No. 24-

IN THE

Supreme Court of the United States

JENNIFER ROOT BANNON,
AS THE SPECIAL PERSONAL REPRESENTATIVE
OF THE ESTATE OF JUSTON ROOT,

Petitioner,

v.

DAVID GODIN, BOSTON POLICE OFFICER;
JOSEPH MCMENAMY, BOSTON POLICE OFFICER;
LEROY FERNANDES, BOSTON POLICE OFFICER;
BRENDA FIGUEROA, BOSTON POLICE OFFICER;
COREY THOMAS, BOSTON POLICE OFFICER;
PAUL CONNEELY, MASSACHUSETTS STATE
TROOPER; THE CITY OF BOSTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARK A. BERTHIAUME
Counsel of Record
GARY R. GREENBERG
PETER ALLEY
ALISON T. HOLDWAY
GREENBERG TRAURIG, LLP
One International Place, Suite 2000
Boston, MA 02110
(617) 310-6000
berthiaumem@gtlaw.com

Attorneys for Petitioner

130380

QUESTIONS PRESENTED

1. Did the appeals court improperly create new summary judgment standards under which a court may assess the summary judgment record by making factual determinations, weighing evidence, assessing credibility, and drawing inferences in the movant's favor?

2. Did the appeals court create a circuit split as to the standards governing whether the totality of the circumstances justifies the use of deadly force?

RELATED PROCEEDINGS

1. *Bannon v. Godin, et al.*, No. 1:20-cv-11501-RGS, United States District Court for the District of Massachusetts. Judgment entered December 5, 2022.

2. *Bannon v. Godin, et al.*, No. 22-1958, United States Court of Appeals for the First Circuit. Judgment entered April 22, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Jennifer Root Bannon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is in Appendix A and reported at 99 F.4th 63. The District Court's order granting defendant-respondents' motions for summary judgment is in Appendix B; it is unreported but is available at 2022 WL 17417615 and 2022 U.S. Dist. LEXIS 218303.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 2024. A petition for rehearing was denied on June 10, 2024. *See* Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following federal and state constitutional and statutory provisions, each of which is in Appendix D: the Fourth Amendment to the United States Constitution; 42 U.S.C. § 1983; Article XIV of the Massachusetts Declaration of Rights; and Massachusetts General Laws chapter 12, sections 11H and 11I.

STATEMENT

This Petition rests on the last three to four seconds of the life of Juston Root ("Root"). On February 7, 2020, Root was shot 31 times by six police officers.[1] Approximately 10 seconds before this hail of bullets, EMS-certified bystander Shelly McCarthy ("McCarthy") reached Root to assist him, thinking that he was experiencing a cardiac event. McCarthy testified that (i) Root was lying on the ground covered in blood, "was struggling to breathe," did not speak, "start[ed] making a lot of gurgling noises with his breathing," and was "gurgling blood"; (ii) he "appeared to have the "[l]ights on[,] no one home," and his eyes were "bouncing around like ping-pong balls" until they rolled to the back of his head; (iii) during the entire time she saw him "his right hand remained on his chest," his left "remained hanging down"; and (iv) he did not try to get up and could "absolutely not" have gotten onto his feet.

Officers screamed commands at Root, which McCarthy and other witnesses—including Defendants—described as unintelligible, confusing, and chaotic. McCarthy observed that Root had no reaction, notwithstanding the sirens and screaming. Officers yelled at McCarthy to leave Root's side. When she left, Root was on the ground, his eyes still stuck in the back of his head, and his right hand still clutching his chest.

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1. The officers who killed Root are Boston police officers David Godin, Joseph McMenamy, Leroy Fernandes, Brenda Figueroa, and Corey Thomas plus State Trooper Paul Conneely. Each is a defendant in this case. This petition refers to the defendant officers individually as "Defendant [Last Name]" and collectively as "Defendants." The City of Boston, also a defendant, is referred to as the "City."

McCarthy let go of Root's face and ran a few steps before the barrage of bullets. The majority below found that, "[f]rom the time McCarthy reached Root (and then left) to the time of the shooting, approximately ten seconds elapsed." App., *infra*, 8a. In other words, within three or four seconds after McCarthy turned away, the six officers fired 31 bullets into Root.

Root's lifeless condition resulted from being shot, a short time before, by Boston police near Brigham & Women's Hospital ("BWH") in Boston,[2] the significant blood loss he sustained in an ensuing vehicle pursuit that a Defendant described "as slow as molasses," and the crushing impact of his subsequent collision with other vehicles in the neighboring town of Brookline. The collision—which occurred shortly after a Defendant "rammed" his cruiser into Root's car in an attempted PIT maneuver[3]—was so forceful that two wheels of Root's car fell off, a third tire was off its rim, and the air bags deployed. The car's interior was covered in blood. Surveillance video shows Root stumble out of his demolished car, limp around it, fall onto the sidewalk, slowly get up, and stagger to a mulched area adjacent to a shopping center parking lot, where he fell again. That is where he was when McCarthy arrived to help him and where he remained, nearly lifeless, until he was shot seconds after she turned away.

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2. In addition to shooting Root outside of BWH, the officers shot a valet working at the hospital.

3. A PIT maneuver, or a precision immobilization technique, is when an officer uses their vehicle to strike another vehicle. App., *infra*, 5a.

As the dissent below explained, Defendants' claims about what they allegedly observed of Root immediately before the shooting and why they each fired are entirely inconsistent:

> 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 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.

App., *infra*, 74a–75a. Worse still, the Boston police officer defendants (except one) met together with their lawyer and the police union president *before* they were interviewed by investigators about the fatal shooting. The one officer who did not recall whether he attended that meeting is the only one who did not testify that Root supposedly reached into or out of his jacket. A sergeant who investigated the shooting testified that the officers having met together before being interviewed "taint[ed]" their versions of events.

During the fatal shooting, Root sustained four bullet wounds to his right hand, including one through his palm.

Defendant Conneely claimed that he removed a plastic bb-gun from Root's right hand as officers rolled him over immediately after the shooting. But Defendant Figueroa testified that nothing was in Root's right hand when they rolled him over, and two officers from the Brookline Police Department reported they actually saw a bb-gun fall out of Root's chest area when he was rolled over. Moreover, the plastic bb-gun recovered at the scene was in pristine condition without any blood on it. A forensic expert testified that, in light of the multiple gunshot wounds to Root's hand, if the plastic bb-gun had been in his hand at the time of the shooting, it would have been bloodied and damaged. The expert also concluded, as the dissent below pointed out, that Root's blood loss between the shooting at BWH and when he exited his car in Brookline was "significant" and would have rendered him "physically and mentally impaired." App., *infra*, 68a, 78a.

Despite the evidence of Root's incapacity—including McCarthy's testimony, video footage, and expert testimony—and Defendants' demonstrated credibility issues, the majority below concluded that a jury could not reasonably infer that Root "could not have reached his right hand under his jacket." App., *infra*, 35a. In other words, according to the majority, the only reasonable inference is that, within no more than three or four seconds after McCarthy left Root's side, Root had the ability to rouse himself from the lifeless stupor McCarthy described and, according to only some Defendants' testimony, reach inside his jacket. The majority offered no reasoning for its dismissal of McCarthy's testimony, other than to declare she was not an eyewitness to Root's position and actions the moment of the shooting and to attempt to blunt McCarthy's testimony by observing that

she "did not convey these observations to the officers at the time." App., *infra*, 22a. The majority reached these conclusions by improperly weighing McCarthy's testimony against Defendants' testimony, accepting their testimony as true while discounting hers, and drawing inferences in Defendants' favor, even though they were the summary judgment movants.

Petitioner, as the nonmovant, "need only present evidence from which a jury *might* return a verdict in [her] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (emphasis added). There is more than sufficient evidence for a jury to conclude that given that Root was *in extremis*, he was entirely incapable of reaching inside his jacket, and, as a result, Defendants' use of force violated Root's Fourth Amendment rights. Yet the majority charted new territory by denigrating evidence supporting Petitioner's claims in favor of Defendants' incredible and inconsistent stories.

The majority also split from established authority in the First Circuit and other circuits concerning how police in the moment, and courts thereafter, are to assess the totality of the circumstances surrounding the use of deadly force. Rather than uphold the obligation of police to reassess the reasonableness of the use of force when an intervening event has fundamentally changed the circumstances, the majority allowed Defendants here and police going forward to kill with impunity based on an earlier threat. This is not the law. As a result of the majority decision, civilians within the First Circuit are less protected from police violence than people elsewhere in the country. A grant of certiorari is necessary to clarify and reinforce bedrock Fourth Amendment principles

so that they equally protect the public throughout the country. The majority decision below should not stand.

A. Factual Background

On February 7, 2020, Defendant Godin and another officer from the Boston Police Department ("BPD") (who is not a party here) responded to a call about a person with a gun near BWH in Boston, Massachusetts; they found Root, who had gotten out of his car, walking on the sidewalk. Defendant Godin pointed his firearm at Root, prompting Root to remove a clear plastic paintball marker from his waist. Defendant Godin and the other officer fired at Root and believed they shot him. Root limped to his car and drove away.

Defendant Godin drove after Root and stated over BPD that Root had been shot, which the dispatcher repeated over the radio for all units to hear. During the pursuit, Defendant McMenamy intentionally "rammed" his cruiser into Root's car. Defendant McMenamy testified that when he hit Root's car, the pursuit was "noticeably slow" and "as slow as molasses." Video evidence confirms the pursuit's slow pace. It is undisputed that the pursuit did not speed up until after Defendant McMenamy hit Root's car.

The pursuit continued down a highway until Root's car struck other vehicles and was extensively damaged. By the time his car came to a stop at the entrance to a parking lot, the air bags had deployed and three tires had fallen off. Root managed to get out of the car. He limped around it, fell onto the sidewalk, got up, staggered toward an adjacent mulched area, and fell again. Defendant

Conneely "couldn't believe [Root] got out of" the car, and Defendant Figueroa assumed he was injured.

McCarthy was sitting in her car in the adjacent parking lot. She observed Root stumbling and holding his chest; she believed he might be having "a cardiac event." She did not take her eyes off him; she ran to help and reached him as he fell the second time. (A cell phone video taken by an unknown bystander captured McCarthy running to help Root as he fell in the mulch.) According to McCarthy, Root appeared to be covered in blood; did not speak; "was struggling to breathe"; "gurgling blood"; appeared to have the "[l]ights on[,] no one home"; and his eyes were "bouncing around like ping-pong balls" until they rolled to the back of his head. The entire time she saw Root, "his right hand remained on his chest," his left "remained hanging down," he did not try to get up, and could "absolutely not" have gotten up.

Police began arriving, simultaneously screaming different unintelligible, "confus[ing]," and "chao[tic]" commands like, "Let me see your hands," "Get on the ground," "Show us your hands," "Stay on the ground and show me your hands," "Get down," "Let me see your hands," and "Stay down." Root had no reaction. Root—according to Defendants' varied deposition testimony and statements to law enforcement investigators—was "on the ground"; on his knees; sitting; "like in a half lying, half kneeling type of position"; "lying, kneeling"; "never able to get up"; not fleeing; did not get up or move; and did not talk. Police ordered McCarthy to leave Root, which she reluctantly did.

Within seconds of their arrival and no more than three or four seconds after McCarthy left Root's side, Defendants opened fire. Defendants proffered different reasons for firing: Defendants Figueroa and Conneely claim they thought they saw the handle of a gun; Defendants Fernandes and Thomas claim they heard a gunshot; Defendant Godin claims he heard another officer say the word "gun"; and Defendant McMenamy claims he saw Root actually stand up and open his jacket, "saw a floating gun in [Root's] chest," and saw Root "reach" in that direction. No other Defendant claims to have seen Root stand, and no Defendant saw a gun in Root's hand prior to shooting. While McCarthy observed Root clutching his chest with his right hand the entire time she saw him, Defendants could not see Root's hands, do not remember whether they could see his hands, or acknowledged that his right hand was in his chest area. Defendants admitted that they did not try to engage with Root or assess his physical or mental condition before firing.

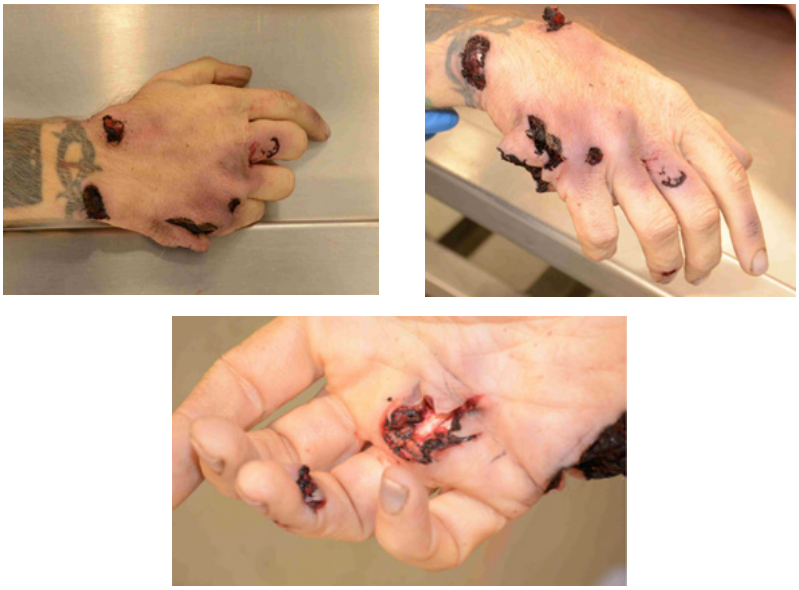
As captured on body worn camera ("BWC") footage after the shooting, Defendant Conneely told Defendant McMenamy to "shut your f*ckin' mouth" and asked if he had "a rep comin.'" Defendant McMenamy replied, "I won't talk."

Root did not possess a firearm. An unloaded plastic bb-gun with a metal rod extending from its barrel was recovered near Root's body. It was undamaged and did not have blood on it:

Photos of the bb-gun taken at the scene in Brookline and at the BPD's evidence storage facility. *See* Petitioner's Summary Judgment Exhibits 30 and 31 (District Court Dkt. Nos. 89-30 and 89-31).

Defendant Conneely claimed that when he, Defendant Figueroa, and other officers rolled Root's body over after the shooting, he recovered the bb-gun from Root's right hand. This conflicts with (1) statements by two other police officers at the scene, both of whom were from a different town's police force, that when Root's body was rolled over, they saw a gun fall from his chest area; and (2) Defendant Figueroa's testimony that nothing was in Root's right hand when she and Defendant Conneely rolled Root over and handcuffed him after the shooting.

Four bullets struck Root's right hand, including one through his palm:



Autopsy photos of Root's right hand. *See* Petitioner's Summary Judgment Exhibit 77 (District Court Dkt. No. 109-40).

Petitioner's forensic medical expert opined that if Root had the bb-gun "in his [right] hand at the time that he was shot in Brookline, it would have had blood on it" and have been damaged.

Unlike the many witnesses who were interviewed on the day of the fatal shooting, the BPD Defendants were not interviewed by law enforcement investigators until five days later, and Defendant Conneely was not interviewed until seven days later. The BPD Defendants were represented by the same attorney, and between the shooting and the interviews, the BPD Defendants met together as a group with their attorney to prepare for their interviews. BPD union president Larry Calderone also attended a portion of that meeting.

BPD rules require that witnesses to a use of force incident be separated before being interviewed by investigators. BPD Sergeant Detective Marc Sullivan, who investigated Root's death, testified that "it's very important" that officers involved in a deadly use of force incident not speak to each other about the incident before being interviewed by investigators because "everybody is going to have a different perception of the incident, and . . . everybody's recollection is going to be different. I want their recollection of the incident." Sullivan implied that Calderone has a history of allowing BPD officers to talk to each other before being interviewed; he testified that he has "had several meetings with . . . Calderone. And it's been confrontational, but we've instilled upon him the importance that his [union] membership shouldn't talk." Sullivan testified that before learning it at his deposition, he did not know that the BPD Defendants met together to prepare to be interviewed. He added that the BPD

Defendants having met together to prepare "would taint the interview[s]."

It was after the post-group-meeting interviews that the BPD Defendants first stated that Root was supposedly reaching before the shooting. Defendant Thomas—who did not recall whether he attended the meeting—was the only BPD Defendant who did not claim to see Root reaching.

There is no video footage of the fatal shooting. The BPD equips its officers with BWCs, which officers must affix to their uniforms and turn on to record most police-civilian interactions. Defendants Godin, McMenamy, and Figueroa were required to have their BWCs recording during the vehicle pursuit and subsequent shooting.[4] Of the three, only Defendant Figueroa activated her BWC, but she did not until approximately 23 seconds before the pursuit ended. When she drew her firearm, her arms completely obscured her BWC's lens, resulting in the BWC recording audio but no video during the shooting. Defendant McMenamy turned on his BWC only after the shooting. Defendant Godin repeatedly claimed that his BWC was in his duty bag on February 7. BWC footage of him and an audit of his BWC establish that was a lie: he was wearing his BWC on February 7 during the fatal shooting, removed the BWC from his chest after the shooting and threw it into his cruiser, and had recorded two videos with it earlier that morning before interacting

4. The then-effective BPD rules allowed but did not require officers working overtime shifts to wear BWCs. Defendants Fernandes and Thomas were both working overtime shifts on February 7, 2020. Both could have chosen to wear and activate BWCs, but neither did.

with Root. Defendants Figueroa, Godin, and McMenamy were never disciplined for violating the BPD's BWC rules, and Defendant Godin was never disciplined for his repeated false statements about his BWC.

B. Procedural Background

1. Petitioner—Root's sister—filed a complaint in the United States District Court for the District of Massachusetts bringing federal and state civil rights claims and related state law claims against the six officers who killed Root and the City of Boston ("City"). As relevant here, Petitioner alleged that Defendants used excessive force against Root in violation of his Fourth Amendment rights by repeatedly shooting him when he was lying on the ground and incapacitated. Compl. ¶¶ 23, 26, 29, 40–72, 81–95. Petitioner brought a similar claim under the Massachusetts Civil Rights Act for violating the Massachusetts Declaration of Rights. *Id.* ¶¶ 96–99.

2. After fact and expert discovery, the parties cross-moved for summary judgment.[5] The District Court denied Petitioner's summary judgment motion, granted Defendants' and the City's summary judgment motions, and entered final judgment for them. App., *infra*, 90a–108a. As is relevant, the court held that Defendants' use of deadly force was reasonable because they "were aware that Root was reportedly armed and dangerous"; Root "fled" from BWH and led police "on a dangerous car

5. Petitioner moved for summary judgment on the claims against Defendants but did not move for summary judgment against the City. Defendants and the City moved for summary judgment on all claims against them.

chase through a densely populated area, culminating in Root's violent collision with vehicles driven by civilian[s]"; and Root "reached into his jacket" while surrounded by officers in Brookline. App., *infra*, 98a. The court further held that Defendants were entitled to qualified immunity. App., *infra*, 101a–104a.

3. In a split decision, the Court of Appeals affirmed.[6] The majority held that "no reasonable jury could conclude that the officers engaged in excessive force in violation of the Fourth Amendment" and "that the officers are entitled to qualified immunity." App., *infra*, 27a.

As to excessive force, the majority concluded that "[n]o reasonable jury could conclude that a reasonable officer would not have determined that Root posed an immediate threat." App., *infra*, 29a. In reaching this conclusion, the majority contravened established Fourth Amendment precedent by determining that a material change in Root's circumstances between the earlier incident at BWH and the fatal shooting (i.e., the accident that totaled his car and left him nearly dead on the ground) did not impact the totality of the circumstances that the officers were required to consider before using deadly force. App., *infra*, 30a–31a. The majority also found that, based on Defendants' testimony and regardless of

6. Petitioner is seeking review of the entry of summary judgment in Defendants' favor on Counts 1 (42 U.S.C. § 1983), 2 (Mass. Gen. Laws ch. 12, §§ 11H and 11I), 8 (assault and battery), and 9 (wrongful death). Petitioner is not seeking review of the entry of summary judgment in Defendant McMenamy's favor on Counts 5 and 6, both of which related to the PIT maneuver, or summary judgment in the City's favor on Count 7, which asserted a claim for failure to train and supervise.

McCarthy's testimony, it is not reasonable to infer that Root could not have acted threateningly, not reached into his jacket, or not moved his arm. App., *infra*, 34a–37a.

The dissent methodically identified multiple instances where the evidence diverged and, when viewed in the light most favorable to Petitioner, from which a reasonable jury could find in Petitioner's favor. App., *infra*, 55a–81a. In particular, the dissent concluded:

> [T]he inconsistencies in [Defendants'] testimony regarding Root's movements (particularly when paired with McCarthy's testimony . . .) create genuine issues of material fact as to what Root's movements were just prior to the shooting. . . . 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 [forensic] expert . . . 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.

App., *infra*, 75a–76a.

The dissent found that "the inconsistencies also raise questions as to the credibility of the officers, as does other evidence in the record," like Godin lying about wearing his BWC, Godin and McMenamy not activating their BWCs, "McMenamy telling Conneely that he 'wo[uld]n't talk,'" and that the BPD Defendants "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)." App., *infra*, 75a–77a. As the dissent explained, only a trial can resolve these disputes of material fact. App., *infra*, 71a–81a.

4. Petitioner moved for rehearing, which the Court of Appeals denied. App., *infra*, 109a–110a.

REASONS FOR GRANTING CERTIORARI

A. The Majority Decision Creates a New Summary Judgment Standard, Allowing Lower Courts to Make Factual Determinations, Weigh Evidence, Assess Credibility, and Draw Inferences in the Movant's Favor Despite Contradictory Evidence.

This Court has reiterated basic summary judgment standards:

- The court cannot make credibility determinations or weigh evidence, and it must believe "[t]he evidence of the non-movant" and draw "all justifiable inferences . . . in his favor."[7] *Anderson*, 477 U.S. at

7. Because Petitioner appealed the grant of Defendants' and the City's summary judgment motions, she is the nonmovant for purposes of the appeal.

255 (citation omitted); *see also Velez-Gomez v. SMA Life Assurance Co.*, 8 F.3d 873, 878 (1st Cir. 1993) ("At the summary judgment stage, however, there is 'no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails, no room for the judge to superimpose his own ideas of probability and likelihood (no matter how reasonable those ideas may be) . . . . '") (citation omitted).

- The court "give[s] credence to the evidence favoring the nonmovant" and to "evidence supporting the moving party," *only* if that evidence "is uncontradicted and unimpeached" and "comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (court "must disregard all evidence favorable to the moving party that the jury is not required to believe") (quotations and citation omitted); *see also Velazquez-Garcia v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 18 (1st Cir. 2007) ("[P]rovided that the *nonmovant's* deposition testimony sets forth specific facts, within his personal knowledge, that, if proven, would affect the outcome of the trial, the testimony must be accepted as true for purposes of summary judgment.") (emphasis added).[8]

8. The District Court misquoted *Velazquez-Garcia* by omitting "the nonmovant's" from the language quoted above and credited the movant Defendants' testimony in the face of countervailing evidence. App., *infra*, 99a. The First Circuit did not correct the District Court's misapprehension and misapplication of the rule that the movants' evidence is to be accepted only if it is uncontradicted and unimpeached.

- A nonmovant plaintiff "need only present evidence from which a jury *might* return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Anderson*, 477 U.S. at 257 (emphasis added); *see also Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) ("Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding. . . . [I]t was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage.") (citation omitted).

- When the movant does not have the burden of proof at trial, at summary judgment, the movant must show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The First Circuit did not merely ignore these rules; it flipped them on their heads. The majority improperly accepted Defendants' statements and deposition testimony as true, discounted evidence undermining Defendants' claims, and drew inferences in Defendants' favor. App., *infra*, 9a–18a, 21a–23a. In so doing, the majority established new summary standards that lower courts and litigants will follow as precedent in future cases.

Examples of the majority's new summary judgment rules abound:

First, the majority repeatedly accepted Defendants' testimony and contended their testimony was consistent, despite multiple examples—identified in Petitioner's

briefing to the Court of Appeals and in the dissent—of inconsistencies throughout their versions of events. For example, the majority accepted some Defendants' claims that they "saw Root reach into his jacket as if to reach for a gun," dismissed contradictory evidence, and concluded that Defendants' claims must be accurate. App., *infra*, 33a–36a.

In contrast, the dissent highlighted the numerous inconsistences in Defendants' versions about what Root was allegedly doing when they killed him: some Defendants stated Root was seated or kneeling while others said he was standing or attempting to stand; some Defendants "testified that Root's hand was by his chest the entire time, while others said Root moved his hand up to his chest"; some Defendants "observed Root reaching into his jacket," but "others testified that they fired because Root was removing his hand from his jacket"; and "yet another officer testified that 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." App., *infra*, 74a–75a. These inconsistences alone—even without considering McCarthy's testimony and video footage showing Root stumbling from his car and into the mulch—warrant a trial. *See, e.g.*, *Estate of Jones by Jones v. City of Martinsburg*, 726 F. App'x 173, 179 (4th Cir. 2018) ("[T]he district court erred by considering the facts in the light most favorable to the officers, concluding that [their] version of events was essentially undisputed despite discrepancies among the officers' accounts, and reasoning that Jones's continuing grasp on the knife from where he lay on the ground—beaten, choked, and tased—indisputably constituted an immediate threat to the officers' safety at the time he was shot.").

The majority also ignored incontrovertible evidence of Defendants' lack of credibility, including that Defendant Godin repeatedly lied about whether he was wearing his BWC; that Defendant Conneely claimed the bb-gun was in Root's right hand after the shooting, while Petitioner's forensic expert opined that the bb-gun could not have been in his right hand in light of the injuries to that hand and that the bb-gun was unscathed; and that a sergeant testified that the BPD officer Defendants having met together before being interviewed by law enforcement "taint[ed]" their interviews, impugning their credibility. *See, e.g.*, App., *infra*, 37a n.20 ("No material dispute of fact emerges from the officers having spoken together after the very tense event putting them in danger and before speaking to investigators, even if doing so violated BPD rules (as Bannon asserts)."). While a court must not make credibility determinations on summary judgment, it cannot ignore the nonmovant's affirmative evidence of the movants' incredibility. *See Mitchell v. Miller*, 790 F.3d 73, 79 n.4 (1st Cir. 2015) ("affirmative evidence that the officer is lying" creates a genuine dispute of material fact) (cleaned up); *Goodwin v. City of Painesville*, 781 F.3d 314, 323 (6th Cir. 2015) ("[S]ummary 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). App., *infra*, 77a n.41 (dissent explaining that Petitioner "put forward affirmative evidence that raises material issues regarding the officers' credibility"). This is particularly true where, as here, the police killed the only other witness who would have the most knowledge about the circumstances of the shooting. *See Lamont v. New Jersey*, 637 F.3d 177, 181–82 (3d Cir. 2011) ("Because 'the victim of deadly force is unable to testify,' . . . a court ruling on summary judgment in a deadly-force case 'should

be cautious . . . to ensure that the officer[s are] not taking advantage of the fact that the witness most likely to contradict [their] story—the person shot dead—is unable to testify.'") (alteration in original) (citations omitted); *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994) ("In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach."); *see also Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 195–96 (4th Cir. 2006); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995).

Second, the majority gave great weight to unsworn statements by a witness, Victor Gerbaudo ("Gerbaudo"), to law enforcement investigators but discounted McCarthy's sworn testimony. The majority concluded that Gerbaudo's statements "fully substantiate[] the officers' versions of events." App., *infra*, 19a–21a, 34a–35a, 38a. But there are fundamental problems with the majority's treatment of Gerbaudo's statements:

- In contrast to McCarthy—who was at Root's side, touching him, taking stock of his injuries, assessing his condition, and trying to help him—Gerbaudo was in his car in the middle lane on the opposite side of a multi-lane highway, with multiple police cars and officers between where Gerbaudo sat and where Root was in the mulch.

- Gerbaudo told investigators that Root "took his right hand under his coat and at the time that happened, um, the police officers discharged their firearms on him." It is unclear whether Gerbaudo meant that Root reached his hand from outside his coat to inside his coat or that Root's right hand was already under his coat. Interpreting Gerbaudo's

statement in the light most favorable to Petitioner—as the court must—it is reasonable to infer that Root was clutching his chest in pain or was moving his hand already inside his coat in compliance with commands to show his hands. This too should have precluded summary judgment.

- Gerbaudo claimed that Root "turned around facing the officers." As the dissent explained, this is "wholly inconsistent" with Defendants' statements, *none* of whom contend that Root turned around. App., *infra*, 68a n.37, 75a.

- As the dissent noted, after the shooting and after Gerbaudo arrived at the hospital where he worked, Gerbaudo—a former reserve police officer—approached police to give a statement "'because . . . [he] kn[e]w that it would have helped [the] officers.'" App., *infra*, 66a nn.35–36.

In contrast to the importance the majority ascribed to Gerbaudo's statements despite inconsistences between them and Defendants' testimony and issues with his credibility, the majority wrote off McCarthy's sworn testimony merely because she allegedly did not convey all of her observations to "the officers at the time." App., *infra*, 22a. McCarthy is a disinterested witness, but the majority ignored her testimony in favor of controverted testimony supporting Defendants' versions of events. *Cf. Reeves*, 530 U.S. at 151. *See also* App., *infra*, 65a n.34 (as the dissent explained, "The majority's position that McCarthy's deposition testimony is inconsistent with the statement she gave to state police investigators is not supported by my reading of the record. The majority opinion has reduced McCarthy's twenty-three-minute

interview to one sentence. 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.'") (alterations in original) (internal citations omitted). McCarthy's testimony "alone provides a reasonable factfinder with an alternative account as to what Root's behavior and abilities were prior to the shooting." App., *infra*, 78a.

Third, the majority drew unreasonable inferences in the moving Defendants' favor while refusing to draw reasonable inferences in Petitioner's favor. For instance, the majority inferred that Root was "fleeing in close proximity both to the officers and to members of the public . . . present in the parking lot (such as McCarthy)." App., *infra*, 31a. But there was absolutely no evidence that Root tried to flee from the mulch near the parking lot. Indeed, Defendants Godin, McMenamy, and Conneely testified that Root was not fleeing, and those and other Defendants testified that Root was "on the ground," was on his knees, was sitting on the ground, was "like in a half lying, half kneeling type of position," was "lying, kneeling" but "was never able to get up," and was not running away. The majority also inferred that Root had the cognitive capacity to understand and respond to police commands in Brookline immediately before the fatal shooting despite his obvious injuries. App., *infra*, 30a. In addition, the majority noted that the forensic expert "did not discuss any possible impact of the day's rainy weather on [her]

conclusion" that "the BB gun would have been damaged and had blood on it had it been in Root's hand at the time of the shooting." App., *infra*, 23a. But the evidence showed that the light rain on February 7 did not wash away Root's blood on the road, as reflected in the following photos taken at the scene in Brookline:

Zoomed-in versions of photos taken outside of Root's car showing blood on the road. *See* Petitioner's Summary Judgment Exhibit 29 (District Court Dkt. No. 89-29).

In comparison to those inferences in Defendants' favor, the majority expressly concluded that, despite McCarthy's testimony about Root's condition and the forensic expert's opinions about Root's injuries, no reasonable juror could infer that Root "could not have reached his right hand under his jacket." App., *infra*, 35a.

In sum, this is not merely a case of the court below misapplying established standards. Instead, the majority forged new summary judgment principles, which will impact summary judgment in future cases within the First Circuit, regardless of the type of case or cause of action. *See* Section C, *infra* (citing recent case demonstrating that the majority decision is already impacting summary judgment jurisprudence in the First Circuit). Lower courts and litigants are now left to square the majority's new approach with longstanding Supreme Court and First Circuit precedent. This type of rogue judicial lawmaking—which undoes years of established case law, thereby injecting additional and unwarranted unpredictability into civil litigation—warrants a grant of certiorari.

B. The Majority Decision Creates a Circuit Split Concerning the Standards Governing the Use of Force.

It is well-established that, before using deadly force, police must consider whether it is justified by the totality of the circumstances. *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985). Reasonableness depends on the circumstances "at the moment" the force is applied. *Graham v. Connor*, 490 U.S. 386, 396 (1989)); *see also McKenney v. Mangino*, 873 F.3d 75, 81 (1st Cir. 2017) ("Timing is critically important in assessing . . . reasonableness . . . .").

Stemming from these rules are two fundamental principles that the majority below rejected, thereby creating a split of authority in the standards governing police use of force. *First*, police officers must reassess changing circumstances because, even if deadly force is "'reasonable at one moment,' [it] may 'become unreasonable in the next if the justification for the use of force has ceased.'" *McKenney*, 873 F.3d at 82 (citation omitted); *see also Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 277 (5th Cir. 2015) (same); *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (same). When circumstances have "meaningfully changed," the reasonableness of force depends on those changes. *See Lachance v. Town of Charlton*, 990 F.3d 14, 25–26 (1st Cir. 2021) (affirming use of "segmented approach" in analyzing applicability of qualified immunity to uses for force separated by "a change in circumstances"); *accord Brockington v. Boykins*, 637 F.3d 503, 507 (4th Cir. 2011) ("[I]t is possible to parse the sequence of events as they occur; while a totality of circumstances analysis still remains good law, if events occur in a series they may be analyzed as such.").

Second, because the use of deadly force against an incapacitated suspect is unconstitutional, police must consider the suspect's condition in assessing whether the suspect poses an *immediate* threat. *See, e.g.*, *Graham*, 490 U.S. at 396 (reasonableness depends on, among other factors, "whether the suspect poses an immediate threat to the safety of the officer or others"); *Tan Lam v. City of Los Banos*, 976 F.3d 986, 1002 (9th Cir. 2020) ("[A]n officer violates a clearly established right when he shoots an incapacitated suspect who no longer poses a threat, even if the suspect previously had a weapon and stabbed an

officer.") (citation omitted); *Estate of Jones by Jones v. City of Martinsburg, W. Va.*, 961 F.3d 661, 669 (4th Cir. 2020) ("[I]t was clearly established in 2013 that officers may not use force against an incapacitated suspect."); *Fancher*, 723 F.3d at 1201 (officer not entitled to qualified immunity where he "fired six shots into a suspect who was no longer able to control the vehicle, to escape, or to fire a long gun, and thus, may no longer have presented a danger . . . Prior to shooting [the suspect], [the officer] stepped back, felt safer, and noticed [the suspect] slump. This allowed him enough time . . . to recognize and react to the changed circumstances and cease firing his gun.") (internal quotation marks and citations omitted); *Brockington*, 637 F.3d at 508 ("[I]t is just common sense that continuing to shoot someone who is already incapacitated is not justified under these circumstances.").

The majority intentionally abandoned these principles by allowing police in the field, and courts months or years later, to pick and choose the circumstances to consider in assessing the reasonableness of the use of force. In particular, the majority failed to consider evolving circumstances and faulted the dissent for doing so. App., *infra*, 29a–31a. The majority expressly viewed an unduly narrow selection of the events of February 7 as a continuum, starting with the BWH shooting, continuing with the pursuit, and ending with the fatal shooting—where the majority concluded that the earlier events justified Root's death. App., *infra*, 30a–31a. Indeed, the majority's summary of the events preceding the fatal shooting completely omitted the car accident and Root's condition:

> The officers also had every reason to believe Root posed a continuing and immediate threat to them and the public: Officer Godin had witnessed Root fire his gun at him at BWH. [9] Just moments before the shooting, Root had led [the officers] in a car chase through an urban area at high speeds, ignoring the officers' attempt[s] to pull him over, act[ing] with complete disregard for [the officers'] safety or the safety of anybody else that might have been on the street,' and causing a serious collision. And throughout his interactions with the officers, Root did not comply with lawful orders meant to defuse the situation and eliminate the danger he posed.

App., *infra*, 30a (alterations in original) (internal quotation marks and citation omitted). Then, in a clear break from precedent, the majority criticized the dissent for "seek[ing] to separate the shooting in Brookline from the context of the morning's events [and] arguing the officers' 'justification for the use of force ha[d] ceased' before they arrived at the scene in Brookline." App., *infra*, 31a.

The dissent concluded that "whether a reasonable officer on the scene could believe [Root] 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." App., *infra*, 73a. As the dissent explained,

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9. Root did not carry a firearm; he possessed only an unloaded paintball marker.

> 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 [incorrectly] believed was a gun and that the officers had been involved in a car chase with Root. . . . 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.'"

App., *infra*, 73a n.40 (emphasis in original) (quoting *McKenney*, 873 F.3d at 82).

In two recent cases—cited in Petitioner's appellate briefs below—the Fourth Circuit addressed the Fourth Amendment issues present here and concluded that factual disputes over the reasonableness of the use of deadly force precluded summary judgment. In *Estate of Jones by Jones v. City of Martinsburg, W. Va.*, the Fourth Circuit reversed entry of summary judgment for officers where they shot and killed a man, Jones, whom the jury could "reasonably find . . . was incapacitated." 961 F.3d at 669. Before the shooting, Jones "had been tased four times, hit in the brachial plexus, kicked, and placed in a choke hold, at which point gurgling can be heard in the video [footage]. A jury could reasonably infer that Jones was struggling to breathe." *Id.*

> [T]he officers contend[ed] that Jones should have dropped the knife upon their commands . . . But

> again, the fact that he did not move or respond corroborates that he was incapacitated, and the reasonable officer would have recognized that fact. Indeed, [one officer] reported that Jones "did not make any overt acts with the knife towards the officers," and [another] reported that Jones "wasn't f**king doing nothing." And yet five officers wasted no time, giving Jones mere seconds to comply before firing. The officers shouting "drop the knife" seconds before shooting him was, at best, farcical because it was impossible for an incapacitated person to drop a knife tucked into his sleeve.

Id. at 670. Here too, Petitioner presented evidence that Root was severely injured, gurgling, struggling to breathe, and not verbally responding to the officers. A jury could reasonably conclude that he was incapacitated and that the officers acted unreasonably in giving him only seconds to comply with contradictory commands before killing him, particularly given McCarthy's testimony that he was unresponsive and *in extremis* immediately before the 31 shots were fired.

In *Franklin v. City of Charlotte*, police officers responded to 911 calls reporting that a man at a Burger King, Danquirs Franklin, was threatening people with a firearm. 64 F.4th 519, 525 (4th Cir. 2023). Before the officers arrived, Franklin went into the parking lot and crouched next to a parked car. *Id.* The officers "exited their vehicles, weapons drawn. Immediately each officer shouted, 'Let me see your hands,' and 'Let me see your hands, now!'—a total of four commands." *Id.* at 526. The officers then "changed their commands to variants of

'Drop the gun!' . . . 'Drop the weapon!' . . . 'Put it on the [g]round!'" *Id.* "As the officers barked instructions to drop his weapon, Franklin's body stayed still. Finally, without moving his head or legs, Franklin slowly reached into the right side of his jacket and retrieved a black handgun with his right hand." *Id.* One officer fired twice, striking Franklin's left arm and abdomen. *Id.* "As he slumped against the open car door, Franklin looked in the officers' direction with a face of shock and uttered his final words: 'You told me to.'" *Id.* at 526–27.

In reversing the district court's finding that the officer was entitled to qualified immunity, the Fourth Circuit scrutinized the officers' commands:

> [T]he instructions the officers gave to Franklin to drop his weapon conflicted with their earlier orders and put Franklin in an awkward position. Although she first demanded to see Franklin's hands, Officer Kerl could not even see Franklin when she issued that command. She had no way of knowing if Franklin attempted to comply with that initial command because, by the time she could see him, she and her partner had abandoned that instruction in favor of one ordering Franklin to drop his weapon. But they could not see a gun either—they apparently assumed he had one in his hands, which were obscured between his legs.

Id. at 532. BWC footage "reveal[ed] that Franklin" responded to the officers by saying, "I heard you the first time." *Id.* The content of his response "d[id] not seem to matter" because "officers were so boisterous that

neither recalled hearing him say anything." *Id.* Because "Franklin's gun was concealed under his jacket, not in his hands . . . the only way for him to obey the officers' commands to drop the gun was to reach into his jacket to retrieve it." *Id.* The defendant officer "interpreted his movement as a threatening maneuver." *Id.*; *see also id.* at 535 ("[The officers'] (inconsistent) commands were ineffectual because the officers could not see his hands at all and Franklin could not comply without handling his weapon."). The present case is strikingly similar to *Franklin*, presents a situation were neither the gun nor the threat was real, and should be resolved the way *Franklin* will be—by a jury.

The First Circuit now stands on the opposite side of a gaping Fourth Amendment schism from its sister circuits. On one hand, the Fourth Circuit faithfully applies Supreme Court precedent in wading through the summary judgment record in police use of force cases. It identifies areas where the evidence diverges, draws inferences in favor of the nonmovant, and properly recognizes that a trial is the only mechanism for determining liability.

And the Fourth Circuit and other circuits continue to recognize that "a clear break in the sequence of events" leading up to a police shooting renders the use of deadly force unreasonable, even if it had been reasonable only seconds before. *Brockington*, 637 F.3d at 507; *see also Mason*, 806 F.3d at 277 ("Although the record reflects that there was a break between the first five and last two shots that struck Mr. Mason, and that Mr. Mason lay on the ground when the final two shots were fired, the district court did not expressly address whether Faul's use of his firearm was justified throughout the encounter.

We conclude that genuine issues of material fact arise regarding the final two shots that struck Mr. Mason . . . .”). The First Circuit has now rejected that rule by determining that Root was supposedly a threat at the time of the fatal shooting based on the earlier incident at BWH and the subsequent pursuit—despite the intervening car accident that left him nearly dead—and expressly condemning the dissent for recognizing the separation between “the morning’s [previous] events” and the fatal shooting in Brookline. App., *infra*, 30a–31a.

Whether someone shot by police can advance a case against the officers to trial should not depend on the location within the country where the person is shot. Yet had Root been killed and Petitioner had brought this case within the Fourth Circuit—rather than the First—given the factual similarities among this case, *Jones*, and *Franklin*, this case likely would have survived summary judgment, and Petitioner would be able to assert her brother’s constitutional rights before a jury. Certiorari is appropriate in situations like this where federal law does not apply equally throughout the country.

C. This Case Presents Exceptionally Important Questions that Warrant Review.

The questions presented here are exceptionally important because they reach far beyond this case. The majority decision implicates the summary judgment standards that district courts within the First Circuit will apply in every civil case and the police’s, the public’s, litigants’, and the courts’ conceptions of assessing the reasonableness of the use of deadly force. This concern is real and has already played out. Indeed, in the few months since the First Circuit issued its opinion here, it

issued an opinion in another case adopting the majority's summary judgment approach to engage in factfinding and support its affirmance of summary judgment in favor of a defendant on the ground that the plaintiff failed to put forth sufficient evidence. *See Caruso v. Delta Air Lines, Inc.*, No. 22-1175, --- F.4th ---, 2024 WL 3886629, at *12 n.10 (1st Cir. Aug. 21, 2024).[10] Like here, a judge on the panel in *Caruso* dissented, concluding that

> [t]he majority is flat wrong to say that Caruso raises not even *one* material fact in reasonable dispute under governing law on whether Delta adequately investigated her sexual-assault charge . . . Caruso and Delta engage in a factual scrum. And the majority joins Delta's side. But because summary judgment isn't a time for factfinding by judges (district or circuit)—that's what trials are for—we must accept (for present purposes only) Caruso's properly documented account (without vouching for its accuracy), resolving evidentiary conflicts, credibility calls, and competing inferences in her favor (even though a jury might later find Delta's story more believable).

Id. at *16 (Thompson, J., dissenting) (emphasis in original).

The First Circuit's engagement in factfinding and foray into new and unsupported summary judgment rules is particularly concerning for Fourth Amendment cases. As this Court has explained,

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10. The two judges in the majority in this case and in *Caruso* are the same judges, and both majority opinions were authored by the same judge. The dissenting judge on each panel is different.

> [s]pecificity is especially important in the Fourth Amendment context . . . [because] it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case . . . .

City of Escondido v. Emmons, 586 U.S. 38, 42 (2019) (citation omitted). The majority below complicated, rather than simplified, Fourth Amendment law by blazing a new standard that absolves officers from having to reassess whether the totality of the circumstances justifies the use of deadly force. If officers believe a suspect previously posed a threat, they can kill him even when an intervening event captured on surveillance video injures the person to within an inch of his life, as testified to by an independent, EMS-certified bystander. The majority's ruling will impact how officers throughout the circuit respond to high-stress situations and, concomitantly, the safety of the public.

Courts now may act as a factfinder at the summary judgment stage and accept police officers' testimony as true despite contrary evidence and the officers' demonstrated incredibility. This will deny plaintiffs and the public a meaningful opportunity to have use of force cases decided by juries. These fundamental changes to summary judgment and Fourth Amendment standards, and the resulting wide-ranging consequences, raise issues of exceptional importance that merit a grant of certiorari. *N.S. v. Kansas City Bd. of Police Comm'rs*, 143. S. Ct. 2422, 2423 (2023) (Sotomayor, J., dissenting) ("[Summary

judgment standards] ensure[] that it is a jury that will hear evidence and determine which story is credible, not a judge reading a paper record. This role of the jury is particularly important in qualified immunity cases, where the stakes are not just about the parties involved, but whether there will be accountability when public officials violate the Constitution.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK A. BERTHIAUME
Counsel of Record
GARY R. GREENBERG
PETER ALLEY
ALISON T. HOLDWAY
GREENBERG TRAURIG, LLP
One International Place,
Suite 2000
Boston, MA 02110
(617) 310-6000
berthiaumem@gtlaw.com

Attorneys for Petitioner

September 9, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED APRIL 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1958

JENNIFER ROOT BANNON, AS THE SPECIAL PERSONAL REPRESENTATIVE OF THE ESTATE OF JUSTON ROOT,

Plaintiff, Appellant,

v.

DAVID GODIN, BOSTON POLICE OFFICER; JOSEPH MCMENAMY, BOSTON POLICE OFFICER; LEROY FERNANDES, BOSTON POLICE OFFICER; BRENDA FIGUEROA, BOSTON POLICE OFFICER; COREY THOMAS, BOSTON POLICE OFFICER; PAUL CONNEELY, MASSACHUSETTS STATE TROOPER; THE CITY OF BOSTON,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Hon. Richard G. Stearns, *U.S. District Judge*

Appendix A

Before Gelpí, Lynch, and Montecalvo, *Circuit Judges*.

April 22, 2024, Decided

LYNCH, ***Circuit Judge***. On February 7, 2020, after Juston Root pointed a gun at a hospital security guard and a responding Boston police officer, shot that gun at police and disregarded police instructions to drop the weapon, led the officers on a high-speed chase down busy urban streets and crashed his Chevrolet Volt, and then ran from the officers and disregarded further commands to stop and drop his gun, six law enforcement officers from two separate law enforcement agencies responding to the reports of his activities fired at him, all simultaneously perceiving that he was again reaching for his gun. Their shots proved to be fatal. After the event, the officers confirmed that he indeed had a gun on his person at the time of the shootings and was carrying two additional guns in his car.

His sister, Jennifer Root Bannon, acting as the representative of his estate, sued six of the officers involved – Massachusetts State Trooper Paul Conneely and Boston Police Department ("BPD") Officers Leroy Fernandes, Brenda Figueroa, David Godin, Joseph McMenamy, and Corey Thomas – and the City of Boston ("City"), alleging, inter alia, that the officers employed excessive force in violation of the Fourth Amendment during the fatal shooting. The district court granted summary judgment to the defendants. *See Bannon v. Godin*, No. 20-cv-11501, 2022 U.S. Dist. LEXIS 218303, 2022 WL 17417615, at *1 (D. Mass. Dec. 5, 2022).

Appendix A

We agree with the district court's conclusion that the officers acted reasonably under the circumstances during the fatal shooting and so did not violate the Fourth Amendment. We independently hold that the officers are entitled to qualified immunity. We also affirm the grant of summary judgment on Bannon's other claims.

I.

A.

At roughly 9:20 a.m. on the morning of February 7, 2020, BPD received a report of an individual with a gun at Brigham and Women's Hospital ("BWH").[1] A BPD dispatcher relayed the information that a man had pulled a gun on BWH security. Officer Godin responded to the call, as did BPD Officer Michael St. Peter.

Upon arriving at BWH, Officer Godin was approached by a hospital security officer who said that a man had just pointed a gun at him. The security officer pointed out the man's location to Officer Godin, who parked his cruiser and ran toward Vining Street, in the direction the security officer had pointed. As he turned onto Vining Street, Officer Godin saw a man in an unzipped black jacket, later identified as Root, walking toward him. Officer Godin observed that Root had a gun in his waistband. Bannon does not contest this point.[2]

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1. BWH is a level one trauma center hospital with over 800 patient beds. It conducts roughly 50,000 inpatient stays and 2.25 million outpatient encounters per year.

2. Later evidence showed that the gun was one of two paintball guns Root had in his possession in addition to a BB gun.

Root falsely told Officer Godin that he (Root) was "law enforcement" and then turned and pointed up the street. Officer Godin did not believe that Root was law enforcement because law enforcement officers do not carry their firearms in their waistbands. Officer Godin drew his firearm and continued to approach Root. When Officer Godin and Root were within a few feet of one another, Root removed the gun from his waistband and pointed it at Officer Godin.

During this interaction, Officer St. Peter arrived on the scene. He too saw Root holding a gun in his hand. He ordered Root to "drop the gun." Civilian witnesses later told investigators that they also saw Root holding a gun.

Officer Godin saw Root start to pull the trigger on his gun and heard "gunshot noises." In response, Officer Godin shot at Root several times. As he did so, Officer Godin fell backward into the street. After seeing Root point his gun at Officer Godin and hearing shots, Officer St. Peter also shot at Root. Multiple civilian witnesses later told investigators that they believed Root had pulled the trigger and fired shots. Both Officer Godin and Officer St. Peter believed Root had been shot.

Still carrying the gun, Root limped to his car, a silver Chevrolet Volt which was parked nearby, and drove away.

Officer Godin returned to his cruiser and began pursuing Root. He also stated over the cruiser's radio that he had been involved in a shooting, that he had been shot at, and that he believed he had shot the suspect.

Additional BPD officers, including Officers Fernandes, Figueroa, McMenamy, and Thomas, joined the pursuit, which traveled down Huntington Avenue.[3] These officers understood Root was armed with a gun.

During the pursuit, Officer McMenamy intentionally struck the side of Root's Volt with his cruiser, in what the parties refer to as a "Precision Immobilization Technique ('PIT') maneuver." Officer McMenamy stated during a deposition that, at the time of the collision, the vehicles were moving at approximately twenty to thirty miles per hour. He also acknowledged that he had been aware at the time that the maneuver violated BPD policy, which forbids intentionally colliding with a pursued vehicle. The collision brought both vehicles to a stop. Officer McMenamy got out of his cruiser, drew his firearm, and ordered Root to show his hands. Root did not obey, rather Root not only drove away at high speeds, but used his Chevrolet Volt to push Officer McMenamy's cruiser out of the way to do so.

The high-speed pursuit continued down Huntington Avenue and on to Route 9,[4] moving from Boston to Brookline. Root's Volt reached speeds of up to ninety miles per hour, and traffic camera footage shows him weaving

3. Huntington Avenue is a major, crowded urban artery used by cars, buses, MBTA trollies, and other forms of transportation, particularly so on a weekday morning.

