No.

IN THE

Supreme Court of the United States

CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY; NATHAN FARRIS,

Petitioners,

vs.

RICHARD VOS, individually and as successor-in-interest to Gerritt Vos; JENELLE BERNACCHI, individually and as successor-in-interest to Gerrit Vos,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

POLLAK, VIDA AND BARER
DANIEL P. BARER
COUNSEL OF RECORD
Email:daniel@pollakvida.com
11150 West Olympic Blvd.
Suite 900
Los Angeles, CA 90064
(310) 203-1621

FERGUSON, PRAET & SHERMAN
ALLEN CHRISTIANSEN
PETER J. FERGUSON
1631 East 18th Street
Santa Ana, CA 92705-7101
(714) 953-5300

Counsel for Petitioners

Courtesy of Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (626) 744-2988

QUESTIONS PRESENTED

1. Does Title II of the Americans with Disabilities Act require law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody? (This Court granted certiorari on this question in *City and County of San Francisco v. Sheehan*, Docket No. 13-1412, but did not resolve it.)

2. Under the Fourth Amendment "totality of the circumstances" analysis for assessing the reasonableness of force used against a suspect who attacks law enforcement officers, must a court take into account allegedly unreasonable police conduct that took place before the use of force, but foreseeably created the need to use that force?

3. Under the Fourth Amendment's analysis for use of force, is a law enforcement officer's interest in using deadly force against a suspect threatening an officer's life diminished if the assailant is mentally ill?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- The City of Newport Beach, California and Newport Beach police officers Richard Henry and Nathan Farris, all defendants, appellees below, and petitioners here.

- Richard Vos and Jenelle Bernacchi (who proceed both as individuals and as successors-in-interest to Gerrit Vos), plaintiffs, appellants below, and respondents here.

No corporations are involved in this proceeding.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Statutes

Page

Regulations

Constitution

Other Authorities

Page

OPINION BELOW

The Ninth Circuit's opinion, the subject of this petition, is reported at 892 F.3d 1024 (9th Cir. 2018). (Appendix ["App."] A, 1-43.) Its order denying rehearing was not published in the official reports. (App. B, 44-45.) The district court's decision granting summary judgment to petitioners was not published in the official reports. (App. C, 46-73.)

JURISDICTION

The Ninth Circuit filed its opinion on June 11, 2018. (App. 1.) Petitioners timely petitioned for rehearing. On August 28, 2018, the Ninth Circuit denied rehearing. (App. 45.) This Court has jurisdiction to review the Ninth Circuit's June 11, 2018 decision on writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Provisions relevant to the first question presented.

42 U.S.C. §12131 provides, in part:

> * * *
>
> (2) Qualified individual with a disability
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in

> programs or activities provided by a public entity.

42 U.S.C. §12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

29 U.S.C. §794 provides, in part:

> (a) Promulgation of rules and regulations
>
> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service
>
> * * *
>
> (b) "Program or activity" defined
>
> For the purposes of this section, the term "program or activity" means all of the operations of--
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> * * *

28 C.F.R. §35.131 provides, in part:

> (a) General.
> (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.
>
> * * *

28 C.F.R. §35.104 provides in part:

> For purposes of this part, the term—
>
> * * *
>
> Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.
>
> * * *

28 C.F.R. §35.130 provides in part:

> (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.
>
> (b) * * *
>
> * * *
>
> (7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are

> necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
>
> * * *
>
> (h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

28 C.F.R. §35.139 provides:

> (a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.
>
> (b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

Provisions relevant to the second and third question presented.

The Fourth Amendment to the United States Constitution provides:

> 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.

42 U.S.C. §1983 provides:

> 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.

STATEMENT OF THE CASE

A. Decedent Charges Police with Weapon, and Is Shot

On May 29, 2014, decedent Gerrit Vos entered a 7-Eleven store in Newport Beach, California. (App. 6.) He was agitated. He ran around the store, cursing at customers, and shouting things like, "Kill me already, dog." (App. 6.) At one point, Vos grabbed and released a store employee, and yelled, "I've got a hostage!" (App. 6.)

Nine-one-one was called. Newport Beach Police Department dispatch reported that "the subject is holding a pair of scissors inside the store and there are still people inside." (App. 31.)

Around 10 minutes after Vos entered the store, a Newport Beach Police officer arrived at the scene and signaled for the clerks to leave. The clerks informed the officer that Vos had armed himself with scissors and had stabbed one of the clerks in the hand. (App. 6-7, 31-32.) The officer observed Vos wrap a garment around his right hand and pretend he was holding a gun. (App. 32.) The officer did not engage Vos. He waited for backup. (App. 32.)

Several other officers arrived, including defendant Officers Henry and Ferris, and surrounded the store entrance. Henry and Ferris positioned themselves behind car doors and armed themselves with rifles. Another officer held a less-lethal 40 mm. weapon. A K9 unit was present. (App. 7-8.) The officers suspected that Vos was mentally unstable or under the influence of drugs. (App. 8.)

The officers did not enter the store. Instead, they prepared to communicate with Vos. They propped open the store doors. An officer set up a

public address system to speak with him. (App. 8, 32.)

Approximately 20 minutes after the first officer arrived, Vos opened the doors of the store's back room. (App. 8.) What happened next may be seen on video, captured from multiple angles, at http://cdn.ca9.uscourts.gov/datastore/opinions/media/16-56791-Exhibit-12-Shooting.mp4 ("video"), last visited November 13, 2018. (App.32, n. 3.)

Vos ran towards the open store door—charging towards the officers. His left hand held a metal object, raised in a stabbing position. An officer said, "He's got scissors." (Video; App. 8, 33.)

The officer on the P.A. ordered, "Drop the weapon!" Vos did not comply. He continued charging. (Video; App. 8, 33.)

Vos would have traveled the 41.1 feet from the back of the store to the officers in 3.4 seconds. (App. 33.) After the warning to Vos to drop his weapon, the officers had about two seconds to decide how to respond to him. (Video; App. 34.)

The officer on the P.A. said, "Shoot him." The officer with the 40 mm. less-lethal weapon fired. Officers Henry and Farris fired their rifles. Vos, shot by both the less-lethal round and bullets, kept charging. He collapsed in the parking lot, a few feet from the officers. He died. (Video; App. 8-9, 33.)

A pronged metal display hook was found on the ground near him. (App. 9.)

Vos's blood tested positive for amphetamine and methamphetamine. (App. 9.) His medical history later revealed a diagnosis of schizophrenia. (App. 9.)

B. The Lawsuit and Appeal

Vos's parents sued the City of Newport Beach and Officers Henry and Farris in the United States District Court for the Central District of California (Selna, J.). They asserted twelve claims, including four under 42 U.S.C. §1983, one under Title II of the ADA (42 U.S.C. §12131), and one under the Rehabilitation Act (29 U.S.C. §701). (App. 10, 50.)

The district court granted the defendants summary judgment. (App. 73.) The court ruled that the undisputed facts established that the officers' use of deadly force was reasonable under the Fourth Amendment as a matter of law. (App. 64.) The court rejected the argument that Vos's mental illness required them to use non-deadly force. (App. 63.) It also rejected the argument that the officers' tactics escalated the confrontation. (App. 63-64.) In ruling summary judgment appropriate on the ADA and Rehabilitation Act claims, the district court distinguished the Ninth Circuit's decision in *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1231 (9th Cir.), *cert. granted sub nom.*, *City & Cty. of San Francisco, Cal. v. Sheehan*, 135 S. Ct. 702 (2014), and *rev'd in part, cert. dismissed in part sub nom.*, *City & Cty. of San Francisco, Cal. v. Sheehan*, __ U.S.__, 135 S. Ct. 1765, 191 L.Ed.2d 856 (2015), which found triable issues of fact on whether officers provoked a mentally ill person to use force by failing to accommodate her disability. Here, the district court ruled, "a reasonable jury could not find that the officers provoked Vos' actions." (App. 66-67 [n. omitted].)

Vos's parents appealed. (App. 5.) On June 11, 2018, the Ninth Circuit affirmed summary judgment for the individual officers on the 42 U.S.C. §1983 Fourth Amendment claims (based on

qualified immunity), and affirmed summary judgment on the parents' Fourteenth Amendment claim, but otherwise reversed. (App. 29-30.)

The Ninth Circuit panel majority ruled that a genuine dispute of material fact existed on whether Vos posed an immediate threat to the officers, and therefore whether Officers Henry and Farris's use of deadly force was reasonable. (App. 14-21.) The majority ruled that, "While a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided' [citations, including *Sheehan*, *supra*, 135 S.Ct. at 1777], the events leading up to the shooting, including officer tactics, are encompassed in the facts and circumstances for the reasonableness analysis [citations]." (App. 19-20.)

The majority further ruled that the indications of Vos's "mental illness create a genuine issue of material fact about whether the government's interest in using deadly force was diminished." (App. 20.)

The panel majority also reversed summary judgment on the parents' ADA/Rehabilitation Act claims against the City. (App. 28.) The majority expanded the grounds for a Title II/Rehabilitation Act claim arising out of police use of force beyond the provocation theory outlined in *Sheehan*, *supra*, 743 F.3d at 1233. (App. 27.) The majority ruled that regardless of whether the officers provoked Vos's attack, they could be held liable for failing to reasonably accommodate Vos under the circumstances. (App. 27-28.) The majority reasoned that " the officers here had the time and the opportunity to assess the situation and potentially employ the accommodations identified by the Parents, including de-escalation, communication, or specialized help." (App. 27.) It further ruled that the

officers' pre-shooting conduct "arguably show[s] further accommodation was possible." (App. 27.) The majority also ruled that "the same fact questions that prevent a reasonableness determination [on summary judgment] also inform an accommodation analysis" and "undercut the defendants' argument that because Vos posed an immediate threat he was not entitled to accommodation." (App. 27-28.)

The Honorable Carlos Bea wrote a dissenting opinion. (App. 30-43.) Judge Bea opined that under the circumstances, the officers' use of deadly force against Vos was objectively reasonable. (App. 43.) He further wrote that this case should not turn on Vos's mental illness. (App. 40.) "While we may consider whether a person is emotionally disturbed in determining what level of force is reasonable," Judge Bea wrote, "we have never ruled that police are obligated to put themselves in danger so long as the person threatening them is mentally ill." (App. 40.) To the contrary, Judge Bea noted, past Ninth Circuit cases held that the circuit would not "create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." (App. 40, quoting *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir.2010).) Judge Bea acknowledged past Ninth Circuit decisions that held officers going about their duties should bear in mind that a mentally disturbed person may respond differently to police intervention than does a person who is not mentally disturbed. (App. 40-42, discussing *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001).) Nevertheless, that factor does not decrease, and may increase, the danger to the officer when a mentally ill person is trying to kill the officer. (App. 42.) Judge Bea opined that the majority opinion "creates a *per se* rule that in *all* circumstances the governmental interest in deadly force is

diminished where the subject is mentally ill." (App. 42 [italics in original].)

On June 22, 2018, defendants petitioned for panel rehearing and rehearing *en banc*. (9th Cir. Dkt. # 67; App. 45.) The petition was denied on August 28, 2018. (App. 44-45.) The Ninth Circuit has stayed the mandate until December 4, 2018, or final disposition of this matter by the Supreme Court.

REASONS TO GRANT THE PETITION

I. Review Is Necessary to Resolve the Issue Raised But Not Resolved In *San Francisco v. Sheehan*: Whether Title II Of The ADA Requires Officers To Provide Accommodations To An Armed, Violent, And Mentally Ill Suspect In The Course Of Bringing That Suspect Into Custody — Particularly Where The Suspect Attacks The Police.

In November 2014, this Court granted certiorari in *City and County of San Francisco v. Sheehan*, No. 13-1412 to resolve the split between the Ninth Circuit and other circuits on whether Title II of the ADA, 42 U.S.C. §§ 12131 et seq., and its implementing regulations, 28 C.F.R. pt. 35, §§ 35.101 et seq. requires officers facing an armed, violent, and mentally ill suspect to provide "reasonable accommodations" to that suspect. In the Court's decision on *Sheehan*, Justice Alito wrote that "[w]hether the statutory language quoted above [42 U.S.C. §12132] applies to arrests is an important question that would benefit from briefing and an adversary presentation." *City and County of San Francisco, Calif. v. Sheehan ("Sheehan II")*, __ U.S.__, 135 S.Ct. 1765, 1773, 191 L.Ed.2d 856

(2015). But at the briefing stage, the petitioner "effectively concede[d]" that §12132 "*may* 'requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.'" *Id.* at 1773 (italics in original). Since no party or *amicus curiae* argued the contrary view, the Court "d[id] not think that it would be prudent to decide the question in this case." *Ibid*. The Court therefore dismissed certiorari on this question as improvidently granted. *Id.* at 1774. On remand, the Ninth Circuit reaffirmed its decision on the ADA claims. *Sheehan v. City and County of San Francisco ("Sheehan III")*, 793 F.3d 1009 (9th Cir. 2015).

In November 2018, the circuit split remains. Further, the Ninth Circuit has not only maintained its holding that law enforcement officers must accommodate armed and violent suspects who appear mentally ill, but has now expanded that holding. The *Sheehan* decision held that officers may violate the ADA where their failure to respect a mentally ill person's "comfort zone," use "non-threatening communications," and "defuse the situation" through the passage of time "precipitat[es] a deadly confrontation." *Sheehan v. City and County of San Francisco ("Sheehan I")*, 743 F.3d 1211, 1233 (9th Cir. 2014). Here, the officers did nothing to precipitate their deadly confrontation with Vos. Yet the Ninth Circuit, in a published decision, held that officers may violate Title II of the ADA (along with the Rehabilitation Act, which provides identical remedies, procedures, and rights) even if they do not provoke the mentally ill person. (App. 27; *Vos v. City of Newport Beach*, 892 F.3d 1023, 1037 (9th Cir. 2018).)

With the provocation requirement rejected, *Vos* leaves confusion about what exactly officers must do to avoid subjecting their employing entities to liability under the ADA or Rehabilitation Act. The officers here did what the officers in *Sheehan* did not do: they acted patiently; they did not invade Vos's "comfort zone"; and they were preparing to communicate with Vos when he charged them. (App.6-8, 32.) Yet the panel majority ruled that "those facts arguably show further accommodation was possible." (App. 27.) The majority gives municipalities no clue on what that "further accommodation" might be.

This Court should grant certiorari to resolve the dispute over whether Title II of the ADA (and thus the Rehabilitation Act) create a source for municipal liability for use of force in arrest separate and apart from the well-developed jurisprudence applying the Fourth Amendment; and if so, what the contours of that liability are.

A. The Circuits Remain Split on This Question.

As in 2014, when the Court granted certiorari in *Sheehan I*, the Ninth Circuit's holding that the ADA's reasonable accommodation requirement applies to officers facing an armed and violent suspect conflicts with the Fifth Circuit's holding in *Hainze v. Richards,* 207 F.3d 795, 801 (5th Cir. 2000) that the ADA does not apply to on-the-street responses to reported disturbances prior to the officer's securing the scene and ensuring there is no threat to human life. *Hainze*, like *Vos*, involves a suspect who approached police officers (albeit walking, rather than running) with a stabbing weapon in hand, refusing orders to stop. The police shot the suspect. *Id.* at 797. Like Vos's survivors, Hainze brought claims both under Title II of the ADA and under the Rehabilitation Act,

and the *Hainze* court analyzed the claims together. *Id.* at 799. Unlike the Ninth Circuit, the Fifth Circuit held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Hainze*, at 801. "To require the officers to factor in whether their actions are going to comply with the ADA," the *Hainze* court reasoned, "in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents." *Id.* at 801. Once the area was secure, and there was no threat to human safety, the court held, the officers would have been under a duty to reasonably accommodate the suspect's disability in handling and transporting him. *Id.* at p. 802.

The Ninth Circuit's holding also conflicts with the Sixth Circuit's holding that the ADA does not apply to police responses to exigent or unexpected circumstances. *Roell v. Hamilton County, Ohio*, 870 F.3d 471, 489 (6th Cir. 2017). *Roell* dealt with a violent, mentally ill suspect who struggled with police officers and passed away after being hit with tasers multiple times. *Id.* at 478-479. The *Roell* court noted that "[n]either the Supreme Court nor this circuit has squarely addressed whether Title II of the ADA applies in the context of an arrest." *Id.* at 489. The *Roell* court declined to decide the issue categorically. *Id.* at 489. Instead, it held that where officers face the exigent circumstances of a mentally ill person who "posed a continuing threat to the deputies and to others" and who swiftly approached the officers brandishing a hose with a metal nozzle as a weapon, the proposed accommodations of de-escalating the situation and calling medical services before engaging with the suspect were

unreasonable in light of the overwhelming safety concerns. The survivor therefore "cannot make out a viable ADA claim under her failure-to-accommodate theory." *Id.* at 489.

On the other hand, *Haberle v. Troxell*, 885 F.3d 170, 180-181 (3rd Cir. 2018) recently found a failure-to-accommodate claim appropriate where a police officer knocked on the door of a suicidal, armed man, causing him to shoot himself, provided the plaintiff pleaded and proved facts showing deliberate indifference.

Other circuits have not barred reasonable accommodation claims against police agencies arising from use of force against violent and mentally-ill suspects, but have not found proposed accommodations to be reasonable under the circumstances. *E.g.*, *Waller v. City of Danville*, 556 F.3d 171, 176-177 (4th Cir. 2009) (mentally ill hostage taker shot and killed when he approached officers swinging a weapon; officers reasonably accommodated suspect by researching his mental illness before acting, and further accommodation once he attacked them would not be reasonable); *Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) (Officers shoot mentally ill plaintiff when he swings knife at them; 42 U.S.C. § 1983 claim against officers for failure to reasonably accommodate under ADA/Rehabilitation Act and against municipality for failure to train officers on ADA accommodation rejected because it was not clearly established what duties, if any, the ADA and Rehabilitation Act imposed on officers attempting to secure potentially violent suspect; officers held entitled to qualified immunity).

The circuits are therefore split.

B. This Is a Suitable Case for Addressing This Question.

This case presents the Court with an opportunity to resolve the question on which it granted certiorari in *Sheehan II*. The Court dismissed the question in *Sheehan II* because the petitioner did not properly brief it. *Sheehan II*, *supra*, 135 S.Ct. at 1773-1174. The parties here will brief that question.

Further, the facts of this case directly raise the issue of whether a municipality may be held liable under Title II when its officers allegedly fail to reasonably accommodate a violent suspect who appears mentally ill and attacks them. Indeed, the facts here mirror those of several of the case listed under the above subheading, which involve suspects attacking, charging, or approaching officers with knives or other weapons. Municipalities and law enforcement officers throughout the nation should know whether, when faced with that peril, they must consider not only the Fourth Amendment's restrictions on use of force, but also whether they are providing reasonable accommodations to the attacking suspect.

C. This Question Is Recurring and Important

As the cases discussed above illustrate, police officers regularly encounter individuals who display symptoms of mental illness, and are faced with the question of whether to use force to defend themselves or others. A 2015 report from the Treatment Advocacy Center concluded that one in four of all fatal police encounters involve individuals with severe mental illness. Doris A. Fuller, H. Richard Lamb, M.D., Michael Biasotti, and John Snook, *Overlooked in the Undercounted:*

The Role of Mental Illness in Fatal Law Enforcement Encounters (available at http://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf (last visited October 24, 2018).) A 2013 joint report by the Treatment Advocacy Center and the National Sheriffs' Association concluded that at least half of the people shot and killed by police each year in the United States have mental health problems. E. Fuller Torrey, M.D., Sheriff Aaron D. Kennard (ret.), M.P.A., Donald F. Eslinger, Michael C. Biasotti, Doris Fuller, *Justifiable Homicides by Law Enforcement Officers: What is the Role of Mental Illness?* (available at http://www.treatmentadvocacycenter.org/storage/documents/2013-justifiable-homicides.pdf (last visited October 24, 2018). In the 2017 term, this Court addressed qualified immunity in the context of an erratically-behaving suspect, armed with a knife, whom a police officer shot out of fear she would attack a civilian. *Kisela v. Hughes*, __U.S.__, 138 S.Ct. 1148, 200 L.Ed.2d 449 (2018).

As this Court has observed, "'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 2020, 188 L. Ed. 2d 1056 (2014), *quoting Graham v. Connor*, 490 U.S. 386, 396-37, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Where, as in this case, mental illness manifests itself in actual or threatened violence toward the police or those they guard, the danger of death or injury multiplies if officers lack clear rules on whether they must accommodate mentally ill suspects; and if so, how. Although *Sheehan I* and the present case impose the threat of municipal liability if officers fail to provide sufficient accommodation, they do not provide clear rules for that accommodation. The problem is

especially acute in circuits that have not decided whether to impose Title II ADA liability in use-of-force situations, or drawn any rules for liability arising out of lack of accommodation.

Further, under the *Sheehan I/Vos* standard, liability may be found even where liability for Fourth Amendment violations would not otherwise attach. For instance, in this case, the officers were found entitled to qualified immunity to liability under the Fourth Amendment. (App. 21-24.) But there is no qualified immunity to municipal liability under the ADA. *Kaur v. City of Lodi*, 263 F.Supp.3d 947, 981 (E.D. Cal. 2017). Municipal liability for Fourth Amendment violations is carefully circumscribed by the analysis under *Monell v. Department of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and its progeny. No such analysis restricts ADA liability. Decades of decisions from this Court and lower courts have shaped the rules for use of deadly force under the Fourth Amendment, setting forth "a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment." *County of Los Angeles, Calif. v. Mendez*, __U.S.__, 137 S.Ct. 1539, 1546, 196 L.Ed.2d 52 (2017). The rules under the ADA are undefined, and the courts' decisions conflict.

D. Title II of the ADA and the Regulations Interpreting It Do Not Require Police Officers to "Accommodate" Armed, Mentally Ill Suspects Who Attack the Police or Others

Nothing in the language of 42 U.S.C. §12132 suggests a legislative intent that violent, armed suspects who attack others must be given reasonable accommodation in use of force. It is a

stretch to consider police use of force against an attacking suspect "participation in" or "the benefits of the services, programs, or activities of a public entity * * *." Nor does the discrimination the statute bars come into play when police use force against a violent individual who attacks them with a weapon. The reason the police are using force is not the assailant's mental health; it is the threat the attacker poses to the officers or others. As Judge Bea observed in his dissent in this case:

> [W]hether the person who charges the officer does so out of a base desire to kill, or does so because, in the midst of a psychotic episode, he thinks the officer is a monster or a ghost, the danger to the officer is the same. The officer's interest in protecting his own life and the lives of his fellows is therefore the same as well.

(App. 43.)

Further, the regulations interpreting Title II suggest that the Title II "reasonable accommodation" scheme is a poor fit for analyzing use of force against an attacking suspect. 28 C.F.R. §35.139 prescribes that public entities need not permit an individual to participate in or benefit from services when those individuals pose a "direct threat to the health or safety of others." 28 C.F.R. §35.104 defines a "direct threat" to mean "a significant risk to the health or safety of others" that cannot be eliminated by reasonable accommodation. An armed, violent suspect who charges or attacks is such a "direct threat." 28 C.F.R. §35.130(b)(7) provides that public entities need not make accommodations where doing so would fundamentally alter the nature of the service, program, or activity. Requiring officers to "reasonably accommodate" a person who is

charging them with a weapon would fundamentally alter law enforcement.

This mismatch between Title II and a situation like the one here leaves municipalities without clear standards on what, if anything, they can do to "accommodate" mentally ill persons who charge or attack their police officers with weapons. It is yet another reason why this Court should again review whether Title II applies to this situation at all.

II. Review Is Also Necessary to Address a Question Noted but Not Resolved in *County of Los Angeles. v. Mendez:* Whether the "Totality of the Circumstances" for Analyzing Use of Force against an Attacking Individual includes Police Conduct before the Attack

In an unnumbered footnote in *Mendez*, *supra*, 137 S.Ct. 1539, 1547, the Court noted the respondents' argument in that case that the "totality of the circumstances" assessment of reasonable use of force under the Fourth Amendment (*Graham v. Connor*, *supra*, 490 U.S. at 396) meant "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." The Court declined to address the question, because it was not addressed in the lower court decision in that case, and because the Court did not grant certiorari on the question. *Mendez,* at 1547.

Petitioners ask the Court to grant certiorari on that question in this case. In finding triable issues of fact on the reasonableness of force in this case, the majority analyzed not only the eight seconds the officers had to respond to Vos's charge at them, but also the officers' conduct before Vos's charge. (App. 14-20 & n. 7.) Other circuits would

deem those events irrelevant. Whether the Fourth Amendment analysis of police use of force in the face of a sudden attack must also take into account officer conduct before the attack is an unsettled issue that should be settled.

A. The Circuits Are Split on This Question

The Ninth Circuit's holding conflicts with the holdings of multiple other circuit that the circumstances leading up to police officers' use of force are irrelevant to the objective reasonableness of their use of deadly force under the Fourth Amendment. *E.g.*, *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Dickerson v. McClellan*, 101 F.3d 1151, 1161-1162 (6th Cir. 1996); *Schulz v. Long*, 44 F.3d 643, 648-649 (8th Cir. 1995); *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275–1276 (5th Cir. 1992); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992). *See also Terebesi v. Torreso*, 764 F.3d 217, 235, n. 16 (2d Cir. 2014) (collecting cases); Aaron Kimber, Note, Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre–Seizure Conduct in an Excessive Force Claim, 13 Wm. & Mary Bill Rts. J. 651, 652-653, n. 8-9 (2004) (noting split).

Other circuits have held that evidence of pre-seizure conduct is relevant to Fourth Amendment excessive force claims. *E.g.*, *Abraham v. Raso*, 183 F.3d 279, 291-292 (3d Cir. 1999) (rejecting 7th, 8th, and 10th Circuit's approaches); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26-27 (1st Cir. 1995) (rejecting 4th, 7th, and 8th Circuit's approaches), *accord*, *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005).

The Ninth Circuit's own position on this issue is contradictory—or, as the *Vos* panel majority put it, "complicated." (App. A-19.) On the

one hand, the circuit has held that a Fourth Amendment violation cannot be established "based merely on bad tactics that result in a deadly confrontation that could have been avoided," *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002); *see also* discussion in *Sheehan II*, *supra*, 135 S.Ct. at 1777 (discussing *Billington*). On the other hand, the circuit has held—in *Vos*, and in other decisions before and after *Vos*—that "the events leading up to the shooting, including the officers [sic] tactics, are encompassed in the facts and circumstances for the reasonableness analysis." (App. 19-20, citing *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1087(9th Cir. 2017) and *Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010).

The panel majority's discussion of California state law on this subject (App. 28-29) creates further uncertainty. The majority writes that California's negligence standard for police use of deadly force uses tort law's "'reasonable care'" standard, which is distinct from the Fourth Amendment's Reasonableness standard. (App. 28.) The Fourth Amendment standard, the majority continues, "'is narrower and *plac[es] less emphasis on preshooting conduct*'" than California's negligence standard. (App. 28-29 [emphasis added], quoting *Hayes v. County of San Diego*, 57 Cal. 4th 622, 305 P.3d 252, 262 (Cal. 2013).) The Ninth Circuit thus holds that the Fourth Amendment places *some* emphasis on pre-shooting conduct, but less than California law does. That does not give the courts, municipalities, or police officers clear guidance.

Further complicating the Ninth Circuit's approach is the circuit's decision on remand from this Court *Mendez v. County of Los Angeles*, 897 F.3d 1067, 1074 (9th Cir. 2018). *Mendez* bypassed the excessive force analysis, and held that the actions of the defendant deputies in that case

preceding the need to use force—the officers' unlawful entry into the house where the plaintiffs were sleeping—were the proximate cause of the action (the male plaintiff picking up a BB gun) that led to the officers shooting the plaintiffs.

The Tenth Circuit's holdings on this subject have also been inconsistent. In *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994), the circuit expressly followed the Seventh and Eighth Circuits' approaches and deemed pre-seizure conduct irrelevant to the Fourth Amendment analysis. In *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995), however, the circuit cited *Bella* as supporting a rule that "reckless or deliberate" conduct by defendants "during the seizure" that "unreasonably created the need to use such force" is a factor in whether the defendants' use of force is reasonable.

The circuits are therefore in conflict on this issue.

B. The Question Is Recurring and Important

The cases discussed above show that this question is recurring. The importance of defining the "totality of the circumstances" considered in deciding whether use of deadly force is objectively reasonable is undeniable. Courts need clear direction on what they must consider when determining whether use of force was objectively reasonable under the Fourth Amendment. Officers and municipalities should have clear rules about the scope of conduct that the Constitution permits. That clarity does not exist. This Court should review this issue, resolve the conflict, and prescribe the rules for courts and officers to follow.

III. If the Court Grants Review, It Should Address The Related Question Of Whether A Law Enforcement Officer's Interest In Using Deadly Force Against A Suspect Threatening An Officer's Life Is Diminished If The Assailant Is Mentally Ill.

The panel majority and Judge Bea split on the question of whether the defendant officers' interest in protecting themselves from an immediate threat of death or serious bodily harm is diminished because the person attacking the police is mentally ill. The majority held that Vos's "indications of mental illness create a genuine issue of material fact about whether the government's interest in using deadly force was diminished." (App. 20.) It further held that "the fact that Vos was acting out and had invited the officers to use deadly force on him is sufficient under our precedent for a reasonable jury to conclude that the government's interest in using deadly force on Vos was diminished * * *." (App. 20-21, n. 9.) Judge Bea rejected the argument that in a case where a mentally ill person charges the police with a metal weapon in his hand, the governmental interest in using deadly force is not diminished. (App. 42.) Judge Bea expressed concern that the majority "creates a *per se* rule that in *all* circumstances the governmental interest in deadly force is diminished where the subject is mentally ill." (App. 42.) He opined that "[t]he majority's position is simply untenable either as a matter of precedent or logic." (App. 43.)

This question is not in itself worthy of certiorari. The undersigned has not found other circuits that have addressed whether a police officer has less of an interest in protecting the officer's life and safety (and that of fellow officers present) if a suspect is mentally ill.

But it is inextricably related to the other questions this petition raises—questions on which the circuits have split. Both this question and the question of whether Title II applies to use of deadly force against a mentally ill attacker raise a common issue: Whether and how a police officer can and should "accommodate" a mentally ill assailant. *See*, *e.g.*, *Sheehan II*, *supra*, 135 S.Ct. 1765, 1775. And where the plaintiff alleges that the officers should have "accommodated" the mentally ill person differently before the attack, the relevance of the pre-attack events will become an issue.

Therefore, if the Court grants certiorari on either the first or second question raised in this petition, it should also review and resolve the third.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: November 20, 2018.

Respectfully Submitted,

POLLAK, VIDA AND BARER

DANIEL P. BARER
Counsel of Record

Attorneys for Petitioners
City of Newport Beach, Richard Henry, Nathan Farris

LIST OF APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56791

D.C. No. 8:15-cv-00768- JVS-DFM

OPINION

Filed June 11, 2018

RICHARD VOS, individually and as successor-in-interest to Gerritt Vos, and JENELLE BERNACCHI, individual, and as successor-in-interest to Gerritt Vos,

Plaintiffs-Appellants,

v.

CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY; NATHAN FARRIS; DAVE KRESGE; DOES, 1–10, inclusive,

*Defendants-Appell*ees.

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted April 12, 2018
Pasadena, California

Before: Carlos T. Bea and Mary H. Murguia, Circuit Judges, and Donald W. Molloy,* District Judge.

Opinion by Judge Molloy;
Dissent by Judge Bea

SUMMARY**

Civil Rights

The panel affirmed in part and reversed in part the district court's summary judgment and remanded in a 42 U.S.C. § 1983 action alleging that police officers used excessive deadly force when they fatally shot Gerritt Vos.

---

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The police responded to a call about a man behaving erratically and brandishing a pair of scissors at a 7-Eleven. The shooting happened while the police were deciding how to handle the situation, and Vos unexpectedly charged the doorway of the store with what appeared to be a weapon raised above his head.

The panel held that the facts were such that a reasonable jury could conclude that Vos was not an immediate threat to the officers. The panel noted that the officers had surrounded the front door to the 7-Eleven, had established positions behind cover of their police vehicles, and outnumbered Vos eight to one. The panel further noted that although officers saw that Vos had something in his hand as he charged them, they did not believe he had a gun, and that the officers had less-lethal methods available to stop Vos from charging. The panel noted that it was undisputed that Vos was mentally unstable and that this created a genuine issue of fact as to whether the government's interest in using deadly force was diminished. The panel nevertheless held that the defendant officers were entitled to qualified immunity on the § 1983 claims because existing precedent did not clearly establish, beyond debate, that the officers' acted unreasonably under the circumstances.

The panel held that because a reasonable jury could find that the officers violated Vos's Fourth Amendment rights, it was appropriate to

remand plaintiffs' conspiracy claims and claims brought pursuant to *Monell v. Dep't of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978) to the district court to consider in the first instance.

The panel held that on the record before it, the defendants were not entitled to summary adjudication of plaintiffs' claims under the American with Disabilities Act and the Rehabilitation Act, and reversed the district court's ruling to the contrary. The panel held that the district court erred when it found that there was no failure to accommodate because the officers did not initiate the confrontation. The panel determined that the officers had the time and opportunity to assess the situation and potentially employ accommodations, including de-escalation, communication, or specialized help. The panel also reversed the district court's summary adjudication of plaintiffs' negligence and remaining state law claims.

Dissenting, Judge Bea stated that because in his view the officers reacted reasonably to the threat they faced, he would affirm the decision of the district court.

COUNSEL

Paul L. Hoffman (argued), Schonbrun Seplow Harris & Hoffman LLP, Los Angeles, California; Milton Grimes, Los Angeles, California; Jason P. Fowler and R. Rex Parris, R. Rex Parris Law Firm, Lancaster, California; for Plaintiffs-Appellants.

Daniel Phillip Barer (argued), Pollak Vida & Barer, Los Angeles, California; Allen Christiansen and Peter J. Ferguson, Ferguson Praet & Sherman APC, Santa Ana, California; for Defendants-Appellees.

OPINION

MOLLOY, District Judge:

On May 29, 2014, officers of the City of Newport Beach Police Department fatally shot Gerritt Vos ("Vos"). The police responded to a call about a man behaving erratically and brandishing a pair of scissors at a 7-Eleven. The shooting happened while the police were deciding how to handle the situation, and Vos unexpectedly charged the doorway of the store with what appeared to be a weapon raised above his head. Vos's parents filed this action against the officers and the City, raising claims under federal and state law. The district court granted summary judgment in favor of the defendants, concluding that the officers' use of force was objectively reasonable. Vos's parents appeal that decision. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand.

FACTUAL BACKGROUND

The record is viewed in the light most favorable to the nonmovants, Richard Vos and

Jenelle Bernacchi (the "Parents"), *Tolan v. Cotton,* 134 S. Ct. 1861, 1866 (2014) (per curiam), so long as their version of the facts is not blatantly contradicted by the video evidence, *Scott v. Harris,* 550 U.S. 372, 378–79 (2007). The mere existence of video footage of the incident does not foreclose a genuine factual dispute as to the reasonable inferences that can be drawn from that footage. *See id*. at 380 (focusing on whether a party's version of events "is so utterly discredited by the record that no reasonable jury could have believed him").

At approximately 8:15 p.m. on May 29, 2014, Vos entered a 7-Eleven convenience store. Vos became agitated; he ran around the store shouting things like "[k]ill me already, dog." Someone called 911. For approximately the next six minutes, Vos ran around the store cursing at people. Meanwhile, the video footage shows other customers going about their business of shopping and checking out at the cash register. The Newport Beach Police Department dispatch stated that "the reporting party is advising that the subject is holding a pair of scissors inside the store and there are still people inside." At one point, Vos grabbed and immediately released a 7-Eleven employee, yelling "I've got a hostage!"

At about 8:25 p.m. Officer David Kresge ("Kresge") arrived at the scene. Officer Kresge spoke to some bystanders who indicated Vos was still in the store and Officer Kresge signaled to the remaining clerks to exit the building. The clerks

said that Vos had armed himself with scissors and one employee had been cut on the hand while trying to disarm Vos before authorities arrived, resulting in a "half-inch laceration." Officer Kresge saw Vos behind the 7-Eleven's glass doors yelling, screaming, and pretending to have a gun. Officer Kresge broadcasted on the police radio that "the subject is simulating having a hand gun behind his back and is asking me to shoot him." Officer Kresge then saw Vos go into the back room and shut the door. Officer Kresge asked for backup and specifically asked for a 40-millimeter less-lethal projectile launcher.[1] As other officers arrived, Officer Kresge informed them that Vos was agitated and likely under the influence of narcotics.

By 8:30 p.m., several more officers arrived, including Defendants Officer Richard Henry ("Henry") and Officer Nathan Farris ("Farris"). Immediately before the fatal shooting, at least eight officers were present. The police positioned two police cars outside the store's front entrance in a "v" formation and used the vehicles' doors for cover. Trainee Officer Andrew Shen ("Shen") armed himself with the requested 40 millimeter less-lethal device. The others readied themselves with lethal weapons: Officers Henry and Farris armed

---

[1] The Newport Police Department differentiates between "non- lethal" means (holds and pain compliance techniques) and "less-lethal" means (baton, 40 millimeter, taser, and aerosol).

themselves with AR-15 rifles,[2] while Officer Kresge held a handgun. The police propped open the 7-Eleven doors and Officer Shawn Preasmyer ("Preasmyer") set up a public address system, getting ready to communicate with Vos. There was also a canine unit on the scene. The officers knew that Vos had been simulating having a gun and that he was agitated, appeared angry, and was potentially mentally unstable or under the influence of drugs. They also heard Vos yell "shoot me" and other similar cries. The police on site talked about using non-lethal force to subdue Vos both over the radio and amongst themselves at the scene.

At about 8:43 p.m., Vos opened the door of the 7-Eleven's back room. As he did so, some officers shouted "doors opening." Vos then ran around the front check-out counter and towards the open doors. As he ran, he held an object over his head in his hand. The distance between Vos and the officers at the point he started running was approximately 30 feet. One officer shouted that Vos had scissors. Over the public address system, Officer Preasmyer twice told Vos to "Drop the weapon." Vos did not drop the object and instead kept charging towards the officers. Officer Preasmyer then shouted "shoot him." Officer

---

[2] Officer Farris initially grabbed a 40-millimeter less lethal when he arrived at the scene but went back to his car and switched to an AR-15. He also directed Officer Shen to move to a better vantage point.

Preasmyer later testified that this order was directed solely to Officer Shen. Officer Shen fired his less-lethal weaponry and, within seconds, Officers Henry and Farris fired their AR-15 rifles.[3] No other officers fired. Vos continued to run as he was struck by the bullets, collapsing on the sidewalk in front of the officers. Vos was shot four times and died from his wounds. About eight seconds elapsed from the time Vos came out of the back room to when he was killed.

Somewhere around 20 minutes passed from when officers arrived until Vos ran at them. During this time, the officers did not communicate with Vos. Officers Shen and Farris later testified that they did not hear Officer Preasmyer's command to shoot, and Officer Henry testified that he heard it but did not react to it. Neither Henry nor Farris knew that Officer Shen had fired the less-lethal weaponry. They also testified that they saw a metallic object in Vos's hand, which they believed to be scissors. After the shooting, a "pronged metal display hook was found on the ground a few feet from where [Vos] had collapsed." While the officers only suspected the possibility of substance abuse, Vos's blood later tested positive for both amphetamine and methamphetamine. Vos's medical history later revealed that he had been diagnosed as schizophrenic.

---

[3] Eight shots were fired, four by each officer. Officer Shen fired once, resulting in nine shots

PROCEDURAL BACKGROUND

Vos's Parents brought this suit as Vos's lawful heirs and successors-in-interest against the City of Newport Beach, Officer Henry, Officer Farris, and Officer Kresge[4] alleging twelve causes of action: (1) excessive force in violation of the Fourth Amendment, 42 U.S.C. § 1983; (2) violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131; (3) violation of the Rehabilitation Act, 29 U.S.C. § 701; (4) violation of civil rights due to loss of familial relationship, 42 U.S.C. § 1983; (5) municipal and supervisory liability, 42 U.S.C. § 1983; (6) wrongful death (negligence); (7) wrongful death (negligent hiring, training and retention); (8) battery; (9) assault; (10) violation of civil rights, Cal. Civ. Code § 52.1; (11) survivor claims; and (12) civil conspiracy, 42 U.S.C. § 1983. The district court granted the defendants' motion for summary judgment as to all of the Parents' claims and judgment was entered in favor of the defendants. The Parents appeal that judgment.[5]

---

[4] The parties later stipulated to the dismissal of Officer Kresge.

[5] The Parents do not challenge the district court's summary adjudication of their Fourteenth Amendment claim for deprivation of a familial relationship. We therefore do not address it. *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069 n.1 (9th Cir. 2008). The district court also made a number of evidentiary rulings that are not at issue on appeal.

DISCUSSION

We review de novo a grant of summary judgment, *Blankenthorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007), "and in 'determining whether summary judgment is appropriate, view the evidence in the light most favorable to the non-moving party.'" *Lal v. California*, 746 F.3d 1112, 1115–16 (9th Cir. 2014) (quoting *Garcia v. Cty. of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011)) (alteration omitted). Summary judgment is appropriate where the record, read in the light most favorable to the non-movant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

I. Excessive Force

To determine whether the use of force was objectively reasonable, the court balances the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotations and citations omitted).

A. Nature of the Intrusion

The officers used deadly force against Vos. "The intrusiveness of a seizure by means of deadly force is unmatched." *Tennessee v. Garner,* 471 U.S. 1, 9 (1985). "The use of deadly force implicates the highest level of Fourth Amendment interests

both because the suspect has a 'fundamental interest in his own life' and because such force 'frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.'" *A.K.H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1011 (9th Cir. 2016) (quoting *Garner*, 471 U.S. at 9). Because no one disputes that the officers used the highest level of force against Vos, the issue is determining whether the governmental interests at stake were sufficient to justify it.

B. Governmental Interests

The strength of the government's interest is measured by examining three primary factors: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. As explained below, on these facts, a reasonable jury could conclude that the government's interests were insufficient to justify the use of deadly force under these circumstances.

First, the officers were not responding to the report of a crime. *See Glenn v. Wash. Cty.*, 673 F.3d 864, 874 (9th Cir. 2011) (identifying that the "character of the offense" is "an important

consideration" especially when no crime has been identified). Rather, law enforcement was contacted because of Vos's erratic behavior. In fact, the officers discussed at the scene what crime may have been committed, speculating "false imprisonment" and stating "let's get a good crime."[6]

Second, once the officers were at the scene, there was little opportunity for Vos to flee. While closing himself in the back room could be perceived as an attempt to evade arrest, officers never initially spoke to Vos or gave him any commands as to make his behavior noncompliant. *See Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010) (noting that while "passive resistance" can support the use of force, "the level of force an individual's

---

[6] The dissent suggests that, under California law, Vos "likely could have been charged with" assault with a deadly weapon, false imprisonment, criminal threats, and disturbing the peace. Yet, the police initially were called in response to Vos's erratic behavior. When Officer Kresege arrived, he learned that one store clerk had been cut while trying to disarm Vos before authorities arrived, and he watched as Vos yelled, simulated having a handgun, and shut himself in the back room. Taking the facts in the light most favorable to the Parents, which we are required to do at this stage, *see Mattos v. Agarano*, 661 F.3d 433, 449 (9th Cir. 2011), it is not clear that the "crime at issue" in this case was one of the severe crimes the dissent identifies. Accordingly, this factor does not weigh in favor of finding that the officers' use of deadly force was reasonable, especially in light of the other facts and circumstances in this case.

resistance will support is dependent on the factual circumstances underlying that resistance").

The most important factor, however, is whether Vos posed an immediate threat to the safety of officers or others. *See Longoria v. Pinal Cty.*, 873 F.3d 699, 705 (9th Cir. 2017) (explaining that the second factor, whether the suspect poses an immediate threat to the safety of the officers or others, is the most important). In considering "whether there was an immediate threat, a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Mattos v. Agarano*, 661 F.3d 433, 441–42 (9th Cir. 2011) (en banc) (internal quotation marks and citation omitted).

Here, the facts are such that a reasonable jury could conclude that Vos was not an immediate threat to the officers. The officers had surrounded the front door to the 7-Eleven, had established positions behind cover of their police vehicles, and outnumbered Vos eight to one. The officers saw that Vos had something in his hand as he charged them, but they did not believe he had a gun, and the officers had less-lethal methods available to stop Vos from charging. Even though only eight seconds passed between when Vos emerged from the back room and when he was shot, construing the facts as they are presented by the Parents and depicted in the video footage, a reasonable jury could conclude that Vos did not pose an immediate

threat such that the use of deadly force was warranted.[7]

The defendants argue that Vos "forced the confrontation" by charging the officers, and the immediacy of the threat is comparable to that in *Lal v. California.* In *Lal*, officers responded to a domestic violence call followed by a 45-minute high-speed car chase. 746 F.3d at 1113–14. During the pursuit, officers learned that Lal wanted them to shoot him and he wanted to kill himself. *Id.* at 1114. After Lal's vehicle was disabled, he got out and officers told him to put his hands in the air. *Id.* Lal briefly complied before putting his hands in his pockets and saying "just

---

[7] The dissent contends that our analysis ignores the fact that the officers had mere seconds to decide whether to deploy deadly force. That is not the case. Rather, the mere seconds that elapsed between when Vos emerged from the back room is one factor in the analysis. While the "calculus of reasonableness must embody the allowance for the fact that police officers are often forced to make split-second judgments," the analysis requires the court to look at all the facts and circumstances surrounding the interaction, which also includes that the officers had non-lethal means of stopping Vos, outnumbered Vos eight to one, did not believe that Vos had a gun, and had established positions of cover behind their vehicles, which also prevented Vos from easily escaping. *See, e.g., Graham*, 490 U.S. at 396–97.

shoot me, just shoot me." *Id.* Lal then reached down, grabbed rock, and smashed it repeatedly into his own forehead. *Id.* He also attempted to pull a metal stake out of the ground to impale himself. *Id.* Lal then approached the officers while carrying a rock in his hand and pretended his cell phone was a gun, and he threw several soft-ball sized rocks at the officers, and one struck a spotlight on a patrol car. *Id.* The officers asked for "less than lethal assistance" and were told a canine unit was on the way. *Id.* Lal picked up a large, football-sized rock and continued to advance on officers despite their commands. *Id.* The officers fired on Lal when he was a few feet away, killing him. *Id.* at 1115. We held that the officers reasonably believed that Lal would heave the rock at them, emphasizing that Lal "forced the issue by advancing on the officers," and "[t]he fact that Lal was intent on 'suicide by cop' did not mean that the officers had to endanger their own lives by allowing Lal to continue in his dangerous course of conduct." *Id.* at 1117–18 (finding "no suggestion that the officers intentionally provoked Lal. Rather, the totality of the circumstances shows that they were patient. . . . Instead, it was Lal who forced the confrontation").

Yet, important facts distinguish this case from *Lal*. First, and perhaps most significantly, while the officers in *Lal* requested less-lethal means, they had not yet arrived when Lal advanced on them. 746 F.3d at 1114. Here, by the time Vos advanced, eight officers had arrived on the scene,

Officer Shen was armed with the 40-millimeter less lethal firearm, there was a canine unit present, and other officers had tasers. The officers also had the door surrounded and had established defensive cover using police vehicles. *See Blanford v. Sacramento Cty.*, 406 F.3d 1110, 1118 (9th Cir. 2005) (specifically noting that a suspect "was not surrounded" in determining use of deadly force reasonable under circumstances); *Longoria*, 873 F.3d at 705 (focusing on the fact the suspect was surrounded in finding a genuine question as to whether officers used excessive force).

Second, while we concluded that using an alternative force on Lal (pepper spray) would not have prevented him from hurling the rock, *Lal*, 746 F.3d at 1119, it is not clear that the use of any of the above less-lethal means on Vos would have been ineffective. Vos was within 20 feet of the officers when he was shot, a distance within the range of the 40-millimeter less-lethal weapon, a taser, or a canine. Although officers are not required to use the least intrusive degree of force available, *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), "the availability of alternative methods of capturing or subduing a suspect may be a factor to consider," *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (citation omitted).

Third, Lal already had led officers on a 45-minute high- speed car chase when he was shot, which had endangered the lives of other drivers and the officers pursuing him, and therefore

demonstrated that he was a serious danger to himself and others. *Lal*, 746 F.3d at 1114, 1117. Here, one clerk was cut on the palm of his hand by Vos's scissors while attempting to disarm Vos before the police arrived, but Vos had not otherwise endangered himself or the 7-Eleven patrons.

Finally, while Lal was on the side of the freeway and could have escaped and risked harm to other individuals, *Lal*, 746 F.3d at 1117, Vos was alone in the 7-Eleven and at least eight officers and their vehicles served as a barricade between Vos and the public.

While we concluded that the officers in Lal reasonably employed deadly force, *Lal* does not compel the same conclusion here where officers had non-lethal means ready and available, Vos had not previously harmed or endangered the lives of others, apart from his confrontation with the store clerk, and eight officers surrounded Vos with their vehicles. The facts and circumstances confronting the officers here are such that whether Vos posed an immediate threat is a disputed question of fact, and one the jury could find in the Parents' favor.[8]

---

[8] The Parents also raise a factual dispute as to whether Officers Shen, Henry, and Farris heard the command to shoot. But the order to shoot is not material to whether the use of lethal force was objectively reasonable. *See Graham*, 490 U.S. at 397 ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without

Additionally, the *Graham* factors are not exclusive. Other relevant factors include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officers that the subject of the force used was mentally disturbed. *See Bryan*, 630 F.3d at 831; *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001).

Here, it is undisputed that the officers had less intrusive force options available to them. *See Bryan,* 630 F.3d at 831. Whether the officers warned Vos that they would use deadly force is more complicated. On one hand, "[e]everything happened within eight seconds," giving officers little to no time to warn Vos that they would use deadly force. On the other hand, the officers had upwards of 15 minutes to create a perimeter, assemble less-lethal means, coordinate a plan for their use of force, establish cover, and, arguably, try to communicate with Vos. While a Fourth Amendment violation cannot be established "based merely on bad tactics that result in a deadly confrontation that could have been avoided," *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002); *see also City & Cty. of S.F. v. Sheehan (Sheehan II),* 135 S. Ct. 1765, 1777 (2015), the events leading up to the shooting, including the officers tactics, are encompassed in the facts and circumstances for the reasonableness analysis, *see*

---

regard to their underlying intent or motivation.").

Hung Lam v. City of San Jose, 869 F.3d 1077, 1087 (9th Cir. 2017); *see also Bryan*, 630 F.3d at 831.

Finally, it is undisputed that Vos was mentally unstable, acting out, and at times invited officers to use deadly force on him. These indications of mental illness create a genuine issue of material fact about whether the government's interest in using deadly force was diminished. *See Longoria,* 873 F.3d at 708. Indeed, other than Henry and Farris, six "[o]ther officers appear to have been aware of this and prepared to respond accordingly by employing only non-lethal weapons." *Id.*[9]

---

[9] The dissent asserts that our opinion creates a "*per se* rule that in *all* circumstances the governmental interest in deadly force is diminished where the suspect is mentally ill." That is not our intent. Rather, whether the suspect has exhibited signs of mental illness is one of the factors the court will consider in assessing the reasonableness of the force used, in addition to the *Graham* factors, the availability of less intrusive force, and whether proper warnings were given. Although this Court has "refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals," our precedent establishes that if officers believe a suspect is mentally ill, they "should . . . ma[k]e a greater effort to take control of the situation through less intrusive means." *Bryan*, 630 F.3d at 829. Here, the fact that Vos was acting out and had invited the officers to use deadly force on him is sufficient under our precedent for a reasonable jury to conclude that the government's interest in using deadly force on Vos was

Balancing all of these considerations, a reasonable jury could find that "the force employed was greater than is reasonable under the circumstances." *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003) (internal quotation marks and citation omitted). Summary adjudication of the Parents' Fourth Amendment claim on these grounds was therefore inappropriate.

II. Qualified Immunity

Despite factual issues which preclude summary judgment on the issue of whether the officer's violated Vos's Fourth Amendment rights, that is not the end of the inquiry. The individual officers are protected "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "In determining whether an officer is entitled to qualified immunity, we consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal*, 746 F.3d at 1116. Because the district court concluded that no constitutional violation occurred, it did not reach the question of whether the law was clearly

---

diminished, *see Longoria*, 873 F.3d at 708, especially in light of the other facts and circumstances in this case.

established.[10] On this record, we conclude that the individual officers are entitled to qualified immunity as a matter of law. *Kisela v. Hughes*, __ U.S. __, 138 S. Ct. 1148 (2018).

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). In determining whether the law has been clearly established, there does not need to be "a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 740 (2011). The Supreme Court has repeatedly admonished courts "not to define clearly established law at a high level of generality." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742). The dispositive question is therefore "whether the violative nature of particular conduct is clearly established" in the specific context of the case. *Id.* (internal quotation marks and citation omitted). "It is the plaintiff who bears the burden of

---

[10] The defendants argue that the Parents waived any argument as to qualified immunity because they did not address it in their opening brief. But because the district court did not address qualified immunity, the Parents' omission does not amount to waiver. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1118 n.6 (9th Cir. 2010); *see also Koerner v. Grigas,* 28 F.3d 1039, 1049 (9th Cir. 2003) (recognizing an exception to waiver when the issue is raised in the appellee's brief).

showing that the rights allegedly violated were clearly established." *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017) (internal quotation marks and citation omitted).

Here, officers confronted a reportedly erratic individual that took refuge in a 7-Eleven, cut someone with scissors, asked officers to shoot him, simulated having a firearm, and ultimately charged at officers with something in his upraised hand. The relevant inquiry is whether existing precedent placed the conclusion that officers acted unreasonably in these circumstances "beyond debate." *Mullenix*, 136 S. Ct. at 309. It did not. *See Kisela*, 138 S. Ct. at 1553–54 (recently holding that the law was not clearly established where officers shot a mentally ill woman holding a kitchen knife by her side standing in close proximity to her roommate). Because Vos acted aggressively, the law was not established by either *Deorle* or *Bryan*. *See S.B. v. Cty. of San Diego*, 864 F.3d 1010, 1016 n.5 (9th Cir. 2017) (refusing to extend law established in *Deorle* and the like to situations involving an aggressive or threatening suspect). Rather, as discussed above, the most analogous case is likely *Lal*, which was decided two months before the events that took place here. 746 F.3d 1112; *see also Blanford*, 406 F.3d at 1119 (holding that deputies were entitled to qualified immunity for shooting a suspect wandering around a neighborhood with a raised sword, growling, and ignoring commands to drop the weapon); *S.B.*, 864 F.3d at 1015–17 (holding law not clearly

established where officers used deadly force on a mentally ill individual with knives in his pockets when he drew one); *Woodward v. City of Tucson*, 870 F.3d 1154 (9th Cir. 2017) (holding the law not clearly established in May 2014 where officers used deadly force on a suspect who attacked them in his apartment while growling and brandishing a broken hockey stick). And even if officers were mistaken, that mistake was reasonable given the decision in *Lal. Mullenix*, 136 S. Ct. at 311 (noting that even though the "wisdom" of the officer's choice not to use less intrusive means may be questionable, Supreme Court "precedents do not place the conclusion that he acted unreasonably in these circumstances beyond debate") (internal quotation marks and citation omitted).

Accordingly, the defendant officers are entitled to qualified immunity on the § 1983 claims and the district court's grant of summary judgment as to the individual officers is affirmed on that ground. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) ("We may affirm on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground.") (internal quotation marks and citation omitted).

III. *Monell*[11] and Civil Conspiracy

When the district court found no constitutional violation, it also granted summary judgment in favor of the City of Newport Beach as to the Parents' *Monell* and civil conspiracy claims. Because a reasonable jury could find that the officers violated Vos's Fourth Amendment rights, these claims are remanded to the district court to consider in the first instance.

IV. ADA and Rehabilitation Act

We, like the district court, analyze the Parents' ADA and Rehabilitation Act claims together because the statutes provide identical "remedies, procedures and rights." *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000). Title VII of the ADA prohibits a public entity from discriminating against any "qualified individual with a disability." *Sheehan v. City & Cty. of S.F.*, 743 F.3d 1211, 1231 (9th Cir.), *cert. granted sub nom., City & Cty. of S.F., Cal. v. Sheehan*, 135 S. Ct. 702 (2014), and *rev'd in part, cert. dismissed in part sub nom., Sheehan II*, 135 S. Ct. at 1778 (hereinafter *Sheehan I*). Title VII applies to arrests. *Id.* at 1232. Although the Supreme Court granted certiorari as to whether Title II requires "any accommodation of an armed and violent individual," it later dismissed that issue as

---

[11] *Monell v. Dep't of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978).

improvidently granted. *Sheehan II*, 135 S. Ct. at 1772, 1774. *Sheehan I* therefore controls:

> To state a claim under Title II of the ADA, a plaintiff generally must show: (1) []he is an individual with a disability; (2) []he is otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) []he was either excluded from participation in or denied the benefits of the public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of h[is] disability.
>
> 743 F.3d at 1232.

In *Sheehan I*, officers responded to a call at a group home to perform a welfare check on a mentally ill woman after she threatened a social worker with a knife when he entered her room. *Id*. at 1217. When officers entered her room, she grabbed a knife and began to aggressively approach them, yelling at them to get out. *Id.* at 1218–19. The officers retreated, closed the door, and called for backup. *Id.* at 1219. But, instead of waiting, the officers forcibly reentered the room, pepper sprayed the woman and, when she continued to advance, shot her five or six times. *Id*. at 1219–20. We held that a reasonable jury could find that "the

situation had been defused sufficiently, following the initial retreat from [the] room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics." *Id.* at 1233.

Here, the district court found no provocation (i.e., that officers did not initiate the confrontation) and so found no failure to accommodate, distinguishing this case from *Sheehan I.* The Parents argue that in doing so, the district court improperly read a provocation requirement into accommodation. They are correct. While *Sheehan I* addresses provocation in the context of a plaintiff's excessive force claim, see 743 F.3d at 1230, the reasonableness of accommodation under the circumstances is an entirely separate fact question, *see id.* at 1233 (citing *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010)). Similar to the situation in *Sheehan I*, the officers here had the time and the opportunity to assess the situation and potentially employ the accommodations identified by the Parents, including de-escalation, communication, or specialized help. While the defendants rely on the officers' pre-shooting conduct to argue they accommodated Vos to the extent required by the law, those facts arguably show further accommodation was possible.

Moreover, the district court's decision was based in part on its earlier determination that the officers' actions were objectively reasonable. The same fact questions that prevent a reasonableness

determination inform an accommodation analysis. They also undercut the defendants' argument that because Vos posed an immediate threat he was not entitled to accommodation. 28 C.F.R. § 35.139(a). Finally, the defendants insist that Title II of the ADA and the Rehabilitation Act do not apply because Vos's behavior stemmed from his illegal drug use, not a mental illness. 28 C.F.R. § 35.131(a). Because the district court concluded there was no failure to accommodate, it did not address the applicability of the ADA based on these grounds. We decline to address this question in the first instance.

On this record, the defendants are not entitled to summary adjudication of the Parents' ADA and Rehabilitation Act claims and the district court's ruling to the contrary is reversed.

V. State Law Claims

A. Negligence

The Parents bring their negligence claims under state law. The California Supreme Court articulated the relevant standard for these claims in *Hayes v. County of San Diego (Hayes I)*, 305 P.3d 252 (Cal. 2013). In California, police officers "have a duty to act reasonably when using deadly force." *Id.* at 256. To determine police liability, a court applies tort law's "reasonable care" standard, which is distinct from the Fourth Amendment's "reasonableness" standard. *Id.* at 262. The Fourth Amendment is narrower and "plac[es] less

emphasis on preshooting conduct." *Id.* Because the district court erred in holding that use of deadly force was objectively reasonable under the Fourth Amendment, we reverse its summary adjudication of the Parents' negligence claim. *See C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1257 n.6 (9th Cir. 2016) (noting that "state negligence law . . . is broader than federal Fourth Amendment law") (quoting *Hayes I*, 305 P.3d at 263).

B. Remaining State Law Claims

Similarly, because the district court found that the officers used reasonable force, it granted summary judgment in favor of the defendants on the Parents' claims under state law causes of action for assault, battery, and California Civil Code § 52.1. It also granted summary judgment for the defendants on the Parents' survivor claims, stating it does not provide independent methods of recovery. Because the district court erred in holding that use of deadly force was objectively reasonable, we reverse its grant of summary judgment as to the remaining state law claims. *Villegas,* 823 F.3d at 1257 ("[T]he doctrine of qualified immunity does not shield defendants from state law claims." (citing *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 Cir. 2013)).

CONCLUSION

We affirm in part the district court's summary adjudication of the Parents' Fourth

Amendment excessive force claim insofar as the individual officers are entitled to qualified immunity. We reverse the district court's decision in all other respects.[12] The case is remanded for the district court's consideration of those claims.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

BEA, Circuit Judge, dissenting in part:

"Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or *to disable his assailant rather than to kill him."* *Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.) (reversing a defendant's conviction for second degree murder and finding no obligation for defendant to retreat rather than use deadly force when presented with the immediate mortal threat of an uplifted knife) (emphasis added).

Before Vos charged at Newport Beach police officers, the officers had been informed by a store employee that Vos had wielded scissors to stab a

---

[12] Neither the Parents' Fourteenth Amendment familial relationship claim nor the district court's evidentiary rulings were challenged on appeal. Therefore, our decision does not impact those rulings.

store employee, and saw that Vos had refused to drop his weapon when ordered by bullhorn to do so. Instead of dropping the weapon as police ordered, Vos raised the metal weapon above his head, and from approximately forty feet away charged full speed at the officers. An officer bullhorned an order "shoot him." Two of the officers shot him. Because deadly force in such a circumstance is reasonable, I respectfully dissent in part.[1]

There is no dispute as to what occurred, as much of it is captured on 7-Eleven's video cameras. At approximately 8:15 PM on May 29, 2014, Vos entered a 7-Eleven convenience store in Newport Beach, California. Vos was agitated, and ran around the store shouting "[k]ill me already" and other provocations. Someone in the store called 911. At one point Vos grabbed and then released a 7-Eleven employee and shouted "I've got a hostage." The Newport Beach Police Department radio stated that "the reporting party is advising that the subject is holding a pair of scissors inside the store and there are still people inside." At 8:20 PM, Officer Kresge arrived at the scene. He testified at his deposition that when he arrived outside the 7-Eleven Vos was "yelling and screaming." Kresge made eye contact with the clerks and signaled them to get out of the store. One of the clerks told Kresge that Vos had "armed himself with scissors and that one of them had been

[1] I concur with the majority that the individual officers are entitled to qualified immunity.

stabbed in the hand." Kresge saw that Vos had wrapped a garment around his right hand and had begun to pantomime with his hand as if he were holding a gun. Kresge did not enter the store or engage Vos; instead, he waited for backup.[2] Several other officers arrived, including Defendant-Officers Richard Henry and Nathan Farris, and Officer Andrew Shen.

The Officers positioned their vehicles outside the store's front entrance and took positions behind the doors of their cars. Officers Henry and Ferris, each positioned behind a car door, armed themselves with AR-15 rifles. Officer Kresge pulled out a handgun. Officer Shen was armed with a non-lethal projectile launcher. The officers propped open the door to the 7-Eleven. Another policeman, Officer Preasmyer, set up a public address system (the bullhorn) and prepared to communicate with Vos. The officers had fully surrounded the entrance to the 7-Eleven.

What followed was captured on video by the police dash- cams and the 7-Eleven surveillance cameras[3]: At approximately 8:43 PM – 23 minutes

---

[2] Plaintiffs do not contradict Officer Kresge's testimony.

[3] The video of the shooting from multiple angles is in the appellate Record and may be seen here: http://cdn.ca9.uscourts.gov/datastore/opinions/media/16-56791-Exhibit-12-Shooting.mp4. An appellate court may view such video evidence to determine the propriety of

after Kresge first arrived at the scene – Vos opened the door to the 7-Eleven's back room. The officers shouted "doors opening." After going towards the back door, Vos turned around and ran around the counter and towards the front of the store. As Vos ran, he held a metal object above his head in his left hand. One officer shouted "he's got scissors." Over the public address system, Officer Preasmyer instructed "Drop the weapon!" Vos did not drop the object, but instead ran full steam toward the officers. Officer Preasmyer said "Shoot him." Officers Henry and Farris fired their AR-15 rifles, while Shen fired his non-lethal weaponry. Vos was shot and collapsed on the sidewalk and parking lot in front of the officers. He died from his wounds. According to an expert report submitted by Defendants, based on his rate of speed Vos would have traveled the 41.1 feet from the back of the store to the police officers' positions in 3.4 seconds.[4]

---

summary judgment. *Scott v. Harris*, 550 U.S. 372, 377–81 (2007).

[4] The 41.1 feet, and the rate of speed at which Vos was traveling, was calculated by Defendant's expert Craig Fries, who analyzed the audio and video evidence and incorporated measurements of the scene. He used the following distances: 27.5 feet from the back of the store to the 7-Eleven's door threshold, 9.1 feet from the door threshold to the white parking block adjacent to the closest police car, and 4.5 feet from the front wheel edge of the closest police car to the location of officers Shen and Farris. He calculated Vos's speed in part by analyzing the frame rate of one of the 7-Eleven

Indeed, the video shows that the officers had approximately two seconds to decide to shoot Vos after having warned him to drop his weapon.

While the majority opinion recites the factors in *Graham v. Connor*, 490 U.S. 386, 396 (1989), it misapplies them. As the majority notes, *Graham* instructs us to consider three primary factors when evaluating the reasonableness of a police officer's use of force: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* In addition, but not noted by the majority, is *Graham's* instruction that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*

---

surveillance cameras. Plaintiffs did not object to nor did they dispute Fries' evidence as to distances, speed and time of Vos's charge to the police. Plaintiffs presented no evidence contrary to Fries. Plaintiffs argued that the video evidence should not have been admitted, and therefore disputed portions of the Fries expert report as lacking foundation. However, the district court ruled that the video evidence was admissible, a ruling Plaintiffs have not appealed.

The majority's first error is its statement that "the officers were not responding to the report of a crime." Slip Op. *10. This is clearly incorrect. The Officers responded to a report of Vos running around a 7-Eleven wielding scissors while screaming and harassing the customers and employees. It was apparent not long after Officer Kresge arrived that Vos had injured at least one person. Vos pantomimed to Kresge that he had a gun. At one point Vos grabbed a 7-Eleven employee and called him a hostage. At the least, under California law Vos likely could have been charged with assault with a deadly weapon,[5] false imprisonment,[6]

---

[5] See California Penal Code (CPC) § 245 (punishing a person "who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm. . .). *See also* Slip Op. at *5 ("The clerks said that Vos had armed himself with scissors and one employee had been cut on the hand. . .").

[6] "The three elements of felony false imprisonment in California are: (1) a person intentionally and unlawfully restrained, confined, or detained another person, compelling him to stay or go somewhere; (2) that other person did not consent; and (3) the restraint, confinement, or detention was accomplished by violence or menace." *Turijan v. Holder*, 744 F.3d 617, 621 (9th Cir. 2014). *See also* Slip Op. at *5 ("At one point, Vos grabbed and immediately released a 7-Eleven employee, yelling "I've got a hostage.")

criminal threats,[7] and disturbing the peace.[8, 9]

---

[7] *See* CPC § 422 (punishing any person who "will- fully threatens to commit a crime which will result in death or great bodily injury to another person.")

[8] *See* CPC § 415 (punishing any person who "unlawfully fights in a public place or challenges another person in a public place to fight" and who "uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction."). *See also* Slip Op. at *5 ("Vos became agitated; he ran around the store shouting things like "[k]ill me already, dog,'. . . Vos ran around the store cursing at people.")

[9] The majority states that "the police initially were called in response to Vos's erratic behavior. When Officer Kresge arrived, he learned that one store clerk had been cut while trying to disarm Vos before authorities arrived, and he watched as Vos yelled, simulated having a handgun, and shut himself in the back room. Taking the facts in the light most favorable to the Parents, which we are required to do at this stage, *see Mattos v. Agarano*, 661 F.3d 433, 449 (9th Cir. 2011), it is not clear that the "crime at issue" in this case was one of the severe crimes the dissent identifies." Slip. Op. at *11. The majority's statement is perplexing. As the majority recognizes, it is undisputed that Vos used a weapon to injure a store employee, grabbed a 7-Eleven employee and declared that he had a hostage, and pretended to have a gun. There is no "inference" in the Parents' favor which can change these undisputed facts. As a result, prior to Vos's charge at the officers, he could have been charged with a number of *severe* crimes,

But more important is the majority's error in its analysis of the "most important [*Graham*] factor," *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir. 2014), the immediacy of the threat posed by the decedent to the officers. The majority says that "[c]onstruing the facts as they are presented by the Parents and depicted in the video footage, a reasonable jury could conclude that Vos did not pose an immediate threat such that the use of deadly force was warranted." Slip Op. at *12. Again, I respectfully disagree.

What the majority ignores is the following undisputed fact: the police were presented with a mere two seconds in which to decide to deploy deadly force. Vos had secreted himself into a back room. The officers had just set up a means of communication when Vos suddenly reappeared and charged. In the mere seconds which passed, the officers warned Vos, and ordered him to drop his weapon. Instead, he ran at them at full speed with a weapon "uplifted." *Brown*, 256 U.S. at 343. As we see on the video, he charged full speed, directly at the officers. There is no factual dispute.

Yes, the officers had a "tactical advantage" as the majority describes. In a fight between Vos and the eight officers, the officers would undoubtedly have come out on top. But at what cost? It is

---

including assault with a deadly weapon, making Vos a "dangerous armed felon threatening immediate violence." *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001).

reasonable for an officer, with only seconds to react, to conclude that the person wielding what looks like a knife and charging at him and his fellows would do serious harm to at least one of them.[10] It is all the more reasonable when those officers know that the person wielding the weapon has already stabbed somebody with it and heard a police officer yell "Shoot him!" To hold otherwise is to ignore the Supreme Court's instruction to remember that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396.

To find that the officers' response to the threat they faced was reasonable is not only logical, but is also compelled by our precedent. While the majority attempts to distinguish *Lal v. California,* 746 F.3d 1112 (2014), its arguments are unpersuasive. As the majority notes, *Lal* involved the police response to a disturbed individual who wished to commit "suicide by cop." *Lal,* 746 F.3d at 1117.[11] Lal had engaged police in a forty-five

---

[10] Again, the reader can see for him or herself by viewing the video of the shooting. *See* fn 3 ante.

[11] A desire here expressed by Vos. *See* Slip Op. at *5 ("Vos became agitated; he ran around the store shouting things like 'Kill me already, dog.'")

minute chase until finally pulling to the side of the road. Lal picked up a few rocks and threw them at the officers' car. Lal then picked up a "football sized rock," held it above his head, and advanced on the officers slowly. The officers instructed him to put the rock down. He did not, and he continued his advance. The officers shot him. A panel of our court ruled that the officers' actions were reasonable, and affirmed a grant of summary judgment in defendants' favor.

Lal is a closer case than this one. In *Lal*, the officers likely could have retreated to a position far enough away that Lal would have been unable to reach them with the rock. Lal advanced on the officers slowly, and there is no indication that he had any other means of harming the officers than the large rock he held above his head. The slow advance meant that the officers likely had more than two seconds in which to decide on the best course of action as Lal approached. Nevertheless, we made clear that "even assuming that it might have been possible for the officers to have given Lal a wider berth…there is no requirement that such an alternative be explored." *Lal*, 746 F.3d at 1118. *See also Billington v. Smith*, 292 F.3d 1177, 1188 (9th Cir. 2002) ("[P]olice officers need not avail themselves of the least intrusive means of responding and need only act within that range of conduct we identify as reasonable.") (citing *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994)) (internal quotations omitted).

So too here. It is possible that other means could have brought down Vos without this tragic loss of life. But a reasonable officer could have believed that the alternate means would not have done the job without the risk that Vos stab one of them. The officers had two seconds to make these calculations before deciding to deploy force to stop the charging man.

Neither should this case turn on Vos's mental illness. While we may consider whether a person is emotionally disturbed in determining what level of force is reasonable, we have never ruled that police are obligated to put themselves in danger so long as the person threatening them is mentally ill. Such a conclusion would be illogical – especially given the admonition in *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010), quoted by the majority, that we will not "create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals."

But that is exactly what the majority does here.

In *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001), we made a common-sense observation that a person who is emotionally disturbed may respond differently to police intervention than a person who is not emotionally disturbed. We noted that "[t]he problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are

ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." *Rutherford*, 272 F.3d at 1282-83. We noted that in some cases, confronting a mentally ill individual with force "may…exacerbate the situation," and that "where feasible" officers who are trained to deal with mentally unbalanced persons should be deployed. *Id* at 1283. Bearing that in mind, the *Rutherford* court stated that "[e]ven when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." *Id.* Here, Vos had already committed a "serious crime against others": he had stabbed a 7-Eleven employee. *See* CPC § 245 (prohibiting assault with a deadly weapon). In the next sentence, the *Rutherford* panel made clear that "[w]e do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed." *Id*.

Rutherford stands for a fairly common-sense and non- controversial result: a mentally disturbed person may respond differently to police

intervention than does a person who is not mentally disturbed. Officers should bear this in mind when going about their duties.

But nowhere in *Rutherford*, or in any other case, have we found that an officer's interest in using deadly force is diminished when his life is threatened by a mentally disturbed person. The danger to the officer is not lessened with the realization that the person who is trying to kill him is mentally ill. Indeed, it may be increased, as in some circumstances a mentally ill individual in the midst of a psychotic break will not respond to reason, or to anything other than force.

But the majority instead creates a *per se* rule that in *all* circumstances the governmental interest in deadly force is diminished where the subject is mentally ill. While in *some* circumstances that may be true, in circumstances such as our case – where a mentally ill person charged at officers while wielding a metal weapon above his head – it is not. To hold otherwise would be to render meaningless the language in *Bryan* that we will not "create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." *Bryan*, 630 F.3d at 829. The majority states "the fact that Vos was acting out and had invited the officers to use deadly force on him is sufficient under our precedent for a reasonable jury to conclude that the government's interest in using deadly force on Vos was diminished." Slip Op. at *17. By the majority's logic, so long as an extremely dangerous person

"acts out" or otherwise evinces mental illness, an officer's interest in self-defense is somehow diminished. The majority's position is simply untenable either as a matter of precedent or logic. Our precedent: in *Lal*, we noted that Lal had stated that he wished "suicide by cop." *Lal,* 746 F.3d at 1117. In logic: whether the person who charges the officer does so out of a base desire to kill, or does so because, in the midst of a psychotic episode, he thinks the officer is a monster or a ghost, the danger to the officer is the same. The officer's interest in protecting his own life and the lives of his fellows is therefore the same as well.

Because I think the officers reacted reasonably to the threat they faced, I respectfully dissent in part and would affirm the decision of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56791

F I L E D
AUG 28 2018
Molly C. Dwyer, Clerk
U.S. Court of Appeals

RICHARD VOS, individually and as successor-in-interest to Gerritt Vos, and JENELLE BERNACCHI, individual, and as successor-in-interest to Gerritt Vos,

Plaintiffs-Appellants,

v.

CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY; NATHAN FARRIS; DAVE KRESGE; DOES, 1–10, inclusive,

*Defendants-Appell*ees.

D.C. No. 8:15-cv-00768- JVS-DFM
Central District of California, Sana Ana

ORDER

Before: BEA and MURGUIA, Circuit Judges, and MOLLOY,* District Judge.

Judges Murguia and Molloy have voted to deny the petition for panel rehearing. Judge Murguia has voted to deny the petition for rehearing en banc, and Judge Molloy so recommends. Judge Bea has voted to grant the petition for panel rehearing and petition for rehearing en banc.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

Appellees' Petition for Panel Rehearing and Petition for Rehearing En Bane is DENIED (Doc. 67).

---

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SACV 15-00768 JVS (DFMx)
Date	November 2, 2016
Title	Richard Vos et al. v. City of Newport Beach et al
Present	The Honorable James V. Selma Karla J. Tunis, Deputy Clerk
Not Present	Court Reporter Attorneys for Plaintiffs Attorneys for Defendants

Proceedings: (In Chambers)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants City of Newport Beach (the "City"), Officer Richard Henry ("Henry"), Officer Nathan Farris ("Farris"), and Officer David Kresge ("Kresge") (collectively "Defendants") moved for summary judgment, or in the alternative summary adjudication. Docket No. 62. Plaintiffs Richard Vos

and Jenelle Bernacchi (collectively "Plaintiffs") opposed. Docket No. 74. Defendants replied. Docket No. 84.

For the following reasons the Court **grants** Defendants' motion.

BACKGROUND

At approximately 8:15 p.m. on May 29, 2014, decedent Gerrit Dean Vos ("Vos") entered a 7-Eleven convenience store. Ex. 1 20:15:51; Ex. 2 20:15:50; Ex. 4 08:14:18.[1] Vos became agitated; he ran around the store shouting things like "[k]ill me already, dog." Defendants' Separate Statement of Undisputed Facts and Conclusions of Law ("SS") No. 2; Ex. 2 20:15: 50-20:26:12.5. Soon after, someone called 911. SS No. 3. For approximately the next six minutes Vos ran around the store cursing at people. Ex. 2 20:15:50-20:26:12.5. The Newport Beach Police Department ("Newport Police") radio stated that "the reporting party is advising that the subject is holding a pair of scissors inside the store and there are still people inside." *Id*. No. 8.

About 8:20 p.m., Officer Kresge arrived at the scene. *Id*. No. 11. 7-Eleven employees said that Vos had armed himself with scissors and had begun running around the store chasing people. Ex. 25

---

[1] All citations to the video exhibits are to the original video's time stamp.

24:25-25:6, 74:3-75:4. Furthermore, one person had been stabbed in the hand. Ex. 25 24:25-25:6. Officer Kresge observed Vos behind 7-Eleven's glass doors. SS No. 12. Officer Kresge saw Vos pantomime a gun. *Id.* Ex. 25. 26:14-25, 28:4-9. He later told other officers that Vos was agitated and likely under the influence of narcotics. Ex. O 38:18-39:2. Officers also heard Vos yell "shoot me" and other similar statements. Ex. Q 99:11-17.

Several more officers arrived, including Defendants Officer Richard Henry and Officer Nathan Farris. They positioned the vehicles outside the store's front entrance and used the vehicles' doors for cover. *Id.* No. 15. Officer Andrew Shen ("Shen") armed himself with a non-lethal projectile launcher. *Id.* No. 16. The others readied lethal weapons: Officers Henry and Farris armed themselves with AR-15 rifles, while Officer Kresge used a handgun. *Id.* They propped-open the 7-Eleven doors. *Id.* No. 17. Officer Shawn Preasmyer ("Preasmyer") set up a public address system and prepared to communicate with Vos. Ex. 25 52:17.

About 8:43 p.m., Vos opened the door of the 7-Eleven's back room. Ex. 1 20:43:49.874; Ex. 4 08:42:12. As he did so, the officers repeatedly shouted "doors opening." Ex. 7 20:42:01. He ran out — around the counter and towards the open doors. Ex. 1 20:43:49-20:43:53; Ex. 4 08:42:12-08:42:20. He held an object over his head in his left hand as he ran. Ex. 4 08:42:19. One officer shouted "he's got

scissors." Ex. 7 20:42:04. Over the public address system, Office Preasmyer instructed Vos: "Drop the weapon." *Id.* 20:42:05. Vos did not drop the object and instead kept moving towards the officers.[2] *Id.* After Vos continued running and did not drop the weapon, Officer Preasmyer instructed the officers to "shoot him." *Id.* 20:42:08; Ex. P 56:15-17. Officer Preasmyer later testified that this order was directed solely to Officer Shen. Ex. D 56:5-17. About three seconds elapsed between the warning and the order to shoot. Ex. 7 20:42:05-08. At that time, Officers Henry and Farris fired their AR-15 rifles, while Officer Shen fired his non-lethal weaponry. *Id.* Ex. 30 57:5-10; Ex. 31 78:10-18. Because of Vos' speed, he continued running as he was struck by bullets — his body stopped on the sidewalk and parking lot in front of the officers. *Id.* Vos died from the bullets. SS No. 33

The three shooting officers later testified that they did not hear the command to shoot. Ex. M 78:1-12; Ex. Q 141:22-142:7; Ex. R 176:10-17. Furthermore, the two officers who fired the AR-15s did not know that Officer Shen had fired the non-lethal weaponry. Ex. Q 149:9013; Ex. R 175:24-176:9. But both officers also testified that they observed a metallic object in Vos' right hand,

---

[2] Although the evidence does not establish exactly what Vos was holding, a "pronged metal display hook was found on the ground a few feet from where he had collapsed." SS No. 32.

which they believed to be scissors. Ex. Q 128:18-27; Ex. R 162:2-12.

Vos' parents, Richard Vos and Jenelle Bernacchi, brought this suit as Vos' lawful heirs and successors-in-interest. Plaintiffs allege twelve causes of action:

1. Excessive force (42 U.S.C. §§ 1983, 1988)
2. Violation of Title II of the Americans with Disabilities Act ("ADA") of 1990 (42 U.S.C. § 12131)
3. Violation of the Rehabilitation Act of 1973 (29 U.S.C. § 701)
4. Violation of Plaintiffs' civil rights due to loss of a familial relationship (42 U.S.C. §§ 1983, 1988)
5. Municipal and supervisory liability (42 U.S.C. §§ 1983, 1988)
6. Wrongful death (negligence)
7. Wrongful death (negligent hiring, training, and retention)
8. Battery
9. Assault
10. Violation of Civil Rights (Cal. Civ. Code § 52.1)
11. Survivor claims
12. Civil Conspiracy (42 U.S.C. §§ 1983, 1988)

LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the non-movant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); *see also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim[.]") (internal quotation marks omitted).

Material facts are those necessary to a claim's proof or defense; they are determined by the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.[3]

---

[3] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such

The moving party bears the initial burden to establish the absence of a material fact for trial. Anderson, 477 U.S. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][4] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 477 U.S. at 322. Therefore, if the non-movant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

---

material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

[4] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary- judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

ANALYSIS

I. Evidentiary Objections

When resolving a motion for summary judgment, courts may only consider admissible evidence. Fed. R. Civ. P. 56. On a motion for summary judgment, a party may object that the material used to "dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). A court must rule on material evidentiary objections. *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010).

A. Plaintiffs' Objections to the Videotapes

Authentication is a prerequisite to admissibility; therefore a court may not consider unauthenticated evidence on a motion for summary judgment. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). To authenticate evidence, the "proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Permissible methods include evidence of the proposed item's "appearance, contents, substance, internal patterns, or other distinctive characteristics." *Id.* (b)(4). It also includes "[e]vidence describing a process or system and showing that it produces an accurate result." *Id.* (b)(9). To authenticate video evidence, proponents may present evidence of how the videos were retrieved and the subsequent chain of custody.

United States v. Salcido, 506 F.3d 729, 733 (9th Cir. 2007).

Here, Plaintiffs object that Defendants have not properly authenticated Exhibits 1-12 (collectively the "Video Evidence"). Exhibits 1-4 include the 7-Eleven surveillance camera videos. Exhibits 5-7 include the Newport Police vehicle's dashcam videos. Exhibit 8 is Defendants' expert, Craig Fries' ("Fries"), report. Exhibits 9-12 are Fries' compilation videos.

First, Plaintiffs object that the declarations authenticating the Video Evidence were untimely filed and thus the Court should reject them. Defendants submitted their motion on September 26, 2016. Docket No. 62. At that time, Defendants stated that they had not yet submitted declarations authenticating the Video Evidence, but that they would do so before the motion hearing. Decl. of Daniel P. Barer ("Barer Decl.") ¶ 2-4. Plaintiffs filed their opposition on October 3, 2016. Docket No. 74. Beginning on October 3, 2016, Defendants filed supplemental Declarations from Rick Bradley ("Bradley Decl."), Docket No. 68, Jeff Troy ("Troy Decl."), Docket No. 71, Dean Fulcher ("Fulcher Decl."), Docket No. 72, and Susan Meade ("Meade Decl."), Docket No. 82. Plaintiffs filed their objections to these declarations on October 6, 2016. Docket No. 81. They also filed objections to the Video Evidence itself. Docket No. 78.

Plaintiffs argue that Local Rule 7-5(b) requires that parties submit all evidence for their

motion with the motion. Docket No. 81, Pl. Objections at 2. But this ignores Defendants' ability to respond to Plaintiffs' objections and prove admissibility. Without such an opportunity, Defendants would be hamstrung and unable to respond to Plaintiffs' objections. Defendants filed their supplemental declarations and Plaintiffs had the opportunity to file written objections before the hearing. Therefore, the filing date did not prejudice Plaintiffs because they still had adequate time to object before the hearing.

Second, Plaintiffs object that these declarations do not establish a proper chain of custody because they lack personal knowledge or proper foundation. In essence, Plaintiffs object that the declarations do not explain the copying process with sufficient depth to constitute "clear and convincing evidence of authenticity and accuracy." *United States v. King*, 587 F.2d 956, 961 (9th Cir. 1978). But King's heightened standard does not apply here. *United States v. Hock Chee Koo*, 770 F. Supp. 2d 1115, 1121 (D. Or. 2011). Rule 901 does. Therefore, Defendants have met their burden under Rule 901 because they have filed multiple supplemental declarations that describe the chain of custody. These declarations explain who copied the videos, when they were copied, and how the copies were transferred.[5] This is sufficient to

---

[5] Plaintiffs' expert, Douglas Carner, states that the technicians' copying method makes it impossible to test the videos' authenticity. Ex. W, Docket No. 75. Because

support a finding that the videos show the evening in question.

In sum, the Court overrules Plaintiffs' objections to the Video Evidence and the Bradley, Troy, Fulcher, and Meade declarations.

B. Plaintiffs' Objections to Defendants' Expert Reports

Federal Rule of Evidence 702 provides that an expert may testify "in the form of an opinion or otherwise" if his "specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." FRE 702 imposes a "gatekeeping obligation" on the trial judge to ensure that expert testimony is relevant and reliable. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000).

Here Plaintiffs object to Defendants' expert reports, Ex. 31, 32, and 33, because they contain unreliable conclusions. Docket No. 78. Plaintiffs object that the reports reached unreliable conclusions because the experts based them on inadmissible Video Evidence, did not examine Vos, and did not appropriately credit Vos' medical

---

Plaintiffs have not submitted any evidence that the documents are inauthentic the Court disregards this conclusion. Thus it also disregards Defendants' objection to this conclusion.

records or other physicians' opinions. Docket No. 78 at 7-8. As discussed above, the Court overrules Plaintiffs' objections to the Video Evidence. Furthermore, this case is not like *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), which Plaintiffs cite for the rule that a court should exclude expert testimony when "there is simply too great an analytical gap between the data and the opinion proffered." In *Joiner* the experts relied on almost entirely unrelated animal studies to draw conclusions about the plaintiff's cancer. *Id.* at 145-46. Here Defendants' experts rely on Vos' own medical records, even if they draw different conclusions than the other experts do. Therefore, the Court overrules Plaintiffs' objections to Defendants' expert reports.

C. Defendants' Evidentiary Objections

Defendants offers several evidentiary objections.[6] First, Defendants object that Ex. C, Vos' diagnosis by Dr. Jon Chaffee, is inadmissible because it has not been authenticated. The Court sustains the objection and does not consider the exhibit. Second, Defendant objects to multiple statements by Plaintiffs' experts that the Video Evidence was retrieved months after the shooting. This contradicts sworn declarations that show the Video Evidence was retrieved within several days of the shooting. Therefore the Court sustains this objection.

---

[6] The Court does not consider exhibits A, B, D, F, I, V, Y, and Z. Therefore, it does not rule on the objections.

Third, Defendants object that the report of Plaintiffs' expert Ernest Burwell is inadmissible because it was not signed under penalty of perjury. The report is merely signed "[v]ery truly yours." Ex. S, Docket No. 75. Under Rule 56, unsworn expert reports are inadmissible. *Am. Fed'n of Musicians of the United States & Canada v. Paramount Pictures Corp.*, No. CV154302DMGPJWX, 2016 WL 3693746, at *5 (C.D. Cal. June 15, 2016); *AFMS LLC v. United Parcel Serv. Co.*, 105 F. Supp. 3d 1061, 1070 (C.D. Cal. 2015). Therefore, the Court sustains this objection and does not consider the Burwell report.

Finally, Defendants also object to several conclusions in Plaintiffs' expert Roger Clark's report. Ex. T, Docket No. 75. In particular, Defendants object that Clark's conclusion regarding the Newport Police's activities "[f]ails to close the analytical gap between the evidence and the conclusion." Docket No. 83 at 5. Again, this is unlike *Joiner* or similar cases in which experts have relied on completely inapposite evidence. Therefore the Court overrules this objection.

II. Excessive Force

Courts determine whether the use of force was objectively reasonable by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotations and citations omitted). These

governmental interests include: (1) the crime's severity (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. The most important Graham factor though is "whether the suspect posed an immediate threat" to officers or public safety. *C.V. by and through Villegas v. City of Anaheim*, 823 F.3d 1252, 1255 (9th Cir. 2016) (internal quotations omitted).

Deadly force is objectively reasonable when a suspect charges officers with a weapon in a threatening position. *See Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1231(9th Cir. 2013) (hereinafter "*Hayes II*") ("[T]hreatening an officer with a weapon does justify the use of deadly force."). For instance, deadly force was appropriate when the suspect advanced on police with a football-sized rock above his head. *Lal v. California*, 746 F.3d 1112, 1117 (9th Cir. 2014). The suspect had previously hit himself with a stone, led the officers on a high speed chase, and thrown rocks at the officers. *Id.* The *Lal* court rejected the plaintiffs' experts' arguments that the officers should have retreated or defused the situation before the shooting: plaintiffs cannot avoid summary judgment "by simply producing an expert's report that an officers' conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *Id.* at 1118 (quoting *Billington v. Smith*, 292 F.3d 1177,

1188-89). Instead the only appropriate inquiry is "whether a reasonable officer could have believed that his conduct was justified." *Id.* (quoting *Billington*, 292 F.3d at 1188-89).

Furthermore a court may rely on video evidence to determine whether force was justified. *Scott v. Harris*, 550 U.S. 372, 378-79 (2007). And if the video blatantly contradicts the plaintiff's version of events, then a court should not allow the plaintiff's factual assertions to defeat summary judgment. *Id.* Instead, it should view the facts as the video depicts them. *Id.*

Here, the Video Evidence establishes that the officers' use of force was objectively reasonable. The officers did not believe that Vos had a gun, but they already knew that he had previously cut someone with scissors. Ex. 7 20:41:16. Vos then charged the officers — gaining speed as he ran from the back of the 7-Eleven to the front door. Ex. 4 8:42:12-20; Ex. 20:42:01-20:42:08. At the same time, he held a potentially threatening object over his head — just like the suspect in *Lal*. *Id. See* 746 F.3d at 1117. Although the object's precise nature is not clear from the videos, the officers reasonably assumed that it was a weapon because Vos was holding it in a threatening position, charging the officers, and had previously cut someone with scissors. The officers also issued a command to drop the weapon that Vos ignored; he continued charging. Ex. 7 20:42:05-08. *Id.* The officers then fired once Vos was about to cross the front door's

threshold: he was only several feet away and running at full speed. *Id.* Ex. 408:42:20.

Everything happened within eight seconds. Ex. 4 8:42:12-20; Ex. 20:42:01-20:42:08. After Vos charged from the back room, the officers noticed his potential weapon; they only had time to give a three-second warning before he was nearly on them. Ex. 7 20:42:05-08. They only had seconds to determine whether their lives were in danger from a charging suspect. Such quick decision-making also suggests that their actions were objectively reasonable. See *Sheehan II*, 135 S. Ct. at 1775 (internal quotations omitted) ("The Constitution is not blind to the fact that police officers are often forced to make split-second judgments."); *Hayes II* 736 F.3d at 1232 (quoting *Graham,* 409 U.S. at 396-97) (determinations of unreasonable force must consider that officers "make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving[.]"). Therefore, because of the short distance between the officers and Vos, Vos' speed, the apparent weapon, and the limited time constraints, the officers' use of deadly force was reasonable as a matter of law.

Plaintiffs' contrary arguments fail. First, Plaintiffs argue that the officers did not need to use deadly force because they outnumbered Vos and were well-armed. Pl. Opp'n Br. at 13. But a police tactical advantage does not require them to risk their lives. *See Lal,* 746 F.3d at 1114-15 (use of deadly force justified even though there were two

armed officers and suspect only had a rock). Furthermore, even if Vos observed the officers' behavior — which is not established in the record — establishing defensive positions outside the 7-Eleven does not constitute provocation. See *Billington*, 292 F.3d at 1189 (provocation must be either intentional or reckless constitutional violation).

Plaintiffs also argue that the officers' use of force was unreasonable because Officer Preasmyer only intended to order non-lethal fire. Opp'n Br. at 16. Plaintiffs argue that this makes their use of force an unreasonable mistake. *Id.* But this argument mischaracterizes the record: all three officers who fired their weapons testified that they did not hear the order. Ex. M 78:1-12; Ex. Q 141:22-142:7; Ex. R 176:10-17. Furthermore, even if they had fired in response to the order, such a mistake would not transform their objectively reasonable use of deadly force into a Fourth Amendment violation. *See Graham*, 490 U.S. at 397 ("[T]he question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

Plaintiffs next argue that Vos' mental illness required them to use non-deadly force. Pl. Opp'n at 13. Plaintiffs rely on *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) and Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001). Both cases are inapposite. Neither case involved life-threatening circumstances. Instead in both cases officers used excessive force on mostly compliant individuals. In *Drummond*, officers continued to use physical force after the plaintiff was cuffed on the ground. 343 F.3d at 1057-59. Likewise, in *Deorle*, the officer fired a non- lethal round at a mostly compliant, unarmed man. 272 F.3d at 1282-83. In contrast, here Vos charged at the officers with a weapon after previously exhibiting violent behavior. *See City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (hereinafter, "*Sheehan II*") (distinguishing Deorle from a case in which the suspect was "dangerous, recalcitrant, law-breaking, and out of sight.").

Finally, Plaintiffs argue that the officers' tactics escalated the confrontation. They argue that the officers' force was unreasonable because they opened the 7-Eleven's front doors and pointed their rifles inside, thus removing a barrier and escalating the situation. Pl. Opp'n Br. at 14. Plaintiffs further argue that the officers failed to use non-lethal means to contain Vos. *Id.* at 14-15. Plaintiffs support this argument with expert opinions. *Id.* (Citing Ex. T at 16-19).

But Plaintiffs' argument — and its reliance on *Billington* — is the same argument that Lal rejected. *See* 746 F.3d at 1118. Police officers do not have to give suspects the widest possible berth or use the least intrusive means available: an "officer's immunity does not become less if his assailant is motivated to commit 'suicide by cop.'" *Id. See also, Sheehan II*, 135 S. Ct. at 1777 (quoting *Billington*, 292 F.3d at 1190) (plaintiff could not "establish a Fourth Amendment violation based merely on bad tactics that results in a deadly confrontation that could have been avoided.").

In sum, the officers' force was justified as a matter of law because the Video Evidence shows that reasonable officers could have believed that they were in immediate danger. Therefore the Court grants summary judgment as to the officers. Because the Court finds that the officers did not commit a constitutional violation, it grants summary judgment to the City as well on all *Monell* claims. *Hayes II*, 736 F.3d at 1231 (constitutional violation is necessary to incur *Monell* liability). This includes Plaintiffs' claim for civil conspiracy because such a claim requires an underlying constitutional violation. *See Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir. 2010).

III. Qualified Immunity

Because the Court holds that the officers did not violate the Fourth Amendment, the Court does not need to discuss whether they were violating

constitutional rights that were clearly established in light of the specific context of the case. *Pearson v. Callahan,* 555 U.S. 223, 242 (2009).

IV. ADA and Rehabilitation Act

Title II of the ADA prohibits a public entity from discriminating against any "qualified individual with a disability."[7] *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1231 (9th Cir.), *cert. granted sub nom., City & Cty. of San Francisco, Cal. v. Sheehan*, 135 S. Ct. 702 (2014), and *rev'd in part, cert. dismissed in part sub nom., Sheehan II,* 135 S. Ct. at 1778 (2015) (hereinafter "*Sheehan I*"). Discrimination includes a failure to make reasonable accommodation "to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.* (Quoting 28 C.F.R. § 35.130(b)(7)).

In *Sheehan I*, the Ninth Circuit held that Title II applies to arrests. *Id.* at 1232. Although the Supreme Court granted certiorari as to whether

---

[7] The Court analyzes Plaintiffs' ADA and Rehabilitation Act claims together because the statutes provide identical "remedies, procedures, and rights." *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) (quoting 42 U.S.C. § 12133). Therefore, case law interpreting either applies to both.

Title II requires "any accommodation of an armed and violent individual," *Sheehan II*, 135 S. Ct. at 1772, it later dismissed the question as improvidently granted. *Id.* at 1774. Therefore, *Sheehan I*'s ruling controls.

Sheehan I found summary judgment inappropriate when two officers shot a mentally-disabled woman, Teresa Sheehan ("Sheehan"), who held a knife. *Sheehan I*, 743 F.3d at 1219-20. The two officers knew that she was disabled and armed. *Id.* They had previously entered the room and retreated. *Id.* Yet they chose to reenter the room, at which point they shot her when she advanced with the knife. *Id.* The Ninth Circuit held that a reasonable jury "could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." *Id.* at 1233.

Here, *Sheehan I* does not require the Court to deny summary judgment because this case is distinct from *Sheehan I*. In *Sheehan I* the Ninth Circuit found that there were triable issues of fact as to "whether the shooting was unreasonable on a provocation theory." *Id.* 1230. Therefore, a jury could also find that the officer should have taken additional steps to accommodate Sheehan's disability. In contrast, here a reasonable jury could

not find that the officers provoked Vos' actions.[8] Although the officers set up outside the doors, they did not initiate the confrontation that led to Vos' death. Nothing on the part of the officers precipitated Vos' charge from the backroom of the 7-Eleven to the front door. Therefore, because the officers' actions were objectively reasonable, a jury could not find that Defendants failed to accommodate Vos. Hence, summary judgment is appropriate on Plaintiffs' ADA and Rehabilitation Act claims.

V. Violation of the Fourteenth Amendment by Deprivation of a Familial Relationship

Parents have fundamental liberty interests in their child's companionship; the state's interference with that liberty interest may be remedied under § 1983. *Crowe v. Cnty. of San Diego*, 593 F.3d 841, 876 (9th Cir.), *amended by*, 608 F.3d 406 (9th Cir. 2010). This applies when official conduct "shocks the conscience." *Hayes II*, 736 F.3d at 1230 (quoting *Wilkinson v. Torres,* 610

---

[8] The parties disagree on whether Vos was disabled under the ADA. Defendants argue that Vos' actions stemmed from his methamphetamine use; therefore the ADA does not protect him from discrimination. Def's. Mot. at 21. Plaintiffs argue that his actions arose from his schizophrenia; therefore the ADA applies. Pl. Br at 22-23. Because the Court finds the ADA inapplicable even if Vos was disabled, it does not address the issue.

F.3d 546, 554 (9th Cir. 2010)). To determine whether excessive force shocks the conscience, a court must determine whether actual deliberation would have been practcal. *Id.* If not, then the officers' conduct would only shock the conscience if they acted "with a purpose to harm unrelated to legitimate law enforcement objectives." *Id.*

Here actual deliberation was not practical because the officers decided to use deadly force in response to Vos' charge. *See id.* (decision to use deadly force against knife-wielding man was a snap judgment that did not include deliberation). Therefore, because there are no claims that the officers acted with a purpose to harm, summary judgment is appropriate.

VI. Wrongful Death

Plaintiffs' wrongful death claims (causes of action six and seven) are brought under state law. The California Supreme Court articulated the relevant standard for these claims in *Hayes v. Cty. of San Diego*, 57 Cal. 4th 622 (2013) (hereinafter "*Hayes I*").

In California, police officers "have a duty to act reasonably when using deadly force." *Id.* at 629. To determine liability, a court applies tort law's "reasonable care" standard. *Id.* at 638. This is distinct from the Fourth Amendment's "reasonableness" standard. *Id.* The Fourth Amendment "focus[es] more narrowly than state tort law on the moment when deadly force is used,

placing less emphasis on preshooting conduct." *Id.* at 638-39; *see also Mulligan v. Nichols,* No. 14-55278, 2016 WL 4501684, at *6 (9th Cir. Aug. 29, 2016) ("[N]egligence claims under California law encompass a broader spectrum of conduct than excessive force claims under the Fourth Amendment").

A court examines the "totality of circumstances" to determine whether officers acted reasonably. *Hayes I*, 57 Cal. 4th at 629. This includes the officers' preshooting conduct. Id at 632. But a court should not consider this in isolation: it must not "divide plaintiff's cause of action artificially into a series of decisional moments[.]" *Id.* at 637. This would wrongly allow a plaintiff "to litigate each decision in isolation, when each is part of a continuum of circumstances surrounding a single use of deadly force[.]" *Id.* at 638. Therefore, when the preshooting conduct did not independently injure the plaintiff, a court should consider the preshooting conduct only to determine whether deadly force was reasonable. *Id.* at 632.

The Ninth Circuit applied this standard in *Hayes II*. 736 F.3d at 1235-37. In that case, two police deputies responded to a domestic disturbance call. *Id.* at 1227. The deputies did not ask Hayes's girlfriend whether the decedent was under the influence of drugs or alcohol, nor did they check whether there had previous calls to the residence. *Id.* Furthermore, they were unaware that police had Hayes had been taken into protective custody a

few months earlier because he attempted suicide with a knife. *Id.* When the deputies entered the living room they identified Hayes about eight feet away. *Id.* After one officer instructed Hayes to show his hands, Hayes "raised both his hands to shoulder level, revealing a large knife pointed tip down in his right." *Id.* at 1227-28. The deputies simultaneously drew their weapons and fired. *Id.* at 1228.

Based on the California Supreme Court's opinion in *Hayes I*, 57 Cal. 4th at 632, the Ninth Circuit reversed the district court's conclusions that the use of force was objectively reasonable and that the deputies owed no duty of care with respect to their preshooting conduct. *Hayes II*, 736 F.3d at 1232, 1236. First, the court found that triable issues of fact existed as to whether Hayes was threatening the officers with the knife. *Id.* at 1234. The deputies did not witness Hayes acting erratically with a knife; nor did they warn Hayes to drop the weapon. *Id.* Furthermore Hayes was walking towards the deputies at a steady gait — not charging them. *Id.* Second, the court also found that deputies had a duty to act reasonably with regard to their preshooting conduct. *Id.* at 1234. Although the court did not elaborate on its reasoning, it emphasized that district courts must determine whether the deputies' preshooting tactical choices were reasonable. *Id.* at 1236.

Here, the officers preshooting conduct and use of deadly force were both objectively reasonable under California negligence law. First, the officers'

preshooting conduct was reasonable. The officers did not provoke Vos; instead they set up outside and waited for him. SS. No. 15. Although did not initially communicate with Vos, they were attempting to do so when he charged at them. Ex. 25 51:8. They also set-up multiple non-lethal options. SS No. 16.

Second, the officers use of deadly force was objectively reasonable because Vos threatened them with a deadly weapon. This is distinct from the situation in Hayes; there Hayes held his knife at shoulder level, but did not brandish it at the deputies or charge them. *Id.* at 1234. In contrast, Vos raised his apparent weapon over his head and charged the officers. Ex. 1 20:43:49-20:43:53; Ex. 4 08:42:12-08:42:20. Furthermore, while the Hayes deputies had never observed Hayes's erratic behavior, here Officer Kresge saw Vos pantomime a gun and multiple officers saw him yell. SS No. 12; Ex. Q 99:11-17. And the officers knew that Vos had cut someone with scissors. Ex. 25 24:25-25:6. Also, unlike the deputies in Hayes, the officers here warned Vos to drop the weapon — even though he was charging them at full speed. Ex. 7 20:42:05; see Hayes II, 736 F.3d at 1235. Finally, in Hayes the district court had to evaluate reasonableness based on the deputies' testimony alone, here the Court has access to video footage of the incident.

Therefore, the Court also grants summary judgment on Plaintiffs' wrongful death claims.

VII. Assault and Battery

To prevail on a battery claim against a police office, the plaintiff must prove that the officer used unreasonable force. *Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1102 (2004), *opinion modified on denial of reh'g*, (Aug. 17, 2004). This requires an identical *Graham* analysis. *Avina v. United States*, 681 F.3d 1127, 1131 (9th Cir. 2012). For the same reasons, the Court grants summary judgment on these causes of action.

VIII. California Civil Code § 52.1

Because, as described above, the officers did not violate Vos' Fourth Amendment rights, there is no Civil Code § 52.1 violation. Therefore, the Court grants summary judgment for Defendants on this cause of action.

IX. Survivor Claims

California Civil Code §§ 377.20 and 377.30 do not provide independent methods of recovery. Therefore, because the Court finds the officers' conduct objectively reasonable, it also grants summary judgment as to Plaintiffs' survivor claims.

CONCLUSION

For the foregoing reasons the Court grants Defendants' motion for summary judgment.

Initials of Preparer kjt