

No. 19-10245-FF

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In the  
**United States Court of Appeals**  
**for the Eleventh Circuit**

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ESTATE OF IBRAGIM TODASHEV,  
*Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA ET AL.,  
*Defendant-Appellee*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
No. 6:17-cv-919-ORL-41DCI

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**BRIEF OF THE UNITED STATES OF AMERICA**

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MARIA CHAPA LOPEZ  
United States Attorney

DAVID P. RHODES  
Assistant United States Attorney  
Chief, Appellate Division

JENNIFER WAUGH CORINIS  
Assistant United States Attorney  
Appellate Division  
Florida Bar No. 49095  
400 N. Tampa St., Ste. 3200  
Tampa, FL 33602  
(813) 274-6000

July 12, 2019

**Certificate of Interested Persons  
and Corporate Disclosure Statement**

In addition to the persons and entities identified in the certificate of interested persons and corporate disclosure statement in Estate of Ibragim Todashev's principal brief, the following persons have an interest in the outcome of this case:

1. Corinis, Jennifer Waugh, Assistant United States Attorney;
2. Estate of Ibragim Todashev, plaintiff-appellant;
3. Lopez, Maria Chapa, United States Attorney;
4. Mendoza, Hon. Carlos E., United States District Judge;
5. Muldrow, W. Stephen, former Acting United States Attorney;
6. Ridi, Marisa C., Esq.; and
7. Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division.

No publicly traded company or corporation has an interest in the outcome of this appeal.

## **Statement Regarding Oral Argument**

The United States does not request oral argument.

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### **Statement of Adoption**

Pursuant to Fed. R. App. P. 28(i) and 11th Cir. R. 28-1(f), the United States hereby adopts the statement of facts (pages 6–10) and argument sections (pages 20–27 & n.7; 29–46) of the brief filed by McFarlane and Savard on July 12, 2019.

### **Statement of Jurisdiction**

This is an appeal from a final decision of the United States District Court for the Middle District of Florida in a civil case. That court had jurisdiction. *See* 28 U.S.C. §§ 1331, 1346(b)(1), and 2674. The court entered its order for summary judgment in favor of the United States on December 20, 2018, Doc. 94, and the Estate of Ibragim Todashev timely filed a notice of appeal on January 20, 2019, Doc. 96. *See* Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction over this appeal. *See* 28 U.S.C. § 1291.

### **Statement of the Issues**

- I. Did the Estate abandon its challenge to the district court's order granting summary judgment on its wrongful death claim in favor of the United States when it failed to address that decision in its brief?
- II. Did the district court correctly grant summary judgment where Florida law forecloses the Estate's FTCA claim and where the Estate proffered no affirmative evidence to create a genuine issue of material fact about whether the use of force was reasonable?
- III. Did the district court abuse its discretion in staying discovery while the individual federal defendants' qualified immunity motions were pending?
- IV. Did the district court abuse its discretion in denying the Estate's Rule 56(d) request for additional discovery where the request did not comply with Circuit precedent and where the Estate made belated but deficient arguments for additional discovery in its Rule 72 objection?

### **Statement of the Case**

Ibragim Todashev was a person of interest in a triple homicide and also

was a known associate of one of the Boston Marathon bombers, Tamerlan Tsarnaev. During an interview with law-enforcement officers about the homicides, Todashev threw a table at FBI Special Agent Aaron McFarlane, causing a serious injury to McFarlane's head, failed to comply with commands to show his hands, then charged at another law-enforcement officer with a pole. Both McFarlane and the officer felt threatened by Todashev and feared for their lives. McFarlane shot Todashev several times, killing him. Todashev's Estate brought a lawsuit against the FBI agent, several other law-enforcement officers, and the United States, alleging that the officers used excessive force against Todashev and caused his wrongful death. Although the Estate argues that it was entitled to discovery before the district court ruled on McFarlane's summary judgment motion, the court concluded that based on the undisputed facts<sup>1</sup> that McFarlane's actions were reasonable during the violent confrontation in Todashev's apartment.

### *Course of Proceedings*

In May 2017, the Estate of Ibragim Todashev filed a four-count civil action against the United States and several law-enforcement officers. Doc. 1.

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<sup>1</sup>The undisputed facts are taken from the record that includes sworn statements by the two law-enforcement officers who were present, photographs of the scene, ballistics evidence, text messages, transcripts of phone calls, and transcripts of interviews of several individuals. McFarlane and Savard's brief at 43.

Count I was a Federal Tort Claims Act (“FTCA”) claim against the United States in which the Estate claimed that the United States was responsible for Todashev’s wrongful death based on McFarlane’s use of deadly force, as well as the United States’ negligent hiring, supervision, and retention of McFarlane. Doc. 1 ¶¶ 81–95. Count II was a claim against two federal law-enforcement officers, McFarlane and Christopher Savard, brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Count III was a 42 U.S.C. § 1983 claim against Massachusetts state troopers Joel Gagne and Curtis Cinelli. Count IV was a combined *Bivens* and § 1983 claim against all of the individual defendants alleging that they conspired to violate Todashev’s civil rights. Doc. 1 ¶¶ 81–116.

