No. 20-1260

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WYATT T. HANDY, JR., *et al.*,
Plaintiffs-Appellants,

v.

TERA L. FISHER, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado, Case No. 18-CV-00789-RBJ-SKC
The Honorable R. Brooke Jackson

APPELLANTS' OPENING BRIEF

Oral Argument Requested

Matthew Cushing
Counsel of Record
Andres Alers
Laura Boyer
David Willner
Matthew Cushing PLLC
2450 Kittredge Loop Drive
Boulder, CO 80309
(303) 735-6554
matthew@cushingpllc.com
andres.alers@colorado.edu
laura.boyer@colorado.edu
david.willner@colorado.edu
Counsel for Appellants

TABLE OF CONTENTS

Required Attachments

Order, *Handy et al. v. Fisher et al.*, ECF No. 118, 18-cv-00789-RBJ-SKC (D. Colo. Apr. 28, 2020)

Final Judgment, *Handy et al. v. Fisher et al.*, ECF No. 119, 18-cv-00789-RBJ-SKC (D. Colo. Apr. 28, 2020)

Order, *Handy et al. v. Fisher et al.*, ECF No. 130, 18-cv-00789-RBJ-SKC (D. Colo. July 1, 2020)

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Ashlee and Wyatt Handy brought this action under 42 U.S.C. § 1983. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and entered summary judgment against the Handys on April 28, 2020. (Order, ROA at 346.)[1] The Handys moved to amend the judgment on May 15, 2020. (Mot. Alter Amend J. ("Mot. Amend"), ROA at 360.) On July 1, 2020, the district court denied their motion. (Order, ROA at 389.) On July 13, 2020, the Handys filed their notice of appeal with the district court. (Notice of Appeal, ROA at 397.) This court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In their brief opposing the Defendants' Motion for Summary Judgment, the Handys cited an on-point case which would have given officers notice that their conduct here violated the Fourth Amendment. The district court did not acknowledge or analyze that case in its opinion. Did the district court err in granting the officers qualified

[1] Citations to "ROA" are to the Record on Appeal, ECF No. 6.

immunity on the sole ground that the Handys had failed to show that the officers violated clearly established law?

INTRODUCTION

Ashlee and Wyatt Handy were driving to visit a friend one night when they pulled into a convenience store parking lot to fix an issue with their GPS device. Less than a minute later, a police car with flashing overhead lights and an activated spotlight pulled behind the Handys' vehicle, blocking the Handys into their parking spot. Confused as to what was happening, the Handys remained in their vehicle. Within minutes, another police car arrived on scene and also parked behind the Handys' vehicle. Two uniformed officers, with weapons drawn, approached the Handys' vehicle from both sides. Even though Mrs. Handy was driving, the officers demanded to see both Mr. and Mrs. Handys' driver's licenses. Unsure about the reason for the stop and fearful that they may be subjected to the use of force, the Handys reluctantly handed over their licenses, which one officer took back to her patrol car. Several minutes later, the officer came back to the Handys' car and returned the licenses to them.

More than four years later, the Handys still do not know why the police stopped them that night. Distraught and disturbed over the arbitrary nature of the police encounter, the Handys filed suit under § 1983 for a violation of their constitutional rights.

The officers moved for summary judgment on the grounds that they were entitled to qualified immunity. In their motion, the officers only argued that they had not violated the Handys' constitutional rights; they did not address whether it was clearly established that the alleged violation was unconstitutional.

The district court correctly found that the officers had violated the Handys' constitutional rights by seizing them without reasonable suspicion. But the court nevertheless granted the officers' motion, holding that the Handys failed to demonstrate that the constitutional violation was clearly established at the time—despite acknowledging in a footnote that the right may be clearly established. In its decision, the district court did not address a case that the Handys had cited in their pro se brief, which was directly on point and clearly established that the officers had violated the Handys' constitutional rights.

The district court erred and should be reversed.

STATEMENT OF THE CASE

I. The Handys Pulled into a Convenience Store Parking Lot to Reprogram Their GPS, and Officers Immediately Boxed Them in and Approached with Weapons Drawn.

Late at night, Ashlee and Wyatt Handy, and an unidentified passenger, were driving to visit a friend when their GPS stopped working. (Order, ROA at 346–47.) They pulled into the parking lot of a 24-hour Kum & Go convenience store to fix it. (*Id.* at 346–47.) As Mrs. Handy, who is white, pulled into the parking lot, Mr. Handy, who is black, noticed a police car parked in the lot. (*Id.* at 346–47.) Less than a minute after the Handys parked, Deputy Tera Fisher activated her spotlight and flashing overhead lights, (Pls.' Resp. Def. Deputies' Mot. Summ. J. ("Resp."), ROA at 194), radioed for backup, and pulled her patrol car directly behind the Handys, boxing them into the parking spot, (Order, ROA at 347). Minutes later, a second patrol car, driven by Deputy Brandon Johnson, pulled in behind the Handys' vehicle, further boxing them into their parking spot.[2] (*Id.*)

[2] Although the Handys brought suit against only Deputies Fisher and Johnson, "several additional officers" were at the scene. (Order, ROA at 347.) For purposes of this brief, "officers" refers to Deputies Fisher and Johnson, unless otherwise specified.

As the district court noted, the officers then approached the Handys with their weapons drawn. (*Id.* at 351–52.) Fisher asked for Mrs. Handy's license and, without explanation, asked for Mr. Handy's identification "in a hostile manner." (*Id.* at 347.)

While Mr. Handy initially refused, he complied once he realized the officers would arrest him if he failed to turn over his license. (*Id.*) The officers provided no justification for why they needed Mr. Handy's license and never asked for the other passenger's license. (*See id.*) Instead, Fisher took both licenses back to her patrol car while the Handys remained boxed into their parking space. (*See id.* at 347, 352; Resp., ROA at 195.)

Eventually, the officers returned the licenses and only then affirmatively told the Handys they were free to leave. (*Id.*) At no point did the officers explain to the Handys why they had stopped them. (Resp. Ex. 3, Ashlee Handy Aff., ROA at 215.)

II. Proceeding Pro Se, the Handys Established That the Officers' Actions Constituted a Seizure in Violation of the Fourth Amendment.

The Handys sued the officers under 42 U.S.C. § 1983, alleging that the officers had seized the Handys without reasonable suspicion

and thus violated the Fourth Amendment. (Am. Compl., ROA at 33.) The officers asserted qualified immunity and moved for summary judgment. (Deputies' Mot. Summ. J. ("Mot."), ROA at 155–56.)

In their brief, the officers identified the two-prong standard for qualified immunity—there must be a constitutional violation, and the violation must be clearly established—but argued only that their actions did not violate the Constitution. (Mot., ROA at 156–57; Order, ROA at 356.) The officers claimed the seizure was constitutional for at least two reasons. (*See* Mot., ROA at 160–63.) First, they claimed they had reasonable suspicion based on a protection order they found after they ran Mrs. Handy's license, in which Mrs. Handy was the protected party. (*Id.* at 162.) Second, the officers claimed the convenience store was adjacent to a building that had been the site of criminal activity in the past. (*Id.* at 161–62.)

As the district court acknowledged, although the officers noted the clearly established prong of the qualified immunity test in their brief, they did not make any arguments based on it. (*See* Order, ROA at 356 ("Defendants argue only that they were entitled to qualified immunity because the plaintiffs failed to show a Fourth Amendment violation");

see also Mot., ROA at 151–65 (failing to argue the clearly established prong).)

Nevertheless, in their pro se opposition brief, the Handys addressed both the constitutional violation and the clearly established prongs of the qualified immunity analysis. (*See, e.g.*, Resp., ROA at 190.) As to the constitutional violation prong, the Handys argued that the officers had violated the Fourth Amendment by seizing the Handys without reasonable suspicion. (*Id.* at 201–07.)

As to the clearly established prong, the Handys cited *United States v. Lopez* for the proposition that "the law is clearly established" that the officers' actions were unconstitutional. (*Id.* at 190 (citing *United States v. Lopez*, 443 F.3d 1280, 1284 (10th Cir. 2006).)

The district court agreed that the officers had violated the Handys' Fourth Amendment rights by seizing them without reasonable suspicion. (*See* Order, ROA at 353–54.) The court concluded that the officers had seized the Handys because a reasonable person under the circumstances would not have felt free to leave. (*Id.* at 352.) The officers boxed the Handys' car into the parking space, approached with guns drawn, used an aggressive tone and demeanor, confiscated the

Handys' licenses, and did not inform them that they were free to go. (*Id.* at 352.) And, the court found, the officers lacked reasonable suspicion to support their actions—in fact, the officers did not even contest that Fisher lacked reasonable suspicion in the initial encounter. (*Id.* at 354.)

Nevertheless, the district court granted the officers' motion for summary judgment. It held that the Handys had failed to demonstrate that the constitutional violation was clearly established, even though the officers had not based any portion of their motion on that prong of the qualified immunity analysis. (*Id.* at 356–57.) In its Order, the district court never addressed the fact that the Handys had cited *Lopez*—a factually similar decision from this Court—in arguing that the law was clearly established. (*See id.* at 346–57.) Moreover, the district court acknowledged that the law likely was clearly established at the time, but it concluded that the Handys had not satisfied their burden of demonstrating as much in their brief. (*Id.* at 357 n.2 (acknowledging that "[t]here is case law that suggests such a violation *may* be clearly established").)

The Handys moved to amend the judgment, arguing that they had met their burden by citing *Lopez*, a case the district court had not addressed in its decision. (Mot. Amend, ROA at 367–69.) Even though the district court acknowledged that *Lopez* gave it "pause," the court denied the motion. It concluded that although "*Lopez* presents some similarities to the instant case," it had enough factual dissimilarities that it would not "render the violation at issue beyond debate." (Order Mot. Amend, ROA at 393 (internal quotation marks omitted).) Specifically, the district court claimed that *Lopez* was distinguishable in two ways: (1) "in *Lopez*, the men were not in the car but standing in the street," and (2) "that the officer [in *Lopez*] ran a plate check before approaching the men, so when he received the identification he already knew that the car was not stolen and that Lopez resided at the same address as the car owner." (*Id.*)

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court correctly found that the officers violated the Handys' constitutional rights by seizing them without reasonable suspicion. But it erred in finding that the Handys had failed to meet

their burden to demonstrate that the officers' constitutional violation was clearly established at the time of the incident. Therefore, the district court's decision should be reversed.

As to the constitutional violation, the officers seized the Handys, *see* part I.A, but lacked reasonable suspicion at the time they effectuated the seizure, *see* part I.B. Thus, their actions violated the Fourth Amendment.

For the clearly established prong, the Handys, pro se litigants, met their burden of demonstrating that it was clearly established at the time of the incident that the officers' actions violated the Fourth Amendment. *See* part II. The Handys pointed the district court to *United States v. Lopez*, a 2006 decision from this Court, which held that a seizure by officers under similar circumstances violated the Fourth Amendment. Coupled with the fact that the officers made no arguments in their motion with respect to the clearly established prong of the qualified immunity analysis, the Handys' citation to *Lopez* was sufficient to meet their burden. Furthermore, even if the Handys had not cited *Lopez*, the officers' actions were so obviously unconstitutional

that any officer would know such conduct was a clearly established violation of the Handys' Fourth Amendment rights.

As a result, the district court should be reversed.

STANDARD OF REVIEW

Summary judgment is inappropriate when there are genuine issues of material fact in dispute, or the moving party is not entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A district court's decision to grant a motion for summary judgment based on qualified immunity is reviewed *de novo*. *Trask v. Franco*, 446 F.3d 1036, 1043 (10th Cir. 2006).

A district court's "factual findings and reasonable assumptions comprise the universe of facts" upon which legal review of a qualified immunity decision is based. *Cox v. Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015) (quotation marks and citation omitted). When a district court determines that a reasonable jury could find certain facts in favor of the plaintiff, those facts generally must be taken as true on appeal, even if a "*de novo* review of the record might suggest otherwise as a matter of law." *Id.* (quoting *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010) (internal quotation marks omitted).

ARGUMENT

I. The Officers Violated the Handys' Fourth Amendment Rights When They Seized the Handys Without Reasonable Suspicion.

Because the officers used their patrol cars to box in the Handys, approached them with guns drawn, and threatened to arrest them if they failed to cooperate, the officers effectuated a seizure; and because the officers did not have reasonable suspicion to support the seizure, the officers violated the Handys' Fourth Amendment rights.

Police officers violate the Fourth Amendment when they detain a person for investigative purposes without reasonable suspicion. *See Florida v. Bostick*, 501 U.S. 429, 433–34 (1991). These encounters are classified as seizures because the person being investigated is "not free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 439; *California v. Hodari D.*, 499 U.S. 621, 628 (1991). Because these encounters are seizures, the officers must have a reasonable suspicion, supported by articulable facts, that the person seized was engaged in criminal activity. *Oliver v. Woods*, 209 F.3d 1179, 1186 (10th Cir. 2000).

Here, as the district court correctly found, the officers' encounter with the Handys was a seizure because a reasonable person in the Handys' position would not have felt free to leave. *See* part I.A. Thus, the officers were required to have reasonable suspicion before they effectuated the seizure. Because they had none, the officers violated the Handys' Fourth Amendment rights. *See* part I.B.

A. The officers effectuated a seizure because reasonable persons would not have felt free to leave when officers had boxed them in, approached with guns drawn, and confiscated their licenses.

The officers here seized the Handys because reasonable persons would not have felt free to leave when officers had boxed in their vehicle, threatened arrest, and confiscated their licenses. Under the Fourth Amendment, officers enact a seizure when their words or actions would cause a reasonable person to believe that she was not free to leave. *See Bostick*, 501 U.S. at 439.

For example, uniformed officers seize a person when they brandish their weapons, use an aggressive tone, and fail to advise the person that he is free "to disregard the police and go about his business." *Hodari D.*, 499 U.S. at 628. *See United States v. Hernandez*, 847 F.3d 1257, 1263 (10th Cir. 2017). In *Hernandez*, two uniformed

officers spotted Phillip Hernandez walking near a construction site at night. 847 F.3d at 1260, 1264. The officers steered their patrol car next to Hernandez, questioned him, and requested his name and date of birth. *Id.* at 1261. The officers ran Hernandez's information and learned he had an active warrant. *Id.* After discovering a firearm on Hernandez, the officers proceeded to arrest him. *Id.*

Hernandez argued that the officers had seized him in violation of the Fourth Amendment. *Id.* This Court held that the encounter was a seizure because a reasonable person in Hernandez's position would not have felt free to leave. *Id.* at 1261, 1266–67. In its analysis, this Court identified factors to be considered in deciding whether officers have seized an individual, including whether:

1. officers advised the person that she was free to leave;
2. officers displayed their weapons;
3. officers retained the person's identification;
4. officers were uniformed;
5. multiple officers were on scene, and their demeanor and tone;
6. bystanders observed the encounter; and
7. officers touched or physically restrained the person.

Id. at 1264. While no one factor is dispositive, the presence of two or more usually indicates that an individual has been seized. *Id.*; *see, e.g.,*

Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2005); *United States v. Lopez*, 443 F.3d 1280, 1284–85 (10th Cir. 2006).

Examining the factors, this Court concluded that Hernandez had been seized. *Hernandez*, 847 F.3d at 1264–65, 1267. First, the officers never advised Hernandez that he was free to leave. *Id.* at 1265. Second, it was dark, and no bystanders had observed the interaction. *Id.* at 1264–65. And third, the presence of multiple, uniformed officers "increase[d] the coerciveness of the encounter." *Id.* at 1264, 1266. Thus, given the presence of these three factors, a reasonable person in Hernandez's position would not have felt free to disregard the officers' questions and leave without consequence.[3] *Id.* at 1265, 1267.

Here, as the district court found, the officers seized the Handys because a reasonable person in the Handys' position would not have felt free to leave. The officers' encounter with the Handys has six of the

[3] While the majority limited its analysis to the three active factors, Judge Briscoe, in dissent, focused on the factors that were absent. *See Hernandez*, 847 F.3d at 1274–75 (Briscoe, J., dissenting). She concluded that Hernandez had not been seized because "both [o]fficers remained in the car, weapons holstered and unseen[,]" *id.* at 1274, and emphasized that "the [o]fficers did not seize any of Hernandez's personal effects[,]" *id.* at 1275. In the present case, the officers exited their vehicles, drew their weapons, and confiscated the Handys' identification cards. (Order, ROA at 352.)

seven factors that this Court has repeatedly identified when analyzing a seizure. *See, e.g.*, *Jones*, 410 F.3d at 1226; *United States v. Zapata*, 997 F.2d 751, 756–57 (10th Cir. 1993).

For the first factor, at no point did the officers advise the Handys that they were free to leave. Just the opposite: the officers indicated that they would arrest Mr. Handy if he failed to produce his identification card, which he eventually handed over. (Order, ROA at 347.) Furthermore, the officers were in marked patrol cars, (*id.* at 351), activated their overhead lights and a spotlight, (Resp., ROA at 171; Order, ROA at 351), and parked directly behind the Handys to prevent them from leaving, (Order, ROA at 347).

Second, the officers approached the Handys with guns drawn. (*Id.* at 351, 352.) Third, as noted, the officers retained both Mr. and Mrs. Handy's driver's licenses. (*Id.* at 347.) Fourth, the officers were uniformed. (*Id.* at 352.) Fifth, there were multiple officers on scene, and Fisher's tone and demeanor were aggressive. (*Id.* at 351–52.) And finally, sixth, because it was in the middle of the night, there were few bystanders to observe the encounter. (*See id.* at 351.)

Taken together, a reasonable person in the Handys' position would not have felt free to leave. As this Court has stated for nearly thirty years: when at least two of the above factors are present, it strongly suggests that a reasonable person would not feel free to leave. *Zapata*, 997 F.2d at 756–57; *Hernandez*, 847 F.3d at 1264. Here, six factors are present.

In short, when uniformed officers box in a vehicle and approach with guns drawn, then aggressively indicate that failure to provide identification will result in arrest, a reasonable person would not feel free to disregard the officers and leave without consequence. *See Hernandez*, 847 F.3d at 1265. Accordingly, the district court correctly found that the Handys had been seized.

B. Because the officers seized the Handys without reasonable suspicion, the seizure violated the Fourth Amendment.

As the district court properly found, the officers have never asserted that Fisher had reasonable suspicion at the time she initiated the stop. Indeed, the officers had no articulable—let alone reasonable—suspicion that the Handys were engaged in criminal activity; thus, when they seized the Handys, the officers violated the Fourth

Amendment. Officers who seize an individual violate the Constitution if they do not have a particularized and objective basis to suspect that the person seized was engaged in criminal activity. *See Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir. 2007); *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

Here, as the district court noted, the officers conceded below that Deputy Fisher had no reasonable suspicion to believe that the Handys were engaged in criminal activity at the time of the seizure. (Order, ROA at 354 ("Defendants do not contest that Officer Fisher lacked reasonable suspicion in the initial encounter.").) The Handys simply drove into a convenience store parking lot to reprogram their GPS. (*Id.* at 346–47.) Nothing about that gives rise to a reasonable suspicion that the Handys were engaged in criminal activity. Because officers nevertheless seized the Handys, despite lacking reasonable suspicion that the Handys were engaged in criminal activity, that seizure violated the Fourth Amendment. *See Cortez*, 478 F.3d at 1115; *Sokolow*, 490 U.S. at 7.

Instead of contesting that Deputy Fisher lacked reasonable suspicion at the time of the seizure, the officers argued below that the

seizure was supported by reasonable suspicion because (1) they later found a protective order naming Mrs. Handy as the protected party, and (2) the gas station was near a high-crime area. (*See, e.g.*, *id.* at 354–55.) Neither argument holds water.

1. As to the officers' subsequent discovery of a protective order after running Mrs. Handy's license, officers must have reasonable suspicion at the time of the seizure, not afterwards. Reasonable suspicion cannot be based on behavior or knowledge acquired after the seizure occurs. *See, e.g.*, *Stoedter v. Gates*, 704 F. App'x 748, 754 (10th Cir. 2017) (unpublished) (holding that "behavior after [the] seizure" cannot "retroactively provide the defendants with the reasonable suspicion they needed to seize him in the first place"). Because the officers seized the Handys before they ran the license, *see supra*, the protective order cannot retroactively support the seizure. *See Stoedter*, 704 F. App'x at 754.

2. As to the argument that the officers had reasonable suspicion because the gas station abutted a vacant building known for vandalism, reasonable suspicion must be based on more than mere presence in an area known for criminal activity. *Hernandez*, 847 F.3d at 1270. For

example, in *Hernandez*, officers seized Hernandez while he was walking alongside a construction site at night. 847 F.3d at 1260. The officers argued that they had reasonable suspicion to seize him because the site had been targeted for theft and because the site abutted a housing project known for drug dealing. *Id.* But this Court held that mere proximity to a site where criminal activity had previously occurred could not, without more, connect Hernandez to specific criminal activity. *Id.* at 1268. Therefore, this Court concluded that the officers had acted on nothing more than "inchoate suspicions and unparticularized hunches." *Id.* at 1270 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). And because "inarticulate hunches" do not directly link an individual to criminal activity, the officers did not have reasonable suspicion when they seized Hernandez. *Id.* Thus, the seizure violated the Fourth Amendment. *Id.*

Here, as in *Hernandez*, parking at a convenience store in an allegedly high-crime area does not provide a particularized basis to link the Handys to criminal activity. *See id.* at 1268. Just as officers could not have reasonably suspected *Hernandez* of criminal activity based solely on his mere proximity to the construction site, *id.*, officers here

could not have reasonably suspected the Handys of criminal activity for parking in a gas station that happened to be near to a vacant building. If they could, officers would have blanket authority to seize anyone who happened to park near a high-crime area.

As the district court properly found, the officers had no articulable basis to suspect that the Handys were engaged in criminal activity prior to the seizure. The officers acted on nothing more than "inchoate suspicions and unparticularized hunches," which cannot sustain a seizure. *Id.* at 1270. Therefore, the seizure violated the Fourth Amendment.

* * *

In sum, the officers seized the Handys by boxing them in with their patrol cars, approaching them with guns drawn, confiscating their licenses, and threatening arrest. These actions caused the Handys to reasonably believe that they were not free to leave. At the time the officers seized the Handys, the officers had no articulable facts to suspect that the Handys were engaged in criminal activity. Accordingly, the district court correctly found that the Handys were seized and that the seizure violated the Fourth Amendment.

II. The District Court Erred When It Found That the Officers' Fourth Amendment Violation Was Not Clearly Established.

Despite finding that the officers violated the Handys' Fourth Amendment rights, the district court nevertheless concluded that the officers were entitled to qualified immunity because the Handys had not satisfied their burden to show that the violation was clearly established at the time of the seizure. (Order, ROA at 356–57.)

That finding was erroneous for two reasons. First, the Handys had met their burden. In their brief opposing the officers' Motion for Summary Judgment, the Handys cited a similar case from this Court that gave the officers notice that their actions were unconstitutional. *See* part II.A. Second, even if the Handys had not cited an on-point case, the officers' actions were so blatantly unlawful that every reasonable officer would have known the conduct was wrong. *See* part II.B.

A. *United States v. Lopez*, cited by the Handys, clearly established that the officers' conduct violated the Fourth Amendment.

In their opposition brief, the Handys cited a factually similar case, *United States v. Lopez*, 443 F.3d 1280 (10th Cir. 2006), to demonstrate that it was clearly established that Deputies Fisher and Johnson's

conduct violated the Constitution. *See* part II.A.i. However, the district court did not consider *Lopez* when it held that the Handys had not satisfied their burden of showing that the officers' violation was clearly established. When the Handys again cited *Lopez* in their Motion to Alter or Amend the Judgment, the district court finally considered the case. Although the court acknowledged that *Lopez* gave it pause about whether the law was clearly established, it ultimately concluded that the case was not factually similar enough to deny qualified immunity. *See* part II.A.ii. That was erroneous.

i. By citing Lopez, *the Handys satisfied their burden of showing that the violation of their rights was clearly established.*

Although the officers did not argue the clearly established prong of qualified immunity in their Motion for Summary Judgment, the Handys, pro se plaintiffs, cited a Tenth Circuit case in their opposition brief that clearly established the officers' conduct was unlawful.

Government officials are not entitled to qualified immunity when their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *See Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotation marks omitted).

While the Supreme Court instructs courts "not to define clearly established law at a high level of generality," *id.* at 308 (internal quotation marks omitted), the "analysis is not a scavenger hunt for prior cases with precisely the same facts," *Estate of Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir. 2020) (internal quotation marks omitted). "'[T]he salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning to the defendants that their alleged [conduct] was unconstitutional.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). If, at the time of the incident, there existed "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts . . . found the law to be as the plaintiff maintains," then the officers should have known that their conduct was unconstitutional. *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018).

Here, in their response to the officers' Motion for Summary Judgment, the Handys cited *Lopez*, which held that an officer's conduct similar to the conduct here violated the Fourth Amendment. (*See* Resp., ROA at 190 (citing *Lopez*, 443 F.3d at 1284).) In doing so, the

Handys satisfied their burden to show that the constitutional violation was clearly established at the time of the incident.

In *Lopez*, a police officer was on a routine patrol when he observed two men, Bobby Lopez and Randy Romero, "standing . . . next to a parked car with its engine running." *Lopez*, 443 F.3d at 1282. Although Lopez and Romero were not (and did not appear to be) engaging in any criminal behavior, the officer made the decision to approach the two men "because it was late at night" and "the street border[ed] a high-crime area." *See id.* at 1282, 1285. Before he approached the men, the officer entered the car's license plate number into his mobile data terminal and learned that the car was registered to a woman. *Id.* at 1282.

The officer then drove toward the men with his spotlight on and parked his car about twenty feet behind them. *Id.* He exited the patrol car and asked both men if they owned the car. *Id.* Lopez said the car was his. *Id.* Knowing that the car was registered to a woman, the officer then moved closer to the two men and asked for their identification. *See id.* When Lopez handed the officer his driver's license, the officer saw that Lopez's address matched the registered

owner's address. *Id.* Nonetheless, the officer returned to his patrol car with Lopez's license and ran a warrants check, which showed that Lopez had an outstanding warrant. *Id.* Soon after, Lopez was arrested. *Id.* Lopez argued that the officer violated his Fourth Amendment rights. *Id.*

This Court found that the officer had seized Lopez, because the officer (1) "was driving a marked patrol car and was dressed in his uniform"; (2) "shined his high-powered spotlight on Lopez and Romero as he approached them and spoke to them through his loudspeaker"; (3) "did not advise Lopez that he had the right to terminate the encounter"; and (4) "specifically instructed Lopez to remain by the parked car and then walked to his police cruiser with Lopez's license." *Id.* at 1285–86. Under these circumstances, this Court explained, "no reasonable person in Lopez's position would have felt free to terminate the encounter." *Id.* at 1286.

This Court then held that the officer's seizure of Lopez violated the Fourth Amendment because the government conceded that the officer did not have reasonable suspicion and only approached Lopez because "it was late at night and Lopez was standing in a high-crime

area." *Id.* at 1285–86. This Court concluded by noting that the Supreme Court has "made clear . . . that an individual 'may not be detained *even momentarily* without reasonable, objective grounds for doing so.'" *Id.* at 1285 (quoting *Florida v. Royer*, 460 U.S. 491, 498 (1983)).

Lopez gave notice to all police officers that, lacking reasonable suspicion, it is a violation of the Fourth Amendment for (1) a uniformed officer in a marked patrol car (2) to approach citizens late at night with activated lights, to then (3) park behind the citizens, (4) demand to see their identification, (5) and return to the patrol car with the identification, (6) without informing the citizens that they are free to terminate the encounter. *See id.* at 1285–86.

That is exactly what happened here.

Like the officer in *Lopez*, Deputy Fisher, a uniformed police officer, was in her marked patrol car late at night when she saw the Handys near an area that had allegedly been the site of criminal activity. (*See* Resp., ROA at 206–07; Order, ROA at 354.) The Handys, like Lopez and Romero, were not (and did not appear to be) engaging in any criminal activity when Fisher approached them. (*See* Order, ROA

at 346–47.) Less than one minute after the Handys parked, Fisher drove toward the Handys and parked her car directly behind them, boxing them in. (Order, ROA at 347.) She then activated her overhead lights and spotlight, in much the same way that the officer in *Lopez* did. (*See id.*; *id.* at 351.) Fisher called for backup and Johnson arrived on scene within minutes. (*Id.* at 347.) The officers then approached the Handys with weapons drawn[4] and Fisher demanded in an "aggressive" tone[5] to see the Handys' licenses. (*Id.* at 352.) Like the officer in *Lopez*, at no point did the officers here inform the Handys that they were free

---

[4] Although the officer in *Lopez* was by himself and did not draw his weapon, this distinction weighs in favor of finding that the officers' encounter with the Handys was a seizure. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (explaining "the threatening presence of several officers, [or] the display of a weapon by an officer" can indicate a seizure). Because the officer in *Lopez* was found to have violated Lopez's Fourth Amendment rights, every reasonable officer would have known that performing the same conduct *with weapons drawn* and *with multiple officers on scene* clearly violated the Handys constitutional rights.

[5] Again, because the officer in *Lopez* was not alleged to have spoken to Lopez and Romero in a hostile tone, Fisher and Johnson should have been even more aware that executing their stop of the Handys in an aggressive manner amounted to an unconstitutional seizure. *See Mendenhall*, 446 U.S. at 554 (explaining that "the use of language or tone of voice indicating that compliance with the officer's request might be compelled" can indicate a seizure).

to terminate the encounter. Additionally, the officers gave the impression to Mr. Handy that if he did not relinquish his license, he would be arrested. After the Handys reluctantly turned over their licenses to the officers, Fisher returned to her patrol car with the licenses for at least several minutes, in nearly the exact same manner as the officer in *Lopez*. (*See id.*)

Although the Handys "need not identify a case directly on point" to show that the officers' constitutional violation of their rights was clearly established, (*id.* at 356 (internal citation omitted)), that is precisely what the Handys did when they cited *Lopez*. Acting without reasonable suspicion, Fisher and Johnson's actions mirrored those of the officer in *Lopez* when they executed the unlawful seizure of the Handys. In fact, the officers' actions here were even more egregious than the officer in *Lopez* because they blocked the Handys car into its parking spot, approached the Handys with weapons drawn, addressed the Handys in a hostile tone, and executed the seizure with additional police officers on scene—all of which are factors that signal a seizure. After *Lopez*, every reasonable officer would have known that these

actions constitute a seizure and that without reasonable suspicion, such conduct violates the Fourth Amendment. *See* 443 F.3d at 1285–86.

The similar circumstances and ultimate holding in *Lopez*—decided ten years before the officers' seized the Handys—were more than enough to give Fisher and Johnson fair warning that their conduct was unconstitutional. *See Shamsud'Diyn v. Lyons*, No. ELH-15-2928, 2016 WL 8669912, at *8 (D. Md. Dec. 9, 2016) ("This principle was clearly established long ago. Thus, defendants cannot claim qualified immunity."). Therefore, by citing *Lopez*, the Handys satisfied their burden of showing that the Defendants' conduct violated clearly established law.

ii. The district court erred when it failed to initially consider Lopez *and when it later concluded that* Lopez *did not clearly establish that the officers' conduct violated the Constitution.*

In the opening paragraph of their brief in opposition to the officers' Motion for Summary Judgment, the Handys cited *Lopez* to show that the officers' Fourth Amendment violation was clearly established at the time of the violation. (*See* Resp., ROA at 190.) Nevertheless, the district court did not address *Lopez* in its Order granting summary judgment, (*see generally* Order, ROA at 355–57),

even though the court professed it construed the Handys' pro se brief liberally, "examining whether they present *any case law* that suggests the violation was clearly established[,]" (*id.* at 356 (emphasis added)).

In its analysis of the clearly established prong, the district court chose to consider only three of the cases[6] cited by the Handys in their response brief—all of which the district court concluded were too factually dissimilar from the instant case to support a finding that the officers' Fourth Amendment violation was clearly established. (*See id.* at 356–57.) The district court did not provide an explanation for why it did not analyze *Lopez*. (*See generally id.* at 355–57.)

Convinced that *Lopez* satisfied the clearly established prong, the Handys pointed out in their Motion to Alter or Amend a Judgment that the district court did not consider *Lopez* in evaluating the clearly established prong. (*See* Mot. Amend, ROA at 367–69.) In its Order denying the Handys' motion, the district court acknowledged that *Lopez* "supports my previous conclusion that Deputy Fisher's actions constituted a seizure" and admitted "*Lopez* gives me some pause"

[6] *Florida v. Bostick*, 501 U.S. 429 (1991), *United States v. Rogers*, 556 F.3d 1130 (10th Cir. 2009), and *I.N.S. v. Delgado*, 466 U.S. 210 (1984).

regarding the clearly established prong. (*See* Order Mot. Amend, ROA at 393.) Despite the similarities, the district court ultimately found that *Lopez* was distinguishable in two ways: (1) the men in *Lopez* were "not in the car but standing in the street," and (2) the officer in *Lopez* "ran a plate check before approaching the men, so when he received the identification he already knew that the car was not stolen and that Lopez resided at the same address as the car owner." (*See id.*) Neither fact makes a difference, and thus the district court's reliance on them was erroneous.

First, that Lopez was standing next to his car while the Handys were sitting in their car is a distinction without a difference. The officers in both encounters retained the citizens' licenses and created an environment where a reasonable person would not have felt free to leave. If anything, the Handys were less free to leave than the individuals in *Lopez* because the officers boxed the Handys into their parking spot, approached the Handys with weapons drawn, spoke to the Handys in a hostile tone, and had multiple officers on scene as backup.

Second, the district court purported to distinguish *Lopez* on the basis that the officer there retained Lopez's license to run a warrant

check after learning that Lopez's address matched that of the registered owner. (*See* Order Mot. Amend, ROA at 393.) But that, too, does not distinguish *Lopez* from the present case for purposes of the clearly established analysis. In both *Lopez* and the present case, officers lacked reasonable suspicion when they executed the seizure. *Lopez* clearly established that officers need reasonable suspicion to conduct a seizure under similar facts—whether an officer possibly had reasonable suspicion during the initial encounter and then lost it during the continuing encounter, as in *Lopez*, or whether an officer never had reasonable suspicion to begin with, as in the present case, does not mean the law is not clearly established. If anything, Fisher and Johnson's lack of reasonable suspicion throughout the entire encounter only means that their conduct was more unconstitutional, not less, than the officer in *Lopez*. Therefore, *Lopez*, *a fortiori*, clearly established that Fisher and Johnson's actions violated the Fourth Amendment. *See Estate of Ceballos v. Husk*, 919 F.3d 1204, 1216 (10th Cir. 2019) (holding that a prior case with less flagrant police misconduct is sufficient to give an officer notice that more egregious conduct violates the Constitution).

In sum, the purported differences between *Lopez* and the present case laid out by the district court merely weigh in favor of finding that *Lopez* clearly established that the officers' conduct was unlawful because the officers' actions were more egregious.[7]

The Handys satisfied their burden of showing that the officers' violation of their rights was clearly established by citing *Lopez*. Despite purportedly construing the Handys' pro se brief liberally, the district court only analyzed three seemingly random cases cited in the Handys' opposition brief when discussing the clearly established prong. In so

---

[7] Although the district court concluded that *Lopez* was too distinguishable to satisfy the clearly established prong, the court notably cited a case in its Order that it said "suggests [the] violation [in the present case] *may* be clearly established." (*See* Order, ROA at 357 n.2 (citing *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995)). In *Lambert*, this Court held that a defendant was seized for Fourth Amendment purposes when, based on a tip, Drug Enforcement Agency agents followed the defendant from an airport baggage claim out to a parking lot and then retained the defendant's driver's license for approximately twenty minutes. *Lambert*, 46 F.3d at 1066–68, 1071. Although *Lambert*, in addition to *Lopez*, also clearly established that an officer's retention of an individual's driver's license for several minutes without reasonable suspicion violates the Fourth Amendment, it must be pointed out that despite the factual differences between *Lambert* and the present case, the district court concluded that if the Handys had cited *Lambert*, then they may have met their burden of satisfying the clearly established prong. (*See* Order, ROA at 357 n.2.)

doing, it overlooked the most factually similar case, *Lopez*, which clearly established that the officers' conduct here violated the Fourth Amendment. The district court therefore erred.

B. The officers' violation of the Handys' constitutional rights was so obviously unlawful that every reasonable officer would have understood that the conduct was wrong.

Even if the Handys had not cited *Lopez*, the district court still would have erred in granting the officers qualified immunity, because the officers' actions were so blatantly unlawful that every reasonable officer would have known that the conduct was wrong. Even without a case directly on point, courts must deny qualified immunity to officers who commit obvious violations of the Constitution. *See Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) ("[S]ome things are so obviously unlawful that they don't require detailed explanation . . . [i]ndeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt."); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("Of course, in an obvious case, these [Fourth Amendment] standards can 'clearly establish' the

answer, even without a body of relevant case law."); *Estate of Booker v. Gomez*, 745 F.3d 405, 433–34 (10th Cir. 2014).

For more than half a century, it has been a bedrock principle of Fourth Amendment jurisprudence that a police officer must have reasonable suspicion to seize an individual. As early as 1968, the Supreme Court warned that an officer who seizes an individual without reasonable suspicion invites a Fourth Amendment claim. *See Terry*, 392 U.S. at 27 (holding that officers may not conduct investigative stops based on "inchoate and unparticularized suspicion[s] or 'hunch[es]'"). Since then, the Supreme Court has repeatedly affirmed the principle that the Fourth Amendment guarantees citizens freedom from investigative police stops absent reasonable suspicion. *See Florida v. Royer*, 460 U.S. 491, 498 (1983); *Rodriguez v. United States*, 575 U.S. 348, 354 (2015).

For instance, in *Brown v. Texas*, 443 U.S. 47, 52 (1979), the Supreme Court held that an officer violated the Fourth Amendment when he demanded identification from an individual standing in an area frequented by drug users without any specific basis for believing the individual was involved in criminal activity. *Id.* at 52. In *Brown*,

the police officer testified that the individual "looked suspicious," but the officer "was unable to point to any facts supporting that conclusion." *Id.* Because the individual's activity was "no different from the activity of other pedestrians in that neighborhood," the officer lacked "any basis for suspecting [the individual] of misconduct." *Id.* The Court concluded that when police stop an individual and demand identification without any specific basis for believing the individual is involved in criminal activity, "the risk of arbitrary and abusive police practices exceeds tolerable limits" and "violate[s] the Fourth Amendment." *Id.* *Brown* and countless other cases have established that seizing a citizen who has not done anything unlawful and does not appear to be doing anything unlawful is a blatant constitutional violation. *See, e.g.*, *Brendlin v. California*, 551 U.S. 249, 263 (2007); *Florida v. J.L.*, 529 U.S. 266, 268, 274 (2000). Therefore, every reasonable officer should know that it is wrong.

Because it is a bedrock principle of the Fourth Amendment that an officer must have reasonable suspicion to seize an individual, and the officers here have never asserted they had "reasonable suspicion in the initial encounter," (Order, ROA at 354), the officers' conduct in the

present case was so obviously unlawful that every reasonable officer would have known that it was wrong. No reasonable officer could have believed that there was any justification to stop the Handys under the circumstances. The officers did not observe any hint of criminal activity by the Handys. Fisher merely observed the Handys pull into a convenience store parking lot late at night—that is it.[8] (*See* Order, ROA at 347.) Simply because the convenience store was located near a building that was the site of prior criminal activity does not justify the seizure of the Handys. Under that logic, the officers would be able to seize *anyone* who stopped at the convenience store, demand their identification, and then take their identification back to their patrol car to enter the information into their data system. As every reasonable officer knows, such unlimited discretion violates the Fourth Amendment's guarantee that people have the right to be secure in their persons against unreasonable seizures.

---

[8] As the district court correctly noted, any "later development of reasonable suspicion does not retroactively remedy plaintiffs' Fourth Amendment injury." (Order, ROA at 355.) The Handys dispute that reasonable suspicion ever developed during the course of the stop; however, this Court need not analyze the issue as it is irrelevant to the determination of whether the Defendants had reasonable suspicion when they initially seized the Handys.

* * *

In sum, even if the Handys had not cited a Tenth Circuit case that clearly established that Deputies' conduct violated the Handys' constitutional rights, the officers' actions were so blatantly unlawful that every reasonable officer would have known the conduct was wrong.

CONCLUSION

For the foregoing reasons, the district court should be reversed, and the case remanded.

STATEMENT REGARDING ORAL ARGUMENT

Because of the importance of the issues presented in this appeal, the Handys believe oral argument may be beneficial to the Court.

October 26, 2020

Respectfully submitted,

/s/ Matthew R. Cushing

Matthew Cushing
Andres Alers
Laura Boyer
David Willner
Matthew Cushing PLLC
2450 Kittredge Loop Drive
Boulder, CO 80309
(303) 735-6554
matthew@cushingpllc.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   __X__ this brief contains 7,828 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I relied on my word processor, Microsoft Word 2010, to obtain the count.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   __X__ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook font, size 14.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Matthew R. Cushing
October 26, 2020 *Counsel for Appellants*

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that (1) the foregoing brief contains no information subject to the privacy redaction requirements of 10th Cir. R. 25.5; (2) the hard copies of the brief to be submitted to the Court are exact copies of the electronic copy filed using the Court's CM/ECF system; and (3) the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Matthew R. Cushing
October 26, 2020 *Counsel for Appellants*

CERTIFICATE THAT ELECTRONIC COPY AND REQUIRED HARD COPIES ARE IDENTICAL

I hereby certify that seven hard copies of this brief, which are required to be submitted to the Clerk's Office within five business days of electronic filing pursuant to 10th Cir. R. 31.5, are exact copies of that which was filed with the Clerk of the Court using the electronic filing system on October 26, 2020.

/s/ Matthew R. Cushing
October 26, 2020 *Counsel for Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, I electronically filed a copy of the foregoing brief with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Court's appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users who will be served by the appellate CM/ECF system.

/s/ Matthew R. Cushing
October 26, 2020 *Counsel for Appellants*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 18-cv-789-RBJ-SKC

WYATT T. HANDY, JR and
ASHLEE M. HANDY,

Plaintiffs,

v.

TERA L. FISHER and
BRANDON H. JOHNSON,

Defendants.

ORDER

This case is before the Court on defendants' motion for summary judgment, ECF No. 80. For the reasons stated below, the motion is granted.

BACKGROUND

I previously described the facts in this case in my order on Magistrate Judge Crews' recommendation on defendants' motion to dismiss. *See* ECF No. 47. I restate those facts here with some additions.

Pro se Plaintiffs Ms. Ashlee Handy and Mr. Wyatt Handy were driving along Highway 285 to visit a friend in Conifer, Colorado in the early morning of April 14, 2016 when the alleged incident occurred. ECF No. 1 ¶ 8. Three people were in the vehicle: Ms. Handy, who is white, was driving; Mr. Handy, who is black, was the front seat passenger; and an unidentified white female passenger sat in the backseat behind Ms. Handy. *Id.* ¶ 9. At approximately 12:43 a.m. plaintiffs stopped in the parking lot of the 24-hour Kum and Go convenience store in Conifer to

reprogram their GPS navigational unit. *Id.* ¶ 10. As plaintiffs pulled into the Kum and Go located off Highway 285, they noticed Deputy Fisher's patrol vehicle parked in the convenience store's parking lot. *Id.* ¶ 12. Mr. Handy alleges that he made eye contact with Deputy Fisher as plaintiffs' vehicle pulled into the Kum and Go parking lot. *Id.* ¶ 13.

Within one minute of parking, plaintiffs allege that Deputy Fisher repositioned her patrol car behind plaintiffs' vehicle and activated her emergency lights. *Id.* ¶ 15. Because plaintiffs' car faced the Kum and Go building, plaintiffs were boxed in and unable to move their car. *Id.* ¶ 16. Apparently, Deputy Fisher radioed for backup because, within "seconds," several additional officers arrived at the convenience store. *Id.* ¶¶ 17–18.

Deputy Johnson was one of those officers. With backup in place and their weapons drawn, Deputy Fisher approached the driver's side of the vehicle, and Deputy Johnson approached the passenger's side. *Id.* ¶¶ 19–20. Deputy Fisher asked Ms. Handy for her license, insurance, and registration. *Id.* ¶ 22. Ms. Handy complied with the request, and then she explained that she pulled over to reprogram her GPS. *Id.* ¶¶ 23–24. Deputy Fisher then asked Mr. Handy for his identification "in a hostile manner." *Id.* ¶¶ 24–25. Mr. Handy initially refused to produce identification, and plaintiffs allege he only complied after defendants inferred that he would be arrested if he did not produce identification. *Id.* ¶¶ 26–28. Defendants did not request identification from the backseat passenger. *Id.* ¶ 31. Defendants claim that when Officer Fisher ran Ms. Handy's identification, it showed she was a protected party under a protection order, and that the order restrained a male individual. ECF No. 80 ¶ 7. Defendants released plaintiffs after they verified that there were no outstanding warrants pending against plaintiffs. ECF No. 1 ¶ 30.

Defendants filed a motion to dismiss which Judge Crews recommended I grant in part and deny in part. ECF No. 31, ECF No. 45. I adopted the recommendation and dismissed all of plaintiffs' claims except the 42 U.S.C. § 1983 claim against defendants in their individual capacities alleging an unlawful seizure under the Fourth Amendment. ECF No. 47. On October 28, 2019 Defendants moved for summary judgment on plaintiffs' remaining claim. ECF No. 80.

STANDARD OF REVIEW

A. Motion for Summary Judgment

The Court may grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden to show that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party must "designate specific facts showing that there is a genuine issue for trial." *Id.* at 324. A fact is material "if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The Court will examine the factual record and make reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Concrete Works of Colo., Inc. v. City and Cty. of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994).

B. Pro se Litigants

When a case involves pro se litigants, courts will review their "pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys." *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007). Nevertheless, it is not "the

proper function of the district court to assume the role of advocate for the pro se litigant." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A "broad reading" of a pro se plaintiff's pleadings "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Id*. Pro se parties must "follow the same rules of procedure that govern other litigants." *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (internal quotation marks and citations omitted).

ANALYSIS

In support of their motion, Defendants argue only that plaintiffs have not shown a Fourth Amendment violation, and therefore defendants are entitled to qualified immunity. ECF No. 80.

Qualified immunity protects government officials acting in their official capacity so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When qualified immunity is asserted by an official, a plaintiff must satisfy the burden of showing (1) that the defendant violated a constitutional right (2) that was clearly established at the time of violation. *Pearson v. Callahan*, 555 U.S. 223, 232, (2009). I address each prong of the qualified immunity analysis in turn.

A. Fourth Amendment Violation

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures." Whether a seizure is reasonable under the Fourth Amendment depends on the type of encounter alleged. *See, e.g.*, *United States v. Shareef*, 100 F.3d 1491, 1500 (10th Cir. 1996). "The Supreme Court has identified three types of police/citizen encounters: consensual encounters, investigative stops, and arrests." *Oliver v. Woods*, 209 F.3d 1179, 1186 (10th Cir. 2000).

Consensual encounters are not seizures under the Fourth Amendment and need not be supported by suspicion of criminal wrongdoing. *Id*. Arrests, on the other hand, are "characterized by highly intrusive or lengthy search or detention." *United States v. Cooper*, 733 F.2d 1360, 1363 (10th Cir. 1984), *cert. denied*, 467 U.S. 1255 (1984). Investigative stops (or *Terry* stops) fall in the middle. *See Terry v. Ohio*, 392 U.S. 1, 26–27 (1968). An investigative stop occurs when an officer stops and briefly detains a person for investigative purposes. *Oliver*, 209 F.3d at 1186. These stops are constitutional if the officer has a reasonable suspicion supported by articulable facts that the detainees are involved in criminal activity, even if the officer lacks the probable cause necessary for an arrest. *Id*.

Defendants argue that no Fourth Amendment violation occurred because the interaction began as a consensual encounter in which the officers did not use force or a show of authority to achieve compliance. ECF No. 80 at 5–6. Once the encounter evolved into a seizure, defendants argue, it was only an investigative stop supported by reasonable suspicion. *Id*. Plaintiffs respond that the initial contact was not a consensual encounter but an investigative stop unsupported by reasonable suspicion. ECF No. 103 at 12. They also argue that defendants did not develop reasonable suspicion justifying an investigative stop at any point during the encounter. *Id*. at 15.

1. Initial Contact

I first examine whether the initial contact defendants made with plaintiffs constituted a seizure or a consensual encounter. If it was a seizure, I must then consider whether the seizure was reasonable.

a. Whether the Initial Encounter was a Seizure

"An officer is free to approach people and ask questions without violating the Fourth Amendment. However, the person approached under these circumstances is free to refuse to

answer questions and to end the encounter." *Oliver*, 209 F.3d at 1186. "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439 (1991). The Tenth Circuit has articulated several factors to consider in making this determination including:

> the location of the encounter, particularly whether the defendant is "in an open public place where he [is] within the view of persons other than law enforcement officers," . . . whether the officers "touch or physically restrain" the defendant; . . . whether the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically "advised defendant at any time that he had the right to terminate the encounter or refuse consent."

United States v. Zapata, 997 F.2d 751, 756–57 (10th Cir. 1993) (quoting *United States v. Ward*, 961 F.2d 1526, 1534 (10th Cir. 1992)) (internal citations omitted). However, this list "is non-exclusive and no one factor is dispositive." *United States v. Spence*, 397 F.3d 1280, 1283 (10th Cir. 2005) (quoting *United States v. Abdenbi*, 361 F.3d 1282, 1291 (10th Cir. 2004) and *United States v. Little*, 18 F.3d 1499, 1504 (10th Cir. 1994)) (internal quotations omitted). Rather, "[t]he focus of the test is on the coercive effect of police conduct, taken as a whole on a reasonable person." *Id.*

Turning to the facts here, the parties agree that the interaction took place in the middle of the night; that defendant Fisher was in a marked car which she pulled behind the plaintiffs' parked vehicle; that she activated her overhead lights; that shortly after, at least one other officer arrived on the scene; and that officers approached the car from either side. ECF Nos. 80 at 2–3; 103 at 1–5. Plaintiffs allege and defendants do not dispute that the officers had their weapons drawn when they approached the vehicle. ECF No. 103 at 5; ECF No. 106 at 3. Plaintiffs allege

and defendants do not dispute that Officer Fisher's tone and demeanor was "aggressive." ECF No. 103 at 14. The parties dispute the number of additional officers that were on the scene and how many approached the car. *Id*.

The undisputed facts show that a reasonable person would not have felt free to leave or disregard the officers' requests under these circumstances. Examining the Tenth Circuit's listed factors, though the interaction occurred in a public place, there is no evidence it occurred in view of anyone other than several law enforcement officers. Officer Fisher parked her vehicle directly behind the plaintiffs' vehicle, making it difficult to move their vehicle.[1] At least two uniformed officers approached the car from either side with their weapons displayed. This fact alone could by itself indicate to a reasonable person that they were not free to leave, and it weighs heavily for a finding that the encounter was not voluntary. *See, e.g.*, *United States v. Parra-Garcia*, 1 F. App'x 778, 782 (10th Cir. 2001) (unpublished) (weighing heavily the fact that the officers "never brandished or displayed their weapons" in assessing the encounter) (citing *United States v. Soto*, 988 F.2d 1548, 1558 (10th Cir. 1993)). Officer Fisher's tone and demeanor was aggressive. The officers took both the driver and passengers' identification card, though perhaps for only a short amount of time. The officers did not advise the plaintiffs that they were free to go until after returning their identification cards.

[1] Defendants argue that plaintiffs were not physically prevented from leaving by Officer Fisher's vehicle because plaintiffs ultimately left without Officer Fisher moving her vehicle. ECF No. 106 at 9. Plaintiffs claim they had to wait for defendants to move their vehicles before backing out. ECF No. 103 at 7. Regardless, the ability to extricate the vehicle does not cut against the fact that the Handys could have reasonably believed they were not free to leave after Officer Fisher parked behind them, making it difficult to remove their car from the parking space. The relevant inquiry is what a reasonable person would believe under the circumstances, *Florida*, 501 U.S. at 439, and not the intention of the officer, or the physical possibility of extrication. I find that parking as Officer Fisher did is one among several factors that would indicate to a reasonable person that they were not free to leave.

These conclusions show how different this encounter was from those cases in which the Tenth Circuit found an encounter consensual. In *United States v. Zapata* the Tenth Circuit found the encounter consensual largely because it occurred on a public train, in view of dozens of other travelers, with plainclothes officers who did not display their weapons and used a regular tone of voice. 997 F.2d at 757. In *United States v. Parra-Garcia* the Tenth Circuit found the encounter consensual because the plainclothes officer never displayed weapons or made threats, it occurred in public, and the officer returned the identification prior to asking permission to search belongings. 1 F. App'x at 782. Defendants have cited no case law in which a court found an encounter analogous to the case at hand consensual.

Because the undisputed facts show that the interaction constituted a seizure, I must determine whether the seizure complied with the Fourth Amendment.

b. Whether the Seizure Complied with the Fourth Amendment

An investigative stop complies with the Fourth Amendment when an officer has "reasonable suspicion." *Oliver*, 209 F.3d at 1186. For an officer to have reasonable suspicion to seize an individual, the officer "must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id*. In evaluating whether the officers had reasonable suspicion to detain the plaintiffs, the Court must consider "the totality of the circumstances—the whole picture." *United States v. Sokolow*, 490 U.S. 1, 6 (1989) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Defendants argue that Officer Fisher developed reasonable suspicion once she discovered the protective order. To reiterate, she did not discover the protective order until after she had parked behind the Handys, activated her lights, and called for backup, and until after the officers

had approached plaintiffs' vehicle with their weapons drawn and asked for identification. ECF No. 80 at 12.

Plaintiffs argue that regardless of whether discovering the protective order conveyed reasonable suspicion, Officer Fisher lacked reasonable suspicion when she first encountered plaintiffs. ECF No. 103 at 12. Defendants do not contest that Officer Fisher lacked reasonable suspicion in the initial encounter.

Defendants do note Officer Fisher encountered plaintiffs late at night in a location known for "significant criminal activity." ECF No. 80 at 12. Though not sufficient in itself, this could make the issue of Officer Fisher's reasonable suspicion a closer question. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("we have previously noted the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis.") (quoting *Adams v. Williams*, 407 U.S. 143, 144 (1972)). However, because defendants do not argue that Officer Fisher had reasonable suspicion at the initiation of the encounter, I assume without deciding that she lacked reasonable suspicion.

Because I found the initial encounter constituted a seizure, and because defendants do not argue that Officer Fisher had reasonable suspicion until after the initial encounter, plaintiffs have sufficiently stated a Fourth Amendment violation as to the initial encounter so as to survive a motion for summary judgment.

2. Continuing Encounter

Defendants argue that Officer Fisher developed reasonable suspicion later in the encounter when she discovered "Ms. Handy was the protected party to a protection order and that the restrained party was male." ECF No. 80 at 12. Defendants are correct that consensual encounters, investigative stops, and arrests are "not static and may escalate from one to another."

United States v. Jones, 701 F.3d 1300, 1312 (10th Cir. 2012) (quoting *United States v. White*, 584 F.3d 935, 945 (10th Cir. 2009)) (internal quotations omitted). Officer Fisher may have developed reasonable suspicion at a later stage in the interaction.

However, this later development of reasonable suspicion does not retroactively remedy plaintiffs' Fourth Amendment injury. Regardless of whether Officer Fisher developed reasonable suspicion later in the unlawful interaction, the fact that the initial seizure occurred without justification sufficiently articulates a Fourth Amendment injury, thereby meeting the first qualified immunity prong. *See Stoedter v. Gates*, 704 F. App'x 748, 754 (10th Cir. 2017) (unpublished) (rejecting assertion of qualified immunity where defendants argued they developed probable cause after initial unjustified seizure); *see also Lundstrom v. Romero*, 616 F.3d 1108, 1125 (10th Cir. 2010) (explaining that officers must have particularized reasonable suspicion *before* initiating an investigative detention).

Because plaintiffs have met their burden on the first qualified immunity prong, I now consider their allegations that the law in question was clearly established.

B. Clearly Established Law

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citing *Reichle v. Howards*, 566 U.S. 658, 664 (2012)) (internal quotations omitted). "A plaintiff may show clearly established law by pointing to either a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts, existing at the time of the alleged violation." *Ali v. Duboise*, 763 Fed. Appx. 645, 650 (10th Cir. 2019) (unpublished) (citing *T.D. v. Patton*, 868 F.3d 1209, 1220 (10th Cir. 2017)) (internal quotations omitted). "[C]learly established law should not be defined at a high level of generality." *White v. Pauly*,

137 S. Ct. 548, 552 (2017) (citing *Ashcroft v. al–Kidd*, 563 U.S. 731, 742 (2011)) (internal quotations omitted). "Although a plaintiff need not identify a case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate." *Ali*, 763 F. App'x at 650 (citing *Mullenix*, 136 S. Ct. at 308) (internal quotations omitted); *see also White*, 137 S. Ct. at 551. Once a defendant raises a qualified immunity defense, the burden is on the plaintiffs to show that they have sufficiently met both prongs. *See Cox v. Glanz*, 800 F.3d 1231, 1245 (10th Cir. 2015) ("[B]y asserting the qualified-immunity defense, [defendant] triggered a well-settled twofold burden that [plaintiff] was compelled to shoulder.").

Defendants argue only that they were entitled to qualified immunity because the plaintiffs failed to show a Fourth Amendment violation. *See* ECF No. 80. Plaintiffs have asserted the violation was clearly established but do not provide independent argument on the qualified immunity prongs, perhaps because defendants did not address it in their motion. *See* ECF No. 103 at 12. Because the plaintiffs appear pro se, I construe their brief liberally, *Trackwell*, 472 F.3d at 1243, examining whether they present any case law that suggests the violation was clearly established. Nevertheless, it is not "the proper function of the district court to assume the role of advocate for the pro se litigant," and the Handys must following the same rules as other litigants. *Hall*, 935 F.2d at 1110. Here, to meet their burden they must make a sufficient showing on the clearly established prong.

Examining plaintiffs' brief, they have presented no case law in which a court found similar conduct to violate the Fourth Amendment. *See* ECF No. 103. Plaintiffs cite *Florida v. Bostick*, 501 U.S. 429 (1991) in which the Supreme Court declined to decide whether a seizure had occurred. They also cite *United States v. Rogers*, 556 F.3d 1130 (10th Cir. 2009), in which the Tenth Circuit found an encounter consensual. Finally, plaintiffs cite *I.N.S. v. Delgado*, 466

U.S. 210 (1984), in which the Supreme Court held that a factory raid did not constitute a seizure. These cases cannot support a finding that the violation in the instant case was clearly established. Therefore, Plaintiffs have not met their burden of showing the law was clearly established.[2]

Because I find that plaintiffs have met not their burden, defendants' motion for summary judgment is granted.

ORDER

Defendants' Motion for Summary Judgment, ECF No. 80, is GRANTED.

DATED this 28th day of April, 2020.

BY THE COURT:

R. Brooke Jackson
United States District Judge

[2] There is case law that suggests such a violation *may* be clearly established. *See e.g.*, *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995) ("Precedent clearly establishes that when law enforcement officials retain an individual's driver's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the encounter."). However, because plaintiffs have the burden of proof on the issue, I do not and cannot resolve the question here.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No 18-cv-00789-RBJ-SKC

WYATT T. HANDY, JR and
ASHLEE M. HANDY,

Plaintiff,

v.

TERA L. FISHER and
BRANDON H. JOHNSON,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a) the following Final Judgment is hereby entered.

Pursuant to the ORDER of Judge R. Brooke Jackson entered on April 28, 2020, [ECF No. 118] it is

ORDERED that the defendants' motion for summary judgment [ECF No. 80] is GRANTED and the case is dismissed. It is

FURTHER ORDERED that judgment is entered in favor of the defendants and against the plaintiffs. It is

FURTHER ORDERED that, as the prevailing party, the defendants are awarded their reasonable costs to be taxed by the Clerk of Court pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 28th day of April, 2020.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ J. Dynes

J. Dynes
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 18-cv-789-RBJ-SKC

WYATT T. HANDY, JR. and
ASHLEE M. HANDY,

Plaintiffs,

v.

TERA L. FISHER and
BRANDON H. JOHNSON,

Defendants.

ORDER

This case is before the Court on pro se plaintiffs Ashlee M. Handy and Wyatt T. Handy, Jr.'s motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e), ECF No. 122. Plaintiffs ask this Court to revise its previous order on defendants Tera L. Fisher and Brandon H. Johnson's motion for summary judgment, ECF No. 118. For the following reasons the motion is denied.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure do not explicitly provide for a motion to reconsider. Instead, litigants subject to an adverse final judgment who seek reconsideration by the district court of that judgment may make "[a] motion to alter or amend" that judgment within 28 days of entry of judgment. Fed. R. Civ. P. 59(e). A court may alter or amend the judgment under Rule 59(e) in its discretion when there is "(1) an intervening change in the controlling law, (2) new

evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." *Id.* (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)).

ANALYSIS

I have described the facts of this case in several previous orders, *see* ECF Nos. 47, 118, and so I do not do so again here. To briefly summarize, in the early morning of April 14, 2016, pro se plaintiffs pulled their vehicle into a convenience store parking lot in Conifer, Colorado. ECF No. 1 ¶ 8–9. Within a minute of the plaintiffs entering the parking lot, Deputy Fisher had parked behind plaintiffs' vehicle, activated her emergency lights, and radioed for backup. *Id.* ¶ 15–18. Deputies Fisher and Johnson approached the plaintiffs' vehicle with their weapons drawn and requested both plaintiffs' identification. *Id.* ¶ 19–25. Defendants eventually released plaintiffs, and plaintiffs filed this lawsuit, claiming defendants' actions violated their Fourth Amendment rights against search and seizure. *Id.* ¶ 30.

In their motion for summary judgment, defendants asserted, among other things, that they were entitled to qualified immunity for plaintiffs' Fourth Amendment claim. *See* ECF No. 80. I found that though plaintiffs had stated a Fourth Amendment violation, they had not met their burden in showing that such a violation was clearly established. *See* ECF No. 118 at 11–12. Therefore, I concluded defendants were entitled to qualified immunity and granted their motion for summary judgment. *Id.* at 12.

Plaintiffs' present motion presents two arguments. First, plaintiffs argue that defendants failed to adequately plead and develop their qualified immunity defense, and so should not have been granted qualified immunity. ECF No. 122 at 7. Second, plaintiffs argue that this court incorrectly concluded that plaintiffs provided no case law evidencing the violation was clearly established. *Id.* at 7–8. I address each argument in turn.

A. Whether Defendants Failed to Plead and Develop Qualified Immunity Defense

In my order on defendants' summary judgment motion I noted that defendants had only presented an argument on the first prong of the qualified immunity analysis. ECF No. 118 at 11. Plaintiffs claim that by neglecting to argue that the law was not clearly established defendants failed to meet their burden of pleading and developing their qualified immunity defense. ECF No. 122 at 6–7.

Plaintiffs note that "qualified immunity is an affirmative defense" and "the burden of pleading it rests with the defendant." *Montoya v. Vigil*, 898 F.3d 1056, 1063 (10th Cir. 2018) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 586–87 (1998)).[1] On the other hand, defendants correctly point out that "by asserting the qualified-immunity defense, [defendants] triggered a well-settled twofold burden that [plaintiffs were] compelled to shoulder." *Cox v. Glanz*, 800 F.3d 1231, 1245 (10th Cir. 2015). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the *plaintiff*, who must clear *two hurdles* in order to defeat the defendant's motion." *Id.* (quoting *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009)) (emphasis in original).

In *Montoya v. Vigil* the Tenth Circuit found the defendant had not asserted qualified immunity before the trial court and could not do so for the first time on appeal. 898 F.3d at 1063–65. The court rejected defendants' argument that it had sufficiently asserted a qualified immunity defense below by raising a failure-to-state-a-claim argument. *Id.* at 1065. Such an argument, without more, "fails to notify either the district court or the plaintiff that the defendant is invoking qualified immunity." *Id.*

[1] Plaintiffs also cite out-of-circuit case law for the same principle. *See* ECF No. 122 at 6–7.

Montoya is not applicable here. Defendants explicitly asserted qualified immunity in their motion for summary judgment and developed in detail their argument on the first prong. ECF No. 80. Though they did not develop their argument on the second prong in any detail, their assertion was sufficient to notify the district court and the plaintiffs of their defense and shift the burden to the plaintiffs. *See Cox*, 800 F.3d at 1245 (finding that "however poorly asserted," defendant's brief presented a qualified immunity defense, which "*necessarily* included the clearly-established-law question," and shifted burden to plaintiff).

My previous order did not misapprehend the law and correctly concluded that defendants had asserted a qualified immunity defense, which plaintiffs were required to rebut.

B. Whether Plaintiffs Met Their Burden of Showing the Violation was Clearly Established

My order also stated that I would construe pro se plaintiffs' brief liberally and examine any case law they present to determine whether such a violation was clearly established. ECF No. 118 at 11. Plaintiffs now point out that I neglected to expressly examine several cases they cited at various points in their response brief. ECF No. 122 at 8–11. Plaintiffs' motion presents four cases they allege show the violation was clearly established. *Id.* Plaintiffs' reply claims they cited eight cases that this Court should have examined but does not specify which additional cases I should consider. ECF No. 128 at 3. I therefore examine the four cases specifically addressed in plaintiffs' motion.

First, plaintiffs' motion cites *United States v. Williams*, 615 F.3d 657, 660 (6th Cir. 2010), a Sixth Circuit case which cannot by itself show a violation was clearly established in this circuit. *Grissom v. Roberts*, 902 F.3d 1162, 1168 (10th Cir. 2018) (quoting *Toevs v. Reid*, 685 F.3d 903, 916 (10th Cir. 2012)) ("[I]n order for the law to be clearly established, there must be a

Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." (internal quotations omitted)).

Second, plaintiffs cite *United States v. Lopez*, 443 F.3d 1280 (10th Cir. 2006). *Lopez* gives me some pause, but I conclude it is not sufficiently factually similar to support a finding that the Fourth Amendment violation was clearly established. In *Lopez*, an officer encountered two men standing in the middle of the street next to a parked car with its engine running. *Id.* at 1282. The officer ran a license plate check, confirmed the car was not stolen, and saw that it was registered to a woman in Westminster, before proceeding to shine his spotlight on the individuals and approach. *Id.* The officer asked for the men's identification, which they provided. *Id.* Lopez's address matched that of the car's owner. *Id.* The officer instructed the men to stay by the car and proceeded to run a warrant check. *Id.* The Tenth Circuit found that that the encounter was no longer consensual after the officer retained the identification to run a warrant check. *Id.* at 1285.

Lopez presents some similarities to the instant case but is not sufficiently close to render the violation at issue "beyond debate." *Ali v. Duboise*, 763 F. App'x 645, 650 (10th Cir. 2019) (unpublished) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). The distinguishing differences include that in *Lopez*, the men were not in the car but standing in the street, and that the officer ran a plate check before approaching the men, so when he received the identification he already knew that the car was not stolen and that Lopez resided at the same address as the car owner. Despite this, he then ordered the men to wait by the car to run a warrant check. This case supports my previous conclusion that Deputy Fisher's actions constituted a seizure.

However, because it presents too many factual dissimilarities, it cannot support a finding that Deputy Fisher's particular conduct here was a clearly established violation.

Third, plaintiffs cite *United States v. Gaines*, 918 F.3d 793, 797 (10th Cir. 2019). The Tenth Circuit issued *Gaines* in 2019, three years after the events in this case occurred. Had *Gaines* been the law of this circuit before plaintiffs encountered Officer Fisher, this case might have come out differently. However, the qualified immunity analysis only considers what law was clearly established "at the time of the defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 811, 172 L. Ed. 2d 565 (2009).

Fourth, plaintiffs cite *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007), which is far too factually distinct from the instant case to show the violation was clearly established. In *Cortez*, the Tenth Circuit found that Rick Cortez had been seized when the police pulled him from the doorway of his home, advised him of his *Miranda* rights, and placed him in the back of a squad car. *Id.* at 1116. The court then found that Tina Cortez was also seized when she was ordered out of her house, taken by the arm and escorted out of her bedroom, and placed in the back of a squad car and questioned. *Id.* at 1123. This case has almost no factual similarity to plaintiffs' experience and cannot provide support for a finding that the violation was clearly established.

Plaintiffs argue that though these cases might not be factually similar to theirs, they need not cite factually identical case law, but only cases "with a sufficient degree of factual correspondence." ECF No. 122 at 4. Plaintiffs present case law stating that "a case on point isn't required" to show something is clearly established, *Kerns v. Bader*, 663 F.3d 1173, 1186 (10th Cir. 2011), and that "some level of generality is appropriate," *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1258 (10th Cir. 1998). *See also Hope v. Pelzer*, 536 U.S. 730 (2002); *Anderson*

v. Creighton, 483 U.S. 635 (1987); *Medina v. City & Cty. of Denver*, 960 F.2d 1493 (10th Cir. 1992). I agree.

However, in the years since plaintiffs' cited cases were published, the Supreme Court has clarified that while courts may not "define clearly established law at a high level of generality," *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011)), "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *al–Kidd*, 563 U.S. at 741). Thus, the court must consider "whether the violative nature of *particular* conduct is clearly established." *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (emphasis in original). "This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Brosseau*, 543 U.S. at 198). Finally, the Supreme Court noted that "[s]uch specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Mullenix and its Supreme Court and Tenth Circuit progeny have reiterated again and again that though plaintiffs need not present a factually *identical* case, they must present precedent showing that the particular conduct was a clearly established violation. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017); *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *Ali*, 763 F. App'x at 650. This is a fine line. However, I conclude that the cases to which plaintiffs point do not establish that defendants' conduct was a clearly established violation at the time it occurred. In sum, while I have reconsidered the previous order, as was reasonably requested, I come to the same conclusion that defendants are entitled to qualified immunity on these facts.

ORDER

Plaintiffs' Motion to Alter or Amend a Judgment, ECF No. 122, is DENIED.

DATED this 1st day of July, 2020.

BY THE COURT:

R. Brooke Jackson
United States District Judge