No. 24-

IN THE

Supreme Court of the United States

MICHAEL PINA,

Petitioner,

v.

ESTATE OF JACOB DOMINGUEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

San Jose police stopped decedent Jacob Dominguez, who was wanted for armed robbery, after tailing the car he was driving. Officer Michael Pina exited his car and ordered Dominguez to put his hands up. Dominguez reluctantly did, then quickly dropped his hands and leaned forward in the driver's seat. Officer Pina had information Dominguez was in possession of a firearm and believed Dominguez was reaching for it, so Officer Pina shot Dominguez, killing him. All that occurred within 30 seconds.

1. Did the Ninth Circuit err so as to warrant summary reversal by refusing qualified immunity without identifying any precedent finding a Fourth Amendment violation based on similar facts and, indeed, overriding its own cases holding an officer would not violate the Constitution under the circumstances the jury found?

PARTIES TO THE PROCEEDING

The Petitioner is Michael Pina, who was an Officer and is now a Sergeant of the San Jose Police Department, a Defendant below.

The Respondent is the Estate of Jacob Dominguez, represented by Jessica Dominguez, a Plaintiff below, who brought the underlying action pursuant to 42 U.S.C. § 1983.

RELATED PROCEEDINGS

Jessica Dominguez, et al. v. Michael Pina, U.S. Court of Appeals for the Ninth Circuit, Case No. 23-15554.

Jessica Dominguez, et al. v. City of San Jose, et al., U.S. District Court for the Northern District of California, Case No. 18-cv-04826-BLF.

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PETITION FOR WRIT OF CERTIORARI

This Court has been clear about the analysis to be undertaken when a court is asked to apply qualified immunity. Yet even after the jury in this case rendered its factual determination about the suspect's conduct that made it clear qualified immunity protects the officer's reaction, the courts below did not do the required analysis. As a result, the Ninth Circuit effectively determined that every reasonable officer would understand he cannot shoot a suspect who stops complying with police and makes a motion as if to retrieve the gun officers are told the suspect is carrying.

That cannot be the law, and the correct analysis makes plain it is not the law. No case from this Court or even from the Ninth Circuit requires officers in such fraught circumstances to wait any longer before acting to protect themselves. The lower courts' rulings in this case are completely at odds with this Court's qualified immunity rulings, and those of the other circuit courts, involving comparable circumstances. Those cases do not require officers to parse the suspect's movement to determine how likely it is to result in retrieval of a weapon and how likely it is the suspect will actually use that weapon against the officer or others. To the contrary, as this Court has recognized, federal cases acknowledge that "'the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Long v. Slaton*, 508 F.3d 576, 581-82 (11th Cir. 2007)).

The Ninth Circuit has again disregarded this Court's clear holding that, when it comes to the use of force, "police

officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (quotation omitted). Qualified immunity is illusory when a court does not identify a case that makes it clear to an officer that he could not use the force he thought warranted at the time. That is especially so where a court does not apply the legal analysis this Court requires, but also disregards the facts decided by a jury on which that analysis must be based.

Notwithstanding the jury's excessive force verdict, its special interrogatory response means qualified immunity should result in judgment on behalf of Officer Pina. Officer Pina therefore respectfully asks the Court to grant the Petition and summarily reverse the Ninth Circuit's rejection of qualified immunity.

OPINIONS BELOW

The Ninth Circuit panel's memorandum opinion is unreported and is reproduced in Appendix A. The opinion of the district court is also unreported and is reproduced in Appendix B.

JURISDICTION

The Ninth Circuit Court of Appeals issued its order on May 10, 2024. Section 1254(1) of Title 28 of the United States Code confers jurisdiction on this Court.

APPLICABLE STATUTES AND CONSTITUTIONAL PROVISIONS

The Dominguez plaintiffs sued under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

At issue is an alleged violation of the Fourth Amendment to the U.S. Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Facts

On September 15, 2017, officers of the San Jose Police Department's undercover Covert Response Unit held a briefing to discuss Dominguez's arrest on a warrant for armed robbery of a gas station that occurred several days before. (6–ER–931-33.) The officers, including Petitioner Officer Pina, were informed that the gun used in the armed robbery had not been recovered and that a confidential informant stated Dominguez was armed with a revolver. (6–ER–956; 4–ER–589.) The officers also saw Dominguez drive by the scene as officers were arresting his two co-perpetrators two days earlier. (4–ER–587.) Following the briefing, the officers surveilled Dominguez for hours as he drove erratically, leading them to conclude Dominguez understood he was wanted by the police and was likely being followed. (4–ER–480-82.)

The officers were eventually able to stop Dominguez's car using a vehicle containment strategy. (6–ER–970-80.) Petitioner Officer Pina ordered Dominguez to put his hands up as Dominguez sat in the driver's seat, and Dominguez eventually did. (4–ER–602-05.) Officer Pina testified that Dominguez then quickly dropped his hands out of sight and leaned forward, causing Officer Pina to think Dominguez was retrieving his gun. (4–ER–606-07.) Two other officers on the scene testified they saw the same motion and reached the same conclusion about what Dominguez was doing. (3–ER–392-93, 4–ER–494-95.) Officer Pina then saw Dominguez quickly start to come back upright and made the decision to shoot. (4–ER–609-11.)

After stopping Dominguez's car, fewer than 30 seconds passed from the time Officer Pina left his car to the time he fired two shots at Dominguez. (4–ER–597.)

Dominguez died at the scene. A subsequent search of the car did not yield any weapon. (4–ER–618.)

The jury heard testimony from a ballistics expert on behalf of the Dominguez plaintiffs that the first bullet fired by Officer Pina struck the car window before striking Dominguez. (5–ER–679, 683-84.) According to the expert, the second bullet passed through Dominguez's left sweatshirt sleeve before striking the opposite side of the car. (5–ER–691-92.) The expert also testified that because there was no bullet hole in the car door, Dominguez's sleeve must have been above the car door's window frame when the second bullet contacted it. (5–ER–691-92.) On that basis, the Dominguez plaintiffs argued to the jury that Officer Pina shot Dominguez while Dominguez had his hands up, in compliance with the officers' commands, rather than in response to Dominguez's furtive movement. (4–ER–634; 3–ER–285.) The expert offered no opinion, however, where Dominguez's right hand was when either shot was fired.

Responding to a special interrogatory, the jury determined Dominguez dropped his hands and leaned forward before Officer Pina shot him, thereby crediting Officer Pina's testimony. (App. C at 58a.) However, the jury found Officer Pina liable for excessive force. (App. D at 60a.) The jury rejected the Dominguez plaintiffs' claims under the Fourteenth Amendment and for violation of California's Bane Act, a state law analog to Section 1983 but with a heightened intent requirement. (App. D at 61a, 62a.)

Proceedings

Based on the jury's response to the special interrogatory, Petitioner Officer Pina argued for judgment as a matter of law under Rule 50. Petitioner argued that, on the facts found by the jury, the force used was not excessive as a matter of law but that, in any event, qualified immunity attached to Petitioner's decision to shoot Dominguez after he dropped his hands and leaned forward.

Petitioner's Rule 50 motion was informed by the district court's decision on his pre-trial motion for summary judgment. The district court denied that motion on the ground that there was a factual dispute for the jury's resolution. (App. F at 82a-83a.) According to the court, "[t]he central and material factual dispute in this case is the course of action that Dominguez took after his arms were raised in response to officers' commands." (*Id.* at 83a.) The district court identified "circumstantial evidence [that] could lead a jury to discredit officers' testimony and find that Officer Pina shot Dominguez when his hands were raised." (*Id.* at 85a.) The court concluded that, "[i]f a jury did so and found that Dominguez had his hands raised when he was shot, it would clearly be unreasonable for officers to shoot him and Officer Pina would not be entitled to qualified immunity." (*Id.* at 87a (quotation omitted).)

Although the jury resolved that key factual dispute in Petitioner's favor in its answer to the special interrogatory, the district court denied Petitioner's post-trial motion for judgment as a matter of law. (App. B.) The district court acknowledged the second step of the qualified immunity

analysis. (*Id.* at 46a ("Under the second step of the qualified immunity analysis, the Court must 'consider whether the law was clearly established at the time of the challenged conduct.'") (quoting *Felarca v. Birgeneau*, 891 F.3d 809, 816 (9th Cir. 2018)). But it did not perform that step. Instead, the district court "determine[d] that Officer Pina is not entitled to qualified immunity because, considering the answer to the special interrogatory and viewing the evidence in the light most favorable to Dominguez, the facts do not establish that Dominguez posed an immediate threat to the safety of Officer Pina." (App. B at 50a-51a.) That was the wrong analysis. Whether the jury determined Dominguez posed an immediate threat is not dispositive of whether Officer Pina is entitled to qualified immunity because it does not answer whether it was clearly established that an officer would behave unreasonably by shooting in these circumstances.

Petitioner Officer Pina appealed the denial of qualified immunity, among other matters. The Ninth Circuit declined to hear oral argument and issued a Memorandum Opinion affirming the district court's decision. (App. A.) The Ninth Circuit first reasoned that "[t]he jury's determination that Officer Pina used excessive force is sufficient to deny him qualified immunity at step one" of the two-part qualified immunity analysis. (App. A at 3a.) According to the court, "a reasonable jury could have found that Dominguez did not appear to be reaching for a weapon when Officer Pina shot him." (*Id.* at 4a.) Alternatively, the court believed "a reasonable jury could have found that, considering the totality of the circumstances, it was unreasonable for Officer Pina to believe that Dominguez posed an immediate threat even though he dropped his hands and leaned forward." (*Id.* at 5a.)

The Ninth Circuit spent a single page on its discussion whether it was clearly established that an officer could not use deadly force in the circumstances Petitioner faced. The court "assume[d] that Dominguez did not appear to be actively reaching for a gun, nor did he appear to be making any other furtive movement or gesture, when he dropped his hands and leaned forward by some amount and, perhaps, raised his hands again. It was clearly established at the time of the relevant events that deadly force is not justified 'absent some reason to believe that the suspect will soon access or use [a] weapon.'" (*Id.* at 6a-7a (quoting *Peck v. Montoya*, 51 F.4th 877, 888 (9th Cir. 2022).) *Peck* and the decision on which it relied, *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014), are the only cases the panel identified.

REASONS TO GRANT THE WRIT

This Court has periodically granted certiorari to ensure the Ninth Circuit correctly conducts the "clearly established" prong of the qualified immunity analysis. *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021); *Kisela v. Hughes*, 584 U.S. 100 (2018); *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600 (2015). The Ninth Circuit's decision here warrants doing so again.

Denial of qualified immunity requires identification of "controlling authority or a robust consensus of cases of persuasive authority" finding a Fourth Amendment violation under circumstances similar enough to those Officer Pina faced that "every reasonable official would interpret it to establish" that what he was doing violated the law. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). "It is not enough that a rule be suggested by then-

existing precedent; the 'rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) (quoting *Wesby*, 583 U.S. at 63). "Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela*, 584 U.S. at 104 (quotation omitted). Put another way, "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (quoting *Anderson v. Creighton*, 483 U. S. 635, 640 (1987)). That is, a court must be able to "identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." *White*, 580 U.S. at 79.

The Ninth Circuit panel entirely failed to identify such a case. It did not discuss the circumstances of *Peck* or *Cruz* or examine the holding of either. If it had, it would have been clear that neither case would have informed Petitioner he could not use deadly force to protect himself from the threat he perceived when, as the jury determined in its response to the special interrogatory, Dominguez stopped cooperating, dropped his hands, and leaned forward in his seat.

In 2022, five years after the present incident, *Peck*, 51 F.4th at 886, held that a fact dispute prevented determination of qualified immunity at summary judgment. The *Peck* plaintiff contended the suspect was moving away from a holstered gun at the time officers fired. *Id.* Deputies responded to a 911 call that a 65-year-old blind man named Mono "was acting erratically and

threatening someone with a firearm" inside a home after becoming angry about the status of home repairs. *Id.* at 882. Responding deputies took up positions around the home, where they could see Mono's behavior: He "swore at the officers, made obscene gestures toward them, and, at one point, lowered his pants and pressed his bare buttocks against the window," waved his cane around, yelled at deputies to shoot him, and told deputies he would shoot them if they entered the home. *Id.* at 883. Deputies then noted a holstered revolver on the couch and told Mono not to go near it. *Id.* at 884. What happened next was in dispute, such that "a jury could find that [the suspect] did not pick up the gun—and was not moving toward the gun—before he was shot. On those facts, [officers] are not entitled to qualified immunity." *Id.* at 887.

The circumstances Officer Pina faced were quite different, according to the evidence at trial and the jury's special interrogatory finding. Petitioner was attempting to apprehend someone who was wanted for robbery involving a firearm, was believed to have a firearm in his possession, demonstrated that he knew he was wanted by police and was trying to avoid capture, and, with police pointing a rifle at him, reluctantly complied with commands to raise his hands, then dropped them and leaned forward. Officer Pina was not responding to an angry person who mooned police and was behaving erratically but (taking disputed facts in plaintiff's favor) was not moving toward a gun. Even if the case had been decided when Officer Pina reacted to Dominguez's actions in 2017, *Peck* would not have informed Officer Pina that he could not use deadly force when what he reasonably believed was an armed suspect trying to avoid capture stopped cooperating with commands and made a movement that would have enabled him to retrieve a gun.

That *Peck* was not decided as of 2017 is another problem. The Ninth Circuit addressed it in a footnote, stating that "*Cruz* was published in 2014. … *Peck*'s analysis and identification of the law that *Cruz* clearly established therefore bears on our inquiry, despite *Peck*'s publication after the events in this case." (App. A at 7a.) But *Cruz* does not state the rule that *Peck* attributes to it—that "officers may not fire at a suspect—even an armed suspect—absent some reason to believe that the suspect will soon access or use the weapon." *Peck*, 51 F.4th at 888 (citing *Cruz*, 765 F.3d at 1077-78). What *Cruz* actually states as the standard, and what Officer Pina would have known at the time of this incident, is as follows: "Did the police see Cruz reach for his waistband? If they did, they were entitled to shoot; if they didn't, they weren't." *Cruz*, 765 F.3d at 1079.

The officers in *Cruz* had information relayed from a confidential informant that Cruz was selling drugs, was carrying a gun in his waistband, and had vowed not to go back to prison. *Id.* at 1078. Cruz's criminal history included a felony conviction for a crime involving a firearm. *Id.* Officers stopped Cruz's vehicle for a broken taillight, then surrounded him with multiple police vehicles. *Id.* Cruz initially tried to escape the containment by backing his car into a police car. *Id.* According to officers, Cruz then opened his door and ignored police commands to get on the ground and instead reached for his waistband. *Id.* It was ultimately determined the suspect was unarmed when he was shot. *Id.*

The *Cruz* court explained that "[i]t would be unquestionably reasonable for police to shoot a suspect in Cruz's position if he reaches for a gun in his waistband,

or even if he reaches there for some other reason. Given Cruz's dangerous and erratic behavior up to that point, the police would doubtless be justified in responding to such a threatening gesture by opening fire. Conversely, if the suspect doesn't reach for his waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him." *Cruz*, 765 F.3d at 1079. The *Cruz* court determined, however, that officers were not entitled to summary judgment because it was possible a jury hearing the case would not credit their account of Cruz's actions. *Id.* at 1079-80. The court explained: "To decide this case a jury would have to answer just one simple question: Did the police see Cruz reach for his waistband? If they did, they were entitled to shoot; if they didn't, they weren't." *Id.* at 1079.

What reasonable officers would understand following *Cruz* is that deadly force is justified if they see a dangerous suspect reach for the location where they are informed he has a gun or "make some similar threatening gesture." *Id.* at 1079. The key question for Officer Pina in 2017, then, was whether Dominguez reached for where his gun would be or made a "similar threatening gesture." Petitioner testified he saw such a movement before he shot Dominguez, and the response to the special interrogatory confirms the jury believed him.

The Ninth Circuit panel in this case observed that "[t]he jury's answer to the special interrogatory did not specify how far Dominguez dropped his hands, how far he leaned forward, or whether he raised his hands again." (App. A. at 4a-5a.) But the panel did not identify any case that would put an officer on notice he needed to assess such details before concluding a suspect's movement toward where he could retrieve a firearm constituted a

threatening gesture or was otherwise enough to justify use of deadly force in response.

Moreover, as in *Kisela*, 584 U.S. at 105, Officer Pina had "mere seconds to assess the potential danger." In *Kisela*, this Court determined that, because officers were responding to a report of a woman with a knife behaving erratically and the woman did not drop the knife on command but instead came close to another woman, the officer was entitled to qualified immunity for his decision to shoot when he had "mere seconds to assess the potential danger." *Id.* The Court reasoned the situation facing the officer was "far from an obvious case in which any competent officer would have known that shooting [the suspect] to protect [the other woman] would violate the Fourth Amendment." *Id.* at 105-06.

