FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF CLEMENTE NAJERA AGUIRRE; J.S.; A.S.; Y.S., *Plaintiffs-Appellees,* v. COUNTY OF RIVERSIDE; DAN PONDER, *Defendants-Appellants.*	No. 19-56462 D.C. No. 5:18-cv-00762-DMG-SP OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted November 15, 2021
San Francisco, California

Filed March 24, 2022

Before: M. Margaret McKeown and Ronald M. Gould, Circuit Judges, and Jane A. Restani,* Judge.

Opinion by Judge McKeown

---

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

COUNSEL

Tony M. Sain (argued), Lewis Brisbois Bisgaard & Smith LLP, Los Angeles, California, for Defendants-Appellants.

Dale K. Galipo (argued) and Hang D. Le, Law Offices of Dale K. Galipo, Woodland Hills, California; Christian F. Pereira and Ian A. Cuthbertson, Pereira Law, Long Beach, California; for Plaintiffs-Appellees.

OPINION

McKEOWN, Circuit Judge:

Police shootings, like all Fourth Amendment seizures, must be objectively reasonable—and when a suspect poses no immediate threat to an officer or others, killing the suspect violates his Fourth Amendment rights. Here, an officer shot Clemente Najera-Aguirre ("Najera") six times without warning and killed him. In dispute is the level of threat Najera posed immediately before he died. That quintessential question of fact is reserved for the jury and precludes summary judgment on the excessive-force claim. We affirm the district court's denial of qualified immunity.

I. Background

On April 15, 2016, Sergeant Dan Ponder of the Riverside County Sheriff's Department received radio reports that someone in Lake Elsinore, California, was destroying property with a bat-like object, and had

threatened a woman with a baby. Crucially, key facts are disputed in this summary judgment record: whether the officer saw bystanders bleeding; how close Najera stood to the bystanders; whether Najera was retreating from the property; and whether, as he interacted with observers and the police, Najera was holding his stick upright in a batter's position in an ostensibly threatening manner, or with the tip pointed down in a way that did not pose a threat.

Upon arriving, Ponder exited the patrol car with his gun drawn and confronted Najera. Ponder motioned for Najera to back away and demanded that he drop the stick. Najera did not drop it, and by some accounts verbally refused to do so. Ponder next tried to pepper-spray Najera, but the spray blew back in Ponder's face, and Najera appeared largely unaffected. Ponder pointed his gun at Najera and again ordered him to drop the stick, but Najera did not comply. By some eyewitness accounts, Najera next retrieved a baseball bat from nearby bushes and advanced quickly toward Ponder with at least one weapon raised; other witnesses say Najera stood still, holding a single stick pointed down. Whichever the case, Ponder, without issuing a warning, shot Najera six times from no more than fifteen feet away. Najera died.

Ponder contends that Najera stood facing him during all six shots, but the coroner's report found that Najera died from two shots to his back. The bullet paths suggested that Najera had turned *away* from the officer and was falling to the ground when the bullets struck.

Three of Najera's children (collectively, "the Najeras") sued Ponder and his employer, Riverside County, under 42 U.S.C. § 1983, alleging that Ponder violated the Fourth and Fourteenth Amendments. Ponder and Riverside County moved for summary judgment. The district court granted summary judgment on the claims against the county and on the Fourteenth Amendment claim against Ponder but denied summary judgment on the Fourth Amendment claim, thus denying Ponder qualified immunity. Ponder asks us to reverse the district court's denial of qualified immunity.

II. Jurisdiction

As a threshold matter, we conclude that we have jurisdiction over this interlocutory appeal. The Najeras argue that we lack jurisdiction because the district court found that triable issues of fact precluded summary judgment, and because Ponder waived his qualified-immunity defense by failing to present the facts in the light most favorable to the Najeras. Both arguments miss the mark. We "undoubtedly" have jurisdiction to consider the district court's denial of qualified immunity. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 707 (9th Cir. 2010). Likewise, Ponder's defense-friendly presentation of the facts does not deprive us of jurisdiction. Although Ponder's appellate briefing arguably "lapse[d] into disputing [plaintiffs'] version of the facts," we are fully capable of distinguishing between advocacy and the record itself. *George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013)

(quoting *Adams v. Speers*, 473 F.3d 989, 990 (9th Cir. 2007)). Ponder's characterization of the facts did not result in waiver of his qualified-immunity defense.

III. Qualified Immunity

We now turn to the principal question on appeal: Whether qualified immunity shields Ponder from Najera's § 1983 claim. The purpose of 42 U.S.C. § 1983 is "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Bracken v. Okura*, 869 F.3d 771, 776 (9th Cir. 2017) (quoting *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)). The doctrine of qualified immunity—though absent from the text of § 1983—"acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt*, 504 U.S. at 168. As the architects of qualified immunity, courts must ensure that the doctrine remains tethered to this principle.

On interlocutory appeal, we review de novo the district court's denial of qualified immunity and view the facts in the light most favorable to the Najeras, the nonmovants here. *See Rice v. Morehouse*, 989 F.3d 1112, 1120 (9th Cir. 2021) (citations omitted). We then ask two questions: (1) "whether there has been a violation of a constitutional right;" and (2) "whether that right was clearly established at the time of the officer's alleged misconduct." *Lam v. City of Los Banos*, 976 F.3d 986, 997 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 77

(2021) (citation omitted). The answer to both questions here is "yes."

A. The Constitutional Violation

Our touchstone in evaluating an officer's use of force is objective reasonableness. *See Graham v. Connor*, 490 U.S. 386, 397 (1989) (citing *Scott v. United States*, 436 U.S. 128, 137–39 (1978)). The reasonableness standard "nearly always requires a jury to sift through disputed factual contentions," so summary judgment in an excessive-force case "should be granted sparingly." *Torres v. City of Madera*, 648 F.3d 1119, 1125 (9th Cir. 2011) (quoting *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002)). The reasonableness of Ponder's conduct is assessed by balancing the "nature and quality of the intrusion" on Najera's Fourth Amendment rights against the government's countervailing interest in the force used. *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

The "nature and quality of the intrusion" here was undoubtedly extreme. *Id.* Deadly force is the most severe intrusion on Fourth Amendment interests because an individual has a "fundamental interest in his own life" and because, once deceased, an individual can no longer stand trial to have his "guilt and punishment" determined. *Garner*, 471 U.S. at 9. Before using deadly force, law enforcement must, "where feasible," issue a warning. *Id.* at 11–12. Nothing in this summary judgment record suggests that it was not "feasible" for

Ponder to warn Najera before firing his weapon six times. *Id.* at 12.

Turning to the government's countervailing interest in the force, three factors inform our analysis: (1) the level of immediate threat Najera posed to the officer or others, (2) whether Najera was "actively resisting arrest or attempting to evade arrest by flight," and (3) "the severity of the crime at issue." *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8–9). Without doubt, the suspected crime in this case was severe, but that is the only *Graham* factor that weighs clearly in the officer's favor. Ponder does not contend that Najera was attempting to flee or evade arrest; quite the opposite, Ponder says that Najera was squarely facing him when all six shots were fired. This contention conflicts with forensic evidence. The coroner's report showed that Najera died from gunshot wounds to his back strongly suggesting he was turned away from Ponder rather than, as Ponder claims, facing him and coming "on the attack."

That leaves the "most important" *Graham* factor—and the central issue in this appeal—the level of threat Najera posed immediately before his death. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) (quoting *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc)). A key disputed fact is whether Najera was facing the officer and coming "on the attack," as Ponder contends, or whether Najera was turned away from the officer, as indicated by the coroner's report. Additionally, although eyewitnesses agree that Najera was holding at least one bat-like

object when he was shot, it is disputed how he held that object. Nothing in the record suggests that Najera was threatening bystanders or advancing toward them when he was killed. Here, on Najera's facts, he presented no threat at all to the officer—or anyone else—in that moment.

In this scenario, the government's interest in the use of force did not justify the "unmatched" intrusion on Najera's constitutional rights. *Garner*, 471 U.S. at 9. Thus, we hold that, construing the evidence in favor of the Najeras, Ponder's conduct was not objectively reasonable, and his use of excessive force violated the Fourth Amendment.[1]

B. The Clearly Established Inquiry

Because the Najeras have presented facts sufficient to establish a Fourth Amendment violation, we consider the second prong of qualified immunity: whether the law was clearly established. The Supreme Court's recent decision in *Rivas-Villegas v. Cortesluna* is instructive. As the Court explained, in an "obvious case," the standards set forth in *Graham* and *Garner*, though "cast 'at a high level of generality,' " can "clearly

---

[1] Ponder cites several cases in an effort to counter Najera's constitutional claims. *See e.g.*, *Bouggess v. Mattingly*, 482 F.3d 886, 896 (6th Cir. 2007); *Mace v. City of Palestine*, 333 F.3d 621, 625 (5th Cir. 2003). However, those cases simply restate the uncontroversial proposition that using force against an immediately threatening suspect is generally reasonable, and Ponder sidesteps the baseline principle that at this stage of the proceedings, the facts must be construed in favor of Najera.

establish" that a constitutional violation has occurred "even without a body of relevant case law." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)). This is one of those obvious cases.

Deadly force is not justified "[w]here the suspect poses no immediate threat to the officer and no threat to others." *Garner*, 471 U.S. at 11. Assuming that Najera posed no immediate threat to Ponder or others at the time of his death, this "general constitutional rule" applies "with obvious clarity" here and renders Ponder's decision to shoot Najera objectively unreasonable. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 270–71 (1997)).

Although no "body of relevant case law" is necessary in an "obvious case" like this one, our precedents also put Ponder "on notice that his specific conduct was unlawful." *Rivas-Villegas*, 142 S. Ct. at 8. We emphasize that only cases that predate the incident are relevant to the "clearly established" inquiry. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam) (citation omitted). Two cases published about three years before the April 2016 incident, *Hayes v. County of San Diego* and *George v. Morris*, made "clear to a reasonable officer" that a police officer may not use deadly force against a non-threatening individual, even if the individual is armed, and even if the situation is volatile. *City of Tahlequah*, 142 S. Ct. at 11.

In *Hayes*, we held that police used excessive force when they fatally shot Hayes after encountering him

inside his girlfriend's home holding a large knife pointed tip-down and standing six to eight feet away. *Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1227–28 (9th Cir. 2013). We reasoned that the officers' use of deadly force was unreasonable because the evidence did not "clearly establish that Hayes was threatening the deputies with the knife," and because Hayes was not attempting to evade arrest. *Id.* at 1233, 1234. It was also "significant" that, like Ponder, the officers failed to warn Hayes before deploying deadly force. *Id.* at 1234–35. In *Hayes*, as here, officers, without warning, shot and killed an individual holding a weapon in a non-threatening manner. Indeed, the officers in *Hayes* were much closer to the individual than Ponder was to Najera when the shooting occurred. *Id. Hayes* stands as clearly established law that Ponder's actions were unconstitutional.

Similarly, in *Morris*, we held that it was unreasonable for officers responding to a domestic disturbance call to fatally shoot a suspect who emerged from his home onto his porch with his pistol pointed down. *See George v. Morris*, 736 F.3d 829, 832–33, 839 (9th Cir. 2013). While we were "clear-eyed about the potentially volatile and dangerous situation these deputies confronted," we could not conclude as a matter of law that the officers behaved reasonably by shooting the decedent "without objective provocation" and while "his gun [was] trained on the ground." *Id.* at 838–39. Like the officers in *Morris*, Ponder entered a "potentially volatile" situation when he responded to the calls about Najera. And we too acknowledge the difficult

landscape facing Ponder and other offices responding to tense and often explosive situations. Nevertheless, *Morris* established that, even in such situations, officers must not use deadly force against non-threatening suspects, even if those suspects are armed.

Ponder's response to these clearly established principles is to repeat his mantra that Najera posed an immediate threat to the officer or bystanders at the time of his death. But Ponder can neither rewrite the facts to his own liking nor ignore the disputed evidence. *See Adams*, 473 F.3d at 991 ("The exception to the normal rule prohibiting an appeal before a trial works only if the appellant concedes the facts and seeks judgment on the law."). The posture of this interlocutory appeal coupled with clearly established law supports the district court's denial of qualified immunity.

IV. Conclusion

Critical disputes of fact render summary judgment premature. We cannot assume the jury's role to resolve the disputed question whether Najera presented an immediate threat. Accepting Najera's version of the facts—as we must at this stage—the bedrock standards set forth in *Graham* and *Garner* and the factual similarity of *Hayes* and *Morris* put the officer's constitutional violation "beyond debate." *Rivas-Villegas*, 595 U.S. at ___, slip op. at 4. We affirm the district court's denial of qualified immunity to Ponder.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE ESTATE OF CLEMENTE NAJERA-AGUIRRE, and J.S, A.S., Y. S., Plaintiffs, v. COUNTY OF RIVERSIDE, DAN PONDER, and DOES 2 through 10 inclusive, Defendants.	Case No.: ED CV 18-762-DMG (SPx) **ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [99]** (Filed Nov. 15, 2019)

Before the Court is a Motion for Summary Judgment filed by Defendants, County of Riverside ("County") and Riverside County Sheriff's Department Sergeant Dan Ponder. [Doc. #99 ("MSJ").] The MSJ is fully briefed. [Doc. ## 101 ("Opp."), 103 ("Reply").] The Court held a hearing on the MSJ on November 15, 2019. For the following reasons, the Court **GRANTS** in part and **DENIES** in part Defendants' MSJ.

I.

PROCEDURAL BACKGROUND

Plaintiffs A.S. and Y.S., by and through their guardian *ad litem*, Lucila Salgado, and Julio Najera Salgado, all children of decedent Clemente Najera-Aguirre ("Najera"), filed their original Complaint on April 13, 2018, suing in their individual capacities and as Najera's successors-in-interest. [Doc. #1.] The

Complaint alleged three claims for relief for violations of 42 U.S.C. section 1983 against the County and Doe Defendants. *Id.* On August 16, 2019, Plaintiffs filed a Second Amended Complaint alleging two section 1983 claims against Ponder for violations of the Fourth and Fourteenth Amendments, and a *Monell* claim against the County. [Doc. # 83.] Defendants now move for summary judgment on all three claims. [Doc. # 99.]

II.

FACTUAL BACKGROUND[1]

A. The Incident

On April 15, 2016, a family gathered at a house in Lake Elsinore, CA (the "House") for a birthday celebration. SUF ¶ 1. The House has a side-facing sliding

---

[1] Defendants submitted a Statement of Uncontroverted Facts ("SUF") [Doc. #99], and Plaintiffs responded in opposition with a Statement of Genuine Disputes of Material Fact and a separately numbered Statement of Additional Material Facts ("SAF") [Doc. ## 101-1 and 101-2]. In their Reply, Defendants filed a response to Plaintiffs' disputes with their SUF and their own disputes with and evidentiary objections to Plaintiffs SAF. [Doc. ## 103-1 and 103-2.] The Court refers to the facts and disputes listed in Defendants' Reply when citing to the SAF and SUF. Unless otherwise stated, the material facts in this section are undisputed. The Court notes, however, that the eyewitness accounts in this case are often contradictory, and there are numerous disputed facts.

To the extent the Court does not rely on evidence to which an evidentiary objection was interposed, the objections are **OVERRULED** as moot. In addition, the Court does not rely on Defendants' lodged PowerPoint document and need not engage the parties' dispute over the propriety of its lodging. [Doc. ## 104, 105, 106.]

glass door that leads out to a carport. *Id.* at ¶ 2. Sometime after 6:00 p.m., two women exited the glass door into the carport, where they observed a man later identified as Najera jump over the front fence carrying a baseball bat-like object. *Id.* at ¶¶ 3, 6. One of them verbally confronted Najera, asking who he was and why he was there, but he responded by advancing further onto the property toward them. *Id.* at ¶¶ 4-5. The women rushed back into the House, locked the doors, started to scream, and tried to call the police once Najera began circling the House, breaking windows with the bat-like object. *Id.* at ¶¶ 6-7. At least two people at the House suffered scratches or cuts from the broken glass, the severity of which is disputed. *Id.* at ¶ 8.

One family member, Jose Orozco, went outside with a baseball bat to confront Najera. *Id.* at ¶ 9. Najera swung his bat-like object, and Orozco swung his bat, but they did not appear to make contact with one another. *Id.* at ¶ 13. One of the women attempted to intervene, inserting herself between the men and ordering Najera to stop and leave. *Id.* at ¶¶ 13-14. Another man, Ulysses Licea, was at a neighbor's house when he heard loud noises and screams from across the street. *Id.* at ¶¶ 10-11. He grabbed two bats before crossing the street to help. *Id.* at ¶ 11. When he drew closer to the House, Licea placed his two bats under a bush at the front of the House, then put his hands in the air and loudly spoke to Najera with words to the effect of "calm down," "put it down," and that it was okay. *Id.* at ¶ 16. Najera turned to face Licea and

started walking toward him holding his bat-like object, while Licea began retreating toward the sidewalk, maintaining a 20-foot distance between himself and Najera. *Id.* at ¶¶ 17-18.

