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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ESTATE OF JAMES D. REDD, *Plaintiff*, v. DANIEL LOVE, *Defendant*.	)	No. 2:11-cv-478-RJS

MEMORANDUM IN SUPPORT OF DEFENDANT LOVE'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

On June 10, 2009, Dr. James D. Redd and his wife were arrested on federal felony charges of "trafficking in stolen Native American artifacts, theft of government property, and theft of tribal property." *Redd v. Love*, 62 F. Supp. 3d 1268, 1270 (D. Utah 2014). The next day, Dr. Redd took his own life. *Id.* His estate now seeks money damages from the personal assets of Bureau of Land Management Agent Dan Love, one of the many federal authorities involved in the Redds' arrests. Plaintiffs accuse Defendant Love of "violat[ing] Dr. Redd's clearly established constitutional right of protection against excessive force" by sending "about 80 to 140 agents" armed with assault rifles and clothed in flak-jackets to arrest the Redds and execute the warrant to search their home. *Id.*; First Amended Complaint, Dkt. No. 56 ("FAC") at ¶ 60. The contemporaneous documentary record blatantly contradicts this grossly exaggerated claim and conclusively establishes the absence of any material factual dispute. Thus, Defendant Love is entitled to summary judgment on the basis of qualified immunity without further discovery.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Pursuant to DUCivR 56-1(b)(2)(A) and (B), Defendant Love identifies the following "legal element[s] required to prevail" on this summary-judgment motion and "legal authority supporting each stated element (without argument)": "When a defendant raises the qualified immunity defense on summary judgment, the burden shifts to the plaintiff to meet a strict two-part test." *Albright v. Rodriguez*, 51 F.3d 1531, 1534-35 (10th Cir. 1995). "First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Id.*; *see also Clark v. Wilson*, 625 F.3d 686, 690

(10th Cir. 2010) ("To resolve qualified immunity claims, a court must consider two elements: whether a constitutional violation occurred, and whether the violated right was 'clearly established' at the time of the violation.").

In accordance with DUCivR 56-1(b)(2)(C), Defendant Love submits the attached Statement of Undisputed Material Facts, containing a "concise statement of the material facts" that "entitle [him] to judgment as a matter of law" and "as to which [Defendant Love] contends no genuine issue exists." *See* Ex. 1 ("SOMF"). As required by DUCivR 56-1(f), the exhibits supporting this memorandum and the statement of material facts will be submitted separately as an appendix.

ARGUMENT

I. The summary judgment standard in qualified immunity cases.

"Qualified immunity is an affirmative defense to an excessive force claim," *Weigel v. Broad*, 544 F.3d 1143, 1151 (10th Cir. 2008), "designed to 'spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit.'" *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001) (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). "[O]nce an officer asserts qualified immunity, the plaintiff bears the 'heavy two-part burden' of showing both that (1) 'the defendant violated … [a] constitutional … right[],' and (2) the 'infringed right at issue was clearly established at the time of the allegedly unlawful activity such that a reasonable law enforcement officer would have known that his or her challenged conduct was illegal.'" *Smith v. McCord*, 707 F.3d 1161, 1162 (10th Cir. 2013) (quoting *Martinez v. Carr*, 479 F.3d 1292, 1294-95 (10th Cir. 2007)).

"Summary judgment is appropriate 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1131 (10th Cir. 2010) (quoting Fed. R. Civ. P. 56(c)(2)). "In evaluating a motion for summary judgment based on qualified immunity, [courts] take the facts 'in the light most favorable to the party asserting the injury,'" *Rhoads v. Miller*, No. 08-8093, 352 Fed. Appx. 289, 291, 2009 WL 3646078 (10th Cir. 2009) (unpublished) (quoting *Scott v. Harris*, 550 U.S. 372, 377 (2007)), but "[u]nsubstantiated allegations carry no probative weight," *Bones v. Honeywell Int'l*, 366 F.3d 869, 875 (10th Cir. 2004); *see also Annett v. Univ. of Kan.*, 371 F.3d 1233, 1237 (10th Cir. 2004) ("[U]nsupported conclusory allegations … do not create a genuine issue of fact."). The "plaintiff must 'go beyond the pleadings and designate specific facts'" establishing that a reasonable juror could find in his or her favor. *Self v. Crum*, 439 F.3d 1227, 1230 (10th Cir. 2006) (quoting *Bones*, 366 F.3d at 875).[1] If the record "blatantly contradict[s]" the plaintiff's version of the facts such that "no reasonable jury could believe it, a court should not adopt that version of the facts." *York v. City of Las Cruces*, 523 F.3d 1205, 1210 (10th Cir. 2008) (quoting *Scott*, 550 U.S. at 380). Unless "the record … clearly demonstrate[s] the plaintiff has satisfied his heavy two-part burden … the defendant[] [is] entitled to qualified immunity." *Gross*, 245 F.3d at 1156 (citing *Nelson v. McMullen*, 207 F.3d 1202, 1205 (10th Cir. 2000); *see also Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 650 (10th Cir. 1988)

[1] *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.") (internal citations omitted); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts").

("[P]laintiffs should not be allowed to overcome a properly submitted motion for summary judgment based on qualified immunity grounds without more than conclusory and nonspecific allegations.").

II. Defendant Love is entitled to qualified immunity.

The factual record belies Plaintiffs' conclusory allegations and unsubstantiated exaggerations. Defendant Love violated no Fourth Amendment right on June 10, 2009, much less any clearly established one. *See White v. Martin*, No. 10-7064, 425 Fed. Appx. 736, 742, 2011 WL 2210098 (10th Cir. 2011) (unpublished) .

A. Prong one: No material dispute of fact exists as to whether Agent Love personally violated Dr. Redd's Fourth Amendment rights.

This case fails under prong one of qualified immunity, because no genuine issue of fact exists as to whether Defendant Love personally violated any Fourth Amendment right of Dr. Redd.

i. Agent Love cannot be held personally responsible for agency policies or the FBI's decision to assemble a partial SWAT team, regardless of whether that decision violated the Constitution.

"*Bivens* from its inception has been based … on the deterrence of *individual* officers who commit unconstitutional acts." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001) (emphasis added). Thus, *Bivens* claims are inappropriate vehicles by which to challenge official policies or initiatives[2] or to attempt to hold supervisory officials liable "for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Ashcroft v. Iqbal*, 556 U.S.

[2] *See Malesko*, 534 U.S. at 71 ("If deterring the conduct of a policymaking entity was the purpose of *Bivens*, then *Meyer* would have implied a damages remedy against the Federal Deposit Insurance Corporation; it was after all an agency policy that led to Meyer's constitutional deprivation."); *F.D.I.C. v. Meyer*, 510 U.S. 471, 484 (1994) (rejecting plaintiff's invitation to "expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal *agents*, but federal *agencies* as well.").

662, 676 (2009). This personal involvement requirement merits particular attention where, as here, those involved in the alleged constitutional violation "hail from different government agencies." *See Pahls v. Thomas*, 718 F.3d 1210, 1235 (10th Cir. 2013) ("This requires our attentiveness to the 'different powers and duties' of different government officials, especially when their authority derives from different sources and … different sovereigns.") (internal citation and quotation omitted). Thus, to succeed on any variety of constitutional tort claim, a plaintiff must demonstrate "a [constitutional] violation traceable to a defendant-official's '*own individual actions*.'" *Id.* at 1225 (quoting *Iqbal*, 556 U.S. at 676, emphasis added).

Even assuming that by virtue of his position in the chain of command, Agent Love could be held personally responsible for the number of federal personnel at the Redd home (which was not even close to the numbers Plaintiffs contend), there is no basis in the record to impose personal liability on him for what the officers making the initial entry wore, or whether they were armed as required by agency policy. With respect to clothing and weapons, FBI and BLM policy dictated that law enforcement officers wear clothing clearly identifying them as such, that uniformed officers carry a service weapon, and that officers executing search and arrest warrants wear soft body armor. *See* SOMF at ¶¶ 17-19, 21-23. Defendant Love certainly cannot be held personally liable for abiding by these policies or for being present while others followed them.[3] Nor, even if it had happened while Dr. Redd was home, can BLM Agent Love be held liable for the FBI's decision to enlist the assistance of a partial SWAT team because of a threat made by

[3] *See Pahls*, 718 F.3d at 1239 ("[B]ecause Special Agent Sheehan's decision was in line with Secret Service policy, and because that policy was itself legitimate, this tempers any inference of a discriminatory motive."); *Alba v. Montford*, 517 F.3d 1249, 1255 n.6 (11th Cir. 2008) ("[plaintiff] … does not challenge the conduct of *individual officers*, but rather the *policy* … However, the Supreme Court has made it abundantly clear that *Bivens* will not support an action challenging the conduct or policy of a non-individual defendant.").

one of the Redds' adult sons. *See id.* at ¶¶ 62-68. Simply put, none of these matters can support individual-capacity liability on the part of Defendant Love.

ii. The "show of force" on the day in question does not comport with the allegations in the First Amended Complaint.

