

UNITED STATES DISTRICT COURT
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

CHIEN VAN BUI, et al.,

No. C 11-04189 LB

Plaintiffs,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

v.

CITY AND COUNTY OF SAN
FRANCISCO, et al.,

[Re: ECF No. 81]

Defendants.

INTRODUCTION

In this civil rights action, Chien Van Bui and Ai Huynh (collectively, "Plaintiffs"), the parents of decedent Vinh Van Bui, known as Tony Bui ("Bui"), sued San Francisco Police Officers Austin Wilson ("Officer Wilson") and Timothy Ortiz ("Officer Ortiz"), as well as the City and County of San Francisco ("CCSF") (collectively, "Defendants") for the death of their son. Complaint, ECF No. 1.¹ Defendants move for summary judgment. Motion, ECF No. 81. The court held a hearing on the matter on June 26, 2014. 6/26/2014 Minute Order, ECF No. 136. Upon consideration of the admissible evidence submitted, the arguments of counsel, and the applicable authority, the court **GRANTS** summary judgment in favor of Defendants with respect to Plaintiffs' *Monell* claim and

¹ Citations are to the Electronic Case File ("ECF") with pin cites to the electronically-generated page numbers at the top of the document.

1 otherwise **DENIES** Defendants’ motion.

2 **STATEMENT**

3 **I. FACTS**

4 Defendants Austin Wilson (“Officer Wilson”) and Timothy Ortiz (“Officer Ortiz”) were police
5 officers with the San Francisco Police Department (“SFPD”) and employed by the City and County
6 of San Francisco (“City”). Joint Statement of Undisputed Facts (“UF”), Fact 1. At all times
7 relevant to this action, they were acting in the course and scope of their employment with the SFPD.
8 UF, Fact 1.

9 On December 29, 2010, Officer Wilson and Officer Ortiz were in uniform and driving a marked
10 police car. UF, Fact 1. Officer Wilson was 6’ tall and weighed 198 pounds, Wilson Depo. 2 at
11 69:18-70:1, Schwartz Decl., Ex. Q, ECF No. 121-17, and Officer Ortiz was 5’9” tall and weighed
12 between 175 and 185 pounds, Ortiz Depo. 2 at 104:19-22, Schwartz Decl., Ex. L, ECF No. 121-12.
13 Police Inspector Kevin Whitfield, who is not a defendant to this action, also was working that day.
14 UF, Fact 1. Vinh Van Bui, known as Tony Bui (“Bui”), lived at 629 Bacon Street, San Francisco, a
15 flat which he shared with several family members, including his sisters Cindy Thanh Tran (“Tran”)
16 and Lan Herrera (“Herrera”), Herrera’s daughter Melina H., his father Plaintiff Chien Van Bui
17 (“Chien Van Bui”) and his mother Plaintiff Ai Huynh (“Huynh”). UF, Fact 2. Bui, who was 46
18 years old and was 5’6” tall and weighed 135 pounds, suffered from a mental condition and was
19 easily agitated by loud noises. UF, Fact 4; Marvin C. Depo. at 20:16-22, Schwartz Decl., Ex. B,
20 ECF No. 121-2; Autopsy Report, Schwartz Decl., Ex. CC, ECF No. 121-29 at 2. Specifically, Bui
21 had suffered from schizophrenia since at least 1995, Chien Van Bui Depo. at 42:9-25, Schwartz
22 Decl., Ex. A, ECF No. 121-1; Medical Records at 87-89, Schwartz Decl., Ex. AA, ECF No. 121-27,
23 and since 1997, as a side effect of his antipsychotic medication, he also suffered from tardive
24 dyskinesia (i.e. “late-onset abnormal movement”), which sometimes caused his trunk and
25 extremities to rock involuntarily and also caused him to sometimes walk slowly, one step at a time,
26 Marvin C. Depo. at 75:23-77:12, Schwartz Decl., Ex. B, ECF No. 121-2; Shyn Depo. at
27 33:20-34:17, 34:21-36:1, 38:21-39:7, 51:14-53:16, 57:14-20, Schwartz Decl., Ex. N, ECF No. 121-
28 14; Tran Depo. at 21:110, 24:22-25:14, 34:24-35:4, Schwartz Decl., Ex. O, ECF No. 121-15;

1 Medical Records at 282, Schwartz Decl., Ex. AA, ECF No. 121-27. Bui did not have a criminal
2 record. Tran Decl. ¶ 4, ECF No. 104.

3 On the afternoon of December 29, 2010, Melina H., who was then 15 years old, had
4 approximately 15 of her teenaged friends over at her home at 629 Bacon Street. UF, Fact 3. Sharon
5 H. was one of these friends. UF, Fact 3. At some point in time, Sharon H. entered the bathroom and
6 slammed the door behind her, which startled and agitated Bui. UF, Fact 4; Sharon H. Depo. at 20:3-
7 6, Schwartz Decl., Ex. I, ECF No. 121-9. When Sharon H. came out of the bathroom and was going
8 to the kitchen, Bui stuck her in the lower back with an X-Acto knife, which had blade that was
9 approximately 1 inch long. UF, Fact 5; Sharon H. Depo. at 25:6-26:16, 72:20-73:18, Connolly
10 Decl., Ex. N, ECF No. 91; Wilson Depo. at 70:13-17, Schwartz Decl., Ex. Q, ECF No. 121-17;
11 Wilson Decl., Ex. A (photograph of the X-Acto knife). The other teenagers told Sharon H. that she
12 was bleeding and apparently injured. Sharon H. Depo. at 27:8-28:8, Connolly Decl., Ex. N, ECF No.
13 91. Melina H. then telephoned her mother (Herrera), who was not at the house, and told her that
14 “Tony [Bui] cut Sharon [H].” UF, Fact 6. Herrera told Melina H. to call “911.” UF, Fact 7. Melina
15 H. called 911 and reported: “We have a man that’s like mental here and just slapped
16 somebody—one of my friends, and yeah, we need him out.” UF, Fact 8.

17 911 Dispatch broadcasted to SFPD officers in the field that Bui had “just slapped [Melina H.’s]
18 friend” and that the “reporting party” said Bui was “mentally challenged.” UF, Fact 9. Moments
19 later, Melina H. clarified, telling the 911 operator the following: “[Bui] has like a mini, a little mini
20 like knife thing. It’s sharp. And when [her friend] came out [of the bathroom], he said ‘Do you
21 want me to stab you?’ and he hit her with the little pointy thing. . . . She’s bleeding. Yeah, he
22 stabbed her.” UF, Fact 10. Based on this additional information, 911 Dispatch broadcasted:
23 “Subject has a pointed object that he stuck the victim with in the back.” UF, Fact 11. 911 Dispatch
24 also transmitted through the computer assisted dispatch system that Bui had “stabbed [Melina H’s]
25 friend” and was “mentally challenged,” that Melina H. was “not sure if [Bui] has the knife,” and that
26 the injury was “minor.” UF, Fact 11; Borg Decl., Ex. J, ECF No. 94-10. 911 Dispatch also sent to
27 the police vehicle computer the following text: “TX: Susp is Toni who is mentally challenged.”
28 Wilson Depo. at 42:5-15, Schwartz Decl., Ex. Q, ECF No. 121-17. When responding to the

1 dispatch, Officers Ortiz and Wilson had access to the dispatch information through a vehicle
2 computer, working radios and, as to Officer Wilson, an earpiece, Ortiz Depo. at 32:22-25, 54:17-23,
3 80:10-17, Schwartz Decl., Ex. L, ECF No. 121-12; Wilson Depo. at 32:12-19, Schwartz Decl., Ex.
4 Q, ECF No. 121-17; Ortiz Decl. ¶ 10, ECF No. 82; Wilson Decl. ¶ 14, ECF No. 84, but Officers
5 Ortiz and Wilson and Inspector Whitfield say they did not know at that time that Bui had mental
6 health problems, Ortiz Decl. ¶ 10, ECF No. 82; Whitfield Decl. ¶ 14, ECF No. 83, Wilson Decl. ¶
7 10, ECF No. 84.

8 At about 3:53 p.m., Officers Ortiz and Wilson arrived at 629 Bacon Street. UF, Fact 12.
9 Inspector Whitfield also responded, arriving at 629 Bacon Street at about the same time as Officers
10 Ortiz and Wilson. UF, Fact 13. The parties dispute whether the officers treated the call as an
11 emergency. Plaintiffs say that the officers did not and provide evidence that the officers' sirens and
12 lights were off, the officers were not running, and the officers did not discuss tactics when
13 approaching the flat. Ortiz Depo. at 45:13-20, 48:18-25, 55:11-14, Schwartz Decl., Ex. L, ECF No.
14 121-12; Wilson Depo. at 55:19-21, 58:1-8, 66:25-68:24, Schwartz Decl., Ex. Q, ECF No. 121-17.
15 Defendants, on the other hand, provide evidence that the 911 call was classified as an "A
16 priority" call, giving it the highest priority, Goley Depo. at 17:20-18:14, Connolly Reply Decl., Ex.
17 D, ECF No. 129-4 at 17:20-18:14; Borg Decl., Ex. B, ECF No. 94-2; Borg Decl., Ex. J, ECF No. 94-
18 10, and that the officers responded, at least initially, to the call as a "Code 3"—with their lights and
19 sirens on, Ortiz Decl. ¶ 2, ECF No. 82; Wilson Decl. ¶ 2, ECF No. 84. Their guns were holstered,
20 Ortiz Decl. ¶ 8, ECF No. 82; Wilson Decl. ¶ 7, ECF No. 84, they had pepper spray and batons on
21 their persons, and they also had an Extended Range Impact Weapon ("ERIW")—a shotgun that
22 shoots bean bags—in their car, Ortiz Depo. at 28:2-4, 46:4-12, Schwartz Decl., Ex. L, ECF No. 121-
23 12; Wilson Depo. at 35:18-37:4, Schwartz Decl., Ex. Q, ECF No. 121-17.

24 The officers either knocked on the door or rang the doorbell, and one of the teenagers at Melina
25 H.'s get-together, Aaron L., opened the door and allowed the officers into the house. UF, Fact 14.
26 Upon entering, Officers Ortiz and Wilson and Inspector Whitfield saw a group of teenagers in the
27 living room, and at least one officer asked whether anyone had been stabbed. UF, Fact 15; UF, Fact
28 16; Ortiz Decl. ¶¶ 4-6, ECF No. 82; Whitfield Decl. ¶ 4, ECF No. 83; Jason W. Depo. at 33:10-24,

1 Connolly Decl., Ex. H, ECF No. 88; Sharon H. Depo. at 36:11-20, Connolly Decl., Ex. N, ECF No.
2 91; Marvin C. Depo. at 40:24-41:9, 42:7-13, 73:20-24, Connolly Decl., Ex. J, ECF No. 89; Tran
3 Depo. at 13:9-11; 14:10-15:17, Connolly Decl., Ex. P, ECF No. 92-1; Ortiz Depo. at 49:5-12,
4 Schwartz Decl., Ex. L, ECF No. 121-12. Initially, no one in the room acknowledged that anyone
5 had been stabbed, no one appeared to be in distress, and Bui's sister, Tran, the only adult present,
6 said nothing had happened. UF, Fact 16; Ortiz Decl. ¶ 5, ECF No. 82; Sharon H. Depo. at 39:1-6,
7 Connolly Decl., Ex. N, ECF No. 91; Ortiz Depo. at 49:13-22, Schwartz Decl., Ex. L, ECF No. 121-
8 12. Tran may also have told the police officers to leave. *See* Sharon H. Depo. at 39:3-40:2,
9 Connolly Decl., Ex. N, ECF No. 91; Sharon H. Depo. at 66:11-16, Schwartz Decl., Ex. I, ECF No.
10 121-9; Whitfield Depo. at 62:7-16, Schwartz Decl., Ex. P, ECF No. 121-16; Tran Decl. ¶ 2, ECF No.
11 104; *but see* Tran Depo. at 14:2-17:15, 57:15-20, 58:20-23, Connolly Reply Decl., Ex. P, ECF No.
12 129-16 at 14:2-17:15. No one had yet informed Tran that anyone had been stabbed, that Melina H.
13 had called the police, or why Melina H. had done so. UF, Fact 19. Relying on the information that
14 Tran provided to him (i.e., that nothing had happened), Officer Ortiz radioed Dispatch at 3:45:43
15 p.m. and stated that the call had "no merit." UF, Fact 17.

16 Thereafter, Inspector Whitfield again asked the group of teenagers if anyone had been "stabbed."
17 Whitfield Decl. ¶ 5, ECF No. 83. This time, Sharon H. was pointed out as having been cut, and she
18 raised her hand in confirmation. UF, Fact 20. Inspector Whitfield asked Sharon H. where she had
19 been stabbed, and she showed him the injury on her back, which Inspector Whitfield describes as a
20 "puncture wound." UF, Fact 21. Tran heard Inspector Whitfield confirm with Sharon H. that she
21 had been stabbed. UF, Fact 22. Inspector Whitfield's observation of the puncture wound confirmed
22 that a stabbing or other such injury had occurred, but Sharon H. stated that she was not hurt and did
23 not need a paramedic. Whitfield Decl. ¶¶ 5-6, ECF No. 83; Whitfield Depo. at 45:6-8, Schwartz
24 Decl., Ex. P, ECF No. 121-16. Officers Ortiz and Wilson saw Sharon H. lift her shirt and point to
25 her back, and Officer Ortiz saw a wound on her back, which looked to him like a fresh cut. Ortiz
26 Decl. ¶ 6, ECF No. 82; Wilson Decl. ¶ 6, ECF No. 84. Having confirmed that Sharon H. had been
27 stabbed, Officers Ortiz and Wilson asked with urgency the location of the man with the knife. Ortiz
28 Decl. ¶ 6, ECF No. 82; Whitfield Decl. ¶ 6, ECF No. 83; Wilson Decl. ¶ 6, ECF No. 84; Tran Depo.

1 at 14:10-15:22, Connolly Decl., Ex. P, ECF No. 92-1; Marvin C. Depo. at 41:3-15, Connolly Decl.,
2 Ex. J, ECF No. 89. Certain people in the house informed Officers Ortiz and Wilson that Bui was in
3 the house, by either pointing down the hall or telling the officers. UF, Fact 25.

4 Hearing that a stabbing had occurred, seeing the wound, and hearing that the perpetrator was in
5 the house corroborated for the officers that a crime had been committed and that the suspect was
6 located on the premises. Ortiz Decl. ¶ 6, ECF No. 82; Whitfield Decl. ¶ 6, ECF No. 83; Wilson
7 Decl. ¶ 6, ECF No. 84. The officers did not know at that time whether Bui still possessed the X-
8 Acto Knife. Ortiz Depo. at 59:20-22, Schwartz Decl., Ex. L, ECF No. 121-12. As they advanced,
9 Tran tried to inform the officers again of Bui's mental illness, and Plaintiffs say that the officers
10 shoved her aside. Marvin C. Depo. at 70:25-71:20, Schwartz Decl., Ex. B, ECF No. 121-2; Melina
11 H. Depo. at 69:6-12, 71:1-25, Schwartz Decl., Ex. H, ECF No. 121-8; Aaron L. Depo. at 21:13-17,
12 21:25-22:2, 25:7-11, 39:14-19, Schwartz Decl., Ex. K, ECF No. 121-11; Simon P. Depo. at 26:2-9,
13 26:24-27:19, 42:3-6, Schwartz Decl., Ex. M, ECF No. 121-13; Tran Depo. at 16:1-15, 17:7-15,
14 55:2-9, Schwartz Decl., Ex. O, ECF No. 121-15; Sandra W. Depo. at 70:22-71:3, 76:15-20,
15 Schwartz Decl., Ex. T, ECF No. 121-20; Tran Decl. ¶ 3, ECF No. 104. In any case, Officer Ortiz
16 and Officer Wilson say that they do not recall Tran telling them that Bui was mentally ill. Ortiz
17 Depo. at 54:17-55:8, 56:24-57:10, Schwartz Decl., Ex. L, ECF No. 121-12; *but see* Tran Depo. at
18 16:7-10, 17:23-24, Schwartz Decl., Ex. O, ECF No. 121-15 (testifying that one of the officers told
19 her that he knew Bui was mentally ill). Officers Ortiz and Wilson did not develop a plan to extract
20 Bui from the bathroom. Ortiz Depo. at 55:11-14, Schwartz Decl., Ex. L, ECF No. 121-12; Wilson
21 Depo. at 96:17-97:11, Schwartz Decl., Ex. Q, ECF No. 121-17.

22 Officers Ortiz and Wilson walked down the hallway toward the bathroom, looking for Bui. UF,
23 Fact 26. Officers Ortiz knocked on the bathroom door and ordered Bui out. Ortiz Decl. ¶ 7, ECF
24 No. 82; Melina H. Depo. at 75:18-24, Schwartz Decl., Ex. H, ECF No. 121-1; Sharon H. Depo. at
25 38:6-23, 40:14-19, Schwartz Decl., Ex. I, ECF No. 121-9; Andrew K. Depo. at 32:24-33:4, Schwartz
26 Decl., Ex. J, ECF No. 121-10; Simon P. Depo. at 26:5-9, Schwartz Decl., Ex. M, ECF No. 121-13;
27 Jason W. Depo. at 37:2-6, Schwartz Decl., Ex. R, ECF No. 121-18. Soon thereafter, the bathroom
28 door opened inward, and Bui emerged with the X-Acto knife in his hand. UF, Fact 26; see Wilson

1 Decl., Ex. A, ECF No. 84-1 (photographs of the X-Acto knife). Officers Ortiz and Wilson then
2 pulled out their guns and pointed them at Bui. UF, Fact 28.

3 The parties dispute much of what happened next. According to Plaintiffs, Bui had the X-Acto
4 knife down by his side. Melina H. Depo. at 78:11-79:7, Schwartz Decl., Ex. H, ECF No. 121-8;
5 Tran Depo. at 21:11-22:1, 69:23-70:5, Schwartz Decl., Ex. O, ECF No. 121-15. Plaintiffs say that
6 Bui turned away from the officers and, with the X-Acto knife still by his side, began to slowly
7 shuffle toward the front door of the flat. Marvin C. Depo. at 76:6-77:10, Schwartz Decl., Ex. B,
8 ECF No. 121-2; Melina H. Depo. at 78:4-81:7, Schwartz Decl., Ex. H, ECF No. 121-8; Simon P.
9 Depo. at 44:6-11, 44:17-18, 57:19-58:1, Schwartz Decl., Ex. M, ECF No. 121-13; Tran Depo. at
10 20:22-22:4, 62:11-20, 63:15-17, 65:21-66:2, 69:17-70:5, Schwartz Decl., Ex. O, ECF No. 121-15.
11 Plaintiffs further say that Bui did not threaten the police with the knife, but assumed a defensive,
12 protective, cringing attitude where he turned away from the Officers and bent at the waist, keeping
13 the hand with the knife at his side and bringing the other hand up with an open palm. Melina H.
14 Depo. at 79:5-82:9, Schwartz Decl., Ex. H, ECF No. 121-8; Aaron L. Depo. at 22:3-4, 23:21-25:5,
15 39:20-23, Schwartz Decl., Ex. K, ECF No. 121-11; Simon P. Depo. at 57:19-58:1, Schwartz Decl.,
16 Ex. M, ECF No. 121-13; Tran Depo. at 21:18-22:19, 65:21-66:2, 69:17-70:5, Schwartz Decl., Ex. O,
17 ECF No. 121-15. The officers ordered that Bui drop the knife, but it appeared that he did not
18 understand them. Sharon H. Depo. at 69:24-70:2, Schwartz Decl., Ex. I, ECF No. 121-9; Simon P.
19 Depo. at 46:23-47:3, Schwartz Decl., Ex. M, ECF No. 121-13; Tran Depo. at 20:20-23, Schwartz
20 Decl., Ex. O, ECF No. 121-15; *but see* Sharon H. Depo. at 70:15-71:25, Schwartz Decl., Ex. I, ECF
21 No. 121-9. The officers backed up to somewhere in the living room. UF, Fact 31. When
22 approximately 6 to 8 feet away from Bui, the officers fatally shot Bui twice, with Officer Ortiz firing
23 two shots (one of which missed Bui), and Officer Wilson firing one. UF, Fact 33; UF, Fact 34;
24 Herrmann Decl. ¶¶ 3-13, ECF No. 103. The bullets hit Bui at a downward angle. Herrmann Decl.
25 ¶¶ 3-13, ECF No. 103. Bui was not facing the officers when shot, and the bullets may have hit him
26 at a downward angle either because he was shorter than the officers, he was falling from having been
27 shot, or was cringing and trying to avoid being shot. *Id.*

28 Defendants present a different story. They say that when Bui emerged from the bathroom, his

1 hands were up near his chest and he walked towards Officers Ortiz and Wilson while waving the
2 X-Acto knife in the air in an aggressive and menacing manner. Ortiz Decl. ¶ 7, ECF No. 82;
3 Whitfield Decl., ¶ 9, ECF No. 83; Wilson Decl., ¶ 8, ECF No. 84; Wilson Depo. at 111:11-112:9,
4 Connolly Decl., Ex. S, ECF No. 93-2. They say that Bui was close enough to Officers Ortiz and
5 Wilson to be able to stab either of them if he lunged towards them. Wilson Decl. ¶ 9, ECF No. 84;
6 Whitfield Decl. ¶ 10, ECF No. 83. Officers Ortiz and Wilson repeatedly told Bui to drop the knife,
7 but he did not do so. UF, Fact 29; Ortiz Decl. ¶¶ 8-9, ECF No. 82; Whitfield Decl. ¶¶ 8, 10, ECF
8 No. 83; Wilson Decl. ¶¶ 9-10, ECF No. 84; Sharon H. Depo. at 43:4-17, 44:4-9, 58:2-4, Connolly
9 Decl., Ex. N, ECF No. 91; Jason W. Depo. at 37:2-15, 40:12-14, 41:18-42:5, 45:2-11, Connolly
10 Decl., Ex. H, ECF No. 88; Marvin C. Depo. at 45:7- 46:2, Connolly Decl., Ex. J, ECF No. 89;
11 Andrew K. Depo. at 34:16-25, Connolly Decl., Ex. C, ECF No. 86-3; Aaron L. Depo. at 19:16-21,
12 22:3-6, 24:7-12, 42:22-43:6, 43:12-44:9, Connolly Decl., Ex. B, ECF No. 86-2; Simon P. Depo. at
13 29:3-7, 57:16-21, Connolly Decl., Ex. O, ECF No. 92. Still holding the knife in the air in an
14 aggressive manner, Bui continued down the hallway (at a regular or quick pace) and toward Officers
15 Ortiz and Wilson, and Officers Ortiz and Wilson continued to order Bui to drop the knife. UF, Fact
16 30; Ortiz Decl. ¶¶ 8-9, ECF No. 82; Wilson Decl., ¶¶ 8-9, ECF No. 84; Tran Depo. at 67:14-25,
17 Connolly Decl., Ex. P, ECF No. 92-1; Sharon H. Depo. at 44:4-17, 56:7-58:4, Connolly Decl., Ex.
18 N, ECF No. 91; Andrew K. Depo. at 34:5-9, 34:16-25, Connolly Decl., Ex. C, ECF No. 86-3; Sandra
19 W. Depo. at 57:14-20, Connolly Decl., Ex. M, ECF No. 90-2; Jason W. Depo. at 39:9-10, 41:1-42:5,
20 47:3-9, Connolly Decl., Ex. H, ECF No. 88; Marvin C. Depo. at 58:5-11, 77:4-8, 90:3-8, Connolly
21 Decl., Ex. J, ECF No. 89; Jonathan Y. Depo. at 47:3-48:4, 48:9-11, 61:8-17, Connolly Decl., Ex. I,
22 ECF No. 88-1. Facing Bui, the officers, with their guns drawn, walked backwards and side-by-side
23 and retreated into the living room. Ortiz Decl. ¶ 8, ECF No. 82; Wilson Decl. ¶ 10, ECF No. 84;
24 Andrew K. Depo. at 34:5-9, Connolly Decl., Ex. C, ECF No. 86-3; Marvin C. Depo. at 47:11-14,
25 Connolly Decl., Ex. J, ECF No. 89. The officers backed up to somewhere in the living room, UF,
26 Fact 31, and continued to order Bui to drop the knife, Ortiz Decl. ¶ 9, ECF No. 82; Whitfield Decl. ¶
27 10, ECF No. 83; Wilson Decl. ¶ 10, ECF No. 84; Andrew K. Depo. at 35:10-13, Connolly Decl., Ex.
28 C, ECF No. 86-3; Jason W. Depo. at 46:2-11, Connolly Decl., Ex. H, ECF No. 88; Tran Depo. at

1 63:18-20, 66:21-25, Connolly Decl., Ex. P, ECF No. 92-1. But Bui did not stop. UF, Fact 32.
2 Instead, Bui continued to advance toward Officers Ortiz and Wilson and threatened them with the
3 knife. Ortiz Decl. ¶ 9, ECF No. 82; Wilson Decl. ¶¶ 10-11, ECF No. 84; Jason W. Depo. at 42:9-
4 45:11, Connolly Decl., Ex. H, ECF No. 88. The officers ran out of room to retreat because some of
5 the teens and living room furniture were in the way. Ortiz Decl. ¶ 9, ECF No. 82; Whitfield Decl. ¶
6 10, ECF No. 83; Wilson Decl. ¶ 11, ECF No. 84; Jason W. Depo. at 42:9-43:3, Connolly Decl., Ex.
7 H, ECF No. 88. Believing that they and some of the teenagers were at imminent risk of being
8 stabbed or otherwise seriously injured by Bui, the officers shot three times at Bui. UF, Fact, 33; UF,
9 Fact 35; Ortiz Decl. ¶ 9, ECF No. 82; Wilson Decl. ¶ 11, ECF No. 84; Ortiz Depo at 97:24-99:19,
10 Connolly Decl., Ex. L, ECF No. 90-1; Wilson Depo. at 117:23-118:8, Connolly Decl., Ex. S, ECF
11 No. 93-2. When they shot, the officers were approximately 4 to 5 feet away from Bui. Whitfield
12 Decl. ¶ 10, ECF No. 83; Wilson Decl. ¶ 11, ECF No. 84; Jonathan Y. Depo. at 60:24-61:7, Connolly
13 Decl., Ex. I, ECF No. 88-1. Two of the shots hit the front of Bui’s body, fatally injuring him. UF,
14 Fact 34; Smith Decl. ¶ 10, ECF No. 85.

15 Between 45 and 90 seconds elapsed between the time the officers entered the house and the time
16 shots were fired. UF, Fact 36. Approximately 10-15 seconds elapsed from the time the officers first
17 had contact with Bui at the bathroom door to when the shots were fired. Ortiz Depo. at 109:18-25,
18 Connolly Decl., Ex. L, ECF No. 90-1. The officers are trained that, when circumstances require the
19 use of their guns, they should aim for the body center mass of the target individual. Ortiz Decl. ¶ 9,
20 ECF No. 82; Wilson Decl. ¶ 11, ECF No. 84. Both Officers Ortiz and Wilson attended Peace
21 Officer Standards and Training (“POST”) academies. Corriea Depo. at 71:7-73:1, Schwartz Decl.,
22 Ex. C, ECF No. 121-3; Ortiz Depo. at 14:4-13, 19:19-20:8, Schwartz Decl., Ex. L, ECF No. 121-12;
23 Wilson Depo. at 16:5-17:3, Schwartz Decl., Ex. Q, ECF No. 121-17; *see* Clark Decl. ¶¶ 2(b), 5-9,
24 Exs. C-E, ECF No. 124.

25 While it is undisputed that Officers Ortiz and Wilson told Bui to drop the knife, UF, Fact 29; UF,
26 Fact 30, it is unclear whether they told him that they would shoot him if he did not do so. *Compare*
27 Ortiz Decl. ¶ 8, ECF No. 82 (testifying that he warned he would shoot); Aaron L. Depo. at 22:4-6
28 (“The police pulled their guns on [Bui] and said, ‘Drop the weapon or we’ll shoot,’ or something

1 like that.”), 44:2-9 (“Then the cops warned they would shoot.”), *with* Wilson Depo. at 71:12-13,
2 71:21-23, 112:20-113:5, 114:22-115:23, Schwartz Decl., Ex. Q, ECF No. 121-17 (no mention of a
3 warning of imminent force); Wilson Decl. ¶10, ECF No. 84 (same); Marvin C. Depo. at 45:12-46:7,
4 77:113-14, Schwartz Decl., Ex. B, ECF No. 121-2 (same); Joanne G. Depo. at 32:21-33:7, Schwartz
5 Decl., Ex. E, ECF No. 121-5 (same); Melina H. Depo. at 87:13-23, Schwartz Decl., Ex. H, ECF No.
6 121-8 (same); Sharon H. Depo. at 43:4-17, 69:19-22, 70:21-23, Schwartz Decl., Ex. I, ECF No. 121-
7 9 (same); Andrew K. Depo. at 34:16-22, 40:20-25, 53:5-9, Schwartz Decl., Ex. J, ECF No. 121-10
8 (same); Simon P. Depo. at 26:13-15, 57:16-18, Schwartz Decl., Ex. M, ECF No. 121-13 (same);
9 Tran Depo. at 21:24-22:1, 66:21-25, Schwartz Decl., Ex. O, ECF No. 121-15 (same); Wilson Depo.
10 at 71:21-23, 112:20-113:5, 114:22-115:2, Schwartz Decl., Ex. Q, ECF No. 121-17 (same); Jason W.
11 Depo. at 37:11-13, 38:16-17, 40:12-14, Schwartz Decl., Ex. R, ECF No. 121-18 (same); Sandra W.
12 Depo. at 56:2-18, 56:23-57:4, Schwartz Decl., Ex. T, ECF No. 121-20 (same).

13 II. PROCEDURAL HISTORY

14 Plaintiffs filed their complaint in this court on August 24, 2011. Complaint, ECF No. 1. They
15 brought: (1) as successor in interest to Bui’s estate and pursuant to 42 U.S.C. § 1983², a claim
16 against Officers Ortiz and Wilson for violation of Bui’s Fourth Amendment right to be free from
17 excessive force; (2) on their own behalf and pursuant to 42 U.S.C. § 1983, a claim against Officers
18 Ortiz and Wilson for interference with their Fourteenth Amendment due process liberty interest in
19 their parental relationship with Bui; (3) as successor in interest to Bui’s estate and pursuant to 42
20 U.S.C. § 1983 and *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a claim against
21 CCSF for failure to train; and (4) on their own behalf and pursuant to California Civil Procedure
22 Code § 377.60, a claim against CCSF (under a theory of respondeat superior) for wrongful death³.

24 ² Under California’s survival statute, Bui’s § 1983 claim survived his death. *See* Cal. Civ.
25 Proc. Code § 377.20; *Chaudhry v. City of Los Angeles*, --- F.3d ---, 2014 WL 2030195, at *4 (9th
26 Cir. May 19, 2014) (citing *Smith v. City of Fontana*, 818 F.2d 1411, 1416-17 (9th Cir. 1987),
27 *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en
banc)).

28 ³ Plaintiffs’ Fourteenth Amendment claim is not duplicative of their wrongful death claim
because prevailing on their Fourteenth Amendment claim entitles them to attorneys’ fees, *see* 42

1 *Id.* ¶¶ 29-53.

2 Defendants now move for summary judgment on all four claims. Motion, ECF No. 81.
3 Plaintiffs oppose the motion, except as to their *Monell* claim. Opposition, ECF No. 120; *id.* at 9 n.1.
4 Defendants filed a reply. Reply, ECF No. 110. The court held a hearing on the matter on June 26,
5 2014. 6/26/2014 Minute Order, ECF No. 136.

6 ANALYSIS

7 I. LEGAL STANDARD

8 The court must grant a motion for summary judgment if the movant shows that there is no
9 genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of
10 law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material
11 facts are those that may affect the outcome of the case. *Anderson*, 477 U.S. at 248. A dispute about
12 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for
13 the non-moving party. *Id.* at 248-49.

14 The party moving for summary judgment bears the initial burden of informing the court of the
15 basis for the motion, and identifying portions of the pleadings, depositions, answers to
16 interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material
17 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To meet its burden, “the moving party
18 must either produce evidence negating an essential element of the nonmoving party’s claim or
19 defense or show that the nonmoving party does not have enough evidence of an essential element to
20 carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz*
21 *Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see Devereaux v. Abbey*, 263 F.3d 1070, 1076
22 (9th Cir. 2001) (“When the nonmoving party has the burden of proof at trial, the moving party need
23 only point out ‘that there is an absence of evidence to support the nonmoving party’s case.’”) (quoting
24 *Celotex*, 477 U.S. at 325).

25 If the moving party meets its initial burden, the burden shifts to the non-moving party to produce
26 evidence supporting its claims or defenses. *Nissan Fire & Marine Ins. Co., Ltd.*, 210 F.3d at 1103.

27 _____
28 U.S.C. § 1988(b), while prevailing on their wrongful death does not. *See Chaudhry*, 2014 WL 2030195, at *7.

1 The non-moving party may not rest upon mere allegations or denials of the adverse party’s evidence,
2 but instead must produce admissible evidence that shows there is a genuine issue of material fact for
3 trial. *See Devereaux*, 263 F.3d at 1076. If the non-moving party does not produce evidence to show
4 a genuine issue of material fact, the moving party is entitled to summary judgment. *See Celotex*, 477
5 U.S. at 323.

6 In ruling on a motion for summary judgment, inferences drawn from the underlying facts are
7 viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith*
8 *Radio Corp.*, 475 U.S. 574, 587 (1986).

9 **II. PLAINTIFFS’ FOURTH AMENDMENT CLAIMS**

10 Plaintiffs’ first claim is against Officers Ortiz and Wilson for violating Bui’s Fourth Amendment
11 right to be free from excessive force. Defendants argue that Plaintiffs’ claim fails because Officers
12 Ortiz and Wilson used reasonable force and are protected by qualified immunity. As explained
13 below, the court disagrees because genuine issues of material fact prevent the court from deciding
14 whether a Fourth Amendment violation occurred or whether the officers are protected by qualified
15 immunity.

16 **A. Genuine Issues of Material Fact Prevent the Court from Deciding Whether a Fourth**
17 **Amendment Violation Occurred**

18 42 U.S.C. § 1983 provides a cause of action for the deprivation of “rights, privileges, or
19 immunities secured by the Constitution or laws of the United States” by any person acting “under
20 color of any statute, ordinance, regulation, custom, or usage.” *Gomez v. Toledo*, 446 U.S. 635, 639
21 (1980). Section 1983 is not itself a source for substantive rights, but rather a method for vindicating
22 federal rights conferred elsewhere. *See Graham v. Connor*, 490 U.S. 386, 393–394 (1989). To state
23 a claim under § 1983, a plaintiff must allege: (1) the conduct complained of was committed by a
24 person acting under color of state law; and (2) the conduct violated a right secured by the
25 Constitution or laws of the United States. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

26 It is undisputed that Officers Ortiz and Wilson were acting under color of state law, and
27 Plaintiffs allege that the officers violated Bui’s Fourth Amendment right to be free from
28 “unreasonable searches and seizures,” U.S. Const. amend. IV, when they “shot [him] without lawful

1 justification.” Complaint, ECF No. 1 ¶ 30. It is undisputed that Mr. Bui was “seized” within the
2 meaning of the Fourth Amendment. Thus, the issue before the court is whether the force used
3 during his seizure was “objectively reasonable.” *Arpin v. Santa Clara Valley Transp. Agency*, 261
4 F.3d 912, 921 (9th Cir. 2001) (citing *Graham*, 490 U.S. at 388).

5 “Determining whether the force used to effect a particular seizure is reasonable under the Fourth
6 Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s
7 Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*,
8 490 U.S. at 396 (internal citations and quotations omitted). To do so, a court must evaluate “the
9 facts and circumstances of each particular case, including [(1)] the severity of the crime at issue,
10 [(2)] whether the suspect poses an immediate threat to the safety of the officers or others, and [(3)]
11 whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at
12 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). The most important of these three factors
13 is whether the suspect poses an immediate threat to the safety of the officers or others. *Id.* The
14 *Graham* factors, however, are not exhaustive. *George v. Morris*, 736 F.3d 829, 837-38 (9th Cir
15 2013). Indeed, because “there are no per se rules in the Fourth Amendment excessive force
16 context,” *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc), courts are to “examine the
17 totality of the circumstances and consider ‘whatever specific factors may be appropriate in a
18 particular case, whether or not listed in *Graham*.’” *Bryan v. McPherson*, 630 F.3d 805, 826 (9th Cir.
19 2010) (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994)). “Other relevant factors
20 include the availability of less intrusive alternatives to the force employed, whether proper warnings
21 were given[,] and whether it should have been apparent to officers that the person they used force
22 against was emotionally disturbed.” *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011)
23 (citations omitted).

24 “The reasonableness of a particular use of force must be judged from the perspective of a
25 reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S.
26 at 396 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)); *see id.* at 396-97 (“‘Not every push
27 or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,’ . . . violates the
28 Fourth Amendment.”) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). This is

1 because “[t]he calculus of reasonableness must embody allowance for the fact that police officers are
2 often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly
3 evolving—about the amount of force that is necessary in a particular situation.” *Id.*

4 As the court described above, the two sides have dramatically different accounts of what
5 happened to Bui. On one hand, Defendants provide admissible evidence to support their story that
6 Bui came down the hall after the officers and attacked, or at least threatened, them with the
7 knife—the same knife with which Bui had stabbed a teenaged girl moments before. Defendants also
8 provide admissible evidence showing that the officers responded to the attack by raising their guns,
9 instructing Bui to drop the knife, and retreating until they no longer safely could. It was only then,
10 when they and some of the teenagers were at imminent risk of being stabbed or otherwise seriously
11 injured, that the officers shot Bui. If this is in fact what happened, under the applicable authority
12 cited by Defendants, then the officers’ actions may have been reasonable. *See Plumhoff v. Rickard*, -
13 -- U.S. ----, 2014 WL 2178335, at *3, *8 (2014) (the officer acted reasonably in shooting the
14 decedent who posed a grave public safety risk where it was undisputed that the decedent led several
15 officers on a five-minute car chase that exceeded 100 miles per hour, nearly collided with more than
16 24 other vehicles, actually did collide with a police car, and, after crashing into different police car,
17 reversed and maneuvered onto another street and tried to resume his flight once again); *Wilkinson v.*
18 *Torres*, 610 F.3d 546, 549, 551 (9th Cir. 2010) (the officer acted reasonably in shooting the decedent
19 where, even construing the facts in the light most favorably to the plaintiffs, the decedent posed an
20 immediate threat to the officer and others because the decedent, driving a van, led the officer on a
21 high-speed and reckless chase, crashed into a telephone pole, ignored the officer’s instruction to
22 show his hands and stop the vehicle and instead accelerated the van while another officer was either
23 lying fallen on the ground or standing but disoriented near the van, and the shooting officer believed
24 the other officer to be at risk of being run over); *Blanford v. Sacramento County*, 406 F.3d 1110,
25 1112-14, 1117-19 (9th Cir. 2005) (the officers acted reasonably in shooting the plaintiff and had
26 probable cause to believe that the plaintiff posed a threat of serious physical harm to the officers or
27 others where it was undisputed that the plaintiff was walking around a neighborhood while wearing
28 a ski mask, appeared to be breaking into a house, growled or roared loudly while raising a two-and-

1 a-half foot sword, and did not obey the officers' commands to drop it); *Reynolds v. County of San*
2 *Diego*, 84 F.3d 1162, 1164-65, 1168-70 (9th Cir. 1996) (the officer acted reasonably in shooting the
3 plaintiff where it was undisputed that the erratically-behaving plaintiff, while being arrested,
4 suddenly picked up a knife, ignored the officer's commands to drop it, and then swung it at the
5 officer at close range); *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 693, 695-96 (1st Cir.
6 1994) (the officer acted reasonably in shooting the plaintiff where it was undisputed that after
7 shouting at the officer "I'll show you" and going into his house, the plaintiff returned holding two
8 steak knives, ignored the officer's warnings to drop them, advanced toward the officer while flailing
9 his arms, and made a kicking or lunging motion toward the officer); *Rhodes v. McDannel*, 945 F.2d
10 117 (6th Cir. 1991) (the officer acted reasonably in shooting the decedent where it was undisputed
11 that the decedent had previously threatened a victim with a machete, advanced toward the officers
12 and the victim with the machete raised, and ignored the officers warnings to drop it); *Pham v. City of*
13 *San Jose*, Case No.: 5:11-CV-01526-EJD, 2013 WL 5443027, at *2-3, *7 (N.D. Cal. Sept. 20, 2013)
14 (the officers acted reasonably in shooting the decedent where it was undisputed that the decedent
15 had a knife, had already slit one victim's throat with it, was trying to re-enter the house which
16 contained another potential victim, ignored the officers' instructions to drop the knife, continued to
17 resist arrest even after being tased, and charged at one of the officers); *Deng v. Loeffler*, No. 2:10-
18 CV-00277-PMP-GWF, 2011 WL 2792340, at *1-2 (D. Nev. July 14, 2011) (the officers acted
19 reasonably in shooting the decedent where it was undisputed that the decedent was holding two
20 knives, running at one of the officer with both hands above his head, ignored the officer's
21 instructions to drop the knives, and, after being shot once, appeared as if he was going to lunge after
22 the officer while still holding one of the knives); *Barber v. City of Santa Rosa*, No. C-08-5649
23 MMC, 2010 WL 5069868, at *1-2, *6 (N.D. Cal. Dec. 7, 2010) (the officer acted reasonably in
24 shooting the decedent where it was undisputed that the decedent suffered from schizophrenia, was
25 agitated and armed with a butcher knife, and advanced toward the officer while making verbal
26 threats and raising the knife in an attack position); *MacEachern v. City of Manhattan Beach*, 623 F.
27 Supp. 1092, 1095-96, 1103-04 (C.D. Cal. 2009) (holding that the officer acted reasonably in
28 shooting the decedent where the plaintiff did not directly counter the defendants' evidence showing

1 that the decedent matched the description of a suspect who threatened a victim with a knife, was
2 armed with a knife and ignored the officer’s instructions to drop it, and jabbed it at the officer while
3 taking steps toward him); *Martinez v. County of Los Angeles*, 47 Cal. App. 4th 334, 339-40, 344-46
4 (Cal. Ct. App. 1996) (the officer acted reasonably in shooting the decedent where it was undisputed
5 that the decedent appeared to be high on PCP and matched the description of a suspect who had
6 brandished a knife, was armed with a carving knife that he held at his waist or with the blade pointed
7 skyward, crossed a busy intersection in complete disregard to oncoming traffic and advanced toward
8 the officer and others, ignored the officer’s instruction to stop and drop the knife, and shouted at the
9 officer that he was the one he was looking for and that if the officer did not kill him he would kill the
10 officer).

11 In all of these other cases, it was undisputed that the plaintiff or decedent attacked, or at least
12 threatened, the officers or others, but in this case Plaintiffs provide admissible evidence of their own
13 to support their story that Bui did nothing like that—and it is Plaintiffs’ view of the facts that the
14 court must take into account for purposes of Defendants’ motion. According to Plaintiffs’ evidence,
15 while Bui did have the X-Acto knife in his hand, it was always down at his side, and rather than
16 charging at the officers, he assumed a defensive, cringing posture and shuffled slowly down the hall
17 because the officers told him to come out of the bathroom. They also present evidence that suggests
18 Bui was not directly facing the officers when he was shot. And if this was what happened, under the
19 applicable authority cited by Plaintiffs, then the officers’ actions likely would not have been
20 reasonable. *See George*, 736 F.3d at 832-33, 838-39 (if a suspect is armed (or reasonably suspected
21 of being armed), a furtive movement, harrowing gesture, or serious verbal threat might create an
22 immediate threat, but the mere fact that a suspect is armed with a deadly weapon does not render an
23 officer’s shooting of the suspect per se reasonable under the Fourth Amendment; if the officers
24 “indeed shot the sixty-four-year-old decedent without objective provocation while he used his
25 walker, with gun trained on the ground, then a reasonably jury could determine that they violated the
26 Fourth Amendment”); *Glenn*, 673 F.3d at 867-69, 872-78 (while a suspect’s possession of a knife is
27 an important consideration, it is not dispositive on its own; finding that a jury could find that the
28 officers’ decision to shoot an individual holding a pocket knife, which the individual did not

1 brandish at anyone, violated the Constitution); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir.
2 1997) (“Law enforcement officials may not kill suspects who do not pose an immediate threat to
3 their safety or to the safety of others simply because they are armed.”); *Curnow v. Ridgecrest Police*,
4 952 F.2d 321, 323, 325 (9th Cir. 1991) (holding that deadly force was unreasonable where,
5 according to the plaintiff’s version of facts, the decedent possessed a gun but was not pointing it at
6 the officers and was not facing the officers when they shot him). At the July 26, 2014 hearing,
7 Defendants argued that it is immaterial whether Bui had the knife down at his side, because he
8 nevertheless was “advancing” toward the officers, did not drop the knife, and had already stabbed
9 someone, but the court does not agree that, under the authority cited above, this is true as a matter of
10 law.

11 Plaintiffs also point to disputed facts relating to other factors bearing upon the court’s inquiry.
12 One factor is whether the officers knew or should have known that Bui had mental health problems.
13 *See Glenn*, 673 F.3d at 875-76 (reversing the district court’s grant of summary judgment in part
14 because the decedent, who was threatening only himself, obviously was emotionally disturbed and
15 the officers should have assigned greater weight to this fact) (citing *Deorle v. Rutherford*, 272 F.3d
16 1272, 1283 (9th Cir. 2001) (while explicitly not adopting a per se rule establishing two different
17 classifications for mentally disabled persons and serious criminals, still emphasizing that “where it is
18 or should be apparent to the officers that the individual involved is emotionally disturbed,” this is a
19 factor to be considered in determining the reasonableness of the force employed)); *Burns v. City of*
20 *Redwood City*, 737 F. Supp. 2d 1047, 1059-60 (N.D. Cal. 2010) (denying the defendants’ summary
21 judgment motion in part because of disputed facts surrounding the officers’ awareness of the
22 plaintiff’s mental health condition, which “has a role to play in the reasonableness inquiry”).
23 Another is whether the officers told Bui that they would shoot him if he did not drop the knife and
24 whether Bui heard of understood them.⁴ *See Glenn*, 673 F.3d at 876 (reversing the district court’s
25 grant of summary judgment in part because it was not clear whether the decedent heard or

26
27 ⁴ Defendants correctly point out that warnings are required “when feasible,” but this further
28 demonstrates the inappropriateness for deciding this issue on summary judgment: given the disputes
about what happened, the court cannot decide whether it was feasible for give Bui more detailed
warnings that they say they did.

1 understood the officers' warnings and the decedent may have been confused about whether his life
2 was in immediate danger) (citing *Deorle*, 272 F.3d at 1284 (instructing that "warnings should be
3 given, when feasible, if the use of force may result in serious injury, and that the giving of a warning
4 of the failure to do so is a factor to be considered in applying the *Graham* balancing test"))).

5 In short, the court cannot say, as a matter of law, that the officers acted reasonably in shooting
6 Bui because there is sufficient evidence for a reasonable jury to return a verdict for either party. In
7 these circumstances, the court must deny Defendants' motion insofar as it asks the court conclude
8 that the officers did not violate Bui's Fourth Amendment right to be free from excessive force.⁵ *See*
9

10
11 ⁵ Plaintiffs contend that they also bring a Fourth Amendment claim based on the Officers
12 Ortiz's and Wilson's "provocation" of the confrontation that led to Bui being shot. *See* Opposition,
13 ECF No. 27-31. As the Ninth Circuit has explained, "where an officer intentionally or recklessly
14 provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation,
15 he may be liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d
16 1177, 1189 (9th Cir. 2002); *see Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366
17 (9th Cir. 1994). In that circumstance, however, the "basis for liability for the subsequent [defensive]
18 use of force is the initial constitutional violation, which must be established under the Fourth
19 Amendment's reasonableness standard." *Id.* at 1190. Plaintiffs argue in their opposition that
20 Officers Ortiz and Wilson recklessly and intentionally provoked the confrontation because they
21 subsequently testified that they would not have done anything differently had they known that Bui
22 was mentally ill and that the officers' allegedly unlawful entry into the house and pointing of their
23 guns at the allegedly non-threatening Bui constitute independent Fourth Amendment violations. *See*
24 Opposition, ECF No. 120 at 29-31. Defendants, in turn, argue in their reply that the officers did not
25 commit independent Fourth Amendment violations and, nevertheless, Plaintiffs cannot introduce this
26 new theory of liability this late in the case. *See* Reply, ECF No. 110 at 13-20.

27 The court declines to rule on whether Defendants are entitled to summary judgment with
28 respect to a Fourth Amendment provocation theory. First, Defendants say that they would have
conducted more detailed discovery regarding the alleged independent Fourth Amendment violations
had it been clear that Plaintiffs brought a provocation theory claim, and the court is not convinced
there has been sufficient briefing on the matter. Second, the concept of escalation is raised in the
Complaint, *see* Complaint, ECF No. 1, ¶ 20, and the context of what happened is relevant to whether
the officers acted reasonably. The case is charged as an excessive-force-resulting-in-wrongful-death
case because that is what the harm is. That a stand-alone provocation theory claim is not explicitly
alleged in the complaint does not preclude the court from considering the context of the entry when
determining whether the officers' subsequent conduct was reasonable. The court expressed this
opinion at the June 26, 2014 hearing, and neither party took issue with it. Third, pleadings often are
amended to conform to the proof, even at trial, and to the extent that there are disputes, they seem
better addressed by motions in limine or jury instructions.

1 *George*, 736 F.3d at 838-39 (affirming the district court’s denial of the defendants’ motion for
2 summary judgment because it could not say the officers assuredly stayed within Constitutional
3 bounds without knowing “[w]hat happened at the rear of [the plaintiff’s] residence during the time
4 [the plaintiff] walked out into the open on his patio and the fatal shot [was fired]”); *Espinosa v. City
5 and County of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010) (“In this case, the district court
6 properly denied the summary judgment motion because there are genuine issues of fact regarding
7 whether the officers violated [the decedent’s] Fourth Amendment rights.”). Indeed, as the Ninth
8 Circuit explained when confronted with similar circumstances:

9 Balancing these various considerations, we hold that the district court erred in
10 granting summary judgment on the constitutionality of the officers’ use of force. We
11 recognize that the officers have offered evidence that could support a verdict in their
12 favor. A jury could view the facts as the district court did, and likewise reach the
13 conclusion that the officers’ use of force was reasonable. But on summary judgment,
14 the district court is not permitted to act as a factfinder. The circumstances of this case
15 can be viewed in various ways, and a jury should have the opportunity to assess the
16 reasonableness of the force used after hearing all the evidence. Because the disputed
17 facts and inferences could support a verdict for either party, we are compelled to
18 reverse the district court’s entry of summary judgment.

19 *Glenn*, 673 F.3d at 878 (internal citation omitted).

20 **B. The Court Cannot Say at this Time that the Officers Are Entitled to Qualified
21 Immunity**

22 Defendants assert that even if Officers Ortiz and Wilson violated Bui’s Fourth Amendment right
23 by using excessive force, they are entitled to qualified immunity. “The doctrine of qualified
24 immunity protects government officials ‘from liability for civil damages insofar as their conduct
25 does not violate clearly established statutory or constitutional rights of which a reasonable person
26 would have known.’” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v.
27 Fitzgerald*, 457 U.S. 800, 818 (1982)). “Qualified immunity balances two important interests—the
28 need to hold public officials accountable when they exercise power irresponsibly and the need to
29 shield officials from harassment, distraction, and liability when they perform their duties
30 reasonably.” *Id.* “The protection of qualified immunity applies regardless of whether the
31 government official’s error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed
32 questions of law and fact.’” *Id.* (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J.,

1 dissenting)).

2 In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court “mandated a two-step sequence for
3 resolving government officials’ qualified immunity claims.” *Id.* at 232. “First, a court must decide
4 whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see
5 Rules 50, 56) make out a violation of a constitutional right.” *Id.* (citing *Saucier*, 533 U.S. at 201).
6 This part of the inquiry “mirrors the substantive summary judgment decision on the merits.” *Sorrels*
7 *v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). “If no constitutional right would have been violated
8 were the allegations established,” then the officer is entitled to qualified immunity. *Saucier*, 533
9 U.S. at 201. “Second, if the plaintiff has satisfied this first step, the court must decide whether the
10 right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.” *Pearson*, 555
11 U.S. at 232. “Qualified immunity is applicable unless the official’s conduct violated a clearly
12 established constitutional right.” *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).⁶

13 As to step one, as noted above, genuine issues of material fact exist regarding whether the
14 officers used objectively reasonable force in shooting Bui.

15 As to step two, “the relevant, dispositive inquiry in determining whether a right is clearly
16 established is whether it would be clear to a reasonable officer that his conduct was unlawful in the
17 situation he confronted.” *Saucier*, 533 U.S. at 202; *see also Walker v. Gomez*, 370 F.3d 969, 978
18 (9th Cir. 2004). This inquiry “must be undertaken in light of the specific context of the case, not as
19 a broad general proposition.” *Saucier*, 533 U.S. at 201. “This is not to say that an official action is
20 protected by qualified immunity unless the very action in question has previously been held
21 unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”
22 *Anderson*, 483 U.S. at 640.

23 As described above, under Plaintiffs’ version of the facts, Bui did not attack or threaten the
24

25 ⁶ The Supreme Court has stated that the order in which these questions are addressed is left
26 to the lower court’s discretion. *Pearson*, 555 U.S. at 236 (“[W]hile the sequence set forth [in
27 *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the
28 district courts and the courts of appeals should be permitted to exercise their sound discretion in
deciding which of the two prongs of the qualified immunity analysis should be addressed first in
light of the circumstances in the particular case at hand.”). That said, the Supreme Court also
believes that the order used in *Saucier* “is often beneficial.” *Id.*

1 Officers Ortiz or Wilson or anyone else in the house after he left the bathroom and before the
2 officers shot him. Officers Ortiz and Wilson shot Bui in 2010, and by that time “[c]ase law ha[d]
3 clearly established that an officer may not use deadly force to apprehend a suspect where the suspect
4 poses no immediate threat to the officer or others.” *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir.
5 2010); *see Curnow*, 952 F.2d at 325 (affirming the district court’s denial of qualified immunity for
6 officers where, under the plaintiff’s version of the 1986 shooting, the officers could not reasonably
7 have believed the use of deadly force was lawful because the decedent did not point the gun at the
8 officers and apparently was not facing them when they shot him the first time). But as explained
9 above, if the events transpired as Defendants say they did, then they likely did act reasonably. Thus,
10 based on the evidence presented by both sides, the court cannot decide as a matter of law whether it
11 would have been “clear to a reasonable officer that his conduct was unlawful in the situation he
12 confronted,” *Saucier*, 533 U.S. at 202, because it is unclear what the situation was. In these
13 circumstances, the court must deny Defendants’ motion insofar as it asks the court conclude that the
14 officers are entitled to qualified immunity. *See Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th
15 Cir. 2003) (“Where the officers’ entitlement to qualified immunity depends on the resolution of
16 disputed issues of fact in their favor, and against the non-moving party, summary judgment is not
17 appropriate.”); *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002) (finding it premature to
18 decide the qualified immunity issue “because whether the officers may be said to have made a
19 ‘reasonable mistake’ of fact or law may depend on the jury’s resolution of disputed facts and the
20 inferences it draws therefrom”) (internal citation omitted); *McCloskey v. Courtnier*, No. C 05-4641
21 MMC, 2012 WL 646219, at *3 (N.D. Cal. Feb. 28, 2012); *Burns*, 2010 WL 3340552, at *12 (“Just
22 as the question of whether a constitutional violation occurred here turns entirely on whose facts to
23 accept, so too does the question of immunity. More simply, if [plaintiff] behaved as the officers
24 contend, their mistake of fact might be objectively reasonable. If he did not, the mistake may be
25 deemed unreasonable.”); *Herrera v. Las Vegas Metro. Police Dept.*, 298 F. Supp. 2d 1043, 1051 (D.
26 Nev. 2004) (“[I]t would be premature to determine the officials’ qualified immunity status at this
27 time [after having concluded that a reasonably jury find that the action complained of constituted a
28 violation of the decedent’s Constitutional rights], because whether the officers may be said to have

1 acted reasonably will depend on the jury’s resolution of the disputed facts.”) (citation omitted).

2 **III. PLAINTIFFS’ FOURTEENTH AMENDMENT CLAIM**

3 Plaintiffs’ second claim is that Defendants’ use of force unconstitutionally interfered with their
4 rights to familial relationships in violation of the Fourteenth Amendment. Defendants argue that
5 their claim fails because Officers Ortiz’s and Wilson’s conduct did not “shock the conscience” and
6 are protected by qualified immunity. As explained below, the court disagrees because genuine
7 issues of material fact prevent the court from deciding whether a Fourteenth Amendment violation
8 occurred or whether the officers are protected by qualified immunity

9 **A. Genuine Issues of Material Fact Prevent the Court from Deciding Whether a**
10 **Fourteenth Amendment Violation Occurred**

11 The Fourteenth Amendment’s substantive due process clause protects against the arbitrary or
12 oppressive exercise of government power. *See County of Sacramento v. Lewis*, 523 U.S. 833, 845-
13 46 (1998). Parents and children may assert Fourteenth Amendment substantive due process claims
14 if they are deprived of their liberty interest in the companionship and society of their child or parent
15 through official conduct. *See Lemire v. Cal. Dept. of Corrections & Rehabilitation*, 726 F.3d 1062,
16 1075 (9th Cir. 2013) (parents and children); *Smith v. City of Fontana*, 818 F.2d at 1418-19; *Curnow*
17 *v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991) (parent); *Crumpton v. Gates*, 947 F.2d 1418,
18 1421-24 (9th Cir. 1991) (child); *cf. Ward v. City of San Jose*, 967 F.2d 280, 284 (9th Cir. 1992)
19 (sibling has no constitutionally protected interest in brother’s companionship under section 1983).

20 “[T]he Due Process Clause is violated by executive action only when it can be properly
21 characterized as arbitrary, or conscience shocking, in a constitutional sense.” *County of Sacramento*
22 *v. Lewis*, 523 U.S. at 845-47; *see Lemire*, 726 F.3d at 1075. The cognizable level of executive abuse
23 of power is that which “shocks the conscience” or “violates the decencies of civilized conduct.” *Id.*
24 at 846. Mere negligence or liability grounded in tort does not meet the standard for a substantive
25 due process decision. *Id.* at 849.

26 “In determining whether excessive force shocks the conscience, the court must first ask ‘whether
27 the circumstances are such that actual deliberation [by the officer] is practical.’” *Porter v. Osborn*,
28 546 F.3d 1131, 1137 (9th Cir. 2008) (quoting *Moreland v. Las Vegas Metro. Police Dep’t*, 159 F.3d

1 365, 372 (9th Cir. 1998) (internal quotation marks omitted)). “Where actual deliberation is
2 practical, then an officer’s ‘deliberate indifference’ may suffice to shock the conscience. On the
3 other hand, where a law enforcement officer makes a snap judgment because of an escalating
4 situation, his conduct may be found to shock the conscience only if he acts with a purpose to harm
5 unrelated to legitimate law enforcement objectives.” *Hayes v. County of San Diego*, 736 F.3d 1223,
6 1230 (9th Cir. 2013) (citing *Wilkinson*, 610 F.3d at 554).⁷

7 A court may determine at summary judgment whether the officer had time to deliberate (such
8 that the deliberate indifference standard applies) or instead had to make a snap judgment because he
9 found himself in a quickly escalating situation (such that the purpose to harm standard applies), “so
10 long as the undisputed facts point to one standard or the other.” *Duenez v. City of Manteca*, No.
11 CIV. S-11-1820 LKK/KJN, 2013 WL 6816375, at *14 (E.D. Cal. Dec. 23, 2013). But, “[b]y its
12 nature, the determination of which situation [the officer] actually found himself in is a question of

13
14 ⁷ In their motion, Defendants appear to assume that the “purpose to harm” standard applies
15 and contend that a plaintiff must present evidence that the officer acted with “malice” to prevail on a
16 14th Amendment due process claim. *See* Motion, ECF No. 81 at 26-27. Defendants then argue that
17 Plaintiffs here have not done so. *Id.* Defendants disagree that “malice” is included in the “purpose
18 to harm” standard. Opposition, ECF No. 120 at 31-32. While it true that the Supreme Court stated
19 in *Whitley v. Albers*, 475 U.S. 312 (1986), that the standard for claims under the Eighth Amendment
20 turns on “whether force was applied in a good faith effort to maintain or restore discipline or
21 maliciously and sadistically for the very purpose of causing harm,” *id.* at 320-21 (quoting *Johnson*
22 *v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)), and while it also is true that in *Lewis* the Supreme
23 Court analogized to the prison riot context at issue in *Whitley* when it held that the “purpose to
24 harm” standard applied to judge an officer’s decisions while in a high-speed pursuit of a suspect on a
25 motorcycle, *see* 523 U.S. at 852-53, the Supreme Court nevertheless omitted any “malicious” and
26 “sadistic” language when it explicitly held that “only a purpose to cause harm unrelated to the
27 legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience”
28 that is necessary for a due process violation in the context of a high-speed automobile chase, *id.* at
836. Subsequent Ninth Circuit opinions also have failed to include any “malicious” and “sadistic”
language when stating the “purpose to harm” standard. *See Porter*, 546 F.3d at 1137, 1140 (citing
Lewis, 523 U.S. at 836); *see also Wilkinson*, 610 F.3d at 554 (citing *Porter*, 546 F.3d at 1140).
Following the Supreme Court’s explicit holding in *Lewis* and the subsequent Ninth Circuit opinions,
the court finds that Plaintiffs need not present evidence that Officers Ortiz and Wilson acted with
“malice” to prevail on their 14th Amendment due process claim. *See Rodriguez v. City of Fresno*,
819 F. Supp. 2d at 937, 948 (E.D. Cal. 2011) (“In this circuit, the phrase ‘maliciously and
sadistically for the very purpose of causing harm’ is often restated as requiring that the plaintiff
show that the officer ‘acted with a purpose to harm [the plaintiff] for reasons unrelated to legitimate
law enforcement objectives.’”) (quoting *Porter*, 546 F.3d at 1137)).

1 fact for the jury, so long as there is sufficient evidence to support both standards.” *Id.*

2 In their motion, although they never make it explicit, Defendants argue that the purpose to harm
3 standard applies because Officers Ortiz and Wilson did not have time to deliberate before having to
4 shoot Bui because the situation in the house was quickly escalating and he attacked or threatened
5 them with the knife. *See* Motion, ECF No. 81 at 26-27. Assuming that this standard applies,
6 Defendants then argue that they are entitled to summary judgment because Plaintiffs do not (and
7 cannot) point to admissible evidence showing that Officers Ortiz or Wilson acted with a purpose to
8 harm Bui. Rather, the officers acted in furtherance of a legitimate law enforcement objective, and
9 they were forced to shoot Bui “in response to the life-threatening circumstances they faced.”
10 Motion, ECF No. 81 at 27.

11 Even though the officers were not in the house for very long—it is undisputed that between 45
12 and 90 seconds elapsed between the time the officers entered the house and the time shots were
13 fired, and approximately 10 to 15 seconds elapsed from the time the officers first had contact with
14 Bui at the bathroom door to when the shots were fired—Plaintiffs argue that it is not clear whether
15 Officers Ortiz and Wilson in fact were in a quickly escalating situation that required them to make
16 the snap judgment to shoot Bui because, as the court described above, there is evidence showing that
17 while Bui did have the X-Acto knife in his hand, it was always down at his side, and rather than
18 charging at the officers, he assumed a defensive, cringing posture and shuffled slowly down the hall
19 because the officers told him to come out of the bathroom. They also present evidence that suggests
20 Bui was not directly facing the officers when he was shot. Viewing the evidence in favor of
21 Plaintiffs, it is possible that the deliberate indifference, and not the purpose to harm, standard would
22 apply here. *See Duenez*, 2013 WL 6816375, at *15 (“Even if it found that decedent had a knife in
23 his hand, that alone would not necessarily bring the situation into a ‘purpose to harm’ situation,
24 since a reasonable jury could find that decedent was not advancing on [the officer], nor threatening
25 him with the knife.”). Plaintiffs go on to point out that courts have denied summary judgment when
26 it was unclear, because of the disputed facts, which standard applied. *See id.* (finding that there was
27 “a genuine dispute about whether [the officer] had the ‘luxury’ of deliberation” and denying
28 summary judgment in favor of the defendants on the plaintiffs’ Fourteenth Amendment due process

1 claim because “a reasonably jury could find [that the officer] acted with deliberate indifference in a
2 non-emergency situation, or that he acted with a purpose to harm decedent”); *McCloskey*, 2012 WL
3 646219, at *4 (denying summary judgment in favor of the officer on the plaintiffs’ Fourteenth
4 Amendment due process claim because “the facts relevant to a determination of whether [the officer]
5 had time to fully consider his use of pepper spray and/or whether he acted with ‘deliberate
6 indifference’” are disputed); *F.C. ex rel. Rios v. County of Los Angeles*, No. CV 10-169 CAS (Rzx),
7 2010 WL 5157339, at *5-6 (C.D. Cal. Dec. 13, 2010) (denying summary judgment in favor of the
8 defendants on the plaintiffs’ Fourteenth Amendment due process claim where the facts regarding
9 how the shooting occurred were disputed).

10 The court notes that Defendants failed to respond in their reply to any of Plaintiffs’ arguments
11 about the Fourteenth Amendment claim. *See generally* Reply, ECF No. 110. Based on the record
12 and the authorities cited, the court denies Defendants’ motion insofar as it asks the court conclude
13 that the officers did not violate Plaintiffs’ Fourteenth Amendment due process right to be free from
14 interference with their rights to familial relationships.

15 **B. The Court Cannot Say at this Time that the Officers are Entitled to Qualified Immunity**

16 Defendants assert that even if Officers Ortiz and Wilson violated Plaintiffs’ Fourteenth
17 Amendment rights by using excessive force that shocks the conscience, they are entitled to qualified
18 immunity. But just as their qualified immunity argument fails with respect to Plaintiffs’ Fourth
19 Amendment claim, their arguments fails with respect to Plaintiffs’ Fourteenth Amendment claim,
20 too. This is because, based on the evidence presented by both sides, the court cannot decide as a
21 matter of law whether it would have been “clear to a reasonable officer that his conduct was
22 unlawful in the situation he confronted,” *Saucier*, 533 U.S. at 202, because it is unclear what the
23 situation was. In these circumstances, the court must deny Defendants’ motion insofar as it asks the
24 court conclude that the officers are entitled to qualified immunity.

25 **IV. PLAINTIFFS’ MONELL CLAIM**

26 Plaintiffs’ third claim is against CCSF for its failure to train the officers. In their opposition,
27 Plaintiffs state that they do not oppose Defendants’ motion for summary judgment with respect to
28 Plaintiffs’ third claim. Opposition, ECF No. 120 at 9 n.1. Accordingly, the court grants Defendants’

1 motion with respect to Plaintiffs' third claim.

2 **V. PLAINTIFFS' WRONGFUL DEATH CLAIM**

3 Plaintiffs' fourth claim is against CCSF (under a theory of respondeat superior) for wrongful
4 death, *see* Cal. Civ. Proc. Code § 377.60, which is simply the statutorily created right of an heir to
5 recover damages resulting from a tortious act which results in the decedent's death," *Gilmore v.*
6 *Superior Court*, 230 Cal. App. 3d 416, 420 (Cal. Ct. App. 1991) (citations omitted). "The elements
7 of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting
8 death, and the damages, consisting of the pecuniary loss suffered by the heirs." *Quiroz v. Seventh*
9 *Ave. Center*, 140 Cal. App. 4th 1256, 1264 (Cal. Ct. App. 2006). The California Supreme Court has
10 held that "an officer's lack of due care can give rise to negligence liability for the intentional
11 shooting death of a suspect." *Munoz v. Olin*, 24 Cal. 3d 629, 634 (1979) (citing *Grudt v. City of Los*
12 *Angeles*, 2 Cal. 3d 575, 587 (1970)). In this context, to prove the tort, a plaintiff must show that the
13 officer violated his "duty to use reasonable force under the totality of the circumstances." *See*
14 *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 526 n.10 (Cal. Ct. App. 2009). Moreover, where the
15 officer's preshooting conduct did not cause the plaintiff any injury independent of the injury
16 resulting from the shooting, the officer's preshooting conduct is properly "included in the totality of
17 circumstances surrounding [his] use of deadly force." *Hayes v. County of San Diego ("Hayes I")*, 57
18 Cal. 4th 622, 632 (2013).

19 Defendants argue that CCSF is not liable because the officers are protected by several statutory
20 privileges and thus are immune from liability. *See Gilmore*, 230 Cal. App. 3d at 421 ("A privileged
21 act is by definition one for which the actor is absolved of any tort liability, whether premised on the
22 theory of negligence or of intent.") (citations omitted).

23 First, they argue that they are protected under California Penal Code § 835a, which provides that

24 [a]ny peace officer who has reasonable cause to believe that the person to be arrested
25 has committed a public offense may use reasonable force to effect the arrest, to
26 prevent escape, or to overcome resistance." It goes on to provide in pertinent part
27 that "[a] peace officer who makes or attempts to make an arrest need not retreat or
desist from his efforts by reason of the resistance or threatened resistance of the
person being arrested.

28 As to Officers Ortiz's and Wilson's shooting of Bui, Defendants argue that the "reasonableness"

1 standard for a wrongful death claim is the same as the standard for a Fourth Amendment excessive
2 force claim and that Plaintiffs’ wrongful death claim fails because Plaintiffs’ Fourth Amendment
3 excessive force claim fails. But as explained above, there are genuine issues of material fact that
4 prevent the court from ruling that the officers’ conduct did not violate the Fourth Amendment, and
5 this means that the court also cannot rule that the officers were not liable for wrongful death.
6 Defendants’ reliance on *Hernandez v. City of Pomona* does not change this outcome because in that
7 case the officers’ conduct was determined to be reasonable under the Fourth Amendment. *See* 46
8 Cal. 4th 501, 512, 516 (2009) (plaintiffs were collaterally estopped from bringing a wrongful death
9 claim based on the officers’ use of deadly force because a federal court previously ruled that the
10 officers’ conduct (shooting the decedent) was reasonable under the Fourth Amendment). Here, there
11 has been no such ruling, and the court will not make such a ruling on summary judgment.

12 As to Officers Ortiz’s and Wilson’s preshooting conduct, Defendant argue that the officers were
13 entitled to persist in arresting Bui, in the face of his resistance. They again cite *Hernandez*, which
14 rejected the plaintiffs’ “preshooting negligence claim” because the officers had probable cause to
15 arrest the decedent and, under Section 835a, could use reasonable force to arrest him and did not
16 have an obligation to stop trying to do so. *See id.* at 518-21. But in that case, the court’s decision
17 was made “in light of the [federal court’s previous] finding that the shooting was reasonable,” so the
18 court focused only on the officers’ pre-shooting pursuit of the decedent. *See id.* Here, on the other
19 hand, Plaintiffs’ wrongful death claim is not limited only to the officers’ preshooting conduct;
20 instead, it is based on the totality of the circumstances surrounding his death, and it is still undecided
21 whether the officers’ shooting of Bui was reasonable. Thus, the officers’ preshooting conduct
22 should not be considered separately from their shooting of Bui. *See Hayes I*, 57 Cal. 4th at 632
23 (where the officer’s preshooting conduct did not cause the plaintiff any injury independent of the
24 injury resulting from the shooting, the officer’s preshooting conduct is properly “included in the
25 totality of circumstances surrounding [his] use of deadly force”). Accordingly, the court cannot find
26 that the officers are protected under Section 853a in these circumstances.

27 Second, Defendants argue that they are protected under California Penal Code § 196. “Under
28 Penal Code section 196, a police officer who kills someone has committed a justifiable homicide if

1 the homicide was necessarily committed in overcoming actual resistance to the execution of some
2 legal process, or in the discharge of any other legal duty.” *Brown*, 171 Cal. App. 4th at 533 (internal
3 quotation marks omitted). “The test for determining whether a homicide was justifiable under Penal
4 Code section 196 is whether the circumstances reasonably create[d] a fear of death or serious bodily
5 harm to the officer or to another.” *Id.* (internal quotation marks omitted) (alteration in original).
6 The obvious problem with this argument is that the court cannot say at this stage whether Officers
7 Ortiz’s and Wilson’s actions were reasonable, as there are genuine issues of material fact regarding
8 what happened, and under Plaintiffs’ version of the facts, the officers’ actions may not have been
9 reasonable. Plaintiffs cite several opinions where courts have rejected Section 196 immunity
10 arguments in this situation, *see Mitchell v. City of Pittsburg*, No. C 09-00794 SI, 2013 WL 5487816,
11 at *12 (N.D. Cal. Oct. 1, 2013) (rejecting on summary judgment the defendants’ Section 196
12 immunity argument where a reasonable jury could find that the officer used excessive force in
13 shooting the decedent); *McMurray v. County of Sacramento*, No. CIV S-09-2245 GEB, 2011 WL
14 4709876, at *28 (Oct. 4, 2011) (rejecting on summary judgment the defendants’ Section 196
15 immunity argument because “there are genuine issue[s] of material fact regarding whether [the
16 officer’s] use of deadly force was reasonable, and whether the circumstances surrounding the
17 incident reasonably created a fear in [the officer] of great bodily injury or death to himself or
18 others”); *Adams v. Speers*, No. CV-F-02-5741 LJO, 2004 WL 5567292, at *15 (Dec. 16, 2004)
19 (rejecting on summary judgment the defendants’ Section 196 immunity argument where the
20 plaintiffs “raised factual issues [about] whether [the officer] was in danger when he fired six shots,”
21 “whether [the officer] acted reasonably,” and “whether the circumstances generated a reasonable
22 fear of danger to [the officer] or others”; “Since this Court is not prepared to rule that [the officer’s]
23 conduct does not shock the conscience, this Court is not prepared to rule he justifiably killed [the
24 decedent] under California Penal Code sections or was otherwise immune.”); *cf. Martinez*, 47 Cal.
25 App. 4th at 349-50 (because the court concluded that the officers acted reasonably under a 42 U.S.C.
26 § 1983 excessive force claim analysis, the court also concluded that the plaintiffs’ wrongful death
27 claims were barred under Section 196), and Defendants failed to address any of them in their reply,
28 *see generally* Reply, ECF No. 110. This court likewise declines to find that the officers are

1 protected under Section 196 in these circumstances.

2 Third, Defendants argue that they are protected by California Government Code § 821.6, which
3 provides that “[a] public employee is not liable for injury caused by his instituting or prosecuting
4 any judicial or administrative proceeding within the scope of his employment, even if he acts
5 maliciously and without probable cause.” As the Ninth Circuit has explained, “[t]he provision’s
6 principal function is to provide relief from malicious prosecution,” *Blankenhorn v. City of Orange*,
7 485 F.3d 463, 487-88 (9th Cir. 2007) (citing *Kayfetz v. California*, 156 Cal. App. 3d 491, 497 (Cal.
8 Ct. App. 1984)), but it “also ‘extends to actions taken in preparation for formal proceedings,’
9 including actions ‘incidental to the investigation of crimes,’” *id.* at 488 (citing *Amylou R. v. County*
10 *of Riverside*, 28 Cal. App. 4th 1205, 1209-11 (Cal. Ct. App. 1994)). “Even so, section 821.6, as it
11 applies to police conduct, is limited to actions taken in the course or as a consequence of an
12 investigation.” *Id.* With this in mind, Plaintiffs point out that the problem with Defendants’
13 argument is that the officers’ shooting of Bui is “not the sort of conduct to which section 821.6
14 immunity has been held to apply.” *See id.* (citing *Crowe v. County of San Diego*, 303 F. Supp. 2d
15 1050, 1120 (S.D. Cal. 2004), *rev’d in part on other grounds*, 608 F.3d 406 (9th Cir. 2010) (applying
16 Section 821.6 immunity to officers who conducted interrogations and strip searches during the
17 course of a murder investigation); *Baughman v. California*, 38 Cal. App. 4th 182, 191-93 (1995)
18 (applying Section 821.6 immunity to officers who destroyed computer floppy disks during a search
19 related to an investigation of computer equipment theft); *Amylou R.*, 28 Cal. App. 4th at 1210-11
20 (applying Section 821.6 immunity to officers who took a rape and attempted murder victim against
21 her will to the crime scene and later told neighbors that she was lying about what happened)).
22 Rather, in this case, “the alleged tortious conduct occurred during an arrest, not an investigation.”
23 *See id.* (rejecting the defendants’ Section 821.6 argument because the plaintiff’s assault and battery,
24 negligence, and intentional infliction of emotional distress claims are based on acts that allegedly
25 happened during his arrest, not pursuant to an investigation into his guilt); *Tien Van Nguyen v. City*
26 *of Union City*, No. C-13-01753-DMR, 2013 WL 3014136, at *7 (N.D. Cal. June 17, 2013) (rejecting
27 the defendants’ Section 821.6 argument because the plaintiffs’ intentional infliction of emotional
28 distress claim was based on the defendant officers’ use of excessive force against him during his

1 arrest); *Medora v. City and County of San Francisco*, No. C 06-0558 EDL, 2007 WL 2522319, at
2 *10 (N.D. Cal. Aug. 31, 2007) (rejecting the defendants’ Section 821.6 argument because “there is
3 no evidence that the officers at the scene of the excessive force incident were engaged in the
4 investigation of a crime for purposes of immunity under this section”). Defendants’ attempt to
5 distinguish *Blankenhorn* on the ground that the officers’ “decision to seek out and confront Bui
6 immediately, without resorting to other tactics,” was “investigative in nature,” Motion, ECF No. 81
7 at 35 n.14, is not persuasive in light of the authorities cited by Plaintiffs (and which were not
8 addressed by Defendants in their reply, *see generally* Reply, ECF No. 110). Accordingly, the court
9 finds that Section 821.6 immunity does not protect Officers Ortiz and Wilson from liability for
10 Plaintiffs’ wrongful death claim.

11 In sum, the court finds that it cannot yet determine whether the officers are protected by
12 California Penal Code §§ 835a or 196 and that California Government Code § 821.6 does not apply
13 here. Accordingly, the court must deny Defendants’ motion insofar as it asks the court conclude that
14 they are entitled to summary judgment on Plaintiffs’ fourth claim.

15 **CONCLUSION**

16 Based on the foregoing, the court **GRANTS IN PART** and **DENIES IN PART** Defendants’
17 motion for summary judgment. The court **DENIES** the motion with respect to Plaintiffs’ first claim
18 for a violation of the Fourth Amendment, Plaintiffs’ second claim for a violation of the Fourteenth
19 Amendment, and Plaintiffs’ fourth claim for wrongful death. The court **GRANTS** the motion with
20 respect to Plaintiffs’ third claim under *Monell*.

21 **IT IS SO ORDERED.**

22 Dated: June 27, 2014



23 _____
24 LAUREL BEELER
25 United States Magistrate Judge
26
27
28