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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22-40781

[Filed November 17, 2023]

SANTOS ARGUETA; BLANCA GRANADO; DORA ARGUETA; JELLDY ARGUETA; THE ESTATE OF LUIS FERNANDO ARGUETA, *Plaintiffs—Appellees*,	)
versus	)
DERRICK S. JARADI, *Defendant—Appellant*.	)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:20-CV-367

Before CLEMENT, HAYNES, and OLDHAM, *Circuit Judges*.

EDITH BROWN CLEMENT, *Circuit Judge*:

On June 25, 2018, Galveston Police Officer Derrick Jaradi fatally shot Luis Argueta, who was armed with a handgun equipped with a high-capacity ammunition

extension. Representatives of Argueta's estate[1] sued, alleging that Jaradi used excessive force in violation of Argueta's Fourth Amendment rights. The district court concluded that four genuine issues of material fact preclude Jaradi's motion for summary judgment on qualified-immunity grounds. For the reasons explained below, we REVERSE and RENDER judgment in favor of Jaradi.

I.

On June 25, 2018, Argueta and his girlfriend, Mary Ann Luna, drove to a convenience store in Galveston around 3 a.m. According to Luna, Argueta intended to buy a cigar. While Argueta was inside the store, Jaradi and his partner, Officer Matthew Larson, drove into the store's parking lot. Luna indicated that the police officers were "looking at [Argueta] like . . . something was wrong," and, when Argueta returned to the car, Luna told Argueta that the officers were "looking at [him] crazy." While Luna denies that Argueta talked to anyone in or outside the store besides a store employee, the officers indicate that Argueta spoke to a woman outside the store whom Jaradi suspected of being a prostitute. Argueta and Luna drove off shortly after the officers pulled into the parking lot. While Jaradi testified that Argueta sped off at a "really high rate of speed," Luna said that Argueta's car left "super slow[ly]."

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[1] The plaintiffs include Argueta's parents—Santos and Blanca Granado—and his sisters—Dora and Jelldy Argueta. For ease of reference, we refer to the plaintiffs collectively as "Argueta."

The officers initially lost sight of Argueta's car after it left the parking lot, but later, while patrolling the area, they saw the vehicle drive through an alleyway. The officers contend that Argueta's headlights and taillights were off and that Argueta rolled through several stop signs. Around this time, Jaradi turned on the patrol car's dashboard camera ("dashcam"). By the time the dashcam video footage begins, Argueta's lights are turned on while the car was in motion. The video also indicates that the vehicle stopped, at least momentarily, at all stop signs, and moved at a moderate speed. The patrol car followed Argueta for a few blocks before the officers turned on the emergency lights. Argueta continued driving for roughly two blocks and then pulled over.

The video shows that Argueta quickly exited the car, turned his left side towards the officers, and ran toward a vacant lot across the street. Argueta's right arm and hand were not visible in the dashcam footage because Argueta kept his right arm pressed against his side and ran in a direction where only his left side was visible to the officers; his right arm and hand were also not clearly visible in the officers' body-camera ("bodycam") footage as they were obscured, blurry, or—at times—apparently pressed down on the right side of Argueta's body. Argueta's apparent concealment of his right hand from Officer Jaradi's view—by pressing his right hand near his right hip with the core of his body between him and Jaradi—made Jaradi concerned that he could not, if necessary, react with his handgun in time to stop an attack.

Approximately five seconds after Argueta exited his vehicle, Jaradi fired two shots at Argueta, both of which struck Argueta and caused Argueta to fall to the ground. There is no audio accompanying the bodycam footage until Jaradi shoots.

Seconds later, the officers set their flashlights on Argueta, who was laying on his back in the empty lot. The bodycam footage shows a black pistol in Argueta's right hand. The officers direct Argueta to drop the weapon and roll over onto his stomach. A few seconds later, Argueta complied, revealing the gunshot wounds on his back.

Shortly after the shooting, the officers called for Emergency Medical Services and backup. Two minutes later, additional officers arrived on the scene. They handcuffed Argueta and started administering medical aid until EMS arrived and transported Argueta to the hospital. Argueta was pronounced dead at 3:42 a.m.

In June 2020, Argueta's parents and siblings, on behalf of themselves and Argueta's estate, filed a wrongful-death lawsuit against Jaradi.[2] At the close of discovery, Jaradi moved for summary judgment, arguing that Argueta could not overcome qualified immunity. The district court denied his motion, and Jaradi filed an interlocutory appeal.

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[2] Argueta also sued the City of Galveston, under a municipal-liability theory, but the district court granted summary judgment in favor of the city. That part of the summary judgment order is not subject to this appeal.

II.

Although an order denying summary judgment is normally not immediately appealable, a pretrial order denying an officer's qualified-immunity defense is subject to immediate appeal. *Plumhoff v. Rickard*, 572 U.S. 765, 771–72 (2014). We review such appeals *de novo*. *Walsh v. Hodge*, 975 F.3d 475, 481 (5th Cir. 2020). In so doing, our jurisdiction is generally limited to examining the *materiality* (*i.e.*, legal significance) of factual disputes the district court determined were genuine, not their genuineness (*i.e.*, existence). *Joseph v. Bartlett*, 981 F.3d 319, 331 (5th Cir. 2020). But an exception exists: we are permitted to review genuineness where, as here, video evidence is available. *Poole v. City of Shreveport*, 13 F.4th 420, 424 (5th Cir. 2021) (citing *Scott v. Harris*, 550 U.S. 372, 380–81 (2007) and *Curran v. Aleshire*, 800 F.3d 656, 663–64 (5th Cir. 2015)).

III.

"The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc). The qualified-immunity inquiry has two parts. First, we ask whether the facts, "taken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a federal right." *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (alterations adopted) (quotation marks and citation omitted). And second, we ask "whether the right in question was 'clearly established' at the time of the alleged violation, such that the officer was on notice of

the unlawfulness of his or her conduct." *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019) (en banc). Once an officer pleads qualified immunity, it is the plaintiff's burden to establish that the officer violated the plaintiff's clearly established federal rights. *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 380 (5th Cir. 2005).

"This is a demanding standard." *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1517 (2016). Because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs,* 475 U.S. 335, 341 (1986), we do not deny its protection unless existing precedent places the constitutional question "beyond debate," *Swanson,* 659 F.3d at 371 (quoting *Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011)).

An officer's use of deadly force is not unreasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others. *Mace v. City of Palestine,* 333 F.3d 621, 624 (5th Cir. 2003). The reasonableness of the use of deadly force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor,* 490 U.S. 386, 396 (1989). In so doing, the "court must 'ask whether the law so clearly and unambiguously prohibited [the police officer's] conduct that *every* reasonable [police officer] would understand that what he is doing violates [the law].'" *Vincent*, 805 F.3d at 547 (emphasis in original) (citation omitted). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to

qualified immunity." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990).

IV.

Argueta pleads excessive force, a cause of action derived from the Fourth Amendment. *See Graham*, 490 U.S. at 388. An excessive-force claim requires (1) an injury, (2) resulting directly and only from excessive force, (3) that was objectively unreasonable. *Westfall v. Luna*, 903 F.3d 534, 547 (5th Cir. 2018) (citation omitted). Here, only the last element is at issue. Determining whether the force used was objectively unreasonable "requires careful attention to the facts and circumstances of [the] particular case," including "(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (quoting *Graham*, 490 U.S. at 396) (internal quotation marks omitted).

The district court identified the following as genuine disputes of material fact that preclude summary judgment on qualified immunity:

> (1) whether Jaradi could see that Argueta held a weapon;
> (2) whether Argueta's flight posed any risk to the officers or the public;
> (3) whether Argueta raised the gun or otherwise made a threatening motion towards the officers; and

(4) whether either officer warned Argueta before firing.

As a preliminary matter, we are not persuaded that the second "fact dispute" is a question of fact at all. Rather, as explained below, it is a legal determination that turns on *other* factual issues. Because our jurisdiction is limited to examining the materiality (and, in cases of video evidence, genuineness) of *fact disputes*, we set aside question two and review the remaining three fact disputes for genuineness and materiality.

A.

Because video evidence is available here, we begin by reviewing fact disputes one, three, and four—listed above—for genuineness. *Scott*, 550 U.S. at 380; *Poole*, 13 F.4th at 424.[3] We conclude that video evidence confirms the genuineness of fact disputes one and three and does not bear on fact dispute four.

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[3] *Scott* could be read to hold that we are empowered to review the genuineness of fact disputes *only to determine* whether video evidence "blatantly contradicts" one party's version of events. *See Scott*, 550 U.S. at 380. However, we have interpreted *Scott* more broadly, reading it as recognizing a general exception to the prohibition on interlocutory review of genuineness in cases involving video evidence. *See Poole*, 13 F.4th at 424; *Curran*, 800 F.3d at 663–64. That wrinkle does not impact the outcome of this appeal, however, because we conclude that the video evidence does not "blatantly contradict" either party's version of events for the fact disputes on which it bears, and in fact serves only to confirm the existence of such fact disputes. Thus, the result is the same whether we are agreeing with the genuineness of the fact disputes identified below after our own independent review or simply deferring to the district court's determinations of genuineness.

In the police footage, the street is very dark, and Argueta's flight from the vehicle towards the vacant lot is illuminated only minimally by streetlight and very briefly by police flashlights. Argueta flees the vehicle in such a way that the right side of his body, including his right arm and hand, is completely hidden in the dashcam video and either obscured or not in focus in the bodycam footage. The bodycam video is not of the highest resolution and is filmed from the vantage of Jaradi's chest rather than eyes, which creates a partially obscured view of Argueta after Jaradi raises his gun. The result of the foregoing is that, from the moment Argueta exits the vehicle until the moment he is laying on the ground, not one frame of video evidence presents a clear glimpse of the firearm. Like the district court, we find that a reasonable jury could conclude that Argueta's weapon was not visible to Jaradi before or at the moment he used deadly force.

The same goes for "whether Argueta raised the gun or otherwise made a threatening motion towards the officers." The only action visible in the police footage is Argueta slowly driving away from the police, exiting the vehicle, and fleeing toward an empty lot. And, while the footage does show that Argueta keeps his right arm pressed against the right side of his body during flight—which, Jaradi argues, suggests Argueta was "trying to conceal his right arm and hand from the officers"—the video does not clearly reflect that Argueta showed the gun during his flight.

The second part of fact dispute three asks whether Argueta "made a threatening motion towards the officers." To the extent the district court is asking

whether Argueta made any motion in the direction of the officers, the video evidence appears to confirm the existence of a fact dispute; the footage shows no such motion, so a jury would be left to determine what happened in the moments the footage is dark, blurry, or physically obscured. To the extent the court is asking whether the motions that Argueta made were threatening, however, that is a legal question and not a fact dispute. As we explain further below, an assessment of whether a suspect's physical actions amount to threatening behavior bearing on an excessive-force claim is a question of law.

Finally, the video evidence does not bear on "whether either officer warned Argueta before firing" because the dashcam video does not contain audio and neither officer's bodycam video contains any audio until the moment Jaradi fires the shots (in the Larson video) or until after the shots are fired (in the Jaradi video). Because the video evidence does not bear on the genuineness of the warning dispute, we defer to the district court's assessment, consistent with the scope of our review.

B.

1.

Next, we examine the materiality of the above-listed fact disputes, beginning with whether Jaradi could see that Argueta held a weapon.

Because a genuine dispute of fact exists as to this issue, we must take the facts in the light most favorable to Argueta and assume that Jaradi could *not* see that Argueta was armed before Jaradi used deadly

force. Accordingly, each of Jaradi's cases in which a gun (or apparent gun) was visible to police prior to their use of deadly force is facially inapposite. *See, e.g.*, *Wilson v. City of Bastrop*, 26 F.4th 709, 711 (5th Cir. 2022); *Garza v. Briones*, 943 F.3d 740, 743 (5th Cir. 2019); *Ramirez v. Knoulton*, 542 F.3d 124, 126–27 (5th Cir. 2008). Instead, we must look to cases where police officers confronted an individual whose actions suggested that he or she possessed, and might in that moment access, a firearm.

In *Salazar-Limon v. City of Houston*, a police officer shot Salazar in his back after a traffic stop when the officer observed that Salazar did not comply with police commands and suddenly reached toward his waistband, which was covered by an untucked shirt. 826 F.3d 272, 275 (5th Cir. 2016). Although Salazar was later found to be unarmed, the officer—at the moment he fired—perceived Salazar's combination of movements to be consistent with Salazar retrieving a weapon from his waistband. *Id.* We held that the officer's actions were objectively reasonable, citing the following circumstances: "Salazar's resistance, intoxication, his disregard for [the officer]'s orders, the threat he and the other three men in his truck posed while unrestrained, and Salazar's actions leading up to the shooting (including suddenly *reaching towards his waistband*)." *Id.* at 279 (emphasis in original).

Similarly, in *Batyukova v. Doege*, Batyukova refused to comply with the officer's instructions, became verbally aggressive, and, instead of heeding the officer's admonition to "get down" and show her hands, reached her hand toward the waistband of her pants

and behind her back. 994 F.3d 717, 722–23 (5th Cir. 2021). The deputy, believing that Batyukova was reaching for a weapon to kill him, shot her. *Id.* at 723. We affirmed the grant of summary judgment in the officer's favor, emphasizing that Batyukova, though later determined to be unarmed, "repeatedly ignored [the officer's] commands, walked towards him, was actually facing him, and then made a movement towards her waistband as if she was reaching for a weapon to use against Deputy Doege." *Id.* at 729.

Further illustrative of the "furtive gesture" line of cases: in *Manis v. Lawson*, Manis ignored police commands to show his hands and instead "reached under the seat of his vehicle and then moved as if he had obtained the object he sought." 585 F.3d 839, 844 (5th Cir. 2009). We found that the officer's use of deadly force did not violate Manis's Fourth Amendment rights, reasoning that such force is reasonable when a suspect "moves out of the officer's line of sight such that the officer could reasonably believe the suspect was reaching for a weapon." *Id.* (collecting cases); *accord Ontiveros v. City of Rosenberg*, 564 F.3d 379, 385 (5th Cir. 2009); *see also Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985); *Reese v. Anderson*, 926 F.2d 494, 500–01 (5th Cir. 1991) (both involving a refusal to comply with police commands coupled with reaching under a car seat during a traffic stop).

On the other hand, consider our recent decision in *Poole*. In that case, Poole sued a police officer, Briceno, for excessive force after Briceno shot Poole four times in the back during a traffic stop. *Poole*, 13 F.4th at 422. The facts relevant here are as follows: Briceno

responded to a police dispatch describing a silver truck that had driven down a street several times; Briceno located a silver truck at a stop sign, driven by Poole; Briceno pulled up behind and engaged his lights and sirens; Poole evaded Briceno for fifteen minutes in a low-speed car chase; Poole eventually stopped the vehicle, exited, and reached into the bed of his truck; Briceno exited his police car, drew his weapon, and allegedly shouted "Show me your hands"; Briceno alleged that he could not see Poole's hands but believed that Poole intended to harm him or the other officers that had arrived on the scene; dashcam footage showed that, as Poole raised his hands from the truck bed, they were empty; Briceno got into a shooting stance and shouted something to Poole that is indecipherable on dashcam audio; as Poole opened the car door and lowered himself into the driver's seat, Briceno fired six times, striking Poole four times. *Id.*

The district court held that genuine issues of material fact preclude summary judgment on Briceno's qualified-immunity claim, namely (1) whether Briceno warned Poole before firing, (2) whether Poole was turned away from Briceno during the shooting, and (3) whether Briceno could see that Poole's hands were empty. *Id.* at 424. On interlocutory appeal, we held, *inter alia*, that "whether it was apparent that Poole's hands were empty" constituted a genuine dispute of material fact precluding summary judgment. *Id.* at 425.