Based on information that Dominguez possessed a firearm, coupled with the fact that Dominguez initially complied with commands to put his hands up, then dropped his hands and leaned forward, this too was "far from an obvious case in which any competent officer would have known" it was unlawful to believe he needed to shoot to protect himself. *Id.* at 105-06. And, again as in *Kisela*, the closest Ninth Circuit precedent available at the time would have led a reasonable officer to believe the use of deadly force in such circumstances did not violate the Fourth Amendment. *Id.* at 106 (citing *Blanford v. Sacramento Cty.*, 406 F.3d 1110 (9th Cir. 2005)).

The error here is amplified by consideration of similar cases from other circuits that recognize a reasonable officer may, consistent with the Constitution, react to the movement of an uncooperative suspect that would allow the suspect to arm himself. The Fifth Circuit in *Reese v.*

Anderson, 926 F.2d 494 (5th Cir. 1991), determined that an officer's use of deadly force was a reasonable reaction to a suspect's movements that were similar to what Officer Pina testified to. In *Reese*, officers responded to a reported robbery and engaged in a high-speed chase of the suspects. *Id.* at 500. When the suspect vehicle stopped, the officer drew his gun, pointed it at the driver and passenger, and ordered them to put up their hands. *Id.* The suspects initially complied, then the passenger "reached down in defiance of [the officer]'s orders. At least twice, [the suspect] reached below [the officer's] sight line. The second time, [the suspect] tipped his shoulder and reached further down." *Id.* at 500-01. The Fifth Circuit reasoned the officer "could reasonably believe that [the suspect] had retrieved a gun and was about to shoot," and so the use of deadly force was justified. *Id.* at 501.

The court went on to explain that "[t]he fact that the vehicle was 'totally surrounded' by police does not change matters; had [the suspect] in fact retrieved a gun from beneath his seat, he could have caused injury or death despite the presence of numerous police officers. Also irrelevant is the fact that [the suspect] was actually unarmed. [The officer] did not and could not have known this. The sad truth is [the suspect]'s actions alone could cause a reasonable officer to fear imminent and serious physical harm." *Id.* The *Reese* court reached that conclusion even though the only reason to believe the suspect was armed was that he looked like someone the officer had previously arrested for armed robbery. *See id.* Here, in contrast, officers had specific reasons to believe Dominguez was armed that day. Other than that difference, the situation in which Officer Pina found himself was quite like the one analyzed in *Reese*.

Similarly, in *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001), the Fourth Circuit affirmed summary judgment in favor of an officer who fired at a suspect who initially complied with commands to put his hands up, then lowered them. In that case, a citizen informed officers of a man who appeared to have a gun under his sweater. *Id.* at 128. Officers approached the suspect and instructed him to put his hands up. *Id.* The suspect initially complied, then, "without explanation to the officers," lowered his hands. *Id.* It turned out the suspect was unarmed; the bulge under his sweater was an eyeglass case, and he put his hand down to turn off the Walkman in his pocket. *Id.* Under those circumstances, the Fourth Circuit concluded "[t]he evidence establishes that immediately before Russell fired, Anderson was reaching toward what Russell believed to be a gun. Any reasonable officer in Russell's position would have imminently feared for his safety and the safety of others. … Accordingly, because Russell had sound reason to believe that Anderson was armed, Russell acted reasonably by firing on Anderson as a protective measure before directly observing a deadly weapon." *Id.* at 131.

In another similar case, the Eighth Circuit explained that "an officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun." *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir. 2001). *Thompson* involved an officer who responded to an armed robbery and approached a person matching the suspect description; the suspect initially appeared to surrender, then fled, and the officer pursued. *Id.* at 898. The suspect fell, got up, looked over his shoulder at the officer, and "moved his arms as though reaching for a weapon at waist level."

Id. at 898. The officer could not see the suspect's hands. *Id.* The officer yelled for the suspect to "stop." *Id.* When the suspect continued to move his arms, the officer fired, striking the suspect in the back. *Id.* Though no weapon was found, the Eighth Circuit affirmed summary judgment in favor of the officer.

And in *Lamont v. New Jersey*, 637 F.3d 177 (3d Cir. 2011), the court determined the use of deadly force was a reasonable reaction to a suspect who quickly moved as though he was drawing a gun from his waistband, even though there was no specific information the suspect had a gun. Officers pursued on foot a suspect who had fled police in a stolen vehicle. *Id.* at 179-80. Officers ordered the suspect to put his hands up and freeze. *Id.* at 180. The suspect's left hand was up, but his right hand appeared to be clutching an object in his waistband. *Id.* "Suddenly, the suspect pulled his right hand out of his waistband, not as if he were surrendering, but quickly and as if he were drawing a pistol." *Id.* Officers shot the suspect. *Id.* It turned out the suspect was clutching a crack pipe and had no weapon. *Id.* The Third Circuit determined the officers were "justified in opening fire" in response to that movement and concluded that "[w]aiting in such circumstances could well prove fatal." *Id.* at 183.

CONCLUSION

Qualified immunity ought to prevent variances in the application of Fourth Amendment law. And in Petitioner's view, qualified immunity ought to mean that officers who rely on the law articulated by this Court and the Courts of Appeal should be protected from liability, especially when they have mere seconds to assess the suspect's actions,

even if a jury subsequently determines a lesser use of force would have been reasonable. Qualified immunity cannot perform its intended function, however, if the Courts of Appeal do not undertake the analysis this Court has repeatedly instructed is required. The Ninth Circuit panel did not follow those instructions here, and therefore reached the wrong result—one that is directly at odds with this Court's repeated admonitions about proper application of qualified immunity. Petitioner therefore asks this Court to grant the Petition and summarily reverse the decision below.

Respectfully submitted,

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APPENDIX

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15554
D.C. No. 5:18-cv-04826-BLF

JESSICA DOMINGUEZ, INDIVIDUALLY AND JESSICA DOMINGUEZ AS GUARDIAN AD LITEM FOR J.D., MINOR # 1; et al.,

Plaintiffs-Appellees,

v.

MICHAEL PINA, POLICE OFFICER,

Defendant-Appellant,

and

CITY OF SAN JOSE; SAN JOSE POLICE DEPARTMENT,

Defendants.

No. 23-15562
D.C. No. 5:18-cv-04826-BLF

JESSICA DOMINGUEZ, INDIVIDUALLY AND JESSICA DOMINGUEZ AS GUARDIAN AD LITEM FOR J.D., MINOR # 1; et al.,

Plaintiffs-Appellants,

Appendix A

v.

MICHAEL PINA, POLICE OFFICER; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Submitted April 12, 2024*
San Francisco, California

Before: SCHROEDER, GRABER, and SUNG, Circuit Judges.

MEMORANDUM**

Defendants appeal the denial of qualified immunity to Officer Michael Pina following a jury verdict in favor of Plaintiffs on their 42 U.S.C. § 1983 excessive force claim, arising from the fatal shooting of Jacob Dominguez. Defendants also appeal the award of damages for pre-death pain and suffering and the use of a multiplier to award attorney fees to Plaintiffs. Plaintiffs cross-appeal the denial of their motion for a new trial on their Fourteenth Amendment, Bane Act, and punitive damages claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appendix A

1. Qualified Immunity: The district court correctly denied Defendants' renewed Rule 50(b) motion for judgment as a matter of law based on qualified immunity. *See Tan Lam v. City of Los Banos*, 976 F.3d 986, 997 (9th Cir. 2020) (holding that we review de novo the denial of a Rule 50(b) motion). Because the jury found in favor of Plaintiffs on their excessive force claim against Officer Pina, "we analyze the motion based on the facts established at trial, viewing the evidence in the light most favorable to [Plaintiffs], and drawing all reasonable inferences in favor of [Plaintiffs]." *Id.* (citations omitted). We give significant deference to the jury's verdict, and our "deference to the jury's view of the facts persists throughout each prong of the qualified immunity inquiry." *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 456 (9th Cir. 2013) (quoting *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 528 (1st Cir. 2009)).

At step one of the qualified immunity analysis, we ask whether the officer's conduct violated a constitutional right. *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc). The jury's determination that Officer Pina used excessive force is sufficient to deny him qualified immunity at step one. *See Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1037 (9th Cir. 2018).

We are unpersuaded by Defendants' argument that because the jury found in favor of Officer Pina on the Fourteenth Amendment, Bane Act, and punitive damages claims, it must have credited Officer Pina's account of the shooting and his reasons for using deadly force. Officer Pina's "subjective motivations . . . [have] no bearing on

whether" his conduct was objectively "'unreasonable' under the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). By contrast, the Fourteenth Amendment's "standard is a subjective standard of culpability," *Cal. Highway Patrol*, 712 F.3d at 453; the Bane Act requires "some showing of intent in addition to showing the constitutional violation," *Reese*, 888 F.3d at 1044; and "the question whether to award punitive damages is left to the jury, which may or may not make such an award," *Smith v. Wade*, 461 U.S. 30, 52, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) (citation and internal quotation marks omitted).

We are similarly unpersuaded by Defendants' contention that the jury's answer to the special interrogatory—that Dominguez dropped his hands and leaned forward before Officer Pina fired his weapon—is irreconcilable with its general verdict that Officer Pina used excessive force. There are at least two scenarios in which the answer to the special interrogatory and the general verdict do not conflict. *See United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 407 (9th Cir. 1964) ("Answers to special interrogatories do not present a square conflict with the general verdict where such answers do not exhaust all of the possible grounds on which the finding implicit in the general verdict may have been based.").

First, a reasonable jury could have found that Dominguez did not appear to be reaching for a weapon when Officer Pina shot him. The jury's answer to the special interrogatory did not specify how far Dominguez dropped his hands, how far he leaned forward, or whether

he raised his hands again. The jury heard evidence that Dominguez's head, upper shoulders, and left arm were raised above the windowsill when he was shot. The jury also heard testimony that no evidence showed Dominguez possessed a gun during the armed robbery, that officers never saw a weapon in Dominguez's hands, and that there was no weapon inside the car. It also is undisputed that Dominguez was not carrying a weapon at any point during the encounter. A reasonable jury could thus infer, notwithstanding the special interrogatory, either (a) that Dominguez did not appear to be reaching for a weapon or (b) it would not make sense for Dominguez to appear to be reaching for a weapon, because there was no weapon. *See Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014). In such circumstances, deadly force is not justified. *See Peck v. Montoya*, 51 F.4th 877, 888 (9th Cir. 2022) (when a suspect is "*not* armed—and [is] not about to become armed—he [does] not 'pose[ ] an immediate threat to the police or the public, so deadly force is not justified.'" (quoting *Cruz*, 765 F.3d at 1078-79)).

Second, a reasonable jury could have found that, considering the totality of the circumstances, it was unreasonable for Officer Pina to believe that Dominguez posed an immediate threat even though he dropped his hands and leaned forward. *See Tan Lam*, 976 F.3d at 998 (when considering "the government's interest in the amount of force used, . . . we must 'examine the totality of the circumstances' . . . [and] the most important factor is whether the person posed an immediate threat to the safety of the officer or another." (internal quotation marks omitted) (quoting *Bryan v. MacPherson*, 630 F.3d 805,

826 (9th Cir. 2010))). Dominguez complied with orders to raise his hands and ceased any further attempts to escape. *See id.* (identifying "whether [the suspect] 'is actively resisting arrest or attempting to evade arrest by flight'" as a relevant factor (quoting *Graham*, 490 U.S. at 396)). In addition, Plaintiffs' expert testified that officers on the scene failed to take crucial steps to de-escalate the situation or to use non-lethal weapons before shooting Dominguez. *See id.* at 999 (identifying "the availability of less intrusive alternatives to the force employed" as a relevant factor (quoting *Glenn v. Wash. Cnty.*, 673 F.3d 864, 872 (9th Cir. 2011) (internal quotation marks omitted))).

Moving to step two of the qualified immunity analysis, we ask whether the right that was violated "was clearly established at the time of the incident." *Castro*, 833 F.3d at 1066. Although the step-two inquiry is a matter of law reserved for the court, *Morales v. Fry*, 873 F.3d 817, 826 (9th Cir. 2017), "[w]e consider this question in light of the jury's findings," *Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017). Consequently, our analysis accepts the jury's findings that Dominguez dropped his hands and leaned forward before Officer Pina shot him and that Officer Pina used excessive force against Dominguez in doing so. Construing the evidence regarding the remaining factual disputes most favorably to Plaintiffs, *Tan Lam*, 976 F.3d at 1000, we consider the scenarios described above.

We therefore assume that Dominguez did not appear to be actively reaching for a gun, nor did he appear to be making any other furtive movement or gesture, when he

dropped his hands and leaned forward by some amount and, perhaps, raised his hands again. It was clearly established at the time of the relevant events that deadly force is not justified "absent some reason to believe that the suspect will soon access or use [a] weapon." *Peck*, 51 F.4th at 888 (citing *Cruz*, 765 F.3d at 1077-78).[1]

Accordingly, Officer Pina's use of deadly force violated Dominguez's Fourth Amendment right under clearly established law. Officer Pina, therefore, is not entitled to qualified immunity.

2. Damages: The district court did not abuse its discretion in denying Defendants' motion for a new trial and remittitur on damages for pre-death pain and suffering, because there was "some reasonable basis for the jury's verdict." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (internal quotation marks omitted). There was evidence that, after Dominguez was shot, a police dog was released into his car for close to a minute that the dog "interacted for a period of time, aggressively, with [him]," and that Dominguez was pronounced dead only after the dog was called off. The jury was "entitled to make use of their general knowledge of the effect of [injuries] upon a human body" and to infer that Dominguez did "not die or lose consciousness immediately." *S. Pac. Co. v. Heavingham*, 236 F.2d 406, 409 (9th Cir. 1956).

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1. Officer Pina shot Dominguez on September 15, 2017. *Cruz* was published in 2014. 765 F.3d at 1076. *Peck*'s analysis and identification of the law that *Cruz* clearly established therefore bears on our inquiry, despite *Peck*'s publication after the events in this case.

3. Attorney Fee Multiplier: Nor did the district court abuse its discretion by awarding a 1.2 multiplier to Plaintiffs' requested attorney fees. The court provided "an objective and reviewable basis for the fees" based on "specific evidence that supports the award." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553, 558, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010) (citation and internal quotation marks omitted). The court explained that "a modest multiplier is justified on the basis of undesirability." "Undesirability" is not a factor subsumed in the lodestar calculation. *See Morales v. City of San Rafael*, 96 F.3d 359, 364 n.9 (9th Cir. 1996). And the court relied on evidence in the record that three prior attorneys declined to represent Plaintiffs on this case before current counsel agreed to do so.

4. Motion for New Trial: The district court did not abuse its discretion in denying Plaintiffs' motion for a new trial. There is no evidence to suggest that the jury was misled or confused by the special interrogatory or that the jury did not follow the judge's instructions to disregard any potential consequences of its verdict on Officer Pina. *See Frank Briscoe Co., Inc. v. Clark Cnty.*, 857 F.2d 606, 615 (9th Cir. 1988) ("Absent some evidence to the contrary, we must assume that the jury properly discharged its duties and followed the district court's instructions."). And any such speculation by the jury did not constitute extraneous prejudicial information. *See United States v. Bussell*, 414 F.3d 1048, 1055 (9th Cir. 2005) ("We do not view the jurors' speculation as extraneous prejudicial information . . . [where] the alleged source of the speculation . . . was not extraneous." (internal quotation marks omitted)).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED MARCH 29, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 18-cv-04826-BLF

JESSICA DOMINGUEZ, *et al.*,

Plaintiffs,

v.

CITY OF SAN JOSE, *et al.*,

Defendants.

Filed March 29, 2023

ORDER DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL; GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR ATTORNEYS' FEES; DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW; AND DENYING DEFENDANTS' MOTION FOR A NEW TRIAL OR REMITTITUR

[Re: ECF Nos. 183, 179]

In the aftermath of an alleged armed robbery involving Plaintiff Jacob Dominguez, officers obtained

a warrant for his arrest and sought his apprehension upon locating Mr. Dominguez on September 15, 2017. While he was driving near Penitencia Creek Park in San Jose, California, three police vehicles pulled up and blocked Mr. Dominguez's vehicle's movement using a vehicle containment technique. Officers emerged from the vehicles, took out firearms, and ordered Mr. Dominguez to raise his hands. The confrontation, which lasted less than one minute, ended with Officer Michael Pina shooting and killing Mr. Dominguez as Mr. Dominguez sat in the driver's seat of his vehicle. This suit, brought against Officer Pina, the City of San Jose, and the San Jose Police Department by Mr. Dominguez's wife (individually and as guardian ad litem for Mr. Dominguez and their three children) and the estate of Jacob Dominguez, alleges that Officer Pina violated Mr. Dominguez's and the family's constitutional and statutory rights when he shot and killed Mr. Dominguez.

Now before the Court are the parties' post-trial motions. Plaintiffs filed a motion for a new trial and a motion for attorneys' fees. *See* ECF Nos. 183 ("PPTM"), 186 ("PPTM Reply"). Defendants oppose the motion. ECF No. 185 ("PPTM Opp."). Defendants filed a motion for judgment as a matter of law and a motion for a new trial or remittitur. *See* ECF Nos. 179 ("DPTM"), 184 ("DPTM Reply"). Plaintiffs oppose the motion. *See* ECF No. 181 ("DPTM Opp."). The Court held a hearing on the motions on February 23, 2023. The Court DENIES Plaintiffs' motion for a new trial; GRANTS IN PART AND DENIES IN PART Plaintiffs' motion for attorneys' fees; DENIES Defendants' motion for judgment as a matter of law; and DENIES Defendants' motion for a new trial or remittitur.

Appendix B

I. BACKGROUND

The facts are well known to the parties and the Court need not recite them in detail here. *See* ECF No. 70 (Order Re Summary Judgment). On August 19, 2022, trial began; it lasted for six days. *See* ECF Nos. 154, 155, 156, 163, 164, 166. On August 31, 2022, the jury returned a verdict after deliberating for three days. *See* ECF Nos. 169, 171, 174 (trial logs); 188 (verdict form). The jury also returned a verdict on the special interrogatory. *See* ECF No. 189. The jury found for Plaintiff the estate of Jacob Dominguez on the Fourth Amendment claim, but without punitive damages. *See* ECF No. 188. And the jury found for Defendants on the Fourteenth Amendment and Bane Act claims. *Id.* As for the special interrogatory, the jury answered "Yes" to the following question: "Did decedent Jacob Dominguez drop his hands and lean forward before Michael Pina fired his weapon?" *See* ECF No. 189.

The Court entered Judgment on September 16, 2022. ECF No. 178. The parties then filed the instant motions. *See* PPTM; DPTM. The Court held a hearing on the motions on February 23, 2023. *See* ECF No. 191.

II. PLAINTIFF'S MOTION FOR A NEW TRIAL

A. Legal Standard

Under Federal Rule of Civil Procedure 59, a court "may, on motion, grant a new trial on all or some of the issues." Fed. R. Civ. P. 59(a). A court may grant a new trial "if the verdict is contrary to the clear weight of the

evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)). A judge should only grant a new trial if she "is left with the definite and firm conviction that a mistake has been committed." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371-72 (9th Cir. 1987) (quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2806, at 48-49 (1973)). The court is not required to view the trial evidence in the light most favorable to the verdict when it considers a Rule 59(a) motion. *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014). Instead, "the district court can weigh the evidence and assess the credibility of the witnesses." *Id.* (citing *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010)). "Ultimately, the district court can grant a new trial under Rule 59 on any ground necessary to prevent a miscarriage of justice." *Id.* (citing *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990)).

B. Analysis

Plaintiffs request a new trial on their Fourteenth Amendment, Bane Act, and punitive damages claims. *See* PPTM at 5-12. Plaintiffs assert that the Court should grant a new trial because the jury was confused by the special interrogatory and the jury considered extrinsic evidence in reaching its decision. *See id.*

The verdict form given to the jury had the following as the final question:

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TO ASSIST THE COURT

Please answer Question 12 only if you answered "Yes" to Question 1, above.

QUESTION 12: Did decedent Jacob Dominguez drop his hands and lean forward before Michael Pina fired his weapon?

_____ YES _____ NO

See ECF No. 188. Over the course of its deliberations, the jury submitted several questions to the Court, three of which are relevant here.

Note No. 5:

Question: The jury asks the Court for the purpose of Question 12 on the verdict form and what it means to "assist the court," as well as the consequences of our answer to this question.

Answer: There are certain issues that the Court decides and other issues that the jury decides. In deliberating on your verdict you should consider each question separately according to the instructions on the verdict form and only address Question 12 after you have completed the other questions. You must consider the totality of the evidence in rendering your verdict.

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> Note No. 6:
>
> Question: Does answer "Yes" to Question 12 trigger legal action against Officer Pina?
>
> Answer: I am deleting Question 12 from your verdict form. Please do not give that Question or any possible consequences of it further discussion or deliberation. If it is necessary for you to answer Question 12 after you complete your deliberations on Questions 1-11, I will provide further instructions.
>
> Note No. 7:
>
> Question: Will a "yes" answer to number #1 on the jury verdict form result in further legal actions against M. Pina? Assuming no punitive damages.
>
> Answer: That is not an issue for the jury to consider. Please only consider the evidence in combination with the jury instructions.

See Declaration of John Kevin Crowley in Support of Plaintiffs' Motion for a New Trial, ECF No. 183-3 ("Crowley NT Decl.") ¶¶ 2-4, Exs. 1-3.

Plaintiffs argue that the notes provided by the jury indicate that the special interrogatory improperly confused and misled the jury. PPTM at 2, 5-9. Plaintiffs further argue that the notes indicate that the special

interrogatory caused the jury to improperly consider extrinsic evidence—the consequences of their verdict to Officer Pina. *Id.* at 2, 9-12. And, Plaintiffs argue, the fact that the jury was confused and considered extrinsic evidence is supported not only by the notes, but by the fact that the jury found for Plaintiff on the Fourth Amendment claim but found for Defendants as to the Fourteenth Amendment, Bane Act, and punitive damages claims. *Id.* at 2, 8.

Federal Rule of Civil Procedure 49 allows the Court to require a jury to return a special verdict "in the form of a special written finding on each issue of fact." Fed. R. Civ. P. 49(a)(1). A Court may do so by "submitting written questions susceptible of a categorical or other brief answer." Fed. R. Civ. P. 49(a)(1)(A). "The decision '[w]hether to submit special interrogatories to the jury is a matter committed to the discretion of the district court.'" *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999) (quoting *Acosta v. City & Cnty. of San Francisco*, 83 F.3d 1143, 1149 (9th Cir. 1996)).

The Court disagrees with Plaintiffs that the special interrogatory requires a new trial as to the Fourteenth Amendment, Bane Act, and punitive damages claims. The use of the special interrogatory was proper. *See* Fed. R. Civ. P. 49(a)(1). And neither the notes from the jury nor the substance of the verdict require the Court to find otherwise. In answering the jury's questions, the Court informed the jury that it should not consider the interrogatory before answering the other questions, and it went so far as to remove the special interrogatory

after Note No. 6. *See* Crowley NT Decl., Exs. 1-2. The Court also correctly informed the jury that it should not consider the consequences to Officer Pina in reaching its verdict. *See id.*, Exs. 2-3. "[J]urors are presumed to follow the instructions given." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 545 n.12 (9th Cir. 1991) (citing *United States v. Escalante*, 637 F.2d 1197, 1202 (9th Cir. 1980)). The Court finds no reason to determine otherwise here. Therefore, the notes from the jury do not indicate that the special interrogatory improperly confused the jury.

And as to the substance of the verdict itself, the Court determines that the verdict is internally consistent and consistent with the evidence. The Fourteenth Amendment claim, Bane Act claim, and punitive damages claim all required a finding above and beyond what the Fourth Amendment claim required. The Fourth Amendment claim required excessive force. *See* ECF No. 188. The punitive damages claim associated with the Fourth Amendment claim required that the violation of Jacob Dominguez's Fourth Amendment right have been committed with "malice, oppression, or reckless disregard of his Constitutional right." *See id.* The Ninth Circuit has recognized that a Fourteenth Amendment claim "demands more" than a Fourth Amendment claim. *Ochoa v. City of Mesa*, 26 F.4th 1050, 1056-57 (9th Cir. 2022) (holding Fourteenth Amendment plaintiff must show "not just that the officers' actions were objectively unreasonable and thus violated [decedent's] Fourth Amendment rights, but that the officers' actions 'shock[ed] the conscience' and thus violated the plaintiffs' Fourteenth Amendment

rights"). And the Ninth Circuit has recognized that a Fourth Amendment violation is not a per se violation of the Bane Act. *See Sandoval v. Cnty. of Sonoma*, 912 F.3d 509, 519-20 (9th Cir. 2018). The verdict was thus not internally inconsistent or incongruous, as asserted by Plaintiffs. The verdict is therefore not a basis for the Court to determine that the jury was improperly influenced by the special interrogatory.

Plaintiffs also argue that the jury improperly considered extrinsic information or evidence. PPTM at 9-12. But Plaintiffs cannot point to any extrinsic evidence that the jury considered in this case. The special interrogatory was not extrinsic evidence. And the fact that the jury discussed and thought about the consequences of its verdict as to Officer Pina is not the same as the jury considering outside evidence. Further, as stated above, the jurors were presumed to have followed the Court's instruction not to consider the consequences to Officer Pina. *See Alaska Airlines*, 948 F.2d at 545 n.12. Because the jury did not obtain or consider any extrinsic evidence, Plaintiffs are not entitled to a new trial on this basis.

The Court DENIES Plaintiffs' motion for a new trial.

III. PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

A. Legal Standard

Pursuant to 42 U.S.C. § 1988, "in federal civil rights actions the court, in its discretion, may allow

the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Barnard v. Theobald*, 721 F.3d 1069, 1076-77 (9th Cir. 2013) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 426 (1983)). "Congress passed § 1988 'to attract competent counsel to prosecute civil rights cases.'" *Id.* (quoting *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008)). "Consequently, 'a court's discretion to deny fees under § 1988 is very narrow and . . . fee awards should be the rule rather than the exception.'" *Id.* (quoting *Mendez*, 540 F.3d at 1126). At the same time, "the district court must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases and avoiding a windfall to counsel." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) (internal citations omitted).

"District courts must calculate awards for attorneys' fees using the 'lodestar' method, and the amount of that fee must be determined on the facts of each case." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (quoting *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001)); *see also Hensley*, 461 U.S. at 429. "The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 546 (9th Cir. 2016) (quoting *Cunningham v. Cnty. of Los Angeles*, 879 F.2d 481, 488 (9th Cir. 1988)). "[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly

rates." *Hensley*, 461 U.S. at 437. Once calculated, the lodestar amount, which is presumptively reasonable, may be further adjusted based on other factors not already subsumed in the initial lodestar calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363-64, n.8-9 (9th Cir. 1996) (identifying factors) (citing *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)).

B. Analysis

Plaintiffs bring a motion for attorneys' fees and costs. *See* PPTM at 12-18. They provide supporting documentation. *See* Declaration of John Kevin Crowley in Support of Motion for Attorney Fees, ECF No. 183-1 ("Crowley Fee Decl."); Declaration of Nevin C. Brownfield in Support of Plaintiffs' Motion for Attorneys Fees and Costs, ECF No. 183-2 ("Brownfield Fee Decl."); Supplemental Declaration of Nevin C. Brownfield in Support of Plaintiffs' Motion for Attorneys' Fees and Costs, ECF No. 192 ("Brownfield Supp. Fee Decl.").

1. Prevailing Party

Plaintiffs assert that they are entitled to attorneys' fees because they are the prevailing party, as they prevailed on the Fourth Amendment excessive force claim. PPTM at 12-14.

When counsel seeks fees for both successful and unsuccessful claims, the Ninth Circuit instructs district courts to follow a two-part analysis. "First, the court asks whether the claims upon which the plaintiff failed to

prevail were related to the plaintiff's successful claims." *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995) (quoting *Thorne v. City of El Segundo*, 802 F. 2d 1131, 1141 (9th Cir. 1986). "Echoing the Supreme Court's description of related-claim cases, [the Ninth Circuit has] said that related claims involve a common core of facts *or* are based on related legal theories." *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003) (emphasis in original).

Where the Court finds that the claims are unrelated, "the final fee award may not include time expended on the unsuccessful claims." *Schwarz*, 73 F.3d at 901 (quoting *Thorne*, 802 F.2d at 1141). If, on the other hand, "the unsuccessful and successful claims are related . . . the court must apply the second part of the analysis, in which the court evaluates the 'significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.' If the plaintiff obtained 'excellent results,' full compensation may be appropriate, but if only 'partial or limited success' was obtained, full compensation may be excessive. Such decisions are within the district court's discretion." *Id.* (quoting *Thorne*, 802 F.2d at 1141).

The Fourth Amendment claim was related to the Fourteenth Amendment and Bane Act claims. All claims involved a common core of facts—the shooting of Jacob Dominguez by Officer Pina. No party argues otherwise. Further, the Court determines that Plaintiffs obtained an "excellent result," having prevailed on the Fourth Amendment claim. Again, no party argues otherwise. Plaintiffs are entitled to full compensation.

Defendants do argue that Plaintiffs are not the "prevailing party" for purposes of attorneys' fees because Defendants are entitled to judgment as a matter of law. PPTM Opp. at 9. But, for the reasons described below, the Court will deny Defendants' motion for judgment as a matter of law. Plaintiffs are therefore the prevailing party for purposes of Section 1988.

2. Amount of Fees

a. Rates

Under § 1988, fees "'are to be calculated according to the prevailing market rates in the relevant community,' taking into consideration 'the experience, skill, and reputation of the attorney.'" *Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005) (first quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984); then quoting *Schwarz*, 73 F.3d at 906). The fee applicant must "produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community." *Dang*, 422 F.3d at 814. "[T]he relevant community is the forum in which the district court sits," here the Northern District of California. *Camacho*, 523 F.3d at 979.

Plaintiffs' counsel request the following rates: $725/hour for Mr. Crowley, who has over 40 years of legal experience and normally charges $650/hour, *see* Crowley Fee Decl. ¶¶ 4, 13; $500/hour for Mr. Brownfield, who has about 20 years of legal experience and normally charges $350-500/hour, *see* Brownfield Decl. ¶¶ 4, 6-7; and $190/

hour for Ms. Wagner, a paralegal who has over 25 years of experience, *see* Crowley Fee Decl. ¶ 11.

Plaintiffs submit a Declaration from Jaime A. Leaños, an experienced civil rights attorney licensed to practice in the Northern District of California, who states that he believes a rate of $725/hour is reasonable for Mr. Crowley. *See* Crowley Fee Decl., Ex. 3 ("Leaños Decl.") ¶¶ 24-25.

Defendants dispute only the hourly rate for Mr. Crowley. *See* PPTM Opp. at 9. They assert that the Court should pay his customary rate of $650/hour, not the higher requested rate of $725/hour. *Id.* The Court agrees with Defendants, and it will grant Mr. Crowley his customary rate of $650/hour.

The Court notes that the rates are reasonable based on the prevailing rates in the Northern District. *See*, *e.g.*, *Human Rights Def. Ctr. v. Cnty. of Napa*, 2021 WL 1176640, at *11 (N.D. Cal. Mar. 28, 2021) (approving hourly rates of $950 for an attorney with about 40 years of experience; $625 for an attorney with about 10 years of experience; $650 for an attorney with about 20 years of experience; and $260 and $350 for paralegals with 10 and 30 years of experience, respectively); *Californians for Disability Rights v. California Dep't of Transp.*, No. C 06-05125 SBA (MEJ), 2010 WL 8746910, at *13 (N.D. Cal. Dec. 13, 2010) (finding $740, $640, $660, and $570 to be reasonable hourly rates for attorneys at Disability Rights Advocates with 26, 23, 19, and 10 years of experience, respectively); *Dixon v. City of Oakland*, No. C-12-05207 DMR, 2014 WL 6951260, at *7, *9 (N.D. Cal. Dec. 8, 2014)

(approving hourly rates in an individual civil rights case of $725 and $695 for partners; $325, $350, and $400 for associates with 2, 3, and 5 years of experience; and $200 for paralegals); *A.D. v. State of California Highway Patrol*, No. C 07-5483 SI, 2013 WL 6199577, at *5-6 (N.D. Cal. Nov. 27, 2013) (approving hourly rates in a wrongful death case of $725 for attorneys with 34 to 40 years of experience and $425 for attorney with 9 years of experience); *Davis v. Prison Health Servs.*, No. C 09-2629 SI, 2012 WL 4462520, at *9-10 (N.D. Cal. Sept. 25, 2012) (approving hourly rates of $675-750 for attorneys with close to 30 years of experience and $180 for a paralegal with 25 years of experience); *Aguilar v. Zep Inc.*, No. 13-cv-00563-WHO, 2014 WL 4063144, at *4 (N.D. Cal. Aug. 15, 2014) (approving hourly rates in an employment case of $700 for a partner with 31 years of experience and $650 for an attorney with 22 years of experience).

