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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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

Plaintiffs agree with defendants' jurisdictional statement as to No. 20-3132. As to No. 20-3190, the district court had jurisdiction over plaintiffs' 42 U.S.C. § 1983 suit under 28 U.S.C. § 1331. AA23.[1] The district court granted summary judgment to Wichita. AA1056. On September 15, 2020, the district court entered a final judgment of dismissal in favor of Wichita under Rule 54(b). SA29. On September 16, 2020, plaintiffs filed a notice of cross-appeal from that judgment. SA30. This Court thus has jurisdiction under 28 U.S.C. § 1291 to review the grant of summary judgment to Wichita.

STATEMENT OF THE ISSUES

Ten seconds after exiting his front door, Andrew Finch was shot and killed by Wichita police officer Justin Rapp. Finch was unarmed. The district court concluded a jury could find that a reasonable officer in Rapp's position would have seen that Andrew Finch's hands were empty,

[1] Citations to defendants' appendix on appeal are denoted AA##. Citations to plaintiffs' supplemental appendix on appeal are denoted SA##.

that he was complying with officers' commands, and that he was neither reaching for a weapon nor fleeing—conclusions this Court must accept on interlocutory review. The issue on appeal in Case No. 20-3132 is:

I. Whether the district court correctly denied Rapp qualified immunity where he shot a suspect who, a reasonable officer would have seen, was unarmed and compliant.

Rapp's shooting was the latest in a long line of incidents where Wichita police shot at civilians—21 times in the preceding six years. Viewed in the light most favorable to plaintiffs, the evidence showed that the victim in many of those shootings posed no threat. In response to these shootings, Wichita conducted cursory "investigations" that rubberstamped officers' use of force and imposed no meaningful discipline on shooting officers. The issue on appeal in Case No. 20-3190 is:

II. Whether the district court erred in granting Wichita summary judgment where plaintiffs put forth evidence regarding 21 shootings by Wichita police, 12 civilian deaths, and yet no meaningful investigations or discipline.

STATEMENT OF THE CASE

I. Andrew Finch's Killing.

On December 28, 2017, Andrew Thomas Finch—a 28-year-old father of two—was lying on his living room couch when he heard a noise outside. Thinking it was one of his kids' friends dropping by, he opened the front door.

Outside, nearly a dozen Wichita Police Department (WPD) officers had surrounded the residence, responding to a 911 call in which the caller claimed to have shot one person and to be holding others hostage. AA1001. The officers would later learn the call was a tragic prank. AA1009. No one had died, there were no hostages, and the caller was a video game player in California with no connection to Andrew Finch.[2] SA42 (Incident Report).

Four officers were stationed east of the house, around 45 feet from the front door, with several other officers on the west side of the house and another to the south. AA1002, 1004. Justin Rapp and three other

[2] Known as "swatting," this type of hoax exacts revenge on a rival video game player by calling 911 and fabricating a violent crisis at the target's address to elicit an armed police response. SA42 (Incident Report). The goal is to terrify the target. *Id.* Compounding the tragedy in this case, Andrew Finch was not even the intended victim of the "swatting"—the caller gave the wrong address. *Id.*

officers were about 120 feet to the north of the house, facing the front door. AA1003.

Ten seconds after Andrew Finch opened the door, Rapp fired the shot that killed him. AA1009. What happened during those 10 seconds is hotly disputed. All parties agree that at least four officers commanded Andrew Finch to “walk this way,” “step off the porch,” put his hands up, and show his hands; that officers shone a flashlight in Andrew Finch’s eyes; and that Andrew Finch raised his hands after officers so commanded. AA1005-06.

Rapp could see that Andrew Finch’s hands were empty, but he testified that he perceived a threat because Andrew Finch grabbed his sweatshirt and “made a motion like he was drawing a firearm and dipped his shoulder forward . . . and put his hand straight back down kind of on the back half of his right thigh.” AA1007.

Several other officers, however, disputed Rapp’s characterization. Two officers next to Rapp and three officers on the east side—including the two officers closest to the front door—did not see any threatening motion. AA1007-08. Multiple officers specifically disputed that Andrew Finch “made a motion like he was drawing a firearm.” AA1008-09. And

body camera footage did not corroborate Rapp's testimony; as the district court held, a viewer could conclude from the footage that "Finch appeared confused but was attempting to comply with the officers' commands, that his movements did not reasonably indicate hostile or threatening action on his part, and that the shot was fired before Finch had a chance to speak or to fully comply with any clear directive." AA1009.

Sifting through the evidence amassed at summary judgment, the district court concluded a jury could find as follows: Rapp could see there was no firearm in Andrew Finch's hand. AA1017. Rapp could hear officers telling Finch to "raise his hands," and he could see Finch "doing exactly that." *Id.* Finch didn't "grab[] his sweatshirt and 'ma[ke] a motion like he was drawing a firearm.'" AA1018. And at the moment Rapp fired, Finch was not going back into the residence, nor did Rapp think he was. AA1021.

Rapp's shot hit Andrew Finch. AA1009. Finch fell backwards into his home. *Id.* He was unarmed. *Id.* The other occupants of the house—including his mother—were handcuffed, ordered outside, and prevented from tending to him. AA874 (Abdelhadi Dep. 50:16-52:23). [redacted] [redacted] SA57 (Investigative Report).

WPD conducted an administrative "investigation" into Andrew Finch's death, but Rapp was not interviewed even once. AA1011. [redacted] SA54 (Investigative Report); AA441 (Rapp Dep. 247:5-248:5).

II. The Wichita Police Department's Troubled History.

Rapp's killing of Andrew Finch was the latest in a long series of WPD shootings for which no one was held accountable. Viewed in the light most favorable to plaintiffs, the evidence below showed the following: In the six years leading up to Andrew Finch's death, WPD officers shot at civilians in 21 separate incidents, killing 12 Wichita citizens. In virtually every case, the shooting officer was exonerated. In the rare instances where discipline was imposed, it was no more than a slap on the wrist.

On paper, WPD has strict regulations surrounding the use of force. An officer is "justified in using deadly force only when such officer reasonably believes that such force is necessary to prevent death or great bodily harm to such officer or another person," a standard that mirrors

the Fourth Amendment limitation on the use of deadly force. AA618 (WPD Regulation); *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). "When practical, a verbal warning for the suspect to submit to the [officer] shall be given prior to the use of lethal force in any situation unless doing so would increase the danger to the [officer] or others." AA618 (WPD Regulation).

In practice, however, Wichita makes no effort toenforce those regulations. While Wichita nominally requires every shooting to be investigated, those investigations don't meaningfully assess whether the shooting complied with departmental regulations. AA563 (Expert Report). No independent entity plays a substantive role in investigating WPD shootings; instead, fellow WPD officers conduct the investigations.[3] AA630-32 (WPD Regulation). And Wichita has no regulations governing the conduct of investigations. AA565-66 (Expert Report). Two years before Andrew Finch was killed, a team of experts from Wichita State University called attention to these and other deficiencies and

[3] While the Kansas Bureau of Investigation (KBI) is occasionally involved in investigations, that involvement is—in the words of one KBI agent—"limited, to say the least," and consists primarily of listening in on WPD officer interviews. AA579, 585 (Jacobs Dep. 69:22-72:25, 128:17-18).

recommended improvements to the department's regulation of the use of force. AA656, 689-90. Those recommendations were never implemented. AA603 (Ramsay Dep. 74:13-76:14).

Investigations of police shootings proceed along two tracks. Criminal investigations focus solely on whether a prosecutor can prove beyond a reasonable doubt that a WPD officer violated criminal law. AA567-68 (Expert Report). Those investigations are deeply flawed, with investigators focused on exonerating shooting officers. *Id.* A sample question from an investigator might be, "[T]his looks like what you're telling me is that you did it in self-defense; is that correct?" AA568. Prior to Andrew Finch's death, not a single WPD officer had been prosecuted criminally. AA615 (Bennett Dep. 29:3-30:16).

More importantly, criminal investigations don't assess compliance with departmental use-of-force regulations. AA563 (Expert Report). That function is reserved for administrative investigations. But those administrative investigations, plaintiffs' expert concluded, are so paltry as to amount to no investigation at all. *Id.* In most cases, the officer conducting an administrative investigation doesn't interview a single witness—not even the officer involved. AA564. In fact, conducting

interviews requires special dispensation from the Chief of Police. AA563. Rather, administrative investigations merely review the evidence from criminal investigations, making no effort to reconcile any discrepancies therein. AA563. And administrative investigations are, by design, so delayed that evidence becomes unavailable and witnesses' memories fade. AA567. A 2013 external audit urged WPD to revise its administrative investigation process to begin sooner and gather more information, but those recommendations went unheeded in officer-involved shooting cases. AA851-53.

Because Wichita's administrative investigations are so cursory, they often overlook clear violations of department regulations. AA569 (Expert Report). On the rare occasion an investigator identifies a violation, discipline is still not forthcoming. *E.g.*, AA569-70. [REDACTED] AA570-71; SA577 (Investigative Report); SA330 (Harty Dep. 99:1-11); SA623.

Using WPD documents and court filings, plaintiffs were able to reconstruct 18 of the 21 officer-involved shootings from the six years

leading up to Andrew Finch's death.[4] Although WPD's review of those shootings was superficial, even that limited documentation paints a damning portrait of both the way WPD officers use force and the way Wichita investigates those uses of force. With few exceptions, administrative investigations did not so much as interview the shooting officer, let alone anyone else. In not one was any meaningful form of discipline imposed. And in most of those cases, a jury could find that officers shot without regard to whether the suspect actually posed a threat to anyone.

In many cases, physical evidence or witness testimony (obtained during the criminal investigation) should have called into question

[4] Plaintiffs obtained internal WPD documents related to 15 of the 21 shootings. . In an additional three cases, records from court cases supplied evidence regarding the shooting and investigation. *Herington v. City of Wichita*, No. 6:14-cv-01094, 2017 WL 76930 (D. Kan. Jan. 9, 2017) (Troy Lanning); *Jackson v. City of Wichita, Kan.*, No. 13-1376-KHV, 2017 WL 106838 (D. Kan. Jan. 11, 2017) (Karen Jackson); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063 (D. Kan. Aug. 7, 2018) (Marquez Smart). After several meet-and-confer conferences, plaintiffs were unable to obtain information regarding three of the shootings. AA335; SA626 (list of WPD shootings in previous five years) ( ).

whether the shooting officer "reasonably believe[d]" that the shooting was "necessary to prevent death or great bodily harm," as required by WPD regulations. *See* AA618 (WPD Regulation). But the investigating officers in each case declined to dig further and found that the shooting fully complied with departmental regulations. For example:

- [redacted] SA283-85 (Investigative Report); SA327-28 (Harty Dep. 77:4-78:21; 80:13-81:13).
- A WPD officer pulled Nicholas Garner over for a broken tail light. When Garner began to "wave his arms," the officer reached into the car to pin his arms down (a decision the investigating officer later admitted was wrong). AA569, 571-72 (Expert Report). [redacted]

SA408, 414, 416-17 (Investigative Report).

