In the

**Supreme Court of the United States**

Estate of Gabriel Strickland, et al., Petitioners,

v.

Nevada County, California, et al,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

# Petition for Writ of Certiorari

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## Questions Presented

This case presents a unique question of law under 42 U.S.C. §1983 concerning the application of the "totality of the circumstances" test adopted in *Graham v. Connor*[1] to determine whether an officer's use of deadly force was objectively reasonable.

Specifically, is the reasonableness of an officer's use of deadly force in face of an imminent threat evaluated solely upon the circumstances of the final moment or upon the "totality of the circumstances" that created the imminent threat?

[1] *Graham v. Conner*, 490 U.S. 386 (1989), 109 S.Ct. 1865, 104 L.Ed.2d 443 ("*Graham*").

## Parties To The Proceeding

### Petitioners

Estate of Gabriel Strickland,
N.S., minor child of Gabriel Strickland, and
Shawna Alexander, mother of Gabriel Strickland.

### Respondents

Nevada County, California, a county government,
Shannon Moon, Sheriff, Nevada County Sheriff's Office ("NCSO"),
Taylor King, a NCSO deputy,
Brandon Tripp, a NCSO deputy,

The City of Grass Valley, California, a municipal government,
Alex Gammelgard, Chief, Grass Valley Police Dept. ("GVPD"),
Brian Hooper, a GVPD officer,
Dennis Grube, a GVPD officer, and
Conrad Ball, a GVPD officer,

Wellpath Management, Inc., a corporation providing medical services at the NCSO jail,
Brent Weldemere, a medical personnel,
Richard Donofrio, a medical personnel.

### Related Cases

None

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**United States Constitution**



**Federal Statutes**

## Petition for a Writ of Certiorari

The Estate of Gabriel Strickland, N.S., and Shawna Alexander respectfully petition the United States Supreme Court for a writ of certiorari to review the denial by the United States Court of Appeals for the Ninth Circuit of a Petition for Rehearing *En Banc* of decision of the United States Court of Appeal for the Ninth Circuit affirming a judgment of dismissal by the United States District Court for the Eastern District of California in the matter of *Estate of Strickland v. Nevada County, California*, et al (C.A. Case No. 22-15761; Civil Case No. 2:21-CV-00175-MCE-AC)

## Opinions Below

The Decision of the United States Court Of Appeal for the Ninth Circuit denying a Petition for Rehearing *En Banc* was filed July 18, 2023. See Appendix, A3. The Decision of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Eastern District of California was filed May 31, 2023. A4-21. The Judgment of Dismissal of the United States District Court for the Eastern District of California was filed on May 13, 2022. A51. The Decision and Order of the United States District Court for the Eastern District of California was filed on May 13, 2022. A52-66.

## Jurisdiction

The jurisdiction for this petition for a writ of certiorari is based upon 28 U.S.C. §1257(a).

## The Federal Issues Were Raised In The Appellate Court

The federal question regarding the application of the Due Process Clause of the 14th Amendment to the United States Constitution has been raised by Petitioners at every stage of proceedings in the courts below. See e.g., Appellant's Opening Brief, A22-50.

## Constitutional Provisions
## U.S. Constitution, Amendment XIV, § 1:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### Factual Allegations of the First Amended Complaint

The basic facts alleged in the First Amended Complaint ("FAC") are not disputed. Midday on January 1, 2020, Gabriel Strickland ("Strickland") was walking through a quiet neighborhood in Grass Valley, California, with an airsoft BB gun that was marked with the orange tip required by law to prevent confusion with a real gun. [A68; FAC ¶¶ 25-26] Strickland did not brandish the replica gun and or assault anyone with it. Strickland was not in progress of committing any crime, there was no threat to public safety, and there was no urgency to the situation. [A88; FAC ¶93]

Nevada County Region Dispatch (911) received reports that a man was walking on Squirrel Creek Road with what looked like a long gun and dispatched Nevada County Sheriff's Department ("NCSD") Deputies Brandon Tripp and Taylor King, and City of Grass Valley Police Department ("GVPD") Officers Brian Hooper, Denis Grube, and Conrad Ball to investigate (collectively "Officers"). [A68, A84; FAC ¶¶ 25, 64.] The Officers all knew Strickland, that he had mental health issues, and that it was likely that he was then experiencing a mental health episode. [A84, A87; FAC ¶¶ 65, 89.]

The officers pulled their cars into blocking positions at the residential intersection of Oak and Walker, jumped from their cars, pointed their guns, and immediately shouted obscene demands to drop the gun. They never attempted to calmly communicate with Strickland, who was standing in plain view, a few feet from the intersection. [A85; FAC ¶¶ 68-69.] Despite the abrupt, harsh tactics,

Strickland tried to explain to the Officers for several minutes that it was just a toy BB gun. The Officers acknowledged the orange tip, but replied that "[y]ou could have painted that ..." and then continued yelling at Strickland to drop the gun. Strickland remained standing in the same place with the gun barrel pointed down. Strickland said "I'm not doing anything wrong". [A85-86; FAC ¶¶ 70-77.]

It was obvious from Strickland's refusal to immediately obey the command that he was in a compromised/delusional mental state. [A88; FAC ¶¶ 91-92.] However, Strickland kept talking to the Officers and this willingness to talk was a golden opportunity to calmly negotiate a resolution. [A88; FAC ¶¶ 93-94]

After just two minutes and fifteen seconds of Strickland and the Officers exchanging words, and despite the fact that Strickland did not try to flee or threaten the officers, Deputy Tripp ordered a direct assault. [A85-86, A89; FAC ¶¶ 69-78, 95-99.] This is exactly the type of approach to a mental health crisis that the policies of the Grass Valley Police Department ("GVPD"), such as its Mental Health Policy §464, Crisis Intervention Incidents ("Policy §464"), were designed to prevent. [A75-78; FAC ¶ 40, FAC Ex. 4]

When the Officers drew close, Officer Hooper tried to use a taser, but Strickland was wearing winter clothing that prevented successful penetration of the probe. [A86; FAC ¶¶ 82-85.] Strickland dropped to his knees as the Officers continued to approach with guns drawn.

The situation had called for calm, thoughtful police work using well-known tactical and de-escalation techniques to negotiate inspection of

the toy gun. Unfortunately, the Officers never communicated with each other about any de-escalation techniques or requested the help of a negotiator or mental health professional. The Officers also did not communicate with any supervisor or request instructions about how to handle the situation. [A89; FAC 95-98] More importantly, the Officers did not employ any law enforcement operational or de-escalation techniques for a mental health crises such as those in GVPD Policy 464. [A89; FAC ¶ 99]

The FAC alleges that, although the policies of the Nevada County Sheriff's Department ("NCSD") were not adequate [A72-73; FAC ¶¶ 35-36], the policies of the GVPD were adequate. [A73-78; FAC ¶¶ 37-40] In fact, GVPD Policy §464 contained detailed instructions and operational advice such as not yelling, staying very calm, and asking for help from superior officers and/or mental health professionals. [A75-78; FAC ¶ 40]

The FAC also set forth detailed allegations about training. Nevada County had done almost no training of its deputies in the use of force or handling a mental health crisis. [A78-79; FAC ¶¶ 41-43, Ex. 5] Despite its good policies, the GVPD inadequately trained its officers. [A80-81; FAC ¶¶ 51-54, FAC Exs. 6 & 7]

Another crucial failure that led to the use of deadly force was the inadequate chain-of-command and inter-agency operating procedures. [A82-83; FAC ¶¶ 61-63] This resulted in NCSO Deputy Tripp, who had the least amount of experience (two years) immediately taking command of the incident, when far more experienced GVPD officers (six to eighteen years) were on scene and supervisory personnel were en route and just seconds away from

being able to take command. [A87, FAC ¶ 88]

The frontal assault was a serious tactical error that, apart from going against everything in GVPD Policy 464, violated standard police tactical training. This approach put them in plain view, without cover, exposing them to close range fire. If the gun had been real, they could have been seriously hurt or killed. [A89-90; FAC ¶ 100, FAC Ex. 4, Policy 464.6]

The consequences of this unnecessary and senseless direct assault were very predictable: Strickland held onto the replica BB gun, dropped to his knees, and at the very last moment, lowered the gun in the direction of the Officers. Officers Tripp and Hooper opened fire at very close range (est. 10-15 feet), killing Strickland.

### The Motion to Dismiss in District Court

On November 7, 2021, Respondents City of Grass Valley, Alex Gammelgard, Brian Hooper, Dennis Grube, and Conrad Ball filed a Motion to Dismiss under FRCP 12(b)(6). Respondents Nevada County, Sheriff Shannon Moon, Deputy Taylor King, and Deputy Brandon Tripp filed a joinder to the Motion to Dismiss. Petitioner's Opposition was filed on November 18, 2021, and the District Court took the motion under submission without oral argument.

Respondents argued that the use of force was objectively reasonable because Strickland pointed a replica BB gun at the Respondent officers in the last moment of the incident.

Petitioners countered with a "totality of the circumstances analysis", arguing that the *Graham* factors alleged in the FAC would establish at trial

that the Officers unnecessarily created the need to use of deadly force. Petitioners pointed out that, despite no imminent threat at the outset of the incident and with no urgency to resolve the matter, the Officers unnecessarily escalated the situation. Further, the tactical assault was extremely dangerous for both the Officers and Strickland and it made the use of deadly force almost inevitable.

### The District Court's Ruling

On May 13, 2022, the District Court issued its ruling on the motion to dismiss. It began with a cursory statement that the presence of an orange tip on the gun, i.e., whether the gun was a toy replica, was irrelevant and that, although the decedent's mental health was a factor, "it was not objectively unreasonable for officers to consider the presence of a deadly weapon a priority." [A60] The District Court did not discuss any of the other *Graham* factors such as the lack of urgency, that there had been no crime committed and no crime was in progress, or that the Officers had unnecessarily escalated the situation. The District Court simply held that the "use of deadly force was constitutionally reasonable...." and dismissed all federal and state claims that were premised upon the excessive use of force. (Counts 1-5, 9-13, 17-18, 20-22) [A60-63] The District Court acknowledged that the state claims had a broader legal standard than the 42 U.S.C. §1983 claims, and it briefly mentioned some of the other *Graham* factors, but then dismissed these as nothing more than "speculation" that de-escalation methods could have made any difference. [A63-65]

Petitioners filed a Notice of Appeal on May 15, 2022.

## Decision of the Ninth Circuit Court of Appeal

The Ninth Circuit Court of Appeal discussed more of the *Graham* factors than did the District Court, and even acknowledged that these factors favored Petitioner's contentions. However, it then inexplicably ignored the most important *Graham* factor: i.e., that there was no *urgency* for the Officers to resolve the standoff. Even further, the Court lost sight of the "totality of the circumstances" test as the foundation for *determining causation* in §1983 cases.

Instead, the Court limited its causation analysis to the *circumstances of the final moment* and mistakenly concluded that this was a "split-second" case. In fact, the Officers were aware of the gun before they arrived at the scene and the toy gun remained visible for the duration of the incident. There was no surprise to Strickland's final, desperate act of lowering of the gun. The Officers tactical march on Strickland precipitated his delusional defense. It was not just predictable, it was almost inevitable.

Of course, cutting-off the prior chain of events from the causation analysis makes it appear that the Officers were justified in using deadly force. However, this ignores the fact that the Officers unnecessarily created the circumstances of the final moment. Reasonable police work would have averted a face-to-face, lethal showdown.

The Ninth Circuit upheld the District Court's ruling on the motion to dismiss. Petitioners filed for a rehearing *en banc*, but this was denied. This Petition followed.

## ARGUMENT

### I. Introduction

This case presents a unique question of law under 42 U.S.C. §1983: At what point during an incident that culminates with the use of deadly force is the reasonableness of an officer's actions to be determined? Is the officer's use of deadly force to be evaluated solely based upon the circumstances and events of the final moment, or is the evaluation based upon the acts and omissions of the officer over the entire course of the incident? Stated another way, is the "totality of the circumstances" test ever to be shortened to the "circumstances of the final moment" test?

Petitioner contends that objective reasonableness in the use of deadly force must be evaluated based upon the entire incident and all of the *Graham* factors present: i.e., the "totality" of all the circumstances and the acts and omissions that led to the use of deadly force. In sharp contrast, the Ninth Circuit's analysis focused exclusively on the final moment and ignored all of the failures of the Officers that unnecessarily created that final moment. The decision, while acknowledging that there were serious shortcomings in the Officers' handing of the incident, never considered that such failures unnecessarily precipitated the imminent threat of the final moment.

The officers had been called to the incident scene to investigate a report of a man walking with a long gun. There had been no crime reported and there was no crime in progress when the officers arrived. The officers immediately saw Strickland out in the open, holding the airsoft toy rifle. The gun was clearly visible and remained so for the entire

incident. Strickland never tried to flee and he did not brandish the replica rifle. With Strickland surrounded and contained at the scene, there was no urgency to the situation.

The officers immediately commanded Strickland to "drop the gun". He refused, telling the officers it was an airsoft BB gun. Strickland pointed to the orange tip and said that he was doing nothing wrong. The officers acknowledged seeing the orange tip, but told Strickland they did not know if he had painted that onto the gun.

The officers knew Strickland and that he had mental health issues. However, they just kept shouting the same command: drop the gun. Strickland kept refusing the command. Within a short time of this back and forth, it was obvious that Strickland was having a mental health crisis. He was not able to overcome his fear of the Officers or to understand the danger of the situation. Indeed, it appears that he held onto the airsoft BB gun in a deluded attempt to protect himself from the Officers.

The task for the Officers was clear: verify whether the gun was a replica without having to use force, especially deadly force. There were several obvious non-force approaches. Strickland was openly communicating and not trying to flee, so the most important thing was to keep the dialog open. This would give time to negotiate a solution that would resolve the stalemate peacefully: maybe offer Strickland a deal that if he would help them confirm that the gun was a toy, they would let him go. Simultaneously, it would allow the Officers to determine if the gun was real by various means, such as looking at the gun with the scopes on their long guns or binoculars, sliding a cell phone over to Strickland so he could send the Officers a picture of

the tip, or have someone that Strickland knew and trusted come to the scene and inspect the gun. In addition, it would allow time for more experienced senior officers, who were en route, to arrive and take command.

Unfortunately, the officers were not trained how to de-escalate or negotiate. Predictably, the lack of appropriate policies, procedures, and training led the Officers to immediately become overly excited and aggressive, shouting at Strickland, pointing their long guns at him, and demanding compliance with their order to drop the gun. This made Strickland more agitated, afraid, and unable to comprehend the situation. This in turn, further increased the Officers' adrenaline levels, making it harder for them to stay calm and think about how to resolve the situation without using force.

Within two minutes from arrival at the incident scene, the Officers were locked into a tunnel vision perspective. They chose the most tactically dangerous approach that was the least likely to end the standoff peacefully: a line-of-sight march toward Strickland with guns aimed at his chest, repeating over and over to "drop the gun." By choosing escalation over de-escalation, the Officers created the final moment that had only two possible outcomes: Strickland either obeyed or they would use lethal force. This was anything but objectively reasonable conduct by the Officers.

The approach taken by the Ninth Circuit creates, in effect, a *per se* rule that whenever a suspect points a gun at an officer, it is objectively reasonable for the officer to use deadly force. Indeed, the circuit decisions cited in support of the Opinion involved situations in which an officer was surprised by the sudden appearance of a gun pointed

in their direction (or that of another person or officer) and the officer had to make a split-second decision. Of course, in situations in which the only *Graham* factor is an imminent threat to life *which was not of the officer's making*, then Petitioner agrees that an officer would be objectively reasonable in using deadly force.

However, that is not what happened in this case. The allegations in the complaint detail how it was the mistakes of the defendants that *created the imminent threat*. The officers *were untrained*. The officer *with the least amount of experience took command*. The officers *did not deliberate* about alternatives to the use of deadly force to resolve the standoff with Strickland. They *promptly escalated* a mental health crisis by shouting commands and pointing long guns, making Strickland fearful and determined to hold onto the toy gun. There *was no urgency*, but the officers proceeded almost immediately with the most tactically dangerous solution that only had two possible outcomes. It was the officers that approached Strickland and put themselves directly in front of him at close range. The body cam video shows the orange tip on the airsoft rifle. The officers then tried to tase Strickland even though he was wearing a thick jacket. When the taser failed, they did not withdraw, but kept moving in. It was only then that Strickland, in his unhealthy mental state, lowered the gun towards the officers.

Based upon such facts, a reasonable jury could find that the officers had acted unreasonably in multiple ways, thereby creating the imminent threat that they responded to with lethal force. See e.g., *Health and Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166, 178, 143 S.Ct. 1444, 1454, 216 L.Ed.2d 183 (2023).

## II. The Opinion Acknowledged that Almost All of the *Graham* Factors Were in Favor of Petitioners

The Opinion acknowledged that the "bulk of the *Graham* factors ... favored Strickland", specifically noting the following failures of the Officers at the incident scene:

(1) "Strickland was known to officers as homeless and mentally ill" and that "[a]t the time of the incident it was obvious that he was suffering a mental health crisis";

(2) "the officers failed to employ de-escalation techniques";

(3) the officers "did not wait for supervisors or call in for backup with crisis or mental health training"; and

(4) "the officers seemingly exacerbated the situation by aggressively shouting directions at Strickland".

Opinion at A11-12. Further, the Opinion observed that "Strickland was not under suspicion for committing a serious or dangerous crime"and that "[a]t the start of the confrontation with police, Strickland had not yet brandished the gun at anyone or threatened the life or property of others." Opinion at A12.

## III. The Failure to Consider the Absence of Urgency

Unfortunately, the Opinion then ignored the most important *Graham* factor in this case: that

there was no *urgency to the situation* because there was no crime in progress and Strickland never tried to flee. Strickland was surrounded and the officers had all the time they needed to determine whether the gun was a replica.

The Opinion's failure to include the lack of *urgency* as a *Graham* factor was a crucial error. At this point in the Opinion, the Court should have discussed the un-reasonableness of the Officers' decision to disarm Strickland by marching directly upon him with long guns after only two minutes of verbal ping pong about the orange tip. The *unreasonableness* of the Officers' risky approach to Strickland's mental health crisis is self-evident: they ignored good police tactics about how to safely engage in a standoff and foolishly put themselves directly into harm's way without any public safety purpose. Strickland was, as the Opinion found, not committing a crime, not trying to flee, and not brandishing the replica gun.

## IV. The Officers Precipitated the Imminent Threat

The failure to consider the lack of urgency was then followed by a failure to consider another pivotal *Graham* factor: that the armed march upon Strickland *precipitated* the imminent threat when Strickland, in his agitated mental state, finally lowered the toy gun towards the Officers. It was obvious from the beginning of the incident that Strickland was in an abnormal state of mind. Any normal person would have dropped the toy gun with the first command by the Officers.

This was a non-urgent mental health crisis and the Officers needed to deliberate and use common sense, not deadly force. Unfortunately, the

Officers became fixated with making Strickland obey their commands and lost situational awareness of Strickland's obvious mental health crisis. With no urgency to make Strickland comply, the Officers had all the time they needed to exhaust appropriate non-force means. However, impatience, lack of training, and loss of focus resulted in the Officers immediately making the *unreasonable* decision to force Strickland to drop the gun by direct, face-to-face confrontation with deadly force. As a consequence, Gabriel Strickland lost his life.

## V. The Opinion Did Not Look at the "Totality of the Circumstances"

The Opinion skipped over the Officers' unreasonable response to the situation and myopically focused on the final moment. Strickland, then on his knees and without cover, having been tased and with the Officers moving towards him with long guns pointed at his chest, slowly lowered the orange tipped airsoft rifle in their direction. This situation was entirely predictable and preventable.

Instead of considering that Strickland was obviously delusional and that the Officers had made the worst possible choices about how to resolve the situation, the Opinion ignores the lack of urgency and the unnecessary confrontation and asks "... whether the immediacy of the threat that Strickland posed outweighs" the "bulk of the *Graham* factors [that] favor Strickland." Opinion at A12. Of course, in the false context created by the Opinion, the answer to this question would be obvious.

But that is not the correct legal analysis. The "totality of the circumstances" test required the Court of Appeal to consider not just whether the Officers were faced with an imminent threat in the

final moment, but whether the prior acts and omissions of the Officers were objectively reasonable and, in fact, had created the imminent threat. The correct use of the "totality of the circumstances test" should have led the Court to hold that a reasonable jury could find the use of lethal force had been unnecessary, and thus, was *objectively unreasonable*.

This Court needs to make clear that the "totality of the circumstances" analysis must not be abbreviated to a "circumstances of the final moment" rule.

## VI. False Comparison to Split-Second Cases and Creation of a *Per Se* Rule

The Opinion correctly concludes that there are legitimate instances in which law enforcement has to act with *urgency* and it is impractical to consider non-force means. In these so called "split-second" cases, delay in using deadly force to counter an *imminent threat* has a significant probability of causing serious or fatal injury to officers and innocent third parties. See Opinion at A12-13.

The Opinion then acknowledges that application of the totality of the circumstances test will "necessarily" require a "fact-bound" examination, and further, that there cannot, by definition, be any *per se* rule. However, in the very next sentence the Opinion creates a *per se* rule with the assertion that "[a]t one end of the spectrum, when a suspect points a gun in an officer's direction, 'the Constitution undoubtedly entitles the officer to respond with deadly force." Opinion at A13-14. By formulating the "totality of the circumstances" test as a linear "spectrum" rather than the multi, time-variable analysis it must be, the Opinion creates a

*per se* rule that whenever, and regardless of why, a suspect points a gun (real or replica) in the direction of an officer, it will be deemed objectively reasonable for deadly force to be used to eliminate the "imminent threat". That is a false and dangerous conclusion which the facts of this case disprove.

The Opinion then proceeds with a purported factual analysis that ignores the crucial facts that: (a) there was no *urgency* to resolution of the standoff; and (b) the Officers escalated when they should have been patient and de-escalated. Opinion at A14-17. The Opinion ignores the obvious, critical factor that Strickland did not provoke the Officers: they intentionally provoked him into delusionally defending himself with a toy gun. There was no legitimate law enforcement reason for doing this. Finally, there was never any surprise: the replica gun was visible to the Officers at all times from the outset of the incident.

By ignoring the absence of urgency and the impatient and ill-conceived plan of the Officers to use deadly force to make Strickland drop the gun or die, the Opinion reaches a conclusion that is inconsistent with its just completed statement of the law that there is no *per se* rule and there must be a complete factual analysis of the "totality of the circumstances". When the lack of urgency and the ill-advised actions of the Officers are included in the analysis, there is serious question whether they acted with objective reasonableness. This is a question that should be sent to a jury to decide.

## VII. When There Is No Urgency, Officers Must Deliberate and Not Unnecessarily Precipitate the Use of Deadly Force

The law has been clearly stated for decades:

any use of force must be reasonably necessary for achieving the governmental interest. Here, the governmental interest was to find out if the gun was real. Thus, only such force as was reasonably necessary could be used to achieve that purpose. The Opinion, however, ignores its own finding that the Officers unnecessarily escalated the situation, thereby dramatically increasing the *imminent threat* to everyone and *increasing* the amount of force necessary to achieve the government's interest.

Moreover, this was never a split-second case as presented in the Opinion. With every step towards Strickland, the Officers knew that there was an *increasing probability* that he would point the gun at them and they would have to shoot to kill him: i.e., the Officers deliberately increased the *imminent threat* for themselves and Strickland. It was a nonsensical approach antithetical to the government's interest and to their own safety. Despite this obvious fact, the Officers chose to keep moving towards Strickland, raising the level of imminent threat to its maximum. The tragic ending was, frankly, predictable and inevitable.

### A. The Split-Second Decisions Are Distinguishable

The Opinion leads with the following quote "[w]hen someone points a gun at a law enforcement officer, the Constitution 'undoubtedly entitles the officer to respond with deadly force.'" *George v. Morris,* 736 F.3d 829, 838 (9th Cir. 2013)("*George*"). A7. Ironically, that was not the basis of decision in *George*.

In fact, the Ninth Circuit made it clear in *George* that its prior decisions in *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 906 (9th Cir.

2007)("*Long*") and *Scott v. Henrich,* 39 F.3d 912, 914 (9th Cir. 1994)("*Scott*"), both of which are the cornerstone cases upon which the Opinion rests, did not create a *per se* rule that an officer's use of deadly force in response to a suspect being armed with a deadly weapon would always be objectively reasonable. *George* at 838. See also, *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir.2011) (*en banc*). Rather, the Ninth Circuit explained that, even though a suspect may be armed with a deadly weapon, the primary *Graham* factor is whether the officer was objectively reasonable in believing that there was an imminent threat of serious harm or death to the officer or another person. *George* at 838. Applying the foregoing reasoning, the Ninth Circuit found that a jury could find the officers to have violated the Fourth Amendment by employing excessive force in killing the suspect even though he was holding a gun because there were disputed facts about whether he actually raised a gun and pointed at an officer.

The *Long* decision is not in conflict with the reasoning in *George*. In *Long*, the suspect had been on a multi-hour rampage and had actually fired his weapon multiple times, hitting at least two persons. At the final incident scene, Officer Sterling said that he saw the decedent, Long, "raise his rifle to about chest level and fire one shot." It was then reported over the police radio that more shots had been fired at officers. When he heard this radio call, Officer Sterling shot and killed Long.

Certainly the facts in *Long* distinguish it from this case. At least two people had already been wounded by Long, so the Officers knew he had a real gun and was actively using it against people. The officers stayed at a safe distance and tried not to further provoke Long. Officer Sterling only fired

after hearing the radio report of more shots fired and seeing Long raise the gun to chest level and fire a shot. Unquestionably, this was a situation with grave imminent threat that *was not created by any failure of the officers to deliberate or de-escalate*. The situation is inapposite to that of Strickland.

The *Scott* case also presents entirely different facts about the cause and moment of imminent threat. In *Scott*, the police were told by a boy that he has seen a man fire shots as he acted strange and crazy. Officers went to Scott's house and banged on the front door and demanded that the door be opened. The officers heard fumbling with the door lock and then the door opened and the suspect Scott stood in the doorway holding a long gun and then pointed the gun at the officers. Both officers fired at Scott and he was killed. The court found that "in the heat of battle" an officer is not required to use the least intrusive alternative to effect the Fourth Amendment seizure. Rather, the inquiry was about whether the officers acted reasonably.

In *Scott*, the officers were faced with an unknown and deadly *surprise* when they opened the door and a real gun was pointed at them. They only had a split-second to deliberate and the most reasonable action was to defend themselves with lethal force. That is very different from this case where the Officers were aware of the gun before they arrived, the replica gun was visible at all times, and the BB gun not pointed at the Officers as a surprise, but as the obvious outcome of the Officers closing down on Strickland.

### B. Law Enforcement Has A Duty to Deliberate and Consider Tactics Other Than Lethal Force

There is a line of Ninth Circuit decisions holding that when officers have time, they have a duty to deliberate and consider non-force means before they decide to use force, especially deadly force. The Opinion mentions some of these decisions, but never discussed the factual findings or legal conclusions that are most relevant to this case.

In *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001) the Ninth Circuit found that defendant officer Rutherford used excessive force when he fired a cloth-cased shotgun round at the plaintiff. Mr. Deorle was mentally ill, in serious pain, and was acting out-of-control at his home. The police were called by his wife to help her gain control over her husband who was expressing suicidal thoughts. Officer Rutherford shot Deorle as he walked towards the officer and came within a range that Officer Rutherford deemed a danger to himself. In its analysis, the court observed that "[a] desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." Further, the Court stated that "[t]here was no immediate need to subdue Deorle before the negotiators who were part of the response group could arrive and perform their 'essential function'".

Just as in *Deorle*, there was no urgency to the standoff with Strickland. The Officers had all the time they required, but instead, they decided to immediately escalate to a deadly force showdown.

Similarly in *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010)("*Bryan*") the Ninth Circuit observed that "police are required to consider what other tactics if any were available to effect the arrest." Further, it observed that the fact that the suspect did not attempt to flee made even the use of a taser unwarranted. In sharp contrast, the Officers in this case never considered alternative tactics.

Shortly after its decision in *Bryan*, the Ninth Circuit held in *Glenn v. Washington County*, 673 F. 3d 864, 876 (9th Cir. 2011)("*Glenn*") that a "failure to consider 'clear, reasonable and less intrusive alternatives' to the force employed 'militates against finding the use of force reasonable.'" Furthermore, when officers have unlimited time, as they did in this case, they have a duty to make allowance for the suspect's mental illness. *Glenn* at 872.

Again in *Vos v. City of New Port Beach*, 892 F.3d 1024, 1031 (9th Cir. 2018), officers were dispatched to the scene because of the suspect's erratic behavior and subsequently fatally shot him. The Court found that the officers had less intrusive force options available and that less lethal means of stopping the suspect might have been effective. Thus, the officers' choice of tactics which led to the use of deadly force was a significant *Graham* factor that a jury could consider in deciding whether the officers had acted with objective reasonableness in using deadly force. *Vos* at 1032-34.

In *Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019) ("*Nehad*") the Ninth Circuit reviewed a litany of specific factors regarding the reasonableness of the use of force that are similar to the facts present in this case. Specifically, it observed that no serious offense had been committed, there was no risk of flight, there was

time to observe that the individual was mentally unwell, there was no discernable threat by the victim, and the officer could have taken more time to evaluate the situation. The Court rejected the argument that the case should be decided upon a "split-second" theory, holding that [s]ometimes, however, officers themselves may 'unnecessarily creat[e] [their] own sense of urgency.'" It then held that the case presented a question for the jury because "[r]easonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably, 'with undue haste.'" *Nehad* at 1134-35.

Recently in *Rice v. Morehouse*, 989 F.3d 1112 (9th Cir. 2021)("*Rice*") the Ninth Circuit repeated its holdings in *Deorle* and *Glenn* that an officer has a duty to evaluate the need to use force, and further, that this duty included the obligation to consider what tactics were available to resolve a situation peacefully. *Rice* at 1122-1123.

Not one of the foregoing decisions held that the totality of the circumstances should be limited to only the circumstances at the final moment when force was used. In every case, all of the officer's decisions and actions were relevant to the reasonableness of the force employed.

### C. Law Enforcement May Be Held Liable When It Precipitated the Use of Force

In addition to the duties to deliberate and use non-force means before deploying lethal force, the Ninth Circuit has held on several occasions that when the actions of the officers unreasonably and "foreseeably created the need to use it [force]", the

jury can evaluate that failure in determining whether the ultimate use of force was objectively unreasonable. *Winkler v. City of Phoenix*, 849 F. App'x. 664 (9th Cir. 2021) (overruling trial court's use of jury instruction preventing jury from considering whether an officer provoked the plaintiff to resist or created the need to use force).

In *Orn v. City of Tacoma*, 949 F.3d 1167, 1176n1 (9th Cir. 2020) the Ninth Circuit refused to foreclose the possibility of liability where "a police officer unreasonably places himself in harm's way", citing to *Tennessee v. Garner*, 471 U.S. 1, 8–9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

Similarly, in *Nehad* at 1135, the Ninth Circuit held that whether an officer's tactical mistakes created a false sense of urgency was a question for a jury.

In *Torres v. City of Madera,* 648 F.3d 1119 (9th Cir. 2011)("*Torres*"), the Ninth Circuit found that the reasonableness of the officer's use of force was a question for the jury because there was evidence in the record upon which a jury could decide that the officer had unreasonably created her own sense of urgency to use force. *Torres* at 1124-1127.

Similarly, in *Porter v. Osborn*, 546 F.3d 1131 (9th Cir. 2008)("*Porter*") the Court observed that when an officer creates the very emergency that he uses deadly force to resolve, "he is not simply responding to a preexisting situation." Thus, "[h]is motives must then be assessed in light of the law enforcement objectives that can reasonably be found to have justified his actions." *Porter* at 1141.

The Tenth Circuit has applied the same analysis and legal standard as the Ninth Circuit: i.e., an officer's use of force is not reasonable if the officer's conduct creates the need to use force. See *Estate of Ceballas*, 919 F.3d 1204, 1214 (10th Cir. 2019) (holding the reasonableness of the use of force depends not only on whether the officer was in danger, but also on whether the officer's own conduct unreasonably created the need to use force).

In *Banks v Hawkins*, 999 F.3d 521, 526-527 (8th Cir. 2021) the Eighth Circuit held that "material questions of fact remain[ed] as to whether [the suspect's] actions at the time of the shooting, even if dangerous, threatening, or aggressive, posed a threat of serious physical harm" and that "[q]ualified immunity does not protect 'the plainly incompetent'" officer.

The Sixth Circuit has similarly ruled in *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008), holding that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive.").

Again in *Palma v. Johns*, 27 F.4th 419, 429-440 (6th Cir. 2022) the Sixth Circuit concluded that all factors had to be considered when analyzing the use of lethal force against a mentally ill person.

## CONCLUSION

The decision of the Ninth Circuit Court of Appeals is a significant deviation from the long established "totality of the circumstances" test for evaluating the objective reasonableness of the use of force. Despite the Court's protestations to the contrary, the decision moves dramatically towards the establishment of a *per se* rule that if a gun is pointed at an officer, the officer's use of deadly force to eliminate the threat will always be, as a matter of law, objectively reasonable.

It is true that in almost every instance in which an imminent threat to life arises in a split-second, it will be objectively reasonable for an officer to use deadly force to end the threat. However, there will be instances, such as the one presented by this case, in which a complete *Graham* analysis of the entire incident shows that it was the officer's mistaken or wrongful act or omission that directly caused the imminent threat and precipitated the need to use deadly force. In such cases, the question of reasonableness is not for a trial court to decide as a matter of law, but for a jury to decide after considering all of the evidence. That is our system of justice under the Seventh Amendment.

Respectfully Submitted,

s/ Patrick H. Dwyer
Patrick H. Dwyer
Counsel of Record for
Petitioners

## CERTIFICATE OF COMPLIANCE

Estate of Strickland, N.S., and Shawna Alexander,

Petitioners

v.

Nevada County, California,
Sheriff Shannon Moon,
Deputy Brandon Tripp,
Deputy Taylor King,
The City of Grass Valley, California,
Chief Alex Gammelgard,
Officer Brian Hooper,
Officer Dennis Grube, and
Officer Conrad Ball,

Respondent(s)

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains not more than 6,650 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 12, 2023

s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel
for Petitioners

## PROOF OF SERVICE

I hereby certify under penalty of perjury that I caused three copies of the Petition For Writ Of Certiorari in the matter of *Estate of Strickland v. Nevada County, et al*, to be served upon each of the following according to Supreme Court Rule 29.3:

1. Steven J. Renick
   Manning & Kass, LLP
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3. Jerome M. Varanini
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   *Attorney for Wellpath Management, Inc, Brent Weldemere, Richard Donofrio

I declare under penalty of perjury under the laws of the State of California that the foregoing certification is true and correct.

Date: October 12, 2023

s/ Patrick H. Dwyer
Patrick H. Dwyer, Counsel for Petitioners

In The

**Supreme Court Of The United States**

Estate of Gabriel Strickland, et al., Petitioners,

v.
Nevada County, California, et al,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

**Appendix to the**

**Petition for Writ of Certiorari**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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Estate of Gabriel Strickland; et al.,
Plaintiffs-Appellants,

v.

Nevada County; et al., Defendants-Appellees.

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FILED JUL 18 2023 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS
Case No. 22-15761

D.C. No. 2:21-cv-00175-MCE-AC
Eastern District of California, Sacramento

**ORDER**

Before: BYBEE and BUMATAY, Circuit Judges, and BENNETT,* District Judge.

Judge Bumatay has voted to deny the petition for rehearing en banc and Judges Bybee and Bennett have so recommended. Fed. R. App. P. 40. The full court has been advised of the petition, and no judge has requested to vote on whether to rehear the matter en banc. Fed. R. App. 35. The petition for rehearing en banc (Dkt. No. 51), is therefore DENIED.

* The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Estate of Gabriel Strickland, et al.,

Plaintiffs-Appellants,

v.

Nevada County, et al.,

Defendants-Appellees.

No. 22-15761 D.C. No. 2:21-cv-00175-MCE-AC

OPINION

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding
Argued and Submitted February 7, 2023
San Francisco, California
Filed May 31, 2023

Before: Jay S. Bybee and Patrick J. Bumatay, Circuit Judges, and Richard D. Bennett,* Senior District Judge.
Opinion by Judge Bumatay

## SUMMARY**

### Civil Rights

The panel affirmed the district court's dismissal for failure to state a claim of an action brought pursuant to 42 U.S.C. § 1983 and state law alleging that police officers used excessive force when they shot and killed Gabriel Strickland, who was known to the officers to be homeless and mentally ill, after he pointed a black toy airsoft rifle in their direction.

The panel held that, under the totality of the circumstances, it was objectively reasonable for the officers to believe that Strickland posed an immediate threat. Construing the facts in the light most favorable to Strickland, he was carrying a replica gun, disregarded multiple warnings to drop it, and pointed it at the officers. While the misidentification of the replica gun added to the tragedy of this situation, it did not render the officers' use of force objectively unreasonable.

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* The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

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

The panel held that the district court did not abuse its discretion in denying Strickland's estate leave to amend the complaint. The complaint established that Strickland pointed the replica gun's barrel at the officers and so it was objectively reasonable for the officers to respond with lethal force. Under these pleaded facts, it would be futile to allow leave to amend.

---

## COUNSEL

Patrick H. Dwyer (argued), Patrick H. Dwyer Attorney at Law, Penn Valley, California, for Plaintiffs-Appellants.

Steven J. Renick (argued), Mildred K. O'Linn, Lynn Carpenter, and Kayleigh Andersen, Manning & Kass Ellrod Ramirez Trester LLP, Los Angeles, California, for Defendants-Appellees Nevada County, Shannon Moon, Taylor King, Brandon Tripp, and Joseph McCormack.

John A. Whitesides (argued), Derick E. Konz, and Bruce A. Kilday, Angelo Kilday & Kilduff LLP, Sacramento, California, for Defendants-Appellees City of Grass Valley, Alex Gammelgard, Brian Hooper, Dennis Grube, and Conrad Ball.

Jerome Varanini, Trimble Sherinian & Varanini, Sacramento, California, for Defendants-Appellees Wellpath Management Inc., Brent Weldemere, and Richard Donofrio.

## OPINION

BUMATAY, Circuit Judge:

When someone points a gun at a law enforcement officer, the Constitution "undoubtedly entitles the officer to respond with deadly force." *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013). But what if the person points a replica gun that the officer believes is real? In this case, we must examine whether it was objectively reasonable for officers to believe a black toy airsoft rifle pointed in their direction presented an immediate threat justifying the use of deadly force. Based on the facts here, we say yes.

## I.

On December 26, 2019, Gabriel Strickland was arrested by the Nevada County Sheriff's Office and incarcerated at a correctional facility in Nevada City, California. The Sheriff's Office and Wellpath Management, Inc.—the contractor providing medical services at the facility—performed a physical and mental intake assessment. The evaluation concluded that Strickland needed an urgent mental health evaluation, and they kept him in custody for several days. During this time, officers and Wellpath nurses observed that Strickland had active mental health issues and was uncooperative and angry, though a mental health evaluation was not given.

This was not the first time the Sheriff's Office and Wellpath had encountered Strickland. They had held him in custody at that facility several times before, and a Wellpath doctor had diagnosed

Strickland with bipolar disorder, PTSD, and anxiety disorder in 2016. The Sheriff's Office and Wellpath did not refer Strickland to outside providers for further evaluations and did not involuntarily hold him. And after a pretrial release hearing on December 30, 2019, the Nevada County Superior Court released Strickland.

Two days later, on January 1, 2020, the Nevada County Region Dispatch received reports that a man was walking on a residential road near a neighboring town, Grass Valley, with "what appeared to be a shotgun" slung over his shoulder. A Grass Valley Police Department officer, Officer Conrad Ball, responded to the call and found Strickland on the road. Strickland was carrying a black, plastic airsoft rifle marked with an orange tip, which signified that it was a replica, not a real firearm. Along with Officer Ball, Grass Valley Police Department Officers Brian Hooper and Denis Grube and Nevada County Sheriff's Officers Taylor King and Brandon Tripp arrived on scene. They recognized Strickland and knew he was homeless with mental health issues and had been released from custody days before. As a result, the officers would have known that Strickland was likely suffering from a mental health episode and would not likely respond to their commands in a "normal or expected manner."

The officers maneuvered their patrol vehicles around Strickland and surrounded him with guns drawn. They immediately began yelling at Strickland to "drop the gun!" and "drop the fucking gun!" Strickland held the gun away from his body and said, "It's a BB gun." Strickland then slapped

the gun with his hand, making a noise that sounded more like plastic than metal. One of the officers reported to dispatch: "He's saying it's a BB gun." The officers continued to yell commands to "drop the fucking gun, now" and told Strickland "we don't know that's a fake gun." Strickland pointed to the orange tip on the barrel. Officer Tripp responded, "you could have painted that . . . . We don't want to kill you." Strickland replied, "I'm not doing nothing wrong." Until then, Strickland stood with the barrel pointing at the ground.

The officers did not contact their supervisors for advice or request assistance from other officers with crisis training. They also did not attempt to bring a professional negotiator, crisis de-escalator, or mental health provider to engage with Strickland. Instead, Officer Tripp asked the other officers to cover him and started approaching Strickland with Officers Hooper and Ball. Officers Tripp and Ball had their firearms drawn, and Officer Hooper was armed with a taser. Officer Tripp then told dispatch to "tell Grass Valley [Police Department] units to get out of [the] cross-fire." As the officers approached, Strickland dropped down to his knees.

At this point, Strickland stopped pointing the BB gun at the ground. Strickland began pointing the BB gun in the direction of Officers Tripp, Hooper, and Ball. At other times, he pointed it up toward the sky. In response, Officer Hooper deployed the taser, but it failed to attach and disarm Strickland. Seconds later, after Strickland lowered the barrel toward the officers, Officers Tripp, King, and Hooper opened fire, striking Strickland several times. Strickland was taken to a nearby hospital, where he

was pronounced dead.

One year later, Strickland's mother, child, and estate ("Estate") sued on his behalf. The Estate brought excessive force claims against the five police officers, their respective departments, Nevada County, and the City of Grass Valley under 42 U.S.C. § 1983 and state law. It also raised constitutional, federal statutory, and state-law claims against Nevada County, Wellpath, and their personnel for deliberate disregard of Strickland's mental health needs during his incarceration days before the shooting. The district court dismissed the case under Federal Rule of Civil Procedure 12(b)(6).

The Estate timely appealed. We review the grant of a motion to dismiss de novo, "accepting as true all well-pleaded allegations of material fact and construing them in the light most favorable to the non-moving party." *Hyde v. City of Willcox*, 23 F.4th 863, 869 (9th Cir. 2022). Dismissal of a complaint at the 12(b)(6) stage is proper when the plaintiff has failed to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

## II.

The Fourth Amendment prohibits the unreasonable seizure of persons. U.S. Const. amend. IV. Even if a seizure is reasonable in a particular circumstance, how that seizure is carried out must also be reasonable. Graham v. Connor, 490 U.S. 386, 395 (1989). So the Fourth Amendment also prohibits the use of excessive force. *Id.* Our "calculus of reasonableness" in these circumstances "must

embody allowance for the fact that police officers are often forced to make split-second judgments" and we do not apply the "20/20 vision of hindsight." Id. at 396–97. At this stage, our question is whether the officers employed an "objectively unreasonable" amount of force under the "totality of the circumstances." See *Brooks v. Clark County*, 828 F.3d 910, 920, 922 (9th Cir. 2016).

This inquiry requires balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 490 U.S. at 396 (simplified). In Graham, the Supreme Court looked to several factors: (1) "the type and amount of force inflicted," (2) "the severity of the crime at issue," (3) "whether the suspect posed an immediate threat to the safety of the officers or others," and (4) "whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *O'Doan v. Sanford*, 991 F.3d 1027, 1037 (9th Cir. 2021) (citing *Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003)). But this list isn't exhaustive; we may also consider other relevant factors, such as "the availability of less intrusive alternatives to the force employed, whether proper warnings were given[,] and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." *S.B. v. County of San Diego,* 864 F.3d 1010, 1013 (9th Cir. 2017).

## A.

Many of the Graham factors support Strickland.

Strickland was known to officers as homeless and mentally ill. At the time of the incident, it was obvious that he was suffering from a mental health crisis. See *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under Graham, the reasonableness of the force employed.").

Although officers were responding to reports of a man walking in the neighborhood with a shotgun, Strickland was not under suspicion for committing a serious or dangerous crime. At the start of the confrontation with police, Strickland had not yet brandished the gun at anyone or threatened the life or property of others.

Furthermore, assuming it's relevant under Graham, the officers failed to employ de-escalation techniques. They did not wait for supervisors or call in for backup with crisis or mental health training. In fact, the officers seemingly exacerbated the situation by aggressively shouting directions at Strickland upon their arrival. See *Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019) (looking at the officer's role in creating the danger).

And the officers employed "deadly force"—firing several rounds at Strickland and killing him. See *Seidner v. de Vries*, 39 F.4th 591, 596 (9th Cir. 2022) (concluding that "shooting a firearm" is "categorically" deadly force).
So the bulk of the Graham factors favor Strickland. The question is whether the immediacy of the threat that Strickland posed outweighs those

considerations here. We think it does.

B.

Of all the use-of-force factors, the "most important" is whether the suspect posed an "immediate threat." *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010); *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (*en banc*). Because our inquiry is about objective reasonableness, there must be "objective factors" to justify an officer's "fear[] for his safety or the safety of others." *Deorle*, 272 F.3d at 1281. In other words, "the objective facts must indicate that the suspect pose[d] an immediate threat to the officer or a member of the public." *Bryan*, 630 F.3d at 826. "This analysis is not static, and the reasonableness of force may change as the circumstances evolve." *Hyde*, 23 F.4th at 870.

While necessarily a fact-bound question with no per se rules, our prior decisions offer some guidance in evaluating the reasonableness of lethal force in response to a threat. At one end of the spectrum, when a suspect points a gun in an officer's direction, "the Constitution undoubtedly entitles the officer to respond with deadly force." *George*, 736 F.3d at 838; see also *Long v. City & Cnty. of Honolulu,* 511 F.3d 901, 906 (9th Cir. 2007) (officer's use of force was justified when "fellow officers radioed that [the suspect] was yelling threats at them and then radioed that [she] was shooting at them"); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (officers' use of lethal force was not excessive when the suspect held a "long gun and pointed it at them"). So it's well-settled that lethal force is justified if an officer has "probable cause to believe

that [a] suspect poses a significant threat of death or serious physical injury to the officer or others." *Long*, 511 F.3d at 906 (simplified).

Reasonableness also doesn't "always require[] officers to delay their fire until a suspect turns his weapon on them." *George*, 736 F.3d at 838. Officers shouldn't have to "wait until a gun is pointed at [them] before [they are] entitled to take action." *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001). "If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." *George*, 736 F.3d at 838.

At the other end of the spectrum, the Constitution does not tolerate the use of lethal force to "seize an unarmed, nondangerous suspect by shooting him dead" in the absence of probable cause of a threat of serious physical harm. *Torres v. City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). As we've said, it is "clearly established that shooting a nonthreatening suspect would violate the suspect's constitutional rights." *Tan Lam v. City of Los Banos*, 976 F.3d 986, 1001 (9th Cir. 2020).

These principles apply even when officers are reasonably mistaken about the nature of the threat. "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of" an immediate threat, and "in those situations courts will not hold that they have violated the Constitution." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Take the example given by the Court: "If an

officer reasonably, but mistakenly, believed that a suspect was likely to fight back, . . . the officer would be justified in using more force than in fact was needed." Id. at 205. Thus, the Constitution even allows for officer's action that resulted from a reasonable "mistake of fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). When an officer's "use of force is based on a mistake of fact, we ask whether a reasonable officer would have or should have accurately perceived that fact." *Torres*, 648 F.3d at 1124.

Here, the tragedy of Strickland's death was made all the more tragic because it turns out that he was only carrying a plastic, airsoft replica gun. So we are tasked with determining whether the officers reasonably concluded that Strickland was an immediate threat even though he merely possessed a replica gun. In the light most favorable to Strickland, we conclude that the officers' mistaken belief that Strickland possessed a dangerous weapon was reasonable and they were justified in the use of deadly force when he pointed it at them.

As is often the case with officer-involved shootings, officers met a "tense, uncertain, and rapidly evolving" circumstance when they confronted Strickland. *Graham*, 490 U.S. at 397. They found him on a residential street carrying what appeared to be a firearm. The officers remembered Strickland from his prior detentions, and they knew he suffered from mental health issues. Compounding the situation, as the complaint alleges, his mental challenges were so severe that he was "not likely to respond to directions in a normal or expected manner." After surrounding him, the officers

immediately ordered him to put down the gun. The officers cautioned Strickland that they did "not want to kill [him]" and repeatedly yelled at him to "drop the gun." Strickland did not comply. Instead, while pointing the replica gun's barrel at the ground, he explained, "I'm not doing nothing wrong."

After continued warnings, three officers approached Strickland with their firearms drawn. Strickland dropped to his knees, continuing to hold the gun. Strickland then began pointing the replica gun in the direction of the approaching officers. One officer tried tasing Strickland but failed to disable him. A few second later, the three officers fired on Strickland, striking him several times and killing him. The whole encounter from start to finish lasted a little more than three minutes.

The pivotal moment occurred when Strickland began pointing the replica gun in the officers' direction. At that point, they had "probable cause to believe that [Strickland] pose[d] a significant threat of death or serious physical injury" to themselves and it became objectively reasonable for them to use lethal force. *Garner*, 471 U.S. at 3. As we've said, when a suspect points a gun in the direction of officers, they would be justified to use deadly force. See *George*, 736 F.3d at 838.

This analysis doesn't change because the weapon turned out to be a replica given the officers' reasonable belief that Strickland possessed a real firearm. They were called to the scene based on reports of a man walking down a residential street with what appeared to be a shotgun. When officers arrived, they saw Strickland armed with the black

replica gun—as with all replicas, it was presumably intended to look like a real firearm. According to the complaint, from its appearance, the only indication that the replica was not real was its orange-painted tip. Although Strickland tried to convince officers that the object was "a BB gun," even slapping it to make a plastic sound, officers disbelieved him. They responded, "we don't know that's a fake gun" and suggested that Strickland "could have painted" the orange tip. The officers were reasonably justified in not taking Strickland's assurances at face value. *Cf. Blanford v. Sacramento County*, 406 F.3d 1110, 1116 (9th Cir. 2005) (finding it objectively reasonable for officers to attempt to "secure the weapon first" when confronting a suspect who might be "mentally disturbed or under the influence of a controlled substance"). After all, misplaced trust in this circumstance could be fatal for the officers.

We note that the facts here differ significantly from other cases when we've held it unreasonable for officers to use lethal force when encountering a replica or toy gun. In *Nicholson v. City of Los Angeles*, 935 F.3d 685 (9th Cir. 2019), for example, we denied qualified immunity to an officer who shot a suspect with a similar plastic, orange-tipped airsoft gun, but we did so because of the officer's failure to deliberate. *Id.* at 693. In that case, the officer saw a group of teenagers in an alley with what looked like a gun. *Id.* He immediately ran down the alleyway without consulting his partner and fired his weapon toward the suspect, ultimately striking an innocent bystander. *Id.* We did not find it dispositive that the gun turned out to be a "toy"; instead, it was conclusive that the officer did not see the suspect "point it at anyone" and nothing

suggested the suspect "was likely to harm anyone." *Id.* at 694. So our decision didn't hinge on the misidentification of the gun.

Likewise, this case differs from Estate of *Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017). In that case, whether a suspect with a toy gun posed an "immediate threat" was in dispute, which precluded qualified immunity at summary judgment. I*d.* at 1011, 1023. There, an officer saw a teenager walking with a toy gun, which looked like an AK-47. Id. at 1010. The officer yelled at the teenager to "drop the gun" one time from behind. *Id.* As the teenager was turning toward the officer, the officer fired eight shots in quick succession at him. *Id.* at 1003. And the parties disputed key facts: whether "the gun was pointed straight down at the ground, [whether] the barrel . . . rose at any point to a position that posed any threat to . . . the officer," and "if [the teenager's] finger was on the trigger." *Id.* at 1010–11. Once again, our decision didn't turn on the mistaken identification of the gun. Rather, we determined that a reasonable jury could conclude that the teenager did not pose an immediate threat and that the use of deadly force was not objectively reasonable. *Id.* at 1011.

Here, under the totality of the circumstances, it was objectively reasonable for the officers to believe Strickland posed an immediate threat. In the light most favorable to Strickland, he was carrying a replica gun, disregarded multiple warnings to drop it, and pointed it at the officers. *Cf. County of Los Angeles v. Mendez*, 581 U.S. 420, 425–26 (2017) (observing that the Ninth Circuit held that a shooting of a person with a BB gun was reasonable

given the officers' belief that the individual had a gun and was threatening them while reversing on other grounds). While the misidentification of the replica gun adds to the tragedy of this situation, it does not render the officers' use of force objectively unreasonable.

The Estate argues that the excessive force claim cannot be adjudicated at the Rule 12(b)(6) stage because of the fact-intensive nature of this inquiry. We disagree. At the 12(b)(6) stage, we take the Estate's well-pleaded factual allegations as true and construe them in Strickland's favor. See *Hyde*, 23 F. 4th at 869. But even under this favorable standard, the Complaint establishes that it was objectively reasonable for the officers to perceive an immediate, deadly threat, permitting them to employ lethal force in their own defense. The Estate pleads that Strickland was carrying a toy gun that resembled a real firearm, that he ignored multiple commands to drop it, and that he pointed it at the officers during a tense confrontation. When he did so, the officers were left with only an instant to act. They were not required to "delay their fire" until they learned whether the gun was real. *George*, 736 F.3d at 838. Given the immediacy of the threat presented by these allegations, the Estate cannot state a plausible claim for excessive force, regardless of whatever additional facts Strickland might allege.

Because we agree with the district court that Strickland's Estate failed to state an excessive force claim, we do not address Appellees-Defendants' qualified immunity arguments.

C.

We also hold that the district court did not abuse its discretion in denying the Estate leave to amend the complaint. "Although a district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations, dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (simplified). We grant the district court "particularly broad" discretion to deny leave to amend when the plaintiff has already had a chance to amend, as here. Id. The Estate argues that it should be given another chance to amend the complaint. It contends that the exchange of discovery could reveal additional evidence about the circumstances of Strickland's shooting and the use of lethal force. But pleading standards must be met before "unlock[ing] the doors of discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Here, the complaint establishes that Strickland pointed the replica gun's barrel at the officers and so it was objectively reasonable for the officers to respond with lethal force. See *Long*, 511 F.3d at 906. Under these pleaded facts, it would be futile to allow leave to amend. See *Bonin v. Calderon,* 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend.").

## IV.

We can all agree that the circumstances of Gabriel Strickland's death are tragic. But under the facts alleged, the officers' use of lethal force was

objectively reasonable under the totality of the circumstances. Thus, the Estate's excessive force claim was properly dismissed. See *Graham*, 490 U.S. at 396–97. While the Estate did not offer specific arguments challenging the district court's dismissal of its other claims, it concedes that those causes of action are tied to the excessive force claim. As a result, we affirm the dismissal of all claims against all Appellees-Defendants.

**AFFIRMED**.

C.A. Case No. 22-15761

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Estate of Gabriel Strickland, et al., Plaintiffs – Appellants

vs.

Nevada County, et al., Defendants – Appellees.

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Appeal From the United States District Court,
Eastern District Of California,
The Honorable Morrison C. England
Civil Case No. 2:21-CV-00175-MCE-AC

# APPELLANTS' OPENING BRIEF

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## Statement of the Issues Presented for Review

The issues presented for review are:

1. Whether the District Court erred when it failed, as required under *Graham v. Conner*, to analyze all of the allegations in the First Amended Complaint ("FAC") that comprised the totality of the circumstances for the use of deadly force, and instead, focused on just the last moment of the incident.

2. Whether the District Court erred when it failed to consider the FAC's allegations that, if proved at trial, demonstrated that the acts and omissions of the Officers were objectively unreasonable and were the precipitating cause for the use of deadly force.

3. Whether the District Court erred by granting a motion to dismiss when there were numerous questions of fact that a jury would need to weigh to decide the reasonableness of the officers' actions.

4. Whether the District Court erred by denying leave to amend when discovery was substantially incomplete.

## Summary of the Argument

### A. The Officers' Conduct Was Objectively Unreasonable

The final moment of a deadly force incident is not taken in isolation. It has to be analyzed in the context of the totality of the circumstances that led to that final moment and the use of deadly force.[2] This has been the law for decades.

The District Court erred when it ignored the FAC's allegations showing that there was no imminent threat or urgency, the Officers failed to take any de-escalation measures, and within two minutes escalated the incident with an armed frontal assault that was almost certain to result in serious injury or death. Looking at the totality of the circumstances, it was the Officers who precipitated the use of deadly force and this was objectively unreasonable.

Appellees make the simplistic argument that only the final moment counts when evaluating the totality of the circumstances, and when just the last moment is considered, that their use of deadly force was objectively reasonable. The problem is that this

[2] The totality of the circumstances analysis is analogous to analyzing causation in the typical tort context, except that it is fashioned around the specific issues presented by 42 U.S.C. §1983. In a fatal car accident, all of the factors that caused the crash such as the driver's condition, speed of the car, traffic infractions, mechanical failure, road signs, or faulty stop lights, must be looked at, not just what happened in the last moment before impact. That is the job of the jury.

argument ignores the fact that it was the Officers that created that final moment by escalating, not de-escalating, the crisis. If the Officers had followed the procedures in GVPD Policy 464, the use of deadly force could have been avoided.

The task for the Officers was to verify if the replica gun was, as Gabriel claimed, a BB gun and not a real gun.[3] There were a number of ways to accomplish this,[4] but the Officers just kept yelling at him to "drop the gun." It was obvious that Gabriel was in a mental health crisis that prevented him from complying, so continuing to yell commands made no sense. The positive aspects of the situation were that Gabriel kept talking, did not try to flee, and did not brandish the replica gun. This gave the Officers time. They needed to keep the situation calm and negotiate a way to verify the gun.

Unfortunately, the Officers were controlled by the situation rather than controlling the situation. After just two minutes, Deputy Tripp commanded the assault and the four other Officers simply followed his orders. Tragedy became almost inevitable with that decision.

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[3] The Officers acknowledged that there was an orange tip, but stated they did not know if that was just painted on. [ER70; FAC ¶¶69-75]

[4] For example, the Officers could have used binoculars or even the scopes on their long guns to examine the tip at a safe distance.

### B. The Allegations in the FAC Raised Crucial Questions For a Jury

Next, the District Court erred by ignoring judicial precedent cited by Appellants that a court should not grant a motion to dismiss when, as in this action, there are numerous factual contentions for a jury to evaluate in deciding whether the use of force by the Officers was reasonable. [ER 30] Instead, the District Court substituted its opinion as the only analysis that was necessary.

### C. Further Discovery Was Necessary and Leave to Amend Was Appropriate

Finally, the District Court erred by denying leave to amend. Appellants made it clear in their Opposition that significant additional discovery was necessary to develop the facts about the incident, and that if Appellees' motion to dismiss were granted, leave to amend was requested. [ER 44] The District Court ignored this request and decided that its subjective interpretation of the totality of the circumstances was the only possible way the incident could ever be understood. This was error.

## Argument of the Case

### I. Applicable Law

#### A. Motions to Dismiss Under FRCP 12(b)(6) and 42 U.S.C. §1983

The federal system is one of notice pleading under FRCP 8(a)(2) and the court may not apply a heightened pleading standard. *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126 (2002). In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) 129 S.Ct. 1937, 173 L.Ed.2d 868 ("*Iqbal*"), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), 127 S.Ct. 1955, 167 L. Ed2d 929 ("*Twombly*") .

To survive a FRCP 12(b)(6) motion, a complaint must articulate "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Although a pleading need not contain "detailed factual allegations," it must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (Emphasis added). *Iqbal* at 678.

To state a 42 U.S.C. §1983 claim, a plaintiff must plausibly allege that a person acting under color of state law deprived them of a federal constitutional or statutory right. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 180 (1997), 118 S.Ct. 523, 139 L.Ed2d 525.

### B. The Reasonableness of the Use of Force Is a Jury Question

In excessive force cases under Section 1983, the courts have consistently denied both FRCP 12(b)(6) and summary judgment motions when, as in this case, there are disputed facts regarding whether the use of deadly force was reasonable. When there are disputed facts, the court must allow the jury to decide the issue. The Ninth Circuit made this very clear in *Glenn v. Washington County*, 673 F. 3d 864, 871 (9th Cir. 2011) where, in holding that there were genuine issues of material fact about the use of deadly force that a jury should decide, it stated that "[b]ecause [the excessive force inquiry] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly," quoting from *Smith v. City of Hemet,* 394 F. 3d 689, 701(9th Cir. 2005).

Similarly, in *Lam v. City of Los Banos*, 976 F. 3d 986, 997 (9th Cir. 2020), the Court of Appeal upheld a jury's special finding that the use of force under the Fourth Amendment was unreasonable. The Court, citing its prior decisions, found that because questions about the reasonableness of the use of force are "not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury." See also, *Nehad v. Browder*, 929 F.3d 1125, 1140 (9th Cir. 2019); *Barnard v. Theobald*, 721 F.3d 1069, 1075-1076 (9th Cir. 2013); and *Santos v Gates*, 287 F. 3d 846, 853 (9th Cir. 2002).

### C. Use of Force Analysis: The Totality of Circumstances

The Supreme Court's decision in *Graham* sets forth the analysis to be used to determine whether the use of force by an officer is objectively reasonable. Under *Graham*, a multi-part test is necessary to ascertain the "totality of circumstances" around the use of force. The *Graham* analysis highlights three factors to consider first: "(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resisted arrest or attempted to escape." *S.B. v. County of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017) (citing *Graham*, 490 U.S. at 396). In a Fourth Amendment context, the officer's actions must be evaluated against an objectively reasonable standard in view of the facts and circumstances confronting the officers. *Graham* at 397.

In addition, Graham made clear that the three factors it highlighted are not exclusive and other factors should be evaluated as circumstances require. See e.g., *Glenn v. Washington County* at 872. Indeed, "[t]he question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of all the relevant circumstances." *Smith v. Hemet*, 394 F.3d 689, 701 (9th Cir. 2005)(*en banc*) ("*Smith*"), quoting from *Hammer v. Gross*, 932 F.2d 842, 846 (emphasis in original).

Where the government's intrusion is the taking of a life, then the government's interest must equal or exceed that right. *Graham* at 396; *Longoria v. Pinal County*, 873 F. 3d 699, 705 (9th Cir. 2017).

## II. The District Court Erred When it Failed To Discuss the Factual Allegations That Described the Totality of the Circumstances

Appellants' Opposition to the Motion to Dismiss the FAC described ten relevant Graham factors among the FAC's factual allegations, along with controlling appellate decisions, that the District Court should have considered in ruling on the Motion. [ER 31-40]. The District Court ignored all of these factors and the cited authority, and instead, made a single conclusory statement that "while Strickland's mental health is a factor, 'it was not objectively unreasonable for officers to consider the presence of a deadly weapon a priority.'" [ER 14]

The failure to review and analyze the applicability of each of the *Graham* factors to obtain a correct picture of the totality of the circumstances at the incident scene that caused the senseless shooting of Gabriel is grounds for reversal.

### A. Review of the Ten Graham Factors Alleged in the FAC

The following are the ten *Graham* factors raised by Appellants:

1. **There Was No Crime** – The absence of any report of a crime carries substantial weight in evaluating the reasonableness of the use of force. See *Vos v. City of New Port Beach*, 892 F.3d 1024, 1031 (9th Cir. 2018) ("*Vos*") and *Glenn v. Washington County* at 874. In *Vos*, the officers were dispatched to the scene because of the suspect's erratic behavior. Similarly, the Officers in this instance were not responding to the commission of a crime because no crime was reported by dispatch and Gabriel was not in progress of committing any crime at the incident scene. There was no threat to public safety and there was no urgency to the situation. [ER 69, 73; FAC ¶¶ 67, 93]

2. **Gabriel Never Tried to Flee** – Whether the suspect tried to flee is another factor of great weight. Vos at 1031; *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010)("*Bryan*")(Ninth Circuit found that the suspect did not attempt to flee the scene and there was insufficient reason to employing a taser against him). Gabriel never tried to hide, evade, or flee the scene. [ER 73; FAC ¶ 93]

3. **There Was No Imminent Threat** – The most important of the Graham criteria is whether the suspect's behavior posed an immediate threat to the officers or other persons. *Vos* at 1031; *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017)(finding that suspect had been wounded, was on the ground, and a reasonable jury could find that there was no imminent threat to support a second volley of bullets fired at the suspect); *Longoria v. Pinal County*, 873 F. 3d 699, 706-708 (9th Cir. 2017) ("*Longoria*")(Court of Appeal holding that immobilized suspect was surrounded by officers and it was a question for the jury whether further use of force was reasonable ). The FAC makes clear that Gabriel never hurt or threatened to hurt anyone or anything. There was no urgency to the situation and there was no imminent threat to anyone. [ER 69, 73; FAC ¶¶ 67, 93]

4. **There Was Time to Deliberate** – Because there was no imminent threat and no urgency, the Officers had no practical limit on the amount of time to resolve the situation. [ER 73-74; FAC ¶¶ 93, 95-98] The failure of Officers to take their time and deliberate about how to resolve the situation without using force was a crucial error. See e.g., *Nunez v City of San Jose*, 381 F. Supp. 1192, 1210-1211 (N.D. Cal. 2019)(District Court found that there was a genuine dispute for a jury as to whether the officers had time to deliberate about the use of force, and if so, the jury could consider this factor in deciding reasonableness).

5. **Duty to Evaluate Alternatives to Use of Force** – Because the Officers had all the time they needed to evaluate before reacting, they had a duty to calmly analyze the situation, follow standard procedures, and obtain the assistance of supervisory personnel and/or trained negotiators to obtain an independent and experienced perspective about how to resolve the matter. See *Rice v. Morehouse*, 989 F.3d 1112, 1124 (9th Cir. 2021)(Court of Appeal held that "failure to consider 'clear, reasonable and less intrusive alternatives' to the force employed 'militates against finding the use of force reasonable,'" citing to *Glenn v. Washington County* at 876; see also, *Deorle v. Rutherford,* 272 F.3d 1272, 1282-83 (9th Cir. 2001)(Court of Appeal observed that "[n]othing in the record before us suggests that [officer] Rutherford considered other, less dangerous methods of stopping Deorle" and "[c]onsidering all of the circumstances, at the time Rutherford fired, the governmental interest in using force capable of causing serious injury was clearly not substantial").

6. **Failure to Follow Policies** – The Officers had unlimited time to review and implement applicable procedures for a mental health crisis like Policy 464. The Appellee Officers failed to review any policies or procedures and then ignored the very clear written policies and procedures in Policy 464. Instead, they launched a frontal assault which was almost certain to result in Gabriel and/or the Officers being seriously injured or killed.

The death of Gabriel was almost 100% certain when the Officers chose this course of action. See e.g., *Glenn v. Washington County* at 875, where the Ninth Circuit discussed the county's use of force written policy and observed that according to the policy directive, the force used was not proportional to the situation and the use of a beanbag was not warranted.

7. **Allowance for Mental Health Crisis** – The Officers had unlimited time, and therefore a duty, to make allowance for the suspect's mental illness. *Glenn v. Washington County* at 872 (Ninth Circuit observed that "'[e]ven when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force,' 'the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual,'" quoting from *Deorle* at 1283); Longoria at 708. In this case, the Officers were aware of Gabriel's mental health issues, but made no allowance for his mental condition before starting the frontal assault. [ER 69, 72-73; FAC ¶¶ 65, 89, 91]

8. **Failure to De-escalate** – The Officers ignored the proven non-force means to resolve the stand-off as laid out in Policy §464. These de-escalation techniques emphasize calm, deliberative thinking about how to control the situation.

Moreover, these policies are designed to protect officers and avoid unnecessary risk to their safety. [ER 54-60, 144-148; FAC ¶¶ 35-40, FAC Ex. 6] The Officers acted without thinking and unnecessarily placed themselves in potentially grave danger for no tactical purpose, contrary to Policy 464 which advises against such type of actions. [ER 74; FAC ¶ 100] This was a classic example of officers being controlled by the situation rather than controlling the situation.

9. **Duty to Use Less Intrusive Alternatives** – Officers should use less than lethal alternatives whenever possible. *Glenn v. Washington County* at 872. Here for example, the Officers could have waited for superiors and called for a crisis negotiator and/or mental health team, but they did nothing to de-escalate. Without provocation from Gabriel or any exigent circumstance, the Officers proceeded after just two minutes of non-violent stand-off to use a frontal assault employing deadly force.

10. **The Officer's Actions Prior to the Use of Force** – As already discussed, the courts have held that when the action of the officers are unreasonable and "foreseeably created the need to use it [force]", the jury can evaluate that failure in determining whether the ultimate use of force was objectively unreasonable. **Winkler v. City of Phoenix**, 849 F. App'x. 664 (9th Cir. 2021) (overruling trial court's use of jury instruction preventing jury from considering whether an officer provoked the plaintiff to resist or created the need to use force);

*Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019)("*Nehad*")(jury question as to whether officer's tactical mistakes created false sense of urgency); *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011)(officers creating their own sense of urgency) ("*Torres*"); *Porter v. Osborn*, 546 F.3d 1131, 1141 (9th Cir. 2008) ("When an officer creates the very emergency he then resorts to deadly force to resolve, he is not simply responding to a preexisting situation.")("*Porter*"). The Tenth Circuit applies the same rule, see *Estate of Ceballas*, 919 F.3d 1204, 1214 (10th Cir. 2019); and so does the Eighth Circuit, see *Banks v Hawkins*, 999 F.3d 521, 526-527 (8th Cir. 2021).

There is not a single *Graham* factor in this action that supported the Officer's decision to use a frontal assault with deadly weapons after just two minutes of verbal interaction with Gabriel.

### B. Alternative Approaches Available to the Officers

As set forth in the FAC, there were many alternative actions the Officers could have taken to resolve the situation peacefully. [ER 57-59, FAC ¶40] Here are some of the options set out in the FAC:

(1) call for a trained negotiator to talk to Gabriel;

(2) call for a mental health professional to advise how to approach Gabriel in this particular mental state;

(3) call senior officers for advice and/or

additional resources;

(4) be calm and patient and allow time for more experienced help to arrive;

(5) turn off flashing lights, sirens, and keep the tone of voice calm and conversational;

(6) keep talking to Gabriel and listen to him for a possible resolution to the stand-off that was agreeable to both sides;

(7) ask Gabriel if he had any suggestions for how the police could verify that it was a replica gun;

(8) consider strategic disengagement.

The officers tried none of these other options or techniques to deescalate, but instead, almost immediately escalated to deadly force.

### C. Prior Judicial Decisions Informed the Officers that Their Use of Force Was Unreasonable

There are many decisions that instruct law enforcement about what tactics are and are not reasonable. The following example cases concerned similar situations to this case. In each one, the use of force was found not only found unreasonable, but the Court of Appeals instructed law enforcement about what non-force means could have been used.

1. In *Deorle v. Rutherford*, the Ninth Circuit found that the threat to the officer was minimal where, although the victim approached the officer with an object in his hand, the officer knew backup was on the way, the officer had a clear means of escape, and the officer did not consider less dangerous methods of stopping the victim. *Id.* at 1280-82. The court observed that "the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." Further, the court noted that "increasing the use of force may, in some circumstances at least, exacerbate the situation." Continuing, the Deorle court found that "[i]n the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis." *Id.* at 1282-1283. In summation, the court found that, although there was not direct precedent informing the officer, no reasonable officer would have believed that Rutherford's shooting of the victim was appropriate or lawful, and therefore, qualified immunity would not apply as a matter of law. *Id.* at 1286.

2. In *Smith v. City of Hemet* at 702, the Ninth Circuit found that the "most important single element" is whether there is an immediate threat to safety. In this case, the victim ignored commands to show if he had a weapon and he resisted arrest. The court held that absent an immediate threat to safety of the officers (or someone else), the failure to follow

a command to drop a weapon does not justify the use of deadly force.

3. In *Bryan v. MacPherson* at 831, the Ninth Circuit held that "police are required to consider what other tactics if any were available to effect the arrest."

4. The requirement to consider other non-deadly tactics was reinforced in *Vos v. City of New Port Beach* at 1032-34, where the Ninth Circuit found that the officers did not show that less lethal means of stopping the suspect would have been ineffective, and it was a question for the jury whether the suspect posed an immediate threat to the officers' safety.

5. In *Glenn v. Washington County* at 873, the decedent, who had a pocket knife, had not previously attempted to hurt anyone and had not moved toward anyone else until after he was shot with a beanbag gun. The Ninth Circuit did not apply qualified immunity and held that a reasonable jury could find a constitutional violation.

6. In *Hayes v. City. of San Diego*, 736 F.3d 1223, 1227 (9th Cir. 2013), the victim, upon command by the officers, revealed a large knife, took a step towards the officers, and the officers shot the victim. The Ninth Circuit found that there was no clear evidence that the victim was threatening the officers with the knife, and thus, the use of force was not objectively reasonable as a matter of law and the officer was not entitled to qualified immunity.

7. In *George v. Morris*, 736 F.3d 829, 832-33 (2013), which arose from a domestic disturbance call, there was a question of material fact as to whether the decedent, who was using a walker, had raised his gun toward the responding officers. The court also noted that the wife had not previously been assaulted and was not near the decedent at the time of the officer shooting him.

8. In *Nehad v. Browder* at 1140-114, the Ninth Circuit reviewed a litany of specific factors regarding the reasonableness of the use of force that are similar to this case. In deciding not to apply qualified immunity, it cited to *Deorle v. Rutherford* and observed that no serious offense had been committed, there was no risk of flight, there was time to observe that the individual was mentally unwell, there was no discernable threat by the victim, and the officer could have taken more time to evaluate the situation.

### D. Summary of Argument on the Totality of the Circumstances

Applying the well-established law to the factual allegations in the FAC, it is unquestionable that the FAC meets the pleading requirements for a §1983 action for excessive force and the granting of the Motion to Dismiss was error. There is just too much evidence and too many factual issues to weigh as to whether the Officers acted reasonably. This is a task for a jury, not the District Court.

## III. The District Court Failed to Consider the Allegations Showing the Acts and Omissions of the Officers To Be the Precipitating Events Causing the Use of Deadly Force

### A. The Replica Gun Was Always in Plain Sight and It Was Predictable in the Final Moment Created by the Officers that Gabriel Would Point the Replica at the Officers

The foregoing analysis of the Graham factors show that it was the Officers' hasty and inappropriate decision to make an armed frontal assault that caused the use of deadly force. There was no crime, no attempt to flee, and no imminent threat. The existing policies for the use of force, especially in a mental health crisis, instructed the Officers to act calmly, be patient, not to yell at the suspect, avoid taking action(s) that would provoke the use of force, and call supervisors for support and instruction.

Two facts among the many allegations in the FAC stand out. First, the Officers were not surprised by the sudden appearance of a possible gun: Gabriel held the replica out in the open and it was in plain sight the entire time. The Officers knowingly chose to march directly towards Gabriel and the gun.

Second, it would have been obvious to any law enforcement officer, indeed obvious to any reasonable person, that a direct frontal assault at the time and manner done in this case was almost certain to lead to the use of deadly force and the infliction of serious or fatal injury to Gabriel and/or the Officers. Of all of the available options, the Officers in this case choose the worst possible approach. It was a foolish act that cost Gabriel his life and could have killed or wounded one or more of the officers.

### B. When Officers are the Precipitating Force The Law Holds Them Liable for the Consequences

When the acts and omissions of the Officers are the precipitating force, the law finds such use of force objectively unreasonable and holds the officers responsible for the wrongful taking of life. See Winkler v. City of Phoenix, et al., discussed at Section II.A.10, supra. Of particular note is *Porter v. Osborn* at 1141, which held that "[w]hen an officer creates the very emergency he then resorts to deadly force to resolve, he is not simply responding to a preexisting situation." Appellants presented the foregoing arguments and authority to the District Court in their Opposition. [ER 25-27]. However, the District Court ignored them. The result was reversible error.

## IV. The District Court Erred by Granting the Motion To Dismiss When There Were Numerous Facts That a Jury Needed To Evaluate To Decide the Reasonableness of the UOF

### A. Amendments to the Complaint

The District Court's ruling ignored the extensive changes in the FAC from the Complaint that related directly to whether the Officers' use of force was reasonable. These changes included the following new and/or revised allegations in the FAC:

#### 1. Inadequate Policies

Discovery revealed that Nevada County did not have adequate policies for the use of force in circumstances involving persons with mental disabilities. [ER 54-55; FAC ¶¶ 35-36] Discovery did, however, reveal that the GVPD had adequate polices for the use of force and how to respond to persons having a mental health crisis. These allegations were included in the substantial amendments in the FAC. [ER 55-59; FAC ¶¶ 37-40]

#### 2. Failure To Train

Discovery revealed that neither Nevada County nor the Grass Valley Police Department had done any significant training of their field officers in either the use of force or in behavior health matters that would teach field officers how to respond to a person that was having a mental health crisis.

Appellants analyzed all of the available POST[5] training records and prepared two detailed exhibits to the FAC showing the enormous training failures prior to the death of Gabriel. These same two exhibits then show that after the shooting of Gabriel on January 1, 2020, both the NCSD and the GVPD engaged in a wholesale re-training of their entire respective forces. For the NCSD: [ER 60-61, 150-152; FAC ¶¶ 41-43, FAC Ex. 5]. For the GVPD: [ER 64-65,154; FAC ¶¶ 51-54, FAC Exs. 6 & 7]

### 3. Specific Failures of the Officers

Based upon written discovery, the FAC contains more detailed allegations about the specific acts and omissions of the Officers that led to the unnecessary use of deadly force. For example:

The Officers ignored the fact that Gabriel's continuing to talk was a very good indicator that negotiation and de-escalation would resolve the matter. [ER 73-74; FAC ¶ 94-95]

The Officers never communicated with a supervisor or requested a negotiator or mental health professional to advise or assist even though there was no time constraint. [ER 74; FAC ¶ 96-98]

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[5] POST is the acronym for the California Commission on Peace Officer Standards and Training that keeps records of all law enforcement officer training. [ER 60, 64; FAC ¶¶ 42, 51]

Without tactical reason, Deputy Tripp decided to march directly upon Gabriel after just two minutes at the scene. Deputy Tripp ordered all officers to cover him and the other officers never questioned this order or suggested an alternative. [ER 74; FAC ¶ 99]

All of the Officers ignored good police tactics by moving from their safe positions and marching openly toward Gabriel. [ER 74-75; FAC ¶100] This needlessly put all of the Officers in grave danger.

### 4. Failure To Follow the Policies That Did Exist

Discovery revealed that none of the Officers followed Policy §464, which provided a full suite of de-escalation tools and non-force means for this very type of situation. [ER 73-74; FAC ¶¶ 93-99]

### 5. Failure To Intercede

Officers King, Grube, Ball, and Hooper failed in their legal duty to intercede with Deputy Tripp to stop the violation of Gabriel's constitutional rights. See *United States v. Koon*, 34 F.3d 1416, 1447n25 (9th Cir. 1994), *O'Neil v. Krzeminski*, 839 F.2d 9, 11-12 (9th Cir. 1988). In particular, the GVPD Officers, who were subject to Policy 464, certainly should have told Deputies Tripp and King about the mandates and techniques in Policy 464 for dealing with such a mental health crisis, and if necessary,

they should have interceded early in the incident and stopped the yelling and other escalating actions and suggested de-escalation techniques. Further, they should have refused Deputy Tripp's command to "cover me" when he undertook a frontal assault. [ER 74; FAC ¶ 99] Deputy Tripp was the least experienced officer at the scene and had been involved in a previous wrongful use of force with his firearm about a year before. [ER 72; FAC ¶ 88].

#### 6. Failure of the Chain of Command

Discovery also revealed that there were inadequate chain-of-command and inter-agency operating procedures. [ER 67-68; FAC ¶¶ 61-63] This resulted in NCSO Deputy Tripp, who had only two years experience, taking command of the incident when far more experienced GVPD officers with six to eighteen years were on scene.[6]

### B. The Revised Allegations Presented Questions for a Jury

This Court of Appeals has repeatedly held "that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly ..." because the reasonableness inquiry under Graham "nearly always requires a jury to sift

[6] Ironically, written discovery revealed that GVPD supervisory personnel were en route and just seconds away from being able to take command. However, there had not been time to add this new information into the FAC. Another minute of patience by the Officers would have put supervisory personnel in control of the incident.

through disputed factual contentions, and to draw inferences therefrom ..." *Byrd v. Phoenix*, 885 F.3d 639, 642 (9th Cir. 2018); *Glenn v. Washington County* at 871; *Smith* at 701; *Santos v. Gates*, 287 F. 3d 846, 853 (9th Cir. 2002). Appellants argued this point to the District Court. [ER 30]

Despite all the new factual allegations in the FAC and the ten *Graham* factors cited by Appellants as leading to the use of deadly force, the District Court did not even consider having a jury sort through all of the factual complexity of this case and make the final determination about the reasonableness of the Officers' actions. It was error for the District Court, based upon a nominal factual analysis, to exercise such extreme gate keeping and dismiss this case.

## V. The District Court Erred by Denying Leave To Amend

When Discovery Was Substantially Incomplete Appellants informed the District Court that they had "not yet conducted any depositions and written discovery is not complete." Accordingly, Appellants requested leave to amend if the Court granted the Motion on any count. [ER 44]

The District Court did not address the early status of discovery and just dismissed the case.[7] [ER 18]. This was an error.

[7] For example, video that was produced, but had not been fully analyzed by Appellants' experts in time for inclusion in the FAC, shows that at the final moment Gabriel was in the open and on his knees facing the oncoming Officers. When the Officers continued moving in after the taser failure to within 10-15 feet, Gabriel appears to have acted with a delusion of self-defense and lowered the barrel of the replica gun towards the Officers. Officer Ball, apparently realizing that the gun was not real, dropped his gun, took out his baton, and swatted it from Gabriel's hands. However, Officers Tripp and Hooper opened fired. Further discovery is obviously needed to prepare this case.

## VI. Conclusion

This is not an appeal concerning conflicting judicial authority. Indeed, as shown above, the applicable law regarding the use of deadly force has been established for a long time. Under that law, it is very clear that where, as here, there is substantial evidence to weigh regarding material questions of fact, it is the jury's role to decide the reasonableness of the use of force by police officers.

The District Court erred by ignoring all but two of the *Graham* factors alleged in the FAC, and giving these only a cursory analysis. Its focus on the last moment, ignoring everything else that had created that moment, was myopic. For example, it mentioned Gabriel's mental health, but made no analysis of how the Officers' decision to march on Gabriel with deadly force was perceived through Gabriel's distorted view of reality. He thought they were intent upon killing him. Finally, without thoughtful analysis, the District Court found all of the other *Graham* factors to be "speculative".

Four facts stand out. First, there was no imminent threat or urgency. Second, the Officers were not suddenly surprised by the appearance of the gun; it was in plain view the entire time. Third, the Officers did not try any de-escalation procedures, despite the fact that Policy 464 had an extensive list of practical advice about non-force means of resolving such a mental health crisis. Fourth, it would have been obvious to any law enforcement officer, indeed obvious to any reasonable person, that a frontal assault under the circumstances was almost certain to end with the use of deadly force

inflicting serious or fatal injury upon Gabriel and/or the Officers.

The Officers simply had to verify that the replica gun was, in fact, a replica. That was the government's legitimate interest. There were several means to accomplish this without force, but calm and patience were required. Instead, the Officer with the least experience and no applicable training took command, and ignoring the obvious danger to himself and the other Officers, foolishly ordered a tactical assault that forced a lethal confrontation with Gabriel.

The limitation of the District Court's analysis to the last moment, and not what caused that moment, did not even come close to fulfilling the "totality of the circumstances" test under Graham. By exceeding its proper role and substituting itself for the jury, the District Court left most of the evidence and questions of material fact unexplored.

Based upon the foregoing, the judgment of dismissal should be vacated and Appellants allowed to pursue all of the federal and state causes of action. In the event that this Court of Appeals finds any of the causes of action deficient, but susceptible to amendment, Appellants request leave to amend.

Respectfully Submitted,

s/ Patrick H. Dwyer
Patrick H. Dwyer, counsel
for Appellants

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF CALIFORNIA**

Estate of Gabriel Strickland, et al.,

V.

Nevada County, et al.,

**JUDGMENT IN A CIVIL CASE**

Case No: 2:21-CV-00175-MCE-AC

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 5/13/22

Keith Holland
Clerk of Court

Entered: May 13, 2022

by: /s/ H. Kaminski
Deputy Clerk

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

Estate of Gabriel Strickland, et al.,

Plaintiffs,

v.

Nevada County, et al.,

Defendants.

No. 2:21-cv-00175-MCE-AC

MEMORANDUM AND ORDER

Through this action, the Estate of Gabriel Strickland, N.S., and Shawna Alexander ("Plaintiffs") seek to recover damages, in part, from two sets of Defendants: (1) the City of Grass Valley, Chief Alex Gammelgard ("Gammelgard"), Officer Brian Hooper ("Hooper"), Officer Dennis Grube ("Grube"), and Officer Conrad Ball ("Ball") (collectively, "City Defendants"); and (2) Nevada County, Sheriff Shannon Moon ("Sheriff Moon"), Deputy Taylor King ("King"), Deputy Brandon Tripp ("Tripp"), and Officer Joseph McCormack ("McCormack") (collectively, "County Defendants" and with City Defendants, "Defendants").[1] See First Am. Compl., ECF No. 59 ("FAC"). Plaintiffs' FAC

[1] Plaintiffs also bring suit against Wellpath Management, Inc. ("Wellpath"), Brent Weldemere, and Richard Donofrio. These parties have elected to file an answer to the First Amended Complaint. ECF No. 64.

alleges 25 causes of action under federal and state law. Presently before the Court is City Defendants' Motion to Dismiss Plaintiffs' FAC. ECF No. 60. County Defendants have joined City Defendants in the arguments and relief requested for Claims One, Two, Four, Nine, Ten, Twelve, Seventeen, Eighteen, Twenty, Twenty-One, Twenty-Two, Twenty-Three, and Twenty-Four. ECF No. 62. For the reasons set forth below, City Defendants' Motion and County Defendants' Joinder are GRANTED.[2]

## BACKGROUND

### A. Officer-Involved Shooting

On January 1, 2020, at approximately 12:46 p.m., Nevada County Region Dispatch ("Dispatch") received reports that a man was walking on Squirrel Creek Road with "what appeared to be a shotgun," but he did not appear to be upset. The man was 25-year-old Gabriel Strickland ("Strickland"), and he was carrying a black toy airsoft rifle with an orange tip on the barrel. Responding to the call, two deputies from the Nevada County Sheriff's Office ("NCSO") (King and Tripp) met with officers (Hooper, Grube, and Ball) from the Grass Valley

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[2] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Local Rule 230(g).

[3] The following recitation of facts is taken, sometimes verbatim, from Plaintiffs' FAC.

[4] Plaintiffs aver that an orange tip signals that a gun is a replica, not a real firearm. See FAC ¶ 26. Federal and California laws regulate the manufacture of airsoft guns and require them to include "blaze orange" parts to distinguish them from real firearms. See 15 U.S.C. § 5001(b)(1); Cal. Penal Code § 16700(b)(4)(B).

Police Department ("GVPD") near the intersection of Squirrel Creek Road and Rough & Ready Highway. Plaintiffs allege that these law enforcement officers ("LEOs") knew that Strickland was a homeless man with mental health issues and that he had been released from custody of the local county jail (Wayne Brown Correctional Facility, "WBCF") a day or two before. According to the FAC, the LEOs consequently knew that it was likely Strickland was suffering from a mental health episode and would also likely not respond to their commands or directions in a normal or expected manner.

The LEOs allegedly formulated a plan to confront Strickland without the assistance of mental health professionals or non-violent de-escalation techniques. Instead, Plaintiffs aver, the objective was simply to use overwhelming force. This plan was communicated to Dispatch with sufficient time for Sheriff Moon to have considered its implications prior to the plan's ultimate implementation.

Strickland continued to walk unaccompanied eastbound on Squirrel Creek Road past Oak Super Market, and then southbound on Walker Drive for 10 to 15 minutes with the toy gun slung over his shoulder. Plaintiffs allege that Strickland never brandished the toy gun, threatened anyone, trespassed onto private property, or acted in any manner that was a threat to public safety.[5]

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[5] According to the FAC, the following facts are based on quotations "taken from a video of the events prepared by Defendants Nevada County and City of Grass Valley that was published online." FAC ¶ 68 ("Although every effort has been made to accurately quote the voices in the video, there may be some correction to these quotes after a forensic examination of

The aforementioned LEOs confronted Strickland near Walker Drive and Oak Street in the unincorporated area of Nevada County, just on the border with the City of Grass Valley, surrounding him with patrol vehicles, exiting those vehicles, and drawing their firearms at him from a close range.

The LEOs commenced to yell commands at Strickland to drop the firearm. Strickland responded by holding the toy gun away from his body and telling the officers it was a "B.B. gun." Strickland purportedly slapped the gun with his hand, demonstrating the sound of plastic instead of metal. One of the LEOs on scene radioed Dispatch: "He's saying it's a B.B. gun." As the LEOs continued to yell commands to drop the weapon, Strickland pointed to the orange tip on the barrel of the gun to demonstrate that it was a toy gun, not a real firearm. Tripp responded that Strickland may have painted that himself, and that the LEOs did not want to kill him. Plaintiffs allege that Strickland kept the toy gun barrel pointed at the ground as he spoke to the LEOs.

Plaintiffs allege that Tripp initiated an assault and told the other LEOs to cover him. Tripp, Hooper, and Ball approached Strickland, with Tripp and Ball armed with assault weapons and Hooper with a Taser device. Anticipating that the LEOs' escalation and confrontation would necessitate the use of deadly force, Tripp told Dispatch, "Tell Grass Valley units to get out of cross-fire!" As they advanced, Strickland dropped to his knees, but

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the original video and audio materials and the testimony of the individual officers.").

Plaintiffs concede that Strickland continued to hold the toy gun, sometimes pointing it in the direction of the LEOs and at other times pointing it up towards the sky. Hooper attempted to employ his Taser, but it failed to effectively connect with Strickland's clothing, rendering it ineffective. King, Tripp, and Hooper then fired their weapons at Strickland, striking him several times. He was later taken to a local hospital, where he was pronounced dead.

B. **Previous Medical Treatment**

Plaintiffs further allege that the NCSO and Wellpath[6] were fully aware of Strickland's existing mental health issues, as they had provided medical and mental health care to him on several prior occasions when Strickland was in custody at WBCF. In early 2016, a doctor at Wellpath diagnosed Strickland with bipolar disorder, post-traumatic stress disorder, and anxiety disorder. Subsequently, Strickland was in the custody of WBCF on at least two other prior occasions, yet NCSO and Wellpath did not provide Strickland with further mental health examinations or mental health care.

On December 26, 2019 (only days before the incident giving rise to the instant matter), Strickland was arrested and taken to WBCF, where he was booked and incarcerated. NCSO and Wellpath performed a physical and mental intake wellness check and noted that Strickland urgently needed a mental health evaluation. While in custody from approximately December 26 to 30, 2019, NCSO

[6] Wellpath, per Plaintiffs, provided contract medical services to Nevada County at the WBCF at all relevant times alleged in the FAC. See FAC ¶ 18.

and Wellpath continued to monitor Strickland. Plaintiffs allege that these Defendants observed unusual conduct and verbal expressions indicating serious active mental health issues, yet they took no further action, such as referring him to Nevada County's Behavioral Health Department or a third-party mental health provider or placing him on an involuntary hold underCalifornia's Welfare and Institutions Code §§ 500 et seq. (notably § 5150). Strickland was released from custody on or about December 30, 2019.

## STANDARD

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),[7] all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337–38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal citations and

[7] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.

quotations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

Furthermore, "Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3 (internal citations and quotations omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* (citing Wright & Miller, *supra*, at 94, 95). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. If the "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* However, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. Leave to amend should be "freely given"

where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of [the] amendment . . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest weight." *Id.* (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." *Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1056 (9th Cir. 2007) (citing *In re Daou Sys., Inc.*, 411 F.3d 1006, 1013 (9th Cir. 2005); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility . . . .")).

## ANALYSIS

### A. Claims One through Five: Excessive Force in Violation of the Fourth Amendment and Monell Liability[8]

Plaintiffs' first five claims are premised on the use of excessive force in violation of the Fourth

[8] County Defendants seek to dismiss Claims One, Two, and Four for the same reasons set forth in City Defendants' Motion to Dismiss Claims One, Three, and Five. County Defs.' Joinder, ECF No. 62, at 2.

Amendment. In its prior Order, the Court found that Plaintiffs' allegations in the original Complaint did not demonstrate a constitutional violation based on the officers' use of deadly force. See ECF No. 58, at 10–13.

Like the original Complaint, the FAC alleges that "Strickland continued to hold the toy gun, sometimes pointing it in the direction of" Tripp, Hooper, and Ball. FAC ¶ 84 (emphasis added). "When an individual points his gun 'in the officer's direction,' the Constitution undoubtedly entitles the officer to respond with deadly force." *George v. Morris,* 736 F.3d 829, 838 (9th Cir. 2013) (citing *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007)). Plaintiffs continue to assert that Strickland was carrying a toy gun, see, e.g., FAC ¶¶ 26, 70, 74, but whether the firearm was real or a replica is irrelevant in terms of the officers' perspective at the time of the shooting. See ECF No. 58, at 11 (citing *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010)). Finally, while Strickland's mental health is a factor, "it was 'not objectively unreasonable' for officers to consider the presence of a deadly weapon a priority." ECF No. 58, at 12 (citing *Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1117–18 (9th Cir. 2005) (finding the use of deadly force against a mentally disturbed individual armed with a sword objectively reasonable)).

Regarding Hooper, King, and Tripp, the officers who "opened fire on [Strickland]," the Court once again finds that their use of deadly force was constitutionally reasonable based on the allegations made in Plaintiffs' FAC. As for Grube and Ball, "[a]llegations of a failure to intercede . . . to stop

Hooper's conduct therefore also fail given the lack of any predicate constitutional injury." See ECF No. 58, at 12–13. Accordingly, Claim One is DISMISSED. By the same reasoning, Claims Two and Three against Moon and Gammelgard, who were not present at the scene of the incident and are thus named in supervisory capacities, are DISMISSED. Finally, "[b]ecause Plaintiffs have not demonstrated a constitutional violation based on Defendants' use of deadly force, a Monell claim is foreclosed." Id. at 12. Therefore, Claims Four and Five against the City of Grass Valley and Nevada County are also DISMISSED.

Despite having been granted the opportunity to amend, the allegations in the FAC are materially the same or identical to those presented in the original Complaint. It thus appears that further amendment would be futile. Accordingly, Claims One through Five are DISMISSED without leave to amend.[9]

### B. Claims Nine through Thirteen: Interference with Familial Association in Violation of Fourteenth Amendment and Monell Liability[10]

Claims Nine through Thirteen assert claims that the LEOs' unreasonable and excessive use of force caused loss of familial association in violation

[9] The Court need not address Defendants' alternate argument that they were entitled to qualified immunity.

[10] County Defendants seek to dismiss Claims Nine, Ten, and Twelve for the same reasons set forth in City Defendants' Motion to Dismiss Claims Nine, Eleven, and Thirteen. County Defs.' Joinder, ECF No. 62, at 2–3.

of the Fourteenth Amendment. Because the alleged use of deadly force was constitutionally reasonable, these claims fail for the same reasons set forth above. Accordingly, Claims Nine through Thirteen are DISMISSED without leave to amend.

### C. Claims Seventeen and Eighteen: Rehabilitation Act and Americans with Disabilities Act[11]

The Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA"), and the Rehabilitation Act, 29 U.S.C. §§ 701, et seq., provide identical remedies, procedures, and rights, and are analyzed under the same legal framework. See *Vos v. City of Newport Beach,* 892 F.3d 1024, 1036 (9th Cir. 2018). "Title VII of the ADA prohibits a public entity from discriminating against any qualified individual with a disability. Title VII applies to arrests." Id. (internal citations and quotation marks omitted). The same fact evaluation applies to an accommodation analysis as to a Fourth Amendment reasonableness determination. *Id.* at 1037.

Given that the allegations in the FAC are materially the same or identical to those in the original Complaint, the Court again finds that, from the reasonable perspective of the officers, "Strickland was armed with a rifle not only capable of instantly killing them, but of firing projectiles with the ability to cause extensive harm at

[11] County Defendants join in City Defendants' Motion to Dismiss these two claims. County Defs.' Joinder, ECF No. 62, at 3.

substantial distances." ECF No. 58, at 15. As a result, the "officers acted reasonably in employing deadly force." *Id.* (further finding "that because Strickland represented himself as a 'direct threat,' Defendants were not required to provide accommodation.") (citing 28 C.F.R. § 35.139). Accordingly, Claims Seventeen and Eighteen are DISMISSED without leave to amend.

### D. Claims Twenty through Twenty-Four: State Law Claims[12]

Claims Twenty, Twenty-One, and Twenty-Two allege unreasonable and excessive force under the California Constitution, Article I, § 13, violation of the Bane Act, California Civil Code § 52.1, and assault and battery, respectively. Because the Court already determined that the use of deadly force was objectively reasonable based on the allegations in the FAC, there can be no basis for these claims and they are therefore DISMISSED without leave to amend.

Claim Twenty-Three asserts a negligence claim. "To establish negligence, a party must prove the following: (a) a legal duty to use due care; (b) a breach of such legal duty; (c) the breach as the proximate or legal cause of the resulting injury." *Hernandez v. City of San Jose*, 14 Cal. App. 4th 129, 133 (1993) (citation and internal quotation marks omitted) (emphases in original). The California Supreme Court has long recognized "that the

[12] County Defendants join in City Defendants' Motion to Dismiss the state law claims. County Defs.' Joinder, ECF No. 62, at 3.

reasonableness of a peace officer's conduct must be determined in light of the totality of the circumstances." *Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1236 (9th Cir. 2013) (citation omitted). "[T]he officer's duty to act reasonably when using deadly force extends to preshooting conduct." *Id.* California negligence law is broader than Fourth Amendment law in analyzing reasonableness. *C.V. ex rel. Villegas v. City of Anaheim,* 823 F.3d 1252, 1257 n.6 (9th Cir. 2016); see *Vos*, 892 F.3d at 1037–38. Additionally, Claim Twenty-Four asserts a wrongful death negligence claim under California Code of Civil Procedure § 377.60, "which is simply the statutorily created right of an heir to recover for damages resulting from a tortious act which results in decedent's death." *Gilmore v. Superior Ct.*, 230 Cal. App. 3d 416, 420 (1991) (citations omitted). The analysis for both claims is the same.

To the extent Plaintiffs allege that Defendants breached their duty of care by using unreasonable and excessive force against Strickland, that argument fails for the aforementioned reasons. Regarding Defendants' pre-shooting conduct, the Court previously expressed its hesitancy "to second-guess the decisions of the officers in the instant manner." ECF No. 58, at 19 (citing Ryburn v. Huff, 565 U.S. 469, 477 (2012)). Plaintiffs again allege that "[t]here was no urgency to the situation because [Strickland] did not try to flee, did not brandish the toy gun, did not threaten anyone, and was not in the process of committing a crime." FAC ¶ 93. As a result, Plaintiffs claim that the LEOs had ample time to, among other things, "request assistance from other deputies or officers with some Crisis Intervention Incident training, and contain

[Strickland] at that location while a professional negotiator, crisis de-escalator, and/or mental health provider came to the scene to engage with [Strickland]." Id. However, "[i]n the objectively reasonable view of the present officers, [Strickland] was in public, armed with a long gun, and not responding to commands." ECF No. 58, at 19. Plaintiffs have provided nothing more than speculation "that a mental health specialist would have been able to (1) promptly dispatch to the scene; (2) be present on scene based on safety considerations; and (3) peacefully diffuse a situation that numerous officers could not despite repeated pleadings." Id. Accordingly, Claims Twenty-Three and Twenty-Four are DISMISSED without leave to amend.

## CONCLUSION

For reasons set forth above, City Defendants' Motion to Dismiss, ECF No. 60, and County Defendants' Joinder in that Motion, ECF No. 62, are GRANTED without leave to amend. Claims One, Two, Three, Four, Five, Nine, Ten, Eleven, Twelve, Thirteen, Seventeen, Eighteen, Twenty, Twenty-One, Twenty-Two, Twenty-Three, and Twenty-Four are DISMISSED in their entirety. The following Defendants are hereby DISMISSED from this action: Moon, King, Tripp, City of Grass Valley, Gammelgard, Hooper, Grube, and Ball. This action shall proceed on Claims Six, Seven, Eight, Fourteen, Fifteen, Sixteen, Nineteen, and Twenty-Five against Defendants Nevada County, McCormack, Wellpath, Brent Weldemere, and Richard Donofrio.

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IT IS SO ORDERED.

Dated: April 1, 2022

s/ Morrison C. England
Senior United States
District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF CALIFORNIA**

CASE NO.: 2:21-CV-00175-MCE-AC

Estate of Gabriel Strickland, N.S.,
and Shawna Alexander,

Plaintiffs,
vs.

Nevada County, California, et al

Defendants.

**FIRST AMENDED COMPLAINT FOR VIOLATION OF UNITED STATES CONSTITUTIONAL AND CIVIL RIGHTS UNDER 42 U.S.C. §1983**

## FACTUAL ALLEGATIONS

25. On January 1, 2020, around 12:46 p.m., Nevada County Region Dispatch received reports that a man was walking on Squirrel Creek Road with "what appeared to be a shotgun" but that the man "didn't seem like upset or anything."

26. The man reported was 25-year-old Gabriel Strickland and the "shotgun" he carried was a black toy airsoft rifle with an orange tip on the barrel, demarcating its status as a replica, not a real-firearm.

### Prior Arrest and Failure to Provide Mental Health Care

27. On or about December 26, 2019, Gabriel Strickland was arrested and taken to the Defendant NCSD's WBCF where he was booked and incarcerated. Upon intake, Defendants NCSD and Wellpath performed a physical and mental intake wellness check that noted that Gabriel Strickland urgently needed a mental health evaluation.

28. Defendants NCSD and Wellpath were fully aware that Gabriel Strickland had existing mental health issues because they had provided medical and mental health care to Gabriel Strickland on several prior occasions when he had been in custody at the WBCF. In early 2016, a doctor employed by Defendant Wellpath diagnosed Gabriel Strickland with bipolar disorder, PTSD, and anxiety disorder. Since that mental evaluation in early 2016, Gabriel Strickland had been in custody at the WBCF on at least two other occasions, but Defendants NCSD and Wellpath did not provide Gabriel Strickland with further mental health examinations or mental health care.

29. While in custody at WBCF on or about December 26 to 30, 2019, Defendants NCSD and its contract medical care provider for the WBCF, Wellpath, by and through their respective employees or contractors Officer Joseph McCormack, nurse Brent Weldemere, nurse Richard Donofrio, and Does 1 to 5 and 16-20 (collectively the "Medical Defendants"), continued to monitor Gabriel Strickland and they observed unusual conduct and verbal expressions indicating that he had serious, active mental health issues, including that Gabriel was uncooperative and angry. However, the Medical Defendants failed to provide Gabriel Strickland with an appropriate mental health examination or mental health care while incarcerated during this period. Plaintiffs are informed and believe, and on that basis allege, that despite their knowledge of Gabriel Strickland's obvious need for mental health evaluation and care, the Medical Defendants failed to provide a mental health evaluation for Gabriel Strickland with a Wellpath staff therapist (who are trained to do 5150 evaluations and/or referrals to staff psychiatrists), or referred him to any other Defendant Nevada County department, such as Behavioral Health, or to any outside third party providers for further mental health evaluation and care. Plaintiffs are further informed and believe, and on that basis allege, that the Medical Defendants did not take any action to place Gabriel Strickland under involuntary hold for psychiatric evaluation under California's Welfare & Institution's Code §§5000 et seq., in particular §5150.

30. The Medical Defendant knew, or should have known, that as a result of Gabriel Strickland's untreated mental health disability, he was in a seriously impaired mental state that probably

included, *inter alia*, psychological delusions and/or suicidal ideations that made him: (a) unable to provide for a home for himself; (b) a danger to himself and/or to others in the immediate to near future (i.e., within hours to a few days of his release); and (c) incapable of understanding and/or reasonably responding to the commands of law enforcement in the field.

31. Plaintiffs are further informed and believe, and on that basis allege, that while Gabriel Strickland was in custody at the WBCF between on or about December 26 to 30th, 2019, the Medical Defendants failed to: (a) prepare any report about his mental health status for the Nevada County Probation Department, the Nevada County District Attorney's Office, or the Nevada County Superior Court regarding Gabriel Strickland's mental health; or (b) even suggest to these same entities that Gabriel's mental health should be evaluated. Consequently, the Nevada County Probation Department, the Nevada County District Attorney's Office, or the Nevada County Superior Court were unaware of Gabriel Strickland's mental health problems at his pre-trial release hearing on December 30, 2019.

## POLICY OR CUSTOM ALLEGATIONS
### Obligation to Have Adequate Policies, Practices, and Procedures

32. Defendants County of Nevada and City of Grass Valley are obligated to have policies, practices, and procedures ("PPPs") regarding the use of force by their law enforcement officers that are constitutionally lawful and protect against the unreasonable or unnecessary (i.e., unlawful) use of

force against persons being investigated or detained for possible criminal violation ("UOF PPPs"). Further, this constitutional duty required Defendants County of Nevada and City of Grass Valley to adequately: (a) train their law enforcement officers in the UOF PPPs; (b) monitor and supervise the implementation of the UOF PPPs with an effective chain of command to verify compliance; and (c) when violations of the UOF PPPs were observed, enforce the UOF PPPs by appropriate disciplinary action.

33. It is common knowledge in the field of law enforcement that persons with a Disability or Mental Health problem, including a substance abuse problem, are likely to have interactions with law enforcement that have greater potential for mis-communication and violence that lead to the use force by law enforcement officers. These are commonly referred to as "Crisis Intervention Incidents". Both Defendants County of Nevada and City of Grass Valley were aware of Crisis Intervention Incidents.

34. Defendants County of Nevada and City of Grass Valley are obligated to have policies, practices, and procedures regarding Crisis Intervention Incidents between their deputies and officers and persons having mental and/or physical health disabilities and/or substance abuse problems so that such Crisis Intervention Incidents do not unduly escalate to require the use of force, or if necessary, the least amount of force, thereby protecting such persons from the unnecessary or excessive use of force that would violate their constitutional and

statutory rights. These will br collectively referred to as the "Mental Health PPPs". Further, these constitutional and statutory duties required Defendants County of Nevada and City of Grass Valley to adequately: (a) train their law enforcement officers in the Mental Health PPPs; (b) monitor and supervise the implementation of the Mental Health PPPs with an effective chain of command to verify compliance; and (c) when violations of the Mental Health PPPs were observed, enforce the Mental Health PPPs by appropriate disciplinary action.

**County of Nevada**
**Failure to Have Adequate UOF PPPs**
**or any Mental Health PPPs**

35. Plaintiffs are informed by the discovery responses to date in this action that the primary use of force PPP for the NCSO as of January 1, 2020, was General Order No. 23, a true and correct copy of which is attached as Exhibit 2. A review of the NCSO UOF PPP shows that, in sharp contrast to the UOF PPP for the Grass Valley police described in paragraph 37, below, it only has cursory language, not specific or detailed provisions regarding how deputies must respond to Crisis Intervention Incidents resulting from mental illness or mental disability and/or impairment from substance abuse. In particular, it lacks details about how NCSO deputies must consider such factors in deciding whether and to what degree the use of force should be applied. However, General Order 23 does acknowledge the need for such detailed Mental Health PPPs with the following statement:

> "[i]ndividuals with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during police interactions, as their

disability may affect their ability to understand or comply with commands from peace officers. It is estimated that individuals with disabilities are involved in between one-third and one-half of all fatal encounters with law enforcement."

36. Plaintiffs are informed by discovery responses to date in this action that, unlike the GVPD, Defendant NCSO did not have any Mental Health PPPs that provided specific directives to its deputies about how to engage individuals with "physical, mental health, developmental, or intellectual disabilities" during Crisis Intervention Incidents.

**City of Grass Valley**
**Adequate UOF and Mental Health PPPs**

37. In sharp contrast, Defendant City of Grass Valley and its GVPD did have an adequately stated UOF PPP. This is GVPD UOF PPP 300, a true and correct copy of which is attached hereto as Exhibit 3. GVPD UOF PPP, § 300.3.2, acknowledged that mental illness or mental disability and/or impairment from substance abuse required its officers to consider such factors in deciding about whether and to what degree the use of force should be applied:

(a) The individual's apparent mental state or capacity (Penal Code § 835a);
(b) The individual's apparent ability to understand and comply with officer commands (Penal Code § 835a);
(c) The availability of other reasonable and feasible options and their possible effectiveness (Penal Code § 835a).

38. Furthermore, UOF PPP 300, § 300.3.6, Alternative Tactics - De-escalation, states that:

"officers should consider actions that may increase officer safety and may decrease the need for using force:

(a) Summoning additional resources that are able to respond in a reasonably timely manner.

(b) Formulating a plan with responding officers before entering an unstable situation that does not reasonably appear to require immediate intervention.

(c) Employing other tactics that do not unreasonably increase officer jeopardy.

In addition, when reasonable, officers should evaluate the totality of circumstances presented at the time in each situation and, when feasible, consider and utilize reasonably available alternative tactics and techniques that may persuade an individual to voluntarily comply or may mitigate the need to use a higher level of force to resolve the situation before applying force (Government Code § 7286(b)). Such alternatives may include but are not limited to:

(a) Attempts to de-escalate a situation.

(b) If reasonably available, the use of crisis intervention techniques by properly trained personnel.

39. In addition, UOF PPP 300, § 300.8 states that:

Officers, investigators, and supervisors will receive periodic training on this policy and demonstrate their knowledge and understanding (Government Code § 7286(b)). Subject to available resources, the Training Manager should ensure that officers receive periodic training on de-escalation tactics, including alternatives to force;
Training should also include (Government Code § 7286(b)):

(a) Guidelines regarding vulnerable populations, including but not limited to children, elderly persons, pregnant individuals, and individuals with physical, mental, and developmental disabilities.

40. At the time of the incident in this complaint, Defendant City of Grass Valley had also Mental Health PPP No. 464, Crisis Intervention Incidents, a true and correct copy of which is attached hereto as Exhibit 4, which "provides guidelines for interacting with those who may be experiencing a mental health or emotional crisis." Mental Health PPP 464.1.1 defines a person in crisis as someone "level of distress or mental health symptoms have exceeded the person's internal ability to manage his/her behavior or emotions." Under this Mental Health PPP, the GVPD was committed to "providing a consistently high level of service to all members of the community and recognizes that persons in crisis may benefit from intervention. The Department will collaborate, where feasible, with mental health professionals to develop an overall intervention strategy to guide its members' interactions with those experiencing a mental health crisis." Mental Health PPP § 464.3 then enumerates the signs of a mental health crisis that its officers should look for, including *inter alia*:

(a) A known history of mental illness
(b) Threats of or attempted suicide
(c) Loss of memory
(d) Incoherence, disorientation or slow response
(e) Delusions, hallucinations, perceptions unrelated to reality or grandiose ideas
(f) Depression, pronounced feelings of hopelessness or uselessness, extreme sadness or guilt
(g) Social withdrawal
(h) Manic or impulsive behavior, extreme agitation, lack of control
(i) Lack of fear
(j) Anxiety, aggression, rigidity, inflexibility or paranoia.

Mental Health PPP § 464.5 required GVPD officers to follow the following list of responses when responding to a situation having a mental health crisis:

> (a) Promptly assess the situation independent of reported information and make a preliminary determination regarding whether a mental health crisis may be a factor.
> (b) Request available backup officers and specialized resources as deemed necessary and, if it is reasonably believed that the person is in a crisis situation, use conflict resolution and de-escalation techniques to stabilize the incident as appropriate.
> (c) If feasible, and without compromising safety, turn off flashing lights, bright lights or sirens.
> (d) Attempt to determine if weapons are present or available.
> (e) Take into account the person's mental and emotional state and potential inability to understand commands or to appreciate the consequences of his/her action or inaction, as perceived by the officer.
> (f) Secure the scene and clear the immediate area as necessary.
> (g) Employ tactics to preserve the safety of all participants.
> (h) Determine the nature of any crime.
> (i) Request a supervisor, as warranted.
> (j) Evaluate any available information that might assist in determining cause or motivation for the person's actions or stated intentions.
> (k) If circumstances reasonably permit consider and employ alternatives to force.

Mental Health PPP § 464.6 describes the specific tools of de-escalation that could be used by a GVPD officer in such a crisis:

1. Evaluate safety conditions.
2. Introduce themselves and attempt to obtain the g_erson's name.
3. Be patient, polite, calm, courteous and avoid overreacting.
4. Speak and move slowly and in a non-threatening manner.
5. Moderate the level of direct eye contact
6. Remove distractions or disruptive people from the area.
7. Demonstrate active listening skills (e.g., summarize the person's verbal communication).
8. Provide for sufficient avenues of retreat or escape should the situation become volatile.

Mental Health PPP § 464.6 also describes the specific things that a GVPD officer generally should not do in such a crisis:

1. Use stances or tactics that can be interpreted as aggressive.
2. Allow others to interrupt or engage the person.
3. Corner a person who is not believed to be armed, violent or suicidal.
4. Argue, speak with a raised voice or use threats to obtain compliance.

Mental Health PPP § 464.7 then describes how the GVPD officer should request critical information from the dispatcher, including:

(a) Whether the person relies on drugs or medication, or may have failed to take his/her medication.
(b) Whether there have been prior incidents, suicide threats/attempts, and whether there has been previous police response.
(c) Contact information for a treating physician or mental health professional.

Finally, Mental Health PPP § 464.8 says that the GVPD supervisor should respond to the scene of any interaction with a person in crisis and do the following:

(a) Attempt to secure appropriate and sufficient resources.
(b) Closely monitor any use of force, including the use of restraints, and ensure that those subjected to the use of force are provided with timely access to medical care.
(c) Consider strategic disengagement. Absent an imminent threat to the public and, as circumstances dictate, this may include removing or reducing law enforcement resources or engaging in passive monitoring.
(d) Ensure that all reports are completed and that incident documentation uses appropriate terminology and language.
(e) Conduct an after-action tactical and operational debriefing, and prepare an after-action evaluation of the incident to be forwarded to the Division Commander.

Finally, Mental Health PPP § 464.12 says that the GVPD "will develop and provide comprehensive education and training to all department members to enable them to effectively interact with persons in crisis."

**County of Nevada**
**Failure to Train its Deputies In UOF or Disability and Mental Health PPPs**

41. In addition to having inadequate UOF PPPs and no Mental Health PPPs, Plaintiffs are informed by the discovery responses to date in this action that Defendant Nevada County never adequately trained its NCSO deputies in its PPPs for either proper UOF or Crisis Intervention Incidents. Consequently, NCSO deputies at the time of the Strickland shooting lacked the knowledge and skills for responding to Crisis Intervention Incidents with appropriate UOF.

42. Plaintiffs have performed a preliminary analysis of publically available POST training records of NCSO personnel which is attached hereto as Exhibit 5. This analysis shows that prior to the shooting death of Gabriel Strickland, NCSO deputies had only taken a total of approximately 29 classes on relevant topics in the prior ten years. However, the

same POST training records show that since the death of Gabriel, NCSO deputies have taken a total of 153 classes on relevant topics, in particular, classes entitled "Use of Force and De-escalation" and "Crisis Intervention Behavioral Health Training" and "Crisis Intervention and De-escalation Training". According to these training records, Defendants Tripp and King had not taken any such training courses before the shooting of Gabriel Strickland, but did so within two weeks thereafter. Accordingly, it is self evident that Defendant Nevada County and the NCSO failed: (a) in their constitutional and statutory obligation to train deputies in the critical skills for the UOF for Crisis Intervention Incidents; and (b) fielded deputies with dangerous firearms, both side arms and long guns such as AR15 semi-automatics, when these deputies were not trained in whether or how to employ such firearms in Crisis Intervention Incidents.

43. Plaintiff is informed by the discovery responses to date of Defendant Nevada County that NCSO Captain Mike Walsh, Lieutenant Sean Scales, Lieutenant Robert Jakobs, Sergeant Jason Spillner, and Does 6-10 were responsible for monitoring, scheduling, and supervising training for NCSO personnel from 2015 to 2020. Plaintiff is further informed and believes, and thereon alleges, that NCSO Captain Mike Walsh, Lieutenant Sean Scales, Lieutenant Robert Jakobs, and Does 6-10 periodically reported on their training work and the training status of NCSO personnel to Sheriff Shannon Moon, and consequently, that Sheriff Shannon Moon was at all relevant times fully aware of the failure of NCSO personnel to be properly trained in the UOF for Crisis Intervention Incidents.

**County of Nevada**
**The Failure to Have Adequate UOF and Mental Health PPPs and the Failure to Train for Crisis Intervention Incidents Have Caused Repeated Instances of Wrongful Use Of Force**

44. As a consequence of the foregoing acts and omissions by Defendant Nevada County, there have been serious instances of NCSO deputies using excessive force against persons with mental disability or substance impairment.

49. Plaintiffs are informed by the discovery responses to date in this action that, Defendant Brandon Tripp was especially unprepared to respond to a Crisis Intervention Incident. On or about February 22, 2018, with less than two months field experience, Defendant Brandon Tripp inappropriately fired his gun at a suspect, causing serious injury to the suspect. The particular timing and manner of Deputy Tripp's use of his weapon placed his fellow deputies at risk from potential cross fire and was unnecessary for apprehending the suspect. However, the NCSO training records used to create Exhibit 5 show that Defendant Brandon Tripp did not receive any additional training in the UOF or how to respond to Crisis Intervention Incidents before the January 1, 2020, shooting of Gabriel Strickland.

50. The failures of Defendant Nevada County as set forth in paragraphs 32-36, 42-49 are a proximate cause, or were a moving force behind, Defendants Taylor King and Brandon Tripp's use of unreasonable and excessive force against Gabriel Strickland.

**City of Grass Valley**
**The Failure to Train for Crisis Intervention Incidents Has Caused Repeated Instances of Wrongful Use Of Force**

51. Although the City of Grass Valley had adequate UOF PPPs and Mental Health PPPs, preliminary analysis of the training of GVPD officers in this regard shows that GVPD did not adequately train its officers. Plaintiffs' analysis, which is based upon publically available POST records, is attached hereto as Exhibit 6. This analysis shows that in the ten years prior to the shooting death of Gabriel Strickland, only 16 classes on relevant topics had been taken by any GVPD officers. However, after the death of Gabriel Strickland, almost all GVPD officers took a class entitled "Use of Force and De-escalation".

52. According to the training records produced in discovery to date, Defendant Conrad Ball had no such training prior to the shooting of Gabriel Strickland, but Defendants Grube and Hooper had

taken a single class entitled "Crisis Intervention and Behavioral Health" about three years before the Strickland incident. Thus, despite having UOF PPPs requiring training for the use of force against individuals with "physical, mental health, developmental, or intellectual disabilities" and Mental Health PPPs for Crisis Intervention Indents, the City of Grass Valley failed to adequately train its officers in the necessary PPPs to prevent the use of unnecessary and excessive force used against persons with mental disability and/or substance impaired persons.

53. Plaintiffs are informed by the discovery responses to date of Defendant City of Grass Valley that, according the GVPD Training Policy, a true and correct copy of which is attached as Exhibit 7, the GVPD is supposed to have a "Training Manager" that establishes a "Training Committee" and creates a "Training Plan". However, in response to interrogatories asking for the names of such persons, Defendant City of Grass Valley has been unable to provide the names of the GVPD personnel responsible for the training of GVPD officers in the UOF PPPs or Mental Health PPPs. Based upon Defendant City of Grass Valley's discovery responses to date, Plaintiffs allege that during the five years up to and including January 1, 2020, Defendant City of Grass Valley did not have any GVPD personnel assigned as the "Training Manager" or anyone on the "Training Committee".

54. Plaintiffs are informed by the discovery responses to date of Defendant City of Grass Valley that, despite having adequate UOF and Mental Health PPPs for the use of force against individuals with "physical, mental health, developmental, or intellectual disabilities" and for Crisis Intervention Incidents, Defendant City of Grass Valley did not have adequate supervision of its GVPD field officers to monitor and enforce such policies. The failure of the GVPD to have a Training Manager or a Training Team shows an inadequate chain of command, starting with Defendant Chief Gammelgard, which

made it impossible to monitor, supervise, or enforce the GVPD UOF and Mental Health PPPs, or to adjust the actions of GVPD field officers to ensure compliance with GVPD UOF and Mental Health PPPs. These failures of Chief Gammelgard and Does 11-15 allowed the unreasonable and unnecessary use of force against Gabriel Strickland and were a direct and proximate cause of the violation of his right to life under the Fourth and Fourteenth Amendments to the U.S. Constitution.

59. As a consequence of Defendants City of Grass Valley, Chief Gammelgard and Does 11-15 failing to: (a) adequately train GVPD officers; (b) supervise GVPD officers; and/or (c) otherwise monitor and enforce the GVPD UOF and Mental Health PPPs, Defendants Brian Hooper, Denis Grube, and Conrad Ball were unprepared to respond to situations involving persons with mental disabilities or substance impairment in Crisis Intervention Incidents.

60. The failures of Defendants City of Grass Valley, Chief Gammelgard and Does 11-15 as set forth in paragraphs 32-34, 37-40, 51-59 are a proximate cause, or were a moving force behind, Defendants Brian Hooper, Denis Grube, and Conrad Ball's use of unreasonable and excessive force against Gabriel Strickland and were a direct and proximate cause of the violation of his right to life under the Fourth and Fourteenth Amendments to the U.S. Constitution.

**Failure of the NCSO/GVPD Command Policy**

61. Defendants County of Nevada and City of Grass Valley are obligated to have an adequate and effective "chain of command" and inter-agency operating procedures so that when incidents arise that require their law enforcement officers in the field to use force, more experienced personnel take command and/or are consulted by officers in the field so that non-force means such as in the GVPD Mental Health PPP 464 are employed before forceful means, or if force is necessary, that it is used in accordance with applicable UOF PPPs.

62. Plaintiffs are informed by the discovery responses to date that the NCSO and GVPD have a working agreement/understanding for determining command of incidents that occur at or near the physical borders of their respective jurisdictions. According to Defendant NCSO's interrogatory answers, the unified command agreement/understanding is as follows:

> If the Grass Valley Police Department personnel respond to assist the Nevada County Sheriff's Office with an incident, then the command element becomes a unified command with the highest ranking official as the incident commander. If a unified command incident occurs within the Nevada County Sheriff's Office jurisdiction and the highest ranking officer is from the assisting agency, as the incident circumstances evolves so will the unified command structure transitioning command to the Nevada County Sheriff's Office.

According to Defendant City of Grass Valley's interrogatory answers, the unified command agreement/understanding is as follows:

> It is normal procedure for the agency in which the incident is occurring to exercise a leadership role. This incident [referring to the shooting of Gabriel Strickland was occurring outside of the City of Grass Valley and within the jurisdiction of the Nevada County Sheriff. The [NCSO] Deputies were first on the scene and were first to engage the suspect vocally. Police officers from GVPD were second on the scene. Communications about any plan to respond and actions to be taken were among the officers and deputies on the scene.

63. The foregoing NCSO/GVPD Command Policy operationally failed in the shooting death of Gabriel Strickland incident because it did not have specific provisions that ensured that experienced, senior personnel would take command of a Crisis Intervention Incident, and as a direct and foreseeable consequence, the least experienced law

enforcement officer at the scene, Defendant Brandon Tripp, assumed command. Deputy Tripp was the least experienced law enforcement officer on scene (about 2 years in the field), he had no training in UOF or Mental Health PPPs such as GVPD Mental Health PPP 464, and he had previously mis-used his firearm in 2018 resulting in serious bodily injury. Meanwhile, neither of the most experienced officers on scene, GVPD Officer Brian Hooper with 18 years of field experience and Officer Denis Grube with 6 years of field experience, both of whom had at least some UOF and Mental Health PPP training, did not assume operational command. Consequently, the inadequate NCSO/GVPD Command Policy was a proximate cause, or was a moving force behind, Defendants Brandon Tripp, Taylor King, Brian Hooper, Denis Grube, and Conrad Ball's use of unreasonable and excessive force against Gabriel Strickland.

## The Shooting Incident

64. After receiving communications from dispatch, and after Defendant GVPD's law enforcement officer Conrad Ball had physically driven past Gabriel Strickland as he walked along Squirrel Creek Road in front of the Oak Super Market, Defendants Taylor King and Brandon Tripp met with Officer Ball near the intersection of Squirrel Creek Road and Rough and Ready Highway and conferred about the dispatch call.

65. Plaintiffs are informed by discovery responses to date in the action that Defendants Brian Hooper, Denis Grube, Conrad Ball, Taylor King and Brandon Tripp all knew who Gabriel Strickland was, including that he was a homeless man with mental health issues and that he had been released from custody at WBCF a day or two earlier. Plaintiffs are further informed that Defendants Brian Hooper, Denis Grube, Conrad Ball, Taylor King and Brandon Tripp knew that it was likely Gabriel Strickland was suffering from a mental health episode and would likely not respond to their commands or directions in a normal or expected manner.

66. Gabriel Strickland walked unaccompanied eastbound on Squirrel Creek Road, past the Oak Super Market, and then southbound on Walker Drive for 10-to-15 minutes with the toy gun slung over his shoulder.

67. Plaintiffs are informed by the discovery responses to date that Gabriel Strickland never brandished the toy gun, never threatened anyone, did no trespass onto private property, or acted in any manner that was a threat to public safety.

68. Defendants Brandon Tripp and Taylor King, followed almost immediately by Defendants Brian Hooper, Denis Grube, and Conrad Ball, confronted Gabriel Strickland near Walker Drive and Oak Street in the unincorporated area of the County of Nevada, California, just on the border with the City of Grass Valley.

69. [approx. starting time 38:56] Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, and Conrad Ball surrounded Gabriel Strickland with their patrol vehicles, exited their patrol vehicles, drew-down firearms pointed at Gabriel Strickland from a close range, and immediately commenced forceful, angry yelling at Gabriel Strickland: "Drop the gun!", "Drop the fucking gun!"

70. [38:57 to 39:20] Gabriel Strickland responded peacefully by holding the toy gun away from his body and told the officers: "It's a B.B. gun!"

71. [39:22] Gabriel Strickland slapped the plastic rifle with his hand, creating the audible sound of tapping plastic-rather than metal.

72. One of Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, or Conrad Ball reported to dispatch, "He's saying it's a B.B. gun."

73. Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, and Conrad Ball continued to angrily yell commands at Gabriel Strickland, including "Drop the fucking gun, now!" and "We don't know that's a fake gun!"

74. Gabriel Strickland pointed to the orange tip on the barrel of the toy gun with his finger and, again, explained to the officers, it was not a real gun he was holding but, rather, was only a toy gun.

75. [40:47] Defendant Brandon Tripp stated, "You could have painted that… We don't want to kill you."

76. [41:08] Gabriel Strickland explained, "I'm not doing nothing wrong."

77. Gabriel Strickland stood, with the toy gun barrel pointed at the ground, as he spoke to the officers.

78. [41:11] Defendant Brandon Tripp initiated an assault and told the other officers: "Cover me."

79. Defendants Brandon Tripp, Brian Hooper, and Conrad Ball then walked towards Gabriel Strickland.

80. Defendants Brandon Tripp and Conrad Ball were armed with assault weapons drawn-down and pointed at Gabriel Strickland, and Defendant Brian Hooper was armed with a taser.

81. [41:30] Defendant Brandon Tripp, anticipating that the officers' escalation and confrontation would necessitate the use of deadly force, told dispatch: "Tell Grass Valley units to get out of cross-fire!"

82. [41:45 ] Gabriel Strickland dropped down to his knees, as Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, and Conrad Ball approached him with their weapons drawn.

83. Defendant Brian Hooper asked, "Is this thing working?," as he approached Gabriel Strickland.

84. Gabriel Strickland continued to hold the toy gun, sometimes pointing it in the direction of Defendants Brandon Tripp, Brian Hooper, and Conrad Ball and at other times pointing it up towards the sky.

85. [41:58] Defendant Brian Hooper attempted to employ a taser against Gabriel Strickland, but in deciding to use a taser he failed to account for the clothing that Gabriel Strickland was wearing which made the probability of success very low, and in fact, the taser deployment was unsuccessful.

86. [42:07] Defendants Taylor King, Brandon Tripp, and Brian Hooper opened fire on Gabriel Strickland, striking him several times.

87. Gabriel Strickland was taken to the Sierra Nevada Memorial Hospital, where he was pronounced dead.

## Individual Defendant Errors and Omissions Leading to their Unnecessary and Excessive Useof Force

88. Based upon the publically available POST training records, at the time of the shooting of Gabriel Strickland Defendant Brandon Tripp had approximately 2 years of field experience, Deputy King had approx. 2 years of field experience, GVPD Officer Ball also had about two years field experience, GVPD Officer Hooper had 18 years of field experience, and GVPD Officer Denis Grube had six years of field experience.

89. Plaintiff is informed by discovery to date in this action that GVPD Officers Hooper, Grube and Ball all knew Gabriel Strickland, had previously interacted with him, were aware that Gabriel had been arrested a few days earlier, were able to identify him at the incident scene, were aware that Gabriel was a homeless man with mental health issues, and were aware that there was a current BOLO for Gabriel Strickland. In fact, the body cam video of Officer Brube reveals that as the Defendants marched down on Gabriel Strickland, Officer Grube calls out "Gabe", "Gabe". Plaintiff is further informed by discovery to date in this action that Defendants Taylor King and Brandon Tripp were also aware of Gabriel Strickland, that he was a homeless man, and had mental health issues.

90. Plaintiffs are informed by the discovery responses to date that, despite the ready availability of information about Gabriel Strickland through the use of the computers in the NCSO and GVPD vehicles, such as the BOLO that had been issued about Gabriel Strickland, his arrest record, and other information that may have been very useful in

formulating an appropriate Crisis Intervention response, Defendants Brandon Tripp, Taylor King, Brian Hooper, Denis Grube, and Conrad Ball all failed to utilize such information.

91. Despite their personal knowledge of Gabriel Strickland, Defendants Brandon Tripp, Taylor King, Brian Hooper, Denis Grube, and Conrad Ball all failed to share this knowledge with each other at the incident scene and to discuss how their knowledge of Gabriel Strickland's mental health issues and homelessness should be factored into their actions, including whether the immediate use of force was either advisable or necessary.

92. Although Defendants Tripp, King, Hooper, Grube and Ball had not been properly trained in UOF and Mental health PPPs, each of them had sufficient basic police training and field experience as law enforcement officers to recognize that Gabriel Strickland was in some type of unusual mental state and was not able to respond in a normal or expected manner to commands.

93. There was no urgency to the situation because Gabriel Strickland did not try to flee, did not brandish the toy gun, did not threaten anyone, and was not in the process of committing a crime. Consequently, Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, and Conrad Ball had ample time to consult with one another, determine who would be best qualified to take command, contact their supervisors for advice, request assistance from other deputies or officers with some Crisis Intervention Incident training, and contain Gabriel Strickland at that location while a professional negotiator, crisis de-escalator, and/or mental health provider came to the scene to engage with Gabriel Strickland.

94. Defendants Tripp, King, Hooper, Grube and Ball all failed to recognize that Gabriel Srtrickland's continuing to talk with them was a very good indication that continued negotiations, i.e., further de-escalation techniques, would be successful.

95. At no time did Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, and Conrad Ball communicate with each other about employing any de-escalation techniques, such as calming the situation down and allowing time to work in favor of the officers obtaining Gabriel's trust and cooperation, or requesting the help of a mental health professional or trained negotiator at the incident scene.

96. At no time did Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, and Conrad Ball communicate with any supervisor about what should be done before commencing to use force against Gabriel Strickland.

97. At no time did Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, and Conrad Ball contact their respective commanding officers to request instructions about, or assistance with, de-escalation techniques.

98. At no time did Defendants Taylor King, Brandon Tripp, Brian Hooper, Denis Grube, and Conrad Ball did not request, via dispatch or otherwise, that a mental health professional or trained negotiator be sent immediately to the scene.

99. Despite the lack of urgency, Defendants Taylor King, Brian Hooper, Denis Grube, and Conrad Ball never questioned Defendant Tripp's assumption of command or his tactical decisions at any time during the incident. Further, Defendants King, Hooper, Grube, and Ball never tried any of the suggestions for dealing with a Crisis Intervention Incidents as detailed in the GVPD Mental Health PPP 464. Finally, Defendants King, Hooper, Grube, and Ball never challenged or tried to stop the unnecessary and excessive use of force commanded by Defendant Brandon Tripp, and in fact, they fully participated in the unnecessary and excessive use of force against Gabriel Strickland.

100. Defendants Brandon Tripp, Taylor King, Brian Hooper, Denis Grube, and Conrad Ball made a serious tactical error against standard police training by moving from their positions of relative

safety behind their patrol vehicles, to a three man, uncovered, direct assault against Gabriel Strickland. This tactical mistake could have seriously endangered their lives if the gun had been real.

101. The failures of Defendants Brandon Tripp, Taylor King, Brian Hooper, Denis Grube, and Conrad Ball as set forth in paragraphs 88-100 are a proximate cause, or were a moving force behind their use of unreasonable and excessive force against Gabriel Strickland.