No. 22-3157

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FLORINE K. CHING, as Trustee for the Heirs and Next of Kin of Travis Matthew Jordan, Decedent,

Plaintiff-Appellee,

v.

OFC. NEAL WALSH, in his individual and official capacities,

Defendant-Appellant,

CITY OF MINNEAPOLIS; OFC. RYAN KEYES AND POLICE CHIEF MEDARIA ARRADONDO, in their individual and official capacities,

Defendants.

On Appeal from the United States District Court
for the District of Minnesota
The Hon. Katherine M. Menendez
No. 21-CV-02467-KMM

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

Counsel listed on inside cover

Paul J. Bosman
COMMUNITIES UNITED AGAINST POLICE BRUTALITY
2136 Ford Parkway
Suite 5328
Saint Paul, MN 55116
(651) 485-7046
paul.bosman@gmail.com

Elise M. Baranouski
Eloy Rodriguez La Brada
Mary B. McCord
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 661-6728
eb1326@georgetown.edu
er804@georgetown.edu
mbm7@georgetown.edu

Ben Gifford
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
PO Box 211178
Brooklyn, NY 11221
(202) 662-9835
bg720@georgetown.edu

Attorneys for Plaintiff-Appellee

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

On November 9, 2018, Travis Jordan sent a message to his girlfriend, Taren, suggesting that he was contemplating suicide. Taren called a non-emergency line, but she was transferred to an emergency line, and a dispatcher put out a call to Minneapolis police officers. Defendant-Appellant Officer Neal Walsh and his partner responded to the call and drove to Travis's house. Travis told them to go away, but they persisted in contacting him until he appeared on his porch with a knife. Obviously disturbed, Travis screamed "let's do this," and "come on, just do it," before walking slowly toward the officers. He never lifted his knife, and he remained well out of reach, but Officer Walsh shot him three times. Travis then fell to the ground and dropped his knife. Officer Walsh shot him four more times. The district court correctly held, at the pleading stage, that it was clearly unreasonable for Officer Walsh to continue shooting Travis after he lay disarmed on the ground.

Plaintiff-Appellee Florine Ching is Travis's mother and trustee for his heirs and next of kin. While she believes affirmance of the district court's decision is straightforward, she does not oppose Officer Walsh's request for oral argument and defers instead to the Court's discretion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiff-Appellee Florine Ching brought this action under 42 U.S.C. § 1983, alleging, among other claims, violations of the Fourth Amendment and state law. On September 21, 2022, the district court issued an order denying Defendant-Appellant Officer Neal Walsh's motion for judgment on the pleadings based on qualified immunity. Addendum 1–26. On October 17, 2022, Appellant filed a notice of appeal from the district court's order. Joint Appendix (JA) 93–94; R. Doc. 44 at 1–2.

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1367(a). Officer Walsh appeals from the denial of his motion for judgment on the pleadings. This Court has jurisdiction to review the legal question whether Officer Walsh is entitled to qualified immunity, but it does not have jurisdiction to resolve the various factual disputes that Officer Walsh raises on appeal. *See Baude v. Leyshock*, 23 F.4th 1065, 1071 (8th Cir. 2022).

STATEMENT OF ISSUE

1. Did the district court correctly deny qualified immunity at the pleading stage where the Complaint plausibly alleged—and bodyworn camera footage corroborated—that Officer Walsh continued to shoot Travis after he lay disarmed on the ground?

- *Roberts v. City of Omaha*, 723 F.3d 966 (8th Cir. 2013)
- *Jackson v. Stair*, 944 F.3d 704 (8th Cir. 2019)
- *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020)
- *Masters v. City of Independence*, 998 F.3d 827 (8th Cir. 2021)

STATEMENT OF THE CASE

I. Factual Background

The following facts are taken from the Amended Complaint:

On November 9, 2018, Travis Jordan was at his home in Minneapolis. JA3, 5; R. Doc. 4, at 3, 5. He sent a message to his girlfriend, Taren, suggesting that he was contemplating suicide. JA3; R. Doc. 4, at 3. Taren called the 311 non-emergency telephone line, and her call was transferred to 911. *See id.* Taren told the dispatcher that Travis was alone and having suicidal thoughts. *See* JA4; R. Doc. 4, at 4. She also told the dispatcher that Travis had previously talked about obtaining a gun, but that he did not follow through with the plan. *See id.*

The dispatcher put out a call to Minneapolis police officers with Travis's name and phone number, indicating that Travis was an emotionally disturbed person. *See id.* Officers Keyes and Walsh assigned themselves to the call and drove to Travis's house. *Id.* Both officers were equipped with firearms, but neither had a beanbag gun—a less-lethal weapon available to all Minneapolis police officers. JA7; R. Doc. 4, at 7.

When the officers arrived, they made several attempts to contact Travis, but Travis communicated to the officers that he did not want to speak with them and wanted them to leave. JA4–5; R. Doc. 4, at 4–5. Officer Walsh called his sergeant, who told him that he should not force entry into the house, and that he should contact Taren to see whether she might be able to persuade Travis to come outside. JA5; R. Doc. 4, at 5. Travis then appeared in his front porch area carrying a knife. *Id.*

The officers were aware that another officer with a Taser was coming to assist them, and Officer Keyes told Officer Walsh to get his mace out. JA5, 7; R. Doc. 4, at 5, 7. Both officers nevertheless drew their guns, and they yelled at Travis to drop the knife and not to come outside. JA5–6; R. Doc. 4, at 5–6. Travis walked out the door screaming "let's do this." JA6; R. Doc. 4, at 6. Travis walked slowly toward the officers with his arms at his sides. *Id.* He never raised his knife. *Id.* Officer Walsh took several steps backward and then fired three shots at Travis. *Id.* Travis fell to the ground and dropped the knife. *Id.* Officer Walsh then lowered his gun and fired four more shots at Travis, who was lying unarmed in the snow. *Id.* All seven of Officer Walsh's shots hit Travis. *Id.* Officer Keyes also fired one round at

Travis during the encounter. *Id.* Travis was subsequently transported to the hospital, where he died from his wounds. *Id.*

II. District Court Proceedings

Travis's mother, Florine Ching, was appointed Trustee for Travis's heirs and next of kin, and she filed this action on November 8, 2021, in the United States District Court for the District of Minnesota. *See* R. Doc. 1. She brought claims against Officers Walsh and Keyes for violating Travis's rights under the Fourth Amendment and state tort law, and against the City of Minneapolis and the Minneapolis Police Chief for liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).[1]

The City and the officers moved for judgment on the pleadings, *see* R. Doc. 13, 32, and the district court granted those motions in part and denied them in part, *see* JA92; R. Doc. 43, at 26. As relevant here, the court held that the Complaint plausibly alleged that Officer Walsh used excessive force in violation of the Fourth Amendment when he shot Travis.

[1] Ms. Ching also brought claims under the Americans with Disabilities Act and the Minnesota Human Rights Act, but she subsequently dropped those claims.

The court agreed with Ms. Ching that the excessive force "analysis should be bifurcated between the two instances of use of force alleged in the Complaint: first, Officer Walsh's initial use of force; and second, his continued use of force after [Travis] had dropped the knife and fallen to the ground." JA76; R. Doc. 43, at 10 (internal quotation marks and citation omitted). With respect to the first three shots that Officer Walsh fired while Travis was still standing, the court held that the Complaint plausibly alleged that Travis "did not pose an immediate and substantial threat justifying Officer Walsh's initial use of deadly force." JA80; R. Doc. 43, at 14. The court nevertheless concluded that Officer Walsh was entitled to qualified immunity with respect to those shots because "it was not clearly established that it was unlawful for Officer Walsh to initially use deadly force against [Travis]." JA84; R. Doc. 43, at 18.

With respect to the four shots that Officer Walsh fired after Travis lay disarmed in the snow, however, the court held that "it was clearly established that after [Travis] had fallen to the ground and dropped the knife, it was unlawful to continue shooting." *Id.* The court explained that, "according to the Complaint, Officer Walsh had sufficient time and

situational awareness to adjust his aim downward after [Travis] fell to the ground," and it determined that, "if he had the time to process that change in circumstance, a jury could also find that he had time to reassess the threat posed by [Travis] and stop shooting." JA77; R. Doc. 43, at 11. The court accordingly denied qualified immunity to Officer Walsh with respect to his continued shooting. JA86; R. Doc. 43, at 20.

Officer Walsh timely filed this interlocutory appeal. JA93; R. Doc. 44.

