No. 20-

IN THE

Supreme Court of the United States

CITY OF HAYWARD, A MUNICIPAL CORPORATION, *et al.*,

Petitioners,

v.

JESSIE LEE JETMORE STODDARD-NUNEZ,

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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QUESTIONS PRESENTED

Fearing for his own safety and that of his ride-along, an officer fired several shots at a fleeing-felon driver as he drove toward and swiped the officer's cruiser. Unfortunately, one of the officer's shots unintentionally hit and killed a passenger in the fleeing car. The driver was convicted for the homicide, yet the victim-passenger's brother brought this § 1983 action against the officer. The district court granted summary judgment, finding the officer was entitled to qualified immunity and that his use of force was reasonable under the circumstances. The Ninth Circuit reversed, once again ignoring this Court's precedent and instructions, and instead defining "clearly established law" at an impermissibly high level of generality. The Ninth Circuit also further entrenched a split among the courts of appeals by failing to address whether the victim-passenger was "seized" as a matter of law to support a claim under the Fourth Amendment.

The questions presented are:

1. Whether an accelerating fleeing driver's sudden turn deprives a threatened shooting officer of qualified immunity?

2. Whether an unintended victim-passenger of a fleeing vehicle is "seized" for purposes of the Fourth Amendment?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioners state that the City of Hayward is a municipal corporation, and Manuel Troche is an individual.

Petitioners are the City of Hayward and Manuel Troche.

Respondent is Jesse Lee Jetmore Stoddard-Nunez, an individual.

In the proceedings below, the appellant was Jesse Lee Jetmore Stoddard-Nunez. Appellees were the City of Hayward and Manuel Troche.

RELATED CASES

Stoddard-Nunez v. City of Hayward, et al., No. 13-cv-04490-KAW, U.S. District Court for the Northern District of California. Judgment entered Jun. 28, 2018.

Stoddard-Nunez v. City of Hayward, et al., No. 18-16403, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Jun. 10, 2020.

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PETITION FOR A WRIT OF CERTIORARI

The City of Hayward and Officer Manuel Troche respectfully petition this Court 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 court of appeals is reported at *Stoddard-Nunez v. City of Hayward*, 817 Fed.Appx. 375 (9th Cir. 2020), and is reproduced at Petitioner's Appendix ("Pet. App.") 1a-8a. The court of appeals' August 18, 2020 order denying the petition for rehearing and rehearing en banc is reproduced at Pet. App. 41a-42a. The district court's June 28, 2018 order granting Petitioners' motion for summary judgment is not reported, but is reproduced at Pet. App. 9a–40a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its Memorandum decision reversing the district court's grant of summary judgment on June 10, 2020. Pet. App. 1a-8a. On June 17, 2020 the court of appeals entered its order extending Petitioners' time to file their petition for rehearing or rehearing en banc until July 10, 2020. Dkt. 50. On July 1, 2020, the court of appeals entered its order extending Petitioners' time to file their petition for rehearing or rehearing en banc to July 24, 2020. Dkt. 52.

Petitioners timely filed their petition for rehearing or rehearing en banc on July 24, 2020. Dkt. 58. The

United States Court of Appeals for the Ninth Circuit entered its order denying the petition for rehearing and rehearing en banc on August 18, 2020. Pet. App. 41a-42a.

By Order dated March 19, 2020, this Court provided that "[i]n light of the ongoing public health concerns relating to COVID-19 . . . the deadline to file any petition for a writ of certiorari due on or after [March 19, 2020] . . . is extended to 150 days from the date of the lower court . . . order . . . denying a timely petition for rehearing." Therefore, this petition for a writ of certiorari is timely, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV.:

> 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.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen

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

INTRODUCTION

This case presents an appropriate vehicle for this Court to resolve multiple splits in authority among federal courts (one already recognized by this Court), to exercise its supervisory role over resistant lower federal courts, and to give needed guidance on two important federal questions: (1) Whether an oncoming vehicle that suddenly turns deprives a shooting officer of qualified immunity; and (2) Whether a victim-passenger of that fleeing vehicle is "seized" for purposes of the Fourth Amendment.

This Court has frequently been called upon to remind lower courts that "'clearly established law' should not be defined 'at a high level of generality'" to defeat qualified immunity. *White v. Pauly,* ___ U.S. ___, 137 S.Ct. 548, 552 (2017) ("[t]oday, it is again necessary to reiterate the longstanding principle . . ."). It follows that it is not enough, as happened below, to merely give lip service to that principle while openly defying it.

By defining "clearly established law" at a high level of generality, the Ninth Circuit's decision not only runs afoul of this Court's precedent concerning qualified immunity, but also conflicts with its own precedent, which the panel below failed distinguish or discuss. In short, the Ninth Circuit panel was unable to identify a single case that would have put Officer Troche on notice of a "clearly established law," other than at an impermissible and exceedingly high level of generality.

In addition to an important qualified immunity question, this petition also presents an important issue of a victim-passenger's standing to bring a § 1983 claim. This Court has recognized the circuit split on this issue (*Plumhoff v. Rickard,* 572 U.S. 765, 778, n. 4 (2014)), providing yet another compelling reason to consider this petition. U.S. Sup. Ct. Rule 10(a) & (c). This question should not turn on whether an officer subsequently says he or she "shot at the car," instead of saying, he or she "shot at the driver inside the car," two statements that are not mutually exclusive, and both of which were made in this case.

This case involves the split-second decision of an officer to fire at the intoxicated and non-compliant driver of a moving vehicle while believing that both he and a bystander were in imminent danger of being run over. Officer Troche unintentionally shot a passenger in the vehicle while attempting to avert the threat by firing at the non-compliant driver. The circuit courts are split as to whether such a victim-passenger has standing to bring a § 1983 claim.

This Court should grant certiorari to resolve these acknowledged splits on questions of profound legal and practical significance.

STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction In The District Court

Respondent/Plaintiff is the successor-in-interest to his brother, Shawn Joseph Jetmore Stoddard-Nunez, a victim-passenger in a vehicle who was shot and

killed during a traffic stop by Defendant Officer Manuel Troche, on March 3, 2013. ER 4-10. Respondent thereafter filed suit against the City of Hayward and Troche, alleging claims under 42 U.S.C. § 1983 and California tort law. ER 4-5. The operative complaint alleges: (1) § 1983 liability for violation of the victim-passenger's Fourth Amendment rights; (2) § 1983 liability for wrongful death; (3) *Monell* liability against the City; (4) wrongful death negligence; (5) assault; and (6) battery. ER 12.

B. Facts

Respondent Jessie Lee Jetmore Stoddard-Nunez ("Respondent") and his now-deceased younger brother Shawn Jetmore Stoddard-Nunez ("decedent" or "victim-passenger") had a social gathering at their apartment on the evening of March 2, 2017. ER 667-668. The decedent's friend Arthur Pakman ("Pakman") attended the gathering. ER 670. While there, the decedent and Pakman consumed alcohol. ER 669-71. Pakman began to get violent and physically fought with Respondent, punching him and putting him into control holds. ER 670-76. Eventually, the decedent and Pakman decided to leave the apartment. ER 670-77. Both had blood alcohol contents more than double the legal driving limit. ER 659, 821-24. Pakman drove on a suspended license, despite being obviously intoxicated. ER 676, 814, 816-17, 821-24.

Petitioner Manuel Troche ("Officer Troche") was on patrol at the time in full uniform and in a fully marked City of Hayward police vehicle. ER 765-767. Officer Troche had a "ride along" passenger, Russell McLeod

("McLeod"), with him. ER 688. At approximately 3:20 a.m. on March 3, 2017, Officer Troche and McLeod noticed Pakman's Honda Civic driving erratically. ER 689-90. Officer Troche noticed that Pakman's car ran a red light and then a stop sign, and that it was swerving over the lane dividers. ER 689-90, 693, 748-50, 768-69.

Officer Troche attempted to catch-up to Pakman's car to read the license plate and relay it to dispatch. ER 692, 695. When Officer Troche caught up with Pakman's car, it was pulling around in a cul-de-sac. ER 694. As Pakman's car was exiting the cul-de-sac, Officer Troche passed Pakman in the fully marked police car within just feet of Pakman's car. ER 694. As the vehicles passed each other, the occupants of Pakman's car made eye contact with Officer Troche's passenger McLeod. ER 752-53. In an apparent attempt to evade police contact, Pakman's car abruptly pulled into the enclosed parking lot of a closed business, turned to the left, and parked in a parking space facing the building on the left side of the lot. ER 697, 699-700, 706.

Looking from the driveway of the parking lot, it was bordered to the left by the building, to the right by a fence with bushes, and at the back with more fencing. ER 698-700, 706, 720, 721-722. Officer Troche perceived Pakman's choice to pull into an enclosed and confined parking lot instead of stopping in the road as suspicious and consistent with a possible ambush. ER 705-07, 713-14. Officer Troche therefore parked his police car in the driveway entrance, perpendicular

with Pakman's car, which was facing the building on the left. ER 700-01.

Officer Troche radioed to dispatch that he had stopped a suspicious vehicle. ER 704, 792 (audio recording), 795. Officer Troche and McLeod then opened the fully marked doors of the police vehicle, exposing the reflective police shield emblem on each door, so that they could easily be seen by the suspect. ER 707-09. As Officer Troche exited the police car, he flipped the switch on his overhead lights and shined his police spotlight on Pakman's car to illuminate the cabin. ER 701-03. McLeod, who was unarmed, stood in the passenger-side doorway of the police vehicle behind the safety of the door's ballistic panel. ER 708-09, 716-17.

Officer Troche yelled "police," "shut the car off," and "show me your hands." ER 707-11. Officer Troche was relatively close to Pakman's car, and Pakman's driver's side window was halfway down. *Id.* Pakman did not comply with Officer Troche's orders but instead stared straight ahead at the building. ER 707-08. Officer Troche repeated his commands to no avail. ER 717- 18. Instead, Pakman lit a cigarette. ER 718-19. To obtain a view of Pakman's license plate number, Officer Troche walked around the back of the police car and up along the passenger side of the vehicle, but he still could not read the plate from that angle. ER 720. Officer Troche began moving back toward his police car when he saw Pakman turn his head and grimace at him. ER 724-25.

Suddenly, Pakman threw his car into reverse backing up in an arc so that his car was facing toward

Officer Troche's car. ER 723-24. Officer Troche and McLeod had a fence and bushes to their right, the passenger side of the police car to their left, and Pakman's car directly in front of them. ER 698-700, 706, 720-24. Pakman's car was now out of the police spotlight and was illuminating Officer Troche, McLeod, and the police car, including its reflective door shields, with Pakman's headlights. ER 723-24, 770. Officer Troche radioed dispatch that Pakman's vehicle was coming at him. ER 10, 792-audio, 795, 800-01. Officer Troche yelled "don't do it" and "Turn the car off." ER 754.