The United States moved to dismiss the FTCA claim based on negligent hiring, supervision, and retention on the ground that it was barred by the discretionary-function exception to the FTCA. Doc. 18. The individually named defendants submitted various motions to dismiss Counts II–IV. Docs. 19, 20. The Estate and all defendants engaged in further exchange of amended complaints and motions to dismiss, but despite that exchange, the allegations and claims in question remained in essence the same.<sup>2</sup> Doc. 32, 35, 36, 37, 43,

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<sup>2</sup>The Estate filed its first amended complaint as of right. Doc. 32. The United States moved to dismiss the negligent-hiring FTCA claim in the first amended complaint. Doc. 35. The individual defendants moved to dismiss all

48.

On January 1, 2018, before the case management report was submitted, the individual federal and individual state defendants collectively moved to stay discovery, arguing that they should not be required to engage in discovery while their dispositive motions raising the defense of qualified immunity were pending. Doc. 52. The United States moved to dismiss the FTCA negligent-hiring claim brought in the Estate's second amended complaint, Doc. 60, and the individual defendants filed motions to dismiss the claims in Counts II–V of the second amended complaint, Docs. 59, 63. McFarlane moved for summary judgment on the remaining *Bivens* claim against him, asserting a qualified-immunity defense. Doc. 61.

On February 21, 2018, the district court denied the individual federal and state defendants' motion to stay discovery because (1) the motions to dismiss were not dispositive, as the FTCA wrongful-death claim against the United States would still remain if the motions were granted, and (2) discovery for the asserted qualified-immunity defenses and the FTCA wrongful-death claim would substantially overlap. Doc. 66 at 5–7.

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claims in Counts II–IV of the first amended complaint except the *Bivens* claim against McFarlane in Count II. Docs. 36, 37. The Estate submitted an omnibus response to the motions to dismiss. Doc. 43. The Estate then submitted a second amended complaint with permission of the district court. Doc. 48.

The district court ordered the parties to meet and confer by March 7, 2018, and to submit their case management report by March 9, 2018. Doc. 66 at 7. In its response to McFarlane's motion for summary judgment, the Estate requested additional discovery under Fed. R. Civ. P. 56(d). Doc. 67 at 23–24. In that request, the Estate conclusorily stated that the physical evidence from the scene did not corroborate the affidavits provided by the officers who were involved in Todashev's shooting. Doc. 67.

The United States moved for summary judgment on the Estate's FTCA wrongful-death claim, arguing that it could not be liable for McFarlane's use of deadly force because the use had been objectively reasonable. Doc. 75 at 1–3. The Estate opposed it. Doc. 76.

Following the United States' motion for summary judgment, the magistrate judge stayed all discovery until it came to a decision on the individual federal defendants' collective claims to qualified immunity because the United States' summary judgment motion made those claims truly dispositive. Doc. 79. In the order staying discovery, the court noted that the Estate's affidavit in support of its Rule 56(d) request for additional discovery was deficient because it did not set out what facts it hoped to discover and how those facts would bear on the individual federal defendants' claims to qualified immunity. Doc. 79 at 7. The court ultimately decided that it would be

“improper” to grant the Rule 56(d) request. *Id.*

The Estate filed a memorandum objecting to the magistrate judge’s order granting the discovery stay and denying its request for further discovery, but it still did not set out the facts it hoped to discover or how those facts would bear on the qualified immunity issue.<sup>3</sup> Doc. 80. The individual state defendants then moved for summary judgment on the § 1983 claim against them (Count III). Doc. 85. In the Estate’s memorandum in opposition to the individual state defendants’ motion for summary judgment, it included a more detailed affidavit in support of a renewed request for further discovery. Doc. 86-1.

In August 2018, the district court issued an omnibus order that (1) granted the individual state defendants’ motion to dismiss the claims against them in Counts III and IV, (2) denied the individual state defendants’ motion for summary judgment as moot, (3) granted the individual federal defendants’ motion to dismiss various counts against them in Counts II–V, (4) granted McFarlane’s motion for summary judgment on the excessive-force claims against him in Count II, (5) granted the United States’ motion to dismiss the negligent-hiring FTCA claim in Count I, (6) dismissed all remaining claims in Counts II–V with prejudice, and (7) affirmed the magistrate judge’s order to

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<sup>3</sup>The Estate devoted most of its argument to the assertion that qualified immunity should not be granted because the individual defendants were being deceitful, though he offered no evidence to support this claim. Doc. 80 at 4–7.

stay discovery and overruled the Estate's objections to it. Doc. 87 at 25–26.

