Case No. 24-5058

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL MANNING, as the ADMINISTRATOR of the ESTATE OF TERENCE CRUTCHER, SR.,

Plaintiff-Appellant,

v.

CITY OF TULSA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable Eric F. Melgren, United States District Judge
District Court No. 17-CV-336-EFM-SH

PLAINTIFF-APPELLANT'S OPENING BRIEF

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TPD	Tulsa Police Department

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Michael Manning, acting on behalf of the Estate of Terence Crutcher ("the Estate"), brought eight causes of action via 42 U.S.C. § 1983 for violations of the Fourth and Fourteenth Amendments of the U.S. Constitution in the U.S. District Court for the Northern District of Oklahoma. The district court had jurisdiction over the Estate's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The district court granted summary judgment to Defendants on April 8, 2024 and entered judgment against the Estate on April 10, 2024. Add.25; Add.39. The Estate filed a timely notice of appeal on May 8, 2024. 3-App.650.

ISSUES PRESENTED

1. Whether the district court erred in granting qualified immunity to Defendant Officer Betty Shelby for killing Terence Crutcher when the facts viewed in the light most favorable to the Estate establish that Mr. Crutcher's arms were raised, and he posed no threat to any person when Officer Shelby shot and killed him.

2. Whether the district court erred in dismissing the Estate's *Monell* claims, where the Estate sufficiently pleaded that the Tulsa Police Department's ("TPD") deficient training and disciplinary practices encourage excessive force.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

On September 16, 2016, Terence Crutcher was shot and killed on the side of a street in Tulsa with his hands raised in the air. Officer Betty Shelby gunned him down within three minutes of encountering him—in a chilling interaction captured on video showing Mr. Crutcher's brutal demise. The bullet entered underneath Mr. Crutcher's right armpit, shattered multiple ribs, tore through both lungs, and ripped a five-inch hole in his heart. At the time he was shot, Mr. Crutcher was unarmed and, as the video shows, was holding his hands up. Nevertheless, Officer Shelby fired her gun at him, ending his life. In that same moment, the officer standing next to Officer Shelby opted to use his Taser.

After Mr. Crutcher had been both shot and tased, Officer Shelby and three other TPD officers ignored Mr. Crutcher for nearly two minutes, as he bled out on the pavement in front of them, in utter disregard of TPD's mission to "preserv[e]. . . human life."[1] Not one officer approached Mr. Crutcher, checked his vitals, or administered any aid during these critical moments—as the life was draining from his body. Mr. Crutcher was eventually transported to a nearby hospital and pronounced dead. Terence Crutcher's death was deemed a homicide. He was a 40-year-old father who left behind four children.

[1] Tulsa Police Department, *Our Mission*, https://www.jointpd.com/our-mission (last accessed Sept. 16, 2024).

After Officer Shelby was criminally prosecuted, the Estate brought a civil rights lawsuit against her and TPD, alleging she violated Mr. Crutcher's Fourth and Fourteenth Amendment rights by shooting and killing him when he was unarmed and posed no danger to her or anyone else. The Estate further alleged *Monell* claims against the City of Tulsa (the "City") for unconstitutional TPD customs and practices responsible for Mr. Crutcher's death that encouraged TPD officers to use deadly force in situations like Mr. Crutcher's—where no such force was warranted.

After the Estate's case had languished in the district court for nearly six years, Judge Eric Melgren of the District of Kansas was assigned in January 2023 and summarily dismissed the Estate's *Monell* claims. Judge Melgren improperly concluded the Estate had not met the pleading standard and ignored pages of well-pleaded facts in the complaint. He then invited Officer Shelby to raise qualified immunity. Following a brief discovery period, she did so, filing a summary judgment motion that argued she was entitled to qualified immunity for killing Mr. Crutcher. The district court agreed—despite numerous material factual disputes in the record, which the court's decision acknowledged. The court further failed to view the evidence in the light most favorable to the Estate and misapplied binding precedents of this Court and the United States Supreme Court.

Both the motion to dismiss and summary judgment decisions should be reversed.

A. Officer Shelby Shot And Killed Mr. Crutcher While He Was Unarmed And Holding His Hands Up.

On September 16, 2016, Terence Crutcher was walking on East 36th Street North in Tulsa, Oklahoma. 2-App.320. A father of four and gospel music enthusiast, he was on his way home from Tulsa Community College, where he had enrolled in a music appreciation class. 2-App.313. Officer Shelby drove past Mr. Crutcher around 7:40 PM, as she was heading to a domestic disturbance call a few miles away. 2-App.260 ¶ 15. After spotting Mr. Crutcher, Officer Shelby continued on toward the domestic disturbance call, leaving Mr. Crutcher, who was not involved in that incident in any way, behind. 2-App.260 ¶¶ 16-17; 2-App.337; 2-App.371 at 00:00:00-00:00:41.[2]

As she continued along the roadway several hundred feet, Officer Shelby came upon Mr. Crutcher's unattended SUV, parked in the middle of the street. 2-App.260 at ¶ 19; 2-App.371 00:00:42. At 7:41 PM, Officer Shelby radioed police dispatch: "I've come across a vehicle abandoned in the middle of the road," and provided the license plate number. 2-App.277 at 00:00:00-00:00:20.[3] Dispatch

[2] All citations to video recordings refer to the elapsed time shown in the video recording.

[3] Mr. Crutcher's killing was captured on video by a police helicopter and dashboard camera. The video provided in 2-App.277 displays the helicopter and dashboard camera videos on one screen, synchronized such that the videos show the same actions at the same time, based on audio and video cues. At the time of the recordings, the clock in the helicopter video recording system was set slightly ahead

responded that the vehicle was registered at a nearby address and not associated with any reports in TPD's system. 2-App.277 at 00:20:00-00:47:17.

Officer Shelby stopped, exited her vehicle, and "looked through the windows on the driver's side, first of the rear compartment, then back seat and then front seat." 2-App.261 ¶ 22. The SUV was unoccupied, and she did not see any weapons inside. 3-App.459 at 21-24. Officer Shelby failed to activate her police dashboard camera or her body-worn microphone. 3-App.502; 3-App.508.

Officer Shelby then saw Mr. Crutcher and engaged him as he walked back toward his car. 3-App.509; 2-App.371 at 01:34:00-03:10:11. This brief, fateful interaction unnecessarily ended in Mr. Crutcher's death.

At 7:42 PM, Officer Shelby radioed, "Hold traffic, I've got a subject who won't show me his hands." 2-App.277 at 01:23:28. But video shows otherwise. At 7:43 PM, a responding helicopter recorded Officer Shelby pointing her gun at Mr. Crutcher as he slowly walked toward the SUV, with his hands raised high above his head.

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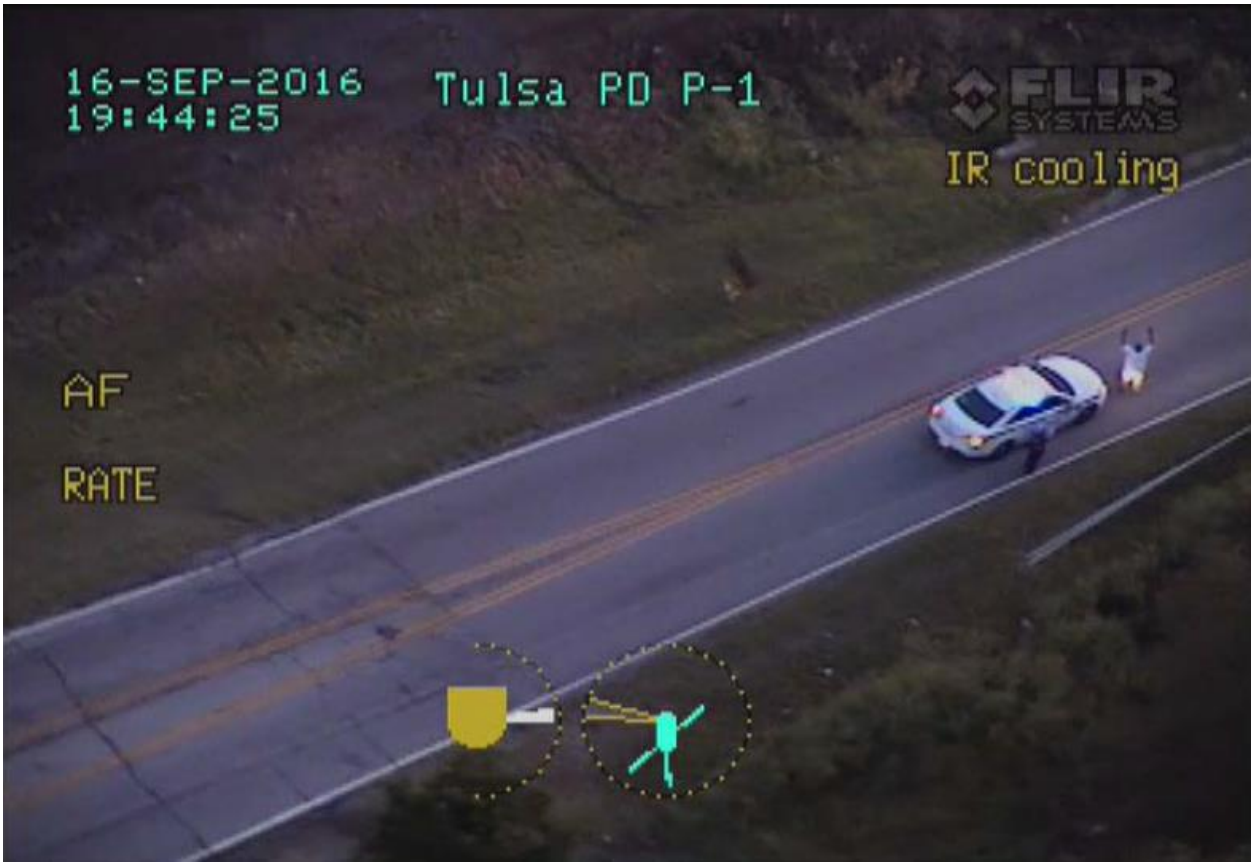
of the clocks in the dashboard camera recording systems. *See* 2-App.330. As a result, when the helicopter and dashboard camera videos are synchronized, the time stamp shown on the helicopter video is slightly ahead of the time stamp shown on the dashboard camera videos. *See* 2-App.350-351.



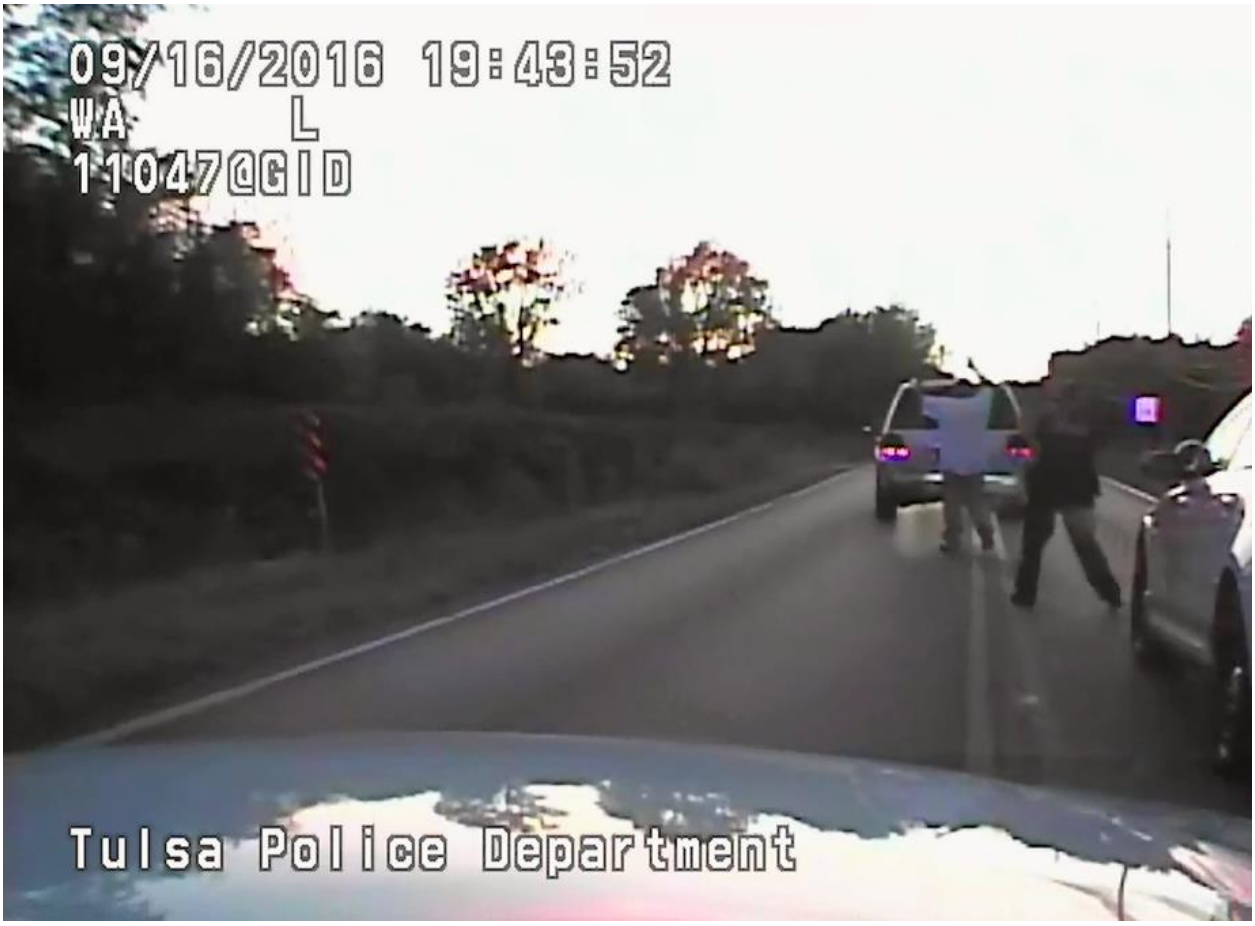
2-App.277 at 2:32:00.

In addition to the helicopter, three nearby officers started to make their way to her location. 2-App.277 at 01:40:25.[4] Officer Shelby could hear their sirens. 3-App.510.

Officer Turnbough arrived within a minute, as Officer Shelby closely followed Mr. Crutcher toward his vehicle with her gun pointed at his back. 2-

[4] The Gilcrease Division police station was located just a few blocks away at 2700 East 36th Street North. 2-App.260; 2-App.281 ¶ 11. It took just over one minute for additional officers to reach Officer Shelby after she radioed for assistance. 2-App.277 at 01:26:24-02:42:23.

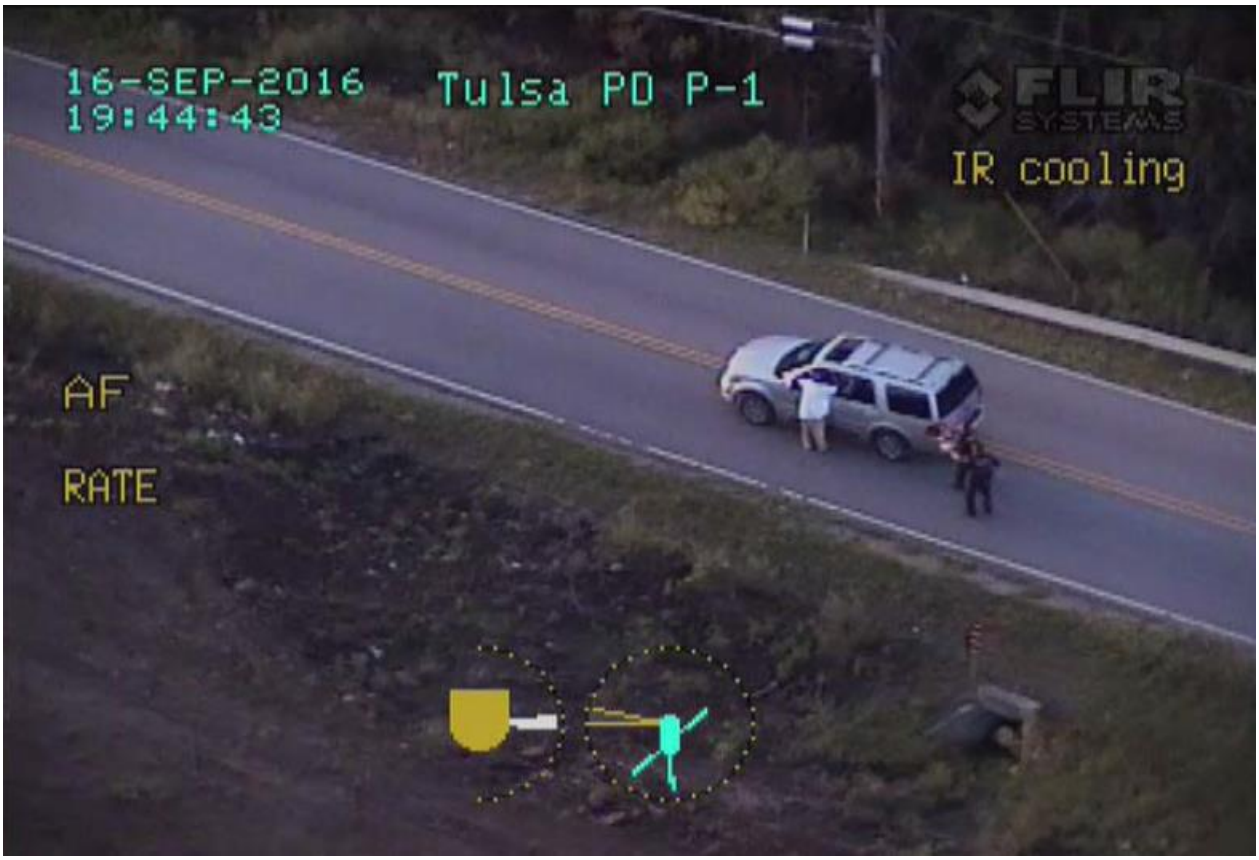
App.277 at 2:39:26; 2-App.282-283 ¶ 15. Video shows Mr. Crutcher had his hands raised and posed no threat to Officer Shelby as she aggressively pursued him with her weapon drawn. 2-App.277 at 2:30:00-3:05:30.