The Court approves rates of $650/hour for Mr. Crowley; $500/hour for Mr. Brownfield; and $190/hour for Ms. Wagner.

b. Hours

The Court next considers the hours expended. The Court cannot "uncritically" accept the Plaintiffs' representations of hours expended; rather, the Court must assess their reasonableness. *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984). In making this determination, the Court can reduce hours when documentation is inadequate, or when the requested hours are redundant, excessive, or unnecessary. *Hensley*, 461 U.S. at 433-34.

Appendix B

Plaintiffs seek fees for 618 hours for Mr. Crowley; 86.6 hours for Mr. Brownfield, and 85.5 hours for Ms. Wagner. *See* Crowley Fee Decl. ¶¶ 11, 14, Exs. 1-2; Brownfield Fee Decl. ¶ 8. Plaintiffs submit detailed time sheets for Mr. Crowley and Ms. Wagner. *See* Crowley Fee Decl., Exs. 1-2. Defendants do not contest that the hours spent by Mr. Crowley and Ms. Wagner are reasonable. *See* PPTM Opp. The Court has reviewed the time sheets and finds that the hours spent by Mr. Crowley and Ms. Wagner are reasonable.

Defendants do contest the hours for Mr. Brownfield. PPTM Opp. at 9-10. The original declaration submitted by Mr. Brownfield stated that he spent 86.6 hours on the case, "which consisted of attendance at each day of trial, concurrent daily trial preparation, review of daily trial transcripts and preparation of written memoranda." Brownfield Fee Decl. ¶ 8. Defendants asserted that Mr. Brownfield did not explain how much time he spent on which tasks or why those tasks were necessary. PPTM Opp. at 9-10. The Court allowed Mr. Brownfield to submit a supplemental declaration, which he did. *See* Brownfield Supp. Fee Decl. In the supplemental declaration, Mr. Brownfield states that he spent 44.5 hours attending "proceedings in Court for pre-trial conferences, jury selection, trial (including analysis and preparation of summations of daily trial transcripts, witness examination outlines and strategizing with co-counsel) and post-trial jury deliberations." *Id.* ¶ 2(A). He spent the remaining 42.1 hours preparing, responding to, or editing various written motions and memoranda, including: "motions *in limine;* motion to amend the complaint; written discovery to defendant regarding net worth; jury instructions and

verdict forms; pre-trial statement; administrative motion for introduction of demonstrative evidence; stipulations re: jurors; response to defendants' request for court order; motion for new trial; [and] motion for attorneys' fees." *Id.* ¶ 2(B). In Reply, Defendants again assert that Mr. Brownfield has failed to justify that his work was reasonable. ECF No. 193 ("D. Fee Reply") at 1-2. Defendants object to the fact that Mr. Brownfield does not identify how much time he spent on specific activities, such as how long each task took, nor does he identify when he performed each task. *Id.* at 2. Defendants argue that they, and the Court, cannot determine whether the hours spent by Mr. Brownfield were reasonable. *Id.*

The Court finds that the 44.5 hours spent by Mr. Brownfield in Court were reasonable. It was reasonable for Plaintiffs to have two attorneys at trial, especially for a case of this magnitude. *See Custom Homes by Via LLC v. Bank of Oklahoma*, No. CV-12-01017-PHX-FJM, 2014 WL 2778822, at *2 (D. Ariz. June 19, 2014) (rejecting defendant's argument that the fees from second counsel's "attendance at trial were duplicative and excessive because he did not speak or enter an appearance" as "[i]t is not unreasonable to have a second counsel at trial"). The fact that Defendants had two attorneys at trial further supports that Mr. Brownfield's hours at trial were reasonable. *See Wallis v. BNSF Ry. Co.*, No. C13-40 TSZ, 2014 WL 1648472, at *4 (W.D. Wash. Apr. 23, 2014) ("The Court finds the presence of two attorneys to be reasonably necessary, given the nature and complexity of the case, and, as Plaintiff notes, Defendant was represented by two attorneys throughout the trial as well."). The 44.5 hours spent by Mr. Brownfield in Court were thus reasonable.

But the Court finds that a reduction of Mr. Brownfield's hours spent working on motions and other written documents is warranted. As stated above, the Court can reduce hours where the documentation is inadequate. *Hensley*, 461 U.S. at 433-34. Contemporaneous billing records are preferred, but not required. *Lexington Luminance LLC v. Feit Elec. Co.*, No. CV 18-10513-PSG (KSx), 2020 U.S. Dist. LEXIS 246266, at *17 (C.D. Cal. Oct. 20, 2020). But "task descriptions offered in support of a motion for attorneys fees can be so general and/or repetitive . . . that the Court cannot properly discern the nature of the work performed, *e.g.*, drafting, research, revising, editing, cite-checking, etc., or the reasonableness of the time expended on those tasks." *Id.* at *17-18. In a case pointed to by Defendants, a district court determined time entries were too general where the attorney submitted one summary entry of 3.5 hours for an opening brief in support of a fee motion and one entry of 2.2 hours for the reply brief. *Id.* at *16-18. Here, the entries are even more generalized, as Mr. Brownfield submits one summary entry for all motion practice in the case. In looking at the motions identified by Mr. Brownfield and the time records of Mr. Crowley, the Court determines that a 30% reduction in hours is appropriate. The Court will award 29.5 hours to Mr. Brownfield for his time spent on motions and other written memoranda, for a total of 74 hours for Mr. Brownfield.

The Court therefore approves 618 hours for Mr. Crowley; 74 hours for Mr. Brownfield, and 85.5 hours for Ms. Wagner.

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c. Lodestar Calculation

Based on the foregoing, the total lodestar calculation is summarized in the following table:

	Hourly Rate	Hours Requested	Hours Excluded	Hours Awarded	Total Tentatively Awarded
Mr. Crowley	$650	618	0	618	$401,700.00
Mr. Brownfield	$500	86.6	12.6	74	$37,000.00
Ms. Wagner	$190	85.5	0	85.5	$16,245.00
				Total	$454,945.00

3. Multiplier

Plaintiffs seek a multiplier, but they do not specify a requested amount. PPTM at 17-18. The lodestar amount, while presumptively reasonable, may be adjusted based on other factors not already subsumed in the initial lodestar calculation. *Morales*, 96 F.3d at 363-64, n.8-9 (citing *Kerr*, 526 F.2d at 70). "The twelve *Kerr* factors bearing on the reasonableness are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Id.* at 363 n.8 (quoting *Kerr*, 526 F.2d at 70). "Under the lodestar approach, many of the *Kerr* factors have been subsumed as a matter of law." *Id.* (citing *Cunningham*, 879 F.2d at 487).

Mr. Crowley states in his declaration that the case was difficult and time-consuming. Crowley Fee Decl. ¶¶ 7-8. Plaintiffs also argue that the "undesirability" of the case was high, as evidenced by the fact that three other attorneys consulted by Plaintiffs before Mr. Crowley refused to take the case. PPTM at 18; Crowley Fee Decl. ¶ 6.

Defendants argue that a multiplier is improper. Fee Reply at 2-3. They argue that a multiplier is available only in "exceptional circumstances," and the fact that Plaintiffs' counsel took the case on contingency does not qualify as an exceptional circumstance. *Id.* at 2. They also assert that the fact that the case was time-consuming does not justify a multiplier, as that fact is reflected in the hours spent on the case, which in turn is reflected in the lodestar. *Id.* at 3.

The Court notes that the case was complex, but the time-consuming and difficult nature of the case has been subsumed into the lodestar calculation. But the Court finds that a modest multiplier is justified on the basis of undesirability, as Mr. Crowley was the fourth attorney consulted by Plaintiffs to take on this case. The Court finds that a multiplier of 1.2 is appropriate on balance, as reflected in the totals below:

Attorneys	**Total Tentatively Awarded**	**Multiplier**	**Total Awarded**
Mr. Crowley	$401,700.00	1.2	$482,040.00
Mr. Brownfield	$37,000.00	1.2	$44,400.00
Ms. Wagner	$16,245.00	1.2	$19,494.00
		Total	$545,924.00

4. Costs

Plaintiffs also request costs. *See* Crowley Fee Decl., Ex. 4. Section 1988 allows counsel to "recover as part of the award of attorney's fees those out-of-pocket expenses

that 'would normally be charged to a fee paying client.'" *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1216 n.7 (9th Cir. 1986), *reh'g denied and opinion amended*, 808 F.2d 1373 (9th Cir. 1987)).

Defendants object to many of the specific line item costs on a variety of bases. *See* PPTM Opp. at 10-11; Declaration of Maren J. Clouse in Opposition to Plaintiffs' Motion for Attorneys' Fees, ECF No. 185-1 ("Clouse Fee Decl."). Defendants object to specific costs for the following reasons: (1) certain costs are non-recoverable expert fees; (2) certain costs are duplicative; and (3) certain costs are unnecessary. PPTM Opp. at 10-11.

a. Undisputed

First, several costs are unopposed by Defendants. These costs, identified below, are GRANTED.

Item	**Cost**
County process, SJPD	$80.00
Filing Fee for US District Court Complaint	$400.00
County Process, service on City of San Jose	$50.00
County Process, service on SJPD	$30.00
Atkinson & Baker, deposition of Officer Lopez	$776.75
Salois & Associates, Exhibits A-E	$337.00
Atkinson & Baker, deposition of Defendants' experts	$1651.38
Check to Daniel L. Sudakin, M.D., Defendants' expert, deposition	$650.00

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Check to John Black, Defendants' expert, deposition	$480.00
Salois & Associates, deposition transcript of Scott DeFoe	$345.00
Salois & Associates, deposition of David Balash	$234.60
Postage - delivered to District Court on 4/1/2022	$8.02
Atkinson & Baker, deposition of Rocky Edwards	$801.90
County process, chambers copies	$133.00
County process, chambers copies	$84.00
Talty Court Reporters, transcriptions of police officer interviews	$1351.00
Stamps.com, hard copies of interview transcripts to opposing counsel	$7.54
Court reporter for trial	$3000.00
County process, chambers copies	$86.80
County process, chambers copies	$55.00
Copyman, copies of exhibit binders	$4231.10
Talty Court Reports, transcripts of BWC of officers	$2166.00
Court reporter for trial	$7082.80
County process, served supoena on Officer Lopez and witness fee	$317.50
County process, served supoena on Officer Ferguson	$405.00
Total Granted	**$24,764.39**

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b. Expert Fees

Defendants object to certain identified costs as being unrecoverable expert fees. PPTM Opp. at 10. Plaintiffs concede that expert fees are not recoverable. PPTM Reply at 9. And the Court agrees. *See* 42 U.S.C. § 1988(c).

But Plaintiffs dispute that certain costs identified by Defendants as expert fees are actually expert fees. PPTM Reply at 9. Specifically, Plaintiffs assert that costs related to the creation of the replica Kia car are properly recoverable as litigation costs. *Id.* at 9. Plaintiffs argue that, while an expert witness did use the mockup vehicle during testimony, it could have been introduced as a demonstrative exhibit and was not tied to the expert witness. *Id.* The Court agrees with Plaintiffs that costs related to the replica Kia were not "expert fees." The Court will grant these costs. The Court will also grant the two costs from Dietz Associates, as they are related to fact discovery and are not expert fees. The Court's ruling on the costs objected to as expert fees are as follows:

Item	**Cost**	**Ruling**
UPS letter and check to expert Defoe	$43.66	DENY
Next delivery sent to expert	$43.66	DENY
Check to expert Allman	$1,875.00	DENY
UPS to expert David Balash	$37.47	DENY
Allman & Petersen Economics	$750.00	DENY
On-scene consulting expert	$2,625.00	DENY

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Salois & Associates, deposition of Phil Allman	$205.00	DENY
On-scene consulting	$8,375.00	DENY
Hyatt hotel for expert David Balash	$137.14	DENY
Flight for expert David Balash	$639.40	DENY
Dietz Associates, Inc., DMW VIN Registration search	$150.00	GRANT
Dietz Associates, intent to contact registered owner of vehicle	$222.76	GRANT
Salois & Associates, deposition of Alan Barbour	$205	DENY
Check to Michael Skrzypek, expert	$5,000.00	DENY
Check to David Balash on 5/21/2021	$3,500.00	DENY
Sent expert fee to David Balash on 5/21/2021	$55.29	DENY
Allman & Petersen Economics	$937.50	DENY
Check to Steve Marshall	$2,200.00	GRANT
IMS Consulting & Expert Services	$15,000.00	DENY
A1 Auto Wreckers	$1,476.63	GRANT
IMS Consulting & Expert Services	$10,372.75	DENY
UPS, delivery of deposition transcripts to Barbour	$43.86	DENY

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Round trip for David Balash	$1,547.20	DENY
Signia Hotel for expert David Balash	$650.73	DENY
Signia Hotel for expert Philip Allman	$332.82	DENY
Signia Hotel for expert Alan Barbour	$487.11	DENY
Steven Marshall re: Car for Trial	$5,065.68	GRANT
Signia Hotel, parking for Alan Barbour	$26.00	DENY
Phillip Allman, expert trial prep and testimony	$2,687.50	DENY
Emporium Logistics Co.	$3,375.00	DENY
Michael Skrzypek	$3,932.95	DENY
Alan Barbour, expert services for trial	$2,787.00	DENY
On-scene consulting, DeFoe	$8,270.11	DENY
David Balash, expert, trial fees	$8,594.00	DENY
Total Granted	$9,115.07	

c. Duplicative Costs

Defendants identify two duplicative costs in Plaintiffs' submission: (1) $1,651.38 to Atkinson & Baker for deposition of Defendants' experts and (2) $650 for a check to Defendants' expert Daniel Sudakin for deposition. PPTM

Opp. at 10. Each is listed twice in the submission. The Court agrees that these costs are duplicative. The Court will DENY the duplicative costs. The Court included each cost only once in the above table for Undisputed Costs.

d. Unnecessary Costs

Finally, Defendants object to several costs as unnecessary. PPTM Opp. at 10-11. Plaintiffs counter that these costs could have been charged to a client and that Defendants "attempt[ ] to interject opinion as to the propriety of these costs." PPTM Reply at 9.

First, Defendants argue that two costs related to Sheila Franco, Mr. Dominguez's girlfriend at the time of his death, were unnecessary because information about Ms. Franco would not have been helpful to Plaintiffs in this case. PPTM Opp. at 10-11. These costs were (1) $874.85 on criminal court documents and (2) $389.80 to a detective service. *Id.* Second, Defendants argue that a cost of $1,587.48 for a video of the family was unnecessary, as they objected to the video as hearsay and the Court did not allow it. *Id.* at 11. Third, Defendants object to a $50 cost for service on Melissa A. Dupee, arguing that her name was not identified in any disclosures or witness list, and there is no indication of what she was served with or why. *Id.* Fourth, Defendants object to costs totaling $2,461.62 for hotel and flights for a witness named Albert Chavez because Plaintiffs never called the witness. *Id.* Fifth, Defendants object to a $1,100 cost for an investigator tasked to interview jurors after the verdict, arguing that they were unnecessary because the Court indicated it

would not consider juror statements in post-trial motions. *Id.* And finally, Defendants object to a $75 cost for personal delivery of a demand letter to the San Jose City Attorney, arguing that personal delivery was not necessary. *Id.* The Court rules as follows on these costs:

Item	**Cost**	**Ruling**
DetectiveInc, info on Sheila Franco	$874.85	GRANT
Detective Inc	$369.80	GRANT
Check to Gina Favorito (video of family)	$1,587.48	DENY
County process, service on Melissa A. Dupee	$50.00	GRANT, Ms. Dupee is a county lab tech
Signia Hotel for witness Albert Chavez Jr.	$742.21	DENY
Flight for witness Albert Chavez	$977.20	DENY
Signia Hotel for expert Albert Chavez	$742.21	DENY
Dietz Associates, interview of jurors	$1,100.00	DENY
County process, personal delivery of demand letter to City Atty	$75.00	GRANT
Total Granted	$1,369.65	

e. Conclusion

The total costs granted by the Court are as follows:

Table	**Amount**
Table 1	$24,764.39
Table 2	$9,115.07
Table 3	$1,369.65
Total	$35,249.11

5. Conclusion

The Court GRANTS a total of $545,924.00 in attorneys' fees and $35,249.11 in costs to Plaintiffs.

IV. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Legal Standard

A district court may grant a motion for judgment as a matter of law pursuant to Rule 50(a) or (b) "when the evidence presented at trial permits only one reasonable conclusion," *i.e.*, "if no reasonable juror could find in the non-moving party's favor." *Torres v. City of Los Angeles*, 548 F.3d 1197, 1205 (9th Cir. 2008) (first quoting *Santos v. Gates*, 287 F.3d 846, 851 (9th Cir. 2002); then quoting *El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1072 (9th Cir. 2005)); *see also* Fed. R. Civ. P. 50(a)-(b). "The evidence must be viewed

in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party. If conflicting inferences may be drawn from the facts, the case must go to the jury." *Torres*, 548 F.3d at 1205-06 (quoting *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000)). "A jury's inability to reach a verdict does not necessarily preclude a judgment as a matter of law." *Headwaters Forest Def. v. Cnty. of Humboldt*, 240 F.3d 1185, 1197 (9th Cir. 2000), *vacated on other grounds*, 534 U.S. 801 (2001). The same standard applies to a motion for judgment as a matter of law made after a mistrial because of jury deadlock. *See id.* at 1197 n.4.

B. Analysis

Defendants argue for judgment as a matter of law on the basis that Officer Pina is entitled to qualified immunity. *See* DPTM at 8-18. "In evaluating a grant of qualified immunity, a court considers whether (1) the state actor's conduct violated a constitutional right and (2) the right was clearly established at the time of the alleged misconduct." *Gordon v. Cnty. of Orange*, 6 F.4th 961, 967-68 (9th Cir. 2021). Defendants contest both prongs. DPTM at 8-18. The Court will address each in turn.

But first, because some of Defendants' argument in support of its motion is based on the answer to the special interrogatory, the Court will first address Plaintiffs' argument that use of the special interrogatory was improper. DPTM Opp. at 21-23. Plaintiffs argue that the special interrogatory should be "disregarded in the Court's qualified immunity analysis." *Id.* at 23. In

opposition to Defendants' post-trial motion, Plaintiffs' reiterate the arguments made in their motion for a new trial that the special interrogatory confused the jury and caused the jury to improperly consider the consequences of its verdict to Officer Pina. *Id.* at 22. For the reasons discussed above, the Court declines to disregard the special interrogatory on that basis. Plaintiffs also argue that the special interrogatory was "incomplete and indefinite," as it did not track the law on the use of force, and the answer to the special interrogatory is not sufficient to grant qualified immunity. *Id.* at 21-23. But these are not reasons to disregard the special interrogatory; rather, they are arguments as to why the Court should not grant qualified immunity regardless of the jury's answer to the special interrogatory. The Court determines that the special interrogatory was not improper. But the Court will consider Plaintiffs' arguments about the limitations of the special interrogatory in determining whether to grant judgment as a matter of law.

1. Step One

Defendants argue that the Court should determine that Officer Pina did not use excessive force as a matter of law. DTPM at 9-14. Analysis of the reasonableness of force under the Fourth Amendment involves a totality of the circumstances inquiry. Courts first consider the governmental interests at stake, such as "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Torres v. City of*

Madera, 648 F.3d 1119, 1124 (9th Cir. 2011) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). On the other side, courts also consider the plaintiff's interests by looking to the "type and amount of force inflicted" and "the severity of injuries" experienced by the plaintiff. *Felarca v. Birgeneau*, 891 F.3d 809, 817 (9th Cir. 2018). "[B]ecause questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury." *Tan Lam v. City of Los Banos*, 976 F.3d 986, 997 (9th Cir. 2020) (quoting *Barnard v. Theobald*, 721 F.3d 1069, 1076 (9th Cir. 2013)).

Here, the jury determined, based on the evidence presented at trial, that Officer Pina used excessive force when he shot Jacob Dominguez. ECF No. 188. To grant judgment as a matter of law, the Court would need to determine that no reasonable juror could find that Officer Pina used excessive force. And that is not the case. The jury instructions on excessive force stated that the jury could "consider all of the circumstances known to the officer on the scene," which included:

> (1) the nature of the crime or other circumstances known to the officer at the time force was applied;
>
> (2) whether Jacob Dominguez posed an immediate threat to the safety of the officers or to others;
>
> (3) whether Jacob Dominguez was actively resisting detention or arrest, or attempting to evade arrest by flight;

(4) the amount of time the officer had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that period;

(5) the type and amount of force used;

(6) the availability of alternative methods to take Jacob Dominguez into custody;

(7) the number of lives at risk (motorists, pedestrians, police officers) and the parties' relative culpability: i.e., which party created the dangerous situation, and which party is more innocent;

(8) whether it was practical for the officer to give warning of the imminent use of force, and whether such warning was given;

(9) whether a reasonable officer would have or should have accurately perceived a mistaken fact; and

(10) whether there was probable cause for a reasonable officer to believe that the suspect had committed a crime involving the infliction or threatened infliction of serious physical harm.

ECF No. 170 at 26-27.

Appendix B

The jury heard six days of evidence. Because the jury found for Plaintiff the estate of Jacob Dominguez on the Fourth Amendment claim, the Court views the evidence in the light most favorable to Plaintiff in deciding the motion for judgment as a matter of law. Defendants make much of the fact that the jury did not grant punitive damages and that the jury found for Defendants on the Fourteenth Amendment and Bane Act claims, arguing that such a verdict means the jury must have credited Defendants' version of events. DPTM at 6-8. But, as discussed above, punitive damages, the Fourteenth Amendment claim, and the Bane Act claim all require a higher showing than the Fourth Amendment claim. The Court "must search for a reasonable way to read the verdicts as expressing a coherent view of the case." *El-Hakem*, 415 F.3d at 1073 (quoting *Toner ex rel. Toner v. Lederle Labs.*, 828 F.2d 510, 512 (9th Cir. 1987)). The Court can easily do so here. Therefore, contrary to Defendants' argument, the fact that the jury did not grant punitive damages and found for Defendants on the Fourteenth Amendment and Bane Act claims does not mean the jury completely credited Defendants' version of events. *See* DPTM at 6-8. The Court will thus view the evidence in the light most favorable to the Plaintiffs, as it is required to do. *See Torres*, 548 F.3d at 1205-06.

The Court will first provide a bit of background. There had been an armed robbery of an Arco gas station in San Jose. On September 15, 2017, Officer Szemeredi held a briefing on the armed robbery case. Vol. II at 402:4-9.[1]

1. The citations refer to the Volumes of the trial transcript. *See* ECF Nos. 158 (Vol. I), 159 (Vol. II), 160 (Vol. III).

Officers were informed that a detective had obtained an arrest warrant for Mr. Dominguez. *Id.* at 402:22-403:10. Officer Pina stated that, at the briefing, he was informed that the firearm from the armed robbery was still outstanding and that a confidential informant stated that Mr. Dominguez was armed with a revolver. *Id.* at 403:3-10.

Officers surveilled Mr. Dominguez, and they were eventually able to stop his vehicle using a vehicle containment strategy. *See* Vol. II at 414:9-415:1. Officer Pina ordered that Mr. Dominguez put his hands up, which Mr. Dominguez eventually did. *Id.* at 416:6-22. Officer Pina testified that Mr. Dominguez had his hands with his "thumbs a little over the shoulders, between the ears at the shoulders." *Id.* at 419:8-9. Officer Ferguson, another officer on the scene, testified that Mr. Dominguez had his hands up after his vehicle was stopped, and there was nothing in his hands. Vol. I at 147:4-10. Officer Lopez, another officer on the scene, also testified that, after being stopped, Mr. Dominguez put both hands up, and he did not have any weapons in his hands. Vol. II at 256:20-25, 258:9-10. Officer Pina testified at trial that Mr. Dominguez then "quickly dropped his hands and moved forward," and Officer Pina thought he was reaching for a weapon. *Id.* at 420:23-421:17. Officer Pina testified at trial that Mr. Dominguez then quickly started to come back upright, and Officer Pina made the decision to shoot. *Id.* at 423:4-19.

The jury also heard evidence that, in an investigation just after the shooting, Officer Pina stated that Mr. Dominguez "just looks at me, leans back with his hands, looks back at me, and then I fire my weapon." Vol. II at

364:15-25. This would appear to contradict the testimony of Officer Pina at trial. The jury heard evidence that there was no weapon inside of the car. Vol. III at 594:17-20. The jury could infer that it would not make sense for Mr. Dominguez to reach down, looking like he was reaching for a weapon, if there was no weapon in the car. *See Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014). The jury heard evidence that Officers Ferguson and Lopez, both of whom were on the scene, did not shoot at Mr. Dominguez. Vol. II at 237:3-5, 22-23; 267:25-268:1.

The jury heard testimony from Plaintiffs' expert on ballistics, David Balash. He testified that the bullets were fired about 0.33 seconds apart. Vol. III at 503:19-504:2. Balash testified that, based on the location of the bullet hole in Mr. Dominguez's sweatshirt, Mr. Dominguez's left arm had to be above "the metal part of the door," meaning above the windowsill, when it was hit by the second bullet. *Id.* at 509:18-510:2. Balash testified that the left arm had to have been "up and above the frame of the driver's side door" when hit by the second bullet. *Id.* at 524:11-16. He testified that, based on the bullet hole in the sweatshirt, if Mr. Dominguez's hands had been down when the bullet was shot, the bullet would have had to have gone through the driver's side door, which it did not. *Id.* at 521:22-522:3. The jury could have credited this evidence, determining that Mr. Dominguez's hands were up when he was shot.

The jury also heard evidence as to the propriety of Officer Pina's actions prior to shooting. Plaintiffs presented an expert witness on police practices, Scott Defoe. Defoe testified that the weapon used to kill Mr.

Dominguez—an M4 Colt assault rifle—contains a sighting mechanism that allows the officer to use it from 25 yards away from a suspect. Vol. III at 575:17-24. He also testified that the weapon system should have been used in a 45-degree angle instead of "up on target," so that Officer Pina could have seen what Mr. Dominguez was doing. *Id.* at 576:3-12. He stated that Officer Pina should not have stood "adjacent from 10 to 12 feet away" from Mr. Dominguez because such a location did not provide cover, and Officer Pina would have wanted to get cover and to "create some time and distance." *Id.* at 576:13-577:21, 579:19-21. Defoe testified that if Officer Pina "reasonably believed that someone is armed with a gun, he wouldn't stand outside that individual's window." *Id.* at 593:22-23. Defoe noted that there were seven to nine additional officers responding, as well as a K9 team. *Id.* at 576:23-24. Defoe testified that, even if Mr. Dominguez had dropped his hands, it still would not necessarily have been reasonable for Officer Pina to shoot Mr. Dominguez, noting that "people drop their hands all the time during vehicle stops." *Id.* at 597:17-23, 598:1. Defoe testified that no one had seen Mr. Dominguez with a gun, including at the robbery three days prior. *Id.* at 621:2-9.

There was also testimony on this issue from the other officers. Officer Ferguson, who was on the scene, testified that the goal of the containment is to slow things down. Vol. I at 148:5-8. He also testified that "standing in open air, 10 feet perpendicular from a suspect [an officer] believe[s] has a gun," is not what the officers were trained to do. Vol. I at 148:18-22. Officer Lopez testified that, at the briefing session prior to the containment strategy being

carried out, there was no evidence that any police officer had actually seen Mr. Dominguez possess a weapon. Vol. II at 245:25-246:3.

This evidence, along with other evidence presented during the trial, was sufficient for a reasonable juror to determine that Officer Pina used excessive force. The Court cannot say that, based on the evidence presented at trial, no reasonable juror would have found for Plaintiff on the Fourth Amendment claim. The Court therefore will not grant judgment as a matter of law on this claim. The Court next turns to step two of the qualified immunity analysis.

2. Step Two

Under the second step of the qualified immunity analysis, the Court must "consider whether the law was clearly established at the time of the challenged conduct." *Felarca*, 891 F.3d at 816 (citing *Sjurset v. Button*, 810 F.3d 609, 615 (9th Cir. 2015)). The Supreme Court recently reiterated the longstanding principle that "the clearly established right must be defined with specificity." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019). Defining the right at too high a level of generality "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)). "[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in

the defendant's shoes would have understood that he was violating it." *Plumhoff*, 572 U.S. at 778-79. There can, however, be "the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Vazquez v. Cnty. of Kern*, 949 F.3d 1153, 1164 (9th Cir. 2020) (quoting *Wesby*, 138 S. Ct. at 590). Defendants argue that it was not clearly established that Officer Pina could not use lethal force under the circumstances presented in this case. DPTM at 15-18.

"Because the jury found for [Plaintiff] on the[ ] excessive force claim[ ], we 'construe the trial evidence in the light most favorable to [Plaintiff] in determining whether [his] rights were clearly established.'" *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 794 (9th Cir. 2018) (quoting *Morales v. Fry*, 873 F.3d 817, 826 (9th Cir. 2017)). The Court will "analyze the clearly-established prong of [its] qualified immunity inquiry by 'considering the jury's factual findings in the special interrogatories and construing the evidence regarding the remaining factual disputes most favorably to'" Plaintiff, because the jury returned a verdict in his favor on the Fourth Amendment claim. *Tan Lam*, 976 F.3d at 1000 (quoting *Jones v. Treubig*, 963 F.3d 214, 228 (2d Cir. 2020)).

Just last year, the Ninth Circuit decided *Peck v. Montoya*, 51 F.4th 877 (9th Cir. 2022). While *Peck* was decided after the events that occurred in our case, the Ninth Circuit's analysis of what was clearly established at the time of the incident at issue in *Peck* is helpful. In *Peck*, the Ninth Circuit was addressing qualified immunity on

summary judgment in the case of a police shooting of an unarmed individual. *Id.* The Ninth Circuit determined that the officers who shot the decedent were not entitled to qualified immunity because, viewing the evidence in the light most favorable to the plaintiff, the plaintiff "was unarmed and not about to arm himself." *Id.* at 888. The court recognized that, in light of its previous cases, "officers may not kill suspects simply because they are behaving erratically, nor may they 'kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed.'" *Id.* at 887-88 (quoting *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997)) (citing *Estate of Lopez v. Gelhaus*, 871 F.3d 998, 1011-12 (9th Cir. 2917); *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013); *Curnow ex rel. Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991)). The Ninth Circuit explained that it has "repeatedly distinguished between a suspect who is actively reaching for a weapon and a suspect who is armed but not reaching for a weapon." *Id.* at 888. It further recognized that "the Fourth Amendment does not necessarily 'require[ ] officers to delay their fire until a suspect turns his weapon on them,' and '[i]f the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat.'" *Id.* (quoting *George*, 736 F.3d at 838). "But where . . . a jury could find that no such movement occurred, [the Ninth Circuit's] cases would clearly establish that the use of deadly force would be impermissible." *Id.* (citing *George*, 736 F.3d at 838; *Curnow*, 952 F.2d at 325; *Cruz*, 765 F.3d at 1079).

The court in *Peck* looked to *Cruz v. City of Anaheim*, which Defendants rely on here. *See* 765 F.3d 1076 (9th Cir.

2014). In that case, officers confronted a suspected gang member during a traffic stop, believing he was armed. *Id.* at 1077-78. The Ninth Circuit affirmed the district court's denial of qualified immunity based on a dispute of fact as to whether the plaintiff was reaching for his waistband at the time he was shot. *Id.* at 1078. The court stated that "[i]t would be unquestionably reasonable for police to shoot a suspect in Cruz's position if he reaches for a gun in his waistband, or even if he reaches there for some other reason," especially "[g]iven Cruz's dangerous and erratic behavior up to that point." *Id.* But the court went on to say that "[c]onversely, if the suspect *doesn't* reach for his waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him after he stopped his vehicle and opened the door." *Id.* at 1078-79 (emphasis in original).

Defendants argue that Officer Pina is entitled to qualified immunity because "the undisputed evidence and the jury's verdict and findings" establish the facts as follows:

> Officer Pina had reason to believe Mr. Dominguez was armed with a gun when he attempted to take him into custody on September 15, 2017; when officers contained Mr. Dominguez's vehicle, he initially tried to drive away, then reluctantly put his hands up after repeated commands by officers; Officer Pina warned Mr. Dominguez he would be shot if he moved; Mr. Dominguez, still in the driver's seat, dropped his hands and leaned forward; Officer

> Pina then fired two shots, the first of which struck and killed Mr. Dominguez; from the time officers attempted to contain Mr. Dominguez's vehicle to the time of the shooting, less than 20 seconds elapsed.

DPTM at 17. But the Court disagrees, considering the jury's factual finding in the special interrogatory and construing the evidence regarding the remaining factual disputes most favorably to Mr. Dominguez.

The special interrogatory asked, "Did decedent Jacob Dominguez drop his hands and lean forward before Michael Pina fired his weapon?" ECF No. 188. And the jury answered, "Yes." *Id.* "Answers to special interrogatories do not present a square conflict with the general verdict where such answers do not exhaust all of the possible grounds on which the finding implicit in the general verdict may have been based." *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 407 (9th Cir. 1964) (citing *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 361 (1956)). And a Court must reconcile the jury's answers when possible. *See Sanchez v. Jiles*, No. CV 10-09384 MMM (OPx), 2013 WL 12242221, at *9 n.26 (C.D. Cal. Sept. 12, 2013) (collecting cases). The special interrogatory does not create a conflict with the general verdict finding that Officer Pina used excessive force. The Court can easily reconcile the verdict and special interrogatory.

The Court determines that Officer Pina is not entitled to qualified immunity because, considering the answer to the special interrogatory and viewing the evidence in

the light most favorable to Mr. Dominguez, the facts do not establish that Mr. Dominguez posed an immediate threat to the safety of Officer Pina. *See Sanchez*, 2013 WL 12242221, at *10 ("The court concludes, therefore, that the jury's responses to the special interrogatories do not establish beyond question that [Defendant] is entitled to qualified immunity."). The special interrogatory does not specify how far Mr. Dominguez's hands dropped, or whether he dropped them both at the same time. Nor does the question establish how far Mr. Dominguez leaned over. It is possible that Mr. Dominguez had dropped his hands only slightly, such that they were still in view of the officers. Further, the question does not specify whether Mr. Dominguez had sat back up or brought his arms back up before Officer Pina fired. The Court determines that a reasonable jury could have found that, in dropping his hands, Mr. Dominguez was "behaving erratically," and that the drop of the hands did not constitute "a furtive movement [or] harrowing gesture." *See Peck*, 51 F.4th at 887-88.

And there is substantial evidence, summarized above, that Mr. Dominguez did not appear to be reaching for a weapon at the time he was shot. The ballistics expert presented evidence that Mr. Dominguez's left arm was up above the windowsill when hit by the second bullet. There was evidence that, in the investigation immediately after the shooting, Officer Pina stated that Mr. Dominguez leaned back immediately prior to being shot. And there was evidence that the other officers on the scene did not shoot Mr. Dominguez. Additionally, Plaintiffs' expert opined that Officer Pina's view was diminished because

he was only looking at Mr. Dominguez directly through the sighting mechanism of his weapon, which restricted Officer Pina's ability to see what Mr. Dominguez was doing. The jury heard testimony that Mr. Dominguez was not armed, which the Ninth Circuit has stated could be interpreted by a reasonable jury to question an officer's testimony that a plaintiff made an action looking like he was reaching for a weapon. *Cruz*, 765 F.3d at 1079. There was of course no testimony from Mr. Dominguez that he did not look like he was reaching for a weapon, but the jury could have relied on the other evidence provided by Plaintiffs and chosen not to credit the testimony of Officer Pina. There was also evidence that Mr. Dominguez's vehicle had been successfully contained by the vehicle containment strategy and that there were several officers on the scene. This evidence further supports a jury finding that Mr. Dominguez was "behaving erratically," but not appearing to be reaching for a weapon, and that Mr. Dominguez did not pose an immediate threat to officer safety.

The Court therefore determines that, viewing the evidence in the light most favorable to the Plaintiff and consistent with the jury's verdict and answer to the special interrogatory, a reasonable jury could have found that Mr. Dominguez was behaving erratically at the time he was shot, but not actively reaching for a weapon, nor making any other furtive movement or harrowing gesture. Therefore, it was clearly established that Officer Pina could not use lethal force against Mr. Dominguez. *See Peck*, 51 F.4th at 887-88 (citing *Harris*, 126 F.3d at 1204; *Lopez*, 871 F.3d at 1011-12; *George*, 736 F.3d at 838;

Curnow, 952 F.2d at 325). Officer Pina is not entitled to qualified immunity.

V. DEFENDANTS' MOTION FOR A NEW TRIAL OR REMITTITUR

A. Legal Standard

As stated above, under Federal Rule of Civil Procedure 59, a court "may, on motion, grant a new trial on all or some of the issues." Fed. R. Civ. P. 59(a). A court may grant a new trial "if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski*, 481 F.3d at 729 (quoting *Passantino*, 212 F.3d at 510 n.15). A judge should only grant a new trial if she "is left with the definite and firm conviction that a mistake has been committed." *Landes*, 833 F.2d at 1371-72 (citation omitted). The court is not required to view the trial evidence in the light most favorable to the verdict when it considers a Rule 59(a) motion. *Experience Hendrix*, 762 F.3d at 842. Instead, "the district court can weigh the evidence and assess the credibility of the witnesses." *Id.* (citing *Kode*, 596 F.3d at 612). "Ultimately, the district court can grant a new trial under Rule 59 on any ground necessary to prevent a miscarriage of justice." *Id.* (citing *Murphy*, 914 F.2d at 187).

B. Analysis

Defendants also bring a motion for a new trial or, in the alternative, remittitur, on the basis that the damages

award was excessive. DPTM at 18-21. The Ninth Circuit has recognized that, under Rule 59(a), a motion for a new trial can be granted on the basis of excessive damages. *See Molski*, 481 F.3d at 729 ("Historically recognized grounds [for granting a Rule 59 motion] include, but are not limited to, claims 'that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.'" (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940))). When a court, "after viewing the evidence concerning damages in a light most favorable to the prevailing party, determines that the damages award is excessive, it has two alternatives": (1) it may grant a motion for a new trial or (2) it may deny the motion conditional on the prevailing party accepting a remittitur. *Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983).

The jury awarded Plaintiff the estate of Jacob Dominguez one million dollars for pre-death pain and suffering. ECF No. 188. The jury was instructed that the amount was for the "pain and suffering Jacob Dominguez experienced before he died." ECF No. 170 at 32. Defendants argue that the amount is excessive "because there was no evidence before the jury that Mr. Dominguez survived for any period of time or experienced any pain after being shot." DPTM at 19. Defendants point the Court to two cases. In *Willis v. City of Fresno*, the district court conducted a small survey of other cases computing damages for pre-death pain and suffering. No. 1:09-CV-01766-BAM, 2017 WL 5713374, at *7 (E.D. Cal. Nov. 28, 2017). The court there ultimately granted

an award of $25,000 for the decedent's pre-death pain and suffering. *Id.* at *8. The evidence established that the decedent had survived for about 15-30 seconds after the final gunshots. *Id.* at *4. In *Estate of Casillas v. City of Fresno*, the district court upheld an award of $250,000 for pain and suffering, determining that it was not against the weight of the evidence. No. 1:16-CV-1042 AWI-SAB, 2019 U.S. Dist. LEXIS 111722, at *53 (E.D. Cal. July 2, 2019). The court considered the fact that the decedent struggled for at least ten minutes after he was shot, and that he died at the hospital six hours after the incident. *Id.*

The Court declines to find that the jury's verdict was against the weight of the evidence. The evidence at trial established that after Mr. Dominguez was shot, the officers sent a police dog into the car with Mr. Dominguez. *See* Vol. II at 239:10-20. Officer Ferguson testified that even after Mr. Dominguez was shot, "whether or not he was still alive was in question." *Id.* at 239: 20. It was not confirmed that Mr. Dominguez was dead until after the dog had "finished his task." *Id.* at 239:14-16. The jury heard testimony that that dog would have "interacted . . . aggressively" with Mr. Dominguez. Vol. III at 544:3-7. The dog was in the car with Mr. Dominguez for approximately 47 seconds. Vol. II at 373:20-374:14.

In their brief, Defendants identify the damages awards from other cases, combined with the amount of time that the decedents in those cases survived. DPTM at 20. But "pain and suffering damages cannot be supported entirely by rational analysis." *Willis*, 2017 WL 5713374, at *8. They are "inherently subjective, involving experience

and emotions, as well as calculation." *Id.* The Court finds that the damages award is not excessive in light of the evidence. The jury heard evidence that supported the conclusion that Mr. Dominguez survived after being shot and was then mauled to death by a police K9. And the circumstances of this case, as with all cases, are unique. For example, neither of the cases cited by Defendants involved a situation where the decedent was being attacked by a police dog after being shot. The Court determines that the damages award was not excessive.

VI. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motion for a new trial is DENIED;

2. Plaintiffs' attorneys' fees motion is GRANTED IN PART and DENIED IN PART;

3. Defendants' motion for judgment as a matter of law is DENIED; and

4. Defendants' motion for new trial or remittitur is DENIED.

Dated: March 29, 2023

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

APPENDIX C — VERDICT FORM OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED AUGUST 31, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case Number: 5:18-cv-04826-BLF

JESSICA DOMINGUEZ, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JACOB DOMINGUEZ, JORDAN DOMINGUEZ AND JALIYAH DOMINGUEZ,

Plaintiffs,

v.

CITY OF SAN JOSE AND MICHAEL PINA,

Defendants.

VERDICT FORM
SPECIAL INTERROGATORY

Appendix C

TO ASSIST THE COURT

Now that you have returned your verdict answering "Yes" to Question 1, please answer the following question:

QUESTION 12: Did decedent Jacob Dominguez drop his hands and lean forward before Michael Pina fired his weapon?

____✓____ YES _____ NO

Please sign and date the verdict form and return it to the Court.

Date: August 31, 2022 Signed: /s/_____

APPENDIX D — VERDICT FORM OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED AUGUST 31, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case Number: 5:18-cv-04826-BLF

JESSICA DOMINGUEZ, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JACOB DOMINGUEZ, JORDAN DOMINGUEZ AND JALIYAH DOMINGUEZ,

Plaintiffs,

v.

CITY OF SAN JOSE AND MICHAEL PINA,

Defendants.

VERDICT FORM

Appendix D

We, the jury in the above-entitled action, unanimously find as follows:

FOURTH AMENDMENT

QUESTION 1: Did plaintiff the estate of Jacob Dominguez prove by a preponderance of the evidence that Michael Pina used excessive force against decedent Jacob Dominguez, causing harm?

____✓____ YES _____ NO

If you answered "Yes" to Question 1, please answer Question 2. If you answered "No" to Question 1, please sign and date the verdict form and return it to the Court.

QUESTION 2: Did plaintiff the estate of Jacob Dominguez prove by a preponderance of the evidence that the violation of Jacob Dominguez's Constitutional right to be free from excessive force was committed with malice, oppression, or reckless disregard of his Constitutional right?

_____ YES ____✓____ NO

Please go to Question 3.

Appendix D

FOURTEENTH AMENDMENT

QUESTION 3: Did plaintiffs Jessica Dominguez and the three children prove by a preponderance of the evidence that Michael Pina's conduct shocks the conscience because he acted with a purpose to harm decedent Jacob Dominguez that was unrelated to a legitimate law enforcement objective?

_____ YES ____✓____ NO

If you answered "Yes" to Question 3, please answer Question 4. If you answered "No" to Question 3, please go to Question 5.

QUESTION 4: Did plaintiffs Jessica Dominguez and the three children prove by a preponderance of the evidence that the violation of their Constitutional right to be free from governmental interference with their familial relationships was committed with malice, oppression, or reckless disregard of their Constitutional right?

_____ YES _____ NO

Please go to Question 5.

Appendix D

BANE ACT

QUESTION 5: Did Plaintiff the estate of Jacob Dominguez prove by a preponderance of the evidence that Michael Pina acted violently against decedent Jacob Dominguez to prevent him from exercising, or in retaliation for exercising, his right to be free from excessive force, with intent to deprive Jacob Dominguez of his enjoyment of the interests protected by the right to be free from excessive force?

_____ YES ___✓___ NO

If you answered "Yes" to Question 5, please answer Question 6. If you answered "No" to Question 5, please go to the section titled "DAMAGES".

QUESTION 6: Did Plaintiff the estate of Jacob Dominguez prove by a preponderance of the evidence that Michael Pina's interference with his right to be free from excessive force was a substantial factor in causing decedent Jacob Dominguez harm?

_____ YES _____ NO

If you answered "Yes" to Question 6, please answer Question 7. If you answered "No" to Question 6, please go to the section titled "DAMAGES".

QUESTION 7: Did Plaintiff the estate of Jacob Dominguez prove by clear and convincing evidence that it should recover punitive damages against Michael Pina because

the violation of the Bane Act was committed with malice, oppression, or reckless disregard?

_____ YES _____ NO

Please go to the section titled "DAMAGES".

Appendix D

DAMAGES

Please answer Question 8 only if you answered "Yes" to Question 1, above.

QUESTION 8: What amount of damages, if any, did plaintiff the estate of Jacob Dominguez prove should be recovered on behalf of decedent Jacob Dominguez for his pre-death pain and suffering?

$ 1,000,000.00

Please answer Question 9 only if you answered "Yes" to Question 3, above.

QUESTION 9: What amount of damages, if any, did plaintiffs Jessica Dominguez and the three children prove they should recover for loss of decedent Jacob Dominguez's financial support, household services, and/or for funeral and burial expenses?

$ _____

If you award damages in this question, what percent of the total do you award to each plaintiff?

Jessica Dominguez	_____%
Ja. Dominguez	_____%
Jo. Dominguez	_____%
Jal. Dominguez	_____%
Total	100%

Appendix D

Please answer Question 10 only if you answered "Yes" to Question 3, above.

QUESTION 10: What amount of damages, if any, did plaintiffs Jessica Dominguez and the three children prove they should recover for loss of decedent Jacob Dominguez's love, companionship, comfort, care, assistance, protection, affection, society, moral support, and/or training and guidance?

Jessica Dominguez $_____
Ja. Dominguez $_____
Jo. Dominguez $_____
Jal. Dominguez $_____

Please answer Question 11 only if you answered "Yes" to Question 7, above.

QUESTION 11: What amount of nominal damages, if any, do you award plaintiff the estate of Jacob Dominguez under the Bane Act?

$ _____

Please go to Question 12.

TO ASSIST THE COURT

Please answer Question 12 only if you answered "Yes" to Question 1, above.

Appendix D

QUESTION 12: Did decedent Jacob Dominguez drop his hands and lean forward before Michael Pina fired his weapon?

_____ YES _____ NO

Please sign and date the verdict form and return it to the Court.

Date: August 31, 2022 Signed: /s/_____
Presiding Juror

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED SEPTEMBER 16, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 18-cv-04826-BLF

JESSICA DOMINGUEZ, *et al.*,

Plaintiffs,

v.

CITY OF SAN JOSE, *et al.*,

Defendants.

JUDGMENT

This action came before the Court for trial by jury, Judge Beth Labson Freeman presiding. The trial commenced on August 22, 2022 and the jury returned its verdict on August 31, 2022. Consistent with the jury's verdict, which is attached hereto, JUDGMENT is hereby entered:

In favor of Plaintiff the estate of Jacob Dominguez and against Defendant Michael Pina on Count 1—42 U.S.C. § 1983, Fourth Amendment—in the amount of $1

million, and in favor of Defendants City of San Jose and San Jose Police Department and against all Plaintiffs as separately set forth in the Court's Order on Summary Judgment (ECF No. 70);

In favor of Defendants Michael Pina, City of San Jose, and San Jose Police Department and against Plaintiff the estate of Jacob Dominguez on Count 2—Bane Act; and

In favor of Defendants Michael Pina, City of San Jose, and San Jose Police Department and against Plaintiffs Jessica Dominguez and the three minor children on Count 3—42 U.S.C. § 1983, Fourteenth Amendment.

Plaintiff shall recover from Defendants the costs of suit according to proof. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: September 16, 2022

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED MAY 16, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 18-cv-04826-BLF

JESSICA DOMINGUEZ, *et al.*,

Plaintiffs,

v.

CITY OF SAN JOSE, *et al.*,

Defendants.

May 16, 2022, Decided;
May 16, 2022, Filed

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Re: ECF Nos. 52, 55]

In the aftermath of an alleged armed robbery involving Plaintiff Jacob Dominguez, officers obtained a warrant for his arrest and sought his apprehension

upon locating Dominguez on September 15, 2017. While he was driving near Penitencia Creek Park in San Jose, California, three police vehicles pulled up and blocked Dominguez's vehicle's movement. Officers emerged from the vehicles, took out firearms, and ordered Dominguez to raise his hands. The confrontation, which lasted less than one minute, ended with Officer Michael Pina shooting and killing Dominguez as Dominguez sat in the driver's seat of his vehicle. This suit, brought against Pina, the City of San Jose, and the San Jose Police Department by Dominguez's wife (individually and as guardian ad litem for Dominguez and their three children), alleges that Pina used excessive force in violation of Dominguez's constitutional and statutory rights when Pina shot and killed him.

Now before the Court are competing motions for summary judgment brought by both Plaintiffs and Defendants. *See* ECF Nos. 52 ("PMSJ"), 55 ("DMSJ"), 62 ("PReply"), 64 ("DReply"). The Court held a hearing on the motions on April 21, 2022. Because the Court finds that there are genuine disputes of material fact regarding the circumstances of the shooting, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS IN PART AND DENIES IN PART Defendants' motion for summary judgment.

Appendix F

I. BACKGROUND

A. September 12-15, 2017 - Armed Robbery and Surveillance

In early September 2017, the Covert Response Unit of the San Jose Police Department began assisting the Regional Auto Theft Task Force in surveilling a stolen Mercedes driven by Andrew Anchondo. ECF No. 55-1 ("Clouse Decl.") Ex. 6 ("Pina Dep.") 27:4-22. On September 12, 2017, officers followed Anchondo to an ARCO gas station, and they were present when it was robbed. *Id.* 29:6-7. An individual later identified as Jacob Dominguez—husband of Plaintiff Jessica Dominguez and father of the three Plaintiff children—had gotten out of the stolen vehicle and purchased water at the gas station before Anchondo entered with a gun and robbed it. Clouse Decl. Ex. 8 ("Ferguson Dep.") 20:8-14. The two returned to the stolen vehicle and fled. Pina Dep. 30:19-31:3.

Officers followed the Mercedes to an area near San Jose City College, where Anchondo, Dominguez, and a woman later identified as Patricia Ruiz got out of the Mercedes and into a different stolen vehicle. *Id.* 33:16-34:1; Clouse Decl. Ex. 7 ("Lopez Dep.") 19:20-20:4, 38:11-14. Officers followed that vehicle to a house, where the three occupants were picked up in a third vehicle—what appeared to be a dark-colored Kia or similar boxy car—driven by someone who officers were told was Dominguez's girlfriend. Pina Dep. 34:5-35:20; Lopez Dep. 38:11-39:12. That vehicle was driven to a parking lot, where Anchondo, Dominguez, and Ruiz got into a fourth vehicle. Lopez Dep.

39:5-14; Ferguson Dep. 23:14-24:4. Officers attempted to surveil that vehicle but lost it later that night. Ferguson Dep. 24:1-4.

On September 13, 2017, Anchondo and Ruiz were arrested at a house in Morgan Hill. Pina Dep. 37:25-38:1; Lopez Dep. 49:11-18. While the arrests were occurring, officers saw Dominguez drive by in the Kia vehicle from the night before. Lopez Dep. 52:22-53:4. Officers attempted to follow the Kia but were unsuccessful. *Id.* On a search of the house, officers recovered ammunition for a .357 gun, but did not locate the gun itself. Pina Dep. 40:2-17. Officers then obtained a warrant for Dominguez's arrest on armed robbery charges. *See* ECF No. 5 ("Neumer Decl.") Ex. 5 (warrant dated September 14, 2017).

B. September 15, 2017 - Briefing, Vehicle Containment, and Shooting

On September 15, 2017, Officers Pina, Lopez, Ferguson, and others met at a briefing to discuss attempts to apprehend Dominguez. Pina Dep. 20:9-25. Officers were informed that Dominguez had a history of arrests and convictions for armed robbery with a gun; carjacking; resisting arrest; possession of a firearm and illegal weapons; a gang enhancement; and being under the influence of a controlled substance. *Id.* 54:1-15. Officers were also told that Pina was an active gang member; officers know from experience that active gang members are likely to be armed in anticipation of confronting other gang members or police. Lopez Dep. 36:14-20. Officers also feared that Dominguez's purported girlfriend, who

was present when Anchondo and Ruiz were arrested, may have tipped off Dominguez that police were looking for him. Pina Dep. 54:25-55:10. Finally, a source had told the police that Dominguez was armed with a revolver. *Id.* 55:16-56:6; Ferguson Dep. 74:2-23.

Officers then set out to attempt to find Dominguez. Officers located and began to surveil his girlfriend. Pina Dep. 57:13-23. Dominguez met up with her in his vehicle. *Id.* Officers followed him, but he began to drive erratically and officers believed Dominguez knew he was being surveilled. Lopez Dep. 59:15-60:14. An aircraft involved in the surveillance continued to relay Dominguez's location, and officers planned to apprehend him at the first opportunity. *Id.* 51:6-14; Pina Dep. 59:10-17.

Dominguez stopped at the intersection of Penitencia Creek and North White Road in San Jose. Pina Dep. 60:21-25. Officers attempted a Vehicle Containment Technique ("VCT"), a tactic in which multiple vehicles surround a suspect vehicle from different sides to box in the suspect vehicle and prevent its escape. *Id.* 59:18-62:22. Officers Pina, Lopez, and Ferguson each drove their unmarked vehicles on three separate sides of Dominguez's vehicle—Officer Pina to the front, Officer Ferguson to the driver's side door, and Officer Lopez to the rear. *Id.*; *see also* Neumer Decl. Ex. 3 at 00:25-39 (surveillance footage from nearby home showing three vehicle executing VCT). Officer Lopez sounded his siren and activated red and blue police lights. Lopez Dep. 67:10-21.

Officer Pina exited the vehicle with a rifle and ran to Officer Ferguson's car, placing himself just across the

hood of Officer Ferguson's car from where Dominguez was in the drivers' seat. Pina Dep. 67:11-24; Neumer Decl. Ex. 3 at 00:39-45; *id.* Ex. 1 ("Pina BWC")[1] at 2:03:15. Dominguez attempted to reverse out of the VCT but was not successful. Pina Dep. 65:24-66:4. Officers Pina and Ferguson both yelled at Dominguez to put his hands up. Neumer Decl. Ex. 2 ("Ferguson BWC") at 2:03:25-29. Officer Pina specifically said, "I'll shoot you, put your fucking hands up!" *Id.* at 2:03:27-28. Dominguez did not comply and Officer Pina could not see his hands. Pina Dep. 72:15-73:25. Instead, Officer Pina says Dominguez gave him a "'screw you' type look." *Id.*

Dominguez then put his hands up to about shoulder level. Pina Dep. 79:9-80:26. Dominguez's wrists were "limp"—in Officer Ferguson's view, suggesting that Dominguez was "kind of like just not wanting to go on the program but kind of getting them up there just enough so we could see them in the window." Ferguson Dep. 72:5-12. Officer Pina then said, "Move and you get shot!" Ferguson BWC at 2:03:30. Dominguez then said either, "Fuck you, shoot me, bitch!" or "Fuck you, bitch, shoot me!" Pina Dep. 91:12-92:13. Officer Ferguson said, "Keep your hands up!" Ferguson BWC at 2:03:38.

According to the officers, after keeping his hands up for a few seconds, Dominguez quickly dropped his hands out of sight and leaned down and forward toward the seat or floor. Pina Dep. 89:6-9, 95:2-22; Ferguson Dep. 78:7-11;

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1. Citations to any bodyworn camera footage will cite to the timestamp in the top right corner.

Lopez Dep. 75:7-8. Officer Pina was aiming his rifle and "finding [his] sight" when Dominguez allegedly leaned forward. Pina Dep. 95:23-96:7, 97:3-10. Officer Ferguson says that once Dominguez dropped his hands below the sill of the window on the driver's door, he couldn't see his hands. Ferguson Dep. 67:7-20, 79:16-80:2. Officer Lopez, from his vantage point to the rear of the Kia, says he saw Dominguez bring his hands down and thought him to be "reaching for something." Lopez Dep. 63:21-24, 69:21-25, 75:9-76:14. Officers Pina and Ferguson again and repeatedly told Dominguez to put his hands up. Ferguson BWC at 2:03:38-42. As Dominguez was reaching down, all three officers believed he was reaching for a gun. Pina Dep. 95:23-96:7, 98:23-99:5; Lopez Dep. 86:5-8, 92:2-15; Ferguson Dep. 80:3-7.

As Dominguez was "coming up," Officer Pina fired two shots, killing Dominguez. Pina Dep. 97:3-10; Ferguson BWC 2:03:42-43. No firearm was found in Dominguez's vehicle. No bodyworn camera footage captures any view of Dominguez throughout the entire incident because of obstructions from the officers' clothing or the positioning of officers during the incident.

C. Aftermath — Forensic Reports and Expert Opinions

A crime lab report states that one bullet struck Dominguez in the jaw and lodged in his neck. Clouse Decl. Ex. 10 ("Balash Rpt.") at 6. A second bullet was found on the interior passenger side of the vehicle. *Id.* at 4. The report also states that a bullet hole was found on the left

forearm of the sleeve of the sweatshirt Dominguez was wearing. *Id.* at 6.

Plaintiffs' proffered ballistic expert is David Balash. *See generally* Balash Rpt. According to Mr. Balash, Officer Pina's first shot struck and shattered the car window, deforming the bullet which then struck Dominguez in the jaw and lodged in his neck. Clouse Decl. Ex. 9 ("Balash Dep.") 19:10-14. The second bullet passed through Dominguez's sweatshirt sleeve before striking and lodging in the passenger side of the vehicle. *Id.* 20:9-14. Mr. Balash opines that because of the location of the bullet hole on Dominguez's sweater and the location of the bullet on the passenger side of the vehicle, Dominguez's arm must have been above the car door's window frame when the second bullet passed through the shirt. *Id.* at 21:11-21.

Defendants' expert Dr. John Black is an expert in police training and decision-making. *See* Clouse Decl. Ex. 11 ("Black Rpt."). Dr. Black opines that officers are trained that initiators of an action have an advantage, and that suspects are often the initiators. *Id.* at 11. His opinion is allegedly supported by research showing that "when the suspect [or] threat is the initiator of the action, the officer will be unable to react quicker than the suspect." *Id.* Officers thus take from 0.31 to 0.39 seconds to react to the movement of a suspect. *Id.* at 9-10. In Dr. Black's opinion, Officer Pina thus "did not have sufficient time to ascertain with any degree of certainty if [] Dominguez actually had gained control of a firearm" because "he would be anywhere from 1/4 to 1/2 a second behind [] Dominguez's movements." *Id.* at 23-24.

D. Procedural History

Plaintiff Jessica Domingez—in her individual capacity and as guardian ad litem for Dominguez and their three children—filed this lawsuit on August 9, 2018. ECF No. 1. The operative complaint is the Second Amended Complaint filed on April 12, 2019, *see* ECF No. 37 ("SAC"), to which Defendants filed answers on April 15, 2019, *see* ECF Nos. 38, 39. Plaintiffs bring three claims against Defendants City of San Jose, San Jose Police Department, and Michael Pina: (1) a claim under 42 U.S.C. § 1983 for use of excessive force; (2) a claim under the California Bane Act, Cal. Civ. Code § 52.1; and (3) a claim under the California Ralph Act, Cal. Civ. Code § 51.7. Compl. ¶¶ 16-40.[2]

Nearly three years after the Second Amended Complaint was filed, Plaintiffs moved for summary judgment. *See* PMSJ. Defendants filed a cross-motion for summary judgment. *See* DMSJ. Both parties filed a simultaneous combined opposition and reply briefs. *See* PReply, DReply.

II. LEGAL STANDARD

"A party is entitled to summary judgment if the 'movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *City of Pomona v. SQM N. Am. Corp.*,

2. The final two paragraphs of the Second Amended Complaint prior to the Prayer for Relief are misnumbered as paragraphs "47" and "39" when they should be paragraphs "39" and "40," respectively.

750 F.3d 1036, 1049 (9th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). A fact is "material" if it "might affect the outcome of the suit under the governing law," and a dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable trier of fact to decide in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The party moving for summary judgment bears the initial burden of informing the Court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To meet its burden, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). In judging evidence at the summary judgment stage, the Court "does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial." *House v. Bell*, 547 U.S. 518, 559-60, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Celotex*, 477 U.S. at 325; *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

If the moving party meets its initial burden, the burden shifts to the nonmoving party to produce evidence supporting its claims or defenses. *Nissan Fire*, 210 F.3d at 1103. If the nonmoving party does not produce evidence to show a genuine issue of material fact, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323. "The court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor." *City of Pomona*, 750 F.3d at 1049. "[T]he 'mere existence of a scintilla of evidence in support of the [nonmovant's] position'" is insufficient to defeat a motion for summary judgment. *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 891 F. Supp. 510, 513-14 (N.D. Cal. 1995) (quoting *Liberty Lobby*, 477 U.S. at 252). "'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" *First Pac. Networks*, 891 F. Supp. at 514 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Both Plaintiffs and Defendants move for summary judgment. *See* PMSJ, DMSJ. The Court will analyze Defendants' motion first.

A. Claim 1 - 42 U.S.C. § 1983

Defendants move for summary judgment on Plaintiffs' first claim for excessive force under 42 U.S.C. § 1983. *See*

DMSJ at 10-20. This claim is brought against both Officer Pina and the two entity defendants. *See* SAC ¶¶ 16-25. Because different legal standards govern § 1983 claims for those entities, the Court will address them separately.

i. Officer Pina

Defendants argue that Officer Pina did not violate the Constitution when he shot Dominguez twice because he was reacting to an "imminent deadly threat," and his conduct did not violate clearly established law, and thus is entitled to qualified immunity. DMSJ at 10-17. Under *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), Defendants say that Officer Pina reasonably perceived an imminent deadly threat when he encountered Dominguez, who was believed to have a weapon, was known to have participated in armed robberies, had a history of crimes involving firearms, and was actively trying to evade police. *Id.* at 10-11, 16-17. Officer Pina, Defendants say, was not required to view a weapon before reacting to Dominguez's movement downwards. *Id.* at 12-16. Because no constitutional violation occurred, Officer Pina is entitled to qualified immunity, Defendants contend. *Id.* at 17-20. Plaintiffs respond that no qualified immunity is warranted because case law has established that using lethal force against Dominguez in these circumstances was excessive and unreasonable. *See* PReply at 13-23. Plaintiffs cite cases they contend clearly establish that the use of force was excessive. *Id.*

"The doctrine of qualified immunity protects government officials from liability for civil damages

'unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'" *Wood v. Moss*, 572 U.S. 744, 745, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), the Supreme Court set forth a two-part approach for analyzing qualified immunity. The initial constitutional inquiry requires the court to determine this threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. If the Court determines that a constitutional violation could be made out based on the parties' submissions, the second step is to determine whether the right was clearly established. *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. The Supreme Court has clarified that the sequence of analysis set forth in *Saucier* is not mandatory and that a court may exercise its sound discretion in determining which of the two prongs of the qualified immunity analysis to address first. *Pearson v. Callahan*, 555 U.S. 223, 241-42, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

The Supreme Court recently reiterated the longstanding principle that "the clearly established right must be defined with specificity." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503, 202 L. Ed. 2d 455 (2019).

Defining the right at too high a level of generality "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590, 199 L. Ed. 2d 453 (2018) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014)). "[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff*, 134 S. Ct. at 2023. There can, however, be "the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Vazquez v. City of Kern*, 949 F.3d 1153, 1164 (9th Cir. 2020) (quoting *Wesby*, 138 S. Ct. at 590).

The Court finds that granting qualified immunity to Officer Pina turns on accepting Defendants' version of disputed facts, so qualified immunity is not appropriate at present. *See Estate of Aguirre v. Cnty. of Riverside*, 29 F.4th 624, 630 (9th Cir. 2022) ("[c]ritical disputes of fact render[ed] summary judgment premature" in police violence case where police claimed qualified immunity); *Espinosa v. City & Cnty. of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010) (affirming denial of summary judgment on qualified immunity grounds because there were genuine issues of fact regarding whether the officers violated plaintiff's Fourth Amendment rights, which were also material to a proper determination of the reasonableness of the officers' belief in the legality of their actions).

Appendix F

The central and material factual dispute in this case is the course of action that Dominguez took after his arms were raised in response to officers' commands. Defendants contend that Dominguez reached down toward his seat so that his hands were obscured from view of the officers, who believed him to be reaching for a weapon they suspected he possessed. *See* Pina Dep. 89:6-9, 95:2-22; Ferguson Dep. 78:7-11; Lopez Dep. 75:7-8. Plaintiffs, however, assert that based on forensic evidence, Dominguez was shot when his hands were raised above the sill of the driver's window. Their proffered expert Mr. Balash opines that because the second bullet passed through Domingez's shirt sleeve and lodged in the passenger side door, the bullet must have passed through his shirt sleeve when he had his arms up. *See* Balash Dep. 21:11-21. And although unknown to Officer Pina at the time, Dominguez did not in fact have a weapon in the car, which could cast some doubt on the officers' testimony about Dominguez's actions. Dominguez, of course, is unable himself to offer his own version of events through testimony because he was killed during the altercation.

The Ninth Circuit confronted a similar situation in *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014), in which the court partially reversed and remanded a district court's grant of summary judgment to police officers. In *Cruz*, acting on a tip from a confidential informant that Cruz was selling methamphetamine and carrying a gun in his waistband, several Anaheim police officers converged on Cruz's vehicle's location. *Id.* at 1077-78. Officers surrounded Cruz in their vehicles, and Cruz's attempt to escape failed when he backed his car into one of

the patrol vehicles. *Id.* at 1078. Cruz opened his door, and police shouted at him to get on the ground. *Id.* According to four officers, "[Cruz] ignored their commands and instead reached for the waistband of his pants. Fearing that he was reaching for a gun, all five officers opened fire." *Id.* After firing, officers found Cruz dead and tangled in his seatbelt. *Id.* Officers found no weapon on Cruz's body but did locate a handgun near the passenger seat. *Id.* The district court granted summary judgment to the officers, finding that Cruz's decedents "hadn't presented anything to contest the offices' version of events." *Id.*

The Ninth Circuit reversed in relevant part. The court first noted that "i[t] would be unquestionably reasonable for police to shoot a suspect in Cruz's position if he reaches for a gun in his waistband, or even if he reaches there for some other reason." *Cruz*, 765 F.3d at 1078 ("Given Cruz's dangerous and erratic behavior up to that point, the police would doubtless be justified in responding to such a threatening gesture by opening fire."). "Conversely, [however,] if the suspect *doesn't* reach for his waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him after he stopped his vehicle and opened the door." *Id.* at 1078-79. Thus, to decide the case, "a jury would have to answer just [the] simple question" of whether "police [saw] Cruz reach for his waistband." *Id.* at 1079. The Ninth Circuit faulted the district court for relying solely on the testimony of the officers in saying that no reasonable jury could find that Cruz didn't reach for his waistband. "Because the person most likely to rebut the officers' version of events—the one killed—can't testify, '[t]he judge must carefully

examine all the evidence in the record . . . to determine whether the officer's story is internally consistent and consistent with other known facts.'" *Id.* (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). This includes "circumstantial evidence that, if believed, would tend to discredit the police officers' story." *Id.* The Ninth Circuit noted the existence of such circumstantial evidence. Cruz did not have a gun on his person—"so why would he have reached for his waistband?" *Id.* Cruz also saw that he was completely surrounded by police, so it "would have been foolish" to try to "fast-draw his weapon in an attempt to shoot his way out." *Id.* A jury could doubt that Cruz made that "foolish" decision. *Id.* It could also be "skeptical" that all four officers saw Cruz reach for his waistband because that would require "four pairs of eyes [to have] a line of sight to Cruz's hand as he stood between the open car door and the SUV." *Id.* The jury could also question officers' credibility given identical testimony given by one of the officers in a previous similar shooting case, or find curious that Cruz was found still constrained by his seat belt after his death despite the officers' testimony that he had opened the door and began to emerge from the vehicle. *Id.* at 1080. Given these "curious and material factual discrepancies," the district court erred in granting summary judgment to the officers. *Id.*

The Court finds that there are striking similarities between this case and *Cruz*. Because Dominguez is deceased and can't testify, the Court is left only with the officers' story, and so it must determine if the officers' testimony is "internally consistent and consistent with other known facts," including circumstantial evidence

that might "discredit the police officers' story." *Cruz*, 765 F.3d at 1079. There is circumstantial evidence here that, if believed, would tend to discredit officers' testimony. First, Dominguez did not have a gun on his person or in his vehicle. This raises the same question as in *Cruz*: why would Dominguez have reached down in a motion associated for reaching for a weapon when he in fact did not have one? Second, as in *Cruz*, the three officers have entirely consistent testimony that they saw Dominguez reach down, despite each of them being in different positions and admitting at other junctures that their line of sight was not entirely clear. Third, and again as in *Cruz*, Dominguez saw that he was surrounded by police officers and failed in his attempt to flee when his vehicle hit one of the police vehicles. Reaching down to seek a (nonexistent) gun and shoot his way out in those circumstances would have been "foolish." *Id.* at 1079. Finally, there is forensic evidence that (in one expert's opinion) suggests that Dominguez's hands were raised when Officer Pina fired the second shot. All of this circumstantial evidence could lead a jury to discredit officers' testimony and find that Officer Pina shot Dominguez when his hands were raised. *Contra* GReply at 11-12 (arguing that "[n]o such [circumstantial] evidence exists here," unlike in *Cruz*).

To be clear, the Court is neither rejecting the officers' version of events nor accepting Dominguez's. *Accord Cruz*, 765 F.3d at 1080 ("We make no determination about the officers' credibility, because that's not our decision to make."). Nor is it finding that one version of events is more credible than the other. The Court merely holds that there is sufficient circumstantial evidence that, if accepted,

could lead a reasonable jury to question officers' version of events. If a jury did so and found that Dominguez had his hands raised when he was shot, "it would clearly be unreasonable for officers to shoot him" and Officer Pina would not be entitled to qualified immunity. *Id.* at 1078.

Officer Pina is not entitled to qualified immunity on this claim at this stage of the case. His motion for summary judgment on claim one is thus DENIED.

ii. City of San Jose and San Jose Police Department

Claim one is also asserted against the City of San Jose and San Jose Police Department. *See* SAC ¶¶ 16-25. Defendants argue that the City and the Department are entitled to summary judgment on this claim because Plaintiffs have identified no policy, custom, or practice that was the "moving force" behind the violation or a pattern of similar incidents. DMSJ at 20 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). Plaintiffs respond that the *Monell* claim is based on (1) "the brutal and deadly manner" in which Defendants seized and used unreasonable force against Dominguez; (2) "the failures of the [D]efendant[s'] decision making"; (3) the promotion of Officer Pina to Sergeant Pina following the incident; and (4) a report issued by the District Attorney after the incident. PReply at 23-26.

"The Supreme Court in *Monell* held that municipalities may only be held liable under section 1983 for constitutional violations resulting from official...policy or custom."

Benavidez v. Cty. of San Diego, 993 F.3d 1134, 1153 (9th Cir. 2021) (citing *Monell*, 436 U.S. at 694). "[P]olicies can include written policies, unwritten customs and practices, failure to train municipal employees on avoiding certain obvious constitutional violations, ... and, in rare instances, single constitutional violations [that] are so inconsistent with constitutional rights that even such a single instance indicates at least deliberate indifference of the municipality[.]" *Id.* at 1153 (internal citations omitted). "A municipality may [also] be held liable for a constitutional violation if a final policymaker ratifies a subordinate's actions." *Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004). "In order to establish liability for governmental entities under *Monell*, a plaintiff must prove '(1) that [the plaintiff] possessed a constitutional right of which [s]he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and, (4) that the policy is the moving force behind the constitutional violation.'" *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (alterations in original) (quoting *Plumeau v. Sch. Dist. No. 40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997)). The Court evaluates each species of *Monell* liability in turn.

Policy, Custom, or Practice. A municipality may be held liable on the basis of an unconstitutional policy if a plaintiff can "prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.

Ct. 915, 99 L. Ed. 2d 107 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)). "Liability for improper custom may not be predicated on isolated or sporadic incidents"—rather, "[t]he custom must be so persistent and widespread that it constitutes a permanent and well settled city policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (internal citations omitted).

Plaintiffs here identify no other incidents similar to this one that would support liability for a policy, custom, or practice. Plaintiffs' first two assertions—the "brutal and deadly manner" of the officers' actions and the "failures of [their] decision making—both relate only to this event. The other two—the promotion of Officer Pina to Sergeant Pina and the District Attorneys' report on the incident—post-date this incident and do not amount to policies, customs, or practices. *Trevino*, 99 F.3d at 918. Because Plaintiffs identify no other distinct incidents, they have not identified a policy, custom, or practice upon which *Monell* liability could be founded.

Failure to Train. "Failure to train an employee who has caused a constitutional violation can be the basis for § 1983 liability where the failure to train amounts to deliberate indifference to the rights of persons with whom the employee comes into contact." *Long v. City of Los Angeles*, 442 F.3d 1178, 1186 (9th Cir. 2006) (citing *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). This standard is met when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation

of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Canton*, 489 U.S. at 390. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983." *Id.* at 389. And only under such circumstances does the failure to train constitute "a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." *Id.* at 390. "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick v. Thompson*, 563 U.S. 51, 62, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) (internal citations omitted).

Here again, Plaintiffs have failed to point to "[a] pattern of similar constitutional violations by untrained employees" such that the City or Department could be found liable for a failure to train. In the absence of any such evidence, failure to train cannot be grounds for *Monell* liability. *Connick*, 563 U.S. at 62.

Ratification. "A municipality may be held liable for a constitutional violation if a final policymaker ratifies a subordinate's actions." *Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004). "To show ratification, a plaintiff must show that the authorized policymakers approve a subordinate's decision and the basis for it." *Id.* (internal quotation marks and citation omitted). The policymaker must have knowledge of the constitutional violation and actually approve of it — a failure to overrule a subordinate's actions,

without more, is insufficient to support a § 1983 claim. *Id.* In other words, ratification requires an authorized policymaker to make a "conscious, affirmative choice" to endorse subordinate's actions. *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). A policymaker's after-the-fact approval of a subordinate's conduct that caused the alleged constitutional violations may be used as evidence that a municipality had a pre-existing policy that caused the alleged constitutional violations. *Silva v. San Pablo Police Dep't*, 805 F. App'x 482, 485 (9th Cir. 2020). To show that ratification was a "moving force" behind the constitutional deprivation, a plaintiff must demonstrate both causation in fact and proximate causation. *Arnold v. Int'l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *Dougherty v. City of Covina*, 654 F.3d 892, 900-901 (9th Cir. 2011).

Plaintiffs point to two post-incident events as grounds for a ratification theory: the promotion of Officer Pina to Sergeant Pina and a report by the District Attorney's office about the incident. Neither can support a ratification theory. A post-incident promotion is insufficient alone as a grounds for *Monell* liability. *See Dizon v. City of S. San Francisco*, 2018 U.S. Dist. LEXIS 177919, 2018 WL 5023354, at *5 (N.D. Cal. Oct. 16, 2018) (citing cases); *see also Moua v. McAbee*, 2007 U.S. Dist. LEXIS 85800, 2007 WL 3492157, at *13 (E.D. Cal. Nov. 14, 2007) (granting summary judgment for defendant on *Monell* claim where plaintiff failed to submit evidence that "any command level policymaker promoted [the officer] or that any supervisor had knowledge of the alleged conduct, let alone that such person made a 'conscious affirmative choice to ratify the

conduct in question'"). Here, Plaintiffs point to the mere fact of Officer Pina's promotion, but offer no other evidence that any policymaker made a "conscious affirmative choice" to ratify Officer Pina's conduct in this case by promoting him. The District Attorney's report suffers from the same defect. Moreover, the District Attorney is a separately elected official with no control over the City of San Jose or its officers. Accordingly, no evidence supports a ratification theory of *Monell* liability.

Because the Court has found that Defendants have shown that there is no genuine dispute of material fact supporting the City or Department's liability under *Monell*, Defendants' motion for summary judgment on claim one as to the City and Department is GRANTED.

B. Claim 2 - Bane Act

Defendants next move for summary judgment on the Bane Act claim. *See* DMSJ at 21-22. They argue that Officer Pina did not violate the Bane Act because, even if there is a genuine dispute of material fact regarding whether Officer Pina committed a constitutional violation, there is no evidence that Officer Pina had a specific intent to "not only use force, but intent to use unreasonable force." *See id.* (citing *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) (quoting *Cornell v. City & Cnty. of San Francisco*, 17 Cal. App. 5th 766, 800, 225 Cal. Rptr. 3d 356 (2017)). Plaintiffs respond that use of unreasonable force under the Fourth Amendment is a *per se* violation of the Bane Act. PReply at 26-27.

The Court finds that Defendants are not entitled to summary judgment on this claim. "[C]ourts have considered recklessness sufficient to meet *Cornell*'s specific intent requirement." *Ochoa v. City of San Jose*, 2021 U.S. Dist. LEXIS 226380, 2021 WL 7627630, at *16 (N.D. Cal. Nov. 17, 2021); *accord Reese*, 888 F.3d at 1045 ("[I]t is not necessary for defendants to have been thinking in constitutional or legal terms at the time of the incidents, because a reckless disregard for a person's constitutional rights is evidence of a specific intent to deprive that person of those rights."). While Plaintiffs are incorrect that a Fourth Amendment violation is *per se* a violation of the Bane Act, *see Ochoa*, 2021 U.S. Dist. LEXIS 226380, 2021 WL 7627630, at *16 (citing *Sandoval v. Cnty. of Sonoma*, 912 F.3d 509, 520 (9th Cir. 2018)), the Court finds that there is a genuine dispute of material fact regarding the recklessness of Officer Pina's conduct given the circumstantial evidence in this case that a reasonable jury could find undermines the officers' version of events. That circumstantial evidence is sufficient to allow the Bane Act claim against Defendants to go forward.

Defendants' motion for summary judgment on claim two is DENIED.

C. Claim 3 - Ralph Act

Finally, Defendants move for summary judgment on Plaintiffs' third claim for violation of the Ralph Act. *See* DMSJ at 22-23. Defendants say that there is no evidence that Officer Pina was motivated to shoot Dominguez because of his race or other protected characteristic. *Id.*

Plaintiffs counter that Dominguez is "readily identified as a Hispanic male" and that Defendants' "actions are so outrageous and inconsistent to the situation they encountered such that [P]laintiffs allege that it must have been motivated by racial animus." PReply at 26-27.

The Ralph Act provides that "[a]ll persons within [California] have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property" because of race. Cal. Civ. Code § 51.7. A plaintiff must show that a defendant "threatened or committed violent acts against [him]" and "was motivated by his perception of the plaintiff's race." *Knapps v. City of Oakland*, 647 F. Supp. 2d 1129, 1167 (N.D. Cal. 2009). To survive summary judgment, the evidence of racial bias must be "specific and substantial." *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1152 (9th Cir. 2006). A "plaintiff's subjective belief . . . that a defendant's conduct is motivated by discriminatory intent is not sufficient to defeat summary judgment." *Hutton v. City of Berkeley Police Dep't*, 2014 U.S. Dist. LEXIS 126300, 2014 WL 4674295, at *10 (N.D. Cal. Sep. 9, 2014).

The Court agrees with Defendants that they are entitled to summary judgment on this claim. Plaintiffs have pointed to no evidence, much less "specific and substantial" evidence, that Officer Pina acted as a result of racial animus. Plaintiffs' grounds for their Ralph Act claim come down to their own "subjective belief" that Officer Pina acted out of racial animus because of what they see as "outrageous and inconsistent" actions by Officer Pina. This is not sufficient to sustain a Ralph Act claim. *Hutton*, 2014 U.S. Dist. LEXIS 126300, 2014 WL 4674295, at *10.

Defendants' motion for summary judgment on the Ralph Act claim is GRANTED.

IV. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs also move for summary judgment on all three of their claims. *See* PMSJ. The Court's analysis in the context of Defendants' motion resolves Plaintiffs' motion for summary judgment.

On claim one as to Officer Pina, the Court has found that there are disputes of material fact regarding Dominguez's actions after officers executed the VCT. *See supra* Section III.A.i. Plaintiffs have offered circumstantial evidence that could lead a jury to discredit officers' testimony, but viewed in a light most favorable to Defendants, the jury could also reject the circumstantial evidence and agree with the officers' story. Summary judgment for Plaintiffs on claim one as to Officer Pina is thus DENIED.

On claim one as to the City of San Jose and San Jose Police Department and claim three, the Court has granted Defendants' motion for summary judgment. *See supra* Section III.A.ii, III.C. Plaintiffs' motion for summary judgment on those claims is thus DENIED.

On claim two, the Court has denied Defendants' motion for summary judgment in light of the disputed issues of material fact discussed in the context of claim one. Those same disputed facts are material to Plaintiffs' motion. *See supra* Section III.B. Summary judgment for Plaintiffs on this claim is thus DENIED.

Appendix F

V. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that:

- Plaintiffs' motion for summary judgment is DENIED; and

- Defendants' motion for summary judgment is GRANTED as to (1) Plaintiffs' first claim for violation of 42 U.S.C. § 1983 as to Defendants City of San Jose and San Jose Police Department (*Monell* claims); and (2) Plaintiffs' third claim for violation of Cal. Civ. Code § 51.7 as to all Defendants. Defendants' motion for summary judgment is DENIED in all other respects.

The existing case schedule (ECF No. 24) remains in effect.

Dated: May 16, 2022

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge