No. 18-55035

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S.R. Nehad, K.R. Nehad, and Estate of Fridoon Rawshan Nehad,

Plaintiffs and Appellants,
vs.

Neal Browder, City of San Diego and Shelley Zimmerman,

Defendants and Appellees,

On Appeal from an Order of the United States District Court
For the Southern District of California
The Honorable William Q. Hayes, Judge Presiding
United States District Court No. 15-cv-01386 WQH(NLS)

APPELLEES' ANSWERING BRIEF

MARA W. ELLIOTT, City Attorney
GEORGE F. SCAHEFER, Assistant City Attorney
KATHY J. STEINMAN, Deputy City Attorney
California State Bar No. 221344
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, California 92101
Telephone: (619) 533-5800
Facsimile: (619) 533-5856
Email: ksteinman@sandiego.gov

Attorney for Defendants and Appellees
Neal Browder, City of San Diego and Shelley Zimmerman

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I. INTRODUCTION

At around midnight on April 30, 2015, San Diego Police Department Officer Neal Browder ("Officer Browder") responded to a 911 call reporting a person threatening people with a knife and saying he was going to "kill people." Officer Browder arrived at the scene within two minutes of the call. Approximately 33 seconds passed between the time Officer Browder arrived at the alley where the suspect had last been seen and when Officer Browder fired a single shot. The suspect matched the description of the person they were looking for and was advancing towards Officer Browder with a shiny metallic object that Officer Browder thought was a knife. Less than five seconds elapsed between the time Officer Browder exited his vehicle and he fired his weapon, while the suspect continued to advance towards him coming within 17 feet. It was not until after he fired his weapon and was administering first aid to the suspect, Fridoon Rawshan Nehad ("Nehad"), that Officer Browder learned that the shiny metallic object Nehad had been holding was a pen, and not a knife.

When we strip away the 20/20 hindsight, we are left with undisputed facts that led Officer Browder to reasonably believe that Nehad was an immediate threat to Officer Browder's safety and the safety of others in the area. The law does not require perfection or superhuman judgment from Officer Browder; it requires him to act reasonably. The District Court properly evaluated the evidence and found

that there was no constitutional violation and that Officer Browder was entitled to qualified immunity because his belief of an imminent threat to his safety and that of others was objectively reasonable. The District Court also properly found that the law in this area was not clearly established at the time of the incident and qualified immunity on that basis was also proper. Absent a constitutional violation, the District Court then properly dismissed Plaintiffs' *Monell* and supervisory claims as well as their state law claims. Accordingly, the District Court's decision should be affirmed.

II. JURISDICTIONAL STATEMENT

A. DISTRICT COURT JURISDICTION

The district court had federal question jurisdiction in this case because Plaintiffs/Appellants S.R. Nehad, K.R. Nehad and Estate of Fridoon Rawshan Nehad's (collectively "Plaintiffs") claims involved a dispute or controversy based on 42 U.S.C. § 1983 ("Section 1983"). "The district courts shall have original jurisdiction of all civil action arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

B. APPELLATE JURISDICTION

The federal district court rendered its final judgment in favor of Defendants/Appellees Neal Browder, Shelley Zimmerman, and City of San Diego (collectively "City Defendants") on December 18, 2017. (Plaintiffs' Excerpts of

Record ("EOR") at 1.) Plaintiffs filed a notice of appeal with the District Court on January 9, 2018. (EOR at 20.) This court has appellate jurisdiction over this action pursuant to 28 U.S.C. § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

III. STATEMENT OF ISSUES PRESENTED

The issues presented in this appeal are:

1. Did the District Court properly determine that Officer Browder acted reasonably when he decided to use deadly force in response to a perceived threat?

2. Did the District Court properly determine that there was no violation of Fridoon Nehad's Fourth Amendment rights?

3. Did the District Court properly determine that there was no violation of S.R. Nehad's and K.R. Nehad's Fourteenth Amendment rights?

4. Did the District Court properly determine that Officer Browder was entitled to qualified immunity?

5. Did the District Court properly determine that the City of San Diego and Shelley Zimmerman were entitled to summary judgment on Plaintiffs' *Monell* claim?

6. Did the District Court properly determine that Shelley Zimmerman was entitled to summary judgment on Plaintiffs' claim for supervisory liability?

7. Did the District Court properly determine that City Defendants were entitled to summary judgment on Plaintiffs' state law claims?

IV. STATEMENT OF FACTS

A. The Assault with a Deadly Weapon

Just after midnight on April 30, 2015, Andrew Yoon encountered the Decedent, Fridoon Rawshan Nehad ("Nehad"), in an alley behind The Body Shop, a strip club. (EOR at 759:4-9.) Mr. Yoon told Nehad that he could not loiter in the alley. (EOR at 759:7-9.) In response, Nehad became angry, pulled a knife from a backpack, and unsheathed it. (EOR at 759:7-20.) As he drew the knife, Nehad took a few steps towards Mr. Yoon and said that he was going to kill people. (EOR at 760:1-3.) Mr. Yoon then fled back inside the bookstore where he worked. (EOR at 760:3-5.) A few minutes later, Nehad followed Mr. Yoon into the bookstore and repeated his threats about harming people approximately five times. (EOR at 760:3-7; 760:14-20; 760:25 – 761:9.)

After his encounter with Nehad, Mr. Yoon decided to call the police, concerned that Nehad would hurt someone in the parking lot or next door. (EOR at 761:10-25.) Mr. Yoon gave the police dispatcher a description and specifically informed the dispatcher that he had been threatened with a knife. (EOR at 762:6-14.) San Diego Police Department ("SDPD") dispatch records confirm that a person named "Andy" who worked at "the Highlight Book Store" called 911 and

reported a male in his 50s or 60s, wearing a gray shirt or sweater was in a back lot threatening people with a knife. (City Defendants' Supplemental Excerpts of Record ("SEOR") at 208.)

Mr. Yoon also told Simmie Barber, who worked at The Body Shop, that he had seen Nehad in the alley with a knife that evening. (SEOR at 139:4-18.) Mr. Barber reported that after Nehad had confronted Mr. Yoon, Nehad came over to The Body Shop. (SEOR at 140:5-13.) Mr. Barber told Nehad that he could not come in that night and Nehad showed Mr. Barber what Mr. Barber believed to be the tip of a knife in his pocket. (SEOR at 140:9-17.)

B. The Arrival of Officer Browder

Officer Browder responded to the call regarding the person threatening people with a knife. (EOR at 288:19 – 290:9; 732:2-9; 750:18-22; SEOR at 208.) Police dispatch had assigned the call as a priority 1, the highest possible priority. (EOR at 749:3-13; 750:20-22.) Officer Browder received a description of the suspect, Nehad, as being an Asian male wearing a gray sweater and gray shorts. (EOR at 290:10-17; 732:10-17.) Officer Browder was also informed that the suspect was last seen in the alley and that he had threatened the reporting party (Mr. Yoon) with a knife. (EOR at 292:9-22; 733:9-22.)

Upon his arrival on scene, Officer Browder quickly noted that there were two individuals in the parking lot nearby. (EOR at 294:8-16; 735:8-16.) Officer

Browder saw Nehad shortly after Officer Browder turned his vehicle into the alley. (EOR at 295:10-17; 736:10-17.) Officer Browder identified Nehad, confirmed with dispatch the description of the suspect and confirmed the description matched the person he saw in the alley. (EOR at 297:9 – 298:2.) After he confirmed that Nehad matched the description of the suspect, Officer Browder noticed what appeared to be a knife in Nehad's hand. (EOR at 738:3-10.)

C. Nehad's Continued Movement Toward Officer Browder

Mr. Yoon, the bookstore clerk who first encountered Nehad and called 911, stated that after Officer Browder arrived and got out of the patrol car, he heard Officer Browder immediately say "Stop. Drop it" or words to that effect. (EOR at 763:22 – 764:18.) Another witness, Alberto Galindo, stated Officer Browder got out of his vehicle and yelled "Stop" and "Drop it" at least two or three times. (EOR at 724:5 -725:6; 726:8-15; 727:13-16.) A third witness, Andre Nelson, said Officer Browder put out his hand like a "stop hand" after he got out of his vehicle. (SEOR at 200:4-9; 203:3-7.) Mr. Nelson does not recall whether Officer Browder provided a verbal command as well. (SEOR at 200:10-12; 203:13-15.) At the time Officer Browder issued these warnings, Nehad was only ten paces away. (SEOR at 201:6-9.) Officer Browder does not recall if he told Nehad "Stop, police" or something similar. (EOR at 302:22 – 303:2.)

