

No. 17-____

IN THE
Supreme Court of the United States

JOSEPHINE SMITH and A.S., a minor child, by and
through her guardian ad litem, JOSEPHINE SMITH,

Petitioners,

v.

CITY OF SANTA CLARA,

Respondent.

**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

May the police conduct a warrantless search of a residence believed to be shared by a probationer and a non-probationer, pursuant to a prior consent deemed given as a condition of probation, over the objection of the physically present non-probationer, contrary to the rule in *Georgia v. Randolph*, 547 U.S. 103 (2006)?

PARTIES TO THE PROCEEDINGS

Petitioners, Josephine Smith and her granddaughter, A.S., were appellants in the Court of Appeals and plaintiffs in the District Court.

Respondent, City of Santa Clara, was appellee in the Court of Appeals and defendant in the District Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Josephine Smith and her granddaughter, A.S., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a–19a) is published at 876 F.3d 987 (9th Cir. 2017). The summary judgment order and the order on Petitioners’ motion for judgment as a matter of law of the United States District Court of the Northern District of California (App. 20a–52a) are unreported, but the summary judgment order is available at 2013 WL 164191.

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution, applicable to the several states through the Fourteenth Amendment to the United States Constitution, provides as follows:

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

INTRODUCTION

In *Georgia v. Randolph*, the Court decided that where a warrantless search is conducted of a shared dwelling over the express objection to the search by a physically present tenant, the search cannot be justified as reasonable as to the objecting tenant on the basis of a consent given to officers by another tenant. *Randolph*, 547 U.S. at 120.

Petitioners filed this case because their Fourth Amendment rights were violated when police officers conducted a warrantless probation search of their home over the express objection of the adult Petitioner, who was physically present at the house when the police searched it.

The facts in the present case parallel those of *Randolph*, namely, a warrantless search performed with the consent of one person, but over the objection of a resident physically present at the time of the search. Under *Randolph*, the warrantless search in the present case was unreasonable as to Petitioners, and the court should have found that *Randolph* applied.

However, the Ninth Circuit found that *Randolph* was a “consent case” and that probation cases, under this Court’s precedent, are not analyzed as “consent cases,” but instead under the “totality of the circumstances” test prescribed by *United States v. Knights*, 534 U.S. 112 (2001). App. 13a–14a. The Ninth Circuit’s decision misconstrued this Court’s ruling in *Knights*, resulting in an erroneous refusal to apply *Randolph* to the case at hand. App. 14a, 16a.

Further, the Ninth Circuit ignored authority stating that probation searches are a type of consent search, and that other state and federal courts have applied

Randolph in cases involving parole and probation searches. See *People v. Woods*, 21 Cal.4th 668 (1999); *Donald v. State*, 903 A.2d 315 (Del. 2006); *Thornton v. Lund*, 538 F.Supp.2d 1053 (E.D. Wis. 2008).

Lower courts have expressed uncertainty over whether *Randolph* applies to probation searches. Resolving the question whether *Randolph* applies to probation searches would provide much needed guidance to those courts, as well as to law enforcement officials conducting these searches. Resolution would also provide nationwide clarity regarding *non*-probationers' rights when warrantless searches are conducted pursuant to probation orders.

In light of the uncertainty expressed in the case law, and the number of individuals under correctional supervision, the question presented is one that will continue to arise across the nation. It is important therefore that this Court grant certiorari, and issue a nationally binding rule that clarifies whether *Randolph* applies to probation searches.

STATEMENT OF THE CASE

A. Federal Jurisdiction In The Court Of First Instance.

The jurisdiction of the district court was invoked under Article III of the United States Constitution and 28 U.S.C. §§ 1331, 1343, and 1367(a).

B. Constitutional Framework.

1. Fourth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution decrees:

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

U.S. Const. amend. IV. The Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Mapp v. Ohio*, 367 U.S. 643, 655, 660 (1961).

The Fourth Amendment, by its own terms, prohibits searches that are “unreasonable.” Warrantless entries into a person’s home are “per se unreasonable,” (see *Payton v. New York*, 445 U.S. 573, 576 (1980)), except under “a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967).

2. The Consent Rule.

One “specifically established and well-delineated exception” is the consent rule, which holds that the Fourth Amendment prohibition against warrantless searches does not apply in situations where voluntary consent is given by the individual whose property is to be searched or from a third party possessing common authority over the searched property. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 248–249 (1973); *United States v. Matlock*, 415 U.S. 164, 171 (1974). “Common authority” rests “on mutual use of the property by persons generally having joint access or control for most purposes[.]” *Matlock*, 415 U.S. at 171, n. 7.

Thus, a warrantless search may be justified with proof of voluntary consent provided by a third party who has common authority over the searched premises. *See id.* at 171.

3. *Georgia v. Randolph.*

This Court revisited the consent rule in *Georgia v. Randolph*, facing the issue of whether law enforcement could carry out a warrantless search of a residence with a third-party's consent when another physically present tenant, sharing common authority over the searched property, expressly objected to the search. *See Georgia v. Randolph*, 547 U.S. 103 (2006). The Court held that “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.” *Id.* at 120.

Under *Randolph*, the consent rule cannot justify a warrantless search under the Fourth Amendment when a physically present cotenant objects to the search. Such a search, if conducted, is deemed unreasonable as to the objecting cotenant, and, thus, a violation of that tenant's Fourth Amendment rights.

C. Factual Background.

On October 7, 2010, police officers of the Santa Clara Police Department (“SCPD”) arrived at the duplex of Josephine Smith (“Josephine”) located at 940 and 942 Gale Drive, Campbell, California (collectively “Duplex”), looking for Josephine's daughter, Justine Smith (“Justine”). App. 24a–25a; 2 Reporters Transcript (“RT”) 61:14-19, 141:22-25, 176:10-13, 223:11-20, 257:16-21. Justine was wanted for questioning regarding an

incident involving an alleged carjacking and stabbing that had occurred in the early morning of October 7. App. 5a–6a; 5 RT 160:22–161:13.

Justine had been on probation since December, 2009. App. 5a. As a condition of her probation, Justine had been required to consent to warrantless searches of her residence. App. 5a. In December, 2009, Justine reported her residential address to probation as 940 Gale Drive in Campbell. App. 5a. In June, 2010, Justine reported to probation and again listed her address as 940 Gale Drive, but added that she was in the process of moving out of Josephine’s home. App. 5a.

Upon identification of Justine as the person driving the allegedly stolen car in which the alleged assailant was a passenger, SCPD officers began conducting surveillance of the Duplex at around 10:00 a.m. on October 7. App. 25a; 5 RT 163:21–164:12. Throughout their surveillance, SCPD officers saw no sign of Justine, the alleged assailant, or the allegedly stolen car. App. 5a, 25a; 5 RT 182:11–186:16. SCPD officers had no reason to believe Justine was inside the Duplex on October 7, 2010.

At approximately 3:00 p.m., SCPD officers knocked on the door to 940 Gale Drive despite having no warrant to enter the Duplex or to arrest Justine. App. 4a, 25a. Josephine opened the door and asked if the SCPD officers had a search warrant. App. 4a–6a; 2 RT 74:1–75:12. The officers responded they did not need one. App. 4a; 2 RT 74:1–75:12. Josephine, stating that Justine did not live at the Duplex, refused to allow the officers to enter. App. 5a–6a; 2 RT 74:1–75:12. Despite Josephine’s objections, the officers entered the home. App. 4a, 6a. The officers did not find Justine. App. 4a, 6a.

After failing to find Justine in the 940 unit, SCPD officers decided to search the 942 unit. App. 6a. Over Josephine's protests that she rented the 942 unit to a tenant and that she did not want police to go inside, police searched the 942 unit anyway, but did not find Justine. App. 6a.

D. Procedural History.

1. Petitioners File Suit Against the City for Violation of Fourth Amendment Rights.

Petitioners filed suit against the City of Santa Clara, alleging, *inter alia*, a violation of their Fourth Amendment right to be free from unreasonable searches and seizures based on the SCPD's October 7, 2010 warrantless search of the Duplex. App. 6a–7a.

2. The District Court Denies Petitioners' Judgment as a Matter of Law due to the Uncertainty of *Randolph* Application to Probation Searches.

On December 9, 2013, the case went to trial. On December 17, 2013, both Petitioners and the City made motions for judgment as a matter of law ("JMOL") pursuant to Federal Rule of Civil Procedure 50. The District Court summarily denied both. App. 52a.

The District Court denied Petitioners' JMOL based on its conclusion that (1) it was unclear if *Randolph* applied to probation searches; (2) *Sanders v. City of Bakersfield*, 2009 U.S. Dist. LEXIS 21085, *6–8 (E.D. Cal. Mar. 17, 2009), which applied *Randolph* in a parole search context, was factually distinguishable because in *Sanders*, the officers were initially unaware of the plaintiff's parole status; (3) applying the rule in

Randolph would eviscerate the probation search condition and the probationer's prior consent to search; and (4) *Randolph* was factually distinguishable because *Randolph* involved an estranged wife consenting to the search of her estranged husband's home. 6 RT 79:16–80:4, 80:13–81:20, 81:23–82:23, 125:4–24.

3. The District Court Rejects Petitioners' Proposed *Randolph* Jury Instructions.

Petitioners proposed to give California Civil Jury Instruction No. 3025, which stated, "Justine Smith's consent is insufficient if Josephine Smith was physically present and expressly refused to consent to the search." 6 RT 72:2–20, 83:12–24. Petitioners also proposed to give a separate instruction on probation searches that stated, "Justine Smith's consent given as a term of probation is insufficient to establish consent if Josephine Smith was physically present and expressly refused to consent to the search." 6 RT 83:18–24. The District Court rejected Petitioners' proposed instructions over Petitioners' objection. 6 RT 83:12–24.

On December 18, 2013, the jury returned a verdict for defendants. A final judgment in favor of defendants was entered on December 19, 2013, pursuant to the jury's verdict. App. 53a. Petitioners appealed.

4. The Ninth Circuit Affirms Based on Finding that *Randolph* does not apply to Warrantless Probation Searches.

On February 12, 2016, Petitioners argued before the Ninth Circuit that the search of Josephine's home was unreasonable as a matter of law under *Randolph* because Josephine was physically present at the time of the warrantless search and objected to the search.

App. 1a–19a. On November 30, 2017, the Ninth Circuit issued its opinion finding in favor of the City. App. 1a–19a. Specifically, the Ninth Circuit found that *Randolph* was a consent case, and that under the U.S. Supreme Court’s probation-search cases, the consent rationale does not apply. App. 13a. Instead, probation searches are to be analyzed under the “totality of the circumstances” approach set forth in *United States v. Knights*. App. 14a. In finding *Randolph* inapplicable in the present case, the Ninth Circuit affirmed the District Court’s decision and held:

[t]he search was not automatically rendered unreasonable by Josephine’s presence at the time of the search and refusal to grant permission to search. Moreover, under the undisputed facts, the governmental interests at stake were sufficient as a matter of law to make a warrantless probation search of the [D]uplex reasonable over Josephine’s objection.

App. 16a.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the Ninth Circuit’s holding conflicts with this Court’s decision in *Georgia v. Randolph*. In the present case, the Ninth Circuit held that warrantless probation searches are not analyzed as consent searches under *Randolph*, and then proceeded to find that a warrantless probation search conducted over the objection of a physically present tenant was reasonable under the “totality of the circumstances.” This holding cannot be reconciled with this Court’s ruling in *Randolph*, given that probation searches may only be justified as searches based on the consent of the probationer, imposed as a condition of probation.

