No. 18-

IN THE

Supreme Court of the United States

CHRISTOPHER CHUNG; SAMANTHA CRITCHLOW; STEPHEN KARDASH,

Petitioners,

v.

GULSTAN E. SILVA, JR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHELDON PAUL HALECK, JESSICA Y. HALECK, INDIVIDUALLY, AND AS GUARDIAN *AD LITEM* OF JEREMIAH M. V. HALECK, WILLIAM E. HALECK, VERDELL B. HALECK,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Police officers were called to the scene where a large unknown man, Sheldon Haleck, was impeding traffic in the middle of a busy six-lane downtown thoroughfare near an intersection. They asked him to move to the sidewalk, but he disobeyed their commands. Neither the officers' multiple warnings that pepper spray would be used, nor its subsequent deployment, led to Haleck's compliance. Instead, he ran a short distance away, out of the officers' reach, but not out of the street. An officer then warned him that taser would be applied, but again he disobeyed the command, continuing to run away while remaining in the street. After taser was deployed, he eventually fell to the ground, where he flailed and kicked and fought six officers before they were finally able to subdue him and carry him to the side of the street so that the flow of traffic could be restored. The district court denied the officers qualified immunity, and a Ninth Circuit panel affirmed, recognizing that the officers were performing a community caretaking function but without citing to any particularized and clearly established law regarding that function.

The questions presented are:

1. Whether the Ninth Circuit erred in denying the officers qualified immunity by defining clearly established law at too high a level of generality rather than considering the particular facts and circumstances of this case.

2. Whether the Ninth Circuit, having found that the officers were exercising a community caretaking function, erred by only considering the reasonableness of their caretaking while disregarding the requirement of clearly established law.

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PETITION FOR WRIT OF CERTIORARI

This case stands at the crossroads of two important doctrines—qualified immunity, addressed many times by this Court, and the rarely-considered community caretaking doctrine. There is a well-developed body of this Court's jurisprudence holding that police officers cannot be denied qualified immunity based on clearly established law defined at a high level of generality. On the other hand, the contours of the community caretaking doctrine, when officers are performing functions divorced from investigating crime, are murky and vary widely among the circuit courts and the states.

The Ninth Circuit's opinion subverted both doctrines. Its foremost error was to bifurcate its analysis, first considering immunity at a high level of generality that completely disregarded the particularized circumstances of the officers exercising their caretaking function while trying to restore the flow of traffic on the busiest thoroughfare in downtown Honolulu. Then, when separately addressing community caretaking, the panel dispensed altogether with the "clearly established law" requirement that provides officers fair notice that their conduct was unconstitutional.

In an extensive series of qualified immunity opinions in the last few years, this Court has repeatedly told courts of appeals that police officers may not be held liable for damages unless they were "plainly incompetent" or "knowingly violated" clearly established and particularized precedent. Over a dozen such decisions have reversed courts of appeals in immunity cases,

including seven strongly worded summary reversals.[1] Yet the Ninth Circuit still is not heeding those emphatic directives. *See*, most recently, *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) ("This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.") (internal quotation marks omitted); *accord*, *City and County of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1775–76 (2015); *Lopez* v. *Smith*, 135 S. Ct. 1, 4 (2014); *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (2011). The panel opinion neither cited nor followed this clear line of authority directed at the Ninth Circuit, even though the opinion was issued a mere three months after *Kisela*. The decision flatly contravenes this Court's jurisprudence and is not only wrong but indefensibly wrong, and should be reversed.

The community caretaking doctrine was first enunciated 45 years ago in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)), noting that police officers perform "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." It is "beyond challenge" that the community caretaking doctrine authorizes police to preserve the uninterrupted and efficient flow of vehicular traffic and threats to public

1. *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (summary reversal); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam) (summary reversal); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam) (summary reversal); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (summary reversal); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (*per curiam)* (summary reversal); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (summary reversal); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam) (summary reversal).

safety and convenience, *South Dakota v. Opperman*, 428 U.S. 364, 368–69 (1976), and the panel here correctly concluded that the officers were serving such a community caretaking function. But the panel only considered the vague command that the officers' conduct be reasonable, without considering the crucial question of whether their caretaking conduct violated clearly established law.

It is doubtful whether such clearly established law exists, given the uniqueness of the facts and circumstances of this case. Moreover, federal and state courts are in disarray as to the appropriate contours and analytical approach, and this murkiness in the law has often been noted. Police officers are therefore left without meaningful signposts. In any case, it simply cannot be the law that officers are entitled to immunity in the absence of clearly established law when performing their crime-investigating duties, but can be denied immunity without clearly established law when performing their caretaking functions. The confusion can only be remedied by this Court's doctrinal guidance.

OPINIONS BELOW

The Ninth Circuit's opinion is reproduced at App. 1a-8a. The district court's order is reproduced at App 9a-78a.

JURISDICTION

The court of appeals issued its panel decision on July 10, 2018, and denied rehearing on August 20, 2018. App. 79a-80a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced at App. 81a.

STATEMENT OF THE CASE

A. Qualified Immunity

Suits against police officers for damages "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (citation omitted). The doctrine of qualified immunity provides officers "breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U. S. at 743. It can be difficult for police officers to know whether their conduct will be judged to be reasonable given the precise situation encountered. *See Saucier* v. *Katz*, 533 U. S. 194, 205 (2001). Assessing reasonableness must make "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." *Kisela*, 138 S. Ct. at 1152 (quoting *Graham* v. *Connor*, 490 U. S. 386, 396 (1989)).

This Court's precedents provide instruction as to how to define and implement that immunity. *Ziglar*, 137 S. Ct. at 1866. Police officers are entitled to immunity unless (1) they violated a constitutional right, and (2) it was clearly established at the time that their conduct was unlawful.

District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (per curiam) (citation omitted). The inquiry thus has two prongs. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). For the first prong, the "use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness," *Saucier*, 533 U.S. at 201–02, which is "a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 & n.8 (2007). But lower courts need not answer the constitutional question and may skip to the clearly established prong, *Pearson* at 236, which is also a question of law. *Allin v. City of Springfield*, 845 F.3d 858, 862 (7th Cir. 2017).

The crux of the test for qualified immunity is whether the officers had "fair notice" that their conduct was unconstitutional. *Mullenix*, 136 S. Ct. at 314. The contours of the right must be "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela*, 138 S. Ct. at 1153 (citation omitted). Immunity should be granted "unless existing precedent 'squarely governs' the specific facts at issue." *Id.* (citation omitted). The rule must be clear, not merely "suggested" by precedent. *Wesby*, 138 S. Ct. at 590. And that "precedent must be clear enough that *every* reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that every reasonable official would know." *Id.* (citations and internal quotation marks omitted, emphasis added). "Existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Id.* at 589 (citation omitted).

Officers sued for damages under 42 U.S.C. § 1983 are entitled to the same right to fair notice as they would be

if criminally charged. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The "dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 136 S. Ct. at 308 (citation omitted). In other words, "the clearly established law must be 'particularized' to the facts of the case." *White*, 137 S. Ct. at 552 (citation omitted). Specificity is important because "it is sometimes difficult for an officer to determine how the relevant legal doctrine…will apply to the factual situation the officer confronts." *Kisela*, 138 S. Ct. at 1152. This "demanding standard" shields "all but the plainly incompetent or those who knowingly violate the law." *Wesby*, 138 S. Ct. at 589 (citation omitted). Immunity should be granted "if officers of reasonable competence could disagree." *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986). As this Court has stated, the fact that a "case presents a unique set of facts and circumstances" is a strong indication that the officers' conduct "did not violate a 'clearly established' right." *White*, 137 S. Ct. at 552 (per curiam).

B. Community Caretaking Doctrine

While investigating crime occupies much of our thinking about police work and the Fourth Amendment, it only represents about a quarter of all activities that patrol officers perform. *See* Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 Wash. & Lee L. Rev. 1485, 1486 (2009); *see also United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993), quoting I ABA Standards for Criminal Justice, 1-1.1(c) at 18 (2d ed. 1986) (stating that "those aspects of police function that relate to minimizing the likelihood of disorder…are equal

in their importance to the police function in identifying and punishing wrongdoers"). A modern police officer is a "jack-of-all-emergencies," with "complex and multiple tasks to perform." *Williams v. State*, 962 A.2d 210, 217 n.23 (Del. 2008); *accord*, *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993) (citations omitted).

"The purpose of the community-caretaking doctrine is to encourage government officials to offer assistance to the public." Dimino, 66 Wash. & Lee Law Rev. at 1529. Street encounters between citizens and police officers are initiated for a wide variety of purposes and are "incredibly rich in diversity," ranging from "wholly friendly exchanges of pleasantries" to "hostile confrontations." *Terry v. Ohio*, 392 U.S. 1, 13–14 (1968). We not only permit—but also expect—officers to exercise their caretaking function, *Samuelson v. City of New Ulm*, 455 F.3d 871, 877 (8th Cir. 2006), and courts have commended officers for performing this service. *See People v. Ray*, 981 P.2d 928, 932 (Cal. 1999). Police are expected "to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety." *United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006) (citation omitted). "[S]ociety does not want or expect a police officer to stand by and allow a condition or altercation to continue where it presents a substantial risk of serious harm." Dimino, 66 Wash. & Lee L. Rev. at 1533 & n.252 ("The public undoubtedly…would be critical of the police if they failed to assist those in need of help or failed to prevent harm to people or property.") (citation omitted); *see also Martin v. City of Oceanside*, 360 F.3d 1078, 1084 (9th Cir. 2004) ("Citizens would have been justifiably outraged if the officers had delayed their community caretaking responsibilities.").

Courts are required to look at the particular function performed by the officer. *See Matalon v. Hynnes*, 806 F.3d 627, 634 (1st Cir. 2015) (citation omitted). A core function is to ensure the safety of the general public or individuals,[2] *King*, 990 F.2d at 1560, which is why the community caretaking doctrine is sometimes referred to as the public safety doctrine. See *Williams*, 962 A.2d at 216. It is "beyond challenge" that the caretaking function authorizes police to preserve the uninterrupted and efficient flow of vehicular traffic and threats to public safety and convenience. *South Dakota v. Opperman*, 428 U.S. at 368–69; *accord*, *United States v. Johnson*, 889 F.3d 1120, 1125 (9th Cir. 2018) (per curiam) ("promoting public safety or the efficient flow of traffic" described as a valid community caretaking purpose); Dimino, 66 Wash. & Lee L. Rev. at 1486 n.3 ("ensuring the smooth flow of traffic" listed as a caretaking duty), quoting Peter K. Manning, *Police Work: The Social Organization Of Policing* 302 (1977).

The rubric of community caretaking has become a "catchall" for a wide range of responsibilities. *MacDonald v. Town of Eastham*, 745 F.3d 8, 12, 14 (1st Cir. 2014) (citation omitted). This array of caretaking functions can be divided into three categories: "(1) the automobile impoundment/inventory doctrine; (2) the emergency aid doctrine; and (3) the public servant doctrine." *See* Sturgis, 99 Iowa L. Rev. at 1847 (citation and internal punctuation omitted); David L. Hudson, *Courts In a Muddle Over 4th*

2. *Cf.* John W. Sturgis VII, Note, *Help! I Need Somebody (or Do I?): A Discussion of Community Caretaking and "Assistance Seizures" Under Iowa Law*, 99 Iowa L. Rev. 1841, 1847 (2014) (citing Dimino, 66 Wash. & Lee L. Rev. at 1541-47).

Amendment's Community Caretaking Exception, ABA JOURNAL (Aug. 2013), online at https://perma.cc/NT9B-KR2H. The public servant doctrine "is the most commonly recognized form of community caretaking." Sturgis, at 1854 (citation and internal quotation marks omitted).

C. Factual Background

The parties agree to the following facts:

On March 16, 2015, at 8:15 p.m., Officer Christopher Chung of the Honolulu Police Department (HPD) responded to a call from dispatch about a man walking in the middle of South King Street, a busy six-lane road in downtown Honolulu. Chung arrived at the scene and observed Sheldon Haleck in the street. Officer Samantha Critchlow arrived a minute later. Both officers instructed Haleck to get out of the middle of the road and to move to the sidewalk. He did not comply with their instructions and moved away from them while remaining in the middle of the street. App. 20a-21a.

They warned Haleck that they would use pepper spray if he did not comply,[3] but he did not move to the sidewalk. They used pepper spray multiple times, but he continued to run away from them but did not move to the sidewalk. Chung warned him that he would use taser if he did not get on the sidewalk. Chung deployed his taser but he did not fall to the ground. Officer Stephen Kardash arrived at the scene and also ordered Haleck to move to the sidewalk.

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3. The parties agreed that warnings were given before the pepper spraying (App. 21a), and the panel's statement to the contrary (App. 3a) is belied by the record.

Id. He did not comply, and Kardash sprayed him with pepper spray. Chung deployed his taser a second time and pulled the trigger to send a current through the probes. Following the third use of taser, he fell to the ground.[4] The officers attempted to handcuff Haleck after he had fallen on the ground, but he did not comply with their requests to cooperate and was "flailing," "squirming," and "kicking." Six officers were needed to hold him down in order to place him in handcuffs and leg shackles. Following the fall and cuffing, he was arrested for disorderly conduct. Minutes later he lost consciousness and stopped breathing. An ambulance arrived at the scene and took him to Queen's Medical Center. The next morning, approximately 11 hours later, he was pronounced dead. App. 21a-23a.

The parties agree that there was some level of resistance by Haleck, that he repeatedly refused to comply with the officers' instructions to move to the sidewalk, and that he ran away from them and evaded seizure. App. 44a.

D. Proceedings Below

1. Respondents sued the three petitioner police officers for damages under section 1983. App. 48a. The officers moved for summary judgment based on qualified immunity, but the district court denied the motion because

4. The parties disagree about certain facts occurring *after* force was deployed (i.e., the effect of the taser and the cause of Haleck's fall to the ground (App. 44a), but these facts are irrelevant to the immunity inquiry. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (limiting qualified immunity analysis to "the facts that were knowable to the defendant officers at the time they engaged in the conduct in question" [citation and internal quotation marks omitted]).

it found that the question of whether the officers violated a clearly established right turned on disputed factual issues as to the use and effectiveness of the taser triggered by Chung, the extent that Haleck presented a threat, and the immediacy and level of threat that the traffic posed during the incident. The court relied on *Ortega v. San Diego Police Dept.*, 669 Fed. Appx. 922, 923 (9th Cir. 2016) (unpublished), to deny qualified immunity on the basis of disputed facts. App. 47a. The district court rejected Respondent's reliance on *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011), as clearly established law that the use of taser was excessive force, concluding that the "two fact patterns in Mattos are not similar to the fact[s] in this case and do not assist the Plaintiff." App. 46a.

2. The officers filed an interlocutory appeal, and Ninth Circuit affirmed the denial of qualified immunity. The panel addressed the two prongs of qualified immunity: "(1) whether the officer used excessive force in violation of the Fourth Amendment; and (2) if so, whether the officer violated clearly established law." The panel's analysis contained three sections: Taser, Pepper Spray, and Community Caretaking Doctrine. App. 4a-8a.

