MONTECALVO, Circuit Judge, dissenting in part and concurring in part. I respectfully disagree with the majority's characterization of the evidence and its application of the summary judgment standard to the deadly force claims and would find that summary judgment on those claims is inappropriate at this juncture. Plaintiff has put forth sufficient evidence, both regarding the events leading up to the shooting and as to the witnesses' credibility, that a reasonable factfinder could find in her favor. However, because I join in the majority's decision as to Part IV and concur as to Part V, I dissent only in part.

I. Standard of Review

"A district court may only grant summary judgment when the record, construed in the light most congenial to the nonmovant, presents no genuine issue as to any material fact and reflects the movant's entitlement to judgment as a matter of law." McKenney v. Mangino, 873 F.3d 75, 80 (1st Cir. 2017). All reasonable inferences are also drawn in favor of the nonmovant. Mitchell v. Miller, 790 F.3d 73, 76 (1st Cir. 2015). We review summary judgment rulings de novo, through this same lens employed by the district court. See McKenney, 873 F.3d at 80.

II. Excessive Force Claims

A. Violation of Protected Right

"The qualified immunity analysis 'entails a two-step pavane.'" Morse v. Cloutier, 869 F.3d 16, 23 (1st Cir. 2017) (quoting Alfano v. Lynch, 847 F.3d 71, 75 (1st Cir. 2017)). Public officials are generally immune from individual liability unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." Punsky v. City of Portland, 54 F.4th 62, 65-66 (1st Cir. 2022) (internal quotation marks omitted) (quoting Irish v. Fowler, 979 F.3d 65, 76 (1st Cir. 2020)). "We have discretion to bypass the first step if we conclude that the right was not clearly established at the time of its alleged violation." Perry v. Spencer, 94 F.4th 136, 146 (1st Cir. 2024).

Under the first step, this court evaluates "whether the plaintiff's version of the facts makes out a violation of a protected right." Morse, 869 F.3d at 23 (quoting Alfano, 847 F.3d at 75). At this juncture, all undisputed facts stand as true; however, all disputed facts are resolved in favor of the plaintiff.

Although we face a fact-intensive inquiry, in my mind, only one question remains: What was Juston Root doing in those few seconds prior to the officers' use of deadly force? If, as the defendants contend, Root reached into his jacket, then the officers likely reasonably responded to a potential imminent threat because

they had reason to believe Root was armed. However, if, as the Plaintiff contends, Root was on the ground, severely bleeding, and merely holding his hand to his chest, the officers' actions appear to be "patently unreasonable." Flythe v. District of Columbia, 791 F.3d 13, 19 (D.C. Cir. 2015). Given we are at the summary judgment stage, after viewing all of the facts in the light most favorable to the plaintiff, we can only affirm the district court if "no rational trier of fact could disbelieve" the officers' telling. Id.; see Morelli v. Webster, 552 F.3d 12, 18 (1st Cir. 2009). As I describe below, the factual record leaves open ample room for reasonable factfinders to dispute the reasonableness of the officers' conduct.

1. The Relevant Factual Record

Much of the interaction between Root and the officers, beginning with the initial confrontation at the hospital, is documented on various video recordings. However, we do not have the benefit of any video recording as to the essential time period -- immediately prior to and during the deadly shooting. Thus, we must look to the other evidence available in the summary judgment record.

While reviewing the record, it is important to note that "history is usually written by those who survive to tell the tale." Flythe, 791 F.3d at 19. Under such circumstances, "where 'the witness most likely to contradict [the officers'] story -- the

person [they] shot dead -- is unable to testify,' courts . . . 'may not simply accept what may be a self-serving account by the police officer[s].'" Id. (quoting Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)). "Instead, courts must 'carefully examine all the evidence in the record . . . to determine whether the officer[s'] story is internally consistent and consistent with other known facts.'" Id. (quoting Scott, 39 F.3d at 915). "Courts 'must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer[s'] story, and consider whether this evidence could convince a rational factfinder that the officer[s] acted unreasonably.'"[29] Id. (quoting Scott, 39 F.3d at 915). "[W]here the circumstantial evidence supports a dispute of material fact, we must conclude that summary judgment is

[29] I agree with the majority that Flythe is "entirely consistent with [our] circuit law." Op. 41 n.21. And, under our caselaw, we must carefully examine the direct and circumstantial evidence presented by the parties to determine whether a genuine issue of material fact exists at the summary judgment stage. See Giroux v. Somerset Cnty., 178 F.3d 28, 32-34 (1st Cir. 1999) (reviewing both circumstantial and direct evidence to reverse the granting of summary judgment); see also In re Neurontin Mktg. & Sales Pracs. Litig., 712 F.3d 60, 69 (1st Cir. 2013) (holding that "it is a jury's task to weigh the individual testimony presented by [the defendant] against the aggregate and circumstantial evidence presented by the . . . plaintiffs"); Mesnick v. Gen. Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991) (holding that plaintiff had not provided "direct or circumstantial" evidence to overcome summary judgment). The majority opinion's characterization of my reliance on Flythe is unfounded, as discussed infra. Op. 41 n.21; Diss. 87-88 n.42.

inappropriate and allow the case to proceed to trial." Hinson v. Bias, 927 F.3d 1103, 1118 (11th Cir. 2019).

Thus, after a careful examination of the record, I have summarized below the relevant evidence provided, including the testimony of the individual officers. I also focus on the essential time period, as noted above. When describing each officer and witness's role and observations in the remainder of this section, I do so based on what those particular witnesses testified to, without drawing any conclusions as to what occurred. As I will lay out, I disagree with the majority's view that the witnesses' testimonies were consistent as to the material facts; accordingly, I think it is important to carefully describe each witness's recollection to evaluate the full scope of the evidence presented.

i. Officer David Godin

Officer David Godin responded to the initial call at Brigham and Women's hospital ("the hospital") regarding a person with a gun.[30] After the vehicle pursuit of Root ended in Root crashing his car and exiting his vehicle, Godin next observed Root

[30] Although the majority opinion refers to this weapon as a "gun," it is undisputed that what was ultimately recovered was a paintball gun. However, there is also no dispute that Godin did not know that it was a paintball gun until after the shooting in Brookline was well over. This paintball gun, as well as another paintball gun, was recovered from Root's vehicle sometime after Root was fatally shot.

seated next to a woman, later identified as Shelly McCarthy, in a mulched area in Brookline. Godin testified that, as he approached, he yelled at McCarthy to get away from Root and yelled at Root to show his hands. Godin never saw Root standing on two feet and did not consider Root to be "fleeing" once Godin observed Root in the mulched area. Godin also said he never saw another officer approach Root or touch Root in any way. Godin testified that although he saw Root reach into his jacket, he did not shoot until he heard another officer yell "gun." Godin fired eight rounds at Root.

In a sworn, written statement, Godin said that his body-worn camera was in his duty bag throughout his interactions with Root and was not attached to his body. Godin also initially stated at his interview with the Massachusetts state police investigators that he was not wearing his body-worn camera on this day, but, after video evidence showed otherwise, he testified that he did not remember whether he was wearing his body-worn camera. Specifically, video from another officer's body-worn camera showed Godin wearing his body-worn camera and then throwing it into a cruiser. Godin also testified that the incident caused him stress, resulting in sleeping problems "for the next couple days."

ii. Officer Joseph McMenamy

Officer Joseph McMenamy joined the pursuit of Root shortly after Root left the area of the hospital. McMenamy

performed a PIT maneuver during the pursuit, which failed to stop the pursuit. Although the pursuit started with Root driving at about twenty to thirty miles per hour, after McMenamy's PIT maneuver, Root increased his speed to up to ninety miles per hour. McMenamy was later the first officer to arrive at the scene after Root crashed his vehicle. McMenamy testified that he observed Root "running" from his vehicle on the sidewalk.

When McMenamy approached, he saw McCarthy "relatively close" to Root and observed her reaching her hand out and touching him. McMenamy yelled at McCarthy to get away from Root. McMenamy testified that Root was in "a hunched over position," but standing with both feet on the ground. McMenamy testified that he was ordering Root to show his hands and to get on the ground. McMenamy also testified that during this time, Root was moving away from him "little by little."

McMenamy stated that he then approached Root and kicked him with the bottom of his foot, causing Root to fall to the ground. McMenamy testified that Root then "started standing back up" and eventually "got up to both feet." McMenamy also testified that he believed he saw the backside of a handgun[31] on Root, and once he thought he saw Root reach toward it, McMenamy shot at him.

[31] Although the majority opinion also refers to this "weapon" as a "gun," it is undisputed that what was ultimately recovered from the scene was a black bb gun.

McMenamy fired ten rounds. McMenamy also stated that although he was wearing his body-worn camera on this day, he did not activate the camera until after the shooting.

iii. Officer Brenda Figueroa

Officer Brenda Figueroa joined the pursuit of Root near the hospital. Figueroa did not recall ever hearing over her radio that Root had been shot at the hospital. Figueroa turned on her body-worn camera while in pursuit of Root's vehicle.

Figueroa testified that when she exited her vehicle at the scene, there were no civilians near Root, and Root was facing the other officers and kneeling on the ground ten to fifteen feet away from her. She further testified that both of Root's hands were inside of his jacket. Figueroa stated that she and the other officers commanded Root to "[s]how us [his] hands." Figueroa testified that Root began removing his hand from his jacket, and she saw the handle of a firearm in one of his hands. Figueroa fired three rounds at Root. Figueroa's body-worn camera was recording throughout the interaction; however, her camera lens was blocked beginning five seconds before Root was fatally shot.

iv. Officer Leroy Fernandes

Officer Leroy Fernandes, who joined the pursuit of Root after he left the hospital area, testified that Root was standing in the mulch when Fernandes came within ten to fifteen feet of Root. At his interview with the Massachusetts state police

investigators, Fernandes described Root's position as "seem[ing] like . . . he was trying to stand but he wasn't standing. He wasn't standing up." Later, at his deposition for this case, Fernandes described Root's position as "standing. Well, upright. . . . [M]aybe a little bit of a lean-type standing, not fully standing up." When asked to clarify what "upright" meant, Fernandes testified that he believed Root was "on his feet" and "standing upright."[32] Fernandes further testified that as he and the other officers verbally commanded Root to show them his hands, Root "reached into his coat . . . at which point shots were fired." However, Fernandes also stated that "after reaching in, there was a motion that appeared to be a reach out, at which point shots were fired." Fernandes fired two rounds. Fernandes testified that part of the reason he fired his weapon was because he heard shots and did not know where they were coming from. Fernandes did not issue any warnings to Root prior to shooting, other than telling Root to show his hands. Fernandes also stated that he did

[32] The majority opinion describes these accounts as consistent, Op. 17; however, I do not see the statements "he wasn't standing" and "[h]e was standing" or "standing upright" as being consistent with one another. Although the majority opinion states that I have taken out of context Fernandes's quote at his deposition, Op. 17 n.9, the majority opinion restates the same language from the record I have quoted above, without considering Fernandes's later clarifying comments as to what "upright" meant to him.

not wear a body-worn camera on the day of the incident because it was an overtime shift.