Instead, Pakman's car accelerated toward the passenger side of the patrol car where both McLeod and Officer Troche were standing. ER 726, 760. In less than two seconds, Officer Troche tried simultaneously to move McLeod out of the way of the approaching vehicle, back away from the approaching vehicle, raise his service weapon, and aim it at the driver of the accelerating vehicle. ER 726-729, 733, 771-73. Pakman's car veered right at McLeod and Officer Troche. ER 730, 771-73. Fearing for his life, McLeod attempted to dive into the patrol car to avoid being hit but because of the limited time could only protect his head. ER 754-56, 763-64.

The right side of Pakman's car hit the police car's open passenger-side door, pinning McLeod between the door and the door jam. ER 761-64. McLeod could hear scraping metal as Pakman's car hit and squeezed past the police car. ER 305, 755. Believing Pakman was in fact running over McLeod and fearing for his own safety as he backpedaled to the rear of his cruiser,

Officer Troche shot at Pakman to stop the threat, but Pakman continued accelerating and then suddenly turned toward Troche on the right as he passed by him, exiting the lot to the right (aware there was no outlet to the left). ER 727-32, 734-35, 751-752, 763-64, 773-74, 776-77, 779, 795. Responding to and attempting to eliminate the threat posed by Pakman's actions, Officer Troche fired nine shots at Pakman, ceasing his fire as soon as the threat had passed. ER 685-86, 730-733, 829-30. Less than 12 seconds had elapsed between Officer Troche reporting to dispatch that Pakman's car was pointed at him and McLeod, and when Officer Troche radioed that the shooting had occurred and that the suspect had fled. ER 10, 792, 795, 801.

Pakman fled the scene at such speed that his car bottomed out and scrapped the pavement. ER 734-736, 837-840. A few blocks away, Pakman lost control of his vehicle hit a curb and crashed. ER 850-51. Leaving his victim-passenger who had been shot by an errant bullet in the car, Pakman fled on foot until he was captured. ER 601-613.

C. Subsequent Legal Proceedings

Pakman was charged with murder and two counts of felony assault (one on a police officer), among other felonies. ER 863-67. Pakman was convicted via plea bargain of involuntary manslaughter (Cal. Penal Code § 192(b)) in connection with the victim-passenger's death and felony driving under the influence. ER 817.

In Respondent's civil action brought by Respondent, the district court granted Petitioners'

summary judgment motion, fully disposing of Respondent's claims. Pet. App. 9a-40a. In its ruling, the district court found (a) there was a triable question of fact as to whether Respondent had standing to assert a claim for seizure under the Fourth Amendment, ER 13-14, but (b) the evidence established that Officer Troche's use of force was reasonable under the totality of the circumstances, including pre-shooting conduct ER 14-20; 22-23, and (c) Officer Troche was entitled to qualified immunity. ER 20-22. Next, the district court concluded that Respondent failed to establish *Monell* liability against the City. ER 22-23. Finally, the district court determined that its finding of reasonableness regarding Officer Troche's actions also precluded Respondent's state-law claims for negligence, assault, and battery. ER 24. Judgment was entered in Petitioners' favor, and Respondent appealed. ER 1-3.

The Ninth Circuit reversed the district court's summary judgment and remanded. Pet. App. 1a-8a. The panel first held that the district court erred in granting summary judgment on the § 1983 excessive force claim because genuine issues of material fact remain with respect to Officer Troche's account of the incident, which inform whether his use of force was reasonable. Pet. App. 4a-5a. The Ninth Circuit next found, applying a high level of generality, that the district court erred when it determined Officer Troche was entitled to qualified immunity because, under Respondent's version of events, at the time of the incident it was clearly established that officers are not entitled to qualified immunity for shooting at an individual in a fleeing vehicle who does not pose a

danger to them or the public. Pet. App. at 5a-6a (citing *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). In so holding, the Ninth Circuit improperly relied on and quoted from a post-incident decision reasoning, "'an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him.'" Pet. App. 6a (quoting *Orn v. City of Tacoma*, 949 F.3d 1167, 1178 (9th Cir. 2020)). Finally, the Ninth Circuit determined that the district court erred by granting summary judgment on the state law wrongful death claim under an "outdated" negligence standard akin to federal Fourth Amendment law that failed to consider the "totality of circumstances," including pre-shooting conduct. Pet. App. 7a-8a. Accordingly, the court of appeals vacated the district court's ruling on the state law claim and remanded it for further proceedings. *Id.*

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Openly Disregarded This Court's Precedent Concerning Qualified Immunity

1. Qualified immunity attaches when an officer "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (citations omitted). "*'[C]learly established law' should not be defined 'at a high level of generality'* . . . [but] *must be 'particularized' to the facts of the case.*" *White,* 137 S.Ct. at 552 (emphasis added; citations omitted); "police officers are entitled to qualified immunity unless existing precedent '*squarely governs*'

the *specific* facts at issue." *Kisela v. Hughes*, __ U.S. ___, 138 S. Ct. 1148, 1153 (2018)(emphasis added; citations omitted).

Moreover, "existing precedent *must have placed the statutory or constitutional question beyond debate*." *Mullenix*, 577 U.S. at 12 (emphasis added); *see also, Plumhoff v. Rickard,* 572 U.S. 765, 778-79 (2014) ("the right's contours [must be] sufficiently definite that any reasonable official . . . would have understood . . . he was violating it.")

The Ninth Circuit correctly acknowledged that "'clearly established law should not be defined at a high level of generality'; it must be 'particularized' to the facts of the case." Pet. App. 5a (quoting *White*, 137 S.Ct. at 552). However, having given lip service to the correct standard, the panel then explicitly defied it by reverting back to expressions of excessive force principles at a "high level of generality," and relying upon a dated standard that has long been overruled by this Court:

> [D]eadly force may be used only if it is necessary to prevent the escape of a suspect and "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury . . ."

App. 6a (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). Because "specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how . . . excessive force[_] will apply to the factual situation the officer confronts" (*Mullenix*,

577 U.S. at 12), the Ninth Circuit erred by summarily concluding that *Acosta v. City and County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996)[1] involved "circumstances similar to those present here." App. 6a.

2. Rather than compare the particular facts in this case with those in *Acosta,* as this Court's precedent requires, the Ninth Circuit relied on dubious language from a *post-incident* decision, *Orn v. Tacoma*, 949 F.3d 1167 (9th Cir. 2020), to shoehorn this case within the highly generalized facts and holding of *Acosta.* Specifically, although *Orn* relied on *Acosta* in finding against qualified immunity, the Ninth Circuit here improperly relied on *post-incident* language from *Orn* that appears nowhere in *Acosta* and which concerns facts that did not exist in *Acosta*: "'an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him.'" Pet. App. 6a (quoting *Orn*, 949 F.3d at 1178).

Besides post-dating the incident in question, *Orn* is materially different from this case. In *Orn*, the suspect was fleeing the police and backed up into a police cruiser, "clipp[ing]" it with a "glancing blow." *Id.* at 1173. *After* the vehicle had moved past the cruiser, an officer on the suspect's passenger side opened fire three times, striking the suspect. *Id.* One of the bullets entered the front passenger-side window, and the

[1] In *Hung Lam v. San Jose*, 869 F.3d 1077, 1086 (9th Cir. 2017), the Ninth Circuit recognized *Acosta* was abrogated by *Saucier v. Katz*, 533 U.S. 194 (2001).

other two entered the rear passenger-side window. *Id.* After the suspect slumped over from being shot, causing his foot to apply the gas, the officer "ran behind Orn's vehicle as it sped away, firing seven more rounds through the rear windshield." *Id.* In finding against qualified immunity, the court emphasized there "were no officers or other individuals in Orn's path" and "under Orn's version of events, he never engaged in any conduct that suggested his vehicle posed a threat of serious physical harm to Officer Rose, or to anyone else in the vicinity." *Id.* at 1180.

Acosta is the only *pre-incident* case relied on by the Ninth Circuit. But just like *Orn,* the facts in *Acosta* bear no resemblance to this case except at a high level of generality. While both this case and *Acosta* involve a fatal shooting by an officer of an individual inside a car, the off-duty officer in *Acosta* pursued two men on foot, and when they got into a waiting car, the officer fired two shots, killing the driver. Witnesses testified the car was rolling slowly when the officer began shooting, giving him enough time to step out of its way. *Id.* at 1144-1146.

Here, in contrast, (1) Pakman's car was travelling at such speed toward McLeod and Officer Troche, and in such close proximity, that McLeod was unable to get out of the way in time to avoid being hit by the passenger door of the police car as Pakman's fleeing car struck the open passenger door ER 304-05; and (2) Officer Troche believed McLeod was being run over as he fired the shots at Pakman. ER 728.

The Ninth Circuit's notation of Pakman's inadmissible statement (Pet. App. at 3a) that he did not drive toward Troche is unsupported by any admissible evidence in the record. Pakman repeatedly stated throughout the cited interview that he could not recall what happened: "I don't know what happened"; "I can't give you a timeline"; "I can't tell you step-by-step." Dkt. 29. Thus, the contents of the interview – including Pakman's self-serving denial that he "didn't drive at anybody" and "wasn't trying to run anybody over" and acknowledgment that he "might have come close to hitting somebody on the way out" – were not recitations of events within his personal knowledge that can be admitted into evidence at trial, as his denials do not satisfy Fed. R. Evid. 602, 612, and 803(5). The statements also conflict with his plea and conviction, ER 814-818, so pursuant to the *Heck* preclusion doctrine, they cannot support Respondent's § 1983 claims. *Heck v. Humphrey*, 512 U.S. 477, 487 (1984); *Beets v. County of Los Angeles*, 669 F.3d 1039, 1047-1048 (9th Cir. 2012).[2]

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[2] The Ninth Circuit similarly misconstrued the coroner's report and the admissibility of its contents. The report states that "[McLeod] had been sitting in the passenger seat with the door open and sustained minor injuries. TROCHE continued to fire his handgun at the car as it went past him." ER 658. The report itself is Monaghan's hearsay recitation of Koller's hearsay recitation of what occurred, without any indication of how Koller obtained her information. Lacking personal knowledge of the incident or further information as to Koller's source, the contents of Monaghan's and Koller's hearsay statements in the report are also inadmissible.

In short, having hit the open passenger-side door of Officer Troche's car, which in turn struck McLeod as he was trying to get out of the way, Pakman's inadmissible statement that he did not drive toward the two men is "blatantly contradicted by the record, so that no reasonable jury could believe it." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Based on the undisputed admissible evidence, Officer Troche is entitled to qualified immunity.

3. The Ninth Circuit's decision is a striking departure from its own precedent, which it made no effort to distinguish or discuss. The district court concluded, "[u]nder these circumstances, '[a] reasonable police officer confronting this scene could reasonably believe that the [vehicle] posed a deadly threat'" to Mr. McLeod and himself. Pet. App. 35a (citing *Wilkinson v. Torres*, 610 F.3d 546, 553 (9th Cir. 2010)). This case bears much greater resemblance to *Wilkinson* than it does to either *Acosta* or *Orn*. And, even though cited by the district court and Petitioners,[3] the Ninth Circuit made no mention of *Wilkinson* in its decision.