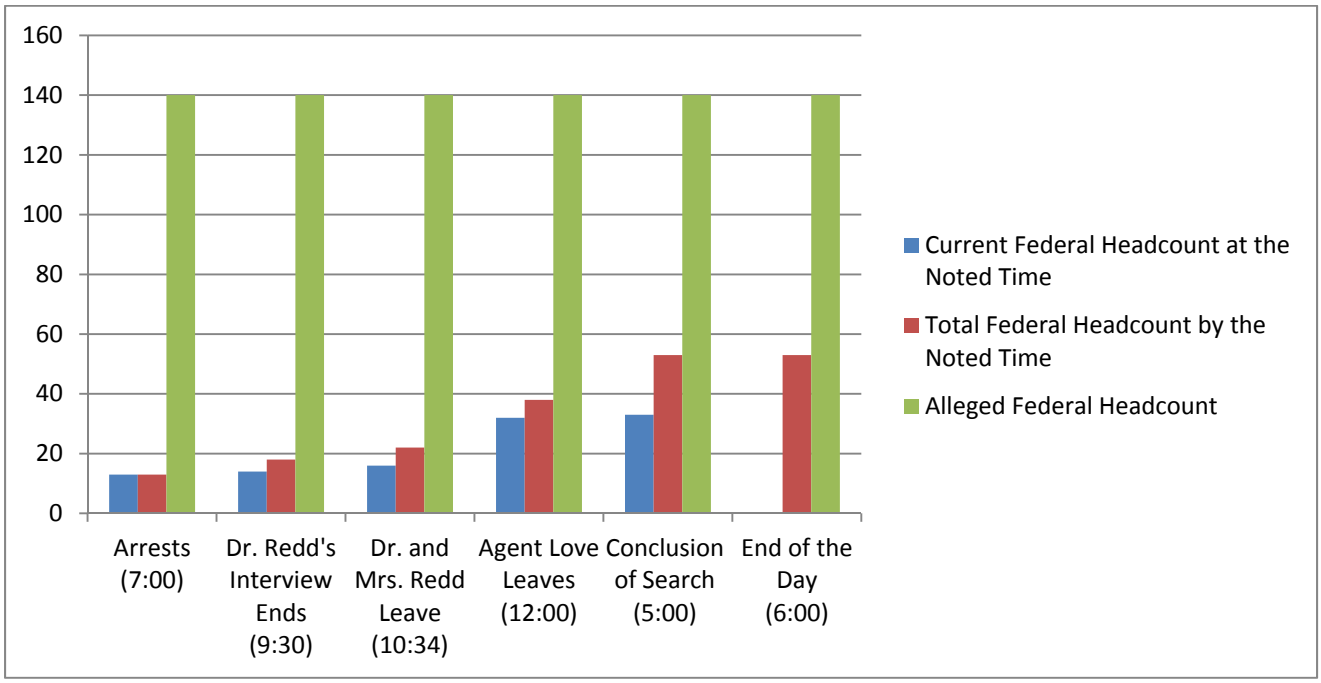
Plaintiffs' other "glaring problem … is that the allegations in [the] complaint stand in stark contrast to the factual record." *Collins v. Bd. Of Educ. of North Chicago Community Unit Sch. Dist.*, No. 10-cv-03329, 2013 WL 1984415, at *7 (N.D. Ill. May 13, 2013) (unpublished). As required by the Federal Rules, this Court's previous ruling on the motion to dismiss accepted as true the claims that "between about 80 to 140 agents … raid[ed] and search[ed] Dr. Redd's home," Redd, 62 F. Supp. 3d at 1270,[4] and that all of the federal employees who arrived at the Redd home were so heavily armed as to resemble a SWAT team, *id.* at 1275 ("Agent Love orchestrated a raid of Dr. Redd's home that involved over 80 heavily armed SWAT-like agents."[5]). Based on the necessary assumption that these allegations were true, this Court found them sufficient to survive a motion to dismiss. The contemporaneous documentary records *now* before the Court, however, show that 80-140 heavily armed law enforcement officers *never* stormed *en masse* into the Redds' home. Nor was there *ever* an "occupation" of the Redd home by "140 agents throughout the day." Dkt. No. 64 at 8; *see Ruttenberg v. Jones*, 603 F. Supp. 2d 844 (E.D. Va. 2009) ("[I]t is worth noting the stark difference between … plaintiff's *allegations* in this case and the *facts* supported by the current record[.]"). In fact, Plaintiffs have conceded that they ac-

[4] *See also id.* at 1272 ("[A]pproximately 140 agents came through the home during the raid on June 10, 2009"); *id.* at 1275 ("[C]lose to 140 agents had been through Dr. Redd's house at some point").

[5] *See also id.* (Agent Love allegedly "deploy[ed] between 80 to 140 agents to Dr. Redd's home" who were "heavily armed"); *id.* (referring to "80 to 140 heavily armed agents in flak jackets" at the home").

tually do not know either how many federal personnel were at their home or when they arrived. *See* Ex. 36 (Pls' Answers to the USA's First Interrogatories) at 7 ("We did not count the number of agents … There were more agents than we could count and there were so many that we were unable to determine which agents arrived on the scene after other agents and which were part of the initial arrival.").

The sign-in log from that day, however, answers both questions. Nowhere near 140 – or even 80 – federal personnel were in the Redds' home, either at one time or collectively throughout the day:



See SOMF at ¶¶ 47 (13 personnel present at 7:00), 53 (a total of 18 personnel had been to the home by 9:30), 53(C) (14 personnel remained at the home at 9:30), 55 (22 personnel had been to the home by 10:34), 55(C) (14 personnel remained at the home at 10:34), 61 (28 personnel had been to the home by 12:00), 61(c) (32 personnel remained at the home at 12:00), 77 (53 personnel had been to the home over the course of the day), 72(A) (33 personnel remained at the home at 5:00), 76 (all federal personnel had left by 5:36).