2-App.277 at 2:39:26.

Although Officer Turnbough—a certified firearms instructor—was also armed with a Glock 22, he drew his Taser instead. 2-App.279 ¶ 2; 2-App.285 ¶ 19. He told Officer Shelby, "I have my Taser," and Officer Shelby replied, "okay." 2-App.285 ¶ 19; 2-App.326.

The video shows Mr. Crutcher reached the driver's side door of the SUV with his hands still raised and turned to face the car. 2-App.277 at 2:48:20. Then, without any warning, Officer Shelby fired her gun at Mr. Crutcher, shooting him under his raised right arm. 2-App.277 at 2:49:14. Officer Turnbough fired his Taser. *Id*.[5]



2-App.277 at 2:49:14.

[5] The two officers in the helicopter, one of whom was Officer Shelby's husband, assumed Mr. Crutcher would be tased. One officer stated, "[time] for a Taser, I think." The other officer agreed, saying "I got a feeling that's about to happen." 2-App.277 at 2:48:00-2:55:00.

The video shows Mr. Crutcher's body remained upright—stunned by the Taser—for several seconds after he was shot, leaning against the SUV, before fully collapsing to the ground, his clothes drenched in blood. 2-App.277 at 02:49:14-03:01:15. In the video, one of the officers in the helicopter says, "I think he may have just been tasered," and then can be heard gasping in shock at the sight of Mr. Crutcher's bloodied body as it rolls onto the pavement. 2-App.277 at 03:02:09-03:09:22.

The four TPD officers at the scene then ignored Mr. Crutcher's dying body in front of them, allowing him to bleed out on the street for nearly two minutes without administering any aid. 2-App.277 at 02:49:41-04:41:29. No weapon was ever found on Mr. Crutcher or in his car. 1-App.126 ¶ 102; 1-App.151 ¶ 51. Mr. Crutcher was pronounced dead when he arrived at the hospital approximately 35 minutes later. 3-App.437, 3-App.439. He was 40 years old.[6] 3-App.437. The medical examiner deemed the manner of death a homicide. 3-App.439. A post-mortem toxicology screen on Mr. Crutcher returned positive results for tenocyclidine, a drug similar to phencyclidine (also known as "PCP"). 3-App.444.

[6] TPD released a video of Mr. Crutcher's killing to the public on September 19, 2016, three days after the shooting. *See, e.g.*, *Police Release Footage of Deadly Tulsa Shooting*, WALL ST. J. (Sept. 20, 2016), https://www.youtube.com/watch?v=LJd4ThiQjEg.

Officer Shelby was charged on September 22, 2016 by the Tulsa County District Attorney with first-degree manslaughter for killing Terence Crutcher. After a six-day trial in May 2017, she was acquitted. TPD never formally disciplined Officer Shelby for the killing.

B. The Estate Commenced A Civil Rights Action.

On June 15, 2017, following the criminal trial, the Estate promptly filed a federal civil rights case against the parties involved in Mr. Crutcher's death. 1-App.7. The Estate alleged, among other things, that Officer Shelby violated Mr. Crutcher's rights under the Fourth and Fourteenth Amendments by shooting and killing him while his hands were raised in the air. The Estate further alleged *Monell* claims against the City for its unconstitutional policies and practices that caused Mr. Crutcher's death.

Despite the Estate's quick filing and diligent prosecution, the case stalled in the district court for years with little progress, moving through the dockets of three different judges. After limited written discovery in 2018, the district court imposed a stay of discovery for nearly six years while various motions languished without decision, including the Estate's repeated motions to lift the stay.[7]

[7] As a result of the Supreme Court's ruling in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), the number of criminal cases filed in the Northern District of Oklahoma increased by nearly 200 percent from 2020 to 2021, causing significant delays in existing civil cases. *See Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects,* Judicial Conference of the United States (Sept. 18, 2021),

The Estate amended its complaint without objection on four occasions from August 2018 to May 2019 in order to: (1) add additional defendants (1-App.25); (2) remove defendants to encourage the court to decide Defendants' pending motion to strike (Dkt.51); (3) add newly discovered facts (Dkt.112); and (4) add a state law cause of action (1-App.106).

But even after the filing of the Fourth Amended Complaint (the "Complaint"), and the pendency of Defendants' motion to dismiss for nearly six years, the case did not move forward. On August 4, 2021, the Estate requested an in-person status conference with newly assigned Judge Heil; he did not respond. Dkt.174. On January 24, 2023, Judge Melgren from the District of Kansas was assigned the case.[8] Dkt.176. On February 9, 2023, he decided all the pending motions and dismissed the Estate's *Monell* claims against the City for TPD's role in Mr. Crutcher's death. Add.1.

C. The District Court Dismissed The Estate's *Monell* Claims Against The City.

A series of systemic failures and unconstitutional TPD practices led to the killing of Mr. Crutcher. The Complaint specifically identified these practices—

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https://www.uscourts.gov/news/2021/09/28/judiciary-supplements-judgeship-request-prioritizes-courthouse-projects.

[8] Judge Melgren is the Chief Judge of the District of Kansas, sitting by designation in the Northern District of Oklahoma.

inadequate officer training, deficient hiring practices, and lack of discipline and accountability for officers who use unnecessary force—and described how they created a permissive culture of excessive force and deadly violence by TPD officers against members of the community, contributing to the killing of Mr. Crutcher.[9]

Overall Culture and Custom of Excessive Force. The Complaint alleged that TPD, as a whole, had a culture that amounted to an unofficial custom or practice that encouraged officers to use force unnecessarily. 1-App.119-122 at ¶¶ 72-83. This "you hesitate and you die" culture pervaded TPD. 1-App.115-122 at ¶¶ 48, 68, 72, 73. The Complaint further explained how TPD's training, hiring, investigation, and disciplinary practices bolstered this overall custom and practice of excessive force.

Deficient Training. TPD officers did not receive adequate training in how to de-escalate encounters, especially in cross-racial interactions. 1-App.120-121 ¶¶ 75-76. This failure to train and equip officers was a particularly dangerous practice given TPD's "history of racially disparate outcomes in arrests and the use of force against African-Americans." 1-App.121 ¶ 76(e).[10] Black Tulsans are stopped, cited,

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[9] Because the Estate's *Monell* claims were dismissed at the motion-to-dismiss stage, the facts in this section are taken from the Complaint and are presumed to be true. *Acosta v. Jani-King of Okla., Inc.*, 905 F.3d 1156, 1158 (10th Cir. 2018).

[10] Such statistics are particularly striking in light of Tulsa's history of racial violence. Most notably, during the Tulsa Race Massacre in 1921, white rioters looted and burned a wealthy Black neighborhood, injuring and killing hundreds of Black Tulsans. *See* Scott Ellsworth, *The Ground Breaking: An American City and Its Search for Justice* (2022); Tulsa Race Riot, A Report by the Oklahoma Commission

arrested, jailed, and subjected to law enforcement force at disproportionate rates. 1-App.124 at ¶ 90. Between 2012 and 2016, Black Tulsans were arrested twice as often as any other race in the city. 1-App.125 ¶ 95. TPD was well aware of these disparities; prior to Mr. Crutcher's killing, the Tulsa Mayor's Police & Community Coalition recommended that TPD institute implicit bias training due to the disparities. 1-App.124 ¶ 88. Yet, TPD "did not implement an implicit bias training program, or any other specific program, training, or policy to reduce this obvious racial disparity in policing." 1-App.125 ¶ 94.[11]

Deficient Hiring. TPD's inadequate officer screening mechanisms allowed the hiring of officers with a history of violence who should not be entrusted to serve; Officer Betty Shelby was one such officer. She had a history of violent interactions before she was hired by TPD. In 2000, during an altercation with her estranged husband, Officer Shelby pulled a "butcher knife" on him and his mother. 1-App.117

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to Study the Tulsa Race Riot of 1921 (2001), https://www.okhistory.org/research/forms/freport.pdf; *see also* Cliff Brunt, *Black Fear of Tulsa Police Lingers 100 Years After Massacre*, AP News (May 29, 2021), https://apnews.com/article/tulsa-race-and-ethnicity-fdc950a679a5aa27715ccddce0ab4642 (discussing Mr. Crutcher's killing in Tulsa's historical context).

[11] TPD also knew its training was lacking in terms of teaching officers how to deal with individuals with diminished capacity. 1-App.121 at ¶ 76(c). Sgt. Dave Walker, TPD's chief homicide detective, stated in May 2017 that TPD needed to "get better at handling" individuals dealing with substance abuse issues and mental issues. *Id.*

¶ 60. Officer Shelby was written up in a TPD report for "Assault with a Deadly Weapon." *Id.* She had also been the subject of two orders of protection for acts of violence and harassment against members of the public. Prior to joining TPD, she used a shovel to smash the vehicle of one man, who was granted an emergency order of protection against her. *Id.* ¶ 62. In 2001, another woman obtained an order of protection against Officer Shelby for threatening her. 1-App.118 ¶ 64. Nevertheless, TPD hired Officer Shelby as a police officer in 2011 (1-App.116 ¶ 58), and she killed Terence Crutcher in 2016 (1-App.108 ¶ 11).

Deficient Use-of-Force Investigations and Officer Discipline. TPD further cemented its custom of excessive force with deficient investigative and disciplinary practices. TPD routinely inadequately investigated, or sometimes outright refused to investigate, complaints of TPD misconduct. 1-App.131 ¶ 135. From 2007 to 2015, there were sixty-one incidents of deadly force by TPD. 1-App.118 ¶ 65. Yet TPD found that only one of those incidents violated department policy. *Id.* And TPD had *never* recommended that the Tulsa District Attorney's Office pursue a criminal investigation in an officer-involved shooting. 1-App.119 ¶ 71. Inadequate investigations made it easier for TPD to continue its practice of rarely disciplining officers for using deadly force. 1-App.118 ¶ 65. In Mr. Crutcher's case, not only was Officer Shelby never disciplined for shooting Mr. Crutcher, but no officer at the scene was ever disciplined for allowing Mr. Crutcher to bleed out for nearly two

minutes without administering medical aid in the last moments of his life. 1-App.122-123 ¶¶ 82, 84.

TPD also failed to implement even basic tools to hold officers accountable to the community, such as mandatory body cameras. 1-App.124 ¶¶ 88-89. This practice could have saved Terence Crutcher's life. TPD knew that body cameras would lead to greater accountability and better policing—but took no action to implement this basic practice. *Id.* (quoting a 2014 statement from TPD Chief Jordan, "Body cameras are a valuable tool. They're important for transparency. You're going to find some misconduct. Historically, behavior improves with them present. We're all better people with a camera on us.").

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Despite the Complaint's detailed allegations against TPD, the district court dismissed the Estate's *Monell* claims. The district court iterated a grab bag of conclusory statements to justify this decision. For example, notwithstanding the allegations detailed above, the district court concluded that the Estate's *Monell* allegations were "vague" and "no[t] specific[.]" 1-App.202. Similarly, the district court claimed that the Estate did "not allege a causal link between [TPD's investigation and officer discipline practices] and a violation of Mr. Crutcher's constitutional rights," 1-App.207, even though the Complaint explicitly did so, *e.g.*, 1-App.122 ¶ 83; 1-App.124 ¶ 92. Instead of considering the Estate's allegations

about TPD's "shoot first and ask questions later" culture, along with the many detailed allegations about inadequate training, screening, investigation, and discipline, the court selectively cited statements from the Complaint it viewed as insufficient while ignoring the Estate's well-pleaded factual allegations. Add.3.

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Following dismissal, the Estate promptly filed a motion for reconsideration. Dkt.181. Judge Melgren denied the motion, stating that the Estate's "repeated amendments" had caused undue delay. Dkt.184 at 3. The court's order did not acknowledge the years-long delay caused by the district court's inaction.

Judge Melgren held a status conference on February 14, 2023 after issuing his ruling—the first status conference in the case in more than three years. Dkt.227. During the conference, he invited Officer Shelby to raise qualified immunity and repeatedly emphasized his interest in "expedit[ing]" the case, which he described as "unconscionably old." *Id.* at 10, 13, 18-19. With respect to discovery, Judge Melgren lifted the stay but allowed only six months for the Estate to conduct discovery. Two weeks after expiration of the discovery period, although the record was far from complete, Officer Shelby and the City moved for summary judgment. Dkts.180, 196; 2-App.219.

D. The District Court Granted Officer Shelby Qualified Immunity For Killing Mr. Crutcher.

Following the truncated discovery period, Officer Shelby moved for summary judgment on the ground that she was entitled to qualified immunity. The Estate opposed. In doing so, the Estate introduced into the record video evidence of the shooting taken from the police helicopter and Officer Turnbough's dash camera, as well as images of the bloody scene. 3-App.434-436; 3-App.521-529; 3-App.565; 3-App.627. The Estate also introduced statements by the officers present and excerpts of Officer Shelby's deposition testimony. 3-App.445-451; 3-App.456-481; 3-App.530-551; 3-App.563. And the Estate introduced the medical examiner's report, which found Mr. Crutcher's cause of death was a gunshot wound under his right arm. 3-App.437-444.

This record evidence viewed in the light most favorable to the Estate (the non-movant) showed that Officer Shelby shot Mr. Crutcher while he was unarmed and posed no threat. Mr. Crutcher had not reached into the SUV before Officer Shelby shot him. 2-App.277 at 02:50:10; 3-App.424. The evidence demonstrated that the window was rolled up too far for Mr. Crutcher to reach inside and grab anything at all. 3-App.427. And the video and other evidence confirmed Mr. Crutcher had his hands in the air at all relevant times—exactly as Officer Shelby claimed she had directed him to do. *See* 3-App.435 at 19:44:25-19:44:46; 3-App.423. The record evidence further demonstrated that Officer Shelby had already searched Mr.

Crutcher's vehicle and found no weapon, that she had never noticed a bulge in Mr. Crutcher's pockets or had any reason to think he had a weapon, and that he in fact had no gun at all either on his person or near it. 3-App.426. In sum, the record evidence the Estate introduced depicted a man who was at all times behaving in a passive, non-threatening manner. 3-App.423.

In its briefing, the Estate argued that clearly established law precluded officers from asserting a qualified immunity defense when they shoot and kill an unarmed person who poses no threat. 3-App.428. The Estate relied on the Supreme Court case *Graham v. Connor*, 490 U.S. 386 (1989), as well as Tenth Circuit cases confirming that, consistent with *Graham*, "an officer could not shoot an unarmed man who did not pose any actual threat to the officer or to others." *King v. Hill*, 615 F. App'x 470, 479 (10th Cir. 2015); *accord Est. of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019); *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997).

On April 8, 2024, the district court granted summary judgment to Defendants. *See* Add.25. The court's analysis focused almost entirely on the Estate's Fourth and Fourteenth Amendment claims against Officer Shelby. Add.5-13. As the district court recounted, the evidence confirmed that before Officer Shelby killed Mr. Crutcher, she had searched the "unattended vehicle" he was standing next to when she shot him. Add.26. Specifically, she had "first looked through at the rear compartment, then at the back seat, and finally at the front seat." *Id.* She saw no

weapon. 3-App.459. The district court's opinion then states: "*[t]he parties dispute* whether Crutcher followed Officer Shelby's orders by keeping his hands in the air or if he periodically lowered them to his pockets." Add.26-27 (emphasis added). The court repeats a few lines below that "*[i]t is disputed* whether Crutcher complied with any commands." Add.27 (emphasis added). The court correctly then noted again that, "*[t]he parties dispute* whether the driver's side window was fully rolled down, partially rolled down, or not rolled down at all." *Id.* (emphasis added). Correct again, the opinion then states: "Additionally, *the parties dispute* whether Crutcher reached into the driver's side window to possibly retrieve a weapon." *Id.* (emphasis added). Later, the court reaffirmed the point, stating: "Whether Crutcher reached into the vehicle window *is disputed in this case*." Add.33 n.39 (emphasis added). All told, the court's decision noted five times that critical facts were disputed, including whether Mr. Crutcher was complying with police orders, whether the driver's side window was rolled down and to what extent, and whether Mr. Crutcher reached into the window. Add.26-27, 33.

Despite these disputed facts, the district court granted summary judgment. Add.38. Its analysis comprises eight pages. Add.5-13. It does not mention *any* of the disputed facts. *Id.* And it cites not a single document or piece of testimony from the record. *Id.* Critically, the district court conceded that the Estate had cited cases that "determined that an officer shooting an unarmed suspect who was not posing a

threat to the officer or others is a clearly established violation of the Fourth Amendment." Add.32 & n.28. Yet it concluded this case was different because the Estate somehow had the:

> burden to demonstrate that it was clearly established that an officer cannot use deadly force on a suspect who: has diminished capacity; was in an open, unconfined area; reportedly committed only non-violent misdemeanors; ignored orders to stop and get on his knees as he slowly walked away from an officer towards a parked vehicle with his hands up; and when he reached the door of the vehicle lowered his arm.

Add.33. The district court even stated that the Estate could have "possessed[] a meritorious case." Add.35-36. But it rejected the notion that the Constitution clearly forbids an officer from killing a suspect who poses no threat to an officer or others—instead focusing its analysis on nitpicking the decisions the Estate had cited and criticizing the Estate's counsel: "Of the three cases [the Estate] provides, the [c]ourt cannot consider *Ceballos* because it was published after the incident occurred, cannot rely on *Allen* because it is too factually different, and cannot rely on *Hill* by itself because it is unpublished." Add.35.

The district court then dismissed the Estate's vicarious liability wrongful death claim against the City without prejudice. Add.37. It did so on the sole ground that it declined to exercise supplemental jurisdiction over the claim. *Id*.

The court subsequently entered judgment for Defendants, and the Estate timely appealed. Add.39; 3-App.650.

SUMMARY OF ARGUMENT

I. This Court should reverse the district court's grant of summary judgment and remand this action for trial. The district court erred in finding that Officer Shelby was entitled to qualified immunity for killing Mr. Crutcher. The law was clearly established in 2016 that an officer could not shoot someone who is unarmed and not dangerous. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Hill*, 615 F. App'x at 479; *Walker v. City of Orem*, 451 F.3d 1139, 1160 (10th Cir. 2006). Construing the evidence in the light most favorable to the Estate as non-movant, that was precisely what Officer Shelby did. As video evidence confirms, at the moment Officer Shelby employed deadly force and ultimately killed Mr. Crutcher, Mr. Crutcher was unarmed, had given no indication that he posed any threat, and had his hands up.

The district court concluded otherwise only by repeatedly making legal errors. *First*, the court flouted the summary judgment standard. On summary judgment, the district court was obligated to "view the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable" to the Estate as the nonmoving party. *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016). Here, the district court expressly acknowledged that material facts were disputed, including whether Mr. Crutcher lowered his arm to reach into the SUV before Officer Shelby shot him as she would later claim. Instead of crediting the

Estate's view of the evidence, the district court resolved several critical factual disputes *against* the Estate and based its summary judgment decision on Officer Shelby's version of those disputed facts. *Second*, the court misapplied the legal standards concerning clearly established law, including defining the clearly established right at issue far too narrowly, wrongly demanding that the Estate marshal a case exactly on point, and erroneously refusing to make any attempt to actually ascertain the law itself.

II. This Court should also reverse the district court's dismissal of the Estate's *Monell* claims and remand for further proceedings. To bring a *Monell* claim, the Estate only needed to provide a short and plain statement plausibly alleging that TPD had a practice or custom encouraging excessive force. The Estate did just that. Namely, the Estate expressly identified policies, customs, or practices that pervaded TPD, including TPD's routine customary practice of inadequately training officers, deficient hiring, and failure to adequately investigate and discipline officers for uses of force, all of which contributed to an overarching practice and custom of excessive force. All of these unconstitutional practices contributed to Mr. Crutcher's death, as the Complaint alleged. The *Monell* claims were sufficiently pleaded.

STANDARD OF REVIEW

This Court reviews "the district court's grant of summary judgment for qualified immunity de novo." *Shepherd v. Robbins*, 55 F. 4th 810, 815 (10th Cir.

2022). "Summary judgment is warranted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006) (citation omitted). On summary judgment, evidence is viewed "in the light most favorable to the nonmoving party," and this Court must "resolve all factual disputes and draw all reasonable inferences in [the non-moving party's] favor." *Torres v. Madrid*, 60 F. 4th 596, 600 (10th Cir. 2023).

Likewise, this Court reviews dismissal of claims by a district court de novo. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept as true all of the well-pleaded factual allegations in the Complaint and view allegations in the light most favorable to the plaintiff. *Id.* To withstand a motion to dismiss, "[i]t is not necessary for the complaint to contain factual allegations so detailed that all possible defenses would be obviated. . . [T]he factual allegations need only contain enough allegations of fact to state a claim to relief that is plausible on its face." *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1276 (10th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). Granting a defendant's motion to dismiss for failure to state a claim is "a harsh remedy," which must be approached with caution to protect "the interests of justice." *Dias v. City &*

Cnty. of Denver, 567 F.3d 1169, 1178 (10th Cir. 2009); *see also Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022 (10th Cir. 2020).

ARGUMENT

I. Officer Shelby Is Not Entitled To Qualified Immunity.

"To overcome a qualified-immunity defense, a plaintiff must show (1) the officers' alleged conduct violated a constitutional or statutory right, and (2) it was clearly established at the time of the violation, such that every reasonable official would have understood, that such conduct constituted a violation of that right." *Packard v. Budaj*, 86 F.4th 859, 865 (10th Cir. 2023) (cleaned up).

Generally, to satisfy the clearly established prong, there must be "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Packard*, 86 F.4th at 867 (citation omitted). But "because excessive force jurisprudence requires an all-things-considered inquiry with 'careful attention to the facts and circumstances of each particular case,' *Graham*, 490 U.S. at 396, there will almost never be a previously published opinion involving exactly the same circumstances." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). The Supreme Court has specifically rejected the argument that qualified immunity applies unless previous cases are "fundamentally similar." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). And the qualified immunity analysis "is not a scavenger hunt for

prior cases with precisely the same facts and a prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law." *Packard*, 86 F.4th at 869.

Here, Supreme Court and Tenth Circuit precedent confirm that no later than September 16, 2016—when Officer Shelby shot and killed Mr. Crutcher—it was clearly established that an officer cannot shoot and kill an unarmed person who poses no threat to anyone. Viewing the facts in the light most favorable to the Estate, Officer Shelby did just that, and this case should therefore proceed to trial. The district court's contrary conclusion disregarded the record evidence, disputes of fact that the court itself recognized existed, and this Court's and the Supreme Court's case law. This Court should reverse.

A. Binding Precedent Clearly Established That An Officer Cannot Shoot And Kill An Unarmed Person Who Poses No Threat.

It was clearly established—both now and back in September 2016—that a police officer cannot shoot and kill an unarmed person who poses no threat. As the Supreme Court stated thirty years before Officer Shelby killed Mr. Crutcher, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In fact, the police can't even use deadly force to prevent escape or flight. *Id*. ("It is not better that all felony suspects die than that they escape."). This Court recognized that was the state of the law just one year before Officer Shelby killed Mr. Crutcher—stating that as of 2010

"the law was clearly established that an officer could not shoot an unarmed man who did not pose any actual threat to the officer or to others." *Hill*, 615 F. App'x at 479; *accord Walker*, 451 F.3d at 1160; *Casey*, 509 F.3d at 1285; *Cavanaugh v. Woods Cross City*, 625 F.3d 661 (10th Cir. 2010).

Viewed under the proper standard of review, the record evidence presented to the district court confirms that Officer Shelby shot and killed Mr. Crutcher while he was unarmed and not dangerous—a violation of literally decades of precedent. Based on the record evidence, Officer Shelby shot and killed Mr. Crutcher when he was next to a vehicle with his arms in the air—complying with Officer Shelby's commands. 2-App.277 at 2:30:00-3:05:30. He had no gun in his hands. 2-App.277 at 2:32:00. Officer Shelby had no reason to think he had a gun on his person at all. 2-App.277 at 2:30:00-3:05:30. And even if Officer Shelby had a concern that Mr. Crutcher could have reached into the vehicle, she had herself just minutes before searched that vehicle and saw *there was no weapon inside it*—let alone a weapon that would have been within Mr. Crutcher's reach. 3-App.459 at 21-24 (Q: "[D]id you a see a gun inside of the truck?" A: "The area that I saw ***I did not see a gun*** in the area that I observed" (emphasis added)). Yet she shot him anyway. This Court and others have repeatedly confirmed that shooting an unarmed person who poses no threat as Officer Shelby did is a clearly established constitutional violation rendering qualified immunity inappropriate as a matter of law. *Hill*, 615 F. App'x

470, 479 (10th Cir. 2015); *see also Garner*, 471 U.S. 1; *Zia Tr. Co. ex rel. Causey v. Montoya*, 597 F.3d 1150 (10th Cir. 2010); *Walker*, 451 F.3d 1139; *Carr v. Castle*, 337 F.3d 1221, 1224-25 (10th Cir. 2003); *Zuchel v. Spinharney*, 890 F.2d 273 (10th Cir. 1989).

Officer Shelby disputed these material facts, but that only confirms the district court erred in granting summary judgment. *First*, Officer Shelby claimed that Mr. Crutcher's arms were not always raised. Add.33 n.39. But as the district court stated: that fact was disputed. Add.26-27. *Second*, Officer Shelby contended that the window of the vehicle was rolled down such that Mr. Crutcher could have reached in to grab something from the car. *Id*. The district court noted that fact was disputed, too. Add.27; Add.33 n.39. In fact, the blood splatter on the car window shows that the window was mostly rolled up. 3-App.434. But, even if the window had been rolled down, Officer Shelby knew there was no gun inside the vehicle. 3-App.459 at 21-24; Add.26. *Third*, Officer Shelby contended that Mr. Crutcher reached into the vehicle right before she shot him. 2-App.233 ¶ 43. The district court again noted "the parties dispute whether Crutcher reached into the driver's side window to possibly retrieve a weapon." Add.27. That alleged reach is not clearly visible in any video of the shooting, which shows that Mr. Crutcher's hands were up when Officer Shelby shot him. 2-App.277 at 0:00:00-02:49:08; 3-App.439; 3-App.565. At best,

each of the facts on which Officer Shelby and the district court relied were disputed or immaterial. They did not entitle her to summary judgment.

This Court has repeatedly denied qualified immunity in similar circumstances. For example, in *Cavanaugh*, 625 F.3d 661, this Court affirmed the denial of qualified immunity where the officer defendant tasered the plaintiff. The plaintiff was "neither actively resisting nor fleeing arrest," she did not threaten the officer, and her hands were clearly visible and not holding a weapon. This Court found even the *non*-deadly use of a Taser was unwarranted on those facts—*i.e.*, where the plaintiff had posed no immediate threat to the officers and was walking away with her hands up. *Id.* at 665. As this Court concluded, "it was clearly established on December 8, 2006 that Officer Davis could not use his Taser on a nonviolent misdemeanant who did not pose a threat and was not resisting or evading arrest without first giving a warning." *Id.* at 667.

This Court also affirmed the denial of qualified immunity in *Walker*, 451 F.3d 1139. There, two police officers sought qualified immunity for shooting a suicidal suspect who was holding a knife to *his own* left wrist. The first officer opened fire because, he contended, he reasonably believed the suspect was holding a gun. This Court disagreed, properly viewing the facts in the light most favorable to the decedent. Based on those facts, the angle of the decedent's hands and the amount of light "should have permitted [the officer] to ascertain that he was not holding a gun

in a shooting stance." *Id.* at 1160. Importantly, the Court highlighted that the decedent "did not pose an immediate threat to the safety of the officers or others," and despite holding a small knife, "[h]e had made no threats and was not advancing on anyone" with the weapon. *Id.* The Court ultimately concluded that "[t]he right to be free from excessive force was well established in this circuit" where the decedent "was not actively resisting arrest, and there was no need to use deadly force to prevent him from fleeing and possibly harming others." *Id.* The second officer was no different. His shooting was also unreasonable considering the decedent "was not advancing on him and had not threatened him in any way, other than allegedly pointing his hands in [the officer's] direction in what [the officer] interpreted as a classic shooting stance." *Id.* (internal quotation marks omitted).

In *Casey*, 509 F.3d 1278, this Court again affirmed denial of qualified immunity. There, an officer-defendant had engaged in "an arm-lock, a tackling, a tasering, and a beating . . . against one suspected of innocuously committing a misdemeanor, who was neither violent nor attempting to flee." *Id.* at 1282. While this Court acknowledged it had "located no case" with the same facts, it made clear it "need not have decided a case involving similar facts to say that no reasonable officer could believe that he was entitled to behave as Officer Sweet allegedly did." *Id.* at 1285. This Court concluded, given these facts, the officer was "not entitled to immunity from trial." *Id.*

The facts of this case are directly analogous to these and other cases. Mr. Crutcher was "neither violent nor attempting to flee." *Casey*, 509 F.3d at 1282. He was unarmed, and neither Officer Shelby nor any reasonable officer in her position would have had a reason to think he had the means of rapidly arming himself, *see* 2-App.277 at 2:48:20—particularly given the fact that Officer Shelby had already searched the vehicle she now claims Mr. Crutcher was reaching into moments before she killed him, 3-App.459 at 21-24. Even Officer Shelby's own expert agreed that Mr. Crutcher "was not . . . actively resisting Shelby." 3-App.574. And Officer Turnbough, who was standing shoulder-to-shoulder with Officer Shelby, apparently didn't think he had any reason to use lethal force on Mr. Crutcher: he drew his Taser, even though he was also armed with a gun. Why Officer Shelby had any basis to shoot and kill Terence Crutcher at the very least remains disputed and, as the district court recognized below, likely presents a "meritorious case" for the Estate. Add.35-36.

In sum, an unbroken line of precedent from 1985 to the present confirms that an officer may not shoot and kill a suspect who is unarmed and poses no threat. *See Garner*, 471 U.S. at 11; *Zuchel*, 890 F.2d 273; *Carr*, 337 F.3d at 1224-25; *Walker*, 451 F.3d at 1160; *Casey*, 509 F.3d at 1285; *Zia Tr. Co.*, 597 F.3d 1150; *Cavanaugh*, 625 F.3d 661; *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (per curiam); *Clem v. Corbeau*, 284 F.3d 543, 550 (4th Cir. 2002); *Craighead v. Lee*, 399

F.3d 954, 963 (8th Cir. 2005). Viewing the facts in the light most favorable to the Estate, that's exactly what Officer Shelby did. The district court's contrary conclusion should be reversed,[12] and this action should proceed to trial.

B. The District Court Committed Fundamental Legal Errors In Reaching Its Result.

The district court's contrary conclusion was grounded in two obvious errors—errors to which this Court is not at all bound in exercising its de novo review—which provide further reason to decisively reverse. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). *First*, the district court's analysis contravened hornbook summary judgment standards, ignoring disputes of fact and viewing the record in the light most favorable to Officer Shelby, not the Estate, as the court was required to do. *Second*, the court misapplied governing qualified immunity law providing that courts need not search for cases that are "fundamentally similar," *Hope*, 536 U.S. at 741, or "exactly parallel to the conduct here," *Packard*, 86 F.4th at 869.

1. The District Court Improperly Based Its Decision On Disputed And Immaterial Facts.

In assessing a motion for summary judgment, a district court must "view[] the evidence in the light most favorable to the nonmoving party" and deny the motion if

[12] In doing so, this Court should vacate dismissal of the Estate's wrongful death claim, which was dismissed solely because the court declined to exercise supplemental jurisdiction, since no federal claims remained in the case. If the federal claims are restored, this state law claim should be as well.

there exists a "genuine dispute as to any material fact." *Davis v. Clifford*, 825 F.3d 1131, 1134 (10th Cir. 2016). That standard applies even where a court is assessing whether the law is "clearly established," as courts "must take care not to define a case's context in a manner that imports genuinely disputed factual propositions." *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (citations omitted). Here, the district court recognized *five times* that material facts were disputed. Add.26-27; Add.33 n.39. Yet it ignored those disputes in framing its decision and analyzing the case law. Doing so was error.

Tenorio v. Pitzer, 802 F.3d 1160 (10th Cir. 2015), is instructive. There, this Court affirmed the denial of qualified immunity to an officer following the use of lethal force. In doing so, the Court recognized that there were many facts that favored the officers' argument in favor of deadly force. *Id.* at 1164. But the Court also recognized that the district court had properly applied the summary judgment standard in *denying* qualified immunity because "the record supports some potential jury findings that would establish [the plaintiff's] claim," including that he was not a threat and was trying to comply with the officers' instructions. *Id.*

The result here should be no different. The district court recognized it was disputed whether Mr. Crutcher was complying with Officer Shelby's commands, and whether he had at all times kept his hands in the air. Add.26-27. It later recognized it was *undisputed* that Officer Shelby "interacted with Crutcher while investigating

a parked vehicle"—*i.e.*, a vehicle no one was driving or could use as a threat and one that she had herself searched and found no weapons inside. Add.35. And the court confirmed Officer Shelby "did not see a weapon in Crutcher's hands." *Id.* But the district court repeatedly ignored the evidence that would have "support[ed] some potential jury findings that would establish [the Estate's] claims," *Tenorio*, 802 F.3d at 1164, including stark video evidence from which a reasonable juror could infer that Officer Shelby shot and killed Mr. Crutcher while his hands were up in the air and he posed no threat to anyone.

