18-55035

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S.R. NEHAD, an individual; K.R. NEHAD, an individual; and ESTATE OF FRIDOON RAWSHAN NEHAD, an entity,

Plaintiffs and Appellants,

v.

NEAL N. BROWDER, an individual; CITY OF SAN DIEGO, a municipality; SHELLEY ZIMMERMAN, in her personal and official capacity as Chief of Police; and DOES 1 through 10, inclusive,

Defendants and Appellees.

Appeal From The United States District Court,
Southern District of California, Case No. 3:15-cv-01386-WQH-NLS,
Hon. William Q. Hayes

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The district court committed legal error in granting summary judgment to Officer Neal Browder, the City of San Diego, and Chief of Police Shelley Zimmerman (collectively, "Defendants") on the constitutional and state law claims Plaintiffs brought in connection with Browder's shooting of Fridoon Nehad ("Fridoon"). The court's errors included its adoption of Defendants' version of disputed facts, ignoring factors of the Fourth Amendment analysis, resolving disputed issues of material fact, and *sua sponte* adjudication of claims in favor of Defendants. Each of these errors merits reversal of the district court's decision.

Defendants' Answering Brief fails to justify these errors. More often than not, it fails to address them at all.

Defendants cannot support the district court's ruling based on an accurate version of the facts, much less one with inferences drawn in Plaintiffs' favor, as the law requires. So instead, Defendants repeat the district court's inaccurate version, even when it is contradicted by the shooting video. Plaintiffs respectfully request that the Court view the video evidence presented as Exhibits 24-26, which will quickly dispel the false and misleading statements made in the Answering Brief.

Defendants seek to justify the shooting with alleged facts that, even if true, happened before Browder arrived on the scene or were unknown to Browder.

Such facts are not relevant to a Fourth Amendment excessive force analysis—only those facts known to the officer at the time of the shooting are relevant.

Defendants argue that Browder's decision to shoot a nonthreatening, unarmed man was reasonable because he had only seconds to act. Defendants ignore, however, that Browder was in control of the scene and the time available to him. Unrefuted expert testimony establishes that Browder could have safely repositioned and given himself more time to assess the situation and make a better decision. His failure to do so was unreasonable. He did not have to shoot when he did. Neither self-defense nor defense of another is applicable here. Defendants' reduction of this life or death decision for Fridoon to the deliberation Browder might use "choosing what to order for dinner" is repugnant to our Constitution.

Defendants mischaracterize the law as to *Monell* and supervisory liability, and ignore that a municipality is liable for the unconstitutional actions of its employees where those employees acted pursuant to a longstanding custom or practice. That is exactly what happened here—Browder shot Fridoon pursuant to the San Diego Police Department's longstanding practices of resorting to unnecessary lethal force and failing to adequately investigate police shootings.

The district court's improper *sua sponte* rulings on Plaintiffs' negligence and wrongful death claims are indefensible under the law, so Defendants ignore them.

The judgment should be reversed, and this case should be remanded for trial.

LEGAL ARGUMENT

I. DEFENDANTS RELY ON AN INACCURATE VERSION OF THE FACTS

The district court erred by applying the version of material disputed facts most favorable to Defendants. *See A. K. H by & through Landeros v. City of Tustin*, 837 F.3d 1005, 1010 (9th Cir. 2016). In their Answering Brief, Defendants double down on the court's mistake by not only denying that the court improperly applied disputed facts in Defendants' favor, but claiming that such facts are **undisputed**. The evidence disagrees.

Defendants go to extraordinary lengths to present Browder's supposed belief that Fridoon was holding a knife as one "undisputed" fact. But to do so, they must walk back Browder's straightforward statement, given on the night of the shooting, that he saw no weapons at the scene. [Plaintiffs' Excerpts of Record ("ER") 319:1-21, 322:18-23, 408:6-14, 430:6-19, 436:20-25, 437:1-438:18, 453:9-17; ER 828-839.]

Defendants claim that Browder did not mean what he said—that he made the statement at a "post-incident safety walk-through," and that the statement was influenced by what he learned after he shot Fridoon. [Appellees' Answering Brief ("AAB") 20.] Notably, Defendants cite to no evidence in support of this retroactive whitewashing—no documents, no deposition testimony, nothing.

Defendants' unsupported argument cannot undo Browder's contemporaneous statement. Whether Browder actually thought that Fridoon held a knife is a disputed question that must be resolved by a jury.

Defendants contend that Fridoon was "aggressing" Browder before he was shot [AAB 9], but are forced to concede that Fridoon moved only one foot before he was shot dead [AAB 7; ER 693:16-18]. Defendants also do not dispute that video evidence shows that Fridoon was walking down the alleyway at a casual pace [ER 595 1:10-1:26], that even their own expert described Fridoon's pace as "relatively slow" [ER 500:6-19, 501:3-13, 502:17-20; ER 543], that eyewitness testimony stated that Fridoon was not acting in an aggressive manner [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14], or that Fridoon did not say or do anything threatening [*id.*].

Defendants also continue to perpetuate the mistaken notion that Browder put up his hand in a "stop" gesture before shooting Fridoon. [AAB 6, 8.] The shooting video shows that Browder did no such thing. [ER 595.]

Defendants, like the district court, assert that Browder gave Fridoon a warning to "stop" or "drop the knife" before shooting him. [AAB 6, 31, 36.] Defendants do not, however, address Browder's own testimony that he does not recall giving any such warning [ER 302:22-304:2], or an eyewitness that did not hear a warning either [ER 279:11-19].

Defendants contend that a jury must somehow disregard Browder's own testimony, and believe instead the statements of a witness, Andre Nelson. [AAB 8.] Yet, Defendants concede that Mr. Nelson "originally told officers that he thought Nehad had shot himself . . . ." [*Id.*] A reasonable juror could doubt the accuracy of Mr. Nelson's perceptions and disregard or discount Mr. Nelson's depiction of what he perceived that night.