SUMMARY OF ARGUMENT

1. The Complaint alleges, and the district court determined a reasonable jury viewing the video evidence could find, that Officer Walsh had sufficient time to reassess any threat posed by Travis and stop shooting after Travis fell and dropped his knife. This Court is bound by that version of the facts for the purpose of deciding this appeal. Although federal appeals courts generally have jurisdiction to review pretrial denials of qualified immunity, their jurisdiction "is limited to resolving abstract questions of law related to the qualified-immunity determination—typically, whether the allegedly infringed federal right was clearly established." *Thompson v. Murray*, 800 F.3d

979, 982–83 (8th Cir. 2015). They do not have jurisdiction to resolve factual disputes, but are instead "constrained by the version of the facts that the district court assumed or likely assumed in reaching its decision," except where that version is "blatantly contradicted by the record." *Id.* at 983 (internal quotation marks and citations omitted). Here, the record corroborates, rather than contradicts, the allegations in the Complaint; accordingly, the only issue for the Court to decide at this stage is whether qualified immunity was appropriate assuming that Officer Walsh continued to shoot Travis after he ceased to pose an immediate threat.

2. The district court correctly denied qualified immunity with respect to Officer Walsh's continued shooting. The Fourth Amendment prohibits law enforcement officers from using deadly force unless a person presents "an immediate threat of death or serious bodily injury." *Billingsley v. City of Omaha*, 277 F.3d 990, 993 (8th Cir. 2002) (citing *Tennessee v. Garner*, 471 U.S. 1, 9 (1985)). As the district court explained, "the allegations in the Complaint—taken as true and in the light most favorable to Ms. Ching—plausibly establish that a reasonable officer would not have had cause to believe that [Travis]

posed an immediate threat to his safety." JA75–76; R. Doc. 43, at 9–10. By nevertheless continuing to shoot Travis after he lay disarmed on the ground, Officer Walsh violated Travis's Fourth Amendment right to be free from excessive force. And Travis's right to be free from such force was clearly established as of November 2018.

A. This Court has made clear that an officer is "'not permitted to ignore changing circumstances,'" and it has recognized that a continued use of force can be unreasonable even where it follows "nearly instantaneously" from an initial, justified use of force. *Masters v. City of Independence*, 998 F.3d 827, 836 (8th Cir. 2021) (quoting *Neal v. Ficcadenti*, 895 F.3d 576, 581 (8th Cir. 2018)); *see Roberts v. City of Omaha*, 723 F.3d 966, 974 (8th Cir. 2013) (affirming denial of qualified immunity where some evidence suggested that officer continued to fire after man with a knife had been subdued). The Complaint alleges, and the video footage shows, that Officer Walsh had sufficient time to adjust his aim downward and continue shooting after Travis lay disarmed on the ground. As the district court explained, a jury could find from these facts that Officer Walsh "had time to reassess the threat posed by [Travis] and stop shooting." JA77; R. Doc. 43, at 11.

B. This Court has also established that deadly force is unreasonable where an individual is lying disarmed on the ground and thus not presenting an immediate threat. *See, e.g.*, *Jackson v. Stair*, 944 F.3d 704, 713 (8th Cir. 2019) (citing *Brown v. City of Golden Valley*, 574 F.3d 491, 496–97 (8th Cir. 2009); *Shannon v. Koehler*, 616 F.3d 855, 862–63 (8th Cir. 2010); *Montoya v. City of Flandreau*, 669 F.3d 867, 871–72 (8th Cir. 2012)); *Henderson v. City of Woodbury*, 909 F.3d 933, 939–40 (8th Cir. 2018) (citing *Nance v. Sammis*, 586 F.3d 604, 611 (8th Cir. 2009)). Other courts' cases bolster this conclusion, particularly where an individual has a knife rather than a gun. *See, e.g.*, *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017); *Walker v. City of Orem*, 451 F.3d 1139, 1160 (10th Cir. 2006). The district court found that, once Travis was on the ground, he "was certainly well out of arm's reach and the knife had fallen from his hand." JA77; R. Doc. 43, at 11. It was clearly unreasonable to believe that Travis posed an immediate threat at this point.

3. While this Court need not reach the issue, the district court correctly held that even Officer Walsh's initial use of force was unreasonable.

A. The district court correctly held that the Complaint and the video evidence support a finding that Travis *never* posed an immediate threat justifying Officer Walsh's use of deadly force. *See* JA80; R. Doc. 43, at 14. At the time of the initial shots, Travis was too far away to pose a serious threat to Officers Walsh and Keyes, and there were no bystanders at risk. Officer Walsh knew, moreover, that Travis was suicidal rather than homicidal, thereby further reducing any threat that Travis posed. *See Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018); *cf. Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995).

B. Officer Walsh's criticisms of the district court's assessment of his initial shots rely on inapposite cases or turn on factual arguments that this Court lacks jurisdiction to review. For the reasons above, the Court need not engage with Officer Walsh's arguments regarding his initial shots. To the extent the Court does engage with them, however, it should reject them.

STANDARD OF REVIEW

Officer Walsh appeals from the denial of judgment on the pleadings. As discussed below, this Court "do[es] not have jurisdiction

to resolve factual disputes," but it does "have jurisdiction to consider *de novo* the legal question of whether [Officer Walsh is] entitled to qualified immunity." *Baude v. Leyshock*, 23 F.4th 1065, 1071 (8th Cir. 2022). Officer Walsh must show that he is "entitled to qualified immunity on the face of the complaint." *Bradford v. Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005). And this Court is "constrained by the version of the facts that the district court assumed or likely assumed in reaching its decision, to the extent that version is not blatantly contradicted by the record." *Thompson v. Murray*, 800 F.3d 979, 983 (8th Cir. 2015) (internal quotation marks and citations omitted).

ARGUMENT

I. This Court Is Bound by the Version of the Facts Alleged in the Complaint and Assumed by the District Court

The Complaint alleges that Officer Walsh "fired three shots at Travis," and that Travis "fell to the ground" and dropped his knife. JA6; R. Doc. 4, at 6. Officer Walsh then "lowered his weapon and fired four more shots at Travis, who was lying in the snow unarmed." *Id.* The district court explained that, "according to the Complaint, Officer Walsh had sufficient time and situational awareness to adjust his aim

downward after [Travis] fell to the ground." JA77; R. Doc. 43, at 11. And the district court determined that, "if he had the time to process that change in circumstance, a jury could also find that he had time to reassess the threat posed by [Travis] and stop shooting." *Id.* As Officer Walsh recognizes, this Court is "constrained by the version of the facts that the district court assumed or likely assumed in reaching its decision, to the extent that version is not blatantly contradicted by the record." *Thompson v. Murray*, 800 F.3d 979, 983 (8th Cir. 2015) (internal quotation marks and citations omitted); *see* Appellant's Br. 13 (quoting same). And the record corroborates rather than contradicts the relevant allegations in the Complaint. *See* JA76; R. Doc. 43, at 10. This Court must therefore assume, for the limited purpose of deciding this appeal, that Officer Walsh had sufficient time to reassess any threat posed by Travis and stop shooting after Travis lay disarmed on the ground.

As a general matter, federal appeals courts lack jurisdiction to review orders issued prior to final judgment. One exception to this rule is the collateral order doctrine, which allows for the immediate appeal of a district court decision that "(1) conclusively determines a disputed

issue; (2) which is an important issue completely separate from the merits; and (3) is effectively unreviewable on appeal from a final judgment." *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, 531 F.3d 679, 684 (8th Cir. 2008) (emphasis omitted). The Supreme Court has held that pretrial denials of qualified immunity are usually immediately appealable as collateral orders, in part because the issue of qualified immunity is "completely separate from the merits of the action." *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014).

One important limitation on the scope of review of a qualified immunity denial is that such an order is appealable only "to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *see Thompson*, 800 F.3d at 982–83 ("In an interlocutory appeal from such an order, our jurisdiction is limited to resolving abstract questions of law related to the qualified-immunity determination—typically, whether the allegedly infringed federal right was clearly established."). That is because the issue of qualified immunity is "completely separate from the merits" only to the extent that it implicates a legal issue "that is significantly different from the questions underlying plaintiff's claim . . . (*i.e.,* in the absence of

qualified immunity)." *Johnson v. Jones*, 515 U.S. 304, 314 (1995). Where a defendant raises only legal issues pertaining to whether he violated clearly established law, a federal appeals court will generally have jurisdiction to review those arguments. Where, by contrast, "a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact . . . , it will often prove difficult to find any such 'separate' question." *Id.* Accordingly, an order that "determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial . . . is not appealable." *Id.* at 313.[2]

The one exception to this jurisdictional limitation on appellate factual review is where the facts alleged in the complaint or assumed by the district court are "blatantly contradicted by the record." *Thompson*, 800 F.3d at 983 (internal quotation marks and citation omitted); *see*

[2] This is true at summary judgment and at the pleading stage. *See Thompson*, 800 F.3d at 983; *Baude v. Leyshock*, 23 F.4th 1065, 1071 (8th Cir. 2022). If anything, "[a]sserting a qualified immunity defense via a Rule 12(b)(6) motion . . . subjects the defendant to a more challenging standard of review than would apply on summary judgment." *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004); *see NanoMech, Inc. v. Suresh*, 777 F.3d 1020, 1023 (8th Cir. 2015) (same standard governs Rule 12(b)(6) motion to dismiss and Rule 12(c) motion for judgment on the pleadings).

LeMay v. Mays, 18 F.4th 283, 289 n.5 (8th Cir. 2021) (affirming denial of qualified immunity at pleading stage where plaintiff alleged unconstitutional shootings by Minneapolis police officer and "video depictions of the shootings d[id] not completely contradict the essence and essential details of the allegations in the complaint" (internal quotation marks and citation omitted)). A blatant contradiction "usually involves a 'version of events that is so utterly discredited by the record that no reasonable jury could have believed the plaintiff's version.'" *Est. of Harmon v. Salt Lake City*, No. 20-4085, 2021 WL 5232248, at *2 (10th Cir. Nov. 10, 2021) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)) (alterations omitted). Where a plaintiff's pleadings are blatantly contradicted by the record, it is necessarily the case that "his allegations are implausible." *Bell v. City of Southfield, Michigan*, 37 F.4th 362, 364 (6th Cir. 2022). By contrast, where the record evidence does not "blatantly contradict or utterly discredit the plaintiff's version of events," the appeals court "must accept the plaintiff's version as true." *Id.* (internal quotation marks, citation, and alterations omitted).

On appeal, Officer Walsh argues that he did not have enough time to "re-evaluate the situation and conclude that deadly force was no longer justified" after Travis fell to the ground and dropped his knife. Appellant's Br. 11; *see id.* at 27. Indeed, Officer Walsh's principal argument in his opening brief is that his use of deadly force was objectively reasonable because Travis posed a threat when Officer Walsh started shooting, and because Officer Walsh did not have sufficient time to reassess that threat after Travis fell to the ground unarmed. *See id.* at 13–27. This argument, however, turns on a factual dispute that this Court does not have jurisdiction to review. As noted above, the Complaint alleges that "Officer Walsh had sufficient time and situational awareness to adjust his aim downward after [Travis] fell to the ground," and the district court determined that, "if he had the time to process that change in circumstance, a jury could also find that he had time to reassess the threat posed by [Travis] and stop shooting." JA77; R. Doc. 43, at 11. This Court is "constrained by th[at] version of the facts" unless it is "blatantly contradicted by the record." Appellant's Br. 13 (quoting *Thompson*, 800 F.3d at 983). And the record does not contradict that version of the facts at all, let alone blatantly. To the

contrary, the relevant allegations are "corroborated by the BWC videos." JA76; R. Doc. 43, at 10.[3] This Court must therefore assume, as the district court did, that a jury could find that Officer Walsh had sufficient time to reassess any threat posed by Travis and stop shooting after Travis lay disarmed on the ground. *See Mulbah v. Jansen*, 55 F.4th 1164, 1166 (8th Cir. 2022) ("[W]e may not decide which facts a party may, or may not, be able to prove at trial." (internal quotation marks and citation omitted)).

This Court found its review similarly limited in *Roberts v. City of Omaha*, 723 F.3d 966 (8th Cir. 2013)—discussed in greater detail below, *see infra* pp. 27–30—which involved facts nearly identical to those in this case. There, as here, the district court denied qualified immunity to a police officer after finding "some evidence suggesting that [the officer] continued to fire shots at [the plaintiff] after he was subdued

[3] Although Officer Walsh argues that he did not have sufficient time to reassess the threat posed by Travis, he does not argue that the Complaint or the district court's version of the facts is blatantly contradicted by the record. *Contra* Appellant's Br. 19 (arguing that allegation that Travis's arms were down at his sides was "blatantly contradicted by the record"). Officer Walsh should therefore be deemed to have forfeited any such argument. *See United States v. Owen*, 854 F.3d 536, 541 n.5 (8th Cir. 2017) (issues not raised in opening brief are forfeited on appeal).

and no longer posed a threat." *Id.* at 974; *see id.* ("The district court found a genuine dispute of material fact regarding whether Roberts posed an objectively reasonable threat of violence during the entire encounter."). And there, as here, the plaintiff argued that this Court lacked jurisdiction to resolve factual disputes, including "[w]hether [the officer] fired unnecessary shots at Plaintiff." Brief of Plaintiff-Appellee at 36, *Roberts v. City of Omaha*, No. 12-3426 (8th Cir. Feb. 4, 2013). Rather than second-guess the district court's assessment of the facts, this Court agreed that it was "bound by the district court's evidence-supported factual findings for purposes of [the officer's] appeal," and it accordingly affirmed the denial of qualified immunity. *Roberts*, 723 F.3d at 974. The Court should reach the same conclusion here.[4]

With the scope of Officer Walsh's appeal appropriately narrowed, the only issue for the Court to resolve at this stage is whether it was clearly unreasonable for Officer Walsh to continue shooting Travis after it became apparent that Travis was lying disarmed on the ground. Officer Walsh tries to frame this case in terms of the reasonableness of

[4] Although *Roberts* was decided at summary judgment, its reasoning is equally applicable to the pleading stage. *See supra* note 2.

his shots from the moment Travis appeared on his front porch. But the reasonableness of Officer Walsh's initial use of force matters only if he did not have sufficient time to "re-evaluate the situation." Appellant's Br. 11. If, as the Complaint alleges and the district court assumed, Officer Walsh had sufficient time to reassess any threat that Travis posed, then it is legally irrelevant whether the initial use of force was justified. For the reasons discussed in Section III, the district court was correct to conclude that Officer Walsh's initial use of force was *not* justified. But at a minimum—and as explained in the next section—the district court was correct to deny qualified immunity with respect to the four shots Officer Walsh fired after Travis fell down and dropped his knife.

II. The District Court Properly Denied Qualified Immunity with Respect to Officer Walsh's Continued Shooting

At the pleading stage, an officer must demonstrate that he is "entitled to qualified immunity on the face of the complaint." *Bradford v. Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005) (citing *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996)). Whether an officer is entitled to qualified immunity depends, in turn, on "(1) whether [his]

conduct violated a constitutional right; and (2) whether the violated right was clearly established." *Manning v. Cotton*, 862 F.3d 663, 668 (8th Cir. 2017) (citing *Borgman v. Kedley*, 646 F.3d 518, 522 (8th Cir. 2011)). Here, the Complaint plausibly alleges that Officer Walsh violated Travis's clearly established right to be free from deadly force while he was lying disarmed on the ground.

The Fourth Amendment prohibits law enforcement officers from using "excessive force in the course of making an arrest, investigatory stop, or other 'seizure.'" *Graham v. Connor*, 490 U.S. 386, 388 (1989). Excessive force claims "are governed by a reasonableness standard," which requires courts to balance "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" *White v. Jackson*, 865 F.3d 1064, 1074 (8th Cir. 2017) (quoting *Graham*, 490 U.S. at 395). The use of deadly force is the most severe type of "intrusion." *See Tennessee v. Garner*, 471 U.S. 1, 9 (1985) ("The intrusiveness of a seizure by means of deadly force is unmatched."). It is therefore reasonable only when a person presents "an immediate threat of death or serious bodily injury." *Billingsley v. City of Omaha*, 277 F.3d 990, 993 (8th Cir. 2002)

(citing *Garner*, 471 U.S. at 9). Where, by contrast, "a person poses no immediate threat to the officer and no threat to others, deadly force is not justified." *Partridge v. City of Benton, Arkansas*, 929 F.3d 562, 565 (8th Cir. 2019) (internal quotation marks and citations omitted).

"[F]or a right to have been clearly established at the time of the alleged violation, there must have existed circuit precedent that involves sufficiently similar facts to squarely govern [the officer's] conduct in the specific circumstances at issue, or, in the absence of binding precedent, a robust consensus of cases of persuasive authority constituting settled law." *Perry v. Adams*, 993 F.3d 584, 587 (8th Cir. 2021) (internal quotation marks, citation, and alterations omitted). However, a plaintiff seeking to overcome a qualified immunity defense "does not have to point to a nearly identical case on the facts for the right to be clearly established." *Banks v. Hawkins*, 999 F.3d 521, 528 (8th Cir. 2021) (quoting *Capps v. Olson*, 780 F.3d 879, 886 (8th Cir. 2015)). Instead, the plaintiff must show simply that "the state of the law at the time gave the [officer] fair warning [his] conduct was unlawful." *Sisney v. Reisch*, 674 F.3d 839, 845 (8th Cir. 2012) (internal quotation marks and citation omitted).

