No. 21-1298

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRAD RUSH, as administrator of the estate of Jeffrey Dennis,
Plaintiff–Appellee,

v.

CITY OF PHILADELPHIA,
Defendant,

and

OFFICER RICHARD NICOLETTI, in his individual and official capacity,
Defendant-Appellant.

On Appeal from a non-final order of the
United States District Court for the Eastern District of Pennsylvania
Case No. 19-cv-932, Hon. Joshua D. Wolson

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April 18, 2022

CORPORATE DISCLOSURE STATEMENT

Brad Rush is an individual, and not a corporation. He issues no stock, and has no parent corporation.

STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no closed or pending cases related to this case, *see* L.A.R. 28.1(a)(2).

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INTRODUCTION

"A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect." *Abraham v. Raso*, 183 F.3d 290, 294 (1999). As the Supreme Court and this Court have repeatedly held, law enforcement officers may not shoot at the driver of a vehicle that poses no threat to anyone, even if that vehicle once posed a threat. The Philadelphia Police Department has codified that precedent in its policies, which specify that officers may use deadly force only in the most extreme circumstances. Following clearly established law, Department policy prohibits officers from shooting into even *moving* vehicles except in narrowly circumscribed situations, to say nothing of vehicles whose movement has ceased. In order to use deadly force, officers must have an objectively reasonable belief that they or another person imminently faces death or serious bodily injury. Despite his Department's policies and clearly established law, Officer Richard Nicoletti killed Jeffrey Dennis by shooting him three times through the driver side window of his stopped car. Mr. Dennis was unarmed.

This Court does not have jurisdiction to hear Officer Nicoletti's appeal. The District Court denied qualified immunity to Officer Nicoletti at summary judgment. Although this Court has jurisdiction to hear interlocutory appeals from otherwise non-final orders denying qualified immunity to the extent they present a question of law, Officer Nicoletti's brief makes clear that he primarily takes issue with the District Court's description of the facts. His framing of Mr. Dennis's constitutional right at issue depends on his own preferred version of the facts, and he would require

this Court not only to draw inferences improperly against Mr. Dennis based upon the record, but to ignore record evidence carefully considered and cited by the District Court. This Court should dismiss the appeal for lack of appellate jurisdiction.

One easily understands Officer Nicoletti's need to argue with the facts, however. Given the District Court's description of the facts, which this Court accepts unless blatantly contradicted by the record, Officer Nicoletti violated Mr. Dennis's constitutional rights that have been clearly established for more than twenty years. Just last year, in nearly identical factual circumstances, this Court held that "a suspect fleeing in a vehicle, who has not otherwise displayed threatening behavior, has the constitutional right to be free from the use of deadly force when it is no longer reasonable for an officer to believe his or others' lives are in immediate peril from the suspect's flight," and that that right had been clearly established in this Circuit as of 1999. *Jefferson v. Lias*, 21 F.4th 74, 81 (3d Cir. 2021). Nothing has changed in the five months since *Jefferson*. To the extent that Officer Nicoletti accepts the facts in the record and inferences drawn in favor of Mr. Dennis, and really presents an appeal of qualified immunity as a matter of law, the law is—and has long been—clear. An officer cannot shoot into the driver's side window of a stopped vehicle, at a person who is unarmed and presents no ongoing threat to anyone.

This Court should affirm the District Court's thoughtful and well-supported opinion, and remand for this case to proceed to trial.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as Mr. Rush's complaint alleged claims pursuant to 42 U.S.C. § 1983. But this Court does not have appellate jurisdiction. Although this Court would have appellate jurisdiction pursuant to 28 U.S.C. § 1291 if Defendant-Appellant had appealed a denial of qualified immunity based upon a question of law, Appellant's brief makes clear that his appeal primarily disputes the District Court's description of the facts. As such, the denial is not subject to appeal as a collateral order. *See also* Argument, Section I, at 9.

ISSUES PRESENTED

I. Whether this appeal should be dismissed for lack of appellate jurisdiction, because its purpose is to challenge a denial of qualified immunity based upon a dispute of material fact?

Proposed answer: Yes

II. Whether a reasonable jury could conclude that Officer Nicoletti used objectively unreasonable force in the totality of the circumstances when he killed Mr. Dennis?

Proposed answer: Yes

III. Whether Mr. Dennis, the unarmed driver of a stopped car who posed no immediate threat to anyone, had the clearly established right not to be shot dead by Officer Nicoletti?

Proposed answer: Yes

STATEMENT OF THE CASE

I. Statement of Facts

Officer Nicoletti kills Mr. Dennis

On August 20, 2018, seven law enforcement officers in plain clothes surrounded Jeffrey Dennis's car. A3. The officers "boxed him in with two cars" and then surrounded the car on foot. A3. Although Mr. Dennis attempted to maneuver his car back and forth to free it, he was unable to do so, and his car stopped moving. A3. Only then, with his car stopped, did Officer Richard Nicoletti reposition himself by taking two steps to the left and shoot Dennis three times through the driver's side window, killing him. A3.

Officer Nicoletti killed Mr. Dennis at the culmination of a short, improvised pursuit that the officers undertook after abandoning service of their authorized search warrant. Officer Nicoletti and six other officers from the Narcotics Field Unit—Officers Bogan, Fitzgerald, Galazka, and Sumpter, Sergeant Schuck, and Lieutenant Muldoon—had a warrant for a home at which they believed that small-quantity retail drug sales took place. A6. The warrant did not name Mr. Dennis; the officers included instead a description of a "B/M with a white tshirt" with no additional identifying features or characteristics. A370. Upon reaching the home, instead of serving the warrant, the officers detoured to stop a passing vehicle, Mr. Dennis's, first. A6.

That stop was ill-fated from the start. The officers, including Officer Nicoletti, were wearing plainclothes and driving unmarked vehicles to serve the warrant. A7. Philadelphia Police Department policy requires plain clothes officers to call for

marked units to make vehicle stops, precisely because of the dangers involved to all parties when a motorist has no idea that the people stopping him are authorized to do so. *See* A381-82. In an unmarked vehicle, Officer Galazka drove the wrong way down a one-way road to cut off Mr. Dennis. A6. When Mr. Dennis—who had no reason to believe that a police officer drove the car in question—attempted to flee, Officer Galazka moved forward to collide with Mr. Dennis's car. A7. Other officers quickly surrounded Mr. Dennis's car. A7. All but one declined to put on their raid vests or other identifying badges or insignia identifying themselves as law enforcement, and the one who did, Officer Sumter, remained out of Mr. Dennis's sight. A365, A366. None of the officers verbally identified themselves as police, A365, instead swarming Mr. Dennis's car with their guns drawn.

In that context, the stop escalated quickly. Officer Galazka shattered Mr. Dennis's driver's side window with a metal bar. A7. Mr. Dennis unsuccessfully attempted to maneuver out of being boxed in by alternately pulling forward and reversing at a slow rate of speed. A6. Officer Bogan temporarily stood in front of the car, and Mr. Dennis stopped moving forward several times rather than run him over. A7; A367. At one point Officer Fitzgerald reached into the shattered driver's side window, purportedly to reach the ignition, but pulled away when Mr. Dennis reversed the car. A7, A8. At no point did Mr. Dennis's car exceed five miles per hour. Ultimately, Officer Galazka rammed his car into Mr. Dennis's car, and Mr. Dennis's car came to a complete stop. A8; A13 ("his car had stopped moving, as the City's own investigation concluded"); A368.

After Mr. Dennis's car came to a stop, most officers recognized that the situation had changed. No civilian cars or pedestrians were in the immediate vicinity. A14; A368. All officers on the scene except for Officer Nicoletti holstered their guns. A8; A13; A370. None of the officers on the scene had any reason to believe that Mr. Dennis was armed, A366, as Sgt. Schuck and others testified at their depositions. *E.g.* A228. Officer Bogan had moved away from the front of Mr. Dennis's vehicle, and no officers remained in front of it. A8; A13-14; A368. That conformed with Police Department policy, which instructs that "moving into or remaining in the path of a moving vehicle, whether deliberate or inadvertent, **SHALL NOT** be justification for discharging a firearm at the vehicle or any of its occupants." (emphasis in original). A4. With the car stopped, and no one in front of it, Nicoletti repositioned himself two steps to his left, standing next to the driver's side door, and shot Mr. Dennis three times through the driver's side window, killing him. A8. Mr. Dennis was unarmed. A366; A370.

Officer Nicoletti's history

That was not the first time Officer Nicoletti had shot at a civilian. On April 4, 2006, Officer Nicoletti fired four shots at a man in flight whom he was pursuing, claiming that the man had pulled a gun on him. A5. And on March 26, 2012, Officer Nicoletti shot at a driver in a vehicle, in strikingly similar circumstances to those in which he shot Mr. Dennis. A5. Officer Nicoletti and other plain clothes officers boxed in that individual, that individual attempted to drive away, and Officer Nicoletti opened fire. A5. The car had not struck any officer on the scene, and the Firearms Review Board found that Officer Nicoletti violated policy procedure by shooting at a moving vehicle and referred him for discipline. A5.

Officer Nicoletti's history of excessive force goes beyond shootings. Civilians have made four different complaints of physical abuse against Officer Nicoletti over the course of his career, and Officer Nicoletti has been the subject of substantial litigation on exactly that subject. A5. The City settled a civil rights suit against him for using excessive force against a different civilian in her home, and in a separate case, an Eastern District of Pennsylvania jury found that Officer Nicoletti "took affirmative steps to conceal and/or cover-up" the beating of a different civilian by fellow officers. A5-6; *see also* A515; *Roseboro v. Binns, et al.*, No. 99-cv-5815 (E.D. Pa.). The Police Department never investigated either of the incidents that gave rise to those cases, and so excludes them from Officer Nicoletti's personnel record. A6.

II. Procedural History

Appellant Brad Rush filed a claim on behalf of Mr. Dennis's estate in the Philadelphia Court of Common Pleas on Feb. 27, 2019. In addition to the individual capacity § 1983 claim against Officer Nicoletti at issue in this appeal, the estate also asserted state law claims for assault and battery and a § 1983 claim against the City of Philadelphia for municipal liability. Because it included claims under 42 U.S.C. § 1983, Officer Nicoletti and the City removed the case to the Eastern District of Pennsylvania on Mar. 5, 2019. The parties engaged in discovery, and on Oct. 16, 2020, both Officer Nicoletti and the City moved for summary judgment.

The District Court denied the summary judgment motions on January 29, 2021. Only Officer Nicoletti filed a notice of appeal, and he appeals the District Court's denial of summary judgment on the Fourth Amendment claim against him in his

individual capacity, on the basis that the District Court declined to apply qualified immunity.

STANDARD OF REVIEW

This Court reviews a District Court's ruling on summary judgment *de novo*. *NAACP v. City of Philadelphia*, 834 F.3d 435, 440 (3d Cir. 2016). In doing so, it applies the same standard as the District Court. *Id.* That is, summary judgment is only appropriate where the movant shows that there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). In undertaking that review, the Court must view the facts in the light most favorable to the non-moving party—here, the estate of Mr. Dennis—and construe all inferences from those facts in the non-moving party's favor. *See, e.g.*, *Hugh v. Butler Cty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005).

In cases where a defendant asserts a qualified immunity defense, however, this Court's review of summary judgment is *de novo* "only to the extent the denial turns on an issue of law." *Montgomery Cnty. Comm'rs v. Montgomery Cnty.*, 215 F.3d 367, 373 (3d Cir. 2000), *cert. denied*, 531 U.S. 1126 (2001). In undertaking the review, this Court accepts the facts as described by the District Court unless those facts are blatantly contradicted by the record, and does not review the scope of the District Court's description of the facts or the sufficiency of the evidence supporting those facts. *E.g.*, *Blaylock v. City of Phila.*, 504 F.3d 405, 409 (3d Cir. 2007); *Jacobs v. Cumberland Cnty.*, 8 F.4th 187, 193 (3d Cir. 2021). It simply considers "whether the

set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right." *Jacobs*, 8 F.4th at 193.

SUMMARY OF ARGUMENT

This Court lacks appellate jurisdiction to hear this case. Although Officer Nicoletti purports to accept the District Court's identified version of the facts and suggests that those facts nevertheless do not amount to a violation, he spends a substantial part of his brief urging this Court to reject the District Court's identification of the facts in the record and draw factual inferences against Mr. Dennis. On appeals of denials of qualified immunity, this Court simply considers whether the facts in the record identified by the District Court make out a violation of a clearly established constitutional right. It does not review evidence sufficiency, or the scope of the facts identified. This Court regularly dismisses qualified immunity appeals for lack of appellate jurisdiction, and does so particularly in excessive force cases like this one where the key question—the reasonableness of the force used—is intensely fact-bound. The existence of a video does not change this analysis, both because of this Court's deference to district court descriptions of video and because the District Court's description here is accurate. Because Officer Nicoletti primarily urges this Court to cast its eyes over the record in the first instance, and substitute his own description of the facts for its consideration, the Court should dismiss this appeal for lack of appellate jurisdiction.

To the extent that Officer Nicoletti suggests that a reasonable jury could not find that he violated Mr. Dennis's clearly established constitutional rights based upon the

facts the District Court identified in the record, he is wrong. Drivers have a constitutional right not to have officers use deadly force against them—by firing into their vehicle—when no officers' or bystanders' lives are in immediate peril. This Court has held that time and time again, in cases like *Abraham*, *El*, *Rivas*, and *Jefferson*. A reasonable jury could not only find that Officer Nicoletti violated Mr. Dennis's Fourth Amendment rights, but could find that nearly every single factor in the excessive force inquiry cuts in Mr. Dennis's favor based upon facts in the record. And in light of the string of on-point case law, Mr. Dennis's rights had been clearly established for nearly twenty years by the time Officer Nicoletti killed him. This Court decided *Jefferson* just five months ago, and held that a reasonable jury could find a violation of clearly established constitutional rights in a case with remarkably similar facts to those in the record here. If this Court does not dismiss for lack of appellate jurisdiction, it should simply affirm.

ARGUMENT

I. This Court does not have appellate jurisdiction because Officer Nicoletti's appeal primarily disputes facts in the record.