The panel concluded that Chung's use of taser violated clearly established law, citing *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010), which, according to the panel, held that one taser deployment was excessive against a belligerent individual who was unarmed, non-threatening, and apprehended for a minor traffic violation, whereas Haleck was met with greater taser force and was not belligerent. The court also relied on *Brooks v. City of Seattle*, one of the two underlying cases in *Mattos*, which held that multiple taser deployments were unconstitutional

when used on one who no longer poses a potential threat to the officers or others, whereas Haleck was unarmed and never posed a threat to Chung and Critchlow. The panel made no taser determination as to Critchlow and Kardash. App. 4a-6a.

Turning next to pepper spray, the panel began by noting that a warning did not precede each deployment of pepper spray. The court found clearly established law that using pepper spray is excessive force when used on one committing a non-violent misdemeanor who disobeys an officer's order but otherwise poses no threat to the officer or others. Two cases were cited for this proposition: *Young v. Cty. of L.A.*, 655 F.3d 1156, 1168 (9th Cir. 2011), and *Nelson v. City of Davis*, 685 F.3d 867, 885 (9th Cir. 2012). The panel held that—given the number of times pepper spray was used, the three factors in *Graham*, 490 U.S. at 396, the availability of other means for arresting Haleck, and his "vulnerable mental state"—there was a factual issue for the jury whether the use of force violated the Fourth Amendment and clearly established law. App. 6a-7a.

The final section of the opinion addressed the community caretaking doctrine. The panel stated that community caretaking actions must meet the standard of reasonableness. The court found that the officers were serving a caretaking function, but held that "there was no emergency to increase the 'severity' of the circumstances." 7a-8a.

3. The officers filed a petition for rehearing en banc, asking the court to reconsider its opinion in light of this Court's requirement that clearly established law be defined

with a high level of specificity, including the fact that the officers were performing a their community caretaking function. The petition was denied. App. 79a-80a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision defies long-established precedents and is an affront to law enforcement. A mere three months after this Court's most recent qualified immunity decision in *Kisela*, which admonished the Ninth Circuit—for the fourth time—not to define clearly established law too generally, the Ninth Circuit yet again disregarded that entire line of authority. The panel denied qualified immunity based on cases that were not even remotely similar: one involved tasering a pregnant woman sitting in her car, and another involved pepper spraying a man sitting on a curb eating broccoli. The HPD officers here were not "plainly incompetent" and did not "knowingly violate the law" because the cases did not "squarely govern" the unique circumstances they were facing in the middle of a major thoroughfare with traffic ground to a halt.

The Fourth Amendment has become a guessing game in the Ninth Circuit, where police officers have no way of predicting how a particular panel will view their conduct in hindsight. Sadly, "different Ninth Circuit panels apply different standards when analyzing the clearly established question." Kate Seabright, Comment, *Arriving at Clearly Established: The Taser Problem and Reforming Qualified Immunity Analysis in the Ninth Circuit*, 89 Wash. L. Rev. 491, 499 (2014). Immunity should not hinge on such randomness. The current inconsistent approach creates confusion for both police officers and district courts,

interfering with their ability to perform their respective functions efficiently.

The particularized facts of this case found the officers exercising their community caretaking function by trying to restore the flow of traffic in a busy downtown thoroughfare. The panel excised those particularized caretaking facts from its qualified immunity analysis. Instead, a separate section of its opinion addressed community caretaking, but only the reasonableness of the officers' conduct was considered, not whether the conduct violated clearly established law. The panel simply bypassed the latter inquiry altogether.

It is inconceivable that police officers may receive immunity when performing their law enforcement duties, but somehow lose their immunity when exercising their community caretaking functions. Only this Court's guidance can provide the necessary clarity. Left undisturbed, the Ninth Circuit's decision will discourage officers from trying to maintain the public safety, and will signal that lower courts may disregard this Court's directions at a whim. The decision is egregiously wrong and must be reversed.

I. The Ninth Circuit Contravened This Court's Recent Precedents By Erroneously Denying Qualified Immunity.

A. The panel defined clearly established law generally, without particularizing it to the facts of the case.

The panel's cardinal error was to define clearly established law based on the general *Graham* factors

rather than the particularized circumstances facing the officers. Under this Court's precedents, officers are entitled to immunity unless "(1) they violated a… constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *Wesby*, 138 S. Ct. at 589 (citation and internal quotation marks omitted). Considering the first inquiry, whether an officer violated the Fourth Amendment by using excessive force "requires careful attention to the facts and circumstances of each particular case, including (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 he is actively resisting arrest or attempting to evade arrest by flight," *Kisela*, 138 S. Ct. at 1152 (quoting *Graham*, 490 U. S. at 396) (numbering added), which are known as the "*Graham* factors." *Ames v. King County*, 846 F.3d 340, 348 (9th Cir. 2017). The second inquiry is entirely different: "Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful," and "this demanding standard protects all but the plainly incompetent or those who knowingly violate the law." *Wesby* at 589 (citations and internal quotation marks omitted).

The panel found "clearly established law" only by framing both the officers' conduct and existing precedent at a high level of generality. The opinion trisected its analysis into separate components: taser, pepper spray, and community caretaking, and then found clearly established law based on two taser cases and two pepper spray cases because of certain shared *Graham* factors. Inexplicably, it analyzed qualified immunity strictly in terms of the law-enforcement function and completely ignored the facts pertaining to the officers performing

a community caretaking function in the middle of a busy downtown street where traffic had been halted by a man who disobeyed commands, repeatedly evaded the officers, and ignored warnings that force would be used.

Chung was the only officer who deployed his taser, a type of force considered reasonable or excessive depending on the circumstances. *See Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 & n.6 (9th Cir. 2013) (collecting cases considering whether the suspect was issued warnings or was evasive or was immobilized). The Ninth Circuit's inconsistent taser law suffers from three defects: "it results in inconsistent outcomes for litigants," "it creates confusion for district courts and government officials," and "it does nothing to help the Ninth Circuit's propensity for defining clearly established law at an impermissibly high level of generality." Seabright, 89 Wash. L. Rev. at 506. Under the current state of the law in the Ninth Circuit, an officer's liability for monetary damages unfortunately hinges upon the arbitrary selection of panels.[5]

The first case relied upon was *Brooks v. City of Seattle*, one of the two underlying taser cases in *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011). An officer stopped Brooks for speeding. Brooks informed him she was seven months pregnant and clutched her steering wheel, at which point the officer removed her key from the ignition and tased her three times rapidly in her neck, thigh, and arm while sitting in her car. The court found the force

5. While the panel's opinion is unpublished, there is evidence of strategic use of publication by judges, possibly to take advantage of the composition of judicial panels in particular cases. *See* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 Emory L.J. 55, 63 (2016) (surveying 800 qualified immunity cases).

to be unreasonable, noting the "overwhelmingly salient" factor that Brooks told the officer "that she was pregnant and less than 60 days from her due date," *id*. at 445, and adding that "no other exigent circumstances existed at the time." *Id*. at 446. The *Silva* panel, focusing on one of the Graham factors, found *Brooks* to have established that multiple taser deployments on someone who no longer poses a threat to the safety of the officers or others was unconstitutional. App. 5a-6a.

But the facts in *Brooks* are not even "roughly comparable to those present in this case." *Ryburn*, 565 U.S. at 474 (summarily reversing the denial of qualified immunity). Even if Chung had kept a copy of *Brooks* in his back pocket and studied it religiously before reporting to duty each day, he could not have known that *Brooks* "squarely governed" his encounter with Haleck. Even the district court found the fact pattern in *Brooks* to be "not similar to the fact[s] in this case." App. 46a. Therefore federal judges disagree about the precedential value of *Brooks*, and "if judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Reichle v. Howards*, 566 U.S. 658, 669–70 (2012) (citation and brackets omitted).

A second taser case the panel relied upon is *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010) (en banc), which the panel found to have established that even one taser deployment against a belligerent but unarmed and non-threatening man apprehended for a minor traffic violation is excessive. App. 5a. But Bryan was a motorist who had complied with police requests to turn down his radio and pull to the side of the road and was not attempting to

flee. He was tasered without warning, early on a Sunday morning, with no pedestrians or traffic. Again, the facts in *Bryan* are not even "roughly comparable," *Ryburn*, 565 U.S. at 474, because Haleck was blocking traffic in the middle of a busy thoroughfare, disobeying commands to get out of the street, and disregarding warnings that taser would be used.

Qualified immunity depends very much on the facts of each case, and Chung could not have known that *Brooks* and *Bryan* clearly established that his conduct was unreasonable, especially since there is clearly established law pointing in the opposite direction. In *Jones v. Las Vegas Metro. Police Dept.*, 873 F.3d 1123, 1127, 1130–31 (9th Cir. 2017), the plaintiff had ran away from a routine traffic stop in 2010. He had neither threatened the officer nor committed a serious offense, and he didn't appear to have a weapon. The Ninth Circuit found that the officer's firing of his taser *twice* to subdue Jones "was consistent with our case law" and that "[u]sing a taser to stop Jones and place him under arrest was reasonable under the circumstances." *Id.* *Brooks* and *Bryan* can only be identified as controlling precedent by ignoring this Court's oft-repeated instruction not to define clearly established law at a high level of generality.

In any case, qualified immunity allows "breathing room to make reasonable but mistaken judgments." *Carroll*, 135 S. Ct. at 350 (citation omitted). The protection applies "regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 U.S. at 231 (quotation marks omitted). Here, at the absolute worst, Chung's taser use could be viewed in hindsight as

a mistake, which does not defeat immunity, and Critchlow and Kardash cannot be denied immunity based on *Brooks* and *Bryan* because they did not use a taser.

The panel turned next to pepper spray cases, even though the Ninth Circuit has never created a hierarchy of intermediate force cases such that one form of force like pepper spray is considered reasonable in circumstances where another form like taser would be unreasonable.[6] Immunity does not depend on the particular intermediate force used. *See* Gravelet-*Blondin*, 728 F.3d at 1093 (indicating that law can be clearly established "even absent taser-specific case law").

It was clearly established, in the eyes of the panel, that the use of pepper spray violated the Fourth Amendment when used against a nonviolent misdemeanant disobeying an officer's order but posing no threat to the officer or others. App. 6a-7a. The principal case cited to support this proposition was *Young v. County of Los Angeles*, 655 F.3d 1156, 1168 (9th Cir. 2011). But the officer in *Young* faced much different circumstances when he "sprayed a driver with pepper spray from behind, while the driver sat on a curb eating broccoli after refusing to return to his vehicle, and later hit the driver with a baton while he 'lay face-first' on the ground." *See Felarca v. Birgeneau*, 891 F.3d 809, 818 (9th Cir. 2018) (distinguishing *Young* and rejecting its precedential value). The panel's second case was *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012). The officer shot Nelson in the eye with a pepperball projectile, without

6. The Ninth Circuit considers taser, pepper spray, and baton blows all to be "intermediate force." *See Saetrum v. Vogt*, 673 F. App'x 688, 690 (9th Cir. 2016) (citations omitted).

warning, in the breezeway of an apartment complex as Nelson was attempting to leave a party, awaiting police instructions, and Nelson was never informed how he could extricate himself from the area to avoid becoming the target of police force. *Id.* at 872–74. By contrast, Haleck was in the middle of a six-lane thoroughfare, disobeyed clear instructions to leave the street, and was given multiple warnings that force would be used. The facts are not even "roughly comparable." *Ryburn*, 565 U.S. at 474. Whatever the merits of *Young* and *Nelson*, the differences between those cases and the present case "leap from the page." *See Kisela*, 138 S. Ct. at 1154 (citation omitted).[7]

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7. In addition to defining clearly established law too generally, the panel opinion briefly suggested three additional reasons for denying immunity, all of them specious. App. 7a. First, "the availability of alternative means for executing arrest." This Court has "repeatedly stated…that the reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative less intrusive means." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (citation and internal punctuation omitted); see also *Cady*, 413 U.S. at 447 ("The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable."). The panel did not identify any such alternative means, and nothing in the record indicates that alternatives were available. Second, "Haleck's vulnerable mental state." There is nothing in the record about Haleck's mental state or, more importantly, whether the officers knew it. Third, "there is a factual issue for the jury whether Appellants' use of force violated…clearly established law." This was an erroneous basis to deny immunity because the existence of clearly established law is a legal question, not a factual one. *Estate of Williams v. Cline*, 902 F.3d 643, 651 (7th Cir. 2018) (considering "a violation of clearly established law" to be a "purely legal question").

The panel's finding of clearly established law based on four dissimilar cases suffers from an even more fatal defect: the so-called "law" is not even clearly established. *Felarca* is an intermediate force case involving community caretaking functions (though the court did not frame it as such), in which police officers attempted to remove protestors' tents. 891 F.3d at 817. The Ninth Circuit defined the law at issue as follows: "whether an officer violates clearly established law when, after several warnings to disperse have been given, the officer uses baton strikes on a plaintiff's torso or extremities for the purpose of moving a crowd actively obstructing the officer from carrying out lawful orders in a challenging environment." *Id*. at 822. The court found no such clearly established law and granted immunity. *Felcarca* shows why Chung, Critchlow, and Kardash should not have been denied immunity for similar conduct.

B. The panel's analysis of community caretaking omitted the key requirement of clearly established law.

The panel conceded that the officers were performing a community caretaking function, but only considered the reasonableness of their conduct under the first prong of qualified immunity. App. 7a-8a. The opinion began and ended its analysis with the statement that "there was no emergency to increase the 'severity' of the circumstances." *Id*. This terse conclusion begs more questions than it answers: (1) Does the caretaking doctrine require an "emergency"?; (2) If so, is the existence of an emergency to be assessed from the vantage point of the officers on the scene, or by an appellate panel applying 20/20 hindsight years later?; (3) Is "severity" a first prong *Graham* factor, or a type of emergency?; and most importantly,

(4) Can officers be deprived of qualified immunity when performing caretaking functions without satisfying the requirement of clearly established law?

First, the law regarding community caretaking is unsettled at best. It has been suggested that the broad array of caretaking functions includes the separate categories of the emergency aid doctrine and the public servant doctrine. *See* Sturgis, 99 Iowa L. Rev. at 1847 (citation omitted). If that is the case, then the panel erred by failing to consider the public servant doctrine for which no emergency is required. See *State v. Pinkard*, 785 N.W.2d 592, 598 & n.6 (Wis. 2010) (citation omitted) (stating that "circumstances short of a perceived emergency may apply under the community caretaking doctrine.")

Second, while the panel declared that there was no emergency, the appropriate inquiry is whether the officers reasonably believed there to be an emergency, even if mistaken. Would it have been clear to the officers at the time that there was no emergency, a determination that must be made "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"? *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (quoting *Graham*, 490 U.S. at 396). Employing omniscient judicial hindsight to second-guess the perceptions and actions of the officers is a fundamental error, and courts are not permitted a factual reconstruction based on the more expansive knowledge that can be produced in litigation and leisurely examination years later. Courts must make "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Kisela*, 138 S. Ct. at 1152 (quoting *Graham* at 396–97). In this regard,

"[n]ot all emergencies are the same. In some, a person's life may hinge on the passage of mere seconds, demanding immediate police action. In others, police must act with reasonable swiftness but their response need not be calculated in seconds." *People v. Molnar*, 774 N.E.2d 738, 741 (N.Y. Ct. App. 2002). Is an "emergency" like an exigency requiring "a need for immediate action"? *See Goodwin v. City of Painesville*, 781 F.3d 314, 330 (6th Cir. 2015) (citation omitted). Or is it an emergency when an officer "has an immediate, reasonable belief that a serious, dangerous event is occurring"? Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 332 & n.42 (citing cases). Defining an emergency strictly is problematic because "police may not know there is an immediate need for their assistance until it is too late for their assistance to be effective, or until a minor situation has grown into a crisis." Dimino, 66 Wash. & Lee L. Rev. at 1510. This Court has rejected the notion that officers must wait until a situation is grave because they could serve the community better by prevention rather than just providing help after damage has been done: "The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided." *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006). "The better rule…is that strict time limits are unnecessary and potentially harmful, for certain dangers may be prevented only in advance of the threat's materialization." Dimino at 1511. What, precisely, did the panel expect the HPD officers to do, faced with a man refusing to exit a busy downtown thoroughfare—wait until cars attempted to go around him, creating an even more precarious situation?

Third, what did the panel mean by referencing the "severity" of the circumstances: was it referring to "severity of the crime," one of the *Graham* factors? If so, this factor only relates to the first prong of qualified immunity, not the second.

Finally, and most importantly, the panel opinion makes no mention of clearly established law when discussing the important caretaking function the officers were performing. While this Court has never opined on the subject, it would seem contrary to settled qualified immunity principles to provide immunity to officers performing their criminal investigatory powers, but not in the many situations when they are performing either purely caretaking functions or a mixture of criminal and caretaking functions. Some other circuits have held the requirement of clearly established law applies to caretaking. *See, e.g., Corrigan v. District of Columbia*, 841 F.3d 1022, 1036 (D.C. Cir. 2016) (applying standard to subjecting community caretaking to clearly established); *MacDonald*, 745 F.3d at 15 (First Circuit); *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) (granting immunity because the "qualified immunity question is whether the officer was reasonably mistaken about the state of the law" regarding community caretaking); see also *Mayfield v. Bethards*, No. 6:14-cv-01307-JTM, 2017 U.S. Dist. LEXIS 139600, at *25 (D. Kan. Aug. 30, 2017) (applying "plainly incompetent" standard to community caretaking case). Furthermore, the coexistence of investigatory and caretaking functions should not defeat an officer's entitlement to immunity. *See Matalon*, 806 F.3d 627 at 635. Finally, "[g]iven such an undeveloped state of the law, the officers in this case cannot have been expected to predict the future course of constitutional law." *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (citation and internal quotation marks omitted).

II. The Questions Presented Are Exceptionally Important To Police Officers And Have A Wide-Ranging Impact On How They Perform Their Duties On A Daily Basis.

Police are in a quandary every day across the nation as they labor to maintain the public safety. Most of their duties involve community caretaking, but there are no clear standards to help them avoid being subjected to monetary damages other than "reasonableness." *See Cady*, 413 U.S. at 447–48. If they are not entitled to immunity absent clearly established law, they are left with "little doctrinal guidance from the Supreme Court other than the vague command of reasonableness." *State v. Coffman*, 914 N.W.2d 240, 268 (Iowa 2018) (citation omitted). "To simply declare that the search must be 'reasonable' is to have no standard at all that judges can consistently and uniformly apply." *Id*. at 263 (citation omitted). There are "no red flags" that would "semaphore" to every reasonable police officer the "general dimensions of the community caretaking exception," and "[q]alified immunity is meant to protect government officials where no such red flags are flying." *MacDonald*, 745 F.3d at 15. This is unfair to police officers, for as Chief Justice Burger stated:

> The policeman on the beat, or in the patrol car, makes more decisions and exercises broader discretion affecting the daily lives of people, every day and to a greater extent, in many respects, than a judge will ordinarily exercise in a week.

Dimino, 66 Wash. & Lee L. Rev. at 1527 & n.219 (quoting Howard Abadinsky, Discretionary Justice 15 (1984). "Given the profusion of cases pointing in different

directions, it is apparent that the scope and boundaries of the community caretaking exception are nebulous," and "rampant uncertainty exists." *MacDonald* at 14. The police and courts should be able to respond differently depending on the particular facts, but there has been little focus on "particular factors that will bring consistency to the field." Dimino at 1500. Whatever standards are applied, the effect should not be to "dissuade police from engaging in community-caretaking functions entirely, even in those instances where society would be benefited by police action." *Id*. at 1522.

Cady, the seminal community caretaking case, involved an impoundment search of a vehicle, but it has spawned an array of different approaches, and "courts have fallen like dominoes as the expansion of community caretaking has spread through American jurisprudence," and "further expansion is inevitable." Gregory T. Helding, Comment, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception With the Physicial Intrusion Standard*, 97 Marquette L. Rev. 123, 149 (Fall 2013) (collecting community caretaking cases). There is "a sea of confusing case law." *MacDonald*, 745 F.3d at 14. The circuit cases are in "disarray," *see Sutterfield v. City of Milwaukee*, 751 F.3d 542, 556 (7th Cir. 2014), and fall within three groups: three circuits take a restrictive view of community caretaking, four apply it expansively, and two are in between. Naumann, 26 Am. J. Crim. L. at 347. There is confusion among circuits as to whether the community caretaking applies to homes, *Ray*, 626 F.3d at 175–76, and "the *Ray* opinion illustrates the continuing debate concerning the scope and applicability of the community caretaking doctrine." *Feis v. King Cty. Sheriff's Dep't*, 267 P.3d 1022, 1033 n.14 (Wash. App. 2011). A similar division exists at the state level. *Sutterfield* at

556–57 (citations omitted) (collecting cases extending community caretaking exception beyond the automobile context and surveying different approaches). While many community caretaking cases involve warrantless searches, the doctrine has also been extended to seizures of individuals. *See Winters v. Adams*, 254 F.3d 758, 763–64 (8th Cir. 2001) (discussing Fifth and Tenth Circuit cases).

It has been noted that there is no "single community-caretaking doctrine," but rather "several different community-caretaking doctrines." Dimino, 66 Wash & Lee L. Rev. at 1494. Different taxonomies have been suggested. One distinguishes between the automobile impoundment, emergency aid, and public servant doctrines, *see* Sturgis, 99 Iowa L. Rev. at 1847 (citation omitted), but perhaps "courts should dispense with the emergency nomenclature and focus on what reasonable means in the community-caretaking context, Dimino at 1509, recognizing that "community-caretaking situations arise on the spur of the moment." *Id*. at 1521. Another classification views assistance seizures performed to help the subject of the seizure differently from seizures performed to protect the general public. *Sturgis* at 1848. A third formulation differentiates between "approaching individuals in public areas to inquire about potential problems" and "more intrusive" actions in private places like homes "to provide aid or respond to a disturbance." *Id*. at 1854–55 (citations omitted). There is a further distinction between first-party and third-party assistance seizures. *Id*. at 1855.

Some jurisdictions apply balancing tests to determine reasonableness under *Cady*. *See id*. at 1849–50; Naumann, 26 Am. J. Crim. L. 355. Detailed balancing may be necessary. *See Whren v. United States*, 517 U.S. 806, 818 (1996). One such balancing test looks to whether there

has been a seizure, whether the conduct was a bona fide caretaking activity, and whether the public interest outweighs the intrusion. *State v. Anderson*, 417 N.W.2d 411, 414 (Wis. App. 1987). The Sixth Circuit has held that the *Graham* factors used to determine reasonableness may not apply to the community caretaking context when there is no crime, no resisting arrest, and no threats to officers. *Estate of Hill v. Miracle*, 853 F.3d 306, 313 (6th Cir. 2017). Applying the *Graham* factors in that context "is equivalent to a baseball player entering the batter's box with two strikes already against him. *Id.* The Sixth Circuit devised a new three-part test for such cases. *Id.* at 314. The Tenth Circuit has fashioned a different three-part test, asking whether there are specific and articulable facts requiring the action, the government's interest outweighs the individual's interest, and the scope is no greater than necessary. *United States v. Garner*, 416 F.3d 1208, 1213 (10th Cir. 2005). The severity of any offense being committed "has less relevance as one moves away from traditional law enforcement functions and towards… community caretaking functions." *Goodwin v. City of Painesville*, 781 F.3d 314, 330–31 (6th Cir. 2015) (citation and internal quotation marks omitted). The "gravity of [an officer's] community caretaking responsibilities…must be factored into the analysis." *Ames*, 846 F.3d at 349.

The questions presented by this case are novel and have deeply divided jurisdictions across the country. There is great need for doctrinal clarification. It is unfair to police officers to demand that they keep communities safe without clear instructions, and the federal and state courts have not been able to agree upon a standard. This petition presents an ideal vehicle to resolve the questions presented, whose implications extend far beyond this case.

Certiorari should be granted to clarify the boundaries of officers' conduct when performing their community caretaking functions and to ensure their entitlement to immunity.

CONCLUSION

This Court should grant the petition for certiorari or, alternatively, summarily reverse the Ninth Circuit's decision.

Respectfully submitted,

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November 19, 2018

APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16406

GULSTAN E. SILVA, JR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHELDON PAUL HALECK; JESSICA Y. HALECK, INDIVIDUALLY, AND AS GUARDIAN AD LITEM OF JEREMIAH M. V. HALECK; WILLIAM E. HALECK; VERDELL B. HALECK,

Plaintiffs-Appellees,

v.

CHRISTOPHER CHUNG; SAMANTHA CRITCHLOW; STEPHEN KARDASH,

Defendants-Appellants.

June 11, 2018, Argued and Submitted Honolulu, Hawaii;
July 10, 2018, Filed

Appeal from the United States District Court for the District of Hawaii. D.C. No. 1:15-cv-00436-HG-KJM. Helen W. Gillmor, District Judge, Presiding.

Before: TASHIMA, W. FLETCHER, and HURWITZ, Circuit Judges.

Appendix A

MEMORANDUM*

Honolulu police officers Christopher Chung, Samantha Critchlow, and Stephen Kardash (collectively "Appellants"), appeal the district court's order denying their motion for summary judgment based on qualified immunity in this 42 U.S.C. § 1983 action arising out of the death of Sheldon Paul Haleck ("Haleck"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We may review a denial of summary judgment based on qualified immunity where a defendant argues that the evidence, construed in the light most favorable to the nonmoving party, shows no violation of the Fourth Amendment or clearly established law. *See A.K.H. v. City of Tustin*, 837 F.3d 1005, 1010 (9th Cir. 2016). We review such denials of summary judgment de novo. *Blanford v. Sacramento Cty.*, 406 F.3d 1110, 1114 (9th Cir. 2005). We view the material facts in the light most favorable to the nonmoving party, *K.R.L. v. Estate of Moore*, 512 F.3d 1184, 1188-1189 (9th Cir. 2008) (citing *Jeffers v. Gomez*, 267 F.3d 895, 905 (9th Cir. 2001), and draw all reasonable factual inferences in their favor, *John v. City of El Monte*, 515 F.3d 936, 941 (9th Cir. 2008).

Appellees presented evidence that, on the evening of March 16, 2015, Officer Chung responded to a call from dispatch regarding a man walking down the middle of South King Street in Honolulu. When he arrived at the

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

scene, Officer Chung observed Haleck walking in the middle of the street. Officer Critchlow arrived about one minute later. Both Officers Chung and Critchlow instructed Haleck to move to the sidewalk. Haleck did not comply with their instructions and instead apologized and walked away from the officers. After Haleck failed to move to the sidewalk, Officers Chung and Critchlow pepper sprayed Haleck multiple times without warnings. Officer Critchlow pepper sprayed Haleck four to five times, and Officer Chung pepper sprayed Haleck two to three times.

Haleck continued to move away from the officers, dodging from side to side in the middle of the street. Officer Kardash then arrived at the scene, boxed Haleck in, and ordered Haleck to move to the sidewalk. Haleck did not comply, and Officer Kardash pepper sprayed Haleck two to three times. Officer Chung then deployed his Taser in dart-mode. Officer Chung first shot the Taser at Haleck's chest. Haleck remained standing and turned away from Chung. Officer Chung then deployed his Taser in dart-mode a second time into Haleck's back. Without warning, Officer Chung pulled the Taser trigger again, releasing a third electric current. Following the third pull of the Taser trigger, Haleck fell face-forward to the ground in the direction of Officer Kardash. Haleck was then arrested for disorderly conduct. Additional officers arrived at the scene, cuffed Haleck's hands, shackled his legs, and carried Haleck to the side of the road where he lost consciousness and stopped breathing. Haleck was resuscitated and taken to the hospital where he was pronounced dead the next morning.

Appendix A

To determine whether an officer is entitled to summary judgment based on qualified immunity, we consider, viewing the facts in the light most favorable to Appellees: (1) whether the officer used excessive force in violation of the Fourth Amendment; and (2) if so, whether the officer violated clearly established law. *Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010). We address each question, in turn, for each method of force used against Haleck.

1. Taser

Deployment of a Taser in dart-mode constitutes an "intermediate, significant level of force" that must be justified by "'a strong government interest [that] compels the employment of such force.'" *Bryan*, 630 F.3d at 826 (quoting *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003), and *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001) (first alteration added and internal quotation marks omitted). This is because "[t]he physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the [Taser] and similar devices are a greater intrusion than other non-lethal methods of force we have confronted." *Bryan*, 630 F.3d at 826.

Whether the governmental interests permitted Officer Chung's use of Taser force is evaluated by examining three primary factors: (1) "the severity of the crime at issue," (2) "whether the suspect pose[d] an immediate threat to the safety of the officers or others," and (3) "whether [the suspect] [was] actively resisting arrest or attempting

to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)). The "'most important' factor under *Graham* is whether the suspect posed an 'immediate threat to the safety of officers or third parties.'" *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) (quoting *Bryan*, 630 F.3d at 826).

Here, there was no serious crime at issue. Appellants were responding to a dispatch call about a man walking in the middle of the road. Nor was Haleck an immediate threat to himself or others. Haleck made neither physical nor verbal threats. There also was no threat to traffic during the encounter. Appellees offered evidence that traffic was stopped. Finally, Haleck was never told he was under arrest, and he never actively attempted to evade arrest by flight.

Officer Chung's use of his Taser violated clearly established law. In *Bryan v. MacPherson*, we held that one deployment of the Taser X26 in dart-mode against a belligerent individual who was unarmed, nonthreatening, and apprehended for a minor traffic violation, was excessive. 630 F.3d 805. Here, Haleck was met with even greater Taser force, and was not belligerent. In *Brooks v. City of Seattle*, one of the two underlying cases in *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc), this court, sitting en banc, held that multiple Taser deployments on an individual who no longer poses even a potential threat to the officers' or others' safety, much less an "immediate threat," was unconstitutional. *Mattos*, 661

F.3d at 444 (citing *Deorle*, 272 F.3d at 1280). Here, Haleck was unarmed and never posed even a potential threat to Officer Chung or Officer Critchlow, because Haleck, unlike Brooks, never had access to even a potential weapon, such as a car.

2. Pepper Spray

Officers Chung, Critchlow, and Kardash used pepper spray numerous times on Haleck. Appellants concede that a warning did not precede each deployment of pepper spray. Officer Kardash testified he pepper sprayed Haleck two to three times, Officer Critchlow testified he pepper sprayed Haleck four to five times, and Officer Chung testified he pepper sprayed Haleck two to three times.

Pepper spray is regarded as an "intermediate force" that presents a significant intrusion upon an individual's liberty interests. *Nelson v. City of Davis*, 685 F.3d 867, 878 (9th Cir. 2012). Pepper spray "is *designed* to cause intense pain," and inflicts "a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx," as well as "disorientation, anxiety, and panic." *Young v. Cty. Of L.A.*, 655 F.3d 1156, 1162 (9th Cir. 2011) (quoting *Headwaters Forest Def. v. Cty. of Humboldt*, 240 F.3d 1185, 1199-1200 (9th Cir. 2000), *vacated and remanded on other grounds*, 534 U.S. 801, 122 S. Ct. 24, 151 L. Ed. 2d 1 (2001)). Under our case law, a reasonable officer would be on notice in 2015 "that police officers employ excessive force in violation of the Fourth Amendment when they use pepper spray upon an individual who is engaged in

the commission of a non-violent misdemeanor and who is disobeying a police officer's order but otherwise poses no threat to the officer or others." *Young*, 655 F.3d at 1168. *See also Nelson*, 685 F.3d at 885 (stating that the use of pepper spray was "an unreasonable application of force against individuals who were suspected of only minor criminal activity, offered only passive resistance, and posed little to no threat of harms to others").

Viewing the facts in the light most favorable to Appellees, considering the number of times Haleck was pepper-sprayed, the three *Graham* factors, the availability of alternative means for executing arrest, and Haleck's vulnerable mental state, there is a factual issue for the jury whether Appellants' use of force violated both the Fourth Amendment and clearly established law. *See Smith v. City of Hemet*, 394 F.3d 689, 704 n.7.

3. Community Caretaking Doctrine

Officers' "community caretaking" actions must meet the overarching standard of "reasonableness." *See Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005) (citing *Cooper v. California*, 386 U.S. 58, 59, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967)) (holding that in considering whether a seizure is appropriate under the community caretaking doctrine, "we must examine whether this seizure is reasonable based on all of the facts presented"); *see also Ames v. King Cty., Wash.*, 846 F.3d 340, 348 (9th Cir. 2017) ("we must determine ... whether the actions she took in subduing Ames were objectively reasonable") (citing *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L.

Ed. 2d 686 (2007)). Although Appellants were serving in a caretaking function, there was no emergency to increase the "severity" of the circumstances.

We affirm the district court's denial of qualified immunity and remand for further proceedings consistent with this disposition.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, FILED JUNE 28, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 15-00436 HG-KJM

GULSTAN E. SILVA, JR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHELDON PAUL HALECK; JESSICA Y. HALECK, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JEREMIAH M.V. HALECK; WILLIAM E. HALECK; VERDELL B. HALECK,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU; LOUIS M. KEALOHA, INDIVIDUALLY; CHRISTOPHER CHUNG; SAMANTHA CRITCHLOW; STEPHEN KARDASH,

Defendants.

ORDER GRANTING DEFENDANT LOUIS M. KEALOHA›S MOTION FOR SUMMARY JUDGMENT (ECF No. 193)

and

Appendix B

DENYING PLAINTIFFS› AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE LIABILITY OF DEFENDANTS CHRISTOPHER CHUNG, SAMANTHA CRITCHLOW, STEPHEN KARDASH, LOUIS M. KEALOHA, AND CITY AND COUNTY OF HONOLULU FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS (ECF No. 195)

and

GRANTING DEFENDANT CITY AND COUNTY OF HONOLULU'S AMENDED MOTION FOR SUMMARY JUDGMENT (ECF No. 199)

and

GRANTING, IN PART, AND DENYING, IN PART, DEFENDANTS CHRISTOPHER CHUNG, SAMANTHA CRITCHLOW, AND STEPHEN KARDASH'S AMENDED MOTION FOR SUMMARY JUDGMENT (ECF No. 200)

June 28, 2017, Decided
June 28, 2017, Filed

Plaintiffs filed a Second Amended Complaint against the City and County of Honolulu, former Honolulu police chief Louis Kealoha, and Honolulu police officers Christopher Chung, Samantha Critchlow, and Stephen Kardash relating to a March 16, 2015 incident involving Sheldon Paul Haleck.

Appendix B

Plaintiffs claim the Honolulu police officers seized Sheldon Paul Haleck and used excess force when they arrested him for disorderly conduct. Plaintiffs assert that the Honolulu police officers used pepper spray and a Taser multiple times against Sheldon Paul Haleck. He died following his arrest.

Plaintiffs allege constitutional violations and state law claims against the City and County of Honolulu, the former police chief, and the Honolulu police officers who seized and arrested Haleck.

There are four motions for summary judgment filed by the Parties.

1. Defendant Louis M. Kealoha's Motion for Summary Judgment (ECF No. 193)

Defendant Louis M. Kealoha filed a Motion for Summary Judgment on all claims against him.

First, Defendant Kealoha seeks summary judgment as to Plaintiffs' third cause of action. The cause of action includes a Section 1983 claim against Defendant Kealoha in his individual capacity for failure to supervise, failure to discipline, and ratification of the police officers' actions as stated in the Third Cause of Action.

Second, Defendant Kealoha moves for summary judgment as to the Eighth Cause of Action for interference with civil rights.

Defendant Louis M. Kealoha's Motion for Summary Judgment (ECF No. 193) is **GRANTED**.

2. Plaintiffs' Amended Motion for Summary Judgment (ECF No. 195)

Plaintiffs filed an Amended Motion for Partial Summary Judgment as to the liability of Defendants City and County of Honolulu, Louis M. Kealoha, Christopher Chung, Samantha Critchlow, and Stephen Kardash for alleged constitutional violations pursuant to Section 1983 as stated in the First, Second, and Third Causes of Action.

Plaintiffs' Amended Motion for Partial Summary Judgment (ECF No. 195) is **DENIED**.

3. Defendant City and County of Honolulu's Amended Motion for Summary Judgment (ECF No. 199)

Defendant City and County of Honolulu filed an Amended Motion for Summary Judgment as to Plaintiffs' Third Cause of Action for Section 1983 municipal liability. Defendant City and County also seeks summary judgment in its favor as to Plaintiffs' Eighth Cause of Action for interference with civil rights.

Defendant City and County of Honolulu's Amended Motion for Summary Judgment (ECF No. 199) is **GRANTED**.

4. Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash's Amended Motion for Summary Judgment (ECF No. 200)

Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash filed an Amended Motion for Summary Judgment as to Plaintiffs' constitutional and state law claims against them stated in the First, Second, Fourth, Fifth, Sixth, and Seventh Causes of Action. The Defendant police officers assert that they did not violate Haleck's constitutional rights and are otherwise entitled to qualified immunity. The Defendant officers argue they are entitled to a conditional privilege as to the Plaintiffs' state law claims.

Defendant Honolulu Police Officers' Amended Motion for Summary Judgment (ECF No. 200) is **GRANTED, IN PART, AND DENIED, IN PART**.

As to the Causes of Action stated in the Second Amended Complaint:

The Court **GRANTS** Summary Judgment for the respective Defendants as to the Causes of Action 2 through 8.

The only Cause of Action remaining is as follows:

> The First Cause of Action for Excessive Force in Violation of the Fourth Amendment to the United States Constitution Pursuant to 42 U.S.C. § 1983 stated by Plaintiff Gulstan

> E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, against Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash in their individual capacities.

There are no remaining claims by Plaintiffs Jessica Y. Haleck, for herself and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck.

The only remaining Plaintiff is Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck.

There are no remaining claims against Defendant City and County of Honolulu and Defendant Louis M. Kealoha.

The only remaining Defendants are Christopher Chung, Samantha Critchlow, and Stephen Kardash.

PROCEDURAL HISTORY

On October 20, 2015, Plaintiffs filed a Complaint. (ECF No. 1).

On the same date, Plaintiff Jessica Y. Haleck filed an Ex Parte Motion for Appointment of Guardian Ad Litem. (ECF No. 3).

On November 23, 2015, the Magistrate Judge issued an Order Appointing Jessica Y. Haleck as Guardian Ad Litem for Jeremiah M.V. Haleck. (ECF No. 11).

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On March 29, 2016, Plaintiffs filed a FIRST AMENDED COMPLAINT. (ECF No. 31).

On January 4, 2017, Defendant Louis M. Kealoha, Defendant City and County of Honolulu, and Defendants Christopher Chung, Samantha, Critchlow, Stephen Kardash, Chad Sano, Reynwood Makishi, and Frank Pojsl filed Motions for Summary Judgment and Concise Statements of Facts. (ECF Nos. 126, 127, 134, 136, 137, 138).

On the same date, Plaintiffs filed a Motion for Partial Summary Judgment and a Concise Statement of Facts. (ECF Nos. 131, 132).

On January 4, 2017, Plaintiffs filed a Motion to Seal Documents (ECF No. 133) and Defendant Louis M. Kealoha filed a Motion to Seal Documents (ECF No. 129).

On January 11, 2017, the Court issued an ORDER GRANTING PLAINTIFFS LEAVE TO FILE EXHIBITS UNDER SEAL. (ECF No. 145).

Also on January 11, 2017, the Court issued an ORDER GRANTING DEFENDANT LOUIS M. KEALOHA'S EX-PARTE MOTION FOR LEAVE TO FILE CERTAIN EXHIBITS UNDER SEAL. (ECF No. 146).

On January 20, 2017, the Parties filed their Oppositions to the Motions for Summary Judgment. (ECF No. 152, 153, 154, 155, 157, 158, 159, 160).

On February 2, 2017, the Parties filed their Replies. (ECF Nos. 167, 168, 169, 170).

On February 6, 2017, the Court issued an ORDER GRANTING PLAINTIFFS LEAVE TO FILE EXHIBITS UNDER SEAL. (ECF No. 171).

On February 15, 2017, Plaintiffs filed PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT. (ECF No. 173).

Also on February 15, 2017, Plaintiffs filed PLAINTIFFS' MOTION TO DISMISS DEFENDANTS LOUIS M. KEALOHA, IN HIS OFFICIAL CAPACITY, CHAD SANO, REYNWOOD MAKISHI, AND FRANK POJSL. (ECF No. 174).

On the same date, Plaintiffs filed PLAINTIFFS' EX PARTE MOTION TO SHORTEN TIME FOR HEARING (1) MOTION TO DISMISS DEFENDANTS LOUIS M. KEALOHA, IN HIS OFFICIAL CAPACITY, CHAD SANO, REYNWOOD MAKISHI, AND FRANK POJSL AND (2) MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT. (ECF No. 175).

On February 16, 2017, the Court issued a Minute Order granting Plaintiffs' Motion to Shorten Time and issued a briefing schedule as to Plaintiffs' Motion to Dismiss and their Motion to File Second Amended Complaint. (ECF No. 177).

On February 16, 2017, the Court issued the Parties' STIPULATION FOR PARTIAL DISMISSAL

WITHOUT PREJUDICE OF ALL CLAIMS AGAINST DEFENDANT DONNA Y.L LEONG AND ORDER. (ECF No. 176).

On March 7, 2017, the Court held a hearing as to Plaintiff's Motion to Dismiss, Plaintiff's Motion for Leave to File Second Amended Complaint, and the scheduling of the Motions for Summary Judgment. (ECF No. 186).

The Court granted, in part, and denied, in part, Plaintiffs' Motion to Dismiss and granted Plaintiff's Motion for Leave to File Second Amended Complaint. (*Id.*)

The Court ordered the Parties to re-file their Motions for Summary Judgment in accordance with its Orders on Plaintiffs' Motions to Dismiss and Leave to Amend. (*Id.*)

On March 10, 2017, Plaintiffs filed their SECOND AMENDED COMPLAINT FOR DAMAGES. (ECF No. 189).

On March 14, 2017, the Court issued an ORDER GRANTING, IN PART, AND DENYING, IN PART, PLAINTIFFS' MOTION TO DISMISS DEFENDANTS LOUIS M. KEALOHA, IN HIS OFFICIAL CAPACITY, CHAD SANO, REYNWOOD MAKISHI AND FRANK POJSL AND GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT. (ECF No. 192).

On March 21, 2017, Defendant Kealoha filed his Motion for Summary Judgment (ECF No. 193), Defendant City and County of Honolulu filed its Amended Motion for

Summary Judgment (ECF No. 199), and the Defendant Honolulu Police Officers filed their Amended Motion for Summary Judgment (ECF No. 200).

On the same date, Plaintiffs filed their Amended Motion for Summary Judgment. (ECF No. 195).

On April 17, 2017, the Parties filed their Oppositions. (ECF No. 208, 209, 210, 211).

On April 24, 2017, the Parties filed their Replies. (ECF Nos. 212, 214, 215, 216).

On June 14, 2017, the Court held a hearing on the Parties' four Motions for Summary Judgment. (ECF No. 223). The Court ruled from the bench. The Court granted the Motions for Summary Judgment filed by Defendants Louis M. Kealoha and the City and County of Honolulu. The Court granted, in part, and denied, in part, the Defendant Officers' Motion for Summary Judgment. The Court denied Plaintiffs' Motion for Summary Judgment. The reasons for the decision are set forth in this Written Order.

BACKGROUND

The Parties

There are five Plaintiffs named in the Second Amended Complaint. All of the Plaintiffs claim they are relatives of Sheldon Paul Haleck, who is deceased. (Second Amended Complaint at ¶¶ 7-12, ECF No. 189). Gulstan E.

Silva, Jr. is the personal representative of the Estate of Sheldon Paul Haleck.

Plaintiffs have filed federal and state law claims against the City and County of Honolulu and various individuals arising out of a March 16, 2015 incident involving Honolulu Police Officers and Sheldon Haleck. (*Id.* at pp. 3-22).

Plaintiffs' relationships to Sheldon Haleck are alleged in the Second Amended Complaint as follows:

(1) **Plaintiff Gulstan E. Silva, Jr**. as the natural uncle of Sheldon Haleck and as the Personal Representative of the Estate of Sheldon Paul Haleck (*id.* at ¶ 8);

(2) **Plaintiff Jessica Y. Haleck** as the wife of Sheldon Haleck and as Guardian Ad Litem of Jeremiah M.V. Haleck (*id.* at ¶ 9);

(3) **Plaintiff Jeremiah M.V. Haleck** as the minor son of Plaintiff Jessica Y. Haleck and Sheldon Haleck (*id.* at ¶ 10);

(4) **Plaintiff William E. Haleck** as the father of Sheldon Haleck (*id.* at ¶ 11); and,

(5) **Plaintiff Verdell B. Haleck** as the mother of Sheldon Haleck (*id.* at ¶ 12).

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The Second Amended Complaint names the following Defendants:

(1) **Defendant City and County of Honolulu** (*id.* at ¶ 13);

(2) **Defendant Louis M. Kealoha**, individually, former Chief of the Honolulu Police Department; (*id.* at ¶ 14);

(3) **Defendant Christopher Chung**, individually and in his official capacity as an officer with the Honolulu Police Department, (*id.* at ¶ 15);

(4) **Defendant Samantha Critchlow**, individually and in her official capacity as an officer with the Honolulu Police Department, (*id.* at ¶ 16); and,

(5) **Defendant Stephen Kardash**, individually and in his official capacity as an officer with the Honolulu Police Department, (*id.* at ¶ 17).

The Parties Agree to the Following Facts:

At 8:15 p.m., on March 16, 2015, Honolulu Police Officer Christopher Chung ("Officer Chung") responded to a call from dispatch about a male walking in the middle of South King Street, a busy six-lane road in Downtown Honolulu. (Deposition of Officer Christopher Chung ("Chung Depo.") at p. 27-29, attached as Ex. C to Pla.'s Concise Statement of Facts ("CSF"), ECF No. 196-4). Officer Chung arrived at the scene and observed

Sheldon Paul Haleck ("Haleck") in the street. (*Id.* at p. 29). Officer Samantha Critchlow ("Officer Critchlow") arrived approximately one minute later. (Deposition of Officer Samantha Critchlow ("Critchlow Depo.") at p. 39, attached as Ex. D to Pla.'s CSF, ECF No. 196-5).

Both Officers instructed Haleck to get out of the middle of the road and to move to the sidewalk. (*Id.* at p. 42; Chung Depo. at p. 30, ECF No. 196-4). Haleck did not comply with the Officers' instructions and moved away from them while remaining in the middle of the street. (Critchlow Depo. at p. 42, ECF No. 196-5; Chung Depo. at p. 34, ECF No. 196-4).

The Officers warned Haleck that they would use pepper spray if he did not comply, but Haleck did not move to the sidewalk. (Chung Depo. at p. 34, ECF No. 196-4). The Officers sprayed Haleck with pepper spray multiple times. (*Id.* at pp. 37-38; Critchlow Depo. at p. 48, ECF No. 196-5). Haleck continued to run away from the Officers, moving side to side, and he did not move to the sidewalk. (Chung Depo. at p. 38, ECF No. 196-4).

Officer Chung warned Haleck that he would use the Taser if Haleck did not get on the sidewalk. (Chung Depo. at p. 49, 196-4). Officer Chung deployed the Taser in dart mode and pulled the trigger to send a current through the probes but Haleck did not fall to the ground. (*Id.*)

Officer Stephen Kardash ("Officer Kardash") arrived at the scene and also ordered Haleck to move to the sidewalk. (Deposition of Officer Stephen Kardash

("Kardash Depo.") at p. 23, attached as Ex. E to Pla.'s CSF, ECF No. 196-6). Haleck did not comply and Officer Kardash sprayed Haleck with pepper spray. (*Id.* at p. 36).

Officer Chung deployed his Taser in dart mode a second time and pulled the trigger to send a current through the probes. (Critchlow Depo. at p. 53, ECF No. 196-5). Officer Chung testified in his deposition that while the probes were still deployed from the second deployment, he pulled the trigger to send a current through the probes a third time. (Chung Depo. at p. 51, attached as Ex. A to Def.'s Opp., ECF No. 210-3). The Parties agree that following the third use of the Taser, Haleck fell to the ground. The Parties dispute the cause of the fall.

The Officers attempted to handcuff Haleck after he had fallen on the ground. (Critchlow Depo. at p. 57, ECF No. 196-5). Haleck did not comply with Officers' requests to cooperate and he was "flailing," "squirming," and "kicking." (*Id.*) Six Officers were needed to hold Haleck down in order to place him in handcuffs and leg shackles. (Chung Depo. at p. 57, ECF No. 196-4; Kardash Depo. at pp. 47-49, ECF No. 196-6).

Following the fall and cuffing, Haleck was arrested for disorderly conduct. (Critchlow Depo. at p. 67, ECF No. 196-5). Minutes later, Haleck lost consciousness and stopped breathing. (Critchlow Depo. at p. 60, ECF No. 196-5; Kardash Depo. at p. 49, ECF No. 196-6). An ambulance arrived at the scene and took Haleck to Queen's Medical Center. (Autopsy Report of Sheldon P. Haleck at p. 3, attached as Ex. A to Def. Honolulu's CSF, ECF No.

136-13). The next morning, approximately 11 hours later, Haleck was pronounced dead at 7:33 a.m. (*Id.*)

Plaintiffs' Position:

Plaintiffs assert that the third use of the Taser caused Haleck to fall. Plaintiffs point to evidence from the Autopsy that there were red marks on Haleck's body that they assert indicate the Taser had some effect on Haleck. (Autopsy Report of Sheldon P. Haleck at p. 6, attached as Ex. A to Def. Honolulu's CSF, ECF No. 136-13; Report of Richard Lichten, at p. 11, attached as Ex. B to Pla.'s CSF, ECF No. 147-1).

Plaintiffs claim the Officers' multiple uses of pepper spray and the Taser were not reasonable under the circumstances.

Defendants' Position:

Defendants state that following the third use of the Taser, Haleck's shorts fell down and he tripped and fell to the ground. (Critchlow Depo. at p. 54, ECF No. 196-5; Kardash Depo. at p. 45, ECF No. 196-6). Defendants assert that the Chief Medical Examiner determined that the Taser had no effect on Haleck because the barbs never implanted in his skin. (Deposition of Chief Medical Examiner Dr. Christopher Happy at pp. 22-24, ("Dr. Happy Depo.") attached as Ex. H to Def.'s Opp., ECF No. 210-9).

Defendants assert that the Officers' actions were reasonable under the circumstances. Defendants claim there was an immediate threat of injury to the Officers and others. The Defendants base their claim on the facts that the incident occurred in the middle of a busy street in Downtown Honolulu, at night, and that Haleck refused to comply with the Officers' warnings and commands.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To defeat summary judgment there must be sufficient evidence that a reasonable jury could return a verdict for the nonmoving party. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 916 (9th Cir. 1997).

The moving party has the initial burden of "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The moving party, however, has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. The moving party need not produce any evidence at all on matters for which it does not have the burden of proof. *Celotex*, 477 U.S. at 325. The moving party must show, however, that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter

of law. That burden is met by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. *Id.*

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of probative evidence tending to support its legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party must present admissible evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Nidds*, 113 F.3d at 916 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

The court views the facts in the light most favorable to the non-moving party. *State Farm Fire & Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989). Opposition evidence may consist of declarations, admissions, evidence obtained through discovery, and matters judicially noticed. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324. The opposing party cannot, however, stand on its pleadings or simply assert that it will be able to discredit the movant's evidence at trial. Fed. R. Civ. P. 56(e); *T.W. Elec. Serv.*, 809 F.2d at 630. The opposing party cannot rest on mere allegations or denials. Fed. R. Civ. P. 56(e); *Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 959-60 (9th Cir. 1994). When the non-moving party relies only on its own affidavits to oppose summary judgment, it cannot rely

on conclusory allegations unsupported by factual data to create an issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993); *see also National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997).

ANALYSIS

There are eight causes of action in the Second Amended Complaint:

FIRST CAUSE OF ACTION: **Excessive Force** in violation of the Fourth Amendment to the United States Constitution and Article I of the Hawaii Constitution pursuant to 42 U.S.C. § 1983

Stated by:

Plaintiffs Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck (hereinafter "the individual Plaintiffs")

Stated against:

Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

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SECOND CAUSE OF ACTION: Violations of the **Due Process** Clause of the Fourteenth Amendment to the United States Constitution Pursuant to 42 U.S.C. § 1983

Stated by:

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and the individual Plaintiffs

Stated against:

Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

THIRD CAUSE OF ACTION: **Municipality and Supervisor Liability** for United States Constitutional Violations pursuant to 42 U.S.C. § 1983

Stated by:

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and the individual Plaintiffs

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Stated against :

Defendants City and County of Honolulu and Louis M. Kealoha

FOURTH CAUSE OF ACTION: **Assault and Battery**

Stated by:

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and the individual Plaintiffs

Stated against:

Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

FIFTH CAUSE OF ACTION: **Intentional Infliction of Emotional Distress**

Stated by:

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and the individual Plaintiffs

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Stated against:

Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

SIXTH CAUSE OF ACTION: **Negligence**

Stated by:

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and the individual Plaintiffs

Stated against:

Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

SEVENTH CAUSE OF ACTION: **Negligent Infliction of Emotional Distress**

Stated by:

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and the individual Plaintiffs

Stated against:

Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

EIGHTH CAUSE OF ACTION: **Interference With Civil Rights**

Stated by:

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and the individual Plaintiffs

Stated against:

Defendants City and County of Honolulu and Louis M. Kealoha

Plaintiffs move for partial summary judgment in their favor as to Causes of Action 1-3.

Defendants move for summary judgment in their favor as to all Causes of Action 1-8.

FIRST CAUSE OF ACTION: Excessive Force in Violation of the Fourth Amendment to the United

Appendix B

States Constitution and Article I of the Constitution of the State of Hawaii Pursuant to 42 U.S.C. § 1983 Stated by All Plaintiffs Against the Defendant Officers Chung, Critchlow, and Kardash

A plaintiff may challenge actions by government officials that violate the United States Constitution, pursuant to 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage ... subjects, or causes to be subjected, any citizen of the United States ... to 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....

42 U.S.C. § 1983. Section 1983 does not create any substantive rights. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 978 (9th Cir. 2004).

To prevail on a Section 1983 claim, a plaintiff must establish that a right secured by the Constitution or law of the United States was violated and that the violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

Appendix B

A. Standing

The First Cause of Action is stated by Plaintiffs Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck against the Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash in both their individual capacities and their official capacities as Honolulu Police Officers.

In Section 1983 actions, the survivors of an individual who allegedly died as a result of an officer's excessive use of force may assert a Fourth Amendment claim on that individual's behalf if the relevant state's law authorizes a survival action. *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998).

Hawaii law permits the decedent's "legal representative" to pursue his tort claims. Haw. Rev. Stat. § 663-7. The term, "legal representative," has not been defined by statute or the Hawaii Supreme Court.

The interpretation of the term "legal representative" in Haw. Rev. Stat. § 663-7 was considered by the federal district court in *Agae v. United States*, 125 F.Supp.2d 1243, 1248 (D. Haw. 2000). In *Agae*, the district court found that a legal representative generally refers to one who stands in place of, and represents the interests of another such as an administrator of an estate or a court appointed guardian of a minor. *Id.* The district court found that the term is not so broad so as to allow an individual

heir to a decedent to file a claim on his or her behalf. *Id.* at 1248. The district court found that the term "legal representative," as used in Haw. Rev. Stat. § 663-7, is limited to one who stands in the place of the deceased and represents his interest, either by the decedent's act or by the operation of law, citing *Mutual Life Ins. v. Armstrong*, 117 U.S. 591, 597, 6 S. Ct. 877, 29 L. Ed. 997 (1886). *Agae*, 125 F.Supp.2d at 1248.

In this case, the Second Amended Complaint states that Sheldon Haleck's estate is represented by Plaintiff Gulstan E. Silva, Jr. (Second Amended Complaint at ¶ 8, ECF No. 189). Plaintiff Silva, as personal representative of the decedent's estate, has standing to assert a Fourth Amendment Excessive Force Claim pursuant to Section 1983 on the decedent's behalf.

The remaining Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck, allege they are related to the decedent Sheldon Haleck. Their status as relatives does not confer upon them standing to pursue decedent Sheldon Haleck's Fourth Amendment claim pursuant to Haw. Rev. Stat. § 663-7. *Agae*, 125 F.Supp.2d at 1248; *Ryder v. Booth*, Civ. No. 16-00065HG-KSC, 2016 U.S. Dist. LEXIS 62534, 2016 WL 2745809, *5 (D. Haw. May 11, 2016) (finding that only one plaintiff had standing to pursue the decedent's Section 1983 claim on behalf of the decedent's estate).

Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William

E. Haleck, and Verdell B. Haleck do not have individual standing to bring a Fourth Amendment Excessive Force Claim. There are no facts that Plaintiffs Jessica Y. Haleck, Jeremiah M.V. Haleck, William E. Haleck, or Verdell B. Haleck were involved in the March 16, 2015 incident that would allow them to pursue their own Section 1983 excessive force claims.

Defendant Officers Chung, Critchlow, and Kardash's Amended Motion for Summary Judgment is **GRANTED, IN PART**, as to Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck's Claim in the First Cause of Action in the Second Amended Complaint.

Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck's Amended Motion for Partial Summary Judgment as to the First Cause of Action is **DENIED**.

Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck may not bring an excessive force claim on behalf of Sheldon Paul Haleck.

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, is the only Plaintiff with standing to bring an Excessive Force Claim pursuant to Section 1983.

B. Section 1983 Does Not Permit State Constitutional Claims

In the First Cause of Action, Plaintiff Silva alleges the Defendant Officers Chung, Critchlow, and Kardash violated Sheldon Haleck's rights under the Fourth Amendment to the United States Constitution and Article I of the Hawaii Constitution pursuant to 42 U.S.C. § 1983. (Second Amended Complaint at pp. 11-12, ECF No. 189). Plaintiff Silva is unable to assert a Section 1983 claim pursuant to a violation of the Hawaii State Constitution.

Section 1983 is a remedy for violations of federal rights. Violations of state law, including a state constitution, are not cognizable pursuant to Section 1983. Maizner v. Haw., Dep't of Educ.., 405 F.Supp.2d 1225, 1240 (D. Haw. 2005) (citing *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996)). Plaintiff Silva may not bring an excessive force claim in violation of the Hawaii Constitution pursuant to Section 1983.

Defendant Officers Chung, Critchlow, and Kardash's Amended Motion for Summary Judgment is **GRANTED, IN PART**, as to Plaintiff Silva's Claim in the First Cause of Action as an alleged violation of Article I of the Hawaii State Constitution pursuant to 42 U.S.C. § 1983.

Plaintiff Silva's Amended Motion for Partial Summary Judgment as to the First Cause of Action as an alleged violation of Article I of the Hawaii State Constitution pursuant to 42 U.S.C. § 1983 is **DENIED**.

C. Individual and Official Capacities

Plaintiff Silva asserts the First Cause of Action against Defendant Honolulu Officers Chung, Critchlow, and Kardash in both their official and individual capacities.

A suit against a police officer in his or her official capacity is the equivalent of naming the government entity itself as the defendant. *Kentucky v. Graham*, 473 U.S. 159, 165-67, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *Community House, Inc. v. City of Boise*, 623 F.3d 945, 966-67 (9th Cir. 2010).

The Defendant City and County of Honolulu is already a named defendant. Plaintiff has brought the Third Cause of Action against the Defendant City and County of Honolulu pursuant to Section 1983.

Duplicative Section 1983 claims may not be brought against both the municipality itself and against the individual government officials in their official capacities. *Vance v. Cnty. of Santa Clara*, 928 F.Supp. 993, 996 (N.D. Cal. 1996); *see Lawman v. City and Cnty. of San Francisco*, 159 F.Supp.3d 1130, 1143 n.7 (N.D. Cal. 2016).

Plaintiff's Section 1983 Claim in the First Cause of Action against Defendant Honolulu Officers Chung, Critchlow, and Kardash in their official capacities is duplicative of Plaintiff's Third Cause of Action against the Defendant City and County of Honolulu. *McFarland v. City of Clovis*, 163 F.Supp.3d 798, 808 (E.D. Cal. 2016); *Carnell v. Grimm*, 872 F.Supp. 746, 752 (D. Haw. 1994).

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Defendant Officers Chung, Critchlow, and Kardash's Amended Motion for Summary Judgment is **GRANTED, IN PART**, as to Plaintiff Silva's Section 1983 Claim in the First Cause of Action against the Defendant Officers in their official capacities.

Plaintiff Silva's Amended Motion for Partial Summary Judgment as to the Section 1983 Claim in the First Cause of Action against Defendant Officers Chung, Critchlow, and Kardash, in their official capacities, is **DENIED**.

The remaining claim in the First Cause of Action is as follows:

> Plaintiff Silva's Claim for Excessive Force in violation of the Fourth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983 as stated against Defendant Officers Chung, Critchlow, and Kardash in their individual capacities.

D. Excessive Force

A person deprives another of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which the plaintiffs complain. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

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Plaintiff Silva asserts that Defendant Honolulu Officers Chung, Critchlow, and Kardash used excessive force in the course of their arrest of Haleck. It is undisputed that Officers Chung, Critchlow, and Kardash acted under color of state law when they acted to seize and arrest Haleck.

The use of force in the course of an arrest is analyzed pursuant to the Fourth Amendment of the United States and its reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The reasonableness inquiry is an objective one: the question is if the officer's actions are objectively reasonable in light of the facts and circumstances confronting them. *See id.* The essence of the reasonableness inquiry is a balancing of the force which was applied against the need for that force. *Liston v. Cty. of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997).

Determining whether the force used to effect a particular seizure is reasonable pursuant to the Fourth Amendment requires a careful balancing of the "nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake. *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 7-8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)).

1. Nature and Quality of the Intrusion

The gravity of the particular intrusion that a given use of force imposes upon an individual's liberty interest

is measured by "the type and amount of force inflicted." *Jackson v. City of Bremerton*, 268 F.3d 646, 651-52 (9th Cir. 2001) (citing *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994)).

In this case, it is undisputed that on March 16, 2015, Honolulu Police Officers Chung, Critchlow, and Kardash seized and arrested Sheldon Haleck. During the course of the seizure and arrest, Officers Chung, Critchlow, and Kardash repeatedly used pepper spray on Haleck. (Chung Depo. at pp. 37-38, ECF No. 196-4; Critchlow Depo. at p. 48, ECF No. 196-5; Kardash Depo. at p. 36, ECF No. 196-6).

The use of pepper spray is a form of force capable of inflicting significant pain and causing serious injury. *Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1161 (9th Cir. 2011). Pepper spray is regarded as an "intermediate force" that, while less than deadly force, presents a significant intrusion upon an individual's liberty interests. *Nelson v. City of Davis*, 685 F.3d 867, 878 (9th Cir. 2012).

There is no dispute that a Taser was deployed by Officer Chung at Haleck. (Chung Depo. at pp. 49-51, ECF No. 196-4; Critchlow Depo. at p. 51, ECF No. 196-5; Kardash Depo. at p. 44, ECF No. 196-6).

The use of a Taser constitutes an intermediate use of force. *Bryan v. MacPherson*, 630 F.3d 805, 824 (9th Cir. 2010). The Ninth Circuit Court of Appeals has considered the effects of Tasers at length and held that they constitute an "intermediate significant level of force that must be justified by the governmental interest involved." *Id.*

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In *MacPherson*, the plaintiff was shot with a Taser that caused him to fall face-first to the ground. *Id.* The plaintiff suffered facial contusions and four fractured teeth as a result of the Taser use. *Id.* The Ninth Circuit Court of Appeals held that the "physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 [Taser] and similar devices are a greater intrusion than other non-lethal methods of force we have confronted." *Id.* The appellate court explained that the Taser delivered in dart-mode sends an electrical impulse that instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless. *Id.*

The appeals court stated that the pain caused by a Taser is "intense, is felt throughout the body, and ... [may cause] immobilization, disorientation, loss of balance, and weakness." *Id.* (quoting *Matta-Ballesteros v. Henman*, 896 F.2d 255, 256 n.2 (7th Cir. 1990)); *see also Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011) (en banc) (reviewing excessive force claims for use of a Taser).

The Parties dispute the effect of the Taser and if the Taser shocked Haleck. The Chief Medical Examiner, Dr. Happy, stated in his autopsy report that there was "no evidence of Taser barb penetration of the skin." (Autopsy Report of Sheldon P. Haleck at p. 1, attached as Ex. A to Def. Honolulu's CSF, ECF No. 136-13). The autopsy report also stated that the "Taser deployment [was] ineffective according to police reports." (*Id.*) Dr. Happy provided a Declaration stating that "there was no indication or evidence that Haleck suffered from Taser

related injuries." (Declaration of Dr. Happy, attached to Def. Honolulu's CSF, ECF No. 136-4).

Plaintiff provided an expert report from Richard Lichten, a law enforcement specialist. (Lichten Report attached as Ex. B to Pla.'s CSF, ECF No. 147-1). Lichten stated in his Report that he reviewed the autopsy photographs and saw evidence of small red wounds called "erythema," which are consistent with the wounds caused by Taser probes. (*Id.* at pp. 10-11).

The Parties dispute the reason Haleck fell to the ground, allowing Officers to seize him. Plaintiff asserts that Haleck fell because of the Taser triggered by Officer Chung. The Defendant Officers claim that Haleck tripped. (Critchlow Depo. at p. 54, ECF No. 196-5; Kardash Depo. at p. 45, ECF No. 196-6).

The genuine disputes of fact regarding the use and effectiveness of the Taser prevent the Court from entering summary judgment for either party. The facts as to the use of force must be balanced by the government interest. With disputed facts as to the use of force in this case, summary judgment is inappropriate. *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002) (explaining that summary judgment is impermissible in excessive force cases where there are material disputes of fact).

2. Governmental Interest

Courts examine three main factors when evaluating the governmental interest in the use of force:

(1) whether the suspect poses an immediate threat to the safety of the officers or others;

(2) the severity of the crime at issue; and,

(3) whether the suspect actively resists detention or attempts to escape.

Liston, 120 F.3d at 968; *MacPherson*, 630 F.3d at 825. The list of factors to be examined by the court is non-exhaustive. In addition to the three main factors, courts examine the totality of the circumstances and whatever specific factors may be appropriate in a particular case. *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994).

(a) Immediate Threat to the Safety of the Officers and Others

The most important factor concerning the governmental interest is whether the suspect posed an "immediate threat to the safety of the officers or others." *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005). A statement by an officer that he subjectively feared for his safety or the safety of others is insufficient, there must be objective factors to justify such a concern. *Mattos*, 661 F.3d at 441-42 (citing *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001)).

Haleck's presence in a busy street, at night, is central to the question of danger to the officers and others. The disputes of fact as to the severity of the threat prevent summary judgment for any of the Parties on this claim.

The Ninth Circuit Court of Appeals has explained that summary judgment should be granted sparingly in excessive force cases because the reasonableness inquiry for such a claim "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom." *Santos*, 287 F.3d at 853 (citing *Liston*, 120 F.3d at 976 n.10).

Summary judgment is not appropriate considering the genuine disputes of fact as to the immediate threat to the safety to the Defendant Officers and others. There are disputes of fact as to other matters as well.

(b) Severity of the Crime At Issue

The Ninth Circuit Court of Appeals held in *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1026 (9th Cir. 2015), that an excessive force analysis takes into account the facts known to the police at the time of the arrest with respect to the alleged offense that triggered the arrest. The severity of the crime factor is diminished as a justification for the use of force where officers are presented with circumstances indicating that no crime, or a minor crime was committed. *Id.* at 1025; *Nelson*, 685 F.3d at 880.

Haleck was arrested for a charge of disorderly conduct. (Critchlow Depo. at pp. 67-68, ECF No. 196-5). The Parties dispute if there was a basis to arrest Haleck for a more severe crime. An issue of fact remains concerning the level of force used by the Defendant Officers. The question is: was the level of force objectively reasonable in light of the totality of the circumstances?

(c) Resistance or Attempt to Escape

There are also disputes of fact as to the level of resistance made by Haleck.

The Defendant Officers testified that after Haleck fell to the ground, he resisted his arrest by reportedly "flailing," "squirming," and "kicking." (Critchlow Depo. at p. 57, ECF No. 196-5).

The Ninth Circuit Court of Appeals has explained that, in cases where officers are involved in deadly incidents, and the officers and the decedent are the only witnesses, courts must carefully examine all the evidence in the record. *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014). It is necessary to determine if the officers' stories are internally consistent and consistent with other known facts. *Id.*

The Parties agree that there was some level of resistance by Haleck. There is no dispute that Haleck repeatedly refused to comply with the Officers' instructions to move to the sidewalk. Haleck ran away from the Officers and evaded seizure.

Genuine disputes of material fact remain which prevent an objective assessment of the use of force in the totality of the circumstances. The Parties do not agree on the facts as to how Haleck was ultimately restrained. The Parties dispute the cause of Haleck's fall. There is disagreement between the Parties' experts as to the use and effectiveness of the Taser. The genuine disputes of

material facts prevent the Court from granting summary judgment.

E. Qualified Immunity

Defendant Officers Chung, Critchlow, and Kardash argue that they are immune from liability as to the excessive force claim.

The doctrine of qualified immunity shields public officials from personal liability when performing discretionary functions, unless their conduct violates a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). A constitutional right is clearly established when every reasonable official would have understood that what he is doing violates that right. *Id.* at 741; *see Bremerton*, 268 F.3d at 651.

The determination whether a right was clearly established must be undertaken in light of the specific context of the case, not as a broad general proposition. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The inquiry is case specific but it is not so narrowly defined to preclude any potential claims without identical fact patterns. *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995).

The United States Supreme Court has explained that officials can be on notice that their conduct violates established law even in novel factual situations. *Hope v.*

Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). A plaintiff need not establish that the officers' exact behavior had been previously declared unconstitutional, only that the unlawfulness of their actions was apparent in light of preexisting law. *Jensen v. City of Oxnard*, 145 F.3d 1078, 1085 (9th Cir. 1998).

Qualified immunity is an affirmative defense and the burden of proof initially lies with the official asserting the defense. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1987). A plaintiff seeking summary judgment on an excessive force claim, however, must prove both that there was a constitutional violation and that the right was clearly defined. *See Morales v. City of Delano*, 852 F.Supp.2d 1253, 1267 (E.D. Cal 2012) (citing *Mueller v. Auker*, 576 F.3d 979, 989 (9th Cir. 2009)).

Here, the question of whether the Defendant Officers' conduct violated a clearly established constitutional right turns on issues of fact that are in dispute.

Plaintiff relies on *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) for the position that it has been clearly established in the Ninth Circuit Court of Appeals that the use of a Taser may constitute excessive force in certain circumstances. The two fact patterns in *Mattos* are not similar to the fact in this case and do not assist the Plaintiff.

The use of pepper spray may also constitute excessive force, depending on the facts of the case. *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1131 (9th

Cir. 2002); *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 960-61 (9th Cir. 2000).

The extent to which the law is "clearly established" in the Fourth Amendment reasonableness context is fact-specific. *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 n.6 (9th Cir. 2013). The material disputes of fact here do not permit a finding of summary judgment as to the issue of qualified immunity.

There are questions of fact as to the use and effectiveness of the Taser triggered by Officer Chung. There are questions as to the extent that Haleck posed a threat to the Officers and others. There is also a question about the immediacy and level of threat the traffic on South King Street posed during the incident. *See Cruz*, 765 F.3d at 1079.

The Ninth Circuit Court of Appeals has found police officers are not entitled summary judgment on the basis of qualified immunity when there are disputes of fact that could lead a jury to find in favor of the plaintiff. *Ortega v. San Diego Police Dep't*, 669 Fed. Appx. 922, 923 (9th Cir. 2016).

Plaintiff Silva's Amended Motion for Partial Summary Judgment as to the First Cause of Action in the Second Amended Complaint is **DENIED**.

Defendant Officers Chung, Critchlow, and Kardash's Amended Motion for Summary Judgment as to the First Cause of Action in the Second Amended Complaint

stated by Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, is **DENIED**.

The Excessive Force Claim stated by Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck is **DENIED**, as a matter of law.

The First Cause of Action for Excessive Force in Violation of the Fourth Amendment to the United States Constitution Pursuant to 42 U.S.C. § 1983 stated by Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, against Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash in their individual capacities remains for trial.

SECOND CAUSE OF ACTION: Violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution Pursuant to 42 U.S.C. § 1983 Stated by All Plaintiffs Against the Defendant Officers Chung, Critchlow, and Kardash

Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Haleck, and Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck, allege that Defendant Officers

Chung, Critchlow, and Kardash violated their individual rights under the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983. (Second Amended Complaint at pp. 12-13, ECF No. 189).

A. Standing

The Ninth Circuit Court of Appeals has recognized that family members have a Fourteenth Amendment liberty interest in familial companionship and society. *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010); *Tokuda v. Calio*, Civ. No. 13-0202DKW-BMK, 2014 U.S. Dist. LEXIS 154984, 2014 WL 5580959, *9 (D. Haw. Oct. 31, 2014).

Plaintiff Gulstan E. Silva, Jr., as the Personal Representative of the Estate of Sheldon Haleck, may not bring a Fourteenth Amendment claim where the estate's claims are more specifically covered by the Fourth Amendment. *Burns v. City of Concord*, 2014 U.S. Dist. LEXIS 158119, 2014 WL 5794629, *8 (N.D. Cal. Nov. 6, 2014). Plaintiff Gulstan E. Silva, Jr.'s Amended Motion for Partial

Plaintiff Gulstan E. Silva, Jr.'s Amended Motion for Partial Summary Judgment as to the Second Cause of Action is **DENIED**.

Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem of Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck have standing to pursue their Fourteenth Amendment claims for their personal

liberty interests as alleged family members of the decedent.

B. Due Process

Parents and children of a person killed by law enforcement officers may assert a substantive due process claim based on the deprivation of their liberty interest arising out of their relationship with the deceased. *Moreland*, 159 F.3d at 371. A substantive due process violation requires that law enforcement officers' conduct "shock the conscience" when responding to an emergency or an escalating situation. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008).

Plaintiffs must prove that the purpose of the Defendant Officers' conduct in using the pepper spray and the Taser was "to cause harm unrelated to the legitimate object of arrest." *Id.* at 1140 (citing *Cnty of Sacramento v. Lewis*, 523 U.S. 833, 836, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)).

The United States Supreme Court has held that a purely reactive decision to give chase or use force to seize a suspect does not shock the conscience. *Lewis*, 523 U.S. at 855. Situations that shock the conscience are "rare situations where the nature of an officer's deliberate physical contact is such that a reasonable factfinder would conclude that the officer intended to harm, terrorize, or kill." *Porter*, 546 F.3d at 1141 (citing *Davis v. Township of Hillside*, 190 F.3d 167, 174 (3d Cir. 1999)).

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In *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 368 (9th Cir. 1998), two officers responded to a dispatch call of a fight outside a bar. The officers arrived at the scene to see a male firing a semiautomatic handgun at a group of individuals across the parking lot who were returning fire. *Id.* There were between 50 and 100 people trapped in the crossfire. *Id.* The officers fired at the male when he failed to comply with their orders to stop. *Id.* After the shooting ceased, the officers discovered they had shot an alleged innocent standby who later died. *Id.*

The mother and children of the victim sued the officers under the Fourteenth Amendment. *Id.* at 371-72. The Ninth Circuit Court of Appeals found that the mother and children were unable to prevail on the Fourteenth Amendment claim because there was no evidence that the police officers intended to punish the victim in a way that was unrelated to a legitimate law enforcement objective. *Id.* at 373. The appellate court explained that even if the officers acted recklessly or with gross negligence in shooting into the parking lot, the officers did not act in a way that shocks the conscience. *Id.*

In this case, there is no dispute that actions of the police officers occurred during an escalating situation within minutes of arriving at a scene in the middle of a busy road in Downtown Honolulu.

There is no evidence that Defendant Officers Chung, Critchlow, or Kardash had any intent to inflict pain, terrorize, harm, or kill the decedent Haleck in a way that was unrelated to any legitimate law enforcement objective.

The deposition testimony of the Officers indicates that they were each intending to perform their legitimate law enforcement duties.

The Parties agree that Haleck repeatedly failed to comply with the Officers' orders to move to the sidewalk. Haleck ran from the Officers and evaded the Officers' attempts to seize him. There is no evidence that the Officers' use of the pepper spray and the Taser was used for a purpose other than to try to seize Haleck pursuant to their law enforcement duties.

Regardless of whether the Officers' amount of force was reasonable, the actions of the Officers, construed in the light most favorable to the Plaintiffs, does not demonstrate a purpose to cause harm that would "shock the conscience." *Moreland*, 159 F.3d at 373; *see Wilkinson*, 610 F.3d at 554 (finding an officer's actions did not shock the conscience when he shot and killed the driver of crashed minivan after a high speed chase as there was no evidence that the officer used force that was unrelated to a legitimate law enforcement objective).

There is no evidence to support a due process violation pursuant to the Fourteenth Amendment to the United States Constitution against the Defendant Officers.

Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck's Amended Motion for Partial Summary Judgment as to the Second Cause of Action in the Second Amended Complaint is **DENIED**.

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Defendant Officers Chung, Critchlow, and Kardash's Amended Motion for Summary Judgment as to the Second Cause of Action in the Second Amended Complaint is **GRANTED**.

THIRD CAUSE OF ACTION: Municipal and/or Supervisor Liability Pursuant to 42 U.S.C. § 1983 Stated by All Plaintiffs Against Defendants City and County of Honolulu and Louis M. Kealoha

Plaintiffs allege Defendant City and County of Honolulu and Defendant Louis M. Kealoha, former police chief of the Honolulu Police Department, are liable for constitutional violations of Sheldon Haleck's rights under theories of supervisor and municipal liability pursuant to 42 U.S.C. § 1983. (Second Amended Complaint at pp. 13-14, ECF No. 189).

A. Defendant City and County of Honolulu

Respondeat superior or vicarious liability is not available under Section 1983. *Tokuhama v. City and City of Honolulu*, 751 F.Supp. 1385, 1394 (D. Haw. 1989) (citing *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)).

The United States Supreme Court has held, however, that a municipality is subject to damages liability under Section 1983 where action pursuant to official municipal

policy causes a constitutional tort. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Such claims are often referred to as *Monell* claims. The municipality itself must cause the constitutional deprivation in order to be liable for such a claim. *Id.*; *Canton*, 489 U.S. at 385 (requiring a direct causal link between a municipal policy or custom and the alleged constitutional deprivation).

A municipality may be liable in a Section 1983 action under two theories. Under the first theory, a municipality is liable for injuries caused by a municipality's unconstitutional policy or custom. *Monell*, 436 U.S. at 694; *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003). The official policy or custom requirement limits municipal liability to actions in which the municipality is actually responsible for the unconstitutional act. *Young v. Hawaii*, 911 F.Supp.2d 972, 985 (D. Haw. 2012); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

The second action for which a municipality may be held liable under Section 1983 is for failure to train, supervise, or discipline its employees. *Canton*, 489 U.S. at 387. Municipal liability may be imposed when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390.

Here, Plaintiffs do not argue that the Honolulu Police Department had an unconstitutional policy or custom. Plaintiffs cite to the written policies for use of force and the use of the Taser. (Honolulu Police Department Policy 1.04 for Use of Force, attached as Ex. I to Pla.'s CSF, ECF No. 147-5; Honolulu Police Department Policy 1.15 for Use of Electric Gun, attached as Ex. J to Pla.'s CSF, ECF No. 147-6). Plaintiffs claim that the Honolulu Police Department's written policies correctly classify the use of pepper spray and the use of a Taser as intermediate types of force.

Plaintiffs argue, however, that Defendant Officers Chung, Critchlow, and Kardash were inadequately trained and supervised with respect to the use of pepper spray and the use of a Taser. Plaintiffs also argue that the Defendant Officers were not properly disciplined because they were never interviewed by anyone from Internal Affairs or the Police Commission and were not disciplined in connection with the March 16, 2015 incident.

1. Failure to Train

Liability may only be imposed for failure to train when that failure reflects a deliberate or conscious choice by a municipality. *Canton*, 489 U.S. at 389. Deliberate indifference in the municipal context is an objective standard. *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016). Deliberate indifference may be shown through a pattern of tortious conduct by inadequately trained employees or where a violation of federal rights may be a highly predictable consequence of a failure

to equip law enforcement with specific tools to handle recurring situations. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 407-09, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

Construing the record in the light most favorable to the Plaintiffs, they have not demonstrated that the Defendant City and County of Honolulu had actual or constructive notice that its officer training was deficient.

The Defendant City and County of Honolulu submitted an expert report from John G. Peters, Jr., Ph.D., stating that it is his opinion that the City and County of Honolulu "met and/or exceeded national standards, recommendations, and/or guidelines for the development of policies and procedures for their officers" including training and lesson plans on the use of force and the use of a Taser "that meet or exceed lesson plan standards for career and technical training and testing of law enforcement officers." (Declaration of John G. Peters, Jr., Ph.D., attached to Honolulu's CSF, ECF No. 136-6; Expert Report of John G. Peters, Jr., Ph.D., attached as Ex. E to Honolulu's CSF, ECF No. 136-17).

The Defendant City and County of Honolulu submitted the Declaration of Brandon Ogata, a Lieutenant at the Honolulu Police Department Training Division. (Declaration of Brandon Ogata, attached to Honolulu's CSF, ECF No. 149-1). Lieutenant Ogata stated that Officers Chung, Critchlow, and Kardash each received training at the Honolulu Police Department's Recruit Training Course and continue to attend Annual Recall Training. (*Id.* at ¶¶ 9, 12). Lieutenant Ogata stated

that Officer Chung was properly trained, certified, and authorized to carry and use the Taser on March 16, 2015. (*Id.* at ¶¶ 11, 22).

A pattern of constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train. *Connick v. Thompson*, 563 U.S. 51, 62, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011). There is no such evidence presented by the Plaintiffs. Plaintiffs have alleged there was one incident where an officer was disciplined in 2013 involving the use of a Taser. (Pla.'s Reply at p. 7, ECF No. 216; News Report from KHON2 dated March 11, 2014, attached as Ex. L to Pla.'s Opp., ECF No. 155-3).

Plaintiffs' allegation of one discrete incident is insufficient to put the City and County on notice that its course in training is insufficient in a particular respect. *Flores v. Cty. of L.A.*, 758 F.3d 1154, 1159-61 (9th Cir. 2014). Plaintiffs have not demonstrated that this is one of the narrow range of cases where it was "patently obvious" that the Defendant's training program was insufficient. *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 794 (9th Cir. 2016) (en banc). Plaintiffs claim to be awaiting additional discovery as to the City and County's records of incidents involving Tasers, but they have not supplemented their briefing and have not filed any Motion with the Court as to any outstanding discovery requests. The Defendant City and County of Honolulu denies that any discovery remains outstanding.

Even if Plaintiffs demonstrated that the Defendant City and County had notice as to its failure to train, there is no evidence that the Defendant City and County was deliberately indifferent. Plaintiffs have not provided any evidence that the Defendant City and County of Honolulu was aware of incidents where constitutional rights were violated and that it made a conscious choice to ignore the incidents. *Blankenhorn v. City of Orange*, 485 F.3d 463, 484-85 (9th Cir. 2007).

2. Failure to Discipline

There is similarly no basis for a *Monell* claim based on the failure to discipline.

In this case, the Honolulu Police Department engaged in an administrative review of the incident involving Haleck on March 16, 2015. (Report of Administrative Review of Critical Incident Involving Officer Christopher G. Chung at p. 1, attached as Ex. F to Pla.'s CSF, ECF No. 147-2).

On August 20, 2015, the Honolulu Police Department's Administrative Review Board convened, reviewed the report issued by the Professional Standards Office, and recommended a finding that no further action be taken against Officer Chung. (Declaration of Dave M. Kajihiro, former Deputy Chief of Police and Chair of the Administrative Review Board, ("Kajihiro Decl.") at ¶ 5, ECF No. 136-9).

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The Chair of the Administrative Review Board prepared a memorandum as to its findings to former Police Chief Louis M. Kealoha. (Memorandum as to Officer Chung dated August 20, 2015, attached as Ex. G to Pla.'s CSF, ECF No. 147-2).

On September 1, 2015, Officer Chung received a notice from the Honolulu Police Department's Human Resources Division that the Professional Standards Office and the Administrative Review Board found that his actions surrounding the incident on March 16, 2015 were within acceptable parameters. (Notice of Disposition of Administrative Review dated September 1, 2015, attached as Ex. H to Pla.'s CSF, ECF No. 147-4).

Plaintiffs may not prevail on their claim solely on the basis that they believe the Defendant Officers should have been disciplined. Decisions in this District have emphasized that something more than the failure to reprimand is required to prevail on a *Monell* claim. *Kanae v. Hodson*, 294 F.Supp.2d 1179, 1190-91 (D. Haw. 2003); *Long v. City and Cnty. of Honolulu*, 378 F.Supp.2d 1241, 1248-49 (D. Haw. 2005).

Plaintiffs have not provided evidence that the administrative review process is futile or that it is nearly impossible for an officer to be disciplined. *Kanae*, 294 F.Supp.2d at 1190. Plaintiffs' expert opinion that is in disagreement with the conclusion of the Honolulu Police Department's Administrative Review Board is insufficient to create a triable issue of fact for the jury. *Long*, 378 F.Supp.2d at 1248-49.

Plaintiffs have not established a Section 1983 *Monell* claim against the Defendant City and County of Honolulu.

Plaintiffs' Amended Motion for Partial Summary Judgment as to the Third Cause of Action in the Second Amended Complaint, as stated against the Defendant City and County of Honolulu, is **DENIED**.

Defendant City and County of Honolulu's Amended Motion for Summary Judgment as to the Third Cause of Action in the Second Amended Complaint is **GRANTED**.

B. Defendant Kealoha

Plaintiffs seek to bring a Section 1983 supervisor liability claim against Defendant Louis M. Kealoha as former Chief of Police of the Honolulu Police Department.

1. Failure to Supervise

A supervisor is liable under Section 1983 for a subordinate's constitutional violations if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1086 (9th Cir. 2013) (citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)) (internal quotation marks omitted).

Defendant Kealoha was not present at the March 16, 2015 incident. There is no evidence that he participated in or directed the alleged violations. *Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009).

Plaintiffs have also not provided any evidence that Defendant Kealoha was personally involved in the hiring or training of Defendant Officers Chung, Critchlow, and Kardash. Plaintiffs have not provided any evidence that Defendant Kealoha's own actions or failure to act caused the alleged constitutional violations in this case. *Dang v. City of Garden Grove*, 2011 U.S. Dist. LEXIS 85949, 2011 WL 3419609, *10 (C.D. Cal. Aug. 2, 2011) (granting summary judgment in favor of the Chief of Police where there was no evidence of the Chief's role in either providing inadequate training of use of a Taser).

2. Ratification of Officers' Actions

Beginning on March 18, 2015, the Honolulu Police Department conducted an internal investigation of the March 16, 2015 incident involving Sheldon Haleck. (Report of Administrative Review of Critical Incident Involving Officer Christopher G. Chung at p. 1, attached as Ex. F to Pla.'s CSF, ECF No. 147-2).

On August 20, 2015, the Chair of the Honolulu Police Department's Administrative Review Board prepared a memorandum as to its findings regarding the incident to Defendant Kealoha. (Memorandum as to Officer Chung dated August 20, 2015, attached as Ex. G. to Pla.'s CSF, ECF No. 147-3). Defendant Kealoha concurred with the Board's findings that Officer Chung's use of the Taser was within acceptable parameters. (Notice of Disposition of Administrative Review dated September 1, 2015, attached as Ex. H to Pla.'s CSF, ECF No. 147-4).

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Plaintiffs claim that Defendant Kealoha is liable as a supervisor under Section 1983 because he concurred with the Honolulu Police Department's Administrative Review Board's finding.

Even construing the record in Plaintiffs' favor and assuming that the use of force was not permissible, Plaintiffs have failed to provide evidence to support a claim against Defendant Kealoha.

In order to prevail on a *Monell* claim based on ratification, Plaintiffs must show the supervisor made a conscious, affirmative choice to ratify a constitutional violation that is tantamount to confirmation of an official policy. *Tokuda*, 2014 U.S. Dist. LEXIS 154984, 2014 WL 5580959, at *14; *see Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999); *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996).

Defendant Kealoha is only sued in his individual capacity, and not in his official capacity as former Chief of Police of the Honolulu Police Department. An individual's private actions cannot constitute an official policy or constitute official actions for purposes of municipal liability pursuant to a *Monell* claim under Section 1983. *Jones v. Town of Quartzsite*, 2014 U.S. Dist. LEXIS 134448, 2014 WL 4771851, *12 (D. Ariz. Sept. 24, 2014) (citing *Rivera v. Cnty. of Los Angeles*, 745 F.3d 384, 389 (9th Cir. 2014)).

To the extent Plaintiffs may bring a Section 1983 claim against Defendant Kealoha in his individual capacity, there is no evidence that Defendant Kealoha deliberately

chose to endorse the actions of Officer Chung. *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). A mere failure to overrule the unconstitutional, discretionary acts of a subordinate, without expressing clear endorsement or approval of unlawful conduct, is insufficient for the imposition of supervisor liability under Section 1983. *Id.*

Defendant Kealoha cannot be found to have ratified the allegedly unconstitutional conduct by merely signing off on the Administrative Board's finding. Courts have found that there must be "something more than the mere evidence that a policymaker concluded that the defendant officer's actions were in keeping with the applicable policies and procedures." *Tokuda*, 2014 U.S. Dist. LEXIS 154984, 2014 WL 5580959, *14 (citing *Garcia v. City of Imperial*, 2010 U.S. Dist. LEXIS 105399, 2010 WL 3911457, at *2-*3 (S.D. Cal. 2010); *Kanae*, 294 F.Supp.2d at 1190-91; and *Larez v. City of Los Angeles*, 946 F.2d 630, 646-48 (9th Cir. 1991) (internal quotation marks omitted)). In addition, there is no evidence that Defendant Kealoha's ratification was the cause of any alleged constitutional violation. *Long*, 378 F.Supp.2d at 1248-49; *Booke v. Cnty. of Fresno*, 98 F.Supp.3d 1103, 1130 (E.D. Cal. 2015).

Plaintiffs have not established a Section 1983 *Monell* claim against Defendant Kealoha.

Plaintiffs' Amended Motion for Partial Summary Judgment as to the Third Cause of Action in the Second Amended Complaint, as stated against Defendant Kealoha, is **DENIED**.

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Defendant Kealoha's Motion for Summary Judgment as to the Third Cause of Action in the Second Amended Complaint is **GRANTED**.

FOURTH CAUSE OF ACTION: Assault and Battery stated by all Plaintiffs against Defendant Officers Chung, Critchlow, and Kardash

FIFTH CAUSE OF ACTION: Intentional Infliction of Emotional Distress stated by all Plaintiffs against Defendant Officers Chung, Critchlow, and Kardash

SIXTH CAUSE OF ACTION: Negligence stated by all Plaintiffs against Defendant Officers Chung, Critchlow, and Kardash

SEVENTH CAUSE OF ACTION: Negligent Infliction of Emotional Distress stated by all Plaintiffs against Defendant Officers Chung, Critchlow, and Kardash

Plaintiffs Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, and Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck have alleged state tort law claims in

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Causes of Action 4-7 against Defendant Officers Chung, Critchlow, and Kardash.

Plaintiffs do not allege Causes of Action 4-7 against the Defendant City and County of Honolulu and Defendant Kealoha.

Under Hawaii law, non-judicial government officials acting in the performance of their public duties enjoy a "qualified or conditional privilege." *Towse v. State*, 64 Haw. 624, 647 P.2d 696, 702 (Haw. 1982). The privilege protects the official from liability for tortious acts unless the injured party demonstrates by "clear and convincing proof" that the official was motivated by "malice and not by an otherwise proper purpose." *Id.* For torts other than defamation, actual malice must be proven to overcome the privilege. *Wereb v. Maui Cty.*, 727 F.Supp.2d 898, 924 (D. Haw. 2010).

"Actual malice" for purposes of the conditional privilege is construed in its ordinary and usual sense to mean "the intent, without justification or excuse, to commit a wrongful act, reckless disregard of the law or of a person's legal rights, and ill will; wickedness of heart." *Awakuni v. Awana*, 115 Haw. 126, 165 P.3d 1027, 1042 (Haw. 2007).

Plaintiffs are unable to prevail on their negligence causes of action in Causes of Action 6 and 7. Plaintiffs must prove that the Defendant Officers acted with "actual malice" in order to overcome conditional privilege. The element of actual malice required to overcome a

conditional privilege is "incompatible with a claim based on negligence." *Dawkins v. City & Cty. of Honolulu*, 2011 U.S. Dist. LEXIS 45628, 2011 WL 1598788, *15 (D. Haw. Apr. 27, 2011); *Bartolome v. Kashimoto*, 2009 U.S. Dist. LEXIS 54425, 2009 WL 1956278, at *2 (D. Haw. 2009); *see Tagawa v. Maui Publ'g Co.*, 448 P.2d 337, 341, 50 Haw. 648 (Haw. 1968).

With respect to the remaining tort claims of assault and battery and intentional infliction of emotional distress, Plaintiffs have not pointed to any evidence that Officers Chung, Critchlow, or Kardash were motivated by malice. *Carroll v. Cty. of Maui*, Civ. No. 13-00066DKW-KSC, 2015 U.S. Dist. LEXIS 43956, 2015 WL 1470732, *7 (D. Haw. Mar. 31, 2015). Officers Chung, Critchlow, and Kardash are entitled to conditional privilege as to Plaintiffs' state law tort claims. *Tokuda*, 2014 U.S. Dist. LEXIS 154984, 2014 WL 5580959, *10 (granting summary judgment for a defendant police officer when there was no evidence in the record that the officer was motivated by malice).

Defendant Officers Chung, Critchlow, and Kardash's Motion for Summary Judgment as to Causes of Action 4-7 in the Second Amended Complaint is **GRANTED**.

EIGHTH CAUSE OF ACTION: Interference with Civil Rights Stated by All Plaintiffs Against Defendants City and County of Honolulu and Louis M. Kealoha

Appendix B

Plaintiffs' Eighth Cause of Action in their Second Amended Complaint is a claim for "interference with civil rights." (Second Amended Complaint at p. 17, ECF No. 189). Plaintiffs assert the Eighth Cause of Action against the Defendant City and County of Honolulu and Defendant Kealoha.

The Eighth Cause of Action concerns the timing of the release of government records to Plaintiffs regarding the March 16, 2015 incident.

The Parties do not dispute the facts related to Plaintiffs' Eighth Cause of Action:

On May 13, 2015, Plaintiffs' Attorney sent a written request to the Defendant City and County of Honolulu for government records regarding the March 16, 2015 incident involving Haleck. (Letter from Attorney Seitz to Chief of Police dated May 13, 2015, attached as Ex. H to Honolulu's CSF, ECF No. 136-20).

Two weeks later, on May 27, 2015, the Defendant City and County of Honolulu informed Attorney Seitz that it was unable to disclose the records requested at that time because they were protected pursuant to Hawaii Revised Statutes Section 92F-13(3) and Section 92F-14. (Letter from Defendant City and County of Honolulu to Attorney Seitz dated May 27, 2015, attached as Ex. I to Honolulu's CSF, ECF No. 136-21).

The Defendant City and County identified in their letter that disclosure of the records at that time was not appropriate because the requested documents were part of

an ongoing investigation and were protected from release pending the outcome of the investigation. (*Id.*)

A month later, on June 30, 2015, the Honolulu Police Department's Media Liaison Office released two copies of videos that showed the deployment of the Taser at decedent Haleck from the night of March 16, 2015 to news media outlets. (Declaration of Sarah Yoro at ¶ 3, attached to Honolulu's CSF, ECF No. 136-12; CD containing videos attached as Ex. K to Honolulu's CSF, ECF No. 136-23). There is no evidence that the identity of Haleck as the individual in the video was released to the media.

The next day, on July 1, 2015, media outlet KHON2 news reported partial results from the autopsy report of the decedent Haleck. (KHON2 news article dated July 1, 2015, attached as Ex. N to Pla.'s Opp., ECF No. 155-5).

Two weeks later, on July 13, 2015, the Defendant City and County of Honolulu authorized the release of the entire autopsy report and a copy of the report was mailed to Plaintiffs' Attorney. (Declaration of Chief Medical Examiner Dr. Christopher Happy at ¶¶ 22-23, attached to Honolulu's CSF, ECF No. 136-4). A copy of the autopsy report was also provided to a reporter for the Civil Beat and to Queen's Medical Center. (*Id.* at ¶¶ 27, 29).

Plaintiffs' Eighth Cause of Action is premised on the idea that Plaintiffs did not receive the records they requested in a timely manner. Plaintiffs requested the records on May 13, 2015, and they received the information two months later on July 13, 2015, after the conclusion of the Defendant City and County of Honolulu's investigation.

There is no legal or factual basis for Plaintiffs' cause of action. Both the Defendant City and County of Honolulu and Defendant Kealoha are entitled to summary judgment in their favor as to Plaintiffs' Eighth Cause of Action.

A. Claim as to Defendant City and County of Honolulu

Plaintiffs have not articulated the legal basis for their Eighth Cause of Action based on the timing of the disclosures of the Taser videos and the autopsy report of Haleck.

The Defendant City and County of Honolulu did not violate Plaintiffs' rights. It properly initially withheld the information pursuant to two provisions in the Hawaii Uniform Information Practices Act, Hawaii Revised Statutes 92F-13 and 92F-14.

1. Hawaii Uniform Information Practices Act

The Hawaii Uniform Practices Act, codified at 92F-1 governs the release of government records to the public. The Defendant City and County of Honolulu cited to the Act when it initially declined to provide Plaintiffs with information as to the March 16, 2015 incident. Hawaii Revised Statutes 92F-13(3), provides:

This part shall not require disclosure of government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.

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Hawaii Revised Statutes 92F-14 provides:

(a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.

(b) The following are examples of information in which the individual has a significant privacy interest:

(1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;

(2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

Haw. Rev. Stat. 92F-14(a)-(b)(1)-(2).

Plaintiffs have not provided any basis to find that the Defendant City and County of Honolulu violated either Haw. Rev. Stat. 92F-13 or 92F-14. Neither of the statutes requires the dissemination of private material to the next of kin before its general release.

Plaintiffs are unable to prevail on a claim pursuant to the Hawaii Uniform Information Practices Act. *Morgan v. Cty. of Haw.*, Civ. No. 14-00551SOM-BMK, 2016 U.S. Dist. LEXIS 41063, 2016 WL 1254222, *24 (D. Haw. Mar. 29, 2016) (granting summary judgment in favor of the county when there was no evidence that the defendant intentionally leaked protected privacy information to the local news media).

2. Conspiracy in Violation of 42 U.S.C. § 1985(3)

Plaintiffs appear to allege that the Defendant City and County of Honolulu engaged in a private conspiracy to withhold the information from them. Plaintiffs allege that it "impeded, hindered, and obstructed the due course of justice and denied Plaintiffs' due process and equal protection of the laws" by "preventing Plaintiffs from receiving all requested information, covering up, and whitewashing the events of March 16, 2015, with selective public release of information and video recordings." (Second Amended Complaint at ¶ 99, ECF No. 189).

Private conspiracies to deny any person or class of person the equal protection of the laws are covered by 42 U.S.C. § 1985(3). *Bretz v. Kelman*, 773 F.2d 1026, 1028-29 (9th Cir. 1985).

To prevail on a cause of action pursuant to Section 1985(3), a plaintiff must demonstrate:

(1) a conspiracy;

(2) to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

(3) an act by one of the conspirators in furtherance of the conspiracy; and,

(4) a personal injury, property damage, or deprivation of any right or privilege of a citizen of the United States.

Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 101-03, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)).

Plaintiffs here must show an invidiously discriminatory, racial, or class-based animus. *Bretz*, 773 F.2d at 1029-30. There is no such evidence in this case. There is no evidence as to any of the Plaintiffs' race or class. There is no evidence that any of the individuals responsible for disclosing the Taser videos or the autopsy report were motivated by discriminatory animus. *Orin v. Barclay*, 272 F.3d 1207, 1217 (9th Cir. 2001); *Bepple v. Shelton*, 2016 U.S. Dist. LEXIS 18778, 2016 WL 633892, *8 (D. Or. Feb. 17, 2016) (granting summary judgment for the defendant when there was no evidence of invidious class-based animus).

The public interest in the disclosure of the information relating to the police encounter with Haleck outweighed the privacy interest of the Plaintiffs. The public concern as to the actions of police officers is given great weight when balanced against competing privacy interests. *See*

Peer News LLC v. City and Cnty. of Honolulu, 138 Haw. 53, 376 P.3d 1, 21 (Haw. 2016). The public had a right to the information contained in the autopsy report and the videos from the Taser deployment.

Defendant City and County of Honolulu's Amended Motion for Summary Judgment as to the Eighth Cause of Action in the Second Amended Complaint is **GRANTED**.

B. Claim as to Defendant Kealoha

Plaintiffs have presented no evidence that Defendant Kealoha participated in any way with the dissemination of any information either to them or the press involving the March 16, 2015 incident.

There is no evidence that Defendant Kealoha participated in, prepared, reviewed, or approved the press release dated March 17, 2015. (Declaration of Metropolitan Police Captain Rade K. Vanic at ¶¶ 4, 5, attached to Honolulu's CSF, ECF No. 136-11).

There is no evidence that Defendant Kealoha was involved in preparing, reviewing, or approving the May 27, 2015 letter to Attorney Seitz that initially declined to release information regarding the March 16, 2015 incident. (Declaration of Major Cylde K. Ho at ¶ 6, attached to Honolulu's CSF, ECF No. 136-10).

There is no evidence that Defendant Kealoha was involved with, participated in, prepared, or released the videos to the media on June 30, 2016. (Yoro Decl. at ¶ 4, ECF No. 136-12).

There is no evidence that Defendant Kealoha was involved in the release of the autopsy report. (Dr. Happy Decl. at ¶¶ 18-29, ECF No. 136-4).

To the extent Plaintiffs attempt to bring a conspiracy claim against Defendant Kealoha either pursuant to 42 U.S.C. §§ 1985(2) or 1985(3), Plaintiffs have not presented evidence of any discriminatory animus toward them on behalf of Defendant Kealoha. *Bretz*, 773 F.2d at 1029-30; *Orin*, 272 F.3d at 1217.

Defendant Kealoha's Motion for Summary Judgment as to the Eighth Cause of Action in the Second Amended Complaint is **GRANTED**.

CONCLUSION

Defendant Louis M. Kealoha's Motion for Summary Judgment (ECF No. 193) is **GRANTED**.

Plaintiffs' Amended Motion for Partial Summary Judgment (ECF No. 195) is **DENIED**.

Defendant City and County of Honolulu's Amended Motion for Summary Judgment (ECF No. 199) is **GRANTED**.

Defendant Officers Christopher Chung, Samantha Critchlow, and Stephen Kardash's Amended Motion for Summary Judgment (ECF No. 200) is **GRANTED, IN PART, AND DENIED, IN PART**.

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SUMMARY JUDGMENT IS GRANTED IN FAVOR OF THE RESPECTIVE DEFENDANTS AS TO CAUSES OF ACTION 2-8:

SECOND CAUSE OF ACTION FOR VIOLATIONS OF THE FOURTEENTH AMENDMENT:

Summary Judgment is entered in favor of Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

THIRD CAUSE OF ACTION FOR MUNICIPALITY AND SUPERVISOR LIABILITY:

Summary Judgment is entered in favor of Defendants City and County of Honolulu and Louis M. Kealoha

FOURTH CAUSE OF ACTION FOR ASSAULT AND BATTERY:

Summary Judgment is entered in favor of Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

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FIFTH CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS:

Summary Judgment is entered in favor of Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

SIXTH CAUSE OF ACTION FOR NEGLIGENCE:

Summary Judgment is entered in favor of Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

SEVENTH CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS:

Summary Judgment is entered in favor of Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash

EIGHTH CAUSE OF ACTION FOR INTERFERENCE WITH CIVIL RIGHTS:

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Summary Judgment is entered in favor of Defendants City and County of Honolulu and Louis M. Kealoha

THE ONLY REMAINING CAUSE OF ACTION:

FIRST CAUSE OF ACTION FOR EXCESSIVE FORCE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION PURSUANT TO 42 U.S.C. § 1983:

The First Cause of Action as stated by Plaintiff Gulstan E. Silva, Jr., as Personal Representative of the Estate of Sheldon Paul Haleck, against Defendants Christopher Chung, Samantha Critchlow, and Stephen Kardash in their individual capacities is the only remaining cause of action for trial.

REMAINING PARTIES:

PLAINTIFFS:

The *only remaining Plaintiff* is Gulstan E. Silva, Jr., as

Personal Representative of the Estate of Sheldon Paul Haleck.

There are no remaining claims by Plaintiffs Jessica Y. Haleck, individually and as Guardian Ad Litem for Jeremiah M.V. Haleck, William E. Haleck, and Verdell B. Haleck.

DEFENDANTS:

The *only remaining Defendants* are Christopher Chung, Samantha Critchlow, and Stephen Kardash in their individual capacities.

There are no remaining claims against Defendant City and County of Honolulu and Defendant Louis M. Kealoha.

IT IS SO ORDERED.

DATED: June 27, 2017, Honolulu, Hawaii.

/s/ Helen Gillmor
Helen Gillmor
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 20, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16406

D.C. No. 1:15-cv-00436-HG-KJM
District of Hawaii, Honolulu

GULSTAN E. SILVA, JR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHELDON PAUL HALECK; JESSICA Y. HALECK, INDIVIDUALLY, AND AS GUARDIAN AD LITEM OF JEREMIAH M. V. HALECK; WILLIAM E. HALECK; VERDELL B. HALECK,

Plaintiffs-Appellees,

v.

CHRISTOPHER CHUNG; SAMANTHA CRITCHLOW; STEPHEN KARDASH,

Defendants-Appellants.

ORDER

Before: TASHIMA, W. FLETCHER, and HURWITZ, Circuit Judges.

Appendix C

Defendants/Appellees filed a petition for rehearing or rehearing *en banc* on July 24, 2018 (Dkt. Entry 44). The panel has voted to deny the petition for rehearing. Judges W. Fletcher and Hurwitz have voted to deny the petition for rehearing *en banc*, and Judge Tashima so recommends.

The full court has been advised of the petition for rehearing *en banc* and no judge of the court has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing or rehearing *en banc* is **DENIED**.

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. AMEND. IV.

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
CIVIL ACTION FOR DEPRIVATION OF RIGHTS

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.