As illustrated above:

- No more than 13 federal personnel were present when the Redds were arrested, *id.* at ¶ 48;
- No more than 22 came and went during the *entire* time Dr. Redd was in the home (six of whom left after fewer than 15 minutes), *id.* at ¶ 56;
- The *total* number of federal personnel who came and went to the home throughout the *entire day* of June 10, 2009, was no more than 53, *id.* at ¶ 77;
- Seven of the 53 were unarmed cultural specialists. *Id.* at ¶ 77(A);
- The total number of people at the home at any one time never exceeded 45 (including un-armed cultural specialists), and this was not when Dr. Redd was present. *Id.* at ¶¶ 48, 54, 56, 62.

The record likewise fails to support the notion that Dr. Redd was personally traumatized by a fully-outfitted SWAT team storming onto his property. In fact, the law enforcement officers who initially arrived wore casual clothing and soft body armor, and they carried ordinary service weapons. *See* SOMF at ¶¶ 17-19, 21-23. Each of these was required by agency policy. *Id.* BLM, Agent Love's employing agency, does not even maintain SWAT or technical teams. *Id.* at ¶ 20. And, when some members of an FBI SWAT team who were already at the home aiding with the search began to assemble (not at the direction of Defendant Love) because of a threat left by the Redds' son, Dr. Redd had already been taken from the home and was not present to personally experience any injury as a result of it. *Id.* at ¶¶ 65, 67, 70-71.

iii. The only "show of force" that could have possibly "injured" Dr. Redd was objectively reasonable.

As set out in in the Statement of Material Facts, Dr. Redd was only at his home from about 7:00-10:34 a.m. on June 10, 2009. *Id.* at ¶¶ 46, 54. He may or may not have returned to park outside the house from about 5:00 p.m. until agents left at 5:36 p.m. *See id.* at ¶¶ 70-71. The "force" exhibited during these windows was eminently reasonable, and any show of "force" that took place outside of these windows is irrelevant.

a. "Force" not witnessed by Dr. Redd cannot defeat qualified immunity.

The Tenth Circuit and the Supreme Court have long recognized "the well-settled principle that a [constitutional tort] claim must be based upon the violation of plaintiff's *personal* rights, and not the rights of someone else." *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990) (emphasis added).[6] Dr. Redd's estate remains the sole plaintiff in this *Bivens* lawsuit,[7] and thus only those injuries that he personally suffered are properly recoverable.[8] For obvious reasons, Dr. Redd could not have been injured by an allegedly unconstitutional "show of force" he never experienced.[9]

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[6] *See also United States v. Salvucci*, 448 U.S. 83, 86-87 (1980) ("[A]ttempts to vicariously assert violations of the Fourth Amendment rights of others have been repeatedly rejected by this Court.") (citations omitted); *Murphy v. Bitsoih*, 320 F. Supp. 2d 1174, 1185 (D.N.M. 2004) ("Plaintiffs must allege a police deprivation directed at themselves[.]"); *Coleman-Johnson v. Chi., Ill. Police Officers*, No. 95 C 3455, 1996 WL 417568 (N.D. Ill. July 22, 1996) (unpublished) ("Fourth Amendment rights are personal rights that may not be asserted vicariously.").

[7] *See* Dkt. No. 64 at 10 ("[T]he Plaintiff is the Estate of James Redd," not his wife.).

[8] Of course, Dr. Redd's estate also lacks standing to challenge a show of force experienced by others. *See* 15-101 *Moore's Federal Practice – Civil* § 101.51 ("The well-established rule of third-party standing is that in the ordinary course, a litigant must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties."); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert *his own* legal rights and interests[.]") (emphasis added); *Coleman-Johnson*, 1996 WL 417568 at *4 ("Fourth amendment rights are personal rights that may not be asserted vicariously."); *James v. York Cnty. Police Dep't*, No. 05-2852, 160 Fed. Appx. 126, 131, 2005 WL 3313029 (3d Cir. 2005) (unpublished) ("James could not bring claims of police harassment on behalf of his wife or her sister."); *Davis v. Brunson*, No. 1:12-2490-SB 2014 WL 1234431, at *3 (D.S.C. Mar. 25, 2014) (unpublished) ("Plaintiff lacks standing to bring a[n excessive force] lawsuit on another inmate's behalf.").

[9] *See Swoboda v. Dubach*, 992 F.2d 286, 290 (10th Cir. 1993) (rejecting constitutional tort claim because plaintiff "stated no specific facts connecting the allegedly unconstitutional conditions with his own experiences … or indicating how the conditions caused him injury"); *Morrison v. Carleton Woolen Mills*, 108 F.3d 429, 440 (1st Cir. 1997) ("Morrison could not have been injured by hostility at a workplace she did not attend."); *Coleman-Johnson*, 1996 WL 417568 at *4 (defendants entitled to summary judgment on excessive force claims where plain-

b. The relevant "force" was objectively reasonable.

The constitutionality of what Dr. Redd experienced turns "not on the officers' particular motivations, nor on [Dr. Redd's] subjective perception … but on 'whether the officers' actions [we]re 'objectively reasonable' in light of the facts and circumstances confronting them.'" *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). This standard "does not require [law enforcement officers] to use the least intrusive means…, only reasonable ones." *Fisher*, 584 F.3d at 894 (quoting *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1222 (10th Cir. 2005)). The factual record demonstrates that any "force" exhibited during the time Dr. Redd was actually home passed this test with flying colors.

First, as explained above, Dr. Redd did not arrive home to a "circus" involving 80 or 100 agents. *See* Dkt. No. 47 at 37; Dkt. No. 64 at 21; *id.* at 23 (arguing that "100-plus heavily armed agents … arrest[ed]" Dr. Redd). In reality, Dr. Redd found no more than 12 law enforcement officers and one cultural specialist at his home, a number generally consistent with the size of teams sent to the other Operation Cerberus sites that day. *See* SOMF at ¶¶ 35, 47. Given the need to serve two felony arrest warrants and initiate a large-scale search, this number also fell well within the realm of standard operating procedure, as established repeatedly in the caselaw. For example, the Sixth Circuit has described as "standard protocol" a situation in which "[a]pproximately twelve FBI agents arrived" at the home of an accountant to search for evidence of RICO violations, wearing "raid jackets [and] bulletproof vests, and [with] their weapons drawn." *See United States v. Haque*, Nos. 07-3086, 07-3087, and 07-3115, 315 Fed. Appx. 510, 519, 2009 WL 484600 (6th Cir. Feb. 26, 2009) (unpublished). Similarly, the Fourth Circuit found nothing unreasonable about the number of officers who took part in serving a nighttime search

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tiffs "were not present when defendants executed the search" and "could not have been detained or subjected to excessive force").

warrant for illegal firearms when "entry into [the] residence [had been] secured by *ten to twelve SWAT team members* and the remaining twelve to fourteen entered the residence after it was secured and the SWAT team … left." *United States v. Rizzi*, No. 06-4884, 221 Fed. Appx. 283, 286, 2007 WL 737408 (4th Cir. Mar. 12, 2007) (unpublished, emphasis added).[10] And, we emphasize, it is Plaintiffs' burden to show that the caselaw clearly establishes the unconstitutionality of Defendant's actions, not vice versa.

By the time that Dr. and Mrs. Redd had left the home for their initial booking, the *total* federal headcount for the entire time they were there had risen to no more than 22. SOMF at ¶ 55. Even taking two implausible[11] leaps of faith in Plaintiffs' favor – (1) that all 22 federal personnel remained in the house at the same time, and (2) that Dr. Redd saw all of them while "sequestered" in the garage – a group of 22 violated no constitutional standard. Indeed, this Court has previously cited the Fourth Circuit's ruling that no constitutional violation occurred when "*[f]orty agents, many dressed in combat gear*," searched an office, ultimately "seiz[ing] 103 boxes of documents and several computer records." *Redd*, 62 F. Supp. 2d at 1278 n.26 (citing

[10] *See also United States v. Simon*, No. 3:10-CR-56, 2010 WL 4236833, at *2 (N.D. Ind. Oct. 20, 2010) (unpublished) (where "eleven agents" searched a home for evidence of tax fraud, all of whom "were armed and wore body armor and flak jackets," there was "nothing facially unreasonable about the number of agents who executed the warrant."); *United States v. P.A. Landers, Inc.*, No. 05-102663-GAO, 2006 WL 3103087, at *1 (D. Mass. Oct. 31, 2006) (unpublished) (warrant "authorizing a search of the Company's offices … and the seizure of various documents, electronic data, and computer hard drives" was "executed by six to nine federal agents" who "were wearing 'raid jackets' identifying them as law enforcement officials" and "carr[ying] firearms on their person, both *standard operating procedures*") (emphasis added); *cf. United States v. Chaney*, 647 F.3d 401, 407 (1st Cir. 2011) (rejecting defendant's argument that he was coerced into allowing a search of his motel room where "neither the number of officers who entered the room (five) nor the readiness of their weapons suggests an overwhelming show of force"); *United States v. Jones*, 523 F.3d 31, 38 (1st Cir. 2008) (ten to fifteen armed officers in hotel room did not render consent involuntary).

[11] *Cf. Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when … the factual content … allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

United States v. Sanders, No. 03-4890, 104 Fed. Appx. 916, 2004 WL 1688340 (4th Cir. 2004) (unpublished). Similarly, the Eleventh Circuit has upheld a warrantless administrative search of nightclub by *more than 40* non-SWAT officers, in light of the fact that they never "drew a weapon or threatened the arrestees or any patrons." *Crosby v. Paulk*, 187 F.3d 1339, 1343 (11th Cir. 1999); *see also Ruttenberg II*, 283 Fed. Appx at 136 ("Depending on the circumstances, it may be eminently reasonable for fifty (or more) police officers to participate in the search of a liquor establishment.").

