No. 25-

IN THE

Supreme Court of the United States

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE,

Petitioners,

v.

ESTATE OF DANIEL HERNANDEZ BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ AND MARIA HERNANDEZ; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY; M.L.H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, CLAUDIA SUGEY CHAVEZ,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises from a split-second police encounter in which an officer fired six shots in six seconds at a suspect armed with a knife who appeared to be regaining his footing to continue his advance. The Ninth Circuit, relying on slow-motion parsing of body-camera footage, deemed the first four shots constitutionally reasonable but held the last two – fired no more than one second thereafter – to constitute excessive force, despite this Court's repeated admonitions against such artificial segmentation of fast-moving events. In doing so, the Ninth Circuit not only fractured established Fourth Amendment precedent, but also expanded its own "moment-of-threat" jurisprudence in direct conflict with this Court's recent and unanimous rejection of that approach.

Petitioners respectfully submit the following questions presented:

1. Whether the Ninth Circuit disregarded this Court's precedents, including *Graham v. Connor*, 490 U.S. 386 (1989), and *Plumhoff v. Rickard*, 572 U.S. 765 (2014), by artificially parsing a six-second event into discrete segments, finding the first four shots reasonable, but the final two unconstitutional based on a split-second gap and slow-motion video review. An approach that also conflicts with other circuits considering similar facts.

2. Whether the Ninth Circuit effectively adopted a new and more extreme "moment-of-threat" rule that this Court unanimously rejected in *Barnes v. Felix*, 605 U.S. 73, 145 S. Ct. 1353 (2025).

3. Whether, in denying qualified immunity in a 6-5 vote, the en banc Ninth Circuit evaluated whether the right at issue was "clearly established" at an impermissibly high level of generality, contrary to this Court's repeated warnings, including in *Kisela v. Hughes*, 584 U.S. 100 (2018); *City & County of San Francisco v. Sheehan*, 575 U.S. 600 (2015); and *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

4. Whether this case presents a novel opportunity to clarify Fourth Amendment guidance that while officers should be encouraged to continue to reassess a situation, they must also be judged in light of the rapidly evolving and life-threatening circumstances they confront.

PARTIES TO THE PROCEEDING

Petitioners (Defendants-Appellees below) are the City of Los Angeles, the Los Angeles Police Department, and LAPD Officer Toni McBride.

Respondents (Plaintiffs-Appellants below) are the Estate of Daniel Hernandez, Manuel Hernandez, Maria Hernandez, and M.L.H., a minor, by and through her guardian ad litem Claudia Sugey Chavez.

LIST OF RELATED PROCEEDINGS

The following consolidated proceedings are related to the present Petition:

- *M.L.H., et al. v. City of Los Angeles, et al.*, United States District Court for the Central District of California, Case No. 2:20-cv-15154-DMG-KS, consolidated with 2:20-cv-04477-SB (KSx) and administratively closed on August 18, 2020.

- *Estate of Daniel Hernandez, et al. v. City of Los Angeles, et al.*, United States District Court for the Central District of California, Case No. 2:20-cv-04477-SB (KSx), summary judgment entered August 10, 2021.

- *Estate of Daniel Hernandez, et al. v. City of Los Angeles, et al.*, United States Court of Appeals for the Ninth Circuit, Case Nos. 21-55994 and 21-55995, en banc opinion filed June 2, 2025.

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Pursuant to Supreme Court Rule 14.1(d), the following opinions give rise to this Petition:

- On August 10, 2021, the United States District Court for the Central District of California entered summary judgment in Defendants' favor in *Estate of Daniel Hernandez, et al. v. City of Los Angeles, et al.*, Case No. 2:20-cv-04477-SB (KSx). The decision is reported at 2021 WL 4139157 (C.D. Cal., Aug. 10, 2021). See, Appendix ("App.") F (115a-140a).

- On March 21, 2024, the United States Court of Appeals for the Ninth Circuit issued its opinion affirming in part, and reversing in part, the grant of summary judgment in *Estate of Daniel Hernandez, et al. v. City of Los Angeles, et al.*, Case Nos. 21-55994 and 21-55995. The opinion is reported at 96 F.4th 1209. See, App. C (84a-108a).

- On July 8, 2024, the United States Court of Appeals for the Ninth Circuit issued an Order granting en banc review, vacating the three-judge panel opinion in *Estate of Daniel Hernandez, et al. v. City of Los Angeles, et al.*, Case Nos. 21-55994 and 21-55995. The opinion is reported at 106 F.4th 940. See, App. B (82a-83a).

- On June 2, 2025, the United States Court of Appeals for the Ninth Circuit sitting en banc issued its opinion affirming in part, and reversing in part, the grant of summary judgment in *Estate of Daniel Hernandez, et al. v. City of Los Angeles, et al.*, Case Nos. 21-55994 and 21-55995. The opinion is reported at 139 F.4th 790. See, App. A (1a-81a).

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331/1343(a)(3) (42 U.S.C. § 1983 claims) and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367. The Ninth Circuit Court of Appeals ("Ninth Circuit") had appellate jurisdiction because the district court's order granting Petitioners' motion for summary judgment was a final decision within the meaning of 28 U.S.C. § 1291, and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985).

On June 2, 2025, the Ninth Circuit entered judgment. On August 11, 2025, this Court granted Petitioners' motion for a 90-day extension of time to file the Petition for Certiorari to October 30, 2025. Petitioners filed this timely Petition for Writ of Certiorari. See Sup. Ct. R. 13(1), (3) and (5). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

Section 1983 provides in pertinent part as follows:

> 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. . .

42 U.S.C. § 1983.

INTRODUCTION

On June 2, 2025, a deeply divided en banc panel of the Ninth Circuit issued an opinion ("Opinion") that departs from decades of Supreme Court precedent. The court held that a jury could potentially deem Officer McBride's split-second use of deadly force unconstitutional based on a one-second pause between shots, relying on hindsight, and slow motion video review rather than assessing the reasonableness of her actions from the perspective of a reasonable officer in real time. In so doing, the Ninth Circuit: (1) ignored the totality of the circumstances approach mandated by *Graham v. Connor*, 490 U.S. 386 (1989) ("*Graham*"); (2) misapplied *Plumhoff v. Rickard*, 572 U.S. 765 (2014) ("*Plumhoff*"), by treating a continuous six-second use of force as discrete, separately reviewable, split-second segments; (3) rejected this Court's directive in *Barnes v. Felix*, 605 U.S. 73 (2025) ("*Barnes*"), prohibiting hyper-technical, moment-by-moment analysis;

and (4) violated qualified immunity principles by defining "clearly established law" at an impermissibly high level of generality, relying on *Zion v. County of Orange*, 874 F.3d 1072 (9th Cir. 2017) ("*Zion*"), which is materially distinguishable. Eight federal judges, including the district court, the entire three-judge panel, and the five dissenting en banc judges,[1] found Officer McBride's actions entitled her to qualified immunity. The Ninth Circuit's Opinion, by contrast, substitutes hindsight for real-time judgment and invites liability for any officer acting in fast-moving, life-threatening circumstances.

This case presents a rare opportunity for this Court to reaffirm the proper Fourth Amendment framework, restore the intended scope of qualified immunity, and establish a clear standard for evaluating continuous or rapidly sequential uses of force. Review is therefore warranted under Supreme Court Rules 10(a) and 10(c).

As one dissenting judge stated, the majority "ignores that officers are forced and allowed 'to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.'" App. 27a, J. Nelson, dissenting, citing *Graham*, 490 U.S. at 396–97. Rather, "[g]oing forward, if there is body-camera footage, [courts] must press [their] noses against [] computer screens, slow down the playback speed, pull out a stopwatch, and analyze a fraction of a second on loop to determine whether the (often infinitesimal) pauses between bursts of initially defensive lethal force make reasonable force unreasonable." App. 27a.

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1. Judge Collins was on both the three-judge and en banc panels.

The Opinion departs from *Graham's* holding to not review an officer's actions through 20/20 hindsight to determine whether the officer used reasonable force or whether the officer is entitled to qualified immunity. The Opinion further flouts the Supreme Court's holding in *Plumhoff*, which generally holds that an officer may continue shooting until the risk is alleviated. Instead, the Opinion disregards *Graham's* holding requiring courts to examine the reasonableness of the use of force from the perspective of the reasonable officer at the time of the events, which will always be in real time, not in studied slow motion. In fact, the Opinion entirely ignores the newest Supreme Court authority in *Barnes*, which reiterated its holding in *Plumhoff* in denouncing a similar "moment-of-threat" rule articulated in other circuits. As another dissenting judge stated, "[o]ur court is wrong here – dangerously wrong. . . . Under the majority's telling, we are to ignore everything except the literal last fractions of a second of a police interaction. . . . But the Constitution doesn't require this radical parsing of events. The touchstone of the Fourth Amendment is reasonableness. It doesn't require the superhuman discipline that the majority demands." App. 80a, J. Bumatay, dissenting.

Similarly, as the five dissenting judges in the Opinion all agreed (as did the district court and the three-judge appellate panel), Officer McBride was entitled to qualified immunity. Instead, the majority incorrectly relied upon *Zion* in proclaiming that clearly established law provides that the use of deadly force against a non-threatening suspect is unreasonable, thereby prohibiting Officer McBride's actions. However, the facts of *Zion* are not close or sufficiently analogous to the facts of the instant case to give notice to McBride that her actions were allegedly

unreasonable. In finding *Zion* applicable, the majority is again evaluating existing case law at too high of a level of generality, which the Supreme Court has repeatedly rejected. *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) ("*Kisela*") (per curiam); *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015) ("*Sheehan*"); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("*al-Kidd*").

As the Supreme Court has made clear, "[a] clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). Despite that truism, and eight federal judges all concluding that Officer McBride is entitled to qualified immunity, the Opinion found to the contrary. How can every reasonable officer clearly understand the inappropriateness of the challenged actions where every reasonable federal judge cannot and are deeply divided on the issue?

Accordingly, Certiorari is necessary to correct the Ninth Circuit's misstatement of the law of qualified immunity and jurisprudence under the Fourth Amendment.

STATEMENT OF THE CASE

A. The Incident

The incident giving rise to this petition occurred late in the afternoon of April 22, 2020. 8-ER-1816, ¶ 22. Respondents' decedent, Daniel Hernandez ("Hernandez"), was under the influence of methamphetamine while driving more than 70 miles per hour down San Pedro Street toward 32nd Street, which is a busy city street in

downtown Los Angeles, when he struck a vehicle waiting to turn. *Id.*; 4-ER-0768, ¶ 7; 4-ER-0833-34. With the accelerator pressed to the floor, Hernandez slammed into the vehicle, rendering it nearly unrecognizable and propelling it across the intersection. 4-ER-0840-45; App. 151a, 01:52-59; App. 152a, 1:08-15. His truck then collided with additional vehicles before finally coming to rest about fifty yards away, after striking a parked motorhome. *Id.* The crash caused severe injuries to several individuals, all of whom required emergency medical care. 2-ER-165 at 0:00-1:24.

Bystanders immediately dialed 911, reporting Hernandez's violent behavior and requesting emergency assistance. 8-ER-1816, ¶ 22; App. 152a, 01:16-25 (". . .San Pedro and 32nd is now an ADW [assault with a deadly weapon] suspect there now. . . . The suspect is male, armed with a knife. . ."). Officers McBride and Fuchigami were nearby, observed the aftermath of the accident, and stopped to assist. 2-ER-216, ¶¶ 1-2; 3-ER-322, ¶¶ 1-2; App. 145a-146a, ¶¶ 2, 5.

Upon exiting her vehicle, McBride observed approximately 50 people in the area, several of whom pointed to Hernandez's truck and warned of a "crazy guy with a knife" who was threatening bystanders and attempting to harm himself. App. 152a, 01:16-32; App. 151a, 01:51-56; 2-ER-165, 0:22-29; App. 146a, ¶¶ 5-6. McBride saw Hernandez inside the truck and directed the crowd to move back. *Id.*; App. 146a, ¶ 7. Moments later, Hernandez climbed out of the driver's side window. App. 147a, ¶ 8; App. 152a, 0:02:23-02:25. Given the numerous reports that Hernandez was armed and threatening, McBride called out: "Hey man, let me see your hands.

Let me see your hands, man." App. 147a, ¶ 9; App. 151a, 0:02:48-0:02:54.

Seconds later, Hernandez appeared from behind the truck and advanced toward McBride holding a knife. App. 147a, ¶ 10; App. 151a, 02:54-02:55; App. 152a, 0:02:29-0:02:32; 4-ER-838, 0:00:05-0:00:11. As he closed the distance, McBride ordered him to "Stay right there. Drop the knife." App. 147a, ¶ 10; App. 151a, 0:02:55-0:02:57; App. 152a, 0:02:35-0:02:36. She simultaneously gestured with her left hand for him to stop. *Id.* Hernandez ignored her commands and continued advancing while clutching the knife. App. 147a, ¶ 10; App. 151a, 02:57-02:58; App. 152a, 0:02:36-0:02:37; 4-ER-838, 0:00:11-0:00:16. McBride backed up while repeating: "Drop the knife! Drop the knife!" App. 147a, ¶ 11; App. 151a, 02:58-03:01; App. 152a, 0:02:36-0:02:37.

McBride believed Hernandez was under the influence of drugs, based on his extreme agitation, profuse sweating, jittery movements, refusal to comply with commands, and aggressive behavior. App. 147a-148a, ¶ 12; 4-ER-833-844. As Hernandez advanced, still armed with the knife, McBride's concern for the safety of herself, her partner, and the surrounding crowd intensified. In response to further orders to "drop the knife," Hernandez declared: "I'm not going to drop this knife." App. 148a, ¶ 14.

When Hernandez continued forward, McBride raised her weapon from the low-ready position, pointed it at him, and again shouted: "Drop it!" App. 151a, 02:58-03:02; App. 152a, 0:02:36-0:02:37; 4-ER-838, 0:00:11-0:00:16; 4-ER-847; App. 148a, ¶ 16. Believing Hernandez posed an imminent threat to her and to nearby bystanders, McBride

fired two rounds. App. 148a, ¶ 17; App. 151a, 03:02-03:04; App. 152a, 0:02:38-0:02:40; 4-ER-838, 0:00:16-0:00:17. Hernandez initially fell but quickly rose into a crouch, screaming in rage. App. 148a, ¶ 17; App. 151a, 03:04-03:05; App. 152a, 0:02:40-0:02:41; 4-ER-838, 0:00:19.

McBride again ordered him to "drop it." App. 149a, ¶ 18; App. 151a, 3:05. Hernandez refused and assumed what appeared to be a sprinter's stance, preparing to lunge forward. App. 148a, ¶ 17; App. 151a, 03:04-03:05; App. 152a, 0:02:40-0:02:41; 4-ER-838, 0:00:19. McBride fired a third and fourth shot. App. 149a, ¶ 19; App. 151a, 3:05-3:07; App. 152a, 0:02:41-0:02:42; 4-ER-838, 0:00:20-0:00:21. Hernandez fell on his back, then rolled to his side as if to rise again, still gripping the knife. *Id.*; App. 151a, 3:07-3:08; App. 152a, 0:02:42-0:02:44; 4-ER-838, 0:00:22. As he continued to move, and appeared to be getting up yet again, McBride fired her fifth and sixth shots. App. 149a, ¶¶ 19-20; App. 151a, 3:08-3:09; App. 152a, 0:02:44-0:02:45; 4-ER-838, 0:00:23. Hernandez then collapsed and remained on the ground. In total, McBride fired six shots within 6.18 seconds, with a one-second pause between the fourth and fifth shots. *Id.*

As officers moved to secure him, they observed Hernandez still holding the knife. App. 149a, ¶ 22; App. 151a, 04:55-05:01. Paramedics arrived soon thereafter, but pronounced Hernandez dead at the scene.

B. Procedural History and Underlying Jurisdiction

Respondents originally brought claims under 42 U.S.C. § 1983 and related California law, alleging excessive force, due process violations, assault and battery, wrongful

death, violations of California's Ralph and Bane Acts (Cal. Civ. Code §§ 51.7, 52.1), conspiracy, and municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

On August 10, 2021, the district court granted Petitioners' motion for summary judgment, holding both that Officer McBride's actions were objectively reasonable and that she was entitled to qualified immunity, thereby dismissing all claims against McBride and the City. App. 121a-134a, 140a. Respondents timely appealed.

On March 21, 2024, a Ninth Circuit panel affirmed the grant of qualified immunity in full and the dismissal of all federal claims against McBride and the City, but held that since a jury could potentially conclude McBride's fifth and sixth shots were objectively unreasonable, it reversed and remanded some of the state law claims. App. 91a-102a. On July 8, 2024, the court granted rehearing en banc and vacated the panel opinion. App. 83a.

On June 2, 2025, a divided en banc court issued its Opinion. The entire en banc panel held that the first four shots were reasonable. App. 13a. However, the six-member majority concluded that a "reasonable jury could find that" before McBride's last two shots, "the immediate threat posed by Hernandez had ended," allegedly because he was "rolling away from her, balled up in a fetal position." App. 17a. The five dissenters, however, emphasized that the majority's characterization was "grossly inaccurate" and "blatantly contradicted" the video evidence. App. 29a, 56a, n.3, 57a, n.4-6. The majority further reasoned that in the one-second pause between shots four and five, McBride "could have and should have first reassessed the

situation to see whether [Hernandez] had been subdued." App. 17a (citing *Zion*, 874 F.3d at 1076).

Relying on *Zion*, the majority held that "[i]n 2020, it had been clearly established for several years that an officer cannot reasonably 'continue shooting' a criminal suspect who 'is on the ground,' 'appears wounded,' and 'shows no signs of getting up' unless the officer first 'reasses[es] the situation'—'particularly . . . when the suspect wields a knife rather than a firearm'—because the suspect 'may no longer pose a threat.'" App. 21a (quoting *Zion*, 874 F.3d at 1076).

Five of the eleven judges dissented in three separate opinions. Judge Nelson explained that the majority's reasoning flouted the edicts of *Graham* and *Plumhoff* by artificially segmenting McBride's split-second use of force when nothing changed in the "1.36 seconds between shots four and five" to render her actions suddenly unreasonable. App. 30a-40a. Judge Collins agreed a jury could deem the final two shots unreasonable, but concluded McBride was entitled to qualified immunity because *Zion* was "materially distinguishable." App. 65a-67a. He further criticized the majority for "directly contraven[ing] the Supreme Court's admonition that it has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" App. 70a (quoting *Kisela*, 584 U.S. at 104). Judge Bumatay's dissent was even sharper, declaring the majority "wrong here—dangerously wrong" for embracing "a more extreme version of the moment-of-the-threat rule recently denounced in *Barnes v. Felix*" and for ignoring that "real life isn't in slow motion." App. 80a-81a. He added that the en banc court "should have taken this opportunity to overrule *Zion*." App. 81a.

Following the June 2, 2025, decision, the Ninth Circuit granted Petitioners' motion to stay the mandate pending this Court's review.

REASONS FOR GRANTING THE PETITION

I. The Opinion Presents a Serious Departure from Fourth Amendment Standards and Conflicts with Supreme Court Precedent, Necessitating this Court's Intervention

The case warrants review under Supreme Court Rules 10(a) and 10(c). The decision below not only conflicts with the decisions of other circuits, but also represents a serious departure from established judicial standards governing Fourth Amendment use-of-force analysis, warranting the exercise of this Court's supervisory authority. The Opinion also squarely conflicts with this Court's longstanding precedents in *Graham* and *Plumhoff*, as well as its more recent holding in *Barnes*. For these reasons, this Court should grant the Petition.

A. The Opinion Flouts Precedent

The decision below squarely conflicts with this Court's precedent governing Fourth Amendment use-of-force analysis. In particular, it disregards the holdings of *Graham*, *Plumhoff*, and *Barnes* by failing to assess the totality of the circumstances from Officer McBride's perspective, by artificially segmenting a single sequence of shots in slow motion, and by embracing an extreme version of the discredited "moment-of-threat" rule.

1. The Opinion Conflicts with *Graham* and Ignores Decades of Fourth Amendment Jurisprudence

Over three decades ago, in *Graham v. Connor*, this Court established the framework for analyzing alleged Fourth Amendment use of force violations. The Court held that the "proper application" of the reasonableness test "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,* 490 U.S. at 396, citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985) ("*Garner*"). This analysis—later described as the "totality of the circumstances,"—requires a contextual, holistic evaluation. *Barnes*, 605 U.S. at 80-81.

Graham also instructed that courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests (*Graham*, 490 U.S. at 396), while judging reasonableness "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. The Court further cautioned that the calculus of reasonableness must allow for the fact that police officers are often required to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force necessary in a particular situation." *Id*. at 396–97.

The Opinion below disregards these foundational principles. Instead of judging Officer McBride's actions

from the perspective of a reasonable officer in her position, the majority, as Judge Nelson observed in dissent, "demands that [courts] go an order of magnitude beyond impermissibly judging from hindsight" by scrutinizing video footage in slow motion, stopwatch in hand, and "ignor[ing] all circumstances favorable to the officer" while substituting its own judgment for that of an officer on the scene. App. 27a. Judge Bumatay echoed this concern, noting that "judges review police shootings only in hindsight. We review police tapes years after the fact. We get to rewind, pause, fast forward—analyzing the situation frame-by-frame. While the advent of police bodycam videos has been a welcome change, we can't ignore that real life isn't in slow motion." App. 81a.

Relying on this hyper-technical parsing, the majority concluded that Hernandez posed no immediate threat because he was "rolling away . . . balled up in a fetal position" when McBride fired her fifth shot. App. 17a. That finding is doubly flawed. First, it is factually inaccurate: as both Judges Nelson and Collins emphasized, the video shows Hernandez moving and rolling, not in a fetal position. App. 29a, 57a, n.4; App. 129a, ¶¶ 19-20; App. 151a, 3:07-3:09; App. 152a, 0:02:42-0:02:45. Second, it disregards *Graham*'s mandate to judge reasonableness from the perspective of a reasonable officer in real time. From McBride's perspective, Hernandez already advanced on her with a knife, ignored repeated warnings, and—after being shot—rose into a runner's stance as if to charge again, prompting further defensive fire. Moments later, while still armed, he again appeared to be regaining his footing. App. 129a, ¶¶ 19-20; App. 151a, 3:07-3:09; App. 152a, 0:02:42-0:02:45. At each stage, McBride faced a rapidly evolving, life-threatening encounter.

By crediting Plaintiffs' unsupported characterization of Hernandez's posture over what the video actually depicts, the majority also violated *Scott v. Harris*, 550 U.S. 372, 380–81 (2007) ("*Scott*"), which directs that when a party's version of events is "blatantly contradicted by the record," courts must adopt the facts as the video shows, not by speculation.

Even if McBride's perception that Hernandez was regaining his footing turned out to be mistaken, she is still entitled to the leeway the Fourth Amendment affords officers operating under fluid, dangerous and ambiguous conditions. *Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014) ("*Heien*"); *Brinegar v. United States*, 338 U.S. 160, 176 (1949). "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Heien*, 574 U.S. 60–61 (officer's mistaken presumption that driver violated law by having only one functioning headlight was reasonable, as officers are allowed to make not only reasonable mistakes of fact, but of law, as well).

In short, the majority disregarded *Graham* by failing to analyze the totality of circumstances from the perspective of a reasonable officer on the scene; disregarded *Scott* by substituting Plaintiffs' "visible fiction" for the objective video evidence; and disregarded *Heien* and other long-settled precedent by refusing to allow for reasonable mistakes in fast-moving, life-threatening encounters. This combination of errors represents a serious departure from established Fourth Amendment jurisprudence and warrants this Court's intervention.

2. The Opinion Conflicts with *Plumhoff*

The Opinion also squarely conflicts with this Court's decision in *Plumhoff*. There, the Court held that "if lethal force is justified, officers are taught to keep shooting until the threat is over," and "need not stop shooting until the threat has ended." *Plumhoff*, 572 U.S. at 777. Officer McBride's conduct fits comfortably within that principle: she fired six shots in six seconds, with roughly one second between the fourth shot (deemed reasonable) and the fifth (deemed unreasonable).

The majority reached its contrary conclusion by misreading *Plumhoff*. Relying on language that "[t]his would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up" (572 U.S. at 777), the majority treated McBride's final two shots as a prohibited "second round." App. 16a. But Hernandez was never "clearly incapacitated" or "surrendering" between the fourth and fifth shots. To the contrary, as Judges Nelson and Collins emphasized, the video shows him armed, moving, and attempting to rise throughout the encounter—including during the final shots. App. 29a, 57a, n.4.

The Ninth Circuit expanded *Plumhoff's* language in *Zion*, where it stated that "terminating a threat doesn't necessarily mean terminating the suspect." But as Judge Nelson observed, the Opinion here takes *Zion's* "stop-and-reassess" requirement to an "absurd and dangerous extreme" that "runs headlong into *Plumhoff*, which controls the outcome of this case." App. 31a. Judge

Bumatay echoed the point: "The Constitution doesn't require this radical parsing of events. . . . It doesn't require the superhuman discipline that the majority demands." App. 80a.

Plumhoff illustrates the error. There, after the suspect, Rickard, engaged police in a car chase, struck multiple vehicles, and momentarily stalled, officers fired 15 shots over 10 seconds, ultimately killing him. 572 U.S. at 769-70. This Court rejected arguments nearly identical to those Plaintiffs make here: that the chase was already over when officers opened fire, and that 15 shots were excessive. The Court concluded instead that Rickard's brief stall did not terminate the threat, and because he never "abandoned his attempt to flee," officers were not required to stop shooting until the threat ended. *Id.* at 776-77.

So too here. Hernandez did not abandon his armed advance on McBride until she stopped firing, six shots in six seconds. The video shows Hernandez moving and attempting to rise throughout. App. 151a, 02:58–03:09; App. 152a, 0:02:36–0:02:45. Nothing indicates he was "clearly incapacitated" after the fourth shot. He became incapacitated only after McBride fired the sixth and final shot. As Judge Nelson summarized, "nothing required Officer McBride to cease her efforts to ensure an armed and threatening man rising or moving throughout a short six-second timeframe was fully subdued." App. 33a.

In short, the majority not only disregarded *Plumhoff*'s central holding, but further expanded dicta from *Zion* in a way that undermines officer safety and contradicts settled precedent. As Judge Nelson warned, the "unfortunate

message is that any millisecond an officer tarries in protecting herself and others is a millisecond closer to liability." App. 39a. That's "[n]ot a great message" and exactly why this Court's intervention is necessary to restore the governing rule of *Plumhoff* and correct the Ninth Circuit's dangerous trajectory. App. 39a.

3. The Opinion Conflicts with *Barnes*

Though issued just two weeks before the Opinion here, the majority wholly ignored *Barnes*. In direct conflict with *Barnes'* directive, the panel adopted an even more extreme "moment-of-threat" rule that this Court rejected.

In *Barnes*, police pulled the suspect over for toll violations. 605 U.S. at 76. When ordered to exit his vehicle, he instead started the car and began to drive away. *Id.* at 77. Officer Felix, caught between the open door and the car, jumped onto the doorsill and fired two shots, one of which proved fatal. *Id.* From start to finish, only about five seconds elapsed—two of which occurred between Felix stepping onto the doorsill and firing his first shot. *Id.*

The Fifth Circuit applied a "moment-of-threat" rule, reviewing only the split-second that "sparked" the shooting, without analyzing the events leading up to it. *Id.* at 78. This Court unanimously rejected that narrow approach, holding that it "conflicts with this Court's instruction to analyze the totality of the circumstances" under *Graham* and *Plumhoff*. *Id.* at 81. As this Court explained, prior events often illuminate why a reasonable officer would perceive a suspect's conduct as threatening, and therefore the courts cannot disregard it. *Id.* at 80-81.

Yet the majority here did precisely what *Barnes* forbids—reducing the inquiry to the instant before Officer McBride's fifth shot, without considering the broader context. That Hernandez had just risen into a runner's stance before the third and fourth shots is directly relevant to why McBride reasonably perceived his movements seconds later as another attempt to rise. Contrary to the majority's characterization, Hernandez was not lying helpless in a "fetal position." App. 17a. Instead, he was still in motion, rolling as if to give himself momentum to stand or rise, still armed with a knife, still under the influence of methamphetamines, and still the cause of a violent car crash. App. 149a, ¶¶ 19-20; App. 151a, 3:07-3:09; App. 152a, 0:02:42-0:02:45. Nothing material changed between the fourth and fifth shots. App. 37a-38a (J. Nelson dissenting, noting that "The panel . . . relies solely on the immediacy of the threat.").

As Judge Bumatay observed, the panel was "wrong here—dangerously wrong" in adopting an extreme moment-of-threat rule. App. 80a. "Under the majority's telling, we are to ignore everything except the literal last fractions of a second of a police interaction. . . . But the Constitution doesn't require this radical parsing of events. The touchstone of the Fourth Amendment is reasonableness. It doesn't require the superhuman discipline that the majority demands." App. 80a.

Indeed, as *Barnes* made clear: "a court cannot . . . 'narrow' the totality-of-the-circumstances inquiry, to focus on only a single moment. It must look too, in this and all excessive-force cases, at any relevant events coming before." *Barnes*, 605 U.S. at 83. By ruling that McBride's final two shots could be deemed unreasonable while

ignoring the totality of the circumstances, the majority flouted this binding directive. Instead, it relied on slow-motion video with the benefit of 20/20 hindsight to isolate a single second of the encounter, even though it is undisputed that is not how McBride perceived the events unfolding in real time. That approach is irreconcilable with *Barnes* and longstanding precedent of this Court, and warrants this Court's intervention.

B. The Opinion Conflicts with Other Circuits and Ninth Circuit Precedent

The Opinion not only conflicts with Supreme Court precedent, but also with other circuits considering similar facts, and precedent within the Ninth Circuit. Turning first to outside circuits, the Fifth, Sixth, and Eighth Circuits found that pausing for mere seconds between shots fired was insufficient to support a change in circumstances, often also concluding that such short temporal differences did not constitute a separate use of force requiring independent analysis.

For example, in *Ching as Trustee for Jordan, et al. v. City of Minneapolis*, 73 F.4th 617, 621 (8th Cir. 2023), in facts similar to the case at bar, the Eighth Circuit held that an officer was entitled to qualified immunity after two seconds of continuous shooting, even though the suspect fell to the ground and dropped a knife after one second. In *Ching*, officers responded to a home where an adult male (Travis Jordan) was "suicidal, emotionally disturbed, and interested in acquiring a gun." *Id.* at 619. After the officers made contact with Jordan, Jordan told the officers to leave and he moved through the house, entering into an enclosed front porch with a knife. *Id.*

The officers then drew their weapons and "repeatedly commanded Jordan to drop the knife." *Id.* Jordan ignored the officers' commands, "opened the front door, stepped into the doorway, and repeatedly shouted, 'Let's do this' and 'Come on, just do it.'" *Id.* Jordan then deliberately walked toward the officers, with the knife at his side. *Id.* As the distance between the officers and Jordan closed, the officers continued their commands and backed away from Jordan. *Id.* at 619-620. Jordan continued advancing. *Id.* When Jordan was approximately six to twelve feet away, Officer Walsh began shooting at Jordan. *Id.* at 620. Walsh fired seven times over the course of two seconds without any discernable pause. *Id.* Walsh fired three shots while Jordan was standing and fired four shots while Jordan was on the ground. *Id.* Jordan later died from his wounds. *Id.*

On a motion for judgment on the pleadings on the basis of qualified immunity, the district court found that Walsh was entitled to qualified immunity "with regard to the initial use of force but not as to the continued firing," finding that "Walsh had sufficient time and situational awareness to adjust his aim downward after Jordan fell to the ground." *Id.* The district court then denied qualified immunity as to the last four shots fired. *Id.*

In analyzing the videos of the incident, the Eighth Circuit reversed and remanded finding that Walsh was entitled to qualified immunity. "Given the swift and continuous progression of the incident and Walsh's limited time to observe and process the circumstances, a jury could not find Walsh had sufficient time to reassess the threat Jordan presented before he stopped firing." *Id.* at 621. The Eighth Circuit went on to note that "[w]hile mere seconds can be sufficient time for an officer to reassess a

threat [citation], this Court's precedent at the time of the shooting did not provide Walsh with notice that a single second in a less than two-second encounter was sufficient time for him to reassess the threat Jordan presented." *Id.*

Arguably, like the Ninth Circuit, however, the Eighth Circuit appears conflicted in situations where an officer pauses between rounds of shots fired. In *Ching*, the Eighth Circuit distinguished an older case, *Roberts v. City of Omaha,* 723 F.3d 966, 974 (8th Cir. 2013). In *Roberts,* the Eighth Circuit found an officer was not entitled to qualified immunity due to the existence of triable issues of material fact as to whether the decedent swung a knife at the officer prompting the officer to shoot in the first place, whether the officer shot the decedent after he threw the decedent to the ground, and the length of time that elapsed between shots. *Roberts*, 723 F.3d at 970-971. In distinguishing *Ching,* the court stated *Ching* was "unlike the encounter in *Roberts* [citation], where . . . there was a disputed factual issue as to the objective reasonableness of an officer's actions due to evidence suggesting the officer fired his weapon at the person several times, paused, and fired several more times, possibly shooting the person in the back." *Id.* at 621. The court decided *Roberts*, however, before this Court decided *Plumhoff.* Thus, whether the Eighth Circuit would have rendered a different decision in *Roberts* in light of *Plumhoff* is unclear. The *Ching* decision also did not reference *Plumhoff.*

More recent Sixth Circuit case law appears consistent with *Plumhoff,* however. In *Stevens-Rucker v. City of Columbus*, 739 F. App'x 834 (6th Cir. 2018), the Sixth Circuit rejected the notion that a one-second pause between shots constitutes a separate volley courts review

independently. In *Stevens-Rucker*, officers responded to the scene where a man, appearing to be confused or under the influence of drugs or alcohol and holding a knife, reportedly entered an apartment believing it was his. *Id.* at 836. Officers arrived and repeatedly engaged with the subject (White), sometimes firing tasers or their firearms, but each time White fled into a different area of the apartment complex, regardless of whether he was struck. *Id.* at 836-838. Finally, as White fled once again, one of the officers (McKee) fired twice toward White, and thought he struck White in the back. McKee then encountered White again seconds later in a breezeway and fired two more shots, striking White in the chest. *Id.* at 838. White collapsed and McKee fired two more times. *Id.* McKee estimated that a second or only a fraction of a second elapsed between the second volley and the third. *Id.* All told, McKee fired six shots in 8-10 seconds. *Id.* at 842.

The district court below (similar to the Ninth Circuit here), found that as to the first two shots, McKee's actions were reasonable and that he was entitled to qualified immunity, but not as to the final two shots. *Id.* at 843. The Sixth Circuit, however, reversed, finding that the district court improperly separated the last four shots from the first two, stating that the district court "failed to point to any evidence that the final four shots were likewise separated by such a significant gap in time that they must be viewed as distinct incidents requiring individualized analysis." *Id.* at 844. The Sixth Circuit found that the artificial separation of shots "was not enough time for Officer McKee to stop and reassess the threat level between the shots. He continued to use his firearm to stop what he justifiably perceived as an immediate threat to his safety." *Id.*

In *Rush v. City of Lansing*, 644 F. App'x 415 (6th Cir. 2016), the Sixth Circuit reconfirmed its prior holdings (and those of other circuits) "that '[w]hile hindsight reveals that [the suspect] was no longer a threat when he was shot,' officers should not be denied qualified immunity 'in situations where they are faced with a threat of severe injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat." *Id.* at 422-423 (brackets in original). In *Rush*, the Sixth Circuit found that an officer's actions were objectively reasonable and that he was entitled to qualified immunity regarding two shots fired (in short proximity to each other) at a suspect, despite evidence from other officers at the scene that the suspect may have been falling backward (and potentially no longer a threat) after the first shot. *Id.* at 423-424. The Sixth Circuit stated, however, that "it was not unreasonable for [the officer] to perceive [the suspect] as still posing a threat when he fired the second shot, even if he was ultimately mistaken in making a split-second assessment" and found the officer's action was reasonable. *Id.* at 424.

In *Estevis v. Cantu*, 134 F.4th 793 (5th Cir. 2025), the Fifth Circuit evaluated circumstances similar to *Plumhoff*, where a suspect engaged with police in a two-hours long, vehicle pursuit, rammed a patrol car, and ended up colliding with a fence. *Id.* at 795. After the suspect rammed into the patrol car, an officer fired three shots into the cab of the suspect's truck. *Id.* Undeterred, the suspect continued driving, finally colliding with a fence. *Id.* Over the next four-to-five seconds, officers advanced on the truck and fired three more times, just as the engine stopped revving. *Id.* One to two seconds later, another

officer fired three more times into the truck. *Id.* The suspect survived, and filed an action alleging excessive force. *Id.* The district court found that the officers' actions as to the first three shots were reasonable, but not with regard to the last six. *Id.* at 795-796.

In reversing the district court's findings, the Fifth Circuit observed that "all the shots were fired within ten seconds. During that brief time, it would have [been] impossible for the officers to know for certain that the threat from [the suspect's] truck had ceased." *Id.* at 797. Ultimately, the Fifth Circuit concluded that no clearly established law placed the officers on notice that their actions would be considered unlawful. *Id.* at 797-798. Notably, the Fifth Circuit found *Plumhoff* was factually similar and further supported that the officers' actions were reasonable. *Id.* at 798 ("Not only is [plaintiff's cited case] factually dissimilar but the closer case, *Plumhoff,* strongly suggests officers could use deadly force to apprehend a boxed-in suspect who uses his vehicle as a battering ram.").

The Ninth Circuit itself has consistently recognized the dangers of second-guessing officers in real time. *Smith v. Agdeppa*, 81 F.4th 994, 1002 (9th Cir. 2023) ("[W]e do not second-guess officers' real-time decisions from the standpoint of perfect hindsight."); *Monzon v. City of Murrieta*, 978 F.3d 1150, 1157 (9th Cir. 2020) (where suspect drove van towards officers and officers fired multiple shots in 4.5 second period without a warning, officers entitled to qualified immunity because courts must view facts "as an officer would have encountered them . . . not as an ex post facto critic dissecting every potential

variance under a magnifying glass"). The District Court below correctly applied these principles, as well:

> [I]t is important to evaluate the shooting in the real-world context in which it occurred. A judicial description of a shooting as involving "volleys" is analytically useful so long as it is not used . . . to distort the split-second reality unfolding before the officer. . . . The question is not whether another officer might have waited . . . . The question is whether firing six shots under these circumstances was unconstitutional. The Supreme Court answered that question in *Plumhoff*: the shooting must stop when "the threat has ended." App. 127a.

Contrary to this precedent, the Ninth Circuit majority literally split tenths of a second, engaging in "ex post facto" scrutiny rather than analyzing the real-world context. The majority even misquoted its own precedent in *Wilkinson v. Torres*, 610 F.3d 546, 552 (9th Cir. 2010), claiming that officers must reassess after every shot. In fact, *Wilkinson* held the opposite:

> To the extent that [outside circuit law] requires an officer to reevaluate whether a deadly threat has been eliminated after each shot, we disagree that it should be applied in the circumstances of this case. *Id.*

As Judge Nelson noted, the *Wilkinson* decision "disclaimed the majority's holding, because '[s]uch a requirement places additional risk on the officer not required by the Constitution.'" App. 35a; *Wilkinson,* 610 F.3d at 552.

Notwithstanding the lack of any precedent requiring her to do so, as in *Wilkinson*, McBride reassessed Hernandez after her fourth shot and reasonably concluded he still posed a threat. She did not "mindlessly" fire; she ceased shooting once she perceived that the threat ended. App. 149a-150a, ¶¶ 19, 23.

Prior Ninth Circuit decisions similarly require objective evidence that a threat has ended before finding subsequent force unlawful. *Gonzales v. City of Antioch*, 697 F. App'x 900, 902 (9th Cir. 2017); *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013); *Sheehan v. City & Cnty of San Francisco*, 743 F.3d 1211, 1216, 1230 (9th Cir. 2014), reversed on other grounds, 575 U.S. 600, 613 (2015). The Constitution does not punish an officer for a reasonable but mistaken belief that a threat remains. *Sheehan*, 575 U.S. at 613; *Heien*, 574 U.S. at 60-61. California law mirrors these principles. *Brown v. Ransweiler*, 171 Cal.App.4th 516, 528 (2009); *Hayes v. County of San Diego*, 57 Cal.4th 622, 632 (2013); Cal. Pen. Code § 835a(a)(4) (2025). In fact, in a case decided by some of the very same justices in this case, the Ninth Circuit previously held that "'the Fourth Amendment does not require' a police officer to be 'omniscien[t], and absolute certainty of harm need not precede [an officer's] act of self-protection.'" *Easley v. City of Riverside,* 890 F.3d 851, 857 (9th Cir. 2018) (officer's use of lethal force, which resulted in subject being paralyzed, was objectively reasonable despite subject having thrown suspected gun 2-4 seconds prior to the use of lethal force), *rev'd on other grounds in* 765 F. App'x 282 (9th Cir. 2019), quoting *Wilkinson,* 610 F.3d at 553 (brackets in original).

Here, McBride had only a split-second between her fourth and fifth shots to assess Hernandez's ongoing threat.

The evidence objectively supports her judgment that he remained dangerous because of his continued movement. Even if mistaken, her assessment was reasonable. Thus, McBride is entitled to qualified immunity.

In sum, the Opinion conflicts with Supreme Court precedent, other circuits, and prior Ninth Circuit authority. It allows officers to be held liable for reasonable, split-second decisions based on video replay in slow motion years later. By permitting ex post facto analysis to supplant real-time judgment, the Ninth Circuit created an untenable and dangerous standard. The Court should overturn the Opinion to restore correct Fourth Amendment jurisprudence in the Ninth Circuit.

II. The Court Should Review the Ninth Circuit's Erroneous Qualified Immunity Decision

The Opinion sets a dangerous precedent regarding qualified immunity, incorrectly interpreting its own holding in *Zion*, and finding that the Ninth Circuit had "clearly established" findings that it never reached. In short, the Ninth Circuit once again defies this Court's repeated instructions not to define clearly established law at a high level of generality. *Kisela*, 138 S. Ct. at 1152; *Sheehan*, 575 U.S. at 613; *al-Kidd*, 563 U.S. at 742. Justice Bumatay even noted that the prior *Zion* opinion upon which the Opinion is predicated may itself warrant review.

Even assuming arguendo that McBride violated the Fourth Amendment, she did not violate a right that was " 'clearly established' at the time of [her] alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232

(2009). Qualified immunity shields government officials from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741.

This Court has repeatedly emphasized that courts cannot frame clearly established law at a high level of generality. The courts must define the right with specificity: "An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela*, 584 U.S. at 105, quoting *Plumhoff*, 572 U.S. at 778-79. Courts must look to "concrete and factually defined" precedent that would have provided fair warning to a reasonable officer. *D.C. v. Wesby*, 583 U.S. 48, 63–64 (2018); *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017).

The Ninth Circuit ignored these principles. No case squarely governs the circumstances McBride faced, and the dissenting judges correctly noted that reliance on *Zion* was misplaced. App. 33a-35a, 65a-76a. The majority erroneously treated *Zion* as if it clearly established that any pause between volleys renders a shot unconstitutional, even though *Zion* never reached that conclusion. Rather, *Zion* addressed a clearly incapacitated suspect—facts materially different from Hernandez, who actively advanced on McBride while armed with a knife, under the influence of methamphetamine, disregarded McBride's

directives, and who just caused a catastrophic accident. App. 37a, 70a.

In *Zion*, Officer Higgins fired two rapid volleys at a suspect who attacked family members and then attempted to flee. *Zion*, 874 F.3d at 1075. Higgins then delivered three stomps to the suspect's head. The decision focused on the fact that the suspect was lying on the ground and clearly incapacitated when the officer stomped on his head; it did not analyze timing between shots, volleys, or reassessment requirements. *Id.* at 1075-1076; App. 34a, n.2 (Judge Nelson also observing that *Zion* held no analysis on timing). In contrast, McBride fired all six shots *within six seconds* at a suspect she reasonably perceived as rising to attack again and fired the fifth shot one second after the fourth shot. No evidence suggested that Hernandez was incapacitated, and no reason existed for her to pause.

As Judge Nelson explains, "*Zion* is best understood as an elaboration" from the Supreme Court's language in *Plumhoff*, that noted that it would have been "a different case" if the officers there " 'had initiated a second round of shots after an initial round had clearly incapacitated [the suspect] and had ended any threat of continued flight.'" App. 34a (citing *Plumhoff* [italics and brackets in Opinion]). "*Zion* turns upon an objectively reasonable officer's knowledge that the suspect was clearly incapacitated and therefore not an immediate threat." App. 34a (citing *Zion*, 874 F.3d at 1076 ["Zion was lying on the ground and so was not in a position where he could easily harm anyone or flee . . . [Z]ion was no longer an immediate threat."]). Thus, "*Zion* may provide some guideposts for finding that an officer should have known a suspect was 'clearly incapacitated' . . . . But those guideposts do not

suggest that Officer McBride was required to stop firing within six seconds." App. 35a.

Judge Collins agreed, explaining that "*Zion* . . . did not suggest that any suspect who literally is 'on the ground' and 'appears wounded' is automatically no longer a threat; rather, *Zion* was referring to a suspect who has been 'clearly incapacitated' by being brought to the ground by the prior shots and by then remaining down." App. 72a.

As the dissent further explained,

> the majority's overly generalized reading of *Zion* is contradicted by *Zion* itself. Far from drawing the sort of broad, bright-line rule the majority conjures, Zion noted that the "boundary" line is "murky" when it comes to defining exactly when the permissible use of deadly force against a suspect who "poses an immediate threat" must be *halted* on the ground that "the suspect no longer poses a threat." *Zion*, 874 F.3d at 1075. Given that *Zion* noted that the relevant line is "murky," *Zion* can hardly be said to have *clearly* established a broad general rule that places the outcome of this case beyond debate. App. 71a (italics in original).

Zion provides guidance only for situations where a suspect is clearly incapacitated—not for cases like this where the suspect is moving and dangerous. App. 34a-35a, 71a. The majority's attempt to extract a broad rule from *Zion* and declare it "clearly established" flagrantly violates this Court's repeated admonitions against defining law at too high a level of generality. App. 71a.

Notably, eight of eleven judges reviewing this case concluded McBride was entitled to qualified immunity. Five also found her actions objectively reasonable. If judges cannot agree, no officer could reasonably know that similar conduct violates clearly established law. Judge Collins' comments highlight the Ninth Circuit's disregard for qualified immunity and prior precedent:

> What follows from all this is quite troubling. Under the majority's opinion, reasonable officers apparently no longer can rely on what our opinions actually say; now, they must delve into the court records to see whether our precedents described their own facts incorrectly, and officers must also consider that future panels may take considerable liberties with selectively quoting the opinion's language. The majority's openly revisionist approach to *Zion* is flatly contrary to settled qualified-immunity doctrine, the "focus" of which is whether the language of the controlling precedent provided "*fair notice*" to the defendant "that her conduct was unlawful." *Kisela*, 584 U.S. at 104 (emphasis added) (citation omitted). App. 75a-76a.

Not only is the Opinion's analysis and conclusion on qualified immunity deeply flawed and in conflict with this Court's prior precedent, but it is extremely dangerous, given the likelihood of future courts selectively misquoting or being misled by the Opinion.

The Ninth Circuit improperly segmented a six-second incident, applied 20/20 hindsight review through a slow-motion video, and misapplied *Zion* to deny qualified

immunity. As this Court has explained, "[w]hatever the merits of the decision in [*Zion*], the differences between that case and the case before us leap from the page." *Kisela*, 584 U.S. at 107; *Sheehan*, 575 U.S. at 614. The Court should overturn the Opinion.

III. The Opinion Presents an Opportunity for This Court to Resolve an Area of Unsettled Law and Important Federal Questions

The Opinion makes clear areas of unsettled law remain and important federal questions warrant this Court's review. Specifically, this Court has never definitively decided whether an officer must reassess after every shot fired. Nor has this Court clearly delineated the precise point at which an officer must halt the use of lethal force, except perhaps in circumstances where a suspect is "clearly incapacitated." Likewise, this Court has never addressed whether a segmented, moment-by-moment approach to analyzing use-of-force incidents is appropriate, or whether a continuous incident—particularly one unfolding over a matter of mere seconds—should be treated as a single, cohesive use of force. This case therefore presents a unique opportunity for the Court to establish a clear, uniform standard, providing guidance to courts, litigants, and law enforcement regarding the reasonable expectations of an officer using a firearm in rapid succession in response to an immediate threat.

The Court should adopt a standard for evaluating when the continuous use of lethal force is objectively reasonable. Under this standard, courts should consider: (1) whether a material change in the circumstances between shots fired has occurred, and, if so (2) whether

the officer had a reasonable opportunity to perceive and respond to any such change.

While an officer's ongoing reassessment of a situation is an important law enforcement practice and a laudable objective, it must not be overshadowed by hindsight-driven over-analysis. Courts should not force officers in the field to engage in impossible "superhuman" deliberation during critical, split-second dangerous incidents; nor should they hesitate to respond to an ongoing threat out of fear that a later court might fault them for failing to pause.

As this Court has long recognized, "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396, quoting *Garner*, 471 U.S. at 8. Fourth Amendment jurisprudence also acknowledges that the right to make an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396, citing *Terry v. Ohio*, 392 U.S. 1, 22-27 (1968). 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." *Graham*, 490 U.S. at 396-397.

The standard proposed here respects these long-standing principles while providing concrete guidance for officers in the field: it recognizes the necessity of rapid decision-making, emphasizes objective reasonableness, and appropriately focuses on material changes in circumstances rather than dissecting milliseconds through the lens of perfect hindsight. By adopting this approach, the Court would clarify the law, provide a clear legal standard, protect officers acting reasonably in rapidly developing situations, and ensure that Fourth Amendment protections are applied sensibly and consistently.

CONCLUSION

McBride made a split-second, life-or-death judgment in the field, yet the majority held her liable by reviewing her actions through the lens of 20/20 hindsight in a judge's chambers, rather than from her perspective in real time—a fundamental error directly at odds with long-standing Fourth Amendment principles, Supreme Court precedent, other circuits, and prior Ninth Circuit law. The Ninth Circuit further improperly denied qualified immunity because the majority incorrectly defined clearly established law at an unduly high level of generality, relying on conclusions from a prior Ninth Circuit opinion that neither addressed nor resolved the questions presented here. This case thus presents a critical opportunity for this Court to reaffirm the proper perspective for assessing officer conduct, and to establish a clear, workable standard for evaluating the continuous or sequential use of force. For these reasons, the Court

should grant this Petition for certiorari and overturn the Opinion.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 2, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55994
D.C. Nos. 2:20-cv-04477-SB-KS,
2:20-cv-05154-DMG-KS

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY,

Plaintiffs-Appellants,

and

M.L.H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiff,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE,

Defendants-Appellees.

Appendix A

No. 21-55995
D.C. Nos. 2:20-cv-04477-SB-KS,
2:20-cv-05154-DMG-KS

M.L.H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiff-Appellant,

and

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY,

Plaintiffs,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Stanley Blumenfeld, Jr., District Judge, Presiding

Argued and Submitted En Banc September 24, 2024
San Francisco, California

Filed June 2, 2025

Appendix A

Before: Mary H. Murguia, Chief Judge, and Johnnie B. Rawlinson, Jacqueline H. Nguyen, Ryan D. Nelson, Bridget S. Bade, Daniel P. Collins, Daniel A. Bress, Patrick J. Bumatay, Holly A. Thomas, Salvador Mendoza, Jr. and Anthony D. Johnstone, Circuit Judges.

Opinion by Judge Nguyen;
Partial Concurrence and Partial Dissent
by Judge R. Nelson;
Partial Concurrence and Partial Dissent
by Judge Collins;
Partial Dissent by Judge Bumatay

OPINION

NGUYEN, Circuit Judge:

A police officer shot Daniel Hernandez six times, the final round killing him, after he ignored her repeated commands to stop moving toward her and drop his knife. Although the entire shooting occurred over just six seconds, the officer fired three distinct volleys of two shots, pausing after each. The officer fired the final volley—shots five and six—after Hernandez had collapsed on the ground. He was on his back with his knees curled up to his chest, rolling away from the officer.

Hernandez's family sued the officer, the police department, and the city, claiming that the officer used excessive force. The district court granted defendants summary judgment, finding that the officer did not violate Hernandez's Fourth Amendment rights and that any such violation was not clearly established.

We reverse the district court's Fourth Amendment rulings. It has been clearly established for more than a decade that when an officer shoots and wounds a suspect, and he falls to the ground, the officer cannot continue to shoot him, absent some indication that he presents a continuing threat, without first reassessing the need for lethal force. *See Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017) (holding that under "long-settled Fourth Amendment law," "the use of deadly force against a non-threatening suspect is unreasonable," including "continued force against a suspect who has been brought to the ground"). We reaffirm circuit precedent that a fallen and injured suspect armed only with a bladed instrument does not present a continuing threat merely because he makes nonthreatening movements on the ground without attempting to get up. *See id.* Because the officer here continued to shoot Hernandez under such circumstances, a jury could reasonably find that she employed constitutionally excessive force. If so, she is not entitled to qualified immunity.

Appendix A

I. Factual Background[1]

Late in the afternoon on April 22, 2020, Los Angeles Police Department ("LAPD") officers Toni McBride and Shuhei Fuchigami drove past a multi-vehicle collision on San Pedro Street near the intersection of East 32nd Street. The uniformed officers were in a patrol SUV en route to a different incident but decided to respond to the collision instead. As they approached from the north, Fuchigami activated the SUV's overhead lights, and McBride asked several bystanders to tell her who had been hurt.

When the officers arrived at the collision, Fuchigami parked facing traffic in the number one northbound lane, to the left and rear of a Toyota Camry stopped in the number one southbound lane. Four vehicles had visible damage—two on the west side of the street, beyond the Camry, where a black truck facing the oncoming (southbound) traffic had collided with an RV parked at the curb, and two sedans on the sidewalk of the east side of the

1. In setting forth the facts, we rely primarily on video recordings from the defendant officer's body-mounted camera, her vehicle-mounted camera, and a bystander's cell phone, because the parties do not dispute that these videos accurately portray the events at issue. *See Scott v. Harris*, 550 U.S. 372, 380-81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (admonishing courts to "view[] the facts in the light depicted by the videotape" when unchallenged). Where the video recordings leave factual ambiguity, however, we follow the usual practice of drawing reasonable inferences in the light most favorable to the party opposing summary judgment—here, plaintiffs. *See id.* at 378.

street. At least 25 people had gathered along the sides of the street, several of whom were screaming and yelling.

As the officers exited their vehicle, the police radio broadcasted that "the suspect's vehicle is a black Chevrolet truck" and "the suspect is male, armed with a knife." Five or six bystanders approached the officers, pointing at the black truck. Officer Fuchigami asked: "Where is he? Where is he at? Is he in the truck?" The bystanders told the officers that a "crazy guy with a knife" was in the truck, threatening to kill himself. The officers directed the bystanders to move back, and McBride drew her service weapon—a Glock 17 handgun—to the "low-ready" position, i.e., trained on the ground between her feet and potential targets.

The Camry occupant told the officers that the man in the truck "has a knife." McBride asked: "Why does he want to hurt himself?" The Camry driver replied: "We don't know. He's the one who caused the accident." McBride directed Fuchigami to call for backup. She then ordered the Camry driver to exit her vehicle and move to the sidewalk.

McBride observed that the man in the truck—later identified as Hernandez—appeared to be rummaging around in the middle console.[2] McBride directed several

2. Plaintiff M.L.H. disputes this observation (the other plaintiffs do not) because "McBride could not have seen" into the truck based on the photos. While the image quality makes it impossible for *us* to see the truck's interior, McBride plainly had the ability to observe Hernandez's movements through the windows—she commented on them contemporaneously. M.L.H. does not dispute that McBride saw

bystanders to clear the area. The police radio reported that the suspect was "armed with a knife, cutting himself . . . inside his vehicle."

McBride asked Fuchigami if they had "less lethal" force options. She was armed with pepper spray and a taser, and knew that a 40-millimeter rubber projectile launcher—an option for using less lethal force against individuals with bladed weapons—was in the patrol SUV.

Observing Hernandez climb out through the window on the far side of the truck and disappear from view, McBride called out to Fuchigami that Hernandez "might be running." She then called out to Hernandez: "Hey man, let me see your hands. Let me see your hands, man."

After about six seconds, Hernandez emerged from behind the rear of the truck, approximately 43 feet from McBride. He was shirtless and sweating profusely. As he rounded the truck, Hernandez began walking in McBride's direction. He was holding something in his right hand—McBride could not tell what—that turned out to be a box cutter.

McBride backed up 10 feet along the side of the Camry. As she did so, she gestured with her hand for Hernandez to stop and ordered: "Stay right there. Drop the knife." Hernandez continued to advance. McBride again ordered: "Drop the knife. Drop the knife."

Hernandez's other actions inside the truck even though, as M.L.H. acknowledges, those observations also were "not supported by" the video from McBride's body-worn camera.

Hernandez, still approaching, raised his fully extended arms to each side at roughly a 45-degree angle. He did not say anything. McBride pointed her gun at him. Hernandez took three more steps toward her, closing the distance between them to approximately 36 feet. McBride yelled "Drop it!" and without pausing fired two rounds at him.

Hernandez fell to the ground on his right side and yelled out something. He then rolled to the left into a position with his knees, feet, and hands on the pavement, facing down, and started to push himself up, though he did not continue walking toward McBride.

McBride again yelled at Hernandez to "drop it" and without pausing fired another two rounds. This second volley caused him to fall onto his back and curl up into a ball with his knees against his chest and his arms wrapped around them. As he rolled away from McBride onto his left side, she fired two more rounds. The third volley caused Hernandez to collapse on the ground and remain down.

The entire shooting sequence lasted approximately 6.2 seconds. Roughly 2.5 seconds elapsed between the first and second volleys and 1.4 seconds between the second and third volleys. Other officers arrived on the scene only after McBride had begun shooting.

Hernandez died from his injuries. The sixth shot caused an immediately fatal wound to his head. The next most serious injury, from the fourth shot, damaged his lung and liver but may have been survivable with immediate medical treatment.

The Los Angeles Board of Police Commissioners found that McBride acted outside of the LAPD's policy on lethal force when firing the fifth and sixth rounds. The policy permits officers to use lethal force only when necessary, based on the totality of circumstances, "[t]o defend against an imminent threat of death or serious bodily injury to the officer or another person." The Board found that it was unreasonable to think Hernandez posed such a threat after the second volley because he "did not reposition himself from laying on his side to being" in a position "from which he could resume an advance toward [McBride] or others."

II. Procedural History

Hernandez's parents[3] and minor daughter (plaintiff M.L.H.) filed separate lawsuits in which they alleged constitutional and state law violations by McBride, the LAPD, and the City of Los Angeles ("City") in connection with Hernandez's death. Pursuant to the parties' stipulation, the district court consolidated the two suits.

Plaintiffs claim that (1) McBride used excessive force against Hernandez in violation of the Fourth Amendment; (2) the LAPD and the City had an unconstitutional custom or practice allowing officers to use firearms callously and recklessly in violation of the Fourth Amendment; (3) all defendants interfered with plaintiffs' right to familial integrity under the Fourteenth Amendment; (4) McBride

3. Hernandez's parents sue on behalf of Hernandez's estate as well as on their own behalf.

and the City are liable for assault, battery, and wrongful death; and (5) all defendants violated the Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1.[4]

The district court granted summary judgment in favor of defendants on each of plaintiffs' claims. The court concluded that McBride did not violate Hernandez's Fourth Amendment rights because her use of lethal force was reasonable under the circumstances. Alternatively, the court ruled that McBride was entitled to qualified immunity because the law did not clearly establish that her actions constituted constitutionally excessive force. The court concluded that the lack of a constitutional violation foreclosed plaintiffs' municipal liability, familial integrity, and state law claims. The court alternatively rejected plaintiffs' municipal liability claim for failure to show that a municipal custom or policy caused any constitutional violation.

A three-judge panel of this court affirmed in part, reversed in part, and remanded. *Est. of Hernandez ex rel. Hernandez v. City of Los Angeles*, 96 F.4th 1209 (9th Cir. 2024). The panel held that the reasonableness of McBride's final two shots was a triable issue of fact, *id.* at 1218, and therefore the district court erred in granting summary judgment on the state law claims at issue, *id.* at 1223. However, the panel agreed with the district court that McBride did not violate clearly established law by firing

4. In addition, plaintiffs claimed conspiracy under 42 U.S.C. § 1985(3) and violation of the Ralph Civil Rights Act, Cal. Civ. Code § 51.7, but they did not oppose defendants' motion for summary judgment on these claims.

the third volley of bullets and thus was entitled to qualified immunity on plaintiffs' Fourth Amendment claim. *Id.* at 1221. The panel also affirmed the district court's grant of summary judgment on plaintiffs' municipal liability and familial integrity claims. *Id.* at 1222-23. A majority of the active, non-recused judges on our court voted to rehear this case en banc. *Est. of Hernandez ex rel. Hernandez v. City of Los Angeles*, 106 F.4th 940 (9th Cir. 2024).

III. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's summary judgment rulings de novo, *see Spencer v. Pew*, 117 F.4th 1130, 1137 (9th Cir. 2024), including an officer's entitlement to qualified immunity, *see Sanderlin v. Dwyer*, 116 F.4th 905, 910 (9th Cir. 2024).

IV. Discussion

A. Fourth Amendment Claim

1. There is a triable issue of fact as to whether Officer McBride violated Hernandez's Fourth Amendment rights

The Fourth Amendment's guarantee of personal security "against unreasonable . . . seizures," U.S. Const. amend. IV, applies to an officer's use of force against a suspect to restrain his movement. *Torres v. Madrid*, 592 U.S. 306, 317-18, 141 S. Ct. 989, 209 L. Ed. 2d 190 (2021). The officer's purpose is determined objectively from the

officer's conduct. *See id.* McBride's conduct—"ordering [Hernandez] to stop and then shooting to restrain [his] movement—satisfies the objective test for a seizure." *Id.* at 318.

In determining whether the seizure comports with the Fourth Amendment, the critical question is whether the use of force was objectively reasonable. *See Plumhoff v. Rickard*, 572 U.S. 765, 774, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014). Courts must carefully 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) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)), considering "the totality of the circumstances," *Plumhoff*, 572 U.S. at 774. The relevant considerations depend on the "particular situation" and the "particular type of force" used, *Scott*, 550 U.S. at 382, and may include "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," *Kisela v. Hughes*, 584 U.S. 100, 103, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018) (per curiam) (quoting *Graham*, 490 U.S. at 396).

Although we determine reasonableness objectively, we do so "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. We must allow for an officer's need "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.* at 397. "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," the use of deadly force is constitutionally permissible. *Terry*, 471 U.S. at 11.

At the same time, "the suspect's interest in his own life" prohibits an officer from using lethal force simply because the suspect has resisted arrest. *Id.* "Where the suspect poses no immediate threat to the officer and no threat to others," deadly force "is constitutionally unreasonable." *Id.*

a.

Here, as a matter of law, Officer McBride acted reasonably when firing the first four rounds at Hernandez, although the third and fourth rounds present a closer question. When she began firing, McBride had probable cause to suspect that Hernandez had caused a serious traffic collision and saw him moving toward her with a bladed weapon. While she knew Hernandez had attempted to cut himself—and thus had reason to suspect his mental instability—she also knew that his actions had likely already injured nearby motorists. And by refusing to comply with McBride's commands to stop and drop the knife, Hernandez created a heightened sense of urgency and unpredictability.

A reasonable officer in those circumstances could conclude that Hernandez posed a safety threat to the

officer and the bystanders in the vicinity. In weighing the possible danger to McBride and the public with the risk to Hernandez by firing at him, we "take into account not only the number of lives at risk, but also their relative culpability." *Scott*, 550 U.S. at 384.

Pointing to Hernandez's erratic behavior and self-harm, plaintiffs argue that McBride's response should have accounted for the likelihood that he was emotionally disturbed or under the influence of a drug such as methamphetamine or PCP. *See Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed."). But in *Deorle*, the person "creating a disturbance or resisting arrest" was "an unarmed, emotionally distraught individual." *Id.* at 1282. We explained that "the tactics to be employed against" such a person "are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." *Id.* at 1282-83. Hernandez falls more closely into the latter category.

In *Deorle*, moreover, "a host of . . . officers were at the scene for over half an hour" when they "made a calculated and deliberate decision to shoot Deorle." *Id.* at 1283. *Deorle* stands for the principle that officers may not use extreme force against an emotionally disturbed individual in circumstances that are neither dangerous nor urgent without first exhausting other, less forceful means.

See Kisela, 584 U.S. at 106-07 (distinguishing *Deorle* as "involv[ing] a police officer who shot an unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been 'physically compliant and generally followed all the officers' instructions'; and he had been under police observation for roughly 40 minutes" (quoting *Deorle*, 272 F.3d at 1276)). Other than Hernandez's erratic behavior, this case is factually dissimilar. McBride had backed up several feet, and Hernandez continued walking toward her, refusing her commands to stop and drop his weapon. While she could have continued backing up and used the rear of the Camry as cover, officers "need not avail themselves of the least intrusive means of responding to an exigent situation." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); *see also Blanford v. Sacramento County*, 406 F.3d 1110, 1117-18 (9th Cir. 2005) (concluding that the officers reasonably shot a sword-bearing suspect who "refused to give up his weapon, was not surrounded, and was trying to get" into a location "where his sword could inflict injury that the deputies would not then be in a position to prevent").

Plaintiffs also argue that McBride should have waited to begin firing because Hernandez was not yet in striking distance, and she could have employed alternate means of subduing him. In *Lal v. California*, we rejected a similar argument that officers "should have used pepper spray" or "waited for less than lethal devices to arrive" before shooting a suspect. 746 F.3d 1112, 1117 (9th Cir. 2014). In *Lal*, as here, the officers did not have immediate access to a less lethal 40-millimeter launcher that might have been

used to defuse the situation, the suspect had "previously harmed or endangered the lives of others," and the suspect was not surrounded by a multitude of officers. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1033 (9th Cir. 2018) (distinguishing *Lal* on those "important facts"). We held that officers need not "endanger their own lives by allowing [a suspect] to continue in his dangerous course of conduct" merely because he "was intent on 'suicide by cop.'" *Lal*, 746 F.3d at 1117.

b.

Having concluded that McBride reasonably began shooting at Hernandez, we must determine whether at some point her continued fire might have become unreasonable. "[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Plumhoff*, 572 U.S. at 777; *see also Blanford*, 406 F.3d at 1118 (holding that the officer reasonably fired a second volley where "[n]othing . . . in the balance of factors already present" to justify the initial volley "had changed when [the officer] fired again").

However, it is a "different case" if the officer "initiate[s] a second round of shots after an initial round ha[s] clearly incapacitated [the suspect] and ha[s] ended any threat." *Plumhoff*, 572 U.S. at 777. "[T]erminating a threat doesn't necessarily mean terminating the suspect." *Zion*, 874 F.3d at 1076. A suspect who "is on the ground and appears wounded . . . may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." *Id.*

After the first volley, Hernandez fell to the ground. McBride paused firing and again ordered Hernandez to drop his knife. He ignored her command and, despite being on the ground, reoriented himself in her direction and had risen halfway to a standing position when she again fired at him. While he had not yet resumed walking toward her, and he may have yelled out in pain rather than rage, he was not yet incapacitated. Thus, a reasonable officer could conclude that he continued to present an imminent threat. *See Blanford*, 406 F.3d at 1118.

However, a reasonable jury could find that after the second volley, the immediate threat posed by Hernandez had ended. Indeed, the Board of Police Commissioners reached just that conclusion in finding that McBride's third volley violated department policy. *See Terry*, 471 U.S. at 19 (explaining that "departmental policies are important" in evaluating whether force was reasonable because courts should hesitate to impose requirements that "would severely hamper effective law enforcement"). When McBride fired the third volley of shots, Hernandez was rolling away from her, balled up in a fetal position. Viewing the video footage in the light most favorable to plaintiffs, Hernandez did not constitute an immediate threat, and McBride could have and should have first reassessed the situation to see whether he had been subdued. *See Zion*, 874 F.3d at 1076.

Defendants characterize *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), as standing for the principle that "officers cannot reasonably be expected to immediately perceive a change in a suspect's threatening behavior when firing in rapid succession." To the contrary,

Wilkinson did not authorize officers to "shoot mindlessly" until the suspect was dead, but rather recognized that officers may need "to reevaluate whether a deadly threat has been eliminated after each shot" if circumstances permit. *Id.* at 552. The officer in *Wilkinson* complied with this requirement "by ceasing fire after he perceived that . . . the threat had been eliminated." *Id.* The issue was factual—the parties disputed whether the officer reasonably could have perceived that the threat had ended earlier, and we held that the officer's stated perception of an ongoing threat was "uncontradicted by any evidence in the record." *Id.* at 551.

Here, McBride did pause—albeit briefly—after the second volley. More importantly, she had already fired four rounds at Hernandez. A jury could reasonably find that Hernandez no longer posed an immediate threat.[5] He

5. Judge Nelson's partial dissent erroneously concludes that 6.2 seconds is insufficient as a matter of law to make such a reassessment because Hernandez presented "an armed and moving threat." R. Nelson Op. at 31. An officer's "continued use of deadly force" against an armed suspect is not per se "reasonable because [the suspect] was still moving." *Zion*, 874 F.3d at 1076 (citing *Plumhoff*, 572 U.S. at 777); *see also Nehad v. Browder*, 929 F.3d 1125, 1134 (9th Cir. 2019) (holding that knife-wielding suspect who approached officer from several yards away did not necessarily present an immediate threat). Even when, as here, an officer is initially justified in using lethal force, she cannot unnecessarily create a sense of urgency by continuing to fire after the immediate threat has ended. *See Wilkinson*, 610 F.3d at 552; *cf. Nehad*, 929 F.3d at 1134-35 (rejecting officer's reliance on having "less than five seconds" to react where the officer unnecessarily created the sense of urgency). Were it otherwise, the officer would have perverse incentives; so long as she fired rapidly enough, no jury could consider whether the circumstances continued

was on his back, well beyond striking distance, armed only with a melee weapon, and writhing in pain from multiple gunshot wounds. It was not clear whether he would or even could get up from the ground to continue advancing toward McBride. She had her handgun trained on him, with which she had already successfully knocked him down twice. McBride had an obligation to reassess the situation before continuing her fire, and a jury could find that her failure to do so was unreasonable. We therefore conclude that plaintiffs have raised a triable issue of fact on their Fourth Amendment claim.

2. It was clearly established that continuing to shoot a suspect who appears incapacitated violates the Fourth Amendment

Even when an officer violates a suspect's Fourth Amendment rights, she is not necessarily liable for money damages under 42 U.S.C. § 1983. Unless the officer "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known," she is entitled to qualified immunity. *City of Escondido v. Emmons*, 586 U.S. 38, 42, 139 S. Ct. 500, 202 L. Ed. 2d 455 (2019) (per curiam) (quoting *Kisela*, 584 U.S. at 104). Qualified immunity ensures that "the officer had

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to call for lethal force, no matter how long the barrage or how clear the suspect's incapacitation had become. Certainly, a duty to stop firing arises if an objectively reasonable officer would view the suspect as clearly incapacitated. *See* R. Nelson Op. at 36-37. But whether a threat perceptibly ended is a factual determination that is ordinarily ill-suited for summary judgment. *See Gonzalez v. City of Anaheim*, 747 F.3d 789, 794 n.1 (9th Cir. 2014) (en banc).

fair notice that her conduct was unlawful" when "judged against the backdrop of the law at the time of the conduct," *Kisela*, 584 U.S. at 104 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam)), thus protecting "all but the plainly incompetent or those who knowingly violate the law," *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015)).

In determining whether a right is clearly established, we consider "[our] own and other relevant precedents." *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994) (cleaned up) (quoting *Davis v. Scherer*, 468 U.S. 183, 192 n.9, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)); *see also Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (holding that the defendants' conduct violated clearly established law "in light of binding Eleventh Circuit precedent" without deciding whether Supreme Court precedent also clearly established the principle). "We do not require a case directly on point," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011), or one "involving 'fundamentally similar' facts," *Hope*, 536 U.S. at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 263, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)), but "existing precedent must have placed the statutory or constitutional question beyond debate," *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5, 142 S. Ct. 4, 211 L. Ed. 2d 164 (2021) (per curiam) (quoting *White*, 580 U.S. at 79).

In addition, "the clearly established right must be defined with specificity." *Emmons*, 586 U.S. at 42. The

right's contours must be "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela*, 584 U.S. at 105 (quoting *Plumhoff*, 572 U.S. at 779). Although "general statements of the law are not inherently incapable of giving fair and clear warning," *Hope*, 536 U.S. at 741 (quoting *Lanier*, 520 U.S. at 271), "specificity is especially important in the Fourth Amendment context, where the [Supreme] Court has recognized that 'it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts,'" *Mullenix*, 577 U.S. at 12 (quoting *Saucier v. Katz*, 533 U.S. 194, 205, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). The "general rules" from *Garner* and *Graham* "do not by themselves create clearly established law outside an 'obvious case.'" *Kisela*, 584 U.S. at 105 (quoting *White*, 580 U.S. at 80).

In 2020, it had been clearly established for several years that an officer cannot reasonably "continue shooting" a criminal suspect who "is on the ground," "appears wounded," and "shows no signs of getting up" unless the officer first "reassess[es] the situation"—"particularly . . . when the suspect wields a knife rather than a firearm"—because the suspect "may no longer pose a threat." *Zion*, 874 F.3d at 1076. Defendants do not contest this. Rather, they dispute the factual premise, arguing that Hernandez was "clearly a serious threat" for the duration of the shooting. But as we have explained, the immediacy of the threat abated by the end of the second volley, when Hernandez was curled up on the ground and rolling away from McBride. *Zion* squarely controls this case.

In *Zion*, two officers confronted a suspect who had "bit his mother and cut her and his roommate with a kitchen knife." *Id.* at 1075. When the first officer arrived at the scene, "Zion ran at him and stabbed him in the arms." *Id.* As Zion ran away toward his apartment complex, the second officer shot him nine times, causing him to fall to the ground, *id.*, at which time Zion "appear[ed] to have been wounded and [was] making no threatening gestures," *id.* at 1076, although he was "still moving," *id.* at 1075.

There was no dispute that the first nine shots were reasonable. *See id.* The excessive force claim arose from the second officer's next two actions. First, he ran up to Zion and fired another volley of nine rounds at Zion's body. *Id.* Then, while Zion was curled up on his side in a fetal position, the officer took a running start and stomped on Zion's head three times. *Id.* We held that either of these actions could constitute excessive force. *See id.* at 1076.

With respect to the second volley of shots, we explained that "[a] reasonable jury could find that Zion was no longer an immediate threat" because he "was lying on the ground and so was not in a position where he could easily harm anyone or flee." *Id.* (emphasis omitted). While acknowledging that the officer "couldn't be sure that Zion wasn't bluffing or only temporarily subdued," we held that such uncertainty did not preclude a finding that the officer "should have held his fire unless and until Zion showed signs of danger or flight." *Id.* Of particular relevance here, we distinguished Zion's continued, nonthreatening movements from an attempt to get up. *See id.* (rejecting argument that the officer's "continued use of deadly force

was reasonable because Zion was still moving" given that "Zion show[ed] no signs of getting up").

Here, Hernandez was apparently trying to get up after the first volley of shots, but the video footage supports a different conclusion after the second volley. A jury could conclude that his continued movements on the ground were due to pain from four gunshot wounds and that his movements, like Zion's, were nonthreatening. And, as in *Zion*, a jury could reasonably conclude that McBride "could have sufficiently protected [her]self and others" after Hernandez fell by pointing her gun at him "and pulling the trigger only if [he] attempted to flee or attack." *Id.*

Judge Collins's partial dissent would distinguish *Zion* based on a red herring.[6] In a footnote to *Zion*, we speculated—based on counsel's unsupported assertions at argument—that "[i]t may be that, once on the ground, Zion had dropped the knife."[7] *Id.* at 1076 n.2. But our

6. Like Judge Nelson, Judge Collins relies on the improper factual inference that Hernandez "managed" to roll back toward McBride and "get" his knee and arm on the ground. Collins Op. at 56 n.5; *accord* R. Nelson Op. at 31 (asserting that Hernandez "reorient[ed] himself toward the officers" and "began pushing himself up with one arm"). The video evidence does not conclusively show that Hernandez's final movements were intentional rather than convulsive. Thus, we cannot infer that Hernandez was "trying to get up" after the second volley, Collins Op. at 67, which improperly views the evidence in the light least favorable to the party resisting summary judgment. *See Scott*, 550 U.S. at 380.

7. In briefing, the *Zion* plaintiff conceded that the only evidence in the record—officer video of the incident—did not show Zion

decision did not turn on whether Zion continued to grip the knife—there was no evidence he had dropped it, the parties had never litigated the issue, and we assumed for discussion purposes that "the suspect *wields* a knife" and might still "attempt[] to . . . attack" the officer.[8] *Id.* at 1076 (emphasis added). To the extent Zion's continued possession of the knife was relevant at all in that case, it was only because the officer was standing a mere four feet away—within striking distance. *See id.* at 1075. Here, in contrast, McBride was standing approximately 36 feet from where Hernandez had fallen, a distance at which

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dropping the knife. *See* Appellant's Opening Br. at 12 n.4, *Zion*, 874 F.3d 1072 (No. 15-56705). At argument, counsel for the *Zion* plaintiff asserted that Zion *had* dropped the knife, claiming that police photographs showed the knife "a few feet away from the body." Oral Argument at 6:30-7:35, *Zion*, 874 F.3d 1072 (No. 15-56705), https://youtu.be/7-IpfHFAEIU?t=390. In response, the judge who authored the opinion described the photographic evidence as "perspectives that the officer doesn't have." *Id.*

8. Judge Collins finds our discussion of the *Zion* oral argument and briefing "troubling" because "reasonable officers . . . no longer can rely on what our opinions actually say." Collins Op. at 72. We agree that our case law must provide fair notice, and of course officers are not expected to "delve into the court records." *Id.*at 73. But anyone who parses the footnotes of our opinions for hidden holdings—as does Judge Collins—would have no difficulty accessing these publicly available materials. We cite them not because they affect our analysis but to contextualize why Judge Collins's reliance on this footnote is misplaced. That is clear enough from the footnote itself, which begins: "It may be that"—indicating that the speculation that follows is counterfactual to the analysis in the main text. As for Judge Collins's charge that we are "improperly alter[ing]" *Zion* by "editing out [a] phrase," *id.* at 72, he overlooks that we already set out the missing phrase in full. *See* Maj. Op. at 23.

Hernandez's possession of the knife did not present an immediate threat if he was not trying to get up.

Because it was clearly established that McBride acted unreasonably if she shot Hernandez after he was on the ground and no longer posed an immediate threat, she is not entitled to qualified immunity. Therefore, we reverse the district court's grant of summary judgment on plaintiffs' Fourth Amendment claim for excessive force and remand for further proceedings.

B. Remaining Claims

Because the district court granted summary judgment on plaintiffs' state law claims solely for lack of a Fourth Amendment violation, we reverse that ruling as well. Plaintiffs also challenge the district court's grant of summary judgment on their Fourth Amendment claim for municipal liability and Fourteenth Amendment claim for violating their right to family integrity. We agree with and adopt the three-judge panel's discussion of those issues, including M.L.H.'s challenge to the district court's discovery rulings, *see United States v. Depue*, 912 F.3d 1227, 1229 (9th Cir. 2019) (en banc), and therefore affirm the district court's rulings. *See Est. of Hernandez*, 96 F.4th at 1221-23.

AFFIRMED in part; REVERSED in part; and REMANDED. Each party shall bear its own costs.

R. NELSON, Circuit Judge, with whom BRESS and BUMATAY, Circuit Judges, join, and with whom BADE, Circuit Judge, joins as to Parts I-III, IV.A, and V, concurring in part and dissenting in part:

I agree with Judge Collins that Officer Toni McBride was entitled to qualified immunity. Collins Diss. § II.B. But Officer McBride never violated the Fourth Amendment in the first place. As the panel unanimously concludes, Officer McBride was justified in shooting Daniel Hernandez to alleviate the risk that he posed when he advanced toward her while armed and ignoring commands to stop. Contrary to the majority's conclusion, however, Officer McBride's six shots over six seconds did not trigger a duty to reassess the risk Hernandez posed, particularly where he remained armed and in motion during that entire time. For similar reasons, I would affirm the district court's dismissal of the state-law claims. And I agree to affirm the district court's dismissal of Plaintiffs' substantive due process right claims. Maj. Op. at 27; Collins Diss. at 75.

The majority correctly concludes that Officer McBride was justified in shooting Hernandez because he was armed, had ignored warnings, and posed a risk. Officer McBride shot six times over six seconds to neutralize that risk. Her actions fell well within the range of conduct sanctioned by the Supreme Court in *Plumhoff v. Rickard*, 572 U.S. 765, 777, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014), which holds that an officer may continue shooting until the risk is alleviated. No reasonable jury could conclude that during those six seconds, Officer McBride had a duty to reassess the risk posed by Hernandez.

The majority errs in holding otherwise. It ignores that officers are forced and allowed "to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). And it judges Officer McBride's actions not "from the perspective of a reasonable officer on the scene," but "with the 20/20 vision of hindsight." *Id.* at 396.

The majority demands that we go an order of magnitude beyond impermissibly judging from hindsight. Going forward, if there is body-camera footage, we must press our noses against our computer screens, slow down the playback speed, pull out a stopwatch, and analyze a fraction of a second on loop to determine whether the (often infinitesimal) pauses between bursts of initially defensive lethal force make reasonable force unreasonable. And in construing the totality of the circumstances, the majority ignores all circumstances favorable to the officer and inserts its judgment rather than looking to how an objectively reasonable officer experiencing the events in real time would perceive the immediacy of the threat. This flouts precedent from the Supreme Court and this circuit. For that reason, I dissent.

I

First, the facts from Officer McBride's perspective, taking all reasonable inferences for the plaintiff.[1] *See S.B.*

1. Officer McBride's body camera footage of the incident is available to watch here: https://www.youtube.com/watch?v=PtSSNn_0GCU&rco=1. We adopt "the facts in the light

v. City of San Diego, 864 F.3d 1010, 1014 (9th Cir. 2017). Officers McBride and Shuhei Fuchigami stopped to assist a multi-vehicle car crash while on patrol. They exited their vehicle to a chaotic scene; a totaled pick-up truck to their right, a totaled sedan to their left, two other vehicles damaged nearby, and four lanes of the street strewn with bits of destroyed automobiles. They were surrounded by at least 25 people, some screaming and yelling. They were warned over the radio that a male suspect was armed with a knife. One of the bystanders also warned them of a "crazy guy with a knife" in the black truck who "was threatening to hurt both himself and others."

Enter a shirtless Daniel Hernandez, who the officers just saw grabbing something from the center console of his destroyed truck. Hernandez aggressively approached the officers with his arms outstretched at a 45-degree angle. Officer McBride correctly assessed that he was under the influence of methamphetamine "based upon her observations of Hernandez being shirtless, sweating profusely, acting jittery and agitated, [and] refusing to comply with directives" all "while also displaying an overly aggressive behavior." Officer McBride quickly determined that Hernandez was armed with a blade. With her duty weapon raised, she repeatedly warned him to stop and drop the weapon. Undeterred, Hernandez advanced upon the officers. After her repeated commands and warnings failed, Officer McBride fired her service firearm to stop Hernandez.

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depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

Appendix A

Officer McBride's use of lethal force lasted 6.18 seconds. Only after her repeated warnings did she use lethal force—two shots, 0.73 seconds apart. These shots—shots one and two—forced Hernandez to the ground. Officer McBride again warned Henandez to drop the knife, a directive he ignored. Then, 2.53 seconds after the second shot, Officer McBride fired two more shots—0.73 seconds apart—after Hernandez oriented his body toward them and rose halfway to a standing position while yelling. After these shots—shots three and four—Hernandez rolled backwards.

Hernandez, on his back, then pushed his legs upwards as if to gain momentum, brought his knees to his torso, rolled onto his side, repositioned himself onto his forearm and elbow, and again began to push himself up while facing away from Officer McBride. He was not, as the majority posits, "balled up in a fetal position." Maj. Op. at 20; *see also* Collins Diss. at 55 n.4. So, 1.36 seconds after her fourth shot, Officer McBride fired her fifth shot—which the majority contends was the start of a third volley. Maj. Op. at 8. Hernandez continued rolling and, after reorienting himself toward the officers, again began pushing himself up with one arm. Only after this, and 0.83 seconds after her fifth shot, does Officer McBride fire upon Hernandez for a sixth and final time. The majority concedes that the 0.73-second pauses after shots one and three did not create new volleys. Maj. Op. at 8 (Officer McBride fired "three distinct volleys of two shots.").

II

That leads us to today's perplexing result. The majority concludes that firing six shots in around six seconds at an armed and moving threat leads to not one, but two duties to reassess. Maj. Op. at 19 (analyzing duty to reassess after "the first volley"); Maj. Op. at 21 (same for "after the second volley"). But under these circumstances, there was never a duty to reassess. Once it is agreed that Officer McBride was justified in shooting to kill, she cannot be reasonably expected or required to reassess her shooting in a tight six-second period during an intense and dangerous situation throughout which Hernandez was rising and never stopped moving.

Judge Collins is correct that Officer McBride is entitled to qualified immunity because her conduct was not clearly unlawful at the time. *See* Collins Diss. § II.B. But she is entitled to qualified immunity for another reason: she never "violated a federal statutory or constitutional right." *Waid v. County of Lyon*, 87 F.4th 383, 387 (9th Cir. 2023) (quotation omitted). Officer McBride's seizure of Hernandez was objectively reasonable, and she therefore did not violate the Fourth Amendment.

A

In *Graham*, the Supreme Court held that excessive force claims are properly analyzed under the Fourth Amendment's "objective reasonableness standard." 490 U.S. at 388. Assessing whether an officer's seizure is objectively reasonable "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." *Id.* at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

In this analysis, the most important question is "whether the suspect posed an immediate threat." *Zion v. County of Orange*, 874 F.3d 1072, 1075 (9th Cir. 2017) (citing *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc)). And 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." *Graham*, 490 U.S. at 396-97.

To that end, "police officers are justified in firing at a suspect in order to end a severe threat to public safety" and "need not stop shooting until the threat has ended." *Plumhoff*, 572 U.S. at 777. But that justification has limits. As we noted in *Zion*, "[i]f the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." 874 F.3d at 1076. The majority, however, extends *Zion*'s stop-and-reassess requirement to an absurd and dangerous extreme that runs headlong into *Plumhoff*, which controls the outcome of this case.

In *Plumhoff*, Rickard engaged officers in a car chase. 572 U.S. at 768-69. During the chase, Rickard crashed into an officer's vehicle, spinning into a parking lot and colliding with another officer's vehicle. *Id.* at 769. Rickard, "in an attempt to escape," reversed his vehicle as two officers approached him on foot. *Id.* at 769-770. Rickard then crashed into another officer's vehicle while reversing and did not take his foot off the gas (he could not move, however, as the third officer's vehicle he collided with blocked his way). *Id.* at 770. In response, an officer fired three shots at Rickard. *Id.* Then, Rickard managed to break his car free of the vehicle behind him, "reversed in a 180 degree arc," and "'maneuver[ed] onto' another street." *Id.* (quotation omitted). So two other officers "fired 12 shots toward Rickard's car, bringing the total number of shots fired during this incident to 15." *Id.* Rickard lost control of the vehicle, crashed, and "died from some combination of gunshot wounds" and car-crash injuries. *Id.*

The Supreme Court's analysis of Rickard's daughter's claims is instructive, and its logic is binding. Rickard's daughter claimed that the first three shots were unjustified because the chase had ended when Rickard's car was stuck after reversing. *Id.* at 775. She also claimed that the officers used excessive force by firing fifteen shots. *Id.* The Supreme Court, rebutting the first argument, found that the chase was not over because "[l]ess than three seconds" after temporarily being brought to a standstill, "Rickard resumed maneuvering his car," *i.e.*, accelerating in reverse. *Id.* at 776. "Under the circumstances at the moment when the shots were fired, all that a reasonable officer could have concluded was that Rickard was intent on resuming his flight." *Id.* at 777.

The Court was also unmoved by Rickard's daughter's second argument. The Court found that "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Id.* And "if lethal force is justified, officers are taught to keep shooting until the threat is over." *Id.* Critically, "during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee." *Id.*

The same is true here. The video shows an armed Hernandez advancing upon Officer McBride, and never "abandon[ing] his attempt" to threaten her. *Id.* And, unlike in *Plumhoff*, Officer McBride did not pause for three seconds to determine whether the threat was controlled, nor should she have been expected to do so. The majority does not distinguish *Plumhoff*. And under *Plumhoff*, Officer McBride's six shots over six seconds cannot be parsed out. The shooting was justified from the start. And nothing required Officer McBride to cease her efforts to ensure an armed and threatening man rising or moving throughout a short six-second timeframe was fully subdued.

Zion provides no haven for the majority. Zion—the suspect—was "on the ground and appear[ed] wounded" after the officer "shot at [him] nine times at relatively close range." 874 F.3d at 1075. The officer then ran up to Zion, who was "making no threatening gestures" and was "lying on the ground . . . not in a position where he could easily harm anyone or flee." *Id.* at 1075-76. There was also a factual dispute about whether the suspect remained armed. *See id.* at 1076 & n.2. Still, the officer fired nine

more rounds while standing at even closer range. *Id.* at 1075. If that were not enough, after he fired shots nine through eighteen, the officer took a running start and stomped on the suspect's head three times. *Id.* In those circumstances, "a reasonable officer would reassess the situation rather than continue shooting[,]" *id.* at 1076, or proceed to stomping.

Thus, *Zion*'s utility in determining whether Officer McBride's use of force was reasonable is limited. And *Zion* does not hold that an exception to *Plumhoff* applies based on a new volley of shots.[2] Nor could it: our precedent cannot displace the logic and reasoning of *Plumhoff*.

Instead, *Zion* is best understood as an elaboration upon the Supreme Court's explanation that *Plumhoff* "would be a different case if petitioners had initiated a second round of shots after an initial round had *clearly incapacitated* [the suspect] and had *ended any threat of continued flight*." 572 U.S. at 777 (emphases added). *Zion* turns upon an objectively reasonable officer's knowledge that the suspect was clearly incapacitated and therefore not an immediate threat. 874 F.3d at 1076 ("Zion *was* lying on the ground and so was not in a position where he could easily harm anyone or flee. . . [Z]ion was no longer an immediate threat.").

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2. *Zion* has little to say about volleys of shots and does not dwell on timing at all. 874 F.3d at 1075-76. Instead, it discusses at length that the suspect was not threatening the officer and could not harm anyone. *Id.* Accordingly, even if we adopted *Zion*'s reasoning (we which need not sitting en banc), *Zion* does not control whether a new volley mandates reassessment.

Zion may provide some guideposts for finding that an officer should have known a suspect was "clearly incapacitated," *see Plumhoff*, 572 U.S. at 777, thus triggering a duty to reassess. But those guideposts do not suggest that Officer McBride was required to stop firing within six seconds.

To avoid these logical flaws, the majority misreads *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010). It claims that in *Wilkinson*, we "recognized that officers may need 'to reevaluate whether a deadly threat has been eliminated after each shot' if circumstances permit." Maj. Op. at 20 (quoting *Wilkinson*, 610 F.3d at 552). We held just the opposite. *Wilkinson* actually said, "[t]o the extent that [our case law] requires an officer to reevaluate whether a deadly threat has been eliminated after each shot, we disagree that it should be applied in the circumstances of this case." 610 F.3d at 552. *Wilkinson* disclaimed the majority's holding, because "[s]uch a requirement places additional risk on the officer not required by the Constitution." *Id.* And, just like in *Wilkinson*, Officer McBride "did not shoot mindlessly, but responded to the situation by ceasing fire [after her sixth shot] after [s]he perceived that . . . the threat had been eliminated." *Id.*

Put simply, there is no duty to reassess after each shot over a six-second period in a high-intensity situation like the one here. Imposing that duty flouts *Plumhoff*. Rather, a duty to stop firing arises only if an objectively reasonable officer would view the suspect as clearly incapacitated. And it beggars belief that an objectively reasonable officer would think Hernandez was incapacitated in just

1.36 seconds when he had just attempted to rise and was still in motion.

B

Even taking the majority's artificial construct on its own terms, its analysis does not satisfy our totality-of-the-circumstances test. The majority posits that the Fourth Amendment's reasonableness analysis rises and falls on just 1.36 seconds between shots four and five. All while acknowledging that a 0.73-second delay between shots one and three did not constitute a separate volley or create a new duty to reassess risk. Thus, under the majority's deviation from *Plumhoff*, this case turns on a mere 0.63 seconds (the difference between the 1.36-second window requiring reassessment and the 0.73 seconds which did not) to find a constitutional violation. Further, during that split second, Hernandez remained armed and was in constant motion. No case has ever made such a holding.

It is also impossible to square this holding with blackletter law. First, the majority's analysis elides that our reasonableness analysis looks to the totality of the circumstances. *See Graham*, 490 U.S. at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 8-9, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1985)). Our reasonableness analysis "requires careful attention to facts and circumstances of each particular case." *Id.* Thus, the question is "whether the totality of the circumstance justified a particular sort of seizure." *Id.* (cleaned up). We look to a host of factors when assessing the totality of the circumstances, but those relevant here are (1) "the severity of the crime at issue," (2) "whether

the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

The majority glosses over this test, mentioning the "totality of the circumstances" only twice. Maj. Op. at 12, 15. And the majority's analysis rises and falls on a split second—0.63 seconds to be exact. As the majority tells it, this fraction of a second was enough to impose a duty to reassess since "Hernandez no longer posed an immediate threat." *Id.* at 21. He was apparently no longer a threat because he was armed with a blade and out of striking distance, and it was not apparent he could get up. *See id.*

But what had changed? Not the totality of the circumstances. *See Graham*, 490 U.S. at 396. The severity of the crime at issue never changed in the 0.63 seconds which the panel claims forced Officer McBride to reassess. From Officer McBride's perspective, Hernandez still caused a multi-vehicle crash while under the influence of methamphetamine and was threatening others with a blade. He was also "actively resisting arrest" before any shots were fired, was approaching Officer McBride armed, and was not complying with her repeated warnings. *Id.*; *see also Hart v. City of Redwood City*, 99 F.4th 543, 552 (9th Cir. 2024) (suspect was resisting arrest under *Graham* when he refused "commands to 'drop the knife' . . . while exhibiting a deadly weapon," a "crime[] in California.") (quotation omitted).

The panel, then, relies solely on the immediacy of the threat. Maj. Op. at 20-22. But, again, a fraction of a

second before, the majority admits there would be no need to reassess. No reasonable officer could determine that Hernandez no longer "pose[d] an immediate threat to the safety of the officers or others" in just 1.36 seconds (a mere 0.63 seconds longer than the breaks after the first and third shots where the majority agrees no constitutional duty to reassess arose). *Graham*, 490 U.S. at 396. And the majority does not explain what makes this 0.63-second difference material. A split second cannot change the reasonableness of Officer McBride's use of force. *See id.* at 397; *Wilkinson*, 610 F.3d at 553 (no duty to reassess where "no evidence that" officer "had immediately perceived" change in threat).

The majority's characterization of Officer McBride's shots also warps our understanding of how an objectively reasonable officer perceives time. Officer McBride fired six times in about 6.18 seconds. More than two-and-a-half of those seconds were the pause between what the majority describes as the first and second volleys. And the pause between the second and third shots is almost double the 1.36 seconds that the majority concludes creates a duty to reassess after the fourth shot. The majority wrongly places legal significance on the delay between the fourth and fifth shots. But because the majority concedes that the third and fourth shots were justified, Officer McBride was not required to "stop shooting until the threat ha[d] ended." *Plumhoff*, 572 U.S. at 777.[3]

3. The majority also relies on the Board of Police Commissioners' conclusion that the third volley violated department policy. Maj. Op. at 20. But we have never delegated the interpretation of the Constitution to a police department. "[W]e may certainly consider

The majority's flawed reasoning also creates perverse incentives. *Zion* stands for the rational requirement that if an officer knows that a threatening suspect is incapacitated, the officer ought to pause and reassess. That is exactly what Officer McBride did here. Instead, from the comfort of our chambers, we will now second-guess every millisecond's pause after the use of initially reasonable force. Our unfortunate message is that any millisecond an officer tarries in protecting herself and others is a millisecond closer to liability. That rule discourages any reassessment. When in doubt, officers should now continue shooting or risk liability. Not a great message.

The majority fails to grapple with these concerns. Instead, the majority erects a straw man. I do not suggest that "6.2 seconds is insufficient as a matter of law" to mandate reassessment. Maj. Op. at 21 n.5. If an officer clearly incapacitates a suspect in the first second of a six-second timeframe, the reasonableness of firing another five shots could create a jury question. That question, however, hinges on the totality of the circumstances, not one single isolated factor. Considering the totality of the circumstances, the 0.63 seconds under which the majority hinges its analysis cannot be enough time to reassess the threat posed by Hernandez—particularly where he remained moving and armed.

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a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable" but those guidelines "are not dispositive." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003).

To excuse this elision, the majority retreats to precedent finding constitutional violations in time-sensitive circumstances where the officer "unnecessarily create[s] their own sense of urgency." *Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019) (cleaned up); *see* Maj. Op. at 21 n.5 (citing *Wilkinson*, 610 F.3d at 552; *Nehad*, 929 F.3d at 1134-35). "When an officer creates the very emergency he then resorts to deadly force to resolve, he is not simply responding to a preexisting situation." *Porter v. Osborn*, 546 F.3d 1131, 1141 (9th Cir. 2008). So we account for how an officer contributed to escalating the situation when weighing the totality of the circumstances. *See Nehad*, 929 F.3d at 1135-36.

That precedent has no application here. An officer's reaction to an emergency she created relates to the initiation of force. *E.g.*, *id.* at 1135 (officer did not identify himself as law enforcement and did not warn suspect before firing); *Torres v. City of Madera*, 648 F.3d 1119, 1126 (9th Cir. 2011) (officer did not follow firearm/taser separation policy and did not draw weapon before confronting suspect). The majority found the first four shots constitutional. So this is not a case where Officer McBride's "own poor judgment and lack of preparedness caused her to act with undue haste." *Torres*, 648 F.3d at 1126; *accord Nehad*, 929 F.3d at 1135. By finding as much in a split-second window, the majority crafts a loophole that negates *Plumhoff*—continuing to fire with *Plumhoff*'s blessing is now verboten under an unrelated strain of cases.

III

Appellants also claim that Officer McBride and the City of Los Angeles are liable for negligent wrongful death, assault, and battery, and violating California's Bane Civil Rights Act, Cal. Civ. Code § 52.1.4. Wrongful death, assault, and battery all have unique elements under California law. But in our posture, they all share one: the officer must have "unreasonably used deadly force." *Koussaya v. City of Stockton*, 54 Cal. App. 5th 909, 932, 268 Cal. Rptr. 3d 741 (2020). The district court found that "Officer McBride's use of force was reasonable," and therefore concluded that "Defendants are also entitled to summary judgment on Plaintiffs' remaining state-law claims." *Est. of Hernandez v. City of Los Angeles*, No. 2:20-cv-04477, 2021 U.S. Dist. LEXIS 155185, 2021 WL 4139157, at *10 (C.D. Cal. Aug. 10, 2021).

Generally, "[t]he U.S. Constitution and California common law are . . . two distinct legal frameworks." *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1122 (9th Cir. 2021). Accordingly, state-law claims should be analyzed individually, and analogizing to federal constitutional standards should be done only when state courts adopt them into their corpus of law. *See id.* at 1122. And district courts should be particularly cautious where there is reason to believe that at least California's negligence analysis is not coextensive with the Fourth Amendment's. *E.g.*, *Hayes v. County of San Diego*, 57 Cal. 4th 622, 160 Cal. Rptr. 3d 684, 305 P.3d 252, 263 (Cal. 2013) (negligence law in California "is broader than

federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used."); *see also Tabares*, 988 F.3d at 1128.

Here, though, no party has argued how California's negligence or assault and battery reasonableness standards diverge from the Fourth Amendment in a dispositive way. And the Bane Act claim as alleged by Appellants relies on a Fourth Amendment violation. So that claim is coextensive with the federal constitutional analysis, and it fails because Officer McBride's use of force was reasonable. *See Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 67, 183 Cal. Rptr. 3d 654 (2015) (the Bane Act requires a violation of a right rooted in state or federal law). Thus, I would affirm the district court's grant of summary judgment on the state-law claims.

IV

Finally, Appellants raise substantive due process claims under the Fourteenth Amendment. Hernandez's parents allege that the defendants violated their substantive due process right to companionship of their adult child. Likewise, Hernandez's minor daughter asserts a substantive due process right to companionship of her father. I agree that we should affirm the district court's dismissal of these claims.

A

The district court granted summary judgment for Defendants on Hernandez's parents' and child's "Interference with Familial Integrity Substantive Due Process Violation" claims. The three-judge-panel affirmed

the district court. And the en banc majority adopts the three-judge panel's discussion of this issue. Maj. Op. at 27. Because directing lethal force toward an armed and persistent threat does not "shock the conscience," *Wilkinson*, 610 F.3d at 554, I agree with the majority that the record does not support these substantive due process claims under our precedent, Maj. Op. at 27.

B

But Plaintiffs' substantive due process claims fail for a more fundamental reason. We seem to have stumbled our way into recognizing the substantive due process rights of parents to the companionship of their adult-children and of children to the companionship of their parents. After *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997), our unreasoned decisions assuming such rights require reexamination.

In *Glucksberg*, the Supreme Court required us to conduct an exacting two-step inquiry before recognizing new substantive due process rights. First, we must carefully describe "the asserted fundamental liberty interest." *Id.* at 720-21. And then we must determine whether that liberty interest is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* (cleaned up). We have never conducted a *Glucksberg* analysis to recognize whether a parent has substantive rights over their adult children or whether a child has a right to companionship with a parent. And we are unique in recognizing a parental interest in this regard.

The majority does not perform the *Glucksberg* analysis, either. And we did not ask for briefing on whether these purported substantive companionship rights are objectively deeply rooted in our nation's history and tradition or implicit in the concept of ordered liberty. Instead, the majority summarily adopts the three-judge panel's analysis which presupposed that these rights exist. For this reason, the majority's opinion cannot be read as our court, sitting en banc, conducting the requisite *Glucksberg* analysis needed to recognize these rights in the first place. Our precedents have never been justified under the proper *Glucksberg* framework.

1

Start with a parent's right to his or her adult child's companionship. The Supreme Court recognizes some parental interest in their minor children. But those interests are typically confined to parental custody or decision-making regarding a minor child's upbringing. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 396-99, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (identifying the right to "establish a home and bring up children"); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

The Supreme Court has also recognized that states may not unjustifiably interfere with the "formation and preservation of certain kinds of highly personal

relationships." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). These include those that "attend the creation and sustenance of a family," including the rearing of children. *Id.* at 619; *accord Meyer*, 262 U.S. at 399; *May v. Anderson*, 345 U.S. 528, 533, 73 S. Ct. 840, 97 L. Ed. 1221, 67 Ohio Law Abs. 468 (1953). That interest extends to a parent's autonomy to decide questions related to the "custody, care and nurture of the child." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (quoting *Prince*, 321 U.S. at 166); *see also Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (same).

We followed those principles, and in *Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979) (per curiam), we held that a parent's relationship with her minor child is constitutionally protected. There, we found that the plaintiff, whose minor child was deported because she could not adequately care for him, had a constitutional interest in "preserv[ing] her access to [her] child." *Id.* at 1271-72, 1275. *Morrison* was rooted in the basic principle that a parent has a protected custodial interest in her minor child. *Id.* at 1275 (citing *Stanley*, 405 U.S. at 651).

We have since gone further, and with little to no explanation. In *Strandberg v. City of Helena*, 791 F.2d 744, 746 (9th Cir. 1986), parents of a 22-year-old decedent asserted constitutional claims against state officials after their son hung himself in prison. The district court dismissed most of the claims, including the Fourteenth Amendment claim asserting the "right to parent." *Id.* We recognized that the parents-plaintiffs "had not been

deprived of any constitutional right to parent" because the decedent reached adulthood. *Id.* at 748. But we still found that the "district court did not . . . dismiss the" parent-plaintiffs' "fourteenth amendment right to companionship and society of the decedent." *Id.* at 748 n.1. Accordingly, we found that this claim could proceed under the Fourteenth Amendment. *Id.* That short sentence in a footnote constitutes our entire analysis.

Our lack of explanation seems to underlie our jurisprudence in this area. In *Byrd v. Guess*, 137 F.3d 1126, 1134 (9th Cir. 1998), we assumed, again without explanation, that a parent could proceed with a Fourteenth Amendment claim to vindicate the loss of companionship of an adult child—although we ultimately held that the parents' claim failed. This lack of explanation in recognizing a new substantive due process right remains a disturbing feature of our jurisprudence. *See, e.g.*, *Porter v. Osborn*, 546 F.3d 1131, 1136 (9th Cir. 2008); *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir. 1998). In none of these cases did we discuss whether special circumstances, such as the adult child's age or living arrangements, may allow his parents to assert a constitutional right to a familial relationship. Nor did we ground such a conclusion in the Constitution's text or our Nation's history and tradition.

This puts us at odds with nearly every circuit to address the question. Like us, other circuits have recognized a substantive due process right to the companionship of a minor child. But none has extended that right to an adult child. And most have rejected such

an extension. *See Valdivieso-Ortiz v. Burgos*, 807 F.2d 6, 8-9 (1st Cir. 1986); *McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003); *Russ v. Watts*, 414 F.3d 783, 791 (7th Cir. 2005); *Robertson v. Hecksel*, 420 F.3d 1254, 1259-60 (11th Cir. 2005); *Butera v. District of Columbia*, 235 F.3d 637, 656, 344 U.S. App. D.C. 265 (D.C. Cir. 2001). Only the Tenth Circuit recognizes such a broad right, and it roots the right in the First, not Fourteenth, Amendment. *See Trujillo v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 768 F.2d 1186, 1188-89 (10th Cir. 1985).

We are thus an outlier in entertaining a parent's substantive due process right to the companionship of adult children. Worse, we have never followed the careful process required by *Glucksberg*. Had we done so, we likely would conclude as the Third Circuit reasoned, that it would be a "serious mistake . . . to extend the liberty interests of parents into the amorphous and open-ended area of a child's adulthood." *McCurdy*, 352 F.3d at 829.

2

Next, a child's right to his or her parent's companionship. Here too, we appear to have stumbled into recognizing this right. Not long after we first assumed parents' liberty interest in their adult child in *Strandberg*, we recognized that the right was reciprocal in *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999). There, we held "that a child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest" because

the "distinction between the parent-child and the child-parent relationships does not . . . justify constitutional protection for one but not the other." *Id.* at 1419. We cited the unreasoned footnote in *Strandberg*—which assumed a parent's right to the companionship of adult children—for support. *Id.* (citing *Strandberg*, 791 F.2d at 748 n.1). After years of stacking unreasoned precedent upon unreasoned precedent, it is now blackletter law in this circuit that a child has a constitutionally recognized interest in the companionship of her parents. *See, e.g.*, *Ochoa v. City of Mesa*, 26 F.4th 1050, 1056 (9th Cir. 2022); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991).[4]

There is reason to doubt that such a right exists under *Glucksberg*. When recognizing a right to familial companionship, we have relied on Supreme Court case

4. Many of our sister circuits appear to recognize this right. *See, e.g.*, *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000); *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000); *J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir. 1997). Others are undecided. *See, e.g.*, *White v. City of Vineland*, No. 116CV08308JDWAMD, 2022 U.S. Dist. LEXIS 199436, 2022 WL 16637823, at *1 (D.N.J. Nov. 2, 2022) (discussing the Third Circuit's silence on this issue); *Stratton v. Mecklenburg Cnty. Dep't of Soc. Servs.*, 521 F. App'x 278, 295 (4th Cir. 2013) (unpublished) (Gregory, J., concurring) (whether this right exists is an "open question in this Circuit."). At least one circuit has questioned the right. *See Chambers v. Sanders*, 63 F.4th 1092, 1097-99 (6th Cir. 2023) (assuming that such a liberty interest exists but stating that "the Ninth Circuit's view" that children have a right to paternal companionship based on state actions incidentally impacting their familial relations "is based primarily on a broad reading of the substantive due process right to family association").

law about parental rights to raise their children. *See, e.g.*, *Meyer*, 262 U.S. at 399, 403; *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535-36, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). That right is founded on the historical tradition that parents have authority in the custody and care of their children. *See* Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* 7 (1994); *see also* § 1:5. Presumption for father, Child Custody Prac. & Proc. & n.9 (2024 Update) (citing *State v. Baird*, 21 N.J. Eq. 384, 388, 1869 WL 3749 (Ct. Err. & App. 1869); *Carr v. Carr*, 63 Va. 168, 22 Gratt. 168, 1872 WL 5192 (1872)). It makes little sense to transform those cases into cases about children's rights. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 601, 603-04, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) (allowing parents to override children's wishes and commit them to mental hospitals—while never suggesting that children have a right to the companionship of their parents). At the very least, that shift requires *some* explanation—which, again, we have never provided.

As noted above, any parental right stems from the authority that parents had to oversee the upbringing of their children. As it turns out, the historical record suggests that this authority is premised less on parental "rights," and more on parental "duties." The law imposes a *duty* on parents to teach and care for their children. That duty carries with it a corresponding interest in raising children, which is what the case law calls a parental "right." But even phrased as a right, any parental interest "is derived from" the duty to rear them properly. W. Blackstone, 1 *Commentaries on the Laws of England*

*438-*441; 2 James Kent, *Commentaries on American Law* 162-63 (1827). If parents breach that duty, they lose the corresponding "rights." *E.g.*, 2 Kent, *supra*, at 182.

In light of this historical understanding, does it make sense to transform a parental duty into a child's right to companionship? If children do not have a duty to care for their parents, why would they have the corresponding "right" to enjoy their parents' companionship?

Look at the issue from another angle. Our legal tradition has long presumed that children are too young to assert their own interests. *Parham*, 442 U.S. at 602-03. So the law trusts parents to assert those interests on their children's behalf. *See id.*; *see also Brach v. Newsom*, 38 F.4th 6, 21-22 (9th Cir. 2022) (en banc) (Paez, J., dissenting) ("[T]he *Meyer-Pierce* right is a right asserted *by parents* ." (emphasis in original)). Given that practice, it is hard to conclude that parental companionship rights are reciprocal for the child. If parents hold and exercise their children's rights, how could children have a substantive due process right in the companionship of their parents independent of the parents' interests?

Of course, this historical analysis is preliminary. Our circuit has never done the requisite substantive due process analysis required under *Glucksberg* to determine whether a child possesses a constitutionally protected parental companionship interest. This issue was never briefed, partly because Plaintiffs have shown no claim under our case law. The Supreme Court has also "never had

occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." *Michael H. v. Gerald D.*, 491 U.S. 110, 130, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989); *Troxel v. Granville*, 530 U.S. 57, 88, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (Stevens, J., dissenting) ("[T]his Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds."). At any rate, the *Glucksberg* analysis must take place to determine whether a child's right is deeply rooted in the Nation's history and tradition.

3

"The Supreme Court has admonished that we must be wary of recognizing new substantive due process rights 'lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences' of judges." *Sinclair v. City of Seattle*, 61 F.4th 674, 685 (9th Cir. 2023) (R. Nelson, J., concurring) (quoting *Glucksberg*, 521 U.S. at 720). And the Court set out a two-step analysis we must engage in before recognizing new substantive due process rights. *Glucksberg*, 521 U.S. at 720-21.

Since *Glucksberg*, this court has shirked its duty. Rightly or wrongly, we continue to recognize two constitutional rights without doing the analysis required by the Supreme Court and without any clear Supreme Court authority undergirding our decisions. We may not create a new substantive due process right implicitly. And after *Glucksberg*, we must revisit these precedents.

V

Constitutional violations do not rise and fall on a fraction of a second. And Officer McBride's objectively reasonable use of force to stop the clear threat that Hernandez posed to her and others' safety does not violate the Fourth Amendment. Even if it did, as Judge Collins explains, Officer McBride is entitled to qualified immunity. And I would also affirm the district court's dismissal of the state-law claims. I agree with the majority, however, to affirm the dismissal of the Fourteenth Amendment claims.

COLLINS, Circuit Judge, with whom R. NELSON, BADE, BRESS, and BUMATAY, Circuit Judges, join as to Part II(B), concurring in part, concurring in the judgment in part, and dissenting in part:

These consolidated actions under 42 U.S.C. § 1983 arise from the shooting death of Daniel Hernandez during a confrontation with officers of the Los Angeles Police Department ("LAPD") on April 22, 2020. [1] Plaintiffs-Appellants, who are the Estate, parents, and minor daughter of Hernandez, asserted a variety of federal and state law claims against the City of Los Angeles ("City"), the LAPD, and the officer who shot Hernandez, Toni McBride. The district court granted summary judgment to Defendants on all claims, and Plaintiffs have appealed. I concur in the judgment to the extent that the majority concludes that (1) the district court erred in holding that no rational jury could find that the final volley of shots fired by McBride was unreasonable under Fourth Amendment standards; and (2) the district court erred in granting summary judgment on that basis as to certain of Plaintiffs' state law claims. I concur in Part IV(B) of the majority's opinion to the extent that it adopts the panel opinion's discussion affirming the dismissal of Plaintiffs'

1. I was the author of the panel decision in this case, *see Estate of Hernandez v. City of Los Angeles*, 96 F.4th 1209 (9th Cir. 2024), and I adhere to the views expressed in that opinion in all respects. Accordingly, in this partial dissent from the en banc court's reconsideration of the case, I will borrow liberally (and often verbatim) from that panel decision, and I will do so without the cumbersome use of quotation marks and without providing citations to my prior panel opinion.

claim of municipal liability under § 1983 and Plaintiffs' claims under the Fourteenth Amendment. But I dissent from the majority's conclusions that McBride's final volley of shots violated clearly established law and that McBride therefore is not entitled to qualified immunity with respect to Plaintiffs' Fourth Amendment excessive force claim. Accordingly, I concur in part, concur in the judgment in part, and dissent in part.

I

A

During the late afternoon of April 22, 2020, uniformed officers Toni McBride and Shuhei Fuchigami came upon a multi-vehicle accident at the intersection of San Pedro Street and East 32nd Street in Los Angeles. They decided to stop and investigate the situation. Video footage from the patrol car and from McBride's body camera captured much of what then transpired. [2]

As the officers arrived near the intersection, they observed multiple seriously damaged vehicles, some with people still inside, and at least two dozen people gathered at the sides of the road. As the officers exited

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2. Because no party contends that these video recordings were "doctored" or "altered," or that they lack foundation, this court must "view[] the facts in the light depicted by the videotape." *See Scott v. Harris*, 550 U.S. 372, 378, 380-81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). However, to the extent that a fact is not clearly established by the videos, this court must view the evidence "in the light most favorable to the nonmoving part[ies]," *i.e.*, Plaintiffs. *Id.* at 380.

their patrol car, the car's police radio stated that the "suspect's vehicle" was "black" and that the suspect was a "male armed with a knife." A bystander immediately told the officers about someone trying to "hurt himself," and Fuchigami stated loudly, "Where is he? Where's he at?" In response, several bystanders pointed to a black pickup truck with a heavily damaged front end that was facing in the wrong direction near two parked vehicles on the southbound side of San Pedro Street. The officers instructed the crowd to get back, and McBride drew her weapon. One nearby driver, who was sitting in her stopped sedan, told McBride through her open car window that "he has a knife." McBride asked her, "Why does he want to hurt himself?" and the bystander responded, "We don't know. He's the one who caused the accident." McBride instructed that bystander to exit her car and go to the sidewalk, which she promptly did. McBride then shouted to the bystanders in both English and Spanish that they needed to get away. At the same time, the police radio announced that the suspect was "cutting himself" and was "inside his vehicle." McBride then asked her partner, "Do we have less lethal?" Referencing the smashed pickup truck, McBride said, "Is there anybody in there?" She then stated, "Hey, partner, he might be running."

As McBride faced the passenger side of the truck, which was down the street, she then saw someone climb out of the driver's side window. McBride yelled out, "Hey man, let me see your hands. Let me see your hands man," while a bystander yelled, "He's coming out!" Daniel Hernandez then emerged shirtless from behind the smashed black pickup truck, holding a weapon in his right

hand. As he did so, Officer McBride held her left hand out towards Hernandez and shouted, "Stay right there!" Hernandez nonetheless advanced towards McBride in the street, and he continued to do so as McBride yelled three times, "Drop the knife!" While Hernandez was coming towards her, McBride backed up several steps, until she was standing in front of the patrol car.

Hernandez began yelling as he continued approaching McBride, [3] and he raised his arms out by his sides to about a 45-degree angle. McBride again shouted, "Drop it!" As Hernandez continued yelling and advancing with his arms out at a 45-degree angle, Officer McBride fired an initial volley of two shots, causing Hernandez to fall to the ground on his right side, with the weapon still in his right hand. At the point that McBride fired at Hernandez, he was between 41-44 feet away from her.

Still shouting, Hernandez rolled over and leaned his weight on his hands, which were pressed against the pavement. He began pushing himself up, and he managed

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3. Apparently relying on a bystander's declaration, the majority insists that Hernandez "did not say anything," *see* Opin. at 11, but this contention is blatantly contradicted by the relevant video evidence and should not be adopted "for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380. The same declarant also stated that he "was standing 5 feet from Mr. Hernandez" and that "[a]fter the 2nd shot was fired by the officer, Mr. Hernandez dropped the boxcutter." (As noted below, *see infra* at 56, Hernandez's weapon turned out to be a double-bladed box cutter rather than a knife.) These assertions are also blatantly contradicted by the video evidence, which shows no one standing within 20 feet of Hernandez and that he still had the box cutter in his hand after the shooting stopped. *See infra* at 56 & n.6.

to get his knees off the pavement. As Hernandez started shifting his weight to his feet to stand up, McBride again yelled "Drop it!" and fired a second volley of two shots, causing Hernandez to fall on his back with his legs bent in the air, pointing away from McBride.[4] Hernandez immediately began to roll over onto his left side, such that his back was momentarily facing McBride, and at that point, McBride fired a fifth shot. Hernandez then continued to roll over, and he pressed his bent left elbow and left knee against the ground, so that his chest was off the ground but facing down. But Hernandez started to collapse to the ground, and just as he did so, McBride fired a sixth shot. [5] Hernandez then lay still, face-down on the street, as McBride and other officers approached him with their pistols drawn. McBride's body camera clearly shows that the weapon was still in Hernandez's right hand as an officer approached and took it out of his hand. [6] The weapon turned out not to be a knife, but a box

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4. In describing this portion of the video, the majority states that Hernandez "curl[ed] up into a ball with his knees against his chest and his arms wrapped around them" and that he was "balled up in a fetal position." *See* Opin. at 12, 20. This is grossly inaccurate—at this point, Hernandez's body was moving and rolling the entire time; his arms were only momentarily near his legs (not "wrapped around them"); and the majority's insinuation that Hernandez thereafter remained in a balled-up, arms-wrapped fetal position is simply untrue.

5. The majority wrongly elides the fact that Hernandez managed to roll over and get a knee and arm on the ground before collapsing as the sixth shot was fired. *See infra* at 70.

6. M.L.H.'s assertion that Hernandez was unarmed during the latter part of the incident is thus "blatantly contradicted" by the relevant video recording. *Scott*, 550 U.S. at 380-81.

cutter with two short blades at the end. Starting from the point at which Hernandez came out from behind the truck until he collapsed on the ground, the entire confrontation lasted no more than 20 seconds. All six shots were fired within eight seconds.

Hernandez died from his injuries. A forensic pathologist retained by Plaintiffs opined that McBride's sixth shot—which the pathologist concluded "more likely than not" struck Hernandez in the top of his head before ultimately lodging inside the tissues in his neck—caused "[t]he immediately fatal wound in [Hernandez's] death." The pathologist further concluded that "[t]he next most serious wound was the wound to [Hernandez's] right shoulder that involved the lung and liver," which he opined was "more likely than not" inflicted by McBride's fourth shot. However, he stated that the shoulder wound "would not . . . have produced immediate death" and that "[w]ith immediate expert treatment, this wound alone may have been survivable." In Defendants' response to Plaintiffs' oppositions to summary judgment, Defendants did not raise evidentiary objections to the forensic pathologist's report, nor did they provide any basis for rejecting its conclusions as a matter of law.

B

In May and June of 2020, Hernandez's parents (Manuel and Maria Hernandez) and his minor daughter (M.L.H.) (collectively, "Plaintiffs") filed separate § 1983 actions alleging constitutional violations in connection with the shooting death of Hernandez. Shortly thereafter,

the district court formally consolidated the two cases for all purposes, and Plaintiffs filed a consolidated complaint against the City, LAPD, and McBride (collectively, "Defendants"). The operative consolidated complaint alleged three federal claims that remain at issue in this appeal: (1) a Fourth Amendment excessive force claim brought against McBride by Plaintiffs, acting on behalf of Hernandez's Estate; (2) a Fourteenth Amendment claim for interference with familial relations brought by Plaintiffs on their own behalf against all Defendants; and (3) a claim under *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), by Plaintiffs, on behalf of the Estate and themselves, against the City and LAPD. The complaint also asserted pendent state law claims for, *inter alia*, assault, wrongful death, and violation of the Bane Act (California Civil Code § 52.1).

In August 2021, the district court granted Defendants' motion for summary judgment on all claims. The court held that, as a matter of law, McBride did not use excessive force in violation of the Fourth Amendment but that, even if she did, she was entitled to qualified immunity. The court also held that McBride's actions did not "shock the conscience" and that the Fourteenth Amendment claim therefore lacked merit as a matter of law. The court concluded that the *Monell* claim failed both because there was no underlying constitutional violation and because, even if there were such a violation, Plaintiffs had not established any basis for holding the City and LAPD liable. Finally, the court held that, because all parties agreed that the remaining state law claims for assault,

wrongful death, and violation of the Bane Act "r[o]se and f[e]ll based on the reasonableness of Office[r] McBride's use of force," summary judgment was warranted on these claims as well.

II

I first address Plaintiffs' claim, asserted on behalf of Hernandez's Estate, that McBride used excessive force in violation of the Fourth Amendment.

A

A police officer's application of deadly force to restrain a subject's movements "is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *see Kisela v. Hughes*, 584 U.S. 100, 103-07, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018) (applying Fourth Amendment standards to a police shooting of a suspect confronting another person with a knife). Accordingly, any such use of deadly force must be "objectively reasonable." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

In evaluating whether a particular use of force against a person is objectively reasonable under the Fourth Amendment, "the trier of fact should consider all relevant circumstances," including, as applicable, "the following illustrative but non-exhaustive factors: 'the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of

force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.'" *Demarest v. City of Vallejo*, 44 F.4th 1209, 1225 (9th Cir. 2022) (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 397, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015)). The overall assessment of these competing factors must be undertaken with two key principles in mind. First, "[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." *Kisela*, 584 U.S. at 103 (citation omitted). Second, "[t]he 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.* (citation omitted).

I first consider whether, under these standards, McBride "acted reasonably in using deadly force" at all. *Plumhoff v. Rickard*, 572 U.S. 765, 777, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014). I agree with the unanimous judgment of the en banc court, and of the three-judge panel, that the district court correctly held, based on the undisputed facts, that McBride's initial decision to fire her weapon at Hernandez was reasonable as a matter of law.

The "most important" consideration in assessing the reasonableness of using deadly force is "whether the suspect posed an 'immediate threat to the safety of the officers or others,'" *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) (citations omitted), and here the undisputed facts establish that the "threat reasonably

perceived by the officer," *Demarest*, 44 F.4th at 1225 (citation omitted), was substantial and imminent. At the time that McBride fired her first shot, Hernandez had ignored her instruction to "Stay right there!" and instead advanced towards her while holding a weapon that McBride had been told repeatedly was a knife. He did so while extending his arms out and yelling in McBride's direction, and, as he continued approaching her, he ignored four separate commands to drop the knife. Under these circumstances, use of deadly force to eliminate the objectively apparent threat that Hernandez imminently posed was reasonable as a matter of law. *See Hayes v. County of San Diego*, 736 F.3d 1223, 1234 (9th Cir. 2013) ("[T]hreatening an officer with a weapon does justify the use of deadly force."); *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (en banc) ("[W]here a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force."). While Plaintiffs emphasize that Hernandez was still approximately 40 feet away from McBride when she fired, "[t]here is no rule that officers must wait until a [knife-wielding] suspect is literally within striking range, risking their own and others' lives, before resorting to deadly force." *Reich v. City of Elizabethtown*, 945 F.3d 968, 982 (6th Cir. 2019) (holding that shooting of approaching knife-wielding suspect within six feet was reasonable and that even shooting a knife-wielding suspect 36 feet away would not violate clearly established law).

I also conclude, however, that the evidence in this case would permit a reasonable trier of fact to find that McBride fired three temporally distinct volleys of two shots each. *See supra* at 55-56. Indeed, there is almost

a two-second pause between McBride's second and third shots, and there is about a one-second pause between her fourth and fifth shots. Accordingly, even though McBride's first volley of shots was reasonable as a matter of law, I must still consider whether she "acted unreasonably in firing a total of [six] shots." *Plumhoff*, 572 U.S. at 777. On that score, *Plumhoff* holds that, "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Id.* We have cautioned, though, that "terminating a *threat* doesn't necessarily mean terminating [a] *suspect*." *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017) (emphasis added). Thus, if an initial volley of shots has succeeded in disabling the suspect and placing him "in a position where he could [not] easily harm anyone or flee," a "reasonable officer would reassess the situation rather than continue shooting." *Id.*

Applying these principles to this case, I again agree with the unanimous judgment of my colleagues on the en banc court and the three-judge panel that the undisputed evidence confirms that, at the time McBride fired the second volley of shots, the "threat" that Hernandez posed had not yet "ended." *Plumhoff*, 572 U.S. at 777. Despite falling down after having been hit by two bullets, Hernandez immediately rolled over, pressed his hands against the ground, and began shifting his weight to his feet in order to stand up. All the while, he continued shouting, and he still held his weapon in his hand despite yet another instruction by McBride to drop it. I therefore agree that McBride's third and fourth shots were reasonable as a matter of law.

However, McBride's final volley of shots—*i.e.*, shots five and six—present a much closer question. Immediately after the fourth shot, Hernandez was lying on his back with his legs in the air, pointing away from where McBride was. Hernandez then rolled over onto his left side such that his back was towards McBride. He was in that position—facing away from McBride and still lying on his side on the ground—when McBride fired her fifth shot. Although Hernandez was still moving at the time of that shot, he had not yet shown that he was in any position to get back up. Hernandez then continued to roll over, so that he was again facing McBride. As Hernandez, while still down on the ground, first appeared to shift his weight onto his left elbow, McBride fired her sixth shot. Under these circumstances, a reasonable trier of fact could find that, at the time McBride fired these two additional shots, the demonstrated threat from Hernandez—who was still on the ground—had sufficiently been halted to warrant "reassess[ing] the situation rather than continu[ing] shooting." *Zion*, 874 F.3d at 1076. A reasonable jury could find that, at the time of the fifth and sixth shots, Hernandez "was no longer an immediate threat, and that [McBride] should have held [her] fire unless and until [Hernandez] showed signs of danger or flight." [7] *Id.* Alternatively, a

7. I therefore do not rely on the majority's questionable notion that what made the third volley unreasonable was that McBride had "unnecessarily create[d] a sense of urgency." *See* Opin. at 21 n.5. I also disagree with the majority's suggestion that there is some sort of hard and fast limit on how rapidly a reasonable officer may fire her weapon in a single volley. *Id.* Any such suggestion is contrary to *Plumhoff* and *Zion*, which confirm that, if the circumstances present a sufficiently great and highly immediate danger to human life, rapidly and continuously discharging a substantial number of

reasonable "jury could find that the [third] round of bullets was justified." *Id.* On this record, the reasonableness of the fifth and sixth shots was thus a question for the trier of fact, and the district court erred in granting summary judgment on that issue. [8]

B

McBride alternatively contends that, even if a reasonable jury could find excessive force, she is nonetheless entitled to qualified immunity. I agree.

1

"The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate *clearly established* statutory or constitutional rights of

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shots may be justified. *See Plumhoff*, 572 U.S. at 777 (holding that officers reasonably fired a total of 15 shots, but that "[t]his would be a different case if [the officers] had initiated a second round of shots after an initial round had clearly incapacitated [the suspect] and had ended any threat of continued flight, or if [the suspect] had clearly given himself up"); *Zion*, 874 F.3d at 1075 (noting that the plaintiff did not challenge the officer's "initial nine-round volley").

8. As I will explain in the next section (*i.e.*, section II(B)), I nonetheless conclude that McBride is entitled to qualified immunity. For the reasons I have stated, I agree that the legal principles discussed in *Zion* help to elucidate why McBride's fifth and sixth shots could be deemed unreasonable under Fourth Amendment standards, but *Zion* is not so squarely controlling that it can be said, on the facts of this case, to have placed the outcome of this case "beyond debate." *Kisela*, 584 U.S. at 104 (citation omitted). That higher standard must be met to defeat qualified immunity, and it is not satisfied here for the reasons I explain *infra*.

which a reasonable person would have known.'" *City of Tahlequah v. Bond*, 595 U.S. 9, 12, 142 S. Ct. 9, 211 L. Ed. 2d 170 (2021) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (emphasis added)). In determining whether the applicable law is "clearly established," so as to defeat qualified immunity, the Supreme Court "has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela*, 584 U.S. at 104 (citations and internal quotation marks omitted). Thus, "it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Id.* at 105. Rather, the "law at the time of the conduct" must have defined the relevant constitutional "right's contours" in a manner that is "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.* at 104-05 (citations omitted).

This need for "[s]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela*, 584 U.S. at 104 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (simplified)). Because "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' . . . police officers are entitled to qualified immunity unless existing precedent '*squarely*

governs' the specific facts at issue." *Id.* (emphasis added) (citation omitted). The majority agrees with Plaintiffs that this court's decision in *Zion*, 874 F.3d at 1075-76, "squarely controls this case" and that McBride is therefore not entitled to qualified immunity. *See* Opin. at 24. That is wrong. An excessive force precedent cannot be said to squarely govern a case, for qualified-immunity purposes, if that precedent is "materially distinguishable" in any respect. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6, 142 S. Ct. 4, 211 L. Ed. 2d 164 (2021). That is, only if the precedent is *materially indistinguishable* can it be said to "squarely govern" this case in the way that *Kisela* requires. But our opinion in *Zion* makes clear, on its face, that it is materially distinguishable from this case in multiple respects.

In *Zion*, the officers were called to Zion's apartment complex after he had suffered several seizures and assaulted his mother and roommate with a knife. 874 F.3d at 1075. As the first officer (Lopez) arrived at the complex, "Zion ran at him and stabbed him in the arms." *Id.* A second arriving officer (Higgins) witnessed the stabbing and then shot at Zion nine times from about 15 feet away while Zion was running back towards the apartment complex. *Id.* After Zion fell to the ground, Higgins ran up to him and fired "nine more rounds at Zion's body from a distance of about four feet, emptying his weapon." *Id.* At that point, Zion "curl[ed] up on his side" but was "still moving." *Id.* After taking a pause and "walk[ing] in a circle," Higgins then took "a running start and stomp[ed] on Zion's head three times." *Id.* "Zion died at the scene." *Id.* On appeal from a grant of summary judgment to the defendants, the plaintiff (Zion's mother) did not challenge the "initial

nine-round volley," and instead only "challenge[d] the second volley (fired at close range while Zion was lying on the ground) and the head-stomping." *Id.*

Zion, like this case, thus involved an initial reasonable use of deadly force against a knife-wielding suspect, followed almost immediately by a further use of deadly force that was challenged by the plaintiffs as excessive. *See* 874 F.3d at 1075. *Zion* acknowledged the Supreme Court's general statement in *Plumhoff* that "[i]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Id.* at 1076 (quoting *Plumhoff*, 572 U.S. at 777). But *Zion* held that this principle did not justify the second use of force by Higgins, and it explained its reasoning as follows:

> But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting. *See id.* [referring to *Plumhoff*, 134 S. Ct. at 2022]. This is particularly true when the suspect wields a knife rather than a firearm.[2] In our case, a jury could reasonably conclude that Higgins could have sufficiently protected himself and others after Zion fell by pointing his gun at Zion and pulling the trigger only if Zion attempted to flee or attack.
>
> Higgins testified that Zion was trying to get up. But we "may not simply accept what may

> be a self-serving account by the police officer." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). This is especially so where there is contrary evidence. In the video, Zion shows no signs of getting up. Lopez Video 3:01. This is a dispute of fact that must be resolved by a jury.
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>
> [2] It may be that, once on the ground, Zion had dropped the knife. Whether the knife was still in Zion's hand or within his reach, and whether Higgins thought Zion was still armed, are factual questions that only a jury can resolve.

Zion, 874 F.3d at 1076 & n.2.

In this discussion, *Zion* specifically noted three issues that were for the jury to resolve at trial and that therefore had to be resolved *against* the defendant for purposes of summary judgment: (1) whether "Zion was trying to get up"; (2) "[w]hether the knife was still in Zion's hand or within his reach"; and (3) "whether Higgins thought Zion was still armed." *Id.* As to each of these points, the *Zion* panel did *not* say that these issues were irrelevant to its holding; instead, it said that each of these issues was triable and had to be resolved by a jury. *Zion* therefore necessarily resolved all three issues against the defendants for purposes of summary judgment, and its excessive-force holding therefore rested on the assumption that (1) Zion was not trying to get up; (2) the knife was no longer in his hand or within his reach; and (3) Higgins knew that Zion no longer had the knife. Against *that* backdrop, *Zion* held that "[a] reasonable jury could find that Zion was no longer an immediate threat, and that

Higgins should have held his fire unless and until Zion showed signs of danger or flight." 874 F.3d at 1076.

This case differs from *Zion* as to each of these three critical facts. The video evidence in this case clearly shows that, even after the fourth shot, Hernandez continuously moved in a way that gave the objective appearance of trying to get up; the video evidence shows that Hernandez never dropped his weapon and still had it in his hand at the end of the episode; and McBride's continued instructions to Hernandez to drop the knife confirm that she continued to believe that he was armed. Even if one assumes *arguendo* that *Zion* is persuasive authority that supports a finding of unreasonableness here, the case is sufficiently and materially different on its facts that it does not "'squarely govern[]' the specific facts" of this case or place its outcome "beyond debate." *Kisela*, 584 U.S. at 104 (citations omitted).

In concluding that *Zion* nonetheless "squarely controls this case," *see* Opin. at 24, the majority ignores the specific factual context of *Zion* and instead adopts a more broadly framed reading of that case that elides several of its critical details. In doing so, the majority directly contravenes the Supreme Court's admonition that it has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela*, 584 U.S. at 104 (citation omitted). In particular, the majority's assertion that "it was clearly established that McBride acted unreasonably if she shot Hernandez after he was on the ground *and no longer posed an immediate threat*," *see* Opin. at 27 (emphasis added), frames the

assertedly "clearly established law" at an extraordinarily "high level of generality" and thereby flagrantly defies the Supreme Court's repeated admonition. Furthermore, the majority's overly generalized reading of *Zion* is contradicted by *Zion* itself. Far from drawing the sort of broad, bright-line rule the majority conjures, *Zion* noted that the "boundary" line is "murky" when it comes to defining exactly when the permissible use of deadly force against a suspect who "poses an immediate threat" must be *halted* on the ground that "the suspect no longer poses a threat." 874 F.3d at 1075. Given that *Zion* noted that the relevant line is "murky," *Zion* can hardly be said to have *clearly* established a broad general rule that places the outcome of this case beyond debate.

The majority also suggests an alternative, narrower formulation of *Zion*'s holding, but it too is flawed. Specifically, at another point in its opinion, the majority says that *Zion* "clearly established" that "an officer cannot reasonably 'continue shooting' a criminal suspect who 'is on the ground,' 'appears wounded,' and 'shows no signs of getting up' unless the officer first 'reassess[es] the situation'—'particularly . . . when the suspect wields a knife rather than a firearm'—because the suspect 'may no longer pose a threat.'" *See* Opin. at 23 (quoting *Zion*, 874 F.3d at 1076). As an initial matter, McBride is entitled to qualified immunity under this formulation, because it cannot be said that Hernandez "show[ed] *no* signs of getting up." *Zion*, 874 F.3d at 1076 (emphasis added). Even if Hernandez had not yet demonstrated that he might actually *succeed* in getting up, his continued movements clearly gave the objective appearance of "*trying* to get

up," which materially distinguishes this case from *Zion*. *See id.* (emphasis added).

The majority also ignores the clear sense in which *Zion* referred to the suspect there as being "on the ground" and "appear[ing] wounded." 874 F.3d at 1076. In asserting that a suspect who "is on the ground and appears wounded . . . *may* no longer pose a threat," *id.* (emphasis added), *Zion* cited *Plumhoff*, 134 S. Ct. at 2022 (subsequently paginated as 572 U.S. at 777-78), and in the relevant passage on the cited page, *Plumhoff* states that "[t]his would be a different case if [the officers] had initiated a second round of shots after an initial round *had clearly incapacitated [the suspect]* and had ended any threat of continued flight, or if [the suspect] had clearly given himself up." 572 U.S. at 777 (emphasis added). *Zion* thus did not suggest that *any* suspect who literally is "on the ground" and "appears wounded" is automatically no longer a threat; rather, *Zion* was referring to a suspect who has been "clearly incapacitated" by being brought to the ground by the prior shots and by then remaining down.

Here, however, Hernandez was dynamically moving the entire time—indeed, between the fifth and sixth shots, he succeeded in rolling over and objectively appeared to shift his weight onto his left elbow. The majority speculates that his movements may have been "convulsive" rather than "intentional," *i.e.*, that they were perhaps due to "pain from four gunshot wounds" rather than to an actual effort to get back up. *See* Opin. at 25 & n.6. But that conjecture about Hernandez's subjective intent is irrelevant. "'[T]he qualified immunity analysis . . . is limited to the facts that

were knowable to the defendant officers at the time they engaged in the conduct in question,' and so [Hernandez's] subjective intentions are not relevant except to the extent that they were communicated to the officers." *Spencer v. Pew*, 117 F.4th 1130, 1139 (9th Cir. 2024) (quoting *Hernandez v. Mesa*, 582 U.S. 548, 554, 137 S. Ct. 2003, 198 L. Ed. 2d 625 (2017) (internal quotation marks omitted)). Indeed, *Zion* itself says that what matters on this score is whether, objectively, the person "show[ed] . . . *signs of getting up*." *Zion*, 874 F.3d at 1076 (emphasis added). Hernandez's behavior indisputably gave the objective impression of continuous movement and "show[ed] . . . signs of getting up," *id.*, and that materially distinguishes this case from *Zion*. It takes an *extension* of the principles in *Zion* to rule for Plaintiffs in this case; *Zion* itself does not "squarely govern" here in the sense that *Kisela* requires—which is that every reasonable officer would know, based on *Zion*, that the last two shots could not lawfully be fired here.

The majority's alternative formulation of *Zion*'s holding also remains overbroad in that it again elides the fact that in this case, unlike in *Zion*, there are no triable issues as to (1) whether the bladed weapon "was still in [the suspect's] hand"; and (2) whether the officer "thought [the suspect] was still armed." 874 F.3d at 1076 n.2. As I have explained, the video evidence in this case indisputably confirms that Hernandez never dropped his weapon, and, in addition, it is undisputed that McBride knew that Hernandez had not dropped the weapon. By again disregarding these critical details, the majority errs in wrongly framing *Zion*'s holding at a "high[er]

level of generality" that treats these points as irrelevant to that holding. *Kisela*, 584 U.S. at 104 (citation omitted). Had the *Zion* panel held that these points raised by the defendants were irrelevant, it could have said so. Instead, it held that they raised disputed factual issues for the jury to ultimately weigh in assessing, at trial, whether or not the force was unreasonable.

The majority's response on this particular point is as startling as it is wrong. According to the majority, the scope of the clearly established rule that emerges from *Zion* must be framed, not based on what our opinion in *Zion* actually *said* about the facts of that case, but rather based on what the *court files* of that case reveal to be the "true" facts of the case. Thus, while our opinion in *Zion* squarely held that there was a "factual question[] that only a jury can resolve" as to whether "the knife was still in Zion's hand or within his reach" and as to whether the officer thought he "was still armed," 874 F.3d at 1076 n.2, the majority instead dismisses that comment in *Zion* as "unsupported" "speculat[ion]" for which "there was no evidence" in the record. *See* Opin. at 25-26. That is true, according to the majority, based on (1) a concession made in a footnote in the *Zion* plaintiff's opening brief and (2) a comment made at the oral argument in *Zion* by "the judge who authored the opinion." *See* Opin. at 25 n.7. But whether *Zion* or any other precedent "squarely governs" a particular case for qualified-immunity purposes, *see Kisela*, 584 U.S. at 104, turns on how *Zion* itself described and understood its own facts, and not on how a later court, based on its own independent review of the earlier record, thinks the facts of the precedent *should* have been

described. *See*, *e.g.*, *Rivas-Villegas*, 595 U.S. at 6-7 (relying entirely on the relevant circuit precedent's description of its own facts).

Moreover, after improperly rummaging through the *Zion* record in an effort to contradict our opinion's description of the facts in that case, the majority then improperly truncates a quotation from *Zion* so as to suggest that, far from acknowledging a triable issue as to whether Zion still held the knife, our opinion affirmatively "assumed for discussion purposes that 'the suspect *wields* a knife' and might still 'attempt[] to . . . attack' the officer." *See* Opin. at 25-26 (emphasis added by majority). But by referencing the fact that Zion "wield[ed] a knife," our point in *Zion* was not—as the majority wrongly insinuates—that Zion *never dropped* the knife, but rather that he "wield[ed] a knife *rather than a firearm*," which of course would have been substantially more dangerous. *Id.* at 1076 (emphasis added). By wrongly editing out the latter italicized phrase in this instance, the majority recasts *Zion* in a way that removes its weapon-comparing point and thereby improperly alters the opinion's clear meaning. In fact, immediately after making this (mis)quoted comment contrasting knives and firearms, the *Zion* court dropped a footnote expressly acknowledging that there *was* a triable issue as to whether Zion dropped the knife that he wielded. 874 F.3d at 1076 & n.2.

What follows from all this is quite troubling. Under the majority's opinion, reasonable officers apparently no longer can rely on what our opinions actually say; now, they must delve into the court records to see whether

our precedents described their own facts incorrectly, and officers must also consider that future panels may take considerable liberties with selectively quoting the opinion's language. The majority's openly revisionist approach to *Zion* is flatly contrary to settled qualified-immunity doctrine, the "focus" of which is whether the language of the controlling precedent provided "*fair notice*" to the defendant "that her conduct was unlawful." *Kisela*, 584 U.S. at 104 (emphasis added) (citation omitted).

Because *Zion* does not "clearly dictate" that McBride's use of force was unreasonable here, *Mullenix*, 577 U.S. at 17, it does not "squarely govern[]" this case, *Kisela*, 584 U.S. at 104 (citation omitted). Absent some other showing that then-existing precedent made clear to every reasonable officer that McBride's use of force was unreasonable, she is entitled to qualified immunity. As explained in the next section, no such showing has been made.

2

Although the majority relies only on *Zion*, Plaintiffs invoke several other precedents, but none of them can be said to squarely govern this case.

For example, Plaintiffs also rely on *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001), but the Supreme Court "has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law." *Kisela*, 584 U.S. at 106. The Court's summary of *Deorle* in *Kisela* equally confirms why it

does not squarely govern the facts of this case: "*Deorle* involved a police officer who shot an unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been 'physically compliant and generally followed all the officers' instructions'; and he had been under police observation for roughly 40 minutes." *Id.* at 106-07 (citing *Deorle*, 272 F.3d at 1276, 1281-82). Nearly all of these key factual premises underlying *Deorle*'s holding are missing in this case.

The other Ninth Circuit cases on which Plaintiffs rely are even more strikingly distinguishable from this case. Indeed, in addition to other significant differences, none of the cited cases even involves a situation (such as this one or *Zion*) in which the use of deadly force initially *was* reasonable. *See Nehad v. Browder*, 929 F.3d 1125, 1141 (9th Cir. 2019) (holding that the officer's shooting of a suspect who was reported to have earlier threatened someone with a knife was unreasonable under clearly established law where a jury could find that the officer "responded to a misdemeanor call, pulled his car into a well-lit alley with his high beam headlights shining into [the suspect's] face, never identified himself as a police officer, gave no commands or warnings, and then shot [the suspect] within a matter of seconds, even though [the suspect] was unarmed, had not said anything, was not threatening anyone, and posed little to no danger to [the officer] or anyone else"); *Hayes*, 736 F.3d at 1234-35 (holding that immediate shooting of suicidal man who revealed a knife, without ordering him to stop or drop the knife, was unreasonable).

I acknowledge that, even when, as here, there is no relevant "[p]recedent involving similar facts" that "can help move a case beyond the otherwise 'hazy border between excessive and acceptable force,'" generally framed rules can still "create clearly established law" in "an 'obvious case.'" *Kisela*, 584 U.S. at 105 (citations omitted). But to meet that high standard, Plaintiffs would have to show that "*any* reasonable official in the defendant's shoes would have understood that he was violating" the Constitution. *Id.* (quoting *Plumhoff*, 572 U.S. at 778-79 (emphasis added)). That demanding standard reflects the long-standing principle that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 577 U.S. at 12 (citation omitted). Plaintiffs have not satisfied that standard here. Even if one assumes *arguendo* that McBride's fifth and sixth shots were unreasonable, this is not an obvious situation in which *every* reasonable officer would have understood that the law forbade firing additional shots at the already wounded Hernandez as he plainly appeared to continue to try to get up.

Because McBride did not violate clearly established law in firing her third volley of shots, she is entitled to qualified immunity. On that basis, I would affirm the grant of summary judgment to McBride on Plaintiffs' Fourth Amendment excessive force claim.

III

With respect to Plaintiffs' challenge to the district court's dismissal of their Fourteenth Amendment claim against all Defendants and their *Monell* claim against the

City and LAPD, the majority adopts the analysis in the three-judge panel's opinion in this case. As the author of that panel opinion, I concur in the majority opinion with respect to these points.

I concur in the judgment to the extent that the majority concludes that the district court erred in dismissing Plaintiffs' state-law claims for (1) assault, (2) wrongful death, and (3) violation of California Civil Code § 52.1. The district court's sole reason for granting summary judgment to Defendants on these claims was its "determin[ation] that Officer McBride's use of force was reasonable." Because I agree that the reasonableness of McBride's final volley of shots presents a question for a trier of fact, the district court erred in dismissing these state law claims on that ground. I therefore concur in the reversal of the district court's dismissal of these claims.

IV

For the foregoing reasons, I dissent from the majority's reversal of the district court's grant of summary judgment as to Plaintiffs' Fourth Amendment excessive force claim against McBride. I concur in the majority opinion to the extent that it rejects all of Plaintiffs' remaining federal claims, and I concur in the judgment reversing the district court's summary judgment with respect to Plaintiffs' state law claims for assault, wrongful death, and violation of the Bane Act (Cal. Civ. Code § 52.1).

Appendix A

BUMATAY, Circuit Judge, dissenting in part:

Our court is wrong here—dangerously wrong. This should have been a straightforward case. Daniel Hernandez charged an officer with a blade, ignored warnings to stop, and closed within a few dozen feet of the officer. The officer began shooting. In the end, the officer shot six times in six seconds. The officer had no reasonable opportunity to ensure her safety or the safety of the many civilians surrounding Hernandez in that short time. Under the totality of the circumstances, the officer didn't use excessive force in stopping an obvious threat. *See Plumhoff v. Rickard*, 572 U.S. 765, 777, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014) (officers are justified in using deadly force until the defendant is "clearly incapacitated" or has "ended any threat of continued flight").

The majority denies qualified immunity by adopting an extreme version of the moment-of-threat rule. Under the majority's telling, we are to ignore everything except the literal last fractions of a second of a police interaction. The majority divides the six seconds between the officer's first and last shots into three distinct "volleys" and measures the intervals between them down to the millisecond. It then faults the officer for failing to reassess the situation in those final milliseconds. But the Constitution doesn't require this radical parsing of events. The touchstone of the Fourth Amendment is reasonableness. It doesn't require the superhuman discipline that the majority demands.

As Judge Nelson aptly points out, judges review police shootings only in hindsight. We review police tapes years after the fact. We get to rewind, pause, fast forward—analyzing the situation frame-by-frame. While the advent of police bodycam videos has been a welcome change, we can't ignore that real life isn't in slow motion.

The Supreme Court's recent decision in *Barnes v. Felix*, No. 23-1239, 2025 U.S. LEXIS 1834, 2025 WL 1401083 (U.S. May 15, 2025), shows the error of our decision. There, the Court rejected the very practice of analyzing use of deadly force cases down to the "precise millisecond when an officer deploys force." 2025 U.S. LEXIS 1834, [WL] at *3 (simplified). Such a practice improperly "narrow[s] the totality-of-the-circumstances inquiry, to focus only on a single moment." 2025 U.S. LEXIS 1834, [WL] at *5. So rather than considering a case with "chronological blinders," courts must look to the entire exchange. *Id.* Here, our court puts on those blinders to ignore everything except the last 1.4 seconds of the interaction.

I join Judge Nelson's dissent in full. I write separately to note that the majority bases its decision on *Zion v. County of Orange*, 874 F.3d 1072 (9th Cir. 2017). In *Zion*, this court started the practice of analyzing police encounters down to milliseconds. *Id.* at 1075-76. Though distinguishable from this case, we should have taken this opportunity to overrule *Zion*.

I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 8, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55994
D.C. Nos. 2:20-cv-04477-SB-KS,
2:20-cv-05154-DMG-KS

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY,

Plaintiffs-Appellants,

and

M.L.H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiff,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE,

Defendants-Appellees.

Appendix B

No. 21-55995
D.C. Nos. 2:20-cv-04477-SB-KS,
2:20-cv-05154-DMG-KS

M.L.H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiff-Appellant,

and

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY,

Plaintiffs,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE,

Defendants-Appellees.

ORDER

MURGUIA, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion is vacated.

Judge Ikuta did not participate in the deliberations or vote in this case.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 21, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55994, No. 21-55995
D.C. Nos. 2:20-cv-04477-SB-KS
2:20-cv-05154-DMG-KS

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY,

Plaintiffs-Appellants,

and

M. L. H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiff,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE,

Defendants-Appellees.

Appendix C

M. L. H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiff-Appellant,

and

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY,

Plaintiffs,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Stanley Blumenfeld, Jr., District Judge, Presiding

Argued and Submitted March 2, 2023
Pasadena, California

Filed March 21, 2024

Before: Milan D. Smith, Jr., Daniel P. Collins, and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Collins

Appendix C

OPINION

COLLINS, Circuit Judge:

These consolidated actions under 42 U.S.C. § 1983 arise from the shooting death of Daniel Hernandez during a confrontation with officers of the Los Angeles Police Department ("LAPD") on April 22, 2020. Plaintiffs-Appellants, who are the Estate, parents, and minor daughter of Hernandez, asserted a variety of federal and state law claims against the City of Los Angeles ("City"), the LAPD, and the officer who shot Hernandez, Toni McBride. The district court granted summary judgment to Defendants on all claims, and Plaintiffs appeal. We conclude that, although a reasonable jury could find that the force employed by McBride was excessive, she is nonetheless entitled to qualified immunity on Plaintiffs' Fourth Amendment excessive force claim. We also hold that the district court properly granted summary judgment to all Defendants on Plaintiffs' remaining federal claims. However, because the reasonableness of McBride's force presents a triable issue, the district court erred in granting summary judgment on that basis as to certain of Plaintiffs' state law claims. Accordingly, we affirm in part, reverse in part, and remand.

I

A

During the late afternoon of April 22, 2020, uniformed officers Toni McBride and Shuhei Fuchigami came upon a multi-vehicle accident at the intersection of San Pedro Street and East 32nd Street in Los Angeles. They decided

to stop and investigate the situation. Video footage from the patrol car and from McBride's body camera captured much of what then transpired.[1]

As the officers arrived near the intersection, they observed multiple seriously damaged vehicles, some with people still inside, and at least two dozen people gathered at the sides of the road. As the officers exited their patrol car, the car's police radio stated that the "suspect's vehicle" was "black" and that the suspect was a "male armed with a knife." A bystander immediately told the officers about someone trying to "hurt himself," and Fuchigami stated loudly, "Where is he? Where's he at?" In response, several bystanders pointed to a black pickup truck with a heavily damaged front end that was facing in the wrong direction near two parked vehicles on the southbound side of San Pedro Street. The officers instructed the crowd to get back, and McBride drew her weapon. One nearby driver, who was sitting in her stopped sedan, told McBride through her open car window that "he has a knife." McBride asked her, "Why does he want to hurt himself?" and the bystander responded, "We don't know. He's the one who caused the accident." McBride instructed that bystander to exit her car and go to the sidewalk, which she promptly did. McBride then shouted to the bystanders in both English and Spanish that they needed to get away. At the same time, the police radio

1. Because no party contends these videotapes were "doctored" or "altered," or that they lack foundation, we "view[] the facts in the light depicted by the videotape." *See Scott v. Harris*, 550 U.S. 372, 378, 380–81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). However, to the extent that a fact is not clearly established by the videotape, we view the evidence "in the light most favorable to the nonmoving part[ies]," *i.e.*, Plaintiffs. *Id.* at 380.

announced that the suspect was "cutting himself" and was "inside his vehicle." McBride then asked her partner, "Do we have less lethal?" Referencing the smashed pickup truck, McBride said, "Is there anybody in there?" She then stated, "Hey, partner, he might be running."

As McBride faced the passenger side of the truck, which was down the street, she then saw someone climb out of the driver's side window. McBride yelled out, "Hey man, let me see your hands. Let me see your hands man," while a bystander yelled, "He's coming out!" Daniel Hernandez then emerged shirtless from behind the smashed black pickup truck, holding a weapon in his right hand. As he did so, Officer McBride held her left hand out towards Hernandez and shouted, "Stay right there!" Hernandez nonetheless advanced towards McBride in the street, and he continued to do so as McBride yelled three times, "Drop the knife!" While Hernandez was coming towards her, McBride backed up several steps, until she was standing in front of the patrol car.

Hernandez began yelling as he continued approaching McBride, and he raised his arms out by his sides to about a 45-degree angle. McBride again shouted, "Drop it!" As Hernandez continued yelling and advancing with his arms out at a 45-degree angle, Officer McBride fired an initial volley of two shots, causing Hernandez to fall to the ground on his right side, with the weapon still in his right hand. At the point that McBride fired at Hernandez, he was between 41–44 feet away from her.

Still shouting, Hernandez rolled over and leaned his weight on his hands, which were pressed against the pavement. He began pushing himself up, and he managed

to get his knees off the pavement. As Hernandez started shifting his weight to his feet to stand up, McBride again yelled "Drop it!" and fired a second volley of two shots, causing Hernandez to fall on his back with his legs bent in the air, pointing away from McBride. Hernandez began to roll over onto his left side, and as he did this, McBride fired a fifth shot. Hernandez then continued to roll over, so that he was again facing McBride. His bent left knee was pressed against the ground, and he placed his left elbow on the street, as if to push himself upwards. But Hernandez started to collapse to the ground, and just as he did so, McBride fired a sixth shot. Hernandez then lay still, face-down on the street, as McBride and other officers approached him with their pistols drawn. McBride's body camera clearly shows that the weapon was still in Hernandez's right hand as an officer approached and took it out of his hand.[2] The weapon turned out not to be a knife, but a box cutter with two short blades at the end. Starting from the point at which Hernandez came out from behind the truck until he collapsed on the ground, the entire confrontation lasted no more than 20 seconds. All six shots were fired within eight seconds.

Hernandez died from his injuries. A forensic pathologist retained by Plaintiffs opined that McBride's sixth shot—which the pathologist concluded "more likely than not" struck Hernandez in the top of his head before ultimately lodging inside the tissues in his neck—caused "[t]he immediately fatal wound in [Hernandez's] death." The pathologist further concluded that "[t]he next most

2. M.L.H.'s assertion that Hernandez was unarmed during the latter part of the incident is thus "blatantly contradicted" by the videotape. *Scott*, 550 U.S. at 380–81.

serious wound was the wound to [Hernandez's] right shoulder that involved the lung and liver," which he opined was "more likely than not" inflicted by McBride's fourth shot. However, he stated that the shoulder wound "would not . . . have produced immediate death" and that "[w]ith immediate expert treatment, this wound alone may have been survivable." In Defendants' response to Plaintiffs' oppositions to summary judgment, Defendants did not raise evidentiary objections to the forensic pathologist's report, nor did they provide any basis for rejecting its conclusions as a matter of law.

B

In May and June of 2020, Hernandez's parents (Manuel and Maria Hernandez) and his minor daughter (M.L.H.) (collectively, "Plaintiffs") filed separate § 1983 actions alleging constitutional violations in connection with the shooting death of Hernandez. Shortly thereafter, the district court formally consolidated the two cases for all purposes, and Plaintiffs filed a consolidated complaint against the City of Los Angeles ("the City"), the Los Angeles Police Department ("LAPD"), and McBride (collectively, "Defendants"). The operative consolidated complaint alleged three federal claims that remain at issue in this appeal: (1) a Fourth Amendment excessive force claim brought against McBride by Plaintiffs, acting on behalf of Hernandez's Estate; (2) a Fourteenth Amendment claim for interference with familial relations brought by Plaintiffs on their own behalf against all Defendants; and (3) a claim under *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), by Plaintiffs, on behalf of the Estate and themselves, against the City and LAPD. The

complaint also asserted pendent state law claims for, *inter alia*, assault, wrongful death, and violation of the Bane Act (Cal. Civ. Code § 52.1).

In August 2021, the district court granted Defendants' motion for summary judgment on all claims. The court held that, as a matter of law, McBride did not use excessive force in violation of the Fourth Amendment but that, even if she did, she was entitled to qualified immunity. The court also held that McBride's actions did not "shock the conscience" and that the Fourteenth Amendment claim therefore lacked merit as a matter of law. The court concluded that the *Monell* claim failed both because there was no underlying constitutional violation and because, even if there were such a violation, Plaintiffs had not established any basis for holding the City and LAPD liable. Finally, the court held that, because all parties agreed that the remaining state law claims for assault, wrongful death, and violation of the Bane Act "r[o]se or f[e]ll based on the reasonableness of Officer McBride's use of force," summary judgment was warranted on these claims as well.

Plaintiffs timely appealed, and we have jurisdiction under 28 U.S.C. § 1291.

II

We first address Plaintiffs' claim, asserted on behalf of Hernandez's Estate, that McBride used excessive force in violation of the Fourth Amendment.

Appendix C

A

A police officer's application of deadly force to restrain a subject's movements "is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v, Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *see Kisela v. Hughes*, 584 U.S. 100, 103–07, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018) (applying Fourth Amendment standards to a police shooting of a suspect confronting another person with a knife). Accordingly, any such use of deadly force must be "objectively reasonable." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

In evaluating whether a particular use of force against a person is objectively reasonable under the Fourth Amendment, "the trier of fact should consider all relevant circumstances," including, as applicable, "the following illustrative but non-exhaustive factors: 'the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.'" *Demarest v. City of Vallejo*, 44 F.4th 1209, 1225 (9th Cir. 2022) (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 397, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015)). The overall assessment of these competing factors must be undertaken with two key principles in mind. First, "[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." *Kisela*, 584 U.S. at 103 (citation omitted). Second, "[t]he 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.* (citation omitted).

We first consider whether, under these standards, McBride "acted reasonably in using deadly force" at all. *Plumhoff v. Rickard*, 572 U.S. 765, 777, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014). We agree with the district court that, based on the undisputed facts, McBride's initial decision to fire her weapon at Hernandez was reasonable as a matter of law.

The "most important" consideration in assessing the reasonableness of using deadly force is "whether the suspect posed an 'immediate threat to the safety of the officers or others,'" *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) (citations omitted), and here the undisputed facts establish that the "threat reasonably perceived by the officer," *Demarest*, 44 F.4th at 1225 (citation omitted), was substantial and imminent. At the time that McBride fired her first shot, Hernandez had ignored her instruction to "Stay right there!" and instead advanced towards her while holding a weapon that McBride had been told repeatedly was a knife. He did so while extending his arms out and yelling in McBride's direction, and, as he continued approaching her, he ignored four separate commands to drop the knife. Under these circumstances, use of deadly force to

eliminate the objectively apparent threat that Hernandez imminently posed was reasonable as a matter of law. *See Hayes v. County of San Diego*, 736 F.3d 1223, 1234 (9th Cir. 2013) ("[T]hreatening an officer with a weapon does justify the use of deadly force."); *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (en banc) ("[W]here a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force."). While Plaintiffs emphasize that Hernandez was still approximately 40 feet away from McBride when she fired, "[t]here is no rule that officers must wait until a [knife-wielding] suspect is literally within striking range, risking their own and others' lives, before resorting to deadly force." *Reich v. City of Elizabethtown*, 945 F.3d 968, 982 (6th Cir. 2019) (holding that shooting of approaching knife-wielding suspect within six feet was reasonable and that even shooting a knife-wielding suspect 36 feet away would not violate clearly established law).

We also conclude, however, that the evidence in this case would permit a reasonable trier of fact to find that McBride fired three temporally distinct volleys of two shots each. *See supra* at 7–9. Indeed, there is almost a two-second pause between McBride's second and third shots, and there is about a one-second pause between her fourth and fifth shots. Accordingly, even though McBride's first volley of shots was reasonable as a matter of law, we must still consider whether she "acted unreasonably in firing a total of [six] shots." *Plumhoff*, 572 U.S. at 777. On that score, *Plumhoff* holds that, "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting

until the threat has ended." *Id.* We have cautioned, though, that "terminating a *threat* doesn't necessarily mean terminating [a] *suspect*." *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017) (emphasis added). Thus, if an initial volley of shots has succeeded in disabling the suspect and placing him "in a position where he could [not] easily harm anyone or flee," a "reasonable officer would reassess the situation rather than continue shooting." *Id.*

Applying these principles to this case, we agree with the district court that the undisputed video evidence confirms that, at the time McBride fired the second volley of shots, the "threat" that Hernandez posed had not yet "ended." *Plumhoff*, 572 U.S. at 777. Despite falling down after having been hit by two bullets, Hernandez immediately rolled over, pressed his hands against the ground, and began shifting his weight to his feet in order to stand up. All the while, he continued shouting, and he still held his weapon in his hand despite yet another instruction by McBride to drop it. McBride's third and fourth shots were thus reasonable as a matter of law.

However, McBride's final volley of shots—*i.e.*, shots five and six—present a much closer question. Immediately after the fourth shot, Hernandez was lying on his back with his legs in the air, pointing away from where McBride was. Hernandez then rolled over onto his left side such that his back was towards McBride. He was in that position—facing away from McBride and still lying on his side on the ground—when McBride fired her fifth shot. Although Hernandez was still moving at the time of that shot, he had not yet shown that he was in any position to get back

up. Hernandez then continued to roll over, so that he was again facing McBride. As Hernandez, while still down on the ground, first appeared to shift his weight onto his left elbow, McBride fired her sixth shot. Under these circumstances, a reasonable trier of fact could find that, at the time McBride fired these two additional shots, the threat from Hernandez—who was still on the ground—had sufficiently been halted to warrant "reassess[ing] the situation rather than continu[ing] shooting." *Zion*, 874 F.3d at 1076. A reasonable jury could find that, at the time of the fifth and sixth shots, Hernandez "was no longer an immediate threat, and that [McBride] should have held [her] fire unless and until [Hernandez] showed signs of danger or flight." *Id.* Alternatively, a reasonable "jury could find that the [third] round of bullets was justified." *Id.* On this record, the reasonableness of the fifth and sixth shots was thus a question for the trier of fact, and the district court erred in granting summary judgment on that issue.

B

McBride alternatively contends that, even if a reasonable jury could find excessive force, she is nonetheless entitled to qualified immunity. We agree.

"The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known.'" *City of Tahlequah v. Bond*, 595 U.S. 9, 12, 142 S. Ct. 9, 211 L. Ed. 2d 170 (2021) (quoting *Pearson v. Callahan*, 555 U.S. 223,

231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (emphasis added)). In determining whether the applicable law is "clearly established," so as to defeat qualified immunity, the Supreme Court "has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela*, 584 U.S. at 104 (citations and internal quotation marks omitted). Thus, "it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Id.* at 105. Rather, the "law at the time of the conduct" must have defined the relevant constitutional "right's contours" in a manner that is "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id.* at 104–05 (citations omitted).

This need for "[s]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela*, 584 U.S. at 104 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (simplified)). Because "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' . . . police officers are entitled to qualified immunity unless existing precedent '*squarely governs*' the specific facts at issue." *Id.* (emphasis added) (citation omitted). Here, there is no such pre-existing precedent that squarely governs the factual scenario presented here.

Appendix C

In arguing that McBride violated clearly established law, Plaintiffs place particular emphasis on this court's decision in *Zion*, 874 F.3d at 1075–76. That is understandable because, as our earlier analysis shows, the legal principles discussed in *Zion* help to elucidate why McBride's fifth and sixth shots could be unreasonable under Fourth Amendment standards. *See supra* at 13–15. But there is a difference between concluding that *Zion* supports Plaintiffs' position on the merits and concluding that *Zion* places the outcome of this case "beyond debate." *Kisela*, 584 U.S. at 104 (citation omitted). The Supreme Court has repeatedly emphasized that, in addressing whether a particular precedent meets that latter standard, we must take account of any material factual differences in that precedent that would preclude us from saying that it "'squarely governs' the specific facts at issue." *Id.* (citation omitted); *see also City of Tahlequah*, 595 U.S. at 13–14; *Brosseau v. Haugen*, 543 U.S. 194, 200–01, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004); *Ventura v. Rutledge*, 978 F.3d 1088, 1092 (9th Cir. 2020). Examination of our decision in *Zion* confirms that it differs in several critical respects from the instant case and that it therefore cannot be said to have clearly established the law that governs here.

In *Zion*, the officers were called to Zion's apartment complex after he had suffered several seizures and assaulted his mother and roommate with a knife. 874 F.3d at 1075. As the first officer arrived at the complex, "Zion ran at him and stabbed him in the arms." *Id.* A second arriving officer witnessed the stabbing and then shot at Zion nine times from about 15 feet away while Zion was running back towards the apartment complex. *Id.* After

Zion fell to the ground, the second officer ran up to him and fired "nine more rounds at Zion's body from a distance of about four feet, emptying his weapon." *Id.* At that point, Zion "curl[ed] up on his side" but was "still moving." *Id.* After taking a pause and "walk[ing] in a circle," the officer then took "a running start and stomp[ed] on Zion's head three times." *Id.* "Zion died at the scene." *Id.* On appeal from a grant of summary judgment to the defendants, the plaintiff (Zion's mother) did not challenge the "initial nine-round volley," and instead only "challenge[d] the second volley (fired at close range while Zion was lying on the ground) and the head-stomping." *Id.* In concluding that there was a triable issue of excessive force, we emphasized that there were several disputed issues of fact that, if resolved in the plaintiff's favor, would warrant a finding that the second volley of shots was unreasonable. *Id.* at 1075–76. In particular, we held that a jury needed to resolve the parties' factual disputes as to whether "Zion was trying to get up"; "[w]hether the knife was still in Zion's hand or within his reach"; and "whether [the officer] thought Zion was still armed." *Id.* at 1076 & n.2.

This case differs from *Zion* as to each of these critical facts. The video evidence in this case clearly shows that, even after the fourth shot, Hernandez continuously moved in a way that gave the objective appearance of trying to get up; the video evidence shows that Hernandez never dropped his weapon and still had it in his hand at the end of the episode; and McBride's continued instructions to Hernandez to drop the knife confirm that she continued to believe that he was armed. Although we conclude that *Zion* is persuasive authority that supports a finding

of unreasonableness here, the case is sufficiently and materially different on its facts that we cannot say that it "'squarely govern[ed]' the specific facts" of this case or placed that outcome "beyond debate." *Kisela*, 584 U.S. at 104 (citations omitted).

Plaintiffs also rely on *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001), but the Supreme Court "has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law." *Kisela*, 584 U.S. at 106. The Court's summary of *Deorle* in *Kisela* equally confirms why it does not squarely govern the facts of this case: "*Deorle* involved a police officer who shot an unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been 'physically compliant and generally followed all the officers' instructions'; and he had been under police observation for roughly 40 minutes." *Id.* at 106–07 (citing *Deorle*, 272 F.3d at 1276, 1281–82). Nearly all of these key factual premises underlying *Deorle*'s holding are missing in this case.

The other Ninth Circuit cases on which Plaintiffs rely are even more strikingly distinguishable from this case. Indeed, in addition to other significant differences, none of the cited cases even involves a situation (such as this one or *Zion*) in which the use of deadly force initially *was* reasonable. *See Nehad v. Browder*, 929 F.3d 1125, 1141 (9th Cir. 2019) (holding that the officer's shooting of a suspect reported to have earlier threatened someone with a knife was unreasonable under clearly established

law where a jury could find that the officer "responded to a misdemeanor call, pulled his car into a well-lit alley with his high beam headlights shining into [the suspect's] face, never identified himself as a police officer, gave no commands or warnings, and then shot [the suspect] within a matter of seconds, even though [the suspect] was unarmed, had not said anything, was not threatening anyone, and posed little to no danger to [the officer] or anyone else"); *Hayes*, 736 F.3d at 1235 (holding that immediate shooting of suicidal man who revealed a knife, without ordering him to stop or drop the knife, was unreasonable).

Plaintiffs argue that, even apart from its specific facts, *Zion* clearly establishes the broader proposition that "the use of deadly force against a non-threatening suspect is unreasonable." *Zion*, 874 F.3d at 1076. But this overbroad reading of *Zion* is directly contrary to *Kisela*, which squarely held that we may not define "clearly established" law in the excessive force context at this "high level of generality." *Kisela*, 584 U.S. at 104 (citation omitted). Indeed, *Zion* noted that the "boundary" line is "murky" when it comes to defining exactly when the permissible use of deadly force against a suspect who "poses an immediate threat" must be *halted* on the ground that "the suspect no longer poses a threat." *Zion*, 874 F.3d at 1075. Given that *Zion* itself noted that the relevant line is "murky," it can hardly be said to have *clearly* established a general rule that places the outcome of this case beyond debate.

We acknowledge that, even when, as here, there is no relevant "[p]recedent involving similar facts" that "can help move a case beyond the otherwise 'hazy border between

excessive and acceptable force,'" generally framed rules can still "create clearly established law" in "an 'obvious case.'" *Kisela*, 584 U.S. at 105 (citation omitted). But to meet that high standard, Plaintiffs would have to show that "*any* reasonable official in the defendant's shoes would have understood that he was violating" the Constitution. *Id.* (quoting *Plumhoff*, 572 U.S. at 778–79 (emphasis added)). That demanding standard reflects the long-standing principle that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 577 U.S. at 12 (citation omitted). Plaintiffs have not satisfied that standard here. As our earlier discussion of the merits of this case makes clear, this is not an obvious case, but rather a close and difficult one. Thus, even granting that McBride's fifth and sixth shots may have been unreasonable, this is not an obvious situation in which *every* reasonable officer would have understood that the law forbade firing additional shots at the already wounded Hernandez as he plainly appeared to continue to try to get up.

Because McBride did not violate clearly established law in firing her third volley of shots, we conclude that she is entitled to qualified immunity. On that basis, we affirm the grant of summary judgment to McBride on Plaintiffs' Fourth Amendment excessive force claim.

III

We next address Plaintiffs' challenge to the district court's dismissal of their Fourteenth Amendment claim against all Defendants.

Appendix C

We have held that "parents have a Fourteenth Amendment liberty interest in the companionship and society of their children" and that "[o]fficial conduct that 'shocks the conscience' in depriving parents of that interest is cognizable as a violation of due process." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010) (citation omitted). We have extended this reasoning to also cover the converse situation of "a 'child's interest in her relationship with a parent.'" *Ochoa v. City of Mesa*, 26 F.4th 1050, 1056 (9th Cir. 2022) (quoting, *inter alia*, *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999) (en banc)). In describing the sort of conduct that would qualify as "shock[ing] the conscience" under this line of cases, we have drawn a distinction between cases where "actual deliberation is practical" and those in which it is not. *Zion*, 874 F.3d at 1077 (citation omitted). In the former situation, liability may be established by showing that the officer acted with "deliberate indifference." *Id.* (citation omitted). But where deliberation is impractical, we require a showing that the officer "acted with 'a purpose to harm without regard to legitimate law enforcement objectives.'" *Id.* (citation omitted).

The outcome of this case, under these standards, is dictated by our decision in *Zion*. In that case, we held that the "two volleys [of shots] came in rapid succession, without time for reflection" and that the more demanding liability standard therefore applied. *Zion*, 874 F.3d at 1077. Given that the two volleys in *Zion* occurred six seconds apart, *see id.* at 1075, the one-second gap between

McBride's second and third volleys likewise constitutes, under *Zion*, insufficient time to reflect. Plaintiffs therefore must show that McBride "acted with 'a purpose to harm without regard to legitimate law enforcement objectives.'" *Id.* at 1077 (citation omitted).

Plaintiffs wholly failed to raise a triable issue under this standard. Here, as in *Zion*, "[w]hether excessive or not, the shootings served the legitimate purpose of stopping a dangerous suspect." *Zion*, 874 F.3d at 1077; *see also Nehad*, 929 F.3d at 1134, 1139 (holding that, although there was a triable issue as to whether officer used excessive force in firing on a knife-wielding suspect who "didn't make any offensive motions" and "was actually not a lethal threat" to the officer, the plaintiffs' Fourteenth Amendment claim nonetheless failed because there was "no evidence that [the officer] fired on [the decedent] for any purpose other than self-defense, notwithstanding the evidence that the use of force was unreasonable").[3]

Because there was no Fourteenth Amendment violation, the district court correctly granted summary judgment to all Defendants on this claim.

IV

As noted earlier, the district court dismissed Plaintiffs' *Monell* claim against the City and LAPD,

3. To the extent that M.L.H. contends that she was not provided a sufficient opportunity to conduct additional discovery with respect to her claims, including her Fourteenth Amendment claim, we reject that argument for reasons explained below. *See infra* section IV.

concluding that (1) there could be no municipal liability when there was no underlying constitutional violation; and (2) even if there was such a violation, Plaintiffs had failed to provide any basis for holding the City and LAPD liable for McBride's shooting of Hernandez. The district court's first rationale fails in light of our conclusion that there is a triable issue as to whether McBride's final volley of shots was excessive under the applicable Fourth Amendment standards. We nonetheless agree with the district court's second rationale, and on that basis, we affirm the grant of summary judgment to the City and LAPD on the *Monell* claim.

As to Hernandez's parents and Estate, the district court noted that their summary judgment "opposition [was] almost entirely silent as to municipal liability" and merely argued that LAPD was properly named as an *additional* municipal Defendant with the City. The same is true of their opening brief in this court. Even assuming *arguendo* that Hernandez's parents and Estate have not thereby completely forfeited their *Monell* claim, they have failed to provide any basis for reversal beyond what is stated by their co-Plaintiff (M.L.H.) in the latter's opening brief.

For her part, M.L.H. does not contest the district court's determination that, based on the existing summary judgment record, there was insufficient evidence to establish municipal liability under *Monell*. Instead, M.L.H. seeks reversal of the dismissal of the *Monell* claim solely on the ground that the district court assertedly abused its discretion in refusing to extend the discovery

cut-off deadline established under the court's scheduling order issued under Federal Rule of Civil Procedure 16(b). We reject this contention.

In requesting a modification of the discovery schedule set forth in a Rule 16(b) scheduling order, a party must make a showing of "good cause." FED. R. CIV. P. 16(b)(4). As we have explained, "[t]he good cause standard of Rule 16(b) 'primarily considers the diligence of the party seeking'" the modification, and "[i]f that party was not diligent, the inquiry should end." *Branch Banking & Tr. Co., v. D.M.S.I., LLC*, 871 F.3d 751, 764 (9th Cir. 2017) (citation omitted). The district court did not abuse its discretion in concluding that M.L.H. had failed to show diligence in pursuing discovery.

As the court noted, M.L.H. did not serve any formal discovery for almost six months, and she "waited until the very end of discovery to notice depositions that she knew she wanted to take at the outset of the case." By proceeding in this fashion, the court concluded, M.L.H. "left herself no margin for error." On appeal, M.L.H. contends that the discovery deadline should have been extended in light of the asserted inadequacy of Defendants' responses to the discovery propounded by the *other* separately represented Plaintiffs (*i.e.*, Hernandez's parents and Estate). But as M.L.H. herself notes, *M.L.H.* "could not immediately act" to address those deficiencies "by way of a motion to compel because *she was not the party who propounded the requests*" (emphasis added). By failing to take *any* steps to serve her own formal discovery requests for six months, M.L.H. unnecessarily placed herself in a position in which

she was unable to bring discovery motions until fairly late in the process, and thus needed to conduct a range of discovery at the eleventh hour. M.L.H. also argues that the failure to serve discovery during the six-month period from August 2020 until February 2021 should have been excused in light of the Covid pandemic, but that explanation does not justify a complete failure to serve even *written* discovery before February 2021. Although the district court's ruling may have been harsh, we cannot say that the court abused its discretion in concluding that M.L.H. had not shown sufficient diligence and that an extension of the discovery cut-off was unwarranted.

Because Plaintiffs have provided no other basis for concluding that the *Monell* claim should not have been dismissed, we affirm the district court's grant of summary judgment on that claim.

V

Finally, we turn to Plaintiffs' state-law claims for (1) assault, (2) wrongful death, and (3) violation of California Civil Code § 52.1. The district court's sole reason for granting summary judgment to Defendants on these claims was its "determinat[ion] that Officer McBride's use of force was reasonable." Because we conclude that the reasonableness of McBride's final volley of shots presents a question for a trier of fact, the district court erred in dismissing these state law claims on that ground. We therefore reverse the district court's dismissal of these claims.

VI

For the reasons we have stated, we affirm the district court's grant of summary judgment to Defendants on all of Plaintiffs' federal claims, and we reverse the district court's summary judgment with respect to Plaintiffs' state law claims for assault, wrongful death, and violation of the Bane Act (Cal. Civ. Code § 52.1).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 25, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55994
D.C. Nos. 2:20-cv-04477-SB-KS,
2:20-cv-05154-DMG-KS
Central District of California, Los Angeles

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; *et al.*,

Plaintiffs-Appellants,

and

M. L. H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiff,

v.

CITY OF LOS ANGELES; *et al.*,

Defendants-Appellees,

and

Appendix D

DOES, 1 TO 10,

Defendant.

No. 21-55995
D.C. Nos. 2:20-cv-04477-SB-KS,
2:20-cv-05154-DMG-KS

M. L. H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiff-Appellant,

and

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; *et al.*,

Plaintiffs,

v.

CITY OF LOS ANGELES; *et al.*,

Defendants-Appellees,

and

Appendix D

DOES, 1 TO 10,

Defendant.

Filed October 25, 2021

ORDER

These appeals are consolidated.

This case is RELEASED from the Mediation Program.

Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant settlement discussions.

FOR THE COURT:

By: Steven J. Saltiel
Circuit Mediator

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 17, 2021

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 20-cv-04477-SB (KSx)

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY; M.L.H., A MINOR, BY AND THROUGH HERGUARDIAN AD LITEM CLAUDIA SUGEYCHAVEZ,

Plaintiffs,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE; AND DOES 1 TO 10,

Defendants.

Filed August 17, 2021

JUDGMENT

WHEREAS, Defendants TONI McBRIDE, CITY OF LOS ANGELES and LOS ANGELES POLICE

Appendix E

DEPARTMENT's ("Defendants") Motion for Summary Judgment having been granted by the Court on August 10, 2021 (Order, Dkt. 111), against Plaintiffs ESTATE OF DANIEL HERNANDEZ, MANUEL HERNANDEZ, MARIA HERNANDEZ and M.L.H., a minor, by and through her guardian ad litem CLAUDIA SUGEY CHAVEZ ("Plaintiffs"), Judgment is hereby entered in favor of Defendants.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Judgment is entered forthwith in favor of Defendants TONI McBRIDE, CITY OF LOS ANGELES and LOS ANGELES POLICE DEPARTMENT, as against Plaintiffs ESTATE OF DANIEL HERNANDEZ, MANUEL HERNANDEZ, MARIA HERNANDEZ and M.L.H., a minor, by and through her guardian ad litem CLAUDIA SUGEY CHAVEZ;

2. Plaintiffs shall take nothing by way of their consolidated Complaint (Dkt. 26) as against Defendants; and

3. Defendants shall recover their costs in accordance with Local Rule 54.

IT IS SO ORDERED.

Appendix E

Dated: August 17, 2021

/s/ Stanley Blumenfeld, Jr.
Stanley Blumenfeld, Jr.
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 10, 2021

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: 2:20-cv-04477-SB (KSx)	Date: 8/10/2021

Title:	*Estate of Daniel Hernandez et al. v. City of Los Angeles et al.*

Present: The Honorable	**STANLEY BLUMENFELD, JR., U.S. District Judge**

Victor Cruz	N/A
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s): None Appearing	Attorney(s) Present for Defendant(s): None Appearing

Proceedings:	**[In Chambers] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [DKT. NO. 83]**

This case stems from the fatal police shooting of Daniel Hernandez (Decedent) on April 22, 2020. Plaintiffs Estate of Daniel Hernandez, Manuel Hernandez, Maria

Hernandez, Claudia Sugey Chavez (together, Estate Plaintiffs) and M.L.H., by and through her guardian ad litem Claudia Sugey Chavez (M.L.H.) (collectively, Plaintiffs) filed this action bringing several federal and state civil rights claims. Defendants Toni McBride (Officer McBride), City of Los Angeles (City), and the Los Angeles Police Department (LAPD) have moved for summary judgment, or in the alternative, partial summary judgment as to each of Plaintiffs' claims. (Mot., Dkt. No. 83.) The Estate Plaintiffs and M.L.H. have each filed an opposition,[1] and Defendants have filed a reply. (Estate Opp., Dkt. No. 99; M.L.H. Opp., Dkt. No. 104; Reply, Dkt. No. 108.) The Court finds this matter suitable for disposition without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. For the reasons below, the Court **GRANTS** the motion.

I. BACKGROUND

The facts below are undisputed unless otherwise noted.[2] Video of the entire encounter is captured on Officer

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1. In reply, Defendants argue that Plaintiffs have violated the local rules by filing separate oppositions because this is a consolidated case and request that the Court "strike Plaintiffs' excessive briefing." (Reply at 2.) Though the Court would have preferred a coordinated, joint opposition, it shall not strike any opposition.

2. Estate Plaintiffs dispute Defendants' characterization of several facts in the DSUF. (Estate Statement of Genuine Disputes, Dkt. No. 100.) Those disputes are insufficient to create a genuine issue of material fact. *See Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1084 (E.D. Cal. 2016) ("The court's decision [on a summary

McBride's body-worn camera and the Digital In-Car Video recorder affixed to her patrol vehicle.

At approximately 5:36 p.m. on April 22, 2020, Officer McBride and her partner were responding to a call when they observed a crowd gathered around a traffic collision at the intersection of San Pedro and 32nd Street in Los Angeles. (Defendants' Statement of Uncontroverted Facts (DSUF) 1, Dkt. No. 83-1.) The officers stopped to help. (DSUF 2.) Upon exiting the patrol vehicle, Officer McBride observed several bystanders yelling and screaming and noticed several vehicles had been severely damaged—with occupants still inside. (DSUF 4.) Five or six of the bystanders immediately told Officer McBride that there was a "crazy guy with a knife" in the black truck that had been in the accident and that he was threatening to hurt himself and others. (DSUF 5.) Officer McBride looked into the truck and observed an individual (later identified as Decedent) rummaging around; based on information from her radio broadcast and reports from the bystanders, she identified the man in the truck as the individual with the knife. (DSUF 6.)

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judgment motion] relies on the evidence submitted rather than how that evidence is characterized in the statements."). This is particularly true when the relevant events are captured on video. M.L.H. offers similar disputes based on Defendants' characterization of the Decedent's actions. (M.L.H. Disputed Statement of Facts, Dkt. No. 104-1.) M.L.H. also repeatedly offers argument in response to facts. But "[n]either legal arguments nor conclusions constitute facts." (MSJ Order § 2 (emphasis omitted).) And to the extent M.L.H. raises discovery-based disputes to avoid summary judgment, the Court has already ruled that her lack of diligence precludes relief. (*See* Dkt. No. 91.) The Court may ignore these improper disputes. *See* Fed. R. Civ. P. 56(e).

Appendix F

After Officer McBride observed Decedent climb out of the truck through the driver's side window, she called to him, "Hey man, let me see your hands. Let me see your hands, man." (DSUF 7-8.) Moments later, Decedent appeared from behind the rear of the truck and approached Officer McBride while wielding a knife. (DSUF 9.) As Decedent closed the distance, Officer McBride ordered him to "Stay right there" and "Drop the knife" while simultaneously giving hand gestures to stop. (DSUF 10.) But Decedent did not comply. (DSUF 11.) As Decedent continued to close the distance, Officer McBride began to back up and again directed him to "Drop the knife! Drop the knife!" (DSUF 12.) Based on Decedent's aggressive behavior and refusal to comply, coupled with the fact that he was shirtless, sweating profusely, and acting jittery and agitated, Officer McBride believed Decedent to be under the influence of either methamphetamine or PCP. (DSUF 13.) Officer McBride again ordered Decedent to "drop the knife"; however, this time, Decedent responded, "I'm not going to drop this knife." (DSUF 15.) Plaintiffs dispute Decedent made this statement. Although Decedent does appear to make some statement, the audio recording of Decedent's verbal response is inaudible.

Decedent continued to advance towards Officer McBride brandishing the knife in his hand with his arms in a raised position. (DSUF 16.) At this point, Officer McBride raised her weapon from the "low-ready" position and aimed it at Decedent, again ordering him to "Drop it!" (DSUF 17.) After Decedent again refused to comply and continued to advance, Officer McBride, believing Decedent posed an imminent threat to her life and the

lives of the bystanders, fired two rounds at Decedent. (DSUF 18-19.) Decedent fell to ground, but immediately got up, and in a crouched stance, attempted to move toward Officer McBride. (DSUF 20.) Officer McBride again ordered Decedent to "Drop it," but he again refused to comply, leading Officer McBride to fire two more rounds at Decedent. (DSUF 21-22.) After Decedent fell on his back and rolled over on his side, still holding the knife and seemingly attempting to get up, Officer McBride fired two final rounds at Decedent. (DSUF 23-24.) When officers went to handcuff Decedent, he still had the knife in his right hand.[3] (DSUF 25.)

II. LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the non-moving party, shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"

3. Plaintiffs place great emphasis on the fact the "knife" was actually a box cutter. (*See* Dkt. No. 104-21 (photograph).) This distinction is not one of any legal significance. A box cutter is still a dangerous bladed object that can be used as a deadly weapon. Moreover, Decedent was wielding the box cutter as a knife by holding it as such and making slashing motions with it.

based on the issue. *Id.* In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50.

The burden is first on the moving party to show an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party satisfies this burden either by showing an absence of evidence to support the nonmoving party's case when the nonmoving party bears the burden of proof at trial, or by introducing enough evidence to entitle the moving party to a directed verdict when the moving party bears the burden of proof at trial. *See Celotex*, 477 U.S. at 325; *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). If the moving party satisfies this initial requirement, the burden then shifts to the nonmoving party to designate specific facts, supported by evidence, showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. If the nonmovant "fails to properly address another party's assertions of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for the purposes of the motion [or] . . . grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e).[4]

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4. The Estate Plaintiffs have filed evidentiary objections that simply track the DSUF. (*See* Dkt. No. 101.) Defendants have also filed evidentiary objections. (Dkt. No. 108-1.) These objections are overruled as moot.

III. DISCUSSION

Defendants move for summary judgment on each of Plaintiffs' claims. Defendants argue that Officer McBride did not violate Decedent's Fourth Amendment right, and even if there was a constitutional violation, she is shielded by the doctrine of qualified immunity. For the same reasons, Defendants argue that no violation of Plaintiffs' substantive due process rights can be found. Defendants further argue that because no underlying constitutional violations occurred, no municipal liability can exist. Finally, Defendants argue that Plaintiffs' state-law claims fail as a matter of law. The Court addresses each argument in turn.

A. Plaintiffs' Fourth Amendment Claim

Plaintiffs' first cause of action is brought under 42 U.S.C. § 1983 against Officer McBride for violation of Decedent's Fourth Amendment rights. (Compl. ¶¶ 31-39, Dkt. No. 26.) The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. In a case involving excessive force, courts examine "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397 (1989). This inquiry "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). Because "police officers are often forced to make split-second judgments,"

reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Id.* at 396-97 (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1975)).

Defendants argue that Officer McBride's conduct was objectively reasonable and thus did not violate the Fourth Amendment. (Mot. at 7-13.) Defendants also argue that even if Officer McBride's actions violated the U.S. Constitution, she is nonetheless entitled to qualified immunity. (*Id.* at 14-18.) The Court addresses each argument in turn.

1. Objectively Reasonable

When evaluating a Fourth Amendment claim, "[i]t is imperative that the facts be judged against an objective standard." *Terry*, 392 U.S. at 21. "Factors relevant to assessing whether an officer's use of force was objectively reasonable include 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempt to evade arrest by flight." *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir. 2014) (en banc) (quoting *Graham*, 490 U.S. at 396). As a general rule, "[a]n officer's use of deadly force is reasonable [] if 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.'" *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (quoting *Garner*, 471 U.S. at 3) (emphasis omitted). "Other relevant factors include the availability of less intrusive alternatives to the

force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011). But the "most important" factor is "whether the suspect posed an immediate threat to the safety of the officers or others." *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) (citation omitted). On balance, these factors demonstrate that Officer McBride's actions were objectively reasonable.

First, Plaintiffs argue that the circumstances giving rise to this encounter did not constitute a crime. (Estate Opp. at 7; M.L.H. Opp. at 11.) Even if the Court were to ignore the potential crimes arising out of a serious traffic collision caused by a man who appeared to be under the influence, Decedent was brandishing a knife around a crowd of people in a menacing manner and advancing toward an armed police officer without heeding commands. *See* Cal. Pen. Code § 417(a) (proscribing the brandishing of a deadly weapon in a rude, angry, and threatening manner). Officer McBride reasonably could have construed Decedent's acts leading up to the shooting to constitute serious criminal conduct.

The second and third *Graham* factors also weigh in favor of finding the use of deadly force to be reasonable. Decedent posed an immediate threat and ignored repeated commands to drop his weapon. Defendants cite several cases involving the use of deadly force in response to a knife-wielding suspect. For example, in *Estate of Toribio v. City of Santa Rosa*, officers responded to a call of a

knife-wielding man who was acting erratically and cut his roommate. 381 F. Supp. 3d 1179, 1182-83 (N.D. Cal. 2019). After barricading himself in a room, officers ordered the man to come out, but he refused. *Id.* at 1184. The man also ignored repeated commands to drop his knife. *Id.* at 1184-85. After the officers used pepper spray, the man jumped up and exited the room into the hallway with the knife, prompting one officer to fire five shots, which fatally wounded him. *Id.* at 1185-86. The court found that even if the officer was mistaken that the man was charging him, his use of force was justified based on the suspect's refusal to comply with orders, threatening statements, and his movement toward the officer. *Id.* at 1188-89.

Defendants' citation to *Blanford v. Sacramento Cnty.*, 406 F.3d 1110 (9th Cir. 2005) is also instructive. There, police responded to calls that a man was walking down a street in a ski mask brandishing a sword. *Id.* at 1112. After the man attempted to enter a home (later determined to be his parents' home), officers ordered him to drop the sword. *Id.* at 1113. Fearing that he might harm an occupant of the house or someone in the backyard, the officers opened fire after the man again refused to drop the sword. *Id.* The man continued to attempt entry through a gate, and after again refusing a command to drop the sword, was shot a second time. *Id.* The man then turned to the back yard, and still holding the sword, was shot a third time, which rendered him a paraplegic. *Id.* at 1113-14. The three volleys of shots occurred in approximately fourteen seconds. *Id.* at 1114. The Ninth Circuit concluded that the officers reasonably believed that the man posed a serious danger to those in or around the house "because he failed

to heed warnings or commands and was armed with edged weapon he refused to put down." *Id.* at 1116.

The facts of this case, viewed in their totality, are even more compelling. Officer McBride stopped at the scene of a very serious car crash; individuals were trapped in their vehicles, and bystanders were yelling and screaming. After being told by bystanders that there was a "crazy guy with a knife," Decedent appeared, shirtless, sweating profusely, and acting erratically. After refusing several commands to drop the knife and stay put, Decedent continued to advance toward Officer McBride, with his arms outstretched. It is well-established that "where a suspect threatens an officer with a weapon such as a gun or knife, the officer is justified in using deadly force." *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (collecting cases); *see also George*, 736 F.3d at 838 ("If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat."). Only after she was faced with Decedent's repeated refusal to drop his weapon did Officer McBride fire her weapon, and only after Decedent continued to refuse to drop the weapon after being shot and told to drop the weapon did she discharge her weapon again. Under these undisputed circumstances, Officer McBride reasonably concluded that Decedent posed a serious threat.

Plaintiffs offer two primary arguments they believe show that Decedent was not an immediate threat. Neither is persuasive. Plaintiffs first contend that the distance from which Officer McBride fired her weapon

(44 feet) rendered the shooting unreasonable. (Estate Opp. at 8-9; M.L.H. Opp. at 11-14.) This argument is unpersuasive because Decedent was advancing and had ignored repeated commands to stop and drop his knife, as is evident from the video. Indeed, the Ninth Circuit has rejected this distance-related argument, finding that a suspect who is 55 feet away can still pose an imminent threat because he can cover the distance in a matter of seconds. *See Watkins v. City of San Jose*, No. 15-CV-05786-LHK, 2017 WL 1739159, at *10 (N.D. Cal. May 4, 2017), *aff'd sub nom. Buchanan v. City of San Jose*, 782 F. App'x 589 (9th Cir. 2019) ("Although the officers may have been in *more* danger if the officers had waited for Decedent to advance closer to the officers, the pace of Decedent's advance and his failure to follow direct commands to drop the knife and get on the ground indicate that the officers had probable cause to believe that the suspect pose[d] a significant threat of death or serious physical injury to the officer[s].") (citation omitted).

Plaintiffs' second argument is that the number of shots fired by Officer McBride—particularly the fifth and sixth rounds—was unreasonable because Decedent could no longer be considered an imminent threat after the initial two shots were fired. (Estate Opp. at 8-10; M.L.H. Opp. at 14-18.) As Defendants observe, the Supreme Court has rejected this argument, finding the overall number of shots fired is not the correct measure of reasonableness. *See Plumhoff v. Rickard*, 572 U.S. 765, 777-78 (2014) ("It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat

has ended."). While Plaintiffs contend that Decedent no longer posed a risk after the initial round of shots was fired, that is plainly contradicted by the video evidence. After the first volley, Decedent, still holding the knife, quickly pops back up and appears positioned to charge at Officer McBride. After the second volley, Decedent hits the ground, and still holding the knife, rolls over from his back and still appears to try to get up— or, at least, it cannot be said that the threat had ended.

Moreover, it is important to evaluate the shooting in the real-world context in which it occurred. A judicial description of a shooting as involving "volleys" is analytically useful so long as it is not used—wittingly or unwittingly—to distort the split-second reality unfolding before the officer who has to make life-and-death decisions with imperfect information and without much time to reflect. The six shots in this case were fired in approximately six seconds. Even after the first two shots, Decedent remarkably continued to rise in the direction of the officer. The question is not whether another officer might have waited to evaluate the rising man's next move to see if he would stop, charge at the officer, or advance toward the crowd. The question is whether firing six shots under these circumstances was unconstitutional. The Supreme Court answered that question in *Plumhoff*: the shooting must stop when "the threat has ended." 572 U.S. at 777-78.

In addition to the three *Graham* factors, Plaintiffs contend that other factors weigh against a finding of reasonableness. (Estate Opp. at 10; M.L.H. Opp. at 12-13.)

Specifically, Plaintiffs contend that Officer McBride should have used various de-escalation tactics and non-lethal alternatives before resorting to deadly force or she should have retreated. Based on the record evidence, there was not a "clear, reasonable and less intrusive alternative[]" to the use of deadly force. *Glenn*, 673 F.3d at 876. This was a fast-evolving, dangerous situation. Plaintiffs' suggestion that there was "ample time" to devise and implement an alternative plan of action would require the type of second guessing the Supreme Court has condemned. *See Graham*, 490 U.S. at 396-97 (recognizing "police officers are often forced to make split-second judgments"). Plaintiffs' further suggestion that Officer McBride should have taken into account Decedent's mental state does not call for a different conclusion. *See Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010) (refusing "to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals"). If anything, Decedent's apparent mental state objectively increased the threat assessment. He had just crashed into a vehicle, a reckless act that caused substantial wreckage; and he emerged from the wreckage in a seemingly crazed and plainly dangerous and menacing state, as he advanced toward an officer who had her gun drawn and was voicing commands that made no impression on him. An officer confronting these circumstances reasonably could perceive Decedent to have presented a deadly threat not only to the safety of the officers but also to the safety of those in the nearby crowd.

Considering the undisputed circumstances in their totality, Officer McBride did not act unreasonably in

using deadly force. Even if the Court were to find Officer McBride's use of force was unreasonable in whole or part, for the reasons discussed immediately below, she is entitled to qualified immunity.

2. Qualified Immunity

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.'" *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The purpose of qualified immunity is to provide officers "breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt v. Millender*, 535 U.S. 535, 546 (2012) (internal quotation marks and citations omitted). The availability of qualified immunity depends on: (1) whether there has been a violation of a constitutional right, and (2) whether that right was clearly established at the time of the alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Lal v. Cal.*, 746 F.3d 1112, 1116 (9th Cir. 2014). It is within the sound discretion of the district court to determine which of the two prongs should be addressed first. *Pearson*, 555 U.S. at 236.

Even if the Court were to conclude that Officer McBride violated Decedent's constitutional rights, those rights were not clearly established under Supreme Court and Ninth Circuit authority. "A clearly established right

is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotations and citation omitted). For a right to be clearly established, it "does not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. Instead, courts must use a case-specific, context driven inquiry. *Mullenix*, 577 U.S. at 12 (citing *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). "Such 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 the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Id.* (citation omitted).

As the Ninth Circuit recently framed the issue, "[t]he question . . . is whether 'clearly established law prohibited' [the officer] from using the degree of force that [s]he did in the specific circumstances that the officer[] confronted." *O'Doan v. Sanford*, 991 F.3d 1027, 1037 (9th Cir. 2021). The specific circumstances confronting Officer McBride are not genuinely in dispute: an erratic, knife-wielding suspect, who had previously exhibited a reckless disregard for his own safety and the safety of others by causing a serious car crash, threatened to harm himself and others, ignored repeated commands to drop his weapon, and continued to advance on a uniformed police officer who

had a firearm drawn. Even after being shot twice, the suspect did not stop but instead rose from the ground still clutching the knife.

Estate Plaintiffs[5] cite several cases to support the contention that Officer McBride violated a clearly established right. None is persuasive. They first cite *Zion v. County of Orange*, 874 F.3d 1072, 1075-76 (9th Cir. 2017). (Estate Opp. at 15.) There, a man suffering from an episodic seizure bit his mother, cut his roommate with a knife, and stabbed a police officer responding to the call for help. *Zion*, 874 F.3d at 1075. Another responding officer witnessed the event and shot the man nine times. *Id.* After the man fell to the ground, the officer walked up to the man, and from a distance of four feet, fired another nine shots at his body. *Id.* After pausing, the officer then took a running start and stomped on his head three times in what was described as "vicious blows to [the] head." *Id.* The man died at the scene. *Id.* The Ninth Circuit found that the officer's use of deadly force by shooting the decedent—and then stomping on his head three times after taking a

5. Plaintiff M.L.H. also argues that Officer McBride is not entitled to qualified immunity throughout her briefing. (*See, e.g.*, M.L.H. Opp. at 20-23.) Her analysis consists largely of string citations to support the notion that it was clearly established that Officer McBride should not have (1) shot Decedent from the distance she did, and (2) shot him six times, which was a violation of LAPD policy (*Id.*) These arguments largely overlap with Estate Plaintiffs' briefing. Without explanation, Plaintiff M.L.H. cites several out of circuit cases to argue that the law of this circuit was clearly established. Even if the Court were to consider these cases, their value is de minimis in the face of Ninth Circuit and Supreme Court authority that is on point, as explained above.

running start—was not objectively reasonable. *Id.* at 1075-76. While the officer's initial shots were not excessive, the court determined that even if a jury could find the second volley of shots was justified, no reasonable jury could find the head-stomping of a disabled suspect justifiable. *Id.* *Zion* is clearly distinguishable. Officer McBride shot a person who appeared intent on ignoring commands to drop his knife and to cease all threatening conduct; even after being shot he remained defiant. *Zion* did not put Officer McBride on notice that the use of deadly force, including the firing of the fifth and sixth shots, was unconstitutional under the circumstances she faced. In *Zion*, the suspect had dropped to the ground after the first nine shots and made "no threatening gestures." *Id.* at 1076. Decedent in this case appeared determined, even once shot, to continue to advance. That was not the case in *Zion*.

Estate Plaintiffs next cite *Lam v. City of Los Banos*, 976 F.3d 986 (9th Cir. 2020). (Estate Opp. at 16.) But this decision post-dates the April 22, 2020 shooting of Decedent. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018) (per curiam) (warning that courts may not deny qualified immunity based on cases that post-date the incident). Plaintiffs nevertheless suggest that Officer McBride was on notice of that case because the district court's unpublished decision pre-dated the shooting. (Estate Opp. at 16 fn. 3 (citing the March 30, 3017 decision denying summary judgment).) However, unpublished authority alone will rarely suffice to show the law was clearly established. *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002). And the unpublished decision in *Lam* did nothing to develop the relevant law, finding only that "if

all factual disputes are resolved in Plaintiff's favor, the jury would find that [the officer] . . . shot [the decedent] twice without provocation and planted a weapon to make it appear that he had instead been attacked." *Tan Lam v. City of Los Banos*, No. 2:15-cv-00531-MCE-KJN, 2017 WL 1179136, at *7 (E.D. Cal. Mar. 30, 2017).

The citation to *Curnow ex rel. Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991) is likewise unavailing. (Estate Opp. at 17.) There, a police officer, after announcing his presence, shot a man who allegedly raised his semi-automatic rifle while other officers were entering the man's residence. The wounded man fled the house, turned around, pointed his weapon at the officer, and was shot a second time, this time fatally. *Id.* at 323. In affirming the denial of summary judgment on qualified-immunity grounds, the Ninth Circuit held that a civilian witness contradicted the police version, stating that the officer appeared to shoot the decedent in his back the first time and that the decedent was holding the muzzle of the rifle when he was fleeing and fatally shot the second time. *Id.* at 325. This holding, which is based on a factual dispute, did little to provide guidance about the law applicable to this case.

Finally, Estate Plaintiffs rely on two cases for the proposition that an officer who violates department policy is not entitled to qualified immunity. (Estate Opp. at 17-18 (citing *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) (asphyxiating a man by kneeling on his neck) and *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir.

2002) (pepper spraying environmental protestors)).) But even if department policy were the proper yardstick in determining qualified immunity, Plaintiffs cite to no specific policy that prohibited the shooting in this case and instead offer the opinion of their retained use-of-force expert. (*Id.*) A retained expert's opinion does not equate to clearly established law within the meaning of the qualified immunity doctrine.

In sum, the law did not clearly establish that the shooting in this case violated Fourth Amendment standards. Indeed, Supreme Court precedent suggests otherwise. *See Kisela*, 138 S. Ct. at 1151. In *Kisela*, police responded to a 911 call of a woman acting erratically and hacking at a tree with a kitchen knife. When officers arrived and spotted the woman, she approached another person (her roommate) while holding the knife, stopping no more than six feet away. *Id.* Despite the officers' announced presence, drawn weapons, and commands to drop the knife, the woman continued to hold the knife. Fearing for the roommate's safety, one officer fired four shots, striking the suspect. Reversing the Ninth Circuit's denial of qualified immunity, the Supreme Court held that it was "far from an obvious case in which any competent officer would have known that shooting [the suspect] to protect [the roommate] would violate the Fourth Amendment." *Id.* at 1153. It is similarly far from obvious that the shooting here constituted a constitutional violation. Accordingly, Officer McBride is entitled to summary judgment on Plaintiffs' first cause of action.

B. Plaintiffs' Fourteenth Amendment Claim

Plaintiffs' third cause of action is brought under 42 U.S.C. § 1983 for interference with familial integrity in violation of the substantive due process clause of the Fourteenth Amendment. (Compl. ¶¶ 55-62.) The Due Process Clause of the Fourteenth Amendment protects against government deprivation of life, liberty, and property of citizens without due process of law. U.S. Const. amend XIV, § 1. Plaintiffs Manuel Hernandez, Maria Hernandez, and M.L.H. seek damages for deprivation of their familial rights with Decedent. Both parents and children of a person killed by law enforcement officers may assert this substantive due process right. *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir. 1998).

To prevail on a such a claim, a plaintiff must show that the state actor's conduct "shocks the conscience." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998) (collecting cases). In determining whether an officer's conduct shocks the conscience, a court must first ask "whether the circumstances are such that actual deliberation [by the officer] is practical." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010) (citations omitted). If actual deliberation is practical, an officer's deliberate indifference is sufficient to shock the conscience. *Id.* But if an officer is confronted with a fast-paced situation in which deliberation is not practical, his or her conduct will only shock the conscience if the act was committed with a "purpose to harm unrelated to law enforcement activities." *Id.* "Deliberation" is not to be interpreted in the narrow,

technical sense of the word used in criminal law. *Porter v. Osborn*, 546 F.3d 1131, 1140 (9th Cir. 2008) (citing *Lewis*, 523 U.S. at 851 n. 11).

Officer McBride was indisputably presented with a fast-moving situation that unfolded in a matter of seconds. Estate Plaintiffs suggest the standard of culpability is a fact question for the jury and that a reasonable jury could find that Officer McBride had time to deliberate before shooting Decedent. (Estate Opp. at 22-23.) Ninth Circuit authority does not support this assertion. *See Porter*, 546 F.3d at 1139 (finding a five-minute altercation ending in shooting left no time for deliberation). Like the officer in *Porter*, Officer McBride "faced a fast paced, evolving situation presenting competing obligations with insufficient time for the kind of actual deliberation required for deliberate indifference." *Id.* at 1142. As such, Plaintiffs must present evidence that Officer McBride acted with a purpose to harm unrelated to law enforcement activities.

An officer acts with a purpose to harm to "induce . . . lawlessness, or to terrorize, cause harm, or kill." *Lewis*, 523 U.S. at 855. This determination requires "an appraisal of the totality of facts in a given case." *Id.* at 850. Defendants argue that Officer McBride's actions were necessary to a legitimate law enforcement purpose of stopping a safety threat. (Mot. at 14.) Plaintiffs argue that the shooting served no legitimate law enforcement purpose as demonstrated by three principal facts: (i) no other officer fired a shot; (ii) the distance of the shots (up to 44 feet); and (iii) the subsequent shots, especially the fifth and sixth shots, occurred while Decedent was falling

to or on the ground. (Estate Opp. at 21-22; M.L.H. Opp. at 23-24.) This argument necessarily fails in light of the Court's conclusion that the shooting did not violate Fourth Amendment standards or otherwise warrants protection under the qualified immunity doctrine. It can hardly be said that a constitutional use of force "shocks the conscience," as that concept is understood under the Fourteenth Amendment. Indeed, in the absence of an underlying constitutional violation, Plaintiffs' familial relations substantive due process claim fails as a matter of law. *See Corales v. Bennett*, 567 F.3d 554, 569 n.11 (9th Cir. 2009) (so holding); *see also Porter*, 546 F.3d at 1141-42 (explaining overlap in analysis between Fourth Amendment excessive force claims and Fourteenth Amendment due process claims).

Accordingly, Defendants are entitled to summary judgment of Plaintiffs' third cause of action.

C. Plaintiffs' *Monell* Claim

Plaintiffs' second cause of action is brought under 42 U.S.C. § 1983 for municipal liability. (Compl. ¶¶ 40-54.) A local government may be sued under section 1983 for an injury inflicted by its employees or agents "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts fairly be said to represent official policy, inflicts the injury." *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978). Plaintiffs seek to hold the City and the LAPD liable under *Monell*.

To hold a municipality liable for the actions of its officers and employees, a plaintiff must allege one of the following: "(1) that a [municipal] employee was acting pursuant to an expressly adopted official policy; (2) that a [municipal] employee was acting pursuant to a longstanding practice or custom; or (3) that a [municipal] employee was acting as a 'final policymaker.'" *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004). Additionally, under some circumstances, a municipality may be held liable for failure to train its police officers. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

The *Monell* claim fails for two reasons. First, Defendants correctly argue that there can be no municipal liability in the absence of an underlying constitutional violation here. (Mot. at 19 (citing *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)).) Second, even if there were such a violation, Plaintiffs have submitted no evidence that a municipal policy, practice, or custom was "a moving force behind [the] violation of constitutional rights." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citing *Monell*). While Plaintiffs list several incidents involving police shootings and several other purportedly illegal policies (Compl. ¶¶ 29, 42), they produced no evidence that those policies caused the shooting in this case. Indeed, Estate Plaintiffs' opposition is almost entirely silent as to municipal liability—only arguing that the LAPD is a proper party.[6] (Estate Opp. at 23.) To the extent Plaintiffs' *Monell* claim is based on ratification or failure

6. The parties disagree whether the LAPD is a properly named Defendant for purposes of the *Monell* claim. The Court need not reach this issue because the claim fails on its merits.

to train theory, it is similarly unsupported by any record evidence. Only M.L.H. offers any argument on this point, suggesting in a single sentence that LAPD Chief of Police Michel Moore ratified Officer McBride's actions by failing to discipline her. (M.L.H. Opp. at 24.) But a failure to discipline does not equate to ratification. *See Lytle*, 382 F.3d at 987 ("A mere failure to overrule a subordinate's action, without more, is insufficient to [show ratification].").

Thus, Defendants are entitled to summary adjudication of Plaintiffs' *Monell* claim.

D. Plaintiffs' Conspiracy Claim and Ralph Act Claim are Unopposed

Plaintiffs do not oppose summary adjudication of the sixth claim for violation of California Civil Code § 51.7, the Ralph Act, and the seventh claim for conspiracy in violation of 42 U.S.C. § 1985(3). M.L.H. explicitly states her nonopposition (M.L.H. Opp. at II); and the Estate Plaintiffs waived any challenge to summary adjudication of these claims by failing to provide any opposition. *See Stichting Pensioenfonds ABP v. Countrywide Fin.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (failure to oppose "constitutes waiver or abandonment"). Defendants are therefore entitled to summary judgment on these claims.[7]

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7. The parties are required to meet and confer to identify issues of nonopposition to avoid wasting judicial resources. Local Rule 7-3. They failed in this obligation and are admonished that future failure in this case or in any other case may result in appropriate sanctions.

E. Plaintiffs' Remaining State Law Claims

In addition to their federal claims, Plaintiffs also bring state-law claims for assault and battery (count four), wrongful death (count five), and violation of California Civil Code § 52.1 (count seven). Defendants argue—and Plaintiffs do not contest—that these claims rise and fall based on the reasonableness of Office McBride's use of force. (Estate Opp. at 23; M.L.H. Opp. at 24.) Because the Court has determined that Officer McBride's use of force was reasonable, Defendants are also entitled to summary judgment on Plaintiffs' remaining state-law claims.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion is **GRANTED**. Defendants are to file a proposed judgment by August 20, 2021.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 18, 2020

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 20-4477-DMG (KSx)

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ AND MARIA HERNANDEZ; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY,

Plaintiffs,

vs.

CITY OF LOS ANGELES, LOS ANGELES POLICE DEPARTMENT, TONI MCBRIDE, DOES 1 THROUGH 10,

Defendants.

Case No.: CV 20-5154-DMG (KSx)

M.L.H BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ AS SUCCESSOR IN INTEREST TO DECEDENT DANIEL HERNANDEZ,

Plaintiff,

Appendix G

vs.

CITY OF LOS ANGELES, OFFICER TONI MCBRIDE #43335; INDIVIDUALLY AND AS A PEACE OFFICER, AND DOES 1-10,

Defendants.

ORDER RE STIPULATION TO CONSOLIDATE RELATED CASES [21]

GOOD CAUSE APPEARING and the parties having stipulated,

IT IS HEREBY ORDERED that *Estate of Daniel Hernandez, et al. v. City of Los Angeles, et al.*, case number CV20-4477-DMG (KSx), is consolidated with *M.L.H. v. City of Los Angeles, et al.*, case number CV 20-5154-DMG (KSx). *M.L.H.*, case number CV 20-5154-DMG (KSx), will be administratively closed and the September 11, 2020 Scheduling Conference in that case is VACATED. Any material documents filed in the closed case will be deemed to have been filed in this consolidated case. All future filings in this matter shall be under case number CV 20-04477-DMG (KSx).

Plaintiffs shall file a Consolidated Amended Complaint by September 8, 2020. Defendants shall respond to the Consolidated Amended Complaint within 21 days after its filing, unless waived by stipulation. The Scheduling and Case Management Order [Doc. # 22] shall remain in place.

IT IS SO ORDERED.

DATED: August 18, 2020

/s/ Dolly M. Gee
DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

APPENDIX H — DECLARATION OF DEFENDANT OFFICER TONI MCBRIDE FILED IN THE UNITED STATES DISTRICT COURT FOR CENTRAL DISTRICT OF CALIFORNIA, DATED JULY 2, 2021

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 20-cv-04477-SB (KSx)

ESTATE OF DANIEL HERNANDEZ, BY AND THROUGH SUCCESSORS IN INTEREST, MANUEL HERNANDEZ, MARIA HERNANDEZ AND M.L.H.; MANUEL HERNANDEZ, INDIVIDUALLY; MARIA HERNANDEZ, INDIVIDUALLY; M.L.H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM CLAUDIA SUGEY CHAVEZ,

Plaintiffs,

v.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; TONI MCBRIDE; AND DOES 1 TO 10,

Defendants.

DATE: August 6, 2021
TIME: 8:30 a.m.
DEPT: Courtroom 6C
JUDGE: Hon. Stanley Blumenfeld Jr.

Appendix H

DECLARATION OF DEFENDANT OFFICER TONI MCBRIDE IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

I, Toni McBride, if called upon to testify will competently testify as follows:

1. I am an officer with the Los Angeles Police Department ("LAPD"). I have been with the LAPD since 2017. I have personal knowledge of the matters set forth herein below and if called upon to testify, I will competently testify thereto.

2. On April 22, 2020, I was partnered with Officer Shuhei Fuchigami when both of us were dispatched to a call for service regarding a separate incident. While en route, we observed a crowd in the vicinity of the intersection of San Pedro and 32nd Street in Los Angeles which was gathered around a traffic collision. In response, Officer Fuchigami and myself decided to respond to the collision and provide assistance.

3. At the time of the incident giving rise to this litigation, I was wearing a full police uniform which identified me as an officer with the Los Angeles Police Department. I also had a body-worn camera affixed to my chest. Attached hereto as **Exhibit A** is a true and correct copy of the video recorded by my body-worn camera during this incident.

4. As we responded to the scene, the overhead lights on our patrol vehicle were activated, which also activates the Digital In-Car Video recorder ("DICV"), which records video from a forward facing camera affixed to the patrol vehicle. Attached hereto as **Exhibit B** is a true and correct copy of the video of the subject incident which was recorded by the DICV in my patrol vehicle.

5. As I exited the patrol vehicle, I observed multiple individuals, many of whom were screaming and yelling. I also observed several vehicles that had been severely damaged with people still in the vehicles. I estimate that there were approximately fifty people in the vicinity.

6. I was advised immediately upon exiting the patrol vehicle by approximately five or six of the bystanders that there was a "crazy guy with a knife" that was in the black truck which appeared to have been involved in the traffic collision. I was also advised by the bystanders that the individual in the black truck was threatening to hurt both himself [a]nd others

7. Although the truck's windows were tinted, I was able to observe an individual who appeared to be rummaging through the middle console of the truck (later identified as Hernandez). Based upon Hernandez's furtive movements in the truck, the information provided over the radio broadcast, the reports from individuals at the scene and my own observations, I believed that Hernandez was armed with a weapon and was threatening to harm either himself or others. In response, I began directing bystanders to clear out of the area.

8. While continuing to monitor the truck and directing bystanders out of the area, I observed Hernandez climb out of the driver's side window of the truck.

9. Based upon the information known to me at the time, which included radio dispatch reports and reports from bystanders that Hernandez was armed and had threatened both himself and others, I called to Hernandez, stating "Hey man, let me see your hands. Let me see your hands, man."

10. Moments later, Hernandez appeared from behind the rear of the truck and began advancing towards me while holding a knife in his hand. As Hernandez quickly closed in on me, I ordered him to "Stay right there. Drop the knife." While giving those verbal commands, I simultaneously gestured with my left hand for Hernandez to stop. Unfortunately, Hernandez refused to comply and instead continued to advance while clutching a knife.

11. In response to Hernandez continuing to close in on me, I began backing up in hopes of maintaining the distance between us while also attempting to create more time for Hernandez to comply. While backing up, I again directed Hernandez to "Drop the knife! Drop the knife!"

12. Hernandez's actions and appearance suggested he was under the influence of drugs – likely either methamphetamine or PCP. That opinion was based upon my training and experience in recognizing the objective signs of drug use and intoxication. Specifically, I observed Hernandez shirtless, sweating profusely, acting jittery

and agitated, refusing to comply with directives while also displaying an overly aggressive behavior.

13. As Hernandez continued to advance towards me, he still had a knife in his right hand while rapidly closing the distance between us. As Hernandez moved closer, my concern for my own, my partner and the crowd's safety escalated.

14. At this juncture, Hernandez finally responded to my further orders to "drop the knife." In response, Hernandez stated that "*I'm not going to drop this knife.*"

15. Based upon Hernandez's response, his actions up to that point and the totality of the circumstances, I believed Hernandez posed an imminent threat to not only my own life, but also the lives of others at the scene.

16. After Hernandez advanced further towards me still with knife in hand, I raised my weapon from the low-ready position and pointed it at Hernandez, again yelling "Drop it!" When Hernandez refused to comply and as he progressed even closer to both me and the bystanders who were standing in close proximity, I feared that Hernandez posed an imminent threat.

17. At that point, I fired two rounds at Hernandez. Although he initially fell to the ground, Hernandez immediately jumped up and into a crouched position that appeared to be a sprinter's stance while screaming in rage.

18. After observing Hernandez rising up into a sprinter's stance and appearing to continue towards me while still holding a knife, I again yelled to Hernandez, directing him to "drop it." Unfortunately, Hernandez again refused to comply.

19. Given Hernandez's continuous refusal to comply and his further actions in closing in on me while still grasping a knife, I continued to fear that Hernandez was going to kill me and/or others. As Hernandez rose up and continued advancing towards me, I fired a third and fourth round at him, which resulted in Hernandez falling on his back before rotating onto his side while appearing to again get up and continue his advance towards me, still tightly grasping the knife.

20. At that point, I fired a fifth and sixth shot (my final shots), which resulted in Hernandez immediately falling to and remaining on the ground.

21. Immediately after firing my final shot, I observed additional officers who had arrived on site. I also heard a radio broadcast which requested an ambulance.

22. As I approached Hernandez to assist the other officers who were placing him in handcuffs, I observed the knife still in his hand.

23. In firing each of the six rounds on Hernandez, I believed that Hernandez posed an imminent threat to my life and the lives of the nearby bystanders. That belief was based upon the totality of the circumstances known

to me at the time, which included Hernandez's aggressive advancement upon me with a knife in his hand, his defiance of my repeated commands to drop his weapon and my belief that he was under the influence of narcotics, possibly methamphetamines or PCP.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 2nd day of July, 2021, in Los Angeles, California.

/s/ Toni McBride
TONI McBRIDE

APPENDIX I — EXHIBIT A, BODY WORN VIDEO OF DEFENDANT OFFICER TONI MCBRIDE, FILED IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ON JULY 2, 2021

Exhibit A to the Declaration of Officer Toni McBride: A true and correct copy of the video from Officer McBride's body-worn camera for the subject incident.

Please click on the following link:

APPENDIX J — EXHIBIT B, DIGITAL IN-CAR VIDEO RECORDING OF DEFENDANT OFFICER TONI MCBRIDE, FILED IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ON JULY 2, 2021

Exhibit B to the Declaration of Officer Toni McBride: A true and correct copy of the video from Officer Toni McBride's Digital In-Car Video for the subject incident.

Please click on the following link: