IN THE SUPREME COURT OF IOWA
No. 22–1625

KRYSTAL WAGNER, Individually and as Administrator of the Estate of Shane Jensen,

Plaintiff–Appellant,

vs.

STATE OF IOWA and WILLIAM L. SPECE,

Defendants–Appellees.

Appeal from the Iowa District Court for Humboldt County,
Kurt J. Stoebe, District Judge

APPELLEES' FINAL BRIEF

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it presents the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a). Specifically, this case turns on whether an officer's use of deadly force was reasonable under the Iowa Constitution. The Iowa Court of Appeals has previously adjudicated whether an officer's use of force was objectively reasonable. *See, e.g.*, *Samsara v. Squires*, No. 15-1079, 2016 WL 540984 (Iowa Ct. App. Feb. 10, 2016). Because the legal principles governing the use of deadly force are settled and not challenged in this appeal, this case may be transferred to the Iowa Court of Appeals.

STATEMENT OF THE CASE

Confronted with an armed man who threatened suicide-by-cop, refused to drop his gun, was in an open yard surrounded by homes and bystanders, fired his gun in the air, and then pointed his gun toward officers, Officer William Spece used deadly force in response to the immediate threat of deadly harm posed to himself, his fellow officers, and the bystanders on the scene.

The man's mother, as executor of his estate, brought *Godfrey*-type claims against the State of Iowa and Officer Spece (collectively, "the State"), alleging Officer Spece engaged in excessive force in violation of article I, sections 8 and 9 of the Iowa Constitution. After discovery, both parties filed motions for summary judgment.

The district court, presented with competing motions for summary judgment, concluded the undisputed facts showed Officer Spece's use of deadly force was objectively reasonable. The court similarly held that no substantive due process violation occurred. Because the law did not require Officer Spece to wait and see whether the man would fire *again*—this time at officers, into nearby homes, or at one of the visible bystanders—summary judgment was properly granted for the State. The district court's judgment should be affirmed.

STATEMENT OF THE FACTS

"Critical decisions regarding the use of force often must be made without much time for reflection. The issue of reasonableness must be examined from the perspective of the facts known to the officer at the time of the incident." *Nelson v. County of Wright*, 162 F.3d 986, 990 (8th Cir. 1998). Accordingly, the following discussion recounts the facts as known to Officer Spece at the time of the event, rather than those known by others or learned after-the-fact.

Officer Spece and DNR Conservation Officers

William Spece is a Conservation Officer for the Iowa Department of Natural Resources ("DNR"). (Defs. S.J. App. 193). DNR officers are fully certified state peace officers with the authority to enforce all Iowa laws. *See* Iowa Code §§ 801.4(11)(*g*) (including DNR conservation officers within the definition of "peace officer"); 456A.13 (explaining DNR conservation officers "have the same powers that are conferred by law on peace officers in the enforcement of all laws of the state of Iowa and the apprehension of violators").

As fully certified law enforcement officers, DNR officers are required to complete the same law enforcement training from the Iowa Law Enforcement Academy as police officers. (Bruner Dep. 6:22–7:6, Defs. S.J. App. 60). Officer Spece served as a police officer

in two Iowa cities before joining the DNR. (Spece Dep. 147:15-20, 149:16-24, Defs. S.J. App. 51–52). Along with his police officer training, Officer Spece is a Certified Firearms and Rifle Instructor. (Defs. S.J. App. 284). And Officer Spece, like all DNR officers, is trained in accordance with DNR's Use of Force, Firearms, and Critical Incident Counseling policies. (Defs. S.J. App. 169–77).

DNR officers regularly interact with individuals armed with hunting weapons—including rifles and knives. (Defs. S.J. App. 194). And because they are certified law enforcement officers, DNR officers routinely help local law enforcement when requested. (Bruner Dep. 60:13–61:6, Defs. S.J. App. 74; Spece Dep. 105:15-16, Defs. S.J. App. 41).

Officer Spece's assigned region for the DNR includes the Humboldt County area, and it is not unusual for him to help local Humboldt law enforcement. (Spece Dep. 112:8-9, Defs. S.J. App. App. 42; Fisher Dep. 78:17-24, Defs. S.J. App. 96). For example, in 2017, Officer Spece assisted with responding to an armed man banging on his girlfriend's door. (Defs. S.J. App. 194). Officer Spece helped search properties, locate the suspect, and take the suspect into custody without incident. (*Id.).* Officer Spece also previously backed up local law enforcement in response to a suicidal individual and helped get the suicidal individual safely to a hospital. (*Id.).*

Law Enforcement Looks for Shane Jensen

On the morning of Saturday, November 11, 2017, Officer Spece was participating in a court matter in Fort Dodge. (Defs. S.J. App. 194). Officer Spece returned to his vehicle and saw an all-points bulletin issued by Pocahontas County. (*Id.)* The bulletin was an Officer Safety Teletype Alert issued at 9:27am, which stated:

> ATTEMPT TO LOCATE CSC686 A BLACK 2015 FORD F150 THAT IS ENTERED AS A STOLEN VEHICLE OUT OF POCAHONTAS COUNTY FROM LAST NIGHT WE BELIEVE THIS VEHICLE IS DRIVE BY SHANE JENSEN FROM LIVERMORE WHO HAD TAKEN A 9 MM HANDGUN FROM A RESIDENCE IN POCAHONTAS AND TOOK OFF ON FOOT LAST NIGHT WE HAVE INFORMATION THAT THIS SUBJECT WAS DRIVING THIS VEHICLE IN THE HUMBOLDT AND WEBSTER COUNTY AREAS IN THE EARLY MORNING HOURS **SHANE JENSEN SHOULD BE CONSIDERED ARMED AND DANGEROUS AND HAS INFORMED LAW ENFORCEMENT LAST NIGHT THAT HE IS SUICIDAL AND HAS BEEN TALKING OF SUICIDE BY COP**.

(Defs. S.J. App. 192, 194) (emphasis added). Officer Spece did not know Shane Jensen before seeing the bulletin. (Spece Dep. 39:23-25, Defs. S.J. App. 24).

Officer Spece did not respond to the bulletin and proceeded with his DNR duties that day. (Spece Dep. 106:4-13, Defs. S.J. App. 41). Humboldt County Sheriff's Deputy Tim Fisher called Officer

Spece to give him a heads up about the missing truck and the possibility it had been sunk. (Spece Dep. 108:10-20, Defs. S.J. App. 41). Later, Deputy Fisher called again and asked Officer Spece to help search for Jensen. (Spece Dep. 109:17-20, Defs. S.J. App. 42). Officer Spece agreed to assist and notified his DNR supervisor that he was assisting local law enforcement. (Spece Dep. 117:6-8, Defs. S.J. App. 44).