In addition, since *Randolph* was decided, state and federal courts have applied *Randolph* to both probation and parole searches. Yet, here, the Ninth Circuit opinion precludes any challenge of warrantless searches conducted over the objection of a physically present cotenant during probation or parole searches. In declining to find that *Randolph* applies to probation searches, the Ninth Circuit decision disregards the broad holding in *Randolph*. This Court did not carve out any exceptions to its holding, nor did it opine on probation or parole. Not applying *Randolph* in these contexts conflicts with this Court's view that a physically present tenant has a legitimate expectation of privacy against warrantless searches, even when another party consents.

The petition should also be granted to resolve lower courts' and law enforcement officials' uncertainty over whether *Randolph* applies to warrantless probation searches. In light of the number of persons on probation and parole, and the even greater number of *non*-probationers directly or indirectly affected by the criminal justice system, this issue is a matter of national importance. If the Court does not address this issue, the Ninth Circuit decision will be used to justify unwarranted invasion of *non*-probationers' privacy, and tend to lessen the caution exercised by law enforcement in exercising their authority.

I. THE NINTH CIRCUIT DECISION UNDERMINES A COTENANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND CANNOT BE RECONCILED WITH THIS COURT'S RULING IN *RANDOLPH*.

In *Georgia v. Randolph*, the Court addressed the issue of whether the police may conduct a warrantless

search with a third-party's consent, even when a physically present occupant, one who shares common authority, expressly refuses entry for the search. The Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Randolph*, 547 U.S. at 120. Notwithstanding this clearly expressed rule, the Ninth Circuit stated that since *Randolph* "was a consent case," and that this Court's "probation-search cases do not rest on a consent rationale," *Randolph* did not apply. App. 13a–16a.

The Ninth Circuit's finding that probation searches are not to be analyzed as consent searches directly undermines both the broad holding of *Randolph* and the principle that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Randolph*, 547 U.S. at 122–123.

A. The Present Case Should Have Been Analyzed as a Consent Case.

The facts regarding consent in this case are similar to those in *Randolph*. In *Randolph*, the wife of the defendant husband called the police to notify them that after a domestic dispute, her husband had taken their son away. *Randolph*, 547 U.S. at 107. When officers arrived at the home, the wife told officers that defendant was a cocaine user. *Id.* Defendant arrived soon after the police to explain the incidents from his perspective—that he had removed the son to a neighbor's house, concerned that his wife would take the boy out of the country again; that he did not use cocaine; and that it was his wife who abused drugs and alcohol. *Id.* The wife insisted defendant abused drugs

and stated there was evidence of drugs in the home. *Id.* Officers asked defendant for permission to search the home, and he refused. *Id.* Officers then turned to the wife for consent, which she immediately and voluntarily gave. *Id.* Officers entered the home, found drug paraphernalia, and, as a result, defendant was eventually indicted for cocaine possession. *Id.*

This Court confronted the issue whether one tenant could consent to a warrantless search of shared premises over the objection of a cotenant, who is both present and expressly refuses to permit the search. *Id.* at 108. The Court unequivocally said, “No.” Underlying its ruling, the Court reasoned: “[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant’s invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, ‘stay out.’” *Id.* at 113. “Without some very good reason, no sensible person would go inside under those conditions. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.” *Id.*

Here, the Ninth Circuit should have found *Randolph* dispositive because the significant facts present in the case at hand are substantially similar to those in *Randolph*—a physically present cotenant objecting, over the consent of another cotenant, to a warrantless search. Like the defendant husband in *Randolph*, Josephine, as the owner of the Duplex, was both physically present and expressly objected to SCPD officers’ warrantless search. App. 4a–6a; 2 RT 74:1–75:12. Officers operating under Justine’s purported consent—per a condition of her probation—entered the Duplex over Josephine’s objection. App. 4a–6a.

Further, SCPD officers had no “very good reason” to enter the Duplex over Josephine’s objections. As the undisputed facts show, during their surveillance of the Duplex, officers did not see Justine, the alleged assailant, or the allegedly stolen car. App. 5a, 25a; 5 RT 182:11–186:16. Josephine answered the door when officers knocked, and informed officers that Justine did not live at the Duplex. App. 4a–6a; 2 RT 74:1–75:12. In fact, in June, 2010, Justine had reported to probation that she was in the process of moving out of the Duplex. App. 5a. Based on these facts—or the lack of facts—officers had no reason to believe Justine was at the Duplex. Officers also had no reason to fear for the Petitioners’ safety or anyone else inside of the Duplex.

The significant facts of the present case parallel those in *Randolph*. The Ninth Circuit’s finding flies in the face of what we understand probation searches to be: warrantless searches conducted pursuant to an advance “consent” given by the probationer. *See People v. Woods*, 21 Cal.4th 668, 674–675 (1999). Thus, the Ninth Circuit was incorrect in refusing to apply *Randolph* to the case at hand.

**B. *Randolph* Does Not Carve Out a
“Probation or Parole Exception.”**

Since *Randolph*, both state and federal courts have applied the *Randolph* reasoning to parole and probation searches. In *Donald v. State*, the Delaware Supreme Court faced the issue of whether the Fourth Amendment required officers to ask for express consent of a present co-occupant at the start of a search when an absent co-occupant has already provided his consent. *See Donald v. State*, 903 A.2d 315, 319 (Del. 2006). The *Donald* Court relied on *Randolph*, and broadly construed this Court’s ruling, examining the

Randolph holding in the context of a warrantless probation search. *See id.* at 320–321 (“Thus, in situations where a non-probationer having common control and authority over a probationer’s home *expressly objects* to a warrantless search, there can be no search unless a valid exception to the requirement for a warrant applies.”).

Similarly, in *Thornton v. Lund*, the court held that a warrantless search of a parolee’s apparent residence was a violation of the cotenant’s Fourth Amendment rights when the physically present cotenant refused consent to the search. *See Thornton v. Lund*, 538 F.Supp.2d 1053, 1058–1059 (E.D. Wis. 2008). There, the issue was whether the plaintiffs, sisters to a parolee, had diminished Fourth Amendment rights because officers reasonably believed that the parolee lived in their home. *Id.* at 1058. The parolee had previously signed a form providing blanket consent to warrantless searches of his residence or any property under his control. *Id.* at 1055. The *Thornton* court determined that, although parolees and probationers have a diminished privacy interest, this is not necessarily the case for cotenants. *Id.* at 1058. As a result, even with the parolee or probationer’s consent, such consent “is insufficient if another co-tenant is present and objects to the search.” *Id.* (citing *Randolph*, 547 U.S. at 119).

Donald and *Thornton* both discussed the holding in *Randolph* and neither hesitated in applying the rule in *Randolph* to parole or probation searches. *See Donald*, 903 A.2d at 320–321; *Thornton*, 538 F.Supp.2d at 1056–1058. Although *Randolph* did not control the outcome in either case—i.e., in *Donald*, the co-tenant did not object, and in *Thornton*, qualified immunity applied—both cases made it clear that an objection by

a co-tenant meant that a search of the residence over this objection would have violated the objecting co-tenant's Fourth Amendment rights. *Id.*

Here, officers justified their warrantless search of Josephine's Duplex based on Justine's probation. App. 4a-6a; 2 RT 74:1-75:12. Josephine was physically present and expressly objected to the warrantless search of her home. App. 4a-6a; 2 RT 74:1-75:12. Josephine retained her Fourth Amendment rights. *See Steagald v. United States*, 451 U.S. 204, 219 (1981) (finding that Fourth Amendment rights are personal in nature). As such, Josephine's case should have been analyzed under *Randolph*, *Donald*, and *Thornton*.

Instead, the Ninth Circuit precluded any such analysis by labeling *Randolph* a "consent" case, and finding that the U.S. Supreme Court's probation-search cases do not rest on consent rationale. App. 13a. The Ninth Circuit's determination ignores the reality that a probation search is a type of consent search, and falls under the "consent" exception to the warrant requirement. *See Woods*, 21 Cal.4th at 674-675. Thus, Ninth Circuit's reasoning amounts to a rejection of the Supreme Court's holding in *Randolph*.

C. The Ninth Circuit's Reliance on *United States v. Knights* is Unfounded.

The Ninth Circuit's rationale starts with the assumption that probation searches are not analyzed as consent searches under this Court's cases. App. 13a. This assumption, and the Ninth Circuit's reliance on the "totality of the circumstances" test in *United States v. Knights*, are not well founded.

In *Knights*, the Court granted certiorari to assess whether the Fourth Amendment confines searches made pursuant to a common California probation

condition only to those searches with a “probationary” purpose. *See Knights*, 534 U.S. at 116, 118. There, as a condition of his probation for a drug offense, the probationer—Knights—had signed a probation order granting any probation officer or law enforcement officer the ability to search, *inter alia*, his place of residence, with or without a search warrant. *Id.* at 114–115. Meanwhile, local law enforcement had been eyeing Knights and his friend as the perpetrators behind thirty recent acts of vandalism against PG&E facilities in the county. *Id.*

Several days after Knights had been placed on probation, in investigating the most recent PG&E vandalism, a sheriff’s deputy began surveilling Knights’ apartment after seeing the friend’s truck parked outside. *Id.* The deputy witnessed the friend exit the apartment carrying three cylindrical items, which the deputy believed to be pipe bombs. *Id.* Aware of the search condition in Knights’ probation order, the deputy conducted a warrantless search of Knights’ apartment and uncovered a number of items that were used as evidence to indict Knights for a number of charges in connection with the PG&E incidents. *Id.* at 115–116.

This Court in *Knights* expressly stated that it would not decide whether Knights’ “acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his *Fourth Amendment* rights,” but instead concluded that the search of Knights was reasonable under the totality of the circumstances. *Id.* at 118. However, here, the Ninth Circuit misconstrued the Court’s holding as an outright rejection of treating probation searches as consent searches. App. 11a–13a. Unlike in *Randolph*, *Donald*, *Thornton*, and the present case, *Knights* presented no facts of consent

given or withheld by a physically present non-probationer/parolee tenant to a warrantless search. Thus, in *Knights*, there was no reason for the Court to address the issue of consent.

Here, the Ninth Circuit's reliance on *Knights* completely side steps the issue of consent despite the facts that bring the present case directly in line with *Randolph*.

II. THE LOWER COURTS REQUIRE GUIDANCE AS TO *RANDOLPH'S* APPLICABILITY, AND THE NINTH CIRCUIT'S DECISION THREATENS THE RECURRENCE OF UNCONSTITUTIONAL SEARCHES, MAKING THIS QUESTION AN ISSUE OF NATIONAL IMPORTANCE THAT WARRANTS IMMEDIATE REVIEW.

A. Lower Courts Remain Uncertain of *Randolph* Applicability in Probation Cases.

The District Court in the present case declined to apply *Randolph* because the court was unclear whether *Randolph* extends to probation searches. App. 35a. Specifically, the court stated, “[I]t was not clear at the time—and indeed, is still unclear—whether this rule applies to a probation search.” App. 35a.

In a recent 2016 decision, another district court faced this very issue of whether a warrantless probation search of a residence could be conducted over the objections of a present co-occupant. There, the district court opined: “Given the uncertainty in the case law and the general absence of authority on this issue, reasonable officers at the time of the search could have concluded the issue of whether objecting co-residents could stop a probation search was not yet resolved.”

Barajas v. City of Rohnert Park, 159 F.Supp.3d 1016, 1034 (N.D. Cal. 2016).

In these two cases, the question whether *Randolph* applies to probation searches led the lower courts to profess their uncertainty and allude to the need for guidance by this Court. The Ninth Circuit attempted to enlighten the lower courts, but the Ninth Circuit misinterpreted this Court's reasoning in *Knights* to hold that probation searches are not to be analyzed as consent searches. The Ninth Circuit's opinion threatens to generate further confusion regarding how the legality of probation searches as to *non*-probationer cotenants is to be evaluated.

B. The Issue of Warrantless Probation or Parole Searches Conducted Over the Objection of a Physically Present Cotenant Stands to Recur.

As of 2015, the Bureau of Justice Statistics approximates that one (1) in thirty-seven (37) adults in the United States, or 2.7 percent of all adults, were under some form of correctional supervision. Bureau of Justice Statistics, *U.S. Correctional Population Lowest Level Since 2002*, U.S. DEPT. OF JUSTICE (Dec. 29, 2016), available at <https://www.bjs.gov/content/pub/press/cpus15pr.cfm> (last visited Feb. 23, 2018). Supervised offenders on “either probation (3,789,800) or parole (870,500) continued to account for most of the U.S. correctional population in 2015.” *Id.*

Petitioners' case is not an isolated event, nor does the present case involve only an individual injustice. The aforementioned statistics are but the tip of the iceberg of the population affected by correctional supervision, and of the hidden burdens that correctional supervision places on families and children, who live

in the shadow of warrantless search conditions in probation or parole orders. Millions of people throughout the United States have endured, or are at risk of enduring, incidents such as those faced by Petitioners. *See, e.g., Barajas*, 159 F.Supp.3d 1016; *Thornton*, 538 F.Supp.2d 1053; *Donald*, 903 A.2d 315.

As it now stands, the Ninth Circuit’s decision renders meaningless an objection by a physically present cotenant to a warrantless probation search. This decision stands in stark contrast with this Court’s recognition of a cotenant’s equal claim to a right of privacy over shared premises. *Randolph*, 547 U.S. at 114–120. The Ninth Circuit’s decision gives free rein to law enforcement officials, operating under the “totality of the circumstances” test, to conduct warrantless probation searches notwithstanding an objection by a *non*-probationer co-occupant of the searched premises. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 34 (1996) (“In applying [the totality of the circumstances] test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry,” in that the courts are to look at “all the circumstances” to determine the question of fact.).

The relationship between the general population and law enforcement has taken front and center stage in recent years. A lack of trust “undermines the legitimacy of law enforcement and creates an unequal society in which some feel comforted by law enforcement while others feel suspicious and distrustful.” Michael Friedman, *What Happens When We Don’t Trust Law Enforcement*, PSYCHOLOGY TODAY (Sept. 9, 2014), <https://www.psychologytoday.com/blog/brick-brick/201409/what-happens-when-we-dont-trust-law-enforcement-0>. A perceived legitimacy of law enforcement

is a crucial factor in effective law enforcement. *Id.* Warrantless searches conducted over civilian objections undermine the legitimacy of law enforcement and breed a societal suspicion and distrust of those traditionally entrusted to safeguard the lives and property of the general public.

In light of the Bureau of Justice statistics and the documented incidents that have traversed courts at both the state and federal level, the issue presented in this petition is one that is likely to recur and one that is likely to affect the general population. The population at large has a right to know what rights they retain when confronted by law enforcement carrying out a warrantless search under a probation or parole condition. It is of national importance that the Court grant certiorari to resolve this issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 28, 2018

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-15103
D.C. No. 5:11-cv-03999-LHK

JOSEPHINE SMITH, an individual; A.S., a minor child,
by and through her guardian ad litem,
Josephine Smith,

Plaintiffs-Appellants,

v.

CITY OF SANTA CLARA, a public entity,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Lucy H. Koh, District Judge, Presiding

Argued and Submitted February 12, 2016
San Francisco, California

Filed November 30, 2017

Before: Mary M. Schroeder and Jacqueline H. Nguyen,
Circuit Judges, and Lynn S. Adelman,* District Judge.

Opinion by Judge Adelman

OPINION

SUMMARY**

Civil Rights

The panel affirmed the district court's judgment, entered following a jury verdict, in favor of several police officers and the City of Santa Clara, in an action brought pursuant to 42 U.S.C. § 1983 alleging that police officers violated plaintiff's constitutional rights under state and federal law when they conducted a search of her home.

Santa Clara police officers, over plaintiff's objections, entered her home, without a warrant, to search for her daughter who was on probation and who police had probable cause to believe had just been involved in a theft of an automobile and a stabbing.

The panel held that once the government has probable cause to believe that a probationer has actually reoffended by participating in a violent felony, the government's need to locate the probationer and protect the public is heightened. The panel held that

* The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

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

this heightened interest in locating the probationer was sufficient to outweigh a third party's privacy interest in the home that she shared with the probationer. The panel held that *Georgia v. Randolph*, 547 U.S. 103 (2006), which recognized a limitation on warrantless consent searches, was not directly applicable because the Supreme Court's probation-search cases did not rest on a consent rationale. Instead, the question was whether a warrantless probation search that affects the rights of a third party is reasonable under the totality of the circumstances. The panel held that under the totality of the circumstances, and the undisputed facts of this case, the warrantless search of plaintiff's home, over her objection, was reasonable as a matter of law. The panel further held that there was sufficient evidence at trial to permit the jury to find that officers had probable cause to believe that plaintiff's daughter lived at the residence.

COUNSEL

Lauren R. Coatney (argued), Christine Peek, Matthew Schechter, and James McManis, McManis Faulkner, San Jose, California, for Plaintiffs-Appellants.

Sujata T. Reuter (argued) and Jon A. Heaberlin, Rankin Stock Heaberlin, San Jose, California, for Defendant-Appellee.

OPINION

ADELMAN, District Judge:

Justine Smith was involved in the theft of a vehicle and the stabbing of its owner. During the course of their investigation of these crimes, the police learned that Smith was on probation and that the terms of her probation allowed warrantless searches of her person and residence. The police went to the house that she

had reported as her residence. Josephine Smith, Justine's mother, answered the door.¹ The officers, who did not have a warrant, told Josephine that they were there to conduct a probation search for Justine. Josephine refused to admit the officers to the home without a warrant. Despite her objection, the officers entered the home to search for Justine but did not find her.

Josephine and her minor granddaughter, A.S., sued several police officers and the City of Santa Clara, alleging that the search for Justine violated their constitutional rights under state and federal law. The jury returned a verdict for the defendants. The plaintiffs now appeal, arguing that under the Supreme Court's decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), the search of Josephine's home was unreasonable as a matter of law because the undisputed facts showed that Josephine was physically present at the time of the search and refused permission to search.

I.

A.

On October 4, 2010, Vahid Zarei reported to the San Jose Police Department that his car had been stolen. Zarei told police that he had just given Justine Smith a ride in the car and discovered that his spare key to the vehicle was missing. On October 7, 2010, Zarei's friend found the car in Santa Clara, California. Zarei and his friend then drove to Santa Clara to retrieve the car. When they arrived, but before they could get to the car, Justine and an unknown male entered the car and drove away. Justine was the driver. Zarei and

¹ For clarity, we will refer to Justine and Josephine Smith by their first names.

his friend followed the car in the friend's car. At some point the cars stopped and the unknown male exited Zarei's vehicle and stabbed Zarei in the stomach. The male got back into Zarei's car, and Justine drove away. Zarei was taken to the hospital with life-threatening injuries.

Santa Clara police officers investigated both the car theft and the stabbing. While at the hospital, they showed Zarei's friend a picture of Justine, and he identified her as the driver of the stolen car. The police then learned that in December 2009, a California court had placed Justine on probation for three years in connection with felony convictions for grand theft and forgery. As a condition of her probation, Justine agreed to warrantless searches of her residence.

The police contacted the probation department to determine Justine's whereabouts. On December 22, 2009, Justine reported her address to probation as 940 Gale Drive. This was the address of her mother's unit in a small, two-unit duplex. On January 6, 2010, Justine reported to the California Department of Motor Vehicles that her address was 942 Gale Drive, which was the address for the other unit in the duplex. In addition, two entries in a county database, one dated January 27, 2010, and the other dated May 14, 2010, listed Justine's address as 940 Gale Drive. Finally, on June 2, 2010, Justine once again reported to probation that her residence was 940 Gale Drive, but this time she added that she was in the process of moving out of her mother's house.

On October 10, 2010, officers began surveilling the Gale Drive duplex but did not see Justine. After waiting awhile, they knocked on the door to 940 Gale Drive and announced, "Probation Search. Open the door." Josephine opened the door, stated that Justine

did not live at the residence, and demanded that the officers produce a search warrant. When the officers explained that they needed to conduct a probation search for Justine, Josephine became angry and refused to allow them to enter.

The officers entered the home despite Josephine's objections. They did not find Justine, but they found in the garage a sofa with sheets lying on it, female clothing, and an unopened envelope addressed to Justine at the 940 Gale Drive address. Officers then told Josephine that they needed to search the 942 unit of the duplex, which was locked and, according to Josephine, rented to another tenant. When officers indicated that they might need to force entry, Josephine directed them to the key. Officers then searched the 942 unit but did not find Justine.

B.

After the search, Josephine and A.S. sued the City of Santa Clara and the individual police officers involved in the search, alleging violations of their constitutional rights under 42 U.S.C. § 1983 and California's Bane Act, Cal. Civ. Code § 52.1,² along with several other state-law claims.³ One of Josephine's claims was that the search of the duplex violated her Fourth Amendment right to be free from unreasonable searches and seizures. Josephine argued that the search was unreasonable because the officers had

² The Bane Act provides a cause of action for individuals whose "rights secured by" federal or California law have been interfered with "by threat, intimidation, or coercion." Cal. Civ. Code § 52.1(a)–(b).

³ For simplicity, from this point on we will refer to Josephine as the sole plaintiff, even though her minor granddaughter is also a plaintiff.

searched her home without a warrant or her consent. (She also challenged the manner in which the officers carried out the search, but we will not discuss that aspect of her claim, as it is not at issue in this appeal.)

The defendants moved for summary judgment on the Fourth Amendment claim. They argued that the warrantless search of the residence was permitted because Justine was on probation and the Supreme Court has held that officers may search a probationer's residence without a warrant if they have reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity. *See United States v. Knights*, 534 U.S. 112, 121 (2001). In opposition to the motion, Josephine argued that the Supreme Court's more recent decision in *Randolph* created an exception to the probation-search rule. In *Randolph*, the Court held that a warrantless search of a residence, when justified only by an occupant's consent to the search, is unreasonable as to a co-occupant when that co-occupant is physically present and objects to the search. 547 U.S. at 106. Josephine argued that, under *Randolph*, because she was present and objected to the search of her home, the search was unreasonable as to her.

The district court granted the defendants' motion for summary judgment on Josephine's § 1983 claim on the ground of qualified immunity, reasoning that it was not clearly established that *Randolph* created an exception to the probation-search rule. However, the court denied the motion for summary judgment on the Bane Act claim because qualified immunity of the kind applied to § 1983 claims does not apply to actions brought under the Bane Act. *See Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009). Thus, the court essentially allowed the federal Fourth Amendment

claim to proceed to trial through the vehicle of the California Bane Act.

The Bane Act claim was tried along with some related claims arising out of the search. Over Josephine's objection, the district court did not instruct the jury that Justine's consent was insufficient to make the search reasonable if Josephine was present and objected to the search. Josephine also sought judgment as a matter of law on the ground that it was undisputed that she was present and objected to the search and that therefore the search was unreasonable under *Randolph*. The district court denied the motion. The jury returned a verdict in favor of the defendants on all claims, and the district court entered judgment in their favor.

