NOT FOR PUBLICATION FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIELLA SLATER; et al., Plaintiffs-Appellants, v. SHANNON DEASEY, Deputy; et al., Defendants-Appellees.	No. 17-56708 D.C. No. 5:16-cv-01103-JFW-KK AMENDED MEMORANDUM* (Filed Dec. 3, 2019)

DANIELLA SLATER; et al., Plaintiffs-Appellees, v. SHANNON DEASEY, Deputy; et al., Defendants-Appellants.	No. 17-56751 D.C. No. 5:16-cv-01103-JFW-KK

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted May 13, 2019
Pasadena, California

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

Before: NGUYEN and OWENS, Circuit Judges, and ANTOON,** District Judge.

Joseph Slater passed away on April 15, 2015, during an arrest by Sheriff's deputies of the County of San Bernardino. Plaintiffs, the children and parents of Slater, contend that Slater died from positional asphyxiation due to pressure applied to his body while he was restrained and on his stomach. They filed suit against the deputies pursuant to 42 U.S.C. § 1983, asserting that the deputies violated the Fourth Amendment by using excessive force during the arrest. The district court granted summary judgment to the deputies and County of San Bernardino, concluding that although the force used during part of the encounter was excessive when viewing the facts in the light most favorable to the Plaintiffs, the deputies were nevertheless entitled to qualified immunity. The Plaintiffs appeal the district court's grant of qualified immunity to the deputies.[1] We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for trial.

Slater, who was known to the deputies from prior contacts as mentally ill with a history of drug addiction, was allegedly pulling wires out of a gas station building.[2] Deputy Deasey responded to the scene and

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** The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

[1] Defendants cross-appeal the district court's conclusion that their application of the second and third hobbles violated the Fourth Amendment.

[2] Nearby security cameras captured most of the incident.

recognized that Slater was on drugs. He placed Slater under arrest, handcuffed him without resistance, and attempted to place him in the back of a patrol car with the intention of taking him to the hospital for psychiatric care. Slater was initially compliant, but before he was completely in the patrol car, he became agitated and fearful, telling Deputy Deasey several times, "You're not a cop, sir," and, "You're going to kill me." After Slater failed to comply with Deputy Deasey's repeated orders to slide into the car, the deputy deployed three pepper sprays at Slater after warning that he would do so. Slater reacted by moving around and yelling things like, "You're blinding me." Although the parties dispute how it happened, Slater ended up on the ground with Deputy Deasey using his body weight to restrain Slater. Other deputies who had responded to the scene, Gentry and Rude, assisted Deasey in applying a hobble restraint to Slater's ankles, connecting it to his handcuffs from the back. Due to the slack in the hobble, Slater was able to sit on his own, and he did so without further resistance. Under these circumstances, the district court found that the application of this first hobble did not constitute excessive force. We agree and affirm the district court's conclusion.

After attempting to wash pepper spray off Slater, the deputies carried him to the patrol car and slid him onto the back seat on his stomach, but Slater was able to partially slide out of the open car door on the other side. The deputies pushed him back onto the seat and applied second and third hobbles to hogtie Slater—the second hobble to bind his feet and hands more tightly

together, and the third hobble to secure him to the car. While the second and third hobbles were applied, Slater remained on his chest and stomach. The officers admitted placing some pressure on Slater's ribs and shoulder during the application of the second and third hobbles. The autopsy showed extensive bruising that Plaintiffs argue is consistent with pressure to Slater's shoulders and back. At some point, the deputies realized that Slater was no longer moving. Fire Department paramedics were already on the scene because Deasey had called for them before applying the first hobble. The deputies removed Slater from the car and the paramedics immediately began to treat him. They transported him to the hospital, but despite medical personnel's attempts to revive him, Slater passed away.

The district court found that the application of the second and third hobbles constituted excessive force under the Fourth Amendment, but that the deputies were entitled to qualified immunity because their actions did not violate clearly established law. We agree that the force was excessive, but viewing the facts in the light most favorable to Plaintiffs, *see Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011), we conclude that Defendants are not entitled to qualified immunity.

When reviewing qualified immunity determinations made at the summary judgment stage, we must consider (1) whether "[t]aken in the light most favorable to the party asserting the injury the facts alleged show the officer's conduct violated a constitutional

right," *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (ellipsis omitted), and (2) " 'whether the right was clearly established in light of the specific context of the case' such that 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' " *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003) (ellipsis omitted) (quoting *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1129 (9th Cir. 2002)); *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Defendants bear the burden of proving they are entitled to qualified immunity. *See Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).

Fourth Amendment excessive force claims require courts to balance "the nature and quality of the intrusion" with the "countervailing governmental interests at stake" to evaluate the objective reasonableness of the force in context. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Further, "a detainee's mental illness" is a factor bearing on the government's interest. *Drummond*, 343 F.3d at 1058 (discussing *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001)). We therefore agree with the district court that the force used in applying the second and third hobbles was excessive.

But we do not agree with the district court's conclusion on the second prong of the qualified immunity analysis—whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Drummond*, 343 F.3d at 1056 (quoting *Headwaters*, 276 F.3d at 1129). We take seriously the

Supreme Court's warning that "'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citation omitted); *see also S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) ("We hear the Supreme Court loud and clear."). This case presents no such risk, as *Drummond* provides "fair warning" to Defendants that their alleged actions were unconstitutional. 343 F.3d at 1060–61. In *Drummond*, we clearly established that "squeezing the breath from a compliant, prone, and handcuffed individual . . . involves a degree of force that is greater than reasonable." *Id.* at 1059; *see also id.* at 1059–62. There, officers placed body weight on the arrestee's back and neck while he was handcuffed and lying on his stomach. *Id.* at 1059. Here, viewing the evidence in the light most favorable to Plaintiffs, Slater was hogtied and placed on his stomach in the back of the police car, and the deputies applied pressure to his body during the second and third hobbling, after pressure was already applied to his shoulders in the prone position during the first hobbling. Deputy Gentry testified that he placed pressure on Slater's left rib area with his knee while applying the second hobble. Deputy Brandt, who arrived after the application of the first hobble, and who was positioned on the driver's side of the car, testified that he put his foot against Slater's shoulder to prevent Slater from sliding out of the car. Prior to closing the patrol car door, Deputy Brandt heard Slater make a spitting noise. Before long, Slater had vomited and largely stopped breathing. We conclude that the circumstances here are sufficiently analogous to *Drummond* such

that Defendants were on notice that their use of force violated the Fourth Amendment.[3]

We therefore reverse the district court's grant of qualified immunity as to the use of the second and third hobbles. We also vacate the district court's dismissal of the Plaintiffs' Fourteenth Amendment familial association claim because the Defendants do not argue and have therefore waived any argument that the facts here would not show deliberate indifference or shock the conscience.[4] *See Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010).

We affirm the grant of summary judgment as to the Fourth Amendment and Fourteenth Amendment

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[3] *Drummond* specifically involved officers squeezing the breath from an individual "despite his pleas for air." 343 F.3d at 1059. However, no court has interpreted *Drummond* to require a restrained suspect to "plead for air" before receiving Fourth Amendment protection. *McCue v. City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016) ("[E]xerting significant, continued force on a person's back 'while that [person] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.") (citation omitted); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) ("[A]pplying pressure to [a suspect's] upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions."); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) ("Creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force.").

[4] We also vacate the dismissal of the Plaintiffs' state law assault, battery, and wrongful death by negligence in force and restraint claims in light of this decision.

claims for denial of medical care, given Deasey's call for medical personnel to stand by and Slater's immediate treatment.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIELLA SLATER; et al., Plaintiffs-Appellants, v. SHANNON DEASEY, Deputy; et al., Defendants-Appellees.	No. 17-56708 D.C. No. 5:16-cv-01103-JFW-KK Central District of California, Riverside ORDER (Filed Dec. 3, 2019)

DANIELLA SLATER; et al., Plaintiffs-Appellees, v. SHANNON DEASEY, Deputy; et al., Defendants-Appellants.	No. 17-56751 D.C. No. 5:16-cv-01103-JFW-KK

Before: NGUYEN and OWENS, Circuit Judges, and ANTOON,* District Judge.

The Memorandum Disposition, filed on June 20, 2019, and reported at 776 F. App'x 942 (9th Cir. 2019), is amended as follows:

* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

At 776 F. App'x at 944, the sentence beginning with <Drummond provides "fair warning"> is amended as follows:

> We take seriously the Supreme Court's warning that "'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citation omitted); *see also S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) ("We hear the Supreme Court loud and clear."). This case presents no such risk, as *Drummond* provides "fair warning" to Defendants that their alleged actions were unconstitutional.

At 776 F. App'x at 945, the following sentences are added after <testified that he put his foot against Slater's shoulder to prevent Slater from sliding out of the car.>:

> Prior to closing the patrol car door, Deputy Brandt heard Slater make a spitting noise. Before long, Slater had vomited and largely stopped breathing.

At 776 F. App'x at 945, the following footnote is added after the paragraph ending <Defendants were on notice that their use of force violated the Fourth Amendment>:

> *Drummond* specifically involved officers squeezing the breath from an individual "despite his pleas for air." 343 F.3d at 1059. However, no court has interpreted *Drummond* to require a restrained suspect to "plead for air" before receiving Fourth Amendment protection. *McCue v. City of Bangor*, 838 F.3d 55, 64 (1st Cir. 2016) ("[E]xerting

significant, continued force on a person's back 'while that [person] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.") (citation omitted); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) ("[A]pplying pressure to [a suspect's] upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions."); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) ("Creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force.").

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIELLA SLATER; et al., Plaintiffs-Appellants, v. SHANNON DEASEY, Deputy; et al., Defendants-Appellees.	No. 17-56708 D.C. No. 5:16-cv-01103-JFW-KK MEMORANDUM* (Filed Jun. 20, 2019)

DANIELLA SLATER; et al., Plaintiffs-Appellees, v. SHANNON DEASEY, Deputy; et al., Defendants-Appellants.	No. 17-56751 D.C. No. 5:16-cv-01103-JFW-KK

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted May 13, 2019
Pasadena, California

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

Before: NGUYEN and OWENS, Circuit Judges, and ANTOON,** District Judge.

Joseph Slater passed away on April 15, 2015, during an arrest by Sheriff's deputies of the County of San Bernardino. Plaintiffs, the children and parents of Slater, contend that Slater died from positional asphyxiation due to pressure applied to his body while he was restrained and on his stomach. They filed suit against the deputies pursuant to 42 U.S.C. § 1983, asserting that the deputies violated the Fourth Amendment by using excessive force during the arrest. The district court granted summary judgment to the deputies and County of San Bernardino, concluding that although the force used during part of the encounter was excessive when viewing the facts in the light most favorable to the Plaintiffs, the deputies were nevertheless entitled to qualified immunity. The Plaintiffs appeal the district court's grant of qualified immunity to the deputies.[1] We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for trial.

Slater, who was known to the deputies from prior contacts as mentally ill with a history of drug addiction, was allegedly pulling wires out of a gas station building.[2] Deputy Deasey responded to the scene and

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[1] Defendants cross-appeal the district court's conclusion that their application of the second and third hobbles violated the Fourth Amendment.

[2] Nearby security cameras captured most of the incident.

recognized that Slater was on drugs. He placed Slater under arrest, handcuffed him without resistance, and attempted to place him in the back of a patrol car with the intention of taking him to the hospital for psychiatric care. Slater was initially compliant, but before he was completely in the patrol car, he became agitated and fearful, telling Deputy Deasey several times, "You're not a cop, sir," and, "You're going to kill me." After Slater failed to comply with Deputy Deasey's repeated orders to slide into the car, the deputy deployed three pepper sprays at Slater after warning that he would do so. Slater reacted by moving around and yelling things like, "You're blinding me." Although the parties dispute how it happened, Slater ended up on the ground with Deputy Deasey using his body weight to restrain Slater. Other deputies who had responded to the scene, Gentry and Rude, assisted Deasey in applying a hobble restraint to Slater's ankles, connecting it to his handcuffs from the back. Due to the slack in the hobble, Slater was able to sit on his own, and he did so without further resistance. Under these circumstances, the district court found that the application of this first hobble did not constitute excessive force. We agree and affirm the district court's conclusion.

After attempting to wash pepper spray off Slater, the deputies carried him to the patrol car and slid him onto the back seat on his stomach, but Slater was able to partially slide out of the open car door on the other side. The deputies pushed him back onto the seat and applied second and third hobbles to hogtie Slater—the second hobble to bind his feet and hands more tightly

together, and the third hobble to secure him to the car. While the second and third hobbles were applied, Slater remained on his chest and stomach. The officers admitted placing some pressure on Slater's ribs and shoulder during the application of the second and third hobbles. The autopsy showed extensive bruising that Plaintiffs argue is consistent with pressure to Slater's shoulders and back. At some point, the deputies realized that Slater was no longer moving. Fire Department paramedics were already on the scene because Deasey had called for them before applying the first hobble. The deputies removed Slater from the car and the paramedics immediately began to treat him. They transported him to the hospital, but despite medical personnel's attempts to revive him, Slater passed away.

The district court found that the application of the second and third hobbles constituted excessive force under the Fourth Amendment, but that the deputies were entitled to qualified immunity because their actions did not violate clearly established law. We agree that the force was excessive, but viewing the facts in the light most favorable to Plaintiffs, *see Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011), we conclude that Defendants are not entitled to qualified immunity.

When reviewing qualified immunity determinations made at the summary judgment stage, we must consider (1) whether "[t]aken in the light most favorable to the party asserting the injury the facts alleged show the officer's conduct violated a constitutional

right," *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (ellipsis omitted), and (2) " 'whether the right was clearly established in light of the specific context of the case' such that 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' " *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003) (ellipsis omitted) (quoting *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1129 (9th Cir. 2002)); *see also Pearson v. Callahan, 555* U.S. 223, 236 (2009). Defendants bear the burden of proving they are entitled to qualified immunity. *See Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).

Fourth Amendment excessive force claims require courts to balance "the nature and quality of the intrusion" with the "countervailing governmental interests at stake" to evaluate the objective reasonableness of the force in context. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Further, "a detainee's mental illness" is a factor bearing on the government's interest. *Drummond*, 343 F.3d at 1058 (discussing *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001)). We therefore agree with the district court that the force used in applying the second and third hobbles was excessive.

But we do not agree with the district court's conclusion on the second prong of the qualified immunity analysis—whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Drummond*, 343 F.3d at 1056 (quoting *Headwaters*, 276 F.3d at 1129). *Drummond* provides

"fair warning" to Defendants that their alleged actions were unconstitutional. 343 F.3d at 1060–61. In *Drummond*, we clearly established that "squeezing the breath from a compliant, prone, and handcuffed individual . . . involves a degree of force that is greater than reasonable." *Id.* at 1059; *see also id.* at 1059–62. There, officers placed body weight on the arrestee's back and neck while he was handcuffed and lying on his stomach. *Id.* at 1059. Here, viewing the evidence in the light most favorable to Plaintiffs, Slater was hogtied and placed on his stomach in the back of the police car, and the deputies applied pressure to his body during the second and third hobbling, after pressure was already applied to his shoulders in the prone position during the first hobbling. Deputy Gentry testified that he placed pressure on Slater's left rib area with his knee while applying the second hobble. Deputy Brandt, who arrived after the application of the first hobble, and who was positioned on the driver's side of the car, testified that he put his foot against Slater's shoulder to prevent Slater from sliding out of the car. We conclude that the circumstances here are sufficiently analogous to *Drummond* such that Defendants were on notice that their use of force violated the Fourth Amendment.

We therefore reverse the district court's grant of qualified immunity as to the use of the second and third hobbles. We also vacate the district court's dismissal of the Plaintiffs' Fourteenth Amendment familial association claim because the Defendants do not argue and have therefore waived any argument that

the facts here would not show deliberate indifference or shock the conscience.[3] *See Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010).

We affirm the grant of summary judgment as to the Fourth Amendment and Fourteenth Amendment claims for denial of medical care, given Deasey's call for medical personnel to stand by and Slater's immediate treatment.

AFFIRMED in part, REVERSED in part, and REMANDED.

[3] We also vacate the dismissal of the Plaintiffs' state law assault, battery, and wrongful death by negligence in force and restraint claims in light of this decision.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **EDCV 16-1103-JFW (KKx)**
Date: September 25, 2017

Title: Sandra Salazar, et al. *-v-* Shandon Deasey, et al.

PRESENT:

HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT, OR PARTIAL SUMMARY JUDGMENT [filed 8/14/17; Docket No. 66];

ORDER DENYING AS MOOT DEFENDANTS' MOTION TO EXCLUDE OPINIONS OF PLAINTIFFS' EXPERT RONALD O'HALLORAN [*DAUBERT* MOTION] [filed 8/14/17; Docket No. 86]; and

ORDER DENYING AS MOOT DEFENDANTS' MOTION TO EXCLUDE MEDICAL CAUSATION OPINIONS OF PLAINTIFFS' POLICE

PRACTICES CONSULTANT ROGER CLARK [*DAUBERT* MOTION] [filed 8/14/17; Docket No. 87]

On August 14, 2017, Defendants County of San Bernardino (the "County"), Deputy Shandon Deasey ("Deasey"), Deputy Peter Gentry ("Gentry"), Deputy Gary Brandt ("Brandt"), and Sergeant Mike Rude ("Rude") (collectively, "Defendants") filed a Motion for Summary Judgment, or Partial Summary Judgment ("Motion for Summary Judgment"). On August 25, 2017, Plaintiffs Daniella Slater and Damien Slater, individually and as successors in interest, by and through their Guardian ad Litem Sandra Salazar, Tina Slater, and David Bouchard (collectively, "Plaintiffs") filed their Opposition. On September 1, 2017, Defendants filed a Reply. On August 14, 2017, Defendants filed a Motion to Exclude Opinions of Plaintiffs' Expert Ronald O'Halloran [*Daubert* Motion] ("Motion to Exclude Re: O'Halloran"). On August 25, 2017, Plaintiffs filed their Opposition. On September 1, 2017, Defendants filed a Reply. On August 14, 2017, Defendants filed a Motion to Exclude Medical Causation Opinions of Plaintiffs' Police Practices Consultant Roger Clark [*Daubert* Motion] ("Motion to Exclude Re: Clark"). On August 25, 2017, Plaintiffs filed their Opposition. On September 1, 2017, Defendants filed a Reply. After hearing oral argument on September 11, 2017, the Court granted Defendants' Motion for Summary Judgment in part, and took the remaining portion of Defendants' Motion for Summary Judgment under submission pending supplemental briefing by the parties. On September 15, 2017, Plaintiffs filed their

Supplemental Brief. On September 18, 2017, Defendants filed their Supplemental Brief. After reviewing the moving, opposing, reply, and supplemental papers and hearing oral argument, the Court confirms its rulings on September 11, 2017 and makes the following additional rulings:

I. Factual and Procedural Background[1]

A. The Decedent

Decedent Joseph Slater ("Slater") was a 28 year old male, five feet nine inches in height, and weighed approximately 150 pounds. Slater suffered from bi-polar disorder and had previous psychiatric hospitalizations, or "5150s." Slater was known by local law enforcement in the City of Highland, and they knew that Slater suffered from mental disorders which caused him to act abnormal at times, that Slater had been hospitalized for psychiatric reasons, and that Slater had had several prior contacts with the San Bernardino Sheriff's Department ("SBSD").

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[1] The facts in this case are largely undisputed because video from the security cameras at the Valero gas station captured the events of the April 15, 2015 incident. In addition, there is audio for a portion of the incident, captured by the recording devices worn by the SBSD deputies. However, to the extent any of these facts are disputed, they are not material to the disposition of this Motion for Summary Judgment. In addition, to the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

B. The April 15, 2015 Incident

On April 15, 2015, at approximately 1:00 a.m., Slater was at the Valero gas station located at 27767 Baseline Road in Highland, California. Edward Cowell ("Cowell"), the Valero gas station attendant on duty that night, spotted a man (later identified as Slater) wandering around outside the gas station. Cowell watched Slater walk towards the propane tanks near the northwest corner of the building. Although he could no longer see Slater, Cowell could hear thumping on the wall. At the same time, the computer inside the gas station indicated that all the gas pumps had been disabled. Cowell then received a phone call from one of his regular customers who advised him that an unknown male was outside pulling wires out of the wall. Cowell called the police and reported that a guy on drugs was pulling wires out of the emergency gasoline shut off switch for the gas pumps and hitting an outside security drawer with pieces of wood. Cowell described Slater as a white male adult with spiked hair and wearing a white t-shirt.

At approximately 1:17 a.m., SBSD deputies from the Highland station were dispatched to investigate a possible vandalism at the Valero by a white male adult. Deasey was the first SBSD deputy to arrive at the gas station at approximately 1:23 a.m., and saw an individual matching the description given by Cowell. As Deasey approached the individual he recognized him as Slater. At the time Deasey arrived, Slater was crouching behind a firewood container in front of the

gas station. Slater then stood up and appeared to be mesmerized by a large display screen. Deasey approached Slater, identified himself, and asked Slater what he was doing. Slater glanced back at Deasey and said nothing, turning his focus back to the large display screen. In response to Deasey's request, Slater willingly placed both of his hands behind his back and was handcuffed. Once Slater was handcuffed, Deasey escorted Slater to his patrol car. Throughout this initial encounter, Slater was calm and cooperative.

Although Slater sat down on the backseat of Deasey's patrol car, Slater refused to put his legs and feet inside. Slater told Deasey that he did not believe Deasey was a police officer and that Deasey was going to kill him. Deasey assured Slater that he would not be harmed, but Slater continued to insist that Deasey was not a police officer, was going to kill him, and, according to Deasey, Slater began to physically resist Deasey and attempted to get out of the patrol car. Slater continued to resist Deasey despite being warned four times that Deasey would use pepper spray if he did not slide all the way into the patrol car. As a result of Slater's failure to comply with Deasey's commands, Deasey pepper sprayed Slater three times. According to Deasey, Slater lunged out of the vehicle while Deasey was holding on to Slater's shoulder, and both Deasey and Slater went to the ground. Deasey was able to gain control over Slater and alerted dispatch that he had a suspect that was resisting. Deasey asked dispatch to "roll medical" and advised that the suspect was Slater. Once Slater was on the ground, he continued to resist by kicking

his feet and yelling random words, such as "twenty-seven," "mom," and "Slater."

Shortly after Deasey called dispatch, SBSD Deputy Gentry arrived on the scene and he held Slater down while Deasey retrieved a hobble from Gentry's patrol car. As Deasey and Gentry were placing the hobble on Slater, SBSD Sergeant Rude arrived and he assisted Deasey and Gentry as they attached the hobble to Slater's legs. From the time Slater was first on the ground until the first hobble was attached, Slater was never flat on his chest/stomach for more than a few seconds. In fact, while Deasey, Gentry, and Rude were waiting for paramedics to arrive to treat Slater, Slater was able to sit up without assistance.

Shortly after the first hobble was placed on Slater, Cal Fire paramedics responded to the scene and performed a medical evaluation of Slater, determined he was stable, and released him to the deputies to transport him to jail.[2] After the evaluation, Gentry and SBSD Deputy Brandt carried Slater over to the air and water station to decontaminate him by rinsing the pepper spray from his head and eyes. Gentry and Brandt carried Slater back to Deasey's patrol car, put him in the backseat, and closed the door. Although Slater was briefly chest/stomach down when Gentry and Brandt slid Slater into the backseat of Deasey's patrol car,

[2] An AMR ambulance arrived on scene shortly after Cal Fire arrived. However, once it was determined that Slater was stable and the deputies would be transporting him to jail, the Cal Fire paramedics advised the ambulance personnel that they were clear to leave the scene, which they did.

Slater was able to freely move around, first moving onto his right side and then sitting up. Slater struggled and thrashed around in the backseat for approximately two minutes.

After the deputies decided that they should seatbelt Slater before transporting him, they opened the rear doors and attempted to place a seatbelt on Slater. The deputies were unable to seatbelt Slater due to his resistance. During this process, Slater briefly escaped from the patrol car. The deputies returned Slater to the backseat of the patrol car, where he continued to struggle and thrash about. After Slater started kicking at the window, the deputies decided to put a second hobble on Slater. Gentry entered the rear of the patrol car and attached a second hobble to Slater while Slater continued to resist. While Gentry was placing the hobble on Slater, Brandt put his right foot against the top of Slater's left shoulder, near the top of the shoulder blade, to prevent Slater from pushing his way out of the vehicle again. As Gentry attached the second hobble, he was positioned over Slater, but never used his body weight to control Slater. At best, Gentry's knee unintentionally touched Slater's rib cage as he was attaching the second hobble. When it was determined that the second hobble was too short to adequately secure it, Deasey attached a third hobble to the second hobble and looped the third hobble through the cage between the front and rear seats of the patrol car, extended the third hobble to the exterior of the vehicle, and closed the door. Although Slater was initially on his chest/stomach, which was the only practical way of

placing him in the back seat, the deputies later positioned Slater on his side. The parties dispute whether Slater remained on his side.

After approximately 40 seconds, the deputies realized that Slater had suddenly stopped moving. The deputies immediately opened the rear doors of the patrol car, removed the hobbles, and removed Slater from the back seat of the patrol car. Cal Fire paramedics, who had remained on the scene, immediately began treating Slater. After initially detecting a pulse and agonal breathing, the paramedics later determined that Slater no longer had a pulse. At that point, the paramedics began performing cardiovascular pulmonary resuscitation on Slater. An AMR ambulance was called to the scene, and Slater was transported to St. Bernadine's Hospital where he was later pronounced dead.

C. Procedural History

On May 27, 2016, Plaintiffs Sandra Salazar, individually and as mother and natural guardian for minor children of the decedent, Daniella Slater and Damien Slater, Tina Slater (the decedent's mother), and David Bouchard (the decedent's father) filed their Complaint. On August 7, 2017, Plaintiffs filed their First Amended Complaint against Defendants.[3] In the First Amended Complaint, Plaintiffs allege causes of action for: (1) unreasonable seizure – detention (42 U.S.C. § 1983) against Deasey, Gentry, Brandt, and

[3] In the First Amended Complaint, Sandra Salazar abandoned her individual claims.

Rude (the "Individual Defendants"); (2) excessive force (42 U.S.C. § 1983) against the Individual Defendants; (3) deliberate indifference to decedent's medical needs (42 U.S.C. § 1983) against the Individual Defendants; (4) violation of Plaintiffs' civil rights to familial relationship (42 U.S.C. § 1983); (5) wrongful death by negligence in force and restraint (C.C.P. § 377.60 and 377.61) against Defendants; and (6) assault and battery – survival claim against Defendants. On August 21, 2017, Defendants filed their Answer.

II. Legal Standard

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of

that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support

the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. Discussion

In their Motion for Summary Judgment, Defendants seek judgment on all six causes of action alleged by Plaintiffs in their First Amended Complaint. At the hearing on Defendants' Motion for Summary Judgment, the Court granted Defendants' Motion for Summary Judgment on Plaintiffs' first cause of action for unreasonable seizure – detention and Plaintiffs' third cause of action for deliberate indifference to decedent's medical needs.

With respect to Plaintiffs' excessive force claim alleged in the second cause of action, the Court held that Deasey's use of pepper spray, Deasey's knee strike to Slater, and the application of the first hobble (including any force that may have been used by the deputies in applying that hobble) were reasonable and did not violate Slater's Fourth Amendment rights.[4] The Court took under submission Plaintiffs' remaining theory of liability for excessive force relating to the force used in the application of the second and third hobbles. In

[4] To the extent any of these rulings were tentative, the Court holds that they are final for the reasons stated on the record at the hearing. To the extent the Court withheld ruling at the hearing on whether the Individual Defendants connecting the first hobble to Slater's handcuffs violated Slater's Fourth Amendment rights, the Court holds that the Individual Defendants are entitled to qualified immunity for the reasons discussed below with respect to the application of the second and third hobbles.

addition, the Court took under submission Defendants' Motion for Summary Judgment with respect to Plaintiffs' fourth cause of action for violation of Plaintiffs' civil rights to familial relationship, fifth cause of action for wrongful death by negligence in force and restraint, and sixth cause of action for assault and battery – survival claim.

Because the Court advised counsel at the September 11, 2017 hearing that it had tentatively concluded that Deasey, Gentry, Rude, and Brandt (collectively, the "Individual Defendants") were entitled to qualified immunity with respect to Plaintiffs' remaining theory of liability for excessive force relating to the application of the second and third hobbles, the Court allowed the parties to file supplemental briefs on the qualified immunity issue. On September 15, 2017, Plaintiffs filed their Supplemental Brief, and, on September 18, 2017, Defendants filed their Supplemental Brief.

A. Plaintiffs' Remaining Excessive Force Theory.

In their second cause of action, Plaintiffs allege a violation of Section 1983. It is well established that Section 1983 itself creates no substantive rights, and that it merely provides a remedy for deprivation of federal rights established elsewhere. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). "The elements of a section 1983 action are: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person

of rights, privileges or immunities secured by the Constitution or laws of the United States." *Alford v. Haner*, 333 F.3d 972, 975-76 (9th Cir. 2003) (citation and internal quotation marks omitted). With respect to the first element, it is undisputed that the Individual Defendants were acting under color of state law. With respect to the second element, Plaintiffs allege that the Individual Defendants violated Slater's Fourth Amendment right to be free from excessive force by placing him in a chest/stomach down position in the backseat of Deasey's patrol car, using force to hold him down while applying a second and third hobbles, and then securing the third hobble in such a manner that it caused his legs to be pulled up towards his buttocks.[5] Plaintiffs further allege that this position made it difficult for Slater to breathe, and, as a result, he died from positional asphyxiation.

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[5] The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Supreme Court has held that the Fourth Amendment prohibits the use of excessive force by police in the course of apprehending suspected criminals. *See, Graham v. Connor*, 490 U.S. 386, 394-395 (1985). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. This determination "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

At the hearing and in their Motion for Summary Judgment, Defendants argue that the force the Individual Defendants used on Slater in applying the second and third hobbles was necessary and objectively reasonable in light of his ongoing resistance and failure to comply with their commands, and not a violation of Slater's Fourth Amendment rights. Defendants also argue that even if the force used in applying the second and third hobble could be considered excessive, the Individual Defendants are entitled to qualified immunity because reasonable officers in the Individual Defendants' position would not have known that their actions violated a clearly established right.

1. Legal Standard for Qualified Immunity.

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012) (holding that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law") (internal quotations omitted). In *Saucier v. Katz*, the Supreme Court established a two-step sequence for determining whether qualified immunity attaches to specific circumstances. *See Saucier v. Katz*, 533 U.S. 194 (2001). First, the Court must

determine based on the facts "[t]aken in the light most favorable to the party asserting the injury," whether "the officer's conduct violated a constitutional right." *Id.* at 201. Second, if the plaintiff satisfies this first step, the Court must then decide whether the right at issue was "clearly established" at the time of the alleged misconduct. *Id.*

Although the determination of qualified immunity requires a two-step analysis, as the Ninth Circuit recently reiterated "[t]hese two prongs of the analysis need not be considered in any particular order, and both prongs must be satisfied for a plaintiff to overcome a qualified immunity defense. *Shafer v. County of Santa Barbara*, ___ F.3d ___, 2017 WL 37079094 (9th Cir. Aug. 29, 2017) (*citing Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 201. This is an "objective but fact-specific inquiry." *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007). "I[f] officers of reasonable competence could disagree on [the] issue, immunity should be recognized." *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "It is the plaintiff who bears the burden of showing that the rights allegedly violated were 'clearly established.'" *Shafer*, ___ F.3d ___, 2017 WL 37079094 (internal citation omitted).

Because the Court finds at the first step of the qualified immunity analysis that the evidence presented by

the parties with respect to Plaintiffs' excessive force theory relating to the use of force by the Individual Defendants in applying the second and third hobbles is such that the trier of fact could find in Plaintiffs' favor with respect to Plaintiffs' Fourth Amendment claim, the Court necessarily proceeds to the determination of whether the right at issue was clearly established. *See Saucier*, 533 U.S. at 201.

a. Whether a Right is Clearly Established is a Particularized Inquiry.

In the recent case of *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 552 (2017) (per curiam), the Supreme Court held that "it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.' " In addition, the Supreme Court held that "[a]s this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case." *Id.* Indeed, the Supreme Court has "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citation omitted), but to consider "whether the violative nature of particular conduct is clearly established." *Id.* at 742; *see also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (holding that the relevant inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition") (quotation marks omitted). Although the law "do[es] not require a case directly on point, . . . existing precedent must have

placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741; *see also Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (per curiam) ("Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law") (quotation marks omitted); *Saucier*, 533 U.S. at 202 ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate"); *see also Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003) (In performing the second step of the *Saucier* analysis, the Court must consider "the reasonableness of the officer's belief in the *legality* of his actions. Even if his actions did violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in the grant of qualified immunity.").

The Supreme Court has held that "[s]uch specificity is especially important in the Fourth Amendment context, where the Court has recognized that [i]t is sometimes difficult for an officer to determine how the relevant legal doctrine" – in this case, excessive force – "will apply to the factual situation the officer confronts." *Mullenix*, 136 S.Ct. At 308 (quotation marks omitted). In addition, the Ninth Circuit recently explained in *Sharp v. County of Orange*, ___ F.3d ___, 2017 WL 4126947, *7 (9th Cir. Sept. 19, 2017), the importance of specificity in the Fourth Amendment context:

> Except in the rare case of an "obvious" instance of constitutional misconduct (which is

> not presented here), Plaintiffs must "*identify a case* where an officer acting under similar circumstances as [defendants] was held to have violated the Fourth Amendment." *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 552 (2017) (per curiam) (emphasis added). In other words, Plaintiffs must point to prior case law that articulates a constitutional rule specific enough to alert *these* deputies *in this case* that *their particular conduct* was unlawful. To achieve that kind of notice, the prior precedent must be "controlling" – from the Ninth Circuit or Supreme Court – or otherwise be embraced by a "consensus" of courts outside the relevant jurisdiction. *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

b. The Individual Defendants Did Not Violate Clearly Established Law.

The second prong of the qualified immunity analysis requires the Court to determine whether the allegedly violated constitutional right was clearly established at the time the defendants purportedly violated it. In this case, Plaintiffs argue that merely placing Slater chest/stomach down in the rear seat of Deasey's patrol car while handcuffed and "hogtied" was a violation of Slater's clearly established rights, but the case law cited by Plaintiffs does not support Plaintiffs' argument. Although Plaintiffs cite several cases that they claim demonstrate that the use of a comparable amount of force constitutes a violation of the Fourth Amendment,

the cases cited by Plaintiffs are distinguishable and the majority involve individuals who were not only placed in a chest/stomach down position and hogtied, but who also had the body weight of one or more officers on their backs for prolonged periods of time or experienced difficulty breathing. For example, in *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), the decedent was chest/stomach down on the ground, handcuffed, with two officers with their knees in the decedent's neck and back, applying their full body weight on him for approximately twenty minutes even though the decedent repeatedly told the officers he could not breathe and that they were choking him. Similarly, in *Garlick v. County of Kern*, 167 F.Supp. 3d 1117 (E.D. Cal. 2016), the decedent was chest/stomach down, handcuffed, with four officers applying body weight pressure to his back for approximately eight to ten minutes while two hobbles were attached and the decedent was hogtied. After the decedent was hogtied and in prone position, the officers twice picked him up and dropped him face down on the ground. *Id.* at 1155-56. The facts of these cases are significantly different than the facts of this case. Slater never had the full body weight of any officer – much less multiple officers – on him at any time while he was in the backseat of Deasey's patrol car or had any difficulty breathing. In addition, Plaintiffs' argument that Brandt's placement of his foot on Slater's shoulder is the same or equivalent to multiple officers placing their full body weight on a suspect is unpersuasive. It is clear from the evidence that Brandt merely placed his foot against Slater's shoulder to prevent Slater from (once again)

sliding out of the backseat of Deasey's patrol car. Moreover, Plaintiffs' argument that Gentry's position "over" Slater while Gentry attached the second and third hobbles indicates that Gentry was somehow placing his entire body weight on Slater is also unpersuasive. Gentry testified in his deposition that his knee unintentionally touched Slater's rib cage while Slater was on the backseat, but that his weight was never on top of Slater's back. Furthermore, even to the extent Gentry may have been on Slater's back for a matter of seconds, that amount of force is simply not equivalent to the force described in the cases cited by Plaintiffs, where several officers placed their entire body weight on a suspect and held the suspect down for several minutes.

In addition, there are cases that have held that the type and amount of force used by the Individual Defendants in this case is *not* excessive. For example, in *Price v. County of San Diego*, 990 F.Supp. 1230, 1238 (S.D. Cal. 1998), the court held that "the hogtie restraint in and of itself does not constitute excessive force – when a violent individual has resisted less severe restraint techniques, applying a physiologically neutral restraint that will immobilize him is not excessive force." *See, also, Mayard v. Hopwood*, 105 F.3d 1226, 1227-28 (8th Cir. 1997) (holding that placing a person wearing handcuffs and leg restraints in a prone position in the backseat of a patrol car was reasonable as a matter of law where the person had violently resisted arrest).

2. The Individual Defendants' Training Regarding Positional Asphyxiation Does Not Deprive Them of Qualified Immunity.

Although Plaintiffs argue that the Individual Defendants had been trained about positional asphyxiation, "such training . . . [is] not dispositive" on either the question of whether a particular use of force is objectionably reasonable or if reasonable officers would have been on notice that the force employed was objectionably unreasonable. *Drumond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003); *see, e.g.*, *Price*, 990 F.Supp. at 1238 (holding that deputies were entitled to qualified immunity where duty of peace officers to personally administer CPR not clearly established, even though deputies had received CPR training, but none administered CPR to the decedent). Instead, "[f]or a right to be clearly established, case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law." *Shafer*, ___ F.3d ___, 2017 WL 37079094; *see, also, White*, 137 S.Ct. 548 ("The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham, Garner*, and their Court of Appeals progeny, which – as noted above – lay out excessive-force principles at only a general level"). In addition, in

this case, the training materials cited by Plaintiffs generally refer to the risk of positional asphyxiation when a suspect is restrained in a chest/stomach down position with officers placing their body weight on top of that suspect. Therefore, despite Plaintiffs' arguments to the contrary, the Individual Defendants' training on positional asphyxiation does not deprive them of qualified immunity.

The Court concludes that Plaintiffs have failed to carry their burden of demonstrating that the constitutional right at issue was clearly established such that a reasonable law enforcement officer would have known that his challenged conduct was unlawful. Therefore, the Court concludes that, under the second step of the *Saucier* qualified immunity analysis, a reasonable officer in the Individual Defendants' position would not have known that their actions in applying the second and third hobble to Slater violated a clearly established right. Accordingly, Defendant's Motion is **GRANTED** with respect to Plaintiff's Fourth Amendment claim alleged in the second cause of action.[6]

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[6] The Court sympathizes with Plaintiffs' terrible loss. However, the Supreme Court has directed lower federal courts to apply qualified immunity broadly to protect from civil liability all officers except "the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Moreover, Plaintiffs will have the opportunity to pursue their state law claims in state court.

B. The Individual Defendants Are Entitled to Summary Judgment on Plaintiffs' Violation of Plaintiffs' Rights to Familial Relationship Claim.

In their fourth cause of action, Plaintiffs allege that the Individual Defendants interfered with their right under the Due Process Clause of the Fourteenth Amendment to a familial relationship with Slater because Slater's death was proximately caused by the Individual Defendants' use of excessive force in violation of the Fourth Amendment.

The Fourteenth Amendment's substantive due process clause protects against the arbitrary or oppressive exercise of government power. *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Parents and children may assert Fourteenth Amendment substantive due process claims if they are deprived of their liberty interest in the companionship and society of their child or parent through official conduct. *See Lemire v. Cal. Dept. of Corrections & Rehabilitation*, 726 F.3d 1062, 1075 (9th Cir. 2013).

In this case, for the same reasons the Individual Defendants are entitled to summary judgment in their favor on Plaintiffs' Fourth Amendment claim alleged the second cause of action, they are entitled to summary judgment on Plaintiffs' Fourteenth Amendment claim alleged in the fourth cause of action. *See, e.g.*, *Dean v. City of Fresno*, 546 F.Supp. 2d 798, 817 (holding that "for the same reasons that Borrego and Davis are entitled to qualified immunity for the Fourteenth

Amendment medical care claim, Borrego and Davis are entitled to qualified immunity for Plaintiffs' Fourteenth Amendment familial relationships claim").

Accordingly, Defendants' Motion is **GRANTED** with respect to Plaintiffs' Fourteenth Amendment claim alleged in the fourth cause of action.

C. Plaintiffs' State Law Claims Are Dismissed.

"The district court may decline to exercise supplemental jurisdiction over a claim . . . if the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). "[A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims." *Carnegie–Mellon University v. Cohill*, 484 U.S. 343, 350 (1988). "'[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state law claims.'" *Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1091 (9th Cir. 2008) (quoting *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988)).

In light of the fact that the Court has granted summary judgment on the only claims over which this

Court has original jurisdiction, and after considering judicial economy, convenience, fairness, and comity, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims. Indeed, although Plaintiffs' state and federal law claims are based on similar facts and theories, their state law claims cannot be easily or summarily disposed of based on the Court's ruling on the federal claims, especially because qualified immunity is not applicable to the state law claims. In addition, the state law claims have unique elements and involve complex issues, which are more appropriately resolved by the state court. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Accordingly, the balance of factors strongly point toward declining to exercise jurisdiction over the remaining state law claims, and Plaintiffs' fifth cause of action for wrongful death by negligence in force and restraint and sixth cause of action for assault and battery – survival claim are **DISMISSED without prejudice**.

IV. Conclusion

For all the foregoing reasons and for all the reasons stated at the hearing on September 11, 2017, Defendants' Motion for Summary Judgment is **GRANTED** with respect to Plaintiffs' second cause of action and Plaintiffs' fourth cause of action. In addition, Plaintiffs' fifth cause of action for wrongful death by negligence in

force and restraint and sixth cause of action for assault and battery – survival claim are **DISMISSED without prejudice**. Defendants' Motion to Exclude Re: O'Hallaron and Motion to Exclude Re: Clark are **DENIED as moot**.

The parties are ordered to meet and confer and agree on a joint proposed Judgment which is consistent with this Order and the Court's rulings at the September 11, 2017 hearing. The parties shall lodge the joint proposed Judgment with the Court on or before **September 29, 2017**. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a Joint Statement setting forth their respective positions no later than **September 29, 2017**.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

DANIELLA SLATER AND DAMIEN SLATER, individually and as successors in interest, by and through their Guardian ad Litem Sandra Salazar; TINA SLATER AND DAVID BOUCHARD, individually; Plaintiffs, DEPUTY SHANDON DEASEY; DEPUTY PETER GENTRY; DEPUTY GARY BRANDT; SGT. MIKE RUDE; COUNTY OF SAN BERNARDINO; and DOES 1-10, INCLUSIVE. Defendants.	**Case No. 5:16-CV-01103-JFW-KK** [*Hon. John F. Walter*] **JUDGMENT IN FAVOR OF DEFENDANTS COUNTY OF SAN BERNARDINO, SHANNON DEASEY, PETER GENTRY, GARY BRANDT, AND MICHAEL RUDE** (Filed Oct. 11, 2017)

The Motion for Summary Judgment by Defendants County of San Bernardino, Shannon Deasey (erroneously named Shandon Deasey), Peter Gentry, Gary Brandt, and Michael Rude came on regularly for hearing on September 11, 2017, before this Court. The following appearances were made by the parties: on behalf of Defendants, Attorney Tony M. Sain, Esq. and on behalf of Plaintiffs, Dale K. Galipo, Esq.

Following oral argument on September 11, 2017, the Court granted Defendants' Motion for Summary Judgment as to plaintiffs' first claim for Unreasonable

seizure-detention (42 U.S.C. § 1983), and plaintiffs' third claim for Deliberate Indifference to Decedent's Medical Needs (42 U.S.C. § 1983) in part. As to plaintiffs' first claim, the Court determined that that there was no triable issue of material fact that there was reasonable suspicion for Deputy Deasey to detain Slater and that the detention was lawful. As to plaintiffs' third claim, the Court determined that there was no triable issue of material fact that defendants promptly summoned medical aid for Slater and were not deliberately indifferent to Slater's medical needs. The Court then took the remaining portion of Defendants' Motion for Summary Judgment under submission pending supplemental briefing by the parties.

After considering the moving, opposing, reply, and supplemental papers, and having heard the arguments of counsel, this Court, for the reasons set forth by this Court in its written orders [Doc. #161, 195] and during the September 11, 2017 hearing:

(a) Granted Defendants' Motion for Summary Judgment as to Plaintiffs' federal claims as follows:

(1) Unreasonable seizure – detention (42 U.S.C. § 1983) against Defendants Deasey, Gentry, Brandt, and Rude;

(2) Excessive force (42 U.S.C. § 1983) against Defendants Deasey, Gentry, Brandt, and Rude;

(3) Deliberate Indifference to Decedent's Medical Needs (42 U.S.C. § 1983)

against Defendants Deasey, Gentry, Brandt, and Rude;

(4) Violation of Plaintiffs' Rights to Familial Relationship (42 U.S.C. § 1983) against Defendants Deasey, Gentry, Brandt, and Rude;

(b) Declined to exercise supplemental jurisdiction over Plaintiffs' state law claims as follows:

(1) Wrongful death by negligence in force and restraint against Defendants Deasey, Gentry, Brandt, and Rude, and Defendant Count of San Bernardino on a vicarious liability basis;

(2) Assault and battery against Defendants Deasey, Gentry, Brandt, and Rude, and Defendant County of San Bernardino on a vicarious liability basis.

Therefore, judgment is hereby entered in Defendants' favor on the above-referenced federal claims. Plaintiffs' above-referenced state claims are dismissed without prejudice to refiling them in state court.

IT IS SO ORDERED.

Dated: October 11, 2017 /s/ John F. Walter
Honorable John F. Walter
United States District
Court Judge
Central District of California

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIELLA SLATER; DAMIEN SLATER, individually and as successors in interest, by and through their Guardian ad Litem Sandra Salazar; TINA SLATER; DAVID BOUCHARD, individually, *Plaintiffs-Appellants*, v. SHANNON DEASEY, Deputy; previously erroneously named as Shandon Deasey; PETER GENTRY, Deputy; GARY BRANDT, Deputy; MIKE RUDE, Sgt.; COUNTY OF SAN BERNARDINO; DOES, 1-10, Inclusive, *Defendants-Appellees*,	No. 17-56708 D.C. No. 5:16-cv-01103-JFW-KK
DANIELLA SLATER; DAMIEN SLATER, individually and as successors in interest, by and through their Guardian ad Litem Sandra Salazar; TINA SLATER; DAVID BOUCHARD, individually, *Plaintiffs-Appellees*, v.	No. 17-56751 D.C. No. 5:16-cv-01103-JFW-KK

SHANNON DEASEY, Deputy; previously erroneously named as Shandon Deasey; PETER GENTRY, Deputy; GARY BRANDT, Deputy; MIKE RUDE, Sgt.; COUNTY OF SAN BERNARDINO,

Defendants-Appellants.

Filed December 3, 2019

Before: Jacqueline H. Nguyen and John B. Owens, Circuit Judges, and John Antoon II,* District Judge.

Order;
Dissent by Judge Collins

ORDER

The panel voted to deny Defendants' petition for panel rehearing. Judges Nguyen and Owens voted, and Judge Antoon recommended, to deny Defendants' petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35.

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* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

The petition for panel rehearing and the petition for rehearing en banc are denied. No future petitions for rehearing or rehearing en banc will be entertained.

COLLINS, Circuit Judge, with whom BEA, IKUTA, and BRESS, Circuit Judges, join, dissenting from the denial of rehearing en banc:

In holding that the police officers in this case violated clearly established law when they restrained Joseph Slater in the back of a patrol car, allegedly causing his death, the panel continues this court's troubling pattern of ignoring the Supreme Court's controlling precedent concerning qualified immunity in Fourth Amendment cases. Indeed, over just the last ten years alone, the Court has reversed our denials of qualified immunity in Fourth Amendment cases at least a half-dozen times, often summarily. By repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal. I respectfully dissent from our failure to rehear this case en banc.

Two particular features of the panel's decision underscore its neglect of binding Supreme Court authority. First, in addressing whether the relevant law was "clearly established," the panel disregarded the Court's clear instruction that, in Fourth Amendment excessive force cases, "police officers are entitled to qualified immunity unless existing precedent '*squarely governs*' the *specific* facts at issue." *Kisela v. Hughes*, 138 S. Ct.

1148, 1153 (2018) (citation omitted) (emphasis added). There is no such squarely governing precedent here, and the panel did not claim there was. Instead, the panel simply ignored *Kisela* (and all of our other recent reversals in Fourth Amendment qualified immunity cases) and denied qualified immunity based on its identification of a single Ninth Circuit decision—*Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003)—that the panel concluded was "sufficiently analogous" to this case. *See Slater v. Deasey*, Mem. Dispo. at 7 (amending 776 F. App'x 942 (9th Cir. 2019)). In applying this lesser "sufficiently analogous" standard, the panel committed the very same error for which we were summarily reversed in *Kisela*. *See* 138 S. Ct. at 1151 (Ninth Circuit had denied qualified immunity "because of Circuit precedent that the court perceived to be analogous").

Second, the panel violated governing Supreme Court authority when it extracted from *Drummond* a "clearly established" rule that is framed at a much higher level of generality than *Drummond* itself. As the Supreme Court has stated, with evident exasperation, "[w]e have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775-76 (2015) (citations and internal quotation marks omitted). Despite professing to " 'hear the Supreme Court loud and clear,' " *Slater*, Mem. Dispo. at 6 (citation omitted), the panel is jurisprudentially a bit deaf, because its decision here significantly raised the level of generality of

the rule in *Drummond*, and in doing so, it overlooked critical differences between *Drummond* and this case.

The Plaintiffs' claim in this tragic case is that, by using "hobbles" (a form of restraining belt) to prevent Slater from moving around in the patrol car, and by applying brief incidental pressure to Slater while applying the hobbles, the officers caused him to suffer "positional or restraint asphyxia," resulting in his death. According to the panel, the officers were not entitled to qualified immunity for these actions because "[i]n *Drummond*, we clearly established that 'squeezing the breath from a compliant, prone, and handcuffed individual . . . involves a degree of force that is greater than reasonable.'" *Slater*, Mem. Dispo. at 6 (quoting *Drummond*, 343 F.3d at 1059) (ellipses in original). But this statement literally elides critical differences between this case and *Drummond* by improperly using ellipses to generalize *Drummond*'s much more specific holding that "any reasonable person" should have known that "squeezing the breath from a compliant, prone, and handcuffed individual *despite his pleas for air* involves a degree of force that is greater than reasonable." 343 F.3d at 1059 (emphasis added). That critical feature of *Drummond* is missing here: in this case, once the officers noticed that Slater appeared to be in trouble, they promptly summoned paramedics (who had examined Slater earlier and were still on the scene). Moreover, *Drummond* differs in a second crucial respect, inasmuch as the nature and extent of the force applied by the officers in the two cases are very different. While the two officers in *Drummond* literally

"squeez[ed] the breath" from Drummond by "press[ing] their weight against his torso and neck, crushing him against the ground" for a "substantial period of time," 343 F.3d at 1059-60 & n.7, the specific challenged actions of the officers here did not involve any such direct, sustained compression with the officers' body weight. Instead, Plaintiffs claim that the manner in which the hobbles were applied put Slater in a *position* such that, coupled with the brief incidental pressure placed on his back during securing of the hobbles, he was at risk of "positional or restraint asphyxia." Given these significant distinctions, *Drummond* cannot be described as "'squarely govern[ing]' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citation omitted).

Under the qualified immunity standards that have been clearly established by the Supreme Court, the district court's dismissal of this action should have been affirmed. I dissent from our failure to rehear this case en banc.

I

Because Fourth Amendment excessive force claims "depend[] very much on the facts of each case," *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (citation and internal quotation marks omitted), it is important to review in some detail the specific alleged actions of the officers that are challenged in this § 1983 suit.

A

On April 15, 2015, sometime around 1:00 AM, Deputy Sheriff Shannon Deasey of the County of San Bernardino Sheriff's Department responded to a radio call that a man was pulling out wires from a Valero gas station building in Highland, California.[1] After Deasey arrived at the Valero station, he saw a man who fit the radioed description crouched down near the front of the gas station. Deasey immediately recognized the man as Slater. Deasey personally knew, from multiple prior encounters, that Slater had a history of mental illness and drug use.

Deasey identified himself to Slater and asked him what he was doing, but Slater would not respond and instead appeared "mesmerized" by a nearby electronic display screen. Deasey handcuffed Slater without resistance and, after walking Slater over to the police car, Deasey opened the door and asked him to sit down. Slater sat down sideways, with his feet outside the vehicle, but he resisted placing his feet in the car. Slater became paranoid, repeatedly denying that Deasey was a cop and saying that he believed Deasey was going to kill him. When Slater refused Deasey's repeated commands to slide into the car, Deasey threatened to use pepper spray on Slater, and then twice did so.

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[1] Because much of the incident was captured on the Valero station's cameras, and parts were also audio recorded on Deasey's belt recorder, many of the core facts of the incident are undisputed. Where the parties' inferences from the video and audio evidence or deposition testimony differ, I have relied on Plaintiffs' version. *See Tolan v. Cotton*, 572 U.S. 650, 651 (2014).

Ultimately, Deasey could not restrain Slater, and he pulled him out of the car. Deasey instead attempted to restrain Slater on the ground, and he again used his pepper spray. Deasey then used a "knee strike" to get Slater to stop resisting; the parties dispute whether the knee strike was on Slater's lower back or his buttocks/thigh area. Deasey radioed for backup, and he also asked for a medical unit.

Deputy Pete Gentry arrived next on the scene, and he saw Slater on the ground moving his feet back and forth while Deasey attempted to restrain him. Gentry suggested that Deasey get a "hobble," a form of belt used in restraining detainees, and Gentry grabbed hold of Slater while Deasey went to retrieve a hobble from his vehicle. When Deasey returned, Gentry ultimately shifted positions and ended up with his knee across Slater's shoulderblades for about 40 seconds, while Slater was on his stomach on the ground. After Gentry removed his knee from Slater's back, Slater lay on the ground on his right side.

Sergeant Mike Rude arrived next, and he assisted Deasey in placing the hobble on Slater's legs. Once the hobble was applied, the three officers stepped back, and Slater was able to sit upright on the ground. Slater continued in that position until paramedics arrived from the California Fire Department ("Cal Fire"). Throughout this time, Slater continued to talk irrationally, saying names or numbers seemingly at random. Deputy Gary Brandt then arrived, and he waited with the other officers and Slater.

The Cal Fire paramedics examined Slater and concluded that there was no medical emergency. Gentry and Rude then carried Slater over to the gas station's air and water area, with Brandt following along, and they attempted to wash the pepper spray off Slater. After attempting to wash Slater, Brandt and Gentry carried Slater back to Deasey's vehicle, whose driver side rear door was still open. They then attempted to place Slater headfirst and chest down into the vehicle, and as they did so, Slater was flailing about. Meanwhile, Rude went around to the other side of the vehicle, opened the rear passenger door, and attempted to pull Slater by his shirt while Brandt and Gentry pushed him in from the driver side. Slater lay on his stomach for a few seconds and then moved himself into an upright seated position, where he continued moving about and speaking irrationally. During this time, an ambulance had also arrived, but after the ambulance personnel briefly communicated with the Cal Fire paramedics, the Cal Fire personnel told them that they could leave.

Gentry and Brandt attempted to put the vehicle's seat belt on Slater, with Gentry leaning in through the rear passenger door, and Brandt leaning in through the opposite door and handing Gentry the seat belt. Slater leaned away from Gentry, but Gentry pulled him back up, and Brandt closed the rear driver side door. Slater, who was still not seatbelted, slid halfway out of the open passenger side door, so that his body from the waist up was outside the passenger side and his head was almost touching the ground. Gentry and

Brandt then placed Slater back into the car, face down, with his head now pointing towards the driver side. Slater continued moving in the back of the car, although the parties dispute how much he was moving about.

Gentry suggested applying another hobble, and Brandt retrieved one and gave it to Gentry. Gentry opened the driver side rear door, put his left foot on the rear floor of the car, leaned over Slater (who was chest down with his head toward the driver side), and then applied the hobble to Slater's ankles. Gentry then passed part of the second hobble through the cage area that separated the back seat from the front seat, and Deasey, who was leaning through the now open driver side front door, took hold of it. Gentry then stepped out of the vehicle. During the time that Gentry applied this second hobble, his right knee applied pressure to Slater's left rib area for up to 45 seconds. After grabbing the second hobble in the front driver area, Deasey realized that it was too short to attach to the front driver seat hook. So Deasey attached a third hobble to the second one and looped the third hobble to the back of the car and through the open driver side rear door, which he then shut closed on the hobble. During most of the time that Gentry and Deasey were securing the second and third hobbles, Brandt, who was standing outside near the open driver side rear door, had his right foot against Slater's left shoulder. Brandt claimed that he did this in order to prevent Slater from sliding himself out of the patrol car. Brandt's right foot was against Slater's left shoulder for about 70 seconds. The

entire process for securing the second and third hobbles took about 86 seconds.

After the second and third hobbles were secured, Slater lay mostly on his stomach on the backseat of the patrol car, with his legs drawn up behind him towards his buttocks. Slater had little, if any, ability to move his legs.

Brandt heard Slater make a spitting noise just before the driver side rear door was closed. After about 40 seconds, the officers noticed that Slater was no longer moving, had stopped speaking, and might have stopped breathing. The officers also noticed that Slater had vomited a small amount. Gentry opened the driver side rear door and unsuccessfully attempted to get Slater to respond. Slater was removed from the car, and the Cal Fire paramedics attempted to resuscitate him. Slater was transported to the hospital where he was pronounced dead.

The pathologist who performed the autopsy of Slater concluded that he had died of "acute methamphetamine intoxication."

B

Plaintiffs, who are Slater's surviving relatives, brought this suit against Defendants Deasey, Gentry, Brandt, and Rude ("Defendants"), asserting a variety of claims under 42 U.S.C. § 1983 and under state law.[2]

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[2] The County was named as an additional defendant only in the state law claims.