The Complaint alleges, and the district court assumed a reasonable jury could find, that Officer Walsh had sufficient time to reassess any threat posed by Travis and stop shooting after Travis fell down and dropped his knife. After this point, the district court explained, "the allegations in the Complaint—taken as true and in the light most favorable to Ms. Ching—plausibly establish that a reasonable officer would not have had cause to believe that [Travis] posed an immediate threat to his safety." JA75–76; R. Doc. 43, at 9–10. Viewing the facts in this light, as this Court must, Officer Walsh used excessive force by continuing to shoot Travis after he lay disarmed on the ground. And Travis's right to be free from such force was clearly established as of November 2018. *See infra* Section II.A.

Officer Walsh offers two responses. First, he argues that he did not have enough time to reassess the threat that Travis posed after he fell and dropped the knife. *See* Appellant's Br. 28 ("Walsh's shots were fired in such close proximity in time that he would have lacked time to re-evaluate the situation and conclude that deadly force was no longer justified."); *supra* p. 17. Second, he argues that even if he did have enough time, "a reasonable officer could have believed that [Travis]

continued to be a threat after dropping the knife." Appellant's Br. 28. These responses create factual disputes that this Court lacks jurisdiction to review. *See supra* pp. 14–20. Rather than engage with them on the merits, the Court must assume that Officer Walsh shot Travis after it was clear that Travis no longer presented a threat, and it should hold that it was clearly unreasonable to shoot Travis under those circumstances. Even if this Court disagrees that it lacks jurisdiction to address the factual disputes raised by Officer Walsh's responses, however, it should reject Officer Walsh's arguments for the reasons below.

A. The Complaint Plausibly Alleges That Officer Walsh Had Sufficient Opportunity to Reassess Any Threat That Travis Posed, and His Continued Shooting Violated Clearly Established Law

The Complaint alleges, and the video footage shows, that Officer Walsh had sufficient time to adjust his aim downward and continue shooting after Travis lay disarmed on the ground. JA6; R. Doc. 4, at 6; JA12; R. Doc. 7, at 8:48; JA13; R. Doc. 8, at 8:49. As the district court explained, a jury could find from these facts that Officer Walsh "had time to reassess the threat posed by [Travis] and stop shooting." JA77; R. Doc. 43, at 11. This conclusion is consistent with this Court's

precedents; indeed, the Court has made clear that an officer is "'not permitted to ignore changing circumstances'" and has recognized that a continued use of force can be unreasonable even where it follows "nearly instantaneously" from an initial, justified use of force. *Masters v. City of Independence*, 998 F.3d 827, 836 (8th Cir. 2021) (quoting *Neal v. Ficcadenti*, 895 F.3d 576, 581 (8th Cir. 2018)).

This Court held in *Cole ex rel. Estate of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020), that it was clearly established, prior to November 2018, "that mere seconds after an immediate threat has passed is sufficient time for an officer to conclude the immediate threat has passed, extinguishing any prior justification for the use of deadly force," *id.* at 1135. *Cole* relied on several pre-2018 cases for that proposition, including *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995), which also involved an emotionally disturbed suspect who was shot while holding a knife. *Ludwig* reversed a grant of qualified immunity even though the suspect had threatened officers just seconds before. *See id.* at 474. And as the district court in this case explained, *see* JA86;

R. Doc. 43, at 20, *Ludwig* would have put Officer Walsh on notice that it was unlawful to continue shooting Travis after any threat had ended.[5]

Officer Walsh acknowledges the above statement from *Cole*, but he argues that "the time period in question, after [Travis] dropped the knife, is not even as long as 'mere seconds' after [Travis] no longer posed an immediate threat because it is not even *two* seconds." Appellant's Br. 29. This reflects an overly literal reading of this Court's cases. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (explaining that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute," but must instead be "read in context"). The point of *Cole* is that officers are expected to continually reassess the threat that an individual poses and

[5] Officer Walsh argues that *Ludwig* is distinguishable because the suspect there "was shot while fleeing, he never approached officers with the knife, and he was 150 feet away from all bystanders and posed no immediate threat to anyone when he was shot." Appellant's Br. 39. But the decedent in *Ludwig* had been surrounded by officers and had "switched the knife from hand to hand" in a threatening manner moments before being shot. 54 F.3d at 468; *see id.* (noting that an officer "later stated that it looked as if Ludwig might throw the knife").

make rapid determinations when an immediate threat has passed.[6] *See McCoy v. Meyers*, 887 F.3d 1034, 1050 n.19 (10th Cir. 2018) ("[T]he relevant inquiry is not how much time elapsed but whether that amount of time provided a meaningful opportunity for a reasonable officer to recognize and react to changed circumstances."). When they are able to make such determinations—as Officer Walsh was here—it is unreasonable for them to continue using deadly force.[7]

This Court confronted a nearly identical situation in *Roberts v. City of Omaha*, 723 F.3d 966 (8th Cir. 2013), discussed briefly above, *see supra* pp. 18–19. There, several police officers responded to a call that

---

[6] Officer Walsh argues that "*Cole* is far too factually dissimilar to the facts here, and therefore it does not establish a clearly established right here." Appellant's Br. 38. But the relevance of *Cole* is not the rights it established—which, in 2020, would have come too late to put Officer Walsh on notice anyway. It is the rights it recognized as having been clearly established, by cases like *Ludwig*, before November 2018. *See Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012) (relying on post-incident case to show that law was clearly established prior to incident).

[7] Officer Walsh's continued use of force is all the more unreasonable given that Travis *never* posed an immediate threat sufficient to justify the use of deadly force. As the district court held, and as explained in Section III, even Officer Walsh's initial shots were unreasonable. It follows that Officer Walsh's shots continued to be unreasonable—and indeed became more unreasonable—as the threat posed by Travis dissipated.

the plaintiff, Roberts, "was having a psychotic episode and had attacked a member of [his] family with a knife or screwdriver and then retreated to the basement." *Id.* at 969 (internal quotation marks omitted). When the officers arrived, they entered the basement and attempted to secure Roberts. *See id.* at 970. The officers testified that Roberts then grabbed a knife and swung it at one officer, Ricker, who had been holding his arm. *See id.* Another officer, Martinec, then "pulled his weapon and fired six rounds, hitting Roberts in multiple places." *Id.*

Roberts survived and filed suit, alleging among other claims that Officer Martinec had used excessive force against him. The district court denied qualified immunity to Officer Martinec after finding "some evidence suggesting that Officer Martinec continued to fire shots at Roberts after he was subdued and no longer posed a threat." *Id.* at 974 (quoting *Roberts v. City of Omaha*, No. 8:11CV129, 2012 WL 4831545, at *7 (D. Neb. Oct. 10, 2012)) (alteration omitted). This Court affirmed, reasoning that "[t]he district court found a genuine dispute of material fact regarding whether Roberts posed an objectively reasonable threat of violence during the entire encounter," and holding—as noted above—that it was "bound by the district court's evidence-supported factual

findings for purposes of Officer Martinec's appeal." *Id.*; *see supra* pp. 18–19.

Roberts governs this case. There, as here, an officer fired multiple shots at an individual with a knife who was experiencing a mental health crisis. And there, as here, the district court determined that a reasonable jury could find at least some of those shots were unjustified because the individual no longer posed an immediate threat to the officer or others. Officer Walsh argues that *Roberts* is distinguishable because there was evidence in that case of a pause in the shots fired by Officer Martinec, and this Court found the pause relevant when denying Officer Martinec qualified immunity. *See* Appellant's Br. 29–30. But the pause in *Roberts* was relevant only insofar as it indicated that Officer Martinec had an opportunity to reassess the threat posed by Roberts. Here, the evidence that Officer Walsh had such an opportunity is the fact that when Travis fell and dropped his knife, "Officer Walsh had sufficient time and situational awareness to adjust his aim downward." JA77; R. Doc. 43, at 11. Just as in *Roberts*, there is "some evidence," 723 F.3d at 974, that Officer Walsh continued to shoot

after Travis was no longer an immediate threat. Whether he paused is immaterial.

Myriad cases establish that uses of force can go from reasonable to unreasonable in an instant. In *Masters v. City of Independence*, 998 F.3d 827 (8th Cir. 2021), this Court held that a police officer used excessive force during a traffic stop by continuing to tase a suspect after the suspect had stopped resisting arrest. Although the officer argued that the case was distinguishable from prior cases involving multiple Taser deployments, this Court held that "[a]n officer may not continue to tase a person who is no longer resisting, threatening, or fleeing," regardless of "whether the tasing comes in the form of multiple, separate deployments or, as in this case, a single, continuous deployment." *Id.* at 837. Likewise, in *Jackson v. Stair*, 944 F.3d 704 (8th Cir. 2019), this Court held that an officer was not entitled to qualified immunity with respect to the second of three tasings, where the suspect had fallen down after the first tasing and "did not appear to pose a threat to law enforcement, resist arrest, or flee," *id.* at 711. This was so even though, as this Court later described, the second tasing

"nearly instantaneously followed the initial discharge." *Masters*, 998 F.3d at 836.