In contrast to Plaintiffs' overblown allegations regarding weapons and tactical gear,[12] the true manner in which law enforcement officers at the Redd home were outfitted was also patently reasonable. The law enforcement officers that Dr. Redd encountered wore the casual clothing and soft body armor required by their agencies. SOMF at ¶¶ 17-19, 21-23. They carried ordinary handguns, as also required by agency policy. *Id.*[13] Thus, neither their clothing nor the degree to which they were armed amounted to *any* sort of departure from standard operating procedure, much less a significant enough deviation to justify the imposition of personal liability on a defendant who played no role in determining such agency policy. *See Mountain Pure, LLC v. Roberts*, --- F. Supp. 3d ---, 2015 WL 1268253, at *9 (D. Ark. Mar. 19, 2015) ("Mountain Pure cites no cases in which the use of standard law enforcement weapons and gear, without more, was found to be unreasonable."); *Veit*, 2014 WL 5393977 at *4 ("agents were armed as required by

[12] *See* Dkt. No. 47 at 37 (claiming that Dr. Redd was arrested by agents "dressed in flak jackets and pointing assault rifles"); FAC at ¶ 60 (alleging that federal personnel were "armed with assault rifles, and clothed in flak-jackets").

[13] *See also United States v. Veit*, No. 2:11-cr-04055-BCW, 2014 WL 5393977 (W.D. Mo. Oct. 22, 2014) (unpublished) ("agents were armed as required by protocol during the execution of a search warrant"); *United States v. McKany*, No. 13CR668-WQH, 2013 WL 6267585, at *1 (S.D. Cal. Dec. 4, 2013) (unpublished) ("It is standard procedure for [Homeland Security Investigations] agents to wear tactical vests and draw service weapons for the safety of the agents when initiating the execution of a search warrant.").

protocol during the execution of a search warrant"); *McKany*, 2013 WL 6267585 at *1 ("It is standard procedure for [Homeland Security Investigations] agents to wear tactical vests and draw service weapons for the safety of the agents when initiating the execution of a search warrant."). Additionally, the seven cultural specialists present at the Redd home over the course of the day were entirely *un*armed. SOMF ¶ 77(A).

In sum, the Redds' unsupported allegations and personal opinions simply cannot negate the search's constitutional reasonableness, as established by the extensive documentary record. *Cf. Ruttenberg*, 603 F. Supp. 2d at 866 ("[I]t was constitutionally reasonable for approximately *thirty-eight* officers to conduct a fifty-four minute operation that was relatively uneventful after its first few minutes, involved little, if any, brandishing of weapons, and caused no physical harm to any patrons or employees.") (emphasis added). Qualified immunity therefore defeats this case at prong one, and the Court need not go on to consider prong two. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

B. Prong two: Agent Love could not have been on notice that the *actual* "force" used that day violated any "clearly established" Fourth Amendment right.

Qualified immunity prong two poses an even more insurmountable obstacle to Plaintiffs. *See iMatter Utah v. Njord*, 980 F. Supp. 2d 1356, 1385 (D. Utah 2013) (defendants entitled to qualified immunity where "[t]he unsettled state of the law in this area demonstrates that [their] assumptions, though not correct, were not unreasonable"). Even accepting that a constitutional violation occurred due to Agent Love's own personal actions, which it did not, Plaintiffs would still have to meet the impossible challenge of demonstrating that "*every* reasonable official" in

Agent Love's position "would have understood that *what he [did]* violated" the Fourth Amendment. *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011)) (emphasis added). As the Supreme Court has explained, "[q]ualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." *City & Cnty. of San Francisco. v. Sheehan*, 135 S. Ct. 1765, 1776 (2015). Instead, the right at issue must be defined with particularity: "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Weigel*, 544 F.3d at 1153. In the latter case, a "robust consensus of cases of persuasive authority" must exist. *Sheehan*, 135 S. Ct. at 1778 (quoting *al-Kidd*, 131 S. Ct. at 2084).