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[3] In fact, *Orn* expressly distinguished *Wilkinson* by emphasizing that in *Orn*, there "were no officers or other individuals in Orn's path" and "under Orn's version of events, he never engaged in any conduct that suggested his vehicle posed a threat of serious physical harm to Officer Rose, or to anyone else in the vicinity." *Orn*, 949 F.3d at 1180. Here, the fact that McLeod was struck by the passenger door of Officer Troche's cruiser as Pakman scraped past it and out onto the street, places this case outside the material facts in *Orn*, as those facts were explicitly articulated by *Orn*.

In *Wilkinson,* an officer on foot began shooting at a fleeing minivan he thought had just run over another officer. *Id.* at 549. The minivan arced around the officer in reverse as he began "shooting [eleven rounds] through the passenger-side window." *Id.* Between the time another officer's vehicle hit the minivan, spinning it out, and the radio call after the shots, nine seconds elapsed. *Id.* Finding the officer entitled to qualified immunity, the Ninth Circuit reasoned that because the officer was in "a rapidly evolving situation requiring him to make 'split second judgments,' we need not scrutinize as closely as the district court did [the officer's] decision about how best to minimize the risk to his own safety and the safety of others." *Id.* at 551.

Here, Officer Troche, fearing for the safety of himself and McLeod, began firing shots *after* Pakman ignored his commands and began accelerating his car toward the two men, so rapidly that McLeod did not have time to get out of the way. ER 305. Officer Troche fired shots at the driver as the car approached, hitting the front of the car and the passenger-side doors. ER 542-46. Unlike in *Orn,* no shots hit the rear of the vehicle. Only twelve seconds elapsed between Officer Troche radioing dispatch about Pakman's car being pointed at them and his calling in "shots fired." Pet. App. at 34a-35a.

Thus, "the situation had quickly turned from one involving a [stopped] vehicle to one in which the driver of a moving vehicle, ignoring police commands, attempted to accelerate *within close quarters*" of Officer Troche and McLeod. *Wilkinson*, 610 F.3d at

551 (emphasis added). Because the Ninth Circuit failed to consider both the temporal and spatial aspect of the circumstances, it effectively made it *per se* unconstitutional to shoot the side of a moving vehicle, regardless of its proximity to the officer, its speed, or the risk of injury to others – again, all in contravention of this Court's precedent and instruction to avoid defining clearly established law at a high level of generality. *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018); *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 552 (2017); *Mullenix v. Luna*, 577 U.S. 7, 12(2015).

4. Since promulgating the "clearly established law" standard decades ago, and particularly in the last eight years, this Court has regularly been required to address and reverse decisions from multiple circuit courts who fail to apply the requisite level of particularity in considering qualified immunity defenses. See, e.g., *District of Columbia v. Wesby*, ___ U.S. ___, 138 S.Ct. 577 (2018)(reversing the D.C. Circuit); *White*, 137 S.Ct. 548 (reversing the Tenth Circuit); *Mullenix, v. Luna*, 577 U.S. 7 (2015) (summarily reversing the Fifth Circuit); *Carroll v. Carman*, 574 U.S. 13 (2014) (reversing the Third Circuit); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (reversing the Sixth Circuit).

Notably, since 2004, this Court has reversed and remanded decisions issued by the Ninth Circuit on qualified immunity in similar cases at least eight times. See, e.g., *City of Escondido v. Emmons*, ___ U.S. ___, 139 S.Ct. 500 (2019) (summarily reversing); *Kisela v. Hughes*, ___ U.S. ___, 138 S.Ct. 1148 (2018)

(summarily reversing); *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600 (2015); *Stanton v. Sims*, 571 U.S. 3 (2013) (summarily reversing); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364 (2009); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (summarily reversing). The Ninth Circuit's failure to provide anything more than lip service to this Court's directive appears to be more common than all other circuits combined.[4]

In contrast to the Ninth Circuit, just this week the First Circuit followed the Court's instructions and affirmed an officer's summary judgment based on qualified immunity. *Fagre v. Parks*, No. 20-1343 (1st Cir. Jan. 13, 2021). Paying heed to *City of Escondido v. Emmons*, which "stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment" in order to defeat qualified immunity (139 S.Ct. at 504 (quoting *Wesby*, 138 S.Ct. at 590)), the First Circuit found that "[t]he case law does not clearly establish that it is unreasonable for an officer to conclude his life is in danger and to use potentially deadly force under circumstances" where the driver was "accelerating at full speed" toward the officer and "came close enough . . . to pose an immediate threat." *Fagre v. Parks*, No. 20-1343, slip. op. at 16-17 (1st Cir.

[4] The Ninth Circuit's inclination to acknowledge and then ignore this Court's standard for qualified immunity is also exemplified in at least one other similar petition for certiorari currently pending before the Court. *See Massie v. Mena*, No. 20-202 (U.S.).

Jan. 13, 2021). The Ninth Circuit should have reached the same decision and affirmed summary judgment.

Certiorari is necessary to rectify the Ninth Circuit's resistance to this Court's instructions and to appropriately afford Officer Troche the qualified immunity to which he is entitled under the law.

B. The Ninth Circuit Implicates A Recognized Conflict Among the Courts of Appeals On Whether The Victim-Passenger Was Seized As A Matter Law To Support A Claim Under the Fourth Amendment.

1. In reversing the district court's summary judgment ruling regarding the reasonableness of Officer Troche's use of force, the Ninth Circuit overlooked undisputed evidence establishing there was no seizure of the victim-passenger as a matter of law to support Respondent's § 1983 claim in the first instance. Other circuits are split on the issue of a victim-bystander's or victim-passenger's standing to bring such a claim (*Plumhoff,* 572 U.S. at 778, n. 4, comparing *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003)(suggesting yes), and *Fisher v. Memphis*, 234 F.3d 312 (6th Cir. 2000)(same), with *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001)(suggesting no), and *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (same)), and the Ninth Circuit lacks citable precedent. Thus, the court of appeals' omission of any

discussion of the issue in its Memorandum decision[5] leaves in place yet another inconsistent ruling among Ninth Circuit's the lower courts. Certiorari is necessary to resolve the circuit split and issue a unifying standard.

2. In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the fleeing suspect was killed when his car crashed into a police roadblock. The plaintiffs-heirs claimed the roadblock had been set up intentionally in such manner as to be likely to kill him. In reversing dismissal of the plaintiffs' complaint, the Court stated that "[v]iolation of the Fourth Amendment requires an *intentional acquisition of physical control*." *Id.* at 596 (emphasis added). The Court went on to state:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . , nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Id. at 596-597 (emphasis in original). Since the Court's decision in *Brower*, lower courts have reached

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[5] This issue was addressed by the district court and is clearly set out in the appellate record. Dkt. 20, at pp. 35-38; Dkt. 31, at pp. 29-30.

divergent conclusions with its application to victim-bystanders or victim-passengers of fleeing drivers.

In *Landol-Rivera*, the First Circuit applied *Brower* and held that a fleeing store-robber and carjacker's hostage, who was shot by an officer's errant bullet, did not have a Fourth Amendment claim. 906 F.2d at 794-795. "A police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern." *Id.* at 794-95; *see also, e.g., Childress v. City of Arapaho,* 210 F.3d 1154, 1156-57 (10th Cir. 2000)(finding, in hostage shooting case, no Fourth Amendment "seizure" because "[t]he officers intended to restrain the minivan and the fugitives, not [the hostages]"); *Medeiros v. O'Connell,* 150 F.3d 164, 167-68 (2d Cir. 1998)(endorsing *Landol-Rivera,* and holding that where a hostage is struck by an errant bullet, the governing principle is that such consequences cannot form the basis for a Fourth Amendment violation).

The Fourth Circuit reached a similar conclusion in *Milstead*. There, the court of appeals analyzed whether an officer who had justification to shoot the suspect but mistakenly shot the victim implicates the Fourth Amendment, and wrote that "where the seizure is directed appropriately at the suspect but inadvertently injures an innocent person, the innocent victim's injury or death is not a seizure that implicates the Fourth Amendment because the means of the seizure were not deliberately applied to the victim." 243 F.3d at 164 (citing *Brower*, 489 U.S. at

596-97, and *Landol-Rivera*, 906 F.2d at 794-95. Noting that one is seized within the meaning of the Fourth Amendment only one is the intended object of a physical restraint by a state agent, the Fourth Circuit concluded that "when officers shoot at a suspect, but hit a bystander instead, no Fourth Amendment seizure occurs." *Milstead*, 243 F.3d at 164 (citing *Rucker v. Harford County, Md.*, 946 F.2d 278, 281 (4th Cir. 1991)).

The Sixth and Eleventh Circuits reached different results in *Fisher*, 234 F.3d 312 and *Vaughan*, 343 F.3d 1323. In *Fisher,* the Sixth Circuit cited *Brower* for the proposition that "a seizure occurs even when an unintended person or thing is the object of the detention or taking, so long as the detention or taking itself is willful." 234 F.3d at 318 (citing *Brower*, 489 U.S. at 596). Evaluating the Fourth Amendment claim of a victim-passenger plaintiff injured by an errant bullet aimed at the driver, the court of appeals held, "[b]y shooting at the driver of the moving car, [the officer] intended to stop the car, effectively seizing everyone inside, including the Plaintiff," and thus the officer the "seized" the Plaintiff by shooting at the car. 234 F.3d at 318-319.

In *Vaughan*, an officer shooting to disable a speeding vehicle in order to apprehend the fleeing driver and passenger – both suspects – was found to have "seized" the passenger when a bullet punctured the passenger's spine. 343 F.3d at 1329. Applying *Brower*, the Eleventh Circuit held that, because the officer fired his weapon to stop *both* the driver and the passenger, and one of those bullets struck the

passenger, i.e., he was hit by a bullet that was meant to stop him, he was subjected to a Fourth Amendment seizure. *Id.*

3. The Ninth Circuit has indicated in two non-precedential decisions that a victim-passenger does not have standing to bring a claim for seizure unless the evidence establishes the force in question was intentionally directed at that individual. *Nakagawa v. Maui*, 686 F. App'x 388, 389 (9th Cir. 2017) (no seizure of victim-passenger because officers "intentionally directed their force towards the driver (and not towards the appellants, any passenger in the vehicle, or the vehicle in general)"); *Fletes v. San Diego*, 687 F. App'x 640, 641 (9th Cir. 2017) (no seizure of victim-passenger who was not "the object of the officer's shot" or "intentionally targeted").

Here, the district court acknowledged *Nakagawa* but applied a different standard and outcome – asserting that it was justified by distinguishable facts because Officer Troche (a) was aware of the passenger's presence, unlike the officers in *Nakagawa*, and (b) he was aiming at the car to stop the driver, "which is distinct from only shooting at the driver." ER 14. While citing Officer Troche's general testimony that "shots were fired at the car to stop the driver from continuing and running us over" as evidence that he intended to target the vehicle, ER 14, 727, the district court ignored Officer Troche's subsequent testimony repeatedly clarifying that he was aiming at – and only intended to shoot – the driver. ER 369, 376, 482-483. Officer Troche specifically testified that he was aware of the

passenger, and that it was *not* his intention to shoot at him. ER 485. Thus, there was no ambiguity regarding the target of Officer Troche's directed "physical restraint" or that he ever intended to shoot the passenger, and the district court erred in finding otherwise.