Masters and *Jackson* teach that the use of force can become unreasonable as soon as a person ceases to pose a threat. Both cases also held that the rights at issue were clearly established before November 2018. *See Masters*, 998 F.3d at 837; *Jackson*, 944 F.3d at 713. They relied, for example, on *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009), *Shannon v. Koehler*, 616 F.3d 855 (8th Cir. 2010), and *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012)—as well as "general constitutional principles against excessive force," *Jackson*, 944 F.3d at 713 (quoting *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012))—to hold that defendants in analogous circumstances to Officer Walsh had been on notice before November 2018 that it was unreasonable to continue using force on a "non-threatening, non-fleeing, non-resisting" suspect, *id.* And this rule applies regardless of whether an officer pauses.

Cases from other circuits reach the same conclusion. In *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005), for example, the Fourth Circuit considered an excessive force claim filed by the estate of

a fleeing motorist who was shot eight times by three police officers over a period of six seconds. The court held that while the officers' initial shots were reasonable given the danger posed by the approaching vehicle, "once [the motorist's] vehicle passed the officers, the threat to their safety was eliminated and thus could not justify the subsequent shots." *Id.* at 482. There is no indication in the opinion of any pause in the officers' shots; instead, the passage of the motorist's vehicle provided the relevant evidence that the officers had an opportunity to perceive that the threat had dissipated.

Likewise, in *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013), the Tenth Circuit considered an excessive force claim filed by the estate of an individual who attempted to drive away in a police car and was shot seven times by an officer who was standing outside the vehicle. The district court held that the officer was entitled to qualified immunity only with respect to the first shot because there was evidence that the officer was able "to assess the situation, and to know that [the plaintiff's decedent] had slumped and may not have presented a continuing danger to himself or to the public." *Id.* at 1200 (quoting *Fancher v. Barrientos*, No. CIV. 11-118 LH/LAM, 2012 WL 12838429, at

*9 (D.N.M. June 13, 2012)). The officer filed an interlocutory appeal with respect to the second set of shots, and the Tenth Circuit affirmed, noting that it had "no trouble concluding a reasonable officer in [the officer's] position would have known that firing shots two through seven was unlawful." *Id.* at 1201.[8] Again, there is no indication that seconds passed between the first and subsequent shots; to the contrary, a witness to the shooting testified that he heard a pause between the first five shots and the final two shots, thereby suggesting that there had been no pause earlier in the shooting. *See id.* at 1197.[9]

Officer Walsh responds with a handful of cases, none of which is from the Eighth Circuit, most of which are unpublished, and all of

---

[8] *Fancher* is relevant for the additional reason that the officer there, like Officer Walsh, argued in his interlocutory appeal that the district court erred by analyzing the first shot separately from the subsequent shots. 723 F.3d at 1199. The Tenth Circuit correctly recognized the officer's argument as a factual dispute that it lacked jurisdiction to consider. *See id.* at 1199–1200. Instead, for purposes of deciding the officer's appeal, the Tenth Circuit took as given "the factual scenario upon which the district court based its rejection of [his] claim to qualified immunity." *Id.* at 1201.

[9] Other cases have likewise held that shots can quickly go from reasonable to unreasonable. *See, e.g.*, *Est. of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1176–77 (10th Cir. 2020); *Hunter v. Leeds*, 941 F.3d 1265, 1280 (11th Cir. 2019); *Harris v. Pittman*, 927 F.3d 266, 279 (4th Cir. 2019); *Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011).

which are distinguishable. *See* Appellant's Br. 30–33. In *Nelson v. City of Battle Creek*, 802 F. App'x 983 (6th Cir. 2020), for example, the defendant officer shot a minor "*as he saw* [*him*] grip and raise his gun," *id.* at 988 (emphasis added). Although the bullet struck the minor after he dropped the gun, the officer "claim[ed] he decided to shoot when he saw [the minor] grab and raise the gun," and the minor "fail[ed] to dispute this fact." *Id.* Here, by contrast, Travis was holding a knife, not a gun, and the Complaint alleges that Officer Walsh continued shooting after Travis fell to the ground and dropped the knife.

Berube v. Conley, 506 F.3d 79 (1st Cir. 2007), is also inapposite. Officer Walsh quotes language from the opinion that the defendant officer "continued to fire as [the plaintiff] fell to or lay on the ground." Appellant's Br. 30 (quoting *Berube*, 506 F.3d at 85). But the undisputed facts were that the plaintiff "fell to his knees and tried to get back up," and that the officer "fired until the threat ceased." *Berube*, 506 F.3d at 83. It was also undisputed that the plaintiff, who was much larger than the officer, was charging the officer with a hammer before she shot him. *See id.* at 85. In this case, Travis was moving slowly with his arms at

his side, there is no evidence he was larger than either officer, and he never tried to get back up after he fell.

Butler v. City of Tulsa, 211 F. App'x 667 (10th Cir. 2006), is distinguishable for similar reasons: the plaintiff there, unlike Travis, was running toward the officer who shot him, *id.* at 668. So too with *Rush v. City of Lansing*, 644 F. App'x 415 (6th Cir. 2016): the plaintiff's decedent was "about a foot out of arm's reach" from the officer who shot her; she had just slashed at the officer; and moments prior she had appeared to be subdued and disarmed but had unexpectedly produced a knife from inside her coat, *see id.* at 423. Travis was much farther away when he fell down; he had attacked no one; and he had done nothing while on the ground to make Officer Walsh "justified in remaining apprehensive of further deception and threat." *Id.*[10]

Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005), is even further afield. The plaintiffs' decedent there stabbed a police officer and

[10] *Johnson v. Latzy*, No. 1:12-CV-805, 2015 WL 470756 (S.D. Ohio Feb. 4, 2015), is likewise distinguishable. The plaintiff's decedent in that case moved toward the officer with a knife, and the officer "had nowhere to easily retreat to as he was caged in by the position of his vehicle." *Id.* at *3. Travis was no longer moving after he fell to the ground, and there is no evidence that Officer Walsh was unable to retreat.

was wrestling with another individual for control of the knife when a second police officer—"[b]elieving that [the decedent] was continuing his attack on" the first officer, *id.* at 314—shot him. Although the plaintiffs argued that their decedent had lost control of the knife just before being shot, the Sixth Circuit held that "a reasonable officer could have fired the shot while acting on the perception that [he] still had the knife." *Id.* at 315. These facts bear no relation to this case, as Travis was clearly disarmed and no longer posed a threat after he fell to the ground.[11]

These cases do nothing to cast doubt on the principles articulated by this Court, and that other circuits have reiterated in cases like *Waterman* and *Fancher*. Where an officer has an opportunity to reassess the threat posed by a suspect—as the Complaint alleges that Officer Walsh did here—it is unreasonable for him to continue using

[11] *Mullins v. Cyranek*, 805 F.3d 760 (6th Cir. 2015), is distinguishable on the same grounds. The officer there shot an individual who had been holding a gun just seconds before. Although the individual had thrown the gun by the time he was shot, the Sixth Circuit concluded that "a reasonable officer in the same situation could have fired with the belief that [he] still had the gun in his hand." *Id.* at 767. For that reason, *Jiminez v. United States*, No. 3:18-cv-01269-BTM-AGS, 2021 WL 4197328 (S.D. Cal. Sept. 15, 2021), is distinguishable too. The officer in that case shot an individual who was coming toward him, and the officer believed that the individual was pointing a firearm at him with his finger on the trigger. *See id.* at *1. Nothing similar occurred here.

deadly force. And the right to be free from such force was clearly established as of November 2018.

B. It Was Clearly Unreasonable to Believe That Travis Posed an Immediate Threat After He Lay Disarmed on the Ground

Officer Walsh suggests in the alternative that, even if he had enough time to reassess the threat that Travis posed once he lay disarmed on the ground, "it was reasonable for Walsh to still perceive [Travis] as a deadly threat during that brief period." Appellant's Br. 28. Officer Walsh notes that Travis "had behaved erratically, screamed and continually refused to obey Walsh and Keyes' orders to drop the knife as he advanced towards them." *Id.* And he argues that, "[w]hen [Travis] dropped the knife, it was still nearby him and afterward his arm was angled toward the knife." *Id.*

This argument can be dispensed with briefly.[12] As the district court explained, "[i]t is unclear from the BWC video exactly how close

[12] As noted above, the Court also lacks jurisdiction to review this argument. *See Graham v. St. Louis Metro. Police Dep't*, 933 F.3d 1007, 1009 (8th Cir. 2019) (dismissing officer's appeal for lack of jurisdiction where officer's "arguments all rest[ed] on his contention that the district court erred in its determination that a genuine dispute of material fact exist[ed] as to whether [the plaintiff] was incapacitated when [the officer] tased [him] a second time").

[Travis] was to Officer Walsh when he fell, but it was certainly well out of arm's reach and the knife had fallen from his hand." JA77; R. Doc. 43, at 11. Officer Walsh does not dispute this interpretation of the facts, and the BWC footage confirms it. *See* JA12; R. Doc. 7, at 8:50. Officer Walsh is instead left to argue that deadly force is justified even when an individual is wounded, disarmed, on the ground, and out of reach.

This Court's cases contradict that position. *Jackson*—discussed *supra* pp. 30–31—is particularly instructive because the plaintiff there had, just moments before, threatened an officer who was handcuffing him. *See* 944 F.3d at 711. The Court nevertheless denied qualified immunity to the officer who tased the plaintiff the moment he fell down because "he was on his back, writhing on the ground." *Id.* at 711–12; *see Masters*, 998 F.3d at 836 (noting that the second tasing in *Jackson* "nearly instantaneously followed the initial discharge" that caused the plaintiff to fall to the ground). As explained *supra* p. 31, *Jackson* relied on cases like *Brown*, *Shannon*, and *Montoya* to hold that the right at issue was clearly established well before November 2018. If the officer in *Jackson* was on notice that the plaintiff did not pose a sufficient

threat to be *tased* immediately after he fell down, then Officer Walsh was certainly on notice that Travis did not pose a sufficient threat to be *shot*, particularly given that Travis was never within reach of the officers and had not threatened either of them.

Likewise, in *Henderson v. City of Woodbury*, 909 F.3d 933 (8th Cir. 2018), this Court reversed a grant of qualified immunity to several officers who shot a suspect they believed was running toward them with a gun, *see id.* at 935–36. Although the officers argued that the suspect failed to comply with their commands to get on the ground and show his hands, this Court held that there was a genuine dispute as to the suspect's compliance, and that the facts, "considered in the light most favorable to the plaintiff, . . . support[ed] a contrary finding: that [the suspect] fully and unequivocally surrendered to police, lay still, and was shot and killed anyway." *Id.* at 939–40. On this version of the facts, the Court concluded, the officers' "action[s] would have violated [the suspect's] clearly established constitutional rights." *Id.* at 940;[13] *see*

[13] Although decided shortly after Officer Walsh shot Travis, *Henderson* held that the right at issue was clearly established before November 2018, and it relied on this Court's decision in *Nance v. Sammis*, 586 F.3d 604 (8th Cir. 2009).

Coker v. Arkansas State Police, 734 F.3d 838, 843 (8th Cir. 2013) (reversing grant of qualified immunity where jury could find that officer struck plaintiff after he "was already on the ground and allegedly complying with [the officer's] demands"); *Kelly v. Bender*, 23 F.3d 1328, 1331 (8th Cir. 1994) (affirming denial of qualified immunity where jury could find that officers tackled and struck plaintiff after he fell to ground and "put up no resistance"), *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995).

Also instructive are this Court's cases holding that officers act unreasonably when they shoot a noncompliant individual armed with a *gun*, so long as the individual "does not raise it toward another or otherwise appear 'ready to shoot' in the moment." *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020) (quoting *Nance v. Sammis*, 586 F.3d 604, 611 (8th Cir. 2009)). In *Nance*, for example, the Court held that officers acted unreasonably by shooting an individual they suspected of planning to commit a robbery, even though the individual was armed with a gun (which, unbeknownst to the officers, was a toy gun), and even though the individual did not comply with the officers' orders to drop the gun. *See Cole*, 959 F.3d at 1134 (describing

Nance). And in *Wilson v. City of Des Moines*, 293 F.3d 447 (8th Cir. 2002), the Court held that officers were not entitled to qualified immunity, even though they were chasing a suspect they believed to be armed with a gun, and even though the suspect turned toward the officers before being shot. *See Cole*, 959 F.3d at 1134 (describing *Wilson*). If it was unreasonable to shoot the suspects in these cases, it follows *a fortiori* that it was unreasonable to shoot Travis as he lay out of reach, disarmed, and wounded.

Cases from other circuits confirm the point. In *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006), one of the defendant officers shot the plaintiffs' decedent while he was out of reach and holding a knife, *see id.* at 1159. In affirming the district court's denial of qualified immunity, the Tenth Circuit explained that, "where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, . . . it was unreasonable for the officer to use deadly force against the suspect." *Id.* at 1160. Likewise, in *Zion v. County of Orange*, 874 F.3d 1072 (9th Cir. 2017), the defendant officer continued to shoot the plaintiff's decedent—who had just stabbed

another officer—after the decedent fell to the ground, *see id.* at 1075. The Ninth Circuit held that the officer was not entitled to qualified immunity, explaining that: "If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." *Id.* at 1076. The court emphasized that "[t]his is particularly true when the suspect wields a knife rather than a firearm." *Id.*; *see Amador v. Vasquez*, 961 F.3d 721, 729 (5th Cir. 2020) (denying qualified immunity where suspect "had a knife, not a gun; was several feet away from the officers . . . ; had his hands in the air in a surrender position; and stood stationary in the officers' line of sight").

The Eighth Circuit cases discussed above, the prior cases on which they relied, and out-of-circuit cases like *Walker* and *Zion* all confirm that Officer Walsh would have had "fair warning" that Travis no longer presented an immediate threat once he fell down and dropped his knife. *Sisney*, 674 F.3d at 845 (internal quotation marks and citation omitted). By continuing to shoot Travis after that point, Officer Walsh acted clearly unreasonably.

III. The District Court Correctly Held That Officer Walsh's Initial Use of Force Was Unreasonable

As explained above, Officer Walsh's continued shooting was clearly unreasonable regardless of whether his initial shots were reasonable. This Court need not assess the reasonableness of the initial shots in this interlocutory appeal, which is necessarily limited to the second set of shots. But because Officer Walsh discusses the initial shots at length in his brief, a response is warranted. With regard to the shots fired before Travis fell to the ground, the Complaint and the video evidence support a finding that Officer Walsh acted unreasonably. At the time Officer Walsh fired these shots, Travis was holding a knife, but he was not within striking distance of either officer, he was not raising the knife, no civilian bystanders were at risk, and the officers knew that Travis was suicidal. The district court was correct to hold that the Complaint plausibly alleges that Travis "did not pose an immediate and substantial threat justifying Officer Walsh's initial use of deadly force." JA80; R. Doc. 43, at 14. And the unreasonableness of the initial set of shots merely confirms the unreasonableness of Officer Walsh's continued shooting.

A. The Complaint Plausibly Alleges That Travis Never Posed an Immediate Threat

As discussed above, "'absent probable cause' for an officer to believe [a] suspect poses 'an immediate threat of death or serious bodily injury' to others, 'use of deadly force is not objectively reasonable.'" *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1132 (8th Cir. 2020) (quoting *Billingsley v. City of Omaha*, 277 F.3d 990, 993 (8th Cir. 2002)). Here, there are at least two reasons that Travis did not pose an immediate threat when Officer Walsh initially shot him. First, Travis was still a considerable distance from the officers, he was well outside of striking range, and there were no bystanders that the officers needed to protect. Second, the officers knew—from Travis's words and actions, as well as the information passed on to the officers by the 911 dispatcher—that his intent was suicidal rather than homicidal, further reducing the threat that he actually posed to the officers.

1. Travis's Actions Did Not Establish an Immediate Threat of Serious Physical Harm

At the time Officer Walsh fired his initial shots, Travis was too far from the officers to pose an immediate threat of serious physical harm, and there were no other bystanders at risk. While Travis was armed

with a knife, JA5; R. Doc. 4, at 5, and we cannot know exactly how far he was from Officer Walsh without discovery, it is clear from the BWC footage that Travis remained "well out of striking distance" at all times. JA78; R. Doc. 43, at 12; *see also Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) ("[A] person standing six feet away from an officer with a knife may present a different threat than a person six feet away with a gun."). In the district court, Officer Walsh sought to introduce a law enforcement report that estimated the distances between the officers and Travis. *See* R. Doc. 9. While the district court rightly refused to consider the report in deciding a motion for judgment on the pleadings, *see* JA73; R. Doc. 43, at 7, even Officer Walsh's report estimated the distance as roughly 12 feet. *See* R. Doc. 34, at 2 (asserting that Travis had "closed the distance between he and Officer Walsh from about 22 feet to about 12 feet" at the time the officers fired their weapons).[14] Drawing all reasonable inferences in favor of Ms.

[14] On appeal, Officer Walsh asserts that Travis was "just on the other side of a city sidewalk" when he fired the initial shots, Appellant's Br. 17; *see id.* at 11, 16, perhaps implying that he was just a few feet away. But any such implication is at odds with both the BWC footage and Officer Walsh's concession below.

Ching, there was no immediate threat of Travis using the knife to cause serious physical harm while he remained "well out of striking distance," and Officer Walsh's initial decision to deploy deadly force was unreasonable as a matter of law.[15]

This Court's opinion in *Swearingen v. Judd*, 930 F.3d 983 (8th Cir. 2019), is instructive. In *Swearingen*, an officer "was suddenly confronted, at a distance of only three feet, with a suspect who was armed with a knife after ignoring multiple commands to drop it." 930 F.3d at 988. Given this short distance, it is reasonable to conclude that the suspect in *Swearingen* posed a more immediate threat to the officers than Travis did to Officer Walsh. Yet this Court indicated that the officer's use of deadly force presented a close question on reasonableness. *See id.* ("[T]he officer's actions sit along the hazy border between excessive and acceptable force." (internal quotation marks and citation omitted)). While the district court granted qualified immunity to the officer on the basis that the force was reasonable, this

[15] Indeed, when Officer Keyes saw that Travis was armed with a knife, he told Officer Walsh "to get his mace out," suggesting that a non-lethal response would be appropriate. JA5; R. Doc. 4, at 5; R. Doc. 34, at 5 (citing JA13; R. Doc. 8, at 8:06).

Court affirmed the judgment on a separate basis, holding that the officer's use of deadly force, "even if just over the line of reasonableness," could not be said to "violate[] a clearly established right." *Id.* This analysis suggests that the much greater distance in this case should push the use of deadly force further over the line, rendering it unreasonable.

Raines v. Counseling Associates, Inc., 883 F.3d 1071 (8th Cir. 2018), *as corrected* (Mar. 6, 2018), also supports the conclusion that Officer Walsh's initial use of force was unreasonable. In *Raines*, officers confronted a man suspected in a stabbing. *Id.* at 1073. The suspect was armed with a knife and "raised the knife to just above his shoulder level, waving it back and forth." *Id.* As more officers arrived on the scene and formed a semi-circle around the suspect, he "continued waving the knife and shifting his weight from foot to foot on the sidewalk," and he ignored commands to drop the knife. *Id.* As one officer began to close in on the suspect with her Taser, three other officers fired their guns. *Id.* At summary judgment, "[t]he officers testified that they all believed [the suspect] aggressively advanced on [the officer with the Taser] just prior to the shots being fired." *Id.* at

1074. The suspect countered that "the video evidence demonstrate[d] that he was continuing to exhibit the same movements as he had done during the minute before he was shot"—waving the knife and shifting his weight from foot to foot. *Id.* The district court denied qualified immunity to the officers, and this Court dismissed the appeal for lack of jurisdiction, holding that the parties' factual disagreement constituted a "material" dispute as to whether the suspect "posed a threat of serious physical harm to an officer." *Id.* at 1075. This holding implies that a knife-wielding individual who was moving erratically, refused officer commands to drop his knife, and was suspected of stabbing another person would *not* have presented a threat of serious physical harm sufficient to justify deadly force if he had not lunged at an officer. Here, Travis was not lunging aggressively towards the officers when Officer Walsh fired the initial shots—indeed, he was not even waving the knife at the officers, and he certainly was not suspected of stabbing another person. It follows from *Raines* that Travis's actions did not constitute a threat justifying deadly force.

Moreover, as discussed above, this Court has noted on numerous occasions that even an individual armed with a gun "is not an

immediate threat unless he appears 'ready to shoot.'" *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134–35 (8th Cir. 2020); *see also Nance v. Sammis*, 586 F.3d 604, 611 (8th Cir. 2009); *Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005) (officer's use of deadly force unreasonable where, *inter alia*, individual was armed with a gun but was holding it "overhead, pointed upward"). Here, Travis's distance from the officers and the limited range of the knife suggest that he was not "ready to [strike]." Extrapolating from the gun cases, Travis did not pose an immediate threat justifying Officer Walsh's use of deadly force.

2. Officer Walsh's Knowledge That Travis Was Suicidal Further Reduced the Threat He Posed

The record at this early stage shows that Travis was acting on an intent to harm himself, not an intent to harm others, further undermining Officer Walsh's claim that Travis posed an immediate threat. According to the Complaint, the 911 dispatcher informed the officers that Travis "was stating that he wants to die and is going to commit suicide," JA4; R. Doc. 4, at 4, and the officers "were notified that this was an EDP (emotionally-disturbed person) call," *id.* As the district court noted, Travis "had not committed, nor was he suspected of committing, any crime." JA75; R. Doc. 43, at 9. Ahead of the

encounter, Travis gave no indication that he intended to harm anyone other than himself, and, when Officers Walsh and Keyes arrived, he "clearly indicated that he did not wish to speak with the officers, and that he wished for them to leave." JA5; R. Doc. 4, at 5.

The officers refused to leave Travis alone, and Officer Keyes yelled at him to come out of the house. *Id.* When Travis came out, his words and actions evinced an intent to provoke the officers to use force against *him*. He yelled "Let's do this" and "come on, just do it," and he "walked slowly toward the officers," ignoring commands to drop the knife. JA5–6; R. Doc. 4, at 5–6; JA69; R. Doc. 43, at 3. "His arms were down at his sides and he never raised the knife." JA6; R. Doc. 4, at 6. The BWC footage shows that Travis was leaning forward as if to brace himself for the officers' gunfire. *See* R. Doc. 38, at 10–11. And it shows the officers, despite the lack of an immediate threat, deploying deadly force. *See* JA12; R. Doc. 7, at 8:48; JA13; R. Doc. 8, at 8:49.

This Court has explained that "[t]he intrusiveness of a seizure by deadly force is unmatched," and that where "the person seized is not a suspect, has committed no crime when the police approach, and is provoked by police escalation of the situation, the importance of the

governmental interests alleged to justify the intrusion is necessarily diminished." *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) (internal quotation marks, footnote, and citations omitted). The fact that an individual's actions are "dangerous, threatening, or aggressive" does not necessarily mean that the individual "pose[s] a threat of serious physical harm," particularly where the individual is known to be emotionally disturbed. *See id.* at 473 (internal quotation marks, citations, and alteration omitted). And other courts have found fact issues as to the reasonableness of deadly force in similar circumstances. *See, e.g.*, *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018) (holding that the fact that the suspect "was mentally unstable, acting out, and at times invited officers to use deadly force on him" gave rise to "a genuine issue of material fact about whether the government's interest in using deadly force was diminished"); *Mercado v. City of Orlando*, 407 F.3d 1152, 1157–58 (11th Cir. 2005) (holding that it was unreasonable to use deadly force against suicidal man who was holding knife and did not obey commands to drop the knife).

At the very least, Officer Walsh's knowledge of Travis's suicidal intent, combined with the fact that Travis was not within striking

distance, should mean that "[w]hether [Officer Walsh] reasonably interpreted [Travis's actions] as a realistic threat . . . is a matter for a jury to decide." *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009).

B. Officer Walsh's Arguments to the Contrary Are Wrong

Despite the limited scope of his interlocutory appeal, Officer Walsh spends much of his brief arguing over the reasonableness of his initial shots. *See* Appellant's Br. 14–26. He takes issue with the district court's assessment of several factual questions and also argues that, on the facts assumed by the district court, prevailing caselaw established that his initial use of force was objectively reasonable. These arguments are unpersuasive.

1. The District Court Did Not Err in Crediting the Allegation That Travis Never Raised the Knife

On appeal, Officer Walsh repeatedly asserts that, contrary to the allegations in the Complaint, Travis in fact "raised the knife" as he was approaching the officers. Appellant's Br. 17, 19, 25. Officer Walsh argues that the allegations that Travis's "arms were down at his sides" and that "he never raised the knife" are "blatantly contradicted by the record." *Id.* at 19 (first quoting JA6; R. Doc. 4, at 6; then quoting *id.*;

and then quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). He insists that "the bodyworn camera recording shows that [Travis] did raise his arm and raised the knife after he came out of the house," and his brief includes a frame of the video footage that, he says, supports this claim. *Id.* at 19–20.[16] But, as the district court correctly held, the Complaint's allegations that Travis's "arms were down at his sides" and that "he never raised the knife" are "not plainly contradicted by the BWC video." JA78; R. Doc. 43, at 12. The image in Officer Walsh's brief shows Travis just as he is emerging from his home, at a considerable distance from the officers—an initial distance that Officer Walsh has conceded was more than 20 feet. *See* R. Doc. 34, at 2. And rather than raising his knife to a striking position, Travis is simply moving it backwards and away from the officers, in alignment with his arm, while taking a step forward. It may be that the video evidence is open to multiple interpretations, but certainly the interpretation offered by the Complaint is a fair one, and Officer Walsh's interpretation is not

[16] While Officer Walsh elsewhere urges that the BWC footage must be considered "in real-time speed—not in slow motion, and not frame-by-frame," Appellant's Br. 38, he calls for the opposite approach in this section of his argument.

compelled by the video footage. This is not a case in which the plaintiff's version of events is "so utterly discredited by the record" that it can be disregarded as a "visible fiction." *Scott*, 550 U.S. at 380–81.

