No. 24-

IN THE

Supreme Court of the United States

SERGEANT FRED CUETO, AND OFFICERS ROMERO GONZALEZ, MARIO MENESES, RODRIGO SORIA, AIRAM POTTER, DANIEL GAYTON, EDUARDO PICHE, AND BRITTANY PRIMO,

Petitioners,

v.

HASMIK JASMINE CHINARYAN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR NEC, A MINOR, AND MARIANA MANUKYAN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Given a jury verdict and resulting judgment in a civil case, does the appellant generally have the burden to show that any error was prejudicial to the final judgment or does the burden shift to the appellee to affirmatively prove harmless error?

PARTIES TO THE PROCEEDING

Individual Los Angeles Police Department ("LAPD") police officers Romero Gonzalez, Fred Cueto; Rodrigo Soria, Airam Potter, Daniel Gayton, Eduardo Piche, Mario Menses, and Brittany Primo are Defendants, Appellees, and Petitioners herein (collectively, "the Officers"). The Ninth Circuit reversed judgment for the Officers and remanded for further proceedings.

The Plaintiffs also named as defendants the City of Los Angeles ("the City") and the LAPD, but the LAPD is part of the City and is not a separate entity. The Ninth Circuit affirmed Judgment for the City.

The Plaintiffs, Appellants, and Respondents herein are Hasmik Jasmine Chinaryan, both individually and as Guardian as Litem for NEC, a Minor, and Mariana Manukyan (collectively, "Chinaryan").

RELATED PROCEEDINGS

The subject of this Petition is the Ninth Circuit decision in the consolidated appeal *Chinaryan, et al., v. City of Los Angeles, et al.*, Case Nos. 21-56237 and 22-55168, consolidated, which the Ninth Circuit entered on August 14, 2024.

Following appellate review, and a partial reversal of the defense judgment, the Ninth Circuit remanded for further proceedings. This matter is now currently pending in the United States District Court, Central District of California, Case No. 2:19-cv-09302-MCS-E, Judge Mark C. Scarsi, presiding. Trial against the individual officers is currently scheduled to begin on May 6, 2025.

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PETITION FOR A WRIT OF CERTIORARI

The Officers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's published opinion affirming in part and reversing in part is reported at 113 F.4th 888. See Appendix ("App.") 1a-48a. The Ninth Circuit order denying the Officer's Petition for Rehearing is not reported. See App. 49a-50a.

The Final Judgment entered by the district court is not reported. See App. 51a-53a. The district court's prior order granting in part and denying in part the party's cross-motions for summary judgment is not reported but is available at 2021 WL 4535349. See App. 54a-82a.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (42 U.S.C. § 1983 claims) and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 (California Bane Act claim). Following final judgment for the City and individual officers, the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

The Ninth Circuit issued its opinion on August 14, 2024. App. 1a. The Ninth Circuit issued an order denying rehearing, whether by panel or en banc, on October 3, 2024. App. 49a. On November 15, 2024, Justice Kagan granted Defendants an extension of time to file this Petition to and

including March 2, 2025, pursuant to Supreme Court Rule 13.5 (Application No. 24A487). Because March 2, 2025, is a Sunday, this deadline is extended to the following day. Sup. Ct. R. 30.1. Defendants invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2111—Harmless Error. App. 83a.

Federal Rules of Civil Procedure, Rule 61—Harmless Error. App. 84a.

INTRODUCTION

Should the Court require an appellant to give an existing judgment the dignity of demonstrating a prejudicial error before a court vacates or reverses that judgment? The Court has already and repeatedly answered affirmatively, and most circuits agree, apparently leaving the Ninth Circuit alone in opposition.

This case involves claims of excessive force and seizure without probable cause related to a traffic stop of Chinaryan's vehicle for suspected vehicle theft in the City of Los Angeles. Having good cause to believe that they found a stolen vehicle, the Officers used high-risk procedures when stopping the vehicle to ensure both their safety, the safety of the occupants, and any nearby community members. Chinaryan sued alleging the officers violated their constitutional rights by stopping the car without probable cause and for using excessive force during the stop.

The district court granted summary judgment for the individual Officers on qualified immunity, finding no clearly governing law regarding the high-risk stop procedures used in this case and under these circumstances. The district court denied summary judgment for the City on the *Monell* claim, finding that City policy encouraging high risk stop procedures was the driving force behind the officers' actions. The *Monell* claim went to trial, and after hearing testimony from the Officers and each of the Plaintiffs, and reviewing bodycam video of the incident, the jury expressly concluded that the Officers, either individually or collectively, did not violate Chinaryan's constitutional rights. The district court entered judgment for the City and the Officers.

Chinaryan appealed, asking the Ninth Circuit to enter judgment in their favor on liability and asked for a new trial on damages only. Chinaryan argued that based on the facts they presented in connection with the motions for summary judgment and at trial, that they were entitled to judgment as a matter of law against both the Officers and the City, that qualified immunity did not apply, and that the trial court gave improper jury instructions. Chinaryan did not argue, either in their opening or reply briefs, that granting qualified immunity was a prejudicial error given the jury's verdict that the Officers did not violate Chinaryan's constitutional rights.

The unanimous panel affirmed judgment for the City, holding the district court properly instructed the jury, and reversed the qualified immunity summary judgment, finding that prior Ninth Circuit rulings prevented immunity under the circumstances of this case. The panel split on harmless error. The majority

declined to hold that Chinaryan, as the appellant, had the burden of showing prejudicial error in light of the jury's finding that the officers did not violate Chinaryan's constitutional rights. Instead, the majority erroneously shifted the burden to require the Officers to prove the erroneous summary judgment ruling was harmless error, and held that the Officers failed to address that burden, even though Chinaryan never claimed any prejudice as a result. The dissent found that because the jury already considered all the evidence of this traffic stop and found that the Officers did not violate any constitutional rights, the error was necessarily harmless. Thus, the majority reversed the judgment for the Officers and remanded for further proceedings on both liability and damages.

STATEMENT OF THE CASE

A. The Underlying Facts[1]

The Los Angeles Police Department ("LAPD") located a stolen black Chevrolet Suburban limousine in an area of the City known as a destination for stolen cars a couple of days before the incident giving rise to this lawsuit. Using the vehicle's LoJack device could only narrow the area to within a few blocks. The Officers spotted Chinaryan driving a black Chevrolet Suburban limousine (different model year, but very similar) in that area. They ran the license plates and California Department of Motor Vehicle ("DMV") records showed the license plate belonged on a Dodge Ram. The heavy window tinting concealed the interior of the vehicle, so the Officers did not know the

1. The facts are set forth in far greater detail in the opinion below. See App. 4a-9a.

number or character of the passengers, other than the two adults visible through the windshield.

About a dozen officers assembled when they pulled over the vehicle. Based on their belief that this was the stolen car and their inability to confirm the vehicle's occupants, the Officers executed a high-risk stop, which included: (1) having the driver throw the keys out the window, walk away from the vehicle, and lie down; (2) having the remaining occupants exit one at a time and walk backwards away from the car, where officers handcuffed them; (3) clearing the car for weapons and confirming the identity of the vehicle; and, (4) Officers having their weapons drawn (it was disputed whether the Officers pointed the weapons at Chinaryan or at a low and ready position) until the Officers secured the occupants and vehicle. The Officers learned that the vehicle's Vehicle Identification Number confirmed it was not the stolen vehicle. They also learned that the DMV issued Chinaryan the wrong license plates, and therefore the Officers reasonably but mistakenly believed the vehicle was stolen. The Officers released everyone and explained what happened. The incident lasted about 24 minutes. App. 9a.

B. Procedural History

1. District Court enters judgment for Defendants.

Chinaryan challenged the arrest and high-risk tactics by initiating this lawsuit under 42 U.S.C. § 1983 and California's Bane Act (Cal. Civ. Code § 52.1). Chinaryan alleged that the Officers violated their Fourth Amendment rights by arresting them without probable cause and using

excessive force. Against the City, Chinaryan alleged a claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for failing to adequately train the officers. App. at 10a. In addition to the state law claim, the district court granted summary judgment for the Officers on the federal claims, based on qualified immunity. App. 10a. The district court denied summary judgment on the City's *Monell* liability, finding that the City's policy was the "moving force" behind the incident and therefore any constitutional violation. App. 39a, n.1.

During the four-day trial of Chinaryan's Fourth Amendment *Monell* claims, the jury saw the officers' bodycam videos depicting the events, heard from each of the plaintiffs, and heard from the officers involved in the traffic stop. See App. 4a-9a, 20a-21a, including n.10 and n.11. The only element of the *Monell* claim presented to the jury was whether the officers deprived the plaintiffs of their constitutional rights. App. 39a-40a. The district court instructed the jury that to prove the Fourth Amendment claims Chinaryan needed to show that the "officers lacked reasonable suspicion to stop them or that the length or scope of the stop was excessive." As to the length or scope of the stop, the district court instructed the jury to "consider all the circumstances, including the intrusiveness of the stop, such as the methods the police used, the restrictions on plaintiff's liberty, and the length of the stop, and whether the methods used were reasonable under the circumstances," including the type and amount of force used. App. 34a, 45a-46a. Chinaryan's closing arguments focused on the actions of the individual officers. App. 30a-31a, 46a.

The jury answered "No" to the verdict question: "Did police officers from the City of Los Angeles, acting

individually or together, . . . deprive . . . Plaintiffs of their Fourth Amendment rights?" App. 47a-48a. The district court entered judgment for all Defendants. App. 51a-52a.

2. The Ninth Circuit affirms judgment for the City, but reverses summary judgment for the Officers.

Chinaryan appealed, arguing that qualified immunity did not apply and that the district court erred in instructing the jury on the *Monell* claim against the City. On appeal, Chinaryan asked the Ninth Circuit to reverse the judgment in favor of the City, enter judgment in favor of Chinaryan and against the Officers on liability as a matter of law, and requested a new trial on damages. See App. 23a. The Ninth Circuit held that the district court properly instructed the jury and affirmed judgment for the City. App. 3a-4a. The full panel ruled against qualified immunity. The panel concluded that *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), and *Green v. City & Cnty. of San Francisco*, 751 F.3d 1039 (9th Cir. 2014), clearly established that reasonable suspicion of vehicle theft and tinted windows, without more, was not enough to categorically justify the intrusive tactics the Officers used here. As such, this presented a factual question for a jury. App. 22a-23a. However, the panel split on whether to reverse judgment in favor of the Officers.

The majority ruled in a published opinion to reverse judgment for the Officers on the grounds that they did not establish harmless error for erroneously granting summary judgment. App. 31a. The Officers argued that because the jury verdict confirmed a lack of any constitutional violation by the Officers, collectively or individually, the Ninth Circuit should affirm the judgment.

App. 40a. Conversely, Chinaryan did not argue in the opening brief that the grant of summary judgment was a prejudicial error despite the subsequent jury verdict finding the Officers did not violate Chinaryan's constitutional rights. On this point, Chinaryan's reply brief argued that the Officers' individual liability would become an open question once the Ninth Circuit reversed the jury verdict, but that did not happen. App. 40a-41a, including n.2. The parties also addressed the issue of harmless error in oral argument. App. 41a.

The majority of the panel held that a civil trial error is presumed prejudicial, asserted that this included the summary judgment ruling, and put the burden on the Officers to demonstrate otherwise. App. 25a. Having unexpectedly shifted the appellate burden to the Officers, the majority held that the Officers forfeited the issue because they insufficiently argued the point, despite the Officer's argument that the jury's specific finding that the Officers did not violate Chinaryan's constitutional rights mooted the question of their qualified immunity. App. 25a-26a and 40a. Having erroneously shifted the burden, the majority found that the record did not support finding harmless error, largely by speculating about possible facts beyond the previous adjudication of the traffic stop, even though that was the only event alleged or argued below. The majority further speculated that Chinaryan might have somehow argued those same facts differently if the Officers were parties at trial, even though nothing in the record supports the conclusion that Chinaryan would have presented any different evidence, or the jury would have considered any different issues, other than what they actually did. See App. 30a-31a and 45a. The panel made no finding whether Chinaryan could have met the burden

to show prejudicial error. The speculative nature of the majority's discussion indicates that the decision of who had the burden on appeal was dispositive.

The dissent noted that the Officers presented a harmless error argument and the record readily established the harmless error. App. 40a-41a and see 41a-48a. Chinaryan addressed the individual actions of the Officers when asking the jury to consider the circumstances of the entire event and agreed that no evidence suggested that Chinaryan would have tried the case differently or presented different evidence or argument to the jury. App. 45a-48a. The dissent explained why the summary judgment error was rendered harmless by the jury's subsequent verdict that the Officers, "acting individually or together," did not deprive Chinaryan of any constitutional rights as part of the *Monell* claim against the City. App. 35a-36a, 47a-48a. The dissent concluded, "it is highly unlikely, if not a certainty, that the jury would have found for Plaintiffs on those claims had they been presented at trial." App. 48a (cleaned up).

REASONS FOR GRANTING CERTIORARI

I. The Ninth Circuit Decision Is Inconsistent with the Decisions of this Court.

The Ninth Circuit disregards this Court's holdings regarding the inherent burden of an appellant seeking to overturn a valid judgment by showing that a prejudicial error exists. Instead, it improperly shifts the burden to the appellee to prove harmless error in violation of this Court's and the majority of the Circuit Courts' rules.

A. The Court has established that it is appellant's burden to show prejudicial error.

This Court has repeatedly confirmed that the appellant has the burden to show prejudicial error when seeking to overturn an existing judgment. In *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (*Shinseki*), plaintiffs appealed adverse administrative rulings which resulted after the Veteran's Administration failed to give plaintiffs notice of their obligation to develop their disability benefits claims on their own. This Court explicitly warned against imposing mandatory presumptions and burden shifting in a harmless error determination, because this undermined judicial review and "may lead courts to find an error harmful, when, in fact, in the particular case before the court, it is not." 556 U.S. at 408; citing 28 U.S.C. § 2111 (harmless error statute).[2] While *Shinseki* addressed an appeal from an administrative ruling, the Court expressly applied "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Id*. at 406. To provide proper respect to the existing judgment, while still allowing for reversal when actual prejudice results from error below, the appellant is tasked with the burden of showing prejudicial error. *Id*. at 407-408. "This Court has said that the party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'" *Id*. at 409; quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). In *Palmer*, the Court held that the petitioner who challenged the

2. 28 U.S.C.A. § 2111 (West) states in full: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." See App. 83a.

existing judgment failed to provide a sufficient record that met his burden on appeal to establish a prejudicial error, and affirmed. *Id.*

The Court has long established a presumption in favor of the existing judgment. For example, in *United States v. Borden Co.*, 347 U.S. 514 (1954), the Court rejected the Government's arguments that a trial court improperly admitted certain evidence, finding that the Government failed to meet its burden of showing prejudicial error, i.e., that the evidence in question would have altered the outcome. *Id.* at 516 ("[E]ven assuming error in each of the challenged rulings, it does not appear that admission of the evidence in question would have been sufficient to change the conclusion that the Government had not established a case under the Sherman Act; hence the rulings cannot be said to have affected substantial rights of the parties within the meaning of 28 U.S.C. § 2111."). The Court applied the same standard in *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963) (per curiam). In *Tipton*, the trial court improperly admitted evidence, over objection and without limitation, that the plaintiff received workers' compensation benefits that were unavailable to seamen on a ship crew. However, a central liability issue was whether the employer should have properly classified the plaintiff as a seamen, a point emphasized by a question from the jury on this issue. Because the plaintiff-appellant affirmatively supported his argument of prejudicial error, the Court reversed the divided circuit court finding that the improper evidence was harmless error. *Id.* at 36-37; citing 28 U.S.C. § 2111.

As *Shinseki* explained, requiring the appellant to show the merits of the appeal is "not to impose a complex

system of 'burden shifting' rules or a particularly onerous requirement." *Shinseki*, 556 U.S. at 410. Rather, "the appellant will point to rulings . . . that the appellant claims are erroneous" and then "must explain why the erroneous ruling caused harm." *Id.* As a practical matter, the Court recognized that sometimes "circumstances . . . will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said." *Id.*; see e.g., *Chapman v. California*, 386 U.S. 18, 24-25 (1967) (prosecution's repeated comments on the defendant's failure to testify made it "completely impossible" for the court to uphold the conviction); and *E.E.O.C. v. Beverage Distributors Co., LLC*, 780 F.3d 1018, 1022 (10th Cir. 2015) (instruction and verdict form that imposed a higher standard on employer than provided by law required reversal of adverse verdict). *Shinseki* observed that the "party seeking to reverse the result of a civil proceeding will likely be in a position at least as good as, and often better than, the opposing party to explain how he has been hurt by an error." 556 U.S. at 410.

This is consistent with Federal Rules of Civil Procedure, Rule 61, which states that no "error by the court or a party" is grounds for "disturbing a judgment or order" unless "justice requires otherwise . . . " App. 84a. This espouses "the same principle" as the harmless error statute, 28 U.S.C. § 2111, "which applies directly to appellate courts . . . " *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (While Rule 61 technically "applies only to district courts . . . it is well-settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61.") In *McDonough Power Equipment*, the parties later discovered that a juror answered a voir dire question

incorrectly in a manner which potentially led to a biased jury. In addition to the task of proving that a juror failed to honestly answer a material question, this Court held that the appellant had the burden to show prejudicial error from this misfeasance. *Id.* at 555-556.

The review of civil judgments is distinguished from the considerations that apply in a criminal case. In criminal cases "the Government seeks to deprive an individual of his liberty" by proving "its case beyond a reasonable doubt," thereby justifying a shift in the burden of proof to the Government appellee to prove that the error "did not affect the outcome of the case." See *Shinseki*, 556 U.S. at 410. "But we have placed such a burden on the appellee only when the matter underlying review was criminal." *Id.*; citing *Kotteakos v. United States*, 328 U.S. 750, 760 (1946), as an example of such a criminal case. This result is further supported by the fact that the criminal defendant need not even put on a defense. A criminal defendant can instead simply challenge the prosecutor's case against him or her. However, even in the criminal context this Court rejected a rule that all constitutional violations were necessarily harmful in favor of a harmless error analysis. *Chapman*, 386 U.S. at 21-22. In any case, these considerations do not apply "in the ordinary civil case. . . ." *Shinseki* at 410; citing *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943) ("He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.").

This Court also imposes the burden of showing harmless error on state actors in a habeas proceeding, because habeas matters address the same liberty interests as criminal cases. See *O'Neal v. McAninch*, 513 U.S. 432,

440 (1995). However, the majority in *O'Neal* distinguished the general rule in civil cases that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Id.* at 439-440.[3] However, such criminal issues are beyond the scope of this petition, which focuses on ordinary civil matters.

B. The Ninth Circuit defied this Court's rulings regarding who has the burden of proving harmless/prejudicial error.

The Ninth Circuit defied this Court's rulings that the party seeking to overturn a civil judgment generally has the burden to show prejudicial error. *Shinseki*, 556 U.S. at 409; *Palmer*, 318 U.S. at 116. Ignoring *Shinseki*, the Ninth Circuit here held the opposite: "The burden of raising harmless error fell on defendants because 'we presume prejudice where civil trial error is concerned.'" App. 25a; quoting *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).[4] The panel majority, consistent with other Ninth Circuit opinions, conflicts with this Court's rulings by categorically shifting the burden of proof against the existing judgment.

The majority here instigated this burden shift, as both parties acted under the belief that the appellant had the burden to show prejudicial error. The Officers argued that reversing the ruling on qualified immunity would not change the result, as the court already knew

3. The three dissenting justices in *O'Neal* would have imposed the burden of proving prejudicial error on the habeas petitioner. *Id*. at 446.

4. While *Clem* issued after *Shinseki*, it was briefed well before and the opinion does not mention *Shinseki*.

how a reasonable jury would rule because one already had, and found no constitutional violation by the Officers. App. 24a and 40a. In their reply brief (and in oral argument), Chinaryan argued in response that once the court reversed the jury verdict, the issue of constitutional violations would reopen, but that never happened. See App. 40a.

In *Clem*, the appellant-plaintiff successfully challenged an erroneous jury instruction that incorrectly added an additional element to the plaintiff's burden of proof. *Clem*, 566 F.3d at 1182. Instead of holding that this was plain error that necessitated reversal, *Clem*, relying entirely on Ninth Circuit authorities, framed the issue as a presumption that "requires reversal" for every jury instruction error, unless harmless error is proven. *Id.* *Clem* expanded this even further, based on other Ninth Circuit jury instruction cases, to issue a broader statement that "we presume prejudice where civil trial error is concerned . . . " *Id.* (cleaned up); quoting and citing, *Dang v. Cross*, 422 F.3d 800, 811 (9th Cir. 2005); *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992); and *Galdamez v. Potter*, 415 F.3d 1015, 1025 (9th Cir. 2005). Even though *Clem* is plainly distinguishable from this case—because in this case the unanimous panel held that a properly instructed jury found no constitutional violation—the majority nevertheless relied on the broader Ninth Circuit rule to improperly shift the presumption away from favoring the existing judgment. See App. 25a.

The Ninth Circuit directly addressed the conflict between *Shinseki* and *Clem*, and chose to ignore *Shinseki*. In *BladeRoom Grp. Ltd. v. Emerson Electric Co.*, 20 F.4th 1231, 1242 (9th Cir. 2021), the appellate court reversed a contract interpretation by the district

court, but under the circumstances of the case treated the issue as a jury instruction error. *BladeRoom Grp. Ltd.* then sought to reduce and distinguish *Shinseki* in favor of the Ninth Circuit holding in *Clem* for purposes of addressing harmless error. *Id.* at 1243. *BladeRoom Grp. Ltd.* primarily accomplished this by erroneously holding that *Shinseki*'s statement on the general rule in civil appeals—requiring the appellant to show prejudicial error—was optional, and did not require compliance by the circuit courts. *Id.* Even further, *BladeRoom Grp. Ltd.* held that any such rule—if it even existed—would only apply in "ordinary civil cases," asserting that a jury instruction error was not "ordinary," but was somehow "abnormal." *Id.* at 1243-1244. *BladeRoom Grp. Ltd.* suggested that its case was 'abnormal' because the failure to provide the proper jury instructions affected the appellant's substantive rights, but this ignores the reality that all prejudicial errors, by definition, affect the appellant's substantive rights, so that is no distinction at all. See *BladeRoom Grp. Ltd.* at 1243-1244; and see See Fed. R. Evid. 103(a); Fed. R. Civ. P. 61.

BladeRoom Grp. Ltd. did not opine on how many other exceptions the Ninth Circuit might find to avoid the holding in *Shinseki*, or why a relatively common basis for appeal—a dispute over jury instructions—would be abnormal. This Court has identified only one exception to a presumption favoring the existing verdict—a habeas proceeding—because it has similar liberty stakes as the criminal proceeding it challenges. See *O'Neal*, 513 U.S. at 440. But even *O'Neal* recognized the general rule in civil litigation is that the appellant has the burden to show

prejudice. *Id.* Having discarded *Shinseki*, *BladeRoom Grp. Ltd.*, like the panel here, followed *Clem.*[5]

These more recent cases echo long-standing Ninth Circuit decisions to improperly shift the burden on appeal in civil matters. Even before *Shinseki*, the Ninth Circuit struggled with harmless error in civil cases in "a somewhat contradictory fashion," holding in different cases both a presumption of prejudice upon finding error and later holding the appellant has the burden of proving prejudice. See *Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005). The contradiction was further muddled by "contradictory" and "inconsistently applied" applications of these contrary standards. *Id.* at 699-700. The Ninth Circuit addressed this conflict in *Obrey*, in which the district court excluded evidence that the appellate court found relevant to the issues of discriminatory bias, pretext, and discriminatory practices. *Id.* at 697-698. *Obrey* then acknowledged the previous contradictory harmless error rulings before affirmatively, and incorrectly, adopting a presumption of prejudice upon a finding of error below. *Id.* at 700.

However, the decision in *Obrey* is suspect for multiple reasons. First, this decision predates *Shinseki*, and so is outdated from the start. Second, *Obrey* mistakenly relied on criminal cases by this Court, which address burden issues that are distinct from civil cases. See *Shinseki*, 556 U.S. at 410-411; and *infra* at 13. Third, *Obrey*'s purported reliance on this Court's precedents was misguided. *Obrey*

5. The Ninth Circuit has since followed the holding in *BladeRoom Grp. Ltd.* in other opinions. E.g., *Sidibe v. Sutter Health*, 103 F.4th 675, 685 (9th Cir. 2024) (reviewing court will "presume prejudice" from the erroneous instruction).

incorrectly cited *O'Neal*, a habeas matter, to find a general presumption of prejudice in civil cases. However, *O'Neal* explicitly distinguished habeas matters from other civil litigation, and reaffirmed the general rule in civil matters that the appellant has the burden to show prejudice. *O'Neal*, 513 U.S. at 440. Even more misleading, the *O'Neal* passage quoted by *Obrey* discusses what constitutes a harmless error, which is similar in both criminal and civil matters, not who has the burden to show prejudicial or harmless error. See *Obrey*, 400 F.3d at 701; and *O'Neal*, 513 U.S. at 441-442.

BladeRoom Grp. Ltd. is consistent with other erroneous Ninth Circuit holdings. E.g., *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017) ("Harmless error review for a civil jury trial shifts the burden to the defendant to demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed.") (cleaned up). While some Ninth Circuit panels followed *Shinseki*, the current published opinion will presumably put an end to that. See, e.g., *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 989 (9th Cir. 2012) (following *Shinseki* that the appellant in a civil matter "has the burden of proving that the error was harmful.")[6]

The Ninth Circuit's departure from this Court's rulings requires review and further guidance from this Court.

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6. Only sporadically following *Shinseki* prior to this case, the Ninth Circuit struggled to find its own harmless error protocol. See generally Chris Goelz et al., *Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice,* ¶¶ 7:208–7:211 (Apr. 2024) (discussing the muddled and contradictory state of Ninth Circuit harmless error law prior to this decision).

II. The Ninth Circuit's Decision Creates a Foundational Circuit Conflict: Who has the Burden of Showing Harmless Error/Prejudice on Appeal?

The Ninth Circuit's rejection of *Shinseki* creates a conflict with the other circuits that follow *Shinseki's* plain language, and requires the Court's intervention. The Ninth Circuit has now definitively held, in a published opinion, that civil trial errors, including pre-trial decisions, are presumed prejudicial unless the answering party on appeal can show otherwise. See App. 25a. This directly conflicts with those circuits that follow *Shinseki* and follow the general rule that the appellant has the burden of showing a prejudicial error to reverse an existing judgment.

The Ninth Circuit previously acknowledged its conflict with the Sixth Circuit on this issue. In *BladeRoom Grp. Ltd.*, the Ninth Circuit recognized that its rejection of the *Shinseki* general rule directly conflicted with the Sixth Circuit in *Kocher v. Durham Sch. Servs., L.P.*, 969 F.3d 625, 630 (6th Cir. 2020). *Kocher* addressed a jury trial verdict over a school bus accident in which the trial court excluded some of the plaintiffs' liability evidence. *Id.* at 628. *Kocher* follows *Shinseki* in requiring that "the party that seeks to have a judgment set aside because of an erroneous ruling, carry the burden of showing that prejudice resulted." *Id.* at 629 (cleaned up); citing *Shinseki*, 556 U.S. at 411; and *Palmer*, 318 U.S. at 116. *Kocher* distinguished the appellate burden in criminal cases and quoted *Shinseki* that "we have placed such a burden on the appellee only when the matter underlying review was criminal." *Kocher* at 630; quoting *Shinseki*, 556 U.S. at 410–411; which cited *Kotteakos*, 328 U.S. at 760.

In fact, the Ninth Circuit appears to stand alone in rejecting *Shinseki*'s general rule that appellants have the duty to show prejudicial error to challenge a judgment. In fact, as *Kocher* reported, most circuits anticipated *Shinseki's* ruling and had already enforced this rule. *Kocher*, 969 F.3d at 630, n.4.[7] In addition to the Sixth Circuit, the Third and Fourth Circuits, each citing *Shinseki*, now also place the burden to show prejudicial error on the appellant. See *Morgan v. Covington Twp.*, 648 F.3d 172, 180 (3d Cir. 2011) ("it is [appellant's] burden to show that the District Court's error was harmful"); and *Dorman v. Annapolis OB-GYN Assocs., P.A.*, 781 F. App'x 136, 142 (4th Cir. 2019) (quoting *Shinseki*, 556 U.S. at 410); with both cases also citing Fed.R.Civ.P. 61.

The decision below further exacerbates the Ninth Circuit's conflict with the remaining circuits and its departure from this Court. *BladeRoom Grp. Ltd.* only disregarded *Shinseki* for those civil cases which were "abnormal," i.e., not an "ordinary civil case," without providing any criteria for how broad that exception

7. And see, e.g., *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 119 (2d Cir. 2006) (courts "will set aside a judgment secured by an erroneous charge only if the appellant shows that the error was prejudicial"); *Howard v. Gonzales*, 658 F.2d 352, 357 (5th Cir. 1981) ("A party asserting error has the burden of proving that 'substantial rights' were affected by" the erroneous ruling, and the effort fails if it had only a slight effect on the jury or there was no substantial prejudice."); *Flanigan v. Burlington N. Inc.*, 632 F.2d 880, 889 (8th Cir. 1980) ("Under [the harmless error] rule, it is also generally held that it is the appellant's burden to establish the prejudicial effect of the trial court's refusal to give a requested instruction."); *Bonner v. Polacari*, 350 F.2d 493, 496 (10th Cir. 1965) ("[T]he appellant had the burden of showing that any prejudice resulted by not being able to pursue this matter . . . ").

might become or what constitutes an abnormal versus an ordinary civil case. *BladeRoom Grp. Ltd.*, 20 F.4th at 1243-1244; *Shinseki*, 556 U.S. at 411. However, the present case has no such limitations, and now the Ninth Circuit wholly disregards both *Shinseki* and all of its sister circuits by declaring categorically: "The burden of raising harmless error fell on defendants because we presume prejudice where civil trial error is concerned." App. 25a (cleaned up).

As observed in *Kocher*: "After *Shinseki*, only the Ninth Circuit seems still to apply the rule that the beneficiary of an error in a civil case bears the burden of showing the absence of harm." 969 F.3d at 630, n.4. Only review by the Court will correct this anomaly.

III. This Standard for Appellate Review Is Recurring and of Great Practical Importance.

A fundamental aspect of appellate review is to ascertain whether that error actually prejudiced the appellant. Simple error, standing alone, is insufficient to reverse a verdict or judgment. See *United States v. Lane*, 474 U.S. 438, 465 (1986) (Brennen, J., concurring) ("the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex. [Citation.]"). By definition, every appeal claims error in the proceedings below, which regularly triggers the question of whether the appellant can justify disturbing the existing judgment by demonstrating a prejudicial error. The need for consistency in federal appellate standards and this Court's supervisory duty each highlight the need for review here.

"This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not." *Foucha v. Louisiana*, 504 U.S. 71, 116 (1992) (Thomas, J., dissenting); quoting *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 610 (1990) (O'Conner, J., dissenting); and see *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995) (discussing "the importance of debating the proper standard of review"). The Ninth Circuit's deviation from this Court's harmless error rulings highlights the need for further clarification and illumination from this Court to better guide the federal courts on the "increasingly frequent" consideration of harmless error. *Lane*, 474 U.S. at 474 (Stevens, J., concurring).

The Ninth Circuit practice of presuming prejudice and shifting the burden of proof can determine the outcome of a civil appeal in any "close case." See *Obrey*, 400 F.3d at 699-700; and see 699-702; see e.g., *John Doe No. 1 v. Reed*, 561 U.S. 186, 199, n.2 (2010) (different outcome based on standard of care majority chose versus the one the dissent promoted). Indeed, improper burden shifting here changed the outcome. In the trial below, a properly instructed jury, having heard from the event participants and having seen the bodycam videos, concluded that the Officers, "acting individually or together" did not violate Chinaryan's constitutional rights. App. 47a; and see App. 4a-9a, 20a-21a, including n.10 and n.11. If the Ninth Circuit had required Chinaryan to show a prejudicial error on appeal, as this Court requires, the Ninth Circuit would have affirmed Judgment in total on this record, as the dissent described in detail. App. 48a ("I would respect the decision of the jury that heard the evidence of the officers' conduct.")

However, after the panel overturned qualified immunity for the Officers, the majority incorrectly applied a mandatory presumption against the existing verdict. App. 25a. This resulted in the majority opining and speculating, without any support in the record, about possible grounds to defeat harmless error, including speculating about possible evidence that went beyond the existing verdict, even though the only basis for Chinaryan's claims against any defendant was the conduct during the traffic stop. App. 26a-31a; but see App. 45a ("The record gives no indication that Plaintiffs would have presented materially different evidence to the jury" in pursuing the Officers individually.) Indeed, the unanimous panel found that the jury instructions "sufficiently covered the officers' use of high-risk tactics in this case." App. 34a. The result of the improper burden shifting is that the Officers will now have to retry the very same issues the jury already adjudicated and determined in their favor.

This Court should grant the Petition because the published opinion below, which is an example of multiple Ninth Circuit decisions, "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). In addition, given the fundamental and pervasive nature of the harmless error doctrine, the Ninth Circuit has "so far departed from the accepted and usual course of judicial proceedings" so as to invoke "this Court's supervisory power" over the conduct of the federal courts. Sup. Ct. R. 10(a). This Court should exercise its supervisory power to resolve any ambiguities and unresolved issues to ensure the proper application of the harmless error rule in civil litigation.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21-56237
22-55168

D.C. No.
2:19-cv-09302-
MCS-E

HASMIK JASMINE CHINARYAN, INDIVIDUALLY AND AS GUARDIAN AS LITEM FOR NEC, A MINOR; MARIANA MANUKYAN,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; MICHEL MOORE, CHIEF OF POLICE; ROMERO GONZALEZ, OFFICER; FRED CUETO, SERGEANT; RODRIGO SORIA, OFFICER; AIRAM POTTER, OFFICER; BRITTANY OKE, OFFICER; JEFF RODD, OFFICER; DANIEL MARTINEZ, OFFICER; DANIEL GAYTON, OFFICER; EDUARDO PICHE, OFFICER; MARIO MENSES, OFFICER; BRITTANY PRIMO, OFFICER,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court
for the Central District of California
Mark C. Scarsi, District Judge, Presiding

Argued and Submitted July 21, 2023
Pasadena, California

Filed August 14, 2024

Before: Sidney R. Thomas, Jacqueline H. Nguyen,
and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Nguyen;
Partial Dissent by Judge Forrest.

OPINION

NGUYEN, Circuit Judge:

Hasmik Chinaryan was driving home from a family celebration with her teenage daughter and a friend when a police officer saw her and mistakenly suspected that she was driving a stolen vehicle. The mix-up was due to several unfortunate coincidences, including an error by the Department of Motor Vehicles ("DMV"), which had issued the wrong license plates. Although Chinaryan drove normally and in compliance with all traffic laws while being followed by a police car for more than ten minutes, officers from the Los Angeles Police Department ("LAPD") decided to conduct a "high-risk" felony stop involving about a dozen officers and a helicopter unit. The officers ordered Chinaryan out of the vehicle at gunpoint and commanded her to lie prone on the street with her

arms outstretched. The officers, again at gunpoint, ordered the passengers out of the vehicle with their hands in the air. All three were handcuffed and seated on the street while the officers investigated.

Chinaryan and her passengers sued the officers, the LAPD, and the City of Los Angeles for illegal seizures, excessive force, and a failure to properly train the officers. The district court granted partial summary judgment in favor of the officers, and a jury subsequently rejected plaintiffs' municipal liability claims against the LAPD and the City.

We reverse the grant of partial summary judgment. It was clearly established in *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), and *Green v. City & County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014), that officers can be held liable for conducting a high-risk vehicle stop based on nothing more than a reasonable suspicion that the vehicle was stolen. Viewing the facts in the light most favorable to plaintiffs, the officers were not entitled to qualified immunity on plaintiffs' Fourth Amendment claims. As for plaintiffs' state law claims, the evidence at summary judgment permitted a finding that the officers acted with the requisite reckless disregard for plaintiffs' rights. Therefore, we remand for a new trial on all of plaintiffs' claims against the individual officers.

We affirm the judgment in favor of the City and the LAPD. The district court did not abuse its discretion by declining plaintiffs' requested jury instructions derived from *Washington* and *Green*. The proposed instructions

misstated the law, and the district court provided a general reasonableness instruction that adequately covered plaintiffs' theory of the case.

I. Factual Background

A. The stolen vehicle

On June 14, 2019, a black Chevrolet Suburban limousine was stolen while parked on the street overnight. The following evening, a helicopter unit in LAPD's Foothill Division detected a signal from the vehicle's LoJack device. Officers Ramiro Gonzalez and Mario Meneses, investigating on the ground, located the signal's approximate source. LoJack signals are not as accurate as GPS, but Gonzalez was confident that the signal originated from no more than two or three businesses away from his location on Glenoaks Boulevard—an industrial area with many "chop shops" that take parts off vehicles.[1] He reported the incident to his supervisor, Sergeant Fred Cueto. Because businesses were closed for the weekend, they planned to return to the location to recover the car on Monday.

B. Officers pursue Chinaryan's vehicle

The following day, on June 16, 2019, Hasmik Chinaryan was driving her daughter ("NEC") and their friend, Mariana Manukyan, from a Father's Day gathering

1. LAPD later recovered the stolen Suburban in that area, but not until after the events at issue here.

in North Hollywood back to their home in Tujunga—a 15-minute drive. Their vehicle, which belonged to Chinaryan's husband, Levon Chinaryan, was also a black Suburban limousine. Both Suburbans were late model vehicles—the stolen one from 2015 and Chinaryan's from 2018—and they looked very similar.

Sergeant Cueto saw Chinaryan's vehicle on Glenoaks at Tuxford Street, less than half a mile from where the stolen Suburban's LoJack signal had been detected. Thinking, "what are the chances," Cueto radioed Chinaryan's license plate number to the communications unit and requested DMV information for her vehicle. The communications unit informed him that the license plate belonged to a Dodge Ram and gave him information regarding the registered owner. The Dodge Ram had not been reported stolen. Cueto suspected that the Suburban had been stolen because it was "cold-plated," i.e., had a license plate other than the one registered with DMV. He called for backup, including a helicopter unit.

Cueto followed plaintiffs for about 10 minutes, during which time Chinaryan did not exceed the speed limit, drive evasively, or violate any traffic laws. Although it was still daytime, Cueto could not see inside Chinaryan's vehicle because it had heavily tinted windows.

As Cueto followed Chinaryan down Foothill Boulevard, Officers Gonzalez and Meneses approached in their vehicle from the opposite direction. As Meneses drove past Chinaryan's vehicle, Gonzalez saw her and Manukyan through the front windshield. The LoJack receiver in

Gonzalez and Meneses's vehicle did not register a signal, but Gonzalez could not be sure they had the wrong vehicle because car thieves can disable LoJack systems.

Gonzalez informed Cueto by radio that he had seen two people in the front of the car. Meneses made a U-turn and began following plaintiffs directly behind their vehicle. At that point, approximately a dozen officers were in pursuit.[2]

C. Officers stop Chinaryan's vehicle and handcuff the three occupants

Chinaryan "saw many, many . . . officer cars" and heard helicopters. Believing the officers "[were] after . . . some criminal," she activated her turn signal and pulled to the side of the road to let them pass. As she did so, the officers activated their sirens. The officers "yell[ed] louder and louder to get out of the car," and Chinaryan realized they were stopping her.

Officer Meneses ordered Chinaryan to turn off the vehicle, throw her keys outside, step out of the car, and keep her hands up. Chinaryan exited the vehicle as Meneses and several other officers pointed their pistols at her or in her direction.[3] Meneses ordered Chinaryan

2. The parties provide differing counts of the number of officers on the ground. Plaintiffs claim there were 13, while defendants claim there were 11, but the difference is immaterial.

3. The officers dispute that they pointed their weapons directly at Chinaryan, but their claimed "low ready" positioning required

to walk away from the vehicle into the rightmost lane, lie down on her stomach, put her hands out "like a plane," and turn her head to the side, facing away from the vehicle, with her cheek touching the ground.

Chinaryan was "extremely scared" and heard NEC crying inside the vehicle. She remained prone on the ground for about three minutes and twenty-five seconds while the officers cleared the car, after which they holstered their weapons and handcuffed her.

Meanwhile, Officer Gonzalez ordered NEC and Manukyan to exit the passenger doors, one at a time. As they did so, Gonzalez and Officer Eduardo Piche pointed firearms in their direction—Gonzalez his AR15 high-capacity police patrol rifle, and Piche his loaded 12-gauge shotgun. The officers ordered them to walk about 15-20 steps backwards (Manukyan in heels), where Officer Airan Potter handcuffed them. NEC cried and urinated on herself "because [she] was so scared."

D. Officers investigate Chinaryan's vehicle

After Chinaryan, NEC, and Manukyan were in handcuffs, Officer Gonzalez racked his rifle. He and Officer Zachary Neighbors located the Suburban's Vehicle Identification Number ("VIN")—Gonzalez on the driver door frame, and Neighbors on the windshield plate—and

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that they point their weapons at least near if not at her person, and in evaluating the district court's ruling on defendants' summary judgment motion, we resolve all factual disputes in plaintiffs' favor. *See, e.g., Green*, 751 F.3d at 1051.

the officers independently checked the VIN on their car computers. They learned from DMV records that the VIN belonged to a 2018 Suburban registered to Levon Chinaryan with a license plate that differed by one digit from the license plates on the stopped vehicle. The vehicle had not been reported stolen.

Officer Gonzalez told Officer Meneses: "It's not stolen. The number is one off." He opined that "DMV gave them the wrong plates." Gonzalez then walked over to Sergeant Cueto and Officer Neighbors and explained what had happened. Neighbors, evidently skeptical of this explanation, told Cueto, "I think they might have swapped [the VIN]." Recalling a prior incident where that had occurred, Neighbors stated, "there's another [VIN] on the engine block [that] they can't switch." He proceeded to check that VIN.

Sergeant Cueto walked over to Chinaryan and explained that he had stopped her because her "license plate comes back to a Dodge Ram." Chinaryan told him that the car belonged to her husband, Levon Chinaryan, who had bought it less than three months earlier. She told Cueto their home address. Sergeant Cueto returned to the front of the Suburban, where Officer Jeff Rood told him: "All the VINs match." Eventually, Cueto directed officers to remove the handcuffs on Chinaryan, NEC, and Manukyan. The officers removed the plates from the Suburban, completed paperwork, and instructed Chinaryan that she or her husband would need to contact DMV about new plates.

The entire incident, from the time the officers stopped Chinaryan's vehicle to the time she and her passengers were released, lasted 24 minutes.

E. Types of LAPD vehicle stops

LAPD officers perform three types of vehicle stops. In a traffic enforcement stop, the car's occupants generally stay in their vehicle while two officers approach the vehicle from opposite sides and proceed to the driver- and passenger-side doors.

A tactical investigatory stop is used in situations that may end up in an arrest rather than a citation or warning.[4] Officers take a position of cover, such as behind the bulletproof police car doors, and order the occupants of the stopped vehicle to step outside. Officers then instruct them to lift up their clothing and turn around to reveal if they have weapons in their waistbands. Officers keep their guns holstered and do not normally order a suspect to lie down on the street.

A high-risk vehicle stop is similar, except that officers draw and hold their weapons at the "low ready" position,

4. The tactical response defendants refer to as an "investigatory stop" should not be confused with an "investigatory stop" in its more general sense, which "involves no more than a brief stop, interrogation and, under the proper circumstances, a brief check for weapons." *United States v. Robertson*, 833 F.2d 777, 780 (9th Cir. 1987); *see Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). For clarity, we refer to the latter sort of investigatory stop as a *Terry* stop and the former as a "tactical" investigatory stop.

meaning pointed anywhere below the suspect's waist—whether directly at the suspect or nearby. In addition, officers place the suspect in a prone position.

II. Procedural History

Chinaryan, NEC, and Manukyan sued several individual officers, the City of Los Angeles, and the LAPD under 42 U.S.C. § 1983 and California's Bane Act, Cal. Civ. Code § 52.1. They claimed that the individual officers violated their Fourth Amendment rights and state law by arresting them without probable cause and using excessive force. They claimed that the City and the LAPD were liable pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), for failing to adequately train the officers.

The district court granted partial summary judgment in favor of the individual officers. The court ruled that they were entitled to qualified immunity on the § 1983 claims because it was not clearly established that their conduct violated plaintiffs' Fourth Amendment rights.[5] The court ruled that plaintiffs could not establish their Bane Act claim because there was no evidence that defendants had a specific intent to violate plaintiffs' constitutional rights.

5. In addition, the district court ruled that the individual officers other than Sergeant Cueto were entitled to qualified immunity because they were following his facially valid orders. Defendants do not defend this rationale on appeal. Viewing the facts in the light most favorable to plaintiffs, Sergeant Cueto did not order the other officers to conduct a high-risk stop.

The case proceeded to trial against the City and the LAPD on plaintiffs' *Monell* claim, and the jury found in favor of defendants. Plaintiffs moved for judgment as a matter of law, *see* Fed. R. Civ. P. 50(b), arguing that the officers' tactics could not be justified based solely on suspicion of a stolen vehicle. In addition, plaintiffs moved for a new trial, *see id.* R. 59, arguing that the district court improperly refused jury instructions they had requested based on *Washington* and *Green*. The district court denied both motions.

III. Jurisdiction and Standard of Review

The district court had jurisdiction over plaintiffs' § 1983 claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over their Bane Act claim pursuant to 28 U.S.C. § 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's ruling on defendants' summary judgment motion de novo. *See Duarte v. City of Stockton*, 60 F.4th 566, 570 (9th Cir. 2023). "We review de novo whether a district court's jury instructions accurately state the law, and we review for abuse of discretion a district court's formulation of jury instructions." *Coston v. Nangalama*, 13 F.4th 729, 732 (9th Cir. 2021) (quoting *Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017)).

IV. Discussion

A. Summary judgment on plaintiffs' Fourth Amendment claims against the individual officers

"Qualified immunity shields government officials under § 1983 unless '(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time."'" *Hernandez v. Town of Gilbert*, 989 F.3d 739, 743 (9th Cir. 2021) (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 62-63, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018)).

1. Whether the officers' tactics violated plaintiffs' Fourth Amendment rights

The Fourth Amendment protects persons "from the terrifying and humiliating experience of being pulled from their cars at gunpoint, handcuffed, or made to lie face down on the pavement when insufficient reason for such intrusive police conduct exists." *Washington*, 98 F.3d at 1187. While circumstances may sometimes call for such intrusive tactics during a *Terry* stop, the police may not employ them "*every time* they have an 'articulable basis' for thinking that someone may be a suspect in a crime." *Id.* Rather, there must be "special circumstances" that make such tactics reasonable. *Id.* at 1189.

Whether a particular *Terry* stop warrants the use of intrusive tactics depends on the tactics' objective reasonableness assessed under the totality of the

circumstances.[6] *Green*, 751 F.3d at 1049. "[W]e balance the 'nature and quality of the intrusion' against the 'countervailing governmental interests at stake.'" *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

Without a doubt, "the degree of intrusion here was severe." *Id.* To begin with, the officers physically restricted plaintiffs' liberty, which "is an important factor in analyzing the degree of intrusion effected by the stop." *Washington*, 98 F.3d at 1189. The officers removed all three suspects from the vehicle, ordered Chinaryan to lie down on the street, and ordered NEC and Manukyan to walk to a location remote from the vehicle. The officers also handcuffed plaintiffs, which "substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical *Terry* stop." *Id.* at 1188 (quoting *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982)). And by drawing their guns and aiming them at or near plaintiffs, the officers "greatly increase[d] the seriousness of the stop." *Id.*; *see Thompson v. Rahr*, 885 F.3d 582, 587 (9th Cir. 2018) ("[P]ointing guns

6. A *Terry* stop requires only "reasonable suspicion of criminal activity." *Robertson*, 833 F.2d at 780. "Beyond such a brief and narrowly circumscribed intrusion, an arrest occurs, for which probable cause is required." *Id.* Plaintiffs concede that defendants had reasonable suspicion to conduct a *Terry* stop to investigate whether their vehicle was the stolen Suburban, and the officers do not assert that they had probable cause to arrest plaintiffs. Whether we analyze the issue as excessive force or a de facto arrest without probable cause, the officers' tactics are evaluated for objective reasonableness. *Compare Green*, 751 F.3d at 1047-49 (de facto arrest), *with Green*, 751 F.3d at 1049-51 (excessive force).

at persons who are compliant and present no danger is a constitutional violation." (quoting *Baird v. Renbarger*, 576 F.3d 340, 346 (7th Cir. 2009))).

In assessing "whether this degree of intrusion was justified by the governmental interests at stake," we typically consider: (1) "the severity of the crime at issue"; (2) whether the suspects pose "an immediate threat to the safety of the officers or others"; and (3) whether the suspects are "actively resisting arrest or attempting to evade arrest by flight." *Green*, 751 F.3d at 1049 (quoting *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994)).

Although vehicle theft is an "arguably severe" crime, *id.* at 1050, the officers had no articulable basis to suspect that plaintiffs posed a threat to anyone beyond the generic threat that a suspected vehicle thief poses. Plaintiffs were not "uncooperative or tak[ing] action at the scene that raise[d] a reasonable possibility of danger or flight." *Washington*, 98 F.3d at 1189. Sergeant Cueto followed their vehicle for several minutes before stopping them, during which time Chinaryan obeyed all traffic laws and did not drive evasively. Chinaryan pulled over at the same time as the officers flashed their lights to initiate the stop. Once stopped, she and her passengers complied with all officer commands.

