitude was one of indifference to the truth," such an attitude "would bespeak an indifference to the rights" violated by those prior shootings. *See Fiacco v. City of Rennselaer, N.Y.*, 783 F.2d 319, 328 (2d Cir. 1986); PB65-66. Wichita says not one word in response to these arguments.

A jury thus could readily find that Wichita acted with deliberate indifference, whether or not it was permitted to consider the 21 prior shootings and 12 civilian deaths that gave Wichita notice of the need to reform its systems for accountability.

C. A Jury Could Conclude That Wichita's Failures Of Accountability Caused Andrew Finch's Death.

Finally, plaintiffs have created a genuine dispute of material fact as to whether Wichita's deliberately indifferent failure-of-accountability policy caused the Fourth Amendment violation at issue in this case. *See Burke*, 935 F.3d at 997-98. A jury could find that Wichita's failure to hold officers accountable caused the violation in at least two ways. First,

Wichita's failures of accountability "sen[t] a message to officers" that shooting at civilians was "tolerated," creating a culture of impunity that "cause[d] [the] future violation" of Finch's rights. *Cordova v. Aragon*, 569 F.3d 1183, 1194 (10th Cir. 2009); *Estate of Roman v. City of Newark*, 914 F.3d 789, 799 (3d Cir. 2019) ("[I]t is logical to assume that [the City's] continued official tolerance of repeated misconduct facilitate[d] similar unlawful actions in the future."). Against that well-established theory of causation, Wichita cites only to Rapp's declaration stating: "My split-second decision to shoot was not caused or affected by any belief that the Wichita Police Department would not hold me accountable." AA323; RRB38-39. A jury, of course, would not have to credit that assertion.

Alternatively, a jury could find, as plaintiffs' expert did, that if Wichita had adequately investigated police shootings and "identified the [] patterns of deficiencies in the use of force, systemic changes could have been made that could have prevented the Finch incident from unfolding as it did." AA573 (Expert Report); *see also J.K.J. v. Polk Cnty.*, 960 F.3d 367, 384-85 (7th Cir. 2020) (finding causation because earlier detection might have spurred reforms). Wichita claims that its administrative investigations were sufficient to spur any necessary reforms because each

administrative investigation report includes [redacted] RRB4. But plaintiffs' expert concluded that there was no follow-up on those "areas of concern" and no attempt to implement any recommendations. AA572-73.

Wichita's brief thus provides no reason to depart from the general principle that causation is a quintessential jury question. *See, e.g.*, 57A Am. Jur. 2d Negligence §425; *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 778-79 (10th Cir. 2013).

II. Wichita's Facially Unconstitutional Custom Of Shooting Without Regard To Whether The Victim Poses A Threat Provides Another Basis For Municipal Liability.

Plaintiffs also argued that Wichita is liable for its widespread practice of shooting without regard to whether the victim poses a threat. Although the evidence for that widespread practice overlaps significantly with the evidence supporting plaintiffs' failures-of-accountability theory, the two theories are distinct. PB70-74. Plaintiffs presented evidence that the practice of shooting civilians without regard to whether they posed a threat was sufficiently widespread and entrenched—notwithstanding WPD's on-paper policy requiring that force only be used where necessary to prevent death or great bodily harm—as to amount to a policy. PB10-

16, 58-62. Because the alleged practice—shooting without regard to whether the victim posed a threat—violates the Constitution on its face, there's no need for any additional showing. PB73-74. Even if such a showing were necessary, plaintiffs presented evidence that WPD was on notice of shootings that potentially violated the Constitution and did nothing about them, demonstrating both deliberate indifference and causation. Wichita characterizes that evidence as "preposterous," but their two-paragraph response, devoid of any citations to the record or to case law, does nothing to suggest the question should be kept from a jury. *See* RRB39-40.

* * *

Reading Wichita's brief, one might be forgiven for assuming that plaintiffs, not Wichita, were the ones who sought summary judgment. Wichita's arguments assume, at each turn, that a jury will credit their say-so over plaintiffs' evidence. Wichita seems to argue that a jury must find that WPD was attempting to reform the department simply because they told an auditor so, *see* RRB37 (citing AA851-53); that a jury could not find causation simply because Rapp filed a declaration disclaiming it, *see* RRB38-39 (citing AA322-23); and that a jury would have to take

WPD's word that its decision to exonerate each shooting officer was reasonable.[4]

Perhaps a jury will so conclude. But at this stage, the question is whether any of those material facts are in dispute, and plaintiffs have introduced more than enough evidence from which a jury might conclude that statements by WPD, Rapp, and his fellow officers at the very least don't tell the full story. Because a reasonable jury could return a verdict in plaintiffs' favor, this Court must reverse.

CONCLUSION

For the foregoing reasons, the Court should **REVERSE** the district court's grant of summary judgment to Wichita and **REMAND** for further proceedings.

[4] *Compare, e.g.*, RRB9 *with* SA455 (SA443 ( ): RRB7 *with* SA408, 414, 416-17 ; RRB9 *with* SA353

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Respectfully submitted,

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CERTIFICATES OF COMPLIANCE

I hereby certify that:

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2. 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 2016 in Century Schoolbook 14-point font.

Dated: March 17, 2021

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I certify that on March 17, 2021, I filed a true, correct, and complete copy of the foregoing Plaintiffs' Reply Brief with the with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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