4. Route 9 separates from Huntington Avenue west of the BWH campus and continues into Brookline. Like Huntington Avenue, it is a major urban thoroughfare serving large numbers of cars, buses, bikes, and pedestrians.

dangerously through other vehicles at high speeds. At some point along Route 9, State Trooper Conneely joined the pursuit, having heard over his radio that shots had been fired at BWH and that a pursuit was ongoing.

At the intersection of Route 9 and Hammond Street in Brookline, Root's Volt collided with three civilian vehicles and came to a stop on Route 9 near the entrance to a shopping center parking lot. The collision caused extensive damage to Root's Volt; multiple tires fell off, glass shattered, and the airbags deployed.[5]

Several sources of evidence consistently describe the events that occurred at the site of Root's collision in Brookline. Traffic camera footage, officer body-worn cameras, and civilian cell phone footage captured documentary evidence of the events and officers' contemporaneous statements. Officers and witnesses also described the events in interviews with investigators in the days following the shooting and, in some cases, in later depositions in this case. We describe each in turn.

1. Documentary Evidence of Shooting in Brookline

Traffic camera footage shows that, at the time of the collision and throughout the confrontation that followed, which occurred at roughly 9:30 a.m. on a Friday, there were numerous cars in the parking lot and a steady stream of traffic down the opposite side of Route 9.

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5. Several of the individual defendants stated in their depositions that they observed that the collision was severe when they arrived at the scene moments later.

Root got out of his car and continued fleeing on foot. He moved toward a mulched area adjacent to the parking lot's entrance. He fell on the sidewalk but rose to his feet and continued into the mulched area, where he fell again.

Shelly McCarthy, a civilian with EMS training who had been in her car in the parking lot, saw Root leave his vehicle and ran to his side. McCarthy spent less than ten seconds by Root's side. Multiple approaching officers, including at least Officers Godin and McMenamy, ordered her to get away from Root, and she did so at a run.

Officer Figueroa's body-worn camera was recording throughout the confrontation in Brookline. Officer Figueroa ran to the mulched area and ordered Root to "get down" and to "let [her] see [his] hands." Her camera recorded audio of several other officers giving similar commands. Officer Figueroa adopted a stance which blocked the camera's lens as officers continued to order Root to get on the ground and show his hands. Just before officers fired, the camera recorded an officer begin a command to Root to "drop. . . ."

Officer Figueroa's camera footage shows that after he was shot, Root fell over in a fetal position on his right shoulder facing the officers, with his chest area rolled partially toward the ground.

Officer Figueroa's body-worn camera recorded that she and Trooper Conneely, along with other officers,

approached Root immediately after the shooting. The footage shows officers roll Root over and secure his hands. The footage shows Trooper Conneely reach into Root's chest area. An officer asks, "Where is the firearm?" and Officer Figueroa responds, "It's under – it's underneath him." An officer then says, "I got it, I got it, I got it, it's secure," and Trooper Conneely walks away with a gun in his right hand. The camera recorded Trooper Conneely with Root's gun in his right hand roughly five seconds later and again roughly a minute later.

Shortly after the shooting, Officer McMenamy's body-worn camera recorded him stating to another officer present that after he had ordered McCarthy to run "[Root] starts – he opens the thing and he starts reaching for it he's got it right there he starts reaching for it on me and that's when uh." The camera similarly recorded Trooper Conneely characterize Root's actions as "suicide by cop."

The six officers fired a total of thirty-one shots, all within three seconds. From the time McCarthy reached Root (and then left) to the time of the shooting, approximately ten seconds elapsed. After McCarthy left Root's side, she did not see him again, including at the time of the shooting. She therefore did not witness Root's position and actions immediately prior to and during the shooting. Root was transported by ambulance to a hospital, where he was pronounced dead.

2. Involved Officers' Statements to Investigators and Later Deposition Testimony

Each involved officer gave statements as part of police investigations, and Bannon later deposed the six defendant officers in this case. Massachusetts state police investigators assigned to the Norfolk County District Attorney's Office conducted at least fourteen interviews of witnesses or officers involved, including interviews of all six officers who fired at Root, between February 7 and 14, 2020. Officers from BPD's Firearm Discharge Investigation Team ("FDIT") participated in most of these interviews as part of BPD's own investigations.[6] Bannon also deposed each officer defendant. Each officer testified consistently with his or her own prior statements to investigators and consistently with his or her fellow officers' statements and testimony. We summarize the relevant statements from each officer in turn beginning with his or her arrival at the Brookline scene.

Officer 1: Joseph McMenamy

The first arriving officer, Officer McMenamy, was interviewed by Massachusetts state police and FDIT investigators on February 12, 2020. In that interview, Officer McMenamy stated that he was the first officer to pull up to the scene where Root crashed his vehicle. He

6. BPD Sergeant Detective John D. Broderick, Jr., of the FDIT filed a report as to weapon discharges at the BWH scene on February 7, 2020. BPD Sergeant Detective Marc Sullivan of the FDIT filed a report as to the discharges at the Brookline scene on June 29, 2020.

stated he "saw . . . a white male stumbling around running towards" the shopping center parking lot and that Officer McMenamy "ran . . . directly towards [Root]." Officer McMenamy stated "a woman . . . civilian . . . was running or walking up to him to help him out . . . and [Officer McMenamy] ordered the woman to get away, . . . and she did immediately." Officer McMenamy stated:

> I . . . pointed my . . . firearm at [Root], ordering him to get on the ground, show me your hands . . . several times as I'm still running . . . or[] walking . . . at a fast pace towards [Root]. [Root is] kinda crouching down, but he's standing, but crouching down looking at me, and I'm still telling him to get on the ground, and he's just not, kinda fumbling around, and that's when I got real close to him, and I walked towards him, and I put my left leg up, and kicked him – not kicked him but like, with the, with the flat of my foot like it was in a soccer kick, like I put my foot up like 90-degree angle and kicked him down to the ground with my left leg.

Officer McMenamy stated that he "believe[d] [Root] stood back up" and while he and another officer continued to order Root to show his hands Root instead:

> with his left hand, started grabbing at his jacket . . . which was unzipped at the time – grabbing at his jacket, which revealed . . . the backside and the handle of a, a pistol . . . that looked like it was holstered. . . . [Root's] left hand grabbed

> the jacket, and his right hand went to go reach for the . . . handgun, and that's when [Officer McMenamy] fired.

Bannon deposed Officer McMenamy on December 7, 2021. Consistent with his interview statements, Officer McMenamy testified at deposition that he was the first officer to arrive at the scene after Root crashed his vehicle and continued fleeing on foot. Officer McMenamy described Root as moving "slumped over as if he was in some pain" and moving at a speed "faster than a walk." Officer McMenamy testified he saw McCarthy reaching out to Root and he began "running up to him [and] commanding her to get away," which she did. He testified he approached Root and "observed both of his hands . . . underneath his chest." Officer McMenamy testified that he ordered Root to "'[l]et me see your hands,' and '[g]et on the ground,'" that Root was "moving away . . . little by little . . . in a crouched position," and that "when [Officer McMenamy] got within reaching distance of [Root], . . . [Officer McMenamy] picked up [his] left leg, and [he] pushed [Root] to the ground with [it]." Officer McMenamy testified that Root, now six to eight feet away from him, returned to his feet, opened up his jacket, and reached for what "looked like a black gun" with his right hand. Officer McMenamy testified that he fired at Root in response.

Officer 2: Paul Conneely

The second arriving officer, State Trooper Conneely, was interviewed by Massachusetts state police investigators on February 14, 2020. In that interview Trooper Conneely stated:

> [I saw Root] had fallen on the mulch, there's a mulch area there. . . . I thought he was just struggling to get up or a Boston cop had tripped him. . . . So I get out [of my cruiser]. I run up onto the sidewalk. He's kind of going down, trying to get up. He's getting up on one knee As I went to go tackle him a Boston officer to my left . . . yelled he's got a gun, he's got a gun, and it's on his chest, he's grabbing it, and they were yelling. . . . All the proper orders were given. I had my gun out. He reached into his chest I saw that he had come up and at that point you know, he's going to pull a gun on us. We're not getting shot. . . . I'm going to protect everyone around us and protect the public so I fired my rounds.

Consistent with Officer Figueroa's body-worn camera footage, Trooper Conneely stated:

> There was a female officer to my right. I told her we're going [to] put our gloves on. We're going to go up, take him in custody. . . . We approached. I grabbed his left. She came around to my right. She took custody of his right hand. As I was holding his left hand and she pulled his right hand the gun was in his right hand. Um, she pulled his hand out. I reached in underneath him and I took control of the gun.

Bannon deposed Trooper Conneely on January 12, 2022. Consistent with his interview statements, Trooper

Conneely testified at deposition that when he arrived, he saw "Root trying to get up and get away." He testified he gave Root a command "along the lines of[ ] '[s]tay down on the ground and show me your hands.'" He testified that Root's hands were on the mulch and he was trying to push himself up, and that Root "was not prone to the ground" but "never got to a fully upright position." Trooper Conneely testified that he "contemplate[d] . . . tackling [Root]" but heard an officer yell, "[g]un. He's got a gun," and Trooper Conneely "immediately backed off." Trooper Conneely testified he then "saw a black handle coming out of [Root's] vest. He had it strapped to his chest," and that Root moved his right hand "inside his jacket" and Trooper Conneely "saw a black handle, [Root's] hand around a black handle coming up." Trooper Conneely then fired five shots at Root. Trooper Conneely testified that when he and Officer Figueroa approached Root to secure his hands, he found Root's gun "in [Root's] right hand under his body when [Trooper Conneely] rolled him to gather his left hand."

Officer 3: Corey Thomas

The third officer,[7] Officer Thomas, was interviewed by Massachusetts state police investigators on February 12, 2020. During that interview Officer Thomas stated:

> [W]e get to the [mulched area]. I, I see him. He's on the ground. . . . I'm to his left 'cause

7. The record does not make clear exactly when the remaining four officers arrived except that it was after Officer McMenamy and State Trooper Conneely arrived.

> he's facing all the other officers. I have my gun drawn. I'm givin' him verbal commands, "let me see your hands! Get on the ground!" . . . I'm hearing other officers give out multiple commands. . . . [H]e wasn't moving his hands in a surrendering manner, as in like just showin' us his hands and wasn't complying. He kept rustling his, his arms . . . they were like close, close to his . . . body. . . . I'm from the side . . . I can't see his hands. I can only . . . see him moving his arms, . . . erratically. . . . I heard . . . one round go off and I actually thought all right, he's firing at officers and I, I discharged my firearm.

Officer Thomas further stated that Root was "on the ground . . . like in a half lying, half kneeling type of position. . . . [H]e wasn't standing or fully sitting."

Bannon deposed Officer Thomas on December 16, 2021. Consistent with his interview statements, Officer Thomas testified at deposition that he approached Root and ordered him to "[l]et [him] see [his] hands" and to "[g]et on the ground." He testified that Root was "stumbling" and "moving" while "in a half lying, half kneeling type of position . . . on the ground"[8] and was not complying with orders to show his hands, instead "keeping his hands close to his body" where Officer Thomas could not see them and "moving very abruptly and aggressively

8. The dissent's position that this testimony is inconsistent with the statement Officer Thomas gave state police investigators is not supported by the record.

versus in a surrendering manner." After Officer Thomas heard gunshots and believed Root was firing at his fellow officers, he fired at Root.

Officer 4: Leroy Fernandes

The fourth officer, Officer Fernandes, was interviewed by Massachusetts state police investigators on February 12, 2020. During that interview Officer Fernandes stated:

> I exit my motor vehicle, and I see officers running towards . . . an area on this Route 9. . . . I . . . take out my department-issued firearm, and I . . . follow officers who seem to be in pursuit of the suspect. . . . [A]s we get to this . . . grassy, patchy area . . . I observe the suspect. . . . [A]t this time, all officers are giving commands, . . . to[] show us your hands. . . . [A]t this point, the male reaches into his, . . . it appeared to be like a jacket of some sort, reaches in as if he's going to pull something and at that point, shots were fired.

Officer Fernandes stated that by the time he joined the officers, Root "seemed like as if he was trying to stand but he wasn't standing."

Bannon deposed Officer Fernandes on January 19, 2022. At that time, consistent with his interview statements, Officer Fernandes testified that he arrived at the mulched area and saw Root "upright. . . . [M]aybe

a little bit of a lean-type standing, not fully standing up."[9] He testified that he and the other officers "issued verbal commands to let [them] see his hands, which [Root] didn't comply with. He did the opposite, and reached into his coat as if he was going to pull out a weapon, at which point shots were fired."

Officer 5: Brenda Figueroa

The fifth officer, Officer Figueroa, was interviewed by Massachusetts state police investigators on February 12, 2020. During that interview, Officer Figueroa stated:

> Obviously, this individual or this person that we're going after[] has a gun and has hurt somebody already. . . . I'm going with a, a hundred percent [certainty] I'm [pursuing] a person with a gun. My gun was out. . . . I see this individual on his knees. There were maybe, I don't know how many officers, but I remember having a state trooper on my side and we begged, . . . I mean we begged this

9. The dissent's position that this testimony is inconsistent with the statement Officer Fernandes gave state police investigators is not supported by the record. In particular, the dissent seizes on one statement Officer Fernandes made at deposition which he immediately clarified, and which the dissent quotes out of context. Officer Fernandes's full testimony was: "He was standing. Well, upright. I would say maybe a little bit of a lean-type standing, *not fully standing up*." (Emphasis added.) That statement is entirely consistent with Officer Fernandes's interview statement that Root "seemed like as if he was trying to stand but he wasn't standing up."

> person to drop his gun, show us his hands and I remember him smirk, like, a laugh. I see it, I see the object coming out and I was afraid. . . . I was afraid I was gonna get shot. Um, someone else was gonna get shot. And as soon as I seen it pulling out, I said either it's me or someone innocent is gonna get really hurt, and I pressed my, I used my gun. I don't recall how many shots were fired.

Consistent with her body-worn camera footage, Officer Figueroa stated during that interview that she and Trooper Conneely then approached Root to "secure[] his hands." She stated she grabbed one of Root's hands and "[a]t that moment, . . . I remember seeing the, a black gun, and that's the gun that this person had on him."

Bannon deposed Officer Figueroa on December 9, 2021. Consistent with her interview statements and body-worn camera footage, Officer Figueroa testified at deposition that when she arrived at the mulched area Root was "kneeling" ten to fifteen feet away, facing the officers. She testified that Root's hands were "hiding underneath his coat," and that she and other officers ordered Root to show his hands and gave similar commands. She testified that Root "smirked" at the officers and "start[ed] taking something out . . . of his jacket, and [Officer Figueroa] s[aw] the handle of a firearm," at which point she fired. Officer Figueroa testified that she then approached the body and found Root's gun "under his body."

Appendix A

Officer 6: David Godin

The sixth officer, Officer Godin, was interviewed by Massachusetts state police investigators on February 12, 2020. Officer Godin stated:

> I saw [Root] laying up on the corner. He was in like a, it was in front of like a shoppin' plaza or a side mall or whatever, but he was up on the curb . . . it was like all muddy, and he was layin' there, and I remember some lady going up to him and we're all yelling at her to get back. . . . [There are] four or five other officers and we're tellin' him, just, I'm just yellin' at him to lay on the ground with your hands out. Get on the ground 'cause he's in like a seated position . . . he was leaning to his right-hand side on a, like a seated position, and we continue to tell him to lay on the ground hands out, and I remember him reaching with his right hand into his jacket, and someone yelling gun, and at that time, I fired my firearm. . . .

Bannon deposed Officer Godin on December 15, 2021. Consistent with his interview statements, Officer Godin testified at deposition that as he approached the mulched area Root "was in a sitting position," possibly "laying halfway" "on his side" and that he ordered Root to "show [him] his hands," but Root did not do so. Officer Godin further testified that he saw Root reach his right hand "[i]nto his jacket," and after hearing other officers yell "gun," he fired at Root.

Non-party Officers Christopher Elcock and David Wagner

Two other officers provided statements about the recovery of Root's gun consistent with Officer Figueroa's body-worn camera and Officer Figueroa's and Trooper Conneely's interview statements and deposition testimony. Massachusetts state police investigators interviewed Brookline police officer and non-party Christopher Elcock. A report summarizing that interview states that Elcock "rolled the suspect over. In doing so, a handgun fell out of the suspect's chest area, which was subsequently removed from the suspect's proximity by an unknown party to Elcock." A similar report based on an interview with Brookline police detective and non-party David Wagner stated that Wagner "saw the suspect get rolled over, which is when he observed a black semi-automatic firearm fall out of the suspect's chest area."

3. Independent Witness Testimony by Dr. Victor Gerbaudo Corroborating Officers' Accounts

A medical doctor unaffiliated with any of the defendants, Dr. Victor Gerbaudo,[10] witnessed the incident from Route 9 and was interviewed by Massachusetts

10. The dissent states that Dr. Gerbaudo was a former reserve police officer. The record shows what Dr. Gerbaudo told investigators was that he had been "a reserve police officer for the Glendale Police Department in Los Angeles from 1989 'til 1994." No evidence suggests that Dr. Gerbaudo has served as a reserve police officer at any point in the twenty-six years between that service and the events here.

state police investigators on February 10, 2020. Dr. Gerbaudo was a BWH doctor driving that morning to BWH. A few moments before the shooting in Brookline Dr. Gerbaudo received "a text message from [BWH] telling [him] that there was . . . a shooter case going on at [the hospital]." After driving ten more meters down Route 9, Dr. Gerbaudo and the surrounding traffic came to a "full stop" in response to police cars running lights and sirens approaching from both directions of Route 9. Dr. Gerbaudo described his location as "exactly in front of the Star Market parking lot and [he] could see diagonal to [his] left the CVS." He stated:

> I saw a white male, 5'11", 6 feet, bald or very short hair, dressed with a black jacket . . . walking on the sidewalk westbound limping.
>
> . . . .
>
> [A]s he comes to exactly the location I'm in . . . in my car, . . . he turns right towards the grass area or like, little bump between the sidewalk and the parking lot of the Star Market.
>
> . . . .
>
> And as he reaches the top of that area, the police cars had already arrived and police officers were already on foot with their guns drawn, running after him. . . .
>
> . . . .

> [I]t seemed to be that [the officers] were asking [Root] to put his hands up, go down on his knees or to the ground. And at the time, they actually said probably three, four times while pointing their guns at him. And he turned around facing the officers and as he did that, he, *with his right hand, he took his right hand under his coat and at the time that happened, um, the police officers discharged their firearms on him*.

(Emphasis added.) That statement fully substantiates the officers' versions of events.

Dr. Gerbaudo told investigators that, other than identifying himself as a witness to a police officer on the day of the shooting, he had not "talked to any other police officers or detectives or anyone else" between witnessing the shooting and giving his interview with investigators.

4. Statements from Civilian Witness Shelly McCarthy

Massachusetts state police investigators interviewed McCarthy on February 7, 2020, just three hours after the shooting. McCarthy told those investigators that she "didn't really get a look at" "[Root's] face."

McCarthy testified during her November 5, 2021, deposition, some twenty-one months after the event and her interview, as to her memory. She testified that, for the entire period she observed Root, his right hand was at his chest and his left hand was hanging by his side. She further testified that, after Root fell in the mulched

area, he was lying on his back; he attempted to turn onto his shoulder, but was unable to do so and, in her opinion, could not possibly have returned to his feet. She testified that Root's jacket was "covered in what appeared to be blood," that "[h]e was struggling to breathe" and "making . . . gurgling noises with his breathing," and that initially his breath was "rapid." McCarthy testified that "his eyes [were] all over the place," but his breathing became "very slow," and his eyes became "stuck in the back of his head," despite her having told officers during her interview on the day of the shooting that she "didn't really get a look at" "[Root's] face." McCarthy did not convey these observations to the officers at the time; she described them only after the incident.

McCarthy testified that she was able to recall several of the commands officers gave Root, including "[g]et down!," "[s]how me your hands!," and "[s]tay down!" Although McCarthy did not specifically remember hearing any officer command Root to drop a gun, she also stated that she wasn't able to identify every single command the officers gave given the "chaos."

5. Post-shooting Evidence

Officers retrieved a black gun from Root's person that was later identified as a BB gun. Root's hand had been shot several times. In photographs taken at the scene, the BB gun appeared to have been undamaged and did not have any visible blood on it, although it was wet from the rainy weather that day.

Despite the fact that Root's gun had not been tested for blood evidence and relying entirely on the lack of blood visible to the naked eye, Dr. Jennifer Lipman, a physician retained as an expert witness by Bannon, opined that the BB gun would have been damaged and had blood on it had it been in Root's hand at the time of the shooting. Her opinion did not discuss any possible impact of the day's rainy weather on that conclusion.

An examination of Root's vehicle and the surrounding area showed substantial amounts of blood loss. The search of Root's vehicle also recovered two additional guns, including the gun Root had pointed at BWH security staff and fired at Officer Godin.

Dr. Lipman – Bannon's expert medical witness – opined that "[i]t is not possible to quantify the amount of blood . . . Root lost inside the car, except to say that it was significant." She further opined that this blood loss would have "rendered . . . Root physically and mentally impaired" at the time of the Brookline shooting.

B.

Bannon's complaint includes nine counts, of which seven are relevant to this appeal.[11] Counts One and Two, brought under 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act ("MCRA"), Mass. Gen. Laws ch. 12,

11. In August 2022, the district court granted Bannon's motion to voluntarily dismiss Counts Three and Four, which alleged that the officers had violated Root's due process rights.

§§ 11H-11I, respectively, allege that the individual defendants employed excessive force in violation of the Fourth Amendment during the shooting in Brookline.[12] Counts Eight and Nine are state law assault and battery and wrongful death claims based on the same facts. Counts Five and Six, brought under § 1983 and the MCRA, respectively, allege that Officer McMenamy employed excessive force in violation of the Fourth Amendment in executing the PIT maneuver and in kicking Root during the confrontation in Brookline. Count Seven is a § 1983 claim against the City alleging a failure to adequately train and supervise the defendant BPD officers. The complaint does not allege that the initial shooting at BWH violated the Fourth Amendment, and Bannon does not argue as much on appeal.

On August 8, 2022, following the completion of discovery,[13] the parties filed cross-motions for summary judgment. Bannon sought summary judgment on her claims against the individual defendants, though not on her municipal liability claim against the City. The City, Trooper Conneely, and the BPD officers (represented separately from Trooper Conneely) each moved for

12. The complaint's MCRA counts also allege that the officers' use of force violated Article XIV of the Massachusetts Declaration of Rights. No party cites this provision on appeal, so we do not discuss it further.

13. Before filing an answer, the City moved to dismiss the municipal liability count for failure to state a claim. The district court denied the motion. *See Bannon v. Godin*, No. 20-11501, 2020 U.S. Dist. LEXIS 230093, 2020 WL 7230902 (D. Mass. Dec. 8, 2020). That decision is not before us in this appeal.

summary judgment on all counts in which they were named. After the parties filed their responses, the district court heard argument on the motions in September 2022. The court also received post-hearing supplemental briefing on the City's alleged failure to train.

On December 5, 2022, the court granted the defendants' motions for summary judgment and denied Bannon's motion. *See Bannon*, 2022 U.S. Dist. LEXIS 218303, 2022 WL 17417615, at *1. The court reasoned that summary judgment was appropriate on Bannon's excessive force, assault and battery, and wrongful death claims because, construing the record in the light most favorable to Bannon, no reasonable jury could conclude that the officers had not acted reasonably in their use of force, and so the officers had not violated the Fourth Amendment. *See* 2022 U.S. Dist. LEXIS 218303, [WL] at *3-5, *7. The court emphasized that the officers were aware that (1) having pointed a gun at Godin and pulled the trigger, Root was armed with a gun throughout these events; (2) Root had fled the initial crime scene leading the officers on a dangerous car chase through a densely populated area that ended with a violent collision with vehicles driven by civilian passersby; (3) despite Root's injuries the officers had reason to believe that Root continued to pose an immediate threat to themselves and the public; and (4) that immediate threat escalated when he reached toward the inside of his jacket which the officers reasonably believed meant he was reaching for a gun. *See* 2022 U.S. Dist. LEXIS 218303, [WL] at *4. The court also concluded that Officer McMenamy had acted reasonably in attempting the PIT maneuver and, after telling Root

to get on the ground, in using his foot to move him to the ground. *See* 2022 U.S. Dist. LEXIS 218303, [WL] at *6-7.

The court further reasoned that the officers were, in any event, entitled to qualified immunity because their actions were justified under ample Supreme Court and First Circuit qualified immunity law. *See* 2022 U.S. Dist. LEXIS 218303, [WL] at *5-6. Finally, the court reasoned that, since there was no underlying constitutional violation, Bannon's § 1983 claim against the City also failed. *See* 2022 U.S. Dist. LEXIS 218303, [WL] at *7.

Bannon timely appealed the grant of summary judgment to the defendants. She has not appealed the denial of her own summary judgment motion.

II.

We review a grant of summary judgment de novo. *Fagre v. Parks*, 985 F.3d 16, 21 (1st Cir. 2021). We must construe the facts in the light most favorable to the nonmoving party – here, Bannon – and draw all reasonable inferences in her favor. *Id.* We are not bound by the district court's reasoning and may affirm on any grounds supported by the record. *Minturn v. Monrad*, 64 F.4th 9, 14 (1st Cir. 2023).

III.

We begin with Bannon's appeal from the district court's holding entering summary judgment on the merits of the § 1983, MCRA, assault and battery, and

wrongful death claims based on the officers' alleged use of excessive force. Both the § 1983 and MCRA claims are premised on an alleged underlying violation of the Fourth Amendment, which prohibits "unreasonable . . . seizures." U.S. Const. amend. IV; *see Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Bannon does not dispute that, as a matter of Massachusetts law, if the officers' use of force was reasonable for Fourth Amendment purposes, her assault and battery and wrongful death claims also fail. *See Raiche v. Pietroski*, 623 F.3d 30, 40 (1st Cir. 2010); *McGrath v. Tavares*, 104 N.E.3d 684, 93 Mass. App. Ct. 1115, 2018 Mass. App. Unpub. LEXIS 505, 2018 WL 3040710, at *2 (Mass. App. Ct. 2018) (unpublished table decision). We conclude that no reasonable jury could conclude that the officers engaged in excessive force in violation of the Fourth Amendment, for the reasons stated in Part A below. We independently hold that the officers are entitled to qualified immunity as described in Part B below.

A.

A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's reasonableness standard.[14] *Plumhoff v. Rickard*, 572 U.S. 765, 774, 134 S. Ct. 2012, 188 L. Ed. 2d

14. The defendants do not dispute that the officers "seized" Root for Fourth Amendment purposes during each of the instances of allegedly excessive force – the Brookline shooting, the kick, and the PIT maneuver. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (discussing meaning of "seizure" under Fourth Amendment).

1056 (2014) (citing *Graham*, 490 U.S. at 386). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397.

Reasonableness is assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *id.* at 396, and must take account of "the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation," *id.* at 397.

This inquiry requires analyzing the totality of the circumstances. *Plumhoff*, 572 U.S. at 774. We consider "[1] [w]hether a reasonable officer on the scene could believe that the suspect 'pose[d] an immediate threat to police officers or civilians,'" *Est. of Rahim v. Doe*, 51 F.4th 402, 414 (1st Cir. 2022) (second alteration in original) (quoting *Fagre*, 985 F.3d at 23-24); *see also Kisela v. Hughes*, 584 U.S. 100, 103, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018), "[2] [w]hether a warning was given before the use of force and whether the suspect complied with this command," *Rahim*, 51 F.4th at 414 (citing *Kisela*, 584 U.S. at 106), "[3] [w]hether the suspect was armed . . . at the time of the encounter or whether the officers believed the suspect to be armed," *id.* (citing *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 612, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015)), "[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.* (citing *Kisela*, 584

U.S. at 105-06; *Sheehan*, 575 U.S. at 612), "[5] [w]hether the suspect was advancing on the officers or otherwise escalating the situation," *id.* at 415 (citing *Sheehan*, 575 U.S. at 612-13), "[6] [t]he suspect's physical proximity to the officers at the time of the use of force," *id.* (citing *Kisela*, 584 U.S. at 107), such as whether the individual "was within range to seriously injure the officers at the time they fired," *id.*, "[7] [w]hether multiple officers simultaneously reached the conclusion that a use of force was required," *id.*, and "[8] [t]he nature of the underlying crime," *id.* (citing *Graham*, 490 U.S. at 396).[15]

Each of these eight factors weighs in favor of the officers' use of force.[16]

1. No reasonable jury could conclude that a reasonable officer would not have determined that Root posed an immediate threat.

The record makes clear that any reasonable officer would have concluded that Root posed an immediate threat

15. In *Rahim*, we held that officers were entitled to qualified immunity because "objectively reasonable officers in their position would not have understood their actions to violate the law." 51 F.4th at 413. In so holding, we concluded that each of these factors "thought to be relevant" "[i]n the case law concerning the reasonableness of officers' use of force" weighed in favor of the officers. *Id.* at 413-15.

16. As the dissent agrees, factors 2, 3, 7, and 8 above (respectively, the warnings given, the suspect's armed status, a simultaneous conclusion that use of force was required, and the nature of the underlying crime) clearly weigh in favor of the officers. The others do as well for the reasons explained below.

both to the officers and to the public both before and at the time of the fatal split-second decisions by six officers to shoot Root. The first factor above thus weighs in favor of the officers.

The test is not, as the dissent puts it, whether Root "pose[d] an immediate threat to police officers or civilians." Instead, the correct test is whether a reasonable officer on the scene could believe he did so. *See Fagre*, 985 F.3d at 23 (holding use of deadly force objectively reasonable in part because "[n]o reasonable jury could conclude that it was unreasonable for [officer] to believe that the driver posed an immediate threat").

Each of the officers reasonably believed that Root was armed with a gun. *See, e.g., id.* at 24 (noting risk created by presence of gun). The officers also had every reason to believe Root posed a continuing and immediate threat to them and the public: Officer Godin had witnessed Root fire his gun at him at BWH. Just moments before the shooting, Root had "led [the officers] in a car chase" through an urban area at high speeds, ignoring the officers' "attempt[s] to pull him over," "act[ing] with complete disregard for [the officers'] safety or the safety of anybody else that might have been on the street," and causing a serious collision. *McGrath v. Tavares*, 757 F.3d 20, 28 (1st Cir. 2014). And throughout his interactions with the officers, Root did not comply with lawful orders meant to defuse the situation and eliminate the danger he posed. These included commands to drop his weapon at BWH, to stop and show his hands following the PIT maneuver, and to show his hands immediately before the shooting in Brookline.

The dissent seeks to separate the shooting in Brookline from the context of the morning's events, arguing the officers' "justification for the use of force ha[d] ceased" before they arrived at the scene in Brookline. Nothing in our precedent supports this attempt to subtract from the analysis the officers' observations of Root's apparent willingness to use deadly force and his disregard for public safety given his choice to lead officers on a high speed chase through rush hour traffic, all of which had occurred just minutes before. Indeed, the dissent's position is inconsistent with this circuit's "case law [that] is 'comparatively generous' to officers facing 'potential danger, emergency conditions or other exigent circumstances,'" *McKenney*, 873 F.3d at 81 (quoting *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994)), and black-letter Supreme Court law holding we must consider "the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, *and rapidly evolving* – about the amount of force that is necessary in a particular situation," *Graham*, 490 U.S. at 397 (emphasis added).

Even setting aside the events at BWH, officers reasonably believed Root was armed and fleeing in close proximity both to the officers and to members of the public driving on Route 9 (such as Dr. Gerbaudo) or present in the parking lot (such as McCarthy). *See Conlogue v. Hamilton*, 906 F.3d 150, 158 (1st Cir. 2018) (explaining that "anyone within firing range is in proximity to the life-threatening danger" potentially created by a gun); *Rahim*, 51 F.4th at 415 (explaining that force is more likely to be reasonable when officers are in close proximity to suspect).

We reject Bannon's argument that it was the officers, not Root, who created this situation by closing in on Root's position rather than seeking cover behind their cruisers, creating a perimeter, or delaying in order to assess the situation. A use-of-force expert retained by Bannon opined that the choice to follow Root into the mulched area did not comply with "standard police practices." As the case law makes clear, in situations such as this that opinion entirely misses the point of the legal test. "[T]he Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases," and "a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently." *Roy*, 42 F.3d at 695; *see also Lamont v. New Jersey*, 637 F.3d 177, 185-86 (3d Cir. 2011) (concluding that officers' decision to pursue a suspect into a wooded area rather than create a perimeter – as would have been a standard practice according to the plaintiff's policing expert – did not render the officers' subsequent use of force unreasonable).

Video footage shows the incident unfolding in a public place between Route 9 (on which a steady stream of traffic was moving) and a shopping center parking lot. A reasonable officer would conclude that Root, known to be armed with a gun, would endanger the officers and nearby members of the public if not quickly apprehended. *See Roy*, 42 F.3d at 696; *Dean v. City of Worcester*, 924 F.2d 364, 368 (1st Cir. 1991) (officers encountering suspect in public area had good reason to "effect the intended arrest with . . . alacrity").

Bannon's appeal, in the end, comes down to an argument that the officers and an independent witness did not see what they consistently testified to and say they saw: that, just before each of the officers made the decision to fire, Root appeared to reach for a gun in his jacket.[17] That movement, under the undisputed circumstances, would lead reasonable officers to conclude that Root posed an immediate threat to the safety of both the officers and the nearby public. *See, e.g.*, *Lamont*, 637 F.3d at 183 (holding that officers reasonably employed deadly force where an apparently armed suspect made "a movement uniformly described by those on the scene as being similar to that of drawing a gun").

Five of the officers gave evidence that each, independently, saw Root reach into his jacket as if to reach for a gun, despite commands to show his hands, drop the gun, etc., in the seconds before the shooting. The three officers who could recall which hand Root used agreed it was his right. The other individual defendant, Officer Thomas, testified that while he could not see Root's hands, Root's movements were "abrupt[] and aggressive[]" rather than "surrendering."

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17. The dissent argues from the lack of video footage from what it refers to as the "essential" time period that this means summary judgment was entered in error. Not so. This argument ignores the fact that on the evidence of record the officers and an independent witness all gave consistent testimony, and that this testimony is also entirely consistent with the video footage that *is* available from immediately before and after the shooting. The mere fact that a body camera lens was blocked by an officer's shooting stance at the precise moment officers shot at Root does not, given those other consistent sources of evidence, create a triable issue of fact.

That is exactly what the independent witness saw. Dr. Gerbaudo's witness statement, taken just six days after the shooting, is entirely consistent with and reinforces the officers' testimony.[18] He told investigators that, just prior to the shooting, Root "turned around facing the officers" and that "with his right hand, he took his right hand under his coat," at which time the officers fired. And Dr. Gerbaudo's statement that Root turned reinforces the officers' testimony that Root was moving just before the shooting.

Bannon offers two arguments concerning Root's reach. First, Bannon argues, as does the dissent, that there is a triable issue of fact as to whether the reach occurred. Second, Bannon argues that even if Root was reaching, other facts still render the officers' use of force unreasonable. We reject both arguments.

Here, six different officers from two different law enforcement agencies have offered consistent evidence, supported by independent eyewitness statements. As a result, Bannon bears the burden of producing *contrary evidence* and not just hypothetical disputes. *See Statchen*

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18. Bannon argues that we may not consider Dr. Gerbaudo's statement because he was not deposed and his statements are hearsay. These objections are meritless and are made for the first time on appeal and waived. *See Desrosiers v. Hartford Life & Accident Ins. Co.*, 515 F.3d 87, 91 (1st Cir. 2008) (finding waiver where party failed to object to materials submitted in support of summary judgment). Bannon chose not to depose Dr. Gerbaudo. Further, she does not argue that Dr. Gerbaudo did not witness the events at issue.

v. Palmer, 623 F.3d 15, 18 (1st Cir. 2010); *Lamont*, 637 F.3d at 182 ("[T]he party opposing summary judgment in a deadly-force case must point to evidence – whether direct or circumstantial – that creates a genuine issue of material fact. . . ."). None of the evidence Bannon argues from contradicts the officers' and Dr. Gerbaudo's description of Root's hand movement toward the inside of his jacket.

Bannon and the dissent argue that a reasonable jury could conclude that "Root was unable to act threateningly during the essential time period." We see no such evidence in the record. Bannon relies heavily on McCarthy's testimony that Root kept his right hand at his chest and his left arm at his side throughout the time she observed him, that she did not believe he would be able to stand, and that he appeared to have the "[l]ights on[, but] no one home."

Neither McCarthy's testimony nor any other evidence supports a reasonable inference that Root, after McCarthy observed him, could not have reached his right hand under his jacket. McCarthy's testimony as to the time when she observed Root is *consistent* with the officers' testimony that they saw him later reaching that hand into his jacket. Even were McCarthy's opinion testimony at her deposition, based on a few seconds of observation, that Root would have been unable to stand, admissible, it does not contradict the officers' testimony that they saw him reaching into his jacket. Indeed, video of the incident shows Root moving from his vehicle to the mulched area under his own power just seconds before she saw him. Nor are the testimonies of all of the witnesses to the shooting

called into question by Bannon's medical expert's opinion that Root's injuries and blood loss would have "rendered [him] physically and mentally impaired." Nor would "impair[ment]" mean it was impossible for him to move his arm. No reasonable jury could conclude, contrary to the witness statements, that Root was unable to move his arm. *See Colt Def. LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 709-10 (1st Cir. 2007) (explaining that "a 'mere scintilla' of evidence" is insufficient to create triable issue (quoting *Hochen v. Bobst Grp., Inc.*, 290 F.3d 446, 453 (1st Cir. 2002))). Nor does that expert's opinion that Root's gun would have shown visible blood or damage had it been in his hand at the time of the shooting call into question the reasonableness of any of the officers' conclusions from their observations that Root was reaching inside his jacket for what they believed to be a weapon.

As a fallback position, Bannon asserts that, even if Root did reach, the officers still could not reasonably have concluded that he posed an immediate threat.[19] This

19. The cases that Bannon cites involving physically or mentally impaired individuals whom courts concluded were not immediate threats are readily distinguishable. *Woodcock v. City of Bowling Green*, 679 F. App'x 419 (6th Cir. 2017) (unpublished) (holding force unconstitutional where officers shot man who had not threatened officers or anyone present, made non-threatening movements, and was seventy feet away from officers); *Palma v. Johns*, 27 F.4th 419 (6th Cir. 2022) (holding force unconstitutional where officer did not reasonably believe suspect was armed or engaged in any serious crime and suspect was not acting aggressively); *Est. of Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020) (holding force unconstitutional where suspect was not engaged in serious crime and was injured on the ground,

position is untenable. The officers did not know the details of Root's medical condition, and Bannon's own expert stops short of any opinion that Root was so incapacitated as to be unable to reach for a gun, point it, or pull a trigger. Nor were Root's actions an attempt to comply with officer commands to show his hands, as Bannon posits. Multiple officers explicitly stated that Root moved his hand into his jacket – a movement inconsistent with showing his hands.

We easily reject Bannon's and the dissent's next argument that the "self-serving" officers' testimony means they are not entitled to summary judgment. This is not circuit law, and the record does not support the contention.

The purported inconsistencies Bannon and the dissent point to do not go to the issue of whether Root reached. Given that the officers arrived at different times, had different vantage points, and had only seconds to assess the scene under chaotic circumstances, these minor differences in testimony are perfectly consistent. Beyond that, the officers testified consistently under oath concerning the reach.[20] That reach seen by a reasonable

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motionless, and armed only with knife pinned under his body); *McKenney v. Mangino*, 873 F.3d 75 (1st Cir. 2017) (holding use of force unconstitutional where suspect did not point firearm at anyone or threaten officers, was moving slowly, and was sixty-nine feet away).

20. No material dispute of fact emerges from the officers having spoken together after the very tense event putting them in danger and before speaking to investigators, even if doing so violated BPD rules (as Bannon asserts).

officer would lead the officer to conclude that Root, known to be armed, presented an immediate threat whether he was seen as struggling to get up or not. Not just one officer gave this account, but every officer at the scene.

This argument also ignores disinterested sources of evidence consistent with the officers' statements. Bannon does not contend that Dr. Gerbaudo's corroborating statements could conceivably have been coordinated with the officers. And body-worn camera footage from the day shows Trooper Conneely recovering the BB gun from the area of Root's chest and hands moments after the shots were fired. The uncontroverted and disinterested evidence shows that any reasonable officer would believe (1) that Root was armed, (2) that such weapons were concealed in his jacket (particularly given that he had flashed a weapon earlier in the day by opening his jacket), and (3) that Root reached into that jacket. We add that a gun was recovered from the area of his body near which Root's hands had been reaching just seconds before officers fired.

As this court has often held, a party cannot survive summary judgment simply by asserting that a jury might disbelieve the moving party's evidence. The non-moving party, Bannon, must instead present sufficient affirmative evidence of its own to create material issues of fact.[21]

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21. The dissent suggests that where an officer kills the sole other witness the officer's testimony is inherently not credible and cites *Flythe v. District of Columbia*, 791 F.3d 13, 416 U.S. App. D.C. 190 (D.C. Cir. 2015). *Flythe* does not stand for that proposition in the D.C Circuit, nor is that this circuit's law. Moreover, *Flythe* is entirely consistent with circuit law and easily distinguishable on

See, e.g., Sears, Roebuck & Co. v. *Goldstone & Sudalter, P.C.*, 128 F.3d 10, 18 (1st Cir. 1997); *see also LaFrenier v. Kinirey*, 550 F.3d 166, 167-68 (1st Cir. 2008) (holding that, where two defendant police officers' testimony was consistent as to key point, that testimony could support summary judgment despite fact officers were not "disinterested" in result).[22] In short, we see "nothing

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the facts. There, the testimony of a sole officer as to the individual he shot "conflict[ed] with that of every other witness" who saw the event and "conflict[ed] with . . . the physical evidence" which supported the other witness's testimony, creating a material issue of fact. *Id.* at 20. Here, by contrast, every witness to the event testified consistently, and that included independent witnesses. Indeed, we have engaged in the "careful[] examin[ation] [of the] direct and circumstantial evidence presented by the parties" that the dissent argues our precedent requires and conclude that evidence supports summary judgment for the officers.

22. The record does not support the dissent's view that officers gave conflicting testimony as to whether Officer McMenamy kicked Root to the ground and that Trooper Conneely testified that he saw Root's gun in his hand which, in the dissent's view, is impossible given the lack of visible blood on Root's gun. This argument fails to account for the varying arrival times and vantage points of the officers at the time of the shooting.

The dissent also cites *Goodwin v. City of Painesville*, 781 F.3d 314, 322-23 (6th Cir. 2015), for the proposition that Officer Godin's failure to activate his body-worn camera "could weigh against [his] credibility." That is not the rule of this circuit. It is also inapposite: in *Goodwin* there was evidence that the officer had a pattern of "avoiding documentation of his actions" and "had already been warned about his failure to use a recording device during an earlier citizen encounter." *Id.* at 322. Here, there is no evidence that Officer Godin had a habit of failing to activate his body-worn camera – to the contrary, Officer Godin had made two recordings with that camera that very morning.

inherently unbelievable about [the] officer[s'] testimony." *LaFrenier*, 550 F.3d at 168.

Six officers operating under "tense, uncertain, and rapidly evolving" "circumstances," *Graham*, 490 U.S. at 397, all made identical and simultaneous "split-second judgments," *id.*, that deadly force was necessary to protect themselves and the nearby public from Root. No reasonable juror could conclude that all six of those officers unanimously, independently, and simultaneously reached an unreasonable conclusion.

2. No reasonable jury could conclude that the other factors weigh against the officers.

The remaining factors – "[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," "[w]hether the suspect was advancing on the officers or otherwise escalating the situation," and "[t]he suspect's physical proximity to the officers at the time of the use of force" such as whether the individual "was within range to seriously injure the officers at the time they fired," *Rahim*, 51 F.4th at 414-15 – also favor the officers.

It was Root who escalated the threat when he reached for a gun concealed in his jacket, *see, e.g., Conlogue*, 906 F.3d at 156 (holding suspect was "escalat[ing] confrontation" where he "raised [a] gun, and waved it back and forth" and "refused to comply" with commands "to drop his weapon"), and certainly "was within range

to seriously injury the officers at the time they fired," *Rahim*, 51 F.4th at 415. Further, Root had just led the officers on a dangerous car chase, stopping only when he had caused a collision that disabled his vehicle. Throughout his interactions with the police, he had repeatedly failed to obey lawful commands. And rather than giving any affirmative indication of surrender, he instead moved his arm in a way that officers perceived to be a reach for a gun. *Cf. Johnson v. Scott*, 576 F.3d 658, 660 (7th Cir. 2009) (noting that an officer "had no idea how [a suspect] was going to behave once he was cornered" and was not "required . . . to take [the suspect's] apparent surrender at face value, a split second after [the suspect] stopped running").

Finally, the record does not support the dissent's view that "[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," *Rahim*, 51 F.4th at 414, "cuts both ways." Not so. Root led officers on a high-speed chase through heavily trafficked streets during the morning rush hour after pointing an apparent gun at law enforcement officers at a hospital, crashing his car into civilian cars, and continuing to run away. Under those circumstances, "[t]he speed with which officers had to respond to unfolding events," *id.*, points unequivocally in favor of the reasonableness of the officers' use of force here.

Under the totality of the circumstances, no reasonable jury could conclude that the officers acted unreasonably in employing deadly force against Root in violation of

the Fourth Amendment.[23] We affirm entry of summary judgment for the defendants on Bannon's § 1983, MCRA, assault and battery, and wrongful death claims arising from the shooting. *See Fagre*, 985 F.3d at 24; *Raiche*, 623 F.3d at 40; *Tavares*, 2018 Mass. App. Unpub. LEXIS 505, 2018 WL 3040710, at *2.

B.

We independently conclude that the officers are entitled to summary judgment on Bannon's § 1983 and MCRA claims[24] based on qualified immunity. *Fagre*, 985 F.3d at 24; *Rahim*, 51 F.4th at 413-15.

Qualified immunity renders government officials sued in their official capacities immune to damages claims unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *Fagre*, 985 F.3d at 24 (internal quotation marks omitted) (quoting *Irish v. Fowler*, 979 F.3d 65, 76 (1st Cir. 2020)). "This is a 'heavy burden' for a plaintiff to meet." *Johnson v. City of Biddeford*, 92 F.4th 367, 375-76 (1st Cir. 2024) (quoting *Rahim*, 51 F.4th at 410). "The qualified immunity [the

23. Bannon argued in the district court that, even if the officers were initially justified in firing at Root, the number of shots fired was excessive. She has not renewed this argument on appeal, so we do not address it.

24. "Qualified immunity principles developed under 42 U.S.C. § 1983 apply equally to MCRA claims." *Krupien v. Ritcey*, 94 Mass. App. Ct. 131, 112 N.E.3d 302, 306 & 306 n.7 (Mass. App. Ct. 2018).

officers] enjoy . . . the Supreme Court of the United States has explained is intended to 'protect[] all but the plainly incompetent or those who knowingly violate the law.'" *Jakuttis v. Town of Dracut*, 95 F.4th 22, 30 (1st Cir. 2024) (quoting *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017)). "Thus, if an objectively reasonable official in [the officers'] shoes 'might not have known for certain that their conduct was unlawful,' then [the officers] '[are] immune from liability.'" *Id.* (third alteration in original) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 152, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017)).

"In the Fourth Amendment context, the '[s]pecificity' of the rule set forth in such precedent 'is especially important,' because it can be 'difficult for an officer to determine how the relevant legal doctrine,' such as excessive force, 'will apply to the factual situation the officer confronts.'" *Lachance v. Town of Charlton*, 990 F.3d 14, 21 (1st Cir. 2021) (alteration in original) (quoting *City of Escondido v. Emmons*, 586 U.S. 38, 42, 139 S. Ct. 500, 202 L. Ed. 2d 455 (2019)). Thus, outside of obvious cases, "'relevant case law,' where 'an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment,' is 'usually necessary' to overcome officers' qualified immunity." *Id.* (omission in original) (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 64, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018)). The plaintiff bears the burden of "identify[ing] controlling authority or a consensus of persuasive authority sufficient to put the officers on notice that their conduct violated the law." *Rahim*, 51 F.4th at 412.

Bannon has failed to "identif[y] a single precedent finding a Fourth Amendment violation under similar circumstances." *City of Tahlequah v. Bond*, 595 U.S. 9, 14, 142 S. Ct. 9, 211 L. Ed. 2d 170 (2021). We have already explained why the cases on which Bannon principally relies, such as *Woodcock* and *Estate of Jones*, involve factual scenarios too dissimilar from those confronted by the officers here to clearly establish any relevant right. Bannon cites *Franklin v. City of Charlotte*, 64 F.4th 519, 532-34 (4th Cir. 2023), a case which was decided over three years after the shooting in February 2020, and so could not have placed the officers on notice of a potential constitutional violation at the time of the incident. *See City of Tahlequah*, 595 U.S. at 13 (explaining that a case "decided after the shooting at issue[] is of no use in the clearly established inquiry"). There, the man shot by officers was not aggressive or threatening, did not attempt to resist or flee, and sought to comply with police orders to drop his weapon by "carefully pull[ing] [his] firearm out of his jacket, point[ing] it at no one, and [holding] it with just one hand from the top of the barrel" in a "non-firing grip." *Franklin*, 64 F.4th at 532-34.

In addition to the clearly established law supporting the officers, we also hold that "objectively reasonable officers . . . would not have understood the[se] actions to violate the law," *Rahim*, 51 F.4th at 413, for the reasons discussed earlier. The officers thus are entitled to qualified immunity on that independent basis. *Id.*

On this issue the dissent begins from the premise, not supported by the record, "that . . . a reasonable factfinder could disbelieve the officers' testimony and find that Root was not and could not act threateningly at the time of the shooting." We have already explained in detail why, properly considering the totality of the circumstances, this premise is incorrect under the well-settled precedent of our circuit. From that erroneous premise the dissent, taking language from *Stamps v. Town of Framingham*, 813 F.3d 27, 39-40 (1st Cir. 2016), argues "'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.'" (Alteration in original.) *Stamps* concerned one officer who shot a man who "was fully complying with the orders he was given, was unarmed and flat on his stomach in the hallway, and [who] constituted no threat." *Id.* at 31. Even on the dissent's own preferred read of the evidence, here Root was understood to be armed, was failing to comply with officer orders, and had, at least until seconds earlier, posed a real threat to officers and the general public by virtue of his erratic driving at high speeds. Unlike *Stamps*, this is not a case where officers "sho[t] a person who [wa]s bleeding on the ground and unable to make sudden movements," *Stamps*, 813 F.3d at 39-40, for all the reasons discussed above.

We affirm the entry of summary judgment on the § 1983 and MCRA claims for the several reasons stated based on qualified immunity.

IV.

We turn to Bannon's other excessive force claims against only Officer McMenamy under § 1983 and the MCRA. We affirm the district court's grant of summary judgment to Officer McMenamy.

We begin with Bannon's claims concerning Officer McMenamy's use of the PIT maneuver to try to stop Root's car with his cruiser. Without deciding whether Officer McMenamy's conduct violated the Fourth Amendment, we affirm based on qualified immunity.

Bannon has not met her burden of "identify[ing] either controlling authority or a consensus of persuasive authority sufficient to put [Officer McMenamy] on notice that his conduct fell short of the constitutional norm."[25] *Rahim*, 51 F.4th at 410. Bannon's brief does not identify any precedent on this issue finding a Fourth Amendment violation at all, citing instead two decisions dealing with

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25. Bannon does not contend an alleged constitutional violation was so "obvious" that "any competent officer would have known that [the maneuver] would violate the Fourth Amendment," *Kisela*, 584 U.S. at 106, nor could she plausibly do so, *cf., e.g., Scott v. Harris*, 550 U.S. 372, 374, 386, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (holding that it is at least sometimes reasonable for an officer to intentionally collide with a suspect's vehicle during a pursuit). Nor does the fact that the PIT maneuver violated BPD policy strip Officer McMenamy of immunity. *See Davis v. Scherer*, 468 U.S. 183, 194-96, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.").

alleged due process violations, neither of which involved an intentional police cruiser collision with a fleeing, armed suspect under circumstances like those presented here. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 836-38, 854, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 & 854 n.13 (1998); *Checki v. Webb*, 785 F.2d 534, 535-36, 538 (5th Cir. 1986).[26] That failure ends her appeal on this claim.

Bannon also argues that Officer McMenamy violated the Fourth Amendment when he kicked Root after arriving at the scene in Brookline. Officer McMenamy responds that the use of force was reasonable under the circumstances, and we agree.[27]

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26. In addition to addressing a different constitutional issue, *Lewis* found no constitutional violation. *See* 523 U.S. at 855. And Bannon acknowledges that the facts of *Checki*, in which two defendant police officers, apparently without any provocation and without providing any indication that they were officers, pursued the plaintiff in a high-speed chase involving "speeds in excess of 100 M.P.H.," occasionally "tailgating to within two to three feet" of the pursued car, 785 F.2d at 535, "are not similar to this case," *cf. Kisela*, 584 U.S. at 106-07 (explaining why various precedents were insufficiently factually similar to show that a right was clearly established).

27. Contrary to Bannon's assertion that Officer McMenamy "did not seek summary judgment as to the kick" and has thereby waived the issue, Officer McMenamy sought summary judgment on all counts. His memorandum in support of his summary judgment motion did not specifically discuss the kick, but he briefed the issue in responding to Bannon's motion for summary judgment. Further, the district court analyzed the kick, *see Bannon*, 2022 U.S. Dist. LEXIS 218303, 2022 WL 17417615, at *7, and the parties have fully briefed it on appeal.

An officer's use of nondeadly force, like the use of deadly force, is governed by a Fourth Amendment reasonableness standard, *see Graham*, 490 U.S. at 396, under which we also must pay "careful attention to the facts and circumstances," *id*. The facts support the reasonableness of Officer McMenamy's actions, such that no reasonable jury could find a constitutional violation.

At the time of Officer McMenamy's kick, he was aware of multiple severe crimes at issue: Root was armed; had demonstrated intent to harm officers and civilians, including hospital patients; had fled in a vehicle at high speeds and, once that vehicle was no longer functional after the collision, continued to flee on foot; was in close proximity to officers and the public; and continued to disregard lawful orders to show his hands, get on the ground, etc.

Even assuming, favorably to Root and contrary to Officer McMenamy's testimony, that Root was stationary at the time of the kick, a reasonable officer would not assume that Root had ceased his efforts to "evade arrest." *Graham*, 490 U.S. at 396; *cf. Johnson*, 576 F.3d at 660 ("No law that we know of required [an officer] to take [a suspect's] apparent surrender at face value, a split second after [the suspect] stopped running.").

Under these circumstances, a reasonable officer would believe that the force employed by Officer McMenamy was appropriate. After ordering Root to show his hands and get on the ground, McMenamy used his foot to "push[] [Root] to the ground." Bannon has produced no

evidence that the kick caused any injury or was otherwise unduly forceful. *See Dean* at 369 (noting that a suspect's "minor physical injuries" were "insufficient to support an inference that . . . officers used inordinate force" when "subdu[ing] an armed felon on a busy city street"); *see also Graham*, 490 U.S. at 396 ("'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." (citation omitted) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973))). Even assuming Root was lying on the ground, we still conclude that, under the circumstances, a reasonable officer would be justified in using his foot to push an unsecured armed suspect toward the ground to ensure that that suspect did not begin to rise. The cases Bannon cites, which involved unwarranted beatings of already-secured suspects, are obviously distinguishable. *See Alicea v. Thomas*, 815 F.3d 283, 287, 292 (7th Cir. 2016); *Boozer v. Sarria*, No. 09-cv-2102, 2010 U.S. Dist. LEXIS 106820, 2010 WL 3937164, at *1, *6 (N.D. Ga. Oct. 4, 2010).

V.

Finally, we affirm the district court's grant of summary judgment to the City on Bannon's § 1983 claim alleging a failure by the City to adequately train its officers.[28]

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28. Bannon's complaint styles the count against the City as sounding in "negligent training and supervision." The City, in moving for summary judgment, construed the claim as one based entirely on failure to train, noting that the claim's "substance principally concerns the City's purported failure to train its

"[A] municipality 'may be liable under [§ 1983] if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such deprivation.'" *Haley v. City of Boston*, 657 F.3d 39, 51 (1st Cir. 2011) (internal quotation marks omitted) (quoting *Connick v. Thompson*, 563 U.S. 51, 60, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011)). Municipalities "are responsible only for their own unconstitutional acts," and "are not vicariously liable . . . for the actions of their non-policymaking employees," and so "a plaintiff must 'identify a municipal policy or custom that caused the plaintiff's injury.'" *Id.* (internal quotation marks omitted) (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)).

A municipality's "decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983," but only where the "failure to train its employees in a relevant respect . . . amount[s] to

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officers." While Bannon argues that the City has therefore "waived any right to argue that it is seeking summary judgment concerning its failure to supervise," the City's reading of the complaint is a fair one, as the pleading makes only passing references to a failure-to-supervise theory. At minimum, Bannon bore the burden of explaining why her failure-to-supervise theory offers a distinct basis for relief, yet she has never done so in any detail, instead asserting vaguely in footnotes in the district court and on appeal that discovery produced evidence of the City's purported failure to supervise its officers. Bannon has waived any argument based on a failure-to-supervise theory. *See, e.g., FinSight I LP v. Seaver*, 50 F.4th 226, 235 (1st Cir. 2022); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990).

'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Connick*, 563 U.S. at 61 (last alteration in original) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). The deliberate indifference standard is "stringent" and "requir[es] proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* (quoting *Brown*, 520 U.S. at 410). "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train," *id.* at 62 (quoting *Brown*, 520 U.S. at 409), although liability based on a single incident may be possible in rare cases where "the need for more or different training is . . . obvious, and the inadequacy [is highly] likely to result in the violation of constitutional rights," *City of Canton*, 489 U.S. at 390; *see Connick*, 563 U.S. at 63-64.

This theory of municipal liability is viable only where a plaintiff establishes the existence of "underlying, identifiable constitutional violations. . . ." *Lachance*, 990 F.3d at 31 (omission in original) (quoting *Kennedy v. Town of Billerica*, 617 F.3d 520, 531 (1st Cir. 2010)). We have already held that neither the shooting nor the kick violated the Fourth Amendment, and so neither can support the claim against the City. Any liability on this claim would have to stem from the only other purported constitutional violation identified by Bannon – the claim of excessive force in Officer McMenamy's attempted PIT maneuver.

Regardless, Bannon cannot show deliberate indifference on the part of the City. BPD policy expressly

forbids officers from deliberately colliding with suspects' vehicles. A Department rule provides: "Officers shall not use their police vehicle to deliberately make contact with a pursued vehicle." The undisputed facts show that the City trained BPD recruits, including Officer McMenamy, about this rule. An instructor from the Boston Police Academy deposed on behalf of the City, *see* Fed. R. Civ. P. 30(b)(6), testified that "[BPD] recruits . . . [are] taught that they are prohibited from using their police vehicle[s] to deliberately strike . . . vehicle[s] that[] [are] being pursued." Officer McMenamy confirmed in his deposition that he was trained not to perform PIT maneuvers and that he was aware on the day of the incident that PIT maneuvers and the use of his vehicle to strike a pursued vehicle were prohibited by BPD policy.

Bannon has not shown that the City had any reason to anticipate that this training would be inadequate. Her brief asserts that "BPD has a long history of excessive force complaints," but does not argue that any of these complaints involved "similar [alleged] constitutional violations," *Connick*, 563 U.S. at 62, like the PIT maneuver. Nor has Bannon explained why it was "obvious" that the City's training concerning PIT maneuvers would be inadequate. *Id.* at 64. On this record, no reasonable factfinder could find deliberate indifference, making summary judgment for the City appropriate.

The entry of summary judgment for defendants is *affirmed*. No costs are awarded.

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, 416 U.S. App. D.C. 190 (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 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;

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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.

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 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

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.

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. 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

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.

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

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.

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 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."

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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.

Prior to the officers being interviewed by the Massachusetts state police investigators, the officers from the 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 observing Root's state, she thought he was unable to stand or speak.

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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."

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. 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

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.

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]

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

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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.

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, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (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

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

six minutes, the officers and dispatch communicated over their radios 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]

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were traveling "only 35 miles per hour") and video evidence that shows the cars traveling at a slow rate of speed.

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)

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

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(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 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.

reaching into his jacket, others testified that they fired because Root was removing his hand from his jacket, and yet another officer testified that 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 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

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).

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, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (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, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (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*, 584 U.S. 100, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (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]

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

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 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

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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))).

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.

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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.

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, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (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 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, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (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, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) (quoting *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (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, 105 S. Ct. 1694, 85 L. Ed. 2d 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.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1958

JENNIFER ROOT BANNON, AS THE SPECIAL PERSONAL REPRESENTATIVE OF THE ESTATE OF JUSTON ROOT,

Plaintiff, Appellant,

v.

DAVID GODIN, BOSTON POLICE OFFICER; JOSEPH MCMENAMY, BOSTON POLICE OFFICER; LEROY FERNANDES, BOSTON POLICE OFFICER; BRENDA FIGUEROA, BOSTON POLICE OFFICER; COREY THOMAS, BOSTON POLICE OFFICER; PAUL CONNEELY, MASSACHUSETTS STATE TROOPER; THE CITY OF BOSTON,

Defendants, Appellees.

JUDGMENT

Entered: April 22, 2024

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's entry of summary judgment for defendants is affirmed.

By the Court:

Maria R. Hamilton, Clerk

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT OF MASSACHUSETTS, FILED DECEMBER 5, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 20-11501-RGS

JENNIFER ROOT BANNON

v.

BOSTON POLICE OFFICERS DAVID GODIN, JOSEPH MCMENAMY, LEROY FERNANDES, COREY THOMAS, AND BRENDA FIGUEROA; MASSACHUSETTS STATE TROOPER PAUL CONNEELY; AND THE CITY OF BOSTON

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

December 5, 2022, Decided;
December 5, 2022, Filed

STEARNS, D.J.

On February 7, 2020, Juston Root was shot and killed by law enforcement after pointing and discharging what appeared to be a firearm at a Boston police officer and then leading police on a car chase through Boston and Brookline. Root's sister, Jennifer Root Bannon, acting as the special personal representative for Root's estate, sued the officers involved in Root's death as well as the City of

Boston as their employer. At the close of discovery, the parties cross-moved for summary judgment. Although the circumstances of this case are undeniably tragic, the court is constrained by legal precedent and the undisputed facts to rule in defendants' favor. Accordingly, for the reasons that follow, the court will grant defendants' motions for summary judgment and deny Bannon's motion for partial summary judgment.

BACKGROUND

On the morning of February 7, 2020, the Boston Police Department (BPD) received a call warning that a person with a gun had been seen on the grounds of Brigham & Women's Hospital (BWH), located on Francis Street in Boston. Bannon Statement of Undisputed Material Facts (BSUMF) (Dkt # 88) ¶¶ 1, 5. Boston Police Officer David Godin responded to the call and encountered Root, who falsely identified himself as a law enforcement officer. *Id.* ¶¶ 6, 8. Root then aimed what was later determined to be a paintball gun at Godin and pulled the trigger. *Id.* ¶ 9. Godin returned fire and tripped backwards onto the street. *Id.* ¶¶ 10, 14. Another officer who responded to the call, Michael St. Peter, witnessed the exchange and fired his weapon at Root. *Id.* ¶¶ 11-13.

Injured, Root limped to his nearby vehicle and drove in the direction of Huntington Avenue. *Id.* ¶¶ 17, 22. Godin and St. Peter gave chase, while Godin reported over the BPD radio that shots had been fired and that he believed Root had been hit. *Id.* ¶¶ 24-25. Other BPD officers joined the pursuit, including Joseph McMenamy, Leroy

Fernandes, Brenda Figueroa, and Corey Thomas. *Id.* ¶¶ 29, 31. In an effort to stop Root, McMenamy performed a "PIT maneuver," ramming the side of Root's vehicle with his police cruiser. *Id.* ¶¶ 37-41.[1]

Undeterred by the collision, Root continued westbound onto Route 9 in Brookline, where Massachusetts State Trooper Paul Conneely joined the chase. *Id.* ¶¶ 54-55. Root collided with other vehicles at the intersection of Route 9 and Hammond Street, and his vehicle – which at this point was heavily damaged – came to a stop. *Id.* ¶¶ 56-60. Root exited his vehicle, limped onto the sidewalk, and fell. *Id.* ¶¶ 67-69. He then got back up, walked to a mulched area adjacent to the sidewalk, and collapsed. *Id.* ¶¶ 70-71.

Shelly McCarthy, an EMS-certified passerby who had been sitting in her car when Root's vehicle came to a stop, ran over to assist Root. *Id.* ¶¶ 73-75. Root, in McCarthy's estimation, was gravely injured. *Id.* ¶¶ 78-81. McCarthy stated that during the entire time that Root was in her line of sight, his right hand clutched his chest while his left hand dangled at his side. *Id.* ¶ 82. At that point, officers converged on the scene and began shouting commands over one another. *Id.* ¶¶ 84-88; *see id.* ¶ 89 ("McMenamy, Thomas, and Conneely stated that the scene . . . was chaotic."). McCarthy heard an officer yell at her to "run," and she did. *Id.* ¶¶ 85-86. Officers continued to give Root overlapping verbal commands to "get on the ground," "stay

1. McMenamy's maneuver was done in violation of written BPD policy. *See id.* ¶ 50 (BPD Rule 301 provides that "[o]fficers shall not use their police vehicle to deliberately make contact with a pursued vehicle").

down," and "show me your hands." *Id.* ¶¶ 90, 94, 98, 100. McMenamy closed in and pushed Root to the ground with the bottom of his left foot. *Id.* ¶¶ 108-110.

Fernandes testified that Root "reached into what appeared to be a jacket" and that he saw Root's "'arm, shoulder, arm motion' like it was 'coming out' of the jacket." *Id.* ¶¶ 112, 115. Figueroa stated that she witnessed Root "'removing his hand out of his jacket,' and 'the handle of a firearm was shown.'" *Id.* ¶ 122. Godin recalled Root "reaching with his right hand into his jacket, and someone yelling gun." *Id.* ¶ 127. McMenamy stated that he saw Root "'open up his jacket,' 'saw a floating gun in [Root's] chest,' and 'saw [Root's] hand reach over and get to there.'" *Id.* ¶ 135. Conneely testified that Root's "right hand went inside his jacket" and he saw Root's "hand around a black handle coming up." *Id.* ¶ 154.

Fernandes, Figueroa, Godin, McMenamy, Conneely, and Thomas opened fire on Root, rapidly unloading a total of thirty-one rounds. *Id.* ¶¶ 160-166. Thomas did not see Root reach into his jacket, but he testified that he "heard . . . one gunshot and . . . presumed [Root] was shooting at the other officers," which "caused [him] to start shooting as well." *Id.* ¶ 146. A bystander, Dr. Victor Gerbaudo, witnessed "Root reach inside his jacket just before the officers discharged their firearms." City Defs.' Statement of Undisputed Material Facts (CDSUMF) (Dkt # 95) ¶ 58.

Root was transported by ambulance to Beth Israel Deaconess Medical Center where he was pronounced dead. BSUMF ¶ 178. Officers recovered a "bb" gun with

a metal rod extending from its barrel in the mulch near Root's body. *Id.* ¶ 182.

DISCUSSION

"Summary judgment is warranted if the record, construed in the light most flattering 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.'" *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 21 (1st Cir. 2018), quoting *McKenney v. Mangino*, 873 F.3d 75, 80 (1st Cir. 2017). The moving party "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If this is accomplished, the burden then "shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation and from which a reasonable jury could find for the nonmoving party." *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir. 1990).

Deadly Force by Individual Defendants (Counts I, VIII-IX)

The crux of Bannon's excessive force, assault and battery, and wrongful death claims against the individual defendants is that their use of deadly force against Root at the Route 9 crash scene was unreasonable and unjustified. The individual defendants contend that their use of deadly force in the chaotic, highly emotive, and ambiguous

circumstances surrounding the final confrontation with Root did not violate his Fourth Amendment rights. In any event, the officers maintain that they are protected by the doctrine of qualified immunity.

Qualified immunity attaches to discretionary conduct of government officials that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The inquiry into whether a constitutional right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *See Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 45 (1st Cir. 2016), quoting *Mullenix v. Luna*, 557 U.S. 7, 12 (2015). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam), quoting *Malley v. Briggs*, 475 U.S. 335, 343, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

> Law enforcement officers quite often are required to assess . . . probabilities[] and to weigh the attendant contingencies. And it is precisely such spontaneous judgment calls—borne of necessity in rapidly evolving, life-endangering circumstances—that the qualified immunity doctrine was designed to insulate from judicial second-guessing in civil actions for money damages, unless the challenged conduct

> was clearly incompetent or undertaken in plain violation of established law.

Hegarty v. Somerset Cnty., 53 F.3d 1367, 1377 (1st Cir. 1995).

When faced with a claim of qualified immunity, a court may choose to "first determine whether the plaintiff has alleged a deprivation of an actual constitutional right at all." *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999). The "threshold" question in this mode of analysis can be stated as follows:

> Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.

Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).[2]

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2. This analytical sequence is not mandated. "There are circumstances in which the first step of the *Saucier* procedure may create a risk of bad decisionmaking," *Pearson v. Callahan*, 555 U.S. 223, 239, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009), as there are

Turning to the constitutional issue – and after viewing the undisputed facts in the light most favorable to Bannon – the court concludes that the defendant officers did not violate Root's Fourth Amendment rights. We begin with some basic Fourth Amendment principles. "[*A*]*ll* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest" are to be decided under a Fourth Amendment standard of reasonableness, the proper application of which "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 395-396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (emphasis in original) (rejecting a Fourteenth Amendment substantive due process analysis of excessive force claims). The standard by which excessive force is to be gauged is an objective one: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397. *See also Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994) (officers attempting to subdue a violent, mentally ill suspect acted reasonably in resorting to deadly force after being unexpectedly fired upon). *Cf. Roy v. City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) ("[W]hether substantive

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cases "in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all." *Id.*

liability or qualified immunity is at issue, the Supreme Court intended to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases.").

The officers were aware that Root was reportedly armed and dangerous, having pointed what appeared to be a firearm at Godin and pulled the trigger during the BWH confrontation.[3] Further, Root had just fled the initial crime scene, leading the officers on a dangerous car chase through a densely populated area, culminating in Root's violent collision with vehicles driven by civilian passersby. Despite Root's injuries, the officers had reason to believe that Root continued to pose an immediate threat to themselves and to the public.

This threat of danger was escalated when Root reached into his jacket, an action that officers reasonably interpreted as an attempt to retrieve a firearm. Given the circumstances, the officers had reason to believe that Root was armed, and his behavior "would lead almost anyone to believe that he was reaching for a weapon." *Escalera-Salgado v. United States*, 911 F.3d 38, 41 (1st Cir. 2018). Where, as here, "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally

3. Although the weapon wielded by Root at the BWH scene ultimately turned out to be nonlethal, a reasonable officer in Godin's and St. Peter's situation would have been warranted in the belief that Root had discharged a deadly firearm at Godin.

unreasonable [to use] deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).[4]

Bannon has provided no evidence to rebut the officers' testimony that Root was reaching into his jacket before the officers opened fire. Although McCarthy testified that Root's hands did not change position while he was in her line of sight, she had turned away to run at the officers' command and did not see what Root's hands were doing at the time the officers started shooting. Moreover, although Bannon takes issue with the self-serving nature of the officers' statements, self-serving deposition testimony may properly be considered on summary judgment. *See Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 18 (1st Cir. 2007) (providing that the deponent's testimony "sets forth specific facts, within his personal knowledge that, if proven, would affect the outcome of the trial, the testimony must be accepted as true for purposes of summary judgment"). In any event, the court does not have to simply take the officers at their word. Dr. Gerbaudo, a disinterested bystander who

4. The case that Bannon relies on in support of her argument that deadly force was unreasonable, *Woodcock v. City of Bowling Green*, 679 F. App'x 419 (6th Cir. 2017), is inapposite. There, the Sixth Circuit explained that the use of deadly force where the decedent had a hand in his pocket was objectively unreasonable because the officer "may have thought that [the decedent] had a gun, but [the decedent] never gave [the officer] reason to think he would use it imminently." *Id.* at 424-425. Unlike in *Woodcock*, Root was observed to be reaching into his jacket, an affirmative action that gave the officers "reason to think" that (as earlier at BWH) Root had a firearm *and* that "he would use it imminently." *Id.*

witnessed the events, stated that he saw Root reach into his jacket immediately before the officers opened fire.[5]

Bannon argues that the officers failed to provide Root with clear verbal commands and that they "did not take cover, use any de-escalation techniques, use less-lethal force options like OC spray or a baton, or warn . . . Root that deadly force may be used." Bannon Mem. (Dkt # 87) at 12-13. That may well be true. But, as the officers point out, the "calculus of reasonableness" in the Fourth Amendment context must make "allowance" for law enforcement "to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-397. Such is essentially the case here.

Finally, the court rejects Bannon's contention that the number of shots fired at Root – by six officers in rapid succession lasting only a few seconds – was constitutionally

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5. Bannon's reliance on Dr. Jennifer Lipman's expert testimony that, "had Mr. Root's hand been as close to the bb gun as the Individual Defendants contend, it is unlikely that the bb gun would have emerged unscathed while Mr. Root's hand suffered multiple gunshot wounds," Bannon Opp'n to Individual Defs.' Mot. (Dkt # 113) at 18, is misplaced. At most, Dr. Lipman's testimony creates a dispute of fact as to whether Root was reaching for the bb gun. However, the actual presence of the bb gun on Root's person is irrelevant where, as here, there is uncontested evidence that the officers had probable cause to believe that Root was armed and that he was reaching into his jacket in a manner that strongly suggested – given the attendant circumstances – that he was grasping for a firearm. *See Garner*, 471 U.S. at 11.

excessive. "[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Plumhoff v. Rickard*, 572 U.S. 765, 777, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014).

While the forceful outcome of the constitutional analysis is to my mind conclusive, for the sake of completeness, I will turn to the defendant officers' qualified immunity claims. Because of the fact-intensive nature of the inquiry, when it comes to excessive force claims, the qualified immunity doctrine has special bite. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152-1153, 1154, 200 L. Ed. 2d 449 (2018) (per curiam) (cautioning courts of appeals against undue generality in their approach and noting that under Supreme Court precedent officers are entitled to qualified immunity unless a prior case "squarely governs" – "a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious").

In *Kisela*, the defendant officer used deadly force to subdue a woman wielding a large knife in the (perhaps mistaken) belief that she posed a threat to another woman at the scene. *Id.* at 1153. The Supreme Court faulted the lower court for its over-reliance on its own less than clear precedent. If anything, the Court concluded, the precedent favored officer Kisela. While they post-date the encounter with Root, two cases – one from the Supreme Court, the other from the First Circuit – are "squarely" on point, *id.*, and based on numerous cases that predate

the encounter. In *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 211 L. Ed. 2d 170 (2021) (per curiam), officers were called to the scene of a domestic disturbance. They encountered Rollice, the trespassing and intoxicated ex-husband of the complainant. When Rollice retreated into his ex-wife's garage, the officers followed. Rollice refused the officers' commands to stop walking. He then grabbed a hammer from a workbench with both hands and turned to face the officers in a fighting stance "as if preparing to swing a baseball bat." *Id.* at 10. The officers opened fire in response, killing Rollice. A Ninth Circuit panel ruled that the district court had committed error in dismissing Rollice's estate's wrongful death claim on qualified immunity ground. The Supreme Court rejected the circuit court's theory that the officers had provoked the confrontation by "cornering" Rollice. Rather, the Court held that the officers were entitled to qualified immunity because neither the lower court nor the respondent had "identified a single precedent finding a Fourth Amendment violation under similar circumstances." *Id.* at 12.

A recent First Circuit decision, *Estate of Rahim v. Doe*, 51 F.4th 402 (1st Cir. 2022), is of similar if not greater import. Rahim, a terrorist suspect, was overheard by authorities expressing in a phone message to one of his confederates his frustration at the slow pace of a planned terrorist attack in New York City and his determination to undertake a vigilante action against the "boys in blue" "right here in Massachusetts." *Id.* at 405. A surveillance team was notified and informed that Rahim was armed with a knife. The team was ordered to stop Rahim from boarding any public transportation. At 7:00 a.m., the team

followed Rahm from his apartment to a bus stop in front of a CVS on Washington Street. The officers approached Rahim with their weapons drawn and ordered him to put his hands up and drop the knife. Rahim refused and began advancing on the officers as they retreated though CVS parking lot, taunting them as he did so.

Given the constellation of events, the majority of the First Circuit panel determined that:

> An objective officer would conclude Rahim had chosen to escalate the situation and that Rahim was an increasing threat. And Rahim's actions were consistent with his words: he kept advancing on the officers, despite their attempts by retreating to not let him close the distance. When he had come close enough to them to be a lethal threat to the officers and others, they had split-second decisions to make about what was needed to stop him. And two officers almost simultaneously reached the same decision. Doe 1 fired twice and Doe 2 fired once. Rahim was hit. The entire encounter unfolded over about thirty seconds.

Id. at 406. The district court denied the officers' claim of qualified immunity, holding that a grant of immunity would be warranted based on the events of the confrontation itself, but not when consideration was given to the information gathered by the officers in the days leading up to the fatal encounter, including their "plans, actions, observations, and means available to respond." *Id.* at 409.

The First Circuit reversed, holding that the district court had erred in importing events that had occurred prior to the fatal shooting into the analysis rather than focusing on the moment of the shooting. *Id.* at 410. When viewed in the proper focus, the court held that a reasonable officer at the situation of the moment "would have understood Rahim to have a lethal knife in his hands . . . [and] would have understood Rahim's actions to show that he had every intention to use this knife to kill the officers and, if they were unsuccessful in stopping him, to kill other people." *Id.* at 413. The propriety of a grant of qualified immunity, moreover, was justified in light of ample precedent, citing among other cases, *City of Tahlequah, supra*, and *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 211 L. Ed. 2d 164 (2021) (per curiam).

Applying the same analysis as used in *City of Tallequah* and *Rahim* to the facts at hand, the case for qualified immunity is even more compelling, particularly in light of the officers' reasonable belief that Root was armed not with a hammer or a knife but with a gun that he was prepared to use.

Excessive Force by McMenamy (Count V)

Bannon first challenges McMenamy's use of a "PIT maneuver" on Root's vehicle during the car chase as an excessive use of force. Although McMenamy's blocking maneuver was in clear violation of BPD policy, an action under § 1983 may not be based on a violation of a state law or an internal departmental regulation unless the act complained of also violates a secured federal right. *See*

White v. Olig, 56 F.3d 817, 821 (7th Cir. 1995); *see also Boveri v. Town of Saugus*, 113 F.3d 4, 7 (1st Cir. 1997) ("A regulatory violation, like a violation of state law, is not inherently sufficient to support a § 1983 claim."). There is no federally secured right under either the Fourth or the Fourteenth Amendments to be free from police pursuits. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853, 854, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) ("[W]e hold that highspeed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under § 1983."); *Scott v. Harris*, 550 U.S. 372, 386, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) ("A police officer's attempt to terminate a high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."). Here, as in *Scott*, the traffic video footage shows Root driving at a high rate of speed through a heavily populated area. The danger that Root's vehicle posed to the public was underscored by the violent end of the chase, which saw Root colliding with two vehicles driven by civilian passersby. Thus, the court concludes that McMenamy's pursuit of Root or his resort to a PIT maneuver did not violate the Fourth Amendment.

The court also rejects Bannon's argument that McMenamy's use of his foot to push Root to the ground at the Route 9 crash scene was constitutionally unreasonable. "'Not every push or shove, even if it later may seem unnecessary in the peace of a judge's chambers,' . . . violates the Fourth Amendment." *Graham*, 490 U.S. at

396, quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

Massachusetts Civil Rights Act (Counts II, VI)

The Massachusetts Civil Rights Act (MCRA) "provides a cause of action for any person whose rights under the Constitution, federal law, or state law have been interfered with by threats, intimidation, or coercion of another." *Kelley v. LaForce*, 288 F.3d 1, 10 (1st Cir. 2002), citing Mass. Gen. Laws ch. 12, §§ 11H, 11I. "The Supreme Judicial Court of Massachusetts has interpreted the MCRA to be co-extensive with § 1983 except for two disparities: (1) the MCRA does not require any state action . . . , and (2) a claim under the MCRA requires a violation by threats, intimidation, or coercion." *Id.*

Because, as discussed above, Bannon has failed to demonstrate that the officers violated any constitutional provision or law, her MCRA claims also fail. Moreover, the court notes that it cannot discern the presence of threats, intimidation, or coercion in any of the officer's challenged actions.

Failure to Train or Supervise (Count VII)

The City argues that Bannon has failed to establish a triable issue that it failed to properly train or supervise its officers such that it is liable under § 1983. The court agrees. A foundational element of a municipal liability claim under § 1983 is the occurrence of a "constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S.

378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989); *see also Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988). Here, Bannon has not demonstrated that any BPD officer committed a constitutional deprivation of Root's rights. It follows then that Bannon's municipal liability claim cannot stand.

ORDER

For the foregoing reasons, the court *ALLOWS* defendants' motions for summary judgment on the finding that no Fourth Amendment violation occurred, or in the alternative, that qualified immunity attaches to the defendant officers' actions. Bannon's motion for partial summary judgment is *DENIED*.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 1:20-11501-RGS

JENNIFER ROOT BANNON AS THE SPECIAL PERSONAL REPRESENTATIVE OF THE ESTATE OF JUSTON ROOT

Plaintiff

v.

DAVID GODIN, *et al.*

Defendants

JUDGMENT

STEARNS, D.J.

In accordance with the court's Memorandum and Order [Dkt. # 124] issued on December 5, 2022, granting defendants' motions for summary judgment, it is ORDERED:

Judgment entered for the defendants.

By the court,
/s/ Arnold Pacho
Deputy Clerk

December 5, 2022
Date

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED JUNE 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1958

JENNIFER ROOT BANNON, AS THE SPECIAL PERSONAL REPRESENTATIVE OF THE ESTATE OF JUSTON ROOT,

Plaintiff-Appellant,

v.

DAVID GODIN, BOSTON POLICE OFFICER; JOSEPH MCMENAMY, BOSTON POLICE OFFICER; LEROY FERNANDES, BOSTON POLICE OFFICER; BRENDA FIGUEROA, BOSTON POLICE OFFICER; COREY THOMAS, BOSTON POLICE OFFICER; PAUL CONNEELY, MASSACHUSETTS STATE TROOPER; THE CITY OF BOSTON,

Defendants-Appellees.

Before Barron,* *Chief Judge*,
Lynch, Kayatta, Gelpí, Montecalvo, Rikelman, and Aframe, *Circuit Judges*.

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* Chief Judge Barron is recused and did not participate in the consideration of this matter.

Appendix C

ORDER OF COURT

Entered: June 10, 2024

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[10]

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

> 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

10. [[NTD: Appendix D is the text of the constitutional and statutory provisions involved. *See* SCOTUS Rule 14.1(i)(v).]]

> 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.

Article XIV of the Massachusetts Declaration of Rights provides:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Massachusetts General Laws chapter 12, section 11H provides:

> (a)
>
> > (1) Whenever any person or persons, whether or not acting under color of

law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

(2) If the attorney general prevails in an action under this section, the attorney general shall be entitled to: (i) an award of compensatory damages for any aggrieved person or entity; and (ii) litigation costs and reasonable attorneys' fees in an amount to be determined by the court.

> In a matter involving the interference or attempted interference with any right protected by the constitution of the United States or of the commonwealth, the court may also award civil penalties against each defendant in an amount not exceeding $5,000 for each violation.

(b) All persons shall have the right to bias-free professional policing. Any conduct taken in relation to an aggrieved person by a law enforcement officer acting under color of law that results in the decertification of said law enforcement officer by the Massachusetts peace officer standards and training commission pursuant to section 10 of chapter 6E shall constitute interference with said person's right to bias-free professional policing and shall be a prima facie violation of said person's right to bias-free professional policing and a prima facie violation of subsection (a). No law enforcement officer shall be immune from civil liability for any conduct under color of law that violates a person's right to bias-free professional policing if said conduct results in the law enforcement officer's decertification by the Massachusetts peace officer standards and training commission pursuant to section 10 of chapter 6E; provided, however, that nothing in this subsection shall be construed to grant immunity from civil liability to a law enforcement officer for interference by

> threat, intimidation or coercion, or attempted interference by threats, intimidation or coercion, with the exercise or enjoyment any right secured by the constitution or laws of the United States or the constitution or laws of the commonwealth if the conduct of said officer was knowingly unlawful or was not objectively reasonable.

Massachusetts General Laws chapter 12, section 11I provides:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.