- SA353 (Investigative Report). But the investigating officer did not even bother asking why the shooting officer chose to use deadly force. AA571 (Expert Report).
- . SA455 (Investigative Report).

Investigators were similarly laissez-faire toward whether officers complied with WPD regulations requiring them to give suspects a verbal warning where "practical" before shooting. For instance:

- SA221, 236 (Investigative Report). SA222.

SA223. Even though the investigation found investigators said it wasn't important to determine whether the officer had time to give a verbal warning. AA571 (Expert Report). (A WPD officer also pointed a gun at Randolph's unarmed mother when she approached her son's dead body. The investigation did not even review that decision. AA569.)

- SA654-55 (Investigative Report). The investigating detective "didn't feel it was necessary" to determine whether it would have been feasible to give a warning prior to opening fire. AA571 (Expert Report).

In the rare instance WPD concluded that an officer violated departmental regulations, the officer received, at most, a slap on the wrist. Of the 18 cases plaintiffs were able to reconstruct, only two resulted in any discipline:

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SA495, 507-08, 514 (Investigative Report).

SA577; AA570-71 (Expert Report).

- SA590 (Investigative Report). SA623; SA330 (Harty Dep. 99:1-11).

In three cases, courts subsequently considering civil suits ruled that a jury could find that WPD officers violated the Constitution by shooting without probable cause to believe a suspect posed a threat. (Though these civil suits were filed after Andrew Finch's death, the shootings in question took place before his death.) An officer who violates the Fourth Amendment by shooting without probable cause to believe

that a suspect poses a threat also violates Wichita's on-paper regulation requiring a "reasonable belief" of a "threat of serious bodily injury or death." Yet, there is no indication that Wichita imposed discipline or even identified violations of departmental regulations in any of these cases:

- Marquez Smart was shot three times in the back as he lay facedown on the ground—a fact that was common knowledge within WPD. Witnesses testified that Smart did not have a gun. WPD took DNA swabs from a recovered handgun and bagged Smart's hands to test for gunshot residue, but never ran either test. None of the officers involved were disciplined. *Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1169-72, 1175 (10th Cir. 2020); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, *7-8 (D. Kan. Aug. 7 2018). According to Rapp, none of the officers were even found to have violated departmental regulations. AA426 (Rapp Dep. 98:19-21).
- Following dispatch reports of a shooting, a WPD officer started chasing a vehicle that was a different make and model from the one mentioned in the dispatch, despite realizing the discrepancy. After Troy Lanning exited the car, the officer fired six rounds, several of

them into Lanning's back, killing him. *Herington v. City of Wichita*, No. 6:14-cv-01094-JTM, 2017 WL 76930, at *11 (D. Kan. Jan. 9, 2017). The officer was not disciplined for his role in this shooting. AA509-10 (Expert Report).

- Karen Jackson walked outside with a lighter, a liquor bottle, and a kitchen knife. Yelling, "Kill me," she stabbed herself in the chest. When she walked toward WPD officers—and everyone agreed that she walked, not ran, and made no hostile motions—they shot and killed her when she was 15 feet away. *Jackson v. City of Wichita*, No. 13-1376-KHV, 2017 WL 106838, *3-17 (D. Kan. Jan. 11, 2017).

In sum, even the cursory documentation amassed by Wichita's administrative investigations reveals a clear pattern. A jury could find that Wichita police often shoot without regard to whether the suspect poses a threat, in violation of WPD's regulations (not to mention the Constitution). Wichita fails to conduct any meaningful investigation into these shootings; on the rare occasion Wichita imposes "discipline," it is so paltry as to be meaningless. As plaintiffs' expert concluded, WPD "lacks a functional, effective system of internal accountability," effectively "fails to conduct an administrative investigation of officers who use lethal

force," and fails to "discipline[], counsel[], or re-train[]" officers despite "clear" violations of departmental regulations. AA562-63, 569 (Expert Report). The result is a department without safeguards and a culture of impunity that fails to deter—that in fact encourages—shootings like the one that killed Andrew Finch.

III. Proceedings Below.

Andrew Finch's mother and sister filed suit under 42 U.S.C. § 1983, alleging that Rapp and Wichita violated Finch's Fourth Amendment right to be free from unreasonable seizures.[5] All defendants moved for summary judgment. The district court denied summary judgment to Rapp but granted summary judgment to Wichita.

First, the district court held that, viewing the facts in the light most favorable to plaintiffs, Rapp violated Andrew Finch's Fourth Amendment right. Although Rapp testified to a version of events that may have justified the shooting, plenty of other evidence—including the testimony of Rapp's fellow officers—called into question Rapp's credibility or, at least, whether a reasonable officer would have believed what he did.

[5] Plaintiffs also sued another officer on the scene, Benjamin Jonker. That claim is not at issue in this appeal.

AA1021-22. Instead, a jury could credit evidence that Finch was obviously unarmed and not making any threatening gestures. *Id.*

Second, the district court held Rapp was not entitled to qualified immunity. The district court recognized that "the dispositive question is 'whether the violative nature of *particular* conduct is clearly established,' which 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" AA1023. The district court examined several Tenth Circuit cases—including *Zia Trust Co. ex. rel. Causey v. Montoya*, 597 F.3d 1150 (10th Cir. 2010), and *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006)—and concluded that "the law was clearly established that an officer could not shoot an unarmed man who did not pose any actual threat to the officer or to others." AA1025.

Third, the district court held that Wichita was not liable for the shooting. Plaintiffs presented two theories of liability. First, plaintiffs argued Wichita was liable for its failures of accountability—it did not meaningfully investigate any of the shootings or discipline any of the officers involved. Second, plaintiffs argued that Wichita was liable because WPD had a widespread practice of shooting without regard to whether the suspect posed a threat. The district court rejected both

theories, finding that plaintiffs could not prove that Wichita acted with "deliberate indifference" because there were no prior jury verdicts or settlements in excessive force cases to give Wichita notice that a constitutional violation was likely. AA1040-43.

Rapp filed an interlocutory appeal of the denial of qualified immunity. AA1057. The district court entered final judgment in favor of Wichita under Fed. R. Civ. P. 54(b), and plaintiffs timely appealed. SA29; SA30. The two appeals were consolidated for briefing and argument.

SUMMARY OF ARGUMENT

I. Summary judgment was properly denied to Rapp. Accepting as true—as this Court must on interlocutory review—the district court's conclusions about what a jury could find, Rapp shot Andrew Finch on sight even though Finch was visibly unarmed, attempting to comply with officer commands, and making no threatening gestures or attempts to flee. **A.** This Court does not have jurisdiction to entertain Rapp's challenges to the trial court's conclusions regarding what a jury could find. *See, e.g.*, *Mglej v. Gardner*, 974 F.3d 1151, 1159 (10th Cir. 2020). **B.** And give those conclusions, it is clear that Rapp violated Andrew Finch's Fourth Amendment right to be free from unreasonable seizures. An

officer may use deadly force only where there is "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Here, a jury could find that a reasonable officer would not have believed Andrew Finch posed such a threat. **C.** Because it was clearly established that police may not shoot a suspect where they could not reasonably believe the suspect was armed, threatening, fleeing or resisting, Rapp was properly denied qualified immunity. **D.** Finally, this Court has no reason to consider Rapp's ex post explanation—that he was trying to prevent Andrew Finch from reentering the house—because the trial court found that a jury may conclude that a reasonable officer in Rapp's position would not have thought Finch was attempting to do so.

II. Summary judgment was wrongly granted to Wichita on plaintiffs' claim that Wichita is liable for the violation of Andrew Finch's Fourth Amendment right. To hold a municipality accountable for a constitutional violation, plaintiffs must show: (1) a municipal *policy* (an "informal custom that amounts to a widespread practice" suffices); (2) *deliberate indifference* to the constitutional rights of citizens (that is, "actual or constructive notice" of the risk of a constitutional violation);

and (3) a "*direct causal link*" between the policy and the constitutional violation. *Hinkle v. Beckham Bd. of Cty. Comm'rs*, 962 F.3d 1204, 1239-41 (10th Cir. 2020). Plaintiffs' evidence was sufficient to go to a jury on two related but separate theories of municipal liability.

A. First, Wichita is liable for Andrew Finch's death because of its failures of accountability. **1.** Plaintiffs presented evidence sufficient to go to a jury on Wichita's failure-of-accountability *policy*—an unwritten but universal practice of, first, inadequately investigating prior shootings and, second, failing to discipline officers involved in those shootings.

2. Plaintiffs also put forth sufficient evidence of *deliberate indifference*. **a.** Wichita continued to rubber-stamp officer-involved shootings even when 21 shootings had resulted in 12 civilian deaths in the six years leading up to Andrew Finch's killing and despite warnings from outside experts. That evidence of deliberate indifference is comparable to evidence this Court has found sufficient to supply "actual or constructive notice" in other cases. *See Quintana v. Santa Fe Bd. of Comm'rs*, 973 F.3d 1022 (10th Cir. 2020); *Burke v. Regalado*, 935 F.3d 960 (10th Cir. 2019); *Zuchel v. City & Cty. of Denver, Colo.*, 997 F.2d 730 (10th Cir. 1993). **b.** The district court concluded otherwise by imposing a

rule that the prior shootings could supply "actual or constructive notice" only if there had been a pattern of jury verdicts or settlements against WPD officers. But that rule finds no basis in the cases of this court, its sister circuits, or the Supreme Court. **c.** Indeed, that a jury *hadn't* previously identified one of Wichita's shootings as unconstitutional doesn't mean a jury *couldn't*. Plaintiffs presented evidence from which a jury could infer that, in many of the prior incidents, WPD officers violated the Fourth Amendment. **d.** In any event, deliberate indifference is apparent in this case even independent of the prior shootings because a constitutional violation was a "plainly obvious" outcome of Wichita's refusal to look into prior shootings, let alone discipline the officers involved. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002). Wichita's system for reviewing police shootings was "out of synch" with the rest of the country, and Wichita's indifference to what actually happened when its officers shot at civilians evinced an indifference to the rights of those civilians. *See Allen v. Muskogee, Okla.*, 119 F.3d 837, 844 (10th Cir. 1997); *Fiacco v. City of Rensselaer, N.Y.*, 783 F.2d 319 (2d Cir. 1986).

3. Finally, plaintiffs presented enough evidence to reach a jury on *causation*. A jury could conclude that Wichita's failures of accountability sent a message that killing civilians was tolerated. *See Cordova v. Aragon*, 569 F.3d 1183, 1194 (10th Cir. 2009). Alternatively, a jury could conclude—as plaintiffs' expert opined—that more accountability could have prevented Andrew Finch's death by spurring department reforms. *See Brown v. Gray*, 227 F.3d 1278, 1291 (10th Cir. 2000).

B. Wichita is also liable for Andrew Finch's death because it had a "policy" of shooting without regard to whether the victim posed a threat. **1.** Such a *policy* may be deduced both from the number of prior shootings where, drawing all inferences in plaintiffs' favor, the victim did not pose a threat, and from the fact that Wichita appeared to sanction those shootings by declining to investigate them or discipline the officers involved. **2.** A policy of shooting without regard to whether the victim poses a threat reflects *deliberate indifference* to the rights of Wichita's citizens, as a constitutional violation was virtually certain to result. **3.** And the "policy" of shooting without regard to whether the victim posed a threat *caused* Andrew Finch's death because Rapp's shooting fell squarely within that "policy."

This Court should affirm the denial of summary judgment to Rapp, reverse the grant of summary judgment to Wichita, and remand this case for trial.

STANDARD OF REVIEW

The standard of review is different for each of the two appeals. Because Rapp's appeal is interlocutory, this Court has jurisdiction to review only whether qualified immunity should be denied based on the facts that the district court held a reasonable jury could find. *Farmer v. Perrill*, 288 F.3d 1254, 1258 (10th Cir. 2002). It does not have jurisdiction to review whether the district court accurately ascertained those facts. *Id.*

By contrast, this Court reviews the district court's grant of summary judgment to Wichita *de novo* and should affirm only if "there is no genuine issue as to any material fact"—that is, "no reasonable jury could return a verdict" for plaintiffs. *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, 1191 (10th Cir. 2001).

ARGUMENT

I. The District Court Correctly Denied Qualified Immunity To Rapp.

According to the district court, a jury could find the following facts regarding the 10 seconds between when Andrew Finch opened his front door and when Rapp fired the shot that killed him:

- "Rapp fired the shot when he could see that Finch's hands were empty"—that is, "when Rapp should have been able to see that Finch had no firearm in his hands." AA1021-22.
- "Finch's movements on the porch did not reasonably suggest he was attempting to draw a firearm or fire it at the officers." AA1020.
- Andrew Finch appeared to be "attempting to comply with the officers' commands," and "his movements did not reasonably indicate hostile or threatening action on his part." AA1009.
- And Andrew Finch's movements did not indicate that he was attempting to go back into the house. AA1021.

The question on appeal is whether it was clearly established that shooting Andrew Finch when there was no indication that Finch posed a threat to Rapp or other officers violated the Fourth Amendment. Plainly, the answer is yes. The Constitution does not permit an officer to

summarily execute anyone—even someone the officer believes may have committed a violent crime—when that person is unarmed, attempting to comply with officers' commands, and making no threatening gestures or attempts to flee.

Unsurprisingly, then, Rapp's interlocutory appeal is not actually about qualified immunity at all. Instead, it is fundamentally a challenge to the trial court's findings about what a jury could conclude. At core, Rapp argues that the district court should have credited his testimony and discredited the testimony—all from his fellow officers—that contradicted his version of events. But on interlocutory review, this Court has no jurisdiction to second-guess the district court's careful parsing of the record.

This Court should affirm the denial of qualified immunity to Rapp.

A. This Court Does Not Have Jurisdiction To Consider Rapp's Challenges To The Facts Adopted By The District Court.

When considering a defense of qualified immunity at summary judgment, the district court first must identify the most plaintiff-friendly version of the facts that a jury could find, then ask whether those facts entitle an officer to qualified immunity. *Mglej v. Gardner*, 974 F.3d 1151,

1159 (10th Cir. 2020) (citing *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014)). On an interlocutory appeal from the denial of qualified immunity, this Court only has jurisdiction to review the second of those inquiries (whether the version of the facts adopted by the district court would entitle an officer to qualified immunity) not the first (what version of the facts a reasonable jury could find). *Id.* Where an appeal is actually a challenge to the first of those inquiries, this Court lacks jurisdiction and should dismiss the appeal. *Castillo v. Day*, 790 F.3d 1013, 1018 (10th Cir. 2015). In other words, Rapp must "be willing to concede" the district court's conclusions regarding the most plaintiff-friendly version of the facts and may only argue over whether those facts entitle him to qualified immunity. *Farmer v. Perrill*, 288 F.3d 1254, 1258 n.4 (10th Cir. 2002).

Far from being "willing to concede" the version of the facts adopted by the district court, Rapp spends 10 of his 30 pages of argument contesting those facts. Opening Brief (OB) 25-35. And the rest of his argument presupposes his version of the facts, not the version adopted by the district court. This Court has no jurisdiction to consider those arguments.

In any event, Rapp's challenges to the version of the facts adopted by the district court are wrong. In broad strokes, Rapp makes two sets of arguments. First, he argues that body camera footage from the officer standing beside him contradicts the version of the facts adopted by the district court. OB24. It's true that there's a narrow exception to the general rule that the district court's version of the facts must be accepted on interlocutory review: where the district court's findings are a "visible fiction," *Lynch v. Barrett*, 703 F.3d 1153, 1160 n.2 (10th Cir. 2013), such as where a video "quite clearly contradicts the version of the story told by [plaintiffs] and adopted by the [lower court]," *Scott v. Harris*, 550 U.S. 372, 378 (2007). But the footage on which Rapp relies does not "quite clearly" show anything.

As Defendants concede, the video is "from a distance and grainy." OB26. Less than ten seconds after the door opens, amid a flurry of different commands yelled by multiple officers and seconds after Andrew Finch has raised his empty hands in an attempt to cooperate, Rapp fires the fatal shot. *Id.* at 27; AA324 at 3:24-3:34. Nothing in the blurry footage contradicts the district court's conclusion that a jury could find "Finch simply moved his arms" and that "his movements did not reasonably

indicate hostile or threatening action," much less renders that conclusion a "visible fiction." *See* AA1009; *Lynch*, 703 F.3d at 1160 n.2. Indeed, the officer who was wearing the body camera that produced the footage testified that he did not perceive Andrew Finch to be armed or posing any threat to the officers. AA518, 519 (Powell Dep. 22:1-11, 27:4-7). Other officers testified to similar effect. *Supra*, 4-5. This Court has warned litigants to "be cognizant of the limited nature of the exception" for "visible fictions," *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 759 (10th Cir. 2013); the video footage here does not fall within that limited exception.

Second, Rapp faults the district court for considering the testimony of officers other than Rapp himself. OB26. But a jury isn't required to take Rapp's word for what he saw, let alone for what a reasonable officer in his position would have seen. *See Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1170 (10th Cir. 2020). As the district court explained, the fact that no other officer viewed Andrew Finch as a threat "casts doubt on Rapp's testimony about what he saw when he fired the shot." AA1007. The officer stationed next to Rapp did not perceive Andrew Finch to be reaching for a weapon. AA1008. The officers closest

to Andrew Finch likewise did not think Finch was a threat, and other officers on the scene testified that they did not see Andrew Finch "ma[ke] a motion like he was drawing a firearm." AA1007-08.[6] The fact that others on the scene—not even civilian bystanders, but fellow police officers—contradicted Rapp's story provided sufficient evidence from which a jury could infer not only that Andrew Finch did not in fact "ma[ke] a motion like he was drawing a firearm," as Rapp asserted, AA1007, but also that a reasonable officer in Rapp's position would not have thought he did.

In short, Rapp provides no basis for this Court to depart from its usual inquiry in interlocutory appeals: whether the version of the facts most favorable to plaintiffs, as laid out by the district court, supports liability. Inasmuch as Rapp's "argument is limited to a discussion of [his] version of the facts and the inferences that can be drawn therefrom," it has no place in this appeal. *Castillo*, 790 F.3d at 1018. He is free to make those arguments before a jury, but not here.

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[6] Then, too, Andrew Finch did not, in fact, have a gun, so it would be passing strange for him to make such a motion. *Cf. Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014) ("[F]or [the victim] to make such a gesture when *no* gun is there makes no sense whatsoever. A jury may doubt that [he] did this.").

B. Rapp's Shooting Was Unreasonable.

The Fourth Amendment prohibits "unreasonable . . . seizures." U.S. Const. amend. IV. A police shooting is a "seizure" within the meaning of the Fourth Amendment's prohibition, and a seizure using deadly force is "unreasonable" unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 7, 11 (1985).

On the district court's telling—which this Court must accept on interlocutory review—a jury could find there was *no* reason, let alone probable cause, to believe Andrew Finch posed a "threat of serious physical harm" to anyone at the time Rapp killed him. *See id.* A jury could conclude Rapp could see Andrew Finch was unarmed. AA1020. A jury could find that Andrew Finch's movements "did not reasonably indicate hostile or threatening action" and that he "appeared confused but was attempting to comply with the officers' commands." AA1009. And a jury could find that Andrew Finch was not attempting to go back into the house. AA1021. An unarmed man, obeying commands, neither fleeing nor making threatening gestures—there was no "probable cause to

believe that [Andrew Finch] pose[d] a threat of serious physical harm, either to the officer or to others." *See Garner*, 401 U.S. at 11.

Rapp leans heavily on the fact that he believed he was responding to a murder-hostage situation. OB31. The district court acknowledged that belief. AA1016-17. But the district court held that a jury could find that belief "had to be considered with other reasonable possibilities, including the possibility that Finch was one of the hostages of the reported 911 caller, that he was an innocent person unconnected with the crimes, or that there were no crimes at all."[7] AA1020.

But even if Rapp had been 100 percent certain that Andrew Finch had killed one person and was holding another hostage, that *still* would not give Rapp license to shoot. The Fourth Amendment does not sanction shooting felons on sight simply because they have committed violent offenses. Instead, the Constitution allows deadly force only where an officer reasonably perceives an immediate threat. *Garner*, 471 U.S. at 11.

Rapp also relies on *Estate of Valverde v. Dodge*, arguing that case stands for the proposition that "[w]hen a suspect is 'reasonably suspected

[7] An uncorroborated call like the one in this case wouldn't, standing alone, give license to stop someone briefly, let alone seize them dead. *See Florida v. J.L.*, 529 U.S. 266, 270-71 (2000).

of being armed,' the Fourth Amendment does not require officers to 'delay their fire until a suspect turns his weapon on them.'" OB31 (quoting *Valverde*, 967 F.3d 1049, 1064 (10th Cir. 2020)). But Rapp omits critical language from that "rule" (drawn, notably, from the parenthetical to a *cf.* cite to a Ninth Circuit case *denying* qualified immunity). The full sentence reads: "[T]he Fourth Amendment does not '*always* require[ ] officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—*a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat*.'" 967 F.3d at 1064 (emphasis added) (quoting *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013)). As the district court held, a jury could find that a reasonable officer in Rapp's position would not have perceived any such "furtive movement, harrowing gesture, or serious verbal threat." AA1022. Moreover, the *Valverde* court itself clarified, "Of course, it would [be] unreasonable for [the officer] to shoot [the victim] if (1) [the victim] did not have a gun and (2) [the officer] was unreasonable in thinking otherwise." 967 F.3d at 1065. Here, (1) it is uncontested that Andrew Finch did not have a gun; and (2) the district court held that a

jury could find Rapp "unreasonable in thinking otherwise." AA1021-22. Under *Valverde* itself, it was "of course" unreasonable for Rapp to shoot.[8]

Ultimately, Rapp's argument is that he "had only a split-second to react to what appeared from his perspective to be a suspect whose motions appeared to be pulling a gun from his waist." OB36. And perhaps a jury will so find. But at this juncture, the Court must assume the version of the facts adopted by the district court—the most plaintiff-friendly version of the facts that a jury could find. *See Castillo*, 790 F.3d at 1018. And on *those* facts—where a reasonable officer would not have thought Finch was "pulling a gun from his waist and raising it toward other officers," OB36, but rather putting his hands up and complying with officers' commands—Rapp lacked "probable cause to believe" that

[8] In *Valverde*, it was uncontested that the suspect not only had a gun but had drawn that gun. The question was whether the Constitution required officers to wait and see whether he intended to toss the gun aside or shoot at them, and this Court held that it did not. 967 F.3d at 1064. In the other Tenth Circuit cases Rapp cites, it was similarly clear the suspect was armed. *See* OB30; *Phillips v. James*, 422 F.3d 1075, 1083-84 (10th Cir. 2005) (suspect had 30 guns, was seen carrying handgun, and threatened to "shoot [an officer's] f***ing arm off"); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (uncontested that suspect had footlong knife).