2. The District Court Did Not Err in Concluding That Travis's Threat Was Reduced Because He Was Suicidal

On appeal, Officer Walsh says that the district court was wrong to conclude that his knowledge of Travis's suicidal intent meant that Travis "presented less of a threat." Appellant's Br. 20. He argues that "whatever [Travis's] true intentions may have been, they are irrelevant to the claims against Walsh, because objective reasonableness is judged by the on-scene perspective of a reasonable officer." *Id.* at 20–21. It is true that police officers are not expected to be mind-readers. But Officer Walsh did not need to read Travis's mind to know that Travis was suicidal—the 911 operator had already told him. *See* JA4; R. Doc. 4, at 4; *see also* Appellant's Br. 21 (noting that Officer Walsh was aware of Travis's "mental state"). The objective-reasonableness test accounts for the "facts known to the officer," *Banks v. Hawkins*, 999 F.3d 521, 525 (8th Cir. 2021) (quoting *Cole ex rel. Est. of Richards v. Hutchins*,

959 F.3d 1127, 1132 (8th Cir. 2020)), and the record here shows that the "facts known" to Officer Walsh included that Travis was suicidal.

Officer Walsh invokes this Court's statement in *Hayek v. City of St. Paul*, 488 F.3d 1049 (8th Cir. 2007), that "[e]ven if [an individual] were mentally ill, and the officers knew it, [his] mental state does not change the fact he posed a deadly threat to the officers." Appellant's Br. 21 (quoting 488 F.3d at 1055). But *Hayek* sheds little light on this case. In *Hayek*, the mentally ill individual—who was alleged to be mentally disabled, not suicidal—clearly did pose a deadly threat, as he already had stabbed one of the officers on the scene with a samurai sword and was trying to stab him again when the individual was shot. 488 F.3d at 1055. The argument that the Court rejected was an argument that mental disability somehow "precluded the use of deadly force" even where the existence of a deadly threat was established. *Id.* The Court had no occasion to address, and did not address, whether a known suicidal intent could inform the determination of whether an individual is a "deadly threat to the officers" in the first place.

Officer Walsh also compares this case to *Frederick v. Motsinger*, 873 F.3d 641 (8th Cir. 2017); *see* Appellant's Br. 21–22, but that case is

inapposite for much the same reason as *Hayek*. There, the possibility that Frederick was "impaired by methamphetamine or some other stimulant" may have helped to explain her erratic and threatening behavior, but it did not provide a reason to doubt the real threat she posed to the officers and bystanders around her while she was "holding a knife in a stabbing position." 873 F.3d at 645, 647. If anything, it heightened the risk that she would behave erratically and inflict serious harm on others.[17]

3. The Remaining Cases Cited by Officer Walsh Do Not Demonstrate That the Initial Shots Were Reasonable

Looking to the initial shots, Officer Walsh argues that "[c]ourts have concluded that deadly force was objectively reasonable in cases with similar facts." Appellant's Br. 22. While the cases he proceeds to discuss may have some "similar facts," they also differ in material ways from the present case, and they do not suggest that Officer Walsh's initial shots were reasonable.

[17] Moreover, the language that Officer Walsh quotes is drawn from *Frederick*'s discussion of the officers' use of *non-lethal force*—tasing—not the deadly force at issue here. *See* Appellant's Br. 21–22 (quoting 873 F.3d at 647).

First, Officer Walsh argues that *Estate of Morgan v. Cook*, 686 F.3d 494 (8th Cir. 2012), compels the conclusion that his initial shots were "lawful and did not violate [Travis's] rights." Appellant's Br. 23. In that case, this Court affirmed a grant of qualified immunity to an officer who shot a man armed with a knife, determining that the officer reasonably believed the man "posed a threat of imminent, substantial bodily injury." *Estate of Morgan*, 686 F.3d at 497. Although *Estate of Morgan* is similar to the present case in some respects, there are also material differences: for one, Morgan "appeared to be trying to conceal" the knife from the officer, *id.* at 497, while Travis was clearly displaying the knife and openly expressing his intention to provoke the officers to use force against him. Furthermore, while the summary judgment evidence showed that Morgan was only "six to twelve feet" from the officer when shots were fired, *id.* at 498, Officer Walsh himself estimated that Travis was approximately 12 feet from him when he shot, and the exact distance—which is not contained in the record for judgment on the pleadings—may well have been more than 12 feet. *See* R. Doc. 34, at 2. While *Estate of Morgan* might be Officer Walsh's

strongest case, it does not compel the conclusion that Officer Walsh's initial use of force was reasonable.

Next, Officer Walsh draws a comparison to *Hassan v. City of Minneapolis*, 489 F.3d 914 (8th Cir. 2007). In *Hassan*, as in *Estate of Morgan*, the Eighth Circuit held that officers were entitled to qualified immunity for shooting a man armed with a bladed weapon. 489 F.3d at 919–20. But the threat of serious harm in *Hassan* was greater than the threat in the present case for a number of reasons: the armed individual was carrying a machete (rather than a kitchen-type knife); he was actively swinging the weapon, repeatedly striking a squad car and making slashing motions; he was also brandishing a tire iron; he continued "approaching officers in a threatening manner" despite five rounds of tasing; and other civilian bystanders were in the vicinity and at risk. *Id.* at 918–19. Officer Walsh's assertion that "[t]he situation with [Travis] was just as dangerous," Appellant's Br. 23, is unsupported by the record.

Officer Walsh then turns to a handful of published and unpublished cases from other circuits to support the reasonableness of his initial shots. *See* Appellant's Br. 23–25. All of these cases are

distinguishable. To note just one basis for distinction, almost all of the cases involve a distance between the armed individual and the officer that was less than the distance in this case (which, while not yet established, was conceded to be approximately 12 feet, and may have been more). *See, e.g.*, *Rucinski v. County of Oakland*, 655 F. App'x 338, 341 (6th Cir. 2016) ("approached to within five feet of [the officer] while brandishing [a] knife in his outstretched hand"); *Chappell v. City of Cleveland*, 585 F.3d 901, 911 (6th Cir. 2009) ("closed to within five to seven feet in a dark, cluttered, enclosed space," with "knife held high" and officers "backed up against a wall"); *Rhodes v. McDannel*, 945 F.2d 117, 119 (6th Cir. 1991) (per curiam) ("got within four to six feet of the officers" wielding a "machete that had a 24-inch blade"); *Shepherd ex rel. Est. of Shepherd v. City of Shreveport*, 920 F.3d 278, 283 (5th Cir. 2019) ("distance at the time of the shooting was approximately ten feet"); *see also Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996) ("intoxicated individual pointing a gun at [officers] from only a few feet away with his finger on the trigger"). And the remaining case also involves a meaningfully different threat calculus, as the armed individual was not just threatening the officer, but had actually

attacked him. *See Est. of Logan v. City of S. Bend*, 50 F.4th 614, 615 (7th Cir. 2022).

In short, none of the cases cited by Officer Walsh supports his argument that Travis posed a threat justifying deadly force at the moment he was first shot.

* * *

To be clear, this Court need not assess the reasonableness of Officer Walsh's initial shots. Indeed, as explained in Section I, the only issue for the Court to resolve at this stage is whether it was clearly unreasonable for Officer Walsh to continue shooting Travis after he realized that Travis lay disarmed on the ground. For the reasons discussed in Section II, Officer Walsh's continued shooting was clearly unreasonable regardless of whether his initial shots were justified. That the initial shots were *unjustified* merely underscores how clearly unreasonable the continued shooting became.

CONCLUSION

The district court properly denied qualified immunity with respect to Officer Walsh's continued shooting. Its order should be affirmed.

Respectfully submitted,

s/Ben Gifford
Ben Gifford
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
PO Box 211178
Brooklyn, NY 11221
(202) 662-9835
bg720@georgetown.edu

Elise M. Baranouski
Eloy Rodriguez La Brada
Mary B. McCord
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
(202) 661-6728
eb1326@georgetown.edu
er804@georgetown.edu
mbm7@georgetown.edu

Paul J. Bosman
COMMUNITIES UNITED AGAINST POLICE BRUTALITY
2136 Ford Parkway
Suite 5328
Saint Paul, MN 55116
(651) 485-7046
paul.bosman@gmail.com

Attorneys for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,883 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word and Century Schoolbook, 14-point point.

I further certify that the electronic version of this brief provided to the Court and parties has been scanned with Microsoft Defender and is virus-free.

s/Ben Gifford
Ben Gifford

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2023, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/Ben Gifford
Ben Gifford