Josephine now appeals the judgment only as it relates to the Bane Act claim. She contends that the district court should have granted her motion for judgment as a matter of law because, under *Randolph*, her objection to the search required the officers to obtain a warrant before conducting a probation search for Justine. For the same reason, she argues that the district court should have instructed the jury to find the search unreasonable if it found that Josephine was present and objected to the search.

II.

Josephine's challenges to both the jury instructions and the district court's denial of her motion for judgment as a matter of law turn on the same question of Fourth Amendment law: Is a warrantless search of a residence that the police have probable cause to believe is the residence of a probationer, and that is otherwise reasonable as to the probationer, unreasonable as to a non-probationer occupant of the

residence who is present at the time of the search and refuses to consent to the search? We review the district court's resolution of this question of law de novo. *See Quicksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 755 (9th Cir. 2006) (review of denial of judgment as a matter of law de novo); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 784 (9th Cir. 2006) (review of whether the district court's jury instructions misstate the law is de novo).⁴

A.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (internal quotation marks omitted). One exception to this principle is that the police generally may search a home without a warrant if they have obtained voluntary consent from the individual whose home is searched. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (citing

⁴ Although Josephine's Bane Act claim is based on alleged violations of both the Fourth Amendment and the California Constitution, we do not understand Josephine to be arguing that there are material differences between the federal and state constitutions regarding unreasonable searches and seizures. That is, we do not understand her to be arguing that even if the search was reasonable under federal law, it could be deemed unreasonable as a matter of California state law, or vice versa. Thus, in this opinion, we apply federal law and assume without deciding that the same result would obtain under state law. *See Sacramento Cnty. Deputy Sheriffs' Ass'n v. County of Sacramento*, 59 Cal. Rptr. 2d 834, 845–46 (Ct. App. 1996) ("[C]ogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution." (quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1088 (Cal. 1990))).

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)). Under this “voluntary consent” rationale, a search will also be valid against an “absent, nonconsenting person” so long as the police obtain the consent of a person who possesses common authority over the home with the absent person. *United States v. Matlock*, 415 U.S. 164, 170–71 (1974). In *Randolph*, the Supreme Court recognized a limitation on warrantless consent searches of a home. In that case, the Court held that even if a person who apparently possesses common authority over a home consents to a warrantless search, the search is not reasonable as to a second occupant if that occupant is physically present and refuses permission to search. 547 U.S. at 120.

Another exception to the principle that warrantless searches of a home are unreasonable relates to persons who are on probation or parole. In *Griffin v. Wisconsin*, the Supreme Court found a search of a probationer’s residence reasonable even though it was conducted without a warrant. 483 U.S. 868, 880 (1987). The search in that case was conducted pursuant to a state regulation that permitted any probation officer to search a probationer’s home without a warrant as long as his supervisor approved and as long as there were “reasonable grounds” to believe that contraband would be found in the home. *Id.* at 870–71. In upholding the search, the Court noted that although a warrant was normally required to search a home, the state’s interest in supervising a probationer gave rise to “special needs” that permitted “a degree of impingement upon privacy that would not be constitutional if applied to the public at large.” *Id.* at 875. The Court then found that these special needs made the warrant

requirement impracticable. *Id.* at 875–78.⁵ The Court stated:

A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create.

Id. at 876 (citations omitted).

Some years later, the Supreme Court, in *Knights*, found a warrantless search of a California probationer’s home reasonable even though it was conducted by a sheriff’s deputy rather than a probation officer and the purpose of the search was not to supervise the probationer but to investigate a specific crime. 534 U.S. at 121. The Court began by noting that, in *Griffin*, it analyzed the reasonableness of a warrantless search by a probation officer under its “special needs” cases. *Id.* at 117–18. In *Knights*, the Court declined to use the special-needs approach used in *Griffin*. *See id.* The Court also declined to analyze the reasonableness of the search under the “consent” rationale of cases such as *Schneckloth* despite recognizing that the California Supreme Court used that rationale in deeming similar

⁵ The Court also found that the special needs relating to the probation regime justified replacing the normal requirement of probable cause to believe that contraband would be found in the probationer’s home with the lesser standard of reasonable grounds. *Griffin*, 483 U.S. at 878–80.

probation searches reasonable. *Id.* at 118 (citing *People v. Woods*, 981 P.2d 1019 (Cal. 1999)).

Instead of using either the special-needs rationale or the consent line of cases, the Court in *Knights* examined whether the search “was reasonable under [the Court’s] general Fourth Amendment approach of ‘examining the totality of the circumstances,’ with the probation search condition being a salient circumstance.” *Id.* (citation omitted) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)). Under this approach, the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *Id.* at 118–19. The Court determined that “Knights’ status as a probationer subject to a search condition” informed both sides of the reasonableness balance. *Id.* at 119. On the individual-privacy side of the balance, the Court found that the probation condition significantly diminished Knights’ reasonable expectation of privacy. *Id.* at 119–20. On the governmental interest side of the balance, the Court recognized that “the probationer ‘is more likely than the ordinary citizen to violate the law.’” *Id.* at 120 (quoting *Griffin*, 483 U.S. at 880). The Court also found that “probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.” *Id.* The Court reasoned that the state’s “interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise,

may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen.” *Id.* at 121. After balancing these respective interests, the Court concluded that a warrantless search of the home of a probationer subject to a search condition is reasonable as to the probationer if there is reasonable suspicion that criminal conduct is occurring.⁶ *Id.* The Court determined that the governmental interests were sufficiently weighty to justify “an intrusion on the probationer’s significantly diminished privacy interests.” *Id.*

B.

Randolph was a consent case. The Court held that when the only justification for a search of a residence is the consent given by a person with common authority over the premises, the search is unreasonable as to a second person who is physically present and refuses permission to search. 547 U.S. at 106. But the Supreme Court’s probation-search cases do not rest on a consent rationale. Rather, *Griffin* used a “special needs” rationale, 483 U.S. at 875–76, while *Knights* expressly eschewed the California Supreme Court’s consent rationale in favor of the “totality of the circumstances” approach, 534 U.S. at 118. Moreover, in a later case involving parole searches, the U.S. Supreme

⁶ The Court in *Knights* left open the possibility that the police can search a probationer’s residence on less suspicion or even none at all. *See Knights*, 534 U.S. at 120 n.6. We have since held that “a suspicionless search, conducted pursuant to a suspicionless-search condition of a violent felon’s probation agreement, does not violate the Fourth Amendment.” *United States v. King*, 736 F.3d 805, 810 (9th Cir. 2013) (leaving open whether the same is true for “probationers who have not accepted a suspicionless-search condition, or of lower level offenders who have accepted a suspicionless-search condition”).

Court again expressly declined to employ a consent rationale. *See Samson v. California*, 547 U.S. 843, 852 n.3 (2006).

Before the Supreme Court decided *Randolph*, the California Supreme Court used a consent rationale to justify warrantless probation searches that affected third parties. *Woods* found a probation search of a residence reasonable as to a non-probationer co-occupant on the ground that the probationer's search condition qualified as consent. 981 P.2d 1019, 1023–28 (1999). The court used the “common authority” principle recognized in *Matlock* to determine that the probationer's search condition rendered the search reasonable as to the non-probationer. *Id.* at 1024–25. Since *Randolph* was decided, however, the California Supreme Court has not considered whether a warrantless probation search of a residence would be unreasonable as to a present and objecting non-probationer co-occupant. Because we do not need to predict how the California Supreme Court would answer this question of federal law, we will not further explore whether that court's approach to probation-search cases is affected by *Randolph*. Rather, we apply the cases of the U.S. Supreme Court.

Under the Supreme Court's cases, probation searches are not analyzed as consent searches. Thus, *Randolph*, which creates an exception to the consent rule, is not directly applicable. Instead, the question is whether a warrantless probation search that affects the rights of a third party is reasonable under the totality of the circumstances. *See Knights*, 534 U.S. at 118–19. To answer this question, we balance the degree to which the search intrudes upon the third party's privacy against the degree to which the search is needed for the promotion of legitimate governmental interests.

Id. at 119. A non-probationer, of course, has a higher expectation of privacy than someone who is on probation, and therefore the privacy interest in this case is greater than it would be if the search affected only the probationer. But we conclude that, under the facts of this case, the governmental interests at stake were sufficiently great that the warrantless search of the duplex over Josephine's objection was reasonable.

It is undisputed that the police knew, at the time of the search, that Justine was serving a felony probation term for serious offenses. It is further undisputed that the police had probable cause to believe that Justine had just been involved in the theft of an automobile and a stabbing, and that she was still at large. As the Court recognized in *Knights*, one of the governmental interests justifying warrantless probation searches is the need to protect the public from the probationer, who is more likely than the ordinary citizen to reoffend. *Id.* at 121. Obviously, once the government has probable cause to believe that the probationer has actually reoffended by participating in a violent felony, the government's need to locate the probationer and protect the public is heightened. This heightened interest in locating the probationer is sufficient to outweigh a third party's privacy interest in the home that she shares with the probationer. Therefore, under the undisputed facts of this case, we conclude that the warrantless search of the home over Josephine's objection was reasonable as a matter of law.⁷

⁷ In our discussion so far, we have assumed that the police had probable cause to believe that the Gale Drive duplex was Justine's residence. However, this was a disputed issue at trial, and we note that a probation search of a residence is unreasonable if the police lack probable cause to believe that the probationer actually resides there. *See Motley v. Parks*, 432 F.3d

We stress that our conclusion is limited to the facts of this case, where the police had probable cause to believe that the probationer, who was on probation in connection with serious offenses, had just participated in a violent felony and was still at large. We express no view as to what would happen in a case in which the police conduct a search—over the objection of a present and objecting co-occupant—of a probationer’s residence who is on probation for offenses that are neither violent nor serious, and who is not suspected of involvement in a subsequent offense.

C.

Because under federal precedent probation and parole searches are not consent searches, and therefore *Randolph* does not directly apply to this case, it follows that the district court correctly denied the Josephine’s motion for judgment as a matter of law, which sought judgment on the ground that Josephine’s objection “trumped” any consent that Justine may have given as a term of her probation. The search was not automatically rendered unreasonable by Josephine’s presence at the time of the search and refusal to grant permission to search. Moreover, under the undisputed facts, the governmental interests at stake were sufficient as a matter of law to make a warrantless probation search of the duplex reasonable over Josephine’s objection. Therefore, the district court did not err in

1072, 1080 (9th Cir. 2005) (en banc), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc). Here, the jury was correctly instructed to find the search of the duplex reasonable only if the police had probable cause to believe that Justine resided there. Josephine contends that the evidence did not support the jury’s conclusion that the police had such probable cause, but as we discuss below, the evidence was sufficient to support the verdict on this issue.

refusing to instruct the jury that Justine's consent was insufficient if Josephine was present and refused to consent to the search.

One aspect of the jury instructions deserves additional discussion. The instructions state that the search of the duplex without a warrant was reasonable provided that the defendants proved that "Justine Smith consented to the search as a probationer." As we have discussed, the Supreme Court does not consider warrantless probation searches reasonable because of the probationer's consent. Rather, the Court uses the totality-of-the-circumstances approach. Thus, the jury instructions, which were framed in terms of consent, did not correctly state the legal rationale for finding a probation search reasonable. (This was understandable, in that the pre-*Randolph* California cases use the consent rationale.) However, as we have discussed, the facts establishing that the entry into the duplex was reasonable under the totality of the circumstances were undisputed. That is, there was no dispute that the police knew that Justine was on probation for serious offenses, that she was subject to a warrantless search condition, and that she had just been identified as an accomplice to a car theft and stabbing. Under these facts, the search was reasonable as a matter of law despite Josephine's objection. Thus, the court's instructing the jury that the search would be reasonable if it was based on Justine's consent as a term of probation was harmless. *See Davis v. Mason County*, 927 F.2d 1473, 1482 (9th Cir. 1991) (noting that error in jury instruction is harmless when subject of instruction is resolved as a matter of law).

D.

As we mentioned above, an additional requirement for a warrantless probation search is that the police have probable cause that the home they are searching is actually the home of the probationer. *Motley*, 432 F.3d at 1080. In her reply brief, Josephine contends that the evidence at trial was insufficient to permit the jury to reasonably conclude that the officers had probable cause to believe that Justine resided there. This argument, which has nothing to do with *Randolph*, is a potential alternative ground for reversing the district court's denial of the plaintiff's motion for judgment as a matter of law. But Josephine did not raise this alternative ground for reversing the denial of the motion in her opening brief, and thus we are inclined to consider it waived. *See, e.g., Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) (argument raised for first time in reply brief is waived).

In any event, the evidence at trial was sufficient to permit the jury to find that the officers had probable cause to believe that Justine resided at the duplex. The evidence allowed the jury to find that, on the morning of the search, officers retrieved records from three separate sources—the probation department, county databases, and the state DMV—indicating that Justine lived at the duplex. Most of these documents listed her address as 940 Gale Drive, but 942 Gale Drive was also listed once. Josephine argues that Justine's listing both addresses required the police to believe that Justine moved back and forth between both addresses in a short period of time, which Josephine thinks is incredible and prevented the police from having probable cause to believe that Justine lived at either address. However, because both addresses belonged to the same duplex, the jury could

have reasonably concluded that Justine's having used both addresses did not cast doubt on whether she lived at the duplex. It is not as though the different addresses were for different homes in different parts of town.

Josephine also points to a police warrant report involving Justine that contains a note stating that, as of June 1, 2009, Justine was "not living on Gale." But this report was created before Justine was even placed on probation in December 2009 or reported to the probation department that she lived at the duplex. This report also predates the entries in the DMV and county databases listing the Gale Drive addresses as her residence. Thus, while the report might have cast doubt on whether Justine lived at the duplex in June 2009, it did not prevent the jury from finding that the officers had probable cause to believe that she lived at the duplex at the time of the search in October 2010.

III.

We conclude that the district court did not err in denying Josephine's motion for judgment as a matter of law or in instructing the jury.

AFFIRM

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No.: 5:11-cv-03999-LHK

JOSEPHINE SMITH, an individual, *et al.*,
Plaintiffs,

v.

CITY OF SANTA CLARA, a public entity, *et al.*,
Defendants.

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

Plaintiffs Josephine Smith and A.S., a minor appearing through her guardian ad litem, bring this action seeking damages against the City of Santa Clara, the City of Santa Clara Police Department, Detective Kenneth Henderson, Sergeant Greg Hill, and Clay Rojas pursuant to 42 U.S.C. § 1983, California Civil Code §§ 52.1-3, and several state common law causes of action. Plaintiff¹ alleges that her home was unreasonably, and therefore unlawfully, searched. Plaintiff also alleges that she was unreasonably, and therefore

¹ Though both Josephine Smith and A.S. are named as Plaintiffs in this matter, the claims relate primarily to Josephine Smith. Accordingly, for the sake of simplicity, the Court will refer to Josephine Smith as "Plaintiff" in this Order, although A.S. remains a Plaintiff as well.

unlawfully, detained and arrested in violation of her Fourth Amendment rights. Additionally, Plaintiff alleges that excessive force was used in the course of the unlawful detention, and that the detention and associated force constituted retaliation for her exercise of her First Amendment rights. Finally, Plaintiff alleges that the conduct of the officers who searched her home constituted assault, battery, negligence, and negligent and intentional infliction of emotional distress.

Defendants City of Santa Clara (“the City”), City of Santa Clara Police Department (“the Police Department”), Detective Kenneth Henderson (“Detective Henderson”), and Sergeant Greg Hill (“Sergeant Hill”)² now move for partial summary judgment on Plaintiffs’ § 1983 claims for invasion of privacy, false arrest, illegal search, and First Amendment retaliation, and Plaintiffs’ state law claims to the extent that they are based on improper detention and search. ECF No. 54. Defendant Henderson moves for summary judgment on all claims. Sergeant Hill, the City, and the Police Department do not move for summary judgment on the excessive force claim or excessive force-related elements of the state law claims. Defendant Clay Rojas (“Defendant Rojas”) has moved separately for summary judgment by filing a joinder in the other Defendants’ motion, along with a separate brief. ECF No. 64. Plaintiff filed oppositions to both motions, ECF

² In this Order, the Court will refer to the City, the Police Department, Detective Henderson, and Sergeant Hill collectively as “Defendants,” because these four defendants together brought one motion. Clay Rojas is also a Defendant, but brought a separate motion for summary judgment. Accordingly, the Court will refer to him as “Defendant Rojas.” When the Court intends to refer to all of the defendants in this case including Rojas, the Court will so indicate.

Nos. 68-69. The original group of Defendants filed a Reply, ECF No. 80, in which Defendant Rojas filed a joinder. ECF No. 84. Defendant Rojas also filed a separate reply. ECF No. 83.³ The Court will address the first Defendants' motion first, and will address Defendant Rojas's motion separately in this Order.

Pursuant to Civil Local Rule 7-1(b), the Court deemed both Defendants' motions suitable for decision without oral argument and vacated the December 13, 2012 hearing on these motions. ECF No. 85. Having considered the parties' submissions and arguments as well as the relevant law, the Court GRANTS in part and DENIES in part all Defendants' motions for partial summary judgment.

I. BACKGROUND

On October 7, 2010, Vahid Zarei was stabbed while attempting to retrieve his car, which had been stolen. *See* Decl. of Daniel Burde at ¶ 6. Zarei could not identify his attacker, but recognized the woman who was with the attacker, and who drove the car away from the scene, as an acquaintance named Justine. *Id.* at ¶ 5; Decl. of Tyson Shearer ("Shearer Decl.") at ¶ 9. A witness identified a photograph of Justine Smith (hereinafter, "Justine"), pulled from a police mug shot database, as the woman who had been with the attacker. Shearer Decl. at ¶ 10.

Detective Michael Carlton (not a defendant here), one of the officers dispatched to respond to the stabbing incident, discovered that Justine was on active

³ Plaintiff also submitted separate evidentiary objections. ECF No. 70. However, Civil Local Rule 7-3 requires that "[a]ny evidentiary and procedural objections to the motion must be contained within the brief or memorandum." Accordingly, the Court disregards Plaintiff's separately filed objections.

probation. *See* Carlton Depo. at 95:5-7. Detective Carlton obtained a DMV printout listing Justine's address as 942 Gale Drive in Campbell, California. Exh. I to Decl. of Michael C. Serverian in support of Defendants' Partial Motion for Summary Judgment ("Serverian Decl."); Carlton Depo. at 103:5-8. Detective Carlton then called the probation department, Carlton Depo. at 93:4-94:22, who sent via fax several documents listing Justine's address as 940 Gale Drive in Campbell. Exh. H to the Serverian Decl.; Carlton Depo. at 105:3-5. Those documents included:

- An undated probation department "Assessment" form, apparently completed by Justine herself, listing Justine's address as 940 Gale Drive, with the notation "just moving back. Before I lived there for 10 years." Exh. H to Serverian Decl.
- A probation report dated June 2, 2010, apparently filled out by Justine herself, listing her address as 940 Gale Drive, and the notation "in process of moving out of mother's house." *Id.*
- A partial probation report dated December 22, 2009, listing 940 Gale Drive as Justine's address. The report also indicates that Josephine Smith and A.S. reside at 940 Gale Drive with Justine. *Id.*
- A "Probation Field Sheet" dated October 7, 2010, listing Justine's address as 940 Gale Drive, and listing Josephine Smith and A.S. as "Others in Home." *Id.*

Defendant Rojas, then an officer on the Special Enforcement Team tasked with conducting the probation search, separately obtained information about Justine from the County's database of arrestees. The documents obtained by Defendant Rojas included:

- The same DMV information originally obtained by Detective Carlton, listing Justine’s address from February 22, 2009 through December 30, 2009 as 942 Gale Drive, and from January 27, 2010 through May 14, 2010 as 940 Gale Drive. Exh. I to Serverian Decl.
- A Santa Clara County “Arrest and Disposition History” for Justine dated October 7, 2010, identified by Sergeant Hill as a “CJIC Printout,” (for “Criminal Justice Information Control”), which notes that Justine was on probation with a search condition, but does not list an address. Exh. J to Serverian Decl.
- A second CJIC printout entitled “Query Probation Grant,” which again notes that Justine was on probation, with a search condition, scheduled to terminate on October 9, 2012, and not listing any address. Exh. K to Serverian Decl.
- A third CJIC printout entitled “List emergency contacts,” identifying “Josie Smith” as the emergency contact for Justine. The address listed for Josie Smith is 942 Gale Drive as of 12/5/2001, and no address is listed as of 3/31/2009. Exh. L to Serverian Decl.
- A fourth CJIC printout entitled “Query person detail,” listing Justine’s address as 940 Gale Drive. Exh. M to Serverian Decl.

940 and 942 Gale Drive comprise a duplex owned by Plaintiff Josephine Smith (“the duplex”). *See* Decl. of Josephine Smith in support of Plaintiffs’ opposition to Defendants’ motion for partial summary judgment (“Smith Decl.”) at ¶ 2. On the basis of the information detailed above that had been collected by Detective Carlton and Officer Rojas, the police determined that

Justine resided at that duplex, and that the duplex would be the appropriate place to search for her. Two officers, Detective Henderson and Detective Shimada (not a defendant here), were assigned to conduct surveillance of the duplex. Henderson Depo. at 30:6-17; 39:14-16. They watched the duplex from approximately 10:00 a.m. until approximately 3:00 p.m., but did not see Justine or anyone fitting the description of the attacker. Toward the end of the surveillance period, Detective Henderson was informed that a team of officers would be arriving soon to conduct a probation search of the premises, looking for Justine. *Id.* at 45:14-21. When the officers arrived, Detective Henderson and Detective Shimada were assigned to move to the adjoining street, where they would watch the back of the house. *Id.* at 51:16-52:7.

Several officers, including Officer Rojas and Sergeant Hill, went to the door of the 940 unit, where the door was open, but the metal security screen was closed. *See* Hill Depo. at 52:7-12; Smith Depo. at 88:19-20. Plaintiff has testified that when she answered the door, the man she found was holding a battering ram, and that though he did not identify himself, she recognized that he was a police officer. *See* Smith Decl. at ¶ 5. The officers spoke to Plaintiff. Defendants contend that they informed Plaintiff that they were there to conduct a probation search. *See* Hill Depo. at 54:20-24. Plaintiff claims that she was told only that they were looking for Justine, and that they needed to search the house – not that this was a probation search. *See* Smith Depo. at 89:14-90:14.

The parties agree that Plaintiff did not allow them entry, and that Defendant Rojas then removed Plaintiff from the doorway and placed her in handcuffs, to allow the officers to enter and search the house. Hill

Depo. at 56:10-15. According to Plaintiff, Plaintiff asked Defendant Rojas to close the security screen to avoid scaring her eight-year-old granddaughter, A.S., and at this point Defendant Rojas “lifted [her] off the ground and pulled [her] out of [the] house. After pulling [her] outside, he pushed [her] into a fence. He twisted [her] arms behind [her] back.” *Id.* at ¶ 7. Plaintiff further testified that when she indicated to Defendant Rojas that she was not under arrest, he said “You are now,” and handcuffed her. *Id.* at ¶ 8; Smith Depo. at 96:21. Defendant Rojas disputes this description of the encounter. Rojas Depo. at 56:2-57:23. Another officer then waited with her outside the house while Defendant Rojas and other officers searched the house. A total of six officers entered the 940 unit. *See* Defendants’ Response to Special Interrogatory No. 6, Rose Decl. Exh. L.

The officers did not find anyone else in the house, though they did find that the garage contained a bed, female clothing, a desk, and a phone bill addressed to Justine at that address. The officers then asked Plaintiff to let them into the 942 unit, but she explained that the unit was rented out to tenants, and that Justine did not live there. Hill Depo. at 69:14-18; Smith Decl. at ¶ 11. The officers insisted on searching the unit, and obtained the keys from Plaintiff, who showed officers where to find them in a drawer in the 940 unit. The officers then entered the 942 unit, where they found no sign of Justine. Most of the officers then left the scene. Detective Henderson then returned to Gale Drive from his position behind the house, spoke to Plaintiff, and removed the handcuffs. He also briefly went inside the 940 unit.

The remaining officers, including Detective Henderson, then spoke to Plaintiff further. They asked her some

questions about Justine, but Plaintiff indicated that she did not know where to find Justine. Plaintiff has testified that after the officers left, she felt pain in her arms, and has submitted photographic evidence of bruises on both arms. *See* Smith Depo. at 18:19-23:4; Exh. H to the Decl. of Brandon Rose (photographs).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), “the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if the evidence is such that “a reasonable jury could return a verdict for the nonmoving party.” *See id.* “[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.” *Id.* at 254. The question is “whether a jury could reasonably find either that the [moving party] proved his case by the quality and quantity of evidence required by the governing law or that he did not.” *Id.* “[A]ll justifiable inferences must be drawn in [the nonmovant’s] favor.” *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc) (citing *Liberty Lobby*, 477 U.S. at 255).

The moving party bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatory answers, admissions and affidavits, if any, that it contends demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party opposing a

properly supported motion for summary judgment “may not rest upon the mere allegations or denials of [that] party’s pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *See* Fed. R. Civ. P. 56(e); *see also Liberty Lobby*, 477 U.S. at 250. The opposing party need not show the issue will be resolved conclusively in its favor. *See Liberty Lobby*, 477 U.S. at 248–49. All that is necessary is submission of sufficient evidence to create a material factual dispute, thereby requiring a jury or judge to resolve the parties’ differing versions at trial. *See id.*

The moving party bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party, but on an issue for which the opposing party will have the burden of proof at trial, the party moving for summary judgment need only point out “that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325; *accord Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Once the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, “specific facts showing that there is a genuine issue for trial.” *Liberty Lobby*, 477 U.S. at 250.

III. DISCUSSION

A plaintiff asserting a claim under § 1983 must demonstrate that (1) the action occurred “under color of state law,” and (2) the action resulted in the deprivation of a constitutional or federal statutory right. *Leer*

v. Murphy, 844 F.2d 628, 632-33 (9th Cir. 1988) (internal citations omitted); 42 U.S.C. § 1983 (2006) (Section 1983 imposes civil liability on any person who, under color of state law, “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.”). The parties do not dispute that the officers were acting under color of state law. They dispute only whether Defendants violated Plaintiffs’ Fourth Amendment rights by (1) searching Ms. Smith’s home, and (2) detaining Ms. Smith during the search. Because Plaintiff bears the burden of proof at trial on her § 1983 claims, Defendants, as the moving party, bear the initial burden on summary judgment of pointing out “an absence of evidence to support [Plaintiffs’] case.” *Celotex Corp.*, 477 U.S. at 325.

Sergeant Hill and Detective Henderson also argue that they should be granted summary judgment on Plaintiff’s § 1983 claims because they are entitled to qualified immunity. The doctrine of qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Because qualified immunity is an immunity from suit, rather than a defense to liability, it is effectively lost if a case is erroneously permitted to go to trial. *Id.* For this reason, the Supreme Court has stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Id.* Therefore, if, drawing all reasonable inferences in favor of the nonmoving party, it is clear as a matter of law that

the defendants are entitled to qualified immunity, summary judgment should be granted. *See Wilkinson v. Torres*, 610 F.3d 546, 548 (9th Cir. 2010) (reversing denial of summary judgment where defendants were entitled to qualified immunity as a matter of law). Where a defendant's entitlement to qualified immunity turns on genuinely disputed issues of fact, however, summary judgment is not appropriate. *See Espinosa v. City and County of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010) (affirming denial of summary judgment because there were genuine issues of fact regarding whether officers violated plaintiff's Fourth Amendment rights and whether those rights were clearly established); *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003) ("If a genuine issue of material fact exists that prevents a determination of qualified immunity at summary judgment, the case must proceed to trial.").

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-part approach for analyzing qualified immunity. The analysis contains both a constitutional inquiry and an immunity inquiry. *Johnson v. County of Los Angeles*, 340 F.3d 787, 791 (9th Cir. 2003). The constitutional inquiry requires the court to determine this threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. If the Court determines that a constitutional violation could be made out based on the parties' submissions, the second step is to determine whether the right was clearly established. *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

The Supreme Court recently held that the *sequence* of analysis set forth in *Saucier* is not mandatory and that a court may exercise its sound discretion in determining which of the two prongs of the qualified immunity analysis to address first. *Pearson*, 129 555 U.S. at 241-42. Thus, in some cases, it may be unnecessary to reach the ultimate constitutional question when officers would be entitled to qualified immunity in an event, a result consistent with longstanding principles of judicial restraint.

A. Detective Henderson

Detective Henderson argues that he has no liability on any of Plaintiff's claims because he did not participate in the search that gave rise to all of Plaintiff's claims. Plaintiff claims that Detective Henderson did participate, and that even if he did not actually search the house, that he can be liable under the "integral participant" doctrine.

The evidence as to whether Detective Henderson actually participated in a search of Plaintiff's property is equivocal. The evidence shows that Detective Henderson was assigned primarily to surveillance during the incident and spent much of the time parked on the street behind the house. *See* Henderson Depo. at 30:10-12. Detective Henderson also testified that he did not search either the 940 or 942 unit. *See id.* at 59:23-25 ("Q: Did you go in and search any of these addresses? A: No."). Detective Henderson did, however, testify that he "walked into the living room" of the 940 unit after some of the other officers had left. *Id.* at 60:3. Moreover, in Defendants' response to Plaintiffs' request for admission, Defendants specifically admitted that Detective Henderson searched the 940 unit. Rose Decl. Exh. M at No. 33. Even if Detective Henderson entered the unit only after most

of the officers had left the scene, there remains a question as to whether his entry could be considered part of the search. Though the question is close, the Court finds, that, given the conflicting nature of the evidence concerning the precise nature and level of Detective Henderson's participation in the incident, there remains a genuine issue of material fact as to Detective Henderson's liability. Accordingly, Defendants' motion for summary judgment that Detective Henderson has no liability because he did not participate in the incident is DENIED. However, the fact that Detective Henderson may have participated in the search does not automatically defeat his motion for summary judgment as to the search and seizure-related claims on which the other defendants have moved. Rather, Detective Henderson may still establish that he is entitled to summary judgment on the search and seizure claims, along with the other defendants. Moreover, Detective Henderson may yet prove at trial that he did not actually participate in any search.

B. The Search

Detective Henderson and Sergeant Hill move for summary judgment that their search of the duplex was reasonable, and that even if it was not, they are entitled to qualified immunity because any law rendering the search unreasonable was not clearly established. Defendants present two reasons why the search was reasonable: (1) that it was a probation search for which consent had previously been given as a condition of Justine's probation; and (2) that it was legal as a protective sweep pursuant to *Maryland v. Buie*, 494 U.S. 325 (1990). Because the Court finds that it was not clearly established at the time of the search that the officers' conduct was unconstitutional, the Court need not consider the second prong of the

qualified immunity analysis, concerning whether the search was actually permissible under the Fourth Amendment. In this case, the Court, mindful of the Supreme Court's guidance in *Pearson* 555 U.S. 223, finds that addressing the underlying Constitutional question that would have no effect on the outcome here would not be a wise use of judicial resources. Resolving the question would entail analysis of a number of complicated issues not clearly presented or briefed, as noted below, and would thus consume precious judicial resources while not providing a good opportunity to advance Fourth Amendment law.

Probationers may consent to future searches as a condition of probation. There is no dispute here that Justine had given such consent as a condition of her probation. Plaintiff articulates two arguments for why this consent did not render the search of Plaintiff's home reasonable: (1) that police did not have probable cause to believe that Justine lived there; and (2) that even if Justine did live there, Plaintiff's explicit refusal of consent trumped Justine's consent to the search.

In order to search a house without a warrant in conjunction with a search condition, officers must have a probable cause to believe that the target of the search actually lives at the address to be searched.⁴

⁴ Much of the law in this area developed in the context of parole searches, not probation searches. Though the Ninth Circuit has recently made clear that the two contexts can entail different analyses under the Fourth Amendment, *see United States v King*, 687 F.3d 1189 (9th Cir. 2012), at the time of the incident – in October, 2010 – the Ninth Circuit had treated the two contexts interchangeably. *See Motley v. Parks*, 432 F.3d 1072, 1083 n.9 (9th Cir. 2005) (“We have consistently recognized that there is no constitutional difference between probation and parole for purposes of the fourth amendment.” (internal quotation and citations

See Motley v. Parks, 432 F.3d 1072, 1080 (9th Cir. 2005). Plaintiff argues that the officers did not have probable cause because none of the officers actually spoke to Justine’s probation officer, and because the documents the officers relied on did not contain “some indicia of reliability.” Opp’n at 7. The Court finds that, whether or not the search was reasonable as a matter of law, the officers were reasonable to believe that the documents they had were sufficient to constitute probable cause that Justine lived at the duplex. The officers had documents from three separate sources (probation, the CJIC, and the DMV), all of which indicated that the 940 and 942 Gale Drive addresses were Justine’s address. None of the documents contained any other address for Justine within the last ten years. *Portnoy v. City of Davis*, the case Plaintiff cites wherein a court in a different district found an absence of probable cause, is inapposite. In that case, the police had only the say-so over the phone of someone at the probation department that the target lived at the address they intended to search. *Portnoy*, 663 F. Supp.2d 949, 954. Additionally, in *Portnoy*, there was some confusion about the actual correct house number, the target was actually in custody at the time, and the people living at the address were unrelated to the target, and had been living there nearly a year – in other words, there were several red flags that should have alerted the police that they had the wrong address. *Id.* This case is markedly different. The police had documents from three separate sources, all listing the Gale Drive duplex as Justine’s address. The reports listing the address were generated that

omitted). Thus, for purposes of the qualified immunity analysis, law concerning a parole search is relevant to what the officers would reasonably have believed was permissible.

same morning, and at least one of them had been specifically updated to verify the Gale Drive address only a few months before. The police knew that Justine was not in custody, because a witness had reported seeing her participate in a violent crime just that morning. In the absence of any other address for Justine, it cannot be said that it was clearly established that the largely consistent information the officers had was not sufficient to constitute probable cause. Accordingly, the officers are entitled to qualified immunity on the issue of whether the search was legal.⁵

Regarding Plaintiff's refusal to consent to the search, it is true that by the time of the incident in 2010, the Supreme Court had decided *Georgia v. Randolph*, 547 U.S. 103 (2006), which established that where two residents are both present and one consents while the other objects to the search, the objection trumps the consent. However, it was not clear at the time – and indeed, is still unclear – whether this rule applies to a probation search. Indeed, Courts have explained again and again that probation and parole are special situations with needs that differ from other types of situations. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (“A State’s operation of a

⁵ Plaintiff makes much of her previous encounters with the San Jose and Santa Clara police departments concerning previous searches for Justine, in which she had told officers that Justine did not live with her. However, there is no evidence that these officers knew of those previous encounters. Because the qualified immunity analysis “shield[s] an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law,” *Pearson*, 555 U.S. at 245, Plaintiff's previous experiences that were unknown to these officers do not bear on the question of whether these officers behaved reasonably at the time of the October 7, 2010 incident.

probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents ‘special needs’ beyond normal law enforcement.”). Thus, officers would be reasonable to believe that a rule that applies to searches generally does not apply the same way to probation searches. At the very least, the *Randolph* rule is in tension with the rule allowing probation searches on a finding of probable cause that the target lives at the address. It was thus not clearly established that Plaintiff’s refusal could or should trump the consent included as a condition of Justine’s probation. Because it was not clearly established that the *Randolph* rule would apply in such a situation, the officers are immune from suit on this issue.

Though under *Saucier* and *Pearson* this Court has the authority to decide the underlying constitutional question, the Court does not think this is the appropriate time to do so. In particular, the law concerning probation and parole appears to be in flux in the Ninth Circuit, *see United States v. King*, 687 F.3d 1189 (9th Cir. 2012), and this case, with its issues of consent and allegations of excessive force, does not present an especially good opportunity to develop that law. Moreover, the parties have not addressed this distinction in their briefing. Accordingly, the Court declines to resolve the underlying constitutional question of whether the Fourth Amendment permits a probation search where another resident of the house is present and objects.

Plaintiff additionally alleges that even if the officers were entitled to conduct a search, they were not entitled to search the entire property, but rather, were obligated to ask Plaintiff to which parts of the property

Justine had access. However, Plaintiff cites no authority that would clearly establish such a requirement. Plaintiff relies primarily on *U.S. v. Davis*, 932 F.2d 752 (9th Cir. 1991). In *Davis*, the police searched a locked safe found in an apartment shared by a probationer and a roommate. The Ninth Circuit held that the police had not exceeded the scope of a permissible probation search when they searched the safe without a reasonable suspicion that it belonged to the probationer, and not the roommate. *Id.* at 758-59. The Ninth Circuit in *Davis* rejected a rule imposing on officers a general duty to inquire as to ownership or control of an object to be searched. *See id.* at 760. Given the holding that there is no general duty to inquire, the Court finds that there was no clearly established law rendering the officers' search of the entire duplex unreasonable.

Finally, Plaintiff alleges that Defendants violated the knock-notice rule, a judicially created Fourth Amendment-based rule that officers must announce their identity and purpose before they can forcibly enter a dwelling. *See Richards v. Wisconsin*, 520 U.S. 385 (1997). California also has a knock-notice statute, though Plaintiff has not specifically alleged violation of the California statute. As an initial matter, Plaintiff did not plead violation of this knock-notice rule as grounds for any of her five causes of action rooted in § 1983. But even if the claim were properly brought, Plaintiff has not established that the officers' conduct violated clearly established law, even fully accepting Plaintiff's version of the facts. Plaintiff admits that she recognized the officers as police officers, and that they told her they were looking for Justine and intended to search the house for Justine. *See Smith Decl.* at ¶¶ 5-6. Moreover, Plaintiff testified at deposition that she knew Justine was placed on probation in 2009.

Smith Depo. at 89:13-17. This Court is aware of no precedent requiring certain “magic words” to satisfy the knock-notice requirement. Because it was apparent to Plaintiff that the officers were police officers; that they were looking for Justine, who was on probation; and that they intended to search the house, the officers would have been fully reasonable to believe that their notice obligations had been discharged. They are thus entitled to qualified immunity for any violation of the knock-notice rule that could inhere in their conduct.

Having found that the officers were reasonable to believe that their search was legal as a probation search, the Court need not reach the question of whether the search was also justified as a protective sweep. In conclusion, Defendants’ motion for summary judgment is GRANTED on grounds of qualified immunity as to Sergeant Hill and Detective Henderson’s liability for the search.

C. The Detention

Plaintiff also claims that she was wrongly arrested, in violation of her Fourth Amendment rights. Defendants claim that they can have no liability and are entitled to qualified immunity because they legally detained Plaintiff incident to a lawful search.

It is clearly established that officers may detain an individual, and may even use handcuffs to do so,⁶ to allow the completion of a lawful search. *See Muehler v.*

⁶ The Court does not find that the use of handcuffs was necessarily reasonable in this case. Rather, the Court notes only that the mere fact that handcuffs were used does not transform what would otherwise be a detention incident to search into an arrest. Plaintiff may still argue at trial that the use of handcuffs in this case constituted excessive force.

Mena, 544 U.S. 93, 99 (2005) (upholding the handcuffing and detention of occupants during the search of a home and noting that “[a]n officer’s authority to detain incident to a search is categorical.”); *Michigan v. Summers*, 452 U.S. 692 (1981) (valid search warrant conveys the authority to detain occupants during the search). Moreover, the Ninth Circuit has explicitly held that it is lawful for officers to detain the occupants of a house, including family members of a probationer who used that address, while they conduct a lawful probation search. *See Sanchez v. Canales*, 574 F.3d 1169 (2009). Although *Sanchez* has now been called into question because it relies, in part, on the now-overruled proposition that there is no difference between a parole search and a probation search, *see King*, 687 F.3d at 1189, *Sanchez* was clearly good law at the time of the incident, in October, 2010. The officers were thus entitled to rely on it. As explained above, the officers were reasonable to believe that their probation search was lawful. Accordingly, to the extent that Plaintiff’s claim is based on her being detained at all while the officers searched her house, the officers are clearly entitled to summary judgment on grounds of qualified immunity.⁷ Thus, Sergeant

⁷ Plaintiff argues extensively that she was arrested, rather than detained. However, all of the cases Plaintiff cites in addressing this distinction involve *Terry* stops, and whether a detention made in the context of an investigatory stop in some public place rose to the level of an arrest. *See* Opp’n at 14-15. Plaintiff was not stopped somewhere out in public for investigatory purposes, but rather restrained at her own home while the officers executed what they reasonably believed to be a lawful probation search. Because Courts have explicitly recognized the type of detention that occurred here as a lawful type of detention as distinct from the brief investigatory detention commonly referred to as a *Terry* stop, the Court does not find it necessary to analyze whether, had

Hill and Detective Henderson's motion for summary judgment on Plaintiff's § 1983 claims based on illegal detention is GRANTED on grounds of qualified immunity.

The Court need not decide the complicated and now unsettled question of whether, after *King*, a detention incident to a probation search, as opposed a parole search, remains lawful. There are many potentially significant ramifications of a decision regarding the differences between parole and probation searches, and as explained above, this case presents several complications that counsel against addressing the issue, unbriefed by the parties, at this time.

The only remaining question concerns the manner in which Plaintiff was detained. *See Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006) ("We interpret the Supreme Court's language to mean that the duration of a detention may be coextensive with the period of a search, and require no further justification. The police do not, however, have unfettered authority to detain a building's occupants in any way they see fit. *Muehler* confirms an officer's authority to detain a building's occupants during a search so long as the officer conducts the detention in a reasonable manner.") (internal citation omitted). However, questions about the manner, rather than the fact, of detention concern not the question of illegal detention itself, but rather of excessive force. Defendants have not moved for summary judgment on Plaintiff's excessive force claims. Thus, the Court will not consider the force and manner used in restraining Plaintiff during what, under *Muehler* and *Sanchez*, was an authorized

the detention occurred under different circumstances, it might have been considered an arrest.

detention incident to search. The question of excessive force in the detention of Plaintiff remains a question for trial. To the extent that Defendants intend to move for summary judgment on questions concerning the manner of detention, the motion is DENIED.

D. *Monell* Liability

In order to establish that the City or Police Department is liable for a constitutional violation, Plaintiff must show that a policy, custom, or practice of the City or Police Department was the “moving force” behind any such alleged constitutional injury. *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978); accord *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011). The Ninth Circuit has made clear that “liability for improper custom may not be predicated on isolated or sporadic incidents.” *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011) (quoting *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (internal quotation marks and citations omitted)). Rather, to hold a government entity liable under § 1983, a plaintiff must show that the alleged unconstitutional act results from “(1) an employee acting pursuant to an expressly adopted official policy; (2) an employee acting pursuant to a longstanding practice or custom; or (3) an employee acting as a ‘final policymaker.’”⁸ *Delia v. City of Rialto*, 621 F.3d 1069, 1081-82 (9th Cir. 2010) (quoting *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003)).

Here, Plaintiff’s *Monell* claim fails. Because the Court has found in favor of Defendants on grounds

⁸ There has been no allegation that the officers here were acting as “final policymakers.” Thus, the Court will not address this potential basis for *Monell* liability.

of qualified immunity, the Court has not ruled, as Defendants suggest, that there was no constitutional violation here. However, Plaintiff has provided no evidence that there is an official policy or custom of performing warrantless searches with no legal justification, or of detaining people during searches of their homes where not authorized by law. Indeed, Plaintiff presented evidence that the City and Police Department have *no* expressly adopted official policy on probation searches. *See* Winter Depo. at 37:18-22 (“In my search of the manual, I did not specifically find a section specifically relate to probation searches.”). Moreover, Plaintiff has not produced evidence of any questionable searches or detentions other than the October 7, 2010 incident that forms the basis of this lawsuit. Without evidence of any other incident, the Court cannot find that there is a longstanding practice or custom. As Plaintiff has not put forward any evidence of either an official policy or a longstanding practice or custom, Plaintiff cannot establish that the city or police department is liable.

Moreover, to establish *Monell* liability on a theory of failure to train, a Plaintiff must show not only that training was inadequate, but that the city was deliberately indifferent to the constitutional rights of citizens. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). The fact that further training might have prevented any violation is insufficient. *See id.* at 392. Here, Plaintiff has not shown that the City and Police Department inadequately trained officers or had any policy of doing so, nor that the City or Police Department was deliberately indifferent. Plaintiff has presented evidence that the City and Police Department do not have a specific written policy on probation searches, and that the Police Department does have a practice of detaining people who interfere

with lawful probation searches. *See* Winter Depo. at 37:20-22; 39:10-12; 62:20-25. But Plaintiff simply has not presented any evidence at all about the training that officers receive, on the topic of searches or any other subject. Under *City of Canton*, “the question [is] whether such inadequate training can justifiably be said to represent ‘city policy.’” 489 U.S. at 390. Here, Plaintiff has not even shown that the City or Police Department inadequately trains its officers, let alone that it has a conscious policy of doing so. Accordingly, Plaintiff cannot establish *Monell* liability on a failure to train theory.

Plaintiff has therefore failed to create a genuine issue of material fact as to any element of their § 1983 claim against the City or Police Department.⁹ Defendants’ motion for partial summary judgment with respect to the *Monell* claim against the City and Police Department for Plaintiffs’ search and detention is therefore GRANTED.

E. State Law Immunities

⁹ Regarding Plaintiff’s remaining claims – the state law claims in the sixth through fifteenth causes of action – Defendants have not made any argument for summary judgment for the City or the Police Department. Rather, Defendants argue only that there is no municipal liability for Plaintiff’s § 1983 claims. Though the state law claims are all listed in the First Amended Complaint as being brought against all defendants, it is not clear whether Plaintiff intends to assert these claims against the City and the Police Department, and if so, on what theory. Accordingly, the Court makes no ruling as to the City or Police Department’s liability on state law claims at this time.

Sergeant Hill and Detective Henderson¹⁰ have moved for summary judgment on Plaintiff's state law claims (sixth through fifteenth causes of action). This motion is based on three types of statutory immunity for public employees or police officers: (1) discretionary immunity; (2) enforcement or execution of laws; and (3) penal code immunity.

Discretionary immunity is afforded by Cal. Gov. Code § 820.2, which provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." California law is clear that this statute requires "judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government." *Johnson v. State*, 69 Cal. 2d 782, 793 (1968).

Plaintiff contends that the officers' actions here were "operational," and thus not considered an exercise of discretion. The Court agrees. A California Court of Appeal has clearly held that officers' actions taken in attempting to carry out their assigned duties are not covered by this type of immunity. *See Gillan v. City of San Marino*, 147 Cal. App. 4th 1033, 1051, 55 Cal. Rptr. 3d 158, 174 (2007) ("The decision to arrest Gillan was not a basic policy decision, but only an operational decision by the police purporting to apply the law. The immunity provided by Government Code section 820.2 therefore does not apply."). The Ninth Circuit, citing *Gillan*, has also held that "the immunity provided by

¹⁰ As explained above, the motion filed by Defendants does not appear to include a motion by the City or Police Department on the state law claims.

California Government Code § 820.2 does not apply to claims of false imprisonment or false arrest predicated on an officer's detaining a suspect without reasonable suspicion or probable cause." *Liberal v. Estrada*, 632 F.3d 1064, 1085 (9th Cir. 2011). Thus, § 820.2 clearly provides no protection from Plaintiff's claims as they relate to the detention. Moreover, the decision to search, like the decision to arrest, is not a "basic policy decision" of type this statute is designed to protect, and courts have declined to apply discretionary immunity to decisions involving surveillance, explaining that "[r]outine discretionary decisions as part of a person's normal job duties are not covered by this immunity." *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1123 (C.D. Cal. 2006) *aff'd sub nom. Bernhard v. City of Ontario*, 270 F. App'x 518 (9th Cir. 2008). The same reasoning applies to Plaintiff's search-related claims. The officers were not making policy in searching Plaintiff's house, but rather acting in accordance with existing policy permitting probation searches. Accordingly, the Court finds that the officers are not immune under § 820.2 from Plaintiff's state law claims as they concern search and detention.

Immunity for the enforcement and execution of laws is provided by Cal. Gov. Code § 820.4, which provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment." Sergeant Hill and Detective Henderson assert that this immunity protects them from Plaintiff's eighth through fifteen causes of action (and not from the sixth and seventh, Plaintiff's Bane Act claims). However, as this statute explicitly does not provide immunity for claims of false arrest, the Court finds that it can also provide no protection from Plaintiff's

ninth cause of action, “False Arrest/False Imprisonment.” Accordingly, the Court will consider its application only as to Plaintiff’s eighth and tenth through fifteenth causes of action.

Section 820.4 provides immunity for officers whose actions are “objectively reasonable.” *See Reynolds v. County of San Diego*, 858 F. Supp. 1064, 1074 (S.D. Cal. 1994). Thus, for this immunity to apply, the Court would have to find that there is no genuine issue of material fact as to the objective reasonableness of the officers’ actions. This is a different question from the federal law-based qualified immunity analysis above, concerning whether the officers’ actions were unlawful under clearly established law, and is also distinct from the ultimate constitutional question of whether the officers’ actions comported with the Fourth Amendment. Rather, it involves a very fact-specific balancing of what would have been “objectively reasonable” under the circumstances as a matter of California law. Here, there are several factual disputes about what exactly occurred. Specifically, there are disputes about both the behavior of Plaintiff and how, precisely, the officers responded. The resolution of these factual disputes will have a bearing on the objective reasonableness of the officers’ behavior. Accordingly, the Court finds that there is a genuine issue of material fact as to the reasonableness of the officers’ actions, and the Court cannot grant summary judgment that the officers are immune under § 820.4. As neither § 820.2 nor § 820.4 provides immunity, Sergeant Hill and Detective Henderson’s motion for summary judgment is DENIED as to Plaintiff’s eighth and tenth through fifteenth causes of action.

The third type of immunity Sergeant Hill and Detective Henderson claim is under California Penal

Code § 847, which states: “There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer. . . acting within the scope of his or her authority, for false arrest or false imprisonment. . . [if] [t]he arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful.” The Court has already found that the officers were reasonable to believe that their detention of Plaintiff was lawful.¹¹ Thus, the officers’ detention of Plaintiff cannot give rise to liability under California law. Accordingly, Sergeant Hill and Detective Henderson’s motion for summary judgment is GRANTED as to Plaintiff’s ninth cause of action, Plaintiff’s state law claim for False Arrest/False Imprisonment.

Finally, Defendants contend that they are entitled to summary judgment on Plaintiff’s sixth and seventh causes of action, under California Civil Code §§ 52.1 and 52.3, both of which are part of a law known as the Bane Act. The Bane Act, as relevant here, provides a cause of action for interference with an individual’s exercise of his or her rights under the state and federal constitutions by means of threats, intimidation, or coercion. *See* Cal. Civ. Code § 52.1. Defendants provide two bases for summary judgment: (1) that Plaintiff’s claims require that the City and/or officers have interfered with Plaintiff’s constitutional rights, which Defendants contend Plaintiff has not established; and

¹¹ The cases discussing § 847 do not specifically address claims of detention not classified as arrests. However, because § 847 provides immunity from false arrest or false imprisonment claims, it does not appear intended to allow such claims where the officers effectuated a lawful detention, even if it did not rise to the level of an arrest.

(2) that the same immunities apply to these claims as to Plaintiff's other state law claims.

Regarding immunities, the only immunity the Court has found to apply at this stage governs, by its terms, only claims for false arrest, and is thus inapplicable to Plaintiff's Bane Act claims, which allege not false arrest, but interference with rights by means of threats, intimidation, or coercion. Thus, Defendants have not established any statutory immunity for these claims.

Regarding interference with constitutional rights, the rights that must be interfered with to establish a Bane Act violation can be under either the United States or the California Constitutions. *See* Cal. Civ. Code §§ 52.1, 52.3. Plaintiff has alleged interference with rights under both. *See* First Amended Complaint, ECF No. 42, at ¶¶ 63 ("Defendants' conduct alleged herein interfered with, or constituted an attempt to interfere with, plaintiffs' rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and article I, sections 1, 2, 7, and 13 of the California Constitution"), 67 ("Plaintiffs are informed and believe, and thereon allege, that the acts of defendants alleged herein were done pursuant to a pattern and practice of depriving persons of rights, privileges, and immunities secured by the laws and Constitution of the State of California, and the laws and Constitution of the United States."). Defendants' arguments, however, concern only the Fourth Amendment to the United States Constitution, and do not address Plaintiff's allegations concerning the California Constitution. As the movants, Defendants bear the burden of demonstrating an absence of evidence in the record to establish Plaintiff's claims. *See Celotex*, 477 U.S. at 323. The only basis Defendants have provided,

however, is their existing arguments about the reasonableness of the search and detention under the Fourth Amendment to the United States Constitution. Defendants have not even attempted to demonstrate a lack of evidence for Plaintiff's claims arising under the California Constitution. Thus, Defendants have not met their burden to show an absence of evidence supporting Bane Act liability. Accordingly, Defendants' motion for summary judgment as to Plaintiff's sixth and seventh claims for relief are DENIED.

IV. DEFENDANT ROJAS

Defendant Rojas separately moves for summary judgment. Defendant Rojas moved by filing a joinder in Defendants' motion. Thus, like the first Defendants' motion, Defendant Rojas's motion is directed only to the search and detention claims, *not* to the claims of excessive force. To the extent that Officer Rojas's motion is grounded in his entitlement to qualified immunity based on the lack of clearly established law rendering it illegal to search Plaintiff's house or to detain Plaintiff during that search, Officer Rojas's motion is GRANTED for the reasons explained above.

Defendant Rojas's memorandum of points and authorities, however, also puts forth an argument for summary judgment that Defendant Rojas did not use excessive force. *See* ECF No. 64 at 7. These arguments are not properly before the Court, as the motion in which Defendant Rojas has joined specifically disclaims any argument that summary judgment should be granted on excessive force claims. However, even if the Court were to entertain Defendant Rojas's argument, the Court could not grant summary judgment on the excessive force claim. The excessive force inquiry

requires a “careful balancing” of interests in a very fact-specific examination of each “particular situation.” See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). As explained in this case, there are several disputed facts concerning what Plaintiff did and said when the officers approached, and what the officers, including Defendant Rojas, did and said in return. The required balancing inquiry will depend on the resolution of these factual disputes. Accordingly, to the extent that Defendant Rojas intends to move for summary judgment on the question of excessive force, his motion is DENIED.

V. CONCLUSION

For the reasons explained above, Detective Henderson’s motion for summary judgment as to all claims due to lack of involvement is DENIED. Detective Henderson and Sergeant Hill’s motion for summary judgment and Defendant Rojas’s motion for summary judgment on Plaintiff’s first, second, fourth, and fifth claims under 42 U.S.C. § 1983 are GRANTED on grounds of qualified immunity insofar as the claims allege illegal search and detention only. Detective Henderson and Sergeant Hill’s motion for summary judgment and Defendant Rojas’s summary judgment on Plaintiff’s sixth and seventh causes of action under the Bane Act are DENIED. Detective Henderson and Sergeant Hill’s motion for summary judgment and Defendant Rojas’s motion for summary judgment on Plaintiff’s eighth and tenth through fifteenth causes of action for state law violations are DENIED. Detective Henderson and Sergeant Hill’s motion for summary judgment and Defendant Rojas’s motion for summary judgment on Plaintiff’s ninth cause of action for state law false arrest/false imprisonment are GRANTED on grounds of immunity under Cal. Penal Code § 847.

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The City of Santa Clara and Santa Clara Police Department's motion for summary judgment on Plaintiff's claims under 42 U.S.C. § 1983 is GRANTED. To the extent that the City and Police Department intend to move for summary judgment on Plaintiff's state law claims, they have presented no argument, and accordingly, the motion is DENIED.

To the extent that Defendant Rojas intends to move for summary judgment on Plaintiff's claims regarding excessive force, his motion is DENIED.

IT IS SO ORDERED.

Dated: January 15, 2013

/s/ Lucy H. Koh
LUCY H. KOH
United States District Judge

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APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

[Filed 12/17/13]

Case No.: 11-CV-03999-LHK

JOSEPHINE SMITH, an individual, and A.S., a minor,

Plaintiffs,

v.

CITY OF SANTA CLARA, a public entity,
and CLAY ROJAS, an individual.

Defendants.

ORDER

For the reasons stated on the record on December 17, 2013, Clay Rojas' motion for judgment as a matter of law, ECF No. 263, the City of Santa Clara's motion for judgment as a matter of law, ECF No. 261, and the Plaintiffs' motion for judgment as a matter of law, ECF No. 260, are denied.

IT IS SO ORDERED.

Dated: December 17, 2013

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

[Filed 12/19/13]

No. CV 11-03999 LHK

JOSEPHINE SMITH, *et al*,
Plaintiff,

v.

CITY OF SANTA CLARA, *et al.*,
Defendants.

JUDGMENT IN A CIVIL CASE

(X) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

() Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that pursuant to the jury verdict filed November 21, 2013, judgment is entered in favor of defendants and against plaintiffs.

Dated: December 19, 2013

Richard W. Wieking, Clerk

By: Martha Parker Brown
Deputy Clerk

APPENDIX E

U.S. Const. Amend. IV provides:

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