No. 24-____

IN THE

Supreme Court of the United States

DAVID ENGSTROM; JANE DOE ENGSTROM; CHRISTOPHER LAPRE; JANE DOE LAPRE; JACOB H. ROBINSON; JANE DOE ROBINSON; RORY SKEDEL; JANE DOE SKEDEL; BRIAN GRAGG; JANE DOE GRAGG,

Petitioners,

v.

JAMES W. DENBY,

Respondent.

On Petition for a 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

1a. Three Officers executing a warrant used various degrees of force on a third party's residence in an effort to safely remove an admittedly dangerous suspect who they reasonably believed had barricaded himself in the residence. This Court has never defined a test for an officer's destruction of property while executing a warrant other than reference to the general reasonableness standard under the Fourth Amendment. Did the Ninth Circuit err in applying the *Graham v. Connor*, 490 U.S. 386 (1989), reasonableness standard for a claim involving the use of excessive force on a person to a destruction of property claim?

1b. If this Court affirms the Ninth Circuit's application of *Graham* to Fourth Amendment destruction of property claims, did the Ninth Circuit otherwise err in denying qualified immunity when no prior case authority squarely put the individual Officers on notice that their conduct in executing a valid warrant violated a clearly established constitutional right?

2a. This Court has never authorized the "integral participant" or "failure to intervene" theories of § 1983 liability against an officer who uses no force but is present when officers damage property while executing a warrant. Did the Ninth Circuit err in utilizing these theories to affirm the denial of summary judgment to Officers that did not cause a constitutional violation?

2b. If this Court recognizes the theories of integral participation or failure to intervene, did the Ninth Circuit err in failing to conduct a qualified immunity analysis by concluding that the law is clearly established any time that an officer fails to intervene or acts as an integral participant, regardless of the facts of the underlying case?

PARTIES TO THE PROCEEDING

The parties in the Ninth Circuit were Petitioners David Engstrom, Christopher Lapre, Jacob Robinson, Rory Skedel, and Brian Gragg and Respondent (the Plaintiff below) James W. Denby. Plaintiffs Wilma J. Logston and Elizabeth J. Torres and Defendants the City of Casa Grande and County of Pinal were not parties to the appeal and are not parties to this petition.

LIST OF RELATED CASES

Denby v. Engstrom, No. 23-15658 (9th Cir.)

Denby v. Engstrom, No. 20-16319 (9th Cir.)

Denby v. Engstrom, No. 19-15803 (9th Cir.)

Denby v. City of Casa Grande, No. CV-17-00119-PHX-SPL (D. Ariz.)

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INTRODUCTION

This case involves the question of whether officers used reasonable force on a home when attempting to apprehend a known dangerous fugitive, Abram Ochoa, who officers believed had barricaded himself inside a residence after fleeing from a domestic violence incident and evading arrest on an active warrant. In an effort to avoid a violent confrontation and preserve life, the officers employed a series of escalating, nonlethal tactics—including verbal commands, the deployment of a throw phone, surveillance robots, and chemical agents—before ultimately breaching and clearing the residence, which involved the use of two flashbangs. Ochoa was later found concealed under a tarp in the backyard. The property, allegedly owned by Plaintiff, sustained damage as a result of the officers' efforts to safely effectuate the arrest.

In *Dalia v. United States*, this Court acknowledged that "officers executing search warrants on occasion *must* damage property in order to perform their duty." 441 U.S. 238, 258 (1979) (emphasis added). Yet, over four decades later, the Court still has not clarified the constitutional limits of such property damage, other than reiterating the Fourth Amendment's general reasonableness standard. Despite the absence of any precedent from this Court or the Ninth Circuit squarely addressing circumstances similar to the facts of this case, the lower courts denied summary judgment on both prongs of qualified immunity, relying on inapposite authority. Given evolving law enforcement practices and the increasing use nonlethal methods in high-risk standoffs, this case presents an urgent need for the Court's guidance on what level of property damage is constitutionally reasonable during the execution of a warrant as well as the need to instruct

the Ninth Circuit (yet again) on the proper application of qualified immunity.

Additionally, this case implicates a broader question concerning causation under 42 U.S.C. § 1983. Several circuit courts have embraced expansive liability theories—such as the "integral participant" and "failure to intervene" doctrines—that impose liability on officers with no direct causal connection to a constitutional violation. This Court has never endorsed such theories, and they conflict with established precedent requiring individualized proof of causation. Review is necessary to test these theories avoiding a proper causation analysis and, even if adopted, to determine the proper application of qualified immunity.

PETITION FOR WRIT OF CERTIORARI

Petitioners David Engstrom, Christopher Lapre, Jacob Robinson, Rory Skedel, and Brian Gragg respectfully petition for a writ of certiorari to review the unpublished Memorandum decision of the United States Court of Appeals for the Ninth Circuit in this case. The Ninth Circuit announced its original decision on February 5, 2025, revised that decision on March 18, 2025, and denied Petitioners' request for panel rehearing and petition for *en banc* review on March 18, 2025.

OPINIONS BELOW

The Ninth Circuit issued its unpublished Memorandum decision on February 5, 2025. It is available at 2025 WL 400042. (Attached hereto as Appendix ("App.") A). It issued an unpublished Amended Memorandum decision on March 18, 2025, which is available at 2025 WL 841608. (App. B). The Ninth Circuit Order denying the petition for panel

rehearing and *en banc* review on March 18, 2025 was not published. (App. C). The United States District Court for the District of Arizona denied Defendants' motion for summary judgment in a written Order on April 5, 2023, which was reported at 668 F. Supp. 3d 855. (App. D).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its original decision on February 5, 2025. (App. A). The Ninth Circuit later issued an amended decision. (App. B). That same day, the Ninth Circuit denied Petitioner's timely filed petition for rehearing and rehearing *en banc* on March 18, 2025. (App. C). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

James Denby alleges that the Defendant officers violated his civil rights under the Fourth Amendment to the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Denby brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

> Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE[1]

On the afternoon of December 17, 2014, Casa Grande Police officers were dispatched to a domestic disturbance involving Abram Ochoa at 107 ½ West 11th Street, Casa Grande, Arizona. By the time police arrived to the 107 ½ address, Ochoa had fled to the subject residence at 110 West 10th Street. Officers knew that in addition to fleeing a domestic violence scene, Ochoa had an active felony arrest warrant, a history of felony criminal activity, a history of violence, had vowed to never return to prison, and was a methamphetamine abuser who had allegedly stabbed his brother two weeks prior.

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[1] Plaintiff took no depositions of law enforcement or other witnesses. As a result, the sworn declarations of Defendants Skadel, Lapre, Gragg, Engstrom, and Robinson remain undisputed.

At the 10th Street residence, police contacted Plaintiff's son, William Denby, Jr., who initially denied Ochoa's presence in the residence, but upon further questioning, recanted and admitted that Ochoa had run into the home and was still in William Jr.'s room. The police told Ochoa via patrol vehicle PA system to exit the residence. Officers also learned firearms were present in the home.[2]

Ochoa's known violent history, flight, and refusal to surrender created a heightened risk of injury for both officers on-scene and Ochoa himself; thus, the Officers requested SWAT assistance. Regional SWAT Team members began to arrive, awaited a search warrant and in the meantime, used a car key given to them to move a vehicle out of the driveway, and continued to use a PA system to order Ochoa to exit the residence. An Officer also reported he saw Ochoa exit the residence and then immediately return inside.

At 5:00 p.m., the Officers obtained a search warrant to enter the home and arrest Ochoa.[3] A vehicle called a "Bearcat" was driven over a chain link fence to get close enough to the residence to break two windows so

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[2] Although Plaintiff claimed these firearms were located in a locked safe or had a trigger lock on them, the Officers had no way of confirming this information prior to their entry into the home.

[3] Sgt. Gragg was on-scene in a SWAT Command capacity. Non-party Detective Brian Walsh and was responsible for obtaining a signed search authorization before force was used. Gragg called for the Bearcat to be brought to the scene and occasionally checked the position of law enforcement personnel, but mostly stayed at the command post which was not in view of the subject residence. He was aware of the later use of chemical munitions and flashbangs but did not oversee or participate in their deployment. He was not co-located with the law enforcement personnel deploying those devices.

that a "throw phone" could be placed in the residence to try to contact Ochoa. Ochoa did not use the phone or exit the residence, but the Officers noted movement inside the residence at the south portion of the home.

The Officers inserted a robot into the residence to allow SWAT members to safely see what was happening inside. One robot observed a large portion of the interior but could not clear two rooms on the north side or several rooms with closed doors. Ochoa still did not exit the residence and was warned that he had five minutes to do so before increased levels of force would become necessary to remove him.

Receiving no response, Sergeant Lapre deployed OC (pepper spray) into the residence toward the high parts of the walls, ceiling, and attic space. After receiving no response, Lapre deployed CS, a micro powder irritant of a different kind, into the residence. OC and CS are nonlethal irritants designed to encourage a barricaded subject to exit the building without exposing law enforcement, or himself, to the risk of serious bodily injury or death. The record is undisputed that large amounts of chemical can be necessary in smaller spaces where a barricaded subject has hidden in places difficult for the chemical to penetrate or where physical barriers in the residence prevent chemical agents from fully reaching all interior spaces. In total, approximately 22 canisters of OC or CS were deployed into the home.[4]

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[4] Officer Robinson was present on scene but did not use any force on the property. No facts in the record suggest that he had any operational ability to interfere with the SWAT operation, had any sufficient background information to do so, or had sufficient knowledge or training to make a decision to interfere. At no time did he deploy chemical munitions. He simply provided cover for Lapre.

After no response, the Officers finally decided to physically enter the residence to locate and arrest Ochoa.[5] The entry team included Sergeants Skedel, Lapre, and Engstrom. To reduce the risk of serious bodily injury or death to the entry team, Sergeant Rory Skedel deployed two noise flash diversionary devices ("flashbangs") into parts of the residence where no innocent persons, or fire-creating accelerants, had been seen—a bathroom behind a locked door, and a room with a propped-up mattress. The flashbang deployment did not injure anyone or cause any fires. However, Plaintiff argues one of the flashbangs used in the bathroom damaged his toilet and caused it to leak.

Though SWAT personnel believed Ochoa was still in the residence, the Officers did not locate him. The Officers later found Ochoa outside the residence hiding under a tarp covering a car.[6] They arrested him there without further incident.

STATEMENT OF THE PROCEEDINGS

Plaintiffs filed their complaint in Arizona state court alleging violations of their Fourth and Fourteenth Amendments rights under 42 U.S.C. § 1983, including violations based on the individual Officers' failure to properly supervise and intervene.[7] Defendants-Petitioners removed the action to federal court based

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[5] The Defendant Officers used the bearcat to breach the front door. Although Plaintiff claims he offered his keys to the front door to some unidentified officer, the breaching officers were not aware of this fact.

[6] No law enforcement personnel on-scene observed Ochoa move from the residence and hide underneath the tarp.

[7] The complaint also alleged state law claims and claims against the City of Casa Grande and Pinal County. which are not at issue in this Petition.

on alleged 42 U.S.C. § 1983 violations.[8] On April 5, 2023, the district court denied Defendants' motion for summary judgment on qualified immunity.[9]

Defendants timely appealed on April 28, 2023. The Ninth Circuit affirmed on February 5, 2025, which was amended on March 18, 2025. (App. A & B). The Ninth Circuit held summary judgment was not appropriate for the individual defendant officers because "the degree of force and resulting property damage far exceeds that in cases in which we have affirmed a trial court's denial of qualified immunity." (App. B at 12a (citing *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974-75 (9th Cir. 2005) and *Mena v. City of Simi Valley*, 226 F.3d 1031, 1035-41 (9th Cir. 2000))); *see also* (App. B at 17a-18a). It also held that the district court did not err in finding each individual defendant was "at least an 'integral participant' in the search of Denby's residence." (*Id.* at 14a-17a). Finally, the Ninth Circuit affirmed the district court's denial of summary judgment on Plaintiff's failure to intercede claim "for the same

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[8] After Plaintiffs filed a second amended complaint, Defendants filed a motion to dismiss based on qualified immunity. The district court denied this motion. (App. E). Defendants appealed this ruling to the Ninth Circuit, which remanded for further proceedings because the district court did not conduct an individualized inquiry into the defendant officer's qualified immunity. (App. F). On remand, the district court clarified its order and again denied Defendants' motion to dismiss regarding qualified immunity. (App. G). Defendants then filed a second notice of appeal. The Ninth Circuit, based on the complaint allegations, affirmed the denial of Defendant's motion to dismiss regarding qualified immunity. (App. H).

[9] By that time, only Plaintiff James Denby remained as a named party-plaintiff.

reasons a jury could find each Defendant was at least an integral participant." (*Id.* at 18a-19a).

Defendants filed a petition for panel rehearing and *en banc* review. On March 18, 2025, the Ninth Circuit denied rehearing and *en banc* review. (App. C).

REASONS FOR GRANTING THE WRIT

I. THIS COURT NEEDS TO ESTABLISH A CLEAR STANDARD FOR CONSTITUTIONAL CLAIMS BASED ON PROPERTY DAMAGE.

This case involves police using force that causes damage to *property* during the execution of a lawful search warrant rather than using force against a *person*. This is a critical and important distinction. There is no reasonable dispute between the parties that "officers executing a search warrant occasionally *must* damage property in order to perform their duty." *Dalia*, 441 U.S. at 258 (emphasis added). Nevertheless, this Court has not clearly delineated when damage to property during the execution of a warrant gives rise to a constitutional claim other than reference to a general reasonableness standard. *See Soldal v. Cook County*, 506 U.S. 56, 61, 71–72 (1992) (instructing lower court to apply reasonableness standard in case involving removal of mobile home).

In the absence of guidance from this Court, the Ninth Circuit held in this case that "the degree of force and resulting property damage far exceeds that in cases in which we have affirmed a trial court's denial of qualified immunity." (App. B at 12a). The Ninth Circuit did not reference any relevant standard from this Court or elsewhere in coming to this conclusion, nor did it clearly articulate the appropriate standard

for analyzing Plaintiff's constitutional claim based on the destruction of property. In other cases, the Ninth Circuit has simply repeated the general Fourth Amendment standard that "[t]he test of what is necessary to execute a warrant effectively is reasonableness." *Hells Angels*, 402 F.3d at 971 (cleaned up).

The Ninth Circuit's decision was thus incorrect on both prongs of qualified immunity because: (A) it could not have found a constitutional violation without first articulating and applying a defined standard; and (B) by definition, the law was not clearly established to find a constitutional violation. This Court's guidance is therefore needed to clarify the appropriate standard in property-damage cases as well as to address the lack of clearly established law.

A. This Court Has Not Articulated A Clear Test For When Property Damage Violates The Constitution During The Execution Of A Warrant.

The lower court's failure to reference any relevant standard stems from the fact that this Court has not clearly defined when an officer's use of force on an individual's property during the execution of a valid warrant violates the Constitution. Although the "general touchstone of reasonableness" governs methods of execution of a search warrant, and "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment," *United States v. Ramirez*, 523 U.S. 65, 71 (1998), that broad-based proclamation provides little guidance to officers

on the ground, who may be engaged in vastly different types of force on the property.[10]

This is a critically important and a recurring issue. A barricaded suspect presents one of the most dangerous circumstances to law enforcement in the field. *Fisher v. City of San Jose*, 558 F.3d 1069, 1080 (9th Cir. 2009) (en banc) (rejecting the notion that "trained officers, who put themselves in harm's way when handling a dangerous armed standoff, essentially increase the constitutional rights of suspects who, by their actions, both provoke and prolong the need for continuing police action" and explaining that adopting the plaintiff's theory would "encourage[] other suspects to barricade themselves in their residences, fortify their positions, and resist full arrest as the mere passage of time would serve as fodder for a suppression motion at the ensuing criminal trial or, as here, for a civil rights action seeking money damages from the police"); *see also Estate of Escobedo v. Martin*, 702 F.3d 388, 408 (7th Cir. 2012) ("There are many situations where a visual inspection of a room prior to deploying a flashbang is impossible or extremely dangerous, such as when the entrance to a room is barricaded or defended by an armed individual . . . .").

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[10] This Court has routinely recognized that general proclamations in the Fourth Amendment context cannot give proper guidance to officers or lower courts on how to determine if a constitutional right has been violated. *See Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("The Court of Appeals acknowledged this statement of law, but then proceeded to find fair warning in the general tests set out in *Graham* and *Garner*. In so doing, it was mistaken. *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality." (citation omitted))

Avoiding a direct conflict between a barricaded suspect and law enforcement is preferred not only for the safety of law enforcement on scene, but also for the suspect. In attempting to avoid harm and the loss of life, modern law enforcement has evolved to employ a variety of escalating nonlethal tools to remove a barricaded suspect without placing officers in harm's way. However, as the facts and evidence in this case reveal, those tools can cause damage to the property.

Despite the proliferation of these nonlethal uses of force and their associated destructive potential to a person's property, this Court has rarely addressed the property damage issue, and in entirely different contexts. *See e.g., Ramirez*, 523 U.S. at 71 (officers acted reasonably in breaking a window to discourage occupants from rushing to locate weapons); *Soldal*, 506 U.S. at 61 (explaining that moving a mobile home as part of an eviction proceeding invokes the Fourth Amendment; but without enumerating factors to consider).[11] These two decisions on opposite ends of a

[11] The Court has addressed whether probable cause or reasonable suspicion is required to *detain* property, *see, e.g.*, *United States v. Place*, 462 U.S. 696, 701–02 (1983); *United States v. Jacobsen*, 466 U.S. 109, 120 (1984), but that is a different question than whether officers can *damage* property within constitutional limits. And this Court previously acknowledged that it has not meaningfully addressed this issue. *See, e.g.*, *United States v. Flores-Montano*, 541 U.S. 149, 154 n.2 (2004) ("We again leave open the question whether, and under what circumstances, a border search might be deemed "unreasonable" because of the particularly offensive manner in which it is carried out." (cleaned up)); *see also Baker v. City of McKinney*, 145 S. Ct. 11, 12 (2024) (Sotomayor, J., dissenting in denial of certiorari) (in case involving property damage under Takings Clause explaining that "[t]his Court has yet to squarely address whether the government can, pursuant to its police power, require some individuals to bear such a public burden").

property-damage spectrum leave officers with no practical guidance to understand the constitutional parameters of property-based constitutional violations.

In the absence of direct guidance on this issue, circuit courts are split on how to properly analyze reasonableness in the property destruction context. A few circuits, like the Ninth Circuit, use the *Graham*, 490 U.S. 386, test but only broadly discuss "objective reasonableness" without necessarily applying the factors as written. *See e.g., Hells Angels*, 402 F.3d at 975;[12] *Cybernet, LLC v. David*, 954 F.3d 162, 169 (4th Cir. 2020) (applying *Graham* factors); *Grant v. City of Houston*, 625 Fed. App'x 670, 677 (5th Cir. 2015) (applying *Graham* in case involving death of a dog); *Johnson v. Manitowoc County*, 635 F.3d 331, 335 (7th Cir. 2011) (applying *Graham* factors).

But *Graham* does not provide any practical guidance to cases involving *property damage*—especially those cases like this one involving third parties[13] or multiple

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[12] The Ninth Circuit did not even address *Graham* in this case, even though it claims to apply *Graham* to cases involving property destruction. (*See* App. B at 12a–14a). And compounding the problem in this case is the Ninth Circuit's failure to meaningfully address each of the uses of force at issue here, including: (1) breaking a window; (2) using chemical agent; (3) forcing entry for a search and clear; and (4) use of flashbangs. Not only are the uses of force different, but each was employed by a different officer.

[13] The fact that the plaintiff in this case is not a suspect, but rather a third party adds another dimension on which this Court's guidance is lacking. Courts have difficulty grappling with how to best handle harm to a third party, like an innocent bystander. The Ninth Circuit itself recently acknowledged the lack of cases on the issue. *See Estate of Soakai v. Abdelaziz,* __ F.4th __, No. 23-4466, 2025 WL 1417105, at *11 (9th Cir. May 16, 2025) ("As Defendants point out, Plaintiffs do not identify—

uses of force. Under *Graham*, this Court recognized that an *arrest* "carries with it the right to use some degree of physical coercion or threat thereof to effect it," 490 U.S. at 396, so its factors are tailored to interactions between officers and suspects. For example, *Graham* asks whether the suspect poses an immediate threat to safety, but that is not always an issue when officers must damage or destroy property to effectuate a search or arrest warrant. *Id.* Similarly, under *Graham* a court must evaluate whether the suspect is "actively resisting arrest or attempting to evade arrest by flight." *Id.* But the suspect might not even be on scene when officers are executing a search warrant. Finally, *Graham's* factor regarding the nature of the force used (deadly force must be justified by a higher governmental interest than intermediate or *de minimis* force) cannot apply when the force is against property, because force against property (except for force against animals) cannot be deadly.

Other courts look to this Court's framework regarding warrant requirements for searches and seizures. *Brown v. Muhlenberg Township*, 269 F.3d 205, 210 (3d Cir. 2001) (applying this Court's precedent regarding warrantless seizures); *Thomas v. Cohen*, 304 F.3d 563, 574 (6th Cir. 2002) (analyzing *Soldal* to determine whether seizure was unreasonable in eviction case); *Mayfield v. Bethards*, 826 F.3d 1252, 1256 (10th Cir. 2016) (discussing warrant requirements in case involving deadly force used on an animal).[14]

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nor are we aware of—a controlling case applying the state-created danger theory to injuries suffered by bystanders after a high-speed police chase."). This is yet another reason review is warranted.

[14] The Second Circuit has, on at least one occasion, referred to this kind of claim as a due process claim rather than a Fourth

A third group of circuits rely on a consensus of circuit authority to resolve the claim. *See, e.g.*, *Maldonado v. Fontanes*, 568 F.3d 263, 271 (1st Cir. 2009) (using circuit consensus of authority to find Fourth Amendment violation for killing a dog clearly established); *Bloodworth v. Kansas City Bd. of Police Commissioners*, 89 F.4th 614, 626 (8th Cir. 2023) (citing Eighth Circuit precedent in analyzing deadly force on animals). However, the mere agreement of inter- or intra-circuit decisions lacks a logical underpinning and ignores the need for a consistent and workable standard upon which to conduct a more detailed understanding of "reasonableness" under the Fourth Amendment. Moreover, the circuits themselves do not even appear to agree on what "reasonableness" means to resolve cases like this, and many of the cases involve deadly force used on an animal rather than destruction of nonliving property. Furthermore, this Court has, on several occasions, questioned whether circuit court cases could clearly establish law, assuming only "for the sake of argument" that a right could be clearly established by circuit precedent.[15] This case provides a prime opportunity to clarify that issue.

In sum, although a Fourth Amendment reasonableness standard applies to searches of individuals and property and the use of force on them, courts and

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Amendment unreasonable search and seizure claim, and imposed a maliciousness requirement. *Cody v. Mello*, 59 F.3d 13, 16 (2d Cir. 1995).

[15] *See, e.g.*, *Pina v. Est. of Dominguez*, 145 S. Ct. 527, 528 (2025) (Alito, J., dissenting); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021); *City of Escondido v. Emmons*, 586 U.S. 38, 43 (2019); *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 614 (2015); *Taylor v. Barkes*, 575 U.S. 822, 826 (2015); *Carroll v. Carman*, 574 U.S. 13, 17 (2014); *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012).

law enforcement officers have little to no guidance regarding the scope of reasonable force on property. That lack of guidance is precisely what led the Ninth Circuit astray here, as evidenced by the fact that the Ninth Circuit purports to apply *Graham* (an excessive force standard) to property damage cases, but failed even do so here. Certiorari is warranted to clarify the scope and boundaries of a § 1983 property damage claim even though circuit courts generally recognize the *existence* of such a claim. *See Thompson v. Clark*, 596 U.S. 36, 42–44 (2022) (accepting certiorari to clarify the elements of a malicious prosecution claim—a claim recognized in nearly every circuit). Moreover, as this Court has done in the past, the general concept of "reasonableness" must be further distilled in order to provide meaningful guidance to officers and lower courts. *See e.g., Graham*, 490 U.S. at 396 (announcing that all excessive force claims should consider the following factors to evaluate reasonableness: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.").

B. The Law Was Not Clearly Established As To Every Individual Use Of Force.

Even if the *Graham* standard is the proper analysis in this case (a point that Defendants reject), the law was not clearly established as to every use of force by each individual officer.[16]

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[16] As described in more detail above, Sgt. Skedel used flashbangs, Sgt. Lapre used chemical cannisters, and Sgt. Engstrom was part of the entry team. Sgt. Gragg did not use any force. Officer Robinson was present but did not use any force on the property and is only known to be providing security in Lapre's

The proper application of qualified immunity is critical as its requirements ensure that public officials are not subject to the burdens of litigation or held liable for conduct without notice that such conduct is unlawful. *See Kisela v. Hughes*, 584 U.S. 100, 104 (2018). Moreover, "[s]pecificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, . . . will apply to the factual situation the officer confronts." *Rivas-Villegas*, 595 U.S. at 6 (cleaned up). This Court has repeatedly admonished courts—"and the Ninth Circuit in particular"—against defining the right at too high a level of generality. *Kisela*, 584 U.S. at 104; *see also City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) (stating same). That is precisely what occurred in this case and this Court's guidance is yet again required to realign the Ninth Circuit to properly apply the second prong of qualified immunity.

Here, the Ninth Circuit's lack of guidance on the appropriate standard for whether the Defendant officer's use of force was reasonable on Plaintiff's property necessarily precludes the denial of qualified immunity's second prong of clearly established law. But even based on existing jurisprudence, the Ninth Circuit erred in failing to properly apply this Court's qualified immunity standards when assessing the defendant officer's use of force on Plaintiff's property because:

1) This Court has found that breaking a window during while executing a warrant does *not* violate the Fourth Amendment. *See Ramirez*, 523 U.S. at 71.

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general area of operation. Sgt. Lapre was SWAT; Officer Robinson was a patrol officer.

2) The Ninth Circuit recognized that there is no clearly established law regarding the use of chemical agents, *West v. City of Caldwell*, 931 F.3d 978, 986 (9th Cir. 2019), and Defendants are unaware of any guidance from this Court on this issue.

3) The Ninth Circuit addressed breaking doors during a breach and entry but found liability in light of an officer's specific statements that he liked to destroy property. *See Mena*, 226 F.3d at 1041. That case could not have clearly established the law here.[17]

4) This Court has not addressed the use of flashbangs. To the extent that the Ninth Circuit *has* created clearly established law, that law is confined to the use of flashbangs in a manner reasonably calculated to physically harm innocent persons on the premises. *See e.g., Boyd v. Benton County*, 374 F.3d 773, 779 (9th Cir. 2004). Such cases are inapposite here.

The Ninth Circuit did not even *attempt* to parse out each individual use of force for *either* prong of the qualified immunity analysis. Rather, it relied on *Mena*, 226 F.3d at 1035–41; and *Hells Angels*, 402 F.3d at 974–75, and improperly found that a jury could decide whether the Officers used excessive force purely based on "the degree of force and resulting property damage." (App. B at 12a). This was error. Neither of these cases could place a reasonable officer on notice that using chemical munitions, flashbangs, or dynamic entry—

[17] Additionally, both federal and Arizona state law codifies an officer's right to break doors or windows to execute a warrant if officers announce their presence and authority and are refused entry. *See* 18 U.S.C. § 3109; Ariz. Rev. Stat. § 13-3891.

even if these techniques caused damage to property—were prohibited by clearly established constitutional law when executing a warrant to extract a dangerous felon hiding in a residence.

In *Mena*, officers executing a knock-and-announce warrant allegedly broke doors that were already open, and one officer was heard saying, "I like to destroy these kind[s] of materials, it's cool." 226 F.3d at 1041. The Ninth Circuit held that such gratuitous destruction, untethered from any legitimate law enforcement purpose, clearly violated constitutional limits, and denied qualified immunity. In stark contrast, the officers here acted under judicial warrants with a clear duty to locate and apprehend a dangerous, fleeing felon. Unlike *Mena*, there is no evidence in this record that any individual defendant—Lapre, Skedel, Gragg, Engstrom, or Robinson—acted for reasons unrelated to the lawful objective of warrant execution. Each officer provided undisputed testimony detailing their actions, all of which were reasonably calculated to conduct the arrest safely and effectively and none of which evidenced any other intent.

Hells Angels is even further afield. There, officers exceeded the scope of a warrant by seizing an excessive volume of property (including motorcycles and personal effects), cutting out a concrete slab, and removing a refrigerator door. 402 F.3d at 965–66, 974. Nothing in *Hells Angels* would have put reasonable officers on notice that employing nonlethal tactics to safely apprehend a dangerous fleeing felon, under the authority of two judicial warrants, was constitutionally suspect.

Neither *Mena* nor *Hells Angels* addresses the circumstances here, and neither establishes clearly applicable law that would preclude qualified immunity. Accordingly, review is warranted to ensure, as this

Court has many times in the past, that the lower courts are not improperly defining the qualified immunity right at issue too broadly.

* * *

In sum, Certiorari is needed to clarify the parameters of a § 1983 claim that officers caused damage to property. This case highlights the various ways that force may be used against property, and the difficulty that courts encounter when they confront those uses of force. Without a clear test beyond reasonableness, officers have no practical guidance as to each use of force and courts, like the Ninth Circuit, will continue to err in their analysis on the first prong of the qualified immunity test. In addition, Certiorari is warranted because the Ninth Circuit continues to err on applying the second prong of qualified immunity by over generalizing existing case authority to define a constitutional right.

II. NEITHER THE "INTEGRAL PARTICIPANT" THEORY NOR THE "FAILURE TO INTERVENE" THEORY SHOULD RESULT IN § 1983 LIABILITY.

A. The Court Should Not Recognize Either A Failure To Intervene Or An Integral Participant Theory of Liability Because Both Violate The Textual And Theoretical Underpinnings of § 1983.

Under Ninth Circuit precedent, an officer who uses no force at all but is present at the scene cannot enjoy qualified immunity if the court calls him an "integral participant" or rules that he "failed to intercede" in the events. *See, e.g.*, *Hughes v. Rodriguez*, 31 F.4th 1211, 1223 (9th Cir. 2022); (*see also* App. B at 14a). Although nearly every circuit has referred to a failure to

intervene theory in one form or another, this Court has never specifically recognized an "integral participant" or "failure to intervene" (or "intercede") theory of liability under § 1983. It should take this opportunity to reject both.

The language of § 1983, as originally passed, stated as follows:

> *[A]ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected*, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691–92 (1978). "The italicized language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Id.* "Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.*

Consistent with § 1983's statutory causation requirement, this Court has on multiple occasions stated that courts must analyze each individual 1983 claim *separately* for sufficient causation. *See, e.g.*, *County of Los Angeles v. Mendez*, 581 U.S. 420, 429, 430–31 (2017) (recognizing that damages are recoverable only that are "proximately caused by any Fourth Amendment violation"); *see also Heck v. Humphrey*,

512 U.S. 477, 483 (1994) (Section 1983 "creates a species of tort liability" informed by tort principles regarding "damages and the prerequisites for their recovery" (internal quotation marks omitted)); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986) (the level of § 1983 damages is "ordinarily determined according to principles derived from the common law of torts").

Integral participant and failure to intervene theories of liability violate the textual and theoretical underpinnings of liability under § 1983 and the Fourth Amendment. However styled, the integral participant and failure to intervene theories seek to hold officers liable for acts of *other* officers, greatly expanding liability and bypassing the requirements of causation. In this regard, officers are effectively held *strictly* liable for the actions of other officers, even if that officer did not engage in the conduct at issue—or engage in any action at all. But a § 1983 claim necessarily involves the *actions* of a person (acting under color of state law) in depriving someone's rights. The circuit courts' expansion of § 1983 liability in this way undermines the requirement of causation, which is a fundamental part of any § 1983 claim.

This has not gone unnoticed by the lower circuit courts. The Sixth Circuit has expressly recognized that it does not know the source of failure-to-intervene claims, even though it recognizes such a claim. *Chaney-Snell v. Young*, 98 F.4th 699, 722 (6th Cir. 2024) ("Perhaps one day we will have to identify the source of this failure-to-intervene claim when deciding its proper scope. But today is not the day." (citation omitted)). The Third Circuit limits the theory and recognizes a failure to intervene claim only in the context of excessive force (as applied to a person) or

sexual assault, but not in any other context. *See e.g., Thomas v. City of Harrisburg*, 88 F.4th 275, 285 (3d Cir. 2023).[18] And although this Court has not weighed in on integral participant or failure to intervene theories amongst officers, it has recognized that there is no claim for the failure of an officer to intervene where a private citizen harms someone. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196–97 (1989).

This Court has previously admonished the Ninth Circuit for creating claims that "provide[] a novel and unsupported path to liability in cases in which the use of force was reasonable" and "permit[] excessive force claims that cannot succeed on their own terms." *Mendez*, 581 U.S. at 428–30 (Ninth Circuit's provocation rule was "an unwarranted and illogical expansion of *Graham*" in part because it included "a vague causal standard" and failed to incorporate "the familiar proximate cause standard."). In *Mendez*, as here, "it is not clear what causal standard is being applied." *Id.* But just as this Court recognized in *Mendez*, the circuit courts cannot impermissibly expand Fourth Amendment claims or remove the causal standard altogether. Given the clear causal issues these theories pose, and their inconsistent application, the Court should, therefore, accept review and clarify that no claim exists for a failure to intervene or under the Ninth Circuit's integral participant theory.

[18] This Court could thus limit its review to failure to intervene and integral participant theories *only* in the context of property damage.

B. At a Minimum, the Integral Participant or Failure to Intervene Theories of § 1983 Liability Must Still Assess the Application of Qualified Immunity.

Even if the Court is going to recognize these theories of potential § 1983 liability, it must still properly assess if those individual officers are entitled to qualified immunity. It is inconsistent with § 1983 theory—requiring actual participation—to deprive qualified immunity for officers who were simply present at the scene. Indeed, the Ninth Circuit did not follow its own admonishment that "simply being present at the scene does not demonstrate that an officer has acted as part of a common plan." *Peck v. Montoya*, 51 F.4th 877, 889 (9th Cir. 2022). It was error and against the underpinnings of § 1983 to hold the officers liable for the actions of their fellow officers, rather than their own actions, especially where, as here, two of the officers did not use *any* force at all. Again, this Court expressly rejected a similar expansion of liability in *Mendez*. 581 U.S. at 428–29; *see also Peck*, 51 F.4th at 892 (discussing *Mendez*).[19]

There is also a great deal of inconsistency in how circuit courts have applied these theories to find liability, especially with their applications of qualified immunity. The circuit courts' different, conflicting approaches highlight the analytical problems with these claims.

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[19] The Officers, therefore, could not have been on notice that their actions would violate Plaintiff's clearly established rights simply by being on scene. The Ninth Circuit thus erred on *both* prongs of qualified immunity—which, under the Ninth Circuit's precent, are one in the same.

For example, some circuits simply conflate both prongs of qualified immunity, completely erasing the second prong as to whether the law was clearly established. *See, e.g.*, *Torres-Rivera v. O'Neill-Cancel*, 406 F.3d 43, 54–55 (1st Cir. 2005) (conflating both prongs of qualified immunity and describing two permissible theories of failure-to-intervene claims); *Helm v. Rainbow City*, 989 F.3d 1265, 1277–78 (11th Cir. 2021) (analyzing qualified immunity prongs as one in the same).

Other circuits recognize such a claim but attempt to analyze the prongs separately. *See, e.g.*, *Weimer v. County of Fayette*, 972 F.3d 177, 191–92 (3d Cir. 2020) (analyzing qualified immunity prongs separately); *Joseph on behalf of Estate of Joseph v. Bartlett*, 981 F.3d 319, 345 (5th Cir. 2020) (analyzing qualified immunity prongs separately); *Harris v. Mahr*, 838 F. App'x 339, 342–43 (10th Cir. 2020) (analyzing qualified immunity prongs separately). At least one circuit has blended liability for failure to intervene with supervisory liability. *See Mitchell v. Kirchmeier*, 28 F.4th 888, 901 (8th Cir. 2022) (appearing to blend supervisory and failure-to-intervene liability); *see also Keating v. City of Miami*, 598 F.3d 753, 766 (11th Cir. 2010).

Other circuits recognize a failure-to-intervene claim without necessarily analyzing its interplay with the second prong of qualified immunity. *See, e.g.*, *Figueroa v. Mazza*, 825 F.3d 89, 106 (2d Cir. 2016) (recognizing duty to intercede); *Quinn v. Zerkle*, 111 F.4th 281, 295 (4th Cir. 2024) ("bystander liability"); *Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017) (claim for failure to intervene).[20]

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[20] As the Sixth Circuit aptly recognized, there does not appear to be a *basis* for these claims. But because these claims hinge on

As such, this Court should clarify that even if an integral participant or failure to intervene theory of liability is cognizable, lower courts must still conduct a full analysis of whether clearly established law precludes qualified immunity for the officer who did not directly cause the constitutional violation at issue.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted, the decision of the Arizona District Court and Ninth Circuit Court of Appeals should be vacated, and summary judgment should be granted in the Defendants' favor on Plaintiff's 42 U.S.C. § 1983 claims.

Respectfully submitted,

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an underlying constitutional violation, they are often resolved on the merits of the underlying claim rather than the failure to intervene (or, in the Ninth Circuit, the integral participant) claim.

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: February 5, 2025]

No. 23-15658

D.C. No. 2:17-cv-00119-SPL

JAMES W. DENBY,

Plaintiff-Appellee,

v.

DAVID ENGSTROM; *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

MEMORANDUM[*]

Submitted February 5, 2025[**]
San Francisco, California

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

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: MURGUIA, Chief Judge, CHRISTEN, Circuit Judge, and LEFKOW,[***] District Judge.

This case concerns Plaintiff James Denby's claim that the defendants violated his Fourth and Fourteenth Amendment rights when law enforcement officers destroyed his house and personal property while executing a warrant to search his residence for another man, Abram Ochoa. Denby brought claims pursuant to 42 U.S.C. § 1983 against the municipality and thirteen individual officers, all but five of whom have been dismissed: David Engstrom, Rory Skedel, Chris Lapre, Brian Gragg, and Jacob Robinson (collectively, Defendants). Defendants appeal the district court's denial of their motion for summary judgment, arguing they are entitled to qualified immunity on Denby's two remaining claims: (1) that Defendants violated his Fourth and Fourteenth Amendment rights by using unnecessary force when executing a search warrant, resulting in the destruction of property, and (2) that Defendants violated his constitutional rights because they had the opportunity to intercede to stop the destruction of his property, but failed to do so.[1] The parties are familiar with the facts, and we recount them only as necessary to resolve the issues on appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291 for interlocutory orders denying qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), but only "[t]o the extent the district court's order denies summary judgment on purely legal issues," *Foster v.*

[***] The Honorable Joan H. Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

[1] We previously affirmed the denial of Defendants' motion to dismiss on the basis of qualified immunity. *Denby v. Engstrom*, No. 20-16319, 2021 WL 2885846 (9th Cir. July 9, 2021).

City of Indio, 908 F.3d 1204, 1210 (9th Cir. 2018) (per curiam). Within those jurisdictional confines, this Court "review[s] *de novo* the denial of a motion for summary judgment predicated on qualified immunity." *Felarca v. Birgeneau*, 891 F.3d 809, 815 (9th Cir. 2018). We affirm.

1. If disputed facts are viewed in Denby's favor, a jury could decide that defendants used excessive force in violation of the Fourth and Fourteenth Amendments. "[O]fficers executing a search warrant occasionally 'must damage property in order to perform their duty.'" *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir.), *as amended* (Oct. 9, 1997) (quoting *Dalia v. United States*, 441 U.S. 238, 258 (1979)). But "unnecessarily destructive behavior, beyond that necessary to execute [a] warrant[] effectively, violates the Fourth Amendment." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974 (9th Cir. 2005) (quoting *Liston*, 120 F.3d at 979).

Viewing disputed facts in Denby's favor, the degree of force and resulting property damage far exceeds that in cases in which we have affirmed a trial court's denial of qualified immunity. *See Hells Angels*, 402 F.3d at 974–75 (denying qualified immunity where officers executing a search warrant for Hells Angels insignia cut a mailbox off its post, jack-hammered the sidewalk outside the clubhouse, and broke a refrigerator); *Mena v. City of Simi Valley*, 226 F.3d 1031, 1035–41 (9th Cir. 2000) (denying qualified immunity where officers executing a search warrant for weapons broke the door of a home with a battering ram, unnecessarily broke down two unlocked doors, and kicked in an open patio door). Here, the warrant authorized police to search the premises only to find and arrest Ochoa. After officers executed the warrant, it is undisputed

Denby's home sustained the following damage: all exterior windows were broken, and the chain-link fence and front door were destroyed, as were Denby's PT Cruiser and another vehicle, all furniture in the home, the appliances, televisions, cushions, pillows, window coverings, shower doors, bathroom mirrors, a toilet, artwork, heirlooms, family pictures, clothes, and antiques.[2] Many of these items were too small to hide Ochoa. *See Maryland v. Buie*, 494 U.S. 325, 334–35 (1990) (permitting sweep of home incident to arrest "only to [conduct] a cursory inspection of those spaces where a person may be found"). The district court correctly concluded that a jury could decide the use of force was unreasonable because Defendants' tactics caused the destruction of numerous objects too small to hide Ochoa, and were therefore outside the scope of the warrant. *See Hells Angels*, 402 F.3d at 971.

It is also undisputed that officers abandoned Denby's residence without notifying Denby of the danger posed by the contaminants, or taking steps to decontaminate the residual tear gas and pepper spray from Defendants' use of chemical munitions. The record contains no explanation for this decision, which violated Pinal County Sheriff's Office SWAT Manual policy. Denby contends this left his home uninhabitable, injured him, prevented him from stopping water that was running from a toilet that was shattered by the officers' tactics, and resulted in the destruction of his home.

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[2] Defendants deny that the force they used was excessive, but they do not deny that the damage resulted from their search. Hence, the question at trial will be whether Defendants' use of force was unreasonable under the circumstances.

As the district court noted, factual disputes remain for the jury regarding whether and when the search became unreasonable.[3] We do not have jurisdiction over "which facts the parties might be able to prove." *Foster*, 908 F.3d at 1210 (quoting *Johnson v. Jones*, 515 U.S. 304, 311 (1995)). Because the excessive force inquiry here "requires a jury to sift through disputed factual contentions, and to draw inferences therefrom," summary judgment is not appropriate. *Avina v. United States*, 681 F.3d 1127, 1130 (9th Cir. 2012).

2. The district court sufficiently "examine[d] the specific factual allegations against each individual defendant," *Cunningham v. Gates*, 229 F.3d 1271, 1287 (9th Cir. 2000), and correctly concluded that, viewed in Denby's favor, the evidence shows that each Defendant was at least an "integral participant" in the search of Denby's residence, *see Peck v. Montoya*, 51 F.4th 877, 891 (9th Cir. 2022).

Engstrom, Lapre, and Skedel: Viewed in the light most favorable to Denby, the unexplained destruction

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[3] Some of the progressively escalating tactics Defendants used to apprehend Ochoa may have been reasonable at the outset. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). But a jury could conclude that at some point over the seven-hour incident (with no response from, or sighting of, Ochoa), the continued and escalating use of force became unreasonable. *Cf. id.* at 396–97 (noting that the reasonableness calculus must account for "split-second judgments" in "tense, uncertain, and rapidly evolving" circumstances). The record evidence suggests that the perceived immediacy of the threat Ochoa posed decreased over time, such that officers wandered casually through the yard and deemed it safe to approach the house's windows and doors before Ochoa was discovered in the backyard.

of furniture and objects too small to hide Ochoa would support a finding that each of the entry team defendants employed unnecessarily destructive force during their search of Denby's home. *See Mena*, 226 F.3d at 1041; *Maryland*, 494 U.S. at 334–35. Even if Engstrom, Lapre, and/or Skedel did not personally use excessive force, the district court correctly identified that each could have been at least an integral participant in the use of unreasonable force because they "knew about and acquiesced in the constitutionally defective conduct as part of a common plan with those whose conduct constituted the violation." *Peck*, 51 F.4th at 891. Defendants conceded that the "SWAT members met to develop a plan to approach the residence, enter the structure, and clear the interior." A jury could conclude Engstrom, Lapre, and Skedel were part of that meeting. *Cf. Sjurset v. Button*, 810 F.3d 609, 619 (9th Cir. 2015) (holding that officers not "privy to any discussions, briefings, or collective decisions" were not integral participants).[4]

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[4] A jury also could find that Skedel used excessive force when deploying two noise-flash diversionary devices (NFDDs) during the entry team's search, and that Engstrom and Lapre were integral participants in that action. *See Boyd v. Benton County*, 374 F.3d 773, 777–80 (9th Cir. 2004). A jury could find Lapre used excessive force by shooting some or all of the 22 canisters of chemical munitions into a 1,300 square foot house when a K-9 unit was available, and that Skedel was an integral participant for providing armed cover to Lapre during that action. *See Hopkins v. Bonvicino*, 573 F.3d 752, 770 (9th Cir. 2009) (citing *Boyd*, 374 F.3d at 780) (recognizing that officers who provide "armed backup during an unconstitutional search" satisfy the integral participant rule). Finally, a jury could find Engstrom's continued use of force was unreasonable after he noticed movement under a tarp in the backyard and failed to investigate it. *See Foster*, 908 F.3d at 1207 ("[W]e lack jurisdiction to consider questions of evidentiary sufficiency on interlocutory review.").

Gragg: The undisputed facts would support a finding that Gragg, who commanded the SWAT units, was an integral participant because he "set in motion a series of acts by others which [Gragg] knew or reasonably should have known would cause others to inflict" a Fourth Amendment injury. *Peck*, 51 F.4th at 891. Gragg was involved in SWAT's planning meeting and decision to enter the residence and clear the interior. A fact finder must resolve whether each decision to escalate the use of force was reasonable under the circumstances. *Avina*, 681 F.3d at 1130. Finally, the SWAT Manual states that the "designated team leader will be responsible for initiating decontamination procedures as appropriate." The record indicates that Gragg, along with SWAT team leaders Lapre and Skedel, directed or approved the abandonment of Denby's contaminated residence without following the decontamination procedures in the Pinal County Sheriff's Office SWAT Manual.

Robinson: The district court correctly concluded that a jury could find Robinson was an integral participant given his role in providing armed cover for the other Defendants during the search. *See Hopkins*, 573 F.3d at 770.

Specifically, if a jury decides that Lapre's use of 22 canisters of chemical munitions constituted unreasonable force, they could also hold Robinson accountable for providing armed cover to Lapre during the deployment. Robinson "cleared the scene" after SWAT personnel took Ochoa into custody, suggesting that he had the opportunity to intervene as the officers decamped from the premises without following the SWAT Manual decontamination procedures.

3. Denby's "Fourth Amendment right to be free from unreasonably destructive searches was clearly estab-

lished at the time of the search." *Denby v. Engstrom*, No. 20-16319, 2021 WL 2885846, at *3 (9th Cir. July 9, 2021). This is a case in which "a general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Andrew v. White*, 604 U. S. ____ (2025), 2025 WL 247502, at *4 (Jan. 21, 2025) (citing *Hope* and affirming that "[g]eneral legal principles can constitute clearly established law" in the rigorous AEDPA context). Existing precedent in *Mena*, 226 F.3d at 1041, and *Hells Angels*, 402 F.3d at 974, "place[s] the . . . constitutional question beyond debate," *White v. Pauly*, 580 U.S. 73, 79 (2017). These cases specifically and clearly establish that similarly destructive force used in a home during the execution of a search warrant amounts to a constitutional violation, and the force used here went above and beyond the force used in those cases. Moreover, the Pinal County Sheriff's Office SWAT Manual should have caused Defendants to question whether their act of leaving a non-suspect's residence contaminated with tear gas without informing him of the dangers was unreasonable. The district court did not err in concluding that the Defendants "had fair notice that [their] conduct was unlawful but still engaged in it." *Wright v. Beck*, 981 F.3d 719, 734 (9th Cir. 2020).

4. Finally, we affirm the district court's denial of Defendants' request for summary judgment on Denby's failure to intercede claim. "'[P]olice officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen' . . . if they had an opportunity to intercede." *Cunningham*, 229 F.3d at 1289–90 (quoting *United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994),

rev'd on other grounds, 518 U.S. 81 (1996)). For the same reasons a jury could find each Defendant was at least an integral participant, the jury could also decide that each Defendant had a "realistic opportunity to intercede" in the violation of Denby's Fourth Amendment Rights. *See id.* at 1290; *see, e.g.*, *Hughes v. Rodriguez*, 31 F.4th 1211, 1223 (9th Cir. 2022) (combining the integral participant and failure to intercede analysis). "By 201[4], we had clearly established that 'police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen.'" *Tobias v. Arteaga*, 996 F.3d 571, 583–84 (9th Cir. 2021) (quoting *Cunningham*, 229 F.3d at 1289); *see also Bracken v. Okura*, 869 F.3d 771, 778–80 (9th Cir. 2017).

AFFIRMED. Defendants-appellants to bear costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: March 18, 2025]

No. 23-15658

D.C. No. 2:17-cv-00119-SPL

JAMES W. DENBY,

Plaintiff-Appellee,

v.

DAVID ENGSTROM; *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

AMENDED MEMORANDUM[*]

Submitted February 3, 2025[**]
San Francisco, California

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

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: MURGUIA, Chief Judge, CHRISTEN, Circuit Judge, and LEFKOW,*** District Judge.

This case concerns Plaintiff James Denby's claim that the defendants violated his Fourth and Fourteenth Amendment rights when law enforcement officers destroyed his house and personal property while executing a warrant to search his residence for another man, Abram Ochoa. Denby brought claims pursuant to 42 U.S.C. § 1983 against the municipality and thirteen individual officers, all but five of whom have been dismissed: David Engstrom, Rory Skedel, Chris Lapre, Brian Gragg, and Jacob Robinson (collectively, Defendants). Defendants appeal the district court's denial of their motion for summary judgment, arguing they are entitled to qualified immunity on Denby's two remaining claims: (1) that Defendants violated his Fourth and Fourteenth Amendment rights by using unnecessary force when executing a search warrant, resulting in the destruction of property, and (2) that Defendants violated his constitutional rights because they had the opportunity to intercede to stop the destruction of his property, but failed to do so.[1] The parties are familiar with the facts, and we recount them only as necessary to resolve the issues on appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291 for interlocutory orders denying qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), but only "No the extent the district court's order denies

*** The Honorable Joan H. Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

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summary judgment on purely legal issues," *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018) (per curiam). Within those jurisdictional confines, this Court "review[s] *de novo* the denial of a motion for summary judgment predicated on qualified immunity." *Felarca v. Birgeneau*, 891 F.3d 809, 815 (9th Cir. 2018). We affirm.

1. If disputed facts are viewed in Denby's favor, a jury could decide that defendants used excessive force in violation of the Fourth and Fourteenth Amendments. "[O]fficers executing a search warrant occasionally 'must damage property in order to perform their duty.'" *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir.), *as amended* (Oct. 9, 1997) (quoting *Dalia v. United States*, 441 U.S. 238, 258 (1979)). But "unnecessarily destructive behavior, beyond that necessary to execute [a] warrant[] effectively, violates the Fourth Amendment." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974 (9th Cir. 2005) (quoting *Liston*, 120 F.3d at 979).

Viewing disputed facts in Denby's favor, the degree of force and resulting property damage far exceeds that in cases in which we have affirmed a trial court's denial of qualified immunity. *See Hells Angels*, 402 F.3d at 974-75 (denying qualified immunity where officers executing a search warrant for Hells Angels insignia cut a mailbox off its post, jack-hammered the sidewalk outside the clubhouse, and broke a refrigerator); *Mena v. City of Simi Valley*, 226 F.3d 1031, 1035-41 (9th Cir. 2000) (denying qualified immunity where officers executing a search warrant for weapons broke the door of a home with a battering ram, unnecessarily broke down two unlocked doors, and kicked in an open patio door). Here, the warrant authorized police to search the premises only to find and arrest Ochoa.

Ochoa did not reside at Denby's residence, but officers thought he may have entered it. After officers executed the warrant, it is undisputed Denby's home sustained the following damage: all exterior windows were broken, and the chain-link fence and front door were destroyed, as were Denby's PT Cruiser and another vehicle, all furniture in the home, the appliances, televisions, cushions, pillows, window coverings, shower doors, bathroom mirrors, a toilet, artwork, heirlooms, family pictures, clothes, and antiques.[2] Many of these items were too small to hide Ochoa. *See Maryland v. Buie*, 494 U.S. 325,334-35 (1990) (permitting sweep of home incident to arrest "only to [conduct] a cursory inspection of those spaces where a person may be found"). The district court correctly concluded that a jury could decide the use of force was unreasonable because Defendants' tactics caused the destruction of numerous objects too small to hide Ochoa, and were therefore outside the scope of the warrant. *See Hells Angels*, 402 F.3d at 971.

It is also undisputed that officers abandoned Denby's residence without notifying Denby of the danger posed by the contaminants they had used in their efforts to flush Ochoa from the home, or taking steps to decontaminate the residual tear gas and pepper spray from Defendants' use of chemical munitions. The record contains no explanation for this decision, which violated Pinal County Sheriff's Office SWAT Manual policy. Denby contends this left his home uninhabitable, injured him, prevented him from stopping water that was running from a toilet that had

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[2] Defendants deny that the force they used was excessive, but they do not deny that the damage resulted from their search. Hence, the question at trial will be whether Defendants' use of force was unreasonable under the circumstances.

been shattered by the officers' tactics, and resulted in the destruction of his home.

Ochoa was not found in the home, and as the district court noted, factual disputes remain for the jury regarding whether and when the search of the home became unreasonable.[3] We do not have jurisdiction to decide "which facts the parties might be able to prove." *Foster*, 908 F.3d at 1210 (quoting *Johnson v. Jones*, 515 U.S. 304, 311 (1995)). Because the excessive force inquiry here "requires a jury to sift through disputed factual contentions, and to draw inferences therefrom," summary judgment is not appropriate. *Avina v. United States*, 681 F.3d 1127, 1130 (9th Cir. 2012).

2. The district court sufficiently "examine[d] the specific factual allegations against each individual defendant," *Cunningham v. Gates*, 229 F.3d 1271, 1287 (9th Cir. 2000), and correctly concluded that, viewed in Denby's favor, the evidence shows that each Defendant was at least an "integral participant" in the search of

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[3] Some of the progressively escalating tactics Defendants used to apprehend Ochoa may have been reasonable at the outset. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). But a jury could conclude that at some point over the seven-hour incident (with no response from, or sighting of, Ochoa), the continued and escalating use of force became unreasonable. *Cf id.* at 396-97 (noting that the reasonableness calculus must account for "split-second judgments" in "tense, uncertain, and rapidly evolving" circumstances). The record evidence suggests that the officers' perceived immediacy of the threat Ochoa posed decreased over time, such that officers wandered casually through the yard and deemed it safe to approach the house's windows and doors before Ochoa was discovered in the backyard.

Denby's residence, *see Peck v. Montoya*, 51 F.4th 877, 891 (9th Cir. 2022).

Engstrom, Lapre, and Skedel: Viewed in the light most favorable to Denby, the unexplained destruction of furniture and objects too small to hide Ochoa would support a finding that each of the entry team defendants employed unnecessarily destructive force during their search of Denby's home. *See Mena*, 226 F.3d at 1041; *Maryland*, 494 U.S. at 334-35. Even if Engstrom, Lapre, and/or Skedel did not personally use excessive force, the district court correctly identified that each could have been at least an integral participant in the use of unreasonable force because they "knew about and acquiesced in the constitutionally defective conduct as part of a common plan with those whose conduct constituted the violation." *Peck*, 51 F.4th at 891. Defendants conceded in their Separate Statement of Facts before the district court that the "SWAT members met to develop a plan to approach the residence, enter the structure, and clear the interior." *See* ECF No. 20-3 at 137 ¶ 64. A jury could conclude Engstrom, Lapre, and Skedel were part of that meeting. *Cf Sjurset v. Button*, 810 F.3d 609, 619 (9th Cir. 2015) (holding that officers not "privy to any discussions, briefings, or collective decisions" were not integral participants).[4]

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[4] A jury also could find that Skedel used excessive force when deploying two noise-flash diversionary devices (NFDDs) during the entry team's search, and that Engstrom and Lapre were integral participants in that action. *See Boyd v. Benton County*, 374 F.3d 773, 777-80 (9th Cir. 2004). A jury could find Lapre used excessive force by shooting some or all of the 22 canisters of chemical munitions into a 1,300 square foot house when a K-9 unit was available, and that Skedel was an integral participant for providing armed cover to Lapre during that action. *See Hopkins v. Bonvicino*, 573 F.3d 752, 770 (9th Cir. 2009) (citing

Gragg: The undisputed facts would support a finding that Gragg, who commanded the SWAT units, was an integral participant because he "set in motion a series of acts by others which [Gragg] knew or reasonably should have known would cause others to inflict" a Fourth Amendment injury. *Peck*, 51 F.4th at 891. Gragg was involved in SWAT's planning meeting and decision to enter the residence and clear the interior. A fact finder must resolve whether each decision to escalate the use of force was reasonable under the circumstances. *Avina*, 681 F.3d at 1130. Finally, the SWAT Manual states that the "designated team leader will be responsible for initiating decontamination procedures as appropriate." The record indicates that Gragg, along with SWAT team leaders Lapre and Skedel, directed or approved the abandonment of Denby's contaminated residence without following the decontamination procedures in the Pinal County Sheriff's Office SWAT Manual.

Robinson: The district court correctly concluded that a jury could find Robinson was an integral participant given his role in providing armed cover for the other Defendants during the search. *See Hopkins*, 573 F.3d at 770.

Specifically, if a jury decides that Lapre's use of 22 canisters of chemical munitions constituted unreasonable force, they could also hold Robinson accountable for providing armed cover to Lapre during the deploy-

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Boyd, 374 F.3d at 780) (recognizing that officers who provide "armed backup during an unconstitutional search" satisfy the integral participant rule). Finally, a jury could find Engstrom's continued use of force was unreasonable after he noticed movement under a tarp in the backyard and failed to investigate it. *See Foster*, 908 F.3d at 1207 ("[W]e lack jurisdiction to consider questions of evidentiary sufficiency on interlocutory review.").

ment. Robinson "cleared the scene" after SWAT personnel took Ochoa into custody, suggesting that he had the opportunity to intervene as the officers decamped from the premises without following the SWAT Manual decontamination procedures.

3. Denby's "Fourth Amendment right to be free from unreasonably destructive searches was clearly established at the time of the search." *Denby v. Engstrom*, No. 20-16319, 2021 WL 2885846, at *3 (9th Cir. July 9, 2021). This is a case in which "a general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Andrew v. White*, 604 U. S. (2025), 2025 WL 247502, at *4 (Jan. 21, 2025) (citing *Hope* and affirming that "[g]eneral legal principles can constitute clearly established law" in the rigorous AEDPA context). Existing precedent in *Mena*, 226 F.3d at 1041, and *Hells Angels*, 402 F.3d at 974, "place[s] the . . . constitutional question beyond debate," *White v. Pauly*, 580 U.S. 73, 79 (2017). These cases specifically and clearly establish that similarly destructive force used in a home during the execution of a search warrant amounts to a constitutional violation, and the force used here went above and beyond the force used in those cases.[5] Moreover, the Pinal County Sheriff's

[5] Defendants rely on *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), but as this panel noted in its prior disposition, *West is* distinguishable. *West* "involved an armed and extremely violent individual barricaded inside a home who had outstanding felony arrest warrants for several violent crimes, including driving his vehicle directly at a police officer. *West* did not involve allegations that officers searched areas too small to hide a person." *Denby*, 2021 WL 2885846, at *3 (citation omitted) (citing *West*, 931 F.3d at 981-82). Unlike *West*, the force used here clearly went beyond

Office SWAT Manual should have caused Defendants to question whether their act of leaving a non-suspect's residence contaminated with tear gas without informing him of the dangers was unreasonable. The district court did not err in concluding that the Defendants "had fair notice that [their] conduct was unlawful but still engaged in it." *Wright v. Beck*, 981 F.3d 719, 734 (9th Cir. 2020).

4. Finally, we affirm the district court's denial of Defendants' request for summary judgment on Denby's failure to intercede claim. `"[P]olice officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen' . . . if they had an opportunity to intercede." *Cunningham*, 229 F.3d at 1289-90 (quoting *United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994), *rev'd on other grounds*, 518 U.S. 81 (1996)). For the same reasons a jury could find each Defendant was at least an integral participant, the jury could also decide that each Defendant had a "realistic opportunity to intercede" in the violation of Denby's Fourth Amendment Rights. *See id.* at 1290; *see, e.g.*, *Hughes v. Rodriguez*, 31 F.4th 1211, 1223 (9th Cir. 2022) (combining the integral participant and failure to intercede analysis). "By 201[4], we had clearly established that 'police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen.'" *Tobias v. Arteaga*, 996 F.3d 571, 583-84 (9th Cir. 2021) (quoting *Cunningham*,

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that necessary to execute the warrant effectively. *Mena*, 226 F.3d at 1041; *Hells Angels*, 402 F.3d at 974. Moreover, the "unusual circumstances of this case" and cumulative force employed over a seven-hour period with no response from Ochoa, in combination with our precedent, make this an "obvious case in which to deny qualified immunity." *Cf West*, 931 F.3d at 987.

229 F.3d at 1289); *see also Bracken v. Okura*, 869 F.3d 771, 778-80 (9th Cir. 2017).

AFFIRMED. Defendants-appellants to bear costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: March 18, 2025]

No. 23-15658

D.C. No. 2:17-cv-00119-SPL

JAMES W. DENBY,

Plaintiff-Appellee,

v.

DAVID ENGSTROM; *et al.*,

Defendants-Appellants.

ORDER

Before: MURGUIA, Chief Judge, CHRISTEN, Circuit Judge, and LEFKOW,* District Judge.

The Memorandum Disposition filed on February 5, 2025, is hereby amended. The amended disposition will be filed concurrently with this order.

With the filing of the Amended Memorandum Disposition, Chief Judge Murguia, Judge Christen, and Judge Lefkow vote to deny the petition for panel rehearing as moot. Chief Judge Murguia and Judge Christen also vote to deny the petition for rehearing en banc as moot, and Judge Lefkow so recommends.

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* The Honorable Joan H. Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition. Fed. R. App. P. 40.

The petition for panel rehearing and rehearing en banc (Dkt. 39) is DENIED. No further petitions for rehearing will be accepted.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-17-00119-PHX-SPL

JAMES W. DENBY, *et al.*,

Plaintiffs,

vs.

CITY OF CASA GRANDE, *et al.*,

Defendants.

ORDER

Before the Court is a Motion for Summary Judgment (Doc. 201) filed by Defendants David and Jane Doe Engstrom, Jacob H. Robinson, Christopher and Jane Doe Lapre, Sgt. Gragg and Jane Doe Gragg, and Rory Skedel (collectively, "Defendants").[1] The Motion is fully briefed and ready for review. (Docs. 201, 203, 210, 211 & 215). For the following reasons, the Court denies Defendants' Motion.[2]

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[1] Plaintiff's Second Amended Complaint also names "Jane Doe Robinson" and "Jane Doe Skedel" as Defendants. (Doc. 82 at 1). However, Defendants indicate that Defendants Robinson and Skedel were not married at the time of the events in this matter and that Plaintiff is incorrect to name their spouses as Defendants. (Doc. 201 at 1, n.1). Additionally, Plaintiff's Second Amended Complaint spells Defendant Gragg's last name as "Gregg." (*See, e.g.*, Doc. 82 at 5). The Court adopts the spelling used in Defendant Gragg's Motion for Summary Judgment (*See* Doc. 201 at 1, n.1).

[2] Because it would not assist in resolution of the instant issues, the Court finds the pending motion is suitable for decision

I. BACKGROUND

This action arises from a December 2014 incident at a residence owned by Plaintiff James W. Denby ("Plaintiff") in Casa Grande, Arizona. (Doc. 82 at 6). At approximately 3:05 P.M. on the afternoon of December 17, 2014, the Casa Grande Police Department ("CGPD") responded to a "domestic disturbance" complaint at a house nearby Plaintiff's. (*Id.*). Upon arrival, the officers learned the dispute involved Abram Ochoa ("Mr. Ochoa"), who had at least one outstanding arrest warrant for an unrelated incident.[3] (*Id.* at 7). The officers were made aware that Mr. Ochoa had potentially fled to Plaintiff's residence down the street (the "Residence"). (*Id.*). CGPD declined offers from Mr. Ochoa's girlfriend and Plaintiff Denby's son to help persuade Mr. Ochoa to leave the Residence voluntarily. (*Id.* at 8). The officers used a loudspeaker PA system to attempt communication with Mr. Ochoa, but they did not receive any response from the Residence. (*Id.*).

Shortly after arriving, CGPD requested assistance from the Pinal County Regional SWAT ("SWAT"). (*Id.*). SWAT arrived approximately one hour later and decided to use a "Bearcat" as a battering ram to gain access to the Residence. (*Id.* at 10). SWAT drove the Bearcat over a chain-linked fence and into the front of the Residence, breaking the windows and front door. (*Id.* at 11). SWAT then unsuccessfully attempted to communicate with Mr. Ochoa through the Bearcat's

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without oral argument. *See* LRCiv. 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

[3] Mr. Ochoa is also a named Defendant in this action. However, he appeared in this case separately, (*see* Doc. 68), and does not join Defendants' Motion for Summary Judgment. (*See* Doc. 201 at 1).

PA system and through a tactical phone deployed through the broken windows and wall. (*Id.*). At approximately 5:00 P.M., a judged signed a search warrant for the Residence, permitting officers to enter the Residence for the sole purpose of arresting Mr. Ochoa. (*Id.*). Over the course of several hours, SWAT deployed robots, fired a total of twenty-two (22) canisters of pepper spray and tear gas, and deployed multiple Noise Flash Diversionary Devices ("NFDDs" or "flash grenades") into the Residence. (*Id.* at 11–12). Through it all, the officers did not see Mr. Ochoa nor any signs of movement or response from inside the Residence. (*Id.* at 13). Next, SWAT developed a tactical plan to enter the Residence and act on the search warrant. (*Id.* at 13). They entered at 9:47 P.M., nearly seven hours after they first arrived at the Residence. (*Id.*). During the search, SWAT team members and CGPD officers destroyed several items in the Residence, including furniture, cushions, pillows, windows, window coverings, bathroom mirrors, shower doors, toilets, televisions, artwork, and antiques. (*Id.* at 13–14). At approximately 10:03 P.M.—seven hours after CGPD was originally dispatched to the area—Mr. Ochoa was found *outside* the Residence and hiding under a tarp on the property. (*Id.* at 14). Mr. Ochoa had apparently been hiding under the tarp during the entire incident. (*Id.*).

Although Plaintiffs initially filed this case in state court, Defendants removed it to this Court on January 13, 2017.[4] (Doc. 1). Plaintiffs amended their complaint twice. (*See* Docs. 31 & 82). Three of Plaintiffs' five

[4] Plaintiff Denby was originally joined by Plaintiffs Elizabeth J. Torres and Wilma J. Logston. (Doc. 82 at 1). However, Plaintiffs Torres and Logston were later dismissed from the action and Mr. Denby is the sole remaining Plaintiff. (*See* Doc. 106 & 188).

original claims have been dismissed, along with several of the originally named Defendants. (*See* Docs. 21, 118 & 136). Only Defendants Engstrom, Robinson, Lapre, Gragg, Skedel, and Ochoa remain. As it relates to these Defendants—excluding Defendant Ochoa—only two claims remain: (i) violation of Plaintiff's Fourth and Fourteenth Amendment rights, pursuant to 42 U.S.C. § 1983 (Count I) and (ii) failure to intervene with respect to a constitutional violation (Count II). (Doc. 82 at 16–21). Defendants Engstrom, Robinson, Lapre, Gragg, and Skedel now seek summary judgment in their favor as to both claims and dismissal from this action. (*Id.*).

II. LEGAL STANDARD

A court must grant summary judgment if the evidence shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). To defeat the motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial.

Anderson, 477 U.S. at 249. "The Court must assume the nonmoving party's version of the facts to be correct, even in qualified immunity cases," *Soto v. Paredes*, No. CIV–05–4105–PHX–MHM, 2008 WL 906461, at *1 (D. Ariz. Mar. 31, 2008) (citing *Liston v. Cnty. of Riverside*, 120 F.3d 965, 977 (9th Cir. 1997)), and all inferences must be drawn in the nonmoving party's favor. *Anderson*, 477 U.S. at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. DISCUSSION

Defendants Engstrom, Gragg, Lapre, Robinson, and Skedel argue they are entitled to qualified immunity and that summary judgment in their favor is therefore appropriate with respect to Plaintiff's two remaining claims. The Court will first address Plaintiff's Fourth Amendment claim and conduct the requisite qualified immunity analysis before turning to Plaintiff's failure to intervene claim.

A. Fourth Amendment Claim & Qualified Immunity Analysis

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Est. of Lopez v. Gelhaus*, 871 F.3d 998, 1005 (9th Cir. 2017) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S.

335, 341 (1986)). "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson*, 555 U.S. at 231 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

In determining whether an officer is entitled to qualified immunity, the Court must consider (1) whether there has been a violation of a constitutional right, and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citing *Pearson*, 555 U.S. at 231). The Court may exercise its discretion "in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236. Once a qualified-immunity defense is raised, the plaintiff bears the burden of proving the violation of a constitutional right and that the right was clearly established. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000).

1. Constitutional Violation Prong

The first prong of the qualified immunity analysis asks whether the facts shown by Plaintiff—when viewed in Plaintiff's favor—make out a constitutional violation. *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019) (citing *Pearson*, 555 U.S. at 232). The constitutional right at issue is the Fourth Amendment's protection from unreasonable searches and seizures. Plaintiff contends that his Fourth Amendment rights were violated when Defendants excessively and unnecessarily destroyed Plaintiff's property during their search of his Residence. (Doc. 82 at 16–19).

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. "It is plain that while the destruction of property in carrying out a search is not favored, it does not necessarily violate the fourth amendment." *United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991) (citation omitted). "[O]fficers executing a search warrant occasionally 'must damage property in order to perform their duty.'" *Liston*, 120 F.3d at 979 (quoting *Dalia v. United States*, 441 U.S. 238, 258 (1979)). However, Ninth Circuit and Supreme Court authority has made clear that "unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively," may sometimes amount to a Fourth Amendment violation. *Id.* (citation omitted). As with any Fourth Amendment inquiry, "[t]he test of what is necessary to 'execute a warrant effectively' is reasonableness." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose* ("*Hells Angels*"), 402 F.3d 962, 971 (9th Cir. 2005). When determining whether officers executed a search warrant unreasonably, a court must determine whether the degree of intrusion matched the underlying purpose of the intrusion. *Id.*

Here, the underlying purpose of Defendants' intrusion was clear and unambiguous: to find and arrest Mr. Ochoa. Defendants were originally responding to a domestic disturbance complaint involving Mr. Ochoa at a house nearby Plaintiff's. (Docs. 203 at 2 & 211 at 2). Defendants were aware that Mr. Ochoa had an active arrest warrant; in fact, one officer had attempted to serve the arrest warrant the day prior. (Docs. 203 at 2 & 211 at 3). Defendants learned that Mr. Ochoa had fled the house and they pursued him to Plaintiff's Residence where they set up a perimeter.

(Docs. 203 at 2–3 & 211 at 3–4). The SWAT Team was requested and soon arrived, while the process to obtain a search warrant for the Residence had begun. (Docs. 203 at 6–7 & 211 at 9–12). Shortly thereafter, the search warrant was signed. (Docs. 203 at 8 & 211 at 16). It directed Defendants to search the Residence to find and arrest Mr. Ochoa. (*See* "Affidavit for Search Warrant," Doc. 203 12 at 5 (requesting "authorization to enter the premises . . . for the purpose of arresting [Mr. Ochoa]") & "Search Warrant," Doc. 203-12 at 6 (authorizing search of Residence for purpose identified in Affidavit)).

Having identified the underlying purpose of Defendants' intrusion—to find and arrest Mr. Ochoa—the question is whether the degree of the intrusion was reasonable in light of this purpose. *See Hells Angels*, 402 F.3d at 971. In analyzing reasonableness, the Court must consider the totality of the circumstances, "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The analysis is purely objective. *See id.* at 397 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."). The Court must consider the facts and circumstances confronting the officers, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" (the "*Graham* factors"). *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)). The most important of these factors

is whether the suspect poses an immediate threat.[5] *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994). "Although the reasonableness of force used ordinarily is a question of fact for the jury, defendants may be entitled to summary judgment if the 'use of force was objectively reasonable under the circumstances.'" *Soto*, 2008 WL 906461, at *1 (citing *Liston*, 120 F.3d at 976, n.10)).

The degree of intrusion in this case was significant. Defendants' actions resulted in near complete destruction of Plaintiff's home and numerous pieces of Plaintiff's personal property. All exterior windows of the Residence were destroyed, either via Defendants' use of the Bearcat or via launched chemical munitions. A chain-link fence around the Residence and the Residence's front door were demolished by the Bearcat. The engine of Plaintiff's PT Cruiser was destroyed when chemical munitions were deployed, and a canister was fired directly into the vehicle's engine compartment. All furniture in the home was destroyed. Home appliances were destroyed. Televisions were destroyed. Cushions and pillows were torn open. Window coverings were torn apart. Shower doors, bathroom mirrors, and a toilet were smashed. Personal items including artwork, heirlooms, clothes, family pictures, and antiques were destroyed, smashed, or damaged. Even the Residence's foundation sustained significant damage because of the damaged toilet,

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[5] The *Graham* factors are not exhaustive. The Court may also consider factors such as whether the suspect resisted or was armed, the number of officers involved, whether the suspect was sober, the availability of alternative methods of capturing or subduing the suspect, or any other dangerous or exigent circumstances that existed. *Chew*, 27 F.3d at 1440, n.5 (citing *Hunter v. Dist. of Columbia*, 943 F.2d 69, 77 (D.C.Cir.1991)).

which caused water to run unchecked in the Residence for days. The Residence sustained significant chemical damage from Defendants firing at least twenty-two canisters of chemical munitions into the home and failing to decontaminate or properly ventilate the home following the incident. Defendants do not dispute that any of these damages occurred.

Altogether, the damages sustained by Plaintiff's Residence and personal property far exceed the damages that occurred in other cases where courts did not find a constitutional violation. *See, e.g.*, *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 333–34, 336 (7th Cir. 2011) (finding search reasonable where officers jackhammered concrete in garage, damaged main door to trailer, removed wall panels and carpet, and cut up a couch). In fact, the damages in this case even exceed the damages that occurred in many cases where courts *did* find sufficient evidence for a constitutional violation. *See, e.g.*, *Hells Angels*, 402 F.3d at 974 (finding Fourth Amendment violation where officers jack-hammered sidewalk, cut mailbox off its post, and broke a refrigerator); *Neal v. Cal. City*, No. 1:14–cv–00269–AWI–JLT, 2015 WL 4227466, at *11 (E.D. Cal. July 10, 2015) (denying defendants' request for summary judgment—and finding that a jury could reasonably find Fourth Amendment violation—where officers disassembled appliances and video game systems, cut holes in sofas and pillows, removed clothes from dryers, broke picture frames, and forcibly opened safe). Although this does not mean that Defendants necessarily violated Plaintiff's constitutional rights, the Court finds that the degree of intrusion in this case—that is, the extent of the property damage—was more than sufficient to sustain a Fourth Amendment violation.

Consideration of the *Graham* factors further supports this finding. As to the third *Graham* factor—whether the suspect was actively resisting arrest or attempting to evade arrest by flight—it is undisputed that Mr. Ochoa was actively resisting arrest by evading the officers from the initial scene and then by hiding under the tarp outside Plaintiff's Residence for over six hours. That said, the parties dispute the applicability of the other two *Graham* factors. As to the first *Graham* factor—the severity of the crime at issue—Defendants contend that Mr. Ochoa was "wanted on a serious offense," (Doc. 201 at 13), while Plaintiff contends that Mr. Ochoa was merely wanted for a failure-to-appear on non-violent charges.[6] (Doc. 211-1 at 13). The fact that Mr. Ochoa's arrest warrant was based only on his failure to appear for non-violent charges is supportive of Plaintiff's position on this factor; such a crime is not a particularly serious offense. However, this overlooks the reason Defendants were dispatched to the scene in the first place: reports of a domestic disturbance involving Mr. Ochoa, a man who had a history of domestic violence, including assaults of his girlfriend and the suspected stabbing of his brother just two weeks prior.[7] The fact that Defendants were responding to and—at least initially—

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[6] To support this contention, Plaintiff relies on the testimony of his expert witness, Mark Hafkey, who declares that he analyzed Mr. Ochoa's CAD and ACIC records and concluded that Mr. Ochoa "had an arrest warrant merely for a failure-to-appear on non-violent charges." (Doc. 211-1 at 13).

[7] Plaintiff points out that Defendants have failed to offer any evidence—other than the Affidavit of Defendant Lapre—of this purported stabbing. (Doc. 211 at 44). The Court has taken this absence of evidence into consideration and does not give great weight to the alleged stabbing in this analysis.

investigating reports of domestic violence is supportive of Defendants' position on the first factor.

As to the second (and most important) *Graham* factor—the immediacy of the threat posed by the suspect—Defendants argue that Mr. Ochoa posed "an immediate threat to law enforcement officers or others in the general area." (Doc. 201 at 13). Plaintiff, meanwhile, contends that "there were no active threats to justify the level of force used." (Doc. 210 at 5). The Court finds that Mr. Ochoa's general background and criminal history increased the potential threat he posed, but that the actual circumstances of the incident at Plaintiff's Residence did not give rise to an immediate threat of the nature contended by Defendants. To be sure, the threat level was heightened by Mr. Ochoa's history of domestic violence and other criminal activity, gang affiliations, and methamphetamine abuse. (*See* Doc. 203–16 at 1–4 (detailing Mr. Ochoa's felony history)). Defendants were aware of this background information, and it was reasonable for them to perceive a more dangerous situation because of it. Likewise, the risk of injury was further increased by Mr. Ochoa's fleeing from the initial scene, his apparent illegal entry into Plaintiff's Residence, and the presence of guns inside that Residence.

That said, numerous *other* circumstances reasonably eased or even eliminated many of these concerns. First, Mr. Ochoa never displayed any threatening or intimidating behavior at any point during the nearly seven-hour incident. He never flashed or used any weapons. He never yelled or used any hostile or aggressive language. He merely ran, and then hid, from Defendants. Second, Defendants were made aware that Mr. Ochoa was not under the influence of

any drugs or alcohol. Third, Defendants were aware that—even if Mr. Ochoa *was* inside the Residence—no other person was inside the Residence with him or otherwise in immediate danger. Fourth, Defendants had control and a thorough understanding of the entire scene. Plaintiff provided them with keys and immediate, unrestricted access to the entire Residence. He also drew them a map of the Residence's interior and told them exactly where his firearms were located—in his bedroom. Defendants established a perimeter and had constant, uninterrupted surveillance of the Residence for nearly seven hours. Plaintiff claims to have observed officers "wandering casually through his yard and walking up to windows and doors" and points out Defendant Robinson's admission "that he was 'close enough to the residence to move a curtain back from a window' to look into the room." (Doc. 210 at 4). This shows both the officers' control of the scene and their general ease with its threat level.

Fifth, the length of the incident—nearly seven hours—combined with the complete absence of *any* communication with Mr. Ochoa or observance of *any* sounds or movement inside the Residence further eased the level of threat. Despite Defendants' contention, this was *not* the sort of multi-hour, hotly contested standoff between officers and an armed suspect who was barricading himself, actively rejecting the officers' commands and negotiation attempts, and outwardly threatening to harm himself, the officers, or some other person. *Compare with Lech v. City of Greenwood Vill.*, 791 Fed. Appx. 711, 713 (10th Cir. 2019) (suspect fired bullet from inside garage and struck officer's car during "high-risk, barricade

situation").[8] Rather, the officers' use of the PA system, the throw phone, the chemical munitions, and the robots—not to mention the numerous, largely unobstructed views into the Residence that they had through the broken windows—allowed them to clear most rooms in the house and confirm that Mr. Ochoa was likely not inside. The truth of the situation—that Mr. Ochoa was not in the Residence at all and that he was not seeking to threaten or harm but rather merely hide from the officers—become increasingly clear with every uneventful hour that passed without any signs of or contact with Mr. Ochoa. In turn, the immediacy of the threat posed by Mr. Ochoa should have decreased.

Sixth, and finally, any concerns that Mr. Ochoa had access to Plaintiff's firearms were reasonably eased, particularly as the day wore on. As noted above, Plaintiff told the officers *exactly* where his firearms were located—in his bedroom. He further explained that his bedroom door was locked, and that even if the room was breached, the guns were either locked in a gun safe or had trigger locks. The secured location of the guns was even confirmed during the incident, when Defendants had "a direct line of sight into the Home to Plaintiff's locked bedroom door and could see it remained unopened, thus proving Ochoa never had access to Plaintiff's firearms, even if he had been in the Home." (Doc. 210 at 3). In sum, the Court finds that Mr. Ochoa posed a moderate threat to the officers, given his background and his fleeing from the initial scene.

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[8] The Court notes that *Lech* is not a Fourth Amendment case. Rather, the constitutional provision at issue in *Lech* was the takings clause of the Fifth Amendment. *Lech*, 791 Fed. Appx. at 714. Nonetheless, the case shares factual similarities to the present case, and Defendants rely on *Lech* in their Motion. (Doc. 201 at 11).

However, the Court cannot find that the threat he posed was so severe or immediate as to freely permit all conduct by Defendants, without any regard for the damages it may cause.

To be sure, *some* of the tactics used by Defendants in executing the search warrant—and the damages resulting therefrom—may have been reasonable. Over the course of nearly seven hours, Defendants steadily escalated their use of force: (1) using the PA system to make commands; (2) using the Bearcat to break windows and deploy a throw-phone into the Residence; (3) deploying a robot into the Residence; (4) firing chemical munitions into the Residence; (5) sending a second, smaller robot into the Residence; (6) firing two NFDDs into the Residence; and (7) making a physical, dynamic entry into the Residence. In their Motion, Defendants cite to caselaw holding that the use of tactics such as chemical munitions, flash grenades, and dynamic entries with armored vehicles such as a Bearcat are often reasonable when a dangerous suspect refuses to leave a building and submit himself to officers. (Doc. 201 at 10–11, 15–16 & 18 (listing cases)). According to the caselaw, when such tactics are reasonably used, damage to property—*e.g.*, broken windows and doors, or flooring damage—can be expected and generally does not render the search unreasonable. *See West v. City of Caldwell*, 931 F.3d 978, 982 (9th Cir. 2019) (finding use of tear gas reasonable under circumstances); *Cook v. Gibbons*, 308 Fed. Appx. 24, 30–31 (8th Cir. 2009) (case relied upon by Defendants where court found officers' use of tear gas, flash grenades, and dynamic entry via rammed side door to be reasonable).

In this case, however, Plaintiff raises numerous factual disputes relating to whether it was reasonable

for Defendants to use these escalating tactics in the first place. For example, Plaintiff argues that Defendants' use of the Bearcat was "unnecessarily destructive, excessive, and therefore unreasonable" given that Defendants had the keys and full, unlimited access to the Residence. (Doc. 210 at 16). Similarly, Plaintiff argues that Defendants' use of at least twenty-two canisters of chemical munitions was unnecessary and unreasonable because the Residence was just 1,300 square feet and Defendants were increasingly aware that Mr. Ochoa was not inside. (*Id.* at 17). Plaintiff argues that Defendants lacked any reasonable belief that Mr. Ochoa was inside the Residence to begin with because of the unreliability of the statements made by Plaintiff's son, the impossibility of footprints existing, and the layout of the Residence. (*Id.* at 5, 12–13). Plaintiff offers expert testimony that Mr. Ochoa could not be considered a "barricaded subject" and that the officers should not have called for the SWAT Team given the circumstances and their failure to complete the requisite risk assessment. (*Id.* at 3–4). Plaintiff also argues that Defendants lacked a reasonable belief that Mr. Ochoa was armed, given the true and accurate statements of Plaintiff at the scene describing where his guns were located in the Residence and the manner in which they were secured. (*Id.* at 3, 15–16). Plaintiff offers expert testimony and refers to "nationally accepted police practices" to argue that Defendants should have searched the yard and under the tarp sooner. (*Id.* at 3–6, 14–15). Plaintiff argues that, after arresting Mr. Ochoa, Defendants exacerbated the chemical damages and left water running in the Residence by abandoning the Residence and failing to secure the property, call the fire department, or properly decontaminate the Residence. (*Id.* at 6–7). Altogether, the Court finds that Plaintiff raises

numerous factual disputes that have a direct bearing on the reasonableness of Defendants' tactics and escalating use of force. Such disputes are properly left for the jury to decide. *See Neal*, 2015 WL 4227466, at *11 ("Although a jury could find that those activities were an appropriate means of effectuating [] the search, it could just as easily find that Defendants' conduct [was] unnecessary to conduct the search.").

Plaintiff also suggests numerous alternatives that Defendants failed to consider. For example, Plaintiff contends that Defendants could have: (i) used their K-9 unit, which was "stationed at the house [during] the entirety of the incident" (Doc. 210 at 6); (ii) used the keys and tactical shields to open the door instead of breaking it open with the Bearcat (*Id.* at 6, 13); (iii) walked away and set up surveillance (*Id.* at 13); (iv) used a helicopter with infrared cameras (*Id.*); (v) simply left the scene and arrested Mr. Ochoa another day, given that he was wanted on non-violent offenses (*Id.* at 13–14); (vi) check under the tarp, given that movement was seen at one point (*Id.* at 14); or (vii) allowed Mr. Ochoa's girlfriend to speak on the PA system (*Id.*). Although the Court will not speculate as to the viability of any of these alternatives, the availability of alternative methods of capturing or subduing the suspect is a factor that courts may consider. *See Chew*, 27 F.3d at 1440, n.5.

Setting aside Defendants' use of chemical munitions, NFFDs, and the Bearcat, the Court notes that the excessive damage sustained by Plaintiff's Residence and personal property also included damages having no apparent relation to such tactics. This independently supports a finding of a constitutional violation. Specifically, Defendants offer no explanation for the destruction of Plaintiff's furniture, appliances,

televisions, PT Cruiser, artwork, heirlooms, clothes, family pictures, and antiques. Presumably, such personal property could have been spared even *with* a reasonable use of chemical munitions, NFFDs, and the Bearcat. More importantly, such property is entirely unrelated to the search's objective. As noted above, the sole purpose of all the actions taken by Defendants—from their arrival, including their search of the Residence, and until Mr. Ochoa was finally found—was to find and arrest Mr. Ochoa. This purpose was plain and simple; it did not include any orders or motivations to search for contraband or recover evidence—purposes that would have widened the scope of reasonably searchable areas in the Residence and possibly justified damage to Plaintiff's personal property. *See Neal*, 2015 WL 4227466, at *11 (explaining why searches may need to be more thorough when target of search is evidence or contraband); *see also Jackson ex rel. Jackson v. Suffolk Cnty.*, 87 F. Supp. 3d 386, 401–02 (E.D.N.Y. 2015) ("The reasonableness of the damage must be evaluated with reference to the target of the search, such as a more invasive contraband search."). As it stands, however, there is no reasonable explanation for Defendants' destruction of numerous objects far too small for Mr. Ochoa to be hiding in.

Finally, the Court must find that *each* individual Defendant engaged in some conduct amounting to a constitutional violation. *See Cunningham v. Gates*, 229 F.3d 1271, 1287 (9th Cir. 2000) ("[I]n resolving a motion for summary judgment based on qualified immunity, a court must carefully examine the specific factual allegations against each individual defendant."). That said, the actions of each individual Defendant need not rise to the level of a constitutional violation. *See Boyd v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir.

2004); *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1090 (9th Cir. 2011) ("Section 1983 liability extends to those who perform functions 'integral' to an unlawful search, even if their individual actions do not themselves rise to the level of a constitutional violation."). Rather, the Ninth Circuit holds that liability may be imposed on an officer so long as he was an "integral participant" in the unlawful conduct. *Boyd*, 374 F.3d at 780. Although the "integral participation" doctrine "does not implicate government agents who are 'mere bystanders' to an unconstitutional search," *see Bravo*, 665 F.3d at 1090, the Ninth Circuit has recognized that officers who provide armed backup to other officers conducting the search—even if they do not themselves enter the residence or building being searched may be considered full, active participants. *Boyd*, 374 F.3d at 780 (citations omitted).

Here, each Defendant was *at least* an "integral participant" in the search of Plaintiff's Residence and therefore can be held liable for any constitutional violations that occurred. First, Defendant Engstrom "was part of the entry team into the [R]esidence, and located toward the end of the line or 'stack' of SWAT Team Operators." (Docs. 203 at 17 & 211 at 35). Although the parties agree that Defendant Engstrom did not personally operate the Bearcat or fire the NFDDs or chemical munitions, they acknowledge that he was charged with maintaining the officers' perimeter of the Residence and that he was "assigned to cover the east perimeter wall" for a few hours. (Docs. 203 at 16–17 & 211 at 33–34). Given his participation in the entry team—and his duties of providing cover and maintaining the officers' perimeter around the Residence—the Court concludes that Defendant Engstrom was an "integral participant" in the search.

Second, Defendant Robinson "took a perimeter position on the west side of the [R]esidence to ensure Ochoa did not flee from the area of the residence he could observe, and to provide security for law enforcement personnel doing their jobs." (Docs. 203 at 28 & 211 at 58). He also provided cover for Defendant Lapre when Defendant Lapre was firing chemical munitions into the Residence. (Docs. 203 at 29 & 211 at 59–60). Although Defendant Robinson was not part of the entry team, he stated in his Affidavit that he provided security for the other officers during the entirety of the incident, including during the officers' entry and search of the Residence. (Doc. 203-10 at 3). Given his role as providing armed cover for the other Defendants during the search, the Court concludes that Defendant Robinson was an "integral participant" in the search.

Third, Defendant Lapre was a member of the SWAT Team and the designated leader of the Bravo Team. (Docs. 203 at 22 & 211 at 44–45). Defendant Lapre assumed the role of grenadier and fired the twenty-two cannisters of chemical munitions into the Residence. (Docs. 203 at 25 & 211 at 51). He was also part of the entry team. (Docs. 203 at 27–28 & 211 at 56). Given his direct participation in the search of the Residence, the Court finds that Defendant Lapre was an "integral participant" in the search.

Fourth, Defendant Gragg was a Sergeant for the CGPD and the Assistant SWAT Team Commander on the day of the incident. (Doc. 203-5 at 2). Defendant Gragg did not operate the Bearcat, deploy chemical munitions, or deploy the NFDDs. (*Id.* at 4). He was not part of the entry team and did not enter the Residence. (*Id.*). He did not search the outside of the residence and the parties do not indicate that he provided cover for

any other officers during the incident. (*Id.*). Instead, Defendant Gragg remained at the command post—which was down the street from the Residence—during the entirety of the incident. (*Id.* at 3). Although he could not see the Residence from the command post, he states in his Affidavit that he "would have provided some directions to the SWAT Team operators." (*Id.* at 4). According to the testimony of Plaintiff's expert witness—who reviewed and analyzed the evidence in this case—Defendant Gragg was the scene supervisor prior to the SWAT Team's arrival, and he remained in charge of the scene even after their arrival, "as there is no evidence higher command personnel ever relieved him." (Doc. 211-1 at 23). Given his role as supervisor and his knowledge of all significant decisions relating to the entry and search of the Residence, the Court finds that Defendant Gragg was an "integral participant" in the search. *See Motley v. Parks*, 432 F.3d 1072, 1081 (9th Cir. 2005) (citations, quotations, and alteration omitted) ("A supervisor can be liable under § 1983 if he sets in motion a series of acts by others . . . which he knew or reasonable should have known, would cause others to inflict the constitutional injury. . . . Liability can exist without direct participation by the supervisor.").

Fifth, Defendant Skedel was a member of the SWAT Team and the designated leader of the Charlie Team. (Docs. 203 at 32 & 211 at 66–67). Defendant Skedel deployed the two NFDDs that were fired into the Residence—one of which destroyed the toilet and eventually caused the water damage to the Residence's foundation. (Docs. 203 at 34 & 211 at 71). Defendant Skedel also provided cover for Defendant Lapre while Defendant Lapre was firing the chemical munitions. (Docs. 203 at 32 & 211 at 68). Defendant Skedel was part of the entry team. (Docs. 203 at 35 & 211 at 74).

Given his direct participation in the search of the Residence—including his use of the NFDDs, his cover of Defendant Lapre, and his participation on the entry team—the Court finds that Defendant Skedel was an "integral participant" in the search.

In sum, each of the remaining Defendants were far more than mere bystanders during the search of Plaintiff's Residence. The Court finds that each of them were "integral participants" in the search and that they can therefore be held liable for any constitutional violations that occurred. Moreover, although the search in and of itself was justified based on the need to find and arrest Mr. Ochoa, this did not free Defendants from their obligation to execute the search reasonably. Plaintiff has demonstrated sufficient evidence showing that the significant damage caused by Defendants' intrusion was not reasonably necessary and that they likely violated Plaintiff's Fourth Amendment rights. The Court concludes that the evidence put forth by the parties—viewed in the light most favorable to Plaintiff—demonstrates that the authority to search for and arrest Mr. Ochoa "did not justify the level of intrusion and excessive property damage that occurred during the search" of Plaintiff's Residence. *Hells Angels*, 402 F.3d at 972. The Court bases this conclusion on the narrow purpose of Defendants' search, the surprisingly extensive damage that occurred to Plaintiff's Residence and personal property, and the relatively low safety threat that was posed by the circumstances. With respect to the first prong, the Court finds that the evidence demonstrates that a constitutional violation occurred.

2. "Clearly Established" Prong

The second prong of the qualified immunity analysis asks whether the constitutional right was "clearly

established" at the time of the alleged constitutional violation. *Peck v. Montoya*, 51 F.4th 877, 887 (9th Cir. 2022) (citation omitted). This inquiry is "a pure question of law for the court to decide." *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994) (citation omitted). "A constitutional right is clearly established if the official had fair notice that her conduct was unlawful but still engaged in it." *Wright v. Beck*, 981 F.3d 719, 734 (9th Cir. 2020) (internal quotations and citation omitted). To determine whether the official had "fair notice," courts usually look to binding precedent in search of "a case where an officer acting under similar circumstances . . . was held to have violated" the Constitution. *White v. Pauly*, 580 U.S. 73, 79 (2017). For a right to be considered "clearly established," it is generally important that the precedential caselaw be factually similar to the case at issue. *See Shafer v. Cnty. of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017) (citing *White*, 580 U.S. at 79) ("For a right to be clearly established, case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law.").

In reviewing caselaw, courts "must be careful not to . . . defin[e] clearly-established law 'at a high level of generality.'" *Wright*, 981 F.3d at 734 (quoting *Ashcroft*, 563 U.S. at 742). This is because "broad pronouncements of an abstract right usually fail to provide a clear sense of the outer limits of lawful conduct." *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)); *see also Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987) (stressing consequences of defining the right too generally because it allows plaintiff "to convert the rule of qualified immunity . . . into a rule of virtually

unqualified liability simply by alleging violation of extremely abstract rights"). For example, it is obvious that all citizens enjoy a "clearly established" right against unreasonable searches and seizures under the Fourth Amendment. *See id.* at 734–35. This "constitutional truism" is entirely unhelpful, however, in determining the "objective legal reasonableness" of an officer's conduct during a *particular* search or seizure. *Id.* Therefore, courts usually must conduct this inquiry "'in light of the specific context of the case, not as a broad general proposition,' and determine whether the right, as explicated, carries over to the facts" of the case at issue. *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). "Such specificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quotations and alterations omitted).

Here, Plaintiff cites to *Mena v. City of Simi Valley*, a case in which officers executed a knock-and-announce search warrant on the plaintiff's residence. 226 F.3d 1031, 1035 (9th Cir. 2000). During the search, the officers broke several doors that were already unlocked and open. *Id.* at 1041. According to the plaintiff's testimony, one of the officers allegedly kicked an already-open door on the patio and stated, "I like to destroy these kind of materials, it's cool." *Id.* The Ninth Circuit affirmed the lower court's ruling that such conduct amounted to a Fourth Amendment violation, finding that the officers "appear to have damaged Plaintiffs' property in a way that was 'not reasonably necessary to execute the search warrant.'" *Id.* (quoting *Becker*, 929 F.2d at 446). Plaintiff also cites to *Hells Angels*, a case in which officers executed search

warrants at the residences and clubhouse of members of the Hells Angels. 402 F.3d at 965. The officers were searching for items with indicia of Hells Angels affiliation to support a sentencing enhancement in a separate murder trial. *Id.* In carrying out the searches, the officers jack-hammered a sidewalk, cut a mailbox off its post, and broke a refrigerator. *Id.* at 974. The Ninth Circuit affirmed the lower court's denial of qualified immunity, finding the destruction caused by the officers to be unnecessary to execute the narrow purpose of the warrants. *Id.* at 974–75.

Defendants' primary contention is that the cases identified by Plaintiff contain "stark factual differences" from the present case and therefore "preclude a conclusion that the unreasonableness of any individual Defendants' actions was clearly established in December 2014." (Doc. 215 at 3). Defendants distinguish *Mena* by pointing out that the officers in that case were "relying on consent which [] was subject to scrutiny as to scope," whereas Defendants here were "duty-bound under a valid judicial warrant to find and apprehend Ochoa," a duty which "carried with it the implication that [the officers] would have to break open doors in order to enter the residence, and while in the residence." (Doc. 215 at 3). The Court is entirely unpersuaded by this argument. Defendants are incorrect that the officers in *Mena* were relying on consent; the word "consent" does not even appear in the Ninth Circuit's decision. *See Mena*, 226 F.3d at 1034–35. Rather, the officers in *Mena*—just like Defendants in this case—were acting on a valid judicial search warrant. *Id.* If anything, the warrant in *Mena* authorized a more thorough—and potentially a more destructive—search than the search authorized in this case because it directed the officers to search for "deadly weapons, specifically firearms including ammunition, casings, holsters and

cleaning equipment, knives and accessories such as sheaves; and evidence of street gang membership or affiliation with any street gang." *Id.* at 1034. Such evidence could have been hidden anywhere, which justified a thorough and detailed search and explained why the officers would have been handling the plaintiff's personal property. Here, in contrast, Defendants were not authorized to search for evidence. Rather, they were charged only with finding and arresting Mr. Ochoa, which narrowed the scope of searchable areas to only those areas where a person could reasonably be hiding.

Defendants also attempt to distinguish *Mena* by pointing out that, in this case, Plaintiff does not allege that any doors were already open or that he witnessed an officer destroying his property "gratuitously" or because he thought it was "cool." (Doc. 215 at 3–4). Rather, Defendants argue they have each provided "undisputed testimony explaining what force they used, and how that use of force was connected to a safe and effective execution of the warrant." (*Id.* at 4). The Court remains unpersuaded. Although Plaintiff does not specifically contend that unlocked, already-open doors were unnecessarily broken by Defendants, Plaintiff *does* contend that Defendants' use of the Bearcat to break down the Residence's front door was equally as unnecessary because Defendants could have simply entered the house using the keys provided to them by Plaintiff. However, even ignoring this damage to the front door—or damage to *any* of Plaintiff's doors for that matter—the damage sustained by Plaintiff's Residence in this case far exceeded the damage sustained by the plaintiff's house in *Mena*, a fact which is conveniently ignored by Defendants' fixation on "gratuitously destroyed doors." Although Defendants here may not have kicked open

unlocked doors and stated that they thought causing such damage was "cool," they instead acted just as—or perhaps, *more*—unreasonably by unnecessarily destroying Plaintiff's furniture, appliances, televisions, PT Cruiser, artwork, heirlooms, clothes, family pictures, and antiques.

Turning to *Hells Angels*, Defendants point out that the officers in that case were charged with seizing indicia evidence to support a sentence enhancement for gang affiliation—a purpose which was rather narrow given that "very few items" were needed. (Doc. 215 at 8). The officers in *Hells Angels* far exceeded the scope of their warrant by unnecessarily seizing "truckloads" of indicia evidence, including unnecessary items such as concrete that was jack-hammered from the sidewalk, a mailbox which was cut off its post, and a door ripped off of a refrigerator. *See Hells Angels*, 402 F.3d at 974. Here, Defendants argue that they did not engage in such unnecessary destruction because they were judicially charged with finding and apprehending Mr. Ochoa, and they had comparably little time to plan their execution of the warrant. (Doc. 215 at 8). Defendants are correct that their search in this case had a different purpose from the search executed in *Hells Angels*. As discussed above, however, the purpose of Defendants' search—to find and arrest Mr. Ochoa—did not justify the *extensive* destruction caused to Plaintiff's Residence. This is *no different* than in *Hells Angels*, where the officers caused extensive, unnecessary destruction that was not justified by the purpose of their search.

In sum, the Court finds that cases such as *Mena* and *Hells Angels*—each decided well before the events at issue in this case—provided "fair notice" to Defendants that their unnecessary destruction of Plaintiff's

Residence and personal property was unconstitutional. Although *Mena* and *Hells Angels* have numerous factual differences from the present case, such differences only highlight that Defendants' actions in this case were just as, or perhaps more, unconstitutional. Whereas the officers in *Mena* and *Hells Angels* were searching for evidence—which could have been hidden anywhere—Defendants here were only searching for Mr. Ochoa. Whereas the officers in *Mena* caused significant damage to doors and the officers in *Hells Angels* caused significant damage to three items of personal property, Defendants here caused near total-destruction of Plaintiff's *entire Residence* and destroyed a litany of items of personal property.

Moreover, the Ninth Circuit has recognized that, in some cases, it is less important to identify perfectly analogous caselaw. In *Wright*, the Ninth Circuit explained that "an official may have 'fair notice' that conduct is unlawful, 'even without a body of relevant case law,' if the violation is so 'obvious' that no reasonable official would have engaged in such behavior." *Wright*, 981 F.3d at 735 (citation omitted). "The need for an on-point case is further diluted when the 'clearly established' rule is concrete and specific." *Id.* In such circumstances, the Ninth Circuit has "not hesitated to deny qualified immunity to officials . . . even without a case directly on point." *Id.* (citations omitted); *see also United States v. Lanier*, 520 U.S. 259, 271 (1997) (quotations, citation, and alteration omitted) ("[I]n [some] instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful."); *Boyd*, 374 F.3d at 781 (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001)) ("However, a victim's constitutional rights may

be clearly established in the absence of a case 'on all fours prohibiting the particular manifestation of unconstitutional conduct at issue.' . . . Rather, when an officer's conduct 'is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.'"); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) ("[S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing."). Therefore, the Ninth Circuit has "not hesitated to deny qualify immunity to officials in certain circumstances, 'even without a case directly on point.'" *Wright*, 981 F.3d at 735; *see also Bonivert v. City of Clarkson*, 883 F.3d 865, 872 (9th Cir. 2018) (citation omitted) ("[I]f qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment.").

Notably, in *Wright*, the Ninth Circuit cited to both *Mena* and *Hells Angels* as specific examples of cases where qualified immunity was denied even in the absence of on-point caselaw. *Id.* at 735. As to *Mena*, the Ninth Circuit explained:

> The need for an on-point case is further diluted when the "clearly established" rule is concrete and specific. For example, in *Mena*, at the time of the allegedly unlawful conduct, it was "clearly established" that officers violate the Fourth Amendment during the execution of a search warrant when they

> engage in "unnecessarily destructive behavior." 226 F.3d at 1041 (quoting *Liston v. City of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997)). Thus, we concluded that an officer who destroyed an already-ajar door to a home during the execution of a search warrant was not entitled to qualified immunity, even though we did not cite a specific on-point case. *Id.* That is because what conduct constituted needless destruction was, in that instance, self-evident. *See id.*

Id. In the present case, the Court agrees with Defendants that Plaintiff could have done a better job in his Response of analogizing the facts of this case to the facts of precedential cases. Likewise, the Court recognizes that the cases identified by the parties are, in many ways, factually dissimilar to the present case. However, cases like *Mena* and *Hells Angels* clearly established that unnecessarily destructive behavior during the execution of a search warrant amounts to a constitutional violation. If the officers' conduct in *Mena* and *Hells Angels* was held to be unnecessarily destructive, it is without question that Defendants in this case had fair notice that their own conduct—which was undoubtedly *more* destructive and took place during a search with a *narrower* purpose—violated Plaintiff's constitutional rights. Therefore, although the Court does not "identify a case with the exact factual situation involved here," it concludes that, in light of the precedent that *did* exist at the time of Defendants' search, their actions violated Plaintiff's clearly established constitutional rights. *See Id.* at 736–37 (citing *Mena*, 226 F.3d at 1041); *see also Neal*, 2015 WL 4227466, at *11–12 (finding that—at time of search in April 2013—clearly established law existed holding that officers violate constitutional rights when

they destroy property unrelated to purpose of search, which, in that case, was to discover evidence of narcotic sales).

B. Failure to Intervene Claim

"[P]olice officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." *Cunningham*, 229 F.3d at 1289 (quotations omitted) (quoting *United States v. Koon*, 34 F.3d 1416, 1447, n.25 (9th Cir. 1994)). "Importantly, however, officers can be held liable for failing to intercede only if they had an opportunity to intercede." *Id.* (citation omitted).

As noted above, Defendants Engstrom, Robinson, Lapre, Gragg, and Skedel were each integral participants in the search of Plaintiff's Residence rather than mere bystanders. *See supra* pt. III, sec. A(1). Given their integral participation in the search—which ranged from directing other officers from the command post (Defendant Gragg), to providing cover for other officers from the perimeter (Defendant Robinson), to actual participation on the entry team (Defendants Engstrom, Lapre, and Skedel)—the Court finds that Plaintiff has demonstrated sufficient evidence showing that each of these five Defendants had reason to be aware of the constitutional violations occurring and realistic opportunities to intercede, but failed to take any action to stop or impede the violations. The Court denies Defendants' request for summary judgment as to the failure to intercede claim.

IV. CONCLUSION

In sum, the Court finds that Plaintiff has demonstrated sufficient evidence to prove that Defendants' search of his Residence—which Defendants were each integral participants in—was carried out in a manner

which violated Plaintiff's clearly established Fourth Amendment right against unnecessary and excessive destruction of property. Defendants are therefore not entitled to qualified immunity. The Court denies Defendants' request for summary judgment.

Accordingly,

IT IS ORDERED that Defendants' Motion for Summary Judgment (Doc. 201) is denied.

Dated this 4th day of April, 2023.

/s/ Steven P. Logan
Honorable Steven P. Logan
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-17-00119-PHX-SPL

JAMES W DENBY, *et al.*,

Plaintiffs,

vs.

CITY OF CASA GRANDE, *et al.*,

Defendants.

ORDER

This action arises from law enforcement's execution of a search warrant for Abram Ochoa at 116 West 10th Street in Casa Grande, Arizona (hereinafter "the Property"). Plaintiffs, the Property residents, allege the use of excessive force upon the Property and assert constitutional claims against Defendants pursuant to 42 U.S.C. § 1983 (Doc. 82). Pending before the Court are Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint (Doc. 83) and Motion for Summary Judgment (Doc. 91). The Court rules as follows.

I. Motion to Dismiss (Doc. 83)

A. Background

On December 17, 2014, the Casa Grande Police Department ("CGPD") responded to a domestic disturbance call down the street from the Property (Doc. 82 at ¶ 31). Upon arrival, officers learned the incident involved Abram Ochoa, who had outstanding warrants for his arrest (Doc. 82 at ¶ 34). After determining that

Ochoa had entered the Property, officers attempted to communicate with Ochoa via a loud speaker PA system but received no response (Doc. 82 at ¶¶ 38-41, 43-45, 55-56). CGPD declined offers from Ochoa's girlfriend and Plaintiff James Denby's son in helping persuade Ochoa to leave the Property voluntarily (Doc. 82 at ¶¶ 45, 57). Minutes after arriving, CGPD requested assistance from Pinal County Regional SWAT ("SWAT") (Doc. 82 at ¶ 58). While establishing a perimeter, CGPD Officer Engstrom reported seeing movement under a tarp covering a car in the Property's backyard, but no further investigation was made (Doc. 82 at ¶¶ 64-70).

SWAT arrived on scene and decided to use an armored vehicle, referred to as a "Bearcat," (Doc. 82 at ¶ 74) as a battering ram to gain access to the Property (Doc. 82 at ¶¶ 76-77). SWAT drove the Bearcat over a chain-linked fence and into the front of the Property, breaking windows and the front door (Doc. 82 at ¶ 80). Further attempts to communicate with Ochoa through the Bearcat's PA system and a deployed tactical phone proved unsuccessful (Doc. 82 at ¶¶ 81-84).

Upon the execution of a search warrant (Doc. 82 at ¶¶ 86-89), SWAT deployed a medium robot into the Property but found no sign of Ochoa (Doc. 82 at ¶¶ 90-91). SWAT used the PA system to announce that Ochoa had five minutes to exit the building or further force would be used against him (Doc. 82 at ¶ 93). After the time expired, SWAT fired a total of 22 canisters of pepper spray and tear gas into the Property (Doc. 82 at ¶¶ 94-102), searched the Property with a second robot (Doc. 82 at ¶ 104), and deployed a Noise Flash Diversionary Device (Doc. 82 at ¶ 105). SWAT then developed a tactical plan to enter the Property, which included the use of two additional Noise Flash

Diversionary Devices (Doc. 82 at ¶ 109-111). During the search, SWAT team members destroyed furniture, cushions, windows, bathroom mirrors, shower doors, toilets, televisions, artwork, and antiques (Doc. 82 at ¶¶ 116-121). Ochoa was not found inside the Property (Doc. 82 at ¶ 112). Once the Property was cleared, SWAT and CGPD searched the backyard (Doc. 82 at ¶¶ 124-126). Ochoa was found hiding underneath the tarp that Officer Engstrom had reported seeing movement under five hours earlier (Doc. 82 at ¶¶ 126-130).

B. Legal Standard

Defendants have moved to dismiss Plaintiffs' Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The motion argues that each individual Defendant is entitled to qualified immunity, and the complaint fails to state a municipal entity claim against either the City of Casa Grande or Pinal County. The motion further argues that Plaintiff Elizabeth Torres must be dismissed for lack of standing.

"'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face;' that is, plaintiff must 'plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Court may dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) for two reasons: (1) lack of a cognizable legal theory, and (2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988), *abrogated on*

other grounds by Bell Atl. Corp v. Twombly, 550 U.S. 544 (2007).

A complaint must contain sufficient factual matter, which, if accepted as true, states a claim to relief that is "plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Facial plausibility requires the plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Plausibility does not equal "probability," but still requires more than a sheer possibility that a defendant acted unlawfully. *Id*. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id*. (citation and internal quotation marks omitted).

In deciding a motion to dismiss, the Court must "accept as true the well-pleaded allegations of material fact," and construe those facts "in the light most favorable to the nonmoving party." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "[A]llegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," however, are insufficient to defeat a 12(b)(6) motion. Although a complaint "does not need detailed factual allegations," a plaintiff must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. This requires "more than labels and conclusions, [or] a formulaic recitation of a cause of action's elements." *Id*.

C. Qualified Immunity

Defendants argue that the individually named Defendants are entitled to qualified immunity (Doc. 83 at 9-16). "The doctrine of qualified immunity protects government officials 'from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted). In resolving qualified immunity claims, the Court must consider: (1) whether the facts alleged establish the violation of a constitutional right, and (2) whether the right was "clearly established" at the time of the incident. *Id*. at 232. To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Dunn v. Castro*, 621 F.3d 1196, 1201 (9th Cir. 2010) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." (quotation omitted)). Although a case on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Clearly established law should not be defined at a "high level of generality." *Id*. at 742.

Although the applicability of qualified immunity should be resolved at the earliest possible stage in litigation, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), "a motion to dismiss on qualified immunity grounds puts the Court in the difficult position of deciding 'far-reaching constitutional questions on a non-existent factual record,'" *Hernandez v. Ryan*, No. CV 09-2683-PHX-DGC, 2010 WL 4537975, at 2 (D. Ariz. 2010) (quoting *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). In this Court's March 31, 2018 Order, the Court found that resolution of Defendants' qualified immunity claims required further factual development (Doc. 80). Accordingly, the Court will not

dismiss the claims against the individual Defendants on the basis of qualified immunity at this time.

D. Sufficiency of the Pleadings

The Court now turns to Defendants' arguments regarding the sufficiency of Plaintiffs' allegations in the Second Amended Complaint (Doc. 83 at 16-18). The Court addresses each claim in turn.

1. Municipal Liability: Failure to Investigate or Prosecute

Municipalities may be liable under § 1983 when the execution of the government's policies or customs inflicts a constitutional injury. *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978); *see also Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 603 (9th Cir. 2019) ("A municipality may not, however, be sued under a respondeat superior theory."). There are two ways in which municipal liability may attach: (1) if the constitutional violation is committed in accordance with a longstanding custom or practice, or (2) if an isolated violation is caused by a person with final policymaking authority. *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003).

The Court reads Count III of the Second Amended Complaint as alleging that the government's failure to investigate or prosecute previous claims of civil rights violations resulted in what amounted to sanctioned use of excessive force (Doc. 82 at ¶¶ 178-182). This allegation, however, is conclusory in nature, and apart from the current incident, contains no factual allegations to support such a practice. *See Meas v. City & Cty. of San Francisco*, 681 F.Supp.2d 1128, 1142 (N.D. Cal. 2010) ("[P]lainiff's unsubstantiated allegations regarding the City's purported failure to discipline a single officer, as opposed to a systematic policy, cannot

support a claim of municipal liability."). The Court therefore finds that Plaintiffs have failed to state a claim and the motion to dismiss Count III is granted.

2. Municipal Liability: Failure to Train and Supervise

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). In Count IV, Plaintiffs allege the government entities and supervising agents were deliberately indifferent to the need to train and supervise employee officers and that lack of training caused Plaintiffs' constitutional harm. In reviewing such a claim, Plaintiffs much allege facts that demonstrate the Defendants "disregarded the known or obvious consequences that a *particular omission* in their training program would cause [municipal] employees to violate citizens' constitutional rights." *Flores v. Cty. of Los Angeles*, 758 F.3d 1154, 1159 (9th Cir. 2014) (alteration in original) (emphasis added) (citation omitted).

Upon review, the Court find the allegations contained within the Second Amended Complaint are insufficient to state a plausible *Monell* Claim. Although the Court understands that Plaintiffs are alleging the government entities and supervising agents failed to adequately train employee officers on how to properly inspect and clear the perimeter of a residence or appropriately work with chemical munitions (Doc. 82 at ¶¶ 131-133, 203), the allegations lack any explanation as to *how* the training was deficient or inadequate. *See McFarland v. City of Clovis*, 163 F.Supp.3d. 798, 803 (E.D. Cal. 2016) ("Simply alleging that training is 'deficient' or 'inadequate' is conclusory

and does not support a plausible claim."). Absent allegations of specific defects in officer training, Plaintiffs cannot prevail on their claim for failure to train. Accordingly, the motion to dismiss Count IV is granted.

E. Elizabeth J. Torres

Finally, Defendants argue the Second Amended Complaint lacks any plausibly stated facts to demonstrate that Plaintiff Elizabeth Torres has standing to bring this suit (Doc. 83 at 4 n.2). Plaintiffs have not responded.

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Kirola v. City and Cty. of San Francisco*, 860 F.3d 1164, 1174 (9th Cir. 2017) (alteration in original) (quotation omitted); *see also* Fed. R. Civ. P. 12(b)(1). "We need only conclude that one of the plaintiffs has standing in order to consider the merits of the plaintiffs' claim." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1014 (9th Cir. 2013). The Court, however, will address Torres' standing because the motion to dismiss challenges that standing. *We Are Am./Somos Am. v. Maricopa Cty. Bd. of Supervisors*, 809 F.Supp.2d 1084, 1091 (D. Ariz. 2011) ("That general rule does not strictly prohibit a district court, in a multiple plaintiff case such as this, from considering the standing of the other plaintiffs even if it finds that one plaintiff has standing.").

The only fact alleged as to Elizabeth Torres in the Second Amended Complaint is that she is a resident of Maricopa County, Arizona (Doc. 82 at ¶ 6). Without more, Plaintiffs have failed to satisfy the Article III standing requirements. Accordingly, Plaintiff Elizabeth Torres will be dismissed for lack of standing.

F. Conclusion

Defendants' Motion to Dismiss (Doc. 83) will be granted in part and denied in part. The motion is denied as to Defendants' qualified immunity claims, but granted as to Count III, Count IV, and Elizabeth Torres.

In the alternative, Plaintiffs request this Court grant them leave to amend. In its March 31, 2018 Order, however, this Court already provided Plaintiffs with an opportunity to cure the defects as to the municipality claims (Counts III and IV) (Doc. 80 at 6). Accordingly, leave to amend will be denied and Counts III and IV will be dismissed with prejudice. *See Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) ("[A] district court has broad discretion to grant or deny leave to amend, particularly where the court has already given a plaintiff one or more opportunities to amend his complaint to allege federal claims."). Plaintiffs will, however, be provided with an opportunity to amend their complaint to allege sufficient facts establishing Article III standing as to Elizabeth Torres.

II. Motion for Summary Judgment (Doc. 91)

The City of Casa Grande and Pinal County have filed a Motion for Summary Judgment asserting the same arguments addressed in their Motion to Dismiss: (1) there are no facts supporting *Monell*-based liability as to the City and County Defendants, and (2) the individual Defendants are entitled to qualified

immunity (Doc. 91 at 2). Plaintiffs argue the motion should be denied and Plaintiffs should be permitted to conduct discovery as to Defendants' qualified immunity claims.

A. Procedural History

Plaintiffs filed a complaint in Maricopa County Superior Court on December 16, 2016 (Doc. 1 at 9), alleging various constitutional claims against Defendants under 42 U.S.C. § 1983 (Doc. 1). Defendants removed this action to federal court on January 13, 2017 (Doc. 1), Plaintiffs filed an Amended Complaint on April 6, 2017 (Doc. 31), the City and County Defendants filed a Motion to Dismiss on June 19, 2017 (Doc. 51), and Defendant Paul Babeu filed a separate Motion to Dismiss on July 10, 2017 (Doc. 58). In its Case Management Order, the Court granted the parties until May 4, 2018 to complete all discovery (Doc. 60 at 2).

On March 31, 2018, this Court issued its ruling on Defendants' pending Motions to Dismiss (Doc. 80). The Order ultimately dismissed the Amended Complaint, gave Plaintiffs the opportunity to amend as to Counts I, III, IV, V, and VI, and denied a Joint Motion to Stay discovery pending resolution of the motions as moot (Doc. 80). Pursuant to that Order, Plaintiffs filed their Second Amended Complaint on April 17, 2018, and Defendants filed another Motion to Dismiss on May 1, 2018 (Doc. 83). In response to a Motion for Clarification (Doc. 84), the Court informed the parties that the Case Management Order deadlines remained in effect (Doc. 85). Defendants then filed the instant Motion for Summary Judgment on July 3, 2018 (Doc. 91), which was fully briefed as of March 1, 2019 (Doc. 104).

B. Discussion

Plaintiffs argue that the Motion for Summary Judgment should be denied as the parties were unable to reasonably conduct discovery until the Second Amended Complaint was filed and the various motions to dismiss were adjudicated (Doc. 101 at 6-9). Defendants argue the response is, in large part, an untimely motion for reconsideration (Doc. 104 at 10-11).

"A motion to reopen discovery is a motion to modify the discovery deadline set in the Court's scheduling order pursuant to [Federal Rule of Civil Procedure 16]." *Lexington Ins. Co. v. Scott Homes Multifamily, Inc.*, No. CV-12-02119-PHX-JAT, 2015 WL 751204, *4 (D. Ariz. Feb. 23, 2015).[1] Rule 16(b)(4) provides that "[a] schedule may be modified only for good cause and with the judge's consent." In the Ninth Circuit, good cause requires a showing that the movant "diligently pursued previous discovery opportunities," and that "additional discovery would have precluded summary judgment." *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006). When ruling on a motion to reopen discovery courts may consider the following factors:

[1] Plaintiffs move to reopen discovery under Federal Rule of Civil Procedure 56(d), which permits the Court to grant the opposing party relief on the basis that the nonmovant cannot present facts essential to its opposition (Doc. 101 at 2). Rule 56(d), however, "does not reopen discovery; rather it forestalls ruling on a motion for summary judgment in cases where discovery is still open and provides the prospect of defeating summary judgment." *Dumas v. Bangi*, No. 1:12-cv-01355-LJO-JLT (PC), 2014 WL 3844775, *2 (E.D. Cal. Jan. 23, 2014). Accordingly, the Court finds the request is improper under Rule 56(d) and will treat the response as a motion under Rule 16.

> 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.

Lexington Ins. Co., 2015 WL 751204, at *4 (quotation omitted). Ultimately, district courts have "wide latitude in controlling discovery." *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987).

After thoroughly reviewing the docket, the Court will permit Plaintiffs time to conduct discovery as to Defendants' qualified immunity claims. As pointed out by Plaintiffs, in its March 31, 2018 Order, the Court stated that "resolution of Defendants' qualified immunity claims requires further factual development" (Doc. 80). Although Defendants object to the request now, the parties previously filed a stipulation to stay discovery, and Defendants recently moved to extend the dispositive motion deadline (*see* Doc. 89). The Court also notes that the parties had mutually agreed to refrain from conducting discovery during a majority of the designated discovery timeframe, based on the pending qualified immunity claims (*see* Doc. 84). *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (stating pretrial matters should be avoided if possible before resolution of qualified immunity claims). Accordingly, the Court finds that Defendants would not be prejudiced by granting an extension. Finally, the Court notes that although this case is beginning to age, a

trial has not yet been set. Plaintiffs' request is therefore granted.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (Doc. 83) is granted in part and denied in part. The motion is denied as to the claims of qualified immunity, but granted as to Count III, Count IV, and Elizabeth Torres. Plaintiff Elizabeth Torres is dismissed without prejudice and Counts III and IV are dismissed with prejudice.

IT IS FURTHER ORDERED that Plaintiffs may file a Third Amended Complaint no later than April 12, 2019.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Doc. 91) is denied without prejudice.

IT IS FURTHER ORDERED that Plaintiff's Response to the Motion for Summary Judgment (Doc. 101), which is construed as a Motion to Reopen Discovery under Rule 16, is granted. Discovery deadlines are modified as follows:

1. Fact Discovery shall be completed by June 26, 2019;

2. Good Faith Settlement talks must be completed by July 10, 2019; and

3. Dispositive Motions shall be due by July 26, 2019.

Dated this 29th day of March, 2019.

/s/ Steven P. Logan
Honorable Steven P. Logan
United States District Lodge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed March 23, 2020]

No. 19-15803

D.C. No. 2:17-cv-00119-SPL

JAMES W. DENBY; *et al.*,

Plaintiffs-Appellees,

v.

FRANCISCO X. LUJAN; *et al.*,

Defendants-Appellants,

and

CITY OF CASA GRANDE; COUNTY OF PINAL,

Defendants.

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted March 2, 2020
Phoenix, Arizona

MEMORANDUM*

Before: CLIFTON, OWENS, and BENNETT, Circuit Judges.

Individual law enforcement officer defendants ("Defendants") moved to dismiss Plaintiffs' claims for violations of their constitutional rights arising from Defendants' search that allegedly destroyed Plaintiffs' home. Defendants claimed that dismissal was mandated because they enjoy qualified immunity from suit. The district court denied the motion, and Defendants appealed. We remand for further proceedings.

We have interlocutory appellate jurisdiction over this appeal as our review does not require the resolution of any controlling facts. *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir. 1998). Ordinarily, we review a denial of qualified immunity de novo and consider "whether the complaint alleges sufficient facts, taken as true, to support the claim that the [defendants'] conduct violated clearly established constitutional rights." *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018). However, we do not reach this review as the district court failed to "carefully examine the specific factual allegations against each individual defendant," *Cunningham v. Gates*, 229 F.3d 1271, 1287 (9th Cir. 2000), in determining if Plaintiffs' claims were adequately pled. In denying Defendants' motion to dismiss, the district court simply stated that it would not dismiss the claims because the qualified immunity claims required further factual development.

Because the district court did not examine the allegations as to each individual Defendant, we

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

remand to the district court for further proceedings. On remand, the district court shall, in the first instance, make an individualized determination as to the alleged actions of each Defendant to determine whether dismissal based on qualified immunity may be proper as to each Defendant.[1] *See Keates*, 883 F.3d at 1242 (stating that, on a motion to dismiss, the court must determine whether a complaint "plausibly alleges that each of the defendants" was at least an integral participant in the violation of the plaintiffs' rights).

Each party shall bear its own costs.

REMANDED.

[1] The district court shall grant Plaintiffs additional leave to amend, if Plaintiffs seek to amend, to make more particularized allegations against the individual Defendants. We express no view on whether such amendment is necessary.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 17-00119-PHX-SPL

JAMES W. DENBY, *et al.*,

Plaintiffs,

vs.

CITY OF CASA GRANDE, *et al.*,

Defendants.

ORDER

Pending before the Court is Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment (the "Motion"). (Doc. 129) For the following reasons, the Motion will be granted in part and denied.

I. Background[1]

This case arises from a search warrant executed in the City of Casa Grande. (Doc. 82) On the afternoon of December 17, 2014, the Casa Grande Police Department ("CGPD") was called to respond to a "domestic disturbance" complaint. (Doc. 82 at 6) Upon arrival, the officers learned that the dispute involved Abram Ochoa ("Ochoa"). (Doc. 82 at 7) Ochoa had outstanding warrants for his arrest due to theft and aggravated domestic violence

[1] Unless otherwise stated, the background facts are recited as pled in Plaintiffs' Second Amended Complaint. (Doc. 82)

assault charges.[2] (Doc. 82 at 7) The officers were made aware that Ochoa had potentially fled to Plaintiffs' home located down the street (the "Property"). (Doc. 82 at 7) CGPD declined offers from Ochoa's girlfriend and Plaintiff Denby's son to help persuade Ochoa to leave the Property voluntarily. (Doc. 82 at 8) Shortly after arriving, CGPD requested assistance from the Pinal County Regional SWAT ("SWAT"). (Doc. 82 at 8) SWAT arrived and decided to use a "Bearcat" as a battering ram to gain access to the Property. (Doc. 82 at 10) SWAT drove the Bearcat over a chain-linked fence and into the front of the Property, breaking the windows and front door. (Doc. 82 at 10) SWAT then unsuccessfully attempted to communicate with Ochoa through the Bearcat's PA system. (Doc. 82 at 11) SWAT then fired a total of twenty-two (22) canisters of pepper spray and tear gas into the Property and deployed multiple Noise Flash Diversionary Devices ("flash-bang" devices) into the Property. (Doc. 82 at 12) SWAT then developed a tactical plan to enter the Property. (Doc. 82 at 13) During the search, SWAT team members and CGPD officers destroyed several items on the Property, such as: furniture, cushions, windows, bathroom mirrors, shower doors, toilets, televisions, artwork, and antiques. (Doc. 82 at 13 14) Ultimately, Ochoa was found outside the residence hiding under a tarp. (Doc. 82 at 14)

Plaintiffs initially filed this case in the Pinal County Superior Court, and Defendants removed the case to this Court on January 13, 2017. (Doc. 1) Plaintiffs have amended their complaint twice and allege multiple constitutional violations under 42 U.S.C. § 1983. (Docs. 31, 82) On May 1, 2018, Defendants filed a motion to

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[2] Ochoa is also a defendant, but he has appeared separately in this case. (Doc. 68)

dismiss, arguing that the City, County, and officers were all entitled to qualified immunity. (Doc. 83) The Court granted the motion as to the City of Casa Grande and Pinal County. (Doc. 106) After determining that factual issues precluded a finding of qualified immunity, the Court denied the officers' request for dismissal. (Doc. 106) The officers appealed that decision, and this Court stayed the proceedings until the appeal was resolved. (Docs. 107, 123) On April 14, 2020, the Ninth Circuit remanded the decision back to this Court, finding that this Court must analyze the facts as alleged in the Second Amended Complaint ("SAC") to determine whether the officers are entitled to qualified immunity. (Doc. 127) On May 28, 2020, Defendants renewed their request for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 129) In the alternative, Defendants ask that the Court consider the Motion as one for summary judgment.[3] (Doc. 129 at 17) Because the Ninth Circuit's Mandate ordered this Court to consider the issue of qualified immunity as presented to it on appeal in Defendants' motion to dismiss (Doc. 83), the Court declines to treat the Motion as one for summary judgment. (Doc. 127-1)

II. Legal Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*

[3] Defendants filed a motion for summary judgment prior to the Court issuing an order regarding their motion for dismissal. (Doc. 121) After Defendants filed their notice of appeal, the Court dismissed the motion for summary judgment without prejudice and stated that Defendants could refile the motion after resolution of the appeal. (Doc. 125) the case. *Id.*

Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Thus, a dismissal under Rule 12(b)(6) is appropriate when there is: (1) the lack of a cognizable legal theory, or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). Under Rule 12(b)(6), all allegations of material fact are assumed to be true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009).

When analyzing a 12(b)(6) motion based on a qualified immunity defense, a district court must consider two different questions: (1) taking the facts as true, whether the facts alleged show the officers' conduct violated a constitutional right; and (2) if so, whether the right was clearly established at the time of the alleged violation. *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018) (internal quotations and citations omitted). If the complaint states at least one allegation of a harmful act that would constitute a violation of a clearly established constitutional right, then the defendants are not entitled to a qualified immunity defense. *Id.* The test for qualified immunity at the motion to dismiss stage includes considering what a reasonable officer would be aware of in light of the specific context of the case. *Id.*

III. Discussion

Defendants argue that they are entitled to qualified immunity because the SAC impermissibly alleges generic constitutional violations and does not specify each individual officer's participation in any alleged constitutional violations. (Doc. 129 at 9-17) In response, Plaintiffs assert that the SAC sufficiently states each individual officer's participation in the alleged constitutional violations. (Doc. 130) The Court

will review the allegations against each officer as alleged in each count of the SAC.

A. Count I: Unreasonable Search and Seizure

Plaintiffs assert that Defendants Lapre, Engstrom, Skedel, Gregg, and Robinson (the "Count I Defendants") violated their Fourth Amendment right to be free from unreasonable search and seizure by causing extensive damage to their property. (Doc. 82 at 16-19)

Under the Fourth Amendment, the test to determine what is necessary to "execute a warrant effectively" is reasonableness. *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir. 2005). When determining whether officers executed a search warrant unreasonably, a court must determine whether the degree of intrusion matched the underlying purpose of the intrusion. *Id.*

Here, all the parties assert that Defendants executed the search warrant for the purpose of arresting Ochoa. (Docs. 82 at 13; 129 at 5) The SAC alleges that the police were called to a house neighboring the Property due to a domestic dispute. (Doc. 82 at 6) Defendants later focused the search on Plaintiffs' home based on a statement made by Ochoa's girlfriend after he had fled the scene. (Doc. 82 at 7) The SAC alleges that Defendants knew Ochoa did not have any firearms, but he sometimes carried a stun gun. (Doc. 82 at 7) The SAC alleges that Plaintiff Denby gave Defendants the keys to the Property and the vehicles surrounding the Property, but Defendants chose to use the Bearcat to demolish the chain-linked fence and the front door of the home. (Doc. 82 at 8 11) Plaintiffs further allege that Defendants declined offers by Plaintiff Denby's son and Ochoa's girlfriend to help coax Ochoa from the home. (Doc. 82 at 8-9) Instead, Defendants chose to call

in SWAT. (Doc. 82 at 9) In addition, Plaintiffs assert that Defendants had several indicia that no one was in the home, but Defendants continued to destroy the Property anyway with the use of the Bearcat, twenty-two rounds of pepper spray and tear gas, and other physical force. (Doc. 82 at 9-12) Plaintiffs further assert that Defendants unreasonably destroyed furniture and other property that was "objectively too small to hide a human body." (Doc. 82 at 13) Such damage included: breaking every window in the home; breaking the bathroom toilets, which caused water damage to the Property's foundation; shattering the bathroom mirrors; destroying all the furniture and major home appliances; and destroying personal items including clothes, family pictures, antiques, and artwork. (Doc. 82 at 15-16) Ultimately, Ochoa was found outside the residence hiding under a tarp. (Doc. 13 at 14)

As to the allegations against each Defendant, first, the SAC alleges that Defendant Lapre operated the Bearcat and fired pepper spray into the Property. (Doc. 82 at 9-12) Second, the SAC alleges that Defendant Engstrom noticed movement under the tarp where Ochoa was ultimately found five hours before the Defendants entered the house, but Defendant Engstrom and the other Defendants failed to thoroughly investigate the movement before entering the house. (Doc. 82 at 8-10, 14) Third, the SAC alleges that Defendant Skedel launched at least two flash-bang devices into the Property. (Doc. 82 at 12-13) Fourth, the SAC alleges that Defendant Gregg was the officer in charge of CGPD during the search. (Doc. 82 at 11) Fifth, the SAC alleges that Defendant Robinson assisted Defendant Lapre in launching the pepper spray into the Property. (Doc. 82 at 12) Finally, the SAC alleges that all the Count I Defendants entered the home and participated in destroying the doors,

windows, bathroom fixtures, furniture, and other personal property in the home. (Doc. 82 at 18)

Taken in the light most favorable to Plaintiffs, the Court finds that the SAC sufficiently alleges specific acts taken by each Count I Defendant that resulted in an unreasonable search and seizure of the Property. Given that the SAC alleges that the search took place against a suspect who was known to be unarmed with any deadly weapons, the suspect was not known to be an immediate threat to the safety of himself or others, and the property damaged included property that was "objectively too small to hide a human body," the Court finds that the extent of the damage was disproportionate to the exigency of the circumstance.

The Court further finds that Plaintiffs' constitutional rights were clearly established at the time of the search and seizure. The Ninth Circuit has repeatedly held that individuals have a Fourth Amendment right to be free of "unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively." *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000) (quoting *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997)). Therefore, the Count I Defendants are not entitled to qualified immunity.

B. Count II: Failure to Intervene

Plaintiffs assert that Defendants Berry, Engstrom, Gregg, Horn, Lujan, Lapre, Skedel, McCabe, Robinson, Western, Wilson, and Ybarra (the "Count II Defendants") violated their Fourth Amendment right to be free from unreasonable search and seizure by failing to intervene during the search. (Doc. 82 at 19)

"[P]olice officers have a duty to intercede when their fellow officers violate the constitutional right of a suspect or other citizen." *Cunningham v. Gates*, 229

F.3d 1271, 1289 (9th Cir. 2000). "[T]he constitutional right violated by the passive defendant is analytically the same as the right violated by the person who strikes the blows." *United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994) (*reversed on other grounds*, 518 U.S. 81 (1996)). However, officers are liable for a breach of this duty only if they had "a realistic opportunity" to intercede. *Cunningham*, 229 F.3d at 1289-90.

Here, the SAC alleges that each Count II Defendant was informed of the decision to use the Bearcat and knew that the scope of the search warrant only allowed them to enter the Property for the purpose of arresting Ochoa. (Doc. 82 at 10, 18, 20) The SAC also alleges that: Defendant Gregg was in charge of the CGPD officers when SWAT arrived and acted in conjunction with SWAT in making the decision to use the Bearcat and launch the chemical munitions into the Property; Defendant Lapre was the Bravo team leader for SWAT and drove the Bearcat; and Defendant Horn specifically called for SWAT to come barricade Ochoa in the home without first ascertaining whether Ochoa was in fact in the home or whether he had any violent intentions. (Doc. 82 at 8-11) Furthermore, the SAC alleges that Defendants Lapre, Engstrom, Skedel, Gregg, and Robinson entered the Property and participated in destroying personal property that was not objectively related to arresting Ochoa. (Doc. 82 at 13, 18)

The Court finds that Plaintiffs' allegations against Defendants Gregg and Lapre sufficiently state a claim for failure to intervene because their positions of authority during the search gave them "a realistic opportunity" to intercede during the destruction of the Property. The Court further finds that the allegation that Defendants Lapre, Engstrom, Skedel, Gregg, and

Robinson went into the home to search for Ochoa also sufficiently shows that these Defendants had "a realistic opportunity" to intercede during the destruction of the Property. However, Defendant Horn's decision to call SWAT did not in itself contribute to any constitutional violation against Plaintiffs. In addition, Plaintiffs fail to allege specific facts establishing an opportunity to intervene as to Defendants Berry, Lujan, McCabe, Western, Wilson, and Ybarra. Accordingly, Count II shall be dismissed as to all Count II Defendants except Defendants Lapre, Engstrom, Skedel, Gregg, and Robinson.

C. Count IV: Failure to Train and Supervise

Plaintiffs assert that Defendants Babeu, Berry, Engstrom, Gregg, Horn, Lapre, and Lujan (the "Count IV Defendants") violated their Fourth and Fifth Amendment rights by failing to train and supervise the Defendants who participated in the search. (Doc. 82 at 23)

To plead a § 1983 claim for failure to train or supervise against an officer in his or her individual capacity, a Plaintiff must allege that the officer was deliberately indifferent to the need to train or supervise subordinates and the lack of training or supervision actually caused the constitutional harm or deprivation of rights. *Flores v. Cty. of Los Angeles*, 758 F.3d 1154, 1158 (9th Cir. 2014). The fact that officers may not have been trained in every conceivable hostile situation does not render their training "inadequate." *Ting v. United States,* 927 U.S. 1504, 1512 (1991).

Here, Plaintiffs allege that the Count IV Defendants failed to train and supervise the officers on how to properly inspect and clear an area when looking for a suspect. (Doc. 82 at 15) Plaintiffs also allege that the

Count IV Defendants failed to train the officers on the correct amount of chemical munition to use per square foot of space and what to do when there are no signs of human activity after the initial use of chemical munition. (Doc. 82 at 15) However, Plaintiffs fall short of establishing the necessary facts to support their claim. First, the SAC fails to allege that Defendants Lujan, Berry or Engstrom had any responsibility to train and/or supervise the officers involved in the search. The SAC does allege that Defendant Horn was the City of Casa Grande police chief during the time of the search and Defendant Babeu was the Pinal County sheriff during the time of the search. (Doc. 82 at 3-4) Even assuming the duty to train and supervise can be inferred from these positions, Plaintiffs fail to allege any deliberate indifference. Similarly, the SAC alleges that Defendant Gregg was in charge of the CGPD and Defendant Lapre was the Bravo team leader for SWAT, but it does not allege facts to establish deliberate indifference. (Doc. 82 at 8-11) Therefore, the Count IV Defendants are entitled to qualified immunity.

Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment (Doc. 129) is granted in part and denied in part as follows:

1. Defendants Lapre, Engstrom, Skedel, Gregg, and Robinson are not entitled to qualified immunity as to Counts I and II.

2. Defendants Horn, Berry, Lujan, McCabe, Western, Wilson, and Ybarra are entitled to qualified immunity as to Count II.

3. Defendants Babeu, Berry, Engstrom, Gregg, Horn, Lapre, and Lujan are entitled to qualified immunity as to Count IV and Count IV is dismissed with prejudice.

4. Defendants Horn, Berry, Lujan, McCabe, Western, Wilson, Ybarra, and Babeu are dismissed from this action with prejudice. Dated this 30th day of June, 2020.

/s/ Steven P. Logan
Honorable Steven P. Logan
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: July 9, 2021]

No. 20-16319

D.C. No. 2:17-cv-00119-SPL

JAMES W. DENBY; WILMA J. LOGSTON,

Plaintiffs-Appellees,

and

ELIZABETH J. TORRES,

Plaintiff,

v.

DAVID ENGSTROM; *et al.*,

Defendants-Appellants,

and

CITY OF CASA GRANDE; COUNTY OF PINAL,

Defendants.

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted March 17, 2021
San Francisco, California

MEMORANDUM[*]

Before: MURGUIA and CHRISTEN, Circuit Judges, and LEFKOW,[**] District Judge.

This interlocutory appeal arises from the search of plaintiffs' home by defendants City of Casa Grande, County of Pinal, and individually named police officers. Plaintiffs brought suit pursuant to 42 U.S.C. § 1983 alleging a violation of their Fourth Amendment rights. Defendants contend the district court erred by denying their motion to dismiss, which sought qualified immunity for five individual officers. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's ruling.[1]

We review the denial of qualified immunity de novo. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1059 (9th Cir. 2006). Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is appropriate "where the allegations in the complaint do not factually support a cognizable legal theory." *Dent v. Nat'l Football League*, 968 F.3d 1126, 1130 (9th Cir. 2020) (internal citation omitted). We "accept as true all well-pleaded allegations of material fact," and construe those facts "in the light most favorable to the nonmoving party." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "Once the defense of qualified immunity is raised by the defendant, the plaintiff bears the burden of showing that the rights allegedly violated were

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

[**] The Honorable Joan H. Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

[1] The parties are familiar with the facts, and we recount them only as necessary to resolve the issues on appeal.

'clearly established.'" *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000).

1. The district court previously granted in part and denied in part defendants' first Rule 12(b)(6) motion. The court dismissed with prejudice Claim Three, for municipal liability, which was only alleged against the City of Casa Grande and Pinal County, and Claim Four, for failure to train/supervise, which was alleged against all defendants. The court denied the motion to dismiss Claim One (unreasonable search and seizure) and Claim Two (failure to intervene) with respect to all thirteen individual defendants in a one-line denial of qualified immunity on the ground that the claims required "further factual development." Defendants appealed. In a memorandum disposition, we remanded with direction to the district court to examine the allegations against each defendant. The district court conducted an individualized assessment of the officers' conduct on remand, and granted qualified immunity to eight of the individual defendants. The only issue in this second appeal is the district court's denial of qualified immunity asserted by the five remaining defendants, David Engstrom, Rory Skedel, Chris Lapre, Brian Gragg[2], and Jacob Robinson, for Claims One and Two.

2. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotations omitted) (quoting *Harlow*

[2] The complaint spells defendant Gragg's last name as "Gregg." We adopt the spelling used in defendant Gragg's affidavit filed in the district court.

v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). In determining whether to grant qualified immunity, the court considers "(1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014). A right is clearly established if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011) (internal citation omitted).

3. The district court did not err by denying qualified immunity to defendants Engstrom, Skedel, Lapre, Gragg, and Robinson on plaintiff's Fourth Amendment claim for an unreasonable search and seizure. To assess the reasonableness of a search authorized by a warrant, we examine whether the degree of intrusion matched the underlying purpose of the intrusion. *See San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir. 2005). Here, plaintiffs allege that defendants searched their home in an attempt to arrest Ochoa, a suspect in a domestic-violence incident. Plaintiffs allege the search of their home was unreasonable because defendants searched spaces too small to hide a person and used unnecessarily destructive force. *See Maryland v. Buie*, 494 U.S. 325, 334–35 (1990) (permitting protective sweep of home incident to arrest "only to [conduct] a cursory inspection of those spaces where a person may be found"); *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (taking action unrelated to an authorized intrusion constitutes a separate, unjustified invasion of the Fourth Amendment); *United States v. Lemus*,

582 F.3d 958, 964 (9th Cir. 2009) (permitting search of room where arrest took place because it was large enough to hide another person).

Evaluating the reasonableness of a search "will reflect a careful balancing of governmental and private interests." *Soldal v. Cook County*, 506 U.S. 56, 71 (1992) (internal quotation marks and citation omitted). "[O]fficers executing a search warrant occasionally must damage property in order to perform their duty . . . [and] only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997) (internal quotation marks and citation omitted). We must adopt the perspective of a reasonable police officer on the scene. *Id.* at 976. The objective reasonableness of the use of force is not assessed with 20/20 hindsight. *Id.*

The complaint plausibly alleges that defendants violated plaintiffs' Fourth Amendment right to be free from unreasonably destructive searches. *See Buie*, 494 12 U.S. at 335–36; *Hicks*, 480 U.S. at 324–25; *Liston*, 120 F.3d at 979. The domestic-violence victim informed the Casa Grande Police Department that Ochoa was not armed with lethal force. Before entering the home, defendant Engstrom noticed movement under a tarp behind the house but did not investigate it. Instead, prior to obtaining a search warrant, a SWAT team used a "Bearcat" vehicle, operated by defendant Lapre, to drive through an exterior fence and into the side of plaintiffs' home, breaking windows and the front door. The complaint alleges that defendants Gragg, Skedel, and Lapre were the leaders of the SWAT team. After obtaining a warrant, two robots were deployed to search the house, but there was no sign of Ochoa, nor did Ochoa respond to calls from a public address

system. The complaint alleges that over the course of six hours, defendants deployed approximately twenty-two times the required amount of tear gas and pepper spray to penetrate an area the size of plaintiffs' home. Specifically, the complaint alleges that defendant Lapre launched the tear gas and pepper spray canisters and defendant Robinson provided security for defendant Lapre while he launched the chemical munitions. Every window in the home was broken, and defendants caused extensive damage. When defendants entered plaintiffs' home, they allegedly crushed and smashed furniture "objectively too small to hide a human body," tore open cushions and pillows, smashed all the windows and destroyed window coverings, smashed shower doors and bathroom mirrors, "obliterated" toilets, and stomped and smashed televisions, artwork, heirlooms, and antiques.[3] Defendants Engstrom, Gragg, Lapre, and Skedel are alleged to have either entered or directed others that entered plaintiffs' home. Plaintiffs allege that defendants either destroyed all, or nearly all, of plaintiffs' property within the residence, and caused extensive damage from burst plumbing, flooding, and chemical sprays.[4]

Plaintiffs' Fourth Amendment right to be free from unreasonably destructive searches was clearly established at the time of the search. We have held that individuals have a Fourth Amendment right to be free of "'unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively.'" *Mena v.*

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[3] We refer to defendants collectively where the complaint does. This case arose at the 12(b)(6) stage. Discovery may later demonstrate that different defendants took particular actions.

[4] Ochoa was ultimately located behind the house under the tarp where an officer had noticed movement before the Bearcat was employed.

City of Simi Valley, 226 F.3d 1031, 1041 (9th Cir. 2000) (quoting *Liston,* 120 F.3d at 979). The district court did not err by citing *Mena*, which was decided fourteen years before the events at issue here. The officers in *Mena* were investigating a drive-by shooting and were informed that the suspect was still armed with the .25 caliber handgun used in the shooting. *Id.* at 1034. The officers broke the door of the home with a battering ram, broke into the padlocked rooms, and detained the occupants in the garage for two to three hours before concluding the search. *Id.* at 1035–36. We held the officers were not entitled to qualified immunity, even though the suspect in that case presented a greater danger to the officers' safety than Ochoa, because the officers used unnecessarily destructive force to effectuate the search, such as kicking in a patio door that was already open. *Id.* at 1041.

Defendants rely on *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), to argue that they are entitled to qualified immunity. But *West* is distinguishable. It was decided five years after the subject search, and it involved an armed and extremely violent individual barricaded inside a home who had outstanding felony arrest warrants for several violent crimes, including driving his vehicle directly at a police officer. *Id.* at 981–82. *West* did not involve allegations that officers searched areas too small to hide a person. The district court correctly denied defendants' motion to dismiss the unreasonable search claims on qualified immunity grounds.

4. The district court did not err by denying qualified immunity to defendants Engstrom, Skedel, Lapre, Gragg, and Robinson on plaintiffs' failure-to-intervene claim. "[P]olice officers have a duty to intercede when their fellow officers violate the constitutional rights of

a suspect or other citizen" if they have a "realistic opportunity" to intercede. *Cunningham v. Gates*, 229 F.3d 1271, 1289–90 (9th Cir. 2000) (quoting *United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994), *rev'd on other grounds*, 518 U.S. 81 (1996)). "[T]he constitutional right violated by the passive defendant is analytically the same as the right violated by the person who strikes the blows." *Koon*, 34 F.3d at 1447 n.25. The district court concluded the complaint plausibly alleged that each individual defendant had a realistic opportunity to intercede during the destruction of plaintiffs' property. At the 12(b)(6) stage, these allegations are sufficient to support the denial of qualified immunity to defendants Engstrom, Lapre, Skedel, Gragg, and Robinson on the failure-to-intervene claim.

AFFIRMED. Defendants-appellants to bear costs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: August 31, 2021]

No. 20-16319

D.C. No. 2:17-cv-00119-SPL

JAMES W. DENBY and WILMA J. LOGSTON,

Plaintiffs-Appellees,

and

ELIZABETH J. TORRES,

Plaintiff,

v.

DAVID ENGSTROM; *et al.*,

Defendants-Appellants,

and

CITY OF CASA GRANDE and COUNTY OF PINAL,

Defendants.

U.S. District Court for Arizona, Phoenix

MANDATE

The judgment of this Court, entered July 09, 2021, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

Costs are taxed against the appellants in the amount of $77.46.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7