Andrew Finch "pose[d] a threat of serious physical harm." *Garner*, 471 U.S. at 7, 11.

C. It Was Clearly Established That Shooting An Unarmed Suspect Who Posed No Threat Was Unconstitutional.

The district court correctly denied qualified immunity to Rapp. In evaluating whether a defendant is entitled to qualified immunity, "'the salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014).[9] That "fair warning" can come from "a Supreme Court or Tenth Circuit decision on point," which makes the law "clearly established." *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018). But the qualified immunity analysis "is not a 'scavenger hunt for prior cases with precisely the same facts.'" *Estate of Smart by Smart*, 951 F.3d at 1168.

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[9] This Court's caselaw assigns plaintiffs the burden of disproving that defendants are entitled to qualified immunity. *See Nosewicz v. Janosko*, 754 F. App'x 725, 728-29 (10th Cir. 2018). Plaintiffs easily satisfy that burden in this case. However, Plaintiffs preserve the right to challenge this Court's burden framework, which is "not justified by . . . any federal statute, the rules of civil procedure, or the common law," *Medina v. Cram*, 252 F.3d 1124, 1135 (10th Cir. 2001) (Seymour, J., dissenting), and conflicts with the law of other circuits, *Halsey v. Pfeiffer*, 750 F.3d 273, 288 & n.11 (3d Cir. 2014).

Indeed, "'general statements of the law' can clearly establish a right for qualified immunity purposes if they apply 'with obvious clarity to the specific conduct in question.'" *Halley*, 902 F.3d at 1149. And in some cases, the unconstitutionality of a defendant's conduct may be clear despite a total absence of precedent addressing similar circumstances. *McCoy v. Meyers*, 887 F.3d 1034, 1053 (10th Cir. 2018); *see Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The first step in assessing whether precedent clearly establishes a constitutional claim involves "determining the salient factual components" of that claim. *McCowan v. Morales*, 945 F.3d 1276, 1286 (10th Cir. 2019). Here, the "salient factual components" of plaintiffs' Fourth Amendment claim against Rapp—accepting, as this Court must, the district court's version of events—were as follows: (1) There was evidence from which a police officer might suspect that, at some point, the victim had access to a gun. AA1021. But (2) the victim had never threatened a police officer in any way, and a reasonable officer would not have thought otherwise; (3) a reasonable officer could see that the victim was not disobeying police commands; (4) a reasonable officer could see that the victim's hands were empty; and (5) the victim was not

attempting to flee, nor would a reasonable officer have thought he was attempting to flee. AA1020-21; *see Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (listing factors relevant to determining reasonableness under Fourth Amendment). "[I]f we can find precedent holding an officer liable where most of these salient facts are present, we can conclude that there was factually relevant precedent that put [the officer] on notice of the unconstitutionality of his behavior." *McCowan*, 945 F.3d at 1286.

The district court considered several cases that should have "put [Rapp] on notice of the unconstitutionality of his behavior." *See id.* For instance, in *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006), police officers were told by dispatchers that David Walker was "en route to cause harm to his family." *Id.* at 1157. (That 911 message, like the one in this case, was "apparently an error." *Id.*) Walker led officers on a car chase; when he exited the car, he pulled out a knife, at which point police shot him. *Id.* at 1158. This Court held that the shooting violated the Fourth Amendment and that the officer was not entitled to qualified immunity. *Id.* at 1160-61.

As in this case, there was (1) evidence from which a police officer might suspect that, at some point, the victim had access to a gun: a (mistaken) 911 call and testimony that it looked like Walker was holding a "38 special with a two-inch barrel" and that he assumed a "classic pistol stance." *Id.* at 1158. But, as in this case, (2) the victim never threatened a police officer, and (3) the victim did not disobey any commands. *Id.*

In fact, the shooting in this case was even *less* reasonable than the shooting in *Walker*. In this case, a jury could find that (4) a reasonable officer could see that Andrew Finch's hands were empty; in *Walker*, by contrast, it was undisputed that Walker was holding a knife. Here, a jury could also find that (5) Andrew Finch was not attempting to flee; in *Walker*, the victim had led cops on a car chase and was fleeing on foot when he was shot. *Walker*, 451 F.3d at 1157-58. Because "[t]he other salient facts" in this case "only operate to make [Rapp's] conduct even less reasonable" than the conduct of the officer in *Walker*, *Walker* "is not only on point—it is *a fortiori* or super precedent." *McCowan*, 945 F.3d at 1286.

As the district court concluded, *Zia Trust Co. ex. rel. Causey v. Montoya*, 597 F.3d 1150 (10th Cir. 2010), also put Rapp on notice that

shooting Andrew Finch was unconstitutional. In that case, police responded to a 911 call about a domestic disturbance. As here, (1) police officers had reason to believe suspect Megan Causey had access to a gun at some point—the 911 call that brought them to the scene specified that there were two firearms at the home. *Id.* at 1153. (Though, also as in this case, officers had no way of knowing whether Causey was the aggressor or the victim in the reported disturbance. *Id.*) When police officers arrived on foot, Causey was driving a van stuck on a pile of rocks. *Id.* The van jumped forward toward an officer, who shot Causey. *Id.* This Court held that (2) "it was not clear that [Causey] manifested an intent to harm" a police officer; (3) Causey may not have known the officers shouting orders were police when he disobeyed the order to exit the vehicle; and (4) the officer could see that Causey's hands were empty. *Id.* at 1153, 1155. This Court found a Fourth Amendment violation and denied officers qualified immunity. *Id.* at 1155.

It did so even though (5) Causey *was* attempting to flee (he was backing his van out of the driveway when police arrived). *Id.* at 1153. And it did so even though each of the "salient facts" mitigating the threat in *Zia Trust* was far closer than in this case. For example, though this Court

found that a jury could conclude that (2) Causey did not threaten an officer, it was undisputed that Causey was driving a van that "jumped forward about a foot" with its wheels pointed toward an officer who stood, at most, 15 feet away (and perhaps far closer). *Id.* As in this case, (3) the victim had no way of knowing the individuals yelling commands at him were police officers. *Zia Trust*, 597 F.3d at 1154-55; AA1005. But where Andrew Finch nonetheless attempted to obey officers' commands, Causey did not. *See* AA1006; *Zia Trust*, 597 F.3d at 1153. And although (4) Causey's hands, like Andrew Finch's, were empty, he did have access in that moment to a potent weapon—the van itself. *See Thomas v. Durastanti*, 607 F.3d 655, 664 (10th Cir. 2010) (term "weapon" may "include a vehicle attempting to run over an officer").

As with *Walker*, then, *Zia Trust* is not only "factually relevant precedent that put [Rapp] on notice of the unconstitutionality of his behavior," it is what this Court has dubbed "super precedent," because it held conduct more reasonable than Rapp's to be not only unconstitutional but clearly so. *McCowan*, 945 F.3d at 1286.

This Court has read *Walker* and *Zia Trust* together to "clearly establish[] that an officer could not shoot an unarmed man who did not

pose any actual threat to the officer or to others." *King v. Hill*, 615 F. App'x 470, 479 (10th Cir. 2015). In *King v. Hill*, for instance, this Court relied on *Walker* and *Zia Trust* to deny qualified immunity to an officer who shot an unarmed man, even though the man boasted about his access to explosives, threatened to "blow [the] place up," and held a coat such that one officer thought it concealed a long gun. *Id.* at 472-73.[10]

Indeed, this case is squarely governed by a rule that was clearly established by the Supreme Court's decision in *Tennessee v. Garner* thirty-five years ago: when a "suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." 471 U.S. at 11. And that rule applies with equal force even where there's evidence that a suspect posed some risk of serious physical harm—or even inflicted some serious physical harm—in the past, so long as the suspect posed no immediate threat of physical harm at the moment of the shooting.[11] So

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[10] While that case was unpublished, its analysis is nonetheless persuasive authority. *See Estate of Ceballos v. Husk*, 919 F.3d 1204, 1217 n.3 (10th Cir. 2019) (reaffirming that a court need not "ignore unpublished opinions in deciding whether the law is clearly established").

[11] *See, e.g.*, *Fancher v. Barrientos*, 723 F.3d 1191, 1196-97, 1200-01 (10th Cir. 2013) (denying qualified immunity where police shot suspect who had stolen police car with firearms inside and tried to run over officer,

long as a jury could conclude that Andrew Finch didn't reasonably seem to be posing a threat in the moment he was shot (rather than at the point of the 911 call), Rapp cannot receive qualified immunity.

Even if there were *no* prior cases establishing the rule governing this case, Rapp *still* would not be entitled to qualified immunity. As the Supreme Court affirmed just last month, qualified immunity does not obtain where "no reasonable . . . officer could have concluded" that the Constitution allowed the conduct at issue, regardless of whether prior precedent involved analogous facts. *See Taylor v. Riojas*, No. 19-1261, 2020 WL 6385693, at *1 (U.S. Nov. 2, 2020). It should go without saying that the Fourth Amendment does not allow a police officer to shoot a man who, on the district court's telling, was visibly unarmed, attempting to comply with police commands, and making no threatening gestures, simply because of a report that he had committed a violent crime.

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finding jury could conclude that in moments before final shots were fired, suspect "was no longer able to control the vehicle" and thus "may no longer have presented a danger to the public"); *Reavis Estate of Coale v. Frost*, 967 F.3d 978, 993-94 (10th Cir. 2020) (denying qualified immunity where police shot suspect who had perpetrated brutal assault and attempted to run officer over, "passing within inches of the officer," because officer arguably shot after perpetrator's truck—and thus immediate threat—had passed).

Because the district court concluded a jury could find that's exactly what Rapp did, the constitutional violation in this case "was so obvious" that Rapp had "fair warning that [his] conduct violated the Constitution." *Hope*, 536 U.S. at 741-42. The district court properly denied qualified immunity.

D. The Law Regarding An Armed Kidnapper's Reentry Into A House Containing Hostages Is Irrelevant Here.

Finally, Rapp argues that he is entitled to qualified immunity because no clearly established law held that an officer cannot shoot to prevent an armed kidnapper from reentering a house full of hostages. OB41-49. But that assumes a disputed factual predicate: that a reasonable officer in Rapp's position would have believed Andrew Finch *was* reentering the house. And, on the district court's telling—which this Court must accept at this stage—a jury could find that a reasonable officer in Rapp's position would not have so believed. *See* AA1021, 1053. After all, Rapp himself did not believe that Andrew Finch was trying to reenter the house. *Id.* Nor did other officers at the scene. AA1021; AA413 (Jonker Dep. 162:13-23).

On appeal, Rapp argues that his "subjective reason for deploying lethal force is immaterial to the Fourth Amendment analysis." OB42.

That's, of course, true—the Fourth Amendment reasonableness analysis turns on an objective inquiry. *E.g.*, *Graham v. Connor*, 490 U.S. 386, 397 (1989). But given that Rapp and several fellow officers did not think Finch was trying to reenter the house, the district court properly found that a jury might conclude that a reasonable officer in Rapp's position wouldn't have either. AA1021, 1053. Rapp's argument about what clearly established law would govern if Andrew Finch were attempting to reenter his house is thus irrelevant.

* * *

This Court has repeated, time and again, that it is barred from revisiting the district court's determination of what a jury could find and that, in any event, juries, not judges, must resolve which disputed version of facts is credible. *See, e.g.*, *Mglej*, 974 F.3d at 1159. Because Rapp's argument for qualified immunity rests entirely on a version of the facts far different from the one the district court adopted, this Court should affirm the denial of summary judgment.[12]

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[12] A "growing, cross-ideological chorus of jurists and scholars" have recognized that the doctrine of qualified immunity, at least as currently conceived, strays far from both the text of 42 U.S.C. § 1983 and from the common law. *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring); *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017)

II. The Trial Court Erred in Granting Summary Judgment On Plaintiffs' Municipal Liability Claim.

Viewed in the light most favorable to plaintiffs, the evidence below showed the following: In the six years leading up to the shooting of Andrew Finch, WPD officers used lethal force in at least 21 separate incidents, killing 12 civilians. In response, Wichita conducted administrative "investigations" that were so bare bones as to amount to no investigation at all, per plaintiffs' expert, rarely so much as interviewing a witness or even the officer involved. Even based solely on the facts found by WPD's paltry investigations, a reasonable jury could conclude that officers routinely shot civilians without regard to whether they posed a threat, violating the Fourth Amendment and WPD's on-paper regulations, both of which forbid lethal force unless an officer

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(Thomas, J., concurring). Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. (forthcoming 2021), at *38-46, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680714; Will Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 50-53 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1801 (2018). Plaintiffs preserve the right to challenge the doctrine in the Supreme Court on that basis. Meanwhile, the general rule requiring caution before abrogating a plaintiff's Seventh Amendment right to have a jury of her peers evaluate her case should be enforced if anything more vigilantly in the face of a doctrine on shaky footing.

reasonably believed that death or serious bodily harm would otherwise result. And the cycle of shooting with no accountability and in the face of no threat culminated in Rapp's unconstitutional shooting of Andrew Finch.

Those facts are sufficient to hold Wichita liable under 42 U.S.C. § 1983. Municipalities are liable for their employees' constitutional violations when three things are true. First, there is a municipal "policy," which may consist of an "informal custom that amounts to a widespread practice." *Hinkle v. Beckham Bd. of Cty. Comm'rs*, 962 F.3d 1204, 1239-40 (10th Cir. 2020). Second, the municipality acts with "deliberate indifference" to the risk that the policy will cause a constitutional violation—that is, the municipality is on "actual or constructive notice of . . . a need for" a different policy but does not change course. *Connick v. Thompson*, 563 U.S. 51, 59 (2011). Third, there is a "direct causal link" between the municipal policy and the constitutional violation. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002).

In this case, plaintiffs' evidence established all three elements as to two separate municipal policies. *See Forrest v. Parry*, 930 F.3d 93, 107 (3d Cir. 2019). First, Wichita is liable for its failures of accountability—

its "policy" of failing to investigate police shootings and failing to discipline officers involved in those shootings. *Id.* Second, Wichita is liable for its "policy" of shooting civilians without regard to whether they pose a threat. *Id.*

This Court must reverse the district court's grant of summary judgment and allow this case to go to a jury on both policies.

A. Wichita's Failures Of Accountability Reflected Indifference To The Constitutional Rights Of Its Citizens And Resulted In Andrew Finch's Death.

Plaintiffs put forth sufficient evidence to go to a jury on Wichita's failures of accountability. Plaintiffs presented evidence that Wichita, for all intents and purposes, did not investigate police shootings or discipline the officers involved; that the failure to do so reflected deliberate indifference to the possibility that police officers might violate the rights of Wichita's citizens; and that Wichita's indifference toward police shootings led to Andrew Finch's death.

1. Wichita had a policy of conducting only the most superficial reviews of police shootings.

The first element of municipal liability is a "policy" adopted by the municipality. "An informal custom that amounts to a widespread practice" can constitute such a "policy." *Hinkle*, 962 F.3d at 1239-40. And

the "policy" needn't itself be unconstitutional, so long as it resulted in a constitutional violation in the case at bar. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 386-87 (1989).

Plaintiffs presented evidence sufficient to go to a jury on Wichita's failure-of-accountability policy. That policy amounted to an unwritten but universal practice of, first, inadequately investigating prior shootings and, second, failing to discipline officers involved in those shootings. *See supra*, 6-17.

Although, on paper, WPD regulations required an administrative investigation any time a police officer discharged a firearm, plaintiffs' expert opined that those "investigations" were so cursory as to be tantamount to no investigation at all. AA563 (Expert Report). Investigating officers rarely even interviewed the officers who shot at civilians, let alone other witnesses. *Id.* They didn't review available evidence or attempt to resolve discrepancies. *Supra*, 9. They didn't ascertain whether the shooting complied with the on-paper regulations (much less the Fourth Amendment's requirements) requiring a reasonable belief that the suspect posed a threat or a warning where feasible. *Supra*, 9-16.

Instead, WPD routinely signed off on reports entirely exonerating shooting officers without meaningfully gathering evidence and even when the limited available evidence was damning—where a suspect was facedown when he was shot, for instance, or where family members were yelling that the suspect was unarmed. *See supra*, 10-13 (collecting other examples). And on the rare instances where WPD concluded that an officer had shot in violation of regulations, the officer faced virtually no repercussions. Plaintiffs identified only two of the 21 shootings in which *any* discipline was imposed—in each case, a one-day suspension. *Supra*, 13-14.

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.

2. Wichita's failures of accountability reflected deliberate indifference toward the constitutional rights of its citizens.

Second, plaintiffs seeking to hold a municipality liable under § 1983 must show that the municipality acted with "deliberate indifference" to the constitutional rights of its citizens. *Connick*, 563 U.S. at 61. A municipality acts with deliberate indifference when it is "on actual or

constructive notice" that its policy will lead to constitutional harm. *Id*. In this case, Wichita was on "actual or constructive notice" that failing to hold its officers accountable would eventually lead to a shooting in violation of the Fourth Amendment.

a. This circuit allows cases to go to a jury where plaintiffs have presented evidence of problems that ought to have put a municipality on notice that a constitutional violation was likely. For example, in *Zuchel v. City & Cty. of Denver, Colo.*, 997 F.2d 730 (10th Cir. 1993), a police shooting case, this Court held that five prior "instances in which citizens have been injured or killed by peace officers" was enough to put Wichita of Denver on notice that its current practices risked a Fourth Amendment violation. *Id.* at 737-38, 740-41. Although "the circumstances [of the prior confrontations] var[ied] greatly," they all pointed to the need for the municipality to reconsider how it equipped officers to use deadly force; failing to do so, this Court held, could constitute deliberate indifference. *Id* at 738.

Similarly, in *Quintana v. Santa Fe Bd. of Comm'rs*, 973 F.3d 1022 (10th Cir. 2020), this Court considered a claim that a municipality should be held liable for a jail's deficient intake process, which failed to give

plaintiff appropriate medication for his heroin withdrawal. *Id.* at 1027. The Court held that plaintiffs had adequately pled the municipality's deliberate indifference because they alleged that there had been three withdrawal-related deaths at the same jail, that the decedent had been jailed eight times and subjected to a deficient intake each time, and that an external study had warned of deficiencies in the jail's medical care. *Id.* at 1034. And in *Burke v. Regalado*, 935 F.3d 960 (10th Cir. 2019), this Court relied on audits regarding a prison's medical care system to conclude that the municipality was deliberately indifferent to the risk that its deficient medical care would ultimately violate the Eighth Amendment. *Id.* at 1000-01.

As in *Zuchel*, *Quintana*, and *Burke*, plaintiffs in this case put forth evidence of both prior incidents and reports from outside experts that ought to have put Wichita on "actual or constructive notice" of the need for a change. First, plaintiffs documented 21 shootings over the six years leading up to Andrew Finch's death and evidence that, in each case, the officer was either entirely exonerated or given a slap on the wrist—even when a jury could conclude there was no reason to use deadly force, such

as where the victim was facedown on the ground, was alone in his house, or had dropped his firearm. *See supra*, 10-16.

Second, plaintiffs presented reports from outside experts sounding the alarm about WPD's approach to police shootings. One team of experts from Wichita State University identified "Discipline and Internal Affairs" as a weakness of the department and recommended WPD "improve internal practices" regarding the use of force. AA656, 689-90. A separate external audit urged WPD to revise its administrative investigation process to begin sooner and gather more information. AA851-53. Those recommendations were never implemented. AA603 (Ramsay Dep. 74:13-76:14).

Like the prior shootings in *Zuchel* and the inmate deaths in *Quintana*, WPD shootings in the years leading up to Andrew Finch's death—many of which a jury could find unjustified—put Wichita on "actual or constructive notice" that failing to hold officers accountable would, sooner or later, result in a Fourth Amendment violation. And that notice was buttressed by expert reports that, like the study in *Quintana* and the audits in *Burke*, should have made clear to Wichita the need to change course.

b. The district court found otherwise only because it imposed an unprecedented rule: Only past jury verdicts finding constitutional violations or past settlements suggesting constitutional violations can put a city on "actual or constructive notice" of the potential for a future constitutional violation. AA1041. Without those prior verdicts, the district court held, a municipality cannot be deliberately indifferent. *Id.* But not even Wichita argued for such a stringent rule. The district court cited no precedent for its rule, and counsel could find none.

Such a rule would create absurd consequences both practical and doctrinal. Doctrinally, the Supreme Court has held that municipalities aren't entitled to qualified immunity, in part to "create an incentive" for municipalities to "err on the side of protecting citizens' constitutional rights." *See Owens v. City of Independence*, 445 U.S. 622, 652 (1980). But the jury-verdict rule would reduce this "incentive" to an even greater degree than a rule granting qualified immunity: Whereas a circuit or Supreme Court case against *any* officer may overcome qualified immunity, the jury-verdict rule would allow liability only if there are jury verdicts or settlements against officers *in that municipality*. And practically, the district court's jury-verdict rule would limit liability to

municipalities with a robust civil rights bar. Without lawyers routinely willing (or financially able) to take on police shooting cases, there would be no pattern of prior jury verdicts or settlements to rely on.