Each fact the district court relied on was either disputed or further confirms that Officer Shelby's use of deadly force was objectively unreasonable. As just one example, the district court claimed that Mr. Crutcher "ignored orders to stop and get on his knees as he slowly walked away from an officer towards a parked vehicle with his hands up." Add.33. That fact was disputed, as the *district court itself stated in its opinion*. Add.27 ("It is disputed whether Crutcher complied with any commands."). The evidence confirms the dispute: The video shows Mr. Crutcher complying with officer commands, including raising his hands in the air. 2-App.277 at 2:30:00-3:05:30. And even if Mr. Crutcher had refused to stop and get on his knees, those facts do not justify use of deadly force, as four decades of case law confirms. As the Supreme Court has explained, the police cannot use deadly force

against an unarmed, nonthreatening suspect to force compliance with an officer's demands, or even to prevent flight. *Garner*, 471 U.S. at 10-11.

The district court also emphasized its view that Mr. Crutcher had "reached [toward] the door of the vehicle" while "lower[ing] his arm." Add.33. That fact, too, was disputed. At no time in any of the videos does Mr. Crutcher clearly lower his arms. *See, e.g.*, 2-App.277 at 0:00:00-2:49:08. Mr. Crutcher was shot under his armpit, allowing a jury to infer that his arms were raised when Officer Shelby killed him. 3-App.438; 2-App.341. And the blood from the shooting spattered such that it shows the window on the car was substantially raised—suggesting the car and its contents posed no threat to anyone. 3-App.434. Following the correct standard—requiring courts to "describe the facts viewing the video in the light most favorable to the Estate, as the nonmoving party," *Bond v. City of Tahlequah*, 981 F.3d 808, 813 n.7 (10th Cir. 2020), *rev'd on other grounds*, 595 U.S. 9 (2021) (per curiam); *Emmett v. Armstrong*, 973 F.3d 1127, 1135 (10th Cir. 2020)—Mr. Crutcher's arms were raised in the air at all relevant times.

Finally, the district court suggested that Officer Shelby was authorized to use deadly force because she suspected Mr. Crutcher of committing a misdemeanor. Add.33. But officers cannot shoot an unarmed, nondangerous individual simply because they (may have) committed a misdemeanor. *See Garner*, 471 U.S. at 11 (holding deadly force cannot be used simply because a person is escaping or fleeing

a seizure); *Washington v. City of Wichita*, 2022 WL 3594587, at *7 (D. Kan. Aug. 23, 2022) ("In [the Tenth] Circuit, the first *Graham* factor weighs against an officer's use of force when the crime committed 'is only a misdemeanor[.]'"(quoting *Koch v. City of Del City*, 660 F.3d 1228, 1246-47 (10th Cir. 2011))); *cf. Myers v. Brewer*, 773 F. App'x 1032, 1038 (10th Cir. 2019) (denying qualified immunity to officer who used *non-deadly* force against "a subject who at most was a misdemeanant, but otherwise posed no threat and did not resist arrest or flee" (citing *Morris v. Noe*, 672 F.3d 1185, 1198 (10th Cir. 2012))); *Casey*, 509 F.3d at 1285 (also denying qualified immunity to officer who used non-deadly force against suspected misdemeanant).

Based on the record before the district court, Officer Shelby was not entitled to qualified immunity as a matter of law. The district court's decision should be reversed.

2. The District Court Misapplied This Court's Legal Standards For Ascertaining A Clearly Established Right.

Not only did the district court disregard the summary judgment standard when it refused to construe the facts and evidence in the Estate's favor, it also misapplied the legal standards for determining whether a right is clearly established. In particular, the district court (a) defined the right at issue far too narrowly, and (b) improperly ignored or disregarded the cases the Estate cited below.

When analyzing a qualified immunity question, a court must appropriately "define" the clearly established law at issue. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742

(2011); *see also Hill*, 615 F. App'x at 477. This requires a careful balancing act. One the one hand, to ensure officers have sufficient notice of the illegality of their actions, courts should be sure "not to define clearly established law at a high level of generality," but should focus on whether "the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742. Yet, courts do not "require a case directly on point," *id.* at 741, and given the fact-specific nature of the excessive force "reasonableness" inquiry, "there will almost never be a previously published opinion involving exactly the same circumstances," *Casey*, 509 F.3d at 1284.

Here, the district court defined the right that needed to be clearly established far too narrowly. Per the district court, the Estate needed to present a case showing "that it was clearly established that an officer cannot use deadly force on a suspect who: [1] has diminished capacity; [2] was in an open, unconfined area; [3] reportedly committed only non-violent misdemeanors; [4] ignored orders to stop and get on his knees as [5] he slowly walked away from an officer towards a parked vehicle with his hands up; and [6] when he reached the door of the vehicle lowered his arm." Add.33. In other words, the district court required the Estate to present a case with all of these six distinct, specific factual circumstances—including multiple facts that were disputed. But this Court has repeatedly held that the correct "formulation" of the clearly established right—one that "meets the clearly established test by avoiding

generalities in favor of a right tailored to the essential facts of this case"—is as follows: at the time of the shooting, was "the law . . . clearly established that a law enforcement officer may not use deadly force to seize an unarmed person who is not posing any threat to the officer or others[?]" *King*, 615 F. App'x at 477; *see also Zia Tr. Co.*, 597 F.3d at 1155; *Garner*, 471 U.S. at 11. Instead of using this correct formulation, the district court did exactly what the Supreme Court and this Court have decreed it should not do: look for cases that are "fundamentally similar," *Hope*, 536 U.S. at 741, or "exactly parallel to the conduct here," *Packard*, 86 F.4th at 869.

The district court also incorrectly dismissed the cases the Estate cited below.

First, the district court refused to consider *Hill*, 615 F. App'x 470, on the ground that it was unpublished. Add.34. That was incorrect. Although "a single unpublished opinion cannot establish qualified immunity," *Williams v. Hansen*, 5 F.4th 1129, 1132 (10th Cir. 2021), "an unpublished decision 'need not be ignored in determining whether the law was clearly established,'" *McCoy v. Meyers*, 887 F.3d 1034, 1049 n.16 (10th Cir. 2018) (quoting *Est. of Booker v. Gomez*, 745 F.3d 405, 428 n.29 (10th Cir. 2014)). Here, the district court refused to consider the published cases cited within *Hill* because "[w]hile Plaintiff did provide the [c]ourt with a citation to *Hill*, Plaintiff did not provide the [c]ourt with citations to or legal arguments regarding the published authority within *Hill*." Add.34. Contrary to the district court's assertion, this Court has never held that district courts must turn a

blind eye to the published cases cited within an unpublished decision. Indeed, the fact that *Hill* was unpublished and this Court still denied qualified immunity signals that the panel in *Hill* thought it was so obvious that clearly established law prohibited an officer from shooting a non-dangerous, unarmed person that they did not need to publish their opinion.

If the district court had analyzed *Hill*, the similarities would have been immediately apparent. Just like Mr. Crutcher, the plaintiff in *Hill* was unarmed, had his hands raised in a non-threating manner, and was not making any threatening motions at the time of the shooting. 615 F. App'x at 476. This Court ultimately concluded that "the law was clearly established that an officer could not shoot an unarmed man who did not pose any actual threat to the officer or to others." *Id.* at 479.

Second, the district court cast aside *Ceballos*, 919 F.3d 1204. In that case, this Court found that a police officer was not entitled to qualified immunity for shooting a distraught individual that the officer—like Officer Shelby—chose to approach. *Id.* at 1216-17. While the individual in *Ceballos* did not comply with police commands and was holding a bat, this Court concluded that a reasonable jury could find that the officer needlessly escalated the situation and a "reasonable officer in Husk's position would have known that his conduct (viewed in the light most favorable to [the

plaintiff]) violated his Fourth Amendment right to be free from excessive force." *Id.* at 1217.

The district court declined to consider *Ceballos* because that case "was published in 2019, two and a half years after the incident at issue occurred"—*i.e.*, after Officer Shelby shot Mr. Crutcher. Add.34-35. That analysis is fundamentally flawed. *Ceballos* affirmed the denial of qualified immunity for a shooting that occurred in 2013—*three years before Officer Shelby shot Mr. Crutcher*. Add.26. As such, anything this Court held was clearly established in that case—as of 2013—would necessarily be clearly established in this case, too. In *Ceballos*, this Court specifically recognized that no later than 2013, it was clearly established that "officers are not justified in using deadly force unless objectively reasonable officers in the same position 'would have had probable cause to believe that there was a threat of serious physical harm to themselves or to others.'" 919 F.3d at 1213-14 (quoting *Thomson v. Salt Lake City*, 584 F.3d 1304, 1313 (10th Cir. 2009)). To come to that conclusion, this Court cited cases from 1995, 1997, and 2007—including an unpublished decision. *Id.* at 1214-17 (citing *Sevier v. City of Lawrence*, 60 F.3d 695, 697-99 (10th Cir. 1995), *Allen v. Muskogee*, 119 F.3d 837, 839-41 (10th Cir. 1997), and *Hastings v. Barnes*, 252 F. App'x 197, 198-200, 203-07 (10th Cir. 2007)). The district court simply ignored all of these cases and facts—disregarding this Court's

holding in *Ceballos* because of the date on which it was published rather than the date about which it opined. That was not only wrong—it was clear error.

Third, the district court refused to consider *Allen*, 119 F.3d 837, "because it is too factually different." Add.35. That, too, was error. In *Allen*, two officers shot an armed man, while several bystanders were present. 119 F.3d at 839. Despite the fact the man was armed and members of the public were nearby, this Court *still* 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. To the extent *Allen* is "factually different," it provides *stronger* justification that Officer Shelby's actions here—where Mr. Crutcher was unarmed and not an immediate threat to himself or members of the public—were unreasonable. *Allen* was sufficiently on point and corroborates that it was clearly established as of 2016 that officers cannot shoot and kill unarmed individuals who pose no threat.

Overcoming qualified immunity does not "'require[] a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself.'" *Finch v. Rapp*, 38 F.4th 1234, 1243 (10th Cir. 2022) (quoting *Zia Trust Co.*, 597 F.3d at 1155 (in turn quoting *Weigel v. Broad*, 544 F.3d 1143, 1154 (10th Cir. 2008))). Here, no matter how similar the facts between any of

the cases cited by the Estate below and the facts of this case, it remains true that, construing the evidence in the light most favorable to the Estate, Officer Shelby's use of deadly force was "totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself." *Id*.

These cases are not the only ones out there, either. The Supreme Court, this Court, and a wealth of courts in other circuits confirm that police officers lack qualified immunity when they shoot unarmed people who pose no threat to anyone.[13] The citations the Estate provided below were adequate, but the district court didn't need to limit itself to them. Indeed, the United States Supreme Court has rejected the argument that a court can blind its eyes to the reality of the law in qualified immunity cases. *Elder*, 510 U.S. at 511-12; *see also Williams*, 5 F.4th at 1133.

In *Elder*, the Ninth Circuit had held that, when deciding a qualified immunity question, an appellate court could only consider legal authorities presented to the district court. 510 U.S. at 511-12. The Supreme Court rejected that rule, holding that "appellate review of qualified immunity dispositions is to be conducted in light of *all relevant precedents*, not simply those cited to, or discovered by, the district court." *Id.* at 512 (emphasis added). The Court explained that refusing to evaluate

[13] *Garner*, 471 U.S. at 11; *Zuchel*, 890 F.2d 273; *Carr*, 337 F.3d at 1224-25; *Walker*, 451 F.3d at 1160; *Casey*, 509 F.3d at 1285; *Zia Trust Co.*, 597 F.3d 1150; *Cavanaugh*, 625 F.3d 661; *Thornton*, 132 F.3d at 1400; *Clem*, 284 F.3d at 550; *Craighead*, 399 F.3d at 963.

qualified immunity "in light of all relevant precedents" did not advance any of the purposes underlying qualified immunity. *Id.* It did not help officers understand their obligations while on duty because arbitrarily limiting the universe of cases to those discovered in the district court would make qualified immunity "unpredictable." *Id.* at 515. And this approach also did not assist the goal of "deterring public officials' unlawful actions and compensating victims of such conduct." *Id.* "Instead, it simply releases defendants because of shortages in counsel's or the court's legal research or briefing." *Id.*

That same reasoning applies here. The district court should have decided the qualified immunity question "in light of all relevant precedents, not simply those cited to, or discovered by" the Estate's counsel below—precedents that established qualified immunity was unwarranted here. Looking to the precedent both cited in the Estate's briefing below and accessible to any reasonable officer assessing their constitutional duty, any officer would have known that she could not shoot and kill an unarmed, nondangerous individual. The district court's contrary conclusion is deeply flawed and should be reversed.[14]

[14] Although the Tenth Circuit has said that the plaintiff bears the "burden" of proving that a constitutional right is clearly established in order to defeat a claim of qualified immunity, the Estate respectfully preserves its right to contest that conclusion either *en banc* or in the Supreme Court. There exists a circuit split on the question of which party should bear the burden with respect to qualified immunity. *See Stanton v. Elliott*, 25 F.4th 227, 233 (4th Cir. 2022); *Vasquez v. Maloney*, 990 F.3d 232, 238 (2d Cir. 2021). It appears this Court first derived this articulation of the burden from

II. The District Court Improperly Dismissed The Estate's *Monell* Claims Against The City.

Officer Shelby's pursuit and killing of Mr. Crutcher with his hands up three minutes after seeing him walk down the street was not an aberration or one-off event. It was just one of the many tragic outcomes caused by TPD's customs and practices that result in excessive force against community members. The Complaint details these practices, including: deficient hiring, training, investigation, and officer discipline, as well as TPD's failure to implement a body camera policy. The Complaint's allegations easily satisfy the "short and plain statement" standard under Rule 8(a)(2) applicable to *Monell* claims.

A. The Estate Only Needed Plausible Allegations To Survive A Motion To Dismiss.

As a threshold matter, the district court applied the wrong legal standard. To survive a motion to dismiss, the Estate only needed to provide "a short and plain

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Davis v. Scherer, 468 U.S. 183 (1984). But as the United States Supreme Court later clarified in another case, *Scherer* merely held that qualified immunity cannot be defeated by showing that the defendant "violate[d] any clearly established duty, including one under state law." *Elder*, 510 U.S. at 515 (emphasis omitted). *Scherer* thus does not support the proposition that a plaintiff bears the burden of disproving qualified immunity, and other basic principles of civil procedure indicate that the defendant should bear the burden of proving their own affirmative defense. *See Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 982 (10th Cir. 2002); *Ahmad v. Furlong*, 435 F.3d 1196, 1201 (10th Cir. 2006). As both the party moving for summary judgment and the party invoking an affirmative defense, Defendants should have borne the burden.

statement" showing its entitlement to relief. Fed. R. Civ. P. 8(a)(2). This standard "does not require detailed factual allegations," but instead just well-pleaded facts that, if accepted as true, state a claim to relief that is "plausible" on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-88 (2009) (internal quotation marks omitted). "The short and plain statement rule is a *de minimus* requirement, compelling the plaintiff to provide his opponents 'fair notice of what [his] claim is . . . and the grounds upon which it rests.'" *Toevs v. Reid*, 267 F. App'x 817, 818 (10th Cir. 2008) (alterations in original) (quoting *Twombly*, 550 U.S. at 555). A plaintiff need only "nudge [his] claims across the line from conceivable to plausible in order to survive a motion to dismiss." *SEC v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) (internal quotation marks omitted).

Monell claims are no different. A federal court cannot "apply a 'heightened pleading standard'—more stringent than the usual pleading requirements of Rule 8(a) . . . in civil rights cases alleging municipal liability." *Leatherman v. Tarrant Cnty. Narcotics Intell. & Coordination Unit*, 507 U.S. 163, 164 (1993); *see also Danford v. DeHerrera*, 2005 WL 1770882, at *2 (D. Colo. July 26, 2005) ("[A] plaintiff alleging a violation of section 1983 against a municipality need only include 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" (quoting *Leatherman*, 507 U.S. at 168)). A *Monell* complaint survives a motion to dismiss, even if the court is "not sure whether the plaintiff[] can prove each of those

elements at trial or even survive summary judgment," as long as the plaintiff has "allege[d] sufficient facts supporting each element for their claim to proceed past the motion-to-dismiss stage." *Quintana*, 973 F.3d at 1034.

Moreover, any evaluation of the legal sufficiency of a *Monell* claim must take into account that defendants typically have nearly all the relevant facts, and a plaintiff has not yet had access to discovery. Accordingly, "a plaintiff, as an outsider to municipal government[] is not expected to have information about a city's official policies, practices, or training programs at the pleading stage." *Walker v. Zepeda*, 2012 WL 13285403, at *5 (D. Colo. May 29, 2012) (citations omitted); *see also Taylor v. RED Dev., LLC*, 2011 WL 3880881, at *4 (D. Kan. Aug. 31, 2011) ("While it is true that plaintiffs do not include in their complaint additional instances of officers targeting African-American shoppers without probable cause, that omission is not fatal under *Iqbal* because it is unlikely that plaintiffs would have access to such information at the pleading stage.").