v. Officer Corey Thomas

Officer Corey Thomas, who was in the passenger seat of Fernandes's car during the pursuit, approached the area where the car accident occurred and stood behind or by a tree, approximately fifteen feet from where Root was located. Thomas recalled that another officer was already present when Thomas and Fernandes arrived on the scene. At his initial interview with the Massachusetts state police investigators, Thomas described Root as being "on the ground" in a "half lying, half kneeling type position. . . . [H]e wasn't standing or fully sitting." Later, at his deposition, Thomas testified that Root was "moving in a direction" and "stumbling." When asked about these potentially conflicting statements, Thomas attempted to reconcile them by explaining, "when you're stumbling . . . it's, like, in the way you're trying to get up. You're not fully on the ground. You're kind of, like, working your way up but, again, stumbling and going back -- you're falling back down." Thomas also testified that the officers were shouting commands at Root to show his hands and get on the ground; meanwhile, Root kept his hands close to his body. Thomas testified that Root was moving "abruptly and aggressively," "keeping his hands close to his body," when Thomas heard gunshots and decided to shoot at Root; Thomas shot three times.

vi. Trooper Paul Conneely

Trooper Paul Conneely, a Massachusetts state trooper, joined the Boston police officers' pursuit of Root just before the final collision occurred. Conneely testified that he first saw Root on the ground in the mulched area in a kneeling position and that "it looked like he had fallen down." Conneely also testified that he saw Root attempting to get up while putting both hands on the ground, but that Root was "never able to get up." Conneely witnessed Root "on either one knee or two." Conneely recalled seeing the civilian woman run towards Root and then run away after being instructed to do so by officers. Conneely testified that he commanded Root to stay on the ground and show his hands, while other officers also gave Root directives.

At some point, Conneely saw Root's right hand "c[o]me up" to his chest, and Conneely "lost sight of [Root's] hand" when it "disappeared briefly behind [Root's] [open] jacket." Conneely remembered Boston police officers yelling that Root had a gun and someone telling Root to drop the gun. Conneely testified that he then saw Root's hand around a black handle that appeared to be a gun handle. Conneely also testified that he fired his gun at the time he saw Root with a gun; Conneely fired five rounds.

vii. Post-Shooting Evidence

In total, the six officers fired thirty-one shots at Root within a three-second time period. After the officers shot

Root, Conneely and Figueroa turned over Root's body, and Conneely testified that he removed a black bb gun pistol from Root's right hand.[33] However, Figueroa testified that when they "pulled his hands out from under him" there was nothing in Root's hands "at that moment." Brookline police officer Christopher Elcock told law enforcement investigators that, after the shooting, he approached Root's body with a medical bag, rolled Root over, and a black firearm (assumedly the bb gun, as no other firearms were recovered from the scene) fell out of Root's chest area. Brookline police detective David Wagner also told the law enforcement investigators that "he saw the suspect get rolled over" and then "observed [what he believed was] a black semi-automatic firearm fall out of the suspect's chest area."

After the shooting, several of the Boston Police Department officers' body-worn cameras recorded the interactions between the officers. Conneely told McMenamy to "shut [his] mouth" and asked if he had a "rep" coming to the scene. In response, McMenamy stated, "Yeah. I won't -- I won't talk."

Prior to the officers being interviewed by the Massachusetts state police investigators, the officers from the

[33] Although the majority describes Conneely's testimony as consistent with the body-worn camera footage, nowhere in the footage do we see from where the bb gun was recovered. Figueroa's body-worn camera is blocked for much of the time that Figueroa and Conneely are handcuffing Root.

Boston Police Department, other than Thomas, collectively met with their attorney, against police department policy. The officers remained together for approximately an hour, during which time the officers discussed the incident.

Sergeant Detective Marc Sullivan investigated the shooting in Brookline as part of the Firearm Discharge Investigation Team; as part of that investigation, he, among other things, personally interviewed some of the officers and submitted a final report relating to the incident. Sullivan was later deposed in relation to this case. In discussing the investigation during a deposition, Sullivan testified that the police department makes efforts to ensure that officers do not collectively confer prior to their interviews. Sullivan also testified that the officers meeting together to prepare for their interviews "would taint the interview[s]."

viii. Shelly McCarthy

McCarthy, a civilian with EMS training who was present at the scene, also testified during a deposition. McCarthy was parked near where Root crashed his vehicle; she saw Root shortly after he exited his vehicle and observed him slowly moving away from it. McCarthy testified that from the moment she saw him leaving his car, Root had his right hand on his chest and his left hand was hanging down at his side. McCarthy watched Root walk away from his car slowly and unsteadily while slumped over, until

he ultimately fell. She then witnessed Root use his left arm to get himself back on his feet; Root walked forward a couple more feet until he fell again in the mulched area and could not get up.

After McCarthy saw Root fall the first time, she began running over to him but did not reach him until he fell for the second time. McCarthy testified that after the second fall, Root was lying with his back on the ground -- still holding his chest with his right hand and keeping his left hand by his side. McCarthy further testified that Root tried to roll onto his shoulder as if to get up, but he could not and so he remained on his back. McCarthy got on her knees next to Root to assist him. McCarthy described Root's eyes as being open but "bouncing around like ping-pong balls."[34] McCarthy also observed that Root was "covered in blood" and making "gurgling noises" while breathing slowly. McCarthy stated that, at some point, Root's eyes "stuck in the back of his head" and stopped moving. McCarthy opined that, after

[34] The majority's position that McCarthy's deposition testimony is inconsistent with the statement she gave to state police investigators, Op. 22-23, is not supported by my reading of the record. The majority opinion has reduced McCarthy's twenty-three-minute interview to one sentence. Op. 22. Although McCarthy stated at the interview that she "didn't really get a look at" Root's face to describe his features with particularity, she described the expression on his face several times. McCarthy stated that Root looked like there were "lights on[,] no one home" and that his eyes looked "pretty vacant." She also stated that "[i]t could have been shock that was on his face" and that when the cops arrived his expression did not change and "[h]e didn't seem to . . . know what was going on."

observing Root's state, she thought he was unable to stand or speak.

McCarthy testified that after the police officers arrived, they approached with their guns out and began screaming different commands. McCarthy remembered one of the officers telling her to run, and so she let go of Root's face and ran a few feet before she began hearing gunshots. McCarthy also testified that she never heard anyone yell, "drop the gun." McCarthy testified that as she was leaving Root, she saw that his eyes were still in the back of his head and one of his hands was still clutching his chest.

ix. Doctor Victor Gerbaudo

In addition, a bystander, Doctor Victor Gerbaudo,[35] was interviewed during the Boston Police Department's investigation of the incident.[36] Gerbaudo was traveling to his work at the hospital, driving in the opposite direction of Root, when Root crashed his vehicle. In his interview, Garbaudo stated that he observed Root walking with a limp on the sidewalk after the car accident.

[35] Gerbaudo noted to the law enforcement investigators that he was a former reserve police officer.

[36] After observing the incident, Gerbaudo approached a police officer who happened to be at the hospital where he worked and described what he had seen "because . . . [he] kn[e]w that it would have helped [the] officers." That officer took Gerbaudo's information, and Gerbaudo was later contacted to be interviewed. The subsequent interview lasted approximately ten minutes.

Garbaudo observed officers arrive with their guns drawn and believed that they were telling Root to put his hands up and get on the ground. Garbaudo stated that "everybody was screaming." Garbaudo said he then observed Root turn around[37] and "t[ake] his right hand under his coat" and that the officers then began shooting.

x. Doctor Jennifer Lipman's Expert Opinion

In addition to the testimony, written statements, and interviews of the officers, McCarthy, and Gerbaudo, Plaintiff also provided the expert report and testimony of Doctor Jennifer Lipman, a forensic medical expert. Lipman was asked to provide her opinion "about the likelihood that a plastic [bb] gun pistol would have no damage and no trace of blood on it if it had been in [Root]'s right hand at the time he was shot in Brookline." Lipman examined the autopsy report, which evidenced that Root suffered thirty-one gunshot wounds. Four of those gunshot wounds were to Root's right hand. The bb gun recovered at the scene near Root's body was not damaged and did not appear to have blood on it.[38]

[37] Although the majority opinion states that Garbaudo's recollection "fully substantiates the officers' versions of events," Op. 22, I do not read the record as supporting a finding that any officer described Root as "turn[ing] around" prior to the shooting.

[38] The parties do not dispute that the bb gun was not damaged or that it did not appear to have blood on it.

Lipman opined that if the bb gun was in Root's right hand at any point after exiting his car, as some of the officers suggested, the bb gun would have had blood on it, particularly because McCarthy "witnessed [Root's] hand on his bloody jacket and chest the entire time [after] he left his car," which "would indicate that if he had anything in his hand after that, it would have blood on it." Lipman additionally pointed to the blood on the right side of the steering wheel in Root's car, which also evidenced that there was blood on Root's right hand while he was driving.

Lipman further testified and concluded in her report that if the bb gun was in Root's hand during the shooting -- during which he sustained four gunshot wounds to the hand -- the bb gun would have blood on it from the gunshot wounds to his hand and the bullets that went through Root's hand would have damaged the bb gun. Lipman testified that it is "commonsense" to conclude that if Root was holding the plastic bb gun at the time he sustained four gunshot wounds to that hand, the bb gun would have been damaged. Lipman also concluded in her report that "Mr. Root's right hand must have had blood on it, and he would have transferred that blood to the plastic bb gun if it had been in his hand at any point after he left his car." In summary, "[a] plastic bb gun pistol would have had blood on it if it had been in Mr. Root's hand at any point after leaving his car[] and would have been

damaged if it had been in his right hand when he was shot . . . in Brookline."

Lipman was also asked to address "how blood loss from wounds sustained by Mr. Root at the Brigham and Women's Hospital would have impacted him by the time he exited his car near the Star Market in Brookline." Lipman opined that "[i]t is not possible to quantify the amount of blood Mr. Root lost inside the car, except to say that it was significant." Accordingly, Lipman concluded that this loss of blood "rendered Mr. Root physically and mentally impaired."

With the relevant portion of the record summarized, the facts are then examined under our Fourth-Amendment precedent, keeping in mind that all disputed facts are resolved in the favor of the nonmoving party -- here, the Plaintiff.

2. Reasonableness of Use of Force

When asserting a Fourth-Amendment violation based on excessive force, a plaintiff must show that there was a seizure and that such a seizure was unreasonable. Stamps v. City of Framingham, 813 F.3d 27, 35 (1st Cir. 2016). The parties do not dispute that there was a seizure here. See McKenney, 873 F.3d at 81 ("A police officer's use of deadly force is deemed a seizure under the Fourth Amendment.").

"Whether a seizure is reasonable depends on 'the facts and circumstances of each particular case.'" Mlodzinski v. Lewis,

648 F.3d 24, 34 (1st Cir. 2011) (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. (quoting Graham, 490 U.S. at 396). The "extreme action" of using deadly force "is reasonable (and, therefore, constitutional) only when 'at a minimum, a suspect poses an immediate threat to police officers or civilians.'" McKenney, 873 F.3d at 81 (quoting Jarrett v. Town of Yarmouth, 331 F.3d 140, 149 (1st Cir. 2003)). Context is also important, "and the use of deadly force, even if 'reasonable at one moment,' may 'become unreasonable in the next if the justification for the use of force has been ceased.'" Id. at 82 (quoting Lytle v. Bexar Cnty., 560 F.3d 404, 413 (1st Cir. 2009)).

There are several fact-intensive considerations the court examines in determining the reasonableness of an officer's use of force, including: (1) "[w]hether a reasonable officer on the scene could believe that the suspect 'posed an immediate threat to police officers or civilians,'" Estate of Rahim v. Doe, 51 F.4th 402, 414 (1st Cir. 2022) (cleaned up) (quoting Fagre v. Parks, 985 F.3d 16, 23-24 (1st Cir. 2021)); (2) whether the officers involved gave "some sort of warning before employing deadly force," McKenney, 873 F.3d at 82; (3) "[w]hether the suspect was armed -- with a gun, knife, or otherwise -- at the time of the encounter or

whether the officers believed the suspect to be armed," Estate of Rahim, 51 F.4th at 414; (4) "[t]he speed with which officers had to respond to unfolding events, both in terms of the overall confrontation and the decision to employ force," id.; (5) "[w]hether the suspect was advancing on the officers or otherwise escalating the situation," id. at 415; (6) "[the] suspect's physical proximity and the speed of his movements," McKenney, 873 F.3d at 82; (7) "[w]hether multiple officers simultaneously reached the conclusion that a use of force was required," Estate of Rahim, 51 F.4th at 415; and (8) "the nature of the underlying crime," id. As I will lay out, a number of these considerations here weigh in favor of the reasonableness of the officers' use of force. However, the most important considerations that answer the question as to whether a reasonable officer could believe that Root "pose[d] an immediate threat to police officers or civilians" involve a dispute of material facts and therefore cannot be resolved at this summary judgment stage. McKenney, 873 F.3d at 81 (quoting Jarrett, 331 F.3d at 149).

Several of these considerations unquestionably weigh in favor of concluding that the officers used reasonable force. The officers reasonably believed that Root may have been armed based on Godin's interaction with Root at the hospital and the police radio transmissions that informed the officers that there was an officer-involved shooting. The nature of the underlying crime --

showing a weapon to someone and then later pointing that apparent weapon at an officer -- also supports the officers' reasonable belief regarding the danger Root posed. Lastly, although some of the officers used deadly force in response to hearing other shots, such as Fernandes and Thomas, the remaining officers testified that they made the decision to shoot independently and appear to have done so simultaneously (or nearly simultaneously) within three seconds of each other, a factor that also supports the reasonableness of the officers' use of force.

Whether the officers' warnings were adequate under the circumstances is a closer question. When officers are going to utilize deadly force, "the suspect ordinarily must be warned (at least when a warning is feasible)." Conlogue v. Hamilton, 906 F.3d 150, 156 (1st Cir. 2018). "Although there is no standardized script for such a warning, the key is that the warning must be adequate in light of the circumstances then obtaining." Id. Godin, McMenamy, Figueroa, Thomas, and Conneely testified that they commanded Root to show them his hands. McMenamy, Thomas, and Conneely also testified that they commanded Root to get on the ground. McCarthy testified that the officers were giving Root several different commands at the same time. The audio from Figueroa's body-worn camera also evidences that Figueroa told Root to both "get down" and to "let [her] see [his] hands." In the background of that audio recording, several officers can be heard

also yelling commands, some of which appear to be "stay on the ground," "stay down," and "show me your hands." Although a jury could find that the scene was chaotic and the officers shouted a cacophony of commands, given the nature of the crime and likelihood of a firearm being involved, these warnings, although wanting for some consistency, were sufficient under the circumstances. See Estate of Rahim, 51 F.4th at 414 (finding reasonableness where officers gave at least nine commands to put hands up and/or drop a weapon). Thus, this consideration also weighs in favor of the officers.

The speed in which the officers had to respond to the Brookline incident cuts both ways. Although the scene in Brookline developed very rapidly, and the officers decided within seconds to utilize deadly force, the officers had significant time prior to the incident in Brookline to consider the situation and develop a plan of how to address apprehending Root. After the incident at the hospital, which lasted several minutes, the officers engaged in a slow-speed, and then high-speed, car chase in pursuit of Root.[39] During the pursuit, which lasted approximately six minutes, the officers and dispatch communicated over their radios

[39] In analyzing this factor, the majority opinion describes the pursuit only as a "high-speed chase," Op. 44, ignoring both the testimony from the officers (such as McMenamy testifying that the initial pursuit "was noticeably slow" and Godin stating they were traveling "only 35 miles per hour") and video evidence that shows the cars traveling at a slow rate of speed.

regarding the incident at the hospital and the ensuing chase. Thus, although the time in which the officers had to determine whether to use deadly force was short, the overall incident was longer and gave the officers more time to consider how to approach and apprehend Root. See McKenney, 873 F.3d at 84 (affirming denial of summary judgment in part because the officers had six minutes between when they first saw the plaintiff point a gun and when they decided to employ deadly force).

However, several of the remaining considerations, and perhaps the most important ones, are still subject to genuine factual disputes. The remaining considerations -- the proximity of Root and speed of his movements, whether a reasonable officer on the scene could believe he posed an immediate threat, and whether he was escalating the situation -- are subject to competing evidence in the record and require making factual conclusions resolving those conflicts as to the essential time period.[40]

[40] The majority opinion points to a number of reasons why the officers "had every reason to believe" Root posed an immediate threat to them and the public, including that at the hospital Godin had witnessed Root pull the trigger on what Godin believed was a gun and that the officers had been involved in a car chase with Root. Op. 31-32. However, this overlooks the immediacy requirement and our case law that affirms that "the use of deadly force, even if 'reasonable at one moment,' may 'become unreasonable in the next if the justification for the use of force has ceased.'" McKenney v. Mangino, 873 F.3d 75, 82 (1st Cir. 2017) (quoting Lytle v. Bexar Cnty., 560 F.3d 404, 413 (1st Cir. 2009)). This does not require the officers to view the situation anew but does reinforce our principle that "a passing risk to a police officer is not an

In holding that the officers' testimony was entirely consistent as to Root's movements immediately prior to the shooting, my view is that the majority has taken an unduly narrow view of the evidence. Op. 35, 36-37. It is readily apparent that the officers' accounts contain many inconsistencies as to Root's movements directly before the shooting. While some officers stated that Root was seated or kneeling, others recalled Root standing on two feet, and one officer first testified that Root was standing but later said that Root was merely attempting to stand. There were also officers who testified that Root's hand was by his chest the entire time, while others said Root moved his hand up to his chest. Some of the officers observed Root reaching into his jacket, others testified that they fired because Root was removing his hand from his jacket, and yet another officer testified that

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ongoing license to kill an otherwise unthreatening suspect." Id. (quoting Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999)). The majority cites McGrath v. Tavares, 757 F.3d 20, 28 (1st Cir. 2014), in support of its finding that the high-speed car chase rendered Root an immediate threat to the officers. Op. 32. However, in McGrath, the suspect was in the car driving towards the officer-defendant when the officer initially made the decision to shoot. 757 F.3d at 28. Subsequent shots were fired by the officer when he believed that "the same reckless driver who had almost run him over a fraction of a second earlier" was driving towards another officer. Id. Here, Root was clearly no longer in the car or posing a threat with his vehicle, which was abandoned on the side of the road after the collision. Further, unlike the "fraction of a second" between the suspect driving at one officer and then another in McGrath, here the officers lost sight of Root's vehicle for approximately thirty seconds before finding it again on the side of the road after the accident and discovering Root several feet away from the vehicle.

shots were fired because Root was reaching into his jacket but later said shots were fired after Root began pulling his hand out of his jacket.

The majority opinion also heavily relies on the unsworn statements of Gerbaudo as support for the finding that Root was reaching into his jacket just before the fatal shooting. Op. 36. Although I agree that Gerbaudo stated that he saw Root reach into his jacket, Gerbaudo also said that he saw Root "turn[] around" -- a fact that is wholly inconsistent with any of the other testimony in the record. The majority opinion states that "Gerbaudo's statement that Root turned reinforces the officers' testimony that Root was moving just before the shooting," Op. 36; however, the officers who described Root as moving did not describe or even suggest that there was a "turn around" movement. None of the officers stated that Root was faced away from the officers at any point or that Root ever changed the direction he was facing. McCarthy's testimony also indicates that when the officers approached her and Root the officers were within Root's line of sight, further evidencing that Root was initially facing towards the officers.

In and of itself, the inconsistencies in the testimony regarding Root's movements (particularly when paired with McCarthy's testimony discussed below) create genuine issues of material fact as to what Root's movements were just prior to the

shooting. However, the inconsistencies also raise questions as to the credibility of the officers, as does other evidence in the record.

Aside from the inconsistencies regarding Root's movements, the officers provided other testimony that was controverted by other pieces of evidence. For example, Godin repeatedly stated that he was not wearing his body-worn camera on the day Root was killed; however, this was later disproved by video evidence from another officer's body-worn camera. Conneely also testified that he only shot when he saw Root's hand around what appeared to be a firearm handle; however, the physical evidence and testimony of Plaintiff's expert, Lipman, lead to the conclusion that the bb gun Root had in his possession could not have been in his hand at the time the shooting occurred (or at any time during the Brookline incident), not only because the plastic bb gun did not appear to have blood on it but also because it was undamaged.

Other evidence in the record also raises concerns regarding the officers' credibility. While several of the officers were wearing body-worn cameras and were mandated to record interactions under police department policies, only Figueroa had hers on during the shooting and it was covered during the essential time period. See Goodwin v. City of Painesville, 781 F.3d 314, 322-23 (6th Cir. 2015) (finding that a failure to activate a recording device against police department policy could weigh

against an officer's credibility). When some of the other officers did have their body-worn cameras on after the shooting, the officers made other statements that draw their credibility into question, such as McMenamy telling Conneely that he "wo[uld]n't talk." Further, the evidence that the officers met collectively prior to their interviews (other than Thomas, who notably did not testify that he saw Root reach into or out of his jacket) raises further questions regarding the officers' credibility.

Based on these facts, Plaintiff relies on more than mere conclusory allegations that the officers may lack credibility. Although this other testimony and evidence does not allow us to conclusively establish what Root was doing prior to the shooting, these clear contradictions in the record raise questions critical to the officers' credibility.[41] See Flythe, 791 F.3d at 21 (holding that "the record contains evidence that could lead a reasonable juror to question [the officer]'s personal credibility and his ability to observe, perceive, and recall the shooting"). The

[41] My conclusion that the officers' credibility was reasonably put in question does not simply hinge on the fact that the sole other witness was killed by officers, as the majority suggests. See Op. 41 n.21. Rather, my conclusion relies on the fact that the nonmoving party has put forward affirmative evidence that raises material issues regarding the officers' credibility. See Bazan v. Hidalgo Cnty., 246 F.3d 481, 491 (5th Cir. 2001) (finding that the district court "found genuine issues of material fact as to the events in the field, both because the [officer] was the sole surviving witness for his use of deadly force and also because of questions arising from the varied testimony as to what occurred shortly before" the deadly shooting).

Plaintiff also is not "relying on the hope that the jury will not trust the credibility of witnesses"; instead, Plaintiff has provided affirmative evidence that directly casts doubt on the officers' credibility, presenting a question that only the factfinder can resolve. Sears, Roebuck & Co. v. Goldstone & Sudalter, 128 F.3d 10, 18 (1st Cir. 1997); see Goodwin, 781 F.3d at 323 ("Though the prospect of challenging a witness's credibility is not alone enough to avoid summary judgment, summary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of the movant's witnesses." (internal citations and quotation marks omitted)); Lamont v. New Jersey, 637 F.3d 177, 184 (3d Cir. 2011) (finding that the officers' explanation of the circumstantial evidence was "a bit far-fetched" and holding that the issue was to be determined by the factfinder).

Lastly, the majority opinion dismisses McCarthy's testimony that Root was under severe physical distress and unable to pose a threat when she was by his side just seconds before the deadly shooting. McCarthy's opinion is supported by Lipman's expert opinion that Root's injuries would have caused him to be both physically and mentally impaired. In my view, this evidence alone provides a reasonable factfinder with an alternative account as to what Root's behavior and abilities were prior to the shooting. Because of this, Plaintiff's contention that Root was

physically incapable of threatening the officers prior to the shooting is neither "incredible" nor "conclusory." Statchen v. Palmer, 623 F.3d 15, 18 (1st Cir. 2010).

For these reasons, I cannot conclude that the officers' accounts are internally consistent or wholly compatible with other known facts. See Flythe, 791 F.3d at 19. The evidence, at this summary-judgment stage, presents significant reasons to discount the officers' stories and offers a reasonable alternative -- that Root was unable to act threateningly during the essential time period. See id. Consequently, the evidence could convince a rational factfinder that the officers acted unreasonably. Although it is also true that a reasonable factfinder could conclude that Root did pose a threat, "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge on a motion for summary judgment." Id. at 22 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

As we have stated before, cases like these are tragic, "tragic for the person who lost his life, for the family left behind, and for the police officer[s] who fired the fatal bullet[s]," but must be evaluated "on [their] own facts." Conlogue, 906 F.3d at 158. Summary judgment is simply not the time to make such an evaluation when a number of vital facts are disputed.

B. Clearly Established

The second step of the qualified immunity analysis is also divisible into two parts. First, "the plaintiff must point to 'controlling authority or a consensus of cases of persuasive authority' that broadcasts 'a clear signal to a reasonable official that certain conduct falls short of the constitutional norm.'" McKenney, 873 F.3d at 81 (quoting Alfano, 847 F.3d at 76). "Then, the court must evaluate 'whether an objectively reasonable official in the defendant's position would have known that his conduct violated that rule of law.'" Id. (quoting Alfano, 847 F.3d at 76).

The test as to the first part is "whether existing case law has 'placed the statutory or constitutional question beyond debate.'" Id. at 83 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014)).

I have already concluded that on this record a reasonable factfinder could disbelieve the officers' testimony and find that Root was not acting and could not act threateningly at the time of the shooting. The "state of the law was clear such that a

reasonable officer in [the officers'] position would have understood that" shooting a person who is bleeding on the ground and unable to make sudden movements "constituted excessive force in violation of that person's Fourth Amendment rights."[42] Stamps, 813 F.3d at 39-40; see McKenney, 873 F.3d at 83 (finding that well-settled precedent established that the officer could not use deadly force against plaintiff who was not attempting to use a firearm against officers or others). Therefore, "the use of deadly force against [Root] by officers who did not think that he was holding a deadly weapon or reaching for one when they fired on him

[42] Putting aside the evidentiary disputes between myself and the majority, which are detailed above, I also strongly disagree with the majority's view that by virtue of Root being armed and previously posing a threat to the officers and the public by driving at a high rate of speed, the law was not clearly established that the officers could not use deadly force against such a person. See Franklin v. City of Charlotte, 64 F.4th 519, 531 (4th Cir. 2023) ("[A]n officer does not possess the unfettered authority to shoot a member of the public simply because that person is carrying a weapon." (quoting Cooper v. Sheehan, 735 F.3d 153, 159 (4th Cir. 2013)). Our caselaw has consistently set out the established principle that, in my view, clearly applies to the facts here, that "the use of deadly force, even if 'reasonable at one moment,' may 'become unreasonable in the next if the justification for the use of force has ceased.'" McKenney, 873 F.3d at 82 (quoting Lytle, 560 F.3d at 413). There is no question that once a suspect no longer poses a threat to the public or the officers, the officers cannot be justified in using deadly force. Id. at 81 (holding that the "extreme action" of using deadly force "is reasonable (and, therefore, constitutional) only when 'at a minimum, a suspect poses an immediate threat to police officers or civilians'" (quoting Jarrett v. Town of Yarmouth, 331 F.3d 140, 149 (1st Cir. 2003))).

would be excessive under clearly established law." Estate of Rahim, 51 F.4th at 421 (Barron, C.J., dissenting).

For these reasons, I would reverse the district court's grant of summary judgment in favor of the individual officers as to the deadly force claims.

III. The Claims Against the City

As to the matter of municipal liability, I agree with the majority's conclusion that McMenamy's kick did not constitute a constitutional violation and, consequently, the kick could not support a theory of municipal liability. See Op. 51-52. Likewise, the majority's analysis in relation to the PIT maneuver soundly supports its determination that regardless of whether the PIT maneuver constituted a constitutional violation, a reasonable factfinder could not find on this record that the City acted with deliberate indifference. See id. at 56-57. But because my colleagues found that there was not a constitutional violation in the use of deadly force, they accordingly held that such deadly force could not support a theory of municipal liability. See id. at 56.

Because I would conclude that a reasonable factfinder could deem the use of deadly force a violation of Root's constitutional rights, I proceed to examine whether a reasonable factfinder, on this summary judgment record, could find municipal

liability for a failure to adequately train the officers.[43] Ultimately, a reasonable factfinder could not find that the City acted with deliberate indifference in its training of the officers; as such, I concur with the majority's conclusion, affirming the district court's granting of summary judgment in favor of the City on the municipal liability claim.

A municipality can be liable for its agents' and employees' constitutional violations "only when the governmental employees' 'execution of a government's policy or custom . . . inflicts the injury' and is the 'moving force' behind the constitutional violation." Young v. City of Providence ex rel. Napolitano, 404 F.3d 4, 25 (1st Cir. 2005) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)). Thus, "two basic elements" must be proven: (1) "plaintiff's harm was caused by a constitutional violation" and (2) the City is "responsible for

[43] Plaintiff argues that if this court determines that there was a constitutional violation, contrary to the district court's conclusion, reversal is mandated solely on that basis as to the municipal liability claims.

This argument ignores our principle that "[w]e may affirm the district court's decision on any grounds supported by the record," Collazo v. Nicholson, 535 F.3d 41, 44 (1st Cir. 2008) (quoting Estades-Negroni v. Assocs. Corp. of N. Am., 377 F.3d 58, 62 (1st Cir. 2004)); in other words, here we can affirm on other grounds even if we find a constitutional violation. Likely acknowledging this, Plaintiff goes on to argue the other element of municipal liability.

that violation." Id. at 25-26. For the reasons discussed supra, I would find that the first element is satisfied.

As to the second basic element, additional requirements have been put in place. "The alleged municipal action at issue must constitute a 'policy or custom' attributable to the City." Id. at 26. Further, "the municipal policy or custom [must] actually have caused the plaintiff's injury" and "the municipality [must] possess[] the requisite level of fault, which is generally labeled in these sorts of cases as 'deliberate indifference.'" Id. To succeed on a claim alleging that a municipality failed "to train police officers who then violate[d] a plaintiff's constitutional rights," the plaintiff must show that "'the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact' and [that] 'the identified deficiency in a city's training program is closely related to the ultimate injury.'" Id. (cleaned up) (quoting City of Canton v. Harris, 489 U.S. 378, 388 (1989)).

"[A] training program must be quite deficient in order for the deliberate indifference standard to be met: the fact that training is imperfect or not in the precise form a plaintiff would prefer is insufficient to make such a showing." Id. at 27. Instead, a finding of deliberate indifference requires a finding that the municipality "disregarded a known or obvious risk of harm" in utilizing a deficient training program or in not developing a

training program. Id. at 28. "Such knowledge can be imputed to a municipality through a pattern of prior constitutional violations." Id. Indeed, such a pattern is "ordinarily necessary" because "[w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." Connick v. Thompson, 563 U.S. 51, 62 (2011) (quoting Bd. of Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 409 (1997)). However, "liability without such a pattern will be appropriate 'in a narrow range of circumstances,' where 'a violation of a federal right' is 'a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.'" Young, 404 F.3d at 28 (cleaned up).

Plaintiff asserts that based on the officers' conduct, "whatever training they received did not stick." Similarly, Plaintiff argues that the officers' repeated violations of the police department's rules during their encounter with Root evinces that the officers "were not trained to understand that they are required to follow BPD rules." However, the mere fact that officers acted unconstitutionally cannot be sufficient to establish that they were trained inadequately; indeed, such a conclusion would render the second basic element of municipal liability meaningless. This is also not a case where there is a

question as to whether any training occurred. See Young, 404 F.3d at 27-28. "[P]lainly, adequately trained officers occasionally make mistakes; the fact that they do so says little about the training program or the legal basis for holding the city liable." City of Canton, 489 U.S. at 391.

Plaintiff further argues that the police department's training manuals and testimony from the City's training instructor reveal deficient training on "establishing a perimeter, focusing on containment to create time and distance, engaging in de-escalation techniques, considering the full totality of the circumstances rather than only select circumstances, teaching when using deadly force is justifiable, and less-lethal force options." However, Plaintiff does not point with any particularity to what the deficiencies in these areas were or how those deficiencies should have been remedied. In fact, the record demonstrates that the police department maintains rules around these exact topics and trains officers on defensive tactics and appropriate use of force. Nonetheless, pointing to the testimony of the City's training instructor, Plaintiff asserts that "recruits are not specifically trained in how to figure out which officers in a multi-officer scenario will assume the contact and cover roles" or how to handle other facets of multi-officer situations. The City's training instructor, however, did not testify that no training was

provided, but rather that determining assigned roles "is very fluid" based on the nature of the circumstances.

Plaintiff also asserts that the City knows that the police department has a long history of excessive force claims, and it thus follows that the City knew it needed to improve training on the proper use of force. This is far too broad a view of when repeated violations put a municipality on notice that its training is inadequate. Excessive force claims can involve an infinite number of factual scenarios, including highly varying degrees of force itself -- clearly, a use of force can be reasonable in one circumstance yet unreasonable in another. Without more particularized claims that the City's awareness of repeated excessive force claims involving similar policies (such as conduct during multi-officer arrests) or factual scenarios (such as where officers used deadly force against a physically injured arrestee or claims involving the same officers), I cannot conclude on this record that the City had sufficient notice that their training was insufficient as to rise to the level of deliberate indifference.

Finally, Plaintiff argues that this case falls within the narrow exception for circumstances where the constitutional violation was highly predictable due to the officers' lack of ability to handle recurring situations. The need to train officers on the constitutional limitations on the use of deadly force, see

Tennessee v. Garner, 471 U.S. 1 (1985), can be said to be "so obvious" that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights, even without a pattern of violations. City of Canton, 489 U.S. at 390 n.10. However, Plaintiff has not asserted that the City offered no training on the use of deadly force, as discussed above. Rather, Plaintiff argues that the training program was "imperfect" -- imperfection is not sufficient to show deliberate indifference. Young, 404 F.3d at 27. Plaintiff also has not pointed to other areas of training that the officers did not receive to which this exception may apply.

Accordingly, because I find that no reasonable juror could find deliberate indifference on the part of the City on this record, I concur with my colleagues in their conclusion that the district court's granting of summary judgment in favor of the City should be affirmed, albeit for different reasons.

IV. Conclusion

For the above stated reasons, I respectfully dissent, joining only as to Part IV of the majority opinion and concurring as to Part V.