After discovery was completed, Defendants moved for summary judgment. With respect to Plaintiffs' § 1983 claim of excessive force, Defendants argued that (1) each application of force against Slater was reasonable; (2) alternatively, Defendants were entitled to qualified immunity as to any force that may have been excessive; and (3) there was insufficient admissible evidence to establish that Defendants' application of force caused Slater's death. In connection with the latter argument, Defendants submitted the report and deposition testimony of the pathologist who performed the autopsy of Slater, and they also filed a *Daubert* motion to exclude the testimony of Plaintiffs' causation expert.

Plaintiffs opposed both the summary judgment motion and the *Daubert* motion. On the causation issue, Plaintiffs contended that there was sufficient evidence to permit a reasonable jury to conclude that "positional or restraint asphyxia" was the cause of Slater's death. In support of this contention, Plaintiffs supplied the declaration of their causation expert, who explained his opinion as to the cause of death as follows:

> In Mr. Slater's case, respiratory compromise, vomiting with aspiration of vomit into Mr. Slater's airway, and loss of consciousness happened within seconds of the final hobbles being attached and pulled tight. *The prone and hobbled position Mr. Slater was in compromised his ability to breathe, compressed his abdomen and chest, and led to his vomiting and aspirating the vomit into his lungs. This*

> *prevented sufficient breathing, leading to loss of consciousness and resulting in death.*
>
> . . .
>
> It is well accepted that inhibition of respiration and/or inhibition of blood flow caused by too much weight on the back for too long can cause asphyxia. The probable trigger for Mr. Slater's vomiting and ultimately for his asphyxial death was likely the effects of the way he was restrained prone, hogtied, and compressed even more by the pressure on his back by two deputies. Even more pressure was applied to Slater's abdomen and chest by his legs being drawn upward and back towards his buttocks with the addition of more hobbles and the improvised technique used to increase the tension on the 2nd and 3rd hobbles. This transferred more of the weight of his legs to his abdomen and chest, the fulcrum for his body weight in his prone position in the car.

Plaintiffs' expert also explained why he ruled out methamphetamine overdose as the cause of death.

After a hearing on the motions and supplemental briefing, the district court granted summary judgment to Defendants. The court first held that, viewing the evidence in the light most favorable to the Plaintiffs, "Deasey's use of pepper spray, Deasey's knee strike to Slater, and the application of the first hobble (including any force that may have been used by the deputies in applying that hobble) were reasonable and did not violate Slater's Fourth Amendment rights." As to the second and third hobbles, the court held that a reasonable

jury could find that the force used was excessive. The court nonetheless granted summary judgment based on qualified immunity, holding that "Plaintiffs have failed to carry their burden of demonstrating that the constitutional right at issue was clearly established such that a reasonable law enforcement officer would have known that his challenged conduct was unlawful." The court dismissed the pendent state law claims without prejudice, and it denied as moot the *Daubert* motion concerning Plaintiffs' causation expert.

C

A panel of this court affirmed in part and reversed in part. The panel affirmed the district court's conclusion that, as a matter of law, the application of the first hobble did not constitute excessive force. *Slater*, Mem. Dispo. at 3. As to the second and third hobbles, the panel agreed that a reasonable jury could find the force to be excessive, but the panel reversed the grant of summary judgment based on qualified immunity. *Id.* at 4-7. According to the panel, this court's decision in *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), was "sufficiently analogous" to put Defendants "on notice that their use of force violated the Fourth Amendment." *Slater*, Mem. Dispo. at 7. In light of this ruling, the panel vacated the dismissal of the state law claims and one additional claim, *id.* at 7 & n.4, and remanded the case "for trial," *id.* at 2.

II

By failing to apply—and in some respects even to mention—the controlling standards that govern the qualified immunity inquiry under the Supreme Court's and this court's recent precedent, the panel's decision warrants en banc review. *See* Fed. R. App. P. 35(b)(1)(A) (en banc review is warranted when "the panel decision conflicts with a decision of the United States Supreme Court or of th[is] court"). Had those standards been applied, the panel would have had no choice but to affirm the district court's holding that the officers were entitled to qualified immunity.

A

Although the Supreme Court has issued numerous opinions over the last ten years that have refined and limited what it means to say that a right was "clearly established" for qualified immunity purposes, the panel largely ignored that case law. Instead, quoting from a 2003 decision of this court, the panel relied primarily on a more general proposition that qualified immunity turns on:

> "whether the right was clearly established in light of the specific context of the case" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Slater, Mem. Dispo. at 5 (quoting *Drummond*, 343 F.3d at 1056 (further citation and internal quotation marks omitted)). Applying that more general standard, the

panel held that qualified immunity was inapplicable because "the circumstances here are sufficiently analogous to *Drummond* such that Defendants were on notice that their use of force violated the Fourth Amendment." *Slater*, Mem. Dispo. at 7. The panel's analysis disregards the relevant qualified immunity standards as more specifically articulated in the Supreme Court's recent case law.

Since our 2003 opinion in *Drummond*, the Supreme Court has issued no less than eight opinions reversing this court's denial of qualified immunity in Fourth Amendment cases—four of which were summary reversals. *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (summarily reversing); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (summarily reversing); *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Stanton v. Sims*, 571 U.S. 3 (2013) (summarily reversing); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364 (2009); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (summarily reversing). During that same time period, the Court has issued six more opinions reversing the other circuit courts' denial of qualified immunity in Fourth Amendment cases, and three of those were summary reversals. *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017) (summarily reversing); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (summarily reversing); *Carroll v. Carman*, 574 U.S. 13 (2014) (summarily reversing); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Pearson v. Callahan*, 555 U.S. 223

(2009). Given that the Supreme Court has thus issued a total of 14 opinions since 2003 reversing the circuit courts' denials of qualified immunity in Fourth Amendment cases, including seven summary reversals, the panel clearly erred when it disregarded much of what the Court said in those cases. This recent Supreme Court precedent has reiterated two important and closely related rules, and the panel violated both of them in its decision.

The first of these rules is the more general principle—applicable to all qualified immunity cases—"that clearly established law should not be defined at a high level of generality." *White*, 137 S. Ct. at 552 (citation and internal quotation marks omitted). Because an officer is entitled to qualified immunity unless then-existing precedent "clearly prohibit[s] the officer's conduct in the *particular circumstances* before him," *Wesby*, 138 S. Ct. at 590 (emphasis added), "general proposition[s]" are "of little help in determining whether the violative nature of particular conduct is clearly established," *al-Kidd*, 563 U.S. at 742; *see also Plumhoff*, 572 U.S. at 779 (more generally phrased propositions do not defeat qualified immunity because they "avoid[] the crucial question whether the official acted reasonably in the particular circumstances that he or she faced"). If it were permissible to generalize beyond the specific points established in the existing precedent, "'[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" *White*, 137 S. Ct. at 552 (citation

omitted). This court has nonetheless routinely strayed from this rule, prompting the Supreme Court to admonish that it has "'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *Sheehan*, 135 S. Ct. at 1775-76 (citation omitted). In its amended memorandum disposition, the panel now at least pays lip service to this rule by quoting *White*'s recitation of it, *see Slater*, Mem. Dispo. at 6, but the panel then still proceeds to flout that rule by relying on higher-level generalizations when defining the relevant clearly established law. *See infra* at 19-25.

The second rule that emerges from the Supreme Court's recent case law is a close corollary of the first, and it underscores the especially heightened need for specificity in the context of a Fourth Amendment excessive force case. *Mullenix*, 136 S. Ct. at 308. Because "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' . . . police officers are entitled to qualified immunity unless existing precedent '*squarely governs*' the *specific* facts at issue." *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 136 S. Ct. at 309) (emphasis added). As this court recently emphasized in a published decision concerning qualified immunity in the Fourth Amendment context, "we must locate a controlling case that 'squarely governs the specific facts at issue,' except in the 'rare obvious case' in which a general legal principle makes the unlawfulness of the officer's conduct clear despite a lack of precedent addressing similar circumstances."

West v. City of Caldwell, 931 F.3d 978, 983 (9th Cir. 2019) (citation omitted).

The panel does not contend (and, as the discussion below makes clear, could not contend) that this is the "rare obvious case" in which the general legal principles governing excessive force would have been sufficient to alert "every reasonable officer" that applying a further hobble to Slater would violate the Constitution. *Wesby*, 138 S. Ct. at 590-92. Accordingly, the panel was required to identify "existing precedent" that "'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 136 S. Ct. at 309); *see also West*, 931 F.3d at 983. The panel, however, did not even recite that demanding standard, much less apply it. Instead, the panel held that the officers here were not entitled to qualified immunity because (in the panel's view) this court's decision in *Drummond* was "sufficiently analogous" to this case to put Defendants "on notice that their use of force violated the Fourth Amendment." *Slater*, Mem. Dispo. at 7. This watered-down "sufficiently analogous" test more closely resembles the standard that we applied in *Kisela* and that earned us a summary reversal by the Supreme Court. *See* 138 S. Ct. at 1151. Moreover, as set forth below, the panel's effort to stretch *Drummond* to cover the facts of this case violates both the Court's repeated admonition not to resort to higher levels of generality and the Court's insistence on identifying a controlling precedent that squarely governs the specific facts at issue.

B

In contending that *Drummond* was alone sufficient to defeat qualified immunity, the panel ignored two significant differences between *Drummond* and this case.

1

First, the panel misstated the specific holding of *Drummond* and, in doing so, it improperly raised the level of generality of the rule established in that case. According to the panel, *Drummond* "clearly established that 'squeezing the breath from a compliant, prone, and handcuffed individual . . . involves a degree of force that is greater than reasonable.'" *Slater*, Mem. Dispo. at 6 (quoting *Drummond*, 343 F.3d at 1059) (ellipses added by panel). The problem with this contention is that the panel's quotation improperly used ellipses to edit out a crucial fact that makes clear that *Drummond* is *not* analogous to this case. The actual quoted language from *Drummond* is as follows, and it includes the additional italicized phrase:

> The officers—indeed, any reasonable person—should have known that squeezing the breath from a compliant, prone, and handcuffed individual *despite his pleas for air* involves a degree of force that is greater than reasonable.

343 F.3d at 1059 (emphasis added). The language omitted by the panel was not an irrelevant or insignificant detail; on the contrary, the *Drummond* court repeatedly emphasized this important factor in finding that

the officers in that case were not entitled to qualified immunity. *See id.* at 1061 ("The officers allegedly crushed Drummond against the ground by pressing their weight on his neck and torso, and continuing to do so *despite his repeated cries for air*, and despite the fact that his hands were cuffed behind his back and he was offering no resistance. *Any* reasonable officer should have known that such conduct constituted the use of excessive force") (emphasis added); *id.* at 1062 ("We need no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him *even after he complained that he was choking and in need of air* violates clearly established law, and that reasonable officers would have been aware that such was the case.") (emphasis added). On top of this express language from *Drummond* itself, common sense confirms that there is an obvious difference between continuing to apply substantial force *while disregarding* explicit cries for air and applying force to a detainee *without* any such protest (and therefore without any such equivalent disregard of actual "notice of the detainee's respiratory distress"). *Id.* at 1060 n.7.

In view of this critical factor, *Drummond* cannot be characterized as a "controlling case that squarely governs the specific facts at issue." *West*, 931 F.3d at 983 (citations and internal quotation marks omitted); *see also Kisela*, 138 S. Ct. at 1153. Here, the first indications that Slater might be struggling to breathe were his spitting noises and vomiting, *see Slater*, Mem. Dispo. at 7, but these acts were first observed *after*

Slater was restrained, and the officers did not ignore them. The spitting noise occurred just before the driver side rear door was closed after the application of the third hobble—meaning that it occurred after the officers had completed their actions in applying force to Slater. Likewise, the vomiting was noticed through the window after the rear door had been closed and before the officers promptly reopened it to check on Slater. When the officers confirmed that he was in distress, Slater was immediately attended to by the Cal Fire paramedics who were still on the scene. By promptly responding to the first indication that Slater was in distress, and calling over medical assistance, the officers here did the opposite of the officers in *Drummond*, who instead ignored the detainee's pleas for air and continued pressing on his body with the full weight of two officers. 343 F.3d at 1059, 1061-62.

This crucial difference—that, unlike in this case, the officers in *Drummond* continued to apply force despite the detainee's pleas for air—"'leap[s] from the page.'" *Kisela*, 138 S. Ct. at 1154 (quoting *Sheehan*, 135 S. Ct. at 1776). Or, to be more precise, it would have leapt from the page had the panel not effaced the text. Moreover, by excising a factor that was crucial to *Drummond*'s holding, the panel here necessarily raised the level of generality of the rule established in *Drummond*, thereby contravening the Supreme Court's repeated admonition "not to define clearly established

law at a high level of generality." *Emmons*, 139 S. Ct. at 503.[3]

2

Beyond that, there is a second respect in which *Drummond* differs critically from this case. As *Drummond* itself emphasized, the force applied there involved "two officers leaning their weight on Drummond's neck

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[3] The panel points to three out-of-circuit decisions to justify its disregard of *Drummond*'s emphasis on the officers' awareness of the detainee's respiratory distress. To the extent that these decisions assertedly found a violation of clearly established law despite the lack of any apparent respiratory distress, *but see, e.g.*, *McCue v. City of Bangor*, 838 F.3d 55, 59 (1st Cir. 2016) (noting that the defendant officer continued to press his knee on McCue's neck "even after McCue twice shout[ed] in distress that the officers are hurting his neck"), they did so only in the context of condemning an officer's direct application of "*significant, continued force on a person's back* 'while that [person] is in a face-down prone position after being subdued and/or incapacitated,' " *id.* at 64 (quoting *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (in turn quoting *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) (emphasis added) (further quotation marks omitted))). Thus, to the extent that these other circuits might be said to have thereby extended and generalized *Drummond*'s holding, they have done so in a way that does *not* cover this case. *See, e.g.*, *Champion*, 380 F.3d at 903 ("This is neither a 'positional asphyxia' case nor a case in which the officers lightly touched or placed incidental pressure on Champion's back while he was face down"); *see generally infra* at 19-25. Where, as here, the officers' actions do not involve that sort of obviously dangerous direct application of full body weight to compress the detainee's back or neck for a sustained period of time, *Drummond* confirms the continued importance of whether "the police were actually put on notice of the detainee's respiratory distress." 343 F.3d at 1060 n.7. The officers here did not ignore any such notice.

and torso for a substantial period of time," creating an obvious risk of "compression asphyxia." 343 F.3d at 1059-60 & n.7. Indeed, in holding that the officers should have been aware of the risks of placing their full body weight on a detainee, the *Drummond* court emphasized the well-known and well-publicized risks of "compression asphyxia" no less than four times in its opinion. *Id.* at 1056, 1059, 1061, 1062. By contrast, in this case, there is no evidence that the officers ever put their full body weight on Slater during application of the second and third hobbles, much less that they did so for a substantial period of time. As noted earlier, at most, Gentry's right knee applied pressure to Slater's left rib area for up to 45 seconds while Gentry applied the second hobble, and given that Gentry had his left leg on the car floor during that whole time, this incidental pressure would not have applied Gentry's full body weight to Slater. Likewise, Brandt did not place his full body weight on Slater, because Brandt was standing *outside* the car and extended his right foot into the car and against Slater's left shoulder. And Brandt's right foot was thus positioned against Slater's left shoulder for only about 70 seconds. As the panel itself elsewhere concedes, the evidence at most shows that the two officers applied "some pressure" to Slater. *Slater*, Mem. Dispo. at 4. The pressure applied by the two officers with their bodies here was materially different, both in nature and in duration, from that applied in *Drummond*. This point is underscored by *Drummond* itself, which in a footnote distinguished two cases in which incidental or light pressure was

applied to a struggling detainee for less than one minute. *See* 343 F.3d at 1060 n.7.

To be sure, this case involves not just the alleged compression from the officer's knee and foot, but also the alleged breathing difficulty created by the *position* in which the hobbles ultimately put Slater. But this factor only further underscores how very different this case is from *Drummond* and how that decision cannot reasonably be said to "'squarely govern[]' the specific facts at issue" here. *Kisela*, 138 S. Ct. at 1153 (citation omitted). Indeed, in opposing summary judgment below, Plaintiffs' theory was not, as in *Drummond*, a straightforward case of compression asphyxia; rather, Plaintiffs contended that the evidence would permit a reasonable jury to conclude that "*positional or restraint* asphyxia" was the cause of Slater's death. As Plaintiffs' causation expert explained, "[t]he *prone and hobbled position* Mr. Slater was in compromised his ability to breathe, compressed his abdomen and chest, and led to his vomiting and aspirating the vomit into his lungs. This prevented sufficient breathing, leading to loss of consciousness and resulting in death." Plaintiffs' expert also identified the officers' pressure on Slater during the application of the second and third hobbles as an additional factor in Slater's alleged asphyxia, but only *in combination* with the asserted breathing difficulties created by his prone and hobbled position. *Drummond*, however, does not address such a hybrid positional asphyxia theory, and it does not provide a basis for concluding that any reasonable officer

would have recognized that Slater's hobbled position might cause him to asphyxiate.

The panel's broadening of *Drummond* confirms just how far the panel has departed from the controlling qualified immunity standards. The focus of the qualified immunity inquiry has to be on the specific *actions* of the officers, and whether the law clearly established that "the Fourth Amendment prohibited the officer[s'] conduct in the situation [they] confronted." *Mullenix*, 136 S. Ct. at 309 (citation and internal quotation marks omitted). But the panel's broadening of *Drummond* converts it into a rule about *outcomes:* if "asphyxia" results, it does not matter whether it was caused by the officers' use of direct "compression" (as in *Drummond*) or was caused by a collection of restraints, together with brief incidental compression (as in this case). However, the relevant question for qualified immunity is not what outcome occurred as a result of the officers' actions; the relevant question is *what specific actions did the officers take.*

By ignoring all of these obvious differences between *Drummond* and this case, the panel has effectively applied an unstated but much broader rule that condemns a set of police restraints that are not covered by the requisite controlling precedent that "squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153 (citation and internal quotation marks omitted). The panel's reasoning and result cannot be squared with the Supreme Court's demanding standards for defeating qualified immunity.

III

The panel committed a further, related error in suggesting that *Defendants* bear the burden of proof on the disputed qualified-immunity issues presented in this appeal.

In reciting the general standards governing qualified immunity, the panel stated that "Defendants bear the burden of proving they are entitled to qualified immunity. *See Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005)." *Slater*, Mem. Dispo. at 5. But on the cited page, *Moreno* merely recites the boilerplate summary judgment point that, "[b]ecause the moving defendant bears the burden of proof on the issue of qualified immunity, he or she must *produce sufficient evidence to require the plaintiff to go beyond his or her pleadings.*" 431 F.3d at 638 (emphasis added). That, of course, is not the relevant burden of proof on the qualified-immunity issues presented in this appeal. Rather, the applicable—and well-settled—rule is that "[t]he *plaintiff* bears the burden of proof that the right allegedly violated was *clearly established* at the time of the alleged misconduct." *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991) (emphasis added); *see also Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017). Other circuits follow the same rule. *See, e.g.*, *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) ("When a defendant raises the defense of qualified immunity, the plaintiff bears the burden to demonstrate that the defendant violated his constitutional rights and that the right was clearly established."); *Findlay v. Lendermon*, 722 F.3d 895, 900 (7th Cir. 2013)

(plaintiff failed to "carry his burden of showing a clearly established right" when he failed to identify precedent showing that "any reasonable officer would know [the conduct at issue] violated the constitution").

The panel's error on this point is significant, because it underscores that Plaintiffs had the burden to find a controlling precedent that squarely governs the specific facts of this case. They failed to carry that burden, and the district court's grant of summary judgment on qualified immunity grounds should have been affirmed.

I respectfully dissent from the denial of rehearing en banc.