In dismissing the Estate's *Monell* claims, the district court disregarded the content of the Complaint and held the Estate to an improperly heightened pleading standard. Instead of applying the permissive pleading standard appropriate for a motion to dismiss, the court relied on case law discussing the standard of proof applicable at trial. Add.10 (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*,

520 U.S. 397, 405 (1997)).[15] This was error. The court then claimed that the Estate provided only "vague conclusions" and "no specific factual allegations." Add.8. But, as detailed below, the Estate alleged every element of a *Monell* claim and supported each element with factual allegations.

B. The Estate Plausibly Alleged That TPD Had A Practice Or Custom Encouraging Excessive Force.

The district court dismissed the Estate's *Monell* claims because, according to the court, the Estate did "not provide any factual averments to support his conclusion that [a] policy or custom exists." Add.13. That is simply not true. Using specific facts, including Officer Shelby's own statements about how her TPD training informed her decision to shoot Mr. Crutcher, the Estate adequately alleged that TPD had a custom and widespread practice of encouraging officers to use force unnecessarily. Not only was this custom or practice entrenched in TPD's overall culture, but it was also bolstered by inadequate training, hiring, discipline, and investigation practices—all of which the Estate specifically discussed.

Under *Monell*, a municipality can be held liable under § 1983 "if it executes an unconstitutional policy or custom, or a facially constitutional policy that causes a constitutional violation." *Finch*, 38 F.4th at 1244. To state a claim, "the plaintiffs

[15] *Brown* was an appeal following a jury trial, not a motion to dismiss. *Brown*, 520 U.S. at 397.

must allege facts showing: (1) an official policy or custom, (2) causation, and (3) deliberate indifference." *Quintana*, 973 F.3d at 1034. The "official policy or custom" element does not require a written, official, facially unconstitutional policy. A plaintiff can establish municipal liability by showing "an official rule or one so entrenched in practice as to constitute an official policy," *Finch*, 38 F.4th at 1244, or "persistent and widespread . . . practices of . . . officials," *Starrett v. Wadley*, 876 F.2d 808, 818 (10th Cir. 1989) (alterations in original) (quoting *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 691 (1978)).

The Estate adequately pleaded that TPD had persistent, widespread practices that encouraged, rather than dissuaded, the use of deadly force in situations where it was "totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself." *Finch*, 38 F.4th at 1243. The Complaint alleged that TPD had a "culture of 'you hesitate and you die,'" 1-App.120 ¶ 73—a practice or custom that, if true, is unconstitutional, *see Garner*, 471 U.S. at 11 (noting that a seizure practice that authorizes the use of deadly force, "whatever the circumstances, is constitutionally unreasonable"). And contrary to the district court's finding that the Estate "failed completely to offer anything more than pure conclusions and bare labels," Add.14, the Estate supported this allegation with specific facts. The Complaint alleged that Officer Shelby espoused this practice or custom on national television *and* attributed it to TPD training and practices. 1-App.119 ¶ 72 ("Officer

Shelby informed the world that the training she received from the City and TPD's culture taught her, 'If I wait to find out if he [Mr. Crutcher] had a gun or not, I could very well be dead [because as] ***we*** always say, I'd rather be tried by twelve than carried by six.'" (emphasis added)). Further, the Complaint alleged *why* this custom or practice existed: because TPD perceived "a war against cops" in Tulsa. 1-App.120 ¶ 73. The Complaint's detail regarding TPD's long history of using excessive force, particularly against Black Tulsans, provides further support for this claim. 1-App.121, 123-125 ¶¶ 76, 85, 91-95. In short, the Estate alleged that TPD had a widespread and well-settled "informal 'custom'" of escalating force to protect TPD officers at all costs, no matter the risk of harm to the community. *Brammer–Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189 (10th Cir. 2010).

The Complaint then went on to explain how specific deficient practices, including practices related to training, hiring, and investigation and officer discipline, contributed to this overall custom and practice of excessive force. Take the allegations related to hiring. A plaintiff can state "a plausible § 1983 claim against the City for negligent hiring, training, supervision and retention." *Chipps v. Roswell*, 2018 WL 4899097, at *2 (D.N.M. Oct. 9, 2018); *see also Prince v. Sheriff of Carter City*, 28 F.4th 1033, 1049 (10th Cir. 2022). Here, the Complaint alleged that TPD "disregarded a known or obvious risk of injury" when it hired and retained Officer Shelby. *Bd. of Cnty. Commissioners of Bryan Cnty., Oklahoma v. Brown*, 520 U.S.

397, 412 (1997). A simple background check revealed that Officer Shelby was no stranger to unnecessarily escalating interactions and using violent force in wholly inappropriate situations. She assaulted her estranged husband and his mother with a deadly weapon. 1-App.117 ¶¶ 60-61. She had at least two protective orders taken out against her due to other instances of threatening behavior, including one instance where she used yet another weapon (a shovel) to cause property damage. 1-App.117-118 ¶¶ 62, 64. These incidents gave TPD notice of the need to "adequately review, scrutinize, and/or consider Officer Shelby's propensity for violence, overreaction during interpersonal conflict, and inability to handle stressful personal interaction," and the likelihood her violent tendencies would result in a constitutional injury, like Mr. Crutcher's death. 1-App.136 ¶ 174. Yet, despite these "warning signs," the TPD still hired Officer Shelby and armed her with a gun. *See Zartner v. City of Denver*, 242 F. Supp. 3d 1168, 1176 (D. Colo. 2017) (finding that plaintiff had sufficiently alleged a *Monell* failure-to-supervise claim where "the City did not properly act despite 'warning signs'" that an officer was likely to use excessive force).

The Complaint further alleged that TPD cemented its practice or custom of using excessive force by consistently failing to hold officers accountable through adequate investigation and discipline. Specifically, the Estate alleged that TPD "had (has) a 'code of silence' and/or 'blue wall' that caused TPD to . . . insufficiently

investigate allegations of police misconduct." 1-App.132 ¶ 144. Contrary to the court's conclusion that the Estate "[did] not provide any factual averments to support his conclusion that this policy or custom exists," Add.13, the Complaint alleged specific examples of investigative and disciplinary failures to substantiate this allegation. It noted that TPD did not have a body camera policy at the time Officer Shelby killed Mr. Crutcher, even though the department knew such cameras were important tools for improving officers' behavior and investigating officer uses of force. 1-App.124 at ¶ 89. It further alleged that TPD had a track record of inadequately investigating—or even outright refusing to investigate—citizen complaints related to use of force by TPD officers. 1-App.131 ¶ 135. And, in those rare instances where TPD did investigate, the department "always recommend[ed]" that the Tulsa District Attorney's Office find an officer's use of force justified. 1-App.119 ¶ 71. When officers know they can use force without consequences, excessive force becomes routine and endemic.

On top of all this, the Estate alleged that TPD's "failure to adequately train or supervise employees" further encouraged excessive force. The Complaint identified specific training deficiencies, including lack of training on de-escalation tactics, implicit bias, and how to engage individuals with diminished capacity. *See* 1-App.119-122 ¶¶ 72-83. This is a plausible *Monell* claim. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002); *Taylor*, 2011 WL 3880881, at *3.

C. The Estate Plausibly Alleged Causation And Deliberate Indifference.

Terence Crutcher's death was the result of the practices alleged. In granting defendants' motion to dismiss, the district court faulted the Estate for failing to "allege a causal link between this policy or custom and a violation of Mr. Crutcher's constitutional rights." Add.13.

Again, the court's conclusion is belied by the record. At the motion to dismiss stage, plaintiffs may plead causation by simply alleging the challenged custom caused their injury. *See Quintana*, 973 F.3d at 1034. The Estate met this standard. Repeatedly and explicitly, the Complaint alleged causation. *E.g.*, 1-App.119 ¶ 72 ("The interaction between Officer Shelby and [Mr. Crutcher] became deadly because of Officer Shelby's own deliberate conduct, which she has testified was a result of the training she received from the City."); *see also* 1-App.122 ¶ 83; 1-App.130 at ¶ 132. Officer Shelby even invoked TPD's training and culture when asked to explain her decision to shoot: "***[W]e*** always say, 'I'd rather be tried by 12 than carried by 6.'" 1-App.119 ¶ 72.

And the Complaint went further, explaining how the alleged practice or custom applied in this particular case. Take, for example, the Estate's allegations related to TPD's persistent practice of encouraging officers to "shoot first, ask questions later" and that TPD insufficiently trained its officers on use-of-force, implicit bias, and de-escalation. 1-App.120, 124-125. Officer Shelby's conduct

exemplified the dangerous behavior these practices cause. 1-App.130 at ¶ 132. And she attributed her decision to shoot Terence Crutcher to TPD's training and culture on national TV. 1-App.119 ¶ 72. The Complaint more than adequately alleged causation.

Finally, the Estate sufficiently alleged deliberate indifference. A plaintiff establishes this element by showing that "the municipality had 'actual or constructive notice that its action or failure to act [was] substantially certain to result in a constitutional violation' and 'consciously or deliberately [chose] to disregard the risk of harm.'" *Finch*, 38 F.4th at 1244 (alterations in original) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)). The Complaint repeatedly alleged TPD's knowledge of the practices alleged, along with its refusal to take corrective action. For example, the Complaint noted that the City and TPD Chief were advised of the need for body cameras, yet failed to require them prior to Mr. Crutcher's death. 1-App.124 ¶¶ 88-89. The Complaint also alleged that TPD ignored Officer Shelby's history of violence and multiple orders of protection against her and that the failure to screen her led to Mr. Crutcher's death. 1.App.117-18 ¶¶ 59-64; 1-App.137 ¶ 177. Further, the Complaint alleged that the City and TPD were aware of TPD's long history of "citing, arresting, jailing, and using excessive force against African-Americans" at disproportionate rates—as such practices were well-documented—yet the City "did not implement an implicit bias training program, or any other

specific program, training, or policy to reduce this obvious racial disparity in policing." 1-App.124-125 ¶¶ 91-95; 1-App.134 ¶ 161. In short, over and over, the Complaint alleged that TPD was aware of systemic problems with its culture and practices yet did nothing to fix them.

* * *

To survive the motion to dismiss, the Estate only needed to "assert a short and plain statement" plausibly alleging a policy, custom, or practice of the Defendants that caused Mr. Crutcher's killing. *Danford*, 2005 WL 1770882, at *2 (citing *Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000)). Allegations far less detailed than those described above have satisfied this plausibility standard. *E.g.*, *Martinez v. Winner*, 771 F.2d 424, 443-44 (10th Cir. 1985) (finding *Monell* liability sufficiently alleged where plaintiff had alleged that the Denver Police Department "had an official policy and plan to repress, vilify, and deny rights to Mexicanos, American Indians, and other 'oppressed' national minorities"); *Walker*, 2012 WL 13285403, at *4 (denying motion to dismiss where plaintiff alleged that the City "'upon information and belief' . . . fail[ed] fully to investigate excessive force claims" and failed to train and supervise officers on how to use reasonable force). This Court should reverse the district court's dismissal of the Estate's well-pleaded *Monell* claims.

CONCLUSION

For the foregoing reasons, the Estate respectfully requests this Court reverse the district court's summary judgment ruling in favor of Defendants, reverse the district court's dismissal of the Estate's *Monell* claims, and remand for further proceedings.

DATED: September 16, 2024

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. Oral argument is necessary to properly set forth the issues presented by this appeal and would aid the Court's decisional process. The district court did not permit oral argument prior to granting the motion to dismiss or motion for summary judgment, which was inappropriate given the significance of the constitutional violations alleged in this case. Oral argument will permit Appellant to properly present its appeal, clarify the issues for the Court, and answer any questions the Court may have.

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that: (1) this document contains no information requiring privacy redactions; (2) hard copies of the foregoing motion required to be submitted to the Clerk's office are exact copies of the motion as filed via ECF; and (3) the motion filed via ECF was scanned for viruses and is virus free.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b) because it contains 12,724 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as indicated by the word-processing program used to prepare this brief.

The 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 Office Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2024, I electronically transmitted the foregoing Plaintiff-Appellant's Opening Brief, which was electronically filed with the Clerk of the Tenth Circuit Court via the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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ADDENDUM PURSUANT TO RULE 28.2(A)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL MANNING, as the Administrator of the ESTATE of TERENCE CRUTCHER, SR., *Plaintiff,* vs. CITY OF TULSA, *et al.,* *Defendants.*	Case No. 17-cv-336-EFM-SH

MEMORANDUM AND ORDER

Plaintiff Michael Manning, as the Administrator of the Estate of Terrence Crutcher, Sr., brings various claims against Defendant City of Tulsa and several of its police officers, based on the 2016 death of Mr. Crutcher. Before the Court is the Renewed Partial Motion to Dismiss filed by Defendant City. (Doc. 138). Plaintiff filed a Response, and the City has replied. Also before the Court are two Motions in Limine of Plaintiff (Docs. 140, 145), as well as several Motions to Dissolve the Stay of Discovery (Docs. 157, 160, 165, 168, 174) previously entered in the action. For the reasons provided in the present Order, the City's Motion to Dismiss is granted. The remaining motions are denied as moot or as premature.

I. Factual and Procedural Background

On September 16, 2016, the Tulsa Police received reports of an unattended SUV, left running in the middle of 36th Street North, just east of North Lewis Street. Tulsa Police Officer

Defendant Betty Jo Shelby, who was then on her way to an unrelated call, responded. At the scene she encountered Mr. Crutcher, where a brief interaction occurred, the exact nature of which is the subject of substantial dispute.

Ultimately, Officer Shelby fired her handgun, striking Mr. Crutcher. Approximately five seconds later, Defendant Officer Tyler Turnbough fired his taser, also hitting Mr. Crutcher, who then fell to the pavement. Less than an hour later, Mr. Crutcher was pronounced dead at St. John Medical Center in Tulsa.

Austin Bond, then the Administrator of the Crutcher Estate, commenced this action in June of 2017, asserting various claims against a number of Defendants. The matter has been subjected to extensive pleadings, with Defendants filing a series of Motions to Dismiss, most of which have been rendered moot by successive Amended Complaints filed by Plaintiff.

In granting Plaintiff's request for a Third Amended Complaint, the Magistrate Judge determined that discovery in the action should be stayed:

> In this case, Defendants Tyler Turnbough, Jason Roy, and Charles Jordan have filed Motions to Dismiss on the basis of qualified immunity. Similarly, Defendant Betty Jo Shelby has asserted qualified immunity as an affirmative defense in her Answer. Because some Defendants have asserted qualified immunity, the Court finds it appropriate to stay discovery pending the Court's decision on the issue of qualified immunity.
>
> Further, discovery cannot proceed against only Defendant City of Tulsa, which has not raised qualified immunity in its Motion to Dismiss, and Defendant Shelby, who has not filed a Motion to Dismiss, and be stayed only for those Defendants who have raised qualified immunity in their Motions to Dismiss. If discovery were to proceed in any form, Defendants for whom discovery had been stayed would still not be free of the burdens of discovery, as it would likely prove necessary for those Defendants to participate in the discovery process to ensure that the case does not develop in a misleading or slanted way that causes prejudice to their positions.

In subsequently granting Plaintiff's Motion for Leave to File a Fourth Amended Complaint, the Magistrate Judge directed that "[d]iscovery remains stayed."

Currently at issue before the Court is the Renewed Motion to Dismiss filed by the City, which was submitted in the wake of Plaintiff's Fourth Amended Complaint. In presenting and responding to this Motion, the parties incorporated their prior briefing related to the Third Amended Complaint and presented additional argument related to the newly-added claim of negligent hiring, training and supervision.

For the purposes of this motion and as reflected in the most recent Amended Complaint, Plaintiff has advanced eight causes of action against Defendant City of Tulsa. Seven of these causes of action allege the Defendant violated the constitutional rights of Mr. Crutcher in various respects. Specifically, Plaintiff alleges the City (1) violated Mr. Crutcher's Fourth Amendment right be free from excessive force by failing to properly train Officer Shelby; (2) violated the same right by failing to properly train Officer Turnbough; (3) violated his Fourteenth Amendment right to equal protection by maintaining or tolerating a discriminatory policy, practice, custom, or culture; (4) violated his Fourteenth Amendment right by developing and maintaining policies, practices, customs, and a culture that interfered with Mr. Crutcher's right to a familial relationship; (5) promulgated an unwritten practice or "code of silence" custom that was deliberately indifferent to his constitutional rights, (6) promulgated a written policy that was deliberately indifferent to his constitutional rights, and (7) engaged in deliberately indifferent hiring and supervision of Officer Shelby.

In addition, Plaintiff advances a wrongful death claim against the City under Oklahoma law, grounding this claim on two separate theories of recovery. First, he argues the City is liable under the doctrine of *respondeat superior* for Officer Shelby's negligent actions. Second, he

argues the City is independently liable for its own negligence in hiring and failing to supervise Officer Shelby.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the City has moved to dismiss all claims, except the Plaintiff's claim of *respondeat superior* liability under Oklahoma law.

Beyond these claims against the City, the Fourth Amended Complaint also advances excessive force claims against Officers Shelby and Turnbough, and a claim of deprivation of the right to life against Officer Shelby. In addition, the Fourth Amended Complaint brings two § 1983 claims against Tulsa Police Chief Charles Jordan. However, Plaintiff dismissed Jordan from the action on March 24, 2021.[1]

II. Legal Standard

Rule 12(b)(6) tests "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true."[2] To survive a Rule 12(b)(6) motion, "[t]he complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support plaintiff's allegations."[3] "[P]lausibility refers to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct,

[1] In addition, Plaintiff previously named Jason Roy, another police officer at the scene of the shooting, as a Defendant. Plaintiff dismissed Roy from the action on January 22, 2019, immediately prior to the filing of the Third Amended Complaint.

[2] *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994).

[3] *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

much of it innocent, then the plaintiff [has] not nudged [his] claims across the line from conceivable to plausible."[4]

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[5] However, "[a] pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do. Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' "[6] That said, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the...claim is and the grounds upon which it rests;" the 12(b)(6) standard does not "require that the complaint include all facts necessary to carry the plaintiff's burden."[7]

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that defendant has acted unlawfully."[8] As the Tenth Circuit has explained, "the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims."[9] "Where a

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[4] *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (internal quotations and citations omitted).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009).

[6] *Id*. (citation omitted).

[7] *Khalik*, 671 F.3d at 1192.

[8] *Id*. (citation omitted).

[9] *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphases in original).

complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' "[10]

III. Analysis

In *Monell v. Department of Social Services of City of New York*,[11] the United States Supreme Court held that a municipality can be liable under § 1983 for violations of civil rights if the violation is a result of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[12] "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible."[13] A government, therefore, cannot be sued under § 1983 for injuries caused by its employees; rather, liability only attaches "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict the injury."[14]

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[10] *Iqbal*, 556 U.S. at 678 (citation omitted).

[11] 436 U.S. 658, 690 (1978).

[12] *Id*. at 690.

[13] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (emphasis in original).

[14] *Monell*. 436 U.S. at 694; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (holding that *Monell* liability attaches only "for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.'").

To establish liability under *Monell*, a plaintiff must show "(1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the violation alleged."[15] In determining the existence of such policies, courts may look to:

> [1] a formal regulation or policy statement, [2] an informal "custom" so long as this custom amounts to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law[,] [3] the decisions of employees with final policymaking authority[,] or [4] the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval.[16]

The municipality may be liable if it was deliberately indifferent to "an obvious risk of constitutional harm which will almost inevitably result in constitutional injury of the type experienced by the plaintiff."[17] Deliberate indifference is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[18] Thus, in actions under § 1983, "a plaintiff [must] show that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury."[19]

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[15] *Hollingsworth v. Hill*, 110 F.3d 733, 742 (1997) (further citations and quotations omitted); *see also Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004) ("In order to establish municipal liability under *Monell*, a plaintiff must show (1) that a municipal employee committed a constitutional violation; and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation.").

[16] *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189 (10th Cir. 2010) (quotations and citations omitted).

[17] *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013) (further citations and quotations omitted).

[18] *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).

[19] *Schneider*, 717 F.3d at 769 (citations omitted).

A. Fourth Amendment Excessive Force based on the Training of Shelby

Plaintiff's first claim against the City is for excessive force in violation of Mr. Crutcher's Fourth Amendment right based on Officer Shelby's conduct. The City contends Plaintiff's claim focuses on a lack of training or supervision/discipline of police officers, and Plaintiff fails to provide factual allegations outlining what the deficiencies of the training were, what supervision or training was lacking, or how this alleged lack of training is linked to Officer Shelby's conduct with respect to Mr. Crutcher. Based on these deficiencies, the City argues dismissal of the claim is appropriate.

Plaintiff has alleged the Tulsa Police Department ("TPD") had systematic deficiencies in its training and policies with respect to: (1) tactical training and policies; (2) de-escalation training and policies; (3) handling of citizens with diminished capacity; and (4) investigation and resolution of legitimate excessive force and racial discrimination complaints. Plaintiff also alleges the City's policy, customs and practices failed to "train officers on avoiding the reckless and deliberate creation of the need to use force."

However, Plaintiff provides no specific factual allegations to support these vague conclusions. Nor does he articulate what the training policies and procedures were, or explain how they were deficient. Thus, Plaintiff does not satisfy the first element of a *Monell* claim, and it is unnecessary to consider the second element, whether as casual link exists between the alleged deficiency and the alleged constitutional deprivation.

Plaintiff in the Fourth Amended Complaint has presented bare legal conclusions, and has failed to nudge his claim against the City across the line from conceivable to plausible. Dismissal of this claim is appropriate.[20]

B. Fourth Amendment Excessive Force based on the Training of Turnbough

Plaintiff's second cause of action asserts a Fourth Amendment violation premised on Officer Turnbough's conduct when he tased Mr. Crutcher. The same policy and custom deficiencies outlined above apply to Plaintiff's second claim. Further, the Fourth Amended Complaint does not allege a causal link between any policy or custom and Officer Turnbough's conduct. Therefore, Plaintiff has failed to state a claim against the City for excessive force with respect to Officer Turnbough and the claim must be dismissed.

C. Fourth Amendment Equal Protection Claim

Plaintiff next asserts a claim against the City for violating Mr. Crutcher's equal protection rights. Specifically, Plaintiff alleges:

> The City violated [Mr. Crutcher's] rights by failing its duty to properly train and supervise Officer Shelby and other TPD officers, and by maintaining or tolerating a policy, practice, custom, or culture that causes intentional disparate enforcement and outcomes in police encounters with African-Americans, who are similarly situated as non-African-Americans. These failures by the City constitute a violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

Plaintiff also alleged the City "created, allowed, and/or knew TPD has a policy, practice, custom, and culture disparately and unconstitutionally stopping, citing, arresting, jailing, and using excessive force against African-Americans . . . ." According to Plaintiff, the City was also

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[20] *See, e.g., Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

allegedly informed of a need to implement implicit bias training and did not implement implicit bias training. And, he alleges, "the City's African-American population was arrested twice as much as other races . . . ."

As outlined above, in order to establish municipal liability under *Monell*, a plaintiff must show (1) that a municipal employee committed a constitutional violation; and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation.[21] Here, Plaintiff does not identify a written policy. Therefore, the Court understands his cause of action to be premised on an "informal custom."[22] Plaintiff alleges the City has an informal custom resulting in unconstitutional stopping, citing, arresting, jailing and using excessive force against African-Americans. However, Plaintiff provides no explanation to the City or this Court what the custom is. Nor does Plaintiff allege any link between the custom and the constitutional violations.

To the extent Plaintiff's claim is one for selective enforcement, claims asserting selective enforcement of a law on the basis of race are properly brought under the Equal Protection Clause.[23] "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."[24] To state

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[21] *Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004); *Bryson v. City of Okla. City,* 627 F.3d 784, 788 (10th Cir. 2010); *see also Monell*, 436 U.S. at 691 ("[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

[22] *Brammer-Hoelter*, 602 F.3d at 1189.

[23] *Marshall v. Columbia Lea Regional Hosp*., 345 F.3d 1157, 1166 (10th Cir. 2003).

[24] *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 405 (1997).

a claim for selective law enforcement against the City, Plaintiff must sufficiently allege Officer Shelby committed a constitutional violation as a result of racial animus.[25]

However, Plaintiff has not presented any factual allegations that Officer Shelby's conduct was motived by a racial animus. Plaintiff alleges Officer Shelby's use of force was the result of her "own deliberate conduct." This allegation does not establish or allege Officer Shelby acted with a racial animus. The only factual allegation concerning race at the time of the incident occurred *after* Officer Shelby discharged her weapon. Plaintiff alleges:

> Upon arrival to the scene of the shooting . . . Corporal Poth immediately instructed Officer Shelby to "use her rights" and "not to say a word" until she had an attorney because he "knew there was going to be a group of people that didn't like what happened simply because of the color of somebody's skin."

This allegation does not demonstrate that a discriminatory purpose motivated the decisions of *Officer Shelby* at the time of the shooting.[26]

Further, "[s]tatistical evidence alone is rarely enough to show discriminatory purpose."[27] Claims based on statistical comparisons "require[] a reliable measure of the demographics of the relevant population, a means of telling whether the data represent similarly situated individuals, and a point of comparison to the actual incidence of crime among different racial or ethnic segments of the population."[28] The conclusory allegation advanced by Plaintiff is insufficient to

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[25] *See Diallo v. Milligan,* 2019 WL 3302166, at *10 (D. Colo. 2019).

[26] *Marshall*, 345 F.3d at 1168.

[27] *United States v. Rodella*, 59 F. Supp. 3d 1331, 1353 (D.N.M. 2014).

[28] *Marshall*, 345 F.3d at 1168 (citations omitted).

state a claim. Plaintiff's Fourteenth Amendment claim premised on selective enforcement must be dismissed.

D. Fourteenth Amendment Due Process Right

Next, Plaintiff alleges a claim against the City for violating Mr. Crutcher's Fourteenth Amendment right of familial association. Defendants argue the claim should be dismissed because it is an unnecessary corollary of Plaintiff's Fourth Amendment claim, and Plaintiff has failed to state a claim for a violation of Mr. Crutcher's Fourteenth Amendment right.

Mr. Crutcher undeniably had a substantial interest in the right to associate with his family.[29] However, to state a Fourteenth Amendment claim premised on the right of familial association, this circuit requires a plaintiff demonstrate that intent on the part of the defendant to disrupt this association.[30]

Here, Plaintiff does not allege Officer Shelby directed her conduct at Mr. Crutcher's familial association, or that she intended to interfere with Mr. Crutcher's familial association. "A municipality cannot be held liable under section 1983 for acts of an employee if [it is not possible

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[29] *J.B. v. Washington Cnty.*, 127 F.3d 919, 927 (10th Cir. 1997).

[30] *See Estate v. Herring ex rel. Fort v. City of Colo. Springs*, 233 F. App'x 854, 856 (10th Cir. 2007) ("Plaintiffs have not alleged, nor do they attempt to demonstrate, that the officers directed their conduct at Plaintiffs' familial association with their father or intended to interfere with it. Because they have not made the requisite showing, the district court correctly granted summary judgment for defendants."); *see also Trujillo v. Board of County Com'rs of Santa Fe County*, 768 F.2d 1186, 1190 (10th Cir. 1985) ("[A]n allegation of intent to interfere with a particular relationship protected by the freedom on intimate association is required to state a claim under section 1983.").

to] find [] that the municipal employee committed [a] constitutional violation."[31] As such, this claim must be dismissed.[32]

E. Deliberate Indifferent Practices and Training

Next, Plaintiff asserts a fifth claim against the City for "deliberately indifferent practices, customs, training, supervision and ratification." To support this claim, Plaintiff alleges TPD had a "code of silence" and/or "blue wall" that "caused TPD to a) insufficiently investigate allegations of police misconduct; b) fail to promptly interview suspected TPD officers or take witness statements and preserve evidence regarding misconduct; and c) fail to properly and sufficiently discipline TPD officers." Plaintiff also alleges Officer Shelby refused to provide needed medical care.

As is reflected in the pleadings, Plaintiff abandoned his failure to provide medical care claim. With respect to the alleged "code of silence," Plaintiff does not provide any factual averments to support his conclusion that this policy or custom exists. Plaintiff does not explain what the "code of silence," is or how it violates a constitutional right. Additionally, the claim focuses on conduct that happened after Officer Shelby discharged her weapon. To the extent these factual allegations fall under the "code of silence," Plaintiff does not allege a causal link between this policy or custom and a violation of Mr. Crutcher's constitutional rights. Instead, the

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[31] *Hill v. Martinez*, 87 F.Supp.2d 1115, 1120 (D. Colo. 2000) (quoting *Myers v. Okla. County Bd of Cnty. Com'rs*, 151 F.3d 1313, 1316 (10th Cir. 1988)).

[32] *See Herring*, 233 F. App'x at 856 (affirming summary judgment in defendants favor where "[p]laintiffs have not alleged, nor do they attempt to demonstrate, that the officers directed their conduct at plaintiff's familial association with their father or intended to interfere with it.").

allegations are that TPD's own procedures were violated to cover up prior constitutional violations. This is insufficient to support a *Monell* claim against the City. For these reasons, this claim must be dismissed.

F. Deliberate Indifference Regarding the Use of Deadly Force

Plaintiff asserts a *Monell* claim against the City, alleging that its written deadly force policy is unconstitutional. The City argues in its Motion to Dismiss that, as with most of his other constitutional claims, Plaintiff has failed completely to offer anything more than pure conclusions and bare labels. The Fourth Amended Complaint identifies the City's excessive force policy as stating that Tulsa's written policy on the use of force provides: 'Deadly force may be used if the officer has probable cause to believe that the suspect poses an imminent threat of serious physical harm." Plaintiff further asserts, again as a bare conclusion, that the policy is unconstitutional on its face.

More importantly, Plaintiff has failed to offer any specific allegations as to how the Tulsa use-of-force policy has any direct causal link to the constitutional deprivation in this case. Plaintiff also has failed to show that the City was deliberately indifferent. Did policy makers at the City of Tulsa have grounds for knowing that the use-of-force policy was so deficient as to render constitutional violations probable? The Fourth Amended Complaint provides absolutely no guidance on the subject.

Plaintiff does not explain how any policy inadequacy led to Officer Shelby's use of force against Mr. Crutcher. Nor does he allege any facts showing how inadequate and constitutionally policies of the City created a known likelihood of constitutional violations. Given the purely conclusory nature of the Fourth Amended Complaint with respect to the City's liability for Officer Shelby's actions, dismissal of the claim is appropriate.

G. Deliberate Indifference Regarding Hiring under § 1983

Plaintiff alleges the City is liable because TPD failed to adequately screen and scrutinize Officer Shelby before hiring her. To establish a claim against the City, Plaintiff must allege "(1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the violation alleged."[33]

Plaintiff's Fourth Amended Complaint does not identify any specific hiring or screening policy or custom. Instead, Plaintiff only alleges TPD failed to adequately screen Officer Shelby. Even assuming TPD failed to adequately screen Officer Shelby and such failure resulted in a constitutional violation, "a single incident of unconstitutional activity is ordinarily not sufficient to impose municipal liability."[34] Dismissal of this claim is warranted.

H. Negligent Hiring, Training and Supervising

Plaintiff next asserts a negligent hiring, training and supervising claim against the City. The City contends it is immune from this negligent hiring, training and supervising claim pursuant to the Oklahoma Governmental Tort Claims Act ("OCTCA").[35]

The OGTCA 'is the exclusive remedy for an injured plaintiff to recover against a governmental entity in tort.'[36] The OGTCA adopts the doctrine of sovereign immunity and sets out the specific circumstances under which the state waives its immunity and that of its political

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[33] *Hollingsworth* 110 F.3d at 742.

[34] *Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009).

[35] *See* Okla. Stat. tit. 51, § 155(1) *et seq.*.

[36] *Tuffy's Inc. v. City of Okla. City*, 212 P.3d 1158, 1163 (Okla. 2009).

subdivisions.[37] The OGTCA states that the state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment in situations where a private person or entity would be liable for money damages under Oklahoma law.[38] However, the OGTCA sets out a list of specific acts for which sovereign immunity is not waived, including the "[p]erformance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees."[39]

The Oklahoma Supreme Court has explained that § 155(5) should be narrowly interpreted because "[a]lmost all acts of government employees involve some element of choice and judgment."[40] "Therefore, 'the government retains its immunity with respect to formulation of policy, but is subject to liability for routine decisions and daily implementation of the policy or planning level decisions.' "[41]

Plaintiff argues the exemption only applies to hiring and training policies as to "managerial" or upper level employees, not "a street level patrol officer." The City disagrees with Plaintiff's characterization. The Oklahoma Supreme Court has not directly "addressed the question of whether a political entity's failure to hire, train, supervise, monitor and/or retain its employees falls under the § 155(5) discretionary function exception."[42]

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[37] Okla. Stat. tit. 51, § 152.1; *see also Smith v. City of Stillwater*, 328 P.3d 1192, 1198 (Okla. 2014).

[38] Okla. Stat. tit. 51, § 153; *see also Anderson v. Eichner*, 890 P.2d 1329, 1336 (Okla. 1994).

[39] Okla. Stat. tit. 51, § 155(5).

[40] *State ex rel. Okla. Dep't of Pub. Safety v. Gurich*, 238 P.3d 1, 3 (Okla. 2010) (quoting *Nguyen v. State*, 788 P.2d 962, 964 (Okla. 1990)).

[41] *Smith*, 328 P.3d at 1198 (quoting *Gurich*, 238 P.3d at 3).

[42] *See Lankamp v. Mayes Emergency Services Trust Authority*, 2017 WL 875483, at *4 (N.D. Okla. 2017).

Plaintiff cites a number of cases to support his position. However, these cases do not establish the managerial/upper level employee distinction is determinative. In *Houston v. Indep. Sch. Dist. No. 89 of Okla. Cnty.*,[43] the court concluded decisions regarding supervision and retention of an executive director did implicate policy concerns.[44] However, the court did not address "low level employees" or suggest that decisions concerning low level employees do not implicate policy concerns. The court merely addressed the facts of the case before it.