The "facts" that Defendants propose as "undisputed" are contradicted by witness testimony, video evidence from the scene, and Browder's own statements. These are factual issues that must be decided by a jury.

II. A JURY COULD FIND THAT BROWDER VIOLATED FRIDOON'S FOURTH AMENDMENT RIGHTS

Defendants' Answering Brief fails to justify the district court's finding that Browder did not violate Fridoon's Fourth Amendment rights as a matter of law. To the contrary, Defendants' arguments merely highlight the disputed questions of fact at issue in this case that make summary judgment inappropriate.

A. A Jury Could Find That No Crime Was Occurring At The Time Of The Shooting

In assessing the government's interest in using force on an excessive force claim, the Supreme Court requires courts to, at a minimum, consider: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to

the safety of others; and (3) whether the suspect was actively resisting or evading arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Defendants artificially inflate the government's interest in using deadly force by overstating the severity of the crime, hinging their argument on *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003), which states that the government's interest in using force is strong "when the criminal is . . . suspected of a felony . . . ." *Id.* at 964. [AAB 23-26.] But Fridoon was not suspected of committing a felony.

At most, he was suspected of a **misdemeanor** offense for exhibiting a weapon. [ER 492:9-13, 493:5-10.] In addition, Fridoon was committing no crime and not doing anything aggressive or threatening when Browder arrived on the scene. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26.] A jury could easily find that the deadly force here was simply unreasonable and unjustified.[1]

Defendants attempt to bolster their argument by identifying other crimes Fridoon could have been (hypothetically) charged with. [AAB 24-25.] Defendants also make their claim that Fridoon "threatened to kill people" a prominent point,

[1] Defendants attempt to cloud the issue by citing *Tennessee v. Garner*, 471 U.S. 1 (1985) (*Garner*), for the proposition that "numerous misdemeanors involve conduct more dangerous than many felonies." [AAB 25.] *Garner* held that deadly force may not be justified even where the victim is committing a felony. *Id.* at 14. In other words, the case **minimizes** the situations in which deadly force is reasonable. Defendants attempt to **expand** them, in contradiction of *Garner*.

raised multiple times in their brief to justify Browder's use of deadly force. [*Id.* 27, 39, 46.] It is, however, irrelevant to the Fourth Amendment analysis.

The only facts relevant to a claim of excessive force are those known to the shooting officer at the time of the shooting. *See County of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546-47 (2017) (*Mendez*) ("Excessive force claims . . . are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." (citation omitted)). At the time of the shooting, the only thing Browder knew about the alleged crime being committed was what the dispatcher told him—that a suspect was committing the misdemeanor of exhibiting a knife. [ER 288:19-293:15.]

He was not told anything about some hypothetical felony. He was not told that the suspect had "threatened to kill people." That is just a lawyer's smokescreen—the **relevant** facts demonstrate that there was no crime occurring, let alone any severe crime, when Browder made the decision to shoot Fridoon.

It was also plain that no crime was occurring at the time of Browder's arrival at the scene. Both undisputed expert testimony [ER 602, ¶ 21(a)] and legal authority hold that an officer's decision to use force must be based on what he himself observed at the scene, not on unconfirmed accounts of what may have happened before he got there. *See George v. Morris*, 736 F.3d 829, 839 (9th Cir.

2013) (deadly force was unreasonable despite prior threatening behavior because any threatening conduct had ceased by the time of the officers' arrival).[2]

All Browder saw was a man walking slowly down an alleyway with a shiny object in his hand. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26.] This is not a crime, severe or otherwise, and could not possibly justify the use of deadly force. At a minimum, this is a question of fact for a jury.

B. A Jury Could Find That Fridoon Did Not Pose An Immediate Threat

1. The Record Shows a Material Dispute Over Whether Browder Reasonably Believed That Fridoon Held a Knife

Defendants' conclusion that Fridoon posed an immediate threat is premised entirely on their presumption that Browder believed that Fridoon was holding a knife. Summary judgment is unwarranted for at least three different reasons: (1) there is a material dispute over whether Browder actually believed that Fridoon held a knife; (2) even if Browder did believe Fridoon held a knife, there is a

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[2] Defendants attempt to distinguish *George*, claiming that the Ninth Circuit did not analyze the severity of the crime in that case. [AAB 25-26.] Defendants misread *George*. The shooting officers in that case argued that their shooting was justified because a severe crime (domestic violence) had occurred before their arrival. 736 F.3d at 839. The Ninth Circuit rejected that argument, because what had happened prior to the officers' arrival was not relevant to the reasonableness of their decision. *Id.*

material dispute over whether that belief was reasonable; and (3) even assuming Browder's belief was reasonable, deadly force was still not justified.

First, there is a dispute over whether Browder's claim to have mistaken Fridoon's pen for a knife is genuine. Indeed, the primary evidence that Browder is telling the truth consists of Browder's own self-serving statement. *See Reed v. City of Modesto*, 122 F. Supp. 3d 967, 974 (E.D. Cal. 2015) (the shooting officer "is an interested witness and the jury is not required to believe his testimony"). And Browder's self-serving statement is contradicted by his statement **right after the shooting** saying that he had not seen any weapons at the scene. [ER 319:1-21, 322:18-23, 408:6-14, 430:6-19, 436:20-25, 437:1-438:18, 453:9-17; ER 828-839.] Browder's credibility should be tested on cross-examination in front of the jury, not resolved in Defendants' favor on summary judgment.

Second, even if Browder genuinely thought Fridoon was holding a knife, Defendants' own case law stresses that "under *Graham*, whether the mistake is an *honest* one is not the concern, only whether it was a *reasonable* one." *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011). Indeed, where a use of force is attributed to a mistake, summary judgment is inappropriate where a jury may find that the mistake was unreasonable. *Id.*; *see also Mattos v. Agarano*, 661 F.3d 433, 441-42 (9th Cir. 2011) (en banc) (a "simple statement by an officer that he

fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern" (citation omitted)).

There is a dispute over whether Browder's alleged belief that Fridoon held a knife was reasonable or not. Fridoon held his pen right out in the open where Browder could see it. [ER 595 1:15-1:26.] The pen was illuminated by Browder's own bright headlights. [ER 295:18-296:2, 297:2-8, 298:21-24, 305:2-7, 417:8-418:10.] And, per unrefuted expert testimony, police officers like Browder receive training to distinguish between weapons and innocuous objects. [ER 604, ¶ 27.]

Defendants present their own reasons as to why it was reasonable for Browder to perceive Fridoon's pen as a knife. None of their proposed explanations are sufficiently conclusive to support summary judgment.

Defendants contend that Browder reasonably perceived a pen as a knife because the dispatcher informed him there was a man with a knife at the scene. [AAB 5.] But expert testimony presented by Plaintiffs, and neither addressed nor refuted by Defendants, establishes it is standard police procedure to confirm the actual facts of any situation, and not assume the allegations of a dispatch broadcast to be correct. [ER 602, ¶ 21(a).] To the extent that Browder relied on the dispatcher rather than his own observations, such conduct was unreasonable.

Defendants contend that Browder's perception was reasonable because three other witnesses that night also thought Fridoon was holding a knife. [AAB 8, 19-

20.] In reality, one of the three witnesses had no idea what Fridoon had in his hand [ER 277:3-20], and another saw only the tip of Fridoon's pen [Supplemental Excerpts of Record ("SER") 140:4-22].[3] No witness saw the pen, as Browder did, out in the open and fully illuminated, and none was a police officer trained to distinguish weapons from non-weapons.[4] The excessive force standard asks whether a reasonable police officer would have perceived an immediate threat, not a reasonable civilian. *See Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene.").

2. ***Bowles* Does Not Apply Here**

Defendants cite to *Bowles v. City of Porterville*, No. F CV 10-0937 LJO GSA, 2012 WL 1898911 (E.D. Cal. May 23, 2012), an unpublished district court decision, to argue that Plaintiffs' expert testimony as to police training in

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[3] Defendants also cite to a past incident in which Fridoon allegedly convinced someone that his pen was a knife. [AAB 19.] This incident occurred days before Browder shot Fridoon, the witness was not a police officer trained to distinguish weapons from non-weapons, and Browder had no awareness of it at the time he shot Fridoon. [ER 288:19-293:15.] It is completely irrelevant to Browder's perception of the pen and is raised by Defendants only to further smear Fridoon.

[4] Defendants posit Andre Nelson, a bystander "who had training as military police," as an undisclosed expert in police tactics and skills. [AAB 8, 19.] But Mr. Nelson is a cybersecurity technician for the Marines who was trained for only a week in military police tactics. [ER 280:17-281:6.] The record shows no indication that he received any training to distinguish between weapons and non-weapons.

recognizing weapons is "useless" and of "no bearing on the relevant legal inquiry." [AAB 31.] But the *Bowles* court made no ruling as to the relevance of police training. The court held only that an excessive force analysis cannot apply the clarity of hindsight. *Id.* at *9.

In *Bowles*, the court found that an officer acted reasonably in shooting a suspect who, after first fleeing to avoid arrest, suddenly stopped, turned to the officer and spun to his left while reaching to his waistband and drawing out a shiny metallic, cylindrical object which the officer took to be a gun, but was actually a cologne bottle. *Bowles*, 2012 WL 1898911, at *1-2. The *Bowles* court found that an officer could not reasonably be expected to recognize an object suddenly pulled out by a fleeing suspect.

It is not the clarity of hindsight, however, that expects a reasonable officer to be able to recognize an object held out in the open, fully illuminated, by a man walking slowly toward him, particularly in the absence of any menacing conduct. "While we do not judge the reasonableness of an officer's actions 'with the 20/20 vision of hindsight,' nor does the Constitution forgive an officer's every mistake." *Torres*, 648 F.3d at 1124 (citation omitted).

3. **The Record Shows a Material Dispute Over Whether Browder Created the "Exigent Circumstances" Himself**

Defendants also contend that Browder's perception of an immediate threat was reasonable because it was a "quick-paced scenario" that gave Browder only 33 seconds after he arrived at the alleyway, and only five seconds after he got out of his car, before he was forced to shoot. [AAB 7, 10, 15, 18, 28, 32, 34, 37.] The law does not allow Browder to benefit from "exigent circumstances," however, when he was the one who created them.

In *Torres*, the district court granted summary judgment where a police officer shot an unarmed suspect after mistakenly grabbing her gun instead of her Taser. *Torres*, 648 F.3d at 1121. The officer had approached an erratic suspect in a car, opened the door, and then gone for her weapon after the door was open. *Id.* The court granted summary judgment after finding that circumstances forced the officer "to make a split-second judgment" about firing her weapon. *Id*. at 1126.

The Ninth Circuit reversed the decision, finding that a jury could find that the "split-second" decision was necessitated not by unavoidable circumstances, but by the officer's "own poor judgment and lack of preparedness." 648 F.3d at 1126. The Court found a genuine dispute existed over "whether a reasonable officer in her position would have waited to draw her weapon until *after* beginning to open

the door, perhaps unnecessarily creating her own sense of urgency." *Id.* at 1126-27.

Like in *Torres*, to the extent that Browder shot Fridoon due to exigent circumstances, there is at least a material dispute over whether Browder himself created those circumstances. Fridoon did not create any "emergency"—he was walking slowly and not engaging in threatening conduct. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14, 500:6-19, 501:3-13, 502:17-20; ER 543, 595 1:15-1:26.] No one else was in danger—Browder testified that he was not concerned for the safety of any bystanders. [ER 299:8-18, 301:19-302:21, 325:2-7.] Fridoon slowed his pace even more as he approached Browder. [ER 413:9-20; ER 595 1:25-1:26.] And Plaintiffs' unrefuted expert testimony demonstrates that Browder had sufficient time to "tactically reposition," find cover, and give himself more time to make an accurate assessment of any perceived threat. [ER 603, ¶ 23.]

Defendants' contention that "five seconds is not sufficient time to engaged [sic] in 'detached reflection'" [AAB 34] misses the point—Browder had far more than five seconds to work with. He shot Fridoon five seconds after getting out of his car not because he had to, but because he decided to. Accordingly, like in *Torres*, a reasonable jury could decide that Browder's five-second timeframe was a result of his "own poor judgment and lack of preparedness."

Defendants cite to *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), for the proposition that "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." *Id.* at 838. But Defendants still cannot identify a single "furtive movement, harrowing gesture, or serious verbal threat" leveled by Fridoon. Indeed, the *George* Court held that summary judgment was inappropriate precisely because there existed a material dispute over whether the shooting victim took "objectively threatening" actions, and accordingly, "a reasonable fact-finder could conclude that the deputies' use of force was constitutionally excessive." *Id.*

4. The Record Shows a Material Dispute Over Whether the "21-Foot Rule" Applies

Defendants contend that Browder perceived Fridoon to be an immediate threat because his training told him that a suspect can close a distance of 21 feet before an officer can react. [AAB 9, 27, 39.] Defendants ignore their own expert, who concedes that this "21-foot rule" refers to the amount of time an officer would need to unfasten his holster, remove his gun, bring it up to a shooting position, and fire. [ER 181-182, ¶ 5(d).] Here, Browder had already drawn his gun and pointed it at Fridoon before Fridoon entered a 21-foot radius, giving Browder time to assess any potential threat.

Moreover, the 21-foot rule refers to a suspect charging an officer at a sprint. [ER 508:3-510:4.] Fridoon, in contrast, was ambling along at a slow pace. [ER 500:6-19, 501:3-13, 502:17-20; ER 543.] Defendants' expert concedes that Fridoon did not speed up at any point, nor did he give any indication that he was about to speed up. [ER 508:3-510:4.] Accordingly, based on Defendants' own expert, a reasonable jury could find that the "21-foot rule" does not apply here.

C. The Evidence Shows That Fridoon Was Neither Resisting Nor Seeking To Evade Arrest

The district court did not analyze whether Fridoon attempted to resist or evade arrest, as required by *Graham*. On appeal, Defendants grasp onto the district court's observation that "there was evidence in the record that Officer Browder gave warnings to Nehad" before he shot him. [AAB 31.] This addresses disputed evidence regarding Browder's conduct, not how Fridoon responded.

Defendants cannot identify any evidence that Fridoon resisted arrest. They do not, and cannot, deny that Fridoon did not attack Browder or anyone else, did not run away, and did not do or say anything threatening, or anything else that could be construed as resisting arrest. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26.]

D. A Jury Could Find That Additional Factors Demonstrate A Fourth Amendment Violation

The district court also failed to consider additional factors dictated by this Court in analyzing Browder's Fourth Amendment violation. This is legal error.

A proposed amicus brief from three municipal organizations argues that the district court was correct to ignore any additional factors in its analysis. They contend that a recent Supreme Court decision, *County of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539 (2017), held that a Fourth Amendment analysis of the government's interest in the use of force must be limited to the three *Graham* factors. [8/28/2018 Amicus Curiae Brief ("ACB") 12-13.] This argument hinges on a misreading of *Mendez*.

In *Mendez*, the plaintiffs brought claims of three separate Fourth Amendment violations: (1) excessive force (unnecessary shooting); (2) unreasonable search (violating the "knock-and-announce" rule); and (3) warrantless entry. *Mendez*, 137 S. Ct. at 1545. After finding for plaintiffs on both the unreasonable search and warrantless entry claims, the district court found that although the shooting itself was reasonable, the officers were nevertheless liable on the excessive force claim under the "provocation rule"—i.e., that an otherwise reasonable use of force is rendered unreasonable if it is necessitated by the officers' prior independent constitutional violation. *Id*. In other words, by

"conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms." *Id.* at 1547.

The Supreme Court rejected the idea that a meritless excessive force claim can be saved by relying on a separate and independent Fourth Amendment claim. It held that the "framework for analyzing excessive force claims is set out in *Graham.* If there is no excessive force claim under *Graham*, there is no excessive force claim at all." 137 S. Ct. at 1547.

Here, the amici attempt to argue that *Mendez* limited the excessive force analysis to solely three factors explicitly identified in *Graham*. That is not what *Mendez* says. Instead, the *Mendez* court cites its own precedent, including *Graham*, to describe the *Graham* test: "The operative question in excessive force cases is 'whether **the totality of the circumstances** justifie[s] a particular sort of search or seizure.'" 137 S. Ct. at 1546 (emphasis added) (citation omitted). *Mendez* does not limit the "totality of the circumstances" to the three explicitly identified *Graham* factors. Indeed, the *Mendez* court specifically declined to address the scope of the reasonableness inquiry under *Graham*. *Id*. at 1547 n.* ("All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate

constitutional violation. Any argument regarding the District Court's application of *Graham* in this case should be addressed to the Ninth Circuit on remand.")

Amici disregard both the binding precedent of this Court and Supreme Court precedent when they argue that *Graham* sets outs a tightly circumscribed list of factors that may be considered to determine whether an officer's use of force was reasonable. [ACB 12-13.] As this Court and other Circuits have long recognized, *Graham* does no such thing. *Mattos*, 661 F.3d at 441; *see also*, *e.g.*, *Fisher v. City of Las Cruces*, 584 F.3d 888, 902 n.1 (10th Cir. 2009) (recognizing "*Graham*'s admonition that its factors were never meant to be exhaustive"). Indeed, *Graham* itself disclaims the notion of a precise, exclusive set of factors. *See Graham*, 490 U.S. at 396 ("[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application" (citation omitted)); *see also id.* (the reasonableness analysis "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" (emphasis added)); *id.* at 399 n.12 ("[A] factfinder may consider, *along with other factors*, evidence that the officer may have harbored ill-will towards the citizen." (emphasis added)). And in subsequent decisions applying *Graham*, the Supreme Court has flatly rejected the suggestion that the Fourth Amendment's

reasonableness standard can be reduced to mechanical application of three or four factors relevant to reasonableness that its decisions have specifically mentioned. *See Scott v. Harris*, 550 U.S. 372, 383 (2007) (rejecting "easy-to-apply legal test[s] in the Fourth Amendment context").

Both the *Graham* factors and the additional factors identified by the Ninth Circuit—including whether the shooting officer considered less intrusive alternatives and whether the officer warned the victim before shooting him—are part of *Graham*'s totality of the circumstances test. *See Vos v. City of Newport Beach*, 892 F.3d 1024, 1033-34 (9th Cir. 2018) ("[T]he *Graham* factors are not exclusive. Other relevant factors include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officers that the subject of the force used was mentally disturbed."). The additional factors are not, as amici contend [ACB 12-13], "independent constitutional violations" barred from the excessive force analysis by *Mendez*, but rather facts that bear on the reasonableness of the shooting.

1. <u>The Record Shows That Browder Failed to Consider Less Intrusive Alternatives</u>

Defendants concede that whether a shooting officer considered less intrusive means of force must be considered when evaluating the reasonableness of a shooting. [AAB 33-35.] Browder admitted that although he was carrying a Taser,

mace, and a collapsible baton with him that evening, he never considered using one of them instead of his gun. [ER 312:16-314:11; ER 603, ¶ 24.] Defendants do not contest this. Indeed, Defendants even concede that "it is possible that Officer Browder could have used his Taser." [AAB 35.]

Instead, Defendants simply argue that Browder did not have time to consider an alternative use of force. [*Id.* 33-35.] But expert testimony establishes that not only did Browder have sufficient time to use a less lethal alternative [ER 603, ¶¶ 23-24], Browder could have also made more time for himself by tactical repositioning[5] [*id.* 603, ¶ 23]. Defendants present no evidence, only argument, that Browder did not have sufficient time to do either of these things. [AAB 34-35.] At most, Defendants piggyback on the flawed "21-foot rule," which, as stated herein, cannot apply here. (*See supra* Section II.B.4.) There exists a triable question of fact as to whether Browder could have used a less lethal method of force.

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[5] Defendants characterize tactical repositioning, a prevalent and well-established police tactic that could have saved a man's life here, as a decision to "run and hide." [AAB 34.] These comments fly in the face of unrebutted expert testimony from Plaintiffs' expert, Roger Clark.

2. The Record Shows That Browder Did Not Warn Fridoon That He Would Use Force

Defendants do not dispute, and thereby concede, that Browder never warned Fridoon that he would use force against him, lethal or otherwise.

Instead, Defendants point to disputed evidence in the record that Browder "did give a warning." [AAB 36.] They ignore the contrary evidence in the record indicating that Browder gave no warning at all. [ER 279:11-19; ER 302:22-304:2; ER 595 1:24-1:26.] That is not something the court can do on summary judgment.

Defendants argue that "if Officer Browder did not issue a warning, the question becomes whether it was feasible for him to do so." [AAB 36.] That is correct—a question exists as to whether it was feasible for Officer Browder to warn Fridoon that he would use force. Specifically, there is a question of fact, which must be resolved by a jury.

E. A Jury Could Find That Browder's Use Of Force Was Not Reasonable

Defendants contend that the shooting was reasonable based on their contention that Browder "believed" that Fridoon was holding a knife. [AAB 15.] But even if Browder actually held that belief, and even if that belief was reasonable (two assumptions that are undermined by the facts, as demonstrated herein), it is not dispositive. *See Hayes v. County of San Diego*, 736 F.3d 1223, 1233-34 (9th

Cir. 2013) (finding genuine issues of material fact as to whether a suspect holding a knife posed an immediate threat to the shooting officers' safety); *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011) (possession of a knife is not dispositive as to whether the suspect posed a deadly threat); *see also Chien Van Bui v. City & County of San Francisco*, 699 F. App'x 614, 615 (9th Cir. 2017) (it was not clear that the suspect posed a significant threat to the shooting officers even though he held an "X-Acto" knife in his hand when he was shot). This case should not have been resolved on summary judgment.

Plaintiffs rely on *Estate of Lopez by & through Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017), finding that defendants were not entitled to summary judgment because: (1) the victim was walking normally; (2) the victim made no aggressive motions; (3) the shooting officer did not identify himself as a police officer; (4) the officer never warned the victim that deadly force would be used despite having the time to do so; (5) the victim was not carrying a weapon, but rather a harmless toy; (6) the toy was never used in an aggressive manner, but rather stayed pointed at the ground; and (7) the only evidence indicating that the victim posed a threat came from the self-serving testimony of the shooting officer and his partner, which a jury might not believe. *Id.* at 1010-12. Defendants try to distinguish this case with the conclusory statement that there were several triable issues of material fact in that case, whereas there are none here. [AAB 38.] But

there are numerous triable issues of material fact here, as detailed herein. *Lopez* warrants reversal.

Defendants try to distinguish *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), arguing that the shooting in that case was less reasonable because: (1) other officers were present; (2) the shooting officer observed the victim for five to ten minutes; and (3) the victim complied with commands to drop his weapon. [AAB 38-39, 46-47.] But as explained in the Opening Brief ("AOB") [AOB 44-45], the police taking time to observe and wait for backup makes them not less, but **more**, reasonable than Browder, who shot without taking time to observe or assess the situation. [ER 602-603, ¶¶ 21-24.] Further, Defendants are wrong in their assertion that the *Deorle* victim had dropped the objects in his hand—the victim there continued to carry a bottle or can of lighter fluid (*Deorle*, 272 F.3d at 1277 n.11).

Defendants also address *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011). [AAB 32, 37, 47.] Again, the short timeframe available to Browder to observe and assess the situation was of his own doing, and is not evidence that he acted reasonably. [*See supra* Section II.B.3.] Moreover, in *Glenn* and in *Deorle*, the police shot their victims with a beanbag gun, a much less lethal means of force than Browder's firearm, making Browder's use of force even less reasonable.

III. A JURY COULD FIND THAT BROWDER VIOLATED PLAINTIFFS' FOURTEENTH AMENDMENT RIGHTS

Defendants fail to respond to Plaintiffs' arguments as to Browder's violations of Plaintiffs' Fourteenth Amendment rights. As set forth in the Opening Brief, the "purpose to harm" standard is met here. A shooting officer acts with a "purpose to harm, unrelated to legitimate law enforcement objectives," thus violating the Fourteenth Amendment, when he uses lethal force despite the fact that neither he nor anyone else is in danger. [*See* AOB 48-50.]

Defendants offer only the conclusory argument that "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." [AAB 41.] But as set forth both herein and in the Opening Brief, a jury could find that Fridoon did not pose a danger to Browder or anyone else at the time of the shooting. [*See supra* Section II.A.; AOB 30-36.] This would constitute a violation of the Fourteenth Amendment.

Defendants cite *Porter v. Osborn*, 546 F.3d 1131 (9th Cir. 2008), which makes the point. [AAB 40-41.] In *Porter*, the Ninth Circuit identified several reasons why a jury could find that the shooting officer had acted with a "purpose to harm," including: (1) the victim was sitting in a stationary car that "posed no overt threat to officer safety"; (2) the victim may not have even known he was dealing

with law enforcement; and (3) the officer shot even though the victim's only "violation" was non-compliance with instructions. *Id.* at 1141-42.

Here, Fridoon was simply walking down an alleyway and posed no threat to Browder or anyone else [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26]; may not have known that Browder was a police officer [ER 293:16-294:7, 295:18-296:2, 297:2-8, 298:21-24, 302:22-304:2, 305:2-7, 401:2-4]; and, at most, the only crime observed by Browder was a failure to comply with instructions to drop his pen (Browder may not have even given these instructions) [ER 279:11-19; ER 302:22-304:2; ER 724:10-725:6, 725:20-22, 726:8-15, 726:19-21, 727:13-16; ER 763:24-764:9, 766:14-16, 767:21-24]. Thus, under Defendants' own case law, there is a triable question of fact as to whether Browder violated the Fourteenth Amendment.

IV. BROWDER IS NOT ENTITLED TO QUALIFIED IMMUNITY

A. Disputed Factual Issues Bar A Grant Of Qualified Immunity

Defendants do not dispute, and thus concede, that a court may not grant qualified immunity at summary judgment where disputed factual issues exist. *See Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017) ("When there are disputed factual issues that are necessary to a qualified immunity decision, these issues must first be determined by the jury before the court can rule on qualified immunity." (citation omitted)). Indeed, Defendants' own case law affirms this principle. *See*

Pearson v. Callahan, 555 U.S. 223, 238-39 (2009) ("When qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims may be hard to identify. . . . '[T]he answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed.'" (citation omitted)).

As set forth herein throughout, there are numerous disputed factual issues as to Browder's violation of Plaintiffs' rights under the Fourth and Fourteenth Amendments. By arguing that Browder is nevertheless entitled to qualified immunity at this stage, Defendants are asking the Court to find that Browder's conduct was reasonable, before the factfinder has determined what that conduct was. Summary judgment as to qualified immunity is not appropriate here.

B. Browder Was On Notice That His Conduct Was Unconstitutional

Further, Browder is not entitled to qualified immunity because he violated clearly established rights in shooting and killing Fridoon. Plaintiffs cited precedent in their Opening Brief showing that Browder should have been on notice that the shooting was unlawful. [AOB 54-56.] Specifically, *Deorle v. Rutherford* and *Glenn v. Washington* should have put Browder on notice that it was unreasonable to shoot a suspect not exhibiting threatening behavior, with neither the officer nor anyone else in danger, where the officer had room to reposition, even if the suspect was armed. [*Id.*]

On the issue of qualified immunity, Defendants merely rehash their meritless attempt to distinguish these two cases. [*See supra* Section II.E.] Defendants assert that these cases could not have put Browder on notice that his conduct was unconstitutional because, in effect, the facts here are not identical to the facts in those cases. [AAB 46-48.] But the differences they cite are superficial and irrelevant. For example, they attempt to distinguish *Deorle* on grounds that the victim in that case "was in distress and suicidal." Defendants do not explain, however, why a distressed and suicidal victim poses **less** of a threat than did Fridoon, who was calm and took no threatening actions.

A constitutional right can be "clearly established" by precedent even where that precedent does not precisely match the facts of the case. *See Deorle*, 272 F.3d at 1285-86 ("Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity . . . . Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct."); *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) ("An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.").

C. An Unreasonable Mistake Bars Qualified Immunity

The amici argue that an officer who violates a victim's constitutional rights should nevertheless be entitled to qualified immunity where the violation is the result of a mistake. [ACB 18-21.] They thus argue that Browder is entitled to qualified immunity because his constitutional violation was the result of him mistaking Fridoon's pen for a knife. [*Id.* 19-20.] But the law is clear that a shooting officer is on notice that "an unreasonable mistake in the use of deadly force against an unarmed, nondangerous suspect violates the Fourth Amendment." *Torres*, 648 F.3d at 1129.

In *Torres*, this Court held that an officer who shot an unarmed suspect after apparently mistaking her firearm for her Taser would unquestionably have been on notice of the illegality of her actions had she realized the truth, and thus was not entitled to qualified immunity. 648 F.3d at 1129-30. The Court rejected the argument that the officer was nevertheless entitled to qualified immunity because "the law remained unclear on *how* to determine if a mistaken use of force was reasonable or unreasonable." *Id*. at 1129. If that were the case, "then qualified immunity would foreclose a trial in any case where the objective reasonableness of the officer's conduct turned on material disputes of fact." *Id*.

Likewise here, Browder was on notice that it was unlawful to shoot a nonviolent suspect carrying only a pen. Even assuming *arguendo* that Browder

mistakenly believed Fridoon's pen to be a knife, Browder cannot be entitled to qualified immunity because there still exist material questions of fact as to whether that mistaken belief was reasonable. [*See supra* Section II.B.1.]

D. **Browder Committed An Obvious Constitutional Violation**

Defendants do not dispute, and therefore concede, that a constitutional right is "clearly established" even in the absence of precedent where conduct that violates the right is obviously unconstitutional. Browder shot an unarmed man who was committing no crime, who exhibited no threatening behavior, and posed no threat to anyone. [ER 7:21-14:2.] Shooting Fridoon under these circumstances constituted an obvious constitutional violation of the Fourth Amendment. *See Longoria v. Pinal County*, 873 F.3d 699, 709 (9th Cir. 2017) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." (citation omitted)); *Torres*, 648 F.3d at 1128 ("While locating the outer contours of the Fourth Amendment may at times be a murky business, few things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, nondangerous suspect by shooting him dead' . . . ." (citation omitted)).

Defendants attempt to distinguish the obvious constitutional violation in *Torres*, conclusorily stating that in this case, Browder had "probable cause to believe that a suspect poses a threat of serious harm." [AAB 48.] But there was no "probable cause" here—it is undisputed that Fridoon did not say anything

threatening in Browder's presence, did not make any threatening gestures, was walking slowly, and did not otherwise give Browder any reason to believe that he posed any threat at all. [ER 273:10-274:8, 274:23-275:21, 277:3-25, 278:25-279:10; ER 299:8-18, 300:6-15, 307:9-308:14; ER 595 1:15-1:26.]

Shooting Fridoon thus violated a "clearly established" constitutional right, and Browder is not entitled to qualified immunity here.

V. A JURY COULD FIND THAT DEFENDANTS ARE LIABLE UNDER PLAINTIFFS' *MONELL* AND SUPERVISORY LIABILITY CLAIMS

Defendants contend that they are entitled to judgment as a matter of law on Plaintiffs' *Monell* and supervisory liability claims because no underlying constitutional violation occurred. [AAB 48.] But as set forth herein and in the Opening Brief, there exist numerous material questions of fact as to whether Browder violated Plaintiffs' constitutional rights under the Fourth Amendment and the Fourteenth Amendment claims. These same questions of fact bar summary judgment on the *Monell* and supervisory liability claims.

Defendants also mischaracterize the law as to these claims. They assert that the *Monell* claim fails because Plaintiffs have "failed to present any evidence that any policy or deficient training was a 'moving force' behind Officer Browder's decision to use deadly force . . . ." [AAB 49-50.] But *Monell* liability lies even in the absence of a policy or deficient training where the constitutional violation was

committed pursuant to a "longstanding practice or custom." *See Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992) (citation omitted).

Plaintiffs have presented evidence that shows that the San Diego Police Department has longstanding practices of unnecessarily resorting to lethal force and failing to adequately investigate officer shootings. [678:15-681:14.] Plaintiffs' expert reviewed over two years' worth of San Diego police shootings, and found that **75%** of the shootings were unnecessary. [ER 602 ¶¶ 17-19.] Not a single one of the officers involved were disciplined. [ER 349:3-10; ER 606 ¶ 46.] Moreover, SDPD investigations are designed to exonerate officers. The shooting officers are categorized as "victims" in the SDPD's paperwork. [ER 431:15-433:20; ER 405:4-406:24; ER 604 ¶ 34.] Shooting officers are not tested for drugs or alcohol. [ER 352:5-13, 353:13-25, 372:22-373:2.] Shooting officers are frequently permitted to go days before giving a statement to investigators. [ER 435:8-17.] Sufficient evidence exists for a jury to find that either or both of the SDPD's customs resulted in Browder's shooting of Fridoon. [ER 681:17-682:9.]

And, again contrary to Defendants' assertions [AAB 48-50], a single constitutional violation may subject a municipality to liability under *Monell* where a "final" policymaker for the municipality "ratified" the act. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). To ratify an unconstitutional act, the final

policymaker must be aware of the act and must affirmatively approve of the act and the basis for it. *Christie v. Iopa*, 176 F.3d 1231, 1238-39 (9th Cir. 1999).

Here, San Diego Police Chief Shelley Zimmerman, a "final policymaker" as to police issues, testified that she affirmatively approved of Browder's shooting and the reasons behind it. [ER 375:16-24.] This constituted ratification sufficient to provide the basis for *Monell* liability. *See Ashley v. Sutton*, 492 F. Supp. 2d 1230, 1238 (D. Or. 2007).

VI. A JURY COULD FIND THAT DEFENDANTS ARE LIABLE UNDER PLAINTIFFS' STATE LAW CLAIMS

A. Material Questions Of Fact Bar Summary Judgment As To Plaintiffs' Bane Act And Assault And Battery Claims

Defendants' argument that summary judgment is proper on Plaintiffs' claims under the Bane Act (Civil Code sections 52.1 and 52.3) is predicated on their contention that no underlying constitutional violation occurred. [AAB 50-52.] Similarly, they argue that because the standards for state law assault and battery claims mirror those for a Fourth Amendment excessive force claim, they are entitled to summary judgment on these claims for the same reason. [*Id.* 52-54.] But as set forth herein and in the Opening Brief, there exist numerous material questions of fact as to whether Browder violated Plaintiffs' rights under the Fourth

and Fourteenth Amendments. Accordingly, these same questions of fact bar summary judgment on Plaintiffs' Bane Act and assault and battery claims.

B. Defendants Ignore Relevant Bane Act Law

Defendants further argue that there is no Bane Act violation because a violation of the Bane Act "must involve threats, intimidation, or coercion **independent** of any threats, intimidation, or coercion inherent in the underlying constitutional violation." [AAB 51.] Defendants misstate the law.

In contrast to the unpublished district court case cited by Defendants, the California Court of Appeal's recent take on the issue, *Cornell v. City & County of San Francisco*, 17 Cal. App. 5th 766 (2017), held that "[n]othing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged." *Id.* at 800. Instead, the constitutional violation of excessive force is itself sufficient "threat, intimidation or coercion" to constitute a Bane Act violation. *Id.* at 799. The Ninth Circuit has since wholly adopted the *Cornell* ruling. *See. e.g., Reese v. County of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) (adopting *Cornell* and holding that "the Bane Act does not require the 'threat, intimidation or coercion' element of the claim to be transactionally independent from the constitutional violation alleged").

VII. THE DISTRICT COURT HAD NO POWER TO GRANT SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE AND WRONGFUL DEATH CLAIMS

Defendants do not dispute, and thus concede, that a district court has no authority to grant summary judgment *sua sponte* without first providing the parties with notice and a reasonable time to respond.

Here, the district court granted summary judgment *sua sponte* for Defendants on Plaintiffs' negligence and wrongful death claims, without notice to either party. [ER 19:15-22.] This was legal error. Defendants cannot dispute this, so they ignore it in their Answering Brief.

The only argument Defendants do make is based on a mischaracterization of the law. Specifically, Defendants argue that negligence and wrongful death claims due to police shootings are judged on the same standards as a Fourth Amendment excessive force claim. [AAB 54-55.] They are not. The California Supreme Court has plainly held that "state and federal standards are not the same" and "state negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." *Hayes v. County of San Diego*, 57 Cal. 4th 622, 639 (2013). Specifically, a negligence claim stemming from a police shooting would focus on "the totality of circumstances

surrounding the shooting, including the officers' preshooting conduct." *Id.* at 638. Excessive force claims, in contrast, have not historically taken preshooting conduct into account.[6]

Defendants cite *Sanders v. City of Fresno,* 551 F. Supp. 2d 1149 (E.D. Cal. 2008), and *City of Simi Valley v. Superior* Court, 111 Cal. App. 4th 1077 (2003),[7] for the proposition that where a federal court finds police conduct to be reasonable, that decision bars a state negligence action premised upon the same conduct. [AAB 55.] First, Defendants cannot seek to apply claim preclusion law to support the district court's *sua sponte* adjudication in this case of Plaintiffs' state claims without any notice to Plaintiffs. Second, these cases do not apply here because the district court did not find Browder's preshoot conduct to be reasonable—it did not consider such conduct at all. [ER 2-19.]

CONCLUSION

A jury must decide the disputed material facts regarding Browder's fatal shooting of Fridoon. It was error for the district court to resolve those disputed

[6] This brief does not address whether the district court was correct to ignore Browder's preshoot conduct in considering the reasonableness of the shooting. The Supreme Court recently declined to address this issue. *See Mendez*, 137 S. Ct. at 1547 n.* (declining to address whether the "totality of the circumstances" on an excessive force claim takes into account "unreasonable police conduct prior to the use of force that foreseeably created the need to use it").

[7] Defendants also cite a third case for this principle: *Oppenheimer v. City of Los Angeles*, 104 Cal. App. 2d 545 (1951). *Oppenheimer*, however, deals with false imprisonment, not the negligence or any other claims asserted in this matter.

facts with a lens calibrated in Defendants' favor and enter summary judgment for Defendants on all claims. Plaintiffs respectfully request that the Court reverse the judgment, and remand the case with directions to the district court to deny Defendants' Motion for Partial Summary Judgment and set this matter for trial.

DATED: November 9, 2018

Respectfully submitted,

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By: *\/s/ Mira Hashmall*

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief complies with the type-volume limitation of Circuit Rules 32-1(b) and 32-2(b) because it is a single brief replying to two separate briefs (Defendants' Answering Brief and the proposed Amicus Curiae Brief filed by the California State Association of Counties et al.), and because it contains 8,373 words, as indicated by Microsoft Word count, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it uses a proportionally spaced Times New Roman typeface in 14-point font.

DATED: November 9, 2018

Respectfully submitted,

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By: *\/s/ Mira Hashmall*

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CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1999 Avenue of the Stars, Suite 1000, Los Angeles, CA 90067.

On November 9, 2018, I served true copies of the following document(s) described as:

FIRST CROSS-APPEAL BRIEF OF APPELLANT COUNTY OF LOS ANGELES

on the interested parties in this action as follows:

BY CM/ECF: 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 using the appellate CM/ECF system on November 9, 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.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 9, 2018, at Los Angeles, California.

/s/ Mira Hashmall
Mira Hashmall