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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GERALDINE NICHOLSON, et al.,)	Case No. 15-07594 DDP (RAOx)
)	
Plaintiffs,)	ORDER RE: DEFENDANTS CITY OF
)	LOS ANGELES, GUTIERREZ, AND
v.)	AMARAL’S MOTION FOR
)	SUMMARY JUDGMENT
CITY OF LOS ANGELES, et al.,)	
)	[Dkt. 126, 122]
Defendants.)	
)	

Presently before the court is the joint Motion for Summary Judgment of Defendants City of Los Angeles, Officer Miguel Gutierrez, and Officer Everado Amaral. Having considered the parties’ submissions and heard oral argument, the court adopts the following Order.

I. BACKGROUND

Defendants Miguel Gutierrez and Everado Amaral are officers of the Los Angeles Police Department (“LAPD”). (Decl. Gutierrez ¶ 2, Dkt. 122-3). Shortly before 8 o’clock on the morning of February 10, 2015, Officers Gutierrez and Amaral were driving en

1 route to a roadside memorial for a city police officer. (Decl. Gutierrez ¶ 2; Depo.
2 Gutierrez 24:20-25:1, Dkt. 131-5). It was daylight, and both officers were in plainclothes
3 and driving in an unmarked vehicle. (Decl. Gutierrez ¶ 2). On their way to the memorial,
4 Officer Gutierrez glanced out his passenger side window and saw several people
5 congregated in an alley near the intersection of Florence and 10th Avenues. (Decl.
6 Gutierrez ¶ 4). These people included minor Plaintiffs J.H. and J.N.G., and a third youth,
7 later identified as Michael Sanders, holding what Officer Gutierrez believed to be a gun.
8 (Decl. Gutierrez ¶ 4). At the time of the events, J.N.G. was fifteen years old, and J.H. was
9 seventeen years old. (Decl. J.H. ¶ 2; Decl. J.N.G. ¶ 2).

10 Earlier that morning, Plaintiffs J.H. and J.N.G. had been hanging out with Sanders
11 and another friend in the alley before school. (Decl. J.H. ¶ 3, Dkt. 131-6; Decl. J.N.G. ¶ 3,
12 Dkt. 131-6). The boys regularly came together in the alley to listen to music, dance, and
13 freestyle rap. (Decl. J.N.G. ¶ 3). That day, all the boys were standing in a circle, within
14 arm's length of each other, dancing and rapping. (Decl. Gutierrez ¶ 4, Decl. J.H. ¶ 4-6). At
15 the time that Officer Gutierrez observed the scene in the alley, Sanders had been holding
16 a toy airsoft gun with an orange tip. (Decl. Gutierrez ¶ 4, 11). J.H. and J.N.G. recall that
17 Sanders was using the toy as a prop while dancing to the beat. (Decl. J.H. ¶ 7; Decl. J.N.G.
18 ¶ 7). Although disputed, J.H. and J.N.G. maintain that Sanders kept the airgun pointed
19 downwards around waist-height and never fired it that morning. (Decl. J.H. ¶¶ 7, 10;
20 Decl. J.N.G. ¶¶ 8-9; Decl. Wooten ¶¶ 6, 7). The boys were students at Alliance Renee and
21 Meyer Luskin College-Ready Academy, located several blocks away from the alley.
22 (Decl. J.N.G. ¶ 3; Decl. J.H. ¶ 3; Decl. Wooten ¶ 2). Before Officer Gutierrez emerged on
23 the scene, the friends had just turned off their music and were preparing to put on their
24 uniforms and head to school. (Decl. J.H. ¶¶ 10, 15).

25 Upon driving past the scene in the alley, Officer Gutierrez exclaimed "Gun, gun,
26 gun!" to Officer Amaral. (Decl. Gutierrez ¶ 5). Officer Amaral quickly pulled the vehicle
27 to a stop south of the alley entrance. (Decl. Gutierrez ¶ 6). Without conferring with
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1 Officer Amaral or taking cover, Gutierrez disembarked from the vehicle and ran toward
2 the alley. (Decl. Gutierrez ¶ 6).

3 As he approached the alley, Officer Gutierrez again saw Sanders holding the toy
4 gun and perceived that it was pointed in the direction of J.H. (Decl. Gutierrez ¶ 7).
5 Plaintiffs contend that Sanders never pointed the gun toward J.H., or any of the other
6 boys that morning. (Decl. J.H. ¶¶ 7, 10; Decl. J.N.G. ¶¶ 8-9; Decl. Wooten ¶¶ 6, 7).
7 Although disputed, Officer Gutierrez reports that he shouted “LAPD, drop your
8 weapon” at Sanders. (Decl. Gutierrez ¶ 4). The parties further dispute whether Sanders
9 turned toward Gutierrez with the gun raised, thereby causing Gutierrez to fire at
10 Sanders. (Decl. Wooten ¶ 7; Decl. Gutierrez ¶ 7).

11 Officer Gutierrez discharged a volley of three gunshots, one of which struck
12 Plaintiff J.N.G. in the back. (Decl. Gutierrez ¶ 7). J.H. and J.N.G. assert that Gutierrez
13 fired his gun with one hand while running toward them and stopped only once he was
14 several feet away. (Decl. J.H. ¶¶ 16, 17). Gutierrez reports that he stood about twenty-
15 nine feet from Sanders when he fired (Decl. Gutierrez ¶ 7). When Officer Gutierrez fired
16 the shots, Sanders quickly dropped the airgun to the ground. (Decl. Gutierrez ¶ 7; Decl.
17 J.H. ¶ 19, 22). When the shots were fired, J.H. was spraying cologne on his face, and
18 J.N.G. had just begun to put on his school uniform. (Decl. J.N.G. ¶ 15; Decl. J.H. ¶ 15).

19 Officer Amaral heard the gunshots ring out before he emerged on the scene in the
20 alley. (Depo. Amaral at 39: 15-16, Dkt. 118). After Amaral arrived, he immediately radio-
21 ed for three additional police units (Depo. Amaral at 58: 4-12) and, together with Officer
22 Gutierrez, held all three individuals at gunpoint for several minutes while they waited
23 for police back-up. (Decl. Gutierrez ¶ 8, 9; Decl. J.H. ¶ 35; Depo. Amaral at 57:22-23;
24 66:15-18). During this period, Officer Amaral discovered that Plaintiff J.N.G. had been
25 shot and requested an ambulance. (Decl. Gutierrez ¶ 9).

26 The parties dispute whether the officers were able to immediately observe that
27 Sanders had dropped a toy airgun and whether a distance of several feet or more
28 separated the airgun from Gutierrez and Amaral after the shooting, such that the bright

1 orange tip was in clear view. (Decl. Gutierrez ¶ 8; Decl. J.H. ¶¶ 27, 29). Neither officer
2 attempted to distance the airsoft gun from Sanders or to pick up the gun from where it
3 had fallen on the ground. (Decl. J.H. ¶ 28; Decl. J.N.G. ¶ 27). While on the ground, J.H.
4 shouted to Officer Gutierrez that the gun was “not even a real gun.” (Decl. J.H. ¶ 27, 34).
5 In addition, J.H. continually asked the officers “What did we do wrong?” and requested
6 to know why Gutierrez had shot at them. (Decl. J.H. ¶¶ 34, 25). J.H. and J.N.G. report that
7 both officers had dumbfounded countenances on their faces upon realizing that the gun
8 was a toy. (Decl. J.H. ¶ 27; Decl. J.N.G. ¶ 28).

9 After five to ten minutes, several dozen officers arrived on the scene with weapons
10 drawn. (Decl. J.N.G. ¶ 32). Gutierrez and Amaral directed the additional officers to
11 handcuff and search J.H. and J.N.G. for weapons (Decl. Gutierrez ¶ 9; Decl. J.H. ¶ 33, 37;
12 Amaral Depo. 59:10-17, 71:18-24). J.H. asserts that one LAPD officer violently pressed his
13 knee into his back while handcuffing him, causing pain. (Decl. J.H. ¶ 37). All the officers
14 holstered their weapons once Sanders, J.H., and J.N.G. were handcuffed and searched.
15 (Decl. Gutierrez ¶ 9). A search revealed that none of the youth had any weapons
16 concealed on their person. (Decl. J.H. ¶ 25; J.N.G. ¶ 37.) Once the handcuffing and search
17 was completed, Officers Amaral and Gutierrez were separated from the scene of the
18 accident, monitored by supervisors, and had no further contact with J.H. and J.N.G.
19 (Decl. Gutierrez ¶ 10).

20 Other LAPD officers continued to detain Plaintiffs J.H. and J.N.G. for an
21 investigation into a potential weapons violation. (Depo. Amaral 60:22-24; 62: 3-6). An
22 ambulance arrived to transport Plaintiff J.N.G. to a hospital. (Decl. J.N.G. ¶¶ 36, 38).
23 Except while he was being medically examined, J.N.G. remained in handcuffs for
24 approximately five hours until he was interrogated by police detectives. (Decl. J.N.G. ¶
25 40, 42). During his time in the hospital and in police interrogation, J.N.G. requested to
26 speak with, but was denied access to, his mother Plaintiff Geraldine Nicholson. (Decl.
27 J.N.G. ¶ 41). Similarly, Plaintiff J.H. remained in handcuffs for several hours until mid-
28 way through his interrogation by detectives at a police station. (Decl. J.H. ¶ 37, 42).

1 Plaintiffs maintain that Defendants directed the back-up officers to handcuff and initiate
2 a weapons violation investigation that resulted in their continued detention for hours
3 after the incident. (Depo. Gutierrez, 130:3-6; Depo. Amaral, 78:21-23, 79:2-10).

4 On the basis of these facts, Plaintiffs J.H., J.N.G, and Nicholson brought suit
5 against the City of Los Angeles, various officials of the LAPD, and Officers Gutierrez and
6 Amaral, alleging various violations of their state and federal rights arising out of the
7 shooting and the subsequent detention. Plaintiffs' First Amended Complaint ("FAC")
8 asserts ten causes of action including, *inter alia*, violations of Fourth and Fourteenth
9 Amendment rights under 42 U.S.C. § 1983, intentional infliction of emotional distress,
10 false arrest and false imprisonment, assault and battery, negligence, and the Bane Act,
11 Cal. Civil Code § 52.1.

12 Defendants Gutierrez, Amaral, and the City of Los Angeles now jointly move for
13 summary judgment on the claims asserted in the FAC.¹

14 **II. LEGAL STANDARD**

15 Summary judgment is appropriate where the pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with the affidavits, if any, show "that
17 there is no genuine dispute as to any material fact and the movant is entitled to judgment
18 as a matter of law." Fed. R. Civ. P. 56(a). A party seeking summary judgment bears the
19 initial burden of informing the court of the basis for its motion and of identifying those
20 portions of the pleadings and discovery responses that demonstrate the absence of a
21 genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All
22 reasonable inferences from the evidence must be drawn in favor of the nonmoving party.
23 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242 (1986). If the moving party does not
24 bear the burden of proof at trial, it is entitled to summary judgment if it can demonstrate

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26 ¹ Subsequent to Defendants' summary judgment motion, Plaintiffs conceded the claims
27 brought in their FAC under the First Amendment, Fifth Amendment, and California
28 Civil Code § 51.7. (Opp. to Def. Gutierrez's MSJ at 17). Defendants City of Los Angeles,
Gutierrez, and Amaral's motion for summary judgment is GRANTED with respect to
those claims conceded.

1 that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477
2 U.S. at 323.

3 Once the moving party meets its burden, the burden shifts to the nonmoving party
4 opposing the motion, who must "set forth specific facts showing that there is a genuine
5 issue for trial." *Anderson*, 477 U.S. at 256. Summary judgment is warranted if a party
6 "fails to make a showing sufficient to establish the existence of an element essential to
7 that party's case, and on which that party will bear the burden of proof at trial." *Celotex*,
8 477 U.S. at 322. A genuine issue exists if "the evidence is such that a reasonable jury
9 could return a verdict for the nonmoving party," and material facts are those "that might
10 affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. There
11 is no genuine issue of fact "[w]here the record taken as a whole could not lead a rational
12 trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio*
13 *Corp.*, 475 U.S. 574, 587 (1986).