Plaintiffs cannot meet this burden for a number of reasons. First of all, there is no Supreme Court or Tenth Circuit caselaw establishing the unconstitutionality of the conduct in question. *See, e.g., Santistevan v. City of Colorado Springs*, 983 F. Supp. 2d 1295, 1319 (D. Colo. 2013) ("The Court is aware of, and Plaintiff cites, no cases in which the Tenth Circuit has found that the deployment of a SWAT team to execute a search warrant amounted to excessive force. To the contrary, the Tenth Circuit has intimated that even a blanket policy of sending a SWAT team to execute warrants in all narcotics cases may not offend the Fourth Amendment in the absence of evidence that the decisionmaker 'knew the team would use excessive force, intended to cause harm, or instructed the team to use excessive force.'") (citing *Whitewater v. Goss*, No. 05-7081, 192 Fed. Appx. 794, 798 2006 WL 2424788 (10th Cir. 2006) (unpublished) and *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1191 (10th Cir. 2001)). That was true in 2009, when Defendant Love acted, and it remains true today. Moreover, Judge Stewart's ruling on De-

fendant Love's first Rule 12 motion, proves that reasonable minds could differ as to whether "the presence of too many officers" can support a freestanding excessive force claim *at all*. *See Redd v. Love*, No. 2:11-CV-478, 2012 WL 2120446, at *5 (D. Utah June 11, 2012) (unpublished). Other courts have registered similar doubts.[14] *See Wilson v. Layne*, 526 U.S. at 618 (Where judges "disagree on a constitutional question," qualified immunity prevails because "it is unfair to subject police to money damages for picking the losing side of the controversy."). Certainly, given the caselaw, reasonable minds could differ on whether the "force" actually demonstrated by the contemporaneous documents was unreasonable.

Along the same lines, Agent Love could not have been on notice that an allegedly excessive "show of force" not directed at Dr. Redd would implicate (much less violate) Dr. Redd's constitutional rights. *See Palm v. Kennebec Cnty. Sheriff's Office*, No. 7-102-B-H, 2008 WL 3978214, at *5 (D. Me. Aug. 21, 2008) (unpublished) (officers entitled to qualified immunity, given the lack of "cases that stood for the proposition that the setting up of a perimeter standing alone implicated the Fourth Amendment right of an individual who had a property interest in the property but who was not at the time in the premises").[15] Even in the evidence suppression context – as opposed to here, where Plaintiffs seek money damages from Agent Love's personal assets – courts have rejected similarly generic challenges to the execution of search warrants by

[14] *See Rizzi*, 221 Fed. Appx. at 285 ("Rizzi asserts no judicial authority for the proposition that a nighttime search may become invalid if too many police officers take part in its execution."); *Simon*, 2010 WL 4236833 ("there are no case citations before the court suggesting that execution of a warrant becomes unreasonable … if too many law enforcement agents engage in the search").

[15] *Cf. Ruttenberg*, 603 F. Supp. 2d at 861 (co-owner of a pool hall who "was not present" for administrative search involving allegedly illegal force had no standing to challenge it in her personal capacity); *State v. Righter*, Nos. IN-92-01-0019-RI to IN-92-01-0027-RI and IN-92-01-1173-41, 1996 WL 280886, at *4 (Del. Super. Apr. 23, 1996) (unpublished) (noting the "surprising dearth of authority regarding the standing of a person not present at a warrant's execution to challenge adherence to the knock and announce rule").

persons who were not present to have their personal rights violated.[16] These doubts and uncertainties call into question the very existence of the underlying rights at issue in this case: (1) purported constitutional protections against extra officers serving warrants, and (2) shows of force not personally witnessed. This alone certainly counsels that qualified immunity should apply. *See Safford Unified Sch. Dist. No. 1. v. Redding*, 557 U.S. 364, 378-79 (2009) ("[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted."); *O'Keefe v. Chisholm*, 769 F.3d 936, 942 (7th Cir. 2014), *cert. denied,* 135 S. Ct. 2311 (2015) ("Public officials can be held liable for violating clearly established law but not for choosing sides on a debatable issue.").

The wide latitude afforded law enforcement officers in contexts such as these provides another compelling indication of the propriety of qualified immunity. *See Sanchez v. Melendrez*, 934 F. Supp. 2d 1325, 1333 (D.N.M. 2013) ("An integral component of the doctrine of qualified immunity is the concept that police officers are to be afforded substantial latitude in their judg-

[16] *See, e.g., United States v. Kahre*, 737 F.3d 554, 560 (9th Cir. 2012) ("Because Kahre was not present during the execution of the search warrants, the district court held that Kahre lacked standing to challenge the manner in which the search warrants were executed."); *Eiland v. Jackson*, No. 01-3139, 34 Fed. Appx. 40, 42, 2002 WL 534650 (3d Cir. 2002) (unpublished) ("[E]ven if we assume that the officers failed to knock and announce their identity, we do not see how that failure impinged upon Eiland's privacy interests given that he was not at the house at the time of the forced entry."); *United States v. Silva*, 247 F.3d 1051, 1059 (9th Cir. 2000) ("Just as a person who is somewhere else cannot benefit from the 'assurance' provided by the showing of a warrant, an absent person has no present stake in the contemporaneous opportunity to monitor the search for compliance with the warrant. Thus the interest in the 'notice' that showing a warrant provides … does not run to someone who is not there and who cannot exercise that option."); *Mena v. City of Simi Valley*, 226 F.3d 1031, 1035 n.2 (9th Cir. 2000) ("Jose Mena was not present during the warrant service and execution and, therefore, lacks standing to challenge the officers' compliance with the knock and announce requirement.").