The district court granted the United States' motion to dismiss the FTCA claim based on negligent hiring and supervision due to lack of subject matter jurisdiction because it fell under the discretionary-function exception to the FTCA. Doc. 87 at 8. The court granted McFarlane's motion for summary judgment on the ground of qualified immunity because it found that McFarlane's use of deadly force was objectively reasonable and therefore he did not violate Todashev's Fourth Amendment rights. *Id.* The court also noted that the Estate's response to McFarlane's summary judgment motion was non-responsive and largely duplicated its response to the individual federal and state defendants' motion to dismiss. Doc. 87 at 22.

Further, the district court overruled the Estate's objections to the magistrate judge's order, noting that the objections were general and conclusory, and did not cite to evidence or authority. Doc. 87 at 14. The court adopted the magistrate judge's order staying discovery and denying the Estate's Rule 56(d) request because the Estate's Rule 56(d) affidavit was deficient and any detail regarding what the Estate wished to obtain during further discovery had not been provided to the magistrate judge before it issued its decision granting the discovery stay. *Id.*

The Estate moved for reconsideration of the court's omnibus order, Doc.

89, which the court denied, Doc. 94. The district court granted the United States' summary judgment motion on the Estate's only remaining claim: the FTCA wrongful-death claim. Doc. 94. The district court granted summary judgment in favor of the United States on three grounds: (1) under Florida law, law-enforcement officers cannot be held liable for negligence, so any wrongful-death claim based on a theory of negligence failed; (2) a wrongful-death claim based on an intentional tort failed because McFarlane previously had been found to have used objectively reasonable force, Doc. 87; and (3) a wrongful-death claim based on a deprivation of constitutional rights failed because McFarlane had been found not to have exercised excessive force, *id.* The court entered judgment for the United States on December 21, 2018. Doc. 95.

This appeal timely followed. Doc. 96.

### ***Statement of the Facts***

Pursuant to Fed. R. App. P. 28(i) and 11th Cir. R. 28-1(f), the United States adopts the statement of facts included in McFarlane and Savard's brief. *See* McFarlane and Savard's brief at 6–10. No additional facts are necessary to resolve this appeal.

### ***Standard of Review***

I. This Court reviews a grant of summary judgment de novo but the district court's findings of fact informing that judgment only for clear error.

*Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010). This Court should apply the same summary-judgment analysis as did the district court: it should review the evidence and reasonable inferences drawn from that evidence in the light most favorable to the nonmovant, and should affirm the grant of summary judgment if there is no genuine dispute of material fact. *See, e.g., Perry v. Sec’y, Fla. Dep’t of Corr.*, 664 F.3d 1359, 1363 (11th Cir. 2011); *see also Penley v. Eslinger*, 605 F.3d 843, 853 (11th Cir. 2010) (“Though factual inferences are made in [Plaintiff’s] favor, this rule applies only *to the extent supportable by the record.*”) (emphasis in original) (internal quotation marks and citation omitted).

Importantly, this Court may uphold the judgment on any basis in the record, regardless of whether the district court specifically relied upon it. *See, e.g., Kolodziej v. Mason*, 774 F.3d 736, 740 (11th Cir. 2014) (“A grant of summary judgment may be upheld on any basis supported by the record.”); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1251 (11th Cir. 2001) (principle is “well-settled”).

II. This Court reviews challenges to all discovery matters for abuse of discretion. *See Tobinick v. Novella*, 848 F.3d 935, 943 (11th Cir. 2017). Further, a party appealing a district court’s denial of its motion for additional discovery “must be able to show substantial harm to its case” as a result of that denial.

*Leigh v. Warner Brothers, Inc.*, 212 F.3d 1210, 1219 (11th Cir. 2000).

### **Summary of the Argument**

The Estate's brief does not address, even in a perfunctory manner, the district court's order granting summary judgment in favor of the United States on the Estate's FTCA wrongful-death claim. Although the court analyzed the Estate's FTCA claim under both a negligence and an intentional-tort theory, the Estate ignores it. Instead, the Estate's brief rehashes arguments it made in opposition to the defendants' motion to stay discovery, objections it made to the court's denial of its request for additional discovery, and arguments it made opposing McFarlane's motion for summary judgment on the ground of qualified immunity.

Like its arguments below, the Estate's arguments on appeal are inadequate to counter the district court's conclusion that, based on the undisputed evidence—that Todashev had attacked McFarlane with a table, causing an injury to McFarlane's head, had disobeyed commands to raise his hands, and had charged at Cinelli with a pole—McFarlane's use of force had been reasonable. Under Eleventh Circuit law, McFarlane's reasonable belief that Todashev had posed a threat to the safety of Cinelli and to himself supports the district court's grant of summary judgment to the United States on the Estate's FTCA claim because McFarlane's use of force was reasonable,

and therefore he did not commit an intentional tort.

