18-SHELLEY
fficial capacity as Chief of Police; and DES 1 through 10, inclusive,

Defendants and Appellees.

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

APPELLANTS'

REPLY BRIEF

Attorneys for Plaintiffs and Appellants
S.R. NEHAD; K.R. NEHAD; and ESTATE OF FRIDOON RAWSHAN NEHAD

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INTRODUCTION

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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

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

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)

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

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.

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.

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 *no d a 7.5s8(na)44(r)1Td [i487 -r4 16.44 rt 0.001vem*

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.

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 wh

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.

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*

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

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.

[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

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. [

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

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.").

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.

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

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

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,

MILLER BARONDESS, LLP

By: */s/ Mira Hashmall*
MIRA HASHMALL
Attorneys for Plaintiffs and Appellants
S.R. NEHAD; K.R. NEHAD; and
ESTATE OF FRIDOON RAWSHAN
NEHAD

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