Approximately 33 seconds passed between the time Officer Browder pulled into the alley and when he discharged his weapon. (EOR at 694:1-3; SEOR at 214; 216.) During that time, Nehad advanced towards Officer Browder's vehicle from an original distance of 50 feet and 7 inches. (EOR at 693:4-6.) Nehad maintained a steady pace as he approached, crossing the alley towards Officer Browder and the nearby civilians until Officer Browder fired his first and only shot. (EOR at 692:25 – 693:10; 698:3-8; 737:2-22; SEOR at 214; 216). After exiting his vehicle, Officer Browder had less than five seconds to react to Nehad's steady progress before Officer Browder ultimately fired his weapon. (EOR at 693:24-25.)

To Officer Browder, Nehad appeared to be steadily approaching, with his eyes open, and with his focus on Officer Browder. (EOR at 742:6-15.) When Officer Browder fired his service weapon, Nehad had come significantly closer to him; Nehad moved from a distance of 16 feet 4 inches to 18 feet away from Officer Browder to a distance of 15 feet 4 inches to 17 feet away from Officer Browder. (EOR at 693:16-18.) Plaintiffs' expert, Roger Clark, does not dispute these distance measurements or that Nehad was still moving at the time he was shot. (SEOR at 176:3-7; 178:17-19; 214; 216.) Clark also agrees that Nehad was heading "in the general direction" of Officer Browder. (EOR at 471:6-16.)

D. The Perception of a Knife

Several individuals that evening believed that Nehad had a knife. Andre Nelson, the witness who saw Officer Browder put up his hand in a "stop" manner, and who had training as military police, observed Nehad fiddling with a silver, shiny object in his hand. (SEOR at 200:4-19; 202:1-24; 204:7-13.) Mr. Nelson thought it was a weapon; that it could have been a gun, a knife, or ninja stars. (SEOR at 204:14-21.) After the shooting, Mr. Nelson originally told officers that he thought Nehad had shot himself, because the circumstances observed by Mr. Nelson led him to believe that Nehad could have had a gun. (SEOR at 202:14-20.)

Prior to the shooting, the bookstore clerk Andrew Yoon, also saw Nehad pull a five to eight-inch knife from a backpack and unsheath it. (EOR at 759:7-9; 765:1-5.) Nehad also flashed his knife prior to the shooting at an employee at The Body Shop. (SEOR at 140:5-17.)

Officer Browder also believed that Nehad was armed with a knife. After Officer Browder confirmed the suspect's description with dispatch, Officer Browder noticed what he believed to be a knife in Nehad's hand. (EOR 738:3-10; 741:18-19; 746:1-5.) Officer Browder believed that because of the way Nehad handled the metallic silvery object in his hand, that Nehad was walking toward Officer Browder to stab him. (EOR at 742:10-25; 743:10-19; 745:12-18.)

E. Officer Browder's Reaction to a Threat

Officer Browder was faced with a life-threatening scenario: Nehad was reported to be armed with a knife, had threatened Andrew Yoon, and was now steadily approaching Officer Browder, all while manipulating a bright metallic object with his hand and keeping his eyes focused on Officer Browder. (EOR at 733:16-22; 734:4-7; 742:6-15; 759:7-9; SEOR at 204:7-13.) There were also civilians in the area. (EOR at 726:8-21; 735:8-11; SEOR at 199:17-19; 201:6-9.)

Based on his training and experience, Officer Browder feared the immediate threat posed by the suspect armed with what he believed was a knife. Officer Browder knew from his training regarding the 21-foot rule that a suspect can close a 21-foot distance before an officer can react. (EOR at 751:12 – 752:7.) Trained officers know reaction time in response to a perceived threat must account for the time to draw a weapon, raise, aim and shoot.

Officer Browder drew his weapon just after he exited his vehicle. (EOR at 739:16 – 740:5.) Officer Browder estimated it was two or three seconds between the time he got out of his car and when he fired his weapon. (EOR at 743:2-9.) In that short time, he quickly assessed the situation, and saw Nehad "aggressing" him with what Officer Browder believed was a knife. (EOR at 743:10-19.) Officer Browder believed the knife was pointed at him. (EOR at 745:15-25.) Officer Browder testified:

> He was looking at me. . . .
> . . . .
> [H]e had what appeared to me the knife in his hand . . . .
> . . . .
> He didn't slow down. When I saw him as he was aggressing me, he didn't slow down. . . .
> . . . .
> [I]t appeared to me he was definitely focusing on me and was walking towards me with that purpose -- with a purpose. . . .
> . . . .
> I felt that he was walking - - he was walking to stab me with the knife because that's what I saw. That's what I saw in his hand.

(EOR at 741:5; 741:18-19; 742:8-9; 742:13-15; 742:18-20.)

Approximately 33 seconds passed between the time Officer Browder pulled into the alley and when he discharged his weapon. (EOR at 694:1-3; SEOR at 214; 216.) It took Officer Browder approximately .83 seconds to raise an un-holstered weapon, point, and shoot one round. (EOR at 693:11-12; 694:4-7; SEOR at 118:21-23.) It takes an average officer 1.5 seconds to un-holster, raise, aim, and shoot a weapon. (EOR at 694:4-7.) Plaintiffs' expert, Roger Clark, agrees that Nehad was approximately 17 feet from Officer Browder at the time of the shooting. (SEOR at 176:3-9.) At a distance of 17 feet, the suspect could reach Officer Browder in 1.35-1.91 seconds. (SEOR at 149:6-9.) This quick-paced scenario elapsed in a mere 4.79 seconds from the time Officer Browder got out of his vehicle and the time he fired a single shot. (EOR at 693:24-25.) After the incident, it was learned that Nehad had been holding a pen, not a knife.

As the District Court noted:

> [V]ideo shows the suspect [Nehad] appear and walk at steady pace toward Officer Browder's vehicle. The video shows Officer Browder exit his vehicle and the suspect continue to advance toward Officer Browder. The video shows Officer Browder shoot the suspect at a distance of between fifteen and twenty feet. The video shows the suspect begin to slow less than a second before he was shot by Officer Browder.

(EOR at 5:13-18; SEOR at 214; 216.)

V. STATEMENT OF THE CASE

Plaintiffs filed this lawsuit on June 24, 2015. (EOR at 795.) On August 28, 2015, they filed the Second Amended Complaint alleging nine causes of action: (1) deprivation of civil rights under 42 U.S.C. § 1983 (Fourth Amendment); (2) deprivation of civil rights under 42 U.S.C. § 1983 (Fourteenth Amendment); (3) deprivation of civil rights under 42 U.S.C. § 1983 (*Monell*); (4) deprivation of civil rights under 42 U.S.C. § 1983 (Supervisory Liability); (5) deprivation of civil rights/Bane Act (Cal Civ. Code § 52.1); (6) deprivation of civil rights/custom and practice (Cal. Civ. Code § 52.3); as well as the common law claims of (7) assault and battery; (8) negligence; and (9) wrongful death. (EOR at 773 – 74.) Plaintiffs named as defendants Shelley Zimmerman, Neal N. Browder, and the City of San Diego. City Defendants filed their Answer to Plaintiffs' Second Amended Complaint on October 30, 2015. (SEOR at 274.)

On March 16, 2017, City Defendants moved for partial summary judgment. (SEOR at 271; 239; 222.) Plaintiffs filed their opposition on April 14, 2017. (EOR

at 184.) City Defendants filed their reply on April 28, 2017. (SEOR at 117; 50.) The Court held oral argument on the motion on August 16, 2017. (SEOR at 1.) On September 25, 2017, November 3, 2017, and December 8, 2017, Plaintiffs filed Notices of Supplemental Authority in Opposition to Motion for Partial Summary Judgment. (EOR at 28, 65, 77.) On September 28, 2017, November 9, 2017, and December 13, 2017, City Defendants filed Responses to the Notice of Supplemental Authority in Opposition to Motion for Partial Summary Judgment. (SEOR at 46, 42, 38.)

After an opportunity for a full briefing of the issues and oral argument, the District Court granted City Defendants' Motion for Summary Judgment on all claims on December 18, 2017. (EOR at 2.) In its opinion the District Court thoroughly addressed the evidence in the record, including video evidence, and found that Officer Browder's actions were objectively reasonable. Judgment in favor of City Defendants was entered on December 18, 2017. (EOR at 1.) Plaintiffs filed a Notice of Appeal on January 9, 2018. (EOR at 20.)

VI. STANDARD OF REVIEW

"A district court's grant of summary judgment is reviewed de novo." *Brady v. Gebbie*, 859 F.2d 1543, 1551 (9th Cir. 1988). The appellate courts can affirm the district court on any basis supported by the record, whether or not the district court decision relied on the same grounds or reasoning. *Helvering v. Gowran*, 302 U.S.

238, 245 (1937) ("[I]f the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."); *United States v. Fonseca-Martinez*, 36 F.3d 62, 65 (9th Cir. 1994) ("The court of appeals may affirm so long as there exists any ground, fairly supported in the record, that supports the district court's ruling.").

Summary judgment is appropriate if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." ." Fed. R. Civ. P. 56(a). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Where the plaintiff bears the burden of proof at trial, summary judgment for the defendant is appropriate if the defendant shows that there is an "absence of evidence" to support the plaintiff's claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998). The movant has the initial burden of demonstrating that there is no issue of material fact and that summary judgment is proper. *Adickes v. S.H. Kresss & Co.*, 398 U.S. 144, 157 (1970); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

If the movant met his or her burden, the burden then shifts to the non-movant to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at

324. The non-movant does not meet this burden by showing "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient . . . ." *Anderson*, 477 U.S. at 252. Accordingly, the non-moving party cannot oppose a properly supported summary judgment by "rest[ing] upon mere allegation or denials of his [or her] pleading . . . ." *Id.* at 256. **The non-movant must go beyond the pleadings to designate specific facts showing that there are genuine factual issues** that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. If the non-movant fails to make a sufficient showing of an element of his or her case, the movant is entitled to a judgment as a matter of law. *See Celotex*, 477 U.S. at 325.

VII. SUMMARY OF ARGUMENT

The District Court properly found that Plaintiffs presented no genuine issue of material fact in support of their claims. In granting summary judgment, the District Court examined the evidence before it, including the videos. Plaintiffs offer no evidence calling into question the City Defendants' evidence of measurements of time, distance, or Nehad's speed. Plaintiffs now attempt to manufacture a triable issue of fact by arguing that the District Court blindly accepted the City Defendants' version of facts. However, when the evidence to

which Plaintiffs cite, including the videos, is actually analyzed, it does not dispute the City Defendants' facts. Plaintiffs also attempt to disguise their legal arguments as disputed facts.

Additionally, the District Court properly found that Officer Browder's use of force during the incident was reasonable. Officer Browder was responding to a hot call with the suspect reported to have been threatening people with a knife. In approximately 33 seconds, Officer Browder arrived on scene, saw the suspect, confirmed he matched the description, saw the suspect holding what Officer Browder believed was a knife, exited his vehicle, drew his weapon, observed the suspect continuing to approach him in what Officer Browder believed was an aggressive manner, and fired. All within 33 seconds. And Officer Browder had less than five seconds in between the time he exited his vehicle and when he had to decide whether to fire his weapon. Based on the totality of the circumstances facing him and in the very short amount of time Officer Browder had to make what he believed was a life or death decision, his actions were objectively reasonable.

Plaintiffs also focus their arguments on the alternate actions they believe Officer Browder should have taken in the less than five seconds he had from the time he got out of his vehicle and the time he fired a single shot. The relevant inquiry is not whether alternate uses of force were possible, but whether the use of

force in the instant, without the benefit of hindsight, was reasonable. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

Considering the overwhelming evidence in the record, Plaintiffs cannot make out a claim for a Fourth or Fourteenth Amendment violation. Moreover, even if Plaintiffs could survive summary judgment on their Fourth and Fourteenth Amendment claims, Officer Browder is entitled to qualified immunity as their claimed rights were not clearly established. *S. B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017). None of the cases Plaintiffs point to are sufficiently analogous to the facts presented here. Therefore, summary judgment on the clearly established prong was proper as well.

With respect to Plaintiffs' *Monell* and supervisory liability claims, without an underlying constitutional violation, the District Court was correct to dismiss those claims. Plaintiffs failed to present any evidence that any policy or deficient training was a "moving force" behind Officer Browder's decision to use deadly force in this case. Therefore, summary judgment in favor of the City and Chief Zimmerman on these claims was also proper.

Finally, because the District Court found that Officer Browder acted reasonably, it was proper for the court to enter summary judgment in favor of City Defendants on Plaintiffs' state law claims.

VIII. ARGUMENT

A. The District Court Properly Evaluated the Evidence to Determine the Undisputed Material Facts

"At the summary judgement stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48, (1986) (emphasis in original).

To avoid summary judgment, the nonmoving party must designate which specific facts show that there is a genuine issue for trial. *Id.* at 256; *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989). To demonstrate an issue of material fact the nonmoving party must cite to "evidence favoring the nonmoving party [sufficient] for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. Merely asserting that the moving party lacks credibility "has no bearing on summary judgment." *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987). With the appropriate standard in mind, and the availability of video evidence, Plaintiffs' allegations and evidence do not create a genuine dispute of material fact.

Here, the District Court viewed "the facts in the light most favorable to Plaintiffs," properly evaluated the evidence, and determined that there was no triable issue of material fact. (EOR at 8:23.) The material facts relevant to the District Court's analysis are undisputed: Officer Browder responded to a 911 call regarding a man threatening people with a knife; Officer Browder spotted the suspect (Nehad) and confirmed the description matched; Officer Browder saw the suspect with what Officer Browder believed was a knife; the suspect advanced towards Officer Browder with the shiny object in his hand; Officer Browder believed the suspect was going to stab him with a knife; the time between when Officer Browder arrived at the alley and the time he fired his service weapon was approximately 33 seconds; less than five seconds elapsed between the time Officer Browder got out of his patrol vehicle and the time he fired; and Nehad was approximately 17 feet from Officer Browder at the time of the shooting. (EOR at 3-5.) Plaintiffs provided no evidence that disputed any of these material facts.

Plaintiffs argue that the District Court viewed the evidence in the light most favorable to City Defendants. However, Plaintiffs point to no evidence that supports their hypothesis. For example, Plaintiffs contend that the District Court improperly found that Officer Browder thought that Nehad had a knife. (Appellants' Opening Brief ("AOB") at 22.) The evidence Plaintiffs cite in support of their claim does not dispute the District Court's finding.

Plaintiffs' argument that it was ultimately learned after the incident that Nehad held a pen instead of a knife does not dispute that Officer Browder and several others that night thought that Nehad had a knife. Plaintiffs dismissively posit that "a pen does not look like a knife." Yet, several individuals that evening believed Nehad had a knife. Andrew Yoon believed Nehad had a knife. (EOR at 759:7-9.) Andre Nelson, who had training as military police, observed Nehad fiddling with a silver, shiny object in his hand that he thought could have been a gun, knife, or ninja stars. (SEOR at 200:4-19; 202:1-24; 204:16-21.) Simmie Barber thought Nehad had a knife. (SEOR at 140:14-17.) And Officer Browder also believed that Nehad was armed with a knife. (EOR 738:3-10; 741:18-19; 746:1-5.)

Nehad had also convinced others prior to the date of this incident that he had a knife. On April 24, 2015, Nehad threatened to stab a caller while in the Midway District. (SEOR at 164.) On April 25, 2015, Nehad was detained by police after a hotel security guard reported Nehad had threatened him with a knife. (SEOR at 134.) The weapon was in fact a pen. (SEOR at 135.) Nehad was also contacted in the Midway District after it was reported that a man was threatening people with a weapon (SEOR at 129.) Therefore, it is not unusual that a pen could be mistaken for a knife.

Additionally, that a police officer receives training to differentiate weapons from ordinary objects also does not dispute that Officer Browder thought that Nehad had a knife. Several witnesses, including one who had training as a military police officer, also thought Nehad had a knife.

Plaintiffs' argument that Officer Browder's belief, formed in the few seconds he had to assess and react to the situation, is contradicted by a post-incident interview in which Officer Browder stated that there were no weapons at the scene is also flawed. First, Plaintiffs argue that Officer Browder's post-incident statements which were taken after he had learned that Nehad did not have a knife is conclusory proof that Officer Browder could not have believed that he saw Nehad with a knife during the incident. However, those statements were taken after the incident and after Officer Browder learned that Nehad did not have a knife as Officer Browder was administering first aid. That information, obtained only after the incident, informed and influenced Officer Browder's post-incident statements.

The excerpts cited by Plaintiffs do not examine what Officer Browder thought during the incident, before he learned that Nehad had a pen and not a knife. Rather, the evidence shows that Officer Browder told officers during a post-incident safety walk-through at the scene that there were no outstanding weapons, that he did not see any weapons during the post-incident walk through; and that, ultimately, there was not a weapon. The information Officer Browder learned post-

incident that led to these statements does not contradict what Officer Browder thought at the time he made the decision to shoot.

Nor do the videos of the incident dispute any of the material facts the District Court relied on in reaching its decision. First, nothing in the videos "clearly contradict" any of the material undisputed facts. Additionally, the District Court evaluated the videos and concluded from viewing them that:

> The video shows the suspect appear and walk at steady pace toward Officer Browder's vehicle. The video shows Officer Browder exit his vehicle and the suspect continue to advance toward Officer Browder. The video shows Officer Browder shoot the suspect at a distance of between fifteen and twenty feet. The video shows the suspect begin to slow less than a second before he was shot by Officer Browder.

(EOR at 5.)

Accordingly, the video evidence does not create a triable of issue of fact and does not warrant a reversal of the District Court's order.

B. The District Court Properly Determined that Officer Browder Acted Reasonably and Did Not Violate Nehad's Fourth Amendment Rights

"A Fourth Amendment claim of excessive force is analyzed under the framework outlined by the Supreme Court in *Graham v. Connor*." *Smith v. City of Hemet*, 394 F.3d 689, 700 (9th Cir. 2005) (en banc). Under *Graham*, the relevant inquiry is "whether the officers' actions are 'objectively reasonable' considering the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The

subjective "good faith" of the officers is irrelevant. *Id.* "This analysis 'requires balancing the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the force used was objectively reasonable under the circumstances.'" *Davis v. City of Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007) (quoting *Smith*, 394 F.3d at 701).

"Factors we consider in assessing the government interests at stake include [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." *Davis*, 478 F.3d at 1054 (citation omitted); *see also Graham*, 490 U.S. at 396. "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 forced against was emotionally disturbed." *Glenn v. Washington Cty*, 673 F.3d 864, 872 (9th Cir. 2011). "The 'most important' factor is whether the individual posed an 'immediate threat to the safety of the officers or others.'" *Id.*

"Whether the use of deadly force is reasonable is highly fact-specific . . . but the inquiry is an objective one . . . . A reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable." *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010).

> 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 . . . 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 (citations omitted).

Moreover, in determining what an objectively reasonable officer would do, the "critical inquiry is what [the officer] perceived." *Wilkinson*, 610 F.3d at 551. "Where an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or *should* have accurately perceived that fact." *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011).

With this framework in mind, application of the *Graham* factors to this case supports the District Court's finding that Officer Browder acted reasonably, and, therefore, there was no constitutional violation.

1. The Severity of the Crime

"The government has an undeniable legitimate interest in apprehending criminal suspects, . . . and that interest is even stronger when the criminal is . . . suspected of a felony, which is by definition a crime deemed serious by the state." *Miller v. Clark Cty.*, 340 F.3d 959, 964 (9th Cir. 2003); *see United States v. Hensley*, 469 U.S. 221, 229 . . . (1985) (describing "the strong government interest in solving crimes and bringing offenders to justice"). In *Miller v. Clark County*, the plaintiff was wanted for a misdemeanor traffic infraction and a prior felony,

"attempting to flee police by driving a car with a wanton or willful disregard for the lives of others." *Id.* at 960, 965. The Ninth Circuit held in that case that the government's interest in apprehending a suspected felon was strong. *Id.*

Here, Nehad was suspected of threatening Mr. Yoon and several others with a knife. (EOR at 759:7-9; 760:3-7; 760:14-20; 760:25 – 761:9; SEOR at 140:5-17.) Nehad said he was going to kill people. (EOR at 760:1-3.) Officer Browder was responding to a hot call to investigate a serious crime and reasonably anticipated that he could encounter someone with a knife. (EOR at 288:19 – 290:9, 732:2-9; 750:18-22; SEOR at 208.) Police dispatch had assigned the call as a priority 1, the highest possible priority. (EOR at 749:3-13; 750:20-22.) Moreover, the dispatcher activated the emergency tone to limit radio traffic and warn officers not to use the radio for non-urgent inquiries or communications. (SEOR at 153 – 154.) And as the District Court noted, "Officer Browder had no indication that the dispatch call involved mental illness or emotional distress." (EOR at 8-9.) Therefore, the government interest in apprehending a person suspected of threatening to kill others and who had brandished a knife at several people is very strong.

Plaintiffs argue that the severity of the crime was not severe because it was a "417," referring to California Penal Code section 417. That section makes it a misdemeanor to draw or exhibit a deadly weapon. Cal. Penal Code § 417. Plaintiffs argument is an oversimplification and a vast understatement of the severity of the

crime presented. First, Plaintiffs' characterization of the crime as a 417 relies upon what a remote dispatcher not on scene typed into a computerized dispatch program. It is not relevant at all to the actual danger presented to the officer in the field or the true nature of the crime.

Second, Nehad's threatening actions could have also been a violation of California Penal Code sections 245(a) (assault with a deadly weapon) or 422 (criminal threats), both of which could be charged as a misdemeanor or felony. And regardless of whether Nehad's actions could be classified as a felony or a misdemeanor, his actions posed a serious threat and a misdemeanant can be just as a dangerous as a felon. *See e.g. Tennessee v. Garner*, 471 U.S. 1, 14 (1985) ("the assumption that a 'felon' is more dangerous than a misdemeanant is untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.")

Plaintiffs cite to *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), to support their argument that the crime was not severe. However, that case is distinguishable because the Ninth Circuit did not analyze the severity of the crime factor because it was not raised on appeal and it was undisputed that the suspect had not committed a crime. *Id.* at 838. Rather, the *George* Court focused on whether the suspect, a 64-year-old man on his patio with a walker and holding a gun that was pointed down, posed an immediate threat to officers responding to a call regarding a

domestic disturbance. *Id.* at 832, 838-39. Therefore, *George v. Morris* is not persuasive authority in this context; the court's analysis was on a different issue.

Plaintiffs also cite to *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), in support of their argument that Nehad's threatening others with a knife was not a severe crime. *Harris v. Roderick*, which dealt with claims regarding an excessive use of force during the Ruby Ridge incident, is distinguishable because the court focused on the immediacy of the threat and not the severity of the crime. *Id.* at 1203. Moreover, the crime at issue had occurred the day before the use of force at issue, not minutes later. *Id.* Here, the 911 call from Mr. Yoon came in at 12:06 a.m. (SEOR at 208.) Officer Browder arrived at approximately 12:09 a.m. and fired approximately 33 seconds later. (SEOR at 208; EOR at 694:1-3, SEOR at 216; 214.) Accordingly, *Harris v. Roderick* does not apply here.

2. The Immediacy of the Threat

The immediacy of the threat posed by the Plaintiff is the "most important" factor in analyzing the reasonableness of an officer's response. *Glenn*, 673 F.3d at 872; *George*, 736 F.3d at 838. In determining what an objectively reasonable officer would do, the "critical inquiry is what [the officer] perceived." *Wilkinson*, 610 F.3d at 551. Arguments as to what the officers **should** have perceived or felt are immaterial. Officers must be held to a standard of reasonable conduct based on the officer's actual perception and objective conduct, rather than penalizing

officers for failing to apprehend all circumstances in quick, highly charged circumstances. *Graham*, 490 U.S. at 396-97; *Wilkinson*, 610 F.3d at 551. "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." *George*, 736 F.3d at 838.

Here, when the totality of the circumstances is evaluated, Officer Browder reasonably believed that Nehad posed an immediate threat to his safety and others in the area. Nehad was reported to be armed with a knife, had threatened to kill people, and was now steadily approaching both Officer Browder and civilians, all while manipulating a bright metallic object with his hand and keeping his eyes focused on Officer Browder. (EOR at 733:16-22; 734:4-7; 742:6-15; 759:7-9; SEOR at 204:7-13.) Based on his training and experience, Officer Browder feared the immediate threat posed by the suspect armed with what Officer Browder believed was a knife. Officer Browder knew from his training regarding the 21-foot rule that a suspect can close a 21-foot distance before an officer can react. (EOR at 751:12 – 752:7.) Trained officers know reaction time in response to a perceived threat must account for the time to draw a weapon, raise, aim and shoot.

In that short time after Officer Browder exited his vehicle, he quickly assessed the situation, saw Nehad "aggressing" him with what Officer Browder

believed was a knife and everything happened quickly. (EOR at 743:10-19.)

Officer Browder testified:

> He was looking at me. . . .
> . . . .
> [H]e had what appeared to me the knife in his hand . . . .
> . . . .
> He didn't slow down. When I saw him as he was aggressing me, he didn't slow down. . . .
> . . . .
> [I]t appeared to me he was definitely focusing on me and was walking towards me with that purpose -- with a purpose. . . .
> . . . .
> I felt that he was walking - - he was walking to stab me with the knife because that's what I saw. That's what I saw in his hand.

(EOR at 741:5; 741:18-19; 742:8-9; 742:13-15; 742:18-20.)

Approximately 33 seconds passed between the time Officer Browder pulled into the alley and when he discharged his weapon. (EOR at 694:1-3; SEOR at 214; 216.) Plaintiffs' expert, Roger Clark, agrees that Nehad was approximately 17 feet from Officer Browder at the time of the shooting. (SEOR at 176:3-9.) At a distance of 17 feet, the suspect could reach Officer Browder in 1.35-1.91 seconds. (SEOR at 149:6-9.) This quick-paced scenario elapsed in less than five seconds between the time Officer Browder got out of his vehicle and the time he fired a single shot. (EOR at 693:24-25.) And as the District Court noted, the video confirms that Nehad was walking at a steady pace towards Officer Browder's vehicle and that Officer Browder shot when the Nehad was between fifteen and twenty feet away from him. (EOR at 5; 13-18; SEOR at 214; 216.)

Plaintiffs argue that there was no immediate threat to Officer Browder, because Nehad was armed with a pen and not a knife. As discussed above, Plaintiffs attempt to manufacture a disputed fact regarding what Officer Browder believed. Plaintiffs' evidence and "facts" disputing Officer Browder's belief are not evidence or facts at all, but, instead, Plaintiffs' legal theory and argument. None of the evidence Plaintiffs cite to support their theories disputes Officer Browder's belief. "Plaintiffs' sanitized version of the incident cannot control on summary judgment when the record as a whole does not support that version." *Wilkinson*, 610 F.3d at 55; *see also Bowles v. City of Porterville*, No. F CV 10-0937 LJO GSA, 2012 WL 1898911, at *7 (E.D. Cal. May 23, 2012), *aff'd* 571 Fed. Appx. 538 (9th Cir. 2014) (a court must "distinguish between Plaintiffs asserted 'facts' and Plaintiffs' arguments disguised as allegedly disputed material fact.")

Moreover, that it was ultimately learned after the incident that Nehad held a pen instead of a knife does not dispute that Officer Browder and several others thought that Nehad had a knife. The issue is whether it was objectively reasonable for Officer Browder to believe that Nehad held a knife. The evidence in the record supports this finding. Several individuals that evening believed that Nehad had a knife. (EOR at 759:7-9; SEOR at 200:4-19; 202:1-24; 204:7-21; 140:5-17.) Officer Browder also believed that Nehad was armed with a knife. (EOR 738:3-10;

741:18-19; 746:1-5.) Therefore, it is not unusual and not unreasonable that a pen could be mistaken for a knife.

Additionally, as set forth above, Plaintiffs' argument that Officer Browder's belief is contradicted by a post-incident interview in which Officer Browder stated that there were no weapons at the scene is also flawed. Those statements were part of a safety walk through taken at the scene after Officer Browder had administered first aid to Nehad and learned that Nehad did not have a knife. That information, obtained after the incident, informed and influenced Officer Browder's post-incident statements: he said he didn't see a weapon because he had learned that there was no weapon, only a metallic pen. The excerpts cited by Plaintiffs do not examine what Officer Browder thought during the incident, before he learned that Nehad had a pen and not a knife.

> All of the actions taken by Officer Browder were consistent with his stated belief that the subject had a knife in his hand . . . . The only evidence in this record that Officer Browder's belief was not reasonable is the discovery that the "pointy metallic object" was a pen and not a knife, a fact known to Officer Browder only **after** the decision to shoot had been made.

(EOR at 9-10) (emphasis added).

Plaintiffs also argue that officers are trained to distinguish weapons from other objects and that Officer Browder should have been able to distinguish a knife from a pen. (AOB at 32.) However, courts have previously rejected such arguments and expert opinions. In *Bowles v. City of Porterville*, Plaintiffs' expert

Roger Clark (Plaintiffs' expert in this case as well) "opine[d] that if Mr. Bowles had a bottle of cologne in his hand at the time of the shooting, Officer McGuire could not have reasonably mistaken the bottle of cologne for a firearm . . . because officers are trained to determine the difference between an actual weapon and an imaginary one." *Bowles*, 2012 WL 1898911, at *3. In *Bowles v. City of Porterville*, the District Court held that the officer's use of deadly force when he saw the suspect turn towards the officer with something shiny in his hand which the officer mistook for a weapon was reasonable. *Id.* at *8-9. The *Bowles* Court noted that "[a]lthough hindsight demonstrates that Mr. Bowles was holding a cologne bottle and not a weapon, and posed no threat to Officer McGuire, the proper inquiry does not consider the reasonableness of Officer McGuire's actions with the clarity of hindsight." *Id.* at *9. Accordingly, Mr. Clark's hypothesis, while a suggestive and interesting argument, is useless because it has no bearing on the relevant legal inquiry.

3. Whether the Suspect Was Resisting or Evading Arrest

Plaintiffs argue that the District Court failed to analyze the third factor, whether Nehad was resisting or evading arrest. (AOB at 36-38.) However, the District Court did analyze this issue. (EOR at 10.) The District Court noted that there was evidence in the record that Officer Browder gave warnings to Nehad to "Stop. Drop It." (EOR at 10:19-21; 724:5 – 725:6; 726:8-15; 727:13-16; 763:22 –

764:18.) Officer Browder's inability to recall if he issued these warnings does not contradict what the witnesses testified that they heard.

Plaintiffs argue that Nehad did not attempt to flee or resist arrest in any way. Plaintiffs cite to *Glenn v. Washington County* in support of their argument that merely holding a knife is not sufficient resistance to warrant being shot with a beanbag shotgun. (AOB at 37.) This case is distinguishable. In *Glenn*, officers responded to a call regarding a suicidal teen with a pocketknife. *Glenn*, 673 F.3d at 867. The officers encountered the teen holding the knife to his own neck and issued commands to the teen to drop the knife. *Id.* at 868. Three minutes had elapsed between the time that the commands were given and the beanbag shotgun was fired. *Id.* at 873.

Here, Nehad was not holding the perceived knife at his own neck, but rather was manipulating it with his hands at waist level in front of him as he continued to walk towards Officer Browder. Nehad had also shown and threatened people with a knife shortly before the incident. Further, this incident occurred in approximately 33 seconds, not three minutes. Less than five seconds elapsed between the time Officer Browder exited his vehicle and when he fired a single shot. Therefore, *Glenn v. Washington* is not applicable to the facts presented here.

Plaintiffs also argue that it is possible that Nehad did not even know that Officer Browder was a police officer or that Nehad knew that Officer Browder was

going to arrest him. However, Nehad's perception is irrelevant in this analysis. Plaintiffs speculate about what Nehad knew: Where did Nehad intend to go? Did he see the police car? Did he recognize it was a police vehicle? Did he see the light bar on top? Did he recognize Officer Browder as a police officer? Did he hear or understand the commands? These questions are not critical to Officer Browder's assessment in less than five seconds of what he observed and believed. The "critical inquiry is what [the officer] perceived. *Wilkinson*, 610 F.3d at 551.

4. The Availability of Less Intrusive Alternatives

Plaintiffs argue Officer Browder failed to use less intrusive alternatives when he encountered Nehad that evening. While the evaluation of less intrusive alternatives is a factor that courts consider when analyzing the reasonableness of an officer's use of force:

> Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore . . . it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.

Brown v. U.S., 256 U.S. 335, 343 (1921).

"The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force." *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997) *superseded by rule on unrelated*

grounds as stated in Chroma Lighting v. GTE Prods. Corp., 127 F.3d 1136 (9th Cir. 1997).

"[T]he availability of a less-intrusive alternative will not render conduct unreasonable." *Wilkinson*, 610 F.3d at 551.

> Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Scott, 39 F.3d at 915.

Plaintiffs argue that Officer Browder could have used his Taser, mace, or collapsible baton. (AOB at 40.) Their expert, Mr. Clark, goes further and says that Officer Browder should have "tactically repositioned himself." (AOB at 36.) Plaintiffs argue that Officer Browder's failure to run and hide from Nehad or consider other alternatives is *per se* evidence that Officer Browder acted unreasonably. Their argument completely ignores the reality that less than five seconds elapsed between the time Officer Browder got out of his vehicle and the time he fired to protect himself and others in the area. Five seconds is not sufficient time to engaged in "detached reflection" and "pause to consider whether a

reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him." *Brown*, 256 U.S. at 343.

Moreover, Plaintiffs' argument that Officer Browder should have used his Taser because Nehad was within the 21-foot range of the Taser is flawed. (AOB at 41.) Plaintiffs fail to consider whether the Taser (or other alternatives) would have been an effective alternative given the circumstances. While it is possible that Officer Browder could have used his Taser, it is equally possible that one or both of the Taser probes could have missed Nehad and the Taser rendered ineffective. Meanwhile Nehad was continuing to approach Officer Browder and others in the area. Just because the use of the Taser was possible does not mean it was an appropriate alternative given the situation that Officer Browder faced. When an officer is facing an immediate threat of serious bodily injury or death, the officer is not required to take further risks for his personal safety or that of others. Nor is the officer required to engaged in detached reflection or metaphysical debate about what possibilities might exist that could save him from the threat he is facing. And more importantly, five seconds is insufficient time to engage in such debate and speculation about the infinite possibilities available in a life or death situation. Most people take longer than that to make insignificant decisions, such as choosing what to order for dinner.

5. Whether Warnings Were Feasible

A failure to warn, does not by itself, create a constitutional violation. Some warning is only required where feasible. *Tennessee*, 471 U.S. at 11-12; *Deorle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001). Nor is it required that the suspect hear the officer's warning. *Forrett*, 112 F.3d at 420. When a warning was feasible, directions to "stop the vehicle," or "put your hands up," have been held sufficient for Fourth Amendment purposes. *Wilkinson*, 610 F.3d at 551.

Here, there is evidence in the record that Officer Browder did give a warning. Mr. Yoon stated that he heard Officer Browder immediately say "Stop. Drop it" or words to that effect. (EOR at 763:22 – 764:18.) Mr. Galindo, stated Officer Browder got out of his vehicle and yelled "Stop" and "Drop it" at least two or three times. (EOR at 724:5 – 725:6; 726:8-15; 727:13-16.) While Officer Browder does not recall if he told Nehad "Stop, police" or something similar, (EOR at 302:22 – 303:2), that does not contradict what these other witnesses heard.

Whether Nehad heard or understood the warning is not dispositive of the issue, especially if Officer Browder had no reason to believe that Nehad had a mental illness or emotional distress. The Court only considers what Officer Browder knew at the time of the incident. *Graham*, 490 U.S. at 396; *Wilkinson*, 610 F.3d at 551.

Moreover, if Officer Browder did not issue a warning, the question becomes whether it was feasible for him to do so. As set forth above, Officer Browder was

on scene approximately 33 seconds before he fired and less than five seconds elapsed between when Officer Browder exited his vehicle and when he fired. He had very little time to assess the situation and react. *Glenn v. Washington*, which Plaintiffs cite in support of their argument that a warning was required, is distinguishable. In that case, three minutes had elapsed between the time officers arrived and when shots were fired. *Glenn*, 673 F.3d at 876. Moreover, the officers in that situation knew that the suspect was suicidal and intoxicated. *Id.* at 867. Here, Officer Browder did not have three minutes, he had 33 seconds, and less than five seconds from the time he got out of this vehicle and the time that he fired while Nehad continued to advance towards him. Officer Browder also had no information about Nehad's mental state at the time of the incident. Therefore, *Glenn v. Washington* is not applicable here.

6. The District Court Properly Weighed the Relevant Factors

The District Court properly weighed all the factors relevant to evaluating whether Officer Browder's use of force was reasonable. Plaintiffs do not provide sufficient evidence to dispute any of the material facts. Rather, Plaintiffs attempt to manufacture a dispute of material fact by disguising their arguments as disputed facts. "Plaintiffs' sanitized version of the incident cannot control on summary judgment when the record as a whole does not support that version." *Wilkinson*, 610 F.3d at 551.

As set forth in greater detail above, the cases cited by Plaintiff in support of their argument that Officer Browder's use of force was unreasonable are distinguishable. The facts presented in those cases are very different from the situation Officer Browder encountered on April 30, 2015. *Estate of Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017) is distinguishable. The *Lopez* Court found that there were several triable issues of material fact which must be decided by a jury. *Id.* at 1009. Here, there are no genuine disputes of material fact.

The District Court also properly distinguished *Deorle*, 272 F.3d 1272. The District Court evaluated *Deorle v. Rutherford*, in analyzing whether Officer Browder was entitled to qualified immunity because the law was not clearly established. (EOR at 16.) Moreover, the United States Supreme Court has held that "[as] for *Deorle*, this 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 v. Hughes*, 584 U.S. ___, 138 S.Ct. 1148, 1154 (2018).

Regardless, the District Court properly noted that the facts presented in *Deorle v. Rutherford* were significantly different from the facts presented here. (EOR at 17.) In *Deorle v. Rutherford*, the officers knew that the suspect was in distress and suicidal. *Deorle*, 272 F.3d at 1276. Over thirteen officers responded to the scene and Officer Rutherford observed the suspect for five to ten minutes. *Id.*

at 1276-1277. The suspect also complied with the commands to drop the weapon. *Id.* at 1277.

In this case, Officer Browder was responding to a call that someone had threatened Mr. Yoon with a knife and made statements about "killing people." Officer Browder reasonably believed that Nehad posed an immediate threat to his safety and others in the area. Nehad was reported to be armed with a knife, had threatened to kill people, and was now steadily approaching both Officer Browder and civilians, all while manipulating a bright metallic object with his hands and keeping his eyes focused on Officer Browder. (EOR at 733:16-22; 734:4-7; 742:6-15; 759:7-9; SEOR at 204:7-13.) Officer Browder also confirmed with dispatch that the description of the suspect matched. (EOR at 297:9 – 298:2.)

Based on his training and experience, Officer Browder feared the immediate threat posed by the suspect armed with what he believed to be a knife. Officer Browder knew from his training regarding the 21-foot rule that a suspect can close a 21-foot distance before an officer can react. (EOR at 751:12 – 752:7.) Trained officers know reaction time in response to a perceived threat must account for the time to draw a weapon, raise, aim and shoot. In weighing the *Graham* factors, both case law and the evidence in the record demonstrate that Officer Browder used reasonable force and the District Court properly found that Officer Browder was

entitled to summary judgment in his favor because there was no violation of Nehad's Fourth Amendment right.

C. The District Court Properly Determined There Was No Fourteenth Amendment Violation

The Fourteenth Amendment confers upon parents a substantive due process right "to the companionship of a child." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168-69 (9th Cir. 2013).

> Police conduct violates due process if it "shocks the conscience." [Citation omitted.] Conscience-shocking actions are those taken with (1) "deliberate indifference" or (2) a "purpose to harm ... unrelated to legitimate law enforcement objectives. [Citation omitted.] The lower "deliberate indifference" standard applies to circumstances where "actual deliberation is practical." [Citation omitted.] However, in circumstances where an officer cannot practically deliberate, such as where "a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives."

A.D. v. California Highway Patrol, 712 F.3d 446, 453 (9th Cir. 2013).

To determine whether the deliberate indifference or purpose to harm standard applies, the "'critical consideration [is] whether the circumstances are such that "actual deliberation is practical."'" *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008) (quoting *Moreland v. Las Vegas Metropolitan Police Dep't*, 159 F.3d 365, 372 (9th Cir. 1998)). Courts distinguish between situations which "evolve in a time frame that permits the officer to deliberate before acting and those that escalate so quickly that the officer must make a snap judgment." *Id.*

Where the quick pace of events prevents an officer from actual deliberation, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998).

In evaluating whether there is a purpose to harm, the Ninth Circuit has clarified that "where force against a suspect is meant only to 'teach him a lesson' or to 'get even'" it is possible a "reasonable factfinder would conclude the officer intended to harm, terrorize or kill." *Porter*, 546 F.3d at 1140-41 (quoting *Davis v. Township of Hillside*, 190 F.3d 167, 174 (3rd Cir. 2017)).

Here, Officer Browder had very little time to assess the situation and react. As examined extensively above, the exceedingly quick timeframe did not afford Officer Browder the necessary opportunity to deliberate. Additionally, as the District Court noted, there are no facts in the record to establish that Officer Browder acted with a purpose to harm unrelated to a legitimate law enforcement objective. Therefore, the District Court properly determined that there was no Fourteenth Amendment violation.

D. The District Court Properly Determined that Officer Browder Was Entitled to Qualified Immunity

1. The Law of Qualified Immunity

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity balances two important interests— the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Qualified immunity recognizes the potential for substantial social costs by shielding government officials from civil damages unless clearly established law proscribed the actions they took. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The protection of qualified immunity is needed because claims against government officials can "entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Id.* "Qualified immunity is important to society as a whole and . . . effectively is lost if a case is erroneously permitted to go to trial." *White v. Pauly*, 580 U.S. ___, 137 S.Ct. 548, 551 (2017).

As the *Harlow* Court aptly stated, suits against public officers "run against the innocent as well as the guilty . . . ." *Harlow*, 457 U.S. at 814. Thus, a ruling on qualified immunity is to be made at the earliest possible stage of litigation, because it is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). "The protection of qualified

immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231(quoting *Groh v. Ramirez*, 540 U.S. 551 (2004) (Kennedy, J., dissenting)).

The Supreme Court has set forth a two-part test for the qualified immunity analysis. "The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (citing *Saucier*, 533 U.S. at 201). If a constitutional right would have been violated under the plaintiff's version of the facts, "the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. Lower courts need not strictly follow the tiered sequence in analyzing qualified immunity, but instead may dispose of the issue at step two without addressing step one. *Pearson*, 555 U.S. at 236.

> In a Section 1983 action an officer will be denied qualified immunity:
>
> only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood her conduct to be unlawful in that situation.

Torres, 648 F.3d at 1123. "[T]here is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption

the plaintiff must present clear evidence to the contrary . . . ." *Gardenhire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000).

2. The District Court Properly Determined that Officer Browder Acted Reasonably and Did Not Violate Plaintiffs' Constitutional Rights

Qualified immunity leaves ample room for mistaken judgments, it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Saucier*, 533 U.S. at 202. When "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley*, 475 U.S. at 341. "This accommodation for reasonable error exists because **'officials should not err always on the side of caution' because they fear being sued."** *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (emphasis added) (citing *Davis v. Scherer*, 468 U.S. 183, 196 (1984)). Thus, a police officer is entitled to qualified immunity from suit for damages arising out of a constitutional violation if a reasonable officer possessing the same facts as the defendant officer could have reasonably believed that his conduct was lawful. As set forth above, there was sufficient undisputed evidence in the record to find that Officer Browder acted reasonably and the District Court properly determined that Officer Browder was entitled to summary judgment.

3. The Court Properly Determined that the Law Was Not Clearly Established

Under the second prong of the qualified immunity test, the court must determine whether the alleged violation of the Fourth Amendment right against excessive force "'was clearly established at the time of the officer's alleged misconduct.'. . . If not, the officer receives qualified immunity." *S. B.*, 864 F.3d at 1015. An officer's conduct violates clearly established law if at the time of the conduct "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotations omitted) (citing *Anderson*, 483 U.S. at 640).

Clearly established law should not be defined "at a high level of generality" but must be "particularized" to the facts of the case. *White v. Pauly*, 137 S. Ct. at 552 (citing *Ashcroft*, 563 U.S. at 742 and *Anderson*, 483 U.S. at 640). "We do not require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741.

> [T]he clearly established inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition," especially in the Fourth Amendment context, where "[i]t 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."

S.B., 864 F.3d at 1015 (quoting *Mullenix v. Luna*, 577 U.S. ___, 136 S.Ct. 305, 308 (2015)).

Here, the law was not clearly established to instruct Officer Browder that his conduct was unlawful. Plaintiffs cite to *Deorle v. Rutherford*, as prior precedent that Officer Browder on notice. The District Court properly determined that the facts presented in *Deorle v. Rutherford* were significantly different that the facts presented to Officer Browder. In *Deorle v. Rutherford*, the officers knew that the suspect was in distress and suicidal. *Deorle*, 272 F.3d at 1276. Over thirteen officers responded to the scene and Officer Rutherford observed the suspect for five to ten minutes. *Id.* at 1276-1277. The suspect also complied with the commands to drop the weapon. *Id.* at 1277.

In this case, Officer Browder was responding to a call that someone had threatened Mr. Yoon with a knife and made statements about "killing people." Officer Browder reasonably believed that Nehad posed an immediate threat to his safety and others in the area. Nehad was reported to be armed with a knife, had threatened to kill people, and was now steadily approaching both Officer Browder and civilians, all while manipulating a bright metallic object with his hands and keeping his eyes focused on Officer Browder. (EOR at 733:16-22; 734:4-7; 742:6-15; 759:7-9; SEOR at 204:7-13.) Officer Browder also confirmed with dispatch the description of the suspect matched. (EOR at 297:9 – 298:2.) And, as the District Court noted "Officer Browder was forced to react to the facts presented within

thirty seconds and was forced to decide what level of force was necessary within five seconds from exiting his patrol car." (EOR at 17:6-8.)

Therefore, *Deorle v. Rutherford*, is not particularized to the facts of this case such that it would have put Officer Browder on notice that his use of force here was objectively unreasonable. Moreover, the United States Supreme Court has cautioned against applying *Deorle* as precedent when analyzing the clearly established prong for qualified immunity: "[as] for *Deorle*, this 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*, 138 S.Ct. at 1154.

Plaintiffs also argue that *Glenn v. Washington*, also put Officer Browder on notice that his conduct was unreasonable. This case is distinguishable. In *Glenn*, officers responded to a call regarding a suicidal teen with a pocketknife. *Glenn*, 673 F.3d at 867. The officers encountered the teen holding the knife to his own neck and issued commands to the teen to drop the knife. *Id.* at 868. Three minutes had elapsed between the time that the commands were given and the beanbag shotgun was fired. *Id.* at 873. The facts presented in *Glenn v. Washington* are not particularized to the facts of this case. Accordingly, Plaintiffs' arguments that the law was clearly established such as to deny Officer Browder qualified immunity is unavailing. None of the cases Plaintiffs point to are sufficiently analogous to the

facts presented here as each is factually dissimilar in several crucial aspects: timing, behavior of the suspect, and threat posed by the suspect. Therefore, summary judgment on the clearly established prong was proper as well.

Plaintiffs also argue that no case precedent was required because the alleged constitutional violation here was obvious. Plaintiffs cite to *Torres v. City of Madera*, in support of their argument, stating that the law is clear that an officer cannot shoot an unarmed dangerous suspect dead. (AOB at 53.) However, Plaintiffs conveniently ignore the situation where an officer has probable cause to believe that the suspect poses a threat of serious harm as well as the factual dissimilarities, for example, that the suspect was known to be unarmed and was handcuffed and sitting in the back of a patrol car. *Torres*, 648 F.3d at 1128. As set forth in detail above, and as the District Court found, it was reasonable for Officer Browder to believe that Nehad posed an immediate threat to his safety as well as the safety of others in the area.

E. The District Court Properly Determined City Defendants Were Entitled to Summary Judgment on the *Monell* and Supervisory Liability Claims

"If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Here, the undisputed

material facts show that Officer Browder acted reasonably in the face of a perceived threat. Without an underlying constitutional violation, the District Court was proper to dismiss Plaintiffs' *Monell* and supervisory liability claims.

Additionally, Plaintiffs have not proffered sufficient, reliable or relevant proof to support these Monell/supervisory claims. "A municipality may be liable under § 1983 . . . where the constitutional deprivation was caused by the implementation or execution of 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *Muhammad v. San Diego Cty. Sheriff's Department*, No. 07-1430, 2007 WL 3306071, at *4 (S.D. Cal. Nov. 2, 2007) (quoting *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 691 (1978)). Evidence of a single, isolated or sporadic incident is an insufficient basis for a *Monell* claim. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). A complaint for liability pursuant to Section 1983 for municipal liability cannot rest solely on principals of respondeat superior. *Monell*, 436 U.S. at 659; *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). Similarly, supervisors cannot be held liable under a respondeat superior theory of liability for the conduct of subordinates. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Here, Plaintiffs failed to present any evidence that any policy or deficient training was a "moving force" behind Officer Browder's decision to use deadly

force in this case. Therefore, summary judgment in favor of the City and Chief Zimmerman on these claims was proper.

F. The District Court Properly Entered Summary Judgment on Plaintiffs' State Law Claims

1. California Civil Code Sections 52.1 and 52.3 Claims

A favorable summary judgment ruling in favor of Defendants in a Section 1983 action precludes further legal action pursuant to California Civil Code sections 52.1 or 52.3 ("Section 52.1" and "Section 52.3"). Absent any underlying constitutional violations, Plaintiffs' Section 52.1 and Section 52.3 claims fail as a matter of law. *See Sholtis v. City of Fresno,* No. CV F 09-0383 LJO GSA, 2009 WL 4030674, at *12-13 (E.D. Cal., Nov. 18, 2009) (dismissing Section 52.1 claim in the absence of valid constitutional claims); *see also Jaa v. City of Dublin*, No. 14-cv-03260-WHO, 2015 WL 1967344, at *5 (N.D. Cal. Apr. 30, 2015).

Plaintiffs' second amended complaint ("SAC") specifically premises their Sections 52.1 and 52.3 claims on Officer Browder's violation of the Fourth and Fourteenth Amendments. Section 52.1, also known as the Bane Act, provides for a claim against anyone who: "[I]nterferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state . . . ." Cal. Civ. Code § 52.1

"The word 'interferes' as used in the Bane Act means 'violates.'" *Austin B. v. Escondido Union Sch. Dist.*, 149 Cal. App. 4th 860, 883 (2007). For purposes of the "by threats, intimidation, or coercion" element, the alleged misconduct must involve threats, intimidation, or coercion **independent** of any threats, intimidation, or coercion inherent in the underlying constitutional violation. *Shoyoye v. County of Los Angeles*, 203 Cal. App. 4th 947, 959 (2012).

Courts in the Ninth Circuit have held that a plaintiff cannot bring a Bane Act claim alleging that a defendant used excessive force to "interfere" with a plaintiff's right to be free from excessive force. *See, e.g., Justin v. City & County of San Francisco*, No. C05-4812 MEJ, 2008 WL 1990819, at *9 (N.D. Cal. May 5, 2008).

> Section 52.1 is only applicable when a defendant intends by his or her conduct to interfere with a separate, affirmative right enjoyed by a plaintiff; **it does not apply to a plaintiff's allegation of use of excessive force absent a showing that the act was done to interfere with a separate state or federal constitutional right.**

Id. (emphasis added) (citing *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 334 (1998)); *see also Chavez v. Cty. of Kern*, No. 1:12-CV-01004 JLT, 2014 WL 412562, at *8 (E.D. Ca. Feb. 3, 2014). Moreover, under *Shoyoye v. County of Los Angeles*, there must be an intent to violate the law, not just an intent to take action. The intent must be "deliberate or spiteful" to be actionable. *Shoyoye*, 203 Cal. App. 4th 959.

With respect to the City, it can only be held liable under the Bane Act if the acts of the Officers themselves give rise to a Bane Act claim. Under California

Government Code section 815.2(b), "a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Cal. Gov't Code § 815.2(b).

Here, Plaintiffs allege wrongful acts by Officer Browder, but all such acts are in the context of the alleged use of excessive force. Plaintiffs fail to present any evidence which would indicate threats, intimidation, and coercion independent from the intimidation and coercion inherent in the alleged use of excessive force. Moreover, as set forth above, Officer Browder's actions were reasonable, therefore there can be no section 52.1 claim and summary judgment was appropriate. With respect to the Section 52.3 claim, which mimics a Section 1983 *Monell* claim, there was no unlawful pattern or practice that led to Officer Browder's actions and summary judgment on that issue was also proper.

2. The Assault and Battery Claims

"The elements of civil battery are: (1) defendant intentionally performed an act that resulted in a harmful or offensive contact with the plaintiff's person; (2) plaintiff did not consent to the contact; and (3) the harmful or offensive contact caused injury, damage, loss or harm to plaintiff." *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 526-527 (2009) (citing *Piedra v. Dugan*, 123 Cal. App. 4th 1483, 1495 (2004)). "[T]o prevail on a claim of battery against a police officer, the plaintiff bears the burden of proving the officer used unreasonable force." *Munoz*

v. City of Union City, 120 Cal. App. 4th 1077, 1102 (2004), *disapproved on other grounds by Hayes v. County of San Diego*, 57 Cal. 4th 622 (2013).

A California peace officer "may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance." *Id.* at 1102 (citing Cal. Penal Code § 835a). Determination whether an officer breached such duty is "analyzed under the reasonableness standard of the Fourth Amendment to the United States Constitution." *Id*. at 1102. Thus, the question is whether a peace officer's actions were objectively reasonable based on the facts and circumstances confronting the peace officer. *Id.* at 1103. The test is "highly deferential to the police officer's need to protect himself and others." *Brown*, 171 Cal. App. 4th at 527.

Battery by a peace officer is based upon the accepted standard that a peace officer is entitled to use some force to carry out his duties. *Id.*; *Munoz*, 120 Cal. App. 4th at 1109; *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272-73 (1998).

> Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." [Citation omitted.] "[Police officers] are, in short, not similarly situated to the ordinary battery defendant and need not be treated the same. In these cases, then, "… the defendant police officer is in the exercise of the privilege of protecting the public peace and order [and]

> he is entitled to the even greater use of force than might be in the same circumstances required for self-defense."

Brown, 171 Cal. App. 4th at 527.

> A police officer in California may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance. (Pen. Code § 835a.) The standard jury instruction in police battery actions recognizes this: "A peace officer who uses unreasonable or excessive force in making a lawful arrest or detention commits a battery upon the person being arrested or detained as to such excessive force." (BAJI No. 7.54.) By definition then, a prima facie battery is not established unless and until plaintiff proves unreasonable force was used.

Edson, 63 Cal. App. 4th at 1272-73.

Again, as set forth in detail above, Officer Browder's actions were reasonable, therefore there can be no assault or battery claims and summary judgment was appropriate.

3. Negligence and Wrongful Death

Plaintiffs are correct that the issue of negligence and wrongful death were not fully briefed below. However, the facts and reasoning underlying these claims are the same as those argued in relation to the other claims that were fully briefed below. Regardless, there was sufficient evidence in the record to warrant summary judgment on the negligence and wrongful death claims.

In order to prevail on a claim for common law negligence against a police officer, a plaintiff must show that (1) the officer owed the plaintiff a duty of care; (2) the officer breached the duty by failing "to use such skill, prudence, and

diligence as other members of [the] profession commonly possess and exercise," (3) there was a "proximate causal connection between the [officer's] negligent conduct and the resulting injury" to the plaintiff; and (4) the officer's negligence resulted in "actual loss or damage" to the plaintiff. *Harris v. Smith*, 157 Cal. App. 3d. 100, 104 (1984). Therefore, "to prevail on their negligence claim, Plaintiffs must show that the deputies acted unreasonably and that the unreasonable behavior harmed. . . ." them. *Price v. County of San Diego*, 990 F. Supp. 1230, 1245 (S.D. Cal. 1998).

Where a "federal court factually finds that the police officers' conduct was objectively reasonable and grants summary judgment, [that decision] bars a state negligence action premised upon violation of the same primary right." *Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1180-81 (E.D. Cal. 2008) (citing *City of Simi Valley v. Superior Court*, 111 Cal. App. 4th 1077, 1084 (2003)); *see Oppenheimer v. City of Los Angeles*, 104 Cal. App. 2d 545, 549 (1951).

A wrongful death cause of action is predicated on a negligence claim. "'The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs.'" *Quiroz v. Seventh Ave. Center*, 140 Cal. App. 4th 1256, 1263 (2006) (quoting 5 Witkin, Cal. Procedure, *Pleading* § 891, p. 350 (4th ed. 1997)). Because Officer Browder's conduct was objectively reasonable as

demonstrated above, Plaintiffs' negligence and wrongful death claims are barred.

IX. CONCLUSION

For all the above stated reasons, City Defendants respectfully requests this Court affirm the District Court's Order entering summary judgment in favor of Defendants on all causes of action.

Dated: August 20, 2018

MARA W. ELLIOTT, City Attorney

By */s/ Kathy J. Steinman*
Kathy J. Steinman

Attorney for Defendants and Appellees
Neal Browder, City of San Diego and
Shelley Zimmerman

STATEMENT OF RELATED CASES

There are no known pending related cases in this Court.

Dated: August 20, 2018

MARA W. ELLIOTT, City Attorney

By /s/ *Kathy J. Steinman*
Kathy J. Steinman

Attorney for Defendants and Appellees
Neal Browder, City of San Diego and
Shelley Zimmerman

CERTIFICATE OF COMPLIANCE

(F.R.A.P. 32(a)(7)(c)

Pursuant to F.R.A.P. 32(a)(7)(c), I certify that the Appellee's Answering Brief is proportionately spaced, has a Times New Roman typeface of 14 points, and contains 13,557 words.

Dated: August 20, 2018 MARA W. ELLIOTT, City Attorney

By /s/ *Kathy J. Steinman*
Kathy J. Steinman

Attorney for Defendants and Appellees
Neal Browder, City of San Diego and
Shelley Zimmerman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 20, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 20, 2018 */s/ Kathy J. Steinman*

SERVICE LIST

Louis R. Miller Daniel S. Miller Mira Hashmall Sean G. McKissick MILLER BARONDESS, LLP 1999 Avenue of the Stars, Suite 1000 Los Angeles, CA 90067	ATTORNEYS FOR PLAINTIFFS AND APPELLANTS S.R. NEHAD, K.R. NEHAD, AND ESTATE OF FRIDOON RAWSHAN NEHAD
Brian E. Watkins BRIAN E. WATKINS & ASSOCIATES 925 B Street, Suite 402 San Diego, CA 92101 Email: bwatkins@brianwatkinslaw.com	ATTORNEYS FOR PLAINTIFFS AND APPELLANTS S.R. NEHAD, K.R. NEHAD, AND ESTATE OF FRIDOON RAWSHAN NEHAD
Kevin M. Osterberg HAIGHT BROWN & BONESTEEL LLP 3880 Lemon Street, Suite 410 Riverside, CA 92501 Email: kosterberg@hbblaw.com	ATTORNEYS FOR APPELLEES NEAL N. BROWDER AND THE CITY OF SAN DIEGO