Unsurprisingly, that is not the rule of this or any other circuit. This Court has routinely imposed liability on municipalities where prior incidents provided notice that a constitutional violation was likely, without examining whether those prior incidents themselves violated the Constitution, let alone whether they resulted in jury verdicts or settlements indicating a constitutional violation. This Court did not suggest that the prior shootings at issue in *Zuchel*—which occurred under circumstances that "var[ied] greatly"—were themselves unconstitutional. 997 F.2d at 740-41. Nor did this Court consider whether the three prior "withdrawal-related deaths" in *Quintana* violated the Constitution, 973 F.3d at 1027, or whether the audits that supplied the evidence of deliberate indifference in *Burke* mentioned the Eighth Amendment, 935 F.3d at 1000-01. And there was no mention of a prior verdict or settlement in any of those three cases. Yet this Court still found sufficient evidence of deliberate indifference.

This Court's sister circuits have similarly understood that a plaintiff can prove deliberate indifference "by showing a series of bad acts"—not necessarily unconstitutional acts found by a jury—"and inviting the court to infer from them that the policymaking level of government was bound to have noticed what was going on." *See Jackson v. Marion Cty.*, 66 F.3d 151, 152 (7th Cir. 1995). For example, in *J.K.J. v. Polk Cty.*, the Seventh Circuit, sitting *en banc*, relied on prior incidents that almost certainly did *not* violate the Eighth Amendment—things like "sexually inappropriate banter"—to find a municipality deliberately indifferent as to a subsequent sexual assault that *did* violate the Eighth Amendment. 960 F.3d 367, 383-84 (7th Cir. 2020) (en banc). "[W]ith red lights flashing," the municipality "chose the one unavailable option—doing nothing"; the jury thus "stood on solid evidentiary ground seeing the County's dormancy as more than oversight, but instead as deliberate inaction." *Id.* Other circuits are in accord.[13]

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[13] *See, e.g.*,*Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 28 (1st Cir. 2005) (prior incidents where off-duty police officers were misidentified were evidence of deliberate indifference toward possibility off-duty officer would be shot in violation of the Fourth Amendment, even though no officer was shot in prior incidents and there was no finding, by a jury or anyone else, that any prior incident violated the Constitution); *Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1170, 1172-73 (11th Cir.

Nor has the Supreme Court required a pattern of jury verdicts to prove deliberate indifference. In fact, the Supreme Court has strongly suggested the opposite. In *City of Canton*, the foundational case on municipal liability, Justice O'Connor wrote separately for three justices to elaborate on the deliberate indifference standard. 489 U.S. at 393 (O'Connor, J., concurring in part and dissenting in part). (Justice O'Connor's interpretation of that standard was, if anything, more stringent than the majority's, as she would have entered judgment for defendants rather than remanding on the deliberate indifference question. *Id.*) By way of example, she cited several circuit court cases, none of which purported to require a pattern of jury verdicts against a municipality. For instance, in *Fiacco v. City of Rensselaer*, 783 F.2d 319 (2d Cir. 1986), evidence of seven civilian complaints of excessive force

1995) (deliberate indifference because plaintiff was "not the only [] inmate who has complained of a lack of adequate treatment"; no finding that prior inmate complaints violated the Constitution, and no mention of prior jury verdicts or settlements); *Leach v. Shelby Cty. Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1989) ("deplorable" treatment of inmates—but not necessarily unconstitutional treatment and certainly not treatment found by a jury to be unconstitutional—sufficient to establish deliberate indifference).

sufficed to demonstrate deliberate indifference, even though not one of those complaints had been adjudicated in claimants' favor. *Id.* at 329-31.

Finally, this Court's decisions in Eighth Amendment prison conditions cases are also instructive. An Eighth Amendment claim, even against an individual officer rather than a municipality, requires a showing of deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 840-47 (1994). The "deliberate indifference" required to prove an Eighth Amendment violation is a more demanding standard than that required to prove municipal liability. Whereas deliberate indifference for municipal liability requires only that policymakers be "on actual *or* constructive notice" of a deficiency in their policies, only *actual* notice suffices for an Eighth Amendment claim. *Id.* at 841-42 (emphasis added). Yet even under the Eighth Amendment's more stringent test, this Court has never required multiple prior constitutional violations, let alone multiple prior jury verdicts, to find deliberate indifference. *See, e.g.*, *Keith v. Koerner*, 843 F.3d 833, 849 (10th Cir. 2016) (finding deliberate indifference where there was no "meaningful threat of discipline" for "ongoing problems with undue familiarity and sexual misconduct,"

without suggesting that these "problems" constituted constitutional violations).

In sum, the district court's brand-new jury-verdicts rule finds no purchase in the cases of this circuit, any other circuit, or the Supreme Court. Twenty-one shootings in six years (many of which involved suspects who clearly posed no imminent threat) were enough to put Wichita on notice that a Fourth Amendment violation was inevitable—or, at least, a jury could so conclude.

c. *Zuchel*, *Quintana*, *Burke*, and other circuits' cases make clear that this Court need not identify any of the 21 prior shootings as unconstitutional in order to find that Wichita was on notice of the potential for a constitutional violation. But even if it were true that only prior unconstitutional incidents could support a finding of deliberate indifference, plaintiffs presented plenty of evidence from which a jury could conclude that many of those shootings were unconstitutional, even if no jury had previously held.[14]

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[14] The district court believed otherwise in part because plaintiffs' expert did not opine that any of the prior shootings violated the Fourth Amendment. AA1040. But of course, plaintiffs' expert could not have answered the ultimate Fourth Amendment question without usurping the province of the jury. *See United States v. Wood*, 207 F.3d 1222, 1236

Indeed, courts have already held that a jury could find a Fourth Amendment violation in three prior shootings. In one case, this Court concluded that a jury could find a constitutional violation where a WPD officer fired thrice into the victim's back as the victim lay facedown on the ground. *See Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1169-72, 1175 (10th Cir. 2020). In a second, a district court denied summary judgment where Wichita police fired on a woman holding a knife, even though she showed no signs of charging the officers. *See Derrick Jackson v. City of Wichita*, No. 13-1376-KHV, 2017 WL 106838, at *12 (D. Kan. Jan. 11, 2017). And a district court held there was enough evidence in a third—where a WPD officer chased and killed a man even though his car did not match the description from dispatch—to go to a jury. *Herington v. City of Wichita*, No. 6:14-cv-01094-JTM, 2017 WL 76930, at *11 (D. Kan. Jan. 9, 2017).

A jury could conclude that others of the 21 shootings were unconstitutional because the facts of those shootings are meaningfully identical to facts this Court has held violate the Fourth Amendment. For

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n.10 (10th Cir. 2000) ("This Circuit . . . prohibits experts from testifying as to ultimate issues of law in civil cases.").

instance, in one incident, [redacted] SA455 (Incident Report). A reasonable jury could find that incident virtually the same as a case where this Court had "no trouble concluding that a reasonable officer in [defendant's] position would have known that firing shots two through seven was unlawful" because the victim could no longer fire back after the first shot. *See Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013). In another WPD shooting, [redacted] SA336, 347 (Incident Report). A reasonable jury could find that incident even more egregious than a case where police used a stun gun on a man who got up from his couch despite orders not to—a set of facts this Court held violated the Constitution, even though the officers had not used deadly force. *See Lee v. Tucker*, 904 F.3d 1145, 1148-50 (10th Cir. 2018). Even if only prior constitutional violations can supply the requisite "actual or constructive notice" for deliberate indifference purposes, then, a jury could surely find that here.

Finally, in the more-stringent Eighth Amendment context, this Court has held that a defendant who lacked notice only because of his own willful blindness to potential constitutional violations is still deliberately indifferent. A prison nurse who "completely refused to assess" an ailing prisoner or a sheriff whose "purported ignorance of the dangerous conditions in the jail was a direct result of his lackadaisical attitude toward his responsibility" were just as liable as if they actually knew a prisoner was suffering. *See Mata v. Saiz*, 427 F.3d 745, 758 (10th Cir. 2005); *Gonzales v. Martinez*, 403 F.3d 1179, 1187 (10th Cir. 2005).

Here, a jury could conclude that if Wichita was not on notice that its officers were routinely violating the Constitution, that was only because of its own willful blindness to such violations. For instance,

SA273, 284 (Incident Report); SA327-28 (Harty Dep. 80:13-81:13); *see supra*, 11. Yet this Court has said that the dispositive question for Fourth Amendment purposes is whether the officer is in the path of the vehicle at the moment of firing a shot. *Reavis Estate of Coale v. Frost*,

967 F.3d 978, 991 (10th Cir. 2020). In another incident, [redacted]

[redacted] SA222-23 (Incident Report); *see supra*, 12-13. WPD did not bother reconciling competing accounts of the victim's movements, even though this Court has held that whereas shooting a man who "brandishes" a knife may be constitutional, shooting someone who simply "takes steps" while holding a knife at his side is not. *Tenorio v. Pitzer*, 802 F.3d 1160, 1165-66 (10th Cir. 2015). That Wichita "refused to assess" whether police officers violated the Fourth Amendment in those cases—that any "purported ignorance" that Wichita could claim "was a direct result of [a] lackadaisical attitude toward [its] responsibility"—should not shield it from liability.

In short, that a jury *hadn't* previously identified WPD shootings as constitutional violations didn't mean a jury *couldn't*. Even supposing the "actual or constructive notice" required for deliberate indifference could only happen by way of prior shootings that violated the Constitution, then, plaintiffs presented enough evidence to go to a jury.

d. Finally, even if Plaintiffs' evidence of 21 prior shootings were somehow insufficient to establish Wichita's deliberate indifference,

summary judgment would still be in error. A jury may find a municipality deliberately indifferent even absent any prior incidents that put the municipality on notice. *See Brown v. Gray*, 227 F.3d 1278, 1289 (10th Cir. 2000) ("None of the Supreme Court or Tenth Circuit [municipal liability] cases require the plaintiff to prove the existence of a pervasive problem."). Here, a jury could so find for at least three reasons.

First, deliberate indifference can be shown even absent any prior incidents if "a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action." *Olsen*, 312 F.3d at 1318. Here, a jury could conclude it was "plainly obvious" that armed police officers would routinely confront potential felons, such that Wichita needed some regulations to manage those interactions. The Supreme Court gave precisely this example in explaining the sort of situation a municipality should be prepared for: Policymakers know "to a moral certainty" that police will have to arrest felons and, indeed, have "armed [their] officers with firearms, in part to allow them to accomplish this task." *City of Canton*, 489 U.S. at 390 n.10. Given that reality, the Supreme Court said, a city is deliberately indifferent if it does not adopt regulations that limit when and how to make those arrests and use those

firearms. *Id.* And a jury could conclude that it was "plainly obvious" that Wichita's on-paper regulations that were never enforced were tantamount to no regulations at all. *See Cordova v. Aragon*, 569 F.3d 1183, 1194 (10th Cir. 2009); *J.K.J.*, 960 F.3d at 384. A constitutional violation was thus a "plainly obvious" consequence of Wichita's failures of accountability.

Second, this Court has held that a jury may find deliberate indifference even without any prior incidents where a police department is "out of synch with the rest of the police profession." *Allen v. Muskogee, Okla.*, 119 F.3d 837, 844 (10th Cir. 1997). It has allowed plaintiffs to proceed to trial even where a municipality's policy had not led to bad outcomes in the past where an expert opines that the municipality is an outlier or the risks of a municipality's approach are documented. *See Zuchel*, 997 F.2d at 739-40 (sufficient evidence of deliberate indifference where expert testified that department standards "were far below the generally accepted police custom and practice at the time"); *Cruz v. City of Laramie*, 239 F.3d 1183, 1191 (10th Cir. 2001) (considering medical literature in assessing city's deliberate indifference for failing to train police officers).

In this case, plaintiffs' expert concluded that Wichita's failures of accountability put it "out of synch" with police departments around the country. AA496, 563-64 (opining on "consistency of the officers' actions with standard police practices"). He concluded that, compared to other departments, WPD "lacks a functional, effective system of internal accountability," effectively "fails to conduct an administrative investigation of officers who use lethal force," and fails to "discipline[], counsel[], or re-train[]" officers despite "clear" violations of department regulations. AA562-64, 569. And municipal decisionmakers *knew* the way they ran their department was "out of synch" with the rest of the country. AA605 (Ramsey Dep.) (acknowledging that "best practice just isn't happening in the Wichita Police Department right now"). That's more than enough evidence to go to a jury on whether Wichita was so "out of synch" with the rest of the country as to indicate deliberate indifference.

Third, the very nature of the claim in this case—refusing to investigate police shootings—bespeaks Wichita's deliberate indifference toward the constitutional rights of its citizens. As one of the cases cited in Justice O'Connor's separate writing in *City of Canton*, *see supra*, 56,

put it, "[I]f the City's efforts to evaluate the claims [of past excessive force] were so superficial as to suggest that its official attitude was one of indifference to the truth of the claim, such an attitude would bespeak an indifference to the rights asserted in those claims." *Fiacco*, 783 F.2d at 328. In this case, a jury could certainly find that Wichita had just such an "attitude" of "indifference to the truth." And if Wichita didn't care what actually happened when police shot civilians—even when police killed civilians—a jury could easily conclude that Wichita didn't care about the Fourth Amendment rights of its citizens either.

3. Drawing all inferences in plaintiffs' favor, Wichita's failures of accountability caused Andrew Finch's death.

Finally, municipal liability under § 1983 requires "a causal relationship between the policy or custom and the underlying violation." *Burke*, 935 F.3d at 998-99. Although the Supreme Court has defined that "causal relationship" using various formulations, they are all "alternative ways of stressing that the enforcement of the municipal policy or practice must be the proximate cause of the deprivation of the claimant's federal right," as one leading treatise put the point. Martin A. Schwartz, *Section 1983 Litigation Claims & Defenses*, § 7.12 (2013); *see, e.g.*, *Schneider v.*

City of Grand Junction Police Dep't, 717 F.3d 760, 770, 771 n.5, 778, 780, 780 n.11 (10th Cir. 2013) (relying on Schwartz treatise).

In this case, plaintiffs put forth enough evidence to go to a jury on two such causal relationships, either of which would be sufficient to establish liability. First, as this Court has recognized, "[a] failure to investigate or reprimand might cause a future violation by sending a message to officers that such behavior is tolerated." *Cordova*, 569 F.3d at 1194. A jury could find Wichita's failures of accountability "sen[t] a message to officers" that killing civilians was "tolerated," which, in turn, facilitated Rapp's killing of Finch. This Court's sister circuits have endorsed similar theories.[15]

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[15] *See, e.g.*, *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."); *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 803 (9th Cir. 2018) (jail "perpetuated a culture where excessive force was encouraged," in part by "promot[ing] the practice of incomplete and ineffective investigations into misconduct," such that "precedents permit[] the jury to infer . . . that this culture of violence and impunity proximately caused the injuries inflicted"). In this case, the causal link between WPD's culture of impunity and Rapp's shooting is even stronger, as there is evidence that Rapp was personally aware that officers involved in prior shootings were still on the force and, as far as he knew, had not been disciplined. *See* AA425-26 (Rapp Dep.).

The court wrongly rejected this causation theory as "a variation on the 'broken windows' theory of policing," dismissing the notion that "strict enforcement of lesser violations will reduce the incidence of greater ones." AA1042-43. But plaintiffs don't predicate liability on Wichita's failure to strictly punish some police equivalent of vandalism or jay walking. Plaintiffs base liability on Wichita's failure to meaningfully regulate police officers' *shooting of civilians*. The 21 shootings and 12 civilian deaths that preceded Andrew Finch's killing weren't "broken windows"; they were broken lives, broken communities, and broken promises to the citizens whose constitutional rights WPD was meant to protect.

Alternatively, a jury could conclude that meaningful accountability could have provided WPD with information that might have spurred reforms—reforms that would have prevented Andrew Finch's death. *See, e.g.*, *J.K.J.*, 960 F.3d at 384-85 (finding causation because earlier detection might have spurred reforms). Plaintiffs' expert opined that "if the Wichita Police Department and if the Chief of Police and Professional Standards Bureau Detectives had 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; *see also* AA851-53 (2013 audit recommended gathering more information during investigations to facilitate improvements on departmental use of force). This Court has repeatedly held that expert testimony is enough to create a jury question on causation in a municipal liability case. *See Brown*, 227 F.3d at 1291 (relying on expert opinion that "attributed the incident to improper training"); *Allen*, 119 F.3d at 844 (same); *Zuchel*, 997 F.2d at 739-40 (same).

Ultimately, proximate cause is a quintessential jury question. *See* 57A Am. Jur. 2d Negligence § 425; *see Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990). Assessing a causal relationship "is not a mechanical exercise like working a math problem and getting an answer, but instead requires jurors to view evidence in its totality, draw on their life experiences and common sense, and then reach reasonable conclusions about the effects of particular action *and* inaction." *J.K.J.*, 960 F.3d at 384-85. This Court should allow a jury to make the ultimate determination whether Wichita is liable for the total failure of accountability that led to Andrew Finch's death.

B. Wichita Is Liable For Its Widespread Practice Of Shooting Civilians Without Regard To Whether They Pose A Threat.

Wichita is also liable for its "policy" of shooting without regard to whether the victim poses a threat. Liability for that shooting-without-regard-to-threat policy is established by much the same evidence supporting plaintiffs' failures-of-accountability theory of liability. *See supra*, II.A. Wichita's shooting-without-regard-to-threat policy helps establish the failures-of-accountability theory by demonstrating Wichita's deliberate indifference to the possibility of a constitutional violation. *Supra*, II.A.2.a, c. Conversely, Wichita's failures of accountability help establish that it tacitly sanctions the shooting-without-regard-to-threat policy. *Infra*, II.B.1-2. This Part therefore cross-references the failure-of-accountability argument in large measure. But though the two theories overlap significantly, they are distinct, and each should go to a jury. *See Forrest*, 930 F.3d at 107.

1. Policy. Again, "[a]n informal custom that amounts to a widespread practice" is an actionable "policy" for municipal liability purposes. *Hinkle*, 962 F.3d at 1239-40. Plaintiffs presented enough evidence from which a jury could conclude that WPD's practice of

shooting at civilians without regard to whether the civilian posed a threat was sufficiently widespread as to constitute such a policy. In some cases, a court has already held that a jury could conclude that the suspect did not pose a threat, *see supra*, 14-16, II.A.2.c; in other cases, even Wichita's limited investigation raised serious questions about whether there was a threat, *see supra*, 10-14, II.A.2.c.

Below, Wichita pointed to its on-paper regulations allowing deadly force "only when [an] officer reasonably believes that such force is necessary to prevent death or great bodily harm to such officer or another person." AA618 (WPD Regulation). But a widespread practice may amount to a "policy" even if that practice is contrary to what's written down in a formal regulation. *See, e.g.*, *J.K.J.*, 960 F.3d at 384 (liability for actual practice notwithstanding "piece of paper with a flat instruction"); *Wright v. City of Euclid*, 962 F.3d 852, 880-81 (6th Cir. 2020) (liability for "custom of allowing excessive force" notwithstanding on-paper regulations complying with Fourth Amendment); *Price v. Sery*, 513 F.3d 962, 972-73 (9th Cir. 2008) (failure to adequately discipline officers, training deficiencies, and officer testimony created unwritten policy of excessive force). And a municipality's repeated failure to discipline

officers who violate its on-paper regulation provides "circumstantial evidence" that the municipality viewed that on-paper regulation "as a policy in name only and routinely encouraged contrary behavior." *Cordova*, 569 F.3d at 1194; *see also Price*, 513 F.3d at 972-73.

In this case, a jury could conclude that Wichita's "reasonably believes that such force is necessary" regulation was a "policy in name only" and that Wichita "routinely encouraged contrary behavior." As described *supra*, 10-16, II.A.2.c, plaintiffs presented evidence regarding most of the 21 shootings from which a jury could conclude the shooting officer did not have the "reasonable belief" required by the on-paper regulation. Yet Wichita entirely exonerated almost all the officers and often did so without even assessing compliance with the "reasonably believes such force is necessary" regulation. *Id.*

Similarly, in *this* case, WPD signed off on Rapp's shooting without even interviewing Rapp, AA1011, [redacted] [redacted] SA54. A jury could thus find that Wichita tacitly endorsed the shooting; that Rapp did not have a "reasonable belief" that Andrew Finch posed a threat, *see supra*, I.B; and, therefore, that WPD had tacitly sanctioned a violation of

its on-paper regulation requiring such a "reasonable belief." *See Cordova*, 569 F.3d at 1194 (though "conduct that occurs *after* the alleged violation" cannot have caused the violation, "[a] subsequent cover-up might provide circumstantial evidence" of city's policy).

A reasonable jury could thus conclude that far from being a rogue act, Rapp's shooting of Andrew Finch was, in fact, in accordance with Wichita's *actual* policy, which allowed officers to shoot without regard to whether a civilian posed a threat. *See Cordova*, 569 F.3d at 1194.

2. Deliberate indifference. The shooting-without-regard policy at issue is facially unconstitutional, because the Constitution requires a reasonable assessment of the threat posed by a suspect. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). The existence of a facially unconstitutional policy suffices to prove deliberate indifference without the need for additional evidence. *See Hinkle*, 962 F.3d at 1239-40. (10th Cir. 2020); *Wright*, 962 F.3d at 880-81 (6th Cir. 2020); *Price*, 513 F.3d at 972-73. Even if Plaintiffs needed additional evidence of deliberate indifference, however, they have presented sufficient evidence for the same reasons articulated *supra*, II.A.2—that is, because the facts of each of the slew of prior shootings should have warned Wichita that a

constitutional violation was imminent (and likely had already occurred), and because Wichita's refusal to change course thus demonstrated reckless disregard for the Fourth Amendment rights of its citizens.

3. Causation. The analysis as to causation is similarly straightforward. The existence of a facially unconstitutional policy renders a separate showing of causation unnecessary. *See Hinkle*, 962 F.3d at 1239-40; *Wright*, 962 F.3d at 880-81; *Price*, 513 F.3d at 972-73. Even if a separate showing were required, Wichita's policy of shooting without regard to a threat was "closely related" to Rapp's shooting of Andrew Finch when he posed no threat, such that "the municipality was the 'moving force' behind the injury alleged." *See Schneider*, 717 F.3d at 770; *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161, 170 (5th Cir. 1985) ("Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied.").

* * *

Viewed in the light most favorable to plaintiffs, then, the evidence presented at summary judgment painted a damning portrait of a deeply

broken police department, whose failings reflected a total lack of concern for the civilians at whom Wichita police were routinely shooting and created a culture of impunity within which Rapp's shooting took place. The district court's grant of summary judgment must be reversed.

CONCLUSION

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

Dated: December 4, 2020

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument given the serious constitutional questions implicated by this appeal and the complexity of the record and arguments.

CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 15,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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: December 4, 2020

/s/ Easha Anand
Easha Anand
Counsel for Plaintiffs

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

a. all required privacy redactions have been made;

b. the hard copies that have been submitted to the Clerk's Office are exact copies of the ECF filing; and

c. the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Advance, version 10.8.9.2, last updated December 4, 2020, and according to the program is free of viruses.

Dated: December 4, 2020

*_/s/ Easha Anand_*
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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2020, I electronically filed a true, correct, and complete copy of the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: December 4, 2020

/s/ Easha Anand
Easha Anand
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LISA G. FINCH and DOMINICA C. FINCH,
as co-Administrators of the Estate of
Andrew Thomas Finch, Deceased,

Plaintiffs,

v. Case No. 18-1018-JWB

CITY OF WICHITA, KANSAS;
JUSTIN RAPP; and
BENJAMIN JONKER,

Defendants.

MEMORANDUM AND ORDER

This matter comes before the court on Plaintiffs' motion for entry of judgment pursuant to Fed. R. Civ. P. 54(b). (Doc. 197.) The motion is fully briefed and is ripe for decision. (Docs. 198, 201.) For the reasons stated herein, the motion is GRANTED.

I. Background

On December 28, 2017, a person telephoned 911 and reported he had shot his father in the head and was holding other family members hostage at 1033 W. McCormick in Wichita, Kansas. Wichita police officers Justin Rapp and Benjamin Jonker, among other officers, responded to the resulting broadcast of a police dispatcher and surrounded the residence. Shortly after their arrival, Andrew Thomas Finch emerged from the front door of the house, and officers began shouting commands at Finch. Rapp, who was armed with a rifle, shot and killed Finch about ten seconds later. Rapp testified he did so based on a belief that Finch was drawing a firearm and was endangering other officers. Jonker was the supervising officer at the scene. It was subsequently

discovered that the 911 call was a hoax perpetrated by a person in California who had no connection to Finch or to the residence.

Plaintiffs filed this action under 42 U.S.C. section 1983 alleging excessive force claims against Rapp and Jonker, a supervisory liability claim against Jonker, and a claim for unlawful policy or practice against the City of Wichita. (Doc. 158 at 13-14.) In a summary judgment ruling, the court held that Plaintiffs had shown a genuine issue of material fact as to whether Rapp's use of force was excessive and unreasonable under the Fourth Amendment, that Rapp was not entitled to qualified immunity, that Jonker was entitled to dismissal based on qualified immunity, and that the City of Wichita was entitled to dismissal because Plaintiffs had not cited evidence to reasonably show the elements of a claim of municipal liability. (Doc. 191.) Defendant Rapp thereafter filed a timely notice of interlocutory appeal to challenge the denial of qualified immunity. (Doc. 192.) *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985) (denial of a claim of qualified immunity is an appealable final decision notwithstanding the absence of a final judgment).

Plaintiffs then filed the instant motion pursuant to Fed. R. Civ. P. 54(b) asking the court to enter final judgment on Plaintiffs' claim against the City of Wichita so Plaintiffs can appeal and have the Tenth Circuit address the claim against the City together with Rapp's appeal of the denial of qualified immunity. Plaintiffs argue the ruling in favor of the City is final and there is no just reason to delay entry of final judgment on the claim against it.

II. Standards

Rule 54(b) provides that a court may direct entry of a final judgment as to one or more, but fewer than all, of the claims or parties "only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). "The purpose of Rule 54(b) 'is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of

the parties until the final adjudication of the entire case by making an immediate appeal available.'" *Oklahoma Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1241 (10th Cir. 2001) (quoting 10 Charles A. Wright et al., *Federal Practice and Procedure: Civil 2d* § 2654 at 33 (1982)).

"Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp. v. Gen. Elec. Co*., 446 U.S. 1, 8 (1980). Rule 54(b) requires the court to act as a "dispatcher," using its discretion to determine the appropriate time when each final decision in a multiple-claim or multiple-party case is ready for appeal, considering the "interest of sound judicial administration." *Id*. (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435-37 (1956)). *See Smith v. TFI Family Servs., Inc.*, No. 17-2235-JWB, 2020 WL 569807, at *2 (D. Kan. Feb. 5, 2020). The rule "preserves the historic federal policy against piecemeal appeals" but allows the court to identify exceptions that promote efficient judicial administration. *Mackey,* 351 U.S. at 438.

III. Analysis

The City of Wichita concedes the summary judgment decision in its favor was a final ruling that disposed of all claims against it. (Doc. 198 at 2.) But it argues certification of the ruling would add a "unique and unrelated" issue to Rapp's appeal that would require extensive effort to prepare and which would be moot if the Tenth Circuit were to find Rapp's actions did not amount to a constitutional violation. (*Id.* at 3.) On the other hand, if the claim against Rapp were to survive the interlocutory appeal and proceed to trial, the City says it would then seek separate trials against Rapp and the City, resulting in a longer trial. But it also argues that the City has indemnity and insurance obligations for any damages caused by Rapp that would make any subsequent trial against the City unnecessary. (*Id.* at 3-4.)

"Factors for the district court to consider in making an express determination of finality and no just reason for delay include 'whether the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [is] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.'" *New Mexico v. Trujillo*, 813 F.3d 1308, 1316 (10th Cir. 2016) (quoting *Curtiss–Wright Corp. v. Gen. Elec. Co*., 446 U.S. 1, 8 (1980)).

After considering the circumstances, the court determines that the ruling in favor of the City of Wichita is a final ruling and that there is no just reason to delay entry of a final judgment in favor of the City. The City argues that allowing an immediate appeal would require extensive work, but the issues pertaining to the City's liability have largely been briefed already in the summary judgment motions. That factor does not weigh in favor of delay. The City also points out that any claim against it would be precluded if the Tenth Circuit were to find that Rapp's actions did not violate the Fourth Amendment. That is true,[1] but in the court's estimation that is not a likely outcome. The facts relevant to Rapp's interlocutory appeal will be viewed by the Tenth Circuit in the light most favorable to Plaintiffs, making it more likely that the Tenth Circuit's determination will be based on whether the law governing Rapp's conduct was clearly established, not whether Plaintiff's version of the incident, if true, shows a Fourth Amendment violation. *See e.g. Harris v. Janes,* ___F. App'x___, 2020 WL 3495943, at *2 (10th Cir. June 29, 2020) (in an interlocutory appeal of the denial of qualified immunity, "the defendant must 'be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal' and discuss only legal issues.") And in that event the Tenth Circuit determination of whether the law was

[1] "When a finding of qualified immunity is based on a conclusion that the officer has committed no constitutional violation – i.e., the first step of the qualified immunity analysis – a finding of qualified immunity … preclude[s] the imposition of municipal liability." *Emmett v. Armstrong,* ___F.3d___, 2020 WL 5200909, at *9 (10th Cir. Sept. 1, 2020) (quoting *Jiron v. City of Lakewood,* 392 F.3d 410, 419 n.8 (10th Cir. 2004)).

clearly established would not necessarily preclude Plaintiffs' claim against the City. *Cf. Contreras on behalf of A.L. v. Dona Ana Cty. Bd. of Cty. Comm'r,* 965 F.3d 1114 (10th Cir. 2020) (concurring opinions discussing relation between clearly established law and municipality's deliberate indifference).

The City next says that if an immediate appeal were allowed, and if Plaintiffs' claims against both Rapp and the City were remanded for trial, then the City would seek a bifurcated trial, which would "significantly extend the time for and complicate the trial." (Doc. 198 at 3.) But the pretrial order governs the proceedings and it does not call for a bifurcated trial. Nor would the court be likely to grant a request for a bifurcated trial under the particular facts of this case. This argument does not demonstrate a just reason for delay of final judgment against the City.

Finally, the City contends a trial of the claim against it would be "unnecessary" even if Plaintiffs prevailed against Rapp because "the City has indemnification obligations to Officer Rapp" and has insurance coverage for that obligation. (Doc. 198 at 3.) The indemnification statute cited by the City, K.S.A. 75-6116, contains a laundry list of conditions that may or may not be satisfied here. But even if it were clear that the City would be obligated and capable of fully indemnifying any judgment against Rapp, that would not preclude Plaintiffs' right to pursue any viable claim against the City.

IV. Conclusion

Plaintiffs' motion for order of final judgment under Rule 54(b) (Doc. 197) is GRANTED. The court determines that its ruling granting the City summary judgment is final and that there is no just reason for delaying entry of judgment on the claims against the City. Pursuant to Fed. R. Civ. P. 54(b), the clerk is directed to enter a final judgment of dismissal in favor of the City of Wichita. IT IS SO ORDERED this 15th day of September, 2020.

_____s/ John W. Broomes__________
JOHN W. BROOMES
UNITED STATES DISTRICT JUDGE

United States District Court

-------------------------- DISTRICT OF KANSAS---------------------------

LISA G. FINCH and DOMINICA C. FINCH,
as co-Administrators of the Estate of
Andrew Thomas Finch, Deceased,

Plaintiff,

v. **Case No: 18-1018-JWB**

CITY OF WICHITA, KANSAS,

Defendant,

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

Plaintiffs' motion for order of final judgment under Rule 54(b) (Doc. 197) is GRANTED. The court determines that its ruling granting the City summary judgment is final and that there is no just reason for delaying entry of judgment on the claims against the City. Pursuant to Fed. R. Civ. P. 54(b), final judgment of dismissal is entered in favor of the City of Wichita.

September 15, 2020
Date

TIMOTHY M. O'BRIEN
CLERK OF THE DISTRICT COURT

by: s/ Joyce Roach
Deputy Clerk