UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Estate of James Redd, M.D., et. al, **Plaintiffs,** **v.** **United States of America,** **Defendant.**	**No. 2:11-cv-01162-TS**

REPLY IN SUPPORT OF
DEFENDANT UNITED STATES OF AMERICA'S
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION EXPLAINING WHY SUMMARY JUDGMENT SHOULD BE GRANTED

In response to the United States' motion for summary judgment, Plaintiffs conceded that they cannot meet their burden to prove that the United States caused Dr. Redd's suicide. *See, e.g.*, Opp. at 58 ("Plaintiffs do not need to prove the wrongful conduct caused the death of James Redd in order to prevail at trial . . ."). Therefore, Plaintiffs' claim for wrongful death must be dismissed, leaving only a claim for intentional infliction of emotional distress ("IIED") on behalf of Dr. Redd's Estate.

Dismissal of this remaining claim is warranted on two independent grounds. First, Plaintiffs have failed to raise any genuine issue of material fact to suggest that the United States exhibited excessive force towards Dr. Redd on June 10, 2009. On the contrary, the discovery to date has produced a summary-judgment record that wholly belies Plaintiffs' overblown allegations in a number of ways, most notably in that it demonstrates that no more than 53 federal personnel – 7 of whom were unarmed cultural specialists – visited the Redd home over the course of the entire day. *See* Mot. at 7-11; *United States v. Immordino*, 534 F.2d 1378, 1383 (10th Cir. 1976) ("An accounting problem has been held especially suited to disposition by summary judgment."). Importantly, the record demonstrates that Dr. Redd could not have seen more than a fraction of these 53 personnel – only 22 visited the Redd residence from the time Dr. Redd arrived until his departure, and Dr. Redd was sequestered in the garage for the vast majority of this time. *See id.* at 7-10.

Instead of pointing to any genuine issue of material fact, Plaintiffs attempt to shirk their summary judgment burden, asking the Court to assist them in poking holes in Defendant's case by "indulg[ing]" certain unsubstantiated and conclusory allegations, improbable inferences, and speculation verging on the fantastic. *See* Opp. at 49. The Court should decline Plaintiffs' invita-

tion, which is contrary to the Rule 56 summary judgment standard and the standard applied to the discretionary function exception. *See Thomas v. Int'l Bus. Machines*, 48 F.3d 478, 484 (10th Cir. 1995) (noting that once the defendant has met its initial Rule 56 burden to show an absence of evidence, "the burden shifts to [the plaintiff] to identify specific facts that show the existence of a genuine issue of material fact."); *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (noting that the discretionary function exception must be strictly construed in favor of the United States). Having failed to meet their burden to establish a genuine issue of material fact, the discretionary function exception applies and summary judgment should be granted on Plaintiffs' sole remaining claim.

Second, even if the Court were inclined to indulge Plaintiffs and accept their most recent rendition of the "facts," Plaintiffs' current story is different from that presented to the Court at the time of the Rule 12 motion to dismiss. *See* Opp. at 56 ("[T]here are arguably fewer agents on Rule 56 than there were previously on Rule 12(b)(6) . . ."); *id.* at 52 ("[T]he number of officers demonstrated on summary judgement is not clearly in excess of 100 or more . . .").[1] Plaintiffs have cited to no case law that would allow them to circumvent the discretionary function exception under their most recent iteration of the facts. Instead, they merely point out that "this Court did not hold that 99 or fewer officers would have been reasonable or discretionary." Opp. at 52. This negative inference is no authority at all. Plaintiffs have simply restated the question currently before the Court. Thus, in light of the authority cited by the United States, even if this Court were to credit Plaintiffs' current version of the facts, Plaintiffs' remaining claim would be barred by the discretionary function exception.

[1] Tellingly, Plaintiffs advanced yet another version of the "facts" in their Opposition to Defendant Love's Motion for Summary Judgment in the related *Bivens* action. *See* Ex. 61 (Bivens Opp.) at 1 ("Defendant Love . . . sent more than 53 and as many as 53 to 65 more (***a total of 106-118***), armed or heavily armed agents to the Redd Home.") (emphasis added).

RESPONSE TO PLAINTIFFS' STATEMENT OF ELEMENTS

Discretionary Function Exception

The parties agree that application of the discretionary function exception, 28 U.S.C. § 2680(a), requires two steps: (1) determining whether the conduct at issue is discretionary, and (2) if the conduct is discretionary, determining whether the discretion or judgment was based on considerations of public policy. *See* Opp. at 2-3.

Proximate Causation

The parties also agree that proximate causation is an essential element of Plaintiffs' remaining claims and that a claim for "wrongful death requires proof of a causal relationship between the death and the wrongful conduct." *See* Opp. at 3-4.

The United States does not dispute Plaintiffs' assertion that claims for "IIED and survival do not require a causal relationship between the death . . . and the wrongful conduct [but instead] require a causal relationship between harm/injury/damage and the wrongful conduct." Opp. at 4. The United States notes, however, that without a causal connection between the death and the wrongful conduct, a plaintiff cannot recover damages relating to the death, regardless of whether the claim is couched as a claim for IIED or survival. *See id.* (noting that "Plaintiffs damages are not limited to the death of James Redd.")

Survival Action

As set out below, *see infra* at 1, the United States disputes Plaintiffs' assertion that a survival claim can be maintained as an independent cause of action. *See id.* at 3-4.

RESPONSE TO PLAINTIFFS'
STATEMENT OF ADDITIONAL "MATERIAL FACTS"[2]

70. "On June 17, 2009, the U.S. Senate Judiciary Committee conducted an oversight hearing at which Eric H. Holder, the Attorney General of the United States (on June 17, 2009) testified. See Oversight of the U.S. Department of Justice, Hearing before the Committee on the Judiciary, United States Senate, 111th Congress, First Session, June 17, 2009, attached to Plaintiff's Appendix as Exhibit 6. See also, Oversight Committee Hearing video excerpts, attached to Plaintiff's Appendix as Exhibit 7."

Response: Admit that the hearing took place. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 "were done in accordance with the FBI and Bureau of Land Management standard operating procedures."

71. "Attorney General Holder read a prepared statement and then offered to answer 'any questions that [the committee] might have.' Plaintiff's Appendix at Exhibit 6 (page 13 of the exhibit, page 9 of the transcript). (The Prepared Statement is found at page 133 of the exhibit, page 129 of the transcript)."

Response: Admit that the Attorney General read a prepared statement and offered to answer questions. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 "were done in accordance with the FBI and Bureau of Land Management standard operating procedures." To the extent Plaintiffs imply that the Attorney General's prepared statement relates to the subject matter of the sole remaining claim in this case in any way, deny.

[2] By responding to Plaintiffs' "facts," Defendant neither concedes the materiality of any particular statement nor makes any admissions for trial.

72. "Senator Orin G. Hatch from Utah was a member of the Committee on the Judiciary on June 17, 2009, and he asked Attorney General Holder questions about the June 10, 2009 raids. The relevant colloquy was as follows (all emphasis is supplied, no emphasis in the original):

Senator Hatch:

> Welcome, General. We are happy to have you here. We know you have a difficult job and we always want to be helpful to you if we can. There is something that really bothers me over this last weekend. After a 2-year investigation, the FBI, in cooperation with the Department of Interior, arrested 19 Utahans trafficking in Indian artifacts from Federal lands. **Now I am extremely concerned by the manner in which these warrants were executed. They came in in full combat gear, SWAT team gear, like they were going after, you know, the worst drug dealers in the world** and in the process – now, I do not believe anybody should be taking Indian artifacts, to establish that right off. But in the process, **one of the leading figures in the whole county down there who is a leading doctor**, had delivered almost everybody who lived in the county as a doctor, committed suicide. **He was by all intents and purposes an upstanding member of the community, a decent, honorable man**, critical to the community from a health and welfare standpoint. And the way they came in here – I mean, you know, I have no problem with going after people who violate the law. But **they came in here like they were the worst common criminals on Earth**, and in the process this man – it became overwhelming to him, I suppose – a really strong individual, a good person, goes out and commits suicide. Now, you know, this bothered me.
>
> **Now media reports state that over 100 Federal agents were used in this operation and that extreme show of force and presence has been perceived by the community out there and the civil leaders in San Juan County as not only unnecessary but brutal…**
>
> The offenses for which these warrants were issued were nonviolent offenses…
>
> **Can you just explain to me what, if any, factors were used to measure the appropriate level of force and personnel for the Utah operation?**

To which Attorney General of the United States responded:

> … The arrests that were done were felony arrests, and as best as I can tell, they were done in accordance with the FBI and Bureau of Land Management standard operating procedures. When arrests are made in even cases that seem to be nonviolent, there is always a danger for the law enforcement officer who is effecting that arrest, and it is a difficult thing to ask them to assume certain things as they are –

> Senator Hatch:
>
> I am with you on that, but in this case, **this is a doctor who everybody respected, everybody loved in the community**. I am just centering on his case since he was so overwrought by it he took his life. And that community – you know how hard it is to get upstanding doctors to move into some of these rural communities and do what this man was doing. Now, again, I do not justify stealing or taking Indian artifacts, if that is what happened here, but I would, I guess – nor do I want to put you through a lot of pain here. I hope you will do something about that type of activity in the future. You can bring all the force you want against drug dealers and people who clearly are violent felons where our people might be in danger. But in this case, **there was not the slightest possibility anybody could have been in danger down in that country**.
>
> Attorney General Holder:
>
> Well, we want to use the appropriate amount of force that is necessary, but we also want to keep in mind the protection – the responsibility I have to make sure that the lives of law enforcement officers engaged in these operations are not put at risk…

See Plaintiff's Appendix at Exhibit 6, Pages 31-33 of the Exhibit, pages 27-29 of the transcript; See Also Plaintiff's Appendix at Exhibit7, Video Excerpts of June 17, 2009 Senate Oversight Hearing."

Response: Admit that Plaintiffs accurately quote the transcript. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 "were done in accordance with the FBI and Bureau of Land Management standard operating procedures."

73. "Mr. Holder did not deny that (1) The agents were in body armor; (2) Most or all of the officers were dressed in combat or SWAT team gear; (3) James Redd was an 'upstanding member of the community, a decent, honorable man.' (4) there were in excess of 100 federal agents used in the Operation. *Id.*"

Response: Admit that the Attorney General made no remarks concerning what agents wore, Dr. Redd's standing in the community, or the total number of agents involved in Operation

Cerberus on June 10, 2009. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 "were done in accordance with the FBI and Bureau of Land Management standard operating procedures."

73B.[3] "As noted in Response to Paragraph 6 above, all SWAT team officers perform regular FBI duties. Any or all of the 85-97 FBI officers involved in the June 10, 2009 operation and on site of the Redd Home would be deemed FBI officers even if they were SWAT certified and equipped (except the 10-12 member SWAT team that executed the 6:01 a.m. search.)."

Response: Admit that the "regular FBI duties" of SWAT-certified FBI agents may involve participating in SWAT as well as non-SWAT operations. *See* Ex. 10 (Bretzing Decl.) at ¶ 43. Deny that Plaintiffs have accurately computed the number of "FBI officers involved in the June 10, 2009, operation and on site of the Redd Home." *See* Ex. 44 (Full Headcount). It is unclear what Plaintiffs mean by "deem[ing]" someone an "FBI officer." To the extent that they imply that anyone who was part of the relevant SWAT team was not an FBI agent, deny. *See* Ex. 7 (May 26 EC) at 1; Ex. 8 (Apr 1 EC) at 3; Ex. 10 (Bretzing Decl.) at ¶ 43.

73C. "Four or more SWAT team members were on site at the Redd Home at or about noon. Response to Paragraphs 6 and 51 above and Paragraph 83 below."

Response: Admit that four members of the one FBI SWAT team that assisted with Cerberus were on site at the Redd home at or about noon. Deny that "more" than four members of that team were present. *See* Ex. 10 (Bretzing Decl.) at ¶ 45-47. Deny that the four SWAT team

[3] Plaintiffs' statement of additional facts does not include 73A.

members who happened to be at the home took any actions that could reasonably be construed as part of a SWAT operation prior to the receipt of threatening voicemail. *See id.* at ¶¶ 20, 43.

73D. "In Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at page 4, ¶5(a), Plaintiff presents evidence that the agents who entered the Redd Home at or about 6:40 a.m. looked like the officer in the photograph attached as to Plaintiff's Appendix at Exhibit 2, page 1, and referenced at Movants Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 4, note 2, except that they did not have helmets and goggles."

Response: Admit that Jericca Redd's Declaration states that "[t]he Agents who entered our home first … did not have on helmets or goggles, but they otherwise looked like" the FBI SWAT team member pictured on the FBI's webpage, in an unspecified way or ways. *See* Dkt. No. 60-1 ("Jericca Decl.") at ¶ 5(a)(ii); *but see* Ex. 59 (Pls. Resp. Bivens Rogs) at 14 ("Jerrica thinks the BLM had BLM clothes, and the FBI were in plain clothes[.]"). Deny that her testimony in this regard is competent summary-judgment evidence. *See, infra,* at 13-14. Deny that any of the 12 law enforcement officers who arrived at the Redd home at approximately 6:40 a.m. was outfitted in the manner of the FBI SWAT team member pictured in Plaintiffs' exhibit. *See* Ex. 10 (Bretzing Decl.) at ¶ 24 ("FBI agents carrying out arrest warrants wear a bullet-proof vest (also called 'soft body armor') and carry a side arm, which is a handgun."); *id.* ("BLM law enforcement officers at the Redd home also wore soft body armor and carried handguns.").[4] Deny that the one cultural specialist who was at the Redd home at the beginning of the day carried any

[4] *See also id.* at ¶ 44 (explaining that BLM does not have SWAT teams); *see also* Ex. 2 (Ops Plan) at 6 ("Casual clothing."); Opp. at 37 ("Undisputed" that BLM agents wore soft body armor as required by agency policy.); *id.* ("Undisputed" that "BLM law enforcement officers … are required to [carry handguns] when performing law enforcement duties in uniform" and that "BLM law enforcement agents at the Redd home followed that policy.").

type of weapon or wore anything that might have been mistaken for body armor. *See* Ex. 11 (Palus Decl.) at ¶ 21. ("On June 10, 2009, I was dressed in casual clothing. I was unarmed and wore no body armor or anything that might have been mistaken for body armor. This was true of every other cultural specialist I encountered that day.").[5]

73E. "The Agents who entered the house at 6:40 a.m. had guns like the gun in the same photo (a firearm with fully automatic capability). Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at page 4-5, ¶ 5(a)(iii)."

Response: Admit that Jericca Redd's Declaration says:

> "The guns that [the first agents] had looked like machine guns, but they were definitely guns. They were not pistols or rifles. I am not a gun expert,[6] but I know what a gun looks like and the Agents I saw (among the first set of Agents who entered our home first) all had guns. They looked similar to the gun held by the [FBI SWAT team member on the FBI's website]."

Jericca Decl. at ¶ 5(a)(iii); *but see* Pls. Ex. 9 (Pls. Resp. Bivens RFAs) at 5 ("Plaintiff is without sufficient information to admit or deny" that "no member of the team of federal personnel that knocked on the Redds' door at approximately 6:40 a.m. on June 10, 2009, carried an automatic weapon."). Deny that the Declaration supports the proffered fact or is competent summary-judgment evidence in this regard. *See, infra,* at 13-14. Jericca Redd does not specify the manner in which she thinks the guns she saw at 6:40 a.m. resembled "the gun in the same photo," but deny that any law enforcement officers present at the time carried weapons other than handguns. Ex. 10 (Bretzing Decl.) at ¶ 24 ("FBI agents carrying out arrest warrants wear a bullet-proof vest

[5] *See also* Opp. at 10 ("Undisputed" that "*unarmed* civilian cultural specialists from BLM … helped the law enforcement officers identify, catalog, and safeguard artifacts.") (emphasis added).

[6] *See also* Ex. 59 (Pls. Resp. Bivens Rogs) at 14 ("Jerrica does not know the model or caliber of the guns, but she says she knows a machine gun [when] she sees one.").

(also called 'soft body armor') and carry a side arm, which is a handgun"); *id.* ("BLM law enforcement officers at the Redd home also wore soft body armor and carried handguns.").[7] To the extent it is implied, deny that the one cultural specialist who was at the Redd home at the beginning of the day carried any type of weapon. *See* Ex. 11 (Palus Decl.) at ¶ 21 ("I was unarmed … This was true of every other cultural specialist I encountered that day.").[8] Deny that Plaintiffs have identified authority for the proposition that the weapon pictured in the photo has "fully automatic capability," or that Jericca Redd's Declaration addresses whether the guns she saw contained a "self-acting mechanism … set in motion by a single function of the trigger." *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (interpreting "the term 'machinegun'" as defined by 26 U.S.C. § 5845(b)).

74. "Also on June 17, 2009, the same day as Mr. Holder was answering Senator Hatch's questions, the FBI issued a press release in which confirmed [*sic*] that the number of agents involved in the June 10, 2009 operation included 'approximately 150 agents and employees from the FBI and BLM.' The number of additional non-employees, such as cultural specialists, was not offered in the press release. *See* Plaintiff's Appendix at Exhibit 8, FBI June 17, 2009 press release."

[7] *See also* Opp. at 37 ("Undisputed" that BLM agents wore soft body armor as required by agency policy.); *id.* ("Undisputed" that "BLM law enforcement officers … are required to [carry handguns] when performing law enforcement duties in uniform" and that "BLM law enforcement agents at the Redd home followed that policy.).

[8] *See also* Opp. at 10 ("Undisputed" that "*unarmed* civilian cultural specialists from BLM … helped the law enforcement officers identify, catalog, and safeguard artifacts.") (emphasis added).

Response: Admit that the FBI issued a press release to this effect. Deny that "cultural specialists" were "non-employees." *See* Ex. 11 (Palus Decl.) at ¶ 7 (cultural specialist assisting with Cerberus "worked for BLM").[9]

75. "The sole justification for the force exercised on June 10, 2009 offered by Attorney General Holder was the safety of the officers involved in executing the warrants. *See* Plaintiff's Appendix at Exhibit 6 at pages 31-33, and Paragraph 72 above."

Response: Admit that the Attorney General identified officer safety as a concern. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 "were done in accordance with the FBI and Bureau of Land Management standard operating procedures." Deny that the testimony purported to identify every "justification" for the number of personnel involved in Cerberus. *See* Pls. Ex. 6 at 31-33. Deny that any degree of "force" was exercised at the Redd home. *See* Ex. 28 (302) at 1 ("Agents arrived on scene at 0640 and arrested Jeanne Redd at 0641 without incident … James Redd … was also arrested without incident.").[10]

76. "Attorney General Holder never said that Media Reports, or the FBI press release, or Senator Hatch's numbers were exaggerated. Attorney General Holder never said anything like:

A. There were only 10 SWAT Agents, and they were not at the Redd Home.

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[9] *See also* Opp. at 10 ("Undisputed" that "unarmed civilian cultural specialists *from BLM* … helped the law enforcement officers identify, catalog, and safeguard artifacts.") (emphasis added).

[10] *See also* Ex. 10 (Bretzing Decl.) at ¶ 28 ("Jeanne Redd answered and was immediately placed under arrest without incident."); *id.* at ¶ 29 ("James Redd … was arrested without incident and taken to the garage for questioning.").

B. None of the other agents were in combat gear.

C. Not only was officer safety a concern, but the volume of material that needed to be handled, catalogued, inventoried and seized required additional manpower.

D. The SWAT agents were not really SWAT agents, they just happened to be SWAT certified regular FBI agents, performing FBI agent duties only and who were not wearing SWAT gear, but they just happened to be on site helping collect evidence but had to unexpectedly transform into a SWAT role."

Response: Admit that the Attorney General made no remarks on these topics. Deny that the transcript is material or admissible, aside from the confirmation that the operations of June 10, 2009 "were done in accordance with the FBI and Bureau of Land Management standard operating procedures." Deny that Plaintiffs have accurately characterized the United States' summary-judgment motion with respect to the ways in which the record belies the allegation of the Complaint that an 80-140-member SWAT team stormed the Redd home *en mass*. *See* Mot. at 7-11.

77. "Similarly, the June 17, 2009, FBI press release makes no allegation similar to those set forth in paragraph 76(A) through 76(D) above."

Response: Admit that the press release provided by Plaintiffs does not speak to these topics. Deny that Plaintiffs have accurately characterized the United States' summary-judgment motion with respect to the ways in which the record belies the allegation of the Complaint that an 80-140-member SWAT team stormed the Redd home *en mass*. *See* Mot. at 7-11.

78. "The Redd family members in the Redd Home on June 10, 2009, were respected members of the community with no known history of violence. This is especially true of James

Redd. Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at page 7, ¶ 8; Plaintiff's Appendix at Exhibit 6, at Pages 31-33 of the Exhibit, pages 27-29 of the transcript; *See Also* Paragraph 72 above (Statements by Senator Hatch)."

Response: Admit that Jericca Redd and Senator Hatch have made such representations with respect to Dr. Redd. Deny that the cited exhibits contain such representations as to any other member of the Redd family. Deny that any family member's reputation is material to the pending summary-judgment motion. Deny that Jericca Redd's or Senator Hatch's remarks are competent summary-judgment evidence. *See, infra,* at 4-5. Deny that Dr. Redd had no criminal history. *See* Ex. 2 (Ops Plan) at 2 ("Criminal background: James Redd: desecration of dead body (dismissed)). Deny that Mrs. Redd had no criminal history. *See id.* ("Criminal Background Jeannie Redd: 1997 desecration of dead body (dismissed). 1998 desecration of a corpse (reduced to crime against person – Misdemeanor)"). Deny that there is any evidence of Mrs. Redd's or Jericca Redd's reputation in the community or "history of violence," or that the reasonableness of any "show of force" turns on such history.

79. "At the time the Arrest and Search Warrants were executed, James Redd was at work at his Blanding medical clinic. Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at page 2, ¶ 2(c)."

Response: Admit that Dr. Redd arrived at the Redd home after Mrs. Redd had been arrested. The record neither confirms nor denies that Dr. Redd was "at work" (as opposed to on his way home) at the time of Mrs. Redd's arrest, but the distinction is immaterial. Deny that Dr. Redd was "at work" when he was arrested or that this is material to the pending summary-judgment motion. *See* Ex. 28 (302) at 1 ("James Redd drove up at 0655 and was also arrested

without incident" at the Redd home.).[11] Deny that Dr. Redd was "at work" during the search of his home. *See id.*[12]

80. "Upon entry into the Redd Home, the Redd family members were sequestered in separate rooms. See Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at pages 2-3, ¶¶ 2(f)-2(g)."

Response: Admit after her arrest and prior to her departure, Mrs. Redd was taken to the kitchen. Admit that after his arrest and prior to his departure, Dr. Redd was taken to the garage. Admit that Jericca Redd spent some portion of the morning in what she has identified as the "Piano Room."

81. "Jeanne Redd was ordered to open the door, and she complied. Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at pages 2-3, ¶¶ 2(e)-2(g)."

Response: Admit that Mrs. Redd unlocked and opened her front door after law enforcement officers knocked and announced their presence.

82. "When Jeanne Redd was arrested, she offered no violence and she was cooperative. She answered questions even though she did not have to do so. See Response to Paragraphs 24 above."

[11] *See also* Ex. 30 (Dr. Redd Interview) at 1 ("JEANNE told officers that REDD was out picking up a key and would return any minute.").

[12] *See also id.*

Response: Admit that Mrs. Redd was arrested without incident and answered questions voluntarily, until "she was advised" by her attorney "not to provide any further information, and all questioning stopped." Ex. 32 (Mrs. Redd interview) at 3.

83. "When Jericca Redd was taken to a room (the Piano Room), she was cooperative and offered no violence or argument or attempt at flight. She was polite and cooperative. When asked a question, she answered it. When asked for help or assistance, she provided it. For example, Agent Love asked Jericca Redd how to access the roof and she told him how to do it. Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at page 3, ¶ 3 and page 3-4, ¶ 4(c). Jericca Redd was under no obligation to assist the officers or to be courteous to them."

Response: Admit that Jericca Redd was generally cooperative. Deny that this portion of her Declaration is competent summary-judgment evidence or material to the pending summary-judgment motion. *See, infra*, at 14-16. Admit that Agent Love asked Jericca Redd about roof access at the behest of the FBI. Admit that Jericca Redd was not obligated to assist the officers. Deny that this is material to the pending summary-judgment motion.

84. "The agents were not afraid of Jericca Redd. They left her alone in her room when she asked for permission to get dressed for the day. The agents were not worried that she would access a weapon or use one if given the opportunity to do so. Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at page 4, ¶ 4(d)."

Response: Admit that agents permitted Jericca Redd to dress in privacy. Deny that Jericca Redd's speculation as to the agents' mindset with regard to Jericca Redd is relevant or competent summary-judgment evidence. *See, infra*, at 14-16. To the extent that Plaintiffs imply

that the potential presence of weapons played no role in planning the execution of the Redd arrest and search warrants, deny. *See* Ex. 2 (Ops Plan) at 1 ("CAUTION STATEMENT: … Guns: Unknown. Barricade: Unknown."). To the extent that Plaintiffs imply that the arrests and search implicated no legitimate safety concerns, deny. *See, infra*, at 7-10.

85. "With regard to weapons, at no time did the Agents appear to be searching for weapons. Guns were in the house, but no Agent ever seized a gun or secured a gun during the course of the search. Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl., at page 7, ¶ 9. None of the Agents seemed worried about, or interested in, any guns that might be in the house. *Id.*"

Response: Admit that Jericca Redd has made such an assertion. Deny that she has sufficient personal knowledge to testify as to what agents did after she left the home or in locations where she was not present. *See, infra*, at 14-16. Deny that Jericca Redd's speculation as to the agents' mindset is material or competent summary-judgment evidence. *See, infra*, at 9 n.49. To the extent that Plaintiffs imply that the potential presence of weapons played no role in planning the execution of the Redd arrest and search warrants, deny. *See* Ex. 2 (Ops Plan) at 1 ("CAUTION STATEMENT: … Guns: Unknown. Barricade: Unknown.").

86. "When James Redd arrived home he was arrested 'without incident.' He offered no violence or resistance or attempt at flight. He was cooperative and answered the officers' questions even though he did not need to do so. See Response to Paragraph 31 above."

Response: Admit that Dr. Redd was arrested without incident and voluntarily spoke with agents after being advised of his right not to. *See* Ex. 30 (Dr. Redd Interview) at 1 ("REDD stated he understood his rights and signed the waiver of rights and agreed to talk with the agents.").

87. "The FBI and BLM began organizing resources and assets, including manpower and funding, on or before April 1, 2009. See Movant's Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 1, FBI000115."

Response: Admit that Plaintiffs have accurately quoted a portion of an April 1, 2009 FBI memo. *See* Ex. 8 (Apr 1 EC). To the extent that Plaintiffs intend to convey that the events related to Operation Cerberus were planned in advance of June 10, 2009, admit.

88. "Contrary to the allegations of the Movant that there was a surprise with regard to the volume of artifacts at the Redd Home, and the allegation that the need for additional manpower to collect the evidence was unanticipated, the Joint Operation originally contemplated the following:

A. Handling precautions might be necessary; Movant's Appendix at Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 2-3, FBI000116-117;

B. Persons with special skill, Archaeologists, would be needed to properly process each scene. Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 2, FBI000116;

C. There would be a large volume of artifacts. Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 3, FBI000117;

D. Many of the artifacts would remain at the home of the subjects, and the agents would 'freeze' all artifacts not seized, to keep them in place until the close of the case. Exhibit 8, 4/1/2009 FBI Electronic Communication RE: Cerberus Action, at page 3,

FBI000117. See also, Movants Appendix at Exhibit 9, Cerberus Action Search/Arrest Warrant Service, at page 1, FBI000063."

E. In fact, the artifacts and evidence were labeled and tagged and left where they were found for almost 30 days. The Government returned to seize the labeled items on July 7, 2009. See Plaintiffs Appendix at Exhibit 1, Jerrica Redd Decl., at page 9-11, ¶ 13. See Also Plaintiff's Appendix at Exhibit 3, (Photos of Items left behind on June 10, 2009), Exhibit 4, (June 10, 2009 Receipt for Property Seized) and Exhibit 5, (Photographs of July 7, 2009 Seizures).

Response: Admit that federal personnel anticipated finding many artifacts requiring special handling at the Redd home and "freezing" some artifacts there. Deny that federal personnel did not find more evidence than they anticipated, or that expecting a large volume of artifacts meant agents could not have encountered a larger volume than anticipated. *See* Ex. 10 (Bretzing Decl.) at ¶ 33 ("By about 8:00 a.m., it had become apparent to the team that they would need additional law enforcement assistance in order to process all of the potential evidence so that the search could be completed as soon as possible.").[13] Admit that certain artifacts were labeled, tagged and frozen in place on June 10, 2009 and then seized on July 7, 2009. Deny that the fact that certain artifacts were labeled, tagged and frozen in place and then seized at a later date means that federal personnel did not encounter a larger volume of evidence than anticipated. *See id.*

[13] *See also* Ex. 11 (Palus Decl.) at ¶ 23 ("Upon completing work at that site, the other cultural specialist at that site and I were directed by the FBI Team Leader there to go to the Redd home, because additional people were needed to complete the search warrant."); *id.* at ¶ 30 ("The Redd home was large, with many rooms, and an incredible amount of artifacts.").

89. "The Sign In Log, filed at Movants Appendix at Exhibit 39, indicates only those agents who entered the Redd Residence, but not those who were at the home or on the premises, but not in the Residence. This fact is demonstrated as follows:"

Response: Deny that Plaintiffs have identified any competent summary-judgment evidence that any agent who participated in the Redds' arrests or the search of their home failed to sign in. *See, infra,* at 10-13.[14]

89A. "SA Bretzing declares that 'the FBI and BLM law enforcement officers who arrived at and departed from the Redd residence over the course of the day on June 10, 2009 signed in and out on a log…' Movants Appendix at Exhibit 10, Bretzing Decl., Dkt. 53-4, at page 5, ¶ 22;"

Response: Admit.

89B. "Agent Vander Veer did not sign in until 9:52 a.m., but she was 'present' at the time of arrival at 6:40 a.m. to arrest James Redd and/or to search the Redd 'Residence.' See Movants Appendix at Exhibit 2, Operations Plan, at page 5, FBI000016 (Vander Veer assigned as Searcher); Movants Appendix at Exhibit 4, Search Warrant Locations, at page 4, FBI000008 (Vander Veer as Finder); Movants Appendix at Exhibit 18, FD-302 by DA Kisabeth, at page 1, Redd_BLM-0243 (Vander Veer alleged to arrive on scene at 640 a.m. and designated as a transporter/searcher/interviewer)"

[14] *See also* Ex. 10 (Bretzing Decl.) at ¶ 22 ("The FBI and BLM law enforcement officers who arrived at and departed from the Redd residence over the course of the day … signed in and out on a log, in accordance with standard operating procedure."); Ex. 11 (Palus Decl.) at ¶ 27 ("All of the cultural specialists who entered the Redd home on June 10, 2009, signed in on that log[.]").

Response: Admit that Agent Vander Veer signed in late. Deny that this is material to the pending summary-judgment motion, in light of the fact that Defendant has assumed Agent Vander Veer arrived at approximately 6:40 a.m. and stayed through the end of the day.

89C. Agent Vander Veer was present at 6:40 a.m., and she assisted in the arrest and interview of James D. Redd. This took place not in the Redd 'Residence,' but in the driveway and garage. Movants Appendix at Exhibit 28, FD-302 by DA Kisabeth, at page 1 ('James Redd drove up at 6:55 a.m.'); See Also Movants Appendix at Exhibit 30, Memorandum of Interview: Dr. Redd, at page 1, Redd_BLM-0217 ('Time [of interview of James Redd]: 7:05 a.m. to approximately 9:30 a.m.')"

Response: Admit that Agent Vander Veer was present at 6:40 a.m. and participated in Dr. Redd's arrest and interview. Admit that garages and driveways are generally separate from the interiors of homes. Deny that this distinction is material to the pending summary-judgment motion.

89D. "The most reasonable inference from these facts is that FBI and BLM agents did not sign in (or out) of the log at Exhibit 39 to Movants Appendix, unless and until they entered the residence."

Response: This is a legal conclusion to which no response is required. To the extent one is, deny.

89E. "There were lots of agents besides just Vander Veer who did not enter the residence but who were present at the Redd Home and exercising force or a show of force."

Response: Deny that Plaintiffs have identified any competent summary-judgment evidence that "lots of agents" are missing from the record. *See, infra,* at 10-13. Deny that Plaintiffs have identified any evidence that Agent Vander Veer never "enter[ed] the residence," or that this point is material to any issue relevant to the pending summary-judgment motion (which assumes Agent Vander Veer arrived at 6:40 a.m. and remained through the end of the day). *See* Ex. 45 (5:36 Headcount) at line 10. Deny that any degree of force was exercised at the Redd home on June 10, 2009. Ex. 28 (302) at 1 ("Agents arrived on scene at 0640 and arrested Jeanne Redd at 0641 without incident … James Redd … was also arrested without incident.").[15]

89E(1). "This fact is evident from above."

Response: This is a legal conclusion to which no response is required. To the extent one is, deny that Plaintiffs have identified any competent summary-judgment evidence in support of the assertions in Paragraph 89(E). *See, infra,* at 10-13.

89E(2). "See Also, Plaintiff's Appendix at Exhibit 1, Jericca Redd Decl. at page 3-4, ¶¶ 4(a) and 4(b)."

Response: This paragraph contains no factual assertions. To the extent that it is intended as support for the assertions in Paragraph 89(E), deny that Jericca Redd's Declaration even addresses "lots of agents besides just Vander Veer who did not enter the residence but who were present at the Redd Home and exercising force or a show of force." *See* Jericca Decl. at ¶ 4(a)(iii) (stating in the cited paragraph that Jericca Redd "saw many agents outside the house"

[15] *See also* Ex. 10 (Bretzing Decl.) at ¶ 28 ("Jeanne Redd answered and was immediately placed under arrest without incident."); *id.* at ¶ 29 ("James Redd … was arrested without incident and taken to the garage for questioning.").

and speculating that "[m]any of those agents never entered our home," but making no reference anywhere to Agent Vander Veer, "lots of agents," or "force").

90. "Agent Love does not appear on any Government document as having been assigned to the Redd Home, either as an arrest team member, or a search team member. See Movant's Exhibit 3, Search Warrant Locations, Dkt. 94-3, at page 4 (B8) (Search team); Movant's Exhibit 4, Search Warrant Locations, at page 4 (B8)(Search team); Movants Exhibit 5, Arrest Locations, (James and Jeanne Redd are not listed). But Defendant Love, and many others, signed in and out of the Redd home."

Response: Admit that the record shows that Agent Love was not assigned to personally arrest the Redds or search their home. *See* Ex. 3 (Comm Locs) (showing Agent Love's assignment to the "Blanding Forward Operating Base"). Admit that Agent Love and the others identified on the sign-in log were at the Redd home on June 10, 2009. *See* Ex. 39 (Log). Deny that these facts are contradictory. To the extent it is implied, deny that "many others" fail to appear on the sign-in log. *See, infra*, at 10-13.

90A. "A reasonable inference from these facts is that there are individuals who went to the Redd Home who were not 'assigned' to go to the Redd Home."

Response: This is a legal conclusion to which no response is required. To the extent one is, admit that the federal personnel identified on the sign-in log were at the Redd home on June 10, 2009, and that not all of them originally had assignments specific to the Redd home (or began the day there). *See* Ex. 39 (Log) (showing who visited the home); Ex. 4 (showing assign-

ments to search locations).[16] To the extent it is implied, deny that Plaintiffs have identified any competent summary-judgment evidence that any "individuals who went to the Redd Home" are missing from the record. *See, infra*, at 10-13.

90B. "The government documents do not identify all the agents present at the Redd home (or in the June 10, 2009 operation)."

Response: Deny that Plaintiffs have identified any competent summary-judgment evidence that "agents present at the Redd home" are missing from the record. *See, infra*, at 10-13. Deny that the total number of federal personnel who participated in "the June 10, 2009 operation" (including sites other than the Redd home) as a whole is material to the pending summary-judgment motion. Deny that the summary-judgment record fails to account for the "approximately 150" people Plaintiffs allege participated in the events of June 10, 2009. *See, infra*, at 10-13.[17]

91. "Most of the agents who entered the home first appeared to be armed and dressed like the agent in the picture referenced in Movant's Exhibit 10, Bretzing Decl. Dkt. 53-4, at page 4, ¶20, note 2, and attached to Plaintiff's Appendix at Exhibit 2, except that they were not wearing goggles or hats. Plaintiffs Appendix at Exhibit 1, Jerrica Redd Decl., at page 4, ¶ 5"

Response: Admit that Jericca Redd's Declaration states that "[t]he Agents who entered our home first … did not have on helmets or goggles, but they otherwise looked like" the SWAT

[16] *See also* Ex. 11 (Palus Decl.) at ¶ 23 ("Upon completing work at that site, the other cultural specialist at that site and I were directed by the FBI Team Lead there to go to the Redd home, because additional people were needed to complete the search warrant.").

[17] *See also* Ex. 60 (Bivens Ex. 64 (People in the Record)) (identifying as many as 162).

team member pictured on the FBI's website in an unspecified way or ways. *See* Jericca Decl. at ¶ 5(a)(ii); *but see* Ex. 59 (Pls. Resp. Bivens Rogs) at 14 ("Jerrica thinks the BLM had BLM clothes, and the FBI were in plain clothes[.]"). Deny that this is competent summary-judgment evidence. *See, infra*, at 13-14. Deny that Jericca Redd's Declaration addresses whether anyone wore hats, or that this would be material to any issue relevant to the pending summary-judgment motion. *See* Jericca Decl. at ¶ 5. Deny that any of the 12 law enforcement officers who arrived at the Redd home at approximately 6:40 a.m. was outfitted in the manner of the FBI SWAT team member pictured in Plaintiffs' exhibit. *See* Ex 59 (Pls. Resp. Bivens Rogs) at 14 ("Jerrica thinks the BLM had BLM clothes, and the FBI were in plain clothes[.]").[18] Deny that the one cultural specialist who was at the Redd home at the beginning of the day carried any type of weapon or wore anything that might have been mistaken for body armor. *See* Ex. 11 (Palus Decl.) at ¶ 21 ("I was unarmed and wore no body armor or anything that might have been mistaken for body armor. This was true of every other cultural specialist I encountered that day.").[19]

91A. "Additional Agents entered the home or walked around outside of it. These agents were not as heavily armed as the initial set of agents, but they were armed and they all had guns.

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[18] *See also* Ex. 10 (Bretzing Decl.) at ¶ 24 ("FBI agents carrying out arrest warrants wear a bullet-proof vest (also called 'soft body armor') and carry a side arm, which is a handgun"); *id.* ("BLM law enforcement officers at the Redd home also wore soft body armor and carried handguns."); *id.* at ¶ 44 (explaining that BLM does not have SWAT teams); *see also* Ex. 2 (Ops Plan) at 6 ("Casual clothing."); Opp. at 37 ("Undisputed" that BLM agents wore soft body armor as required by agency policy.); *id.* ("Undisputed" that "BLM law enforcement officers … are required to [carry handguns] when performing law enforcement duties in uniform" and that "BLM law enforcement agents at the Redd home followed that policy.).

[19] *See also* Opp. at 10 ("Undisputed" that "*unarmed* civilian cultural specialists from BLM … helped the law enforcement officers identify, catalog, and safeguard artifacts.") (emphasis added).

Plaintiffs Appendix at Exhibit 1, Jerrica Redd Decl., at page 4, ¶ 5(a)(i). They were also all wearing body armor. *Id.* at page 4, ¶ 5(a)(i)."

Response: Admit that Jericca Redd's Declaration asserts that "[t]he Agents who came in the house after the first set of agents who came in the door first and arrested my mother, were not as heavily armed as the first set of Agents were armed." Jericca Decl. at ¶ 5(b). Admit that Jericca Redd's Declaration states that "[i]t is my recollection that they all had guns, but they did not all have their guns out" and that she "d[id]n't think" the guns were "like in the photo." *Id.* Deny that Jericca Redd's Declaration states that agents who arrived after the initial set of agents "were … all wearing body armor." *See id.* at ¶ 5(a)(i) ("The Agents *who entered our home first*, early in the morning … appeared to be wearing bullet proof vests or some sort of body armor or flak jacket.") (emphasis added).[20] Deny that Jericca Redd's vague statements are competent summary-judgment evidence as to this point. *See, infra*, at 13-14. Admit that law enforcement officers who visited the Redd home on June 10, 2009, wore soft body armor as required by their agencies' policies. *See* Ex. 10 (Bretzing Decl.) at ¶ 24 ("According to standard operating procedure, FBI agents carrying out arrest warrants wear … 'soft body armor' … FBI agents at the Redd home followed this procedure. BLM law enforcement officers at the Redd home also wore soft body armor[.]").[21] Deny that any cultural specialist who visited the Redd home on June 10, 2009 carried any type of weapon or wore anything that might have been mistaken for body armor. *See* Ex. 11 (Palus Decl.) at ¶ 21 ("I was unarmed and wore no body armor or anything that

[20] *See also id.* at ¶ 5(b) (not addressing whether "[t]he Agents who came in the house after the first set of agents who came in the door first and arrested my mother" wore body armor).

[21] *See also* Opp. at 37 ("Undisputed" that BLM agents wore soft body armor as required by agency policy.).

might have been mistaken for body armor. This was true of every other cultural specialist I encountered that day.").[22]

91B. "Yet more additional Agents stayed outside the home and never entered the residence itself. Plaintiffs Appendix at Exhibit 1, Jerrica Redd Decl., at page 3, ¶ 4. Page 6-7, ¶6(c)"

Response: Admit that Jericca Redd's Declaration asserts that she "saw many agents outside the house" and speculates that "[m]any of those agents never entered our home." Jericca Decl. at ¶ 4(a)(iii). Deny that this portion of the Declaration supports the inference that many additional agents visited the Redd home without signing in, in light of Jericca's complete lack of personal knowledge as to where and when personnel signed in, what took place outside of her presence while she was in the "Piano Room," or what happened after she left the home. *See, infra*, at 10-13. Deny that Jericca Redd's Declaration addresses whether the "many agents" she claims to have seen were part of the first group of federal personnel, or not. Deny that this is material to any assertion relevant to the pending summary-judgment motion. To the extent it is implied, deny that Plaintiffs have identified any competent summary-judgment evidence that federal personnel who participated in the Redd arrests or search are missing from the record. *See, infra*, at 10-13.

91C. "There were Agents inside the house, outside the house, and far away from the house (but on the property). They were everywhere. Plaintiffs Appendix at Exhibit 1, Jerrica Redd Decl. at page 3, ¶ 4(a)."

[22] *See also* Opp. at 10 ("Undisputed" that "*unarmed* civilian cultural specialists from BLM … helped the law enforcement officers identify, catalog, and safeguard artifacts.") (emphasis added).

Response: Admit that Jericca Redd's Declaration states that "Agents were inside the house, outside the house, and far away from the house walking around our land. They were everywhere." Jericca Decl. at ¶ 4(a)(ii). Deny that Jericca Redd has testified (or has sufficient personal knowledge to testify) as to the location of federal personnel after she left the home or in places where she was not present. *See id.* at ¶ 4 (describing Jericca Redd's observations "[w]hile I was at home on June 10, 2009"). Admit that federal personnel searched the Redd home and property. Deny that federal personnel were "everywhere" in the literal sense or all "agents." *See* Ex. 11 (Palus Decl.) at ¶ 23 ("Upon completing work at that site, the other *cultural specialist* at that site and I were directed by the FBI Team Lead there to go to the Redd home, because additional people were needed to complete the search warrant.") (emphasis added).[23] Deny that this is material to the pending summary-judgment motion.

91D. "If the Agents were on site, but did not enter the residence, they did not sign in the sign in log. See Paragraph 89 above."

Response: This is an unsupported speculation by Plaintiffs' counsel, to which no response is required. To the extent one is, deny that Plaintiffs have identified any competent summary-judgment evidence that federal personnel who participated in the Redd arrests or search are missing from the record. *See, infra,* at 10-13.

[23] *See also* Opp. at 10 ("Undisputed" that "unarmed civilian cultural specialists from BLM … helped the law enforcement officers identify, catalog, and safeguard artifacts.").

ARGUMENT

I. Plaintiffs have conceded that they cannot prove proximate causation with respect to their claim for wrongful death.

Plaintiffs admit that a claim for "wrongful death requires proof of a causal relationship between the death and the wrongful conduct." Opp. at 4. Yet, Plaintiffs offer no response to the United States' demonstration that Plaintiffs cannot establish proximate causation with respect to Dr. Redd's suicide. *See* Mot. at 28-30. Instead, Plaintiffs assert that their claims for "IIED and survival do not require a causal relationship between the death of James Redd and the wrongful conduct." Opp. at 4.[24] Thus, Plaintiffs have conceded that they cannot prove that the United States caused Dr. Redd's suicide, and their claim for wrongful death must be dismissed.

Further, Plaintiffs' assertion that they can maintain an independent survival claim is incorrect. *See id.* at 4 ("Three claims remain as discussed below, IIED, wrongful death, and survival.").[25] The Utah survival statute did not create an independent cause of action. Rather, it merely provided that an existing cause of action does not abate when an injured person dies. *See* Utah Code Ann. § 78B-3-107 ("A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of a wrongdoer, does not abate upon the death of the wrongdoer or the injured person."); *Berrett v. Albertsons Inc.*, 293 P.3d 1108, 1120 (Utah Ct. App. 2012), *cert. granted*, 304 P.3d 469 (Utah May 13, 2013) ("By their nature, survival statutes do not give rise to new causes of action; rather, they regulate the viability and scope of preexist-

[24] *See id*. at 57 ("Plaintiffs can prevail on the survival claim regardless of whether the wrongful acts of the Defendant caused the death of James Redd."); *id*. at 58 ("Plaintiffs do not need to prove the wrongful conduct caused the death of James Redd in order to prevail at trial . . .").

[25] *See id.* at 57 ("Plaintiffs can prevail on the survival claim regardless of whether the wrongful acts of the Defendant caused the death of James Redd.").

ing causes of action . . .") (citation omitted). Thus, Plaintiffs' sole remaining claim is for IIED on behalf of Dr. Redd's Estate.[26]

As set out *infra*, Plaintiffs' remaining claim is barred by the discretionary function exception, and this lawsuit should therefore be dismissed in its entirety.

II. The discretionary function exception bars Plaintiffs' remaining claim.

Plaintiffs misstate the standard applied to a Rule 56 motion, and improperly attempt to equate the Court's prior Rule 12 ruling with the current motion. Application of the proper standard makes clear that Plaintiffs have failed to identify any genuine issue of material fact. Summary judgment is therefore appropriate pursuant to the discretionary function exception.

Further, even if the Court were to accept Plaintiffs' current rendition of the "facts," Plaintiffs' remaining claim would still be barred by the discretionary function exception. Plaintiffs' current story is different from that presented to the Court at the Rule 12 stage and they cite to no authority that would allow them to circumvent the discretionary function exception under their current version of the facts. Nor do they dispute the authority cited in the United States' opening motion. Summary judgment is appropriate for this additional reason.

A. The Court's prior Rule 12 ruling does not control.

Though purporting to understand that "different standards apply," Opp. at 49, Plaintiffs

[26] Plaintiffs have previously indicated that their IIED claim relates solely to alleged emotional distress experienced by the decedent, Dr. Redd. *See* Ex. 46 (Letter from S. Baddarudin to E. Blege dated June 15, 2015 ("June 15 Letter")) at 3 ("At this time, and at the time of trial, it is the desire of Plaintiffs to pursue an Intentional Infliction of Emotional Distress Claim on behalf of the Estate of James D. Redd and only the Estate of James D. Redd."). Further, because Plaintiffs have conceded that they cannot meet their burden to show that the United States caused Dr. Redd's suicide, the Estate's recovery, if any, would be limited to damages relating to Dr. Redd's alleged emotional distress from the time federal personnel arrived at the Redd residence up until his suicide. The Estate is not entitled to recover any damages that may have resulted from Dr. Redd's suicide.

suggest that the Court must deny summary judgment because it denied dismissal on the pleadings.[27] The law says otherwise: factual allegations lacking adequate evidentiary support no longer carry any presumption of truth.[28] The facts currently before the Court differ significantly from Plaintiffs' previous story,[29] and this Court has never considered whether "99 or fewer" or "50 or more" agents would have been reasonable or discretionary. Opp. at 52. In fact, Plaintiffs identify *no* case in which *any* court has addressed the deployment of 50 to 99 officers, much less found that it violated any mandatory and specific directive such that it fell beyond the ambit of the discretionary function exception.

B. Plaintiffs overstate the "indulgence" accorded summary-judgment opponents.

The United States has no duty to prove that excessive force was not exhibited against Dr.

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[27] *See* Opp. at 56 ("the evidence is the same or sufficiently similar to the facts alleged in the complaint . . .").

[28] *See Behrens v. Pelletier*, 516 U.S. 299, 309 (1996); *see also Kaufman v. Alexander*, --- Fed. Appx. ---, No. 14-3293, 2015 WL 5062074, at *2 n.7 (3d Cir. Aug. 28, 2015) (unpublished) ("The District Court's ruling on a motion to dismiss … could hardly foreclose a subsequent ruling on summary judgment where a different standard applies."); *Cohlmia v. St. John Medical Center*, 693 F.3d 1269, 1282 (10th Cir. 2012) (though plaintiff had "alleged facts in his complaint sufficient to survive a motion to dismiss," he failed to adequately support them at the summary-judgment phase).

[29] *Compare, e.g.*, Complaint at ¶ 54 (alleging that "there were approximately 80 agents in the home at any one point in time, with approximately 140 different agents despoiling the home during the course of the day"); *and* Rule 12 Order at 3 ("Dr. Redd was driving home from an early-morning errand when he saw over 100 officers on his property in 'paramilitary gear.'") *with* Opp. at 10, ¶ 9 ("Undisputed" that "[s]earch teams included … unarmed civilian cultural specialists"); Dkt. No. 60-1 ("Jericca Decl.") at ¶ 5(b) ("The Agents who came in the house after the first set of agents … were not as heavily armed … [and] mostly had guns in a holster at their waist" that "appeared to be pistols."); *id.* at ¶ 6(c) ("There appeared to be as many as 50 agents at any one time" that morning.); Ex. 59 (Pls. Resp. Bivens Rogs) at 14 ("Jerrica thinks the BLM had BLM clothes, and the FBI were in plain clothes[.]"); *and* Pls. Ex. 9 (Pls. Resp. Bivens RFAs) at 5 ("Plaintiff is without sufficient information to admit or deny" that "no member of the team of federal personnel who knocked on the Redds' door at approximately 6:40 a.m. on June 10, 2009, carried an automatic weapon.").

Redd on June 10, 2009. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, (1986) (Rule 56 does not require the moving party to "negat[e] the opponent's claim"). Rather, the United States met its summary-judgment burden by demonstrating the "absence of evidence to support" Plaintiffs' claim that excessive force was exhibited in violation of the Fourth Amendment. *Id.* at 325. Plaintiffs must now "present sufficient evidence in specific, factual form for a jury to return a verdict in [their] favor." *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir. 1995); *see also Fitzpatrick v. Catholic Bishop*, 916 F.2d 1254, 1256 (7th Cir. 1990) ("The days are gone, if they ever existed, when the nonmoving party could sit back and simply poke holes in the moving party's summary judgment motion.").

1. Unsupported "facts" deserve no presumption of truth.

Plaintiffs say they have "submit[ted] evidence that demonstrates that the complained of conduct . . . is not discretionary." Opp. at 51. But the vast majority of the facts submitted by Plaintiffs lack support in "proper evidentiary material." *Allen v. Int'l Telephone and Telegraph Corp.*, 164 F.R.D. 489, 491 (D. Ariz. 1995). For example, "[h]earsay testimony that would not be admissible at trial is not sufficient to defeat a motion for summary judgment." *Jaramillo v. Colorado Judicial Dept.*, 427 F.3d 1303, 1314 (10th Cir. 2005).[30] Therefore, Senator Hatch's repetition of "facts" deriving from unspecified "media reports" cannot create a genuine issue as to what actually happened at the Redd home.[31] Plaintiffs' problems of proof also go far beyond

[30] Pursuant to DUCivR 7-1(b)(1), Defendant raises evidentiary objections here.

[31] *See Robinson v. Keota*, 20 F. Supp. 3d 1140, 1151 n.11 (D. Colo. 2014), *amended sub. nom. by Robinson v. City & Cnty. of Denver, CO*, 12-cv-00483, 2014 WL 1395758 (D.Colo. Apr. 10, 2014) (unpublished) (newspaper articles are hearsay inadmissible as summary judgment evidence); *Century Colorado Springs P'ship v. Falcon Broadband*, No. 05CV02295, 2006 WL 521791, at *3 (D. Colo. Mar. 2, 2006) (unpublished) (a "press release" is "pure hearsay and thus not competent summary judgment proof").

admissibility concerns. For example, the sole evidence cited for Plaintiffs' "assert[ion] that no less than approximately 50 agents were present … that were visible from the Piano Room," Opp. at 17, ¶ 16, states otherwise.[32] With respect to other "facts," Plaintiffs cite no authority at all except for their own conclusory assertions and speculation.[33]

2. Unreasonable inferences cannot defeat summary judgment.

The claim that the Court must resolve "*all* doubts" against the United States, Opp. at 49 (emphasis added),[34] is wrong. *See Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1187 (10th Cir. 2013) (unreasonable inferences not required). The Court ought not resolve doubts or inconsistences in Plaintiffs' favor where logic or context mandates otherwise.[35] Despite Plaintiffs' claims to the contrary, *see* Opp. at 49, the Court is not required to ignore obvious inferences "more likely" or "more probable" than the ones Plaintiffs strain to justify. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (even at the *pleading* stage, dismissal is appropriate when the alleged

[32] The declaration says Jericca saw "several" agents outside of each of an unspecified number of windows in the "Piano Room." Jericca Decl. at ¶ 4(a)(i). The "50 agent" figure represents her speculation as to the total number of federal personnel on the property as a whole during the morning.

[33] *See, e.g.*, Opp. at 51, ¶ 106(E) (asserting that "[t]here were lots of agents besides just Vander Veer who did not enter the residence, but who were present at the Redd Home and exercising force or a show of force" and citing only (1) the conclusory statement that "this fact is evident from above" and (2) Jericca Redd's Declaration).

[34] *See* Opp. at 56 (inviting the Court to "view[] the evidence in a light most favorable to Plaintiffs, and mak[e] all inferences in favor of the Plaintiffs . . .")

[35] *See, e.g., Grubb v. YSK Corp.*, 401 Fed. Appx. 104, 111 (6th Cir. 2010) (unpublished) ("[W]e are not obliged to draw unreasonable inferences[.]"); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990) ("[A]n inference based upon speculation or conjecture does not create a material factual dispute[.]"); *Blackston v. Shook and Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985) ("[A]n inference based on speculation and conjecture is not reasonable."); *Parrillo v. Commercial Union Ins. Co.*, 85 F.3d 1245, 1250 (7th Cir. 1996) ("[T]he court is not required to draw every possible inference in favor of the non-movant, only all *reasonable* inferences.").

conduct "is … not only compatible with, but indeed [is] more likely explained by, lawful" behavior).[36] This is particularly true when the proffered inference requires considering portions of evidence in isolation from the record *as a whole*.[37] For example, the Court need not suspend disbelief to infer that no reasonable officer could have found voicemail messages such as, "I'll be there in a little bit. Be ready," as threatening under the circumstances.[38] Nor must this Court accept Plaintiffs' contention that the person who left those messages was "Dan Fessia/Roofer's Supply" or some other unidentified person in Cedar City, *see* Opp. at 28, ¶ 45, and not Javalan Redd, who lived in Cedar City,[39] appears to have been associated with one of the phone num-

[36] *See also Woodward v. Emulex Corp.*, 714 F.3d 632, 640 (1st Cir. 2013) ("[W]e will not ignore the obvious context of a statement simply because the language is open to multiple interpretations."); *Hyland v. HomeServices of America, Inc.*, 771 F.3d 310, 317 (6th Cir. 2014) (Courts "cannot ignore the clear teaching of *Matsushita* that 'conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.'") (quoting *Matsushita Elec. Indus.Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)); *Sylvia Dev. Corp. v. Calvert Cnty, Md.*, 48 F.3d 810, 821-822 (4th Cir. 1995) (courts need not "ignore or distort the plain meaning of words or conveniently to read them out of context.").

[37] *See, e.g., Hocker v. Walsh*, 22 F.3d 995, 999 (10th Cir. 1994) ("We decline plaintiff's invitation to view [the phrase] in isolation … [which] ignores the factual context[.]"); *Lyons v. Lancer Ins. Co.*, 681 F.3d 50, 57 (2d Cir. 2012) ("[T]he district court may not properly focus on individual strands of evidence and consider the record in piecemeal fashion; rather it must consider all of the evidence in the record.") (citation and quotation omitted).

[38] In fact, a month later, a very similar threat from another Redd brother made a local writer so "uneasy and uncomfortable" that she contacted the police to make an "intimidating statement report." *See* Ex. 51 at 3 (Jay Redd saying "make sure you don't write anything slanderous about my father, mother and family, I will make sure I will do everything that is necessary. I'll be watching"); *id.* (complainant "deems Jay[']s conduct crazy and scary"). While this evidence is not explicitly material to the pending motion, it certainly counters Plaintiffs' suggestion that the officers' inference as to the threatening nature of the voicemails was unreasonable.

[39] Ex. 52 (Blog) at 5-6 (May 2010 post by Javalan's wife announcing that "[w]e are moving" from Cedar City because "Jav got a job for Christensens Arms").

bers,[40] and has "assert[ed] his Fifth Amendment Privilege" not to answer the United States' interrogatory on this point,[41] – even though all of his siblings have indicated that they "believe the message was left by Javalan Redd[.]"[42]

C. Plaintiffs fail to identify any *genuine* issue precluding summary judgment.

Plaintiffs specify no fact supposedly precluding summary judgment. Instead, they argue generally that: given the lack of "indicia of danger," the number of agents dispatched to the Redd residence and the manner in which they were equipped constituted non-discretionary conduct. *See* Opp. at 51, 52. These arguments are unavailing, in light of the record as a whole.

1. Arrests for "nonviolent" offenses can and do turn violent.[43]

Plaintiffs make much of the nonviolent nature of the Redds' felonies. *See* Opp. at 53-54. But as the Supreme Court has recognized, *whenever* officers "execut[e] an arrest warrant within a private dwelling," they encounter a risk of "potential ambush." *Maryland v. Buie*, 494 U.S. 325, 340 (1990) (Brennan, J., dissenting, but "agree[ing] with the majority" as to this point). And regardless of the nature of the crime, an arrestee may "attempt to flee; attempt to injure or kill [the] arresting person; commit suicide; [or] effect a rescue by confederates." Ex. 18 (FBI Arrest Policy). As a matter of agency policy, officers planning arrests must do their best to ensure that there are "enough Agents/officers … to cope properly with those or other situations

[40] *Compare* Ex. 53 (classified advertisement, dated November 1, 2009, posted by "Javalan" and listing a home phone number) *with* Ex. 33 at Redd_BLM_0121 (indicating that the second message was left by a caller from the same phone number).

[41] *See* Ex. 37 (Pls.' Resp. to U.S. 3d Rogs.) at 4-5.

[42] *See id.*

[43] Though not directly material to Defendant's summary-judgment motion, the sources cited in this and the subsequent section squarely combat Plaintiffs' suggestion that the non-violent nature of the crimes meant that those serving Cerberus warrants ought not have taken precautions when they went to the Redd home or responded to threatening voicemails.

which might arise," even if that number of officers turns out to be more than strictly necessary. *Id.*; *see also* Ex. 16 (FBI Weapons) at 2 ("[E]mphasis must be placed on planning arrests *to ensure superiority of manpower and firepower* to exert maximum pressure on the individual(s) being sought, thereby reducing the opportunity for a subject to resist or flee.") (emphasis added).[44] Searches, too, implicate risks necessitating precautions that may appear unnecessary in hindsight.[45] These principles hold no less true with respect to arrests (and searches of the homes) of "nonviolent" felons, who can and do pose real threats to law enforcement.[46] Plaintiffs' contention that the "non-violent" character of the offenses for which the Redds were being arrested obviated the need for any precautions upon entering the property, or for convening a partial SWAT team (in the context of threating voicemail after the Redds were removed from the property) is meritless.

2. The Redd arrests and search implicated legitimate safety concerns.

A number of factors could have led a reasonable officer to fear that Dr. Redd would react dangerously, as though officers were attacking his family or way of life: the role "pot hunting"

[44] *See also Michigan v. Summers*, 452 U.S. 692, 702-03 (1981) ("The risk of harm to both the police and the occupants is minimized if the officers … exercise unquestioned command of the situation.").

[45] *See Bailey v. United States*, 133 S. Ct. 1031, 1039 (2013), *cert. denied*, 135 S.Ct. 705 (2014)("It is likely … that an occupant will return to the premises at some point … Officers can and do mitigate that risk … by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door."); *United States v. Davis*, 588 F. Supp. 2d 693, 703 (S.D. W. Va. 2008) ("[L]aw enforcement officers may be at risk from unknown threats [whenever] they are in a home[.]").

[46] *See, e.g., Arizona v. Johnson*, 555 U.S. 323, 330 (2009) ("[T]raffic stops are 'especially fraught with danger to police officers.'") (quoting *Michigan v. Long*, 463 U.S. 1032, 1047 (1983)).

played in the lives of Blanding residents of his generation;[47] Dr. Redd's antipathy toward the government for past prosecution based on a "similar incident in 1995" as well as perceived religious persecution against Dr. Redd and "the Mormon community in general";[48] the location of the Redds' home ("on the top of a hill," which could have permitted him to see agents approach);[49] the fact that Dr. Redd enjoyed hunting, coupled with the absence of information regarding how many guns he had or whether the home presented a potential "[b]arricade" situation;[50] and "San Juan County['s] … [history as] a hotbed of far-right anger over federal intrusion into local affairs."[51] Plaintiffs' subsequent admission that Dr. Redd actually had *nine* guns,[52] in-

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[47] *See* Ex. 54 ("Native American Artefacts") at 1 (Childhood friend of "Jim Redd" stating that "scavenging for the treasures" was "our way of life."); Ex. 55 ("Unearthed Relics") at 3 ("By the 1950s and 1960s, 'pot hunting' was deeply ingrained among Blanding's 1,800 or so residents.").

[48] *See* Dkt. No. 2 (Compl.) at ¶ 47(c), (e).

[49] Jericca Decl. at ¶ 11(a); *see also* Ex. 2 (Ops Plan) at 1 ("House is elevated above surrounding area. There is one access driveway … visible from residence.").

[50] *See* Jericca Decl. at ¶ 9 ("My father enjoyed hunting and he had one or more guns for hunting."); Ex. 2 (Ops. Plan) at 1 ("Guns: Unknown. Barricade: Unknown."). Jericca Redd's speculation that agents other than Defendant Love "were not afraid of [her]" and did not "appear to be searching for weapons," Opp. at 44, ¶ 84-85, is immaterial, given her lack of personal knowledge (both as to agents' thoughts and what happened outside of her presence), the *objective* nature of the reasonableness test, and the fact that her observations relate to events *after* the home was secure.

[51] Ex. 56 ("Recapture Canyon") at 2; *see also* Ex. 57 ("Reluctant Rebellion") at 3 (southern Utahans "particularly [those from] Blanding … have long butted heads with the feds"); Ex. 58 ("Open Hostilities") at 1 ("At Canyonlands … a ranger opened up a trailhead register to find that someone had written, 'Government [expletive deleted] who close off their lands to us ought to be shot.").

[52] *See* Ex. 59 (Pls. Resp. Bivens Rogs) at 11 ("Three 12 gauge shotguns (Browning Auto 5 lite's), [o]ne Winchester 410, [o]ne Christensen Arms 300 RUM, [o]ne Benelli Super Black Eagle, [o]ne HK 223, [o]ne 300 WIN MAG Browning BAR, [and] [o]ne 300 RUM Remington SBS.").

cluding at least two semi-automatic rifles,[53] confirms the reasonableness of such concerns. Officers had no constitutional obligation to wait to see whether these warning signs would coalesce into violence *before* exercising caution.[54]

3. Plaintiffs identify no genuine issue as to the actual "show of force" used.

Plaintiffs' claim that "the number of agents at the Redd home was no less than 50 . . . and as many as 100" *see* Opp. at 52 – is little more than rank speculation.

i. The Court should reject Plaintiffs' "phantom agent" theory.

Rather than seriously dispute what the record does show – that no more than 53 federal personnel *in total* visited the Redd home throughout the entire day – Plaintiffs propose that the United States has failed to account for "27 additional agents" that may have participated in Operation Cerberus as a whole, all of whom visited the Redd home "between (shortly after) 6:40 a.m. and before 10:34 a.m." *See* Opp. at 15-16, ¶ 16.[55] The exact number of participants in Cerberus *as a whole* has nothing to do with this case beyond contextualizing the size of the Redd team. Moreover, despite Plaintiffs' claims, the "approximately 150" people who participated in

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[53] *See United States v. Martin*, No. 1:03-CR-MP-AK, 2011 WL 679328, at *2 (N.D. Fla. Feb. 15, 2011) (unpublished) (describing a "Heckler and Koch .223 caliber" as a "semi-automatic assault weapon"); *Batten v. Clarke*, No. 7:12cv00547, 2013 WL 2565990, at *1 (W.D. Va. June 11, 2013) (unpublished) (describing the "Browning Semi-Automatic Rifle '300 win cal.'").

[54] *See United States v. Perdue*, 8 F.3d 1455, 1462 (10th Cir. 1993) ("[P]olice officers should not be required to take unnecessary risks in performing their duties."); *United States v. Hatcher*, 680 F.2d 438, 443 (6th Cir. 1982) ("Courts should be cautious 'in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger.'") (quoting *United States v. Coates*, 495 F.2d 160, 165 (D.C. Cir. 1974)).

[55] Tellingly, Plaintiffs evince so little faith in this theory that they identify no particular discovery for the purpose of uncovering any *actual* evidence in support of it. Nor would additional discovery be appropriate based only on "a speculative hope of unearthing evidence sufficient to prevail." *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1206 (10th Cir. 2015).

Cerberus have been accounted for.[56] *See* Ex. 60 (Bivens Ex. 64 (People in the Record)) (identifying as many as 162).[57] And, Plaintiffs cite no more than the theoretical possibility that, even if they existed, any "unaccounted for" agents visited the Redd home, much less encountered Dr. Redd with anything that might reasonably be characterized as "force." *See* Opp. at 16, ¶ 16; *see* Ex. 11 (Palus Decl.) at ¶ 25 ("Some of the other cultural specialists … were never sent to the Redd home.").

Further, even if these supposed 27 agents all went to the Redd residence at 6:40 a.m., this would not support Plaintiffs' claim that a total of 50 or more agents were at the home at that time. *See* Opp. at 17, ¶ 16 ("Plaintiffs assert that no less than approximately 50 agents were present during the morning, from arrival until noon, that were visible from the Piano Room (the room in which Jericca Redd was sequestered).") Totaling these supposed 27 agents with the 12 law enforcement officers who appeared initially at the Redd property, and the 1 unarmed cultural specialist who arrived at 6:45 a.m., only brings the number of federal personnel up to 40. Similarly, adding these supposed 27 agents to the total number of federal personnel that appeared at the Redd residence throughout the entire day, 53, yields only 80 federal personnel, not the 100

[56] Though Plaintiffs' various tallies generally lack consistency or any readily apparent basis in arithmetic, *see, e.g.*, Opp. at 14-16, ¶ 16, it is reasonably clear that they believe Cerberus "was conducted … by approximately 150 agents and employees from the FBI and the BLM." *See* Opp. at 16, ¶ 16; *id.* at 42, ¶ 74. At one point, Plaintiffs suggest that an unspecified number of "non-employees, such as cultural specialists," *see* Opp. at 42, ¶ 74, should be added to this "approximately 150," but it is undisputed that cultural specialists came from BLM, and Plaintiffs identify nothing suggesting that "non-employees" participated.

[57] The Court may take judicial notice of the parties' filings in the related *Bivens* action. *See, e.g.*, *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (collecting cases) ("Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it.").

that Plaintiffs claim may have been there.[58] *See* Opp. at 52 ("the number of agents at the Redd Home was no less than 50 . . . and as many as 100."); *id.* at 53 ("In sum, the Government deployed 50 to 100 agents . . .") Plaintiffs offer no explanation for these discrepancies.

Nor do Plaintiffs make any attempt to reconcile their current claim that the United States failed to account for "27 additional agents," with their claim in the related *Bivens* action that the defendant "fail[ed] to account for no less than 53, and as many as 65 (or more) agents." Ex. 61 (Bivens Opp.) at 23; *see id.* at 1 ("Defendant Love, who was one of two joint commanders of the Operation, sent more than 53 and as many as 53 to 65 more (a total of 106-118), armed or heavily armed agents to the Redd Home.") Both claims lack credibility, and Plaintiffs' willingness to change their story without explanation speaks volumes.

Indeed, the Court could not credit the argument that an extra "27" people visited the Redd home without also making the underlying, unjustifiable inference (finding no support in fact) that more than a third of the federal personnel failed to sign in altogether.[59] The immaterial point that Agent Vander Veer signed in *late*,[60] cannot justify this inference.[61] Nor can Jericca Redd's claims about agents she supposedly saw "outside the house" and thinks may not have signed in.

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[58] As discussed above, *see supra* at 4, Plaintiffs cannot rely upon Senator Hatch's repetition of "facts" deriving from unspecified "media reports" in support of their claim. *See* Opp. at 40-41 ¶ 72.

[59] This figure is based on the 53 federal personnel that signed the log and assumes 80 total federal personnel.

[60] Agent Vander Veer is not missing from the log but rather signed in twice. *See* Opp. at 22; Ex. 44 (Total Headcount) at 3, 4.

[61] Defendant's motion assumed that Agent Vander Veer arrived at the Redd home first thing in the morning and stayed through the end of the day. *See* Ex. 40 (Personnel Present for Initial Arrival) at line 8 & n.1; Ex. 45 (5:36 Headcount) at line 10. It also assumed that any person whose departure time was unclear from the record remained at the home through the end of the day. *See* Ex. 45 (5:36 Headcount).

See Jericca Decl. at ¶ 4. Jericca lacks personal knowledge as to when or where anyone signed in, who entered the home during the significant portion of the morning she spent in the "Piano Room," or what happened after she left. *See id.* at ¶¶ 2, 4, 10. Furthermore, Plaintiffs offer no explanation (or even speculation) as to why the record as a whole – which fills in other gaps in the log, such as Agent Vander Veer's arrival time – fails to confirm the presence of a single other person. This entire line of argument is "the stuff of [Plaintiffs'] dreams," plainly insufficient to create a genuine issue of material fact in the face of the existing summary-judgment record. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991).

ii. Plaintiffs identify no genuine issue as to the first group to arrive.

Rather than arriving in SWAT gear, the first officers to go to the Redd home wore soft body armor and carried handguns, as required by agency policy. *See* Ex. 10 (Bretzing Decl.) at ¶ 24. Plaintiffs fail to controvert this point with Jericca Redd's declaration that:

- This first group's "appearance was more like military than the police officers [she is] accustomed to seeing on the streets of Blanding or Salt Lake City." Jericca Decl. at ¶ 5(a)(i).
- "They did not have on helmets or goggles," but the first group "otherwise looked like" the FBI SWAT team member pictured on the FBI's website, *id.* at ¶ 5(a)(ii).[62]
- Though "not a gun expert," she thinks "[t]he guns" carried by the first group "looked like machine guns," "not pistols or rifles," *id.* at 5(a)(iii).
- The guns carried by "the first set of Agents who entered [the] home" looked similar to the gun held by the" FBI SWAT team member on the FBI's website, *id*.

First, Plaintiffs make no attempt to reconcile Jericca's claim that all of the officers in the "first group" resembled FBI SWAT team operators with her previous sworn statement that she "thinks the BLM had BLM clothes, and the FBI were in plain clothes." Ex. 59 (Pls. Resp. Bivens

[62] Although this portion of Jerrica Redd's declaration references United States' Exhibit 2, the relevant picture appears at Exhibit 48.

Rogs) at 14. Nor do they make any attempt to reconcile Jerrica's claim that "[t]here were 5 or 6 in the group" of agents that she initially saw approaching the front door, Jericca Decl. at ¶ 2(d), with her claim that "[t]he agents numbered 50 or more from the time [she] first noticed them until [she] left the home . . . around noon [.]" Jericca Decl. at ¶ 5(c)(iii). Moreover, regardless of what they may have been wearing, Jerrica's declaration offers no evidence to suggest that Dr. Redd encountered any members of this "first group" upon returning home. *See id.* at ¶ 2(c)-(g) (indicating that when the initial 5 to 6 agents arrived, Jeanne Redd was immediately arrested and escorted to the kitchen, and Jericca Redd was immediately escorted to the "Piano Room").

iii. Plaintiffs identify no genuine issue as to the personnel who arrived after the arrests.

Plaintiffs concede that personnel who arrived at the Redd home post-arrest did so neither looking nor acting like a SWAT team.[63] As to their numbers, the record shows that a *total* of 22 had been to the house by the time Dr. Redd departed, and a *total* of 53 had been there by the end of the day. Mot. at 9-10, 11. Plaintiffs fail to controvert this point with Jericca Redd's vague and speculative claim that "[t]here appeared to be as many as 50 agents at any one time." Jericca Decl. at ¶ 6(c). Jericca (who left "sometime after 12:00 pm," *id.* at ¶ 9, and was confined to the "Piano Room" for a significant portion of the morning), admits that she saw only "5 or 6" officers approaching the house early in the morning, *id.* at ¶ 2(d); an unspecified number of "agents coming and going from the Piano Room," *id.* at ¶ 4(a); "several agents outside of each" of the unspecified number of windows in the "Piano Room," *id.* at ¶ 4(a)(i); and "6-8 agents . . . imme-

[63] *See* Jericca Decl. at ¶ 5(b) ("The Agents who came in the house after the first set of Agents who came in the door first and arrested my mother, were not as heavily armed as the first set of Agents were armed."); *id.* at (b)(ii) (their "guns appeared to be pistols."); 5(b)(i) ("they did not all have their guns out"); *id.* at (b)(ii) ("These officers mostly had guns in a holster at their waist[.]").

diately in front of the front door," *id.* at ¶ 4(b).[64] This creates no triable issue,[65] especially where the record blatantly contradicts her speculation. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts[.]").

With respect to why personnel continued to arrive *after* the arrests, early on, it became apparent that the personnel assigned to the Redd home would need help identifying and cataloging the great volume of artifacts found there. *See* Ex. 10 (Bretzing Decl.) at ¶ 33; Ex. 11 (Palus Decl.) at ¶ 23.[66] Plaintiffs purport to "dispute" this but identify no evidence controverting it,[67]

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[64] *See also id.* at ¶ 4(a) ("There were more agents than I could count."); Ex. 36 (Pls. Resp. to U.S. Rogs) at 7-8 ("Jeanne Redd and Jerrica Redd: We did not count the number of agents[.]"); Ex. 59 (Pls. Resp. Bivens Rogs) at 14 (admitting that Jericca Redd could see only "to the south and the west and a little bit to the north" from the "piano room").

[65] *See, e.g, Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (rejecting assertions from someone who "simply was not in a position to acquire such comprehensive knowledge"); *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995) ("[N]onmovant's affidavits must be based upon personal knowledge.") (quotation omitted); *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988) (plaintiffs cannot rely on "ignorance of facts," "speculation," "suspicion," or "the mere hope that something will turn up at trial."); Fed. Practice & Procedure § 2738 (affidavits opposing a summary-judgment motion must "be made on personal knowledge" and "set forth such facts as would be admissible in evidence") (quoting Fed. R. Civ. P. 56(e)).

[66] *See also* Mot. at 23-25.

[67] *See* Opp. at ¶ 42 ("Disputed. See response to Paragraph 13 above. . . . See Also responses to Paragraphs 87-88 below."); *id.* at 11-12, ¶ 13 (not addressing the reason why additional personnel went to the home); *id.* at 45-46, ¶¶ 87-88 (claiming that "there was [no] surprise[,]" agents knew in advance that "[t]here would be a large volume of artifacts," without explaining how this would somehow prohibit finding more artifacts than expected); *Karacand v. Edwards*, 53 F. Supp. 2d 1236, 1252 (D. Utah. 1999) ("'[S]urprises,' by definition are unexpected[.]"). Plaintiffs also appear to argue that "the Redd Home included a smaller than standard volume of anticipated artifacts" because the evidence recovery team ("ERT") that initially arrived at the Redd residence was composed of 3 personnel, as opposed to the 4 personnel that an April 1, 2009 FBI communication suggested would be necessary at each scene. Opp. at 11-12, ¶ 13. The initial assignment of ERT resources has no bearing on whether or not the volume of artifacts discov-

and point to no reason to infer that anyone arrived for any other purpose. Given that Dr. Redd was sequestered in the garage and left by 10:34, inferring that the arrival of any additional agents was somehow intended to exert excessive force (or inflict emotional distress) upon him requires a leap of logic.

iv. Plaintiffs identify no genuine issue regarding "SWAT Agents."

One FBI SWAT team assisted with Cerberus.[68] After personnel had already entered the Redd home, four members of that team came to assist with the Redd search after finishing their duties at another site. *See* Ex. 10 (Bretzing Decl.) at ¶¶ 43, 45. Shortly before noon, officers overheard the first of two voicemails that they interpreted as threatening. *See* Ex. 10 (Bretzing Decl.) at ¶ 41-42.[69] Officers enlisted the help of the four SWAT team members who happened

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ered *after arrival*, was greater than expected, and therefore necessitated additional personnel. In fact, the very document cited by Plaintiffs in support of this argument indicates that while one ERT leader and two archeologists initially arrived at the Redd residence at 6:40 a.m., "[o]ther search teams arrived on scene through the day and assisted with the search. . ." Ex. 28 (302) at 1; *see also* Mot. at 10-11 (noting that 7 unarmed cultural specialists entered the Redd property on June 10, 2009); Ex. 11 (Palus Decl.) at ¶ 23 ("Upon completing work at that [other] site, the other cultural specialist at that site and I were directed . . . to go to the Redd home, because additional people were needed to complete the search warrant.")

[68] *See* Opp. at 9 ("*A* SWAT team was in use on June 10, 2009, and four or more members of *the* SWAT team(s) was present at the Redd Home[.]") (emphasis added); Ex. 7 (May 26 EC) at 1 (referring to a single "SWAT operation," at a home other than the Redds'); Ex. 8 (Apr 1 EC) at 3 ("The Salt Lake City SWAT team" – singular – "will be deploying 10 members … to execute *a* high risk search warrant at the home of *a* subject.") (emphasis added); Ex. 9 (Search and Arrest Service) at 1 ("12 SWAT operators will leave their search site" – singular – "after it has been served"); Ex. 10 (Bretzing Decl.) at ¶ 43 (referring to "members of *an* FBI SWAT team") (emphasis added).

[69] Plaintiffs claim that these messages were not interpreted as threatening because no criminal prosecution was initiated against any member of the Redd family and "[i]t is a reasonable inference that if you threaten a federal law enforcement officer . . . appropriate prosecution [will be] initiated." Opp. at 27. Yet Plaintiffs offer no support whatsoever for their assertion that this is a reasonable inference. Moreover, Plaintiffs' claim is belied by the fact that Javalan Redd invoked his Fifth Amendment right against self-incrimination when asked whether he had left these messages. *See* Opp. at 28.

to be present, who then retrieved their rifles and took up positions allowing them to ensure that no one could approach the home undetected. *See id.* at ¶¶ 44-47. Plaintiffs fail to controvert this sequence of events (or the fact that Dr. Redd could not have been injured by it) with the argument that as many as 22 "SWAT certified officers"[70] *may have* participated in Cerberus *as a whole*. This theory relies on the fact that one planning memo refers to the team as having 10 members and another says 12 members. *See* Opp. at 8. Reaching 22 would require either double counting 10 of the officers or reading one of the memos out of context. And there is no evidence that every SWAT-certified officer who participated in Cerberus went on to visit the Redd home, let alone that they were seen by Dr. Redd.

D. Even if the Court accepts Plaintiffs' current version of the facts, Plaintiffs' remaining claim is still barred by the discretionary function exception.

Plaintiffs admit that their current claim as to the number of federal personnel who entered the Redd property on June 10, 2009 is different from the claim they presented to this Court at the time of the United States' Rule 12 motion to dismiss. *See* Opp. at 56 ("[T]here are arguably fewer agents on Rule 56 than there were previously on Rule 12(b)(6) . . ."); *id.* at 52 ("[T]he number of officers demonstrated on summary judgement is not clearly in excess of 100 or more . . ."). Yet, Plaintiffs have pointed to no case law that would allow them to circumvent the discretionary function exception under their most recent iteration of the facts. Instead, they rely solely on the fact that "this Court did not hold that 99 or fewer officers would have been reasonable or discretionary." Opp. at 52. This is no authority at all, and merely restates the question currently before the Court – did the number of agents dispatched to the Redd residence on June 10, 2009 constitute non-discretionary conduct? Even indulging Plaintiffs' current story as to the number

[70] Plaintiffs overlook the distinction between an agent who happens to be SWAT-certified and an agent actually outfitted in full SWAT gear and participating in a SWAT operation.

of agents – "99 or fewer" or "50 or more" or "50 to 100," Opp. at 52-53 – the answer is a resounding no.

As noted in the United States' opening motion, the discretionary function exception must be strictly construed in favor of the United States. *See* Mot. 13 (citing *United States Dep't of Energy v. Ohio*, 503 U.S. at 615).[71] Application of the exception involves a two-pronged analysis: (1) whether the conduct at issue is discretionary in that it "involve[s] an element of judgment or choice[,]" *United States v. Gaubert*, 499 U.S. 315, 322 (1991) and (2) whether the exercise of judgment or choice at issue "is the kind that the discretionary function exception was designed to shield." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The Court's Rule 12 ruling and Plaintiffs' Opposition focus on the first prong of this analysis.[72] Plaintiffs have not disputed the United States' argument with respect to the second prong. *See* Mot. at 21-28.

To overcome the first prong, Plaintiffs must show that "[the government] violated a federal statute, regulation, or policy that is both 'specific and mandatory.'" Mot. at 13 (citing *Elder v. United States*, 312 F.3d 1172, 1176-77 (10th Cir. 2002). Where, as here, the alleged violation is of the Constitution, the constitutional mandate at issue must be sufficiently specific to place the actors on notice that the conduct would be clearly unconstitutional. *See* Mot. at 17-18. Yet, as set out in the United States' Motion, there is no unambiguous mandatory directive in the Constitution

[71] *See also* Mot. at 28 (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996) for the proposition that the court must strictly construe the FTCA's waiver of sovereign immunity in favor of the United States).

[72] *See* Rule 12 Order, Dkt. No. 25, at 16 ("Accepting as true Plaintiffs' allegation that 100 plus heavily armed officers were sent to arrest Dr. Redd and search his home, which the Court must, the Court finds that the decision to use that amount of force was unreasonable and therefore non-discretionary."); Opp. at 51 (recognizing that, in order to avoid summary judgement pursuant to the discretionary function exception, Plaintiffs must "submit evidence that demonstrates that the complained of conduct was unconstitutional in order to demonstrate that the conduct is not discretionary.") (citing Rule 12 Order, at 7-8).

regarding the number of officers that may be used to carry out lawfully obtained search and arrest warrants. *See* Mot. at 18. [73] Moreover, numerous courts have rejected excessive force claims under circumstances analogous to the present case. *See id.* at 19-21. Plaintiffs offer no response to this line of argument raised in the United States' motion. As such, summary judgment would be appropriate even if the Court accepts Plaintiffs' current version of the facts.

CONCLUSION

For the foregoing reasons, and those set out in its motion, Defendant United States of America's Motion for Summary Judgment should be granted.

[73] On the contrary, the Fourth Amendment affords broad latitude to officers in contexts such as this. *See, e.g. Graham v. Connor*, 490 U.S. 386, 396 (1989) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."); *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (Fourth Amendment reasonableness "does not require [law enforcement officers] to use the least intrusive means …, only reasonable ones.") (quotation omitted); *Holland v. Harrington*, 268 F.3d 1179, 1192 (10th Cir. 2001) ("[I]t is not unreasonable for officers to carry weapons or to take control of a situation by displaying their weapons" without first waiting to see whether an arrestee will attempt to resist.) (internal citations omitted).

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Respectfully submitted,

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UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2015, a true and correct copy of the foregoing United States of America's REPLY IN SUPPORT OF SUMMARY JUDGMENT, with the clerk of the court by using the CM/ECF system, which will send notice to the following ECF participants:

Shandor S. Badaruddin
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/s/ Christopher R. Benson
CHRISTOPHER R. BENSON