ments, as they often must make 'split-second judgments in circumstances that are tense, uncertain, and rapidly evolving.'") (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). As a general matter, "the Fourth Amendment's reasonableness inquiry notoriously eludes easy formula or bright line rules." *Fisher*, 584 F.3d at 894.[17] "[N]othing in the [F]ourth [A]mendment specifies how many officers may respond to a call." *McNair v. Coffey*, 279 F.3d 463, 466 (7th Cir. 2002). Instead, the agencies involved (and Agent Love to the extent he personally participated) had "significant discretionary authority to determine" how to execute the arrest and search warrants. *Redd*, 62 F. Supp. 3d at 1278; *see also Dalia v. United States*, 441 U.S. 238, 257 (1979)("[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant."). Indeed, "[t]he very term 'reasonableness' implies reasonable latitude and room for judgment." *Ruttenberg v. Jones*, No. 07-1037, 283 Fed. Appx. 121, 1372008 WL 2436157 (4th Cir. 2008) (unpublished) ("*Ruttenberg II*").

In any event, no authority (in existence then, as required to overcome qualified immunity, or now) clearly establishes that the actual "show of force" at the Redd home on June 10, 2009 – regardless of whether it is examined in the aggregate or limited to what Dr. Redd personally witnessed – violated the Fourth Amendment. As already pointed out, Plaintiff's counsel has yet to identify any particular "authority establishing" that even if such a thing had happened, "Agent Love could not send 80 heavily armed federal agents to arrest Dr. Redd, and up to 140 agents to search his home." *Redd*, 62 F. Supp. 3d at 1277. Certainly they cannot identify authority showing that under the circumstances, the actual – significantly smaller – "show of force" here was unreasonable. *See United States v. Ramirez*, 523 U.S. 65 (1998) (execution of no-knock search war-

[17] *See also Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000) ("generally no bright line exists for identifying when force is excessive");

rant by 45 officers who broke a window in the garage and stuck a gun through it was not unreasonable). Nor can Plaintiffs identify authority establishing that a partial SWAT team informally assembled not to forcibly enter a house, but rather to guard its exterior during a search, violated any clearly established right of the absent owner. *See Phillips v. James*, 422 F.3d 1075, 1082 (10th Cir. 2005) ("In this case, the SWAT team was not requested to execute an arrest … or to search [the plaintiff's] residence; the SWAT team in this instance was called in as back up and performed the more passive role of securing the perimeter.").

The warrants executed at the Redd home also implicated a number of unusual circumstances that complicated how then-existing law might apply in this context, to the situation at hand. First, the team was there to deal with a large number of artifacts requiring especially meticulous cataloging. *See* Ex. 7 (April 1 EC) at FBI000117 ("A photographer and scribe will set up at a location in the house/business. Items will be brought to them, photographed with a scale, color correction strip, and an ID number … A scribe collects the ID number, item description, and where the artifact was found and runs the photo log that captures all data for each four-person unit."). These artifacts – including some human remains – were also extraordinarily valuable and delicate. *See id.* at FBI000116 ("Because highly valuable artifacts will be seized, certain precautions are needed to properly process each scene."); Ex. 22 (Bill of Particulars) at 7, lines 183-187 and 27, lines 792-796 (identifying 812 items seized from the Redd home, including ten entries for human remains).[18] These unique circumstances, taken together with the uncertainty as

[18] *See also, e.g.*, National Park Service, *Museum Handbook* 7:32 ("Treat collections subject to [the Native American Grave Protection and Grave Repatriation Act] with great sensitivity, because of their cultural significance, sacred importance to descendants, tribal leaders, elders, and traditional religious leaders."), *available at* http://www.nps.gov/museum/publications/MHi/CHAP7.pdf (last accessed February 20, 2015); Wyoming Department of State Parks and Cultural Resources, *Wyoming State Museum Collections Care Manual* 7 (describing the care required to pack and transport artifacts), *available at*

to the existence of the specific rights Plaintiffs allege were violated, the lack of analogous caselaw suggesting the conduct was unconstitutional, and the discretion Defendant Love enjoyed as a matter of law, leave no doubt as to his entitlement to qualified immunity. *Cf. Gravitt v. Brown*, No. 02-561-6, 74 Fed. Appx. 700, 703, 2003 WL 21698972 (9th Cir. 2003) (unpublished) (9th Cir. 2003) ("Although forty officers searching her home may have appeared excessive, in light of the fact that the officers were searching for nearly 300 kilograms (approximately $4.5 million worth) of cocaine stolen from a government evidence vault, the search was reasonable under the circumstances.").

CONCLUSION

No justification exists to allow this baseless personal-capacity litigation to proceed against Defendant Love any further. He therefore respectfully requests that the Court grant summary judgment on his behalf.

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Respectfully submitted,

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http://wyospcr.state.wy.us/Intranet/WSM%20Collections%20Care%20Manual.pdf (last accessed February 20, 2015).

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