At around this time, Defendant Ponder, a uniformed deputy, arrived on scene in a marked patrol car. *Id.* at ¶ 19. Ponder was the watch commander for the Lake Elsinore area of the County and had four deputies working with him on the duty shift that night. *Id.* at ¶¶ 20-21. At around 6:31 p.m. that evening, Ponder heard calls over the radio about a male suspect going around hitting mailboxes and reportedly breaking car windows, and that a person of the same description had threatened a woman and her baby. *Id.* at ¶¶ 22, 25. Though the parties dispute the actual availability of other deputies to investigate the calls, Ponder found himself the only deputy available and assigned himself to the call. *Id.* at ¶¶ 24-25. Ponder received more information from dispatch that a man wearing tan shorts with a gray hoodie wrapped around his neck was on foot and carrying a large stick, breaking vehicle windows and breaking things at the post office. *Id.* at ¶ 26. Other people pointed Ponder to where the suspect might be and informed him that a man carrying a large piece of wood had passed. *Id.* at ¶ 28.

Also disputed are precisely where Najera, Licea, and Orozco and his family members were standing when Ponder arrived outside the House, as well as whether Najera was holding the bat-like object in a batter's stance or with the tip of the object pointing to the ground. *Id.* at ¶¶ 29, 34. It is undisputed, however,

that he was wearing tan shorts with a gray sweatshirt wrapped around his neck, and Ponder believed Najera matched the description of the suspect who had reportedly broken windows and the suspect who reportedly threatened to harm a woman and her child. *Id.* at ¶ 30. Ponder told dispatch that he had arrived at the location of the suspect and that he needed back-up, and he exited his patrol car with his gun drawn in a low-ready or ready position, not held up to point at anyone. *Id.* at ¶¶ 19, 31, 36.

As Ponder approached, he asserts that he saw a man on the House's property—Orozco—holding a bat and bleeding from the head, though Plaintiffs dispute that Orozco was bleeding from the head and point to evidence that Orozco suffered a cut on his hand. *Id.* at ¶ 8, 33. Ponder also saw the side door to the house was shattered, with glass everywhere. *Id.* at ¶ 35. Ponder motioned for Licea to back away and, in English, verbally commanded and motioned with his hand for Najera to drop the bat-like object. *Id.* at 38, 42. At this point, Najera and Ponder were about 10-12 feet apart from one another. *Id.* at ¶ 37. Although Najera's attention turned toward Ponder, he did not comply with the commands to drop the bat-like object. *Id.* at ¶¶ 42-43. It is disputed whether Najera, at this point, was raising the bat-like object in a threatening manner or holding it pointing to the ground. *Id.* at ¶ 46.

Ponder alerted dispatch that Najera was not complying with his commands and deployed pepper spray. *Id.* at ¶¶ 44-45. Najera winced but did not appear otherwise affected by the pepper spray. *Id.* at ¶ 50. Again,

Ponder deployed pepper spray, which partially blew back in Ponder's face due to wind and did not appear to affect Najera. SAF ¶¶ 23-24. Before and after the second pepper spray deployment, Ponder continued to issue the command, "Drop it." *Id.* at ¶¶ 23-24; SUF ¶¶ 51-52.

What precisely transpired after the pepper-spray deployments is disputed. As Ponder began to put away his pepper spray, Ponder observed Najera put down the bat-like object and appear to reach into the bushes in front of the House. SUF ¶¶ 52-53. The parties dispute whether Najera in fact dropped his bat-like object and whether he turned back toward Ponder holding one object or two (with the second being one of the bats Licea had put under the bushes). *Id.* at ¶¶ 53-56. Eyewitnesses appear to be consistent in their observations that after the pepper-spraying, Najera held at least one bat-like object in his hand, upright or in a batter's stance. *Id.* at ¶¶ 54, 56.[2] Ponder pointed his gun at Najera and continued to verbally command him to drop the object, but Najera did not comply. *Id.* at ¶ 57.

There is differing testimony about whether Najera then quickly advanced toward Ponder or remained stationary, and whether Najera was swinging the bat(s)

---

[2] Plaintiffs point to the testimony of Laura Carvajal, who said that Najera kept the bat-like object in his hand pointed towards the ground. *See* SUF ¶ 57 (citing Pls.' Opp., Ex. I (Carvajal Dep.) [Doc. # 101-12]). But Carvajal also testified that she did not witness the pepper-spraying or the shooting, and the Court finds that her cited testimony refers to Najera's stance before, not after, the pepper spray deployments. *Id.* at ¶ 54.

or not, but the undisputed result is that Ponder fired six shots at Najera and issued no verbal warning that he was going to shoot. *Id.* at ¶¶ 59-60, 63; SAF ¶ 28, 69-71. Ponder asserts that he thought Najera was going to assault him by either striking him with a bat or by throwing a bat at him and so aimed his shots at Najera's front center mass. SUF ¶¶ 62-63. Eyewitnesses testified that Najera and Ponder were face-to-face for the duration of the shooting, and that Najera then fell facedown. *Id.* at ¶ 66 (citing Sain Decl., Ex. D (Sandoval Dep.); Ex. E. (Moreno Dep.)). Other eyewitnesses testify that Ponder shot Najera three times, then after Najera fell, Ponder shot another three times. Sain Decl., Ex. J (Gaspar Dep.) at 44:9-14 [Doc. # 99-3]. Ponder states that he fired three shots, repositioned himself "to the left," then saw Najera "kinda turn[]" away from him before turning back and coming "right back on the attack," causing Ponder to fire two or three more times. SAF ¶ 35-38. At the time Ponder shot Najera, Ponder estimated the distance between them as 7-10 feet, and another eyewitness estimated it at 12-14 feet. *Id.* at ¶ 68; SUF ¶ 59. It is disputed whether Ponder had the opportunity to move backward before shooting Najera, though it is undisputed that the SUV parked in front of the House could have provided Ponder cover from Najera throwing the bat. SAF ¶¶ 74, 80. Four of the shots fired hit Najera, and after the last shot was fired, Najera fell to the ground. SUF ¶¶ 65, 74. It is disputed if and when Najera dropped the object(s) he was holding. *Id.* at ¶ 65. Najera died almost immediately as a result of the gunshot wounds

suffered. *Id.* at ¶ 72. Another deputy arrived on scene less than one minute after the shots were fired. SAF ¶ 76.

On April 18, 2016, Dr. Leticia Schuman of the Riverside County Sheriff Coroner's Office conducted Najera's autopsy. She described four gunshot wounds: (1) a non-fatal entrance gunshot wound on the right upper chest below the front of the shoulder; (2) a non-fatal entrance wound on the left elbow; (3) a potentially fatal entrance wound on the left upper back region more toward the shoulder blade with a wound path that was back to front, left to right, and upward; (4) a fatal entrance wound on the right mid-back with a wound path that was back to front, left to right, and upward. SUF ¶¶ 46, 73-74. Schuman concluded that the exclusive cause of death was the two gunshots that entered through Najera's back. *Id.* at ¶ 72.

According to Schumann, the fatal and potentially fatal gunshot wounds are not consistent with the person charging the shooter while facing the shooter and were consistent with being shot from behind, but she could not say exactly what happened based on the autopsy. SAF ¶ 54 (citing Pereira Decl., Ex. D (Schuman Dep.) at 45:19-21, 115:311). She also testified that the wounds were circular, consistent with the bullet entering at a perpendicular relative to the plane of the back or the skin when the bullet entered, and that an upward trajectory is consistent with someone being shot while they are falling. *Id.* at ¶ 63. Defendants contend that "the back-side gunshots struck Najera at a steep sideways angle, consistent with Najera twisting at the

waist to his right in a split-second between when the trigger was pulled and the bullets impacted." SAF ¶ 65-66.

B. Riverside County's Training Procedures

Prior to April 2016, Ponder underwent state-mandated training every two years and received training from the County through various courses, including ones that involved handling mentally ill individuals. SUF ¶ 82. Ponder's training on interactions with mentally ill individuals required attempts to establish a dialogue to observe verbal responses and determine the depth of the problem. *Id.* at ¶ 40. Training also required gaining control over a suspect, so that he is no longer a danger to self or others, before summoning mental health resources to the scene. *Id.* at ¶ 41. The Riverside County Sheriff's Department's policy requires responding deputies to make efforts to immediately respond to a request for additional units. SAF ¶ 10.

The County trains officers to use deadly force only when other means of control are unreasonable or have been exhausted. SAF ¶ 79. The Riverside County Sheriff's Department authorizes deputies to use deadly force when a reasonable officer, under the totality of the circumstances, believes a suspect is a violent fleeing felon or poses an immediate threat of death or serious bodily injury. SUF ¶ 82. According to the County's training, a bat-armed suspect less than 21 feet away can cross the distance or toss the weapon in

one to two seconds, quicker than most deputies can react, which creates a greater risk of death or serious bodily injury to the deputy. *Id.* at ¶ 48. In a post-incident interview, Ponder said that officers "often refer to [the 21-foot rule] as the 'kill-zone.' That's the most dangerous place for an officer to be when confronting or contacting an individual" with a blunt-force weapon. SAF ¶ 85. He also stated that "people are even talking now that the 21-foot rule . . . might even be a little bit dated, especially in light of the popularity of people training in different types of self-defense and mixed martial arts and things of that nature." Pereira Decl., Ex. V (Ponder Interview); *see* SAF ¶¶ 85-86. It is unclear from the limited evidence in the record whether the "kill-zone" moniker refers specifically to the greater likelihood of officers being killed at that distance or that an armed suspect should be killed when he enters that zone.

C. Post-Incident Investigations

Ponder was not disciplined and remains employed with the County.[3] SUF ¶ 80. The Riverside Sheriff's Department's Professional Standards Bureau conducted an internal administrative investigation of the shooting incident and concluded that Ponder's actions complied with all Department General Orders. *Id.* at

[3] From the time he began his employment at the County of Riverside in 2003, until this incident in April 2016, Defendant Ponder had not fired his weapon in the line of duty. SUF ¶ 76. It is undisputed that Defendant Ponder used lethal force while employed by the Downey Police Department in 1996. SAF ¶ 1.

¶ 77. On January 25, 2018, Riverside County's Sheriff, Stan Sniff, reviewed and approved the Professional Standards Bureau's recommendations. *Id.* at ¶ 78.

III.

LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to "go beyond the pleadings and by [his or] her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(c), (e)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (*en banc*) ("Rule 56 requires the parties to set out facts they will be able

to prove at trial."). "In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). "Rather, it draws all inferences in the light most favorable to the nonmoving party." *Id.*

IV.

DISCUSSION

Defendants contend that Ponder is entitled to qualified immunity for Plaintiffs' claim of excessive force on two bases: (1) no constitutional violation occurred because Ponder's use of lethal force was justified and (2) Ponder's use of force did not violate any clearly established law. MSJ at 9 [Doc. # 99].[4] As to Plaintiffs' claim for intentional interference with familial relations, Defendants argue that Ponder did not act with a purpose to harm and thus did not violate Plaintiffs' substantive due process rights. *Id.* Defendants also argue that Plaintiffs have not identified any triable issues of material fact regarding the County's liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Court addresses each argument in turn.

---

[4] All page references herein are to page numbers inserted by the CM/ECF system.

A. Qualified Immunity

To determine whether officers are entitled to qualified immunity, the Court must answer two separate questions: (1) whether the officers violated a federal statutory or constitutional right, and (2) whether the unlawfulness of their conduct was "clearly established" at the time. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

1. Whether Defendant Ponder Violated Najera's Fourth Amendment Rights Depends on Disputed Issues of Fact

The Fourth Amendment permits police officers to use only so much force as is "reasonable" under the circumstances. *Scott v. Harris*, 550 U.S. 372, 381 (2007). The reasonableness inquiry is both objective and attuned "to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). In any particular case, the reasonableness of the force used must be judged from the perspective of a reasonable officer at the scene rather than with the perfect vision of hindsight. *Id.* Police officers often must make split-second judgments about the amount of force that is necessary in a particular situation under circumstances that are tense, uncertain, and rapidly evolving. *Id.* at 396-97. The inquiry is nonetheless an objective one: just as an officer's evil intentions will not turn an

otherwise objectively reasonable use of force into a Fourth Amendment violation, an officer's good intentions will not make an objectively unreasonable use of force constitutional. *Id.* at 397.

Courts in the Ninth Circuit employ a three-step analysis in evaluating excessive force claims. The first step is to assess the severity of the intrusion on the plaintiff's Fourth Amendment rights based on the type and amount of force inflicted. Next, a court must evaluate the government's interests in light of the three *Graham* factors: (1) the severity of the crime; (2) the threat posed to officers or bystanders; and (3) any resistance to arrest and risk of flight. Finally, a court must balance the gravity of the intrusion on the plaintiff against the government's need for the intrusion. *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010); *see also Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003). The Ninth Circuit has held that "[b]ecause the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, . . . summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly." *Torres v. City of Madera*, 648 F.3d 1119, 1125 (quoting *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002)). "This is because such cases almost always turn on a jury's credibility determinations." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005).

The governmental interests at stake must be considered in light of the lethal force resulting in Najera's death. Plaintiffs argue that none of the *Graham* factors

are satisfied, as Ponder had no information to support a reasonable belief that Najera committed a severe crime, and Najera did not pose an immediate threat to Ponder or anyone else at the time he was shot, and neither fled nor resisted arrest. Because the "most important single element of the . . . factors" identified in *Graham* is whether the suspect poses an immediate threat to the safety of the police officers or others, the Court begins its analysis with this factor. *Id.* at 702 (quoting *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994)).

There can be no question that Ponder had reasonable suspicion to believe that Najera had committed a serious crime prior to the time he encountered Najera. Nonetheless, the threat that Najera posed to Ponders and others *at the time of the shooting* is a triable issue. There is conflicting witness testimony as to whether Najera ever advanced toward Ponder, whether Najera was holding one or two bats in a threatening manner after the pepper spray deployments, whether Ponder and Najera were facing each other for the duration of the shooting, and whether Ponder paused before firing a second volley of shots. The autopsy evidence also raises questions about to what extent Najera had turned away from Ponder before the final fatal shots into Najera's back. It is therefore improper for the Court to determine at this stage whether Najera posed an immediate threat.

Ponder may have reasonably believed that Najera had threatened a woman and her child, broken windows, and committed battery against Orozco, all of

which Defendants assert are serious crimes. MSJ at 20. But the severity of the crime weighs less heavily "where no crime is in progress when police arrived, even though suspect might have threatened [someone] before police arrived." *S.R. Nehad v. Browder*, 929 F.3d 1125, 1136 (9th Cir. 2019). As for the third factor, Najera was indisputably not fleeing, but he may have been resisting arrest by ignoring Ponder's commands to drop the object in his hand. *Id.* at 1337.

In addition to the *Graham* factors, the Court may consider other factors. For example, a jury could consider Ponder's failure to warn that he would use deadly force as evidence of objective unreasonableness. *Id.* at 1137-38 ("The seemingly obvious principle that police should, if possible, give warnings prior to using force is not novel, and is well known to law enforcement officers. . . . A prior warning is all the more important where . . . the use of lethal force is contemplated."). Another relevant factor is "whether less intrusive alternatives to deadly force were available." *Id.* at 1137. Ponder's testimony does not indicate that he considered alternatives that would be more effective than pepper spray and less intrusive than six shots fired into Najera's front center mass, and Plaintiffs contend that Ponder could have taken cover behind an SUV parked in front of the House and waited for nearby backup to arrive.

Under these circumstances, a reasonable jury could find that the use of deadly force was unreasonable and a violation of Najera's Fourth Amendment rights.

2. Viewing All Evidence in the Light Most Favorable to Non-Movants, Defendant Ponder is Not Entitled to Qualified Immunity

Demonstrating that the unlawfulness of an officer's actions was "clearly established" requires a showing that "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Wesby*, 138 S. Ct. at 589; *Hardwick v. Cty. of Orange*, 844 F.3d 1112, 1118 (9th Cir. 2017). The party asserting the injury bears the burden of "showing that the rights allegedly violated were clearly established." *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017), *cert denied sub nom. Shafer v. Padilla*, 138 S. Ct. 2582 (2018).

A clearly established right cannot merely be implied by precedent, and plaintiffs may not defeat qualified immunity by describing violations of clearly established general or abstract rights outside "an obvious case." *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017) (quoting *Brousseau v. Haugen*, 543 U.S. 194, 199 (2004)); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality"). The Ninth Circuit has emphasized that "it is the facts of particular cases that clearly establish what the law is." *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 951 (9th Cir. 2017). The standard, however, does not "require a case directly on point for a right to be clearly established," so long as "existing

precedent" places "the statutory or constitutional questions beyond debate." *Kisela*, 138 S. Ct. at 1152 (quoting *White*, 137 S. Ct. at 551).

It is clearly established that "the use of deadly force against a non-threatening suspect is unreasonable." *Zion v. Cty. of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1548 (2018); *see also Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010). Binding precedent places this constitutional question—the right of a non-threatening suspect not to be killed—beyond debate. Moreover, if a jury credits Plaintiffs' version of the facts—i.e., that Najera was killed by a gunshot to the back while posing no threat to anyone at the time of the encounter—Ponder's use of lethal force is an "obvious case" involving the unreasonable use of deadly force against a non-threatening suspect.[5] *See White*, 137 S. Ct. at 552. Given the disputed facts

[5] At the hearing, Defendants argued that under similar facts in *Blanford v. Sacramento Cty.*, 406 F.3d 1110 (9th Cir. 2005), and *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234 (11th Cir. 2003), courts have found officers' use of lethal force to be reasonable. While there are similarities, the disputed facts in this case distinguish it from both of those cases. Unlike in *Blanford*, where the suspect "was warned that he would be shot if he didn't comply [and] appeared to flaunt the deputies' commands by raising the sword and grunting," Ponder gave no warning that he would shoot, and it is disputed whether Najera wielded the bat at Ponder in a threatening way. 406 F.3d at 1119. *McCormick*, an out-of-circuit case, is also distinguishable because it was undisputed that the suspect rushed at the officer, pumping or swinging the stick above his head, and the officer tripped and fell as he was attempting to retreat, limiting his reasonable options. 333 F.3d at 1241.

and the divergent inferences to be drawn from them, the Court cannot determine on summary judgment that Ponder did not violate a clearly established constitutional right and therefore **DENIES** Defendants' MSJ on Plaintiff's claim of excessive force.

B. Interference with Familial Relations

Children have a Fourteenth Amendment liberty interest in the companionship and society of their parents, and vice versa. *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010); *Curnow ex rel. Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). Official conduct that "shocks the conscience" in depriving children of that interest in their family relationships is cognizable as a violation of due process. *Id.*; *see also Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). In determining whether an officer's force shocks the conscience, the court first asks whether the circumstances of the case allowed the officer to have actual deliberation. *Wilkinson*, 610 F.3d at 554. Deliberation is impractical when a suspect's evasive actions force the officers to act quickly or when fast-paced situations pose safety concerns. *Tatum v. Moody*, 768 F.3d 806, 821 (9th Cir. 2014). In such fast-paced situations, the Court applies the purpose to harm standard, under which a plaintiff must show that the officer's goal was to cause harm unrelated to a legitimate law enforcement objective. *Porter*, 546 F.3d at 1140.

A court may determine whether the deliberate indifference standard or the purpose to harm standard

applies if the undisputed facts clearly point to one standard. *Garlick*, 167 F. Supp. 3d 1117, 1165 (E.D. Cal. 2016). The Ninth Circuit has held that a five-minute altercation—in which the officer continually yelled at the suspect, the suspect did not comply with orders, and the officer shot the suspect—did not provide enough time for deliberation. *Porter*, 546 F.3d at 1139. Similarly, about five minutes elapsed from Ponder's arrival on scene until the shooting, and Plaintiffs have not provided evidence contesting Defendants' assertion that Ponder did not have time for actual deliberation.[6] The Court will therefore apply the purpose to harm standard.

In *Zion*, the Ninth Circuit held that an officer "emptying his weapon" in two separate rounds—firing 18 rounds in total—at a suspect did not act with a purpose to harm where the shots "came in rapid succession, without time for reflection," concluding that "[w]hether excessive or not, the shootings served the legitimate purpose of stopping a dangerous suspect." *Zion*, 874 F.3d at 1077. This case factually resembles *Zion* up to this point—Ponder arrived on scene in response to calls regarding a potentially dangerous suspect and, based on Najera's non-compliance with commands and perceived threat to Ponder, fired six

[6] In response to SUF ¶ 53, Plaintiffs cite witness testimony that shows two to three minutes passed between the pepper spray deployments and the gunshots. Additionally, Plaintiffs do not dispute Ponder's interview with Investigator Paz, during which he asserts that it was about a five-minute range from the time he called a Code 3 until the back-up unit arrived on scene.

shots in quick succession. Ponder, like the officer in *Zion*, may have used excessive force and also may have paused briefly between volleys of shots, but the Court does not find a triable issue of fact over whether Ponder's use of force indicated a purpose to harm.[7] Even viewed in the light most favorable to Plaintiff, there is no evidence that Ponder used force to "teach [Najera] a lesson," to "get even," or to "terrorize" him, or that he otherwise exhibited a goal to cause harm unrelated to a legitimate law enforcement objective to stop a dangerous suspect. *Id.*; *Porter*, 546 F.3d at 1140.

Because the evidence in the record does not give rise to a reasonable inference that Ponder had a purpose to harm Najera unrelated to a legitimate law enforcement objective, the Court **GRANTS** Defendants' MSJ on Plaintiffs' third claim for interference with familial relationship.

C. *Monell* Liability

Local governments may be sued under Section 1983, but they may not be held vicariously liable for their employees' constitutional violations. *Gravelet-Blondin*

---

[7] In *Zion*, the officer paused again after the second round of shots, then walked in a circle around the suspect curled up on the ground and dealt running stomps to the suspect's head. Because the jury could "reasonably find that [the officer] knew or easily could have determined that he had already rendered [the suspect] harmless" before dealing the additional blows, the Ninth Circuit reversed summary judgment for the officer on the intentional interference with familial relations claim. 874 F.3d at 1077. Here, Ponder did not use additional force after the six rapid shots felled and killed Najera.

v. Shelton, 728 F.3d 1086, 1096 (9th Cir. 2013) (citing *Monell*, 436 U.S. at 690). "Instead, a municipality is subject to suit under § 1983 only 'if it is alleged to have caused a constitutional tort though a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *Id.* (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988)). "A plaintiff seeking to establish municipal liability must demonstrate, moreover, that the government 'had a deliberate policy, custom, or practice that was the moving force behind the constitutional violation he suffered.' *Id.* (quoting *Galen v. Cty. of L.A.*, 477 F.3d 652, 667 (9th Cir. 2007)).

A plaintiff may meet *Monell's* policy or custom requirement in three ways: (1) "prov[ing] that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a 'longstanding practice or custom which constitutes the standard operating procedure of the local government entity,' (2) "establish[ing] that the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenged action itself thus constituted an act of official government policy;" or (3) "prov[ing] that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." *Hopper v. City of Pasco*, 241 F.3d 1067, 1083 (9th Cir. 2001) (citations omitted). In order to make out a *Monell* claim, "[t]he plaintiff must show both causation-in-fact and proximate causation." *Gravelet-Blondin*, 728 F.3d at 1096.

Plaintiffs argue that the County is liable under *Monell* for its 21-foot rule and ratification of both that policy and Ponder's unreasonable use of lethal force.

1. Plaintiffs Have Not Established an Issue of Fact as to the Existence of a Policy or Custom that Caused a Constitutional Tort

To show that the government had a policy or custom leading to *Monell* liability, a plaintiff must prove: (1) he had a constitutional right of which he was deprived, (2) the municipality had a policy, (3) the policy amounts to deliberate indifference of his constitutional right, and (4) the policy is the moving force behind the constitutional violation. *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011). "But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *City of Oklahoma v. Tuttle*, 471 U.S. 808, 824 (1985).

As discussed, *supra*, triable issues remain as to whether Ponder committed a constitutional violation. It remains uncontroverted, however, that the County's policy regarding the use of lethal force authorizes deputies to use such force when the totality of circumstances leads a reasonable deputy to perceive an immediate threat of death or serious bodily injury.

SUF 82. In addition, in Ponder's interview with an investigator after the shooting, he stated that he and fellow deputies believed that under the 21-foot rule, also known as the "kill zone," a bat-armed suspect less than 21 feet away from the deputy poses a greater risk of death or serious bodily injury to the deputy, because a bat-armed suspect can cross that distance or toss the weapon in one or two seconds, quicker than most deputies can react.

Plaintiffs have not shown, based on Ponder's interview alone, that the County had a policy of training officers to ignore the totality of the circumstances and deploy lethal force when an armed suspect is within the so-called "kill zone." The evidence shows only that Ponder considered himself in greater danger when confronting a bat-armed suspect within 21 feet of him, and that others said the 21-foot rule was outdated because it did not account for the rise in martial arts training. Plaintiffs have not submitted any other evidence of a purported 21-foot "kill zone" policy, or even that the County improperly trained officers to follow such a rule.

Based upon Plaintiffs' oral argument at the hearing, Plaintiffs appear to argue only that Najera's subversion of the 21-foot rule by calling it "outdated" is an unconstitutional policy. They do not contest other aspects of the County's policies regarding lethal force. Plaintiffs' far-fetched characterization of Ponder's comments about the 21-foot rule do not a policy make. Without further evidence of a County "policy" either promoting or subverting the 21-foot rule as a license to

kill or that such a purported policy has resulted in more than one death, Plaintiffs have not controverted the County's assertion that it has no unconstitutional policy or custom in this regard. *See*, *e.g.*, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988) ("Respondent does not contend that anyone in city government ever promulgated, or even articulated, such a policy. Nor did he attempt to prove that such [unconstitutional conduct] was ever directed against anyone other than himself."); *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) ("Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy."); *Davis v. City of Ellensburg*, 869 F.2d 1230, 1233 (9th Cir. 1989) ("A plaintiff cannot prove the existence of a *municipal* policy or custom based solely on the occurrence of a single incident of unconstitutional action by a non-policymaking employee."[8]). Plaintiffs' claim for municipal liability based on an unconstitutional custom, practice, or policy therefore fails.

---

[8] As discussed further with regard to Plaintiffs' claim of ratification, although a single decision by a policymaking employee may result in *Monell* liability, Plaintiffs present no argument as to the policymaking status of any of the actors involved in their claim. *See Davis*, 869 F.2d at 1234.

2. Plaintiffs Have Not Established an Issue of Fact as to Whether Ratification Occurred

A municipality may be liable under 42 U.S.C. § 1983 if an official with final policy-making authority "ratified a subordinate's unconstitutional decision or action and the basis for it." *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010), *overruled on other grounds by Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (*en banc*). "If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Praprotnik*, 485 U.S. at 127. The authorized policymaker must make an affirmative choice in choosing a course of action. *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992). Failing to discipline an employees' misconduct is not enough to show ratification. *Clouthier*, 591 F.3d at 1253. The question of who is a final policymaker is a question of state law. *Praprotnik*, 485 U.S. at 123 (plurality opinion).

Plaintiffs point to the County's failure to discipline Ponder for his role in Najera's death as ratification of the so-called 21-foot "kill zone" rule. It is unclear, however, who Plaintiffs consider to be the final policymaker. The Ninth Circuit has held that a county's failure to discipline employees for violating constitutional rights "did not create a triable issue of fact because plaintiffs had not shown who the final policymaker was or that anyone made a conscious, affirmative decision to approve the employees' actions."

Clouthier, 591 F.3d at 1253. Because Plaintiffs' argument fails for similar reasons as in *Clouthier*, the County is not liable under *Monell* for ratifying Ponder's actions.

In light of Plaintiffs' failure to identify a specific policy or custom of the County or a specific policymaker who ratified Ponder's decisions, the Court **GRANTS** Defendants' MSJ on Plaintiffs' second claim.

V.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' MSJ in part as to the claim against Ponder for intentional interference with familial relations in violation of the Fourteenth Amendment and the claim against the County under *Monell*, and **DENIES** it in part as to the claim against Ponder for use of excessive force in violation of Fourth Amendment rights.

IT IS SO ORDERED.

DATED: November 15, 2019

/s/ Dolly M. Gee
DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF CLEMENTE NAJERA AGUIRRE; J.S.; A.S.; Y.S., Plaintiffs-Appellees, v. COUNTY OF RIVERSIDE; DANORDER PONDER, Defendants-Appellants.	No. 19-56462 D.C. No. 5:18-cv-00762-DMG-SP Central District of California, Riverside ORDER (Filed Jun. 10, 2022)

Before: McKEOWN and GOULD, Circuit Judges, and RESTANI,* Judge.

The panel has voted to deny the petition for panel rehearing.

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

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.