By not addressing the issue, the Ninth Circuit's decision leaves in place the district court's implicit reliance on yet a different standard, i.e., that knowledge of the presence of a passenger and force directed at either the drive or vehicle – but not the passenger – is sufficient to establish standing for the passenger's claim of seizure. This standard conflicts with *Nakagawa*, *Fletes*, and other recent district court decisions. *See, e.g., Villanueva v. California,* 2019 WL 1581392 at *5 (C.D. Cal. 2019)(discussing cases); *Nakagawa v. Cnty. of Maui*, CIVIL No. 11-00130 DKW-BMK, 12 (D. Haw. Mar. 21, 2014) (victim-passengers lacked standing); *Arruda v. County of Los Angeles*, 2008 WL 11411632, 2 (C.D. Cal. Aug. 5, 2008) (governmental actor must intend to seize "*the particular object or individual at issue*"); *M.J.L.H. v. City of Pasadena*, 2019 WL 2249545, at *9 (C.D. Cal. May 24, 2019)(no seizure without some evidence officer intentionally shot at victim-passenger). Further, the district court's standard adheres to none of the standards endorsed in other circuits, as outlined above.

4. *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), cited by Respondent below (Dkt. 30, at p. 38), is easily distinguishable, as it found an injured protester seized because the officer intentionally aimed pepper

spray pellets at the protester and his "undifferentiated" group. *Nelson,* 685 F.3d at 877. Here, there is no admissible evidence that Officer Troche intentionally aimed at the victim-passenger, and Officer Troche specifically testified that this was not his intent.

Respondent also cited *Brendlin v. California*, 551 U.S. 249 (2007), for the inapplicable proposition that all occupants of a car, not just the driver, are "seized" for purposes of the Fourth Amendment during a traffic stop when the officer intends to stop the vehicle. However, this case involves the split-second decision of an officer to fire at the *driver* of a moving vehicle, with facts bearing no resemblance at all to *Brendlin*. Officer Troche accidentally shot a passenger in the vehicle while he was trying to stop the *driver*, and the circuit courts are split as to whether such a victim-passenger has standing to bring a § 1983 claim.

Accordingly, neither *Nelson* nor *Brendlin* directly addresses the issue raised here, which is the subject of the circuit split.

5. This Court recently heard argument on a related question of "seizure" within the meaning of the Fourth Amendment, in *Torres v. Madrid*, 19-292 (argued October 14, 2020). *In Torres*, the question presented is whether a "seizure" can occur only if the applied physical force successfully detains the person asserting the claim of seizure, and the petitioner's brief asserts that under the Tenth Circuit's decision being reviewed, "[e]ven if the passenger of a car is shot dead without reason, for instance, her family will have no Fourth Amendment remedy if the driver of the car

keeps going." (No. 19-292, Petitioner's Brief, at p. 45.) Here, the fleeing driver kept going after the passenger was shot, so the Court's potential endorsement of such a rule in *Torres* could justify holding this petition. *See, e.g., Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (noting that the Court has "GVR'd in light of a wide range of developments, including [its] own decisions"); *id.* at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.") (emphasis omitted). However, this case also presents a separate and different question dividing the courts of appeal that requires resolution – i.e., whether the applied physical force must be intentionally directed at the person asserting "seizure" to implicate the Fourth Amendment.

* * *

In short, with divergent decisions from the First and Fourth Circuits finding no seizure and from the Sixth and Eleventh Circuits finding seizure, and with no citable precedent itself, the Ninth Circuit's ruling here entrenches a circuit conflict which this court should resolved.

CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

January 15, 2020

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED JUNE 10, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16403
D.C. No. 4:13-cv-04490-KAW

JESSIE LEE JETMORE STODDARD-NUNEZ, INDIVIDUALLY AND AS THE SUCCESSOR-IN-INTEREST OF SHAWN JOSEPH JETMORE STODDARD-NUNEZ,

Plaintiff-Appellant,

v.

CITY OF HAYWARD, A MUNICIPAL ENTITY; MANUEL TROCHE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF HAYWARD,

Defendants-Appellees.

Argued and Submitted, February 6, 2020
San Francisco, California

Appeal from the United States District Court
for the Northern District of California
Kandis A. Westmore, Magistrate Judge, Presiding

MEMORANDUM[*]

Before: PAEZ and BEA, Circuit Judges, and ADELMAN,[**] District Judge.

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

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

Appendix A

Jessie Stoddard-Nunez ("Jessie") appeals the district court's grant of summary judgment to defendants City of Hayward and Officer Manuel Troche on the merits of his excessive force claim under 42 U.S.C. § 1983. The district court also ruled that even if Officer Troche had used excessive force, he was entitled to qualified immunity because the law was not clearly established. Because Jessie could not prevail on his excessive force claim, the district court granted summary judgment on his wrongful-death claim under California law.[1] We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

1. The district court erred in granting summary judgment to defendants on Jessie's § 1983 excessive force claim. To determine whether Officer Troche's use of force was objectively reasonable, we balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (internal quotation marks and citations omitted). The parties do not dispute that Officer Troche fired nine shots at Shawn or that firing a gun constitutes deadly force. *See Tennessee v. Garner*, 471 U.S. 1, 3-5, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

The strength of the government's interest is measured by reference to three factors: (1) "the severity of the crime at issue," (2) "whether the suspect poses an

1. Jessie brings his claim on behalf of his brother, Shawn Stoddard-Nunez ("Shawn"), as the personal representative of Shawn's estate.

immediate threat to the safety of the officers or others," and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *A.K.H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1011 (9th Cir. 2016) (internal quotation marks and citation omitted). This list is "non-exhaustive"; "[c]ourts still must 'examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.'" *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1006 (9th Cir. 2017) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)).

Officer Troche testified that Arthur Pakman's ("Pakman") Honda Civic veered toward him, he opened fired only after he perceived the swerve, and he did not continue to shoot at the vehicle as it drove away. But there remain genuine issues of material fact with respect to Officer Troche's account of the incident, which inform whether Officer Troche's use of deadly force against Shawn was reasonable and whether the car posed an immediate threat to Officer Troche's or Russell McLeod's ("McLeod") safety. *See* Fed. R. Civ. P. 56(c).

First, in a video interview taken shortly after the incident, Pakman stated, "I didn't drive at [Officer Troche]. I didn't drive at anybody. I wasn't trying to run anybody over." Pakman's video interview included more than "undisclosed motivations," Ans. Br. 19; he directly stated he did not drive toward Officer Troche.

Second, the coroner's report states that "[McLeod] had been sitting in the passenger seat with the door open

and sustained minor injuries. TROCHE continued to fire his handgun at the car as it went past him." Firing the gun "as [the car] went past him" is inconsistent with Officer Troche's statement that he fired at the vehicle only as it approached him.

Third, and critically, the coroner noted that the fatal bullet entered Shawn's right shoulder and passed through the left side of his neck, and photographs of the front and rear passenger doors of the Honda Civic show bullet holes in the side and rear of the car. The district court disregarded the photographs because "absent an expert report, there is no information as to what conclusions a jury could draw from [the photographs]." But expert evidence is not needed to assist a trier of fact in drawing an obvious inference. *See Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119, 8 L. Ed. 2d 313 (1962). A reasonable trier of fact could examine the photographs and conclude that Officer Troche fired his gun from the side and rear of Pakman's car. One of the photographs shows a bullet hole passing directly into the passenger door and another shows a bullet pointing toward the front of the car, lodged into the frame of the passenger door. Drawing all reasonable inferences in Jessie's favor, a jury could conclude that at least one of the photographs depicts bullet holes inconsistent with Officer Troche's account that he fired his gun at *only* the front of the car.

Resolution of these outstanding material factual issues is essential for determining the reasonableness of Officer Troche's use of deadly force, and must be resolved by a trier of fact. We do not decide whether any of the

evidence submitted by Jessie would be admissible at trial; at the summary-judgment stage, "we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents." *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003).

We vacate the district court's grant of the defendants' summary-judgment motion on Jessie's excessive-force claim under 42 U.S.C. § 1983 and remand for further proceedings.

2. The district court erred when it determined that Officer Troche was entitled to qualified immunity on Jessie's excessive-force claim. To determine whether a police officer is entitled to qualified immunity, we consider whether (1) the defendant's conduct violated a constitutional right, and (2) that constitutional right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (1994), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236-42, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The "clearly established law should not be defined at a high level of generality"; it must be "particularized" to the facts of the case. *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (internal quotation marks and citations omitted). The district court granted qualified immunity to Officer Troche because Jessie failed to demonstrate that Officer Troche violated a clearly established constitutional right.

It is well established that deadly force may be used only if it is necessary to prevent the escape of a suspect and

"the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. In *Acosta v. City & County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996), we held that an officer's use of deadly force violated the Fourth Amendment in circumstances similar to those present here. The defendant-officer was standing in front of the suspect's car "closer to the side than dead-center," *id.* at 1146, and the car was "moving or rolling very slowly from a standstill" as it approached him. *Id.* at 1147. We stated that the car was moving sufficiently slowly that the officer could have just stepped to the side, making his use of deadly force unreasonable. *Id.* at 1146. We recently affirmed *Acosta*'s holding, emphasizing that "an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him." *Orn v. City of Tacoma*, 949 F.3d 1167, 1178 (9th Cir. 2020).

As long as Jessie's version of events is not "'blatantly contradicted by the record, so that no reasonable jury could believe it,' we must assume that a jury could find [Jessie's] account of what happened credible." *Id.* at 1171 (quoting *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)). Under Jessie's version of the encounter, Pakman did not drive toward Officer Troche; Officer Troche shot into the side or rear of the Civic, as it drove away from the lot and from him; and the Civic posed no threat to officer safety and, at best, a minimal threat to the public. Officer Troche stated at various points in his deposition there were virtually no other individuals in the vicinity or on the roads that evening: there was "very

limited traffic on the road at that time," and "pretty much nobody out" on the roads, because it was 3:00 AM. "All I remember," he stated, is "the two of us." There were no indications that Pakman or Shawn were armed.

At the time of the incident, it was clearly established that officers are not entitled to qualified immunity for shooting at an individual in a fleeing vehicle that does not pose a danger to them or to the public. *Acosta*, 83 F.3d at 1146; *see also Adams v. Speers*, 473 F.3d 989, 992-93 (9th Cir. 2007); *Garner*, 471 U.S. at 3. Therefore, Officer Troche is not entitled to qualified immunity under Jessie's version of events, and we reverse the district court's grant of qualified immunity.

3. The district court erred by granting summary judgment on Jessie's state law wrongful death claim. Jessie argues that the district court erred by grouping his wrongful-death claim with the dismissal of his state-law assault and battery claims.[2] The district court dismissed the three claims together, citing to an unpublished Northern District of California case, which states: "the California Court of Appeal has held that a determination that an officer's use of deadly force is objectively reasonable under § 1983 precludes negligence, assault, and battery claims." *Watkins v. City of San Jose*, No. 15-cv-5786, 2017 U.S. Dist. LEXIS 68648, 2017 WL 1739159, at *20 (N.D. Cal. May 4, 2017). In making this statement, the

2. To the extent Jessie argues that the district court erred in granting summary judgment in favor of defendants on his state-law battery and assault claims, Jessie has waived that argument by failing to raise it in the opening brief.

court relied upon two decisions by the California Court of Appeal, one from 2004 and the other from 2009.

But, as Jessie correctly notes, the California Supreme Court has since clarified that similar language in other cases "can be misunderstood," and stated that "state negligence law . . . is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." *Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 160 Cal. Rptr. 3d 684, 305 P.3d 252, 263 (Cal. 2013). California state negligence law "considers the totality of the circumstances surrounding any use of deadly force"; "the state and federal standards are not the same." *Id.*

Because the district court applied an outdated standard, we vacate the district court's grant of summary judgment to the defendants on Jessie's state wrongful-death claim and remand for further proceedings.

REVERSED and **REMANDED**.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED JUNE 28, 2018

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 13-cv-04490-KAW

JESSIE LEE JETMORE STODDARD-NUNEZ,

Plaintiff,

v.

CITY OF HAYWARD, *et al.*,

Defendants.

June 28, 2018, Decided
June 28, 2018, Filed

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 100

On September 27, 2013, Plaintiff Jessie Lee Jetmore Stoddard-Nunez filed the instant suit against Defendants City of Hayward and Manuel Troche. (Compl., Dkt. No. 1.) Plaintiff brings claims under 42 U.S.C. § 1983 and other state law actions, based on the March 3, 2013 shooting death of Plaintiff's brother, Shawn Joseph Jetmore

Stoddard-Nunez ("Decedent") by Defendant Troche. (Third Amended Compl. ("TAC") ¶ 1, Dkt. No. 134.)

On July 11, 2017, Defendants filed the instant motion for summary judgment. (Defs.' Mot., Dkt. No. 100.) Upon consideration of the parties' filings and the arguments made at the September 7, 2017 and April 19, 2018 hearings, and for the reasons set forth below, Defendants' motion for summary judgment is GRANTED.

I. BACKGROUND

A. Factual Background

On March 3, 2013, Plaintiff and Decedent had a social gathering at their apartment. (Brick Decl., Exh. 4 ("Plf.'s Dep.") at 56:22-23, Dkt. No. 102.) Decedent's friend, Arthur Pakman, attended the gathering. (Plf.'s Dep. at 57:7-8.) Decedent and Pakman were drinking alcohol, and Pakman became more violent and disruptive as the night went on. (Plf.'s Dep. at 62:6-8; 66:14-16.) Pakman picked a fight with Plaintiff, causing Decedent to intervene. (Plf.'s Dep. at 67:10-12; 68:10-12.) When Pakman failed to stop, Plaintiff and Pakman got into an argument, and Plaintiff asked Pakman to leave. (Plf.'s Dep. at 69:23-70:5.) Pakman and Decedent then left. (Plf.'s Dep. at 71:7-10.)

That same night, Defendant Manuel Troche was on patrol in full uniform, using a fully marked patrol vehicle. (Pointer Decl., Exh. A ("Troche Prelim. Hearing Test.") at 43:11-14, Dkt. No. 112; Pointer Decl., Exh. A ("McLeod Prelim. Hearing Test.") at 15:3-6.) Defendant Troche had

a ride-along passenger, Russell McLeod. (Troche Prelim. Hearing Test. at 44:5-8.) The Hayward Police Department Ride-Along Policy requires that a ride-along passenger complete an application form and execute a waiver of liability; Defendant Troche could not recall whether Mr. McLeod completed his paperwork. (Pointer Decl., Exh. D ("Ride-Along Policy"); Exh. B ("Plf.'s Troche Dep.") at 32:2.)

Around 3:20 a.m., Defendant Troche and Mr. McLeod were on patrol when they noticed a red Honda Civic swerving over the lane lines. (Brick Decl., Exh. 5 ("Defs.' Troche Dep.") at 36:25-37:12; Troche Prelim. Hearing Test. at 46:3-4.) The vehicle was driven by Pakman, with Decedent in the passenger seat. At the time, the streets were fairly empty. (Troche Prelim. Hearing Test. at 46:1-2.) Defendant Troche and Mr. McLeod saw the Honda Civic run a red light, and Defendant Troche followed, trying to catch up because he believed the vehicle could be a danger to people around it or that the driver was drunk, and decided to investigate. (Defs.' Troche Dep. at 38:5-14.) As Defendant Troche sped up, he did not turn on his traffic enforcement lights, nor did he radio dispatch to inform them of what he was doing. (Defs.' Troche Dep. at 38:19-25.) During the pursuit, Defendant Troche observed the car swerving in and out of the lanes, looking like he was trying to find somewhere to pull in. (Plf.'s Troche Dep. at 44:21-45:2.) He also saw Pakman go through a stop sign. (Plf.'s Troche Dep. at 46:11-16.) Defendant Troche still did not call the car in or communicate with dispatch regarding an intent to stop the car, as he did not have license plate information to provide at that juncture. (Plf.'s Troche

Dep. at 46:23-47:3.) Defendant Troche never activated his sirens. (Plf.'s Troche Dep. at 48:4-10.)

Defendant Troche caught up to Pakman's vehicle as it pulled around a cul-de-sac on Fletcher Avenue. (Defs.' Troche Dep. at 47:16-18.) As Defendant Troche drove down the cul-de-sac, Pakman reached the end of the cul-de-sac and was looping back, resulting in Defendant Troche and Pakman passing each other. (Defs.' Troche Dep. at 47:14-22.) As they passed, Mr. McLeod was able to make eye contact with the driver and passenger, who were looking at him and Defendant Troche. (McLeod Prelim. Hearing Test. at 8:14-18, 8:27-9:1.) Defendant Troche also looked into the car and saw two men, although neither appeared to make eye contact with him and Defendant Troche did not say anything. (Troche Prelim. Hearing Test. at 50:21-51:25.)

Defendant Troche exited the cul-de-sac, and saw Pakman pull into an empty parking lot of a closed business adjacent to the cul-de-sac, and park in a spot facing the business. (Troche Prelim. Hearing Test. at 51:27-52:2, 52:7-10; Defs.' Troche Dep. at 50:1-8, 54:24-55:3.) Thus, Pakman's vehicle was facing the left-hand side of the parking lot. (McLeod Prelim. Hearing Test. at 9:22-23.) Looking into the parking lot from Fletcher Lane, there was an apartment complex to the right of the parking lot, and a one-level brick building to the left. (Defs.' Troche Dep. at 55:5-15.) There were also two reddish-colored poles at the end of the driveway. (Defs.' Troche Dep. at 55:19-21.) Defendant Troche pulled into the parking lot to the left side of the entrance, near the pole, with part of

his vehicle in the roadway, blocking the sidewalk. (Defs.' Troche Dep. at 56:16-57:3; Troche Prelim. Hearing Test. at 52:28-53:1.) Based on this positioning, Defendant Troche's vehicle would have been perpendicular with Pakman's vehicle. Defendant Troche thought that from the way Pakman pulled into a secured lot, it appeared to be a possible ambush situation. (Defs.' Troche Dep. at 61:7-16; Troche Prelim. Hearing Test. at 53:2-7.)

Defendant Troche radioed dispatch a code 1154 (suspicious vehicle). (Defs.' Troche Dep. at 60:10-16; *see also* Brick Decl., Exh. 9 at 2:2-3.) Defendant Troche and Mr. McLeod both exited the marked police vehicle. (McLeod Prelim. Hearing Test. at 10:1-5; Troche Prelim. Hearing Test. at 54:17; Defs.' Troche Dep. at 63:5-7.) Mr. McLeod testified that he got out to get clear of the car, but that before he could go off to the side, Defendant Troche told him not to. (McLeod Prelim. Hearing Test. at 10:19-24.) Mr. McLeod remained next to the patrol car behind the vehicle door. (Defs.' Troche Dep. at 73:10-13.) Defendant Troche testified that he did not remember what, if any, directions he gave to Mr. McLeod as they were exiting or after exiting the vehicle. (Defs.' Troche Dep. at 67:19-22.) Defendant Troche turned on the driver's side overhead spotlight and set it on the Honda. (McLeod Prelim. Hearing Test. at 14:11-16; Troche Prelim. Hearing Test. at 54:21-28; Defs.' Troche Dep. at 58:1-59:2.)

Defendant Troche testified that when he exited the vehicle, he immediately drew his gun as he announced himself as "Police," and told the driver, "Shut off the car. Let me see your hands." (Defs.' Troche Dep. at 63:16-

18; 82:8-11; Troche Prelim. Hearing Test. at 55:11-14, 55:24-26, 56:13-22.) Pakman's window was down, but Pakman did not look at him or respond, and instead continued to look forward. (Defs.' Troche Dep. at 64:1-10, 66:11-17; Troche Prelim. Hearing Test. at 56:5-7, 57:25-28.) Defendant Troche saw Decedent leaning over as if reaching for something under the seat or dash, making Defendant Troche believe that he was arming himself or hiding contraband. (Defs.' Troche Dep. at 69:20-70:1; Troche Prelim. Hearing Test. at 58:1-6.) Defendant Troche continued to give orders to Pakman, telling him to turn the car off and show his hands. (Defs.' Troche Dep. at 73:19-74:6.) Pakman and Decedent did not comply with the commands; Defendant Troche then went around the back of his patrol vehicle, walking west to try to get to the back of Pakman's vehicle to get a plate to dispatch. (Defs.' Troche Dep. at 77:13-19; Troche Prelim. Hearing Test. at 58:22-26.) At some point, although it was not clear if it was before or while Defendant Troche was moving, Pakman placed a cigarette in his mouth and lit it while continuing to look forward. (Defs.' Troche Dep. at 74:20, 83:17-21; Troche Prelim. Hearing Test. at 58:17-21.) When he could not get a good angle for the plate, Defendant Troche returned to the patrol car, positioning himself on the passenger side with Mr. McLeod. (Defs.' Troche Dep. at 77:20-22; Troche Prelim. hearing Test. at 60:24-27.) Defendant Troche saw Pakman look at him for the first time with an angry grimace. (Defs.' Troche Dep. at 86:11-18; Troche Prelim. Hearing Test. at 60:19-21.)

Mr. McLeod testified that he heard Defendant Troche yelling at Pakman and Decedent to "Turn the fucking

car off. Turn the fucking car off now. Turn the car off," and to "Get out of the car." (McLeod Prelim. Hearing Test. at 10:24-11:6.) Mr. McLeod described Defendant Troche's tone as "[a]uthoritative and yelling." (McLeod Prelim. Hearing Test. at 11:7-9.) He did not, however, recall whether Defendant Troche identified who he was. (McLeod Prelim. Hearing Test. at 11:10-11.) Mr. McLeod could only see the driver, who never acknowledged Defendant Troche or Mr. McLeod, but continuously looked straight ahead, even though the driver's window appeared to be halfway down. (McLeod Prelim. Hearing Test. at 12:1-15.) Mr. McLeod saw Pakman light a cigarette, although Defendant Troche was still yelling commands. (McLeod Prelim. Hearing Test. at 12:21-26.)

Pakman then put the Honda into reverse, backing up. (Defs.' Troche Dep. at 85:15-17; McLeod Prelim. Hearing Test. at 13:23-26.) Both Mr. McLeod and Defendant Troche testified that they could hear the sound of the car going in reverse. (Defs.' Troche Dep. at 85:20-23; McLeod Prelim. Hearing Test. at 13:27-14:3.) Pakman essentially did a three-point turn in reverse, such that the back-end of his vehicle was against the fence and the headlights were facing Defendant Troche and Mr. McLeod. (Defs.' Troche Dep. at 86:2-10; McLeod Prelim. Hearing Test. at 14:4-7.) During this time, Defendant Troche does not recall giving any instructions to Mr. McLeod. (Plf.'s Troche Dep. at 90:12-17.) The Honda's headlights were on, making it difficult for Defendant Troche to see what was happening inside of the car. (Plf.'s Troche Dep. at 88:20-86:4.) Defendant Troche radioed that the Honda was coming at them based on Pakman's vehicle facing them.

(Plf.'s Troche Dep. at 89:23-90:6.) Mr. McLeod recalled Defendant Troche yelling at Pakman, "Don't do it. Don't do it. Turn the car off. Don't do it." (McLeod Prelim. Hearing Test. at 15:9-11; *see also* Troche Prelim. Hearing Test. at 61:10-17.)

Pakman then stepped on the gas and accelerated towards Defendant Troche and Mr. McLeod. (McLeod Prelim. Hearing Test. at 15:10-11; Plf.'s Troche Dep. at 89:24-25; Troche Prelim. Hearing Test. at 61:4.) Defendant Troche could hear the tires screeching or squealing, and believed Pakman floored the gas based on the body shift and the lights going up. (Plf.'s Troche Dep. at 91:16-20.) Mr. McLeod testified that he knew that Pakman was coming his way because the bigger side to get out of the driveway was on his side, and that there was no room to get out from the patrol vehicle driver's side. (McLeod Prelim. Hearing Test. at 15:9-18.) As the Honda came towards the police vehicle, Defendant Troche was standing in the circle near the door, and brought his gun up and pointed at the driver. (Plf.'s Troche Dep. at 92:12-22.) Defendant Troche stated that the car was initially coming forward, but then veered towards the police vehicle's passenger side. (Plf.'s Troche Dep. at 93:7-10; Troche Prelim. Hearing Test. at 62:12-22, 63:6-13.) Based on the video, Sergeant Eric Krimm, who supervised the investigation into the shooting, stated that he did not recall seeing a discernible swerve, although the quality of the video made it difficult to determine whether the vehicle swerved. (Pointer Decl., Exh. E ("Plf.'s Krimm Dep.") at 18:17-21; 21:11-16.) Crime scene tech Sergeant Jason Corsolini testified that Mr. Pakman's vehicle was on a direct course, *i.e.* going straight towards, with the

passenger side of the police vehicle. (Pointer Decl., Exh. H ("Corsolini Dep.") at 87:5-14.)

The vehicle was approximately ten feet from Defendant Troche when he started backpedaling as he opened fire, while also trying to shove Mr. McLeod out of the way of the Honda. (Plf.'s Troche Dep. at 94:15-22, 99:10-11; Troche Prelim. Hearing Test. at 61:19-23, 63:18-20, 63:24-27.) Defendant Troche thought that Mr. McLeod had gotten run over at some point. (Plf.'s Troche Dep. at 95:23-96:2; Troche Prelim. Hearing Test. at 64:17-20.) When Mr. McLeod saw the Honda coming towards him, he ducked down and heard the Honda make contact with the door of the patrol vehicle; the patrol vehicle door then pressed against Mr. McLeod until the car passed and the door opened back up. (McLeod Prelim. Hearing Test. at 16:4-7; *see also* Pointer Dec., Exh. C ("McLeod Interview") at 71:12-25.) Mr. McLeod could hear metal scraping against metal, and felt impact on his left and right side. (McLeod Prelim. Hearing Test. at 16:10-15.) Sergeant Corsolini later found an 18- to 20-inch horizontal line on the body line of the patrol vehicle, in addition to other scuff marks and dents that he believed were made by Mr. Pakman's car. (Brick Decl. ISO Reply, Exh. 21 ("Reply Corsolini Dep.") at 74:1-14.) Sergeant Corsolini did not match the scuff marks to the Honda, and no paint chips from the Honda were found on the patrol vehicle, although white colored paint was found on the Honda. (Plf.'s Corsolini Dep. at 56:3-5; Reply Corsolini Dep. at 72:17-19, 74:15-75:2.)

Appendix B

Defendant Troche was continuously pulling the trigger as quickly as he could. (Plf.'s Troche Dep. at 111:18-19; Troche Prelim. Hearing Test. at 64:14-16.) Defendant Troche ultimately fired nine shots out of thirteen rounds in his gun. (Defs.' Troche Dep. at 24:20-24; Brick Decl., Exh. 14 ("Defs.' Padavana Dep.") at 17:1-4.) Mr. McLeod recalled hearing shots being fired as he felt the patrol vehicle door being pressed up against him, presumably by the Honda as it drove by. (McLeod Prelim. Hearing Test. at 17:4-6; McLeod Interview at 33:22-24.) When Defendant Troche perceived that the Honda was past him, he stopped firing, by which point he had backed up to the rear of his police vehicle and was in the street. (Plf.'s Troche Dep. at 100:3-13.) Mr. McLeod stated that he looked out of the back window, and saw Pakman's vehicle going down the street and Defendant Troche following, although Defendant Troche was not shooting at that point. (McLeod Interview at 33:17-22.) After the car had gone by, Mr. McLeod thought he heard Defendant Troche say, "I think I got him." (McLeod Prelim. Hearing Test. at 17:21-22.) Defendant Troche then informed the dispatcher: "Shots fired. Shots fired. The vehicle took off." (Brick Decl., Exh. 9 at 2:19-20.) Approximately twelve seconds passed between Defendant Troche radioing dispatch about Pakman's car pointed at them and his informing dispatch that a shooting had occurred. (Brick Decl., Exh. 8 at 0:57-1:08.)

Crime scene tech Sergeant Corsolini found gouge marks near the shooting scene, and concluded that it was caused by Mr. Pakman's Honda exiting the apron. (Corsolini Dep. at 52:15-53:10.) Sergeant Corsolini's conclusion was based on asphalt north of the gouge marks

that appeared to be fresh, although Sergeant Corsolini did not analyze whether the asphalt came from the gouge marks. (Corsolini Dep. at 53:14-54:1.) Pakman drove the vehicle until it was involved in a collision. (Brick Decl., Exh. 16 ("Defs.' Krimm Dep.") at 12:23-13:3.)

Bullet holes were found in the Honda's front windshield and hood, front passenger door, and rear passenger door. (Pointer Dec., Exh. F ("Plf.'s Padavana Dep.") at 26:14-16, 29:1-13, 31:7-11.) No bullet holes were found in the back of the vehicle. Bullet fragments were found in the front driver's floorboard, the front passenger floorboard, the rear passenger's door. (Pointer Dec., Exh. I ("Portillo Dep.") at 23:5-7, 26:17-18, 30:11-13.) Decedent suffered two bullet wounds: a gunshot wound to the right shoulder, with the bullet recovered on the left side of the neck, and a through-and-through gunshot wound to the right arm. (Pointer Dec., Exh. J ("Autopsy Report").) Decedent ultimately died from a "massive hemorrhage due to transection of the carotid artery due to gunshot wound to the right arm with neck involvement." (*Id.*)

When Pakman was interviewed after the incident, he stated that he did not know it was the police and that he was just "trying to get the fuck out of there" because he was getting shot at. (Pointer Decl., Exh. K.) He also denied driving at anyone. (*Id.*) Pakman was later charged with Decedent's murder, two counts of felony assault, and two counts of driving under the influence. (Brick Decl., Exh. 17.) On January 26, 2016, Pakman pled no contest to involuntary manslaughter and felony driving under the influence. (Brick Decl., Exh. 12 at 1:10-14, 6:17-22.)

B. Procedural Background

On September 27, 2013, Plaintiff brought claims for § 1983 violations and various state claims, based on Decedent's death. (Compl. at 6-11.) On July 11, 2017, Defendants filed a motion for summary judgment. Defendants argued that Plaintiff lacked standing to bring the instant case because Decedent's father, Jeffrey Stoddard, had superior rights to Plaintiff. (Defs.' Mot. at 6-8.) In the alternative, Defendants argued that Defendant Troche's use of force was reasonable and that he was entitled to qualified immunity. (*Id.* at 9-21.) Defendants also argued that Plaintiff could not establish *Monell* liability as to the claims against the City. (*Id.* at 21-25.)

On August 1, 2017, Plaintiff filed his opposition to Defendants' motion for summary judgment. (Plf.'s Opp'n, Dkt. No. 114.) The opposition included an expert report by Scott G. Roder, which opined that Defendant Troche fired his gun at Pakman's vehicle from behind, and that Decedent died from a gunshot fired from behind Pakman's vehicle as it was driving away. (Roder Decl. ¶¶ 10, 14, Dkt. No. 115.) On August 15, 2017, Defendants filed their reply brief. (Defs.' Reply, Dkt. No. 123.)

On September 7, 2017, the Court held a hearing on Defendants' motion for summary judgment, focused on the standing issue. (*See* Dkt. No. 127.) The parties disputed whether amending the complaint to add Decedent's Estate as a plaintiff would be futile, as Defendants argued that such a complaint would not relate back.

Appendix B

On October 18, 2017, the Court stayed the case to allow the probate court to decide Plaintiff's petition to be appointed as personal representative of Decedent's Estate. (Dkt. No. 131 at 2.) On November 27, 2017, Plaintiff filed a notice that the appointment had been made. (Dkt. No. 132.) On March 1, 2018, the Court unstayed the case and permitted Plaintiff to file a third amended complaint naming Plaintiff as the personal representative of Decedent's Estate, thus resolving the standing issue. (Dkt. No. 133 at 11.)

On March 9, 2018, Plaintiff, acting in his capacity as the personal representative of Decedent's Estate, filed the operative complaint. Plaintiff brought the following causes of action: (1) 42 U.S.C. § 1983 claim for violation of Decedent's Fourth Amendment Rights; (2) 42 U.S.C. § 1983 claim for wrongful death; (3) *Monell* liability; (4) wrongful death based on negligence; (5) assault; and (6) battery. (TAC at 6-11.)

The Court then set Defendants' motion for summary judgment for hearing and requested that the parties be prepared to address certain issues, including whether Mr. Roder's opinion complied with the requirements of *Daubert* and Federal Rule of Evidence 702. (Dkt. No. 136 at 1-2.)

II. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed.

R. Civ. P. 56(a). Summary judgment is appropriate when, after adequate discovery, there is no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law. *Id.*; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Southern Calif. Gas. Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

On an issue where the nonmoving party will bear the burden of proof at trial, the moving party may discharge its burden of production by either (1) "produc[ing] evidence negating an essential element of the nonmoving party's case" or (2) after suitable discovery, "show[ing] that the nonmoving party does not have enough evidence of an essential element of its claim or defense to discharge its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000); *see also Celotex*, 477 U.S. at 324-25.

Once the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some genuine issue for trial in order to defeat the motion. *See* Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 250. "A party opposing summary judgment may not simply question the credibility of the movant to foreclose summary judgment." *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001). "Instead, the non-moving party must go beyond the pleadings and by its own evidence set forth specific facts showing that there is a genuine issue for trial." *Id.* (citations and quotations omitted). The non-moving party must produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise a genuine issue of material fact to defeat summary judgment. *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Electronics Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

In deciding a motion for summary judgment, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011).

III. DISCUSSION

A. Seizure

First, Defendants argue that Decedent was not seized as a matter of law, relying on *Nakagawa v. County of*

Maui, 686 Fed. Appx. 388 (9th Cir. 2017). (Defs.' Mot. at 8-9.) Generally, "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (internal quotations and citations omitted). In *Nakagawa*, an unpublished decision,[1] the Ninth Circuit found that there was no intentional seizure of the decedent where the plaintiffs admitted as "undisputed" that each of the officers was aiming at the driver, but had instead hit a passenger. 686 Fed. Appx. at 389.

The facts of *Nakagawa* are readily distinguishable. Although not discussed by the Ninth Circuit, the district court, in granting summary judgment, found that "the officers were not aware of [the p]laintiffs' presence in the bed of the truck before they discharged their firearms." Case Nos. 11-cv-130 DKW-BMK, 12-569 DKW-BMK, 2014 U.S. Dist. LEXIS 37901, 2014 WL 1213558, at *6 (D. Haw. Mar. 21, 2014). As the officers did not even know that the plaintiffs were in the vehicle, the officers could not have intentionally aimed at the plaintiffs. 2014 U.S. Dist. LEXIS 37901, [WL] at *7. In contrast, Defendant Troche was aware of Decedent's presence prior to the shooting. (Plf.'s Troche Dep. at 69:21-70:18.) There is also testimony that Defendant Troche was aiming at the car to stop the

1. Unpublished decisions are not binding authority. (Ninth Cir. Rule 36-3.)

driver, which is distinct from shooting only at the driver. (*See* Plf.'s Troche Dep. at 94:15-16 ("Shots were fired **at the car** to stop the driver from continuing and running us over") (emphasis added).) The Court, therefore, cannot conclude, as a matter of law, that Decedent was not seized within the meaning of the Fourth Amendment.

B. Reasonable Force

Second, the parties dispute whether the amount of force used by Defendant Troche was reasonable. "Apprehension by deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement." *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010). While an officer may not use deadly force to apprehend a suspect that poses no immediate threat to the officer or others, "it is not constitutionally unreasonable to prevent escape using deadly force where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Id.* (internal quotation omitted). Determining reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Furthermore, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance

for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *Id.*

i. Firing at Vehicle that had Passed

In his papers, Plaintiff argues that "the fatal shots were fired after the vehicle had passed Defendant Troche and his patrol vehicle." (Plf.'s Opp'n at 27.) Thus, "at the time the fatal shots were fired, any alleged threat had subsided and the subject vehicle and its occupants did not pose a threat." (*Id.*) The Court finds, however, that Plaintiff has failed to provide any admissible evidence to support this theory. In his opposition, Plaintiff appears to primarily rely on Mr. Roder's expert opinion that shots were fired at the back of the vehicle and that the fatal shot was fired from behind the Honda as it was driving away. (*Id.* at 17-18; Roder Decl. ¶¶ 10, 14.) Mr. Roder's opinion, however, fails to satisfy Rule 702 and *Daubert*. In general, "[t]he trial court must assure that the expert testimony both rests on a reliable foundation and is relevant to the task at hand. Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 813 (9th Cir. 2014).

Here, Mr. Roder's opinion satisfies neither of these requirements. In the order setting this matter for oral

argument, the Court explained that "there [wa]s no information on whether 'the testimony is the product of reliable principles and methods,' and whether Mr. Roder 'has reliably applied the relevant principles and methods to the facts of the case.'" (Dkt. No. 136 at 1-2 (quoting *Pyramid Techs., Inc.*, 752 F.3d at 813).) The Court also noted that Mr. Roder's report failed to account for Mr. McLeod's presence and the patrol vehicle doors being open. (*Id.* at 2.) At the hearing, Plaintiff stated that Mr. Roder had been admitted and qualified in other cases, and that Mr. Roder's opinion involved a computer program that had been used for his opinions admitted as expert testimony in other cases. Plaintiff, however, did not explain the methodology used by Mr. Roder, nor did Plaintiff explain how Mr. Roder's opinion had been reliably applied to the facts of the case at bar. Indeed, at the hearing, Plaintiff appeared to concede the issue by asserting that Mr. Roder's opinion was not necessary and requesting that the Court instead rely on the evidence in the record.

That evidence, in turn, is also insufficient to create a dispute of material fact. At the hearing, Plaintiff pointed only to a photograph by CSI Jennifer Padavana of a bullet hole in the back passenger seat, and to the alleged conflicts in the testimony of Defendant Troche and Mr. McLeod. (*See* Dkt. No. 116; Plf.'s Troche Dep. at 89:24-90:6, 95:6-12, 96:24-97:6; McLeod Interview at 33:5-25.) With respect to the photograph, absent an expert report, there is no information as to what conclusions a jury could draw from it. The photograph, alone, does not demonstrate that Defendant Troche fired after the car had already

passed him, and without expert testimony to explain the significance of the photograph, a reasonable inference cannot be made as to when Defendant Troche fired his gun.

As to the alleged conflicts in the testimony of Defendant Troche and Mr. McLeod, the Court finds that the conflicts, if any, do not create a dispute in material fact as to whether Defendant Troche shot at the vehicle after it had passed. As a general matter, "once the movant for summary judgment has supported his or her motion, the opponent must affirmatively show that a material issue of fact remains in dispute and may not simply rest on the hope of discrediting movant's evidence at trial." *Frederick S. Wyle Prof'l Corp. v. Texaco, Inc.*, 764 F.2d 604, 608 (9th Cir. 1985). Thus, "[n]either a desire to cross-examine affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment, unless other evidence about an affiant's credibility raises a genuine issue of material fact." *Id.*

Here, Plaintiff argues that Defendant Troche lacks credibility for several reasons. First, Plaintiff contends that Defendant Troche testified that it took two seconds from the time he saw the car moving towards him until he was done shooting, but that it was impossible for the described of events to occur in two seconds. It is undisputed, however, that twelve seconds passed from the time Defendant Troche reported that Pakman was driving towards him to the time he reported that shots had been fired. (Brick Decl., Exh. 8 at 0:57-1:08.) Plaintiff does not argue that based on this twelve seconds, Defendant

Troche's testimony that the car was driving at him was false, or that Defendant Troche was shooting at the car after it passed. In other words, whether the events occurred in two seconds or twelve seconds, the dispute is not material because it does not affect Defendant Troche's justification for shooting, which was that the car was driving at him.

Plaintiff also points to Mr. McLeod's testimony that he was in the car when he heard the shots. (*See* McLeod Interview at 33:5-25.) Mr. McLeod testified that Pakman's vehicle clipped the patrol vehicle door, which slammed into Mr. McLeod and caused him to fall onto the passenger seat, when he heard gunfire. (*Id.* at 33:5-12.) When the shooting stopped, he looked up and saw Defendant Troche following Pakman's vehicle as it drove down the street, with Defendant Troche following it but not shooting. (*Id.* at 33:17-25.) Based on this, Plaintiff argues that a jury could infer that Defendant Troche did, in fact, shoot at the back of the vehicle. This inference is, however, unreasonable. In the absence of expert testimony, it cannot be inferred that Defendant Troche shot at the back of Pakman's vehicle after it had passed him based solely on Mr. McLeod observing Defendant Troche *not* shooting at the vehicle as it drove down the street. In short, Mr. McLeod's testimony is not evidence that Defendant Troche shot at Pakman's vehicle after it passed him, and thus does not create a genuine dispute of material fact.

Additionally, Plaintiff points to alleged discrepancies in the testimony in another attack on the eyewitness testimony. For example, Plaintiff argues that Defendant

Troche testified that the car veered towards the passenger side, but that Sergeant Krimm did not see a discernible swerve on the video footage. (Plf.'s Troche Dep. at 93:7-10; Plf.'s Krimm Dep. at 18:17-21, 21:11-16.) First, the poor quality of the video made it difficult to determine whether the vehicle swerved. Sergeant Krimm's failure to recall a discernable swerve does not create a conflict with the other testimony.[2] Moreover, even if the car did not swerve, Plaintiff provides no evidence to contradict Defendants' evidence that the vehicle was aimed directly at the passenger side of the police vehicle, where both Defendant Troche and Mr. McLeod were positioned. Indeed, Crime scene tech Sergeant Corsolini testified that Pakman's vehicle was going straight toward the passenger side of the patrol car.

Plaintiff also disputes what caused Mr. McLeod to be pushed into the vehicle. Mr. McLeod testified that it was Pakman's vehicle making contact against the door that pushed him into the patrol vehicle. (McLeod Prelim. Hearing Test. at 16:4-7; McLeod Interview at 71:12-25.) Mr. McLeod also heard metal scraping metal against metal. (McLeod Prelim. Hearing Test. at 16:10-15.) Sergeant Corsolini did not, however, find paint chips from Pakman's vehicle on the patrol vehicle, but did find white paint on Pakman's vehicle. (Plf.'s Corsolini Dep. at 56:3-5; Reply Corsolini Dep. at 72:17-19, 74:15-75:2.) Based on this, Plaintiff argues that the lack of paint chips means the car was not hit. Again, however, Plaintiff fails

2. Sergeant Krimm also testified that he had not seen the video since 2013, and thus did not recall any discernible swerve. (Plf.'s Krimm Dep. at 21:11-14.)

to produce any evidence, such as expert testimony, that paint from Pakman's vehicle should have been found on the patrol vehicle if the cars made contact. This is particularly significant when, as Defendants noted at oral argument, Pakman's vehicle had a bumper that was not painted. (*See also* Dkt. No. 116.) Thus, Plaintiff fails to affirmatively provide evidence that would create a dispute of material fact as to whether Pakman's vehicle hit the patrol vehicle. In short, in the absence of admissible evidence, Plaintiff's asserted discrepancies in the testimony are insufficient to defeat summary judgment.

ii. Firing at a Slow-Moving Vehicle

At the hearing, Plaintiff, for the first time, raised the possibility that Pakman's vehicle was driving between 2-7 mph when Defendant Troche fired at the vehicle. Plaintiff argued that in such circumstance, it was unreasonable for Defendant Troche to shoot at the vehicle, particularly without giving a warning that he would shoot.

Plaintiff, however, provides no evidence from which a fact-finder could conclude that the vehicle was driving at such a speed, and oral argument is not evidence. Plaintiff relies heavily on *Gonzalez v. City of Anaheim*, in which the Ninth Circuit found that a jury could find that the vehicle was only going 3-7 mph based on the defendants' own testimony. 747 F.3d 789, 795-96 (9th Cir. 2014). Specifically, the officers testified that the vehicle had moved 50 feet in five to ten seconds, and that it was going 50 mph when one of the officers shot. *Id.* at 794. The Ninth Circuit explained that the combination of these three facts was physically

impossible; it pointed to the plaintiffs' arguments that if the vehicle had traveled 50 feet in ten seconds, the average speed would be 3.4 mph. *Id.* Likewise, if the vehicle had traveled 50 feet in five seconds, the average speed would be 6.8 mph. Thus, if a jury believed the officers' testimony that the vehicle had moved 50 feet in five to ten seconds, then the vehicle would only have been going at between 3-7 mph, a speed at which the defendants did not argue a threat would still be posed. *Id.* at 795-96.

Here, however, Plaintiff has not produced evidence to conclude that the vehicle was driving at only 2-7 mph. Plaintiff states that the parking lot was "small," but does not provide a measurement, nor compare that with the time it might have taken for Pakman to drive out of the parking lot -- which, as discussed above, would be a maximum of twelve seconds. Plaintiff does not provide expert testimony that opines as to the speed Pakman was driving. Furthermore, the evidence that Defendant Troche heard Pakman's car's tires screeching suggests that Pakman had floored the gas, suggesting he was not going 2-7 mph. (Plf.'s Troche Dep. at 91:16-20.) In short, there is nothing from which a fact-finder could infer that the vehicle was driving at only 2-7 mph, and, therefore, no support for Plaintiff's theory that the car was moving so slowly that Defendant Troche and Mr. McLeod were not in danger, or that Defendant Troche had sufficient time to give a warning that he would shoot.

Plaintiff also relies on the failure to test whether asphalt came from the gouge marks. The failure to test the asphalt is merely an attempt to create a genuine

dispute of material fact from the absence of evidence. This is insufficient to defeat summary judgment, as Plaintiff must *produce* evidence to show a genuine dispute exists. *See Bhan*, 929 F.2d at 1409 (finding that the non-moving party must produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists").

Accordingly, the Court finds that Plaintiff has failed to produce admissible evidence to conclude that Pakman's vehicle was moving so slowly that it did not pose a threat. Thus, Plaintiff cannot establish that Defendant Troche's actions were unreasonable, or that the vehicle was moving slowly enough for Defendant Troche to issue a warning that he would shoot. Further, to the extent Plaintiff argues that Defendant Troche should have given a warning regardless of the speed at which the vehicle was moving, Plaintiff provides no authority which suggests that an officer must issue a warning even if a vehicle is coming at them at a high speed.[3]

3. To the extent Plaintiff relies on *Gonzalez*, again, there the Ninth Circuit found that the vehicle may have been moving at 3-7 mph, and thus a jury could find that a warning was practicable. 747 F.3d at 797. In so finding, however, the Ninth Circuit emphasized that "[t]he absence of a warning does not necessarily mean that [the] use of deadly force was unreasonable." *Id.* At the hearing, Plaintiff did not argue that Defendant Troche should give a warning regardless; instead, Plaintiff only argued that because Pakman was probably going between 2-7 mph, it was reasonable to give a warning.

iii. Firing at Vehicle Without Identifying Self and While Blinded by Headlights

At the hearing, Plaintiff argued briefly that Defendant Troche acted unreasonably because he never identified himself, and then shot at Pakman's vehicle while blinded by Pakman's headlights. Even assuming these facts as true, however, the Court finds that these facts alone do not demonstrate that Defendant Troche acted unreasonably, and Plaintiff does not explain otherwise.

Analyzing the *Graham* factors, the Court finds that the underlying crime was not severe, as Defendant Troche believed Pakman was a drunk driver, and saw Pakman commit traffic violations such as going through a stop sign. (Defs.' Troche Dep. at 38:5-14, Plf.'s Troche Dep. at 46:11-16.) At the time of the shooting, however, the evidence in the record shows that Pakman was attempting to escape the scene by driving toward the passenger side of the police vehicle, where both Defendant Troche and Mr. McLeod were located. Even if Pakman's intent was simply to escape, and not to hit Defendant Troche and Mr. McLeod, as Plaintiff argues, Plaintiff does not dispute that Pakman was driving in their direction. By driving towards them, the threat to Defendant Troche and Mr. McLeod was extremely high, which is evidenced by Mr. McLeod being knocked over when Pakman's vehicle hit the passenger door of the police car. Further, Pakman was attempting to escape the scene, although he may not have known that Defendant Troche was an officer. Moreover, from the time it took for Defendant Troche to report that Pakman was driving at him to reporting that

shots were fired, only twelve seconds had passed, suggests a fast-developing situation. Under these circumstances, "[a] reasonable police officer confronting this scene could reasonably believe that the [vehicle] posed a deadly threat" to Mr. McLeod and himself. *Wilkinson v. Torres*, 610 F.3d 546, 553 (9th Cir. 2010).

Therefore, the Court concludes that based on the evidence in the record, the amount of force used by Defendant Troche was reasonable. Defendant Troche is therefore entitled to summary judgment on this claim.

C. Qualified Immunity

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S.Ct. 548, 551, 196 L. Ed. 2d 463 (2017) (internal quotation omitted). "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (internal quotations omitted). In particular, "[u]se of excessive force is an area of law in which the results depend very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 138 S.Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018). The Supreme Court has further emphasized that "qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White*, 137 S.Ct. at 551 (internal quotation omitted).

Appendix B

In determining if qualified immunity exists, the Court must generally first determine whether the facts make out a violation of a constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Next, the Court determines if "the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* In *Pearson*, however, the Supreme Court found that this two-step sequence was not mandatory (although beneficial), and that some cases could be decided by going directly to the second step. *Id.* at 236.

As discussed above, Plaintiff has failed to establish a violation of a constitutional right. Even if Plaintiff had done so, the Court finds that Defendant Troche would still be entitled to qualified immunity because Plaintiff has not shown that the right at issue was clearly established at the time of the alleged misconduct. The Supreme Court has overturned the appellate court's rejection of qualified immunity because "[i]t failed to identify a case where an officer acting under similar circumstances as [the defendant officer] was held to have violated the Fourth Amendment." 137 S.Ct. at 552. Moreover, "general statements of the law are not inherently incapable of giving fair and clear warning to officers . . . the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case." *Kisela*, 138 S.Ct. at 1153 (internal quotations omitted).

Here, instead of pointing to any authority with similar facts that would have clearly established the right at issue, Plaintiff only argues that the credibility issues preclude a finding of qualified immunity. The Court disagrees;

simply attacking a party's or witness's credibility does not create a genuine issue of material fact when Plaintiff has failed to produce evidence that would support his theories. Based on the facts in the record, the Court finds that there is no clearly established constitutional or statutory right that was violated. Plaintiff points to no authority with similar circumstances which would have provided an officer in Defendant Troche's situation notice that his actions were a violation of a constitutional right. The closest such case is *Gonzalez*; again, however, that case involved a situation where the jury could have found that the decedent's vehicle was moving at 3-7 mph and that a warning should have been given, whereas here Plaintiff has produced no evidence to allow a fact-finder to draw a similar conclusion.[4] The Court, therefore, concludes that Defendant Troche is entitled to qualified immunity.

D. *Monell* Liability

Next, the Court concludes that Plaintiff has failed to establish *Monell* liability against the City. In general, local governments are "persons" subject to liability under 42 U.S.C. § 1983 where official policy or custom causes a constitutional tort, *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); however, a city or county may not be held vicariously liable for the unconstitutional acts of its employees under the theory of respondeat superior. *See Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382,

4. Indeed, the evidence in the record shows that Defendant Troche yelled at Pakman to turn the car off before opening fire. (McLeod Prelim. Hearing Test. at 15:9-11.)

137 L. Ed. 2d 626 (1997); *Monell*, 436 U.S. at 691; *Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir. 1995). Thus, to impose municipal liability under § 1983 for a violation of constitutional rights, a plaintiff must show: (1) that the plaintiff possessed a constitutional right of which he or she was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional rights; and (4) that the policy is the moving force behind the constitutional violation. *See Plumeau v. Sch. Dist. #40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

Here, Plaintiff argues that Defendant's practice of allowing ride alongs to accompany patrol officers without proper training, supervision, and management proximately caused Decedent's death. (Plf.'s Opp'n at 30-31.) Plaintiff, however, provides no explanation for how this alleged practice caused Decedent's death. Plaintiff, for example, argues that Mr. McLeod was permitted to ride along with Defendant Troche without preparing the appropriate documents and without receiving instructions on where to stand during car stops, but fails to explain how either of those facts, if different, would have affected what occurred. Similarly, Plaintiff points to the failure to adequately instruct patrol officers as to how to monitor and control their ride along passengers, but again fails to analyze how this failure proximately caused Decedent's death.

In the alternative, Plaintiff points to Defendant "Troche's act of firing at the car as it sped away from the scene" as indicating a severe lapse in training, but again,

there is no evidence that would permit a fact-finder to conclude that Defendant Troche fired at Pakman's vehicle after it had passed him. Accordingly, summary judgment on the *Monell* claim is appropriate.

E. State Claims for Assault, Battery, and Negligence

"The California Court of Appeal has held that a determination that an officer's use of deadly force is objectively reasonable under § 1983 precludes negligence, assault, and battery claims." *Watkins v. City of San Jose*, Case No. 15-cv-5786-LHK, 2017 U.S. Dist. LEXIS 68648, 2017 WL 1739159, at *20 (N.D. Cal. May 4, 2017); *see also Brown v. Ransweiler*, 171 Cal. App. 4th 516, 533, 89 Cal. Rptr. 3d 801 (2009) ("We further conclude that because Ransweiler's use of force against Ojeda was reasonable, Ransweiler may not be held liable . . . for battery for any injury that may have resulted from that same use of force."); *id.* at 534 ("As we have already concluded in analyzing the . . . battery claim, Ransweiler's decision to use deadly force and his use of deadly force were objectively reasonable under the circumstances. As a result, Ransweiler met his duty to use reasonable care in deciding to use and in fact using deadly force, and, as a matter of law, cannot be found to have been negligent in this regard."). Here, the Court has concluded that Defendant Troche's use of deadly force was objectively reasonable under § 1983. Therefore, Defendants are entitled to summary judgment on the negligence, assault, and battery claims.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendants' motion for summary judgment.

IT IS SO ORDERED.

Dated: June 28, 2018

/s/ Kandis A. Westmore
KANDIS A. WESTMORE
United States Magistrate Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 18, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-16403

JESSIE LEE JETMORE STODDARD-NUNEZ, INDIVIDUALLY AND AS THE SUCCESSOR-IN-INTEREST OF SHAWN JOSEPH JETMORE STODDARD-NUNEZ,

Plaintiff-Appellant,

v.

CITY OF HAYWARD, A MUNICIPAL ENTITY; MANUEL TROCHE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF HAYWARD,

Defendants-Appellees.

August 18, 2020, Filed

Before: PAEZ and BEA, Circuit Judges, and ADELMAN,* District Judge.

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

Appendix C

The panel voted to deny Defendants-Appellees' petition for panel rehearing. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.