No. 23-2158

IN THE

United States Court of Appeals for the Fourth Circuit

XYAVIER CALLISTE,

Plaintiff-Appellee,

v.

OFFICER XENG LOR, IN HIS INDIVIDUAL CAPACITY,

Defendant-Appellant,

CITY OF CHARLOTTE, NORTH CAROLINA, ET AL.,

Defendants.

On Appeal from the U.S. District Court for the
Western District of North Carolina, No. 3:21-cv-00455
Judge Max O. Cogburn, Jr.

PLAINTIFF-APPELLEE XYAVIER CALLISTE'S RESPONSE BRIEF

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Fed. R. App. P. 26.1, Plaintiff-Appellee Xyavier Calliste makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations?

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation?

No.

5. Is party a trade association?

No.

6. Does this case arise out of a bankruptcy proceeding?

No.

7. Is this a criminal case in which there was an organizational victim?

No.

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INTRODUCTION

In 2018, Defendant Xeng Lor shot Xyavier Calliste multiple times through the driver's side door of Mr. Calliste's car. Lor was investigating a potential trespass into an airport parking garage. As he later admitted, he had no reason to believe that any violent crime had occurred or would occur. At the exit to the garage, Lor got out on foot and stopped a different car at the end of the exit lane. Mr. Calliste pulled up behind the car and attempted to pass it on the right, driving slowly onto the curb to avoid hitting anyone. As Mr. Calliste passed the stopped car, Lor stepped out of the way. He saw the front bumper of Mr. Calliste's car go by. But despite being "along side" Mr. Calliste's car and "out of the car's trajectory," Lor fired two bullets through the driver's side door, hitting Mr. Calliste in the hand and chest. JA1379.

By shooting Mr. Calliste while Lor was standing safely "out of the car's trajectory," JA1379, Lor violated the Fourth Amendment. This Court has long made clear that "officers violate the Fourth Amendment if they employ deadly force against the driver" of a car while the officers are not "in the car's trajectory." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019). Lor violated precisely that rule because, as the district court expressly determined, he "shot Mr. Calliste after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377.

Accordingly, the district court properly denied qualified immunity under this Court's decision in *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005). There, this Court drew a sharp distinction between two sets of shots that officers fired at a moving vehicle, based on whether the officers were in the vehicle's trajectory. The first shots were fired while the vehicle was accelerating towards the officers. *Id.* at 480. In that moment, the officers "stood only a few feet to the passenger side of the vehicle's projected path" and "could have been run over in about one second." *Id.* at 475, 479. In contrast, the second set of shots were fired after the car had "passed" the officers, such that they were no longer in the vehicle's trajectory. *Id.* at 480. This Court held that the second set of shots violated the Fourth Amendment because the initial threat from the car had "been eliminated" once the officers were out of its path. *Id.* at 481. In doing so, this Court "clearly established" that "officers

violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory." *Williams*, 917 F.3d at 770.

Since *Waterman*, this Court has repeatedly held that officers violated clearly established law by firing at a car "after they were no longer in the trajectory of [the] car." *Id.* at 769. For example, in *Krein v. Price*, 596 F. App'x 184 (4th Cir. 2014), this Court denied qualified immunity to officers who shot the driver of a car "through the passenger side window," because the fact that the officers were off to the side of the car meant that they "were not in danger" of being hit. *Id.* at 188. Similarly, in *Williams*, this Court denied qualified immunity to officers who fired at a moving car, even though the closest officer "was alongside the car and out of the car's trajectory." *Williams*, 917 F.3d at 766. "Following *Waterman*," this Court had "no difficulty" concluding that the officers violated the Fourth Amendment. *Id.* at 769.

This case is squarely governed by *Waterman* because, as the district court expressly determined, Lor was "along side [Plaintiff's] car and out of the car's trajectory when he fired." JA1379. The district court's factual determinations cannot be challenged in this interlocutory appeal, despite Lor's efforts to do so. Like the officers in *Krein* and *Williams*, Lor is not entitled to qualified immunity under *Waterman*'s clear holding that "officers violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory." *Williams*, 917 F.3d at 770. The decision below should be affirmed.

JURISDICTIONAL STATEMENT

In this interlocutory appeal from the denial of qualified immunity, this Court's jurisdiction is "limited to a narrow legal question: if we take the facts as the district court gives them to us, and we view those facts in the light most favorable to the plaintiff, is the defendant still entitled to qualified immunity?" *Williams*, 917 F.3d at 768. Thus, the district court's factual determinations—including that "Officer Lor shot Mr. Calliste after Officer Lor was no longer in the path of Mr. Calliste's vehicle," JA1377—cannot be challenged in this appeal. *Williams*, 917 F.3d at 768.

As discussed below, Lor repeatedly challenges the district court's factual determinations in his arguments on appeal. *Compare, e.g.*, JA1383 ("[T]here is a genuine dispute as to whether Officer Lor was in the trajectory of Plaintiff's vehicle when he shot Plaintiff."), *with* Opening Br. 20 ("[T]here is no dispute that Officer Lor was in Calliste's trajectory."). Any such arguments are improper and exceed this Court's limited jurisdiction. This Court "may reach only one question": whether Lor is entitled to qualified immunity even though he shot Mr. Calliste when "Lor was no longer in the path of Mr. Calliste's vehicle," JA1377. *Williams*, 917 F.3d at 768.

STATEMENT OF THE ISSUES

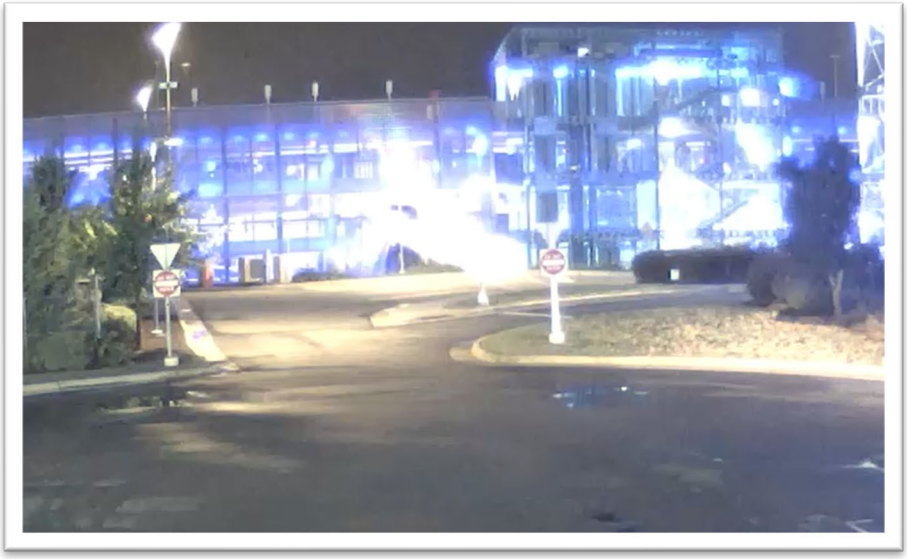
1. Whether Lor's use of deadly force violated the Fourth Amendment because he shot Mr. Calliste after "Lor was no longer in the path of Mr. Calliste's vehicle." JA1377.

2. Whether it was clearly established when Lor shot Mr. Calliste in 2018 that it is unlawful to use deadly force against the driver of a car if the officer is "no longer in the car's trajectory." *Williams*, 917 F.3d at 770; *see Waterman*, 393 F.3d at 482.

STATEMENT OF THE CASE

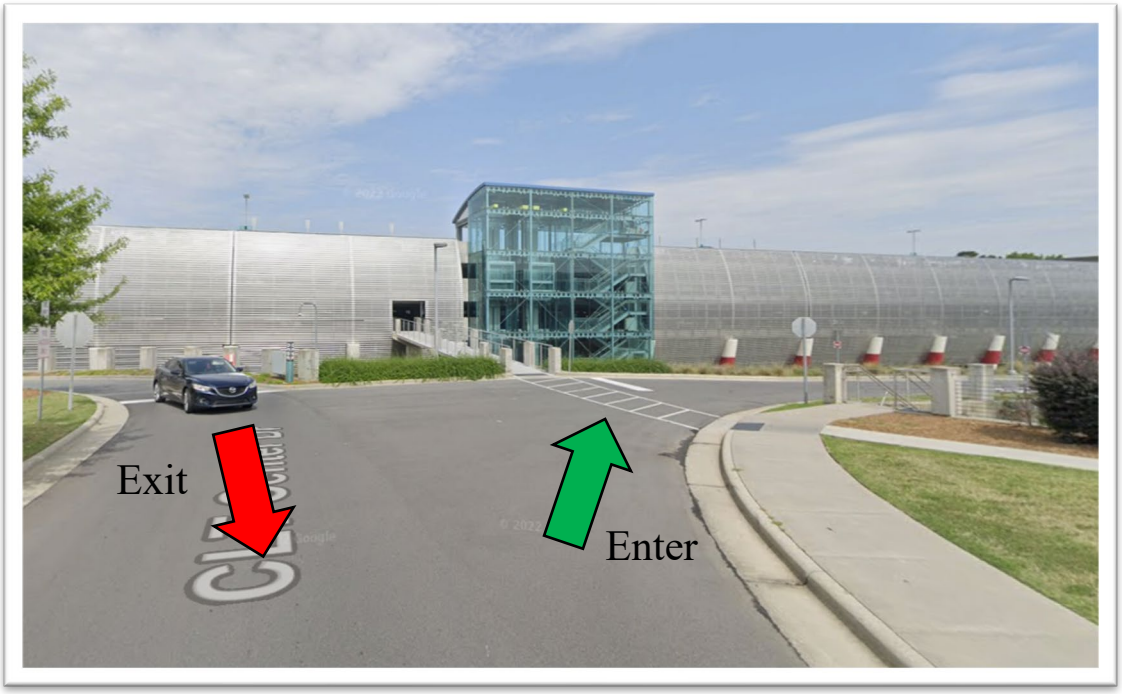
I. Factual Background.

On the evening of July 31, 2018, Mr. Calliste drove to the business valet parking garage at the Charlotte Douglas International Airport, located at 5601 Wilkinson Boulevard. JA61; JA872. That garage requires a keycard to be accessed, and is normally used by business valet and airport employees. JA922-23. The garage is located in an area with street lights and security cameras, and is regularly patrolled by police officers. JA434; *see* JA609.



JA Vol. IV, 36.6 Airport Video at 0:00.

The garage's layout is designed so that there is only "one way in and one way out." JA416. One lane leads to a gated entrance to the garage, and another lane leads out of the garage. The exit lane from the garage is a single-car lane, with a curb separating the road from a grassy area to the side.


Exit
Enter


3630
Exit

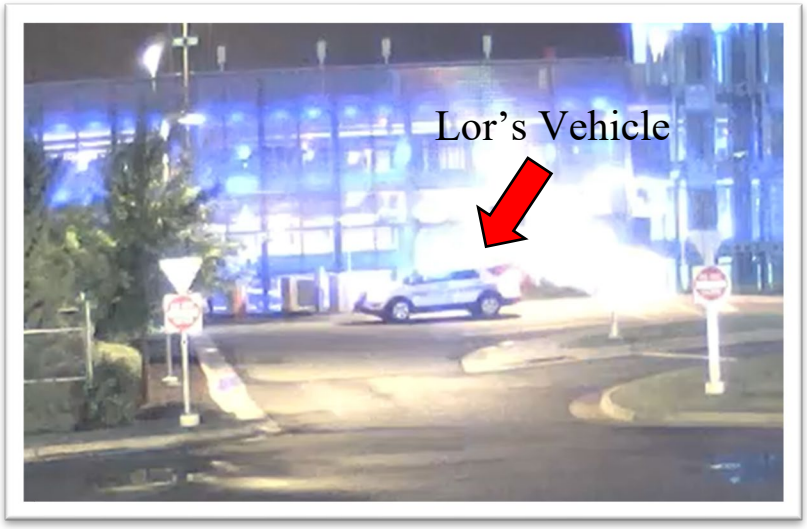
See Google Maps Street View (arrows and labels added).[1]

Mr. Calliste drove to the entrance of the parking garage, where another car was entering. JA469. When the car in front of him entered, the arm of the entrance gate "didn't come down," and Mr. Calliste followed the car into the garage. *Id*.

Shortly after 9:00 p.m., Lor received a call about a "black Dodge piggybacking" behind another car into the garage. JA414-15; JA1369. This call concerned, at most, a trespassing offense, which is a non-violent misdemeanor. JA591; JA529; JA525. As Lor admitted, he had no reason to believe that any violent crime had occurred or would occur. JA885.

When Lor arrived at the garage, he spotted a black Dodge vehicle. JA415. Lor turned on his police lights in order "to see if he was the vehicle" described in the call. JA884; JA416; JA872-73. The Dodge sped up and drove into the parking garage. JA416. Rather than follow the Dodge, Lor drove to the exit of the garage to wait for it. JA416-17; JA929-30. Lor parked his vehicle at the end of the exit lane.

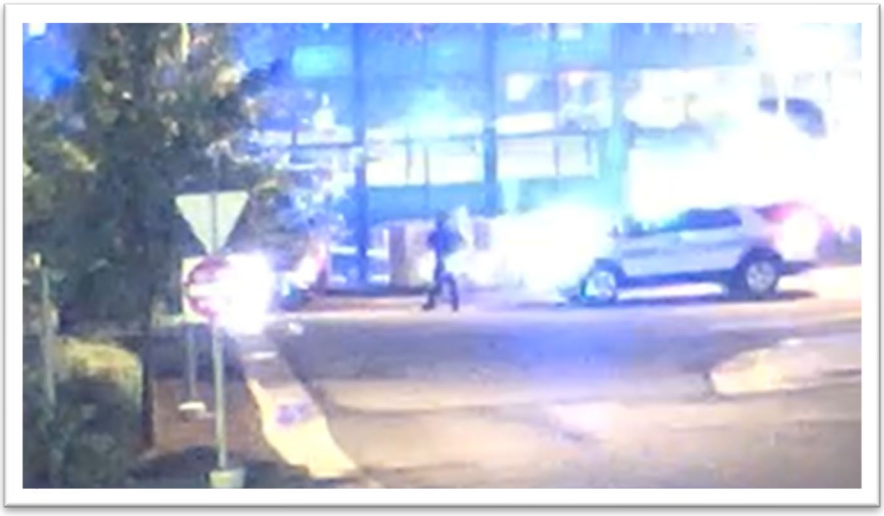
[1] https://www.google.com/maps/@35.2327448,-80.9365901,3a,75y,287.99h,87.45t/data=!3m7!1e1!3m5!1sgwNfq13HRg1rv0mzVHUABg!2e0!6shttps:%2F%2Fstreetviewpixels-pa.googleapis.com%2Fv1%2Fthumbnail%3Fcb_client%3Dmaps_sv.tactile%26w%3D900%26h%3D600%26pitch%3D2.5499999999999997%26panoid%3DgwNfq13HRg1rv0mzVHUABg%26yaw%3D287.99!7i16384!8i8192?entry=ttu&g_ep=EgoyMDI0MTEyNC4xIKXMDSoASAFQAw%3D%3D.



JA Vol. IV, 36.6 Airport Video at 0:12 (arrow and label added).

At the exit, a TSA employee named Tonya Cox was driving a "larger passenger vehicle" down the exit lane. JA931.

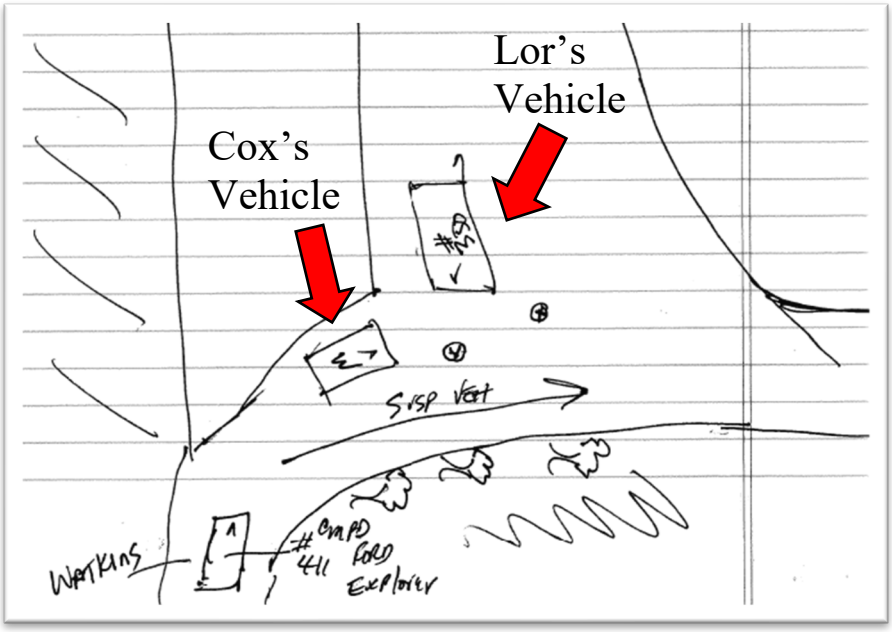
Lor got out on foot and approached Ms. Cox's vehicle. JA422-23; JA1369. Lor raised his hand and ordered her to stop. JA710.



JA Vol. IV, 36.6 Airport Video at 0:22.

At the same time, Mr. Calliste drove into the exit lane and came up behind Ms. Cox's stopped vehicle. JA467; JA1369. He saw Lor's police lights and thought the police were trying to pull Ms. Cox's vehicle over. JA467.

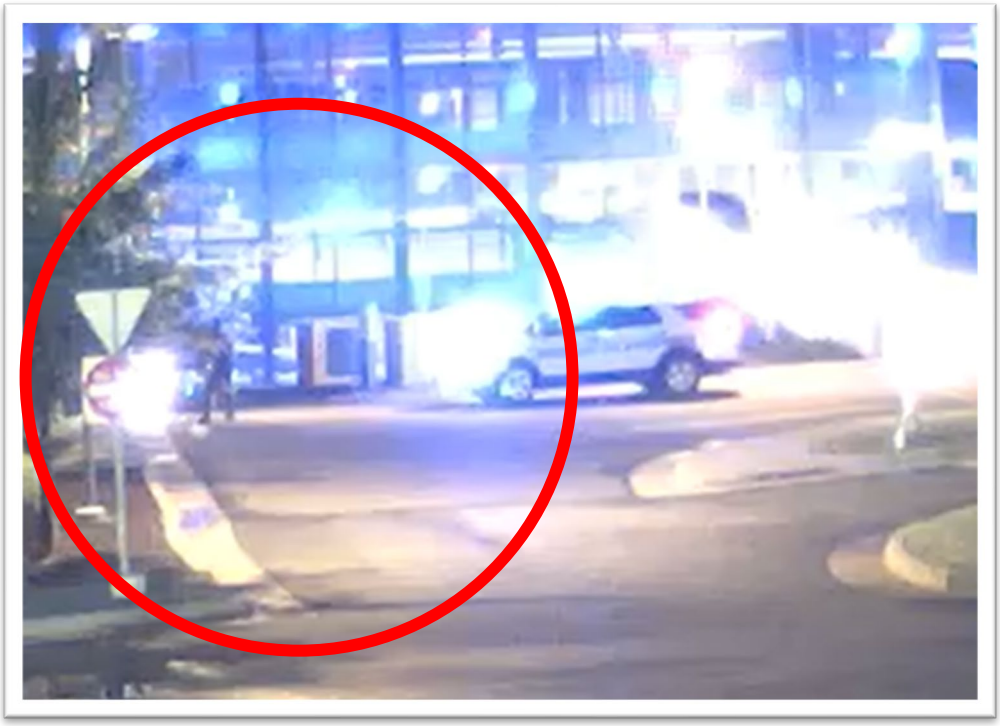
The exit lane was so narrow that Mr. Calliste's car could not "squeeze by" Ms. Cox's vehicle to pass. JA679. Accordingly, Mr. Calliste passed on the right by driving "around the car," going up onto the curb and into the grassy area alongside the exit lane. JA467; JA1369-70; *see* JA623. [redacted]; JA679 ("[H]e ain't touch my car."). [redacted]

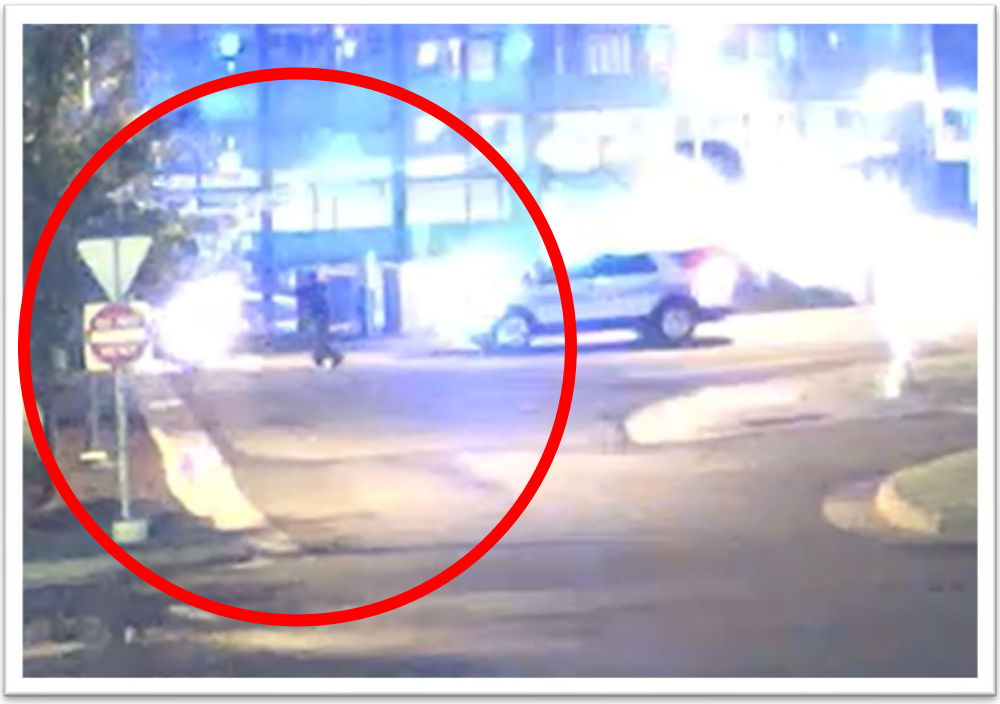


JA806 (arrows and labels added).

Mr. Calliste's intention "was just to get out of the parking lot." JA624. Mr. Calliste did not intend to hit anyone, and he never aimed his car at anyone. *See* JA624 ("I didn't intend to hit nobody. I wasn't intending to hit no police officer."); JA1383 (finding a "genuine dispute as to whether Mr. Calliste ever 'aimed' his car at Officer Lor"). He "didn't even see" an officer on foot as he passed Ms. Cox's car. JA624-25.

As even Lor's expert admitted, Lor had time—"possibly 4 to 5 seconds"—to react to the passing vehicle. JA529. Lor responded by stepping backwards and shouting, "stop the car." JA680; JA879 ("I tried to retreat then and move backwards, back pedal from it."). He stepped "back far enough where [he] thought it was safe." JA955. By the time Mr. Calliste's vehicle drove past Lor, Lor had already "retreated" out of the way, "to where [he] was standing still." JA954.





JA Vol. IV, Airport Video 36.6 at 00:25-00:26 (circles added).

As a result, Mr. Calliste drove by without making any contact with Lor. JA940. Lor watched as the "front bumper of Plaintiff's car passed Officer Lor." JA1370.

Nevertheless, even though "the front bumper of Plaintiff's car had already passed Defendant Lor," he fired two shots. JA1370; *see* JA879. As Lor himself admitted, he fired while the car was "beside of me." JA879. He could see that "the car was passing him, not going towards him." JA455. At that point, Lor was "already out of the way." JA455; *see* JA707 (Cox stating that Lor was "going behind him and that's when he fired"); JA532 (Lor's expert noting that Lor "fires two shots as Calliste goes by and leaves the scene").

As a result, Lor conceded that he was not "in the path of the vehicle" when he fired. JA896; JA1377. [redacted]. Lor could even see Mr. Calliste through the window and aimed straight at him. JA881; JA886 ("I was aiming at the driver.").

JA1211 (noting Lor fired both bullets from the "same spot").

JA518.

Both bullets pierced the driver's side window, striking Mr. Calliste in the hand and chest. JA625; JA654. Mr. Calliste was able to drive to a nearby gas station, trying to get to "the nearest hospital." JA468; JA653. He was covered in blood. JA719 ("[H]e had blood everywhere when he came in."); JA737 ("I ain't never seen that much blood."). Mr. Calliste told the gas station clerk he could not drive anymore because he had to "put some pressure on these wounds." JA717-18. The clerk drove Mr. Calliste to the Carolinas Medical Center. JA596; JA655.

Subsequently, Lor was placed on leave, and Defendant David Osorio, a police detective, was assigned to conduct a criminal investigation of the shooting. JA590; JA906. Lor was placed on administrative leave for about four months during the criminal investigation. JA920-21.

The police department's shooting board also conducted an internal investigation. JA909. At the time, the department's "Use of Deadly Force" policy expressly forbade officers from shooting at "a moving vehicle, unless deadly force is being used against the officer or another person and the officer reasonably believes that no other option is reasonably available." JA1312. The policy further provided that shooting into a moving vehicle "is never authorized when it is reasonable to believe that the vehicle may contain an innocent passenger." *Id*. The policy also

required officers to "take all reasonable steps to move out of the way" when "confronted with an oncoming vehicle." *Id*.

After reviewing the evidence, the board determined that Lor's use of deadly force was not justified. *See* JA910 ("[M]e using any firearm was also not justified."); JA911 ("[I]t was found not justified for the use of deadly force."). The board determined that Lor did not face an imminent threat necessitating deadly force because he was able to safely retreat to cover. *See* JA911. As a result, Lor was disciplined by the department, including being docked 160 hours without pay and having to complete a two-week ride-along with a field training officer. JA915-16.

Meanwhile, all charges against Mr. Calliste were dismissed. JA1370.

II. Procedural History.

On August 2, 2021, Mr. Calliste brought this civil rights suit under 42 U.S.C. § 1983, alleging among other things that Lor's use of deadly force violated Mr. Calliste's Fourth Amendment rights and state law. JA28-37. On February 4, 2022, the district court denied Defendants' motions to dismiss. JA313.

On September 28, 2023, the district court denied Lor's motion for summary judgment. JA1399. The court determined that, "[t]aking the facts in the light most favorable to Plaintiff, Officer Lor shot Mr. Calliste after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377 (noting "Defendant admits as much"). Accordingly, under *Waterman*, the court concluded that a reasonable jury could find

that Lor violated Mr. Calliste's clearly established Fourth Amendment rights. JA1378. The court noted that its conclusion was confirmed by *Williams*, which similarly applied *Waterman* to deny qualified immunity to officers who shot into a moving vehicle despite being "out of the car's trajectory." JA1379-80. Finally, the court also concluded that, on top of *Waterman* and *Williams*, "the unlawfulness of Defendant's conduct" was "apparent in light of pre-existing law." JA1382 (internal quotation marks omitted). Accordingly, the court held that Lor was not entitled to qualified immunity. JA1384. The court also denied Lor's motion as to Mr. Calliste's state law assault-and-battery claim "for the same reason." JA1384.[2]

STANDARD OF REVIEW

This Court reviews the denial of summary judgment *de novo*, "accept[ing] as true the facts that the district court concluded may be reasonably inferred from the record when viewed in the light most favorable to the plaintiff." *Waterman*, 393 F.3d at 473.

[2] The district court also denied summary judgment as to Mr. Calliste's negligence claim against Lor. *See* JA1391. Lor does not challenge that ruling in his opening brief, and any such challenge is thus waived. *See, e.g.*, *United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004). In addition, the district court denied summary judgment to the City of Charlotte on Mr. Calliste's negligence claim, JA1399, and the City has not appealed that ruling.

SUMMARY OF ARGUMENT

I. As the district court properly recognized, under *Waterman* and its progeny, Lor violated the Fourth Amendment by using deadly force "after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377. This Court has repeatedly held that "officers violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory." *Williams*, 917 F.3d at 770. Here, the district court expressly determined that Lor was "along side [Plaintiff's] car and out of the car's trajectory when he fired." JA1379. Accordingly, deadly force was prohibited.

I.A. In 2005, this Court made clear in *Waterman* that officers cannot use deadly force against the driver of a car as soon as the officers are out of the car's trajectory. There, several officers began firing at a car when it accelerated towards them. Seconds later, the officers fired a second volley of shots, after the car had driven past them. This Court held that the officers violated the Fourth Amendment when they fired the second volley of shots because, at that moment, the vehicle had "passed their position and they were out of danger." *Waterman*, 393 F.3d at 482. Because the officers were no longer in the path of the vehicle, deadly force was unjustified because "the threat to their safety was eliminated and thus could not justify the subsequent shots." *Id.*

Since *Waterman*, this Court has repeatedly held that officers violated clearly established law when they fired at a car despite being out of the car's trajectory. For example, in 2009, officers violated *Waterman* by shooting "through the passenger side window" of a truck as it passed by. *Krein*, 596 F. App'x at 185. In 2012, officers violated *Waterman* by shooting the driver of a car, even though the closest officer "was alongside the car and out of the car's trajectory." *Williams*, 917 F.3d at 766. And in 2016, an officer violated *Waterman* by shooting "into the driver's side door and window" of a car as it "passed" the officer. *Gallmon v. Cooper*, 801 F. App'x 112, 114 (4th Cir. 2012). The list goes on. *See Doriety for Estate of Crenshaw v. Sletten*, 109 F.4th 670, 680-81 (4th Cir. 2024) (determining deadly force was not justified when officers shot "through the car's passenger window").

Just as in these cases, Lor shot Mr. Calliste through the side door of his car, "after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377. The district court determined those facts based not just on Mr. Calliste's evidence, but also on Lor's express admission that he was not "in the path of the vehicle" when he fired. JA896; *see also* JA1377 (Lor conceding that "when my shot went off, [the car] was beside of me"). As a result, the district court determined that Mr. Calliste showed that Lor was not in the car's trajectory "with ease." JA1381. Accordingly, a reasonable jury—like the shooting board from Lor's own police department—could find that Lor's use of deadly force was unjustified. JA910-11.

I.B. Lor's arguments to the contrary should be rejected. Lor's opening brief rests entirely on Lor's own disputed version of the events, "reflect[ing] a clear misapprehension of summary judgment standards." *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (per curiam). Lor's attempts to improperly construe the evidence in his own favor are especially inappropriate here because, as Lor himself acknowledged in opposing Mr. Calliste's motion to dismiss, this Court's limited jurisdiction precludes any review of the district court's factual determinations. *See* Response to Motion to Dismiss Appeal, ECF 22, at 6-7 (claiming he would "take the facts as the district court gives them to us").

Despite acknowledging that this Court is bound by the district court's determination of the facts, Lor repeatedly contradicts the district court's factual determinations in an effort to escape the holding of *Waterman*. *Compare, e.g.*, JA1383 ("[T]here is a genuine dispute as to whether Officer Lor was in the trajectory of Plaintiff's vehicle when he shot Plaintiff."), *with* Opening Br. 20 ("[T]here is no dispute that Officer Lor was in Calliste's trajectory."). For example, Lor claims he "was in Calliste's direct path" and "could have been run over in about one second," even though the district court expressly found the opposite. *See* JA1379 ("In this case, as in *Williams*, Officer Lor appears to have been 'along side [Plaintiff's] car and out of the car's trajectory' when he fired."). Lor's effort to inject disputed factual claims on appeal only confirms that he cannot prevail. *See Gallmon*, 801 F. App'x

at 115 (dismissing an interlocutory appeal because the district court determined that "a genuine 'issue' of fact exists as to whether the danger had passed" when an officer shot into a car's "side door and window"). His appeal should be rejected, and this case should be remanded for trial.

II. As the district court properly concluded, qualified immunity must be denied because *Waterman* "clearly established" that "officers violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory." *Williams*, 917 F.3d at 770. *Williams* asked the same question facing the district court: whether it was clearly established that an officer violated the Fourth Amendment by shooting the driver of a car even though the officer was "out of the car's trajectory." *Id.* at 766. *Williams* answered that question the same way the district court did: Yes, because *Waterman* "clearly established" the law in 2005. *Id.* at 770. Indeed, Lor did not even "attempt to distinguish *Williams*" before the district court. JA1381. That, alone, resolves the qualified immunity inquiry.

On top of that, the district court properly recognized that the unlawfulness of Lor's conduct was apparent even setting aside *Waterman* and its progeny. *See* JA1382; *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (recognizing that rights can be clearly established even without cases like *Waterman* that involve "fundamentally similar" fact patterns). For example, Lor received fair warning because at least seven Circuits had held "that an officer lacks an objectively reasonable basis for believing

that his own safety is at risk when firing into the side or rear of a vehicle moving away from him." *Orn v. City of Tacoma*, 949 F.3d 1167, 1178 (9th Cir. 2020). In addition, the unlawfulness of Lor's misconduct was apparent in light of his own police department's use-of-force policy. *See* JA1312; *Booker v. South Carolina Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017) (finding the obviousness of a violation "buttressed by the South Carolina Department of Correction's internal policies"). Under that policy, the department's shooting board determined that Lor's use of force was unjustified because he did not face an imminent threat necessitating deadly force. *See* JA911 (Lor admitting "it was found not justified for the use of deadly force"). Given all of these forms of notice, no reasonable officer would believe that it was reasonable to shoot Mr. Calliste "after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377.

Lor has no real response to these multiple forms of "'fair warning' that shooting Plaintiff from outside the trajectory of Plaintiff's vehicle was unconstitutional." JA1382. For example, he never addresses the shooting board's express determination that his use of deadly force was unjustified. Nor does he "attempt to distinguish *Williams* from the facts at hand." JA1381. He simply points out that *Williams* was decided after the shooting in this case, and argues that it cannot constitute clearly established law.

The problem for Lor is that *Williams* itself did not clearly establish the law: Instead, this Court made clear that *Waterman* clearly established the law back in 2005. That is why *Williams* denied qualified immunity to officers who shot someone in 2012; that is also why *Krein* denied qualified immunity to officers for conduct occurring in 2009. *Williams* is controlling not because it established a new rule of constitutional law, but because it applied a preexisting rule to circumstances that are on all fours with the facts of this case. The district court properly recognized that it was conducting the same inquiry: asking whether *Waterman* put officers on notice that they cannot use deadly force once they are "no longer in the car's trajectory." *Williams*, 917 F.3d at 770. *Williams*'s application of *Waterman* to deny qualified immunity thus applies directly here.

Accordingly, the decision below should be affirmed.

ARGUMENT

I. Under *Waterman*, Lor's Use Of Deadly Force Violated The Fourth Amendment Because Lor Was Not In The Trajectory Of Mr. Calliste's Car When Lor Shot Mr. Calliste.

"Because deadly force is extraordinarily intrusive, it takes a lot for it to be reasonable." *Williams*, 917 F.3d at 769; *see Waterman*, 393 F.3d at 477 ("[T]he intrusiveness of a seizure by means of deadly force is unmatched."). In particular, "[t]he Constitution tolerates the use of deadly force by police officers only when necessary to thwart an imminent threat to life." *Franklin v. City of Charlotte*, 64 F.4th 519, 525 (4th Cir. 2023). That imminent threat must exist, moreover, "at the moment that force is employed." *Waterman*, 393 F.3d at 481.

Applying these well-established principles, this Court has repeatedly held that officers cannot shoot the driver of a car if the officers are not "in the car's trajectory." *Williams*, 917 F.3d at 770; *see Waterman*, 393 F.3d at 482. If the officers are not in the car's trajectory, there is no imminent "threat to their safety" that could justify deadly force. *Waterman*, 393 F.3d at 482.

Waterman resolves this appeal because, just like the officers there, "Lor shot Mr. Calliste after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377. As the district court noted, "Defendant admits as much." *Id.* Lor's arguments to the contrary should be rejected.

A. Just Like The Officers In *Waterman*, Lor Shot The Driver Of A Car Even Though Lor Was Not In The Car's Trajectory.

As the district court properly recognized, *Waterman* and its progeny make clear that Lor's use of deadly force was unreasonable. In a series of cases, this Court has repeatedly held that officers violated the Fourth Amendment because they shot someone even though they were not "in the trajectory" of the person's vehicle. *Williams*, 917 F.3d at 769. Lor violated this clearly established law because, as the district court expressly determined, he was "out of the car's trajectory when he fired." JA1379.

In *Waterman*, this Court drew a sharp distinction between two sets of shots—fired seconds apart—based on whether the officers were in the trajectory of a moving vehicle at the time they fired. In that case, several officers attempted to intercept a driver as he sped through the Fort McHenry Tunnel in Baltimore, Maryland. *Waterman*, 393 F.3d at 474. When the driver exited the tunnel, he drove towards a toll plaza, and suddenly accelerated forward towards the waiting officers, including one officer who was "a little more than 16 feet ahead." *Id.* "Although none of the officers were directly in front" of the vehicle, they "stood only a few feet to the passenger side of the vehicle's projected path." *Id.* at 474-75. As a result, the officers "could have been run over in about one second" if the vehicle "had turned slightly toward them." *Id.* at 479. "[A]s soon as" the vehicle accelerated towards them, the officers fired an initial volley of shots. *Id.* at 475.

Seconds later, the officers fired a second volley of shots, which was key to this Court's decision. By that point, the vehicle had "passed all of the officers, avoiding them by several feet." *Id.* Even though they were no longer in the vehicle's path, the officers still fired, shooting the vehicle "from the passenger side of the vehicle and from behind." *Id.* The entire sequence, beginning with initial acceleration towards the officers, lasted about six seconds. *Id.*

This Court recognized that, at the moment of the second volley, deadly force was not justified because the vehicle had "passed the officers" without "veering in their direction," such that "the threat to their safety was eliminated." *Id.* at 482. Rather than facing an oncoming car that might hit them, the officers fired "from the passenger side of the vehicle and from behind." *Id.* at 475. At that moment, the officers "knew or should have known that Waterman had passed them without veering in their direction." *Id.* at 482. This Court explained that "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Id.* at 481. Because any potential threat of being hit "was eliminated," and thus "could not justify the subsequent shots," the Fourth Amendment prohibited the use of deadly force. *Id.* at 482. In other words, *Waterman* "clearly established" that "officers violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory." *Williams*, 917 F.3d at 770.

Since 2005, this Court has applied *Waterman* repeatedly to hold that officers violate the Fourth Amendment when they shoot into the side of passing cars. *See, e.g.*, *Gallmon*, 801 F. App'x at 115 (applying *Waterman* to conclude that a reasonable jury could find that "the danger had passed when Cooper fired at the Honda's side door and window"); *Doriety*, 109 F.4th at 680-81 (holding deadly force was not justified when officers shot "through the car's passenger window" while the car was "moving away from the officer"). For example, in *Krein*, officers shot the driver of a truck as he tried to escape from a gas station. *See* 596 F. App'x at 186. Prior to the fatal shot, the driver "accelerated" his truck towards the officers. *Id.* at 185. The officers moved "to get out of [the driver's] way," including an officer named Price who "stepped off to the side." *Id.* But even though "Price got out of harm's way when he stepped to the side," he fired "through the truck's passenger-side window," hitting the driver. *Id.* at 186.

Applying *Waterman*, this Court held that "a reasonable officer would have realized that deadly force was not necessary to protect himself or others when he was no longer in the direction of Krein's vehicle." *Id.* at 189. The Court placed special emphasis on the fact that the "shot entered through the passenger side window," "strongly suggesting that Price was not in front of the truck when he fired." *Id.* at 188. The Court explained that *Waterman* "demonstrates that the right

Price allegedly violated is clearly established." *Id.* at 189. Accordingly, the Court denied qualified immunity. *Id.* at 190.

Similarly, in *Williams*, this Court denied qualified immunity to officers who shot a driver in 2012—six years before Lor shot Mr. Calliste. 917 F.3d at 766. In that case, the officers had approached the plaintiff's parked car, when the plaintiff suddenly backed his car up, drove towards an officer named Strickland, and then passed him. *Id.* As the plaintiff was "passing by Strickland," the officers fired. *Id.* Some evidence indicated that, like Lor, Strickland "was alongside the car and out of the car's trajectory" when he fired. *Id.* This Court concluded that a reasonable jury could find that the officers violated the Fourth Amendment because they "started or continued to fire on Williams after they were no longer in the trajectory of Williams's car." *Id.* at 769. That misconduct violated the "clearly established" rule of *Waterman*: "officers violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory." *Id.* at 770.

As these decisions show, *Waterman* resolves this appeal. Just like the officers in those cases, "Officer Lor shot Mr. Calliste after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377. Because Lor "was on the passenger side of the vehicle," he "was no longer in danger of being hit." *Krein*, 596 F. App'x at 190; *see also Waterman*, 393 F.3d at 481 (citing officers who unlawfully fired "on vehicle from side after stepping out of the way" in *Abraham v. Raso*, 183 F.3d 279 (3d Cir.

1999)). Indeed, Lor himself admitted that he was not in the path of Mr. Calliste's vehicle when Lor fired:

> Q: When the front bumper of the plaintiff's car goes by you, you weren't in the path of the vehicle at the time, right?
>
> A: At that time, no.

JA896; *see* JA1370 ("When Defendant Lor fired, the front bumper of Plaintiff's car had already passed Defendant Lor.").

Lor's admission, alone, is sufficient to deny summary judgment. *See* JA1381 ("In light of Officer Lor's deposition testimony, Plaintiff carries this burden with ease."). Like the officers in *Williams*, Lor faced no imminent threat from the car once he was "alongside the car and out of the car's trajectory." *Williams*, 917 F.3d at 766; *see* JA1381 (noting Lor did not even "attempt to distinguish *Williams* from the facts at hand").

Lor's admission was also corroborated by Mr. Calliste's other evidence, further confirming a genuine dispute of material fact that must go to a jury. For example, Tanya Cox stated that Lor fired into the "side of the vehicle," not from "in front." JA687; *see also* JA707 (Cox stating that Lor was "going behind him and that's when he fired"). Mr. Calliste testified to the same. *See* JA455 ("He shot from the side of the car when he's already out of the way."). [redacted], "strongly suggesting that [Lor] was not in front" of the car "when he fired." *Krein*, 596 F. App'x at 188.

[redacted]

JA518.

This evidence shows that Lor's actions were even more egregious than the violation in *Waterman*. There, the officers "fired at Waterman in the context of a high-speed chase," raising the risk of an imminent threat to the officers' safety. *Krein*, 596 F. App'x at 190. And before the officers fired the unlawful second volley, the officers had already fired an initial volley as soon as the car accelerated towards them, when "the vehicle could have reached [them] in about one second without accelerating further, and in even less time if it had continued to accelerate." *Waterman*, 393 F.3d at 478. Even under those circumstances, this Court held that deadly force was not authorized as soon as the officers were "no longer in the car's trajectory." *Williams*, 917 F.3d at 770.

Here, in contrast, Lor was not required to make a split-second adjustment because deadly force was never justified. Mr. Calliste was not speeding through the Fort McHenry Tunnel on a high-speed chase; he was simply trying to pass Ms. Cox's car on the right. He did so slowly and carefully, never making contact with her car or with Lor. JA940; JA679. Mr. Calliste also never aimed his car at Lor. *See* JA1383. And the only time Lor fired his gun was when—as he admitted—he was already out of "the car's trajectory." *Williams*, 917 F.3d at 770; JA1378; *see also* JA455 ("He shot me while the car was passing him, not going toward him."). Thus, as Lor's own police department determined, Lor was not justified in using deadly force. *See* JA909-11 ("On the violation of use-of-force, I was not justified . . . me using any

firearm was also not justified."). Accordingly, the district court properly concluded that a reasonable jury could find that Lor violated the Fourth Amendment. JA1378.

B. Lor's Only Response Is To Dispute The District Court's Factual Determination That He Was Not In The Car's Trajectory.

In response, Lor does exactly what he conceded he cannot do in this appeal: dispute the facts. *See* Response to Motion to Dismiss Appeal, ECF 22, at 6-7 (claiming he would "take the facts as the district court gives them to us"). Every argument he makes rests on a plain contradiction of the facts determined by the district court. *See Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 762 (2d Cir. 2003) ("Although Breen purports to rely only on the undisputed evidence . . . his brief on appeal is replete with his own versions of the events," which form "no proper basis for this appeal.").[3] None succeeds.

[3] In light of this Court's order denying Mr. Calliste's motion to dismiss, this Court could resolve this appeal on the merits by rejecting Lor's attempts to dispute the facts and accepting the district court's factual determinations. *See Lewis v. Caraballo*, 98 F.4th 521, 530, 538 (4th Cir. 2024). That being said, as this Court recognized, this Court lacks jurisdiction to hear any challenge to the decision below that rests on a "factual basis." Order, ECF 23, at 2; *see Johnson v. Jones*, 515 U.S. 304, 313 (1995). As explained above, Lor so focuses his "appellate argument on factual disputes" that he "fails to raise a single legal question appropriate for appellate review." *Witt v. West Virginia State Police, Troop 2*, 633 F.3d 272, 275 (4th Cir. 2011). Because Lor simply "rehash[es] the factual dispute below," this Court could resolve this appeal by dismissing for lack of jurisdiction. *Id.*; *see, e.g.*, *Rhoades v. Forsyth*, 834 F. App'x 793, 796 (4th Cir. 2020) (dismissing appeal because the officer's "legal arguments hinge repeatedly, and fundamentally, on a view of the facts contrary to that reached by the district court"); *Smith v. Kendall*, 369 F. App'x 437, 439 (4th Cir. 2010) ("While [the officer] claims that the record

First, Lor attempts to analogize the shots he fired to the initial volley fired in *Waterman*. *See* Opening Br. 14. Citing his own deposition testimony, Lor insists that he "was in Calliste's direct path seconds before Calliste was a few feet away," such that "his safety was still in peril" when he fired. *Id.* at 15-16.

Lor's story flips the facts as the district court found them on their head. The district court expressly determined that Lor was *not* in the path of Mr. Calliste's car when he fired, finding "Officer Lor shot Mr. Calliste after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377. Indeed, before he fired, Lor watched as the "front bumper of Plaintiff's car" passed by. JA1370. The district court also expressly addressed and rejected Lor's claim that Mr. Calliste "aimed" his car at Lor, concluding that the evidence—including Lor's own body-worn camera footage—"establishes a genuine dispute as to whether Mr. Calliste ever 'aimed 'his car at Officer Lor." JA1383.[4]

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shows that his use of force was reasonable because he faced an imminent threat of being run over . . . we lack jurisdiction to consider this claim.").

[4] To the extent Lor attempts to invoke the narrow exception to the ordinary summary judgment standard for indisputable video evidence, *see* Opening Br. 12 (citing *Scott v. Harris*, 550 U.S. 372 (2007)), that exception does not apply because the video evidence does not "blatantly contradict" Mr. Calliste's evidence or "indisputably support" Lor's "rendition of the facts." *Gallmon*, 801 F. App'x at 115-16 (refusing to disturb the district court's conclusion that "the trajectory of Gallmon's car is plainly in dispute"); *Lewis*, 98 F.4th at 529 (holding that a body camera video "falls far below that high bar" and emphasizing that "where a video only 'offers *some* support for [an] officer's version of events,' we do not allow the officer to 'rehash[] the factual dispute below"). To the contrary, as the district court expressly recognized, "the BWC established a genuine dispute as to whether Mr. Calliste ever

Accordingly, Lor's shots are not analogous to the initial volley fired in *Waterman*. The officers in *Waterman* fired their initial volley while the car was accelerating towards them and they stood "only a few feet to the passenger side of the vehicle's projected path." *See Waterman*, 393 F.3d at 474-75 ("Waterman began to accelerate in the general direction of the toll plaza and the officers *ahead of him*." (emphasis added)). Here, in contrast, Lor admitted that he was not in front of Mr. Calliste's car when he fired. *See* JA940 ("Q: Did you shoot the vehicle from the front? A: No sir."). Even more to the point, Lor squarely acknowledged that he was not in the path of the vehicle when he fired. *See* JA896 ("Q: When the front bumper of the plaintiff's car goes by you, you weren't in the path of the vehicle at the time, right? A: At that time, no."). The district court expressly relied on those admissions to make its factual findings, and those findings cannot be challenged in this appeal.

In an effort to escape his own admissions, Lor argues that, even though he admittedly "was not in Calliste's direct path," he was still somehow in the car's trajectory "because Calliste swerved seconds before he would have run over Officer Lor." Opening Br. 18 (citing Lor's own deposition). Remarkably, Lor claims that "there is no dispute that Officer Lor was in Calliste's trajectory, albeit not his direct path, when he fired shots." Opening Br. 20.

'aimed' his car at Officer Lor." JA1383. That factual determination cannot be challenged in this appeal. *See Gallmon*, 801 F. App'x at 116.

The problem for Lor is, again, the district court expressly determined the opposite. *See* JA1383 ("[T]here is a genuine dispute as to whether Officer Lor was in the trajectory of Plaintiff's vehicle when he shot Plaintiff."); JA1382 ("Defendant thus had 'fair warning' that shooting Plaintiff from outside the trajectory of Plaintiff's vehicle was unconstitutional."); JA1381 (finding Mr. Calliste satisfied his burden to show that "Defendant was 'no longer in the car's trajectory'" "with ease"). Lor's attempt to invent some distinction between "path" and "trajectory" fails because, as *Waterman* made clear, the "crucial" question is simply whether "the position of the person relative to the path of the vehicle" created a risk that the officer "could have been run over." *Waterman*, 393 F.3d at 479; *see Williams*, 917 F.3d at 768 (asking whether "Strickland and Heroux fired on Williams after they were no longer in the path of Williams's car"). Whichever term Lor uses, the district court's determination was the same: Lor "was not in the path of Mr. Calliste's vehicle when he fired," and he was "out of the car's trajectory when he fired." JA1378-79. As a result, he faced no "imminent threat of physical harm." JA1378.[5]

[5] Lor suggests that he was "unable to retreat" to safety prior to firing because "Cox's vehicle blocked his path." Opening Br. 4, 12. This is yet another attempt to flip the facts as found by the district court on their head. During his deposition, for example, Lor testified that he "was nowhere near her car" when he fired his weapon. JA1210. Accordingly, the district court expressly found that Lor retreated to safety, as did the police department's shooting board. JA1378; *see* JA911 (Lor admitting that the department found his use of deadly force unjustified because he was able to retreat "to cover").

Finally, Lor attempts to distinguish his shots from the second volley in *Waterman* by arguing that, in *Waterman*, "the suspect passed the officers altogether" when they fired. Opening Br. 15. Lor claims that here, in contrast, he "fired right as Calliste flew beside him and when his safety was still in peril." Opening Br. 16.[6]

Lor's argument is foreclosed by this Court's repeated application of *Waterman* to cases in which officers fired into the side of cars. *See, e.g.*, *Williams*, 917 F.3d at 766 (car passed one officer and "may have been passing by" another); *Krein*, 596 F. App'x at 190 (officer "was on the passenger side of the vehicle and thus was no longer in danger of being hit"). For example, in *Williams*, some evidence indicated that the car was "passing by" one of the officers, such that the officer "was alongside the car," rather than behind it. 917 F.3d at 766. Notwithstanding the exact position of the officer relative to the car, this Court recognized that what mattered was that, because the officer was out of the car's trajectory, it was unreasonable "to believe that the car was about to run them (or their fellow officers) over." *Id.* at 769.

[6] To the extent Lor claims that he was subjectively "afraid for his life," Opening Br. 12, that is irrelevant to the objective reasonableness inquiry—as he himself admitted before the district court. *See* JA1374. Any fear for his life was objectively unreasonable, given that Lor was not in the car's trajectory. *See* JA1378; *Gallmon*, 801 F. App'x at 115 (dismissing officer's interlocutory appeal because the plaintiff's evidence showed "[t]here was no way for the Honda to have hit Defendant Cooper when Defendant Cooper fired the shots . . . through the driver's side window and door").

Accordingly, "[f]ollowing *Waterman*," this Court had "no difficulty concluding" that the officers violated the Fourth Amendment. *Id.* at 769.

So too here. Applying *Williams* and its progeny, the district court had no difficulty concluding that Lor violated the Fourth Amendment. *See* JA1379 ("In this case, as in *Williams*, Officer Lor appears to have been 'along side [Plaintiff's] car and out of the car's trajectory' when he fired."). That decision was correct and should be affirmed.

II. *Waterman* Clearly Established Mr. Calliste's Rights, As This Court Has Repeatedly Recognized.

As the district court properly recognized, Lor is not entitled to qualified immunity for two reasons. *See* JA1381. First, *Waterman* "clearly established" the law more than a decade before Lor shot Mr. Calliste in 2018. *Williams*, 917 F.3d at 770; *see also Krein*, 596 F. App'x at 190 (denying qualified immunity under *Waterman* to an officer who fired after he stepped to "the passenger side of the vehicle and thus was no longer in danger of being hit"). *Waterman* thus provided Lor "fair warning" that shooting Mr. Calliste "from outside the trajectory of [his] vehicle was unconstitutional," JA1382—just as *Waterman* did for the officers in *Krein* in 2009, the officers in *Williams* in 2012, and the officers in *Gallmon* in 2016. *See Krein*, 596 F. App'x at 185; *Williams*, 917 F.3d at 766; *Gallmon*, 801 F. App'x at 113. As the district court noted, Defendants did not even "attempt to distinguish

Williams from the facts at hand." JA1381. Therefore, based on this Court's binding precedent, qualified immunity must be denied.

Second, in addition to *Waterman* and its progeny, "the unlawfulness of Defendant's conduct was 'apparent' in light of pre-existing law." JA1382. By the time of the shooting, "at least seven circuits had held that an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him." *Orn*, 949 F.3d at 1178; *see, e.g.*, *Cowan*, 352 F.3d at 763 (holding deadly force was not justified because the vehicle was "traveling slowly" and the officer was "not in front of the vehicle but substantially off to the side when he fired the second, fatal shot"); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) (finding no imminent threat to the officer because he "was still two feet to the Ranger's side, and thus not in its path"). This "robust consensus of persuasive authority" also clearly established that Lor's conduct was unlawful. *Booker*, 855 F.3d at 544.

For example, in *Abraham*—a case on which *Waterman* relied, *see* 393 F.3d at 481—an officer shot the driver of a car through "the driver's side window," striking the driver in his arm and chest, just like Lor did in this case. *See Abraham*, 183 F.3d at 293-94. The court recognized that a reasonable jury could reject the officer's claim that she was in front of the car, especially given that the bullet traveled "from left to right" through the side of the car. *Id.* The court also held that,

"[e]ven assuming" the officer "was in front of the car and was in danger at some point," deadly force was not justified because the officer "did not fire until safely out of harm's way." *Id.* at 294-95. Again, the court emphasized that "the fact that [the officer's] shot was fired through the driver's side window . . . suggests she may have had time to get out of the way, take aim, and fire." *Id.*; *see also Villanueva v. California*, 986 F.3d 1158, 1172 (9th Cir. 2021) (recognizing it is "clearly established that an officer who shoots at a slow-moving car when he can easily step out of the way violates the Fourth Amendment").

Consistent with this broad judicial consensus, the Charlotte-Mecklenburg Police Department's use-of-force policy expressly prohibited deadly force against a moving vehicle unless "the officer reasonably believes that no other option is reasonably available," including "mov[ing] out of the way." JA1312; *see* JA911 (finding Lor's use of force unjustified because he was able to "retreat[] to cover"). The policy also forbade deadly force in all circumstances in which it is reasonable to believe that the vehicle may contain an innocent passenger. JA1312. That policy went into effect in 2016—two years before the shooting—and Lor admitted that he had a "good understanding of the CMPD's directives" at the time of the shooting. JA890; JA1312. The department's policy—combined with the shooting board's express determination that Lor violated that policy and was "not justified" in using deadly force, JA910-11—"provides additional support" for the district court's

conclusion that a reasonable official in Lor's position "had fair warning" that Lor's conduct was unconstitutional. *Booker*, 855 F.3d at 546; *see Hope*, 536 U.S. at 741 (finding a "clear violation" of the Constitution based in part on department policy).[7]

As a result, the district court's decision to deny qualified immunity was plainly correct. Given all of these forms of notice, no reasonable officer in Lor's position would believe that it was reasonable to shoot Mr. Calliste "after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377.

In response, Lor claims that *Williams* "announced a new rule with 'trajectory' as the criterion for deadly force." Opening Br. 21. Based on that misreading, Lor argues that, because *Williams* was decided after Lor shot Mr. Calliste, *Williams* cannot constitute clearly established law. *Id.*

Put simply, Lor's argument is foreclosed by *Williams* itself, which made clear that it was *Waterman*, not *Williams*, that "clearly established that . . . officers violate the Fourth Amendment if they employ deadly force against the driver once they are

[7] As the district court recognized, under *Hope*, "defendants can violate clearly established law under even novel factual circumstances." JA1382; *see Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."). Denying qualified immunity here is even more straightforward because "the facts at hand are hardly 'novel.'" JA1382. To the contrary, these circumstances have been expressly addressed both by this Court and by a robust consensus of other Circuits.

no longer in the car's trajectory." *Williams*, 917 F.3d at 770. Only because *Waterman* clearly established that rule in 2005 was *Williams* able to deny qualified immunity based on conduct that occurred in 2012. *See id.* at 766. *Williams* thus did not establish new law; it applied preexisting clearly-established law to circumstances that are on all fours with the facts of this case. *See also Doriety*, 109 F.4th at 677 (explaining that "[o]ur holding in *Waterman* thus established that . . . officers violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory"). *Williams*'s application of *Waterman* resolves the qualified immunity inquiry here.

Lor also argues that *Waterman* did not clearly establish the law because "Calliste came at him faster and in tighter quarters than the officers in *Waterman*." Opening Br. 22. Lor claims that Mr. Calliste was driving "at speeds between 25-30 miles per hour and then swerved when he was 10 feet or so from Officer Lor." *Id.* at 14.

This argument fails on several levels. First, as with all of Lor's arguments, it improperly contradicts the district court's construction of the evidence in Mr. Calliste's favor. [redacted]; *see also* JA1232 (Lor admitting he never cited Mr. Calliste for speeding). [redacted]

[redacted]. *See also* JA1108-09; JA1369-70. Going slowly allowed Mr. Calliste to avoid hitting Ms. Cox's car. *See* JA679 ("[H]e ain't touch my car."). [redacted]; *see also* JA624 (Mr. Calliste testifying, "I didn't intend to hit nobody"); JA1383 (finding a "genuine dispute as to whether Mr. Calliste ever 'aimed' his car at Officer Lor").

Based on this evidence, a reasonable jury could easily reject Lor's version of the events. *See Abraham*, 183 F.3d at 293 (finding a genuine dispute about "how fast Abraham drove" and emphasizing that "a reasonable jury could reject the witnesses' recollections as inaccurate"). Lor's effort to inject his disputed factual claims on appeal only confirms that he cannot prevail on the district court's binding factual determinations. *See Gallmon*, 801 F. App'x at 116 (declining to disturb the district court's determination about "the car's trajectory"); *Cowan*, 352 F.3d at 763 (rejecting the defendant's version of events where the plaintiff's evidence showed "that the Camaro Cooper was driving . . . slowly" and that the officer "was not in front of the vehicle but substantially off to the side when he fired").

Second, Lor cannot prevail even on his own, disputed version of the events. In *Waterman*, this Court recognized that, when the officers fired the unlawful second volley, the car had "reached a top speed of approximately 15 miles per hour," and

passed within "several feet" of the officers. *Waterman*, 393 F.3d at 475. Despite the speed of the car and the close distance from the officers, this Court still recognized that firing at the car was unjustified because "any belief that the officers continued at that point to face an imminent threat of serious physical harm would be unreasonable." *Id.* at 482.

So too here, where the evidence shows that "Officer Lor shot Mr. Calliste after Officer Lor was no longer in the path of Mr. Calliste's vehicle." JA1377. The distinctions Lor attempts to draw—for example, his disputed claim of 25-30 miles per hour here, as opposed to 15 miles per hour in *Waterman*—are "insignificant" for purposes of whether the law provided "fair warning that the officer's conduct was unconstitutional." *Lewis*, 98 F.4th at 535; *see also* JA1382 (noting that any differences with *Waterman* do "not entitle Defendant to summary judgment" because "the unlawfulness of Defendant's conduct was 'apparent' 'in light of pre-existing law'"). What matters under *Waterman* is whether Lor was "no longer in the car's trajectory." *Williams*, 917 F.3d at 770. The district court determined exactly that. JA1379.

* * *

The district court properly concluded that the facts of this case fall squarely within *Waterman*'s clearly established rule. As a result, the district court's decision should be affirmed as to both Mr. Calliste's federal Fourth Amendment claim and

his parallel state-law claim. *See* JA1384 (denying summary judgment as to Mr. Calliste's assault-and-battery claim "for the same reason" as the Fourth Amendment claim); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994) ("The parallel state law claim of assault and battery is subsumed within the federal excessive force claim and so goes forward as well."). For example, in *Lee v. Town of Seaboard*, 863 F.3d 323 (4th Cir. 2017), this Court denied summary judgment for the same kind of parallel state-law claim because the officer was "facing the side" of a passing car "at the time he fired" from about "five feet away," and thus was "away from the path of the vehicle." *Id.* at 329. This Court noted that the federal excessive-force standard is more stringent than the state tort-law standard, such that a meritorious federal claim will necessarily encompass a state-law claim. *Id.* at 328 n.4.

Here, Mr. Calliste's parallel state-law claim easily survives summary judgment for the same reasons as his Fourth Amendment claim. Accordingly, the decision below should be affirmed, and this case should be remanded for trial.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Dated: December 18, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because it contains 9,477 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 Times New Roman 14-point font.

Dated: December 18, 2024

/s/ *Gregory Cui*
Gregory Cui

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2024, I electronically filed the foregoing *Plaintiff-Appellee Xyavier Calliste's Response Brief* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Gregory Cui*
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