Here, the question we must decide is whether Argueta's case is more like the *Salazar-Limon* line of furtive-gesture cases or *Poole*. On balance, we think

this case is more like the former than the latter. In *Poole*, the suspect was visibly unarmed, a fact made apparent from video evidence showing his empty hands from the approximate vantage of the defendant officer. 13 F.4th at 424. Here, Argueta was armed with a high-capacity semiautomatic weapon, which he kept out of view as he fled, and needed only a slight turn to begin firing on the officers from close range. Rather than swing both of his arms, as one naturally does when running, Argueta swung only his left arm, keeping his right arm purposefully and unnaturally pressed along his right side and out of sight as he ran away. Although Argueta did not make any *sudden* movement for his gun, as in *Manis*, Argueta's clutching his right arm to his side as he fled at top speed was tantamount to "mov[ing his arm] out of the officer's line of sight such that the officer could reasonably believe the suspect was reaching for a weapon." 585 F.3d at 844. Jaradi testified that he concluded the same and that he was concerned that he could not, if necessary, react with his handgun in time to stop an attack. We have repeatedly cautioned against "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Wilson*, 26 F.4th at 713 (citing *Valderas v. City of Lubbock*, 937 F.3d 384, 389 (5th Cir. 2019) (per curiam)).

In *Poole*, we distinguished the facts at hand from the furtive-gesture cases because, we concluded, a jury could find that Poole was "visibly unarmed" at the moment of the shooting. Thus, *Poole* was unlike furtive-gesture cases in "in which the officer could reasonably fear that the suspect was about to pull a gun from a waistband or other hidden location." 13

F.4th at 425. Here, no reasonable jury could conclude that Argueta was visibly unarmed—because he was armed. At most, a jury could conclude that Argueta was *apparently* unarmed. Considering the furtive-gesture case law, we conclude that whether Jaradi could see Argueta's weapon is immaterial because Argueta clutched his right arm to his side as he fled, which created "reasonabl[e] fear that [Argueta] was about to pull a gun from a … hidden location." *Id.*

We therefore conclude that, even taking the facts in the light most favorable to Argueta—that the gun was not visible to Jaradi when Jaradi fired—this fact question is immaterial because Argueta's clutching his right arm to his side as he fled police confrontation was a furtive gesture akin to reaching for a waistband. And again: it is Argueta's burden to establish that Jaradi is *not* entitled to qualified immunity, a protection that we honor unless existing precedent places the constitutional question "beyond debate." *Swanson*, 659 F.3d at 371.

2.

As stated above, we are not persuaded that the second "fact dispute" identified by the district court—whether Argueta's flight posed any risk to the officers or the public—is a question of fact at all. As the district court appears itself to acknowledge in its citations to *Wilson* and *Blevins*, whether the suspect's flight posed a threat to the officers or onlookers is a question of law left to the court. Indeed, we have repeatedly recognized that the risk an individual poses to officers or others is part of our objective-reasonableness analysis, a legal inquiry: "The question

for this court is whether [the police officer] could reasonably believe that [the fleeing suspect] posed a serious threat of harm." *Harmon v. City of Arlington*, 16 F.4th 1159, 1163 (5th Cir. 2021); *see also Roque v. Harvel*, 993 F.3d 325, 333 (5th Cir. 2021) (explaining that determining whether an officer acted in an objectively reasonable way is a legal question for the court which asks whether "the suspect poses a threat of serious physical harm, either to the officer or to others"); *Romero v. City of Grapevine*, 888 F.3d 170, 176–77 (5th Cir. 2018) (same) (collecting cases). Accordingly, we decline to address the genuineness or materiality of this "fact dispute" because it is actually a question of law.

Instead, we review as part of our objective-reasonableness analysis whether Argueta posed a threat to the officers or others. Our answer is straightforward: because we conclude that Argueta's concealing his right arm as he fled the police amounted to a furtive gesture akin to reaching for a waistband during a police confrontation, Jaradi's conclusion that Argueta posed an immediate danger was not unreasonable. *See, e.g.*, *Salazar-Limon*, 826 F.3d at 279; *Fraire v. City of Arlington*, 957 F.2d 1268, 1277 (5th Cir. 1992).

3.

Next, we consider the materiality of fact dispute three: "whether Argueta raised the gun or otherwise made a threatening motion towards the officers." Our analysis of the first fact dispute obviates this one. Even if Argueta never touched his gun and his gun remained completely concealed from the moment he exited the

vehicle until after he was shot, that fact is immaterial: Argueta did not need to raise (or even show) his gun or make a threatening motion towards the officers because, by suspiciously concealing his right arm as he fled in a way that objectively suggested he was armed and dangerous, he engaged in a furtive gesture justifying deadly force. *See, e.g.*, *Salazar,* 826 F.3d at 279; *Batyukova*, 994 F.3d at 729.

4.

Finally, we consider the materiality of fact dispute four: "whether either officer warned Argueta before firing." Taking the facts in the light most favorable to Argueta, Argueta received no warning before Jaradi shot him.

In *Tennessee v. Garner*, the Supreme Court held:

> [I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. 1, 11–12 (1985). And we recently held in *Poole* that, "[e]ven when a suspect is armed, a warning must be given, when feasible, before the use of deadly force." 13 F.4th at 425; *see also Cole*, 935 F.3d at 453 (but note that the record reflected Cole was armed but not dangerous).

Notwithstanding this general rule, neither party has presented, and we have not located, clearly

established law holding that a furtive gesture signaling an immediate threat to officers followed by deadly force without warning constitutes a violation of the suspect's federal rights. To the contrary, we held in *Batyukova* that the suspect's ignoring police commands and reaching behind her back to her waistband justified deadly force notwithstanding the officer's lack of warning. 994 F.3d at 729. For this reason, we conclude that whether Jaradi issued a warning prior to firing is immaterial here.

IV.

In sum, we hold that Argueta has failed to establish "beyond debate" that Jaradi violated a clearly established federal right.

Accordingly, we REVERSE and RENDER judgment in favor of Jaradi.

HAYNES, *Circuit Judge*, dissenting:

I would affirm the district court's order denying summary judgment to Officer Jaradi. Although I agree with the majority opinion's conclusions that there are genuine disputes of fact, I disagree with respect to the purported immateriality of these genuine factual disputes.

The majority opinion's reliance on the "furtive gesture" line of cases does not support its conclusion that the genuine factual disputes are immaterial here because each of those cases included "other factors that led the officer to suspect that the victim would resort to

violence." *Allen v. Hays*, 65 F.4th 736, 744 (5th Cir. 2023) ("[A]n officer cannot escape liability any time he claims he saw a gun. The question is whether the officer's belief that he saw a gun was sufficiently reasonable to justify the use of deadly force in light of all the surrounding circumstances."). For instance, in *Batyukova v. Doege*, where we affirmed the district court's grant of summary judgment on the "clearly established" prong, the suspect refused to comply with the officers' demands, gave them the middle finger, and yelled "f**k you," "f**k America," and, allegedly, "you're going to f**king die tonight." 994 F.3d 717, 722–23 (5th Cir. 2021). In *Salazar-Limon v. City of Houston*, we concluded there was no violation of the plaintiff's Fourth Amendment rights in light of the totality of the circumstances, "which include[d] [plaintiff's] resistance, intoxication, his disregard for [the officer's] orders, the threat he and the other three men in his truck posed while unrestrained, and [plaintiff's] actions leading up to the shooting (including suddenly reaching towards his waistband." 826 F.3d 272, 279 (5th Cir. 2016), *as revised* (June 16, 2016). Finally, in *Manis v. Lawson*, the suspect ignored the officers' orders and "began shouting obscenities and flailing his arms aggressively at them." 585 F.3d 839, 843 (5th Cir. 2009).

By contrast, these "other factors" are almost entirely absent in this case. Argueta did not verbally threaten the Officers, did not shout obscenities, did not make any *sudden* movements toward an apparent weapon, was not visibly agitated and aggressive, nor was there any suspicion that he was intoxicated. Thus, on the facts before us, there is very little justification

for a reasonable officer "to suspect that [Argueta] would resort to violence." *Allen*, 65 F.4th at 744.

Indeed, the genuinely disputed facts here undermine the objective reasonableness of Officer Jaradi's use of deadly force. For instance, whether the Officers had reasonable suspicion to stop and detain Argueta for minor traffic violations certainly weighs against the objective reasonableness of the use of deadly force. *See Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000) (declining to extend qualified immunity to two officers on an excessive force claim in part because material issues remained as to whether the officers had reasonable suspicion to detain suspect or probable cause to arrest him); *see also Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (concluding a minor offense militated against the use of force). So too does whether Argueta fled away from the officers toward an empty lot. *Poole v. City of Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021) ("Common sense, and the law, tells us that a suspect is less of a threat when he is turning or moving away from the officer."). The warning, or lack thereof, is also equally material to the objective reasonableness calculus. *See Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019) (en banc) (explaining an officer must give a warning, where feasible, before using deadly force because a warning is "a critical component of risk assessment and de-escalation").

In short, if the jury views the disputed factors in Argueta's favor—concluding that the Officers had no reason to stop and detain Argueta and that within five seconds of Argueta exiting his vehicle, Officer Jaradi

shot him twice in the back, without warning, as Argueta ran away from the Officers toward a vacant lot with his right arm obscured from view during flight—then Officer Jaradi violated Argueta's clearly established right to be free from unreasonable seizure. *See Poole*, 13 F.4th at 426 (holding that if a jury views the disputed facts in favor of the plaintiff—"concluding that [the officer] shot [the suspect], without warning, seeing that he was empty handed and turning away from the officer"—then the clearly established prong was satisfied); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866–67 (2017) (explaining for the particular conduct to be clearly established there need not be a case directly on point nor is it necessary that "the very action in question has previously been held unlawful").

I therefore respectfully dissent from the majority opinion with respect to the immateriality of the genuine factual disputes. Accordingly, I would affirm the district court's order denying summary judgment to Officer Jaradi on qualified immunity grounds.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

No. 3:20-cv-367

[Filed November 14, 2022]

SANTOS ARGUETA, *ET AL.*, *PLAINTIFFS*,	)
V.	)
CITY OF GALVESTON, *ET AL.*, *DEFENDANTS*.	)

MEMORANDUM OPINION AND ORDER

JEFFREY VINCENT BROWN, *UNITED STATES DISTRICT JUDGE*:

The defendants, Officer Derrick Jaradi and the City of Galveston, have moved for summary judgment. Dkt. 43. The court grants in part and denies in part.

I. BACKGROUND

This case arises from Jaradi's fatal shooting of Luis Argueta. The plaintiffs are Argueta's parents—Santos

and Blanca Granado—and his sisters—Dora and Jelldy Argueta.[1]

On June 25, 2018, a few hours after midnight, Argueta and his girlfriend, Mary Ann Luna, drove to Sunny Food Mart on Broadway in Galveston. Dkts. 56 at 4–5; 43 ¶ 10. Like many of the events at issue, what happened at the store is disputed.

By the plaintiffs' account, Argueta entered Sunny to buy a cigar. Dkts. 56 at 5; 59-2 at 74:10–74:12. While Argueta was inside, Jaradi and his partner, Officer Matthew Larson, drove into the store parking lot. Dkts. 56 at 5; 43 ¶ 10. When Argueta returned to his vehicle, Luna told Argueta that the cops were "looking at [him] crazy." Dkt. 56 at 6. "Nervous" about this negative attention, Argueta pulled out of the parking lot "super slow[ly]." *Id.*

Jaradi and Larson recall the events differently. The officers saw Argueta talking to a suspected prostitute outside the store. Dkt. 43 ¶ 10. When they pulled next to Argueta's vehicle to investigate, he drove away almost immediately. *Id.* Based on this "suspicious behavior," the officers followed Argueta. *Id.*

The parties also dispute what happened next. According to the plaintiffs, Argueta's car lights were on, he stopped at stop signs, and he did not speed. Dkts. 59-3 at 22:16-22:17; 56 at 18–19. Conversely, Jaradi claims Argueta was driving without headlights or taillights and rolled through two stop signs. Dkt. 43

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[1] Argueta's brother, Tomas Argueta, is no longer a party to this suit. Dkt. 42 (Order of Dismissal).

¶¶ 6–7. The video from the officers' dash camera indicates that Argueta at least stopped momentarily at all stop signs and drove at a moderate speed. Dkt. 58, Attachment 25 (0:59–1:17). Argueta's lights were on at least while his vehicle was in motion. *Id.* (0:25–1:27).

Argueta continued driving for about two blocks after the officers turned on their emergency lights. *Id.* (0:59–1:17). Upon pulling over, Argueta immediately exited the car, turned his left side toward the officers, and ran into an empty lot across the street. *Id.* (1:29–1:32). As this occurs, Argueta's right arm and hand are not visible in the dash camera or on the officers' body camera footage. *Id.*; *see also id.*, Attachments 26 (1:53–1:57); 27 (1:54– 2:00).

The parties dispute what—if anything—the officers said to Argueta and the exact direction everyone was facing when shots were fired. The time from when Argueta exits his car to when the shots are fired is about five seconds. *Id.*, Attachment 27 (1:54–2:00). In the videos captured by the officers' body cameras, nothing is audible until immediately before Jaradi fired his weapon. *Id.*, Attachments 26 (1:53–1:57); 27 (1:54–2:00).

A few seconds after shots were fired, the officers shone their flashlights on Argueta, who was lying face up in the empty lot, about twenty feet from the road, loosely holding a pistol in his right hand. Dkts. 43-5 (1:59); 43-6 (2:05). After a few seconds, Argueta complies with the officers' commands to drop the weapon and roll over. Dkts. 43 ¶ 11; 43-5 (2:12–2:18); 43-6 (2:07–2:21). Argueta's two wounds are not visible until he rolls over onto his stomach. Dkts. 56 at 31; 43-

5 (2:18); 43-6 (2:20). An autopsy later found that both shots entered through Argueta's back. Dkts. 56 at 37–39; 56-17 at 2–3.

Shortly after the shooting occurred, the officers called for an ambulance and backup. Dkt. 58, Attachment 26 (2:08–2:10). The next officer to arrive—Lt. Joel Caldwell—searched Argueta, handcuffed him, and rendered him medical aid until EMS transported Argueta to the hospital. Dkt. 56 at 33–36. Just under seven minutes passed between the shooting and EMS's arrival. Dkt. 58, Attachment 27 (2:00–8:50). About two minutes after EMS transported Argueta to the hospital, Caldwell told Larson he could turn off his body camera because he was "riding two-man." *Id.* (10:08–12:05). Argueta was pronounced dead at 3:42 a.m. Dkt. 43-4 at 26.

The plaintiffs sued under 42 U.S.C. § 1983, alleging that Jaradi violated Argueta's Fourth Amendment rights and asserting municipal liability against the City of Galveston. Dkt. 1 ¶¶ 125–148. The plaintiffs seek damages under § 1983 and Texas's wrongful-death and survival statutes. *Id.* ¶ 149. The defendants have moved for summary judgment on all claims. Dkt. 43.

II. LEGAL STANDARD

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view the evidence in the light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). The movant bears the burden of presenting the

basis for the motion and the elements of the causes of action for which a genuine dispute of material fact does not exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to offer specific facts showing a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

The court "may not make credibility determinations or weigh the evidence" in ruling on a summary-judgment motion. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). But where video evidence exists, courts prioritize it. *Batyukova v. Doege*, 994 F.3d 717, 724 (5th Cir. 2021); *Roque v. Harvel*, 993 F.3d 325, 336 (5th Cir. 2021).

III. ANALYSIS

The defendants move for summary judgment on the following grounds: (1) Argueta's siblings lack standing under the Texas wrongful-death statute and capacity under the Texas survival statute; (2) Jaradi is entitled to qualified immunity because his use of deadly force was objectively reasonable and not a violation of clearly established law; and (3) the plaintiffs' failure to establish municipal liability against the City of Galveston. Dkt. 43 ¶¶ 13–69.

A. Standing and Capacity

The parties agree that Argueta's sisters, Jelldy and Dora, do not have standing under the Texas wrongful-

death statute. Dkts. 56 at 62; 43 at ¶¶ 67–69; *see also* Tex. Civ. Prac. & Rem. Code § 71.004. The parties disagree over who can bring a Texas survival action. Dkts. 56 at 63; 43 ¶ 69; *see also* Tex. Civ. Prac. & Rem. Code § 71.021. Undisputedly, the estate's personal representative has capacity[2] to bring a claim. Dkt. 56 at 63 (citing *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W. 3d 845, 850 (Tex. 2005)). For heirs to bring a survival suit, they must show there is no administration pending or necessary. *Lovato*, 171 S.W. 3d at 850–51. "[A] family agreement regarding the disposition of the estate's assets can provide support for the assertion that no administration of the decedent's estate is necessary." *Id.* at 851. The defendant bears the burden of challenging an heir's capacity. *Id.* at 853 n.7. The challenge must be by "verified plea," and courts should give the plaintiff a "reasonable time to cure any defect." *Id.*

The defendants argue that Jelldy lacks capacity to bring a survival action. Particularly, the defendants claim that Jelldy's affidavit contradicts prior deposition testimony necessary to establish her capacity, and they object to its inclusion in the summary-judgment record on those grounds. Dkts. 64 ¶¶ 34–37; 65 ¶¶ 19–22.[3]

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[2] Considerations of who can sue under the survival statute are properly characterized as questions of "capacity" rather than standing. *Lovato*, 171 S.W.3d 845, 851 n.3 (Tex. 2005) (citing *Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998)).

[3] The defendants filed an extensive set of objections to the plaintiffs' summary-judgment evidence. Dkt. 65. The court has set forth in this opinion, through citations to the record, the specific summary-judgment evidence it relied on in reaching its ruling. The

Generally, "[i]n considering a motion for summary judgment, a district court . . . cannot disregard a party's affidavit merely because it conflicts to some degree with an earlier deposition." *Seigler v. Wal-Mart Stores Tex., L.L.C.*, 30 F.4th 472, 477 (5th Cir. 2022) (quoting *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893 (5th Cir. 1980). Under the sham-affidavit doctrine, however, "a district court may refuse to consider statements made in an affidavit that are 'so markedly inconsistent' with a prior statement as to 'constitute an obvious sham.'" *Winzer v. Kaufman Cnty.*, 916 F.3d 464, 472 (5th Cir. 2019) (quoting *Clark v. Resistoflex Co., A Div. of Unidynamics Corp.*, 854 F.2d 762, 766 (5th Cir. 1988)) (citations omitted). But "not 'every discrepancy' in an affidavit justifies a district court's refusal to give credence to [it]." *Winzer*, 916 F.3d at 472 (quoting *Kennett-Murray Corp.*, 622 F.2d at 893). Contradictory affidavits remain competent summary-judgment evidence so long as they are not inherently inconsistent or irreconcilable with earlier testimony. *See Winzer*, 916 F.3d at 472–73 (citing *Kennett-Murray Corp.*, 622 F.2d at 894 and *Robinson v. Nexion Health at Terrell, Inc.*, 671 F. App'x 344, 344 (5th Cir. 2016)).

Jelldy attests in her affidavit that her family agreed that she should be the administrator of her brother's estate, if any administration proceedings become necessary. Dkt. 56-1. She further asserts that no proceedings are currently pending. *Id.* These

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parties may properly assume that if the court relied on any piece of evidence to which the defendants have objected, that objection is overruled. The remaining objections—to evidence on which the court did not rely— are overruled as moot.

statements are not inherently inconsistent with her earlier testimony that she was not involved in any ongoing proceedings for the administration of Argueta's estate. Dkt. 44-7 at 25:1–25:5.

The other identified contradictions are not material to what the plaintiffs must show: that there is no pending or necessary administration of the estate. *Lovato*, 171 S.W.3d at 850–51 (citation omitted). The defendants have not satisfied their burden to show that Jelldy lacks capacity.

B. Qualified Immunity and Excessive Force

"Qualified immunity shields government officials from liability when they are acting within their discretionary authority and their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." *Gates v. Tex. Dep't of Protective & Reg. Servs.*, 537 F.3d 404, 418 (5th Cir. 2008). It "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). And "it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

"Qualified immunity is an immunity from suit rather than a mere defense to liability." *Pearson*, 55 U.S. at 237 (internal quotation marks omitted). It alters the usual summary-judgment burden of proof:

"[o]nce an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). "The plaintiff bears the burden of negating qualified immunity, but all inferences are drawn in his favor." *Id.* (citation omitted).

The qualified-immunity analysis is a two-pronged inquiry: "whether an official's conduct violated a constitutional right of the plaintiff; and whether the right was clearly established at the time of the violation." *Id.* The court may rely on either prong in its analysis, *id.*, and has the "discretion to decide which prong to consider first." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (citing *Pearson*, 555 U.S. at 236). "If the defendant's actions violated a clearly established constitutional right, the court then asks whether qualified immunity is still appropriate because the defendant's actions were 'objectively reasonable' in light of 'law which was clearly established at the time of the disputed action.'" *Brown*, 623 F.3d at 253 (quoting *Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004)). "Whether an official's conduct was objectively reasonable is a question of law for the court, not a matter of fact for the jury." *Id.* But "this question of law cannot be decided if there are genuine issues of material fact." *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 490 (5th Cir. 2001) (citation and alterations omitted).

An excessive-force claim requires (1) an injury, (2) resulting directly and only from excessive force,

(3) that was objectively unreasonable. *Westfall v. Luna*, 903 F.3d 534, 547 (5th Cir. 2018) (citation omitted). Here, only reasonableness is at issue. Deciding whether an officer's force was objectively reasonable

> requires careful attention to the facts and circumstances of each particular case, including (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.

Trammell v. Fruge, 868 F.3d 332, 340 (5th Cir. 2017) (quoting *Graham v. O'Connor*, 490 U.S. 386, 396 (1989)) (internal quotations omitted).

When considering the use of deadly force, the court's "'objective reasonableness' balancing test is constrained." *Batyukova*, 994 F.3d at 725 (quoting *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004)). Using deadly force to apprehend a suspect violates the Fourth Amendment when "the suspect poses no immediate threat to the officer and no threat to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *see also Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018). We consider only facts the officer could have known when using force, and we are careful to avoid second-guessing a police officer's on-scene assessment of dangerous situations. *Roque*, 993 F.3d at 333.

The court will deny Jaradi's motion for summary judgment because the evidence raises at least four genuine disputes of material fact:

(1) whether Jaradi could see that Argueta held a weapon;
(2) whether Argueta's flight posed any risk to the officers or the public;
(3) whether Argueta raised the gun or otherwise made a threatening motion towards the officers; and
(4) whether either officer warned Argueta before firing.

First, a jury could find that Jaradi did not know or reasonably suspect that Argueta possessed a weapon when he fired. "It should go without saying that it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.'" *Poole v. City of Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021) (quoting *Garner*, 471 U.S. at 11, and citing *Waller v. Hanlon*, 922 F.3d 590, 601 (5th Cir. 2019); *Romero*, 888 F.3d at 176; *Lytle v. Bexar Cnty.*, 560 F.3d 404, 417 (5th Cir. 2009)).

Jaradi has testified he saw a gun in Argueta's hand before firing. *See* Dkts. 59-1 at 54:9–54:12; 43-6 (5:54–5:57). The plaintiffs describe the weapon as "secreted" and "unseen." Dkt. 56 at 53. The officers' body-camera footage could lead a reasonable jury to doubt whether Jaradi could see Argueta's weapon. The street was very dark. Dkt. 43-6 (1:55–2:00). It happened very quickly; five seconds spanned from when Argueta exited his car to when Jaradi shot him. *Id.* Jaradi faced Argueta's left side, and Argueta held a gun in his right hand. Dkt. 59-1 at 43:21–43:23. Therefore, a reasonable jury could find that Jaradi did

not know or reasonably suspect Argueta was armed when he fired.

Second, it is not clear whether Argueta's flight posed any risk to the officers or the public. The Fifth Circuit often relies on a suspect's flight toward civilians or aggression toward officers as a factor in assessing whether deadly force was warranted. *See, e.g.*, *Wilson v. City of Bastrop*, 26 F.4th 709, 713–15 (5th Cir. 2022) (finding the armed suspect's flight toward an elementary school justified, in part, the officer's deadly force); *Batyukova*, 994 F.3d at 726 (identifying the suspect's verbal and physical attacks on the officers as important factors in finding reasonable force); *Garcia v. Blevins*, 957 F.3d 596, 602 (5th Cir. 2020) (noting the armed suspect's fight in the parking lot and walk toward a crowd as warranting, in part, deadly force). Indeed, "[c]ommon sense, and the law, tells us that a suspect is less of a threat when he is turning or moving away from the officer." *Poole***,** 13 F.4th at 424 (citing *Roque*, 993 F.3d at 339; *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir. 2017)).

Jaradi recalls Argueta running "southeast, which was diagonal to the driver's side door of [the] police vehicle." Dkt. 43-2 ¶ 8. The plaintiffs argue Argueta was running "toward an open, empty field/lot, and away from the police." Dkt 56 at 14. The video footage indicates that Argueta was running away from the officers and towards an abandoned lot. Dkts. 58, Attachment 26 (1:52–1:57); 43-6 (1:55–1:57). The autopsy report also indicates that Argueta was running away rather than towards the officers: both shots struck Argueta in the back. Dkt. 56 at 37–39. A

reasonable jury could find that Argueta was retreating from the officers when he was shot.

Third, it is not clear that Argueta threatened the officers with his weapon. Admittedly, the Fifth Circuit does not always consider whether the suspect pointed his weapon at the officer as material to its excessive-force analysis. *See, e.g.*, *Garza v. Briones*, 943 F.3d 740, 747 (5th Cir. 2019) (categorizing it as immaterial where the suspect pointed his gun before the officer shot him but also emphasizing that video evidence clearly contradicted the plaintiff's claim that the suspect never raised his gun at the officer). *But see Cole v. Carson*, 935 F.3d 444, 455 (5th Cir. 2019) (finding a clearly established Fourth Amendment violation when, though the suspect held a weapon in his hand, he had not directed it toward the officer when he was shot); *Roque*, 993 F.3d at 335 (explaining that the Fifth Circuit has found obvious Fourth Amendment violations "where a suspect has a weapon but is incapacitated or otherwise incapable of using it (functionally unarmed)") (citing *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 277 (5th Cir. 2015)).

According to Jaradi, it is immaterial whether Argueta threatened the officers with his weapon because "[c]ourts have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety." Dkt. 43 ¶ 20 (quoting *Salazar-Limon v. City of Houston*, 826 F.3d 272, 279 n.6 (5th Cir. 2016)). But the defendants underestimate the Fifth Circuit's concern with what kind of threat justifies an officer's use of deadly force. In *Wilson*, officers responded to reports of

an armed altercation, undisputedly saw the suspect's weapon, repeatedly ordered the suspect to stop, and feared for public safety because the suspect ran toward an elementary school before ultimately using deadly force. *Wilson*, 26 F.4th at 711–13. In *Salazar-Limon*, the Fifth Circuit considered the totality of the circumstances—including the suspect's resistance, intoxication, disregard for the officer's orders, and the magnified threat due to the three passengers in the suspect's vehicle—as reasons warranting deadly force when an unarmed suspect reached for his waistband. *Salazar-Limon*, 826 F.3d at 278–79.

Argueta seems to argue both that he never exposed the gun and, in the alternative, that any movement he made to lift the gun out of his pocket was merely in compliance with Jaradi's commands. *Compare* Dkt. 56 at 28, *with id.* at 53–54. Jaradi testified that "[t]he gun was not pointed at [him]," Dkt. 59-1 at 54:8, but that "only a slight motion of [Argueta's] hand would have resulted in his handgun being pointed directly pointed at [Jaradi]." Dkt. 43 ¶ 11. Jaradi also concedes that Argueta's motion was not consistent with how he would raise his arm to shoot a gun, Dkt. 59–1 at 53:16–53:21, and that Argueta could have just been swinging his arm while running, Dkt. 59-1 at 53:22–53:24. Therefore, a reasonable jury could find that Argueta did not point his weapon at the officers.

Finally, there is a question as to what, if any, warning the officers gave Argueta before Jaradi shot him. The Fifth Circuit frequently cites the failure to give or heed warnings as a factor in determining whether deadly force was justified. *E.g.*, *Poole*, 13 F.4th

at 425 ("Even when a suspect is armed, a warning must be given, when feasible, before the use of deadly force.") (citing *Cole*, 935 F.3d at 453); *see also Ramirez v. Knoulton*, 542 F.3d 124, 131 (5th Cir. 2008); *Reese v. Anderson,* 926 F.2d 494, 500–01 (5th Cir. 1991); *Manis v. Lawson*, 585 F.3d 839, 846 (5th Cir. 2009); *Batyukova*, 994 F.3d at 726; *Garcia*, 957 F.3d at 601–02.

Jaradi testified that he told Argueta to "get his hand out of his pocket." Dkt. 59-1 at 44:15–44:16. On the other hand, two witnesses who lived near where the incident occurred reported hearing variations of an order to "get down" immediately before the shots were fired. Dkt. 43-4 ¶¶ 30–31. Luna does not remember hearing anything before the shooting. Dkt. 59-2 at 47:17–47:21. The officers' body camera audio is silent until shots are fired. *See* Dkt. 58, Attachments 26 (1:53–1:57), 27 (1:54–2:00). Given the very rapid pace of events, the inconsistency of testimony regarding commands, and the lack of audio in the recording, a reasonable jury could find that Argueta did not receive a warning before Jaradi shot him.

In sum, as set forth above, there are at least four genuine issues of material fact that preclude summary judgment for Jaradi on the plaintiffs' excessive-force claim. It could very well be that Jaradi's use of force was justified. (After all, it is not as if Jaradi was mistaken about whether Argueta was armed; he was found to be holding the weapon in his hand immediately after Jaradi shot him.) But in light of the fact issues raised by the evidence, a jury will have to

make that determination. Accordingly, the plaintiffs' claim against Jaradi survives summary judgment.

C. Municipal Liability

To establish municipal liability under § 1983, a plaintiff must prove three elements: "a policymaker; an official policy [or custom]; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). In other words, a plaintiff must show "a direct causal link" between the policy and the violation. *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009) (quotation omitted).

Liability against a municipality is only appropriate where "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." *Monell*, 436 U.S. at 694. If the policy is not written, it can still be considered official if "such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* at 691 (quotation omitted). To show a custom, a plaintiff "must typically venture beyond the actions which caused his or her own alleged constitutional deprivation and introduce evidence of 'similar' objectionable conduct by the same or other city employees." *Backe v. City of Galveston*, 2 F. Supp. 3d 988, 1001 (S.D. Tex. 2014).

The plaintiffs allege that Galveston's "policies" of (1) failing to document and report use of force and

(2) targeting minority citizens caused Argueta's death.[4] Dkt. 1 ¶¶ 145–148. As to all allegations, the plaintiffs fail to tie their grievances against Galveston to any specific constitutional violation—much less show that Jaradi's alleged constitutional violation fits within a larger pattern of events sufficient to show a widespread custom.

The plaintiffs point to Caldwell's conduct as evidence of an unconstitutional policy leading to Argueta's death. According to the plaintiffs, Caldwell telling the officers to stop recording with their body cameras (almost two minutes after Argueta was taken to the hospital) was an attempt of "secreting . . . to hide the violation of [Argueta's] constitutional rights." Dkt. 56 at 60. Notably, this allegation does not include any citation to the record. *See id.* The court reads this statement as the plaintiffs' characterization of Caldwell's statement to Larson, after Argueta is no longer at the scene, that "since [he was] riding two-man, [he could] go ahead and kill [his] camera." *Id.* at 36–37 (citing Dkt. 58 Attachment 27 (12:00–12:04)). Critically, the plaintiffs fail to show a constitutional right to body cameras at all, much less to a seemingly indefinite stream of footage after the incident ends and the suspect is no longer at the scene. Moreover, the plaintiffs do not—and obviously cannot—show how

[4] The plaintiffs' raise their "failure to train" claim for the first time in their response to the defendants' motion for summary judgment. Dkt. 56 at 58–61. The court will not consider the merits of this claim because the parties did not seek (and the court sees no basis to allow) leave to amend. *See Douglas v. Wells Fargo Bank, N.A.*, 992 F.3d 367, 373 (5th Cir. 2021).

turning off the cameras after Argueta was removed from the scene led Jaradi to use excessive force.

Finally, by not mentioning it in their response, the plaintiffs have abandoned their unsupported claim that the city maintains a policy of targeting minority citizens.

Because the plaintiffs have failed to show a policy or custom that directly caused a constitutional violation, the city is entitled to summary judgment.

* * *

The court grants the defendants' motion for summary judgment as to the City of Galveston but denies it as to Officer Jaradi. Dkt. 43. The plaintiffs' opposed motion for leave to file a surreply is denied as moot. Dkt. 69.

Signed on Galveston Island this 14th day of November, 2022.

/s/ Jeffrey Vincent Brown
JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22-40781

[Filed February 29, 2024]

SANTOS ARGUETA; BLANCA GRANADO; DORA ARGUETA; JELLDY ARGUETA; THE ESTATE OF LUIS FERNANDO ARGUETA, *Plaintiffs—Appellees*,	)
versus	)
DERRICK S. JARADI, *Defendant—Appellant*.	)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:20-CV-367

ON PETITION FOR REHEARING AND
REHEARING EN BANC

Before CLEMENT, HAYNES, and OLDHAM, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED.[1] The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, seven judges voted in favor of rehearing (STEWART, ELROD, HAYNES, GRAVES, HIGGINSON, DOUGLAS, and RAMIREZ), and ten voted against rehearing (RICHMAN, JONES, SMITH, SOUTHWICK, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON).

JENNIFER WALKER ELROD, *Circuit Judge*, joined by STEWART, GRAVES, HIGGINSON, and DOUGLAS, *Circuit Judges*, dissenting from denial of rehearing en banc:

This case is about whether an officer is entitled to qualified immunity for shooting a fleeing suspect in the back without warning when that suspect concealed his arm from view such that the officer thought that he *might* be armed. Such are the facts read in the light most favorable to Argueta, the non-moving party. The panel majority answered "yes," overturning the district court's determination that genuine disputes of material fact bearing on qualified immunity remained.

The panel majority relied heavily on our "furtive-gesture" line of cases, which instructs that an officer's use of deadly force is permissible where a suspect

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[1] Judge HAYNES would grant the petition for panel rehearing.

appears to reach for what might be a weapon and the officer reasonably believes that a suspect will imminently use violence. *E.g., Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir. 2009) (suspect ignored repeated commands and reached under his seat to grab an object). But as Judge Haynes observed in her dissent from the panel opinion, "each of those cases included 'other factors that led the officer to suspect that the victim would resort to violence.'" *Argueta v. Jaradi*, 86 F.4th 1084, 1094 (5th Cir. 2023) (Haynes, J., dissenting) (quoting *Allen v. Hays*, 65 F.4th 736, 744 (5th Cir. 2023)). Here, no such factors were present. Rather, all Argueta did was "clutch[] his right arm to his side as he fled." *See id.* at 1092 (majority opinion).

I agree also with Judge Douglas that the panel majority contravenes our precedent and that of the Supreme Court by failing to draw all inferences in favor of Argueta, the non-moving party. *See Tolan v. Cotton*, 572 U.S. 650 (2014); *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc). And I agree with the able district court, which held that several genuine issues of material fact precluded granting summary judgment: as to whether Officer Jaradi knew that Argueta was armed, whether Argueta threatened the officers with a weapon, and whether Jaradi gave Argueta any orders or warning before shooting him.

I offer no opinion as to whether Jaradi should have ultimately been entitled to qualified immunity. That question turns on genuine fact disputes that we have no jurisdiction to review in this posture. *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc). The panel majority removed that determination from

the hands of the fact finder, in the process effecting—incorrectly, in my view—a sweeping expansion of our furtive-gesture caselaw. I believe that this warranted *en banc* treatment.

DANA M. DOUGLAS, *Circuit Judge*, joined by GRAVES and HIGGINSON, *Circuit Judges*, dissenting from denial of rehearing en banc:[*]

Luis Argueta was a teenager driving from a convenience store with his girlfriend when Officer Jaradi pulled him over.[1] In a matter of seconds, Argueta took off on foot and Officer Jaradi shot him in the back twice. Those shots proved fatal, and Argueta's family brought an excessive force claim against Officer Jaradi. The district court rightfully denied the officer qualified immunity because at least four disputed material facts undermined the reasonableness of his deadly force. A panel of this court, however, decided those facts were either not in dispute or not material to Fourth Amendment protections and qualified immunity. *See Argueta v. Jaradi*, 86 F.4th 1084 (5th Cir. 2023). That decision misconstrues the law of this court and the Supreme Court.

"When an officer uses deadly force, that force is considered excessive and unreasonable 'unless the

[*] Judge ELROD joins in Parts I and II of this opinion.

[1] It is disputed whether Officer Jaradi, and his partner Officer Larson, had probable cause or reasonable suspicion to conduct a traffic stop. Also, Officers Jaradi and Larson provided conflicting statements of the events leading up to the shooting.

officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Roque v. Harvel*, 993 F.3d 325, 333 (5th Cir. 2021) (quoting *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018)); *see Tennessee v. Garner*, 471 U.S. 1, 11 (1985). "Further, 'an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.'" *Roque*, 993 F.3d at 333 (quoting *Lytle v. Bexar County*, 560 F.3d 404, 413 (5th Cir. 2009)). "Whether an officer's use of force was excessive is 'necessarily a fact-intensive' endeavor that 'depends on the facts and circumstances of each particular case.'" *Barnes v. Felix*, 91 F.4th 393, 400 (5th Cir. 2024) (Higginbotham, J., concurring) (quoting *Amador v. Vasquez*, 961 F.3d 721, 727 (5th Cir. 2020)).

In this case, the district court found four facts at issue, including: (1) whether Officer Jaradi saw that Argueta had a weapon; (2) whether Argueta was running away or toward officers or the public; (3) whether Argueta threatened officers; and (4) whether officers warned Argueta before shooting him. Each of these facts are material to whether an officer's use of force was excessive. *See, e.g., Roque*, 993 F.3d at 333. And nothing in the officers' dash or body camera footage "resolve[s] the parties' dispute." *Curran v. Aleshire*, 800 F.3d 656, 664 (5th Cir. 2015) ("Because the visual evidence does not refute Curran's testimony, we must accept it for purposes of this appeal."); *see Scott v. Harris*, 550 U.S. 372, 380 (2007).

The opinion of the panel was not faithful to the legal standards underlying Argueta's claims. Specifically,

the opinion commits at least three errors. First, it does not view the facts in favor of the non-movant, Argueta, and is based on inferences in favor of Officer Jaradi. Second, it distorts precedent regarding armed suspects and the summary judgment standard for qualified immunity. Third, it misconstrues flight risk as a question of law, rather than fact. For these reasons, I must dissent from denial of rehearing en banc—the only process through which this opinion can be corrected.

I.

The opinion contravenes *Tolan v. Cotton*, 572 U.S. 650 (2014) and *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc) because it fails to consider the evidence in the light most favorable to the non-movant, Argueta. In *Tolan*, the Supreme Court stated that the Fifth Circuit "failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to central facts of this case." 572 U.S. at 657. "In failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party." *Id.* (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986)); *see Cole*, 935 F.3d at 452.

Moreover, "'drawing inferences in favor of the nonmovant'" is especially important when determining whether there is clearly established law. *Roque*, 993 F.3d at 335 (quoting *Tolan*, 572 U.S. 650, 657 (2014)). "That's because the Supreme Court has 'instructed that courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case.'"

Id. (quoting *Good v. Curtis*, 601 F.3d 393, 398 (5th Cir. 2010); *see also id.* ("[A] defendant challenging the denial of a motion for summary judgment on the basis of qualified immunity must be prepared to concede the best view of the facts to the plaintiff.")). "'In other words, a court assessing the clearly established law cannot 'resolve disputed issues in favor of the moving party.' And it must 'properly credit' Plaintiffs' evidence." *Id.* (quoting *Tolan*, 572 U.S. at 660).

In this case, the video footage and autopsy report confirm that Argueta was running away. Jaradi's partner, Officer Larson, conceded that he did not know "why" Jaradi shot Argueta. In addition, Jaradi provided conflicting testimony regarding whether he felt Argueta posed a risk or threat. We cannot ignore the long line of cases demonstrating that these facts, among others, are material and preclude summary judgment here. *See, e.g.*, *Cole*, 935 F.3d at 453 (affirming denial of qualified immunity, finding Fourth Amendment violation where, though the suspect held a weapon in his hand, he had not directed it toward the officer when he was shot); *Roque*, 993 F.3d at 335 (affirming denial of qualified immunity, finding Fourth Amendment violations "where a suspect has a weapon but is incapacitated or otherwise incapable of using it (functionally unarmed)"); *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 281-82 (5th Cir. 2015) (remanding for consideration of whether the officer's decision to shoot plaintiff "when he was already on the ground" was entitled to qualified immunity); *Poole v. City of Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021) ("Common sense, and the law, tells us that a suspect is

less of a threat when he is turning or moving away from the officer.").

The panel's opinion contravenes these precedents. That reason alone was sufficient to warrant rehearing en banc as the opinion runs afoul of our own rule of orderliness with respect to the above decisions, as well as the Supreme Court's own precedents. *See In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021) ("'It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court.'" (quoting *Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008))).

II.

Perhaps most egregiously, the opinion concludes that the lack of visibility of Argueta's right arm and hand constituted a "furtive gesture akin to reaching for a waistband." *Argueta*, 86 F.4th at 1092. Such "gesture" is akin to running, as Argueta argues, Jaradi *admits*, and the district court found. The conclusion that Argueta's movements constituted a "furtive gesture" stems from both the panel's substituting its view over the district court's without any clear video evidence, and declining to apply the correct summary judgment standard to the facts. *See Tolan*, 572 U.S. at 651 ("In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable

inferences are to be drawn in his favor.'" (quoting *Liberty Lobby*, 477 U.S. at 255)).

To be clear, the furtive-gesture line of cases does not apply here. For example, unlike the plaintiff in *Salazar-Limon*, Argueta presented "controverting evidence" to rebut Officer Jaradi's testimony. *Salazar-Limon v. City of Houston*, 826 F.3d 272, 278-79 (5th Cir. 2016), *as revised* (June 16, 2016); *see also Manis v. Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) (explaining that "Appellees *do not dispute the only* fact material to whether [the officer] was justified in using deadly force" (emphasis added)). In *Salazar-Limon*, the court explained that the plaintiff "did not deny reaching for his waistband; nor [had] he submitted any other controverting evidence in this regard." *Salazar-Limon*, 826 F.3d at 278-79. If the "furtive gesture" cases are inapposite, almost all of the majority's arguments about the four identified genuine disputes of material fact identified by the district court fall away. *See Argueta*, 86 F.4th at 1092-93.

As JUDGE HAYNES mentioned in her dissent, "the genuinely disputed facts here undermine the objective reasonableness of Officer Jaradi's use of deadly force," even with deference to the higher standard for qualified immunity cases. *Argueta*, 86 F.4th at 1094-95 (Haynes, J., dissenting). For example, whether the officers had reasonable suspicion to stop and detain Argueta is material to the analysis. *See Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000) (declining to extend qualified immunity to officers in part because material issues remained as to whether the officers had reasonable suspicion to detain suspect

or probable cause to arrest him); *see also Trammell v. Fruge*, 868 F.3d 332, 340 (5th Cir. 2017) (concluding a minor offense militated against the use of force). Further, the factual dispute concerning Officer Jaradi's warning, or lack thereof, is equally material to the analysis. *See, e.g.*, *Cole*, 935 F.3d at 453 (explaining that disputed material facts regarding whether the officer warned the plaintiff before shooting him precluded qualified immunity).

The opinion held that "no reasonable jury could conclude that Argueta was visibly unarmed—because he was armed. At most, a jury could conclude that Argueta was *apparently* unarmed." *Argueta*, 86 F.4th at 1092. This pronouncement has no basis in our precedent, and there are no citations in the opinion to support it. In fact, this is an impermissible conclusion to reach under relevant precedent. As we have repeatedly stated: "We only consider the facts 'knowable to the defendant officers' at the time the officers used force." *Roque*, 993 F.3d at 333 (quoting *Garza v. Briones*, 943 F.3d 740, 745 (5th Cir. 2019)); *see also White v. Pauly*, 580 U.S. 73, 76-77 (2017) ("Because this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers." (citing *Kingsley v. Hendrickson*, 576 U.S. 389, 399 (2015))).

Furthermore, despite repeatedly asserting that "not one frame of video evidence presents a clear glimpse of the firearm," and that "the video does not clearly reflect that Argueta showed the gun during his flight," the opinion concluded that these disputes were immaterial. *Argueta*, 86 F.4th at 1090. This contravenes the

Supreme Court's mandate to consider the facts knowable to the officers at the time force was used. *Kingsley*, 576 U.S. at 399 ("[W]e have stressed that a court *must* judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer." (emphasis added)). The opinion is particularly troubling because it *reversed* a district court's careful conclusion regarding genuinely disputed material facts. As the district court found, however, the officers are not entitled to qualified immunity because nothing in the record "blatantly contradicted" Argueta's version of events. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

III.

Finally, the opinion "set aside" the district court's finding that there is a genuine dispute as to "whether Argueta's flight posed any risk to the officers or the public." *Argueta*, 86 F.4th at 1089. It appears that the opinion ignores our deferential standard of review by holding that "whether the suspect's flight posed a threat to the officers or onlookers is a question of law left to the court." *Id.* at 1092; *see also id.* at 1093 ("We decline to address the genuineness or materiality of this 'fact dispute' because it is actually a question of law."). *But see, e.g., Poole*, 79 F.4th at 460 (explaining that "we decline to disturb the district court's factual determination" because the district court sits as the factfinder). In doing so, the opinion drastically changes the law with respect to excessive force claims.

In *Roque*, two factual disputes on video *prevented* the court from answering whether the officer's force was excessive and objectively unreasonable. *Roque*, 993

F.3d at 333-34 ("Two fact disputes . . . prevent us from answering these questions"). As to whether Roque posed a risk, the court determined that two fact disputes existed, including the placement of Roque's gun and his movements (i.e., whether Roque was incapacitated). Those facts were material to whether the officer's second and third shots were excessive and objectively unreasonable. *Id.* at 334. Because of the disputed facts, and the clearly established law preventing officers from using deadly force after incapacitating an individual, the officer was precluded from qualified immunity. *Id.* at 339. The logic in *Roque* is as follows:

> [O]n interlocutory appeal following the denial of qualified immunity, the scope of our review is limited to whether the factual disputes that the district court identified are material to the application of qualified immunity. Our review therefore involves only whether a given course of conduct would be objectively unreasonable in light of clearly established law. We do not review the district court's determination that there are genuine fact disputes.

Id. at 332 (quotation marks and internal citations omitted).

The opinion appears to concede that *Roque* is controlling but contravenes it. *See Argueta*, 86 F.4th at 1093 (citing *Roque*, 993 F.3d at 333). Again, the disputed facts here raise the issue of whether Jaradi's force was excessive and objectively unreasonable. *See, e.g., Poole*, 13 F.4th at 424 (citing *Roque*, 993 F.3d at 339; *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir.

2017)). When a suspect poses no immediate threat to officers or other individuals, "'the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.' *Garner* also requires a warning before deadly force is used 'where feasible,' *a critical component* of risk assessment and de-escalation." *See Cole*, 935 F.3d at 453 (emphasis added) (quoting *Garner*, 471 U.S. at 11-12).

Indeed, whether Argueta posed a risk to the officers or the public is "not only disputed but material to Plaintiffs' Fourth Amendment claim." *Roque*, 993 F.3d at 333-34. And nothing in the video "resolve[s] the parties' dispute." *Curran*, 800 F.3d 656 at 664. Moreover, the opinion narrows the moment-of-threat-analysis despite finding that "a reasonable jury could conclude that Argueta's weapon was not visible to Jaradi before or at the moment he used deadly force." *Argueta*, 86 F.4th at 1090. To the contrary, we must "agree with the district court that the video and still picture evidence of the . . . use of force is 'inconclusive.'" *Curran*, 800 F.3d at 663.

IV.

In holding that Officer Jaradi was entitled to qualified immunity, the panel "failed to view the evidence at summary judgment in the light most favorable to [Argueta] with respect to the central facts of this case." *Tolan*, 572 U.S. 650 at 657. Indeed, the panel disregarded crucial facts and precedent and, in doing so, improvidently suggested that this court is the judge, jury, and executioner. The panel's opinion foments inconsistency in the caselaw and contributes to a confusing network of cases for district courts to

navigate in reviewing qualified immunity claims. For clarity's sake, our circuit must comply with the rule of orderliness. Accordingly, I dissent from the denial of rehearing en banc.

APPENDIX D

U.S. Const. amend. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens

shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

42 U.S. Code § 1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.