The officers had no information that plaintiffs were "currently armed" or that "a crime that may involve violence [was] about to occur." *Id.* Nor was this a situation "where the stop closely follow[ed] a violent crime." *Id.* The owner of the stolen Suburban was not even present

when his vehicle was taken, and the theft took place two nights before the officers encountered plaintiffs. Even if plaintiffs' vehicle had been the stolen one, as the officers suspected, the passage of time gave rise to the possibility that the occupants were unconnected to the crime. Further, any safety-based justification to restrain plaintiffs in handcuffs weakened considerably once the DMV error became apparent and the officers ascertained that plaintiffs were cooperative and unarmed. Yet plaintiffs were inexplicably restrained for several additional minutes.

Construing the facts in the light most favorable to plaintiffs, the officers' reasonable suspicion that plaintiffs had stolen the Suburban, standing alone, was "not enough to justify such intrusive tactics." *Green*, 751 F.3d at 1050. Therefore, the officers are entitled to qualified immunity only if it was unclear that employing the tactics violated plaintiffs' Fourth Amendment rights.

2. Whether it was clearly established that the officers' tactics violated plaintiffs' Fourth Amendment rights

"For a right to be 'clearly established,' existing 'precedent must have placed the statutory or constitutional question beyond debate,' such that 'every' reasonable official, not just 'a' reasonable official, would have understood that he was violating a clearly established right." *Thompson*, 885 F.3d at 587 (emphasis omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). Courts cannot "define

clearly established law at a high level of generality." *Perez v. City of Fresno*, 98 F.4th 919, 924 (9th Cir. 2024) (quoting *Wesby*, 583 U.S. at 63). The legal principle must "clearly prohibit the officer's conduct in the particular circumstances before him." *Wesby*, 583 U.S. at 63.

Defining the rule with specificity "is 'especially important in the Fourth Amendment context.'" *Id.* at 64 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015)). The excessive force standard is "cast at a high level of generality," *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam), and its application "depends on 'the facts and circumstances of each particular case,'" *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6, 142 S. Ct. 4, 211 L. Ed. 2d 164 (2021) (per curiam) (quoting *Graham*, 490 U.S. at 396).

"Although there need not be a case directly on point," *Perez v. City of Fresno*, 98 F.4th 919, 924 (9th Cir. 2024), or even one with "fundamentally similar" facts, *Cates v. Stroud*, 976 F.3d 972, 978 (9th Cir. 2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)), a plaintiff claiming excessive force normally must identify a "case that addresses facts like the ones at issue" such that the officer was "put . . . on notice that his specific conduct was unlawful."[7] *Rivas-Villegas*, 595

7. In the rare case, where constitutional misconduct is "sufficiently 'obvious,'" we "do not require a precise factual analogue in our judicial precedents." *Sharp v. County of Orange*, 871 F.3d 901, 911 (9th Cir. 2017) (quoting *Brosseau*, 543 U.S. at 199). But this "obviousness" exception "is especially problematic in the Fourth-Amendment context," *id.*, and plaintiffs do not argue that it applies here.

U.S. at 6. The facts of the prior case cannot be "materially distinguishable." *Id.*

Green "addresses facts like the ones at issue" here. *Id.* Denise Green, a 47-year-old Black woman with no criminal record, was driving her car when an automated license plate reader misread her license plate number by one digit and erroneously identified the plate as belonging to a stolen vehicle. *Green*, 751 F.3d at 1042. The officers with the reader were unable to respond, so "they radioed the hit to dispatch" for other officers to follow up. *Id.* at 1042-43. Dispatch determined that the license plate number belonged to a gray GMC truck, whereas Green was observed driving a burgundy Lexus sedan. *Id.* at 1043.

A nearby officer who had heard the radio traffic observed Green's vehicle pass him and did not realize that her license plate differed by one digit from the number reported to dispatch. *Id.* The officer called for backup, and after three to five additional officers arrived, they made a high-risk stop of Green's vehicle. *Id.* The officers ordered Green out of her car, drew and pointed their weapons at her, ordered her to her knees, and handcuffed her. *Id.* "Green was wholly compliant and nonresistant for the entirety of the stop and . . . there was no indication that she was armed." *Id.* at 1044. Officers searched Green's vehicle, performed a pat-down search of her person, and after a record check of her correct plate number revealed they had made a mistake, uncuffed her. *Id.* at 1043-44.

The district court granted the defendants summary judgment on Green's excessive force claim, but we

reversed. We rejected the defendants' argument that "the crime of vehicular theft is enough in itself to support a finding that Green posed an immediate threat" because a jury could also find that Green did not pose a threat. *Id.* at 1050.

a.

Defendants point to several factors that, they argue, distinguish this case from *Green*.

i.

To begin with, defendants assert that unlike the officers in *Washington* and *Green*, they had "specific information that the people they were stopping, using high-risk tactics, were the proper suspects." As a factual matter, defendants are mistaken; if anything, they had *less* specific information than the *Green* officers that they were pursuing the right woman.

In *Green*, as here, there was a mismatch between the suspected stolen vehicle and its license plates. *See id.* at 1042. In *Green*, the officers "knew" (incorrectly, it turns out) that they had stopped a vehicle with stolen plates.[8]

8. As in *Green*, the officers' suspicion here originated from an error for which they were not responsible. But in *Green* the parties disputed whether the officers reasonably relied on the automated reader's erroneous identification—the machine was known to make mistakes, and the officers failed to verify that Green's license plate number was read correctly before stopping her, leading to a triable issue regarding reasonable suspicion. *See* 751 F.3d at 1042, 1045-46. In analyzing Green's claims of unlawful arrest and excessive force,

Id. at 1046. Even if the burgundy sedan turned out to be legitimately in Green's possession, the stolen plates still linked her to the theft of the gray truck. *See id.* Here, in contrast, the officers did not know with any degree of certainty that Chinaryan's vehicle was stolen. The vehicle registered to her license plate number had not been reported missing, and Sergeant Cueto acknowledged the improbability that any given black Suburban limousine he encountered on the streets of Los Angeles was the stolen one.

Even assuming defendants here were more certain than the officers in *Green* that they had the right suspects, their certainty was relevant only to whether they had reasonable suspicion to investigate. It did not increase the likelihood that the suspected vehicle thieves were armed or dangerous or that any other special circumstances called for the use of high-risk tactics.

ii.

Defendants also assert that "[t]he approaching nightfall" would have made it "more difficult to search for someone if they fled the vehicle," but that fact does not cut in their favor. The *Green* stop occurred at approximately 11:15 p.m., when it was already "dark outside." *Green*, 751 F.3d at 1042. Here, the video footage reveals that there was still daylight at the time of the stop and for several minutes thereafter.

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however, we assumed the existence of reasonable suspicion. *See id.* at 1047, 1050. Thus, the *Green* officers' factual mistake is irrelevant to our analysis, and defendants' reliance on the dispute over reasonable suspicion in *Green* is misplaced.

iii.

In addition, defendants assert that Chinaryan's "darkly tinted windows . . . made it impossible for the officers to see how many people were inside" her vehicle,[9] but it is not clear that the tinted windows obscured their view in the daylight any more than the nighttime darkness did for the officers in *Green*. Prior to the stop, Officer Gonzalez was able to observe Chinaryan and Manukyan in the front seat through the front windshield.

While tinted windows might justify precautions beyond the standard traffic stop in some circumstances, "police must consider less intrusive alternatives" before using extreme force. *Id.* at 1050 (citing *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc)). Here, as in *Green*, "there is evidence . . . suggesting that the officers had alternatives available." *Id.* Even a tactical investigatory stop rather than a high-risk stop would have addressed the officers' inability to see into the vehicle's rear seats. From a position of cover, they could have ordered plaintiffs to step outside, lift up their clothing, and turn around to reveal if they had weapons in their waistbands.[10]

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9. Defendants argue only that the uncertainty about the number of persons in the vehicle distinguishes this case from *Green*—not that the two additional suspects here constitute a material difference. In both cases, officers substantially outnumbered suspects—by a ratio of roughly four to one.

10. It may not even have been necessary for plaintiffs to lift up their form-fitting clothing. Chinaryan had only partially turned around when the officers ordered her to the ground and handcuffed

Even if a jury found that the tinted windows here materially distinguish this case from the darkness in *Green*, that distinction ended after approximately five minutes when the officers cleared the vehicle and began their investigation. "Green's handcuffs were promptly removed" after the officers ran a license plate check and discovered their mistake, and the officers merely "directed [her] to remain" until they completed their paperwork. *Id.* at 1043-44. Here, the officers kept Chinaryan, her sobbing teenage daughter, and their friend handcuffed for about nine minutes after the DMV error became apparent and the officers' residual suspicion was no longer reasonable.[11]

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her, suggesting that she was visibly unarmed. At trial, Officer Meneses testified that he could tell from Chinaryan's fitted pants that she did not have a handgun, and that he deviated from the protocol of having her turn around completely because "it wasn't necessary." Officer Gonzalez testified that when NEC and Manukyan emerged from the vehicle, he observed nothing to suggest that either had a gun, and he was "fairly certain" that "they weren't armed personally." In reviewing the district court's summary judgment ruling, we consider only the evidence submitted in connection with the parties' motions rather than any trial testimony. *See Edgerly v. City & County of San Francisco*, 599 F.3d 946, 951 (9th Cir. 2010). However, the video footage from the officers' body- and dashboard-mounted cameras, which reveals plaintiffs' appearances, was submitted at summary judgment.

11. Although the officers spent a few of those minutes investigating Officer Neighbors's theory about swapped VINs, a jury could find that the theory was unreasonable. Chinaryan's license plate number differed by only one digit from the number in DMV records associated with the two VINs already observed on the vehicle, which Officer Gonzalez immediately realized suggested a DMV error. Officer Neighbors's theory would have Chinaryan buy a 2018 Suburban, steal a 2015 model, and swap the VINs so that

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983).

iv.

Finally, defendants cite their "training and personal experience" that "stolen vehicles are often linked with armed and dangerous individuals." But the officers in *Green* were similarly aware that the occupants of stolen vehicles can be armed and dangerous; indeed, that is why they argued "that the existence of a stolen vehicle, in and of itself, is enough to satisfy the degree of force used." *Green*, 751 F.3d at 1048; *see also* Deposition of Jahan Kim at 32, *Green v. City & County of San Francisco*, No. 3:10-cv-02649-RS (N.D. Cal. Mar. 23, 2011), ECF No. 37-1, Ex. B (stating that in the officer's training and experience, some people pulled over in cold-plated vehicles "are inherently very dangerous" and have a "high propensity for weapons or violence"). We held that the generic dangers posed by stopping a cold-plated vehicle may or may not justify a high-risk stop, and that only a jury can resolve this inherently factual question. *See Green*, 751 F.3d at 1050.

Defendants are correct that *Washington* and *Green* "did not establish bright-line rules on the reasonableness of high-risk stops." Nonetheless, these cases established that for summary judgment purposes, reasonable suspicion of

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the older, stolen car would appear legitimately registered to her. Moreover, it would have Chinaryan wait a day before disabling the LoJack signal that could lead police to the stolen vehicle.

vehicle theft alone is not enough to justify the intrusive tactics used here absent some case-specific need for them. *See id.* Because a jury could find that the totality of the circumstances here did not justify the officers' tactics, the district court erred in ruling that the officer defendants are entitled to qualified immunity.

Plaintiffs would have us go further—they argue that the officers' use of extreme tactics based solely on a reasonable suspicion of car theft establishes a Fourth Amendment violation and entitles *them* to summary judgment. However, they read *Washington* and *Green* too broadly. *Green* concluded that "reasonable jurors could disagree" whether "the existence of a stolen vehicle, in and of itself, is enough to satisfy [an extreme] degree of force," *Green*, 751 F.3d at 1048, and remanded the case so that the jury could resolve this factual question, *see id.* at 1051.

To be sure, *Washington* contains broader language. *See Washington*, 98 F.3d at 1192 ("The law was . . . clearly established that if the *Terry*-stop suspects are cooperative and the officers do not have specific information that they are armed or specific information linking them to a recent or inchoate dangerous crime, the use of such aggressive and highly intrusive tactics is not warranted, at least when, as here, there are no other extraordinary circumstances involved."). But to the extent this language can be read to support a categorical holding, *Green* necessarily carved out an exception where officers encounter a vehicle they reasonably believe to be stolen with no information about the occupants. *Washington* did not involve a potentially

stolen vehicle, and it was "extremely questionable whether the tenuous general physical similarities between [the plaintiffs] and the supermarket robbers" sought by the officers "[gave] rise to even the reasonable suspicion necessary to make a *Terry* stop." *Id.* at 1191.

b.

Taking a different tack, defendants attempt to distinguish *Green* procedurally. They assert that "[t]his case, unlike *Green*, is . . . on appeal from a jury verdict," and "[t]here is no question what a reasonable jury might do, because a reasonable jury has already ruled in [defendants'] favor." But defendants do not explain how the jury verdict in favor of the City and the LAPD bears on whether the district court earlier erred in granting summary judgment to the individual officers. Because it was clearly established under *Washington* and *Green* that the officers' conduct, viewed in the light most favorable to plaintiffs, constituted excessive force, we reverse the grant of summary judgment in favor of the individual officers on plaintiffs' § 1983 claims.

i.

Defendants do not argue, as the dissent asserts, that the jury verdict renders any summary judgment error harmless. Briefs must include a party's "contentions and the reasons for them, with citations to the authorities and [relevant] parts of the record." Fed. R. App. P. 28(a)(8)(A). We do not consider inadequately briefed and perfunctory arguments that cite no authority. *Cal. Pac. Bank v. FDIC*,

885 F.3d 560, 570 (9th Cir. 2018); *see Badgley v. United States*, 957 F.3d 969, 978 (9th Cir. 2020) (holding forfeited argument that was "limited to two sentences and two footnotes, without a single citation to legal authority").

The burden of raising harmless error fell on defendants because "we 'presume prejudice where civil trial error is concerned.'" *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (quoting *Dang v. Cross*, 422 F.3d 800, 811 (9th Cir. 2005)). Yet nowhere in their brief do defendants discuss harmless error or prejudice. Their statement that "[t]here is no question what a reasonable jury might do" is tucked in the middle of a section arguing that "*Washington* and *Green* did not establish bright-line rules" but rather "held that the 'totality of circumstances' must be considered when evaluating the reasonableness of a stop." Plaintiffs evidently did not construe this passing comment as a harmless error argument and, understandably, did not address the issue in their reply brief. It would be unfair to consider a harmless error argument when defendants' inadequate briefing "misled the other parties." *NLRB v. Valley Health Sys.*, LLC, 93 F.4th 1115, 1118 n.1 (9th Cir. 2024). Because defendants "failed to address prejudice in [their] answering brief," they "cannot overcome the presumption" of prejudice and have forfeited a harmless error argument. *Clem*, 566 F.3d at 1182.

Although the dissent does an admirable job making defendants' argument for them and finding authority to support it, that is not our role. "[W]e rely on the parties to frame the issues for decision" and merely serve as a "neutral arbiter of matters the parties present." *United*

States v. Sineneng-Smith, 590 U.S. 371, 375, 140 S. Ct. 1575, 206 L. Ed. 2d 866 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)).

ii.

Even were we to consider the question, we disagree with the dissent that the jury's failure to consider plaintiffs' claims against the individual officers was harmless.

At the outset, it is unclear—and the parties, of course, did not brief—what harmless error standard applies in these circumstances. For ordinary trial errors, such as when the district court improperly instructs the jury, the party prevailing below need only demonstrate that "it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Sidibe v. Sutter Health*, 103 F.4th 675, 685 (9th Cir. 2024) (quoting *Fierro v. Smith*, 39 F.4th 640, 651 (9th Cir. 2022)). The jury here, however, having never considered any claims against the individual officers, cannot "reach the same verdict" as to them.

Granting summary judgment implicates the Seventh Amendment in that it denies plaintiffs their right to have a jury decide their claims. *See Thompson v. Mahre*, 110 F.3d 716, 719 (9th Cir. 1997) ("[W]here there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand . . ., the Seventh Amendment, require submission to a jury."); *see also*

LaLonde v. County of Riverside, 204 F.3d 947, 954 (9th Cir. 2000) ("[W]e could view the district judge's *sua sponte* [summary judgment] as constituting a bench trial on the issues he decided [O]ur analysis and result would still be the same." (citation omitted)). The erroneous denial of a jury trial "will be harmless only if 'no reasonable jury could have found for the losing party, and the trial court could have granted a directed verdict for the prevailing party.'" *Solis v. County of Los Angeles*, 514 F.3d 946, 957 (9th Cir. 2008) (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1533 (9th Cir. 1995)).

The dissent identifies only one Ninth Circuit decision addressing even roughly analogous circumstances, and that case does not clearly identify the harmlessness standard it applies. *See Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 691 (9th Cir. 2001) (concluding that "any error committed by the trial judge was harmless" where, absent the claimed error, "it is highly unlikely the jury would have found in favor of Plaintiffs").[12] For present purposes, we need not decide the standard. It is not "highly unlikely" that the jury would have found in

12. In *Tennison*, unlike this case, the untried claims were against the same defendants who went to trial on claims involving "the same facts and similar legal inquiries." 244 F.3d at 691. The other Ninth Circuit case that the dissent cites reviewed the district court's remedy for an improper jury instruction. *See Westinghouse Elec. Corp. v. Gen. Cir. Breaker & Elec. Supply Inc.*, 106 F.3d 894, 901 (9th Cir. 1997). There was no question of a Seventh Amendment violation because the jury heard all claims against all defendants. The issue was "whether the trial judge overstepped the boundary dividing [the] roles [of judge and jury] when he changed the jury verdicts to accord with the jury's implicit factual findings." *Id.*

favor of plaintiffs on their claims against the officers just because the jury found in favor of the City and the LAPD on plaintiffs' *Monell* claims.

As the dissent acknowledges, we are in an unusual procedural posture. Ordinarily, a jury's general verdict on a claim challenging a police policy would not reveal any findings that the jury may have made regarding the constitutionality of individual police officers' conduct. A jury can find that officers violated the Fourth Amendment but that the municipality is not liable because the plaintiffs failed to show "a policy of inaction" that "amounts to a failure to protect constitutional rights." *Scanlon v. County of Los Angeles*, 92 F.4th 781, 812 (9th Cir. 2024) (quoting *Mortimer v. Baca*, 594 F.3d 714, 722 (9th Cir. 2010)).

Here, however, the district court instructed the jury that it had "determined that [the City and the LAPD] have an official policy of allowing officers to conduct a high-risk stop on a suspected stolen vehicle after considering the totality of the circumstances" and that "the officers acted pursuant to that official policy." The only issue for the jury to decide was whether the officers violated plaintiffs' Fourth Amendment rights *when following that policy*. For several reasons, that question does not shed light on whether an individual officer violated plaintiffs' Fourth Amendment rights.

First, the jury was instructed that the officers were following the law. As the court explained, determining whether a Fourth Amendment violation occurred required the jury to "consider all the circumstances." But the

district court had already instructed the jury that the officers were adhering to a policy of "considering the totality of the circumstances" before acting. And the court directed the jury to "judge the reasonableness of a particular use of force from the perspective of a reasonable officer," keeping in mind that "officers are permitted to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them." "[J]urors can be relied upon to follow the trial judge's instructions." *Samia v. United States*, 599 U.S. 635, 646, 143 S. Ct. 2004, 216 L. Ed. 2d 597 (2023). Had the jury considered plaintiffs' claims against the individual officers, however, the jury would not have presumed the officers were following a legally compliant policy.

Second, the jury did not decide whether any single officer violated plaintiffs' Fourth Amendment rights. Perhaps the jury would have found some officers liable and not others but, overall, felt that the officers' force was not excessive—at least not enough to impose liability on the City and the LAPD for their policy. The jury instructions were confusing in this respect. The court instructed that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer***s***"—plural—"used excessive force." This required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force.

The verdict form was similarly confusing. It asked whether "police officer***s***"—again, plural—"deprive[d]

. . . Plaintiffs of their Fourth Amendment rights." While the verdict form also stated that the multiple officers could have been "acting individually or together," that merely explains that the officers need not have acted in concert for the cumulative effect of their conduct to be unconstitutional.

Third, the instructions prevented the jury from considering the entirety of each officer's conduct as the basis of a Fourth Amendment violation. The district court confined the jury's analysis to whether the officers used excessive force "by unreasonably pointing guns at [plaintiffs] during a traffic stop." Although the district court subsequently corrected itself, the court did not explain that the earlier instruction was incorrect. And the court still limited the jury to considering only "the high-risk traffic stop tactics that [the officers] used," because that was the policy at issue. But the individual officers may have used excessive force in other ways, such as by keeping plaintiffs handcuffed for too long. A jury considering claims against the individual officers would be entitled to consider the full scope of their conduct. *See Coles v. Eagle*, 704 F.3d 624, 631 (9th Cir. 2012) ("The substance of the applicable law under *Graham* is whether the officers' force was reasonable under the totality of the circumstances, and the court's instruction plainly prevented the jury from applying *Graham* to all of the relevant facts.").

Similarly, in closing argument, plaintiffs' counsel focused the jury's attention on the officers' conduct while following the policy permitting high-risk tactics. In light of

the summary judgment ruling, counsel pursued a strategy of portraying the officers as "victims" of the municipal defendants' unconstitutional policy, repeatedly stressing that "the officers are not on trial" and were merely "doing what the LAPD told them to do." If plaintiffs had tried their case against the officers, counsel would have argued the case differently. Counsel almost certainly would have argued that the officers' unconstitutional conduct included more than just the high-risk tactics.

Because defendants do not argue harmless error and the district court's summary judgment ruling was not harmless, plaintiffs are entitled to a trial on their Fourth Amendment claims against the individual officers.

B. Jury instructions on plaintiffs' municipal liability claims

Plaintiffs challenge the district court's refusal to deliver two special jury instructions that they requested. Their proposed special instruction based on *Washington* would have provided:

> Under ordinary circumstances, when the police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints, such as ordering a person to lie prone in the street, will violate the Fourth Amendment.
>
> Especially intrusive means of effecting a stop are only allowed in special circumstances.

These circumstances are as follows:

1) where the person is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight;

2) where the police have information that the person is currently armed;

3) where the stop closely follows a violent crime; and

4) where the police have information that a crime that may involve violence is about to occur.

As proposed, this instruction misstates the law. *Washington* discussed the need for special circumstances "such as" the four listed above. *Washington*, 98 F.3d at 1189. They are merely examples of circumstances where especially intrusive means to effect a stop may be warranted. The proposed instruction suggests that these four circumstances are exhaustive, which would improperly limit the jury's ability to consider other special circumstances.[13]

13. In addition, both the proposed jury instruction based on *Washington* and the instruction that the district court gave the jury on *Terry* stops confusingly referred to an "investigatory stop" without explanation. In light of the testimony about tactical "investigatory stops," these instructions may have caused the jury to conflate a *Terry* stop with a type of tactical response.

Plaintiffs' proposed special instruction based on *Green* would have provided: "The fact that Plaintiffs were stopped on suspicion of a stolen vehicle does not by itself demonstrate that they presented a danger to the officers." This instruction also misstates the law because, as we have explained, *Green* did not hold that the proposition is categorically true—only that it is an inference a jury could properly make.

Plaintiffs' attempt to craft categorical rules from *Washington* and *Green* is analogous to an argument that the Supreme Court rejected in *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). There, the plaintiff proposed that "deadly force" violates the Fourth Amendment absent certain preconditions derived from *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). *Scott*, 550 U.S. at 381-82. *Garner*, the Court explained, "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* at 382. Rather, it "was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation." *Id.* (citation omitted). Like *Garner, Washington* is an application of the Fourth Amendment's reasonableness test, not a new Fourth Amendment rule. *See Washington*, 98 F.3d at 1185 ("The relevant inquiry is always one of reasonableness under the circumstances." (quoting *Allen v. City of Los Angeles*, 66 F.3d 1052, 1057 (9th Cir. 1995))).

Because plaintiffs' proposed jury instructions misstated the law, the district court did not abuse its

discretion in refusing to deliver them. Of course, the fact that the proposed instructions were misleading "does not alone permit the district judge to summarily refuse to give any instruction on the topic." *Norwood v. Vance*, 591 F.3d 1062, 1067 (9th Cir. 2010) (quoting *Merrick v. Paul Revere Life Ins.*, 500 F.3d 1007, 1017 (9th Cir. 2007)). Plaintiffs argue that the defects in their proposed instructions "could have been fixed." "Where a proposed instruction is supported by law and *not* adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction." *Merrick*, 500 F.3d at 1017.

The district court's instruction on excessive force, adapted from the Manual of Model Civil Jury Instructions, provided the general reasonableness standard and listed eight case-relevant factors to consider, including "the type and amount of force used." This instruction sufficiently covered the officers' use of high-risk tactics in this case. We have repeatedly "upheld as adequate the use of fairly general reasonableness/'totality of the circumstances' instructions in an excessive force case, despite the plaintiff's request for more detailed instructions addressing the specific factors to be considered in the reasonableness calculus." *Brewer v. City of Napa*, 210 F.3d 1093, 1097 (9th Cir. 2000); *see also Lam*, 869 F.3d at 1087 (holding that "an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation" does not require a special jury instruction on that application beyond the standard excessive force instruction on reasonableness (quoting *Scott*, 550 U.S. at 382)).

Therefore, we affirm the district court's decision not to provide the jury with case-specific instructions derived from *Washington* and *Green*.

C. Summary judgment on plaintiffs' state law claims against the individual officers

Plaintiffs contend that the district court erred by granting summary judgment on their Bane Act claims in favor of the officers. "The elements of a Bane Act claim are essentially identical to the elements of a § 1983 claim, with the added requirement that the government official had a 'specific intent to violate' a constitutional right." *Hughes v. Rodriguez*, 31 F.4th 1211, 1224 (9th Cir. 2022) (quoting *Reese v. County of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018)).

An officer acts with the requisite specific intent if "the right at issue [is] clearly delineated and plainly applicable under the circumstances of the case," and the officer "commit[s] the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that right." *Sandoval v. County of Sonoma*, 912 F.3d 509, 520 (9th Cir. 2018) (cleaned up) (quoting *Cornell v. City & County of San Francisco*, 17 Cal. App. 5th 766, 225 Cal. Rptr. 3d 356, 386 (Ct. App. 2017)). The officer need not "recognize the unlawfulness of his act" if he "acted in 'reckless disregard' of the constitutional right." *Id.* (quoting *Cornell*, 225 Cal. Rptr. 3d at 386).

The district court concluded that defendants' behavior was "not the type . . . that shows a specific intent to violate

Plaintiffs' constitutional rights." In most cases, including this one, the existence of specific intent for a Bane Act claim is a question that is "properly reserved for the trier of fact." *Hughes*, 31 F.4th at 1224.

A jury could conclude that the officers acted in reckless disregard for plaintiffs' right to be free from having guns trained on them, being handcuffed, and in Chinaryan's case, being forced to lie on the ground, while officers investigated the suspected stolen vehicle. Sergeant Cueto stated that he did not need to order the officers to conduct a high-risk stop because "it's going to be a given" in those circumstances. In his view, "[p]eople that cold-plate their vehicles are inherently trying to avoid detection, which leads [him] to believe that they're dangerous." Officer Gonzalez stated that he conducted a high-risk stop of Chinaryan's vehicle "because [he] believed that the car was stolen" and therefore "that the individuals inside could possibly be armed." At the end of the stop, Cueto commented to NEC, "we didn't put you down on the ground," and then told Chinaryan: "You were driving—I had no choice." From this evidence, the jury could infer that the officers conducted high-risk stops as a matter of routine whenever a cold-plated vehicle was involved. The officers' refusal to exercise discretion to use less intrusive measures when warranted would support a finding that they acted with reckless disregard for plaintiffs' rights.

That the officers "worked to resolve the incident" after they discovered the DMV error does not preclude a finding that they acted recklessly beforehand. In fact, a jury could infer that the officers took more time than

was reasonably necessary to uncuff plaintiffs once it became apparent that plaintiffs had committed no crime, reflecting a cavalier indifference to plaintiffs' rights. In light of the evidence, the district court erred in granting summary judgment in favor of the officers on plaintiffs' Bane Act claims.

AFFIRMED in PART, REVERSED in PART, and REMANDED.

Costs are awarded to plaintiffs.

Forrest, J., dissenting in part.

I respectfully dissent from Sections A and C of the majority opinion because any error by the district court in granting summary judgment for the individual officers on Plaintiffs' 42 U.S.C. § 1983 and Bane Act claims was rendered harmless by the jury's subsequent verdict on Plaintiffs' municipal-liability claims asserted against the City of Los Angeles (City) and the Los Angeles Police Department (LAPD).

Procedurally, this is an unusual case. After the district court granted summary judgment to the individual officers, Plaintiffs' municipal liability claims asserted under *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), went to trial with only one issue for the jury to resolve: Did the individual officers violate Plaintiffs' Fourth Amendment rights? As should be obvious, this issue is critical not only to the *Monell* claims, but also to the claims against the individual officers—if the officers did not violate Plaintiffs' constitutional rights, they are not liable under either § 1983 or the Bane Act. After hearing the evidence, the jury found that the individual officers did not violate Plaintiffs' Fourth Amendment rights. Thus, I would affirm the district court in full.

I. Procedural Background

Plaintiffs sued the City, the LAPD, and several individual officers under § 1983 and California's Bane Act after Plaintiffs were subjected to a high-risk traffic

stop. The district court granted summary judgment for the individual officers. Relevant to the § 1983 claims, the district court concluded that the law did not clearly establish that the officers' actions violated the Fourth Amendment. Relevant to the Bane Act claims, the district court found that the evidence did not demonstrate that the officers specifically intended to violate Plaintiffs' constitutional rights.

Plaintiffs' *Monell* claims against the City and the LAPD proceeded to jury trial. The district court instructed the jury that Plaintiffs needed to prove four elements to prevail: (1) the individual officers acted under color of state law; (2) the officers deprived Plaintiffs of their constitutional rights; (3) the officers followed a policy, practice, or custom of the City and the LAPD; and (4) the policy, practice, or custom caused the deprivation of Plaintiffs' rights. The court further instructed the jury that the parties stipulated the first element was met and that the court had determined the third and fourth elements were met—that the City and the LAPD have a "policy of allowing officers to conduct a high-risk stop on a suspected stolen vehicle after considering the totality of the circumstances" and that the officers followed that policy when they detained Plaintiffs.[1] Therefore, as the majority recognizes, the only issue for the jury to decide

1. These instructions were based on the district court's previous findings at summary judgment that the LAPD has a policy of allowing officers, after considering the totality of the circumstances, to conduct high-risk traffic stops based on suspicion of a stolen vehicle and that this policy was the moving force behind the officers' actions.

was whether the officers violated Plaintiffs' constitutional rights: whether the officers used excessive force or unlawfully arrested plaintiffs without probable cause. Maj. Op. at 27. The jury decided this issue in favor of the City and the LAPD, finding that the officers did not violate Plaintiffs' constitutional rights.

II. Discussion

A.

Defendants argued in their Answering Brief that because this case is "on appeal from a jury verdict" in the City's and the LAPD's favor, we know "what a reasonable jury might do" regarding the claims against the individual officers. This is a harmless-error argument. The majority contends that this argument is not fairly considered because it was inadequately briefed. *Id.* at 24-25. While there is no doubt that Defendants did not fully develop this issue, it was presented. And, importantly, Plaintiffs recognized the import of Defendants' contention, as evidenced by the assertion in their Reply Brief that Defendants' argument that the jury's verdict justified rejecting Plaintiffs' individual claims "fails . . . if this [c]ourt holds that the jury did not find a constitutional violation because it was not properly instructed" and awards a new trial on that basis.[2]

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2. The court is in full agreement that the district court did not err in declining to give Plaintiffs' requested instructions. Maj. Op. at 30-33. Thus, this issue does not justify ignoring the harmless-error analysis.

Additionally, the parties and the court addressed harmless error during oral argument. Plaintiffs did not contend that the harmless-error issue was not properly raised. Rather, as in their Reply Brief, they argued that the jury found no constitutional violation occurred only because it was not properly instructed on the law under *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), and *Green v. City & County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014). Under these circumstances, it is not unfair to consider harmless error because the parties and the court were aware it had been raised and Plaintiffs had an opportunity to respond. *Cf. Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 1188 (9th Cir. 2024) (explaining that district courts may consider arguments raised in a reply brief "if the opposing party had an opportunity to respond" to the arguments).

B.

Turning to the merits of the harmlessness inquiry, improper dismissal of a claim is not reversible where the jury's verdict on the remaining claims shows that the plaintiffs would not have prevailed on the dismissed claim had it gone forward. *See, e.g., Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 691 (9th Cir. 2001); *Westinghouse Elec. Corp. v. Gen. Cir. Breaker & Elec. Supply Inc.*, 106 F.3d 894, 902 (9th Cir. 1997); *see also* 28 U.S.C. § 2111 ("On the hearing of any appeal . . . in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed. R. Civ. P. 61 ("At every stage of [a] proceeding, the court

must disregard all errors and defects that do not affect any party's substantial rights.").

For example, in *Tennison*, employees sued their employer for sexual harassment and intentional infliction of emotional distress (IIED). 244 F.3d at 686. The district court granted summary judgment for the employer on the IIED claims, and a jury found for the employer on the sexual harassment claims. *Id.* On appeal, we held that the district court's error in granting summary judgment on the IIED claims was harmless because they were "predicated on the same facts and similar legal inquires as the[] sexual harassment claims." *Id.* at 691. And where "the jury found against [the employees] on their sexual harassment claims, it [was] highly unlikely the jury would have found in [their] favor . . . on their [IIED] claims." *Id.*

In *Westinghouse*, we instructed that, even if the district court erred, "where the necessary factual findings can be determined from the pattern of verdicts—justice has nothing to gain from a new trial." 106 F.3d at 902. In that case, the district court gave erroneous jury instructions on defendants' affirmative defense as to one claim but a correct instruction for the same defense as to a different claim. *Id.* at 898. The error resulted in contradictory verdicts—the jury found that the defendants established their affirmative defense on the correctly instructed claim but not on the incorrectly instructed claim. *Id.* at 897-98. To remedy its mistake, the district court determined what the jury must have found under the correct instruction, applied that finding to the improperly instructed claim, and entered judgment for the defense on both claims. *Id.* On appeal, we explained that

"ordering a new trial [on the incorrectly instructed claim] would [have] produce[d] an anomalous result" because "the jury's earlier findings on the [other] claim would [have] preclude[d] [the plaintiff] from challenging the validity of the defendants' affirmative defenses. Thus, the results upon retrial would [have] be[en] identical to the status quo." *Id.* at 901 n.3.

Several of our sister circuits likewise apply harmless error in cases like the one before us. *See, e.g., Abbasid, Inc. v. First Nat'l Bank of Santa Fe*, 666 F.3d 691, 696-97 (10th Cir. 2012) (listing cases); *Goulet v. New Penn Motor Express, Inc.*, 512 F.3d 34, 42-43 (1st Cir. 2008); *Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994); *James v. Nico Energy Corp.*, 838 F.2d 1365, 1373 (5th Cir. 1988). For example, in *Thompson*, the plaintiff sued a police officer for using excessive force during arrest, and the city and its police chief for having a policy of condoning use of excessive force. 33 F.3d at 850. The district court granted summary judgment for the city and police chief on the *Monell* claim because there was insufficient evidence of a policy of tolerating excessive force. *Id.* at 851. Thereafter, a jury returned a verdict in favor of the officer on the excessive force claim. *Id.* On appeal, the Seventh Circuit concluded that any error in granting summary judgment on the *Monell* claim was harmless because the jury verdict in favor of the officer "preclude[d] the possibility that [the plaintiff] could prevail on his *Monell* claim," which required a constitutional injury. *Id.* at 859.

Additionally, in *Abbasid, Inc.*, a rug store sued a bank for conversion and negligence because the bank accepted deposits of the store's checks from the storeowner's ex-

wife. 666 F.3d at 693. The district court dismissed the negligence claim, and at trial the jury found that the bank did not convert any checks. *Id.* at 694. The store challenged the dismissal of its negligence claim on appeal. *Id.* at 696. The Tenth Circuit affirmed the district court, explaining that, because the jury found that the bank did not convert any checks, the store could not have prevailed on its negligence claim, which depended on the existence of converted checks. *Id.* at 696-97. Where the negligence claim would have failed had it been presented to the jury, the court concluded that "any error in dismissing the . . . claim turned out to be harmless." *Id.* at 697.

In *Goulet*, a union member sued a company hiring his former co-workers for breach of a collective bargaining agreement by failing to place him on a call list. 512 F.3d at 39. The union member also sued the union for breach of its duty of fair representation by failing to pursue his grievance against the hiring company. *Id.* The district court granted a directed verdict in favor of the hiring company at the close of the plaintiff's case, *id.*, and a jury returned a verdict in favor of the union, *id.* at 42. On appeal, the First Circuit determined that any error in granting a directed verdict was harmless because the trial against the union "involv[ed] the same issues and evidence as would have been presented had [the company] not been let out." *Id.* The court further noted that there was no indication that the company's dismissal "affected the evidence [that the plaintiff] was able or allowed to present to the jury." *Id.* Because the jury's findings would have been fatal to the plaintiff's claim against the company, the erroneous directed verdict was harmless. *Id.* at 43 ("A

wrongly directed verdict in favor of one party is harmless where the jury's ultimate verdict necessarily defeats the claim against the dismissed party.").

This case follows the same pattern. To resolve Plaintiffs' *Monell* claims, the jury had to answer one question: Did the individual officers violate Plaintiffs' Fourth Amendment rights? This is also the central issue in Plaintiffs' § 1983 and Bane Act claims against the individual officers. The individual officers cannot be held liable unless it is proven that they violated Plaintiffs' constitutional rights. *See* 42 U.S.C. § 1983 (authorizing civil actions for "*the deprivation* of any rights, privileges, or immunities secured by the Constitution" against a party acting under color of state law (emphasis added)); *Williamson v. City of National City*, 23 F.4th 1146, 1155 (9th Cir. 2022) ("California's Bane Act requires proof of an underlying constitutional violation.").

The record gives no indication that Plaintiffs would have presented materially different evidence to the jury had their claims against the individual officers been allowed to go forward. And after presentation of the evidence, the court instructed the jury that for Plaintiffs to prove their Fourth Amendment unreasonable-seizure claims, they needed to show that the "officers lacked reasonable suspicion to stop them or that the length or scope of the stop was excessive." As to the length or scope of the stop, the district court instructed the jury to "consider all the circumstances, including the intrusiveness of the stop, such as the methods the police used, the restrictions on plaintiff's liberty, and the length

of the stop, and whether the methods used were reasonable under the circumstances."

Likewise, Plaintiffs' closing argument asked the jury to consider the unreasonableness of the entire stop. Counsel specifically argued that the following three actions violated Plaintiffs' Fourth Amendment rights: (1) the officers pointing guns at Plaintiffs, (2) Officer Meneses ordering Ms. Chinaryan to the ground, and (3) the officers placing and keeping Plaintiffs in handcuffs. As presented, the jury could have found that any of these individual acts alone established a constitutional violation. And counsel argued not only that the initial handcuffing was unreasonable but also that the duration Plaintiffs were handcuffed was extreme. According to counsel, the officers should have removed the handcuffs after learning "that the car belonged to [Ms. Chinaryan's] husband" but failed to do so for approximately ten minutes, including when "Sergeant Cuento [was] trying to explain" the error to Plaintiffs. Thus, counsel argued the jury needed to decide whether "the length and scope of the seizure was reasonable," from the pointing of guns to the 10-minute handcuffing. The majority's suggestion that the jury was not permitted to consider the length of handcuffing in determining whether a Fourth Amendment violation occurred is simply wrong. Maj. Op. at 29-30.

The majority also reasons that the district court's summary judgment ruling was not harmless because "the jury did not decide whether any single officer violated [P]laintiffs' Fourth Amendment rights" but rather whether "the officers *collectively* . . . used excessive force."

Id. at 28 (emphasis added). This argument stems from the use of "officers," plural, in the jury instructions and on the verdict form. *Id.* at 28-29. But reading "officers" as referring only to collective activity, rather than as a description that multiple actors were involved in the events presented to the jury, is not the most obvious reading, ignores how Plaintiffs presented their case to the jury, and is contrary to the instructions and verdict form taken as whole.

As explained above, Plaintiffs identified several specific acts that they argued constituted Fourth Amendment violations, including an act that involved individual (not collective) conduct: only one officer ordered Ms. Chinaryan to the ground. And the district court instructed the jury that it could "find for one or more plaintiff," meaning that the actions of one or more officers could have violated the rights of one plaintiff but not all the plaintiffs.

And the verdict form was explicit that the jury was not limited to considering the officers' collective action. It framed the question for the jury as follows: "Did police officers from the City of Los Angeles, *acting individually or together*, . . . deprive . . . Plaintiffs of their Fourth Amendment rights?" (Emphasis added.) On its plain terms, both an individual and collective assessment of the officers' conduct was invited. Additionally, both "officers" and "Plaintiffs" were in plural form. There is no suggestion that the jury could consider only whether the Plaintiffs suffered a collective constitutional violation. Likewise, there is no reason to construe the verdict form as having limited the jury to considering only whether

the officers committed a collective violation. Taken as a whole, and in context of the case as it was presented and argued, the confusion the majority contends is caused by the word "officers" falls away. *Id.* at 28.

Ultimately, the jury found that the officers, neither "acting individually or together," violated Plaintiffs' Fourth Amendment rights. Accordingly, any error by the district court in granting summary judgment for the individual officers on Plaintiffs' § 1983 and Bane Act claims was harmless because it is "highly unlikely," if not a certainty, that the jury would have found for Plaintiffs on those claims had they been presented at trial. *Tennison*, 244 F.3d at 691. I would respect the decision of the jury that heard the evidence of the officers' conduct.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 3, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21-56237
22-55168

D.C. No.
2:19-cv-09302-MCS-E
Central District of California, Los Angeles

HASMIK JASMINE CHINARYAN, INDIVIDUALLY AND AS GUARDIAN AS LITEM FOR NEC, A MINOR; MARIANA MANUKYAN,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; MICHEL MOORE, CHIEF OF POLICE; ROMERO GONZALEZ, OFFICER; FRED CUETO, SERGEANT; RODRIGO SORIA, OFFICER; AIRAM POTTER, OFFICER; BRITTANY OKE, OFFICER; JEFF RODD, OFFICER; DANIEL MARTINEZ, OFFICER; DANIEL GAYTON, OFFICER; EDUARDO PICHE, OFFICER; MARIO MENSES, OFFICER; BRITTANY PRIMO, OFFICER,

Defendants-Appellees.

Appendix B

Filed October 3, 2024

ORDER

Before: S.R. THOMAS, NGUYEN, and FORREST, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Forrest would grant the petition.

The panel has voted to deny the petition for rehearing en banc, and Judge S.R. Thomas has so recommended.

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

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

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED OCTOBER 12, 2021

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.
2:19-cv-09302-MCS-E

HASMIK JASMINE CHINARYAN, INDIVIDUALLY AND AS GUARDIAN AS LITEM FOR NEC, A MINOR; MARIANA MANUKYAN,

Plaintiffs,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; MICHEL MOORE, CHIEF OF POLICE; ROMERO GONZALEZ, OFFICER; FRED CUETO, SERGEANT; RODRIGO SORIA, OFFICER; AIRAM POTTER, OFFICER; BRITTANY OKE, OFFICER; JEFF RODD, OFFICER; DANIEL MARTINEZ, OFFICER; DANIEL GAYTON, OFFICER; EDUARDO PICHE; and, DOES 8-10, inclusive,

Defendants.

Filed October 12, 2021

Appendix C

FINAL JUDGMENT

Pursuant to Rules 54 and 58 of the Federal Rules of Civil Procedure, and by reason of the Court's orders in this action and the jury's special verdict, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

By reason of the special verdict, prior dismissals by Plaintiffs, and the Court's ruling on Defendants' Motion for Summary Judgment, Plaintiffs HASMIK JASMINE CHINARYAN, individually and as Guardian Ad Litem for NEC, and MARIANA MANUKYAN recover nothing by reason of each and all of their claims as set forth in the First Amended Complaint against CITY OF LOS ANGELES, LOS ANGELES POLICE DEPARTMENT, CHIEF OF POLICE MICHEL MOORE, OFFICER ROMERO GONZALEZ, OFFICER MARIO MENESES, SERGEANT FRED CUETO, OFFICER RODRIGO SORIA, OFFICER AIRAM POTTER, OFFICER BRITTANY OKE, OFFICER JEFF ROOD, OFFICER DANIEL MARTINEZ, OFFICER DANIEL GAYTON, and OFFICER EDUARDO PICHE. Judgment is entered in favor of all Defendants.

Defendants may file an Application to the Clerk to Tax Costs. C.D. Cal. L.R. 54-2. The Court will address any arguments both Parties raise concerning Defendants' ability to recover costs upon the filing of a Motion to Retax Costs. Fed. R. Civ. P. 54(d)(1).

IT IS SO ORDERED.

Appendix C

Dated: October 12, 2021

/s/_____
MARK C. SCARSI
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED JANUARY 25, 2021

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:19-cv-09302 MCS (Ex)

HASMIK JASMINE CHINARYAN, *et al.*,

Plaintiffs,

v.

CITY OF LOS ANGELES, *et al.*,

Defendants.

Filed January 25, 2021

ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiffs' motion for partial summary judgment as it pertains to two issues and Defendants' motion for summary judgment. ("Pl.s' Mot.," ECF No. 55-1; "Defs.' Mot.," ECF No. 61). Defendants oppose Plaintiffs' motion for partial summary judgment and Plaintiffs oppose Defendants' motion for summary

judgment. ("Defs.' Opp'n," ECF No. 68; "Pl.s' Opp'n," ECF No. 69).[1] Both parties also filed replies. ("Pls.' Reply," ECF No. 73; "Def.'s Reply," ECF No. 72). A hearing was held on November 30, 2020 and the Court took the matters under submission. (ECF No. 75). For the following reasons, the Court **DENIES in part** and **GRANTS in part** both motions.

I. BACKGROUND

On June 16, 2019 Plaintiffs Hasmik Jasmine Chinaryan ("Chinaryan"), NEC, and Mariana Manukyan ("Manukyan") "attended a Father's Day Celebration" when NEC began to feel ill. Chinaryan Decl. ¶¶ 3, 4; Pl.s' Statement of Uncontroverted Facts and Conclusions of Law ("Pls.' SUFCL") ¶ 1. Chinaryan "decided to drive [NEC] home" and used her "husband's Suburban." Chinaryan Decl. ¶ 4. Manukyan joined Chinaryan and NEC so that Chinaryan "would not be alone" on the drive. *Id.* Chinaryan's husband owns the "black 2018 Chevrolet Suburban." Pls.' SUFCL ¶ 1.

As the plaintiffs drove home, "Sgt. Cueto spotted the [Suburban], which coincidentally matched the description of a vehicle" that was previously "reported

1. Defendants submitted objections to evidence. Some objected-to evidence is unnecessary to the resolution of the motion, and some supports facts not in dispute. As such, the Court need not resolve many of the objections at this time. To the extent the Court relies on objected-to evidence in this Order, the relevant objections are **OVERRULED**. *See Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006)

stolen." *Id.* at ¶ 2. Sgt. Cueto "contacted LAPD dispatch to verbally query the license plate." Def.s' Statement of Uncontroverted Material Facts and Conclusions of Law ("Defs.' SUFCL") ¶ 4. Sgt. Cueto correctly "reported to LADP dispatch" the license plate number on the Suburban and the "dispatcher checked this plate number and informed Sgt. Cueto that plate was registered to a Dodge Ram pickup truck." *Id.* at ¶ 5. Sgt. Cueto noted the mismatched plate and "believed that this black Suburban may be the stolen vehicle, because, based on his training and experience, it appeared to be 'cold plated.'" *Id.* at ¶ 6. "'Cold plating' is a term which refers to a criminal technique employed by some vehicle thieves where the license plate of a vehicle that has been stolen is switched with the license plate of another vehicle of a license plate to avoid detection (e.g., of the stolen vehicle's license plate) by law enforcement." *Id.* at ¶ 7.

Sgt. Cueto then "broadcast to all nearby units in the vicinity" a request for "two additional units for a possible cold-plated vehicle, a black Chevrolet Suburban" and then "repeated his request and also asked for an airship (police helicopter)." *Id.* at ¶ 11 (quotation marks omitted). This request "indicated, per LADP policy requirements, [Sgt. Cueto's] intention to follow LAPD policy for a high-risk stop." *Id.* "Based on the totality of the circumstances—including the very recent report of a [stolen] 2015 black Suburban from ST Limo—Sgt. Cueto used his discretion and decided that the most appropriate method of stopping the Chevrolet Suburban with Dodge Ram plates was to proceed with a 'high-risk' stop (rather than an 'investigatory stop' or a 'traffic enforcement stop')

which, in accordance with LAPD and POST training and procedure, involves the 'proning-out' (instructions to lie down on the ventral or front side of the body) on the ground of the driver (to create a position of disadvantage) and if necessary based on the totality of the circumstances, the passengers." *Id.* ¶ 14.

Officers Gonzalez and Meneses responded to Sgt. Cueto's call and began following the Suburban. Gonzalez Decl. ISO Defs.' Opp'n ¶¶ 2, 7-8; Meneses Decl. ISO Defs.' Opp'n ¶¶ 2, 7-8. While following the Suburban, "Officer Meneses saw at least one passenger in the Suburban, but could not see in the back of the vehicle due to its tinted windows" and Sgt. Cueto "could also not see inside the vehicle at all." Defs.' SUFCL ¶ 15. Officers Gonzalez and Meneses were also aware that, previously, a "black Suburban had been stolen" and that "[t]he airship had received an alert from a LoJack tracking device." Gonzalez Decl. ISO Defs.' Opp'n ¶¶ 2, 3; Meneses Decl. ISO Defs.' Opp'n ¶¶ 2, 3. As they followed the Suburban, "[t]he LoJack receiver in the Officer Gonzalez and Menses [sic] patrol unit gave no indication that the Suburban they were following was the one reported stolen." Pls.' SUFCL ¶ 4. However, Officer Gonzalez also knew that the vehicle reported stolen was last "in an auto industrial area where parts are taken off of vehicles" and "someone could have . . . removed the LoJack tracking system off of the vehicle." Ford Decl. Ex. G, Gonzalez Dep. 26:24-25, 27:2-3.

"Officers Gonzalez and Meneses activated their lights and sirens" and "Ms. Chinaryan immediately pulled over." Pls.' SUFCL ¶ 5. During the time Sgt. Cueto, Officer

Gonzalez, and Officer Meneses observed the suburban, none of them "observed any traffic code violations or evasive driving." *Id.* at ¶ 6.

"[O]ther [o]fficers also heard Sgt. Cueto's commands" and responded, arriving "after the 'high-risk' stop was already in process." Defs.' SUFCL ¶ 17. The officers who arrived "included Defendants Brittany Primo and Eduardo Piche (partners in the same vehicle), Officers Daniel Gayton and non-defendant Zachary Neighbors, Officers Airam Potter and Daniel Martinez (in the same vehicle), and Officers Jeff Rood and Rodrigo Soria (in the same vehicle)." *Id.*

After the officers pulled the vehicle over, they organized into two different groups and handled different passengers. Officer Meneses, Sgt. Cueto, and Officer Rood directed Chinaryan "to turn off the vehicle, to throw the keys outside, to step out with her hands up, to walk to the left, to get down on her knees, then to lie down on her stomach with her hands out and her head to the left . . . and to not move." *Id.* at ¶ 20. Chinaryan "substantially complied" with these directions. *Id.* Sgt. Cueto then "directed Officer Gayton to approach" Chinaryan and "directed . . . Officer Primo [to] approach and handcuff" her. *Id.* at ¶ 22. Officer Primo did so and received "cover by Officers Gayton, Soria, and Rood." *Id.* Officer Soria "then escorted" Chinaryan to a police vehicle and told her "she would be 'patted down' for weapons." *Id.* at ¶ 23. Officer Primo conducted the "pat down." *Id.*

Chinaryan "was left prone for" around three minutes while officers removed the other plaintiffs from the Suburban. Pls.' SUFCL ¶ 16. "Officers Gonzalez and Potter" directed plaintiffs "Marina Manukyan and NEC . . . to step out of the Suburban and to walk backwards on the sidewalk towards Officers Martinez and Potter." *Id.* at ¶ 21. Officer Potter than "conducted a 'pat down' search for weapons and handcuffed both of them pending investigation." *Id.*

Many officers held weapons during this incident, though the parties dispute where exactly the guns were pointed. Plaintiffs allege that the officers pointed guns at plaintiffs. *See* Pls.' SUFCL ¶ 9 ("Officers Menses [sic], Gayton, Primo, [and] Soria pointed pistols at Plaintiffs."); Pls.' SUFCL ¶ 10 ("Officer Gonzalez pointed an assault rifle at Plaintiffs."); Pls.' SUFCL ¶ 11 ("Officer Piche pointed a shotgun at Plaintiffs.") However, Defendants allege that "the Officers (excluding Sgt. Cueto) had their weapons drawn at the 'low ready' position, which means holding the weapon at an angle less than 90 degrees, so that the officer can still view the subject and assist if necessary."[2] Defs.' SUFCL ¶ 26. Defendants define "low ready" as placing "the weapon . . . canted down but 'ready' if the circumstances change and become more dangerous," as opposed to placing the weapon "'up on target' or 'on sights' with any person's body or an object with the intention of shooting a target immediately." *Id.* In the low ready position, the "trigger finger" is also "on

2. Defendants allege that Sgt. Cueto "never drew any weapon." SUMFCL ¶ 26.

the slide or frame of the weapon but off the trigger itself so that the weapon could not be fired at anyone." *Id.* at ¶ 27 (citations omitted). Regardless of where they were pointed, officers displayed weapons and Plaintiffs could see that officers held weapons.

Officer Soria took Chinaryan to a police vehicle and asked her for identification. Def.'s SUFCL ¶¶ 23, 24. "Ms. Chinaryan told Officer Soria that it was located in her purse in the car and did not express any objection to the identification being located there." *Id.* at ¶ 24. Officer Soria told Officer Meneses this information and "Officers Meneses, Piche, and Gonzalez, who opened the doors, and Officer Neighbors, who opened the back hatch" ensured nobody else was in the vehicle. *Id.* at ¶¶ 24, 28. Officer Meneses found Chinaryan's identification in her purse while "Officers Gonzalez, Meneses, Neighbors, Rood, and Gayton examined the various locations of the VIN (Vehicle Identification Number) on the Suburban." *Id.* at ¶ 30. Officer Gonzalez searched the VIN in the "police Mobile Data Computer ('MDC')" and the MDC showed "the VIN number of the Suburban was registered to Levon Chinaryan, the husband of Ms. Chinaryan, and the associated license plate should be 09343S2." *Id.* at ¶ 30, 32. However, the MDC also showed that "the license plate on the Suburban . . . was returned to a 2017 Dodge Ram Pickup truck registered to Anastasia Duniaka." *Id.* at ¶ 31. The police officers determined that the DMV had issued a license plate with an incorrect license plate number to Chinaryan's husband, thus creating this registration discrepancy. *See Id.* at ¶¶ 31, 32, 34. Realizing that the car was not stolen, and after conducting checks for

wants and warrants, "Sgt. Cueto directed that all three individuals be un-handcuffed while he, Officer Meneses and Officer Rood explained the circumstances that led to the stop to the three detainees, who were un-handcuffed by Officers Potter, Martinez, and Soria." *Id.* at ¶ 36. The officers removed the incorrect license plates, instructed Chinaryan to obtain new license plates, and gave her "an explanatory business card in case the vehicle was stopped again before replacement plates could be obtained." *Id.* at ¶ 37.

II. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A fact is material when, under the governing law, the resolution of that fact might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The burden of establishing the absence of a genuine issue of material fact lies with the moving party, *see Celotex*, 477 U.S. at 322-23, and the court must view the facts and draw reasonable inferences in the light most favorable to the nonmoving party, *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). To meet its burden, "[t]he moving party may

produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). Once the moving party satisfies its burden, the nonmoving party cannot simply rest on the pleadings or argue that any disagreement or "metaphysical doubt" about a material issue of fact precludes summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). There is no genuine issue for trial where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *Id.* at 587.

B. 42 U.S.C. § 1983

Under 42 U.S.C. § 1983, "[e]very 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." 42 U.S.C. § 1983. "[A] 'person' subject to liability can be an individual sued in an individual capacity . . . or in an official capacity." *Theney v. City of Los Angeles*, No. CV 15-9602-AB (AFMx), 2017 U.S. Dist. LEXIS 223586, 2017 WL 10743001, at *4 (C.D. Cal. June 19, 2017) (citations and quotation marks omitted).

Additionally, "[m]unicipalities are considered 'persons' under 42 U.S.C. § 1983 and thus may be liable for causing a constitutional deprivation." *Waggy v. Spokane Cty. Washington*, 594 F.3d 707, 713 (9th Cir. 2010). "[A] claim under" 42 U.S.C. § 1983 is established when the plaintiff shows that "a person acting under color of state law" violated a plaintiff's "right secured by the Constitution and laws of the United States." *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 2254, 2255, 101 L. Ed. 2d 40 (1988).

III. DISCUSSION

Plaintiffs seek summary adjudication on the following two issues:

1. The high-risk tactics used during the traffic stop under the circumstances known to the officers violated Plaintiffs' Fourth-Amendment rights.

2. The LAPD practice that allows officers to use high-risk tactics during traffic stops of mis-plated cars, including the pointing of firearms, was the moving force behind the violation of Plaintiffs' Fourth-Amendment rights.

Pls.' Mot. 1. Defendants move for summary judgment on Plaintiffs' three claims. Specifically, Defendants argue summary judgment should be granted in the following manner:

1. The officers are entitled to qualified immunity;

2. The officers had reasonable suspicion and probable cause to detain Plaintiffs;

3. Plaintiffs cannot establish *Monell* liability; and

4. Plaintiffs' Bane Act claim fails because Plaintiffs do not provide any evidence that officers had the specific intent required for a Bane Act claim. Defs.' Mot. 1, 20-21. The Court will now address these issues.

Defs.' Mot. 1, 20-21. The Court will now address these issues.

A. Whether Plaintiffs' Constitutional Rights Were Violated

Plaintiffs first seek summary adjudication on the issue of whether Defendants' high-risk tactics violated Plaintiffs' fourth amendment constitutional rights. Pls.' Mot. 6-16. The Fourth Amendment states 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, 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." U.S. Const. amend. IV. A police stop of "an automobile and detaining its occupants constitute a 'seizure'." *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660 (1979).

Appendix D

Plaintiffs first argue that while the officers had "reasonable suspicion to conduct a brief investigatory detention" due to "[t]he mismatched plates," the officers violated Plaintiffs' constitutional rights because "the high-risk tactics they were subjected to exceeded those allowed for a *Terry* stop under the benign circumstances presented." Pls.' Mot. 6. Therefore, Plaintiffs argue, Defendants' use of high-risk tactics turned the *Terry* stop into a *de facto* arrest that needed to be supported by probable cause. *Id.* Plaintiffs further argue that "[b]ecause Defendants did not have probable cause for an arrest, or any other justification for using such intrusive, high-risk tactics, Plaintiffs are entitled to summary adjudication that their Fourth-Amendment rights were violated." *Id.* Defendants disagree. Defendants "deny that this stop amounted to a *de facto* arrest" and also argue they had "*both* reasonable suspicion *and* probable cause *at the time the traffic stop was executed*." Defs.' Opp'n. 10 (emphasis in original); *see also* Defs.' Mot. 18.

The Ninth Circuit has stated that "[t]here is no bright-line rule to establish whether an investigatory stop has risen to the level of an arrest." *Green v. City & Cty. of San Francisco*, 751 F.3d 1039, 1047 (9th Cir. 2014). "Instead, this difference is ascertained in light of the 'totality of the circumstances.'" *Id.* (quoting *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir.1996) (quotation marks and citation omitted)). In conducting this analysis, courts employ a "highly fact-specific inquiry that considers the intrusiveness of the methods used in light of whether these methods were 'reasonable *given the specific circumstances*.'" *Id.* (emphasis in original)

(quoting *Washington*, 98 F.3d at 1185). Some relevant factors include the number of police officers present, the length of time of the detention, and whether the plaintiffs were ordered to "prone out." *See Washington*, 98 F.3d at 1187 (citations omitted). "Under ordinary circumstances, when the police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment." *Id.*

Here, thirteen police officers were present. Defs.' Resp. to Interrog. No. 2. Officers used weapons, handcuffed each plaintiff, and ordered Chinaryan to prone out on a busy street. Pls.' SUFCL ¶¶ 16, 21, 22, 27. These tactics can be "especially intrusive." *See Washington*, 98 F.3d at 1189. The Ninth Circuit has "only allowed the use of especially intrusive means of effecting a stop in special circumstances" without it being deemed an arrest. *Id.* These circumstances are as follows:

> 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur.

Id. (also noting that a combination of these factors is sufficient) (footnotes omitted). The "specificity of the information that leads the officers to suspect that the individuals they intend to question are the actual suspects

being sought . . . [and] the specificity of information that the persons actually being sought are likely to forcibly resist police interrogation" affect whether police can "take extraordinary measures" to protect themselves. *Id.* at 1189, 1190. "The more specific the information in both these regards, the more reasonable the decision to take extraordinary measures to ensure the officers' safety." *Id.* at 1190. Additionally, "the number of police officers present" affect whether the officers' "aggressive investigatory tactics" are reasonable. *Id.* "[B]ecause this inquiry is fact specific, it is often left to the determination of a jury." *Green*, 751 F.3d at 1047.

Here, all of the plaintiffs complied with various police orders. Cueto Dep. 105:21-24. None of the police officers had information that any of the three plaintiffs were armed. Cueto Dep. 108:18-25—109:1; Gonzalez Dep. 19:17-19; Meneses Dep. 16:12-14; Piche Dep. 16:11-15; Primo Dep. 21:4-6; Soria Dep. 16:2-5. Officers were not aware of violent crimes happening in the same area. Cueto Dep. 109:13-23; Gonzalez Dep. 21:3-22; Meneses Dep. 12:18-21, 16:3-9, 18:2-25; Piche Dep.13:8-23; Primo Dep. 21:7-12; Soria Dep. 13:3-19. Finally, officers did not have information that a violent crime was "about to occur." *Washington*, 98 F.3d at 1189; Cueto Dep. 110:4-12; Gonzalez Dep. 22:2-6; Meneses Dep. 17:2-5; Piche Dep. 13:8-10; Soria Dep. 22:14-16. However, a rational juror could also find that Sgt. Cueto did have enough information to conclude that a high-risk stop was warranted based on his training, his knowledge that a similar suburban was recently stolen, the time of day of the incident, and the Suburban's tinted windows. *See Theney*, 2017 U.S. Dist. LEXIS 223586, 2017

WL 10743001, at *7 ("Drawing all reasonable inferences in favor of Defendants, however, the dangers of traffic stops in general, combined with the collective experience of officers that drivers of vehicles with mismatched plates are dangerous, could convince a rational juror that high-risk tactics are merited.")

Defendants also assert that they had probable cause. *See* Defs.' Opp'n 9-14; *see also* Defs.' Mot. 18. "Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007). A rational jury could find that, based on the recently reported stolen Suburban in the same area and the mismatched license plates on Plaintiffs' Suburban, there was probable cause to arrest. However, a rational jury could also find that the facts in this case do not provide the officers with probable cause to arrest. The Court declines to rule on whether probable cause existed based on the evidence set forth by parties and leaves this issue for the jury.

Plaintiffs also argue that the way the officers used their weapons constituted excessive force during this incident. Pls.' Mot. 13-16. "In addressing a claim of excessive force, [courts] balance the 'nature and quality of the intrusion' against the 'countervailing governmental interests at stake.'" *Green*, 751 F.3d at 1049 (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 10871 104 L.Ed.2d 443 (1989). Displaying a weapon can be

considered a highly intrusive tactic. *See Id.* (finding that "the degree of intrusion . . . was severe" in part because officers "pointed handguns and a shotgun directly" at the plaintiff).

As for the second prong of the government interest, courts "have typically considered '(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Id.* (citing *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994)). A stolen vehicle can possibly be a severe crime. *Id.* (stating "the crime at issue (stolen vehicle or plates) was arguably severe"). However, a rational jury could differ on whether the Plaintiffs here posed an immediate threat to the officers' safety. A rational jury may decide that the police should not have assumed the suspects could pose an immediate threat. Alternatively, a rational jury could decide that the Plaintiffs could have posed an immediate threat upon being pulled over and that officers were justified in displaying weapons due to their belief that suspects who steal vehicles are often armed. Cueto Decl. ¶ 10; Gonzalez Decl. ¶ 10; Meneses Decl. ¶ 10; Potter Decl. ¶ 10. Finally, as to the last prong, it is undisputed that Plaintiffs complied with the officers' orders. Cueto Dep. 105:21-24.

Plaintiffs also argue that *Thompson v. Rahr*, 885 F.3d 582 (9th Cir. 2018) establishes that the officers' actions here constituted excessive force. *See* Pls.' Mot. 14. However, *Thompson* contains a distinguishable set of facts from the present case. There, the plaintiff was

sitting "on the bumper" of the officer's car and the officer had already patted the plaintiff down for weapons and searched his vehicle before pointing a weapon at him. *Thompson*, 885 F.3d at 585. Even though the police officer found a weapon in the plaintiff's car during the search, the plaintiff was already "10-15 feet from the gun in the backseat of his car." *Id.* Here, the officers mainly displayed weapons as they ordered Plaintiffs out of the vehicle with tinted windows and before searching the vehicle or patting down and handcuffing the Plaintiffs. *See* Pls.' Opp'n 10-12; Sahak Decl., Ex. E at 8:30-10:00; Sahak Decl., Ex. H at 5:30-8:00. The factual distinctions preclude *Thompson* from establishing at summary judgment that the officers exhibited excessive force, thus leaving this determination for the jury.

Parties also dispute where exactly officers pointed the guns. Plaintiffs seem to allege that the guns were pointed directly at them. Pls. Mot. 13. Defendants disagree. However, this does not change the Court's view that the issue of excessive force should be decided by a jury. In *Green*, the officers "pointed handguns and a shotgun directly" at the person the police suspected of stealing a vehicle. *Green*, 751 F.3d at 1049. Some officers "continued to point weapons at her even after she was handcuffed and searched." *Id.* at 1050. However, the Ninth Circuit still held that the issue of excessive force should "be determined by a jury." *Id.* at 1051. Therefore, even if the guns were pointed directly at Plaintiffs, that still does not change the Court's analysis on excessive force. Therefore, the Court declines to resolve where exactly the officers pointed the guns.

For the foregoing reasons, the Court **DENIES** summary judgment on the issue of whether the high-risk tactics used during the traffic stop under the circumstances known to the officers violated Plaintiffs' Fourth-Amendment rights and leaves this determination for the jury.

B. Qualified Immunity

Qualified immunity protects "government officials performing discretionary functions" by "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987). Determining whether police officers are entitled to qualified immunity is an issue the Court "must resolve . . . 'at the earliest possible stage in litigation.'" *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 815, 172 L.Ed.2d 565 (2009)).

"An officer will be denied qualified immunity in a § 1983 action only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood her conduct to be unlawful in that situation." *Torres*, 648 F.3d at 1123. Furthermore, "[a] facially valid direction from one officer to another to stop a person or a vehicle insulates the complying officer from assuming

personal responsibility or liability for his act done in obedience to the direction." *United States v. Robinson*, 536 F.2d 1298, 1299 (9th Cir. 1976).

Defendants allege that each police officer involved in this incident is entitled to qualified immunity. Defs.' Mot. 11-18. Plaintiff opposes. Pls.' Opp'n 4-12.

i. Sgt. Cueto

As addressed above, the issue of whether "the officer's conduct violated a constitutional right" is a question for the jury, and as such, cannot be resolved. *See Torres*, 648 F.3d at 1123. Therefore, the Court will address the issue of whether "the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood her conduct to be unlawful in that situation." *Id.*

Under the second prong of qualified immunity "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (quoting *Creighton*, 483 U.S. at 640). Courts often look for whether there is a "case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *Id.* Preceding cases do not have to have "materially similar factual circumstances or even facts closely analogous" to the current case but should make it "sufficiently clear such that any reasonable official" would have understood they were violating the Fourth Amendment. *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1038 (9th Cir. 2018) (quotation marks and citations omitted).

Here, the law did not clearly establish that Sgt. Cueto's actions violated the Fourth Amendment. Plaintiffs point to *Green* for the proposition that "it was clearly established that officers may not use highly intrusive measures such as pointing guns, proning and handcuffing, [sic] during traffic stops when the people being detained are cooperative and there is no specific information they are armed nor specific information linking them to a dangerous crime." Pls.' Opp'n 9. However, this Court has previously stated, in a decision after *Green* and with similar facts to the present case, that it is not clearly established "that a high-risk stop is an unreasonable level of intrusiveness for a suspected stolen vehicle." *Theney*, 2017 U.S. Dist. LEXIS 223586, 2017 WL 10743001, at *9. Plaintiffs are asking the Court to contradict the Court's previous statement in *Theney* and find that it is clearly established that a reasonable officer would know that actions such as Sgt. Cueto's violate the Fourth Amendment. The Court will not reach this conclusion. Therefore, the Court **GRANTS** qualified immunity to Sgt. Cueto.

ii. Other Officers

Defendants also move for summary judgment on whether Officers Gonzalez, Meneses, Primo, Gayton, Piche, Potter, Soria, and Rood are entitled to qualified immunity for use of the high-risk tactics. These officers all responded to Sgt. Cueto's "police radio broadcast" for additional units and a police helicopter. Defs.' SUCFCL ¶ 11.[3] Sgt. Cueto's request for a police helicopter

3. Plaintiffs allege that, "[w]ithout consent," Officer Meneses "searched the vehicle and two purses." The Court does not address

"indicated, per LADP policy requirements, his intention to follow LAPD policy for a high-risk stop." *Id.* All of these officers were thus acting at the direction of Sgt. Cueto.

Here, even if the actions taken by the police officers violated the Plaintiffs' constitutional rights, they are entitled to qualified immunity for three reasons. First, they are entitled to qualified immunity for the same reasons Sgt. Cueto is entitled to qualified immunity as previously discussed. Second, the factual distinctions outlined above between this case and *Thompson* preclude a finding that it was clearly established that a reasonable officer would find the use of weapons during this incident to be excessive force. And third, they are entitled to qualified immunity because they were acting at the direction of Sgt. Cueto, an officer who gave facially valid directions. *See Theney*, 2017 U.S. Dist. LEXIS 223586, 2017 WL 10743001, at *9; *see also Robinson*, 536 F.2d at 1299.

"A facially valid direction from one officer to another to stop a person or a vehicle insulates the complying officer from assuming personal responsibility or liability for his act done in obedience to the direction." *Robinson*, 536 F.2d at 1299. This Court in *Theney* granted qualified immunity to two police officers who "acted on the direction

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the constitutionality of the searches, as they do not appear to be discussed in either party's briefing. Further, Plaintiffs appear to concede elsewhere that "[w]hen asked for the location of her identification (i.e., driver license), Ms. Chinaryan told Officer Soria that it was located in her purse in the car and did not express any objection to the identification being located there." Defs.' SUFCL ¶ 24.

of" a third officer. *Theney*, 2017 U.S. Dist. LEXIS 223586, 2017 WL 10743001, at *9. The third officer made the call "for a helicopter, a supervisor, and backup" and two other police officers responded to that call. *Id.* at *2, *9. Despite the possibility of a constitutional violation, the responding officers were still granted qualified immunity because they acted on a "facially valid direction. *See Id.* at *9; *see also Robinson*, 536 F.2d at 1299. Here, Officers Gonzalez, Meneses, Primo, Gayton, Piche, Potter, Soria, and Rood all responded to Sgt. Cueto's broadcast. Defs.' SUFCL ¶¶ 13, 17. For example, Officers Gayton, Potter, Rood, and Soria "arrived after the 'high-risk' stop was already in process." *Id.* at ¶ 17. Therefore, all of these officers are **GRANTED** qualified immunity.

C. *Monell* Liability

Plaintiffs also move for summary judgment on a claim of *Monell* liability "against the City of Los Angeles and the LAPD." Pls.' Mot. 17-20. "A government entity may not be held liable under 42 U.S.C. § 1983, unless a policy, practice, or custom of the entity can be shown to be a moving force behind a violation of constitutional rights." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citing *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978)). To establish *Monell* liability, Plaintiffs must show that Defendant City of Los Angeles and LAPD ("Municipal Defendants") "had a deliberate policy, custom, or practice that was the 'moving force' behind the constitutional violation he suffered." *Galen v. Cty. of Los Angeles*, 477 F.3d 652, 667 (9th Cir. 2007) (quoting *Monell*,

436 U.S. at 694-95). Furthermore, Plaintiffs "must show both causation-in-fact and proximate causation." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1096 (9th Cir. 2013).

Plaintiffs argue that "LAPD's practice of allowing its officers to conduct high-risk car stops on any vehicle with mis-matched plates, or that it suspects to be stolen, even where the people detained are cooperative and there is no indication of risk to the officers or the community, was the moving force in the violation of Plaintiffs' rights." Pls.' Mot. 17. Defendants argue that Plaintiffs have "not shown that such a violation was due to any policy or custom on the part of the LAPD." Defs.' Opp'n 23.

Defendants concede that "LAPD trains its Officers that a mismatched license plate is a strong indicator of either a stolen vehicle, or that the vehicle is being used in the commission of a crime." *Id.* Defendants also do not dispute that "LAPD trains its Officers, when appropriate under the totality of the circumstances, to conduct 'high risk' traffic stops, meaning to request back-up and an airship, to maintain distance from the suspect, to put the suspect at a position of disadvantage, and to generally exercise caution when initiating the stop." *Id.* at 23, 24. However, Defendants argue that the "wide latitude to exercise discretion within such a 'high risk stop' based on the totality of the circumstances and to adapt that procedure as specific circumstances warrant" precludes a finding of any policy. *Id.* at 24. Plaintiffs' argument, according to Defendants, is an effort to create a policy out of "a vague and general tactical principal . . . that stopping a stolen vehicle should often be treated as a 'high

risk' situation" when the problems Plaintiff have with the incident, such as the "handcuffing, firearms exhibition, [and] requiring the driver to lie prone on the ground" were done at the officers' discretion and based on the circumstances. *Id.*

The Court finds that the LAPD policy was the "moving force" behind the incident. LAPD training materials advise officers to use "[a] high-risk pullover . . . when officers have the reasonable belief that the occupants in the vehicle may be armed and may represent a serious threat to the officer, or have committed a felony." Sahak Decl., Ex. J at 7. Various officers involved in the incident stated that their training and experience caused them to believe that when a vehicle has a mis-matched plate, the vehicle is involved in dangerous crime and the passengers may be armed. *See* Cueto Decl. ¶ 10 ("Based on my training and experience, I am aware that stolen vehicles are often linked with armed or dangerous individuals."); Gonzalez Decl. ¶ 10 ("Based on my training and experience I was aware that individuals who steal vehicles are often carrying weapons such as guns and knives."); Meneses Decl. ¶ 10 (same); Potter Decl. ¶ 22 ("Because I and other Officers believed we were dealing with a stolen vehicle, we believed that the occupants of the vehicle could very well be armed and dangerous, as is often the case in car theft situations."). Therefore, because officers believe that stolen vehicle suspects are often armed, they will deploy "high-risk pullover" procedures outlined in LAPD training materials, as those procedures are to be used when "officers have the reasonable belief that the occupants in the vehicle *may be armed and may represent*

a serious threat to the officer, or have committed a felony." *See* Sahak Decl., Ex. J at 7 (emphasis added).

Furthermore, officers who appeared later at Sgt. Cueto's request stated they were acting according to LAPD policy on high-risk tactics. *See* Primo Decl. ¶ 5 ("In accordance with my LAPD training regarding high-risk vehicle stops, when I got out of my police vehicle I had my gun at the low-ready position . . . "); Rood Decl. ¶ 4 (same); Soria Decl. ¶ 4 (same). Other aspects of the incident, such as the proning out of Chinaryan, verbal commands various police officers gave the Plaintiffs, and the matter in which police officers searched Plaintiffs and the vehicle all align with LAPD training materials. Sahak Decl., Ex. J at 7-22. The officers' decision to not prone out Plaintiffs Manukyan and NEC was merely an adaptation of the procedure the officers were following. These adaptations also still appear to follow LAPD policy on high-risk stops. *See* Sahak Decl., Ex. P at 1 (stating that in "[h]igh-risk situations . . . [t]he prone search is the most secure method of controlling a suspect, however it should not be automatically used in every high-risk situation"); *see also Theney*, 2017 U.S. Dist. LEXIS 223586, 2017 WL 10743001, at *10-*11 (finding that Los Angeles was subject to *Monell* liability under a similar policy).

Defendants move for summary judgment on Plaintiffs' *Monell* claims on the basis that Plaintiffs "cannot prove the existence of a policy/custom based solely on the occurrence of a single, isolated Constitutional violation."[4]

4. Defendants also move for summary judgment because Plaintiffs have not "establish[ed] *Monell* liability under the

Defs.' Mot. 20, 21. As stated in *Theney*, "[e]vidence of multiple incidents, however, is only necessary to establish an informal policy or custom" as opposed to when "the policy is officially documented" and there are statements by officers regarding the policy. *See Theney*, 2017 U.S. Dist. LEXIS 223586, 2017 WL 10743001, at *11 (citing *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Plaintiffs have both official documents and officer statements and thus do not need to provide evidence of multiple incidents.

The Court therefore finds that the Municipal Defendants' policy was the "moving force" behind the officers' actions. However, the Court does not rule on whether the policy is constitutional and leaves this question for the jury.

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very high deliberate indifference standards that applies to such claims." Defs.' Mot. 21. The Court does not reach the merits of this argument, as Plaintiffs do not need to show "deliberate indifference" in this case. *See Mann v. Cty. of San Diego*, No. 3:11-CV-0708-GPC-BGS, 2016 U.S. Dist. LEXIS 80035, 2016 WL 3365746, at *6-*9 (S.D. Cal. June 17, 2016), *aff'd*, 907 F.3d 1154 (9th Cir. 2018). In *Mann*, Judge Curiel distinguished between "the 'direct' and 'indirect' paths to municipal liability." *Id.* at *7. The "indirect path" is used in instances of a municipality's "omissions" or "inaction" and requires a showing of deliberate indifference. *See Id.* at *7-*8. Under the "'direct' route to *Monell* liability, 'a plaintiff can show that a municipality itself violated someone's rights or that it directed its employee to do so'" and does not require a showing of deliberate indifference. *Id.* at *8 (quoting *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1185 (9th Cir. 2002)), *overruled on other grounds by Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). Plaintiff has shown a direct path of *Monell* liability by alleging that Municipal Defendants maintained a "formal policy" that violated their constitutional rights and does "not need to show deliberate indifference." *See Id.* at *8.

Appendix D

D. Bane Act

Defendants move for summary judgment on Plaintiffs' third claim of violation of the Tom Bane Civil Rights Act ("Bane Act"), Cal. Civ. Code § 52.1, on the basis that "Plaintiffs lack any evidence that the officers had a specific intent to violate the Plaintiffs' rights to freedom from unreasonable search and seizure." Defs.' Mot. 22.

"The Bane Act civilly protects individuals from conduct aimed at interfering with rights that are secured by federal or state law, where the interference is carried out by threats, intimidation or coercion." *Reese*, 888 F.3d at 1040 (quotations omitted). Bane Act claims require a plaintiff to "demonstrate both that a constitutional violation occurred (either accompanied by threat, intimidation, or coercion, or with one of those as an inherent aspect of the violation) and that the defendant had the specific intent to violate the plaintiff's constitutional right(s)." *A.B. v. City of Santa Ana*, No. SA CV 18-1553-DOC-ADS, 2020 U.S. Dist. LEXIS 73602, 2020 WL 1937879, at *5 (C.D. Cal. Jan. 7, 2020) (citing *Reese*, 888 F.3d at 1043); *see also Romero v. City of Los Angeles*, No. CV 18-02479-AB (JCx), 2019 U.S. Dist. LEXIS 211130, 2019 WL 6604877, at *4 (C.D. Cal. July 15, 2019) (stating that "*Reese* extends to all cases except for circumstances of mere negligence," not just "excessive force cases").

Defendants argue that there is no evidence any of the Defendants had the "specific intent to violate" Plaintiffs' "constitutional right(s)." *See A.B.*, 2020 U.S. Dist. LEXIS 73602, 2020 WL 1937879, at *5 (citing *Reese*, 888 F.3d at

1043). Instead, Defendants argue, the officers determined the DMV made an error, removed the Plaintiffs' handcuffs upon learning of the error, provided information on how to get replacement license plates, and explained what to do if they are pulled over before receiving new license plates. *See* Defs.' Mot. 22, 23. Plaintiffs do not point to any evidence showing specific intent, but instead argue that "Plaintiff's [sic] evidence taken in a light most favorable to Plaintiffs, [sic] creates a genuine issue whether Defendants acted in reckless disregard of Plaintiffs' rights." Pls.' Opp'n 16. The Court disagrees. Even when the evidence is taken in the light most favorable to Plaintiffs, it does not show that officers had a "specific intent" to violate any rights. Instead, the evidence shows that once officers became aware of the DMV error, they worked to resolve the incident by explaining the DMV error and providing Chinaryan with a business card to show in case subsequent police officers pulled over the vehicle for not having license plates. Defs.' Mot. 22, 23. This is not the type of behavior that shows a specific intent to violate Plaintiffs' constitutional rights. Because Plaintiffs have not provided necessary evidence showing specific intent for purposes of their Bane Act claim, the Court **GRANTS** summary judgment in favor of Defendants.

IV. CONCLUSION

For the foregoing reasons, the Court denies Plaintiffs' motion for partial summary judgment on the issue of whether the high-risk tactics violated Plaintiffs' Fourth Amendment rights but finds that Defendants City of Los Angeles and LADP Policy was the moving force behind

the incident and grants summary judgment in favor of Plaintiffs on that issue. As for Defendants' motion for summary judgment, the Court grants qualified immunity to all officers, denies a finding of summary judgment on whether there was probable cause to arrest Plaintiffs, declines to find in favor of Defendants on *Monell* liability, and grants summary judgment on the fact that there is no evidence to support a Bane Act claim.

IT IS SO ORDERED.

Dated: January 25, 2021

/s/_____
MARK C. SCARSI
UNITED STATES DISTRICT JUDGE

APPENDIX E — FEDERAL STATUTE – 28 U.S.C.A. § 2111

28 U.S.C.A. § 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

APPENDIX F — FEDERAL RULES OF CIVIL PROCEDURE - RULE 61

Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.