UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

ROXANNE TORRES, *Plaintiff*, v. JANICE MADRID and RICHARD WILLIAMSON, *Defendants*.	No. 16-CV-1163 (LF) (KK)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND RENEWED MOTION FOR SUMMARY JUDGMENT

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Oral Argument Requested

INTRODUCTION

Early on July 15, 2014, four police officers, including Defendants Williamson and Madrid, arrived at an apartment complex, dressed in nearly all black and driving unmarked cars, to effectuate an arrest warrant. They saw Plaintiff Roxanne Torres sitting in her parked car. Despite having determined that Ms. Torres was not their suspect, Defendants rushed up to her car, failed to identify themselves as police, shouted at her, and drew their guns. Ms. Torres became aware of Defendants only when she heard them trying to open her locked car door. Looking up, she saw two individuals dressed in black standing beside her car with guns drawn; when she put the car in drive, they pointed their guns at her face. Believing they were carjackers, Ms. Torres drove away to save herself. Defendants shot 15 times into the side and back of the car as Ms. Torres drove off, hitting her twice in the back. Ms. Torres later pleaded no contest to aggravated fleeing a law enforcement officer and assault upon a peace officer.

The Tenth Circuit remanded a narrow issue to this Court: whether there is a triable issue of fact as to whether "Defendants used excessive force when shooting" Ms. Torres "through the rear window of her vehicle," and if so, whether "the unreasonableness of force" was "clearly established at the time Ms. Torres was shot," precluding qualified immunity on summary judgment. *Torres v. Madrid*, 60 F.4th 596, 603-04 (10th Cir. 2023). The answer to both questions is yes. A reasonable jury could readily conclude that Defendants shot Ms. Torres twice in the back after she had driven past them and posed no threat to them or anyone else. And it has been clearly established in the Tenth Circuit since 2009 that officers use excessive force when they shoot a fleeing suspect after the risk of harm to the officers or others has passed.

RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS (DSUF)

DSUF 7-8, 13, 18-19, 31, 33: Not materially disputed.

DSUF 1: Disputed and immaterial. Ms. Torres was not on any drugs at the time of the

incident and had not used methamphetamine for several days. Pl. Ex. A, 73:3-6, 102:16-103:22.

DSUF 2: Disputed. Ms. Torres gave a detailed account of the events of July 15, 2014. Pl. Ex. A, 65:9-66:2, 66:16-67:21, 70:4-71:21, 83:3-18, 86:4-87:22, 90:8-24. She testified that her recollection was "vague[]" only as to the time of day of the shooting. Defs.' Ex. A, 52:7-10.

DSUF 3-4: Undisputed but immaterial. Defendants did not have a warrant for Ms. Torres, Pl. Ex. E, 34:23-25, or know who she was, Pl. Ex. B, 20:25-21:7.

DSUF 5-6: Undisputed but immaterial, except disputed insofar as the shooting took place at an apartment complex that is not known as "housing projects." Pl. Ex. E, 18:12-17, 19:2-5.

DSUF 9-10: Undisputed, except that that Defendants knew Ms. Jackson was a resident of the apartment complex, Pl. Ex. K, at 2; Ms. Jackson was being investigated for forged checks, Pl. Ex. I, at 1; Madrid agreed forgery is not a crime of violence and she had no knowledge that Ms. Jackson had engaged in any violence, Pl. Ex. C, 22:6-14, 31:12-18, 32:1-5; and Sgt. Smith testified forgery is a "financial or white collar crime," Pl. Ex. D, 7:4-12, 54:4-7.

DSUF 11: Undisputed, except that Madrid gave a statement that she never saw anyone other than Ms. Torres standing by the car, ECF No. 58, Ex. H; *see also* Pl. Ex. C, 38:22-39:11, and Williamson testified that the individuals were "at the side of the [car] at the driver's side in front of" the apartment building, not directly in front of Ms. Jackson's door, Pl. Ex. 30:1-2.

DSUF 12: Disputed. Williamson testified that he knew before attempting to contact the driver of the car that she "certainly wasn't Ms. Jackson," and he had no reason to believe the driver had committed any crime. Pl. Ex. B, 31:19-32:17, 42:8-22, 67:22-25. Williamson testified that Defendants approached Ms. Torres because she "got in the vehicle and started" it and he could not see what she did with her hands, Pl. Ex. B, 33:1-34:8, not to ascertain her identity or Ms. Jackson's whereabouts. Ms. Torres is a fair-skinned Navajo woman. Pl. Ex. A, 33:21; Pl. Ex. E, 28:4-15; Pl. Ex. J. Ms. Jackson is African-American. Pl. Ex. E, 28:4; Pl. Ex. B, Ex. 14.

Madrid knew Ms. Jackson was African-American and had seen photos of her. Pl. Ex. C, 23:7-13. It was apparent the driver of the car was not African-American and thus was not Ms. Jackson. Pl. Ex. B, 31:19-32:5, 42:8-22. A reasonable officer would not mistake Ms. Torres for Ms. Jackson. Pl. Ex. E, 28:13-18.

DSUF 14-15: Disputed. Defendants were dressed mostly in black. Pl. Ex. B, Exs. 5, 9; Pl. Ex. C, 26:23-25. It was dark outside. Pl. Ex. A, 62:21; Pl. Ex. D, 11:12-13. Defendants were driving unmarked cars without external police insignias or emergency lights. Pl. Ex. B, 25:23-26:16; Pl. Ex. D, 8:3-18, 9:17-21. Defendants never orally identified themselves as police, in contravention of their training. Pl. Ex. B, 34:15-18, 40:4-9; Pl. Ex. C, 42:12-25, 43:22-44:2. A reasonable person would not have recognized Defendants as police. Pl. Ex. E, 22:2-5, 14-16.

DSUF 16: Madrid knew Ms. Jackson was African-American and had seen photos of her. Pl. Ex. C, 23:3-14. It was apparent that the driver of the car was not African-American and thus was not Ms. Jackson. Pl. Ex. B, 31:19-32:17, 42:8-22. A reasonable officer would not mistake Ms. Torres for Ms. Jackson. Pl. Ex. E, 28:13-18. Ms. Torres spent the roughly 10 minutes before the shooting cleaning her car, looking for a change of clothing, and locating her cigarette lighter, not making aggressive movements. Pl. Ex. A, 63:4-65:15.

DSUF 17: Disputed. Ms. Torres spent the roughly 10 minutes before the shooting cleaning her car, looking for a change of clothing, and locating her cigarette lighter, not making furtive movements. Pl. Ex. A, 63:4-65:15. Williamson had no basis for believing Ms. Torres had a weapon and did not form the belief that she had a weapon. Pl. Ex. B, 70:12-23.

DSUF 20: Disputed. Defendants were at all times beside or behind Ms. Torres's car. Pl. Ex. A, Ex. 1; Pl. Ex. B, Ex. 1; Pl. Ex. D, 21:19-22:17.

DSUF 21: Disputed. Williamson testified that the car would not have hit Madrid even if she had not stepped aside because "[t]he vehicle turned to the right" instead of driving at her. Pl.

Ex. B, 37:22-38:4; Pl. Ex. E, 34:10-15. Madrid stated that she moved aside as Ms. Torres pulled forward. Pl. Ex. C, 45:21-46:1, 50:3-6, 76:20-23.

DSUF 22-23: Disputed. Bullet trajectory analysis shows 15 bullets were fired into the side and back of the car. Pl. Ex. B, 66:18-22; Pl. Ex. M. Madrid shot at Ms. Torres seven times. Pl. Ex. B, 47:13-18. Ms. Torres was shot twice in her back. Pl. Ex. F, at 2; Pl. Ex. G; Pl. Ex. H. Sgt. Smith testified Defendants fired "some" shots "after the vehicle had passed Madrid and Williamson" and neither was "in danger of being hit." Pl. Ex. D, 30:23-31:4. Plaintiff's responses to DSUF 21 are incorporated herein by reference as if set forth in full.

DSUF 24: Disputed. Defendants testified that Ms. Torres was moving her hands before they approached, not when Williamson fired. Pl. Ex. B, 33:7-9. When Ms. Torres saw Defendants' guns she "put [her] hands up" and then drove. Pl. Ex. A, 83:13-14. Williamson had no basis for believing Ms. Torres had a weapon and did not form the belief that she had a weapon. Pl. Ex. B, 70:12-23. Madrid never saw Ms. Torres wield a weapon. Pl. Ex. C, 48:2-10.

DSUF 25: Disputed. Ms. Torres drove directly out of her parking space and out of the lot. Pl. Ex. A, 90:8-91:3. Williamson believed Ms. Torres was looking to escape. Pl. Ex. B, 44:22-23. All fifteen bullets were fired at the side and back of the car. Pl. Ex. B, 66:18-22; Pl. Ex. M. Williamson shot at Ms. Torres eight times. Pl. Ex. B, 47:13-18. Ms. Torres was shot twice in her back. Pl. Ex. F, at 2; Pl. Ex. G; Pl. Ex. H. Sgt. Smith testified that Defendants fired "some" shots "after the vehicle had passed Madrid and Williamson" and neither was "in danger of being hit." Pl. Ex. D, 30:23-31:4. Madrid testified that Williamson "fired into the back of the vehicle," after it passed her and she was out of danger. Pl. Ex. C, 64:7-20, 65:1-3. Williamson admitted that he fired at the back of the car, trying to shoot Ms. Torres as she "continued to drive away," and that he kept shooting until Ms. Torres had left the "vicinity." Pl. Ex. B, 45:2-7, 45:21-46:4.

DSUF 26: Disputed. Madrid agreed that "after [she] moved out of the way," "there

wasn't any danger" to her. Pl. Ex. C, 50:12-15. Plaintiff's responses to DSUF 25 are incorporated herein by reference as if set forth in full.

DSUF 27: Disputed. Plaintiff's responses to DSUF 25 and 26 are incorporated herein by reference as if set forth in full.

DSUF 28: Undisputed but immaterial.

DSUF 29: Disputed. Several minutes elapsed between the officers' arrival and the conclusion of shooting. Pl. Ex. B, 30:3-12; Pl. Ex. C, 39:14-17. There was sufficient time for a reasonably trained officer to make appropriate force decisions. Pl. Ex. E, 30:5-7.

DSUF 30: Undisputed, except that Ms. Torres believed the carjackers were following her, Pl. Ex. A, 98:11-13; she could not see through the windshield because bullets shattered it, Pl. Ex. A, 90:13-19; her left arm was paralyzed, making driving difficult, Pl. Ex. A, 90:19-24; she lay on the ground and asked a bystander to call the police, Pl. Ex. A, 98:13-20; and she became lightheaded and confused after being shot, Pl. Ex. A, 105:15-24.

DSUF 32: Disputed and immaterial. Ms. Torres knew as she was driving away that she had been shot, her arm was paralyzed, and she was covered in blood. Pl. Ex. A, 90:19-24, 101:24. Ms. Torres testified that she did not notice she had been shot in her back *as well as her arm* until she arrived in Grants. Defs.' Ex. A, 108:1-8.

DSUF 34-36: Undisputed except that Ms. Torres did not plead to the allegations in the complaint, Defs.' Ex. G; Ms. Torres entered a plea of no contest to aggravated fleeing a law enforcement officer, assault upon a peace officer, and unlawful taking of a vehicle, *id.*; and the charge of aggravated assault on a peace officer was dismissed, *id.*

PLAINTIFF'S ADDITIONAL STATEMENT OF FACTS

(A) Madrid was reprimanded at work for untruthfulness. Pl. Ex. C, 13:6-14:11; Pl. Ex. L.

(B) Ms. Torres had no relationship to Ms. Jackson. Pl. Ex. A, 113:17-22. (C) Defendants

had no reason to and did not suspect Ms. Torres of any crime. Pl. Ex. B, 31:19-32:17, 42:8-22, 67:22-25. (D) Defendants had no lawful reason to detain Ms. Torres. Pl. Ex. E, 33:12-14.

(E) Nonetheless, Defendants tried to detain Ms. Torres. Pl. Ex. E, 33:18-23. (F) Defendants shouted commands at Ms. Torres, who could not hear them because she was in her car with the windows up and it was raining, Pl. Ex. A, 67:13-14, 79:16-21; Pl. Ex. D, 28:18-21. (G) Defendants attempted to open Ms. Torres's car door. Pl. Ex. A, 65:15-67:12; Pl. Ex. B, 34:4-14. (H) Ms. Torres became aware of Defendants when she heard them trying her door handle. Pl. Ex. A, 65:9-25, 67:1-21, 83:3-18, 86:4-15. (I) She looked up, startled, and saw two people in black with guns drawn. Pl. Ex. A, 65:9-25, 67:1-21, 83:3-18, 86:1-15. (J) She could not read the markings on their clothing because it was dark out. Pl. Ex. A, 70:4-24, 78:20-79:4; Pl. Ex. B, 68:6-11; Pl. Ex. C, 47:6-8. (K) She believed she was being carjacked. Pl. Ex. A, 70:6-9. (L) Based on Defendants' attire and actions, a reasonable person in Ms. Torres's position would have believed she was about to be the victim of a violent crime. Pl. Ex. E, 40:3-24.

(M) Ms. Torres put the car in drive, and Defendants pointed their guns at her face. Pl. Ex. A, 65:19-23, 67:15-18, 83:8-18, 86:1-5. (N) Ms. Torres began driving away to save herself. Pl. Ex. A, 71:2-11, 17-21, 86:18. (O) Ms. Torres's car did not touch Defendants. Pl. Ex. B, 44:14-16; Pl. Ex. C, 45:16-46:1, 68:15-16. (P) Defendants fired repeatedly as Ms. Torres drove away. Pl. Ex. B, 45:6-7, 68:20-25; Pl. Ex. C, 50:2, 16-25; Pl. Ex. M. (Q) Defendants continued firing after Ms. Torres had driven past them and could not pose any threat to them. *See* Pl. Ex. A, 90:8-91:3 (Ms. Torres drove directly out of parking space and parking lot); Pl. Ex. B, 37:22-38:4 (car turned away from Madrid rather than driving at her), 45:2-46:4 (Williamson kept shooting at Ms. Torres as she "continued to drive away"), 66:18-22 (all bullets shot from side or back of car); Pl. Ex. C, 45:21-46:1, 50:3-6 (Madrid moved aside as car pulled forward), 50:12-15 (after Madrid "moved out of the way," "there wasn't any danger" to her), 64:7-65:3 (Williamson fired into the

back of the car after it passed Madrid and she was out of danger); Pl. Ex. D, 30:23-31:4 ("some" of Defendants' shots occurred "after the vehicle had passed Madrid and Williamson" and neither was "in danger of being hit"); Pl. Exs. G, H (gunshot wounds in Ms. Torres's back); Pl. Ex. M (bullet trajectory analysis); *see also* Pl. Ex. A, Ex. 1; Pl. Ex. B, Ex. 1; Pl. Ex. D, 21:19-22:17.

(R) Despite being shot twice in the back and partially paralyzed, Ms. Torres escaped the apartment complex. Pl. Ex. A, 90:11-91:3. (S) She drove a short distance before losing control of her car. Pl. Ex. A, 91:13-25. (T) Coming to a stop, she lay on the ground and asked a bystander to call the police for help. Pl. Ex. A, 98:13-20. (U) Receiving no favorable response, Ms. Torres took a nearby car that was running and drove to a hospital in Grants, New Mexico, where she was airlifted to a hospital in Albuquerque. Defs.' Ex. E, at 2-3.

(V) Defendants had video recording devices but did not turn them on. Pl. Ex. C, 40:2-23. (W) A reasonable person would not have known Defendants were police based on their actions and attire. Pl. Ex. E, 22:2-5, 14-16. (X) It is inappropriate for officers to recklessly put themselves in jeopardy that requires force to extricate themselves. Pl. Ex. E, 37:21-24, 56:16-21. (Y) It is inconsistent with law enforcement training to draw a gun to make contact with a person the officer does not have reason to detain. Pl. Ex. E, 43:3-14.

LEGAL STANDARD

"Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam) (quoting Fed. Rule Civ. Proc. 56(a)). "In making that determination, a court must view the evidence 'in the light most favorable to the opposing party.'" *Id.* at 657 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional

right was clearly established." *Courtney v. Oklahoma ex rel., Dep't of Pub. Safety*, 722 F.3d 1216, 1222 (10th Cir. 2013) (quoting *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013)). "But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 572 U.S. at 656.

ARGUMENT

I. Defendants Improperly Seek to Relitigate Issues Resolved by the Tenth Circuit.

The Court should reject Defendants' efforts to relitigate issues already resolved in this case by the Tenth Circuit. Defendants argue that because, prior to the Supreme Court's decision in this case, courts were divided on whether a person is "seized" by an officer's use of force if she evades the officer's efforts to restrain her, "the law on this element … was not clearly established in July 2014" and Defendants are entitled to qualified immunity. Defs.' Mem. 9. The Tenth Circuit expressly rejected this argument in the prior appeal, holding that the fact of Ms. Torres's escape "was unknown to Defendants as they fired at" her and "therefore was irrelevant to the analysis," which looks only at "facts that were knowable to [Defendants] at the time they engaged in the conduct in question." *Torres*, 60 F.4th at 602-03 (alteration in original).

Defendants similarly seek to relitigate *Heck* issues resolved by the Tenth Circuit in the last appeal. They assert that the Tenth Circuit opined only that an excessive force claim might not be necessarily inconsistent with a conviction for assault if the claim was "that the officer used too much force to respond to the assault, or that the officer used force after the need for force had disappeared." Defs.' Mem. 25. They then argue "that is not what happened in this case," because the 15 shots they fired were "an incident that was unitary in nature," rendering the entire shooting reasonable, *id.* Defendants mischaracterize the Tenth Circuit's decision: It held explicitly that Ms. Torres's plea agreement is "not inconsistent with her claims that the officers used excessive force by firing at her after she had driven past them and no longer posed a threat."

Torres, 60 F.4th at 600. Accordingly, "Defendants lack a *Heck* defense to Ms. Torres's claims that they employed excessive force after the vehicle had passed the officers." *Id.* at 602.

This Court ordered the parties to address whether the Tenth Circuit's decision on *Heck* "affects the question of whether any of the shots fired were unreasonable." Order, ECF No. 147. As Ms. Torres acknowledged on appeal, her plea agreement prevents her from arguing that as she began driving "Defendants lacked a reasonable basis for using deadly force." Br. for Appellant 22, *Torres*, 60 F.4th 596 (22-2001). Her claim focuses on the shots Defendants fired in the side and back of her car after any danger had passed—including the two that struck her back.

II. Defendants Are Not Entitled to Summary Judgment Based on Qualified Immunity.

A. The Summary Judgment Record Supports a Jury Finding that Defendants' Use of Deadly Force Was Objectively Unreasonable.

"*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard…." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The factors for evaluating reasonableness include (1) the severity of the crime, (2) whether the suspect poses a threat to the safety of the officers or others, and (3) whether the suspect is resisting or attempting to evade arrest. *Id.* at 396. "Where the suspect poses no immediate threat" to the officer or others, "the harm resulting from failing to apprehend him does not justify the use of deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The second *Graham* factor is "undoubtedly the most important" in deadly force cases. *Reavis ex rel. Est. of Coale v. Frost*, 967 F.3d 978, 985 (10th Cir. 2020). Deadly force satisfies that factor and is objectively reasonable only if the officers reasonably believed when they fired that "the suspect pose[d] a threat of serious physical harm, either to the officer[s] or to others." *Garner*, 471 U.S. at 11; *see also Cordova v. Aragon*, 569 F.3d 1183, 1190 (10th Cir. 2009)

("[D]eadly force is justified only if a reasonable officer in the officer's position would have had probable cause to believe that there was a threat of serious physical harm to himself or others."); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) (same). Even a "substantial but not imminent risk imposed on innocent bystanders and police" does not justify "a reasonable officer to use a level of force that is nearly certain to cause" death. *Cordova*, 569 F.3d at 1189, 1192. "[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Fancher v. Barrientos*, 723 F.3d 1191, 1200 (10th Cir. 2013) (quoting *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005)).

Substantial evidence establishes that Defendants continued to shoot at Ms. Torres after any threat had passed and that the two bullets that hit Ms. Torres were discharged after deadly force became objectively unreasonable. An officer at the scene testified that "some" of the shots were fired after Ms. Torres's car "passed Madrid and Williamson," when neither officer was "in danger of being hit." Pl. Ex. D, 30:23-31:4. Madrid agreed that Williamson "fired into the back of the vehicle" after it had "already passed" her and she was "out of danger." Pl. Ex. C, 64:7-11, 64:18-20, 65:1-3. Williamson likewise admitted that he fired at the back of the car as Ms. Torres drove off, intending to shoot her. Pl. Ex. B, 45:4-7, 45:21-46:4. All 15 rounds were fired from the side and back of Ms. Torres's car. Pl. Ex. B, 66:18-22; Pl. Ex. E, 45:1-4; Pl. Ex. M. Most notably, the two bullets that hit Ms. Torres—and thus are the basis of her excessive force claims—entered through the rear window and lodged in her back, meaning they were not fired until Defendants were behind her. Pl. Ex. G; Pl. Ex. H; Pl. Ex. M. Defendants do not argue anyone else was at risk from Ms. Torres as she fled. Accordingly, a reasonable factfinder could conclude Defendants had no basis for believing that Ms. Torres posed a "threat of serious physical harm" to themselves or anyone else when they shot the bullets that hit her.

The objective unreasonableness of deadly force under these circumstances is established

by circuit precedent. In *Cordova v. Aragon*, the defendant officer shot and killed a fleeing decedent who "evaded capture by driving straight at" the defendant and another officer in a stolen truck towing machinery. 569 F.3d at 1186. The decedent "employ[ed] evasive maneuvers such as running red lights[] [and] driving off the road"; both the decedent and the defendant crossed to the wrong side of the highway, and the decedent "tried to ram" the defendant. *Id.* at 1186, 1189. After the defendant passed the decedent and got out of his car, the truck drove at the defendant, who believed he was "about to be run over" and "rapidly fired at the vehicle while simultaneously trying to move out of the way." *Id.* at 1186-87. But the fatal shot "entered the [decedent's] truck from the side and went through the back of [his] head," "strongly suggest[ing]" he "had turned the truck and was no longer bearing down upon [the defendant] at the moment [he] fired the fatal shot." *Id.* at 1187. Given the evidence that any "danger [the defendant] might have perceived had passed by the time he fired the fatal shot," the Tenth Circuit held that a reasonable jury could conclude that the "substantial but not imminent risk imposed on innocent bystanders and police by [the] motorist's reckless driving" did not justify the use of deadly force. *Id.* at 1187, 1189-92.

Similarly on point is *Reavis v. Frost*. In that case, a decedent "accelerated his truck forward and toward" a defendant officer standing before him. 967 F.3d at 983. The defendant moved out of the way and the truck "pass[ed] within inches of" him. *Id.* As the truck's "side mirror passed" the defendant, he "raised his gun" and "fired five to seven times." *Id.* "[A]ll of the bullets were [fired] behind and to the side of" the decedent, including the fatal gunshot wound to the back of the head. *Id.* at 983-84 (second alteration in original). The Tenth Circuit concluded "that a reasonable officer … would have perceived that [the decedent's] vehicle had passed him" and there was no longer any "immediate threat of harm to himself or others" when he fired the fatal shots, "even in the short time it took … to raise his weapon and line up his shot." *Id.* at 991.

The summary judgment record supported a jury finding that "an objectively reasonable officer would not have feared for his life" when the defendant shot the decedent. *Id.* at 991-92.

As in *Cordova* and *Reavis*, here "all of the bullets were [fired] behind and to the side of" Ms. Torres, including the two that lodged in her back. *Id.* at 983. The summary judgment record supports that conclusion that by the time Defendants shot the bullets that hit Ms. Torres, she had already driven by them and any danger had ended. A reasonable jury could therefore conclude that, given the evidence suggesting that "whatever danger [Defendants] might have perceived had passed by the time" they shot Ms. Torres, *Cordova*, 569 F.3d at 1189-92, it was objectively unreasonable for Defendants to shoot Ms. Torres.[1]

B. Defendants' Contrary Arguments Are Unavailing.

In arguing otherwise, Defendants focus almost exclusively on their initial shots toward Ms. Torres as she pulled out of her parking space. *See, e.g.*, Defs.' Mem. 18 (contending Ms. Torres "posed a threat of serious harm when she almost struck Defendants with her car," such that "the crucial inquiry of whether the suspect posed an immediate threat to others has been satisfied"); *id.* at 22 (arguing Defendants were "directly in harm's way and reasonably believed they were going to be killed by" Ms. Torres when they shot at her). But Ms. Torres has acknowledged "that her plea agreement prevents her from arguing that at that initial moment, Defendants lacked a reasonable basis for using deadly force." Br. for Appellant 22, *Torres*, 60

[1] The other *Graham* factors do not alter this conclusion. The first factor, the severity of the crime, favors Ms. Torres, as when Defendants approached her they did not suspect her of any crime. Even including the charges to which Ms. Torres later pleaded—the fourth-degree felony of aggravated fleeing a law enforcement officer and the misdemeanor of assault upon a peace officer—those offenses are not severe enough to shift the balance toward deadly force. The third factor slightly favors Defendants here, because when they shot Ms. Torres they perceived her to be fleeing. But weighting this factor too heavily against Ms. Torres would subsume the rule that deadly force is unreasonable against a fleeing suspect who is not presently endangering the officers or others, *see Cordova*, 569 F.3d at 1190-92; *Reavis*, 967 F.3d at 984.