The U.S. Courts of Appeals only entertain interlocutory appeals in limited circumstances. Interlocutory appeals by law enforcement officers to whom a district court has denied qualified immunity may only address issues of law, rather than attack the district court's description of the facts in the record. In considering those appeals, this Court accepts the district court's description of the facts unless the record blatantly contradicts that description, and simply considers whether the district court has appropriately defined the right at issue and correctly determined whether that right had been clearly established. Although Officer Nicoletti styles this as a dispute of law, his brief makes quite clear that his real issue concerns the District Court's description of the facts. This Court regularly dismisses such qualified immunity appeals for lack of jurisdiction, and it should do so here.

A. This Court has appellate jurisdiction to hear interlocutory appeals of qualified immunity denials that only present questions of law, not such appeals that dispute the facts.

Individual capacity government defendants to whom a district court denies qualified immunity may appeal that denial on an interlocutory basis only in limited circumstances. This Court has appellate jurisdiction to hear interlocutory appeals of denials of qualified immunity "only to the extent the denial turns on an issue of law." *Montgomery Cnty. Comm'rs*, 215 F.3d at 373; *see also Walker v. Horn*, 286 F.3d 705, 710 (3d Cir. 2002); *E.D. v. Sharkey*, 928 F.3d 299, 305 (3d Cir. 2019). Denials turn on issues of law when they decide whether the conduct of the government defendant

violated a right that was clearly established at the time. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1989). When, instead, a District Court denies qualified immunity because there is a version of the facts supported by the record from a which a reasonable jury could find a violation of a clearly established right, this Court does not have jurisdiction to hear an interlocutory appeal that attacks that version of the facts. *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995); *see also Walker*, 286 F.3d at 710.

Johnson specified that courts of appeals may not entertain interlocutory appeals from denials of qualified immunity based upon questions of fact that a party may prove at trial. Such orders are not appealable. *Johnson*, 515 U.S. at 313. *Johnson* characterized *Mitchell*'s allowance as "limited . . . to appeals challenging, not a district court's determination about what factual issues are 'genuine,' . . . but the purely legal issue what law was 'clearly established.'" *Johnson*, 515 U.S. at 313. This reflects several practical considerations, including appellate courts' comparative expertise in considering questions of law and trial courts' comparative expertise in assessing issues of fact, *id.* at 313-14, 316; the distinction between the qualified immunity question and the factual issues likely to predominate at trial, *id.* at 314-15; and the need to consider many key factual questions in civil rights suits—including state of mind, or reasonableness—upon a full airing at trial, rather than earlier, *id.* at 316. These factors, as well as the judiciary's interests in efficiency and finality to which interlocutory appeals run counter, "are too strong" to allow interlocutory appeals of denials of qualified immunity except on pure questions of law. *Id.* at 317-18.

As a result, during interlocutory appeals of qualified immunity denials this Court considers only whether "there is sufficient record evidence to support a set of facts

under which there would be no immunity." *El v. City of Pittsburgh*, 975 F.3d 327, 333 (3d Cir. 2020); *Schieber v. City of Philadelphia*, 320 F.3d 409, 415 (3d Cir. 2003). This Court may review "whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right," but that is different from appeals presenting "questions of evidence sufficiency" over which this Court "lack[s] jurisdiction." *Jacobs*, 8 F.4th at 193 (citing *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 986 (3d Cir. 2014), and *Blaylock*, 504 F.3d at 409). The *Johnson* Court recognized that allowing defendants to appeal fact issues on an interlocutory basis served none of the interests of the qualified immunity doctrine. Qualified immunity exists to shield government actors from unfairly facing the burdens of litigation when they exercise judgment in areas governed by arguably unclear law—and also to ensure that people not eschew government service out of fear of liability for their good-faith mistakes. *See*, *e.g*, *Mitchell*, 472 U.S. at 511. Cases in which an evidence-supported version of the facts falls entirely outside of any such gray areas do not implicate this interest at all. When there is a construction of the facts that suggests a violation of a clearly established right, this Court "must accept the District Court's version of the facts" and has "no jurisdiction over [an] appeal and must dismiss it." *Walker*, 286 F.3d at 711.

Since *Johnson*, this Court and its sister Circuits regularly dismiss appeals of district courts' denials of qualified immunity for lack of jurisdiction when those appeals turn on disputed issues of material fact or attack a district court's description of the facts as lacking support. *See, e.g.*, *Walker*, 286 F.3d at 710, *Blaylock*, 504 F.3d

at 405.[1] This practice includes, particularly, cases involving a police officer's use of force. *E.g., Geist v. Ammary*, 617 F. App'x 182 (3d Cir. 2015) (dismissing police

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[1] This has long been true within this Circuit. *See*, *e.g.*, *Blaylock*, 504 F.3d at 405 (dismissing police defendants' appeal of a denial of qualified immunity for lack of jurisdiction because, in a false arrest claim, a genuine issue of material fact as to physical resemblance meant that construction in favor of plaintiff could make out a violation); *see also Mazuka v. Rice Twp. Police Dep't*, 655 F. App'x 892 (3d Cir. 2016) (dismissing appeal of denial of qualified immunity for lack of jurisdiction because of genuine dispute of material fact as to whether officer had probable cause to believe suspect was fleeing).

It has also long been true across this Court's sister Circuits. *See*, *e.g.*, *Carter v. Rhode Island*, 68 F.3d 9 (1st Cir. 1995) (dismissing appeal of denial of qualified immunity by state prison officials for lack of jurisdiction because presence or absence of discriminatory intent is a fact question precluding summary judgment); *Terebesi v. Torreso*, 764 F.3d 217, 240 (2d Cir. 2014) (dismissing appeal of denial of qualified immunity by police officers for lack of jurisdiction because question of whether use of force was reasonable was a fact question); *Burge v. Par. of St. Tammany*, 187 F.3d 452 (5th Cir. 1999) (dismissing appeal of denial of qualified immunity for lack of jurisdiction because of dispute of fact as to what actions had even occurred); *Smith v. Brenoettsy*, 158 F.3d 908 (5th Cir. 1998) (dismissing appeal of denial of qualified immunity by correctional defendants in a failure to protect case where a genuine dispute of material fact existed as to whether the defendants had actually drawn the inference that plaintiff faced a substantial risk of harm); *Berryman v. Rieger*, 150 F.3d 561, 564 (6th Cir. 1998) (dismissing appeal of denial of qualified immunity by correctional defendants for lack of jurisdiction because defendants' appeal "contradicted plaintiff's version of the facts at every turn" instead of addressing questions of law); *Krout v. Goemmer*, 583 F.3d 557 (8th Cir. 2009) (dismissing appeal of denial of qualified immunity by police defendants for lack of jurisdiction because of dispute of fact over causation in excessive force case); *Jackson v. McIntosh*, 90 F.3d 330 (9th Cir. 1996) (dismissing appeal of denial of qualified immunity by outside medical defendants in an Eighth Amendment suit because question of whether they had been deliberately indifferent was factual); *Castillo v. Day*, 790 F.3d 1013 (10th Cir. 2015) (dismissing appeal of denial of qualified immunity by correctional defendants because question of defendants' awareness of abuse was one of fact); *Garrett v. Stratman*, 254 F.3d 946 (10th Cir. 2001) (dismissing appeal of denial of

defendants' appeal of a denial of qualified immunity for lack of jurisdiction, because of dispute of material fact as to reasonableness of force used); *Fried v. N.J. State Police*, 620 F. App'x 108 (3d Cir. 2015) (same); *Fuller v. Narkin*, No. 18-3660 (3d Cir. Feb. 7, 2020) (same). Such dismissals are particularly common in the use of force context because in such cases, as here, the denial of qualified immunity often turns on a fact-bound inquiry into the reasonableness of the force used. *See* Section II, *infra* (discussing facts in this case). This is because when "facts material to the determination of reasonableness [of a use of force are] in dispute, then that issue of fact should be decided by the jury." *Giuffre v. Bissell*, 31 F.3d 1241, 1255 (3d Cir. 1994) (quoting *Barton v. Curtis*, 497 F.3d 331, 335 (3d Cir. 2007)). In such cases, interlocutory Appellant officers often "ignore[] the reason that the District Court declined to grant [the officer] qualified immunity: disputed issues of fact remain concerning the extent of force [the officer] used." *Fried*, 620 F. App'x at 111. Or, similarly, disputes remain as to "facts material to the determination of reasonableness" of force used. *Geist*, 617 F. App'x at 185 (quoting *Giuffre*, 31 F.3d at 1255). In such cases, this Court lacks appellate jurisdiction.

This Court takes particular care not to second-guess the District Court's description of the facts in excessive force cases, like this one, where the officer killed the plaintiff. "Because the victim of deadly force is unable to testify, we have recognized that a court ruling on a summary judgment in a deadly-force case should be cautious to ensure that the officers are not taking advantage of the fact that the

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qualified immunity by prison official in denial of medical care case because question of deliberate indifference was one of fact).

witness most likely to contradict their story—the person shot dead—is unable to testify." *Lamont v. New Jersey*, 637 F.3d 177, 181-82 (3d Cir. 2011) (internal quotations omitted). Under such circumstances, the court "should avoid simply accepting what may be a self-serving account by the officer." *Id.*

B. This appeal primarily disputes the District Court's description of the facts in the summary judgment record.

Government defendants denied qualified immunity in district courts regularly "attempt[] to evade" this limit on appellate jurisdiction "by asserting that [they] do[] not challenge the District Court's factual findings, but rather challenge[] its determination that, as a matter of law," they should get qualified immunity. *Fried*, 620 F. App'x at 111. Appellant Officer Nicoletti does just that here. Although Appellant claims that "the issues raised involve only the application of law to undisputed facts at the summary judgment stage," Appellant's Br. at 2, on the very same page he commences rejecting the District Court's description of the record and characterizes Mr. Dennis as "violently resisting arrest and attempting to escape" and as having been "in the process of demonstrating his intent to continue risking the life and safety of others in the area." *Id.* The rest of his brief makes quite clear that he simply has a different version of the facts. He is welcome to present that at trial, but in the meantime, this Court should dismiss for lack of appellate jurisdiction.

The District Court, properly construing facts in favor of the non-moving party at summary judgment, undertook its qualified immunity analysis based upon a well-supported version of the facts that Appellee's statement of facts, above, generally reiterates. Construing facts in favor of the nonmovant at the summary judgment

stage "[i]n qualified-immunity cases . . . usually means adopting the plaintiff's version of the facts." *Jacobs*, 8 F.4th at 192 (citing *Scott v. Harris*, 550 U.S. 372, 378 (2007)). And as noted, this especially holds where a "victim of deadly force is unable to testify," *Abraham*, 183 F.3d at 294, where the Court "should avoid simply accepting what may be a self-serving account by the officers" and "must also look at the circumstantial evidence that, if believed, would tend to discredit the police officers' story." *Lamont*, 637 F.3d at 182.

If anything, the District Court could have done more to construe facts in favor of Appellee at the summary judgment stage. For example, the District Court acknowledged that all of the officers involved in the encounter with Mr. Dennis, including Officer Nicoletti, wore plain clothes, drove unmarked vehicles, and generally refused even to wear the tactical vests with insignia that would have identified them to Mr. Dennis as officers. Under those circumstances, a reasonable jury could certainly conclude that Mr. Dennis did not even evince a desire to evade a valid arrest—he might not have known that the men swarming his car were officers, and might have believed that they intended to carjack him. Such a finding of fact by a jury would make even one of the few factors identified by the District Court as cutting in Officer Nicoletti's favor weigh less heavily, or even weigh in favor of Mr. Dennis. *See* Section II.B, *supra*.

Officer Nicoletti, by contrast, "nonetheless urges [this Court] to revisit the District Court's version of the facts." *Fuller*, No. 18-3660 at *3-4. He asks the Court "to conduct an in-depth review of the underlying" record, *id.*, and to reject the District Court's reasonable description of the facts in virtually every respect. His statement of the

facts repeatedly urges this Court to draw inferences against Mr. Dennis on the summary judgment posture. This includes, for example, Officer Nicoletti's inference that Mr. Dennis "undoubtedly recognized" the officers based upon a prior interaction at an unspecified time in the past. Appellant's Br. at 7. It includes his demanded inference that the officers might have thought Mr. Dennis had a gun merely because he reached into the center console, Appellant's Br. at 8, despite no officer testifying at deposition that they believed he had one and despite Officer Bogan holstering his own weapon. A370.[2] Most importantly, however, Officer Nicoletti urges this Court to draw the most important inference against Mr. Dennis. He explains that because the officers "were all within ten feet of Mr. Dennis's car," they were "thereby at risk of grave injury or death . . ." Appellant's Br. at 11. The question of whether the officers were in danger is a key fact question that suffuses the entire case, and is, of course, hotly disputed. Officer Nicoletti cannot dress up a fact dispute as a legal question, and he certainly cannot do so by resolving that factual dispute in his own favor on the summary judgment posture.[3]

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[2] In support of that improperly-urged inference, Officer Nicoletti cites a case in which an officer *saw a gun*. Appellant's Br. at 9 (citing *United States v. Yusuf*, 993 F.3d 167, 172 (3d Cir. 2021), including that "the officer saw the gun more clearly"). Appellant admits on the next page, as he must, that Sgt. Schuck testified that "I did not see a gun." Appellant's Br. at 10.

[3] Even on his own improper version of the facts, Officer Nicoletti gets the law wrong, too. As explained at greater length in Section II, *infra*, the Third Circuit's cases are uniformly clear that mere proximity to a car is not enough to place an officer in danger or justify the use of deadly force. *Abraham* announced that the justification lapsed when the officer stepped out of the path of a moving vehicle. *Jefferson* reiterated than an officer standing on the side of the car is not in danger of being hit by it. Indeed, an officer has a responsibility to get out of the way before resorting to

Of course, Officer Nicoletti disagrees with the version of the facts identified by the District Court, believes that some inferences should be construed against Mr. Dennis, and believes other additional facts change the analysis. But his recourse is not an interlocutory appellate attack on the District Court's evidence-supported version of the facts from which a reasonable jury could find a violation at trial. "[A] police officer who is accused of having used excessive force is not precluded from arguing that he reasonably perceived the facts to be different from those alleged by the plaintiff, but that *contention must be considered at trial*." *Rivas v. City of Passaic*, 365 F.3d 181, 199 (3d Cir. 2004) (emphasis in original). This Court lacks jurisdiction to consider Officer Nicoletti's version of the facts on interlocutory appellate review.

C. The video in the record does not change this analysis.

Although Appellant Officer Nicoletti insists that the video in the record supports reversal, he is wrong as both a matter of law and a matter of fact. First, as a matter of law, given the interlocutory nature of this appeal, this Court gives the greatest possible deference to the District Court's description of the events in the video. Where, as here, a district court reasonably describes the events in the video, this Court does not disturb that description for purposes of its review. And second, as a matter of fact, even if this Court were inclined to review the District Court's description, that description is accurate. Appellant Officer Nicoletti's assertions are belied by the video and the rest of the record, including the City of Philadelphia's own fact-finding. Under

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deadly force. *See Abraham*, 183 F.3d at 285; *Jefferson*, 21 F.4th at 79; *see also* A4 (citing Philadelphia Police Department policy).

the circumstances, the existence of video does not change the analysis at all, and the video should go to the jury for its consideration at trial on remand.

First, this Court provides great deference to a district court's description of the events in a video on the summary judgment posture. As noted, this Court does not disturb a district court's description of the facts in qualified immunity cases at all. *See* Section I.A., *infra*. Even in non-qualified immunity cases, this Court reviews district courts' factual finding for clear error. *See, e.g.*, *United States v. Mack*, 229 F.3d 226, 235 (3d Cir. 2000). But its review of a district court's description of a video is even more deferential. When "there is a video in the record capturing the events in question, we must accept the trial court's factual determinations unless they are blatantly contradicted by the video." *El*, 975 F.3d at 333; *Scott*, 550 U.S. at 380 (emphasizing deference to determinations not "blatantly contradicted" by video). The existence of video "does not permit us to embark upon our own factfinding exercise." *El*, 975 F.3d at 338. This Court may only "disregard factual findings that no reasonable jury could believe." *Id.*[4]

Second, regardless of deference owed, the District Court "did not make any demonstrably false findings about the how the events unfolded" at all. *El*, 975 F.3d at 337. Watching it confirms the District Court's description in virtually every

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[4] Notably, in support of his argument that this Court should substitute its own view of the video in the first instance, Officer Nicoletti cites a Sixth Circuit case instead of *El*. Appellant's Br. at 7 (citing *Cunningham v. Shelby Cnty.*, 994 F.3d 761, 766 (6th Cir. 2021)). To the extent Appellant suggests that this Court should ignore its own binding precedent in favor of following an out-of-Circuit decision, Officer Nicoletti is incorrect.

respect. The District Court accurately described the movements of each of the cars and the positioning of the officers; the plain clothes worn by the officers and the absence of identifying vests by all but one out-of-view officer; the lack of pedestrians in the immediate vicinity; the collisions of the cars and Mr. Dennis's car coming to a stop before Officer Nicoletti fired; and the absence of any officers in front of Mr. Dennis's car before Officer Nicoletti fired. Even if this Court could substitute its own view of the video in the first instance, its own description would likely match the District Court's because the District Court's is already accurate. Under the circumstances, attacking the District Court's accurate description of the video offers Officer Nicoletti no help on interlocutory appellate review.

II. Based upon the facts in the record, a reasonable jury could find that Officer Nicoletti violated Mr. Dennis's clearly established constitutional rights.

If Officer Nicoletti really intends to appeal the purely legal question of whether a reasonable jury could find that he violated Mr. Dennis's clearly established constitutional rights, he remains out of luck. Based upon the District Court's well-supported description of the facts in the record, Officer Nicoletti violated constitutional rights that have been clearly established for more than two decades. Drivers have a constitutional right not to have officers use deadly force against them—by firing into their vehicle—when no officers' or bystanders' lives are in immediate peril. That right holds for drivers of moving cars, to say nothing of drivers like Mr. Dennis whose cars are stopped—as this Court held just last year in denying qualified immunity to an officer in nearly identical factual circumstances that

preceded the events of this case. While qualified immunity appeals sometimes present difficult questions because the facts at issue differ in substantial ways from precedent, Officer Nicoletti asks for qualified immunity based upon substantially the same facts to which this Court has repeatedly declined to apply it. To the extent the Court even reaches this question, it should affirm the District Court.

A. An unarmed driver has a right not to have deadly force used against him when no officers' or bystanders' lives are in immediate peril.

This claim, as one involving excessive force against a police officer, falls under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). For civil rights claims involving force by police officers, plaintiffs must show that the police effected a seizure, and that the force used in doing so was unreasonable under the circumstances. *E.g.*, *El*, 975 F.3d at 336. Officer Nicoletti cannot reasonably dispute that a shooting amounts to a seizure, *see Torres v. Madrid*, 141 S.Ct. 989, 999 (2021). As to reasonableness, accounting for context and circumstances, the District Court correctly recognized that a jury could find that Officer Nicoletti used objectively unreasonable force based upon the factors identified by the Supreme Court and this Court. Simply put, "deadly force is not justified in circumstances where a fleeing suspect poses no immediate threat to the officer and no threat to others." *Jefferson*, 21 F.4th at 79 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)); *Lamont*, 637 F.3d at 185 ("it has long been the law that an officer may not use deadly force against a suspect unless the officer reasonably believes that the suspect poses a threat of serious bodily injury to the officer or others."). Officer Nicoletti of course would

analyze the factors differently. But even his argument reflects how intensely fact-bound that analysis is, and why it therefore is "normally an issue for the jury." *Jefferson*, 21 F.4th at 79 (quoting *Rivas*, 365 F.3d at 198); *see also Abraham*, 183 F.3d at 290.

In undertaking that analysis here, a jury easily could find that Officer Nicoletti's use of deadly force was objectively unreasonable. Accounting for all of the circumstances, Mr. Dennis's Fourth Amendment interests at the moment of the shooting outweighed any possible countervailing government interests at the same moment. For purposes of the analysis, the timing of the use of force matters tremendously. This Court has observed about prior uses of force that even where use of some force might have been reasonable at some point in an interaction, that "force became unreasonable some time thereafter." *Lamont*, 637 F.3d at 179.[5] In this case, the District Court properly accounted for the context of the entire encounter and analyzed the factors at the time that Officer Nicoletti shot Mr. Dennis, as this Court does when reviewing its determination.

In the analysis, factors that courts consider:

> include 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.

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[5] Appellant suggests that *Lamont* is not good law in light of *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014). *See* Appellant's Br. at 40. But *Plumhoff* simply stands for the proposition that in the face of an immediate threat, officers "need not stop shooting until the threat has ended." *Id*. at 2022. That has no impact on the analysis in cases, as here, where the District Court's well-supported description of the facts suggests that the officer used deadly force to kill a suspect who did not pose an immediate threat even as of when the officer opened fire. *See, e.g.*, *Abraham*, 183 F.3d at 294.

> Additional factors include the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.

Rivas, 365 F.3d at198; *see also Jefferson*, 21 F.4th at 79. The list of factors also includes "the severity of the injury" to the suspect. *Jefferson*, 21 F.4th at 79; *El*, 975 F.3d at 338. And at the key moment, nearly all of those factors cut clearly in Mr. Dennis's favor.

The most important factor, of course, is that at the moment of the shooting Mr. Dennis "pose[d] no immediate threat to the officer and no threat to others." *Garner*, 471 U.S. at 11; *El*, 975 F.3d at 336. Whatever threat the car might have posed, that threat ended by the time Officer Nicoletti shot Mr. Dennis. At best, the immediate threat ended when the car stopped. Officer Nicoletti cannot seriously dispute this. As the District Court recognized, "[b]y the time Officer Nicoletti shot [Mr. Dennis], his car had stopped moving, *as the City's own investigation concluded*." A13. (emphasis added). "[A] jury could find, notwithstanding [his] testimony, that [he] did not fire until it was no longer objectively reasonable for him to believe [he] was in peril." *Abraham*, 183 F.3d at 294.

In fact, this factor would cut in Mr. Dennis's favor even accepting Officer Nicoletti's insistence that his own view of the facts should apply at summary judgment. Even if Mr. Dennis had not stopped his car, no one was in danger when Officer Nicoletti shot him because no one was in front of the car—which is how this Court analyzes the threat posed even by *moving* cars. *Abraham*, 183 F.3d at 290 (holding that a jury could find an unreasonable use of force where "Raso jumped to

her right out of the car's path and fired her gun once at the driver-side window"). This Court has made quite clear that when an officer shoots through a driver-side window rather than the windshield, because the officer is to the side and not in the car's trajectory, a reasonable jury could find that the "decision to shoot through [the] driver's side window was not justified by any objective threat." *Jefferson*, 21 F.4th at 79. In such circumstances, the officer is "safely out of the way and standing alongside the car." *Abraham*, 183 F.3d at 285. Shooting through a driver's side window rather than a windshield is evidence as to "where exactly the officer was positioned vis-à-vis the vehicle," *Jefferson*, 21 F.4th at 79, that a reasonable jury could use to find unreasonable force. *See also Abraham*, 183 F.3d at 281 (discussing "evidence showing the bullet shattered the driver's side window, rather than the front windshield"). This case poses no such problem at all—the record, including the video, makes quite clear that Officer Nicoletti shot Mr. Dennis through the driver's side window from the side of the car.

Officer Nicoletti's primary justification only confirms how objectively unreasonable his actions were. Although Officer Nicoletti later claimed he believed that Officer Bogan was in danger, A370, the District Court also observed, correctly, that Officer Bogan was not only on the passenger side of the car, but had holstered his own weapon, "which suggests he did not perceive a threat to himself." A13. Officer Nicoletti's proffered justification is just the sort of "self-serving account by the officer" that this Court should "avoid simply accepting" because circumstantial evidence—Officer Bogan's position and Officer Bogan holstering his own weapon—"tend[s] to

discredit [Officer Nicoletti's] story." *Lamont*, 637 F.3d at 182.[6] Moreover, even to the extent that officers "are often forced to make split-second judgments" and reasonableness is considered "from the perspective of a reasonable officer on the scene," *id.* at 183, Officer Bogan not only declining to fire, but going so far as to holster his own weapon, would allow a reasonable jury to conclude that a reasonable officer on the scene perceived no ongoing threat and that Officer Nicoletti acted objectively unreasonably. Moreover, as the video similarly makes clear, no one was nearby besides Mr. Dennis and the six other officers—no civilians faced any danger from Mr. Dennis at the moment that Officer Nicoletti shot him.

The lack of threat posed by Mr. Dennis in a stopped car with no one in front of it underscores another factor that cuts in his favor. Officers, including Appellant Officer Nicoletti, had no suspicion that he had a firearm or posed a threat independent of the car. A366.[7] "[T]he possibility that the persons subject to the police action are themselves violent or dangerous" or "the possibility that the suspect may be armed" might otherwise make use of force appear more reasonable—although even then, not necessarily—but the absence of reason to believe a person is dangerous and the

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[6] This is especially important when considering the testimony of an officer whom a federal court has already found "took affirmative steps to conceal and/or cover-up" a prior use of excessive force. A6 (citing *Roseboro v. Binns*).

[7] Officer Nicoletti conflates the "violent or dangerous" factor with the mere existence of a car. *See* Appellant's Br. at 27-28. In this Court's cases involving police using deadly force to kill drivers, this factor clearly means *independent* of the existence of the car, which is analyzed as part of the "immediate threat" factor. *See, e.g.*, *Jefferson*, 21 F.4th at 79. Indeed, if the car alone could serve as sufficient basis to find someone "violent or dangerous," this factor and the "poses an immediate threat" factor would be entirely redundant.

absence of weapons renders the use of deadly force objectively unreasonable. *El*, 975 F.3d at 336. Mr. Dennis had not explicitly threatened the officers. *See Jefferson*, 21 F.4th at 85 (contrasting lack of threat by Mr. Jefferson with a driver's having "threatened to kill the officers" in *Bland v. City of Newark*, 900 F.3d 77 (3d Cir. 2018)). In the absence of any evidence that Mr. Dennis was armed—and in the face of Sgt. Schuck's testimony to the contrary, A228—Officer Nicoletti instead invites this Court to make an inference against Mr. Dennis based upon the offense for which the officers sought the warrant to search the house. *See* Appellant's Br. at 28-29 (urging this court to draw adverse inference because "violence and drug trafficking often go hand in hand"). Worse still, Officer Nicoletti urges this court to draw an inference against Mr. Dennis based upon the results of a search that *had not even happened yet* and that could not have influenced the officers on the scene at all. Appellant's Br. at 29; *see also Jefferson*, 21 F.4th at 77 (demarcating events that Officer Lias "did not personally witness" prior to his arrival on the scene).

Other additional factors identified by this court also cut in Mr. Dennis's favor. For instance, the "severity of the crime," suspected retail drug sales, is minimal compared to offenses involving violence. *Id*. at 79; *see also El*, 975 F.3d at 337 (discussing lack of severity of potential underage purchase of tobacco).[8] The "physical injury to" Mr.

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[8] In analyzing this in his own brief, Officer Nicoletti engages in the same conflation of factors as in his analysis of immediate threat. Here, he mistakenly conflates the crime at issue—retail drug sales—with the nature of the pursuit. Appellant's Br. at 23-24 (discussing Mr. Dennis purportedly "violently resisting arrest" under the heading "The severity of the crime at issue."). And as already discussed, Officer Nicoletti's own characterization of Mr. Dennis's conduct is also improper fact construction on the posture.

Dennis, death, was as serious as possible. *Jefferson*, 21 F.4th at 79; *El*, 975 F.3d at 338 (describing even a "hip contusion" as weighing in suspect's favor even despite describing that injury as "relatively minor"). Mr. Dennis was alone, surrounded by seven officers, and so "the number of persons with whom the police officers must contend at one time" was just one. *Jefferson*, 21 F.4th at 79; *El*, 975 F.3d at 336. Compared to other cases, the number of officers here—seven—and their ratio to Mr. Dennis makes this factor cut especially strongly in Mr. Dennis's favor. *See El*, 975 F.3d at 337-38 (describing a ratio of six officers to two suspects as cutting in favor of the suspects and supporting a possible jury finding that officers used unreasonable force).

Even the factors identified by Officer Nicoletti as most strenuously cutting in his favor only do so when improperly construing facts against Mr. Dennis on the summary judgment posture. For example, although Officer Nicoletti repeatedly points to Mr. Dennis "attempting to evade arrest by flight," *e.g.*, Appellant's Br. at 27; *compare id. with Jefferson*, 21 F.4th at 79, and *Rivas*, 365 F.3d at 198, a reasonable jury could infer from the facts in the record that Mr. Dennis did not even realize the people pursuing him were officers intent on making an arrest. As the District Court observed, none of the officers wore uniforms. They drove unmarked vehicles, including the wrong way down a one-way street. They were executing a car stop in a manner not allowed by Philadelphia Police Department policy. When they got out and swarmed his car, none of them identified themselves as officers. Only one wore a tactical vest with identifying markings, and he remained out of Mr. Dennis's view. To the extent that "attempting to evade arrest" evinces danger, the importance recedes

when someone—as Mr. Dennis—has no reason to believe he is attempting to evade a valid arrest at all, rather than escaping a potential carjacking.

Even assuming, improperly, that Mr. Dennis was attempting to evade a lawful arrest, that does not justify Officer Nicoletti's use of deadly force. As the Supreme Court and this Court have observed, force may not be justified to stop flight even though a suspect who "successfully flee[s] may never be apprehended." *Abraham*, 183 F.3d at 288 (quoting *Garner*, 471 U.S. at 7). Even in situations where "subsequent arrest is not likely . . . the government's interest in effective law enforcement was insufficient to justify killing fleeing felons who did not pose a significant threat of death or serious injury to anyone." *Abraham*, 183 F.3d at 288. This is because "[w]eighty interests militate against the unrestrained pursuit of arrest," including "the suspect's fundamental interest in his own life" and "the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.* (quoting *Garner*, 471 U.S. at 9). Officer Nicoletti hinges virtually his entire argument about his own reasonableness in using deadly force upon Mr. Dennis's purported evasion of arrest, even adding it to his analysis of unrelated factors in the multi-factor inquiry. But evasion of arrest simply does not justify deadly force.

Officer Nicoletti justifying his use of deadly force based upon Mr. Dennis's purported flight is even more unreasonable in context, however. The parties dispute whether Officer Nicoletti knew Mr. Dennis's identity before the shooting. A362. But accepting, as Officer Nicoletti says, that the authorized search warrant was for Mr. Dennis's own home, the risk that he would "never be apprehended," *Abraham*, 183 F.3d at 288, was extraordinarily low. He was not a suspect whom Officer Nicoletti

encountered only in a car and might plausibly never have run into again. Officer Nicoletti did not face a choice between shooting Mr. Dennis to stop his flight, or potentially allowing him to flee with no recourse. Even then, the government's interests would pale in comparison to Mr. Dennis's. But under the circumstances, where Officer Nicoletti and the other officers could have returned in the future, the balancing of the interests cuts even more strongly in favor of Mr. Dennis than usual.

Of course, Officer Nicoletti disagrees with this analysis of the District Court's reasonable, evidence-supported version of the facts. But that disagreement is precisely why this case should go to a jury. Because the excessive force inquiry is so fact-dependent, this Court has repeatedly held that "[t]he reasonableness of the use of force is normally an issue for the jury." *Rivas*, 365 F.3d at 198 (citing *Abraham*, 183 F.3d at 290). It has affirmed this time and time again. "As we decided in *Abraham*, a jury ought to have the opportunity to make factual determinations regarding Officer Lias's decision to employ deadly force against Jefferson." *Jefferson*, 21 F.4th at 80. A jury should have that opportunity here, too.

B. As the District Court recognized and as this Court recently affirmed, that right has been clearly established for more than twenty years.

While *Jefferson* obviously issued after the events of this case and could not have served as notice for Officer Nicoletti,[9] *Jefferson* did not establish the right in the first

[9] *Jefferson* "was published in 20[21] and, therefore, cannot clearly establish Fourth Amendment rights as of 20[18]." *El*, 975 F.3d at 340. "[T]he question is what the case law held at the time of the incident." *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011)). But *Jefferson* itself "relied on pre-20[18] case law." *El*, 975 F.3d at 340.

instance. Like the District Court here, the *Jefferson* Court relied on *Abraham v. Raso*, which this Court decided in 1999, and which predated Officer Nicoletti killing Mr. Dennis by nearly two decades. Indeed, even though the District Court's decision predated *Jefferson*, the District Court cited *Abraham* and two other Third Circuit cases for an uninterrupted string of precedent confirming the constitutional right at issue here. Whether this Court considers the District Court's framing of the already-established constitutional right at issue, or the similar framing of the already-established constitutional right the *Jefferson* Court used, *Abraham* put Officer Nicoletti on notice that his conduct violated clearly established rights and precludes the application of qualified immunity.

In assessing whether a right has been clearly established, the Court conducts a two-part inquiry. First, it defines the right at an appropriate level of specificity, and second, considers whether existing precedent at the time of the violation would have put a reasonable official on notice that his or her conduct violated that right. *Peroza-Benitez v. Smith*, 994 F.3d 157, 165 (3d Cir. 2021); *see also Lamont*, 637 F.3d at 182 (3d Cir. 2011). This Court can affirm based upon the District Court's definition of the right at issue, but it may also make "a modification of the District Court's decision" to uphold the District Court based upon similarly-defined right that convers the District Court's identification of the relevant facts. *Peroza-Benitez*, 994 F.3d at 172.

Given its marked similarity to the *Jefferson* Court's framing of the right, the District Court has already framed the right at the appropriate level of specificity. The *Jefferson* Court defined the right at issue in that case "as follows: a suspect fleeing in a vehicle, who has not otherwise displayed threatening behavior, has the

constitutional right to be free from the use of deadly force when it is no longer reasonable for an officer to believe his or others' lives are in immediate peril from the suspect's flight." *Jefferson*, 21 F.4th at 81. Even though *Jefferson* had not yet issued, the District Court defined the right at issue in this case similarly, observing that "using deadly force against an individual driving a car when the driver did not pose a threat to the safety of the officer or others" violated the law. A15.

If anything, the District Court defined the right more narrowly than it needed to. "[T]his Court takes a broad view of what constitutes an established right of which a reasonable person would have known." *Peroza-Benitez*, 994 F.3d at 166; *Kopec v. Tate*, 361 F.3d 772, 778 (3d Cir. 2004). Indeed, sometimes "a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct in question even though the very action in question has not previously been held unlawful." *Jacobs*, 8 F.4th 187 at 196 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Despite that, the District Court here increased the level of specificity beyond the level of specificity this Court used in *Jefferson*, observing that "an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him." A15. (citing *Orn v. City of Tacoma*, 949 F.3d 1167, 1178 (9th Cir. 2020), for a collection of cases in which "at least seven circuits including the Third Circuit in *Abraham*" had so held). That level of specificity was unnecessary. This Court held in *Jefferson* on remarkably similar facts that the lack of ongoing threat was enough to foreclose shooting at the driver of a vehicle, regardless of the exact angle of the shot.

Although *Abraham* is binding law of this Circuit and therefore enough to clearly establish the right at issue, a robust consensus of law in other Circuits confirms this Court's precedent. For instance, in addition to *Abraham* and *Orn*, the Fourth Circuit has held that officers "violate the Fourth Amendment if they employ deadly force against the driver [of a car] once they are no longer in the car's trajectory." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019) (denying qualified immunity based upon clear establishment by *Waterman v. Batton*, 393 F.3d 471, 479 (4th Cir. 2005)). The Tenth and Second Circuits have held that shooting into the side of a car means that a reasonable jury could find that an officer faced no immediate danger. *Cordova v. Aragon*, 569 F.3d 1183, 1187 (10th Cir. 2009); *Cowan ex Rel. Estate of Cooper v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003). The Fifth Circuit, citing *Abraham*, has observed that "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased," in the case of a motorist driving away from police. *Lytle v. Bexar Cnty.*, 560 F.3d 404, 413 (5th Cir. 2009). The Seventh Circuit has held the same. *Scott v. Edinburg*, 346 F.3d 752, 757 (7th Cir. 2003). The Eleventh Circuit held that an officer could not reasonably have believed he or anyone was in danger to justify firing on a truck where "the truck's lane was clear of traffic," even where the truck "had accelerated to eighty to eight-five miles per hour . . . in an attempt to avoid capture." *Vaughan v. Cox*, 343 F.3d 1323, 1330 (11th Cir. 2003). The Sixth Circuit held that where a car "was stationary at the time of the shooting . . . reasonable police officers in defendants' positions would not have believed that [the driver] posed a threat of serious physical

harm" to anyone. *Estate of Kirby v. Duva*, 520 F.3d 475, 481 (6th Cir. 2008). All of these cases predated Officer Nicoletti shooting Mr. Dennis.

C. The facts in the record nearly exactly match those in this Court's precedents denying qualified immunity.

This Court has sometimes faced difficult questions about whether applying qualified immunity would be appropriate when facts differed from those in the precedent establishing the constitutional right at issue. Indeed, substantial variation of facts from precedent serves as the entire basis for the "judicially created doctrine of qualified immunity." *Peroza-Benitez*, 994 F.3d at 165. This, however, is not such a difficult case. The facts in the record here closely match those in the record of *Jefferson*, to say nothing of *Abraham* itself. And as the *Jefferson* Court held, based upon those facts, Officer Lias violated clearly established law. So too could a reasonable jury find that Officer Nicoletti did based upon the summary judgment record here. If anything, key facts in the *Jefferson* record might have provided more basis for a reasonable officer to use force than facts in the record here, making it even more reasonable for a jury to potentially find that the use of force here was excessive.

In *Jefferson*, as a man was driving a car, and an officer saw him, followed him, and attempted to pull him over. 21 F.4th at 76. Instead of the driver pulling over, a car chase ensued. *Id*. at 77. During the chase, Officer Lias joined the pursuit. *Id*. The chase ended when Mr. Jefferson hit a fire hydrant, which brought his car to a stop. *Id*. At that point, officers boxed in his car and surrounded the vehicle. *Id*. Although the hydrant stopped the car, Mr. Jefferson still tried to maneuver out, including by reversing and pulling forward—and he hit one of the officers' cars while doing so. *Id*.

Subsequently, Officer Lias exited his vehicle. None of the officers were in the path of Mr. Jefferson's car, but Officer Lias shot him through the window while the car was moving. *Id*.

Those facts line up closely with the facts in the summary judgment record here. In both cases, an individual in a car was stopped by police who had no particular reason to know that he was armed or posed a danger independent of the presence of a car. In both cases, while effecting a stop, officers boxed in and surrounded the driver. In both cases, the driver made abbreviated but slow back and forth movements in the car to try to maneuver out of being boxed in. In both cases, at least one police car collided with the driver's car. In both cases, officers exited their vehicles to engage the driver. In both cases, whatever immediate danger the driver posed subsided when no officers stood in the car's hypothetical forward trajectory. And in both cases, ultimately, an officer fired shots into the car at the driver from the side of the vehicle.

Officer Nicoletti's brief attempt to distinguish *Jefferson* is unpersuasive. In fact, in attempting to distinguish, he recounts numerous facts present in both cases. Appellant's Br. at 46. If anything, subtle distinctions between the two cases all cut in Mr. Dennis's favor because they characterize *less* threatening circumstances. Unlike Mr. Jefferson, Mr. Dennis did not lead Officer Nicoletti or the others in a car chase prior to being boxed in and surrounded. Unlike Mr. Jefferson, Mr. Dennis specifically declined to plow over Officer Bogan during the moments Officer Bogan stood in front of his car. Unlike Mr. Jefferson, who survived, Mr. Dennis died after Officer Nicoletti shot him. And, crucially, unlike Mr. Jefferson—who an officer shot from the side while his car was moving forward—Mr. Dennis's car had stopped entirely. None of those

facts change the analysis of the interactions between the officers in each situation and the respective drivers of boxed-in cars—in all crucial analytical respects, the facts are the same. But to the extent that there are any differences, they cut in Mr. Dennis's favor.

Other cases cited by Officer Nicoletti have such stark factual distinctions that they are inapposite. For example, one case cited, Appellant's Br. at 21, involves "a heavy pedestrian presence during the course of the pursuit" and the driver having "continuously swerved between inbound and outbound lanes, which ultimately led to his colliding with three other vehicles." *Davenport v. Borough of Homestead, Corp.*, 870 F.3d 273, 280 (3d Cir. 2017). Another cited case, *Scott v. Harris*, Appellant's Br. at 35, involved a high-speed pursuit "at speeds exceeding 85 miles per hour" for "nearly 10 miles." 550 U.S. at 375. Similarly, *Plumhoff v. Rickard*, relied upon extensively by Officer Nicoletti—*see* Appellant's Br. at 12, 16, 18, 19, 20, 33, 37, 38, 40, 43, 47—involved "outrageous reckless driving" at speeds that "exceeded 100 miles per hour" and endangered "more than two dozen other motorists." 134 S.Ct. 2012, 2015 (2014). Other cases are inapposite because they involve armed suspects posing emergent threats. *Sheehan*, *Kisela*, and *Bond*, Appellant's Br. at 43-44, all involved someone menacing officers or others with imminent use of a dangerous weapon and ignoring commands to drop it. *See City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 605 (2015) (describing menacing officers with a 5 inch kitchen knife); *Kisela v. Hughes*, 138 S.Ct. 1148, 1151 (2018) (describing advancing on officers with "a large knife"); *City of Tahlequah v. Bond*, 142 S.Ct. 9, 10 (2021) (describing a man grabbing a hammer and having "raised the hammer higher behind his head and took a stance

as if he was about to throw the hammer or charge at the officers"). Under the circumstances, those courts reasonably thought that the person "posed [a] serious threat or immediate harm to others." *Davenport*, 870 F.3d at 280. This case involves no such facts, and indeed, the video itself does not even picture any pedestrians at the scene.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the appeal for lack of appellate jurisdiction, or, alternatively, it should simply affirm the judgment of the District Court.

Respectfully submitted,

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April 18, 2022

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 10,866 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B); and

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CERTIFICATE OF BAR MEMBERSHIP

I certify pursuant to L.A.R. 28.3(d) that I am a member in good standing of the Bar of the Third Circuit.

/s/ Jim Davy
Jim Davy

Dated: April 18, 2022

CERTIFICATE OF SERVICE

I certify that on April 18, 2022, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system. I also certify that within the time required, the paper copies described in the certificate of compliance will be delivered to the Clerk's office at 601 Market Street.

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