Later that morning, Jensen's mother—Krystal Wagner—called Deputy Fisher. (Defs. S.J. App. 202). During the call, Ms. Wagner stated:

> I do believe **he still has the gun and his plan is to die today**, he says. . . . But he does want a shootout and I -- I told [Deputy] Vinsand that -- I don't know, 3:30 or 4 o'clock this morning, **he does want a shootout and he intends to fire so that you guys have to fire back** and like I told him, I'm prepared for whatever, sadly, cause I would like to see all of you guys come home to some sort of normalcy because we haven't had that in years.

(App. 215, at 1:16-1:22, 4:09-4:30) (emphasis added). Ms. Wagner also provided additional, limited information about Jensen's possible location. Ms. Wagner reported that Jensen had sent Snapchats to his sister, which indicated he was under a deck near a chain-link fence. (*Id.* at 0:38-1:38). Ms. Wagner was not sure whether Jensen was using was his own phone, as the picture

quality appeared better than Jensen's phone. (*Id.*). And she believed it was possible Jensen may have left his phone somewhere along a nature trail. (*Id.*).

Officer Spece met with Deputy Fisher, Humboldt County Sheriff's Deputy Kenneth Vorland, and Humboldt County Police Department Officer Tom Nielsen at the Humboldt Law Enforcement Center. (Defs. S.J. App. 195, 217). Officer Spece was informed about that Jensen had stolen a 9mm handgun from a family member. *(Id.* at 195).[1] He was also informed of Ms. Wagner's reported information about Jensen's possible location. (*Id.*). Although Pocahontas County had pinged Jensen's cell phone, the officers did not know whether Jensen was using another phone or if the phone had been abandoned, and thus they did not know whether the ping location would also be Jensen's location. (Nielsen Dep. 56:17–57:6, Defs. S.J. App. 129).

With the limited information available, the officers searched for homes with decks or chain-link fences. (Defs. S.J. App. 195).

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[1] Some of the officers had varying degrees of knowledge about Jensen's mental health history and varying degrees of experience in dealing with Jensen personally, yet no specifics were shared with Officer Spece. (Spece Dep. 12:6-21, Defs. S.J. App. 17). Thus, all Officer Spece knew about Jensen going into the search was that Jensen had stolen a truck, was armed with a handgun, had prior mental health issues, was suicidal, and had expressed desire to commit suicide-by-cop. (Spece Dep. 11:9-24, Defs. S.J. App.17).

During the search, Deputy Fisher responded to a report of a sunken truck in a quarry. (Defs. S.J. App. 203). Deputy Fisher confirmed the sunken vehicle was the stolen truck—but did not find the stolen pistol. (*Id.*) At the quarry, Humboldt Deputy Mathew Steil joined the search. (Defs. S.J. App. 208).

The officers then reconvened in a restaurant parking lot to discuss next steps. (*Id.*). They decided to search a different area and Officer Nielsen recalled seeing a yard with a chain-link fence in the new search location. (Defs. S.J. App. 218). Deputy Vorland departed the search to address another law enforcement matter. (Defs. S.J. App. 197, 203, 226).

The officers—Officer Spece, Deputy Fisher, Deputy Steil, and Officer Nielsen—then proceeded to the area identified by Officer Nielsen: 205 4th Street South. (Defs. S.J. App. 197, 218).

Officers Arrive at the House and Discover Jensen

Between roughly 90 and 120 minutes after the search began, the officers arrived at the home. (Steil Dep. 38:14-18, Defs. S.J. App. 108). Officer Spece tried to look under the deck from afar with binoculars, but couldn't see anything. (Defs. S.J. App. 197). Officer Nielsen decided he would go to the house and try and look down from atop the deck to see underneath. (Defs. S.J. App. 218).

Officer Spece, Deputy Steil, and Deputy Fisher moved toward the backyard, each carrying their patrol rifles. (Defs. S.J. App. 198). Officer Nielsen carried his service handgun. (Nielsen Dep. 29:5-14, 42:19-22, Defs. S.J. App. 121, 125). Officer Spece realized there was no cover between the deck and himself, Deputy Fisher, and Deputy Steil in the yard if Jensen was under the deck and decided to shoot. (Defs. S.J. App. 198). So Officer Spece and the Deputies moved next to a cement garage next to the yard. (Defs. S.J. App. 187, 198, 209–10).

When Officer Nielsen approached at the house, the resident was home. (Defs. S.J. App. 219). The resident consented to Officer Nielsen walking through the house to get to the deck. (*Id.*). There, Officer Nielsen could look below the deck through its wooden slats. (*Id.*). While walking through the house, Officer Nielsen realized the resident's children were also present in the home. (*Id.*).

Officer Nielsen radioed the officers that he was going to physically go on top of the deck to see if Jensen was beneath it. (*Id.*). Officer Spece observed Officer Nielsen walk out onto the deck and shine his flashlight down between the slats. (Defs. S.J. App. 198).

Officer Spece then observed Officer Nielsen reach for the gun on his hip, fumble, get his weapon out, take a couple of steps and start yelling. (*Id.)*. Officer Nielsen indeed saw something move

below the deck and immediately yelled "get out" and "show me your hands." (Defs. S.J. App. 219–20).

The Standoff

Jensen emerged from under the deck, carrying a handgun. (Spece Dep. 87:17-19, Defs. S.J. App. 36). Jensen then pointed his gun at Officer Nielsen. (Nielsen Dep. 6:13-16, 10:2-10, Defs. S.J. App. 116–17). Officer Nielsen had his gun drawn and pointed at Jensen, but as Officer Nielsen stepped back toward the doorway, he stumbled. (Nielsen Dep. 6:13-16, 57:10-16, Defs. S.J. App. 116, 129) Because he stumbled, he did not fire at Jensen. (Nielsen Dep. 57:20–58:2, Defs. S.J. App. 129)

Officer Spece watched Jensen walk away from the deck and into the open yard. (Defs. S.J. App. 198, 186). Officer Spece and Deputy Steil ordered him to drop the gun. (Defs. S.J. App. 210).

Officer Spece realized his position in the yard was now directly in Jensen's line of fire and the officers had to move. (Spece Dep. 87:7-19, Defs. S.J. App. 36). The officers moved to the west side of the garage, next to a dumpster. (*Id.*) Officer Spece was on one side of the dumpster with his rifle pointed at Jensen. (Defs. S.J. App. 199). Deputy Fisher was positioned on the other side of the

dumpster, and Deputy Steil was four or five feet behind the officers. (Defs. S.J. App. 203, 211).[2]

Officer Spece and the other officers continued to order Jensen to drop his weapon—Jensen did not comply. (Defs. S.J. App. 199).

Jensen's position in the yard was about 28 feet from the back doorway where Officer Nielsen was located—the home where the resident and children were inside. (Defs. S.J. App. 186). And Jensen was about 80 feet, or roughly 26 yards, from the dumpster where Officer Spece and the Deputies were located. (*Id.*).

The yard where Jensen was standing and refusing to drop his weapon was not isolated, but within a residential neighborhood surrounded by homes. (Spece Dep. 98:4-8, Defs. S.J. App. 39). It was a Saturday afternoon, and the officers began to notice bystanders observing near the scene. (Defs. S.J. App. 199) Officer Spece, with his rifle trained on Jensen, observed a man stick his head around the corner of a house behind Jensen. (*Id.*). Officer Spece yelled at the man to get back. (*Id.*)

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[2] Wagner falsely states that the officers believed the dumpster provided adequate cover. (Appellant Brief, at 19). To the contrary, each officer testified the dumpster did not provide adequate cover, but instead "was the only thing that was readily available." (Fisher Dep. 54:3-8, Defs. S.J. App. 90; Steil Dep. 18:21-23, Defs. S.J. App. 103).

Officer Spece then observed two other bystanders and similarly ordered them to get back. (*Id.*). At some point after Jensen walked into the yard, one of the bystanders, Jason Smith, began recording cell-phone footage from his vantage point. (App. 192 ["Footage"]; Defs. S.J. App. 230).[3]

Jensen continued to stand in the yard with the gun pointed at his own head. (Defs. S.J. App. 220). Jensen said something to the effect of the officers were "going to have to take him out and put him down." (*Id.*).

Jensen then moved the gun away from his head and fired it into the air. (Footage at 0:17). Jensen firing his gun "answere[d] a lot of questions" for the officers "as to if he was willing to pull the trigger, [and] if the gun was actually loaded." (Steil Dep. 56:7-11, Defs. S.J. App. 113).[4]

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[3] Meanwhile, unknown to Officer Spece, Deputy Vorland arrived on the scene. (Defs. S.J. App. 226). Deputy Vorland heard yelling and saw Officer Spece and the Deputies behind the dumpster with their rifles pointed at Jensen. (*Id.* at 226–27). Deputy Vorland saw Jensen in the yard with a black handgun in his hand. (*Id.* at 227). Deputy Vorland also saw bystanders standing on the scene in Jensen's potential line of fire. (Vorland Dep. 8:12-25, Defs. S.J. App. 135) He yelled at the bystanders to get out of the way and take cover. (*Id.*).

[4] Reading Wagner's statement of facts, one would never know that Jensen fired his gun during the standoff. (Appellant Brief, at 20) (describing the event as Jensen entering the yard, bringing the

After firing his gun, Jensen put the gun back toward his own head and began walking in a circle. (Footage at 0:19–27). Again, Officer Spece knew there was a resident in the home and that other bystanders were visible near the scene. (Spece Dep. 85:24–86:12, Defs. S.J. App. 36).

The officers continued to give orders for Jensen to drop his weapon and Jensen continued to refuse. Officer Spece heard Jensen yell, "you're going to have to kill me." (Spece Dep. 130:19–131:1, Defs. S.J. App. 47). Jensen then turned to face Officer Spece, Deputy Fisher, and Deputy Steil. (Footage at 0:27). Officer Spece observed Jensen bring his hand up at full length, although he did not point it—the gun—at anyone at that time. (Footage at 0:28–0:38; Defs. S.J. App. 199).

Officer Spece then watched Jensen bring the gun full circle right toward him and Deputy Fisher. (Defs. S.J. App. 200; Footage at 0:38–0:43). Officer Spece was intensely focused on Jensen's wrist

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gun to his head, facing the officers, and Spece firing)). The omission is telling, as the officers testified that Jensen firing his weapon significantly escalated the dangerousness of the situation. (Fisher Dep. 76:16–77:1, Defs. S.J. App. 96 (explaining Fisher hoped Jensen would "just put it down and surrender" and "then once he fired in the air, that was – that really took it up several levels in my mind, that this was more dangerous")).

and hands, and believed Jensen would fire again. (Spece Dep 133:5-22, Defs. S.J. App. 48).

Other individuals on the scene also observed Jensen point his gun toward Officer Spece and the Deputies. Deputy Vorland saw Jensen extend his arm toward the officers. (Vorland Dep. 9:2-6, Defs. S.J. App. 135). Deputy Vorland brought Jensen within his rifle sights, but Officer Spece fired before Deputy Vorland could drop the safety on his rifle. (Vorland Dep. 9:13-14, 17:14-20, Defs. S.J. App. 135, 137). Officer Nielsen also observed Jensen point his gun in the officers' direction, as did bystander Jason Smith. (Defs. S.J. App. 129, 230–31).

Confronted with a loaded gun, Officer Spece was not required to wait and see whether Jensen would fire *again*—this time at officers, into nearby homes, or at one of the visible bystanders. Officer Spece fired his rifle, hitting Jensen in the chest and killing him. (Defs. S.J. App. 200).

District Court Proceedings

This suit followed.[5] After motion practice and an Amended Petition, the suit was narrowed to three claims: (1) a *Godfrey*-type

[5] Wagner previously sued Officer Spece in federal court, bringing identical § 1983 claims. *Wagner v. State*, 19-cv-3007 (N.D. Iowa). A motion to dismiss in the federal case led to a certified-question action to the Iowa Supreme Court. *See generally Wagner*

claim alleging excessive force in violation to article I, section 8 of the Iowa Constitution; (2) a *Godfrey*-type claim alleging a substantive due process violation under article I, section 9 of the Iowa Constitution; and (3) a derivative loss-of-consortium claim. Both parties filed motions for summary judgment, and the district court granted summary judgment for the State.

First, the court concluded "Officer Spece acted reasonably." (App. 39). Specifically, "Mr. Jensen posed an immediate threat to Officer Spece, the other officers on scene, and the bystanders both standing nearby and in within the home. Mr. Jensen had already fired his handgun once, alerting the officers that the handgun was loaded and that Mr. Jensen had the physical ability to fire the weapon." (*Id.*) Jensen was also noncompliant, ignoring "repeated orders to drop his handgun." (*Id.*). Ultimately, "Mr. Jensen was armed, he was dangerous, and the force applied by Officer Spece was proportionate to the serious needs of the circumstances." (*Id.*).

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v. State, 952 N.W.2d 843 (Iowa 2020). As a result of the certified-question decision, Wagner pursued the § 1983 claims in federal court and the *Godfrey*-type claims in state court. In October 2021, Officer Spece moved for summary judgment asserting his use of force did not violate the Fourth or Fourteenth Amendments to the United States Constitution. Rather than respond to Officer Spece's motion for summary judgment, Wagner dismissed the federal suit.

Second, the court "reject[ed] Plaintiff's claims that Officer Spece created the need to use deadly force." (*Id.*). Rather, the "officers on the scene and the bystanders were in immediate danger of Mr. Jensen firing either in their direction or from another shot in the air." (*Id.*). Thus, "Officer Spece's use of force was reasonable and necessary to protect himself, his fellow officers, and the community from serious injury due to Mr. Jensen's dangerous behavior." (*Id.* at 11). Because Officer Spece did not violate the constitution, the court afforded all-due-care qualified immunity. (*Id.*).

Third, the court explained its inquiry was guided by "objectivity"—"what a reasonable officer would have believed rather than Officer Spece's subjective beliefs." (*Id.* at 40). So Wagner's repeated objections to whether Officer Spece could have actually seen Jensen's wrist flex were immaterial. (*Id.*). Instead, the guiding inquiry is whether a reasonable officer confronted with this situation would be justified in using deadly force. (*Id.*). Conducting an objective inquiry, the undisputed facts justified the use of deadly force: "Mr. Jensen's firing of the handgun into the air, Mr. Jensen's statements and his refusal to follow law enforcement's repeated demands to drop his handgun, Mr. Jensen's location in a residential neighborhood with bystanders observing the scene, and Jensen's

arm movements raising the handgun up and down in the direction of the officers." (*Id.* at 41).

Fourth, the court summarily disposed of the substantive due process claim because it was not cognizable. (*Id.* at 42). "[W]hen a complaint alleges both fourth amendment and due process claim violations in a claim of excessive force in the course of an arrest, seizure of the person should be analyzed under the "reasonableness standard" of the fourth amendment, rather than under the more generalized notion of substantive due process." (*Id.* (quoting *Bailey v. Lancaster*, 470 N.W.2d 351, 359 (Iowa 1991))). Because Officer Spece's conduct was reasonable under search-and-seizure principles, it similarly "would not violate the more generalized standard of substantive due process claims." (*Id.*).

Finally, absent any constitutional violation, Wagner's derivative loss-of-consortium claim was dismissed. (*Id.* at 43). Accordingly, the court granted summary judgment for the State. Wagner appealed the judgment.

ARGUMENT

I. Officer Spece's use of deadly force was objectively reasonable and proportionate to the dangerous circumstances.

A. Error preservation and standard of review.

The State agrees that Wagner preserved error on whether summary judgment was properly granted on Count I—the *Godfrey*-type claim alleging excessive force under article I, section 8 of the Iowa Constitution. The State also agrees that this Court generally reviews grants of summary judgment for correction of errors at law. *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 76 (Iowa 2022). However, constitutional questions are reviewed de novo. *Id.*

When a defendant files a well-supported motion for summary judgment, a plaintiff cannot overcome the motion on mere allegations or denials alone. Iowa R. Civ. P. 1.981(5). Instead, the plaintiff must set forth specific material facts, supported by admissible evidence, to establish the existence of a material issue for trial. *Id.* "Speculation is insufficient to create a genuine issue of material fact." *Cemen Tech, Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 5 (Iowa 2008). And a mere dispute of one or more discrete facts cannot overcome a proper motion for summary judgment—the fact at issue must be a *material* fact that would allow a reasonable

jury to return a verdict for the plaintiff. *Fees v. Mut. Fire & Auto. Ins.*, 490 N.W.2d 55, 57 (Iowa 1992).

When considering the summary judgment record in the context of law enforcement decision-making, the court must "avoid judging an officer's split-second decision (made with imperfect information) against one [the court] would make with a complete record and the benefit of hindsight." *Goffin v. Ashcraft*, 977 F.3d 687, 691 (8th Cir. 2020).

B. The district court properly found that Officer Spece used deadly force in response to a serious threat of physical harm to himself, his fellow officers, and the bystanders on the scene.

1. *Unreasonable seizures, deadly force, and all-due-care immunity.*

"Article I, section 8 guarantees the right to be secure against unreasonable searches and seizures, and it contains language nearly identical to the Fourth Amendment counterpart." *State v. Salcedo*, 935 N.W.2d 572, 577 (Iowa 2019). This Court "generally 'interpret[s] the scope and purpose of the Iowa Constitution's search and seizure provision to track with federal interpretations of the Fourth Amendment' because of their nearly identical language." *Id.* (quoting *State v. Christopher*, 757 N.W.2d 247, 249 (Iowa 2008)). And when a party fails to advance a separate theory or analytical

framework for interpreting a provision of the Iowa Constitution, Iowa courts will "ordinarily exercise prudence by applying the federal framework to [its] analysis of the state constitutional claim." *State v. Baker*, 925 N.W.2d 602, 610 (Iowa 2019); *see also State v. Dewitt*, 811 N.W.2d 460, 467–68 (Iowa 2012) (applying Fourth Amendment search-and-seizure law to excessive-force claim brought under both United States and Iowa constitutions).

Wagner does not advance a separate interpretation under the Iowa Constitution. Accordingly, this Court may look to both Iowa and federal precedent when considering whether Officer Spece used deadly force reasonably under the circumstances.

Using deadly force constitutes a seizure. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Garner*, 471 U.S. at 8).

"The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others." *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012). When considering an excessive-

force claim, the court must "view the facts from the perspective of a reasonable officer on the scene, not one with the illumination of hindsight." *Dewitt*, 811 N.W.2d at 470. The "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* (quoting *Graham*, 490 U.S. at 396–97).

Defendants sued for tort damages under article I, section 8 of the Iowa Constitution are entitled to a qualified-immunity defense if they exercise all due care to comply with the law. *Baldwin v. City of Estherville*, 915 N.W.2d 259, 260 (Iowa 2018). The immunity has been described as a "two-step inquiry." *Saunders v. Thies*, 38 F.4th 701, 710 (8th Cir. 2022). "[F]irst, whether a state constitutional right has been violated and, second, whether the defendant exercised all due care to conform to the requirements of state law." *Id.* If the answer to either question is "no," then the defendant is immune from suit. *Id.* Here, the district court found Officer Spece's use of force was objectively reasonable, satisfying the first step, and thus the court granted all-due-care immunity. (App. 39).

2. *Officer Spece's use of force was objectively reasonable.*

Officer Spece's use of force was justified, reasonable, and consistent with constitutional requirements.

Jensen repeatedly ignored the officers' orders to drop his gun. *Loch v. City of Litchfield*, 837 F. Supp. 2d 1032, 1040 (D. Minn. 2011) (holding deadly force was objectively reasonable where unarmed subject "aggravated the tense situations by failing to follow [the officer's] orders to get on the ground" because "[a]n officer reasonably perceives a heightened risk of serious physical harm when a suspect disobeys the officer's orders"), *aff'd*, 689 F.3d 961 (8th Cir. 2012).

Officer Spece had credible information that Jensen intended to fire his gun to commit suicide-by-cop. *Mayers v. Williams*, No. 16-5409, 2017 WL 4857567, at *2 (6th Cir. Apr. 21, 2017) (holding deadly force was objectively reasonable where "officers knew Mayers intended to use his weapon if confronted by officers to commit 'suicide by cop'" and Mayers "brandished his firearm at one or more of the officers"). Jensen acted consistent with that information by repeatedly escalating the situation—refusing to drop his gun, firing his gun, and then pointing his gun toward the officers. *Serrano v. United States*, No. 16-cv-40-F, 2017 WL 8776908, at *7 (D. N.M. Dec. 20, 2017) (holding deadly force was

objectively reasonable, explaining the officer "did not have to wait for Serrano to injure one of the Deputies before he used deadly force," and that the officer "had been informed Serrano stated he would commit suicide by cop"), *aff'd*, 766 F. App'x 561 (10th Cir. 2019).

Officer Spece, Deputy Vorland, Officer Nielsen, and bystander Jason Smith each observed Jensen point his gun in the direction of Officer Spece and the Deputies; no one who witnessed the event has testified that Jensen did not point his gun at the officers; and the video footage aligns with the officers' accounts. *Partlow v. Stadler*, 774 F.3d 497 (8th Cir. 2014) (holding use of force was objectively reasonable when person "move[d] the shotgun in such a way that [the officers] believed that [the person] was aiming the barrel of the shotgun at them," as the officers "had no way of knowing what [the person] planned to do" and explaining officers were still not liable even if they "were mistaken in perceiving that [the person] was taking aim at them").

And Officer Spece's close proximity to Jensen—roughly 80 feet, or 26 yards, away—put him well within shooting range of Jensen's loaded handgun, which presented an immediate deadly threat to not just Officer Spece, but all others within the vicinity. *Conlogue v. Hamilton*, No. 1:16-cv-296, 2017 WL 5339895, at *12

(D. Me. Nov. 13, 2017) (holding deadly force was objectively reasonable when suicidal man pointed his handgun at a 45-degree angle over the heads of two officers positioned roughly 50 yards away, as such a distance "was within shooting range" of the officers and thus "posed an immediate threat to the troopers when he pointed the gun over their heads"), *aff'd*, 906 F.3d 150 (1st Cir. 2018).

Officer Spece's authority to use deadly force was not lessened by Jensen expressing suicidal ideation. In *Rogers v. King*, Iowa officers responded to the home of an Ankeny woman threatening suicide. 885 F.3d 1118, 1120 (8th Cir. 2018). The officers kicked down the door and moved into a stairwell, where the woman exited an upstairs door holding a handgun. *Id.* The woman raised the gun to her head, back down to her side, and then "continued to move her arm and wave the gun around." *Id.* Although "she did not make any verbal threats or shoot her gun, she refused to comply with [the officers'] commands to drop it." *Id.* The woman then pointed her gun toward one officer's shins. *Id.* The officer fired three rounds, killing the woman. *Id.*

The Eighth Circuit held the officer's use of force was objectively reasonable. *Id.* at 1121. The court found the woman "failed to respond to commands to drop the weapon," "her mental

state added to [the officer's] fears," and pointing the gun at the officer's shins created an immediate threat of serious physical harm. *Id.* at 1121–22. *See also Johnson ex rel. Est. of Johnson v. Combs*, No. 4:04-cv-019, 2005 WL 2388274, at *5 (W.D. Ky. Sept. 27, 2005) (holding deadly force was objectively reasonable when a person threatened suicide-by-cop and charged at officers with a knife, as "Johnson's mental illness does not alter the conclusion that the Troopers were entitled to defend themselves. Whether or not Johnson was mentally ill, he posed an immediate threat to the Troopers when he charged at them with a deadly weapon. The Troopers had a right to protect themselves under the law").

Finally, Deputy Vorland was also preparing to fire at the time Officer Spece fired. *See Conlogue*, 906 F.3d at 156 (affirming summary judgment for officer's use of deadly force, relying in part on the fact that "[t]wo other officers testified that, when [the officer] fired, they too were preparing to shoot" and explaining "the fact that two other officers on the scene were also about to fire supports the objective reasonableness of [the officer's] decision").

Thus, Officer Spece's use of force was objectively reasonable, consistent with established search-and-seizure principles, and the district court properly granted summary judgment.

C. The law did not require Officer Spece to hide rather than protect the public, section 704.2(2) is inapplicable, an officer's subjective motivations are immaterial, and Jensen created a substantial danger to the officers and bystanders.

Wagner makes four arguments to prove that Officer Spece used excessive force, but none are availing.

First, Wagner argues Officer Spece was not personally in any jeopardy because "[a]ll Defendant Spece had to do to remain completely safe in this case was duck behind the steel dumpster." (Appellant Brief, at 46). But this misstates both the record and the law. Officer Spece was not the only person Jensen placed in immediate danger of death or serious injury. Jensen and his loaded gun were 28 feet from a house with a family inside. Officer Nielsen, Jason Smith, and other bystanders were on the scene, visible, and well within shooting range of Jensen's gun. Officer Spece had a duty to protect them, too. *See Liebenstein v. Crowe*, 826 F. Supp. 1174, 1177–79, 1185–87 (E.D. Wis. 1992) (holding deadly force was objectively reasonable despite the officers being concealed, because man was shooting into the air from his yard and endangering neighbors and a bystander who approached the scene out of curiosity).

And asserting that officers should simply hide while an armed man has free rein to fire at innocent bystanders misapprehends the

fundamental purpose of law enforcement. *Perrin v. Columbus Police Dep't*, No. 2:08-cv-748, 2010 WL 816638, at *11 (S.D. Ohio Mar. 4, 2010) (rejecting plaintiff's "suggestion that [the officer] should have been required to hide behind a tree rather than open fire" at man who refused orders to drop his weapon and raised his gun toward officers). There is "no requirement that officers are forced to hide and not use active force to protect their lives and the lives of others whenever a suspect gives them a reason to believe they are facing an immediate risk of serious physical harm." *Id.*

The law did not require Officer Spece to wait and see whether Jensen would fire *again*. "Even if [the court] accept[s] that the threat posed [by the suspect] to [the officer] was not immediate[,] . . . the law does not require officers in a tense and dangerous situation to wait until the moment the suspect uses a deadly weapon to stop the suspect." *Long v. Slaton,* 508 F.3d 576, 581 (11th Cir. 2007); *cf. Scott v. Harris*, 550 U.S. 372, 385 (2007) ("But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? *We think the police need not have taken that chance and hoped for the best*. Whereas [the officer's] action—ramming respondent off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not."

(emphasis added)). Officer Spece reasonably perceived an immediate risk of deadly harm and responded with appropriate force to ensure the safety of himself and those on the scene.

Second, Wagner asserts deadly force violated Iowa Code section 704.2(2) because "Jensen was doing no more than 'displaying or brandishing' a deadly weapon." (Appellant Brief, at 42). But Jensen far exceeded merely displaying his gun—he fired it. And Wagner omits the limiting language within section 704.2(2), which only negates the existence of a deadly threat if the person brandishing a weapon limits their conduct to "creating an expectation that the person may use deadly force to defend oneself, another, or as otherwise authorized by law." Iowa Code § 704.2(2). Jensen far exceeded the baseline of creating an expectation that he would use his gun to defend himself. Rather, he pointed his gun at Officer Nielsen, pointed it at his own head, fired his gun, and then pointed it toward Officer Spece. Section 704.2(2) is inapplicable.

Third, Wagner makes much of Officer Spece believing he saw Jensen's wrist flex just before Officer Spece fired. But Wagner's argument misses the point. As the district court properly recognized, an officer's subjective beliefs or motivations have no bearing on whether the degree of force used was reasonable. *Aipperspach v. McInerney*, 766 F.3d 803, 806 (8th Cir. 2014). The

only inquiry for the Court is whether a reasonable officer in Officer Spece's position would have believed Jensen posed a serious threat of death or serious bodily injury to himself or others. *Id.*

Wagner believes Officer Spece's intense focus cannot prove Jensen would have fired—but that's not the question in this case. Inquiring into whether Jensen actually would have fired at the officers or others, whether Jensen would have fired accurately, or what would have happened if the officers had simply abandoned their public duties and hid is precisely the type of "Monday-morning quarterback[ing] that this Court may not engage in." *Ogle v. Lantz*, No. CIV 08-4148, 2010 WL 1928793, at *14 (D.S.D. May 11, 2010).

The only question here is whether "the factual circumstances as they existed at the moment" Officer Spece fired "support a finding of objective reasonableness." *Id.* at *15. The undisputed factual circumstances show that Jensen was in an open yard surrounded by homes; bystanders were visible on the scene; Jensen refused to drop his gun; Jensen escalated the situation by firing his gun; and Jensen pointed his gun toward the officers. And when a noncompliant individual makes a threatening gesture toward officers with a weapon, deadly force is permitted. *Rogers*, 885 F.3d at 1121–22. Jensen posed a risk of deadly harm to Officer Spece, the officers on the scene, the residents in the nearby homes, and the

bystanders on the scene. Accordingly, Officer Spece's use of force was objectively reasonable, and Wagner's emphasis on Officer Spece's subjective beliefs—while completely brushing aside Jensen firing his gun and the presence of bystanders on the scene—is inapt.

Finally, Wagner argues that even if jeopardy existed, it was created by Officer Spece rather than Jensen. But this misstates the record. Jensen was ordered out of the deck by Officer Nielsen and, after exiting, refused to drop his gun. Jensen then pointed his gun at Officer Nielsen. Jensen continued to escalate the public danger by entering an open yard, refusing to drop his gun, firing his gun, and then pointing his gun toward the officers. It was Jensen that placed the officers, the residents, and the bystanders in jeopardy, not Officer Spece.

Despite Jensen creating substantial public danger with his loaded gun and escalating the danger throughout the event, Wagner still asserts Officer Spece created the danger by departing from his "training." (Appellant Brief, at 44). But Officer Spece did not depart from his training.

First, Officer Spece indeed notified his supervisor before joining the search for Jensen, and a supervisor was not needed on the scene. (Spece Dep. 117:6-19; Defs. S.J. App. 44 Bruner Dep. 18:8-18, Defs. S.J. App. 63). Second, Officer Spece did not order

Jensen out from under the deck, Officer Nielsen did. (Defs. S.J. App. 220). Third, the officers in fact took the best cover available on the scene. (Fisher Dep. 54:3-8; Defs. S.J. App. 90).

Fourth, Officer Spece abided by his training by giving clear, loud orders to Jensen to drop his gun. As Officer Spece's supervisor explained, in an "ideal situation" officers can have a dialogue with a suspect. (Bruner Dep. 9:11-17, Defs. S.J. App. 61). But there is a "step zero" in these situations, which requires officers to "secure a firearm and ensure public safety before we can address that individual and help them through that situation." (Bruner Dep. 16-23, Defs. S.J. App. 61). And when dealing with an armed suspect, providing clear instructions is necessary "so they are aware they need to drop the weapon." (Spece Dep. 58:3-4, Defs. S.J. App. 29).

Finally, if a bystander was in Officer Spece's line of fire, then the bystander was also within Jensen's line of fire, as Jensen was turning in the open yard. (Footage, at 0:19–0:27). Preventing Jensen from killing the bystander justifies Officer Spece's use of force. Thus, Officer Spece acted entirely consistent with his training.

Importantly, Wagner cites no authority—binding or persuasive—in support of her alleged training-related deficiencies. Wagner cites no authority to support her novel propositions that

deadly force is unconstitutional because a supervisor was not called, officers yelled orders to drop a weapon, officers declined to flee, the best cover available on the scene was inadequate, or an officer fired at the suspect near innocent bystanders.

In fact, Wagner's identified shortcomings are not grounded in any constitutional jurisprudence. On this point, *Ogle v. Lantz* is instructive. In *Ogle*, a man with a known history of psychological health problems called 911 and threatened suicide-by-cop. 2010 WL 1928793, at *2. The man led a group of responding officers—which included a state natural resource officer—to a clearing in a field. *Id.* at *3. The officers ordered the man to drop his weapon, and he refused. *Id.* at *4. The man "shouted obscenities at the officers and began waiving a black pistol in the air and then would point it at officers, at his head, and in his mouth." *Id.* After continuing to disobey orders to drop his gun, the man then dropped the gun to his side, seemingly in compliance with the officers' orders, but then grabbed the gun and pointed it toward two officers roughly 78 feet away. *Id.* at *6. In response, an officer fired, killing the man. *Id.*

The man's estate filed a § 1983 suit against the officer alleging excessive force. *Id.* at *7. During litigation, the estate focused—just as Wagner does in this suit—on several aspects of the incident that, in its view, rendered the use of deadly force unconstitutional: (1)

the availability of adequate cover; (2) the officers yelling at a suicidal individual, likely worsening his mental state; (3) the 25- to 27-yard distance between the officers and the man; (4) the officers could have waited for negotiators to arrive; (5) the officers could have retreated rather than escalating the situation; (6) the officers did not shoot the first several times the man engaged in threatening behavior; (7) the man had committed no serious crime; and (8) the officers could have used non-lethal alternatives. *Id.* at *7–8.

The federal district court granted summary judgment for the officer. The court rejected the argument that the man's suicidal behavior lessened the presence of a deadly threat. *Id.* at *13.

> The fact that [the officer] had been informed that [the man] was intending to commit suicide by cop, that [the man] had exhibited suicidal behavior in the field, and had waved and pointed his gun in the direction of officers numerous times throughout the encounter without firing a shot does not render unreasonable [the officer's] belief that [the man] posed a serious threat to his physical safety at the time he fired his weapon.

Id. The court was "simply unwilling to put officers in a situation whereby they cannot defend themselves from a threat of deadly force if it appears that a suspect is mentally ill and suicidal." *Id.* (citing *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007) ("Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the

general public when faced with threatening conduct by the disabled individual.")).

The court went on, explaining the man "had made threats to shoot and kill the officers in his calls to 911 and throughout his confrontation with the officers in the field." *Id.* Whether the man "ultimately would have fired at officers is exactly the type of 'Monday morning quarterback[ing],' that this Court may not engage in determining whether Lantz's actions were reasonable under the circumstances." *Id.* at *14 (internal citation omitted). Indeed, the court found that "the circumstances as they existed at the moment" the officer fired "support a finding of objective reasonableness even though it may have been unwise to yell at a suicidal man or not retreat further and wait for a negotiator to arrive." *Id.* at *15.

Nor did the existence of less-than-lethal alternatives change the court's analysis, as "it may appear, in the calm aftermath, that an officer could have taken a different course, but we do not hold the police to such a demanding standard." *Id.* at *16 (quoting *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996)). Ultimately, the officer "was not required to utilize[] this less lethal force because his belief that [the man] posed as serious and immediate threat to his physical safety was not unreasonable." *Id.*

So too here. Asking whether Jensen actually would have fired if Officer Spece had not acted is precisely the type of hindsight in which courts may not indulge. Jensen's threat of suicide by cop—of wanting a shootout—was taken seriously by both officers and his family. Jensen's possession, refusal to drop, and firing of a loaded handgun in an open yard presented an immediate risk of deadly harm not just to Officer Spece, but to the other officers, the residents in their nearby homes, and the bystanders on the scene. As in *Ogle*, that Jensen "pointed the gun in the direction of officers numerous times throughout the encounter without firing a shot does not render unreasonable [Officer Spece's] belief that [Jensen] posed a serious threat to his physical safety at the time he fired his weapon." *Id.* at *13.

At bottom, an "officer's immunity does not become less if his assailant is motivated to commit 'suicide by cop.'" *Lal v. California*, 746 F.3d 1112, 1118 (9th Cir. 2014). That an armed person is "intent on suicide by cop did not mean that the officers had to endanger their own lives by allowing [the person] to continue his dangerous course of conduct." *Id.* Nor does it matter whether officers could have retreated because "even assuming that it might have been possible for the officers to have given [the armed individual] a wider berth, . . . there is no requirement that such an

alternative be explored." *Id.* A court must consider the totality of the encounter, and that an individual "may have been intent on committing 'suicide by cop' does not negate the fact that he threatened the officers with such immediate serious harm that shooting him was a reasonable response." *Id.* at 1119.

Considering the totality of the encounter, Officer Spece exercised all due care to comply with the law. Summary judgment should therefore be affirmed.

D. The district court did not make any improper or unsupported factual conclusions.

As a final matter, the district court did not make any improper factual determinations when concluding Officer Spece used reasonable force.

First, Wagner objects to the court noting that DNR officers are fully certified state peace officers, despite conceding that it is true. (Appellant Brief, at 30–31). Wagner's objection to this accurate statement is unclear—the status of DNR officers as peace officers is not a fact capable of dispute. Officer Spece was acting in complete accordance with state law when searching for, and apprehending, Jensen. Iowa Code § 456A.13. A jury could not find otherwise.

Second, Wagner objects to the court citing her phone call with Deputy Fisher. (Appellant Brief, at 31). But again, this fact is undisputed—Wagner indeed called Deputy Fisher and told him Jensen intended to fire at law enforcement. (App. 215, at 1:16-1:22, 4:09-4:30). The call shows that it was reasonable for Officer Spece to take Jensen's threat of suicide-by-cop seriously, as his threat was also taken seriously by those who knew him best. This point is particularly important given Wagner's repeated focus on Officer Spece having the least experience with Jensen. It was not unreasonable for Officer Spece to believe Jensen would shoot at the officers—Wagner held the same belief.

Third, and contrary to Wagner's assertions, Deputy Vorland's testimony aligned with his report and the district court did not err in citing it. (Appellant Brief, at 32). Deputy Vorland stated in his report he heard a loud bang—later understood to be Jensen firing his gun—and he "ran over to the south of the house to take [his] position. As soon as [he] had Jensen within [his] rifle sights [he] heard another big bang and a small bang." (App. 182). Deputy Vorland had his rifle trained on Jensen—observing Jensen—when Officer Spece fired. His written statement tracks his deposition testimony, which similarly stated he observed Jensen, intended to fire at Jensen, and that the only reason he didn't fire was because

Officer Spece fired before he could drop his safety. (Vorland Dep. 8:12–9:14, Defs. S.J. App. 134). The district court thus did not err in citing Deputy Vorland's testimony.

Fourth, Wagner challenges the district court's statement that Officer Spece saw Jensen "point the gun toward himself and Deputy Fisher." (Appellant Brief, at 34). But during the summary judgment proceedings, Wagner admitted the following statement was true: "Officer Spece then observed Jensen bring the gun full circle right toward him and Deputy Fisher." (App. 26). Thus, the district court did not misstate a disputed fact—the parties agreed that Jensen pointed his gun toward Officer Spece and Deputy Fisher.[6]

Fifth, Wagner disputes the district court's disagreement with her expert report and alleges the court improperly adopted the State's expert's opinions. (Appellant Brief, at 34). But Wagner again misreads the district court decision. The court summarily noted the information in the record, which included (at Wagner's behest) expert reports. (App. 41). Briefly acknowledging the existence of expert testimony is a far cry from accepting one party's expert opinions. At no point did the district court cite the State's expert, let alone adopt, his opinion. Instead, the district court

[6] Video footage of the event further corroborates the officers' testimony that Jensen pointed his gun toward the officers. *See generally Scott*, 550 U.S. at 380.

explained why Wagner's expert's view of the record and law was incorrect—a task plainly within the scope of a summary judgment ruling.

The presence of competing motions for summary judgment shows the material facts of this case were not in dispute. Because the district court's well-reasoned opinion was based on the undisputed material facts, summary judgment should be affirmed.

II. Wagner's substantive due process claim is not cognizable.

Turning to Count II, Wagner's substantive due process claim arising out of the shooting was correctly dismissed. The State agrees Wagner preserved error on this issue.

"*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.*

The Iowa Supreme Court has applied the *Graham* reasoning and declined to allow a due-process claim to proceed when it is based on an unreasonable seizure. *Bailey*, 470 N.W.2d at 359 ("Plaintiffs' claims regarding execution of the warrant raise the clearer fourth amendment standard of reasonableness of defendants' conduct rather than the less specific standards associated with a claim of a liberty interest violation under the due process clause."). Thus, Count II is not cognizable.

Wagner asserts her due-process claim should still proceed if her excessive-force claim fails, citing two federal cases in support. But both federal cases hold that dismissal is required. In *Williams v. Burlington*, plaintiffs challenged an officer's use of deadly force under article I, sections 8 and 9 of the Iowa Constitution. 516 F. Supp. 3d 851, 861 (S.D. Iowa 2021). The court granted the defendant's motion for summary judgment for the due process claim because the plaintiffs' challenge to the use of force could be pursued only under article I, section 8. *Id.* at 870. And in *Young v. City of Council Bluffs*, the court similarly granted summary judgment to the defendants on a due process claim arising out of excessive force, explaining "the Fourth Amendment—not the Fifth or Fourteenth Amendment due process clause—is the appropriate mechanism for

violations arising from unreasonable seizures and excessive force." 569 F. Supp. 3d 885, 900 (S.D. Iowa 2021).

Count II challenged the use of force through a substantive due process lens. But such claims are not cognizable. *Williams*, 516 F. Supp. 3d at 870. The district court therefore rightly dismissed the claim and summary judgment should be affirmed.

But even if the claim were cognizable, it still fails. To establish the claim, Wagner must show Officer Spece's conduct in discharging his service weapon was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Braun v. Burke*, 983 F.3d 999, 1002 (8th Cir. 2020). The Iowa Supreme Court has similarly adopted the shocks-the-conscience test for substantive due process claims under article I, section 9. *Atwood v. Vilsack*, 725 N.W.2d 641, 647 (Iowa 2006).

Substantive due process claims are "not easy to prove." *Lennette v. State*, 975 N.W.2d 380, 394 (Iowa 2022) (quoting *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 265 (Iowa 2001)). The claim "is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity.'" *Id.* (quoting *Blumenthal Inv. Trusts*, 636 N.W.2d at 265). Wagner must show

"conduct 'so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Buckley v. Ray*, 848 F.3d 855, 863 (8th Cir. 2017) (quoting *Truong v. Hassan*, 829 F.3d 627, 631 (8th Cir. 2016)). Whether conduct is conscience-shocking is a question of law for the court. *Terrell v. Larson*, 396 F.3d 975, 981 (8th Cir. 2005).

"[T]ypically—and especially in 'rapidly evolving, fluid, and dangerous situations'—the plaintiff must show an intent to harm." *Braun*, 983 F.3d at 1002 (quoting *Terrell v. Larson*, 396 F.3d at 978). "Only a purpose to cause harm *unrelated to the legitimate object of* the government action in question will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Folkerts v. City of Waverly*, 707 F.3d 975, 981 (8th Cir. 2013) (emphasis added). Negligence alone cannot sustain a claim. *Buckley*, 848 F.3d at 863.

Here, it is in no way egregious, outrageous, or conscience-shocking for a law enforcement officer to use deadly force in response to a person who threatened suicide by cop, refused to disarm or obey orders, fired his weapon into the air, and then pointed his loaded gun toward an officer. The Due Process Clause "is not a font of tort law to be superimposed upon whatever systems

may already be administered by the States." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). It does not, as a matter of law, shock the contemporary conscience for an officer confronted with a loaded gun pointed toward him to decline to wait to see if the person will fire *again*. Thus, even if Wagner's claim could be cognizable under article I, section 9, the claim fails on the merits and summary judgment should be affirmed.

CONCLUSION

"Under the similar circumstances here—a suicidal person with a gun who failed to drop the gun when ordered and pointed the gun at an officer—the use of deadly force was reasonable. [Wagner] tries to make this case more complicated than that, but it just isn't." *Lewis v. City of Burnsville*, 573 F. Supp. 3d 1334, 1342 (D. Minn. 2021). Cases involving a justified use of deadly force all "share a tragic result—tragic for the person who lost his life, for the family left behind, and for the police officer who fired the fatal bullet." *Conlogue*, 906 F.3d at 158. But the law requires that each case be decided on its own facts, and the "doctrine of qualified immunity must flex to those tense, uncertain, and often life-threatening situations in which an officer may find himself embroiled." *Id.*

The undisputed facts show Jensen exited the deck and pointed his gun at Officer Nielsen. At that point, no one was safe. Jensen

continued to escalate the danger by defying orders to drop his weapon, firing his weapon, and pointing it toward Officer Spece. No constitutional provision, statute, case, or public policy required Officer Spece to wait and see if Jensen would fire *again* before protecting himself and those on the scene. Because Officer Spece's use of force was objectively reasonable, summary judgment should be affirmed.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/ Tessa M. Register
Assistant Solicitor General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 9,495 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Tessa M. Register
Assistant Solicitor General

CERTIFICATE OF FILING AND SERVICE

I, Tessa M. Register, hereby certify on the 27th day of February, 2023, I, or a person acting on my behalf filed this brief and served it on counsel of record to this appeal via electronic filing.

/s/ Tessa M. Register
Assistant Solicitor General