F.4th 596 (22-2001). Her claim focuses on the shots Defendants fired into the side and back of her car after any danger had passed—shots Defendants barely attempt to defend.

Defendants mention those subsequent shots only once: where they note that "[f]rom the first shot to the last, only 6 to 7 seconds elapsed" and argue that "[w]hen the Officers perceived the threat to have passed, they ceased firing." Defs.' Mem. 23. But "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." *Fancher*, 723 F.3d at 1200 (quoting *Waterman*, 393 F.3d at 481). Defendants ignore substantial evidence that they continued shooting after any danger to them had passed *and* after it became objectively and subjectively apparent this was so. For instance, Madrid agreed that Williamson fired at "the back of the vehicle" after it "already passed" her and she was "out of danger." Pl. Ex. C, 64:7-11, 18-20, 65:1-3. And a fellow officer testified that Defendants kept shooting after they were not "in danger of being hit." Pl. Ex. D, 30:23-31:4.

The Tenth Circuit already held that a jury would be permitted "to parse Defendants' shots into those uses justified by the threat posed by Ms. Torres's vehicle and those uses not so justified." *Torres*, 60 F.4th at 602; *see also, e.g.*, *Est. of Smart ex rel. Smart v. City of Wichita*, 951 F.3d 1161, 1177 (10th Cir. 2020) (whether officer had time to "conclude that [a suspect] posed no further threat" and "react[] to the changed circumstances and stop[] shooting" is a jury question). *Fancher* is instructive: The defendant officer fired seven shots at a fleeing individual who endangered the officer by driving at him; a witness "heard a series of gunshots, followed by five to seven seconds in which he did not hear any gunshots, followed by the sound of two more gunshots." 723 F.3d at 1197. In denying qualified immunity, the Tenth Circuit segmented not only the last two shots, but also shots two through five, finding a question of fact as to whether the defendant "reasonably perceived that he or others were in danger at the precise moments that he fired shots two through seven, and thus, whether those additional shots were excessive." *Id*. at

1998. Likewise, the evidence here creates a triable issue of fact as to whether Defendants "reasonably perceived" they were "in danger at the precise moments" they fired the two shots that entered Ms. Torres's back as she drove away from them. *Id.*

Defendants' remaining arguments relating to the *Graham* factors defy the summary judgment record. Their emphasis on the "severity of the crime," for example, relies on the white collar charges against Ms. Jackson. *See* Defs.' Mem. 21. They repeatedly suggest they had "an objective basis to believe Plaintiff could be the subject of the arrest warrant[and] that criminal activity m[ight] be afoot." *Id.* at 18; *cf. id.* at 23. But Williamson himself testified that before approaching Ms. Torres's car he had determined she was not the subject of the warrant and he had no reason to believe she was doing anything unlawful. Pl. Ex. B, 31:19-32:17, 67:22-25. Defendants' contention that "a reasonable officer in Defendants' position could fear Plaintiff might have one or more weapons" and that "Plaintiff made hostile motions which the Officers perceived as looking for a weapon," Defs.' Mem. 20, 22, is similarly contradicted by the record: Williamson testified that he had no reason to believe Ms. Torres had any weapons and that he never formed a belief that Ms. Torres had a weapon. Pl. Ex. B, 70:12-23.

Defendants assert that the factors set forth in *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255 (10th Cir. 2008), justify their use of force. Defs.' Mem. 20-21. But the *Larsen* factors are simply a "non-exclusive" means of "assessing the degree of threat facing officers" in situations involving ongoing danger, *Larsen*, 511 F.3d at 1260—that is, a way of determining if a "suspect pose[d] a threat of serious physical harm," *Garner*, 471 U.S. at 11. *Larsen*'s inquiries about hostile motions and the distance between a suspect and officers, for instance, help assess whether an armed suspect behaved in a way a reasonable officer might perceive as a threat. They are not illustrative in cases where there is no danger or any danger has passed. Many such cases do not even cite *Larsen*. *See, e.g.*, *Finch v. Rapp*, 38 F.4th 1234 (10th Cir. 2022); *Vette v.*

Sanders, 989 F.3d 1154, 1171 (10th Cir. 2021); *Emmett v. Armstrong*, 973 F.3d 1127, 1136 (10th Cir. 2020); *Davis v. Clifford*, 825 F.3d 1131 (10th Cir. 2016); *Cordova*, 569 F.3d 1183.[2]

In any event, even under the *Larsen* factors, Defendants cannot show Ms. Torres posed a threat when they shot her. *See, e.g.*, *Reavis*, 967 F.3d at 986-87 ("Although several of the[*Larsen*] factors weigh in favor of [the defendant], the totality of circumstances nevertheless do not support his use of deadly force 'at the precise moment that [he] used force.'" (third alteration in original) (emphasis omitted) (quoting *Reavis v. Frost*, No. 17-CV-138, 2019 WL 13423772, at *6 (E.D. Okla. July 3, 2019))). The first factor, "whether the officers ordered the suspect to drop [her] weapon, and the suspect's compliance," *Larsen*, 511 F.3d at 1260, is inapposite, as the only order Defendants issued was to "open the door," which did not pertain to a weapon because Ms. Torres had not yet used her car in a threatening manner, *cf. Thomas*, 607 F.3d at 664. She did not comply because she did not hear them, but even from the perspective of a reasonable officer, Defendants cannot have reasonably perceived Ms. Torres's noncompliance in failing to open the door as a threat. The second factor, "whether any hostile motions were made with the weapon towards the officers," *Larsen*, 511 F.3d at 1260, no longer applied by the time Defendants fired the shots that hit Ms. Torres because she had driven past them and could no longer be perceived as a danger. The third factor, "the distance separating the officers and the suspect," favors Ms. Torres because Defendants continued shooting at her as she was increasing the distance. And the fourth factor, "the manifest intentions of the suspect," *id.*, similarly favors Ms. Torres because, as Williamson testified, her manifest intention was to escape, Pl. Ex. B, 44:22-23, and she gave no indication of turning around or engaging with the officers. Under any view of the facts, Ms.