14 It is not the court's task "to scour the record in search of a genuine issue of triable
15 fact." *Keenan v. Allan*, 91 F.3d 1275, 1278 (9th Cir.1996). Counsel have an obligation to lay
16 out their support clearly. *Carmen v. San Francisco Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir.
17 2001). The court "need not examine the entire file for evidence establishing a genuine
18 issue of fact, where the evidence is not set forth in the opposition papers with adequate
19 references so that it could conveniently be found." *Id.*

20 **III. DISCUSSION**

21 **A. Qualified Immunity**

22 Defendants claim qualified immunity under federal law for those causes of action
23 arising under Section 1983. Reasonable mistakes of law, fact, or both may trigger
24 qualified immunity. *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc).
25 "Qualified immunity gives government officials breathing room to make reasonable but
26 mistaken judgments," and "'protects' all but the plainly incompetent or those who
27 knowingly violate the law.'" *Green v. Fresno*, 751 F.3d 1039, 1051 (9th Cir. 2014) (citing
28 *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

1 The Supreme Court has established a two-prong test to determine whether
2 qualified immunity applies. *Pearson v. Callahan*, 555 U.S. 223, 235-36 (2009). A court must
3 deny qualified immunity when (1) the allegations, if true, amount to a constitutional
4 violation, and (2) the constitutional violation was clearly established at the time. *Id.* In
5 applying the second prong, a court looks to whether “the right at issue was clearly
6 established at the time of the incident, such that a reasonable officer would have
7 understood her conduct to be unlawful in that situation.” *Green v. City and County of San*
8 *Francisco*, 751 F.3d 1039, 1051-52 (9th Cir. 2014) (citation and quotations omitted).

9 The court applies this federal qualified immunity analysis to each of Plaintiffs’
10 Section 1983 claims below.

11 1. Section 1983 Claims under the Fourth Amendment

12 Defendants City of Los Angeles, Gutierrez, and Amaral move for summary
13 judgment on Plaintiffs’ Section 1983 challenges under the Fourth Amendment. For
14 analytical ease, the court divides its Fourth Amendment analysis of these into two stages:
15 the shooting and the post-shooting events.

16 a. Shooting

17 As a preliminary matter, the parties dispute whether Gutierrez’s shots were
18 directed at J.N.G and J.H., rather than at Sanders, who held the airsoft gun. “Violation of
19 the Fourth Amendment requires an intentional acquisition of physical control.” *United*
20 *States v. Al Nasser*, 555 F.3d 722, 728 (9th Cir. 2009) (quoting *Brower v. Cty. of Inyo*, 489 U.S.
21 593, 596 (1998)). Based on this intentionality principal, Defendants argue that Officer
22 Gutierrez must have had the intent to seize a particular individual, here J.H. or J.H.G., in
23 order for the police encounter to constitute a “seizure” of that individual cognizable
24 under the Fourth Amendment.

25 This interpretation comports with the Ninth Circuit’s analysis in *United States v.*
26 *Al-Nasser*, 555 F.3d 722 (9th Cir. 2009). There, the Ninth Circuit held that “[a] person is
27 seized when he is ‘meant to be stopped by [a particular law enforcement action] ... and
28 [is] so stopped.’” *Al-Nasser*, 555 F.3d at 731 (quoting *Brendlin*, 559 U.S. 249, 261 (2007)).

1 Put differently, “a seizure occurs where a person is stopped by the very instrumentality
2 set in motion or put in place in order to achieve that result.” *Id.* (quotations omitted); *see*
3 *Scott v. Harris*, 550 U.S. 372 (2007) (defining seizure as the “governmental terminal of
4 freedom of movement through means intentionally applied”).

5 Applying this standard, the court concludes that neither J.N.G nor J.H. may bring
6 Fourth Amendment claims as a result of being seized by Officer Gutierrez’s gunfire.
7 Plaintiffs have not created a triable issue of fact that Officer Gutierrez intended to use
8 deadly force against J.N.G. or J.H. when it was Sanders who held the airsoft gun.

9 **b. Post-Shooting Events**

10 J.N.G. and J.H. also raise Fourth Amendment claims related to the events that
11 transpired following the shooting.

12 **i. Unlawful Arrest**

13 Plaintiffs assert that they were unlawfully arrested after the shooting. “A claim for
14 unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment,
15 provided the arrest was without probable cause or other justification.” *Velazquez v. City*
16 *of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015) (quotations omitted). Probable cause
17 exists when, based on the totality of the circumstances known to officers at the time,
18 there is a “fair probability or substantial chance of criminal activity.” *Velazquez*, 793 F.3d
19 at 1018. “[A] search or seizure of a person must be supported by probable cause
20 particularized with respect to that person.” *Crowe v. Cty. of San Diego*, 608 F.3d 406, 439
21 (9th Cir. 2000) (quotations omitted).

22 The requirement of probable cause yields to the lower threshold of “reasonable
23 suspicion” when police officers are engaged in a brief investigatory stop, or *Terry* stop, in
24 which “a police officer observes unusual conduct which leads him to conclude in light of
25 his experience that criminal activity may be afoot.” *Terry v. Ohio*, 392 U.S. 1, 30 (1968).
26 The classification of the seizure—whether an investigatory *Terry* stop or an arrest—will
27 depend upon a host of factors. These include “whether the suspect was handcuffed;
28 whether the police drew their weapons; whether the police physically restrict the

1 suspect's liberty, including by placing the suspect in a police car; whether special
2 circumstances (such as an uncooperative suspect or risk of violence) are present to justify
3 the intrusive means of effecting a stop; and whether the officers are outnumbered." *Sialoi*
4 *v. City of San Diego*, 823 F.3d 1223, 1232 (9th Cir. 2016) (quotations omitted). Even when a
5 seizure is considered a *Terry* stop, it must "last no longer than is necessary to effectuate
6 the purpose of the stop." *United States v. Place*, 462 U.S. 696, 709 (1983).

7 After the gunshots were fired, Officers Gutierrez and Amaral detained J.H., J.N.G.,
8 and Sanders for several minutes before additional police arrived. (Decl. Gutierrez ¶ 9;
9 Decl. J.H. ¶ 35). The airsoft gun remained nearby where it had been dropped by Sanders.
10 (Decl. J.H. ¶¶ 28; Decl. J.N.G. ¶¶ 27). Plaintiffs contend that the officers were able to
11 quickly discern that the gun was in fact a toy airsoft gun with a bright orange tip, and not
12 a deadly weapon. (Decl. J.H. ¶¶ 27, 29). When they were apprehended, the youth had
13 backpacks and their school uniforms. (Decl. J.H. ¶ 6, 11; Decl. J.N.G. ¶ 12; Decl. Wooten ¶
14 19). While on the ground, J.H. shouted to Officer Gutierrez that the gun was "not even a
15 real gun." (Decl. J.H. ¶ 27, 34). In addition, J.H. continually asked the officers "What did
16 we do wrong?" and asked why Gutierrez had shot at them. (Decl. J.H. ¶¶ 34, 25).
17 Plaintiffs maintain that the officers knew they were mistaken because both had
18 dumbfounded countenances on their faces. (Decl. J.H. ¶ 27; Decl. J.N.G. ¶ 28).

19 In the immediate aftermath of the incident, the officers may have engaged in an
20 investigatory stop of J.H. and J.N.G. to discern what had transpired. At some point,
21 however, the detention evolved into a full-fledged arrest that required probable cause
22 that J.H. and J.N.G. had been engaged in criminal activity. Once police back-up arrived at
23 the scene, the officers instructed their colleagues to handcuff and search J.H. and J.N.G.
24 (Decl. Gutierrez ¶ 9; Decl. J.H. ¶ 33, 37; Depo. Amaral 59:10-17, 71:18-24). A search
25 revealed that none of the youth had any weapons concealed on their person. (Decl. J.H. ¶
26 25; J.N.G. ¶ 37.). Even though no weapons were found, both J.H. and J.N.G. remained in
27 handcuffs and under police supervision for hours. Plaintiffs maintain that Defendants
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1 initiated a sham weapons investigation that resulted in their detention long after the
2 dissipation of probable cause.

3 Taking these facts as true, that Gutierrez decided to pursue an arrest of J.H. and
4 J.N.G. without probable cause that either posed a public danger or had been engaged in
5 any crime, then his actions would run afoul of the Fourth Amendment's protections
6 against unlawful arrest. Moreover, a jury could find that Gutierrez had no
7 "particularized" cause to believe that J.H. and J.N.G, neither of whom had been holding
8 the gun (and one of whom was the suspected crime victim), were engaged in criminal
9 activity. *Crowe*, 608 F.3d at 439.

10 Defendants counter that, even if they had known that the airsoft gun was a toy, a
11 toy gun could well be mistaken for a real gun and used in the commission of a crime,
12 which would have created probable cause for the arrest. This explanation, however, is
13 undercut by the fact that Sanders, J.H., and J.N.G. were standing in a tight circle within
14 arm's length and facing each other. (Decl. Gutierrez ¶ 4, Decl. J.H. ¶ 4-6). At such close
15 distance, it seems improbable that the orange tip of the airsoft gun would have been
16 hidden from J.H. and J.N.G.'s view, especially if the tip of the gun was pointed at either
17 individual. Although it is questionable under these circumstances that there was
18 probable cause that Sanders had committed a crime with a toy gun, the court does not
19 rule out this theory as a matter of law because an airsoft gun could hypothetically cause
20 injury or be used in the commission of a crime.

21 Taking all facts in the light most favorable to Plaintiffs, however, a reasonable
22 officer in Gutierrez's position would have known that it was unlawful to detain J.H. and
23 J.N.G. in the absence of probable cause. In *Sialoi v. City of San Diego*, the Ninth Circuit
24 relied upon "well settled" concepts of probable cause to conclude that police officers
25 were not entitled to qualified immunity when they decided to handcuff three youths and
26 "placed them in the back of a police car after learning the [gun] was a toy." 823 F.3d 1223,
27 1233 (9th Cir. 2016). Although *Sialoi* was not decided at the time of the incident, it relied
28 upon a long line of case law, holding that "[a] person may not be arrested, or must be

1 released from arrest, if previously established probable cause has dissipated." *United*
2 *States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005). In *United States v. Lopez*, 482
3 F.3d 1067, 1072 (9th Cir. 2007), for example, the Ninth Circuit affirmed that "there may
4 initially be probable cause justifying an arrest, but additional information obtained at the
5 scene may indicate that there is less than a fair probability that the [individual] has
6 committed or is committing a crime. In such cases, execution of the arrest or continuation
7 of the arrest is illegal." In light of this settled law, Gutierrez is not entitled to qualified
8 immunity on Plaintiffs' unlawful arrest claims under the Fourth Amendment.

9 **ii. Excessive Force**

10 Plaintiffs' excessive force claims under the Fourth Amendment are governed by
11 the "reasonableness" standard enunciated in *Graham v. Connor*, 490 U.S. 386, 397 (1989).
12 Under *Graham*, "[t]he question is whether the officers' actions are 'objectively reasonable'
13 in light of the facts and circumstances confronting them, without regard to their
14 underlying intent or motivation." *Id.* at 397 (citation omitted). This analysis requires an
15 evaluation of the "totality of the circumstances," which can include "the severity of the
16 crime at issue, whether the suspect poses an immediate threat to the safety of the officers
17 or others, and whether he is actively resisting arrest or attempting to evade arrest by
18 flight." *Id.*

19 The court finds that there is no constitutional violation here arising from the fact
20 that the officers continued to point guns at Plaintiffs until the scene was secure. Whether
21 officers are constitutionally permitted to draw and point their weapons will, of course,
22 vary with the circumstances of each situation. Here, the chain of events triggering this
23 unfortunate situation was that Sanders exercised poor judgment in carrying a simulated
24 gun in a public place. The risk that Sanders created for himself and those around him
25 cannot be overstated. Simulated deadly weapons carry the clear risk of a deadly
26 confrontation. Because of this aberrant, essentially inexcusably risky conduct by Sanders,
27 the officers cannot be faulted for continuing to point their weapons at all concerned until
28 Sanders and his friends were handcuffed, thus permitting a more deliberate

1 investigation. The fact that the officers learned relatively early in this encounter that the
2 gun was a simulated gun does not alter this conclusion. As noted previously, simulated
3 guns can be used to commit crimes. Additionally, people who lack the judgment to not
4 appreciate the risk of carrying a simulated gun in public, may also lack judgment in other
5 ways. This could include carrying another weapon, such as a knife, or acting in an
6 unexpected manner. That Plaintiffs J.H. and J.N.G. also had guns pointed at them until
7 they could be secured is likewise understandable. The officers were confronted with a
8 situation in which they had little information about the relationship between the
9 participants or exactly what had transpired before shots were fired. Therefore, the court
10 finds the officers did not violate Plaintiffs' constitutional rights by pointing their
11 weapons at J.H. and J.N.G. until they were handcuffed.

12 However, a different logic may apply if J.H. and J.N.G. remained in handcuffs for
13 longer than was constitutionally permissible. J.N.G. was bleeding from a gunshot wound
14 to his back, yet remained handcuffed for about five hours, including while he was in the
15 ambulance and awaiting treatment at the hospital. (Decl. J.N.G. ¶¶ 36, 38, 40, 42). In
16 addition to being handcuffed to the gurney in the ambulance, J.N.G. was accompanied
17 by an LAPD officer who "maintained a constant surveillance over [him]." (J.N.G. ¶ 38).
18 After being medically examined, J.N.G. was re-handcuffed, which "only exacerbated the
19 pain in [his] back." (Decl. J.N.G. ¶ 40). J.H., the suspected crime victim, was handcuffed
20 for about four hours, including being "left handcuffed to a chair in an interrogation room
21 for hours." (Decl. J.H. ¶ 42, 43). He adds that one LAPD officer violently pressed his knee
22 into his back while handcuffing him, causing pain. (Decl. J.H. ¶ 37). "[B]ecause
23 handcuffing 'substantially aggravates the intrusiveness of a detention,' it follows that
24 circumstances which would justify a detention will not necessarily justify a detention by
25 handcuffing." *Meredith v. Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003); *see also Tekle v. U.S.*,
26 511 F.3d 839, (9th Cir. 2001); *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994)
27 ("Detentions, particularly lengthy detentions, of the elderly, or of children, or of
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1 individuals suffering from a serious illness or disability raise additional [Fourth
2 Amendment] concerns.”).

3 Here, in the absence of evidence of a violent crime, active resistance, or an
4 immediate safety threat posed by J.H. or J.N.G., *see Graham*, 490 U.S. at 397, a reasonable
5 jury could determine that the sustained handcuffing of J.H. and J.N.G. under the
6 conditions described above constituted excessive force. *See Velazquez v. City of Long Beach*,
7 793 F.3d 1010, 1025 (9th Cir. 2015) (holding that “[w]here officers are presented with
8 circumstances indicating that no crime was committed, the ‘severity of the crime at issue’
9 factor is necessarily diminished as a justification for the use of force”). A reasonable
10 officer in Gutierrez’s situation should have known that Plaintiffs’ prolonged handcuffing
11 was unlawful when the “circumstances indicat[ed] that no crime was committed,” and
12 when neither youth had resisted arrest or posed a safety threat. *Id.* Taking all of these
13 circumstances into consideration, the court finds that Officer Gutierrez is not entitled to
14 qualified immunity on Plaintiffs’ excessive force claims.

15 **iii. Integral Participation**

16 Finally, even though Officer Gutierrez separated from the scene following the
17 handcuffing of J.H. and J.N.G., his actions were integral in Plaintiffs’ initial arrest and
18 detention for a potential weapons violation. Section 1983 “extends liability to those actors
19 who were integral participants in the constitutional violation, even if they did not
20 directly engage in the unconstitutional conduct themselves.” *Hopkins v. Bonvicino*, 573
21 F.3d 752, 770 (9th Cir. 2009). Integral participation means that an officer contributed
22 meaningfully to the action, such as by providing armed back-up or ordering the
23 unconstitutional action. *See id.* at 770, n.11. It does not “require that each officer's actions
24 themselves rise to the level of a constitutional violation.” *Id.*

25 Gutierrez admitted that he ordered the handcuffing of J.H. and J.N.G. (Amaral
26 Depo. 78:21-23; Gutierrez Depo. 130:3-6). In addition, Gutierrez was “aware of the
27 decision” to detain Plaintiffs pursuant to a weapons investigation, “did not object to it,”
28 and directly participated in it. *Boyd v. Benton Cty.*, 374 F.3d 773 (9th Cir. 2004). Thus, a

1 reasonable trier of fact could conclude that, more than a “mere bystander,” Officer
2 Gutierrez directed Plaintiffs’ arrest, even after probable cause may no longer have
3 existed. *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996).

4 Conversely, Officer Amaral, who arrived on the scene after the gunshots were
5 fired, was essentially unaware of the details of what had transpired. Therefore, Amaral
6 did not act in violation of the Fourth Amendment in assisting his partner Gutierrez in
7 detaining J.H. and J.N.G. after the shooting.

8 **2. Section 1983 Claims under the Fourteenth Amendment**

9 Plaintiffs also bring substantive due process claims under the Fourteenth
10 Amendment as part of their Section 1983 challenge. A substantive due process violation
11 arises when an officer’s action “shocks the conscience.” *Wilkinson v. Torres*, 610 F.3d 554,
12 556 (9th Cir. 2010). The “shock the conscience” standard requires that (1) an officer act
13 with deliberate indifference or, (2) if deliberation is impractical under the circumstances,
14 that an officer act with a “purpose to harm . . . unrelated to legitimate law enforcement
15 objectives.” *Id.* (quotations omitted). Deliberate indifference occurs when a police officer
16 “disregarded a known or obvious consequence of his action.” *Patel v. Kent Sch. Dist.*, 648
17 F.3d 965, 974 (9th Cir. 2011).²

18 In evaluating whether Officer Gutierrez is entitled to qualified immunity under
19 the 14th Amendment, the court finds that a reasonable jury could draw the factual
20 conclusions below:

- 21 • Officer Gutierrez observed what he believed to be a firearm displayed by
22 Sanders in close proximity to other individuals. (Decl. Gutierrez ¶ 4).
- 23 • Sanders was not engaged in any threatening or menacing behavior, and
24 kept the airsoft gun securely pointed toward the ground. (Decl. J.H. ¶¶ 7,
25 10; Decl. J.N.G. ¶¶ 8-9; Decl. Wooten ¶¶ 6, 7).

26 ² Because the court excluded J.H. and J.N.G. from part of the Fourth Amendment analysis
27 under the assumption that they were not “seized” by Officer Gutierrez’s shots, *see supra*
28 Part III.A.1.a, the court now engages in the substantive due process analysis as it pertains
to his behavior during the shooting.

- The youth, equipped with school uniforms and backpacks, (Decl. J.H. ¶ 6, 11; Decl. J.N.G. ¶ 12; Decl. Wooten ¶ 19), looked to be minors on their way to school and not gang members.
- When they heard the shots ring out, J.H. was spraying cologne on his face, and J.N.G. had just begun to put on his school uniform. (Decl. J.N.G. ¶ 15; Decl. J.H. ¶ 15).
- The incident occurred several blocks away from Plaintiffs’ school, (Decl. J.N.G. ¶ 3; Decl. J.H. ¶ 3; Decl. Wooten ¶ 2), and at a time (shortly before 8am) when students could reasonably be expected to be playing outside.
- Neither officer had been responding to recent reports of criminal activity in the area. (Gutierrez Depo. 24:20-25:1; 26:25-27:6).

Taking all facts in the light most favorable to Plaintiffs, nothing other than the suspected presence of a gun in Sanders’s hand suggested to Officer Gutierrez that a crime was afoot.³ “Our case law clearly establishes that the use of deadly force against a suspect simply because he is holding a gun—even when that suspect is in proximity to police officers or other individuals . . . is not *ipso facto* reasonable, particularly when that gun is not pointed at another individual or otherwise wielded in a threatening fashion.” *Hughes v. Kisela*, 862 F.3d 775, 789 (9th Cir. 2016), as amended (June 27, 2017) (citations omitted).

This is not to say, of course, that the presence of a gun was not significant. The court does not fault Officer Gutierrez for not recognizing that the gun was a toy during the heat of the encounter. The court understands that Officer Gutierrez believed that the gun posed an imminent threat of death or serious harm to other individuals. Officer Gutierrez then acted as he acted.⁴

³ The parties dispute whether Sanders’ gun was being pointed at anyone, whether Gutierrez delivered a verbal warning, and whether Sanders turned toward Gutierrez before he fired. (See Decl. Wooten ¶¶ 5-7).

⁴ To avoid these incidents of misidentification, more state legislatures might consider adopting measures to visually distinguish simulated weapons and to ban those colored to look like real guns, which might have avoided these tragedies in the first instance. See *Estate of Lopez by & through Lopez v. Gelhaus*, No. 16-15175, 2017 WL 4183595, at *4 (9th Cir. Sept. 22, 2017) (officer who fatally shot 12-year-old child “realized for the first time that the gun’s coloring was different” from a real gun once he was close enough to stand over

1 Reduced to its essence here, however, all that Officer Gutierrez saw and knew was
2 that there was a gun in the possession of an unknown person (Sanders), who was
3 standing in the presence of other individuals. The court notes that, to the extent that
4 labels may sometimes be useful in designating a general category of cases, the present
5 case and those below are characterized as “minimal information” cases. In cases similar
6 to those presented here, the information known to officers was so minimal that the
7 circumstances required an assessment before the use of deadly force. *See, e.g. Gelhaus*,
8 2017 WL 4183595, at *8-*9 (holding that deadly force was unlawful when officer shot 12-
9 year-old boy with a toy gun, although he did not display any intent to use the weapon,
10 which was pointed downward at his side); *George v. Morris*, 736 F.3d 829, 839 (9th Cir.
11 2013) (holding that deadly force was unlawful when, in responding to a domestic
12 disturbance, “deputies shot the sixty-four-year-old decedent without objective
13 provocation while he used his walker, with his gun trained on the ground”); *Shannon v.*
14 *City of Sacramento*, No. 215CV00967KJMCKD, 2016 WL 1138190, at *6 (E.D. Cal. Mar. 23,
15 2016) (holding that deadly force was unlawful when police shot at man walking on the
16 sidewalk cradling an airsoft gun, but who did not pose a safety threat to officers or
17 bystanders); *Gonzales-Guerrero v. City of San Jose*, No. CV12-03541 PSG, 2013 WL 3303144,
18 at *5 (N.D. Cal. June 28, 2013) (holding that deadly force was unlawful when police shot
19 at costumed partygoer with fake gun painted gold and decorated with glitter).

20 In minimal information cases, police officers must, and indeed we expect them to,
21 accept a certain amount of the risk inherent in taking sufficient time to gather the
22 information that would make the decision to use deadly force objectively reasonable
23 under the circumstances.⁵ Were this not the case, the court suspects there would be more

24
25 the child); *see* Cal. Penal Code § 16700(4) (mandating that certain airsoft guns, to avoid
26 being considered imitation guns, contain fluorescent markings).

27 ⁵ In view of Plaintiffs’ submissions, the court has a reasonable basis to believe that that
28 there will be evidence presented at trial that officers are expected to follow their training
and assess a situation before the use of deadly force. *See Smith v. City of Hemet*, 394 F.3d
689, 703 (9th Cir. 2005) (en banc) (holding that a jury may rely on evidence of proper

1 needless shootings. In noting the above, the court in no way diminishes the fact that
2 police are often requested to make split-second decisions as circumstances evolve.

3 For example, the court can envision situations where the individual with the gun
4 is lawfully in possession of it, and is defending himself from a robbery or assault. The
5 court finds it impermissible to subject that individual to the risk that, in such situations,
6 the police are entitled to immediately use deadly force. The court is also concerned that
7 permitting an officer to use deadly force under the minimal information known by
8 Officer Gutierrez could put innocent individuals at unreasonable risk of harm. This is
9 particularly true here, in view of the obvious risk of serious injury to J.N.G. or J.H., both
10 of whom stood within arm's length of Sanders.

11 Finally, that a person possessing a firearm, with no prior knowledge of a police
12 officer's presence, may turn toward an officer shouting a command does not change the
13 analysis. *See Gelhaus*, 2017 WL 4183595, at *17 ("Turning is also the most natural reaction
14 when someone yells in your direction from behind."). If the rule were otherwise, every
15 startled individual who is engaged in defending himself would be placed in jeopardy. Of
16 course, this situation would be different if, for example, the officer knew the individual
17 had a history of violence, or had other particularized information that the individual was
18 about to commit a crime with the firearm.

19 In light of the above analysis, the court concludes that Officer Gutierrez is not
20 entitled to qualified immunity on J.H. and J.N.G.'s Fourteenth Amendment claims. A
21 finder of fact could conclude that deliberation was practical under the circumstances, and
22 that Gutierrez disregarded the known or obvious risks of injury to J.H. and J.N.G. when
23 he fired at Sanders without taking time to assess the situation.

24 The court further finds that Officer Amaral's limited actions leading up to the
25 shooting do not constitute a violation of the Fourteenth Amendment. Therefore, unlike
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28 police procedures and practices to determine whether conduct was constitutionally
reasonable).

1 Officer Gutierrez, Officer Amaral is entitled to qualified immunity with respect to
2 Plaintiffs' Fourteenth Amendment claims.⁶

3 **B. State Law Claims**

4 Defendants Gutierrez, Amaral, and the City of Los Angeles additionally move for
5 summary judgment on each of Plaintiffs' state law claims arising from the same events
6 described above. The court examines each claim in turn, first to determine whether it is
7 subject to state immunity law and then to decide whether there remain triable issues of
8 material fact that would defeat summary judgment.

9 **1. State Immunity Law**

10 "The doctrine of qualified governmental immunity is a federal doctrine that does
11 not extend to state tort claims against government employees." *Venegas v. County of L.A.*,
12 153 Cal.App.4th 1230 (2007) (quotations omitted). Instead, Defendants raise two
13 provisions, California Civil Code § 815.2(b) and § 821.6, to immunize themselves from
14 liability for claims arising under state law.

15 The first of these, Section 821.6, provides that "a public employee is not liable for
16 injury caused by his instituting or prosecuting or any judicial or administrative
17 proceeding within the scope of his employment, even if he acts maliciously and without
18 probable cause." Section 815.2 complements this provision by adding that, "except as
19 otherwise provided by statute, a public entity is not liable for an injury resulting from an
20 act or omission of an employee of the public entity where the employee is immune from

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22 ⁶ Defendants also challenge the claim that Plaintiff Geraldine Nicholson was deprived of
23 her rights to familial association under the Fourteenth Amendment because of her
24 inability to contact her child J.N.G. for several hours while he was undergoing treatment
25 for his gunshot wound and interrogated by police detectives. Plaintiffs do not squarely
26 rebut Defendants' challenge to this claim in their briefing. Even had they done so,
27 Gutierrez and Amaral are entitled to qualified immunity on this charge because a
28 reasonable officer would not have known that such behavior "shocked the conscience."
Other cases of "shock the conscience" behavior have rested on significantly more extreme
circumstances of familial separation. *See, e.g., Kelson v. City of Springfield*, 767 F.2d 651,
654–55 (9th Cir. 1985) (death of child); *Lee v. City of Los Angeles*, 250 F.3d 668, 685–86 (9th
Cir. 2001) (two-year separation of child).

1 liability." Put differently, public entities cannot be held liable for the acts of their
2 employees if the employees have immunity for those acts.

3 However, these provisions have limited effect in this case. Conceivably, the
4 immunity provision of Section 821.6 might apply to the officers' instigation of the
5 weapons investigation. Yet California public employees, including police officers, are not
6 necessarily immune from suit for false arrest or false imprisonment. *See* Cal. Gov't Code
7 § 820.4; *Sullivan v. County of L.A.*, 12 Cal.3d 710, 721 (1974). Moreover, to the extent other
8 claims are "based . . . on the same facts," "derivative of," or "related to" false arrest
9 claims, then then those claims may survive the immunity hurdle as well. *See Cousins v.*
10 *Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009) (refusing to grant immunity for negligence
11 claims arising from false imprisonment claim). Therefore, Plaintiffs' state claims may
12 proceed, despite § 815.2(b) and § 821.6.

13 **2. The Bane Act**

14 The Bane Act, Cal. Civil Code § 52.1, provides a cause of action when a person
15 "interferes [or attempts to interfere] by threat, intimidation, or coercion with the exercise
16 of enjoyment by any individual" of federal or state rights. Coercion must be
17 "independent from the coercion inherent in the wrongful detention itself." *Shoyoye v.*
18 *County of Los Angeles*, 203 Cal.App.4th 947, 959 (2012). Specifically, such separate and
19 independent coercion is present when "an arrest is unlawful and excessive force is
20 applied in making the arrest." *Bender v. County of L.A.*, 217 Cal.App.4th 968, 978 (2013).
21 Because, as determined above, Plaintiffs J.H. and J.N.G. may have unlawful arrest and
22 excessive force claims against Gutierrez arising under the Fourth Amendment, *see supra*
23 Part III.A.1.c, their Bane Act claim against Gutierrez also survives.

24 **3. False Arrest/False Imprisonment**

25 Defendants further move for summary judgment on Plaintiffs' false arrest and
26 false imprisonment claims. In California, false imprisonment is "the unlawful violation of
27 the personal liberty of another." *Asgari*, 15 Cal.4th at 757. More specifically, false
28 imprisonment requires "the nonconsensual, intentional confinement of a person, without

1 lawful privilege, for an appreciable length of time, however short." *George v. City of Long*
2 *Beach*, 973 F.2d 706, 710 (9th Cir.1992) (quotations omitted). False arrest is not a separate
3 tort, but merely one manner of committing a false imprisonment. *Collins v. City & Cty. of*
4 *San Francisco*, 50 Cal.App.3d 671, 673 (1975).

5 Under California Penal Code § 847(b), a police officer is immune from liability for
6 false imprisonment when, "acting within the scope of his or her authority," she makes a
7 "lawful" arrest or "ha[s] reasonable cause to believe the arrest was lawful." Because a
8 trier of fact may find that Gutierrez's arrest of J.H. and J.N.G. was not lawful under the
9 Fourth Amendment, the court declines to award summary judgment in Gutierrez's favor
10 on false arrest/false imprisonment claims that are predicated on the same facts.

11 4. **Assault and Battery**

12 The tort of civil battery involves the act of "intentional, unlawful and harmful
13 contact." *Piedra v. Dugan*, 123 Cal.App.4th 1483, 1495 (2004). Battery requires a showing
14 that (1) an officer "intentionally did an act which resulted in a harmful or offensive
15 contact with the plaintiff's person," (2) such act was performed without the plaintiff's
16 consent, and (3) consequent injury or harm. *Id.* The tort of assault has similar elements.
17 *See Yun Hee So v. Sook Ja Shin*, 212 Cal.App.4th 652, 668-69 (2013). Unlike with battery,
18 however, the tort of assault is complete when a plaintiff's anticipation of harm occurs.
19 *Garcia v. City of Merced*, 637 F.Supp.2d 731, 748 (E.D. Cal. 2008).

20 In the context of a police detention, a plaintiff alleging battery or assault must
21 additionally show that the officer's use of force was "unreasonable" under the
22 circumstances presented. This analysis is similar to the reasonableness inquiry governing
23 federal excessive force claims under the Fourth Amendment. *See Champommier v. United*
24 *States*, No. CV11-10538-MWF PJWX, 2013 WL 4502069 at *21 (C.D. Cal. Aug. 21, 2013)
25 (applying *Graham* factors to battery claim). The court has already concluded, in the
26 Fourth Amendment context, that Gutierrez's actions may not have been constitutionally
27 reasonable. Therefore, the court denies summary judgment on Plaintiffs' battery and
28 assault claims against Gutierrez.

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5. Intentional Infliction of Emotional Distress

In California, a plaintiff prevailing on a claim of intentional infliction of emotional distress must establish: “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.” *Hughes v. Pair*, 46 Cal.4th 1035, 1050 (2009) (quotations omitted).

The requirement of “extreme and outrageous” conduct closely follows the standard adopted for substantive due process liability under the Fourteenth Amendment. *See Nelson v. City of Davis*, 709 F. Supp. 2d 978, 993 (E.D. Cal. 2010) (citing *County of Sacramento v. Lewis*, 523 U.S. at 847), *aff’d*, 685 F.3d 867 (9th Cir. 2012)). The court determined earlier that Gutierrez’s conduct may constitute a Fourteenth Amendment substantive due process violation. For similar reasons, the court finds that Gutierrez’s actions may constitute intentional infliction of emotional distress.

6. Negligence

To prevail on a theory of negligence under California law, Plaintiffs J.H. and J.N.G. must show that Defendants “had a duty to use due care, that [they] breached that duty, and that the breach was the proximate or legal cause of the resulting injury.” *Hayes v. Cty. of San Diego*, 57 Cal.4th 622, 629 (2013) (quotations omitted).

As the California Supreme Court elucidated in *Hayes*, state negligence liability “can arise if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable.” *Hayes*, 57 Cal.4th at 626. A reasonable trier of fact could find that Officer Gutierrez acted negligently in the events leading to the shooting. *See supra* Part III.A.2. In addition, a reasonable trier of fact could conclude that Gutierrez negligently detained J.H. and J.N.G. after he had determined the gun was a toy, despite lacking any basis to believe the young men were dangerous or involved in criminal activity.

C. Punitive Damages

1 Finally, Defendants move for summary judgment on Plaintiffs' punitive damages
2 in their prayer for relief. The court addresses the propriety of punitive damages under
3 both federal law and state law below.

4 **1. Federal Law**

5 In a § 1983 action, punitive damages are recoverable against officers sued in their
6 individual capacities when the "conduct is shown to be motivated by evil motive or
7 intent, or when it involves reckless or callous indifference to the federally protected
8 rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). As discussed above, a reasonable
9 finder of fact could conclude that Gutierrez acted with reckless disregard to J.N.G. and
10 J.H.'s rights with respect to the shooting. Moreover, a reasonable finder of fact could
11 conclude that Gutierrez deliberately or recklessly prolonged the detention of J.H. and
12 J.N.G without any basis for suspecting that the pair were involved in a crime.

13 **2. State Law**

14 Under state law, punitive damages are proper when clear and convincing
15 evidence shows that the defendant acted with oppression, malice or fraud. Cal. Civ. Code
16 § 3294(a). In California courts, the "clear and convincing" standard for punitive damages
17 applies to every stage of the litigation process, including summary judgment. *See Adams*
18 *v. Allstate Ins. Co.*, 187 F. Supp. 2d 1219 (C.D. Cal. 2002); *Spinks v. Equity Residential*
19 *Briarwood Apts.*, 171 Cal. App. 4th 1004 (2009). Reviewing the record evidence, the court
20 concludes that a reasonable jury, accepting Plaintiffs' facts as true and making all
21 reasonable inferences in their favor, could find with clear and convincing evidence that
22 Officer Gutierrez acted with "malice, oppression, or fraud," and that Plaintiffs would
23 thereby be entitled to an award of punitive damages.

24
25 **IV. CONCLUSION**
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1 For the reasons stated above, Defendant Amaral's Motion for Summary Judgment
2 is GRANTED. Defendants the City of Los Angeles and Officer Gutierrez's Motion for
3 Summary Judgment is GRANTED in part and DENIED in part.⁷

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5 **IT IS SO ORDERED.**

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7 Dated: October 2, 2017

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10 DEAN D. PREGERSON

11 UNITED STATES DISTRICT JUDGE
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26 ⁷ Although Defendant City of Los Angeles moved jointly for summary judgment on the
27 FAC, the court finds it premature to opine on the City of Los Angeles' liabilities at this
28 stage in the proceedings, particularly as Defendants have not expressly briefed this issue
in their moving papers.