### **Argument and Citations of Authority**

#### **I. The Estate abandoned its challenge to the district court's order granting summary judgment on its FTCA wrongful-death claim in favor of the United States because it fails to address that decision on the merits in its brief.**

The Estate does not even mention the district court's order granting summary judgment on its FTCA wrongful-death claim in favor of the United States, let alone argue that the court's order was erroneous, or why. Rather, its brief is focused exclusively on its arguments that it should have been permitted to conduct discovery and that the record would not justify the inference that the use of deadly force was reasonable, so the district court should not have granted McFarlane's summary judgment motion. And the Estate makes no argument that, even if McFarlane was entitled to qualified immunity, the district court erred by dismissing the Estate's FTCA wrongful-death claim against the United States. Instead, the Estate relies on a cut-and-paste argument from its opposition to the United States' summary judgment motion.<sup>4</sup> In such circumstances, the Estate has abandoned its challenge to

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<sup>4</sup>Aside from changing "the United States" to "Appellees" and adding to the discussion of the summary judgment standard, the Estate's argument is lifted verbatim from its opposition to the United States' summary judgment motion (Doc. 76). Compare the Estate's brief at 28–29 to the Estate's

the court's grant of summary judgment on its FTCA claim against the United States. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.")

**II. The district court correctly granted summary judgment in favor of the United States on the Estate's FTCA claim because caselaw supports the court's conclusion that the use of force was reasonable and the Estate proffered no affirmative evidence to create a genuine issue of material fact about whether the use of force was reasonable.**

If this Court nonetheless considers the Estate's FTCA claim, it should affirm the district court's grant of summary judgment in favor of the United States. The court's conclusion that the Estate's FTCA claim failed is supported by Florida law. As the court correctly stated, Florida law does not recognize a wrongful-death claim based on alleged negligence by a law-enforcement officer. Further, the court concluded that to the extent the Estate's claim was based on an alleged battery by McFarlane, that claim failed because the court previously had found that McFarlane's use of force was objectively reasonable. Doc. 94 at 4 (citing Doc. 87 at 25). On appeal, the Estate has failed to

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opposition, Doc. 76 at 9–10; Estate's brief at 30 to Estate's opposition, Doc. 76 at 12; and Estate's brief at 31–40 to Estate's opposition, Doc. 76 at 15–23.

establish—or even to try to establish—that the court’s determination was wrong.

Further, the Estate alleges as one of the bases of its FTCA wrongful-death claim against the United States that, as a “direct and foreseeable result” of McFarlane and Savard’s violation of Todashev’s Fourth Amendment rights, Todashev “suffered injury and death.” Doc. 48 at ¶¶ 128–29. But the United States is not liable under the FTCA for constitutional claims. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994); see 28 U.S.C. § 2679(b)(1) (remedy against the United States for federal employees’ wrongful acts does not extend to civil actions brought for a violation of the United States Constitution). This Court can affirm the district court’s decision on any basis in the record, and so it need not reach the merits of the Estate’s FTCA claim that is based on an alleged constitutional violation.

#### **A. Applicable Law**

##### **(1) *The Federal Tort Claims Act***

The Federal Tort Claims Act waives sovereign immunity and makes the United States liable in tort for the negligence or wrongful conduct of its employees. 28 U.S.C. §§ 2671–2680. Although the FTCA excepts certain intentional torts from its waiver of sovereign immunity, an individual may sue the United States if the alleged act was committed by a law-enforcement

officer. 28 U.S.C. § 2680(h). As the district court correctly stated, the substantive law of Florida determines whether the United States is liable for the actions of McFarlane.<sup>5</sup> Doc. 94 at 3 (citing 28 U.S.C. § 1346(b)(1)).

**(2) Excessive Force**

Under Florida law, “[a] battery claim for excessive force is analyzed by focusing upon whether the amount of force used was reasonable under the circumstances.” *City of Miami v. Sanders*, 672 So.2d 46, 47 (Fla. Dist. Ct. App. 1996) (citing Fla. Stat. § 776.05(1)). A law-enforcement officer cannot be liable for excessive use of force if he “reasonably believes [the force] to be necessary to defend himself or another from bodily harm while making the arrest.” *Id.* (quoting § 776.05(1)). Florida law equates an excessive-force claim with an intentional tort. *Id.*

The same objective-reasonableness standard that applies to Fourth Amendment excessive-force claims applies to Florida excessive-force claims. *See, e.g., Taffe v. Wengert*, No. 18-10776, 2019 WL 2157363, \*7 (11th Cir. May 17, 2019) (unpublished) (dismissing Florida battery claim based on excessive force where court found no Fourth Amendment violation). “Any claim that a

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<sup>5</sup>While McFarlane and Savard filed a joint brief, the question on appeal as to the United States is whether McFarlane, for whose conduct the United States is liable, used reasonable force.

law enforcement officer used excessive force—whether deadly or not—during a seizure of a free citizen must be analyzed under the Fourth Amendment’s ‘reasonableness’ standard.” *Garczynski v. Bradshaw*, 573 F.3d 1158, 1166 (11th Cir. 2009) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

“[R]easonableness is generally assessed by carefully weighing ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’” *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (quoting *Tenn. v. Garner*, 471 U.S. 1, 8 (1985)). “The operative question ... is ‘whether the totality of the circumstances justifie[s] a particular sort of search or seizure.’” *Id.* (quoting *Garner*, 471 U.S. at 8–9). An officer may use deadly force against a person he reasonably perceives as posing an imminent threat of serious physical harm to an officer or others. *Robinson v. Arrugeta*, 415 F.3d 1252, 1256 (11th Cir. 2005); *see also Hammett v. Paulding Cty.*, 875 F.3d 1036, 1048 (11th Cir. 2017) (explaining that an officer may use deadly force when he reasonably believes that his own life is in peril).

Further, the Supreme Court has made clear that “[t]he 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.” *Graham*, 490 U.S. at 396 (internal quotation marks and citation omitted). As this Court

held in *Garczynski*, the Court’s job “is not to evaluate what the officers could or should have done in hindsight.” 573 F.3d at 1168; *see also Manuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994) (“Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer.”) (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir. 1994))).

### **B. The Estate’s FTCA Claim Based on a Negligence Theory**

The Estate based its FTCA wrongful-death claim against the United States in part on “state and common law tort claims for wrongful death” and negligent hiring, supervision, and retention of McFarlane. Doc. 48, ¶ 123.<sup>6</sup> To the extent that the Estate’s excessive-force claim is based on a negligence theory, the district court correctly concluded that it failed as a matter of Florida law because “[a] cause of action for battery requires the showing of intentional affirmative conduct and cannot be premised upon an omission or failure to act.” *Sanders*, 672 So. 2d at 47–48. As this Court stated in *Lewis v. City of W. Palm Beach*, 561 F.3d 1288 (11th Cir. 2009), “[i]t is inapposite to allege the

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<sup>6</sup>The district court granted the United States’ motion to dismiss the Estate’s wrongful death claim to the extent it relied on a theory of negligent hiring because the discretionary-function exception to the FTCA bars such claims. Doc. 87 at 5–8. The Estate has not appealed that decision.

negligent commission of an intentional tort, such as the use of excessive force.” *Id.* at 1294 (citing *City of Miami v. Ross*, 695 So.2d 486, 487 (Fla. Dist. Ct. App. 1997)); *Sanders*, 672 So.2d at 48). The court’s conclusion that Florida law barred the Estate’s negligence-based wrongful death claim was correct, and the Estate has not argued otherwise.

### **C. The Estate’s FTCA Claim Based on a Battery Theory**

Next, the Estate alleged that the United States was liable under the FTCA for the wrongful acts of its officers in “assaulting, battering, falsely imprisoning, and tortuously [*sic*] causing the death of ... Todashev.” Doc. 48, ¶ 127. The district court correctly stated that with respect to the Estate’s claim for the intentional tort of battery, under Florida law “an officer is liable for damages only where the force used is clearly excessive.” *Sanders*, 672 So.2d at 47. Likewise, under federal law, the reasonableness of an officer’s use of deadly force turns on whether the force was used “to dispel a threat of serious physical harm to either the officers or others, or to prevent the escape of a suspect who threatens this harm.” *Singletary v. Vargas*, 804 F.3d 1174, 1181 (11th Cir. 2015). Thus, the Estate’s wrongful-death claim rests on the question whether the amount of force McFarlane used in response to Todashev’s attack was reasonable. The district court, in its order granting McFarlane’s motion for summary judgment, found that it was. On appeal, the Estate has failed to show

that the court's conclusion was wrong.

In its analysis of whether the Estate had met its burden to establish that McFarlane violated Todashev's right to be free from the use of excessive force, the district court cited Florida law that "a court must ask whether the officer's conduct is objectively reasonable in light of the facts confronting the officer."

Doc. 87 (citing *Saunders v. Duke*, 766 F.3d 1262, 1266–67 (11th Cir. 2014)).

The court also cited the factors to guide the assessment of objective reasonableness that were established by the Supreme Court in *Graham*: "(1) 'the severity of the crime at issue,' (2) 'whether the suspect poses an immediate threat to the safety of the officers or others,' and (3) 'whether he is actively resisting arrest or attempting to evade arrest by flight.'" Doc. 87 at 22 (quoting *Graham*, 490 U.S. at 396). Further, the district court noted that this Court has established that deadly force is constitutionally permissible when an officer:

(1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible.

Doc. 87 at 22 (quoting *Perez v. Suszczyński*, 809 F.3d 1213, 1218–19 (11th Cir. 2016)).

Applying these standards, the district court correctly concluded that the

Estate had failed to establish that McFarlane's use of force was unreasonable. The court stated that McFarlane had "presented a compelling argument that he did not violate Todashev's right to be free from excessive force" but had instead acted "reasonably under the circumstances" given that Todashev posed an "imminent risk of serious harm to the officer or others." Doc. 87 at 23. In particular, the court cited the undisputed facts that Todashev had seriously injured McFarlane by throwing a table at his head and then had ignored McFarlane's orders to show his hands; that McFarlane knew about Todashev's martial arts training and his history of aggressive behavior; and that Todashev appeared ready to use a pole as a weapon when he charged at Cinelli. The court cited several cases discussing the use of deadly force in dangerous situations and concluded that "McFarlane had acted reasonably under the circumstances" and "was not required to wait and see what Todashev might do next." Doc. 87 at 25. The court was correct: "This was precisely the type of situation where the decisions of the officers confronted with 'circumstances that are tense, uncertain, and rapidly evolving' should not be second-guessed." *Lewis*, 561 F.3d at 1292 (quoting *Graham*, 490 U.S. at 397).

In its opposition to McFarlane's motion for summary judgment, the Estate had argued that a disputed issue of fact existed, but as the district court correctly noted, the Estate had "merely assert[ed] conclusory statements to

indicate [its] disagreement and fail[ed] to provide any evidence to demonstrate that a material dispute of fact exist[ed].” Doc. 87 n.7. The Estate’s arguments on appeal contain virtually the same arguments that it asserted below, and so they contains the same flaws that the district court described. And those flaws are fatal to its claim.

For example, in its brief, the Estate claims that Cinelli’s description of Todashev as a dangerous individual “appears to be largely exaggerated, self-serving, and propagandistic.” Estate’s brief at 10. For one thing, such conclusory allegations, without supporting facts, “have no probative value.” *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000). Moreover, the Estate acknowledges that the FBI had been interested in Todashev because he had trained at a gym with one of the Boston Marathon bombing suspects, Tamerlan Tsarnaev, Estate’s brief at 6, and was a person of interest in a triple-homicide investigation in Waltham, Massachusetts, Estate’s brief at 7. Further, the Estate admits that the team involved in interviewing Todashev was aware that, in addition to being trained in mixed martial arts, Todashev recently had been arrested for his involvement in two physical altercations: a fight with two men over a parking space and a violent road-rage incident. *Id.* at 8–10. The Estate attempts to dispute that these incidents could give rise to a perception of Todashev as potentially dangerous because Todashev had shown “restraint” in

the parking lot fight, and, contrary to the United States' claim, Todashev had not caused one of the men to lose several teeth but instead had only "moved [the man's] teeth pretty bad to the back." Estate's brief at 9 & n.5. But the Estate has failed to offer any evidence to demonstrate that the officers' belief that Todashev could be dangerous was unreasonable.

The Estate also acknowledges that the officers believed that Todashev had, at some point during the interview, implicated himself by a written statement in the Waltham triple homicide, but it questions *when* during the interview Todashev made such a statement and argues that it should be permitted to test the authenticity of that document. Estate's brief at 10–11 & n.7. Further, the Estate questions the veracity of McFarlane's assertion that he had a "heightened sense of awareness" for his safety as the interview went on because he had been reading his notes when Todashev threw the table at his head, and posits that "it could also be reasonably inferred that McFarlane had been feigning inattention in order to make Todashev feel that it would be a good time to try to flee from the apartment." Estate's brief at 11. But this theory—like all of the Estate's theories—is based on speculation and conjecture about McFarlane's supposed nefarious motives, not a reasonable inference based on the evidence. If the undisputed evidence does not contradict a law enforcement officer's direct testimony, conjecture cannot create a

genuine issue of material fact. *See Rodriguez v. Farrell*, 280 F.3d 1341, 1353 n.20 (11th Cir. 2002).

In addition to these examples, the United States refers to McFarlane and Savard's comprehensive analysis of the Estate's failure to challenge the undisputed facts in the record beyond its conclusory assertions that it disagrees with them, *see* McFarlane and Savard's brief at 20–27 & n.7, and adopts that section pursuant to Fed. R. App. P. 28(i) and 11th Cir. R. 28-1(f).

In short, the Estate has failed to point to any evidence to refute the record evidence that McFarlane had acted reasonably, and thus has failed to demonstrate that there is a disputed issue of material fact. The district court was presented undisputed facts showing that a law-enforcement officer had been violently attacked by a noncompliant subject with a history of violence who appeared prepared to attack again. "Non-compliance of this sort supports the conclusion that the use of deadly force was reasonable." *Hammett*, 875 F.3d at 1051. Under these circumstances, the court correctly concluded that Eleventh Circuit caselaw supported McFarlane's use of force. The Estate has failed to show that that conclusion was wrong.

The Estate criticizes the United States for citing deadly-force cases involving an armed suspect. Estate's brief at 43. But the undisputed evidence in this case shows that Todashev had just violently attacked McFarlane with a

table, ignored commands to show his hands, and charged at Cinelli with a pole. The Estate's conclusory statements disputing that evidence, without more, cannot counter the undisputed facts. In fact, this Court's decision in *Hammett v. Paulding County*, 875 F.3d 1036 (11th Cir. 2017), which the Estate argues is distinguishable, involves circumstances very similar to the circumstances in this case and supports the district court's decision.

In *Hammett*, a team of law-enforcement officers attempted to execute a search warrant at the home of Hammett and his wife, the latter of whom was the target of the search warrant because of her suspected drug activity. 875 F.3d at 1039–40. The team entered the house and announced themselves, but received no response. *Id.* at 1040. According to the lead officer's statement, he proceeded down a dark hallway and saw a large man—Hammett—emerge from a room. *Id.* at 1041. Hammett had his hands tucked in his waistband, then moved something to his left hand. *Id.* He did not obey the officer's orders to raise his hands, but instead stepped aggressively toward the officer and tried to push past him. *Id.* As he did, he raised his hand toward the officer's head, and the officer caught a glimpse of a shiny black object in Hammett's hand, which the officer thought was a weapon. *Id.* at 1041–42. The officer fired one shot at Hammett, then fell backward in an effort to avoid Hammett. *Id.* at 1042. Two other officers heard the shot and saw the officer fall. Each fired one

shot at Hammett, who was killed. *Id.* A can of pepper spray was found in the hallway near Hammett's body. *Id.* at 1043–44. Both Hammett's wife and his son confirmed that Hammett—a repo man—usually carried pepper spray with him, although neither remembered seeing it near Hammett's body after the shooting. *Id.*

Hammett's son, Justin Hammett, filed a lawsuit against individual law-enforcement officers and the sheriff's office alleging violations of the Fourth Amendment and state-law tort claims. *Id.* at 1045. The district court granted summary judgment in favor of the individual officers on the ground of qualified immunity, and this Court affirmed because the undisputed facts showed that the officers had not acted unreasonably. Justin had argued that the physical evidence—the location of the bullet wounds—and allegedly contradictory testimony by the officers supported an inference that the officers had fired on Hammett without justification and that Hammett had in fact been retreating. *Id.* at 1050–52. This Court specifically rejected Justin's argument that the bullet wounds supported his theory that Hammett had been retreating because the undisputed evidence showed that Hammett had refused the officers' commands to show his hands and officers thought that Hammett had a weapon. *Id.* at 1051–52. This Court found that Justin had failed to point to any affirmative evidence that Hammett had, in fact, surrendered and retreated.

Further, this Court noted that the location of Hammett's wounds "by themselves, tell us essentially nothing about what happened" because "[t]here are infinite possible permutations that would explain how the bullets ended up where they did during the brief and chaotic scuffle that occurred." *Id.* at 1050.

Although the Estate attempts to distinguish *Hammett* by citing the alleged "inconsistency of the location of the bullet wounds, the placement of the body, the clear perception of a weapon by one officer but not the other" in this case, Estate's brief at 31, this Court addressed precisely the same issues in *Hammett*. And this Court found that the record, while "theoretically not inconsistent" with Justin's theory that Hammett had been retreating, was not enough to survive summary judgment absent affirmative evidence that Hammett had, in fact, been retreating. For the same reasons, the district court was correct that the Estate's speculative theory, without more, could not overcome the undisputed evidence supporting the reasonableness of McFarlane's actions.

The cases the Estate cites—many of which are from other circuits—do not undermine the district court's decision. For example, the Estate cites *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), to support its argument that "every circuit to have confronted this issue has found that 'a court must undertake a fairly critical assessment of the forensic evidence to decide whether the officer's testimony could reasonably be rejected at trial.'" Estate's brief at 43 (quoting

*Plakas*, 19 F.3d at 1147). But *Plakas* does not urge courts to focus on forensic evidence. The Estate’s quotation of that case omits a large portion: “a court must undertake a fairly critical assessment of the forensic evidence, *the officer’s original reports or statements and the opinions of experts* to decide whether the officer’s testimony could reasonably be rejected at a trial.” *Id.* (emphasis added). In other words, the *Plakas* court held that courts should consider the totality of the circumstances in making the reasonableness determination. That is what this Court requires, and that is what the district court did in determining that the undisputed evidence showed that McFarlane had acted reasonably.

The other cases the Estate cites discuss the general rule that a trial court should examine all of the circumstances to determine whether they contradicted the officer’s stated reason for using force, but the cases do not support the Estate’s argument that the district court erred by concluding that McFarlane’s use of force was reasonable. For example, in *Maravilla v. United States*, 60 F.3d 1230 (7th Cir. 1995), the Seventh Circuit examined all of the circumstances in a deadly-force case, and concluded that “either one of the officers’ stated reasons for shooting the victim would provide an objectively reasonable justification for the use of deadly force” and that “any variance among the officers’ stated justifications was immaterial and thus cannot

provide a basis to upset the district court's grant of summary judgment." *Id.* at 1233. Similarly, in *Hegarty v. Somerset County*, 53 F.3d 1367 (1st Cir. 1995), the First Circuit granted summary judgment in favor of law-enforcement officers despite the fact that the suspect died and "virtually all evidence comes from officers" because Hegarty had failed to establish a genuine dispute as to a material issue. *Id.* at 1376 & n.6.

The district court concluded that the Estate had failed to establish that the amount of force McFarlane used was "clearly excessive," as required to establish a battery claim based on excessive force under Florida law. Because the Estate failed to establish that McFarlane committed a tort under Florida law, its FTCA claim fails. *See* 28 U.S.C. § 1346(b)(1). Accordingly, the court correctly granted summary judgment on the Estate's wrongful-death claim against the United States.

**III. The district court did not abuse its discretion in staying discovery as to all defendants while the individual federal defendants' qualified-immunity motions were pending because discovery involving the United States would require the individual federal defendants to participate in it.**

In its order granting the defendants' motion to stay discovery, Doc. 79, the district court noted that "[d]iscovery matters are committed to the sound discretion of the Court" and that "[s]uch discretion allows the court to stay

proceedings as part of its inherent authority to control its docket.” Doc. 79 at 4. Although the court previously had denied the stay motion because the Estate’s wrongful-death FTCA claim against the United States remained, Doc. 66, after the United States moved for summary judgment on that claim, the court concluded that the issues “appear[ed] to be clearly meritorious and truly dispositive of this case, and thus, if the motions [were] granted, the need for discovery [would] be entirely eliminated.” Doc. 9 at 7–8. For the reasons explained in the argument section (pages 29–32) of the brief that the individual federal defendants have filed, which the United States adopts pursuant to Fed. R. App. P. 28(i) and 11th Cir. R. 28-1(f), the district court did not abuse its discretion by granting the defendants’ motion to stay discovery.

**IV. The district court did not abuse its discretion either in denying the Estate’s deficient Rule 56(d) request for additional discovery or in its rejection of the Estate’s belated arguments for additional discovery in its Rule 72 objection.**

The magistrate judge denied the Estate’s Rule 56(d) request because it did not comply with Eleventh Circuit precedent. Doc. 79 at 6–7. The district court reviewed the magistrate judge’s recommended report and order for findings that were clearly erroneous or contrary to law and found none. Doc. 87 at 14. The court also disregarded the Estate’s attempt at Rule 56(d) compliance in its objection to the magistrate judge’s recommended report and

order. *Id.* The Estate alleges that the court abused its discretion when it denied the Estate's original Rule 56(d) request because the court based its decisions on technicalities rather than substance. Estate's brief at 25. For the reasons explained in the argument section (pages 32–42) of the brief that the individual federal defendants have filed, which the United States adopts pursuant to Fed. R. App. P. 28(i) and 11th Cir. R. 28-1(f), the district court did not abuse its discretion by denying the Estate's Rule 56(d) request for additional discovery or in rejecting the Estate's new arguments made in its Rule 72 objection.

## Conclusion

The United States requests that this Court affirm the judgment of the district court.

Respectfully submitted,

MARIA CHAPA LOPEZ  
United States Attorney

DAVID P. RHODES  
Assistant United States Attorney  
Chief, Appellate Division

By: s/ Jennifer Waugh Corinis  
JENNIFER WAUGH CORINIS  
Assistant United States Attorney  
Appellate Division  
Florida Bar No. 49095  
400 N. Tampa St., Ste. 3200  
Tampa, FL 33602  
(813) 274-6000  
jennifer.corinis@usdoj.gov

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This brief, which contains 6684 countable words under 11th Cir. R. 32-4, complies with Fed. R. App. P. 32(a)(7)(B).

## Certificate of Service

I certify that a copy of this brief and the notice of electronic filing was sent by CM/ECF on July 12, 2019, to:

JAMES VERNON COOK, ESQ.

*Counsel for Estate of Ibragim Todashev*

*s/ Jennifer Waugh Corinis*  
\_\_\_\_\_  
JENNIFER WAUGH CORINIS  
Assistant United States Attorney

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