[2] The Tenth Circuit often does not apply the *Larsen* factors in excessive force cases where they are inapplicable, including in most of Defendants' primary cases. *See Est. of Ronquillo ex rel. Sanchez v. City & Cty. of Denver*, 720 F. App'x 434 (10th Cir. 2017); *Carabajal v. City of Cheyenne*, 847 F.3d 1203 (10th Cir. 2017); *Thomas v. Durastanti*, 607 F.3d 655 (10th Cir. 2010).

Torres ceased to be a threat to Defendants by the time they fired the shots that hit her.

Finally, Defendant's common law argument is mistaken and irrelevant. According to Defendants, because the Supreme Court analyzed the definition of "seizure" by looking to Founding Era common law, "the term 'unreasonable' as used in the Fourth Amendment must also be analyzed by reference to the common law in existence at/around 1791." Defs.' Mem. 9-10. Defendants do not and cannot cite any authority for the notion that law of the case requires this Court to ignore the reasonableness standard set forth in *Graham* and *Garner* or the application of that standard in *Cordova*, *Reavis*, and *Fancher* in favor of 18th-century common law. No court has so interpreted the Supreme Court's *Torres* decision. Nor has Ms. Torres ever urged such a pivot. In her Supreme Court briefing, she argued that the Framers "incorporat[ed] into the Fourth Amendment the prevailing understanding of seizures of persons: common-law arrests," while citing the "more modern test[s]" for evaluating Fourth Amendment claims that "have always sat alongside" the common law of arrests. Br. for Pet'r 3, 36-37, *Torres v. Madrid*, 141 S. Ct. 989 (2021) (No. 19-292), 2020 WL 583727. Her core argument was that such modern tests could not *narrow* the common law protections afforded against unreasonable seizures but could expand the kinds of conduct properly understood as seizures. *E.g.*, *id.* at 36-37 (describing how the reasonable-expectation-of-privacy test was "*added to*, not *substituted for*, the common-law trespassory test"). In the Tenth Circuit, she elaborated on the application of *Graham* and its progeny to this case. *See, e.g.*, Br. for Appellant 17, 20-27, *Torres*, 60 F.4th 596 (22-2001). Defendants have likewise always agreed that modern excessive force jurisprudence governs: In their first renewed motion for summary judgment following the Supreme Court's decision, for instance, Defendants argued that "[t]his Court must evaluate a police officer's use of force under the 'objective reasonableness' test of the Fourth Amendment," under which "[t]he plaintiff must show that the force purposely or knowingly used was objectively unreasonable." Defs.' First

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In any event, Defendants' historical claim is merely that the common law recognizes that police officers have the right to act in self-defense. Defs. Mem. 10-11. This is a non sequitur: The issue before this Court is whether a reasonable jury could find that Defendants were *not* acting in self-defense when they shot Ms. Torres in the back as she was driving away from them.[3] Defendants do not offer any historical sources bearing on that question.

C. Defendants' Recklessness in Creating the Dangerous Situation Further Establishes the Unreasonableness of Their Conduct.

Defendants' conduct in shooting at the back of Ms. Torres's car after she had driven past them alone constitutes excessive force. Considering the events leading to the shooting under the totality of the circumstances, however, further bolsters the conclusion that Defendants' conduct was objectively unreasonable.

To assess reasonableness, the Tenth Circuit "looks at the facts and circumstances as they existed at the moment the force was used, while also taking into consideration the events leading up to that moment." *Vette*, 989 F.3d at 1169 (quoting *Emmett*, 973 F.3d at 1135). In other words, the reasonableness of officers' use of force "depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Sevier*,

[3] Moreover, by Defendants' reasoning, they have no qualified immunity defense at all, as ample scholarship establishes that there was no such defense at common law. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1 (1972); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862 (2010). The early American rule was "extremely harsh to the public official," and early public officers "bore personal liability" for their "affirmative acts," including "any positive wrong which was not actually authorized by the state" and purportedly authorized wrongs. Engdahl, *supra*, at 16-18. Strict official liability for civil rights claims persisted through Reconstruction and the enactment of § 1983. *See, e.g.*, 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1676 (4th ed. 1873).

60 F.3d at 699 (citing *Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n.7 (10th Cir. 1994)).

Allen v. Muskogee, the "seminal case on this issue," *Pauly v. White*, 874 F.3d 1197, 1220 (10th Cir. 2017), is instructive. In that case, police were informed that the decedent was armed and had threatened family members, and there was a warrant out for his arrest. 119 F.3d 837, 839 (10th Cir. 1997). When the officers arrived, the decedent was sitting in his car, gun in hand. *Id.* The summary judgment record supported the conclusion that one officer immediately began shouting at the decedent to drop the gun and get out of the car. *Id.* at 841. The officer attempted to seize the gun, while another officer grabbed the decedent's free arm. *Id.* at 839. A third officer attempted to open the passenger-side door. *Id.* The decedent pointed his gun at the third officer and swung the gun toward the other two officers. *Id.* Shots were exchanged, and the officers fired a dozen rounds. *Id.* In denying qualified immunity, the Tenth Circuit held that "a reasonable jury could conclude on the basis of some of the testimony presented that the officers' actions were reckless and precipitated the need to use deadly force." *Id.* at 841; *see also Est. of Ceballos v. Husk*, 919 F.3d 1204, 1216, 1220 (10th Cir. 2019) (approaching an armed suspect, yelling at him to drop his weapon, and refusing to give ground before shooting was "reckless" and a "precipitous resort to lethal force" violating "clearly established Fourth Amendment law").

Pauly is similarly relevant. There, officers arrived in the dark at the decedent's house and approached the house in a "confusing and terrifying" manner from the perspective of the decedent and his brother, who feared they were intruders. 874 F.3d at 1204. The officers did not identify themselves as police but stated they were "coming in," causing the brothers to arm themselves. *Id.* at 1205. After the decedent's brother fired warning shots, the decedent stepped out of the house and pointed a gun at an officer, leading another officer to fatally shoot him. *Id.* The Tenth Circuit concluded that "the alleged reckless actions of all three officers" were "immediately connected" to the brothers having armed themselves, such that "the threat made by

the brothers, which would normally justify an officer's use of force, was precipitated by the officers' own actions," rendering the shooting unreasonable. *Id.* at 1211, 1221.

Those principles apply here, where Defendants recklessly created a dangerous situation that led to their use of force. Defendants approached Ms. Torres, who did not match the description of their warrant subject, with no reason to detain her or belief she had committed a crime. Pl. Ex. B, 31:19-32:17, 67:22-25; Pl. Ex. E, 33:12-14; *see State v. Leyva*, 250 P.3d 861, 878 (N.M. 2011) (New Mexico Constitution requires "reasonable justification for the initial stop"). They neared her car while it was dark out, driving unmarked cars and dressed in black. Pl. Ex. A, 62:21; Pl. Ex. B, 25:23-26:13; Pl. Ex. B, Exs. 5, 9; Pl. Ex. D, 8:16-18, 9:17-21. They drew their guns and attempted to open Ms. Torres's door without orally identifying themselves, in contravention of their training and established New Mexico law requiring officers to knock and announce. Pl. Ex. B, 34:15-18, 40:4-9; Pl. Ex. C, 42:12-25, 43:22-44:2; *see State v. Johnson*, 146 P.3d 298, 301 (N.M. 2006). Madrid stood beside the left front tire, though it violated police procedure for an officer in her situation to put herself in harm's way, Pl. Ex. E, 56:16-21. Ms. Torres first became aware of Defendants' presence when she heard them jiggle her door handle, Pl. Ex. A, 65:9-19, 66:16-67:12, and she looked up to see people in dark clothing holding guns and trying to get into her car, Pl. Ex. A, 65:9-25, 67:1-21, 83:3-18, 86:1-15. When she put the car in drive, they pointed guns at her face. Pl. Ex. A, 65:19-23, 67:15-18, 83:8-18, 86:1-5. She reasonably feared they were carjackers and drove away to escape the perceived criminal attempt. Pl. Ex. A, 70:6-9; Pl. Ex. E, 40:3-24. Defendants' recklessness in approaching Ms. Torres without justification and giving the appearance of being carjackers thus "precipitated" their use of deadly force. *Allen*, 119 F.3d at 841; *see also Rosales v. Bradshaw*, 72 F.4th 1145, 1154 (10th Cir. 2023) (officer tailing suspect in unmarked car and shouting at him without identifying as police "precipitated" suspect's decision to arm himself, "undercut[ting]" threat suspect posed).

Defendants once again disregard the summary judgment record in disputing the recklessness of their conduct. They contend it was "objectively reasonable for them to believe" Ms. Torres knew they were police officers, Defs.' Mem. 23-24, although they wore dark outfits that were not standard uniforms and it was sufficiently dark outside that Madrid incompatibly testified that she was unable to recognize that Ms. Torres, a light-skinned woman, was not the dark-skinned African-American target of the warrant.[4] They reiterate that they "approached Plaintiff to determine if she was the subject of the warrant" and claim that "virtually immediately thereafter, Plaintiff assaulted Officer Madrid before fleeing," *id.* at 24, even though they had already concluded she was not their subject and Ms. Torres became aware of their presence—and therefore motivated to flee—only after they drew their guns and attempted to open her car door without identifying themselves. They also claim that Ms. Torres was "impaired by … narcotics" and "acted irrationally" by driving off, *id.*, though she testified it had been days since she had taken drugs and her police practices expert testified that a "reasonable person in Ms. Torres's position would believe … that she [was] about to be the victim of a violent crime," Pl. Ex. E, 40:3-24. Properly construed, the record supports a jury finding that Defendants' reckless conduct precipitated their use of force.

D. The Constitutional Violation Was Clearly Established in 2014.

It was clearly established in the Tenth Circuit five years before the shooting in this case that officers use excessive force when they shoot at a fleeing suspect after any imminent threat to the officers or others has passed. In *Cordova*, the defendant officer believed he was "about to be

[4] Defendants suggest Ms. Torres' plea agreement "estop[s]" her from arguing she was unaware Williamson and Madrid were police officers. Defs.' Mem. 18-19. It is unclear how Defendants think this relates to qualified immunity, which turns on what they, not Ms. Torres, reasonably could have believed when they used deadly force. *See Graham*, 490 U.S. at 396. In any event, the argument fails because neither crime to which Ms. Torres pleaded required her to have known at the time that Defendants were police. *See* N.M. Stat. Ann. §§ 30-22-1.1, 30-22-21.

run over" by a decedent driving toward him and "therefore rapidly fired at the vehicle while simultaneously trying to move out of the way." 569 F.3d at 1186-87. Because the fatal shot "entered the [decedent's] truck from the side and went through the back of [his] head," "strongly suggest[ing]" that he "was no longer bearing down upon [the defendant] at the moment [he] fired the fatal shot," the Tenth Circuit concluded that "whatever danger [the defendant] might have perceived had passed by the time he fired the fatal shot" and that a reasonable jury could find that his use of deadly force violated the Fourth Amendment. *Id.* at 1187, 1191-92.

Though the Tenth Circuit granted the defendant in *Cordova* qualified immunity because no previous circuit decision clearly established the unlawfulness of deadly force under these circumstances, it has cited *Cordova* as clearly establishing the law for violations after 2009. In *Reavis*, the decedent had accelerated his truck directly at the defendant officer, missing him by inches, and the defendant "raised his gun" as the decedent's "side mirror passed" and "fired five to seven times," shooting the decedent in the back of the head. *Id.* at 983-84. The Tenth Circuit affirmed the denial of qualified immunity, holding that *Cordova* provided the defendant "fair notice that opening fire at a fleeing vehicle that no longer posed a threat to himself or others was unlawful." *Id.* at 995; *see also id*. at 989 (noting that *Fancher* similarly denied qualified immunity as to an officer's later shots because "the officer lacked probable cause to believe the suspect posed a threat when the officer fired those shots").

Likewise, in *Simpson v. Little*, 16 F.4th 1353 (10th Cir. 2021), the defendant officer claimed he shot the fleeing decedent because he was in danger of being run over, but "the bullet defects be[gan] near the middle of the driver's side window and continue[d] along the side of the SUV, and two shots struck the rear of the vehicle." *Id.* at 1358. The bullets that struck and killed the decedent entered through the driver's door. *Id*. The Tenth Circuit affirmed the denial of qualified immunity because *Cordova* "provided 'fair warning'" that it was unlawful to shoot a

suspect fleeing by car if "the threat to the officer was not 'actual and imminent' when he pulled the trigger." *Id.* at 1364, 1366. The court further noted that although *Reavis* was decided after the incident at issue, it was precedential for the point that *Cordova* clearly established the relevant law in 2009. *See id*. at 1365 (citing *Soza v. Demsich*, 13 F.4th 1094, 1100 n.3 (10th Cir. 2021)).

The Third Circuit observed that its denial of qualified immunity on similar facts—where the defendant officer was initially in danger of being hit by the plaintiff's car but used deadly force after the danger had passed—was consistent not only with *Reavis*, but also precedent from the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits. *See Jefferson v. Lias*, 21 F.4th 74, 82-83 (3d Cir. 2021). As in this case, the *Jefferson* shooting occurred in 2014, and the plaintiff escaped and drove himself to the hospital. *Id.* at 76-77. The Third Circuit denied qualified immunity based on the "robust consensus" of pre-2014 case law clearly establishing that "a suspect fleeing in a vehicle, who has not otherwise displayed threatening behavior, has the constitutional right to be free from the use of deadly force when it is no longer reasonable for an officer to believe his or others' lives are in immediate peril from the suspect's flight." *Id.* at 81, 85-86.

So too here. The shots that hit Ms. Torres entered through the rear window and lodged in her back, "strongly suggest[ing]" she was driving away from Defendants when they fired, after "whatever danger [they] might have perceived had passed." *Cordova*, 569 F.3d at 1187. Bullet trajectory evidence, a fellow officer's eyewitness account, and Defendants' own testimony establish that whatever risk Defendants may have faced when Ms. Torres began to drive, that danger had passed and no one else was at risk of immediate harm when they shot her. This evidence forecloses Defendants' qualified immunity defense at the summary judgment stage.

Defendants' cases are not to the contrary: All involve officers who shot a suspect whom they reasonably believed posed an immediate threat to officers or others nearby. In *Brosseau v. Haugen*, 543 U.S. 194 (2004), a "disturbed" suspect fled the police on foot to his car, which the

officer reasonably believed he had done to get a weapon. *Id.* at 196, 200. After an altercation, the suspect drove off, and the officer—fearing for other officers pursuing the suspect on foot "in the immediate area" and people in occupied cars in the driver's path—shot once to prevent the "risk to others." *Id.* at 195-97, 200. The Court granted qualified immunity given the undisputed facts that the suspect "would do almost anything to avoid capture" and posed a "major threat" to pursuing officers. *Id.* at 199-200 (describing qualified immunity inquiry as whether officer reasonably believed it was lawful "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight").

Thomas v. Durastanti is also inapposite. In *Thomas*, an officer shot at the driver of an apparently stolen car that was "coming directly at him" after fleeing other officers. 607 F.3d at 661. The car did not slow down but continued toward the defendant and hit him; within two seconds of being hit, the defendant "rolled off its hood, landed on his feet, turned around and then fired two more shots at the back" of the car. *Id.* The defendant argued that "he reasonably perceived that the [car] posed an immediate threat of death" throughout the encounter and had "no way to escape" when he first fired. *Id.* at 664. As for the shots immediately after he was struck, the defendant claimed he was "disoriented" and fired "while believing that the [car] was still approaching him." *Id.* at 666. The Tenth Circuit found this misperception "quite reasonable" given the "disorienting experience" of being "struck by the [car] and spun around." *Id.*

Carabajal and *Clark v. Bowcutt*, which postdate the shooting here, are similarly unavailing. In *Carabajal*, the suspect "appeared to deliberately drive his vehicle in [the defendant's] direction," so the defendant was "facing the oncoming vehicle with two parked cars closely behind." 847 F.3d at 1209. In such "close quarters," the Tenth Circuit held, "a reasonable officer could conclude" his "life was in danger and employ deadly force to stop the vehicle." *Id.* It distinguished the case, where the defendant was "in the path of [the] vehicle as it lurched

forward," from ones in which there were disputes "as to the position of the police officer relative to the vehicle at issue and therefore the threat posed to the officer." *Id.* at 1211. And in *Clark*, an officer pursued a suspect who fled a traffic stop after the officer smelled alcohol. 675 F. App'x 799, 800 (10th Cir. 2017). When the defendant cornered the suspect and exited the patrol car, the suspect's car "continued to move forward" toward the defendant and the suspect "offered no indication that he intended to stop." *Id.* at 801. After he shouted six times at the suspect to stop and get out of the car, the defendant shot the suspect when the car was "inches away." *Id.* The Tenth Circuit granted qualified immunity in an unpublished opinion because it was "readily apparent" from video evidence that the suspect "posed an immediate threat to [the officer's] safety" when he was shot. *Id.* at 807-08; *see also Ronquillo*, 720 F. App'x at 437, 440 (granting qualified immunity where officers shot at driver as he "accelerated forward directly at" them).

Unlike the cases they cite, Defendants have put forth no evidence suggesting they or anyone else was endangered by Ms. Torres's flight after she pulled past them out of the parking space. None of their cases cast doubt on *Cordova*'s holding that it is unlawful for police to shoot a fleeing suspect after any immediate danger to the officers or others has passed. *See Reavis*, 967 F.3d at 991 (describing *Clark*, *Carabajal*, *Thomas*, and *Ronquillo* as cases in which officers "were in the path of an oncoming vehicle when they used deadly force" and distinguishing *Reavis* because the officer "used deadly force after the vehicle had passed him"). Because the record contains sufficient evidence for a jury to conclude that is precisely what happened here, Defendants cannot obtain summary judgment based on qualified immunity.

CONCLUSION

For the foregoing reasons, Defendants' second renewed motion for summary judgment should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2023, I electronically filed the foregoing brief with the U.S. District Court for the District of New Mexico by using the Court's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the Court's CM/ECF system.

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