In *Langkamp v. Mayes Emerg. Servs. Trust Auth.*,[45] the plaintiffs alleged the defendant "failed to sufficiently and properly hire, train, supervise, monitor and retain its employees."[46] The plaintiffs were themselves a former secretary and executive director.[47] However, the decision does not reveal the positions held by the "employees" who were improperly hired, trained, supervised, monitored or retained. Therefore, *Langkamp* does not support the conclusion that the Section 155(5) exemption only applies to upper level employees.

Finally, in *Johnson v. Ind. Sch. Dist. No. 89 of Okla. Cnty*,[48], the plaintiff alleged the defendant negligently supervised a director of special services.[49] In reaching its conclusion that plaintiff's claim was barred by section 155(5), the *Johnson* Court did not analyze the employee's

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[43] 949 F. Supp. 2d 1104 (W.D. Okla. 2013).

[44] *Id*. at 1109.

[45] 2017 WL 875483 (N.D. Okla. 2017).

[46] *Id*. at *4 (quotation omitted).

[47] *Id*. at *1.

[48] 2016 WL 1270266 (W.D. Okla. 2016).

[49] *Id*. at *1.

position at issue.[50] Instead, the Court noted, "courts in this district (including this Court) have applied the discretionary function exemption to similar allegations of negligent hiring, supervision and retention."[51]

In contrast, the clear weight of Oklahoma authority supports the finding that the hiring, training, supervising, monitoring and retention of employees are actions which implicate a political entity's policy and planning functions, and therefore fall under the discretionary function exemption of Section 155(5).[52] Notably, many of these decisions apply the exemption to "low level employees" such as teachers and police officers. Therefore, the Court concludes Plaintiff's negligent hiring, training and supervision claim is barred by the discretionary function exemption found in Okla. Stat. tit. 51, § 155(5).

I. Equitable Claims

Finally, Plaintiff does not state a separate claim for injunctive relief but requests injunctive relief in his prayer for relief. Plaintiff seeks injunctive relief "to prevent such deprivations of constitutional rights in the future, and/or ensure that allegations of deprivations of constitutional rights are properly investigated . . . ."

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[50] *Id*. at *7-8.

[51] *Id*. at *8.

[52] *See id.* (negligent supervision); *Burris v. Okla. ex rel. Okla. Dep't of Corrections*, 2014 WL 442154, at *9 (W.D. Okla. 2014) (negligent hiring, training, supervision, and retention of a correctional center's case manager); *Seals v. Jones*, 2013 WL 5408004, at *4 (N.D. Okla. 2013) (negligent hiring and retention of a deputy); *Houston*, 949 F. Supp. 2d at 1109 (negligent supervision and retention of an executive director); *Fumi v. Bd. of Conty. Comm'rs of Rogers Cnty*., 2011 WL 4608296, at *6 (N.D. Okla. 2011) (negligent training and supervision of investigating sergeant); *Burns v. Holcombe*, 2010 WL 2756954, at *15 (E.D. Okla. 2010) (negligent hiring, training, and supervision of police officers); *Jackson v. Okla. City Pub. Schs*., 333 P.3d 975, 979 (Okla. Civ. App. 2014) (negligent hiring, training, and supervision of teacher).

Plaintiff "must demonstrate standing separately for each form of relief sought."[53] As explained by the Supreme Court in *City of Los Angeles v. Lyons*,[54] a plaintiff seeking such relief must show that "he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical."[55] That is, "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[56]

The City argues Plaintiff does not have standing to seek prospective injunctive relief. In response, Plaintiff complains that "under the state of current Constitutional law, [there will never be anyone] who has standing to obtain declaratory injunctive relief." Dkt. No. 117 at 17. Therefore, he asks that "the Court consider these public policy issues, review the language of Article III and find that the Court does have jurisdiction to consider the granting of equitable relief."

Despite Plaintiff's position, this Court is bound to follow the applicable precedent of the Supreme Court.[57] The situation before the Court cannot be differentiated from *Lyons,* or from *Brown v. City of Ferguson, Missouri*,[58] where the court dismissed the plaintiff's similar request

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[53] *Friends of Earth Inc. v. Laidlaw Envtl. Serv. (TOC) Inc*., 528 U.S. 167, 185 (2000).

[54] 461 U.S. 95 (1983).

[55] *Id.* at 101-02 (1983) (internal citations and quotations omitted).

[56] *Id*. at 101 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)) (brackets omitted).

[57] *United States v. Martinez*, 565 F. Supp. 2d 1270, 1274 (D.N.M. 2008).

[58] 2015 WL 8313796 (E.D. Mo. 2015).

for injunctive relief to prevent discriminatory policy, finding that Article III standing cannot be established on "a mere possibility [the plaintiffs] will again encounter police and face discrimination."[59]

Here, Plaintiff seeks relief to protect "all Tulsans," but he has failed to show an immediate danger of sustaining a direct injury,[60] and has not alleged real and immediate imminent harm is likely to result from the City's policing policies. Further, Plaintiff's request for injunctive relief seeks an injunction forcing the City government to comply with the law. Courts have "repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."[61] Additionally, the Court does not find that Plaintiff has made the requisite showing to justify third-party standing.[62]

Finally, Plaintiff's requested relief implicates federalism concerns. Supreme Court precedent "advise[s] caution on behalf of federal courts when seeking to impose injunctive relief upon state governmental authorities, particularly in the case where there remain alternative remedies at law."[63] This Court will not interfere with the state government's administration of its own laws. For these reasons, Plaintiff's prayer for injunctive relief is dismissed for lack of Article III standing.

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[59] *Id*. at *7.

[60] *Lyons*, 461 U.S. at 101-02.

[61] *Allen v. Wright*, 468 U.S. 737, 754 (1984), abrogated on other grounds by *Lexmark Intern. Inc. v. Static Control Components, Inc*., 572 U.S. 118 (2014).

[62] *See Aid for Women v. Foulston*, 441 F.3d 1101, 1111-12 (10th Cir. 2006) (to establish third party standing plaintiff must show a close relation to the third party and a hindrance or inability of the third party to pursue his own claims).

[63] *Brown*, 2015 WL 8313796 at *7.

J. The First Amended Complaint

In his Response, Plaintiff cites to his First Amended Complaint to support his claims and in opposition to the City's Motion. Plaintiff argues the City should be somehow judicially estopped from arguing the Fourth Amended Complaint is factually deficient due to the City's prior arguments with respect to prior complaints. The Court declines to consider Plaintiff's allegations in his prior complaints.

"An amended complaint supersedes the original complaint and renders the original complaint of no legal effect."[64] Upon the proper filing of an amended complaint, the district court limits its examination to those claims included in the most recently amended complaint.[65] "However, pursuant to Rule 10(c), specific allegations of the prior complaint may be referenced or incorporated by the amended complaint, but only if reference to allegations in the prior complaint is direct and specific."[66] It is not enough that the amended complaint "mentions the existence of a prior original complaint and refers generally to the 'informal relief' sought in that complaint, [if] the amended complaint makes no explicit and direct reference to specific allegations of the original complaint."[67]

The Fourth Amended Complaint makes no explicit or direct reference to the First Amended Complaint. Further, the Second Amended Complaint superseded the First Amended Complaint;

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[64] *Franklin v. Kansas Dept. of Corrections*, 160 F. App'x 730, 733-34 (10th Cir. 2005) (citing *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir.1991); *see Davis v. TXO Production Corp*., 929 F.2d 1515, 1517 (10th Cir.1991) ("[i]t is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect") (internal quotations marks and citations omitted)).

[65] *Franklin*, 160 F. App'x at 733-734.

[66] *Fullerton v. Maynard*, 943 F.2d 57, 1991 WL 166400, *2 (10th Cir.1991) (Table) (citations omitted).

[67] *Id*.

the Third Amended Complaint superseded the Second Amended Complaint; and the Fourth Amended Complaint superseded the Third Amended Complaint. The Court therefore limits its examination to the Fourth Amended Complaint.

Additionally, the Court notes that each amendment was the result of Plaintiff's own action, and not in response to any order of this Court ruling on the City's previous motions to dismiss or motion to strike. The City responded to each version of the complaint pending before the Court. The City was not in control of Plaintiff's strategy, or the allegations Plaintiff chose to include or not include in his various complaints. Therefore, the Court declines to judicially estop the City from raising the arguments raised herein.

K. No Further Amendment

"Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment."[68] The Court notes that the instant complaint is Plaintiff's *fifth*.

Plaintiff has had ample opportunity to state his claims for relief. Additionally, this case has been pending since June 15, 2017, and Defendants are entitled to a resolution of the claims against them. For these reasons, the Court will not grant Plaintiff leave to file yet another Amended Complaint.

L. Additional motions

[68] *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

Plaintiff has file two Motions in Limine. (Docs. 140, 145). The first Motions seeks to exclude as irrelevant any evidence regarding the presence of phencyclidine (PCP) in Mr. Crutcher's blood or in his vehicle, or evidence of his criminal record. The second Motion seeks to exclude any testimony from Defendant Officer Shelby as to what she believed Mr. Crutcher was doing immediately before the shooting. This motion cites various passages of Officer Shelby's testimony at her criminal trial as to the inferences she made at the scene about Mr. Crutcher's intentions. Plaintiff argues that such testimony represents improper lay witness opinions.

Plaintiff filed both motions while the case was stayed pending resolution of various motions to dismiss. This stay applied to all discovery by the parties. Courts in this District and elsewhere in the Tenth Circuit generally find motions in limine filed before the close of discovery to be premature.[69] Further, the chambers rules in effect at the time the Motions were filed limit any single party to one omnibus motion in limine.[70]

Under the scheduling order entered in this case, such omnibus motions are to be brought within 21 days *after* the close of discovery, and must be preceded by an attorney meeting to confer and resolve anticipated evidentiary issues. Therefore, Plaintiff's Motions in Limine will be denied

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[69] *See, e.g., Dwerlkotte v. Mitchell*, 2021 WL 5890953, at *1 (D. Kan. 2021) ("Because this case is in its initial stages and discovery has not been initiated, the request is premature."); *Shaw v. T-Mobile*, 2020 WL 4334993, at *3 (D. Kan. 2020) ("The court concludes it must deny plaintiff's motion as premature . . . where plaintiff filed her motion before discovery . . . ."); *Baker v. U.S. Dep't of Agriculture*, 2007 WL 2344757, at *2 (N.D. Okla. 2007) (plaintiff's motion to approve admissibility of evidence prior to entry of scheduling order set "is procedurally improper and at best premature."); *Scottsdale Ins. Co. v. Tolliver*, 2006 WL 2193434, at *1 (N.D. Okla. 2006) (denying motion in limine direct at arson report, as there was "no reason to exclude the report until the completion of discovery."); *Krepack v. Freidstein*, 2009 WL 5908009, at *1 (D. Colo. 2009) (summarily denying motion in limine after noting, "[t]he Court has reviewed this motion and the case file and finds no indication that the parties have conducted any discovery relating to the issues raised in the motion.").

[70] *See* https://www.oknd.uscourts.gov/jfh-chambers-rules.

without prejudice, subject to refiling after the close of discovery as part of an omnibus motion in limine contemplated by chambers rules.

Finally, Plaintiff has submitted a series of motions seeking a lifting of the stay a resumption of discovery. The stay of discovery put in placing pending resolution of the City's Motion to Dismiss, and those motions are therefore moot.

The Court will address discovery and other issues at the conference it has scheduled for February 14, 2023.

IT IS THEREFORE ORDERED that Defendant City of Tulsa's Motion to Dismiss in Part (Doc. 138, incorporating Doc. 115) is hereby **GRANTED**. Plaintiff's Motions in Limine (Docs. 140, 145) are **DENIED WITHOUT PREJUDICE**. Plaintiff's Motions for Relief from Stay (Docs. 157, 160, 165, 168, 174) are **DENIED AS MOOT.**

IT IS SO ORDERED.

Dated this 9th day of February, 2023.

Eric F Melgren

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL MANNING,
as the Administrator of the
ESTATE of TERENCE CRUTCHER, SR.,

Plaintiff,

vs.

CITY OF TULSA, et al.,

Defendants.

Case No. 17-CV-336-EFM-SH

MEMORANDUM AND ORDER

Before the Court are Defendants Betty Jo Shelby's ("Officer Shelby") and City of Tulsa's (the "City") Motions for Summary Judgment. (Docs. 193 and 196). Plaintiff Michael Manning, as the Administrator of the Estate of Terrence Crutcher, Sr., asserts an excessive force claim under the Fourth Amendment and a deprivation of life claim under the Fourteenth Amendment against Officer Shelby. Plaintiff also brings a wrongful death claim against the City under a theory of vicarious liability. Officer Shelby asks the Court to grant her summary judgment, arguing that the Fourth Amendment claim is barred by qualified immunity and the Fourteenth Amendment claim is meritless. The City asks the Court to grant it summary judgment, arguing that Officer Shelby acted reasonably and met the Oklahoma law standard of conduct. For the reasons stated below, the Court grants both motions for summary judgment.

I. Factual and Procedural Background

This case arises from the fatal shooting of Terence Crutcher by Officer Shelby. On September 16, 2016, Officer Shelby, an officer of the Tulsa Police Department, responded to a domestic disturbance call. At the intersection of 36th Street North and Lewis Avenue, Officer Shelby observed a black male who she believed was under the influence of PCP or having a mental episode. Officer Shelby decided to continue west on 36th Street North to respond to the priority domestic disturbance call.

After traveling west on 36th Street North for several hundred feet, Officer Shelby stopped to investigate an unattended, running vehicle parked in the middle of the road. Officer Shelby radioed dispatch to request that someone else respond to the domestic disturbance call, explain that she would be investigating the vehicle, and call in the tag number. She turned on only her rear flashing lights, which did not activate her dash cam, and exited her patrol car. Officer Shelby walked to the unattended vehicle and looked through the windows on the driver's side. She first looked through at the rear compartment, then at the back seat, and finally at the front seat. Officer Shelby did not see anyone in the vehicle and started walking toward the back of the vehicle to go around and check the passenger's side.

As she approached the back of the vehicle, Officer Shelby saw the same man she had seen walking at the intersection earlier walking west on the north edge of 36th Street North. This man was Crutcher. Officer Shelby yelled to him, asking if the parked vehicle was his, but Crutcher did not respond to her. Instead, Crutcher started walking toward Officer Shelby who ordered him to take his hands out of his pockets. Officer Shelby could not understand what Crutcher mumbled in response. Then Crutcher slowly pulled his hands out of his pockets and put both hands up in the air. He was profusely sweating, and his head was positioned downward. The parties dispute

whether Crutcher followed Officer Shelby's orders by keeping his hands in the air or if he periodically lowered them to his pockets.

Crutcher had walked to the rear end of Officer Shelby's patrol car. Officer Shelby radioed "Adam 303. Hold traffic. I have a suspect that won't show me his hands!" Officer Tyler Turnbough heard Officer Shelby's radio traffic and immediately headed toward her location. After radioing, Officer Shelby ordered Crutcher to stop moving, get on his knees, and to show his hands. It is disputed whether Crutcher complied with any commands. Crutcher walked to the front of the passenger side of the patrol car, stopped, mumbled something, and then looked over at the vehicle parked in the middle of the road. Officer Shelby could hear police sirens in the distance.

Then Crutcher started walking toward the driver's side of the parked vehicle with his hands in the air. Officer Shelby followed him with her handgun drawn and ordered Crutcher to stop and get on his knees. It took Crutcher approximately 27 steps over the course of about 18 seconds to reach the driver's side door of the vehicle parked in the middle of the road. Shortly before Crutcher reached the driver's side door of the vehicle, Officer Turnbough arrived at the scene.

Crutcher had his hands up and was stopped facing toward the driver's side door of the vehicle. Officer Shelby was near the rear of the vehicle with her handgun drawn. Officer Turnbough was slightly behind Officer Shelby's left shoulder with his Taser drawn. The parties dispute whether the driver's side window was fully rolled down, partially rolled down, or not rolled down at all. Additionally, the parties dispute whether Crutcher reached into the driver's side window to possibly retrieve a weapon. However, Crutcher did at least lower his arm. When Officer Shelby and Officer Turnbough saw Crutcher lower his arm, they simultaneously fired the handgun and Taser at him. Crutcher fell to the pavement. Less than an hour later, Crutcher was pronounced dead.

Austin Bond, the administrator of Crutcher's Estate at the time, commenced this action in June 2017, asserting various claims against several Defendants. After years of litigation and a few partially successful motions to dismiss, only two Defendants remain—Officer Shelby and the City. Plaintiff brings a Fourth Amendment and Fourteenth Amendment claim against Officer Shelby, and a vicarious liability wrongful death claim under Oklahoma law remains against the City. Both Defendants filed Motions for Summary Judgment on September 1, 2023. Plaintiff filed his Responses on September 29, 2023. The City filed its Reply on October 13, 2023, and Officer Shelby filed her Reply on October 20, 2023.

II. Legal Standard

Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law.[1] A fact is "material" when it is essential to the claim, and issues of fact are "genuine" if the proffered evidence permits a reasonable jury to decide the issue in either party's favor.[2] The movant bears the initial burden of proof and must show the lack of evidence on an essential element of the claim.[3] The nonmovant must then bring forth specific facts showing a genuine issue for trial.[4] These facts must be clearly identified through affidavits, deposition transcripts, or incorporated exhibits—

[1] Fed. R. Civ. P. 56(a).

[2] *Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1219 (10th Cir. 2006) (citing *Bennett v. Quark, Inc.*, 258 F.3d 1220, 1224 (10th Cir. 2001)).

[3] *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)).

[4] *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005) (citation omitted).

conclusory allegations alone cannot survive a motion for summary judgment.[5] The court views all evidence and reasonable inferences in the light most favorable to the non-moving party.[6]

III. Analysis

A. Officer Shelby's Motion for Summary Judgment

1. Fourth Amendment Right to be Free from Excessive Force

Officer Shelby argues that she is entitled to summary judgment because Plaintiff cannot overcome her assertion of qualified immunity. It is well established that "individual defendants named in a § 1983 action may raise a defense of qualified immunity."[7] "The doctrine of qualified immunity shields public officials . . . from damages actions unless their conduct was unreasonable in light of clearly established law."[8] When the defense of qualified immunity is asserted, the burden shifts to the plaintiff to show: "(1) that the defendant's actions violated a federal constitutional or statutory right, and if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct."[9] The Court has discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[10] "If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity."[11] "In determining whether the plaintiff has shouldered

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[5] *Mitchell v. City of Moore*, 218 F.3d 1190, 1197 (10th Cir. 2000) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670–71 (10th Cir. 1998)).

[6] *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004) (citation omitted).

[7] *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 460 (10th Cir. 2013).

[8] *Id*. (quotations and citation omitted).

[9] *Id*. (citation omitted).

[10] *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

[11] *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (citation omitted).

this *heavy burden*, '[the Court] construe[s] the facts in the light most favorable to the plaintiff as the nonmovant.' "[12]

a. Clearly established

A right is "clearly established" if Supreme Court or Tenth Circuit precedent (or the weight of authority from other circuits) would put reasonable officers in the defendants' position on notice they were violating the constitution or statute.[13] "The plaintiff bears the burden of citing to [the Court] what he thinks constitutes clearly established law."[14] The law must be "sufficiently clear that every reasonable official would have understood that what [she] is doing violates that right."[15] This does not require the existence of a case exactly on point,[16] but does require that the existing caselaw be sufficiently clear to place the constitutional issue "beyond debate."[17] "Because the focus is on whether the officer had fair notice that [her] conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct."[18] Thus, the law then-existing

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[12] *Corona v. Aguilar*, 959 F.3d 1278, 1282 (10th Cir. 2020) (quoting *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015)) (emphasis added).

[13] *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1210 (10th Cir. 2017); *see also Ullery v. Bradley*, 949 F.3d 1282, 1294–97 (10th Cir. 2020) (finding a right was clearly established based on the consensus of persuasive authority from six other circuits).

[14] *Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010); *Easter v. Cramer*, 785 F. App'x 602, 607 (10th Cir. 2019) ("The plaintiff bears the burden of directing the Court to authority that clearly establishes the right that was arguably violated."); *see Gutierrez v. Cobos*, 841 F.3d 895, 902 (10th Cir. 2016) (finding plaintiffs failed to carry their heavy burden when they did not cite or discuss any pertinent caselaw).

[15] *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (further citation and quotations omitted).

[16] *See Hope v. Pelzer*, 536 U.S. 730, 740–41 (2002); *Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1167 (10th Cir. 2022) *cert denied sub nom. Anderson v. Calder*, 143 S. Ct. 2658 (2023) ("[T]his inquiry does not require a scavenger hunt for prior cases with precisely the same facts.") (quotations and citation omitted); *Est. of Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir. 2020) (" '[A] prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law.' ") (quoting *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1347 (2019)).

[17] *White v. Pauly*, 580 U.S. 73, 79 (2017).

[18] *McInerney v. King*, 791 F.3d 1224, 1237 (10th Cir. 2015) (quoting *Mascorro v. Billings*, 656 F.3d 1198, 1207–08 (10th Cir. 2011)).

at the time of the officer's actions must clearly establish that such conduct would violate the Constitution.[19]

"[E]xcessive force jurisprudence requires an all-things-considered inquiry with careful attention to the facts and circumstances of each particular case, and there will almost never be a previously published opinion involving exactly the same circumstances."[20] To accommodate the multitude of factual circumstances involving claims of excessive force, the Tenth Circuit has established "a sliding scale in which '[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation."[21] However, the precedent at the time of the officer's conduct must do more than merely suggest a rule.[22] The precedent must sufficiently define the rule's contours so "that it is clear to a reasonable officer that [her] conduct was unlawful in the situation [she] confronted."[23] This required specificity is " 'especially important in the Fourth Amendment context,' where it is 'sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.' "[24]

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[19] *Id*.

[20] *Easter*, 785 F. App'x at, 607 (quotation omitted).

[21] *Id*. (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (further quotations omitted).

[22] *City of Tahlequah, Okla. v. Bond*, 595 U.S. 9, 11 (2021).

[23] *Id*. (quotation omitted).

[24] *Id*. at 12–13 (quoting *Mullenix*, 577 U.S. at 12).

Plaintiff cites to *King v. Hill*,[25] *Estate of Ceballos v. Husk*,[26] and *Allen v. Muskogee*.[27] The Tenth Circuit in *Hill* determined that an officer shooting an unarmed suspect who was not posing a threat to the officer or others is a clearly established violation of the Fourth Amendment.[28] In *Hill*, an officer shot and wounded the plaintiff who was mentally ill, holding a jacket, and raising his hands.[29]

In *Ceballos*, the Tenth Circuit determined that a reasonable officer would have known that the reckless action of running screaming to a suspect caused the need to use deadly force, and thus is a clearly established violation of the Fourth Amendment.[30] There, an officer shot and killed a distraught suspect after approaching the suspect quickly, shouting at the suspect to drop the bat, and refusing to "give ground" when the suspect approached officers.[31] The Tenth Circuit noted that a case decided on jurisdiction grounds[32] and a unpublished decision[33] by themselves are not enough to meet the standard of clearly established.[34] However, the Tenth Circuit found that the clearly established standard is met when those cases are considered in conjunction with *Allen*, a closely analogous published case, that analyzes an officer's actions in the context of excessive force.[35]

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[25] 615 F. App'x 470 (10th Cir. 2015).

[26] 919 F.3d 1204 (10th Cir. 2019).

[27] 119 F.3d 837 (10th Cir. 1997).

[28] *Hill*, 615 F. App'x at 477, 479.

[29] *Id*. at 471–72.

[30] *Ceballos*, 919 F.3d at 1216–17.

[31] *Id*. at 1216.

[32] *Id*. at 1217 (discussing *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995)).

[33] *Id*. (discussing *Hasting v. Barnes*, 252 F. App'x 197 (10th Cir. 2007)).

[34] *Id*.

[35] *Id*. at 1215–17 (discussing *Allen*).

Moving to *Allen*, the Tenth Circuit there held that a jury could find that the Fourth Amendment was violated when an officer's reckless conduct "precipitated the need to use deadly force."[36] In *Allen*, officers, within ninety seconds, shot and killed a potentially suicidal suspect after running to the parked vehicle where the suspect was located, yelling at the suspect, and attempting to physically take the suspect's gun.[37] All of these events took place within ninety seconds.[38]

Here, it is Plaintiff's burden to demonstrate that it was clearly established that an officer cannot use deadly force on a suspect who: has diminished capacity; was in an open, unconfined area; reportedly committed only non-violent misdemeanors; ignored orders to stop and get on his knees as he slowly walked away from an officer towards a parked vehicle with his hands up; and when he reached the door of the vehicle lowered his arm.[39] Officer Shelby argues that Plaintiff fails to meet his burden because the cases that he cites too are either unpublished, published after the incident at issue in this case, or factually distinguishable.

Plaintiff cites to *Hill*, *Ceballos*, and *Allen* to meet his burden. However, none of these cases sufficiently aid Plaintiff in meeting his burden.

For instance, Plaintiff draws no comparisons between the facts of *Hill* and the facts of this case. Instead, he merely cites the general rule from *Hill* that shooting an unarmed suspect who poses no threat to officers violates the Fourth Amendment. However, this rule is far too broad to be sufficiently defined to facts at issue in this case. A broad rule may serve as a founding principle

[36] *Allen*, 119 F.3d at 841.

[37] *Id*. at 839.

[38] *Id*.

[39] Whether Crutcher reached into the vehicle window is disputed in this case. Construing facts in a light most favorable to Plaintiff, Crutcher lowered his arm.

for other cases to build upon to show that a right is clearly established; however, the broad rule by itself is not enough for the clearly established burden to be met.[40]

Additionally, *Hill* is an unpublished case. An unpublished case, by itself, is wholly inadequate to meet the clearly established burden.[41] Even though Plaintiff vaguely alludes to published authority in a parenthetical citation following his citation to *Hill*, this too is insufficient. Importantly, the parenthetical citation fails to specify whether the clearly established right applied only to the plaintiff in *Hill*, or whether the clearly established right applies to Plaintiff in this case.[42] Regardless, a vague parenthetical citation falls short of the heavy burden that Plaintiff bears to show that the right is clearly established. Plaintiff has the burden to provide the Court with citations to authority and/or legal argument to show that the right at issue is clearly established. While Plaintiff did provide the Court with a citation to *Hill*, Plaintiff did not provide the Court with citations to or legal arguments regarding the published authority within *Hill*. Therefore, by only citing to an unpublished case, Plaintiff cannot meet his high burden.

Ceballos is the case that Plaintiff most heavily relies upon to meet his burden. However, this reliance is misplaced. To determine whether a right is clearly established, the Court looks to the legal precedent at the time that the conduct occurred.[43] *Ceballos* was published in 2019, two

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[40] *Hill*, 615 F. App'x at 477 (finding a published case that was factually distinguishable could not meet the clearly established standard by itself, but it could supply "a foundational principle concerning the limits on the use of deadly force against unarmed suspects").

[41] *Ceballos*, 919 F.3d at 1216–17 (discussing *Hasting*, 252 F. App'x 197); *see Morris v. Noe*, 672 F.3d 1185, 1197 n.5 (10th Cir. 2012) ("[A]n unpublished opinion provides little support for the notion that the law is clearly established on a given point. But we have never held that a district court must ignore unpublished opinions in deciding whether the law is clearly established."); *Harris v. Mahr*, 838 F. App'x 339, 343 (10th Cir. 2020) (citing *Mecham v. Frazier*, 500 F.3d 1200, 1206 (10th Cir. 2007)).

[42] This uncertainty stems from Plaintiff utilizing "Plaintiff" to refer to both himself, and to plaintiffs in general when articulating legal standards.

[43] *McInerney*, 791 F.3d at 1237.

and a half years after the incident at issue occurred. A case "decided after the shooting at issue, is of no use in the clearly established inquiry."[44] As such, *Ceballos* could not give fair notice to Officer Shelby that her conduct was unconstitutional.

Nonetheless, Plaintiff asserts that the untimeliness of *Ceballos* is inconsequential because the Tenth Circuit ruled that *Allen* clearly established the rights at issue in *Ceballos*, and therefore, *Allen* clearly establishes the right at issue in the present case. But Plaintiff provides no analysis of how the facts in *Allen* resemble the situation at issue before this Court. A review of the case reveals that the facts of *Allen* differ from the facts of the situation at issue here.

In *Allen*, the officers carelessly escalated the situation by screaming at the suspect in the vehicle and attempting to physically take the suspect's gun.[45] By contrast, Officer Shelby interacted with Crutcher while investigating a parked vehicle in the middle of the road; did not see a weapon in Crutcher's hands; and followed Crutcher to the stopped vehicle while ordering him to show his hands, stop walking toward the vehicle, and to get on his knees. Thus, *Allen* does not clearly establish that Officer Shelby's conduct in the case at issue was reckless or that her ultimate use of force was unlawful.

The issue here is whether Plaintiff met his burden to show that the law is clearly established. Of the three cases Plaintiff provides, the Court cannot consider *Ceballos* because it was published after the incident occurred, cannot rely on *Allen* because it is too factually different, and cannot rely on *Hill* by itself because it is unpublished. As a result, Plaintiff fails to meet his heavy burden to show the right at issue is clearly established. "This isn't to say Plaintiff lacked (or

[44] *Bond*, 595 U.S. at 13 (citation omitted).

[45] *Allen*, 119 F.3d at 841.

possessed) a meritorious case, but clients are usually bound by their lawyers' actions."[46] And "Plaintiff, through his counsel, has simply failed to carry the burden assigned to him by law."[47] Therefore, the Court grants Officer Shelby's motion for summary judgment, finding that qualified immunity bars Plaintiff's Fourth Amendment claim against her.

2. Fourteenth Amendment Right to be Free from Deprivation of Life Without Due Process

Officer Shelby argues she is entitled to summary judgment because Plaintiff's Fourteenth Amendment claim is meritless. In his Response, Plaintiff fails to address Officer Shelby's summary judgment arguments against the Fourteenth Amendment claim. Instead, Plaintiff responded only to Officer Shelby's assertion of qualified immunity against the Fourth Amendment excessive force claim.

On summary judgment the burden of persuasion is shifted to the nonmovant when the movant makes an argument as to "why summary judgment is appropriate as to a particular claim."[48] The nonmovant's "failure to respond" to summary judgment arguments against a particular claim, is "fatal."[49]

Here, in Plaintiff's response, he only addresses Officer Shelby's summary judgment arguments against the Fourth Amendment claim. He provides no argument or support for his remaining Fourteenth Amendment claim against Officer Shelby. Therefore, the Court finds that

[46] *Gutierrez*, 841 F.3d at 903 (quoting *Smith v. McCord*, 707 F.3d 1161, 1162 (10th Cir. 2013)) (internal quotation marks and brackets omitted).

[47] *Rojas v. Anderson*, 727 F.3d 1000, 1005–6 (10th Cir. 2013) (quoting *Smith*, 707 F.3d at 1162) (internal quotation marks and brackets omitted) (alterations in original).

[48] *Hinsdale v. City of Liberal, Kan.*, 19 F. App'x 749, 769 (10th Cir. 2001).

[49] *Id.*; *see Bejar v. Dep't of Veterans Affs.*, 683 F. App'x 656, 657 n. 2 (10th Cir. 2017) ("[Plaintiff] waived his retaliation claim by . . . omitting it from his summary judgment briefing.").

Plaintiff abandoned his remaining Fourteenth Amendment claim by failing to substantively respond to Officer Shelby's arguments against that claim. Consequently, the Court grants Officer Shelby's motion for summary judgment on Plaintiff's Fourteenth Amendment claim against her.

B. The City's Motion for Summary Judgment

The City argues that it is entitled to summary judgment on the vicarious liability wrongful death claim because Officer Shelby acted reasonably and met the Oklahoma law standard of conduct. However, the wrongful death claim is a state law claim and no federal law claims remain in this case.

"[F]ederal courts are courts of limited subject-matter jurisdiction," and they "may only hear cases when empowered to do so by the Constitution and by act of Congress."[50] "[S]upplemental jurisdiction over state claims is exercised on a discretionary basis and . . . if federal claims are dismissed before trial, leaving only issues of state law, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice."[51] The Tenth Circuit advises the district courts to "generally decline to exercise supplemental jurisdiction when no federal claims remain because '[n]otions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary.' "[52]

Here, no federal law claims remain. Because Plaintiff's only remaining claim arises under state law, the Court declines to exercise supplemental jurisdiction over Plaintiff's wrongful death

[50] *Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035 (10th Cir. 2015) (further citations and quotations omitted).

[51] *Hubbard v. Okla. Ex. Rel. Dep't Hum. Servs.*, 759 F. App'x 693, 713 (10th Cir. 2018) (quoting *Bauchman v. West High Sch.*, 132 F.3d 542, 549 (10th Cir. 1997)) (internal quotation marks omitted).

[52] *Id*. (quoting *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995)).

claim. Consequently, the Court dismisses the vicarious liability wrongful death claim without prejudice. Therefore, the City's Motion is denied as moot.

IT IS THEREFORE ORDERED that Defendant Betty Jo Shelby's Motion for Summary Judgment (Doc. 193) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's vicarious liability wrongful death claim against Defendant City of Tulsa is **DISMISSED** without prejudice.

IT IS FURTHER ORDERED that Defendant City of Tulsa's Motion for Summary Judgment (Doc. 196) is **DENIED** as moot.

IT IS SO ORDERED.

Dated this 8th day of April, 2024.

This case is closed.

Eric F Melgren

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

United States District Court

---------- NORTHERN DISTRICT OF OKLAHOMA----------

MICHAEL MANNING,
as the Administrator of the
Estate of Terence Crutcher, Sr.,

Plaintiffs,

v. **Case No: 17-336-EFM**

CITY OF TULSA, and
BETTY JO SHELBY,

Defendants,

JUDGMENT IN A CIVIL CASE

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

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

that pursuant to the Memorandum and Order filed on April 8, 2024, Doc. 215, Defendant Betty Jo Shelby's Motion for Summary Judgment, Doc. 193 is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's vicarious wrongful death claim against Defendant City of Tulsa is DISMISSED without Prejudice.

IT IS FURTHER ORDERED that Defendant City of Tulsa's Motion for Summary Judgment, Doc. 196, is DENIED AS MOOT.

This case is closed.

April, 10, 2024

Date

Eric F Melgren

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE