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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WHITNEY DUENEZ, individually
and as successor-in-interest
for Decedent ERNESTO DUENEZ,
JR.; D.D., a minor, by and
through his guardian ad
litem, WHITNEY DUENEZ;
ROSEMARY DUENEZ, individually;
and ERNESTO DUENEZ, SR.,
individually,

NO. CIV. S-11-1820 LKK/KJN

Plaintiffs,

v.

O R D E R

CITY OF MANTECA, a municipal
corporation; DAVID BRICKER,
in his capacity as Chief of
Police for the CITY OF
MANTECA; (FNU) AGUILAR,
individually and in his
official capacity as a police
officer for the CITY OF
MANTECA; and DOES 1-100,
inclusive,

Defendants.

This case arises from the shooting death of Ernesto Duenez,
Jr., and is brought pursuant to 42 U.S.C. § 1983. Plaintiffs
allege that officers from the Manteca Police Department shot and

1 killed Ernesto Duenez, Jr., in violation of their rights under the
2 Fourth and Fourteenth Amendments to the United States Constitution.
3 Plaintiffs are the widow and successor-in-interest to the decedent,
4 the son, and the parents of Ernesto Duenez, Jr. Defendants are the
5 City of Manteca; Chief David Bricker of the Manteca Police
6 Department; Officer Aguilar of the Manteca Police Department, being
7 sued individually and in his official capacity; and a number of
8 officers from the Manteca Police Department.

9 Before the court is Defendants' motion to dismiss, to strike,
10 and for a more definite statement, Defs' Mot. Dismiss, ECF No. 9
11 (Aug. 30, 2011), which Plaintiffs oppose, Pls' Opp'n, ECF No. 14
12 (Sept. 27, 2011).

13 I. FACTUAL BACKGROUND¹

14 On June 8, 2011, Ernesto Duenez, Jr. was driven by
15 acquaintances, Rudy Camarena and Rudy Camarena's wife, to the
16 Manteca home of Michael Henry, where Mr. Ernesto Duenez, Jr.
17 retrieved some of his property. ECF No. 1, ¶ 12. Mr. Henry
18 offered a small knife to Ernesto Duenez, Jr. Id. After Ernesto
19 Duenez, Jr. indicated that the knife was not his, Mr. Henry
20 offered the knife to Mr. Camarena, appearing insistent that Mr.
21 Camarena take the knife. Id. Mr. Camarena accepted the knife
22 and threw it backwards, where it either landed in the bed of the
23

24 ¹ These facts are taken from the allegations in the
25 Plaintiffs' Complaint, ECF No. 1 (July 11, 2011), unless otherwise
26 specified. The allegations are taken as true for purposes of this
motion only. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct.
2197 (2007).

1 pickup truck or on the ground. Id.

2 That afternoon or evening, a Manteca Police Officer, Sgt.
3 Aguilar, was seen driving around the neighborhood of Mr.
4 Camarena's residence. Id. at ¶ 13. Local press accounts have
5 since portrayed Mr. Camarena's residence as a suspected drug
6 house, but an unlawful search of the Camarena residence found no
7 contraband or evidence that the Camarena residence was involved
8 in any illegal activity. Id. No one who lived at the Camarena
9 residence or who was inside the residence at the time of the
10 incident was on probation or parole. Id.

11 Shortly before 6:45 p.m., as Mr. Camarena and his wife
12 returned to their home in Manteca with Ernesto Duenez seated in
13 the small backseat of their two-door pickup, Mr. Camarena saw a
14 Manteca Police Department patrol vehicle pass his truck, but the
15 patrol vehicle did not activate its siren or indicate for Mr.
16 Camarena to pull over. Id. at ¶ 13.² At this time, Plaintiff
17 Whitney Duenez, Ernesto Duenez's wife, was inside the Camarena
18 residence, along with other members of Mr. Camarena's family,
19 including Mr. Camarena's elderly mother and the Camarenas'
20 children. Id.

21 After Mr. Camarena parked his pick-up truck in its usual
22 parking spot, in the yard of the Camarena residence, a Manteca
23 Police Department patrol vehicle stopped behind Mr. Camarena's
24

25 ² The "Statement of Facts" section of Plaintiff's complaint
26 has two paragraphs numbered "13." See Pls' Compl., ECF No. 1, at
4-5. This fact is taken from the second of those paragraphs.

1 truck and activated its siren light. Id. at ¶ 14. The truck's
2 ignition was turned off, and Ernesto Duenez began to try and
3 exit the truck, while Mr. Camarena and his wife remained in the
4 truck. Id. Ernesto Duenez pushed Mr. Camarena's wife (who was
5 seated in the passenger seat) forward as he began to exit the
6 truck and stepped his left foot out of the truck, while his
7 right foot was tangled in the seat belt. Id. Mr. Duenez's
8 hands were up and it was clear that he possessed no visible
9 weapon. Id. Other Manteca patrol vehicles arrived at the scene
10 and at least one police officer, who Plaintiffs believe to be
11 Defendant Officer Aguilar, and possibly other unknown officers
12 (named as Defendant "Officer Does"), then fired several gunshots
13 at Ernesto Duenez and struck him in the torso several times.
14 Id.

15 Plaintiff Whitney Duenez, hearing gunshots and someone
16 yelling her husband's name, ran outside the Camarena residence
17 and saw her husband standing, with one foot outside the truck
18 and his right foot still inside the truck, having apparently
19 been shot several times in the torso. Id. at ¶ 15. Ernesto
20 Duenez had no weapon in his possession, was not advancing upon
21 anyone, and was essentially standing still after he had been
22 shot multiple times. Id. Whitney Duenez saw a Manteca Police
23 Department officer, identified by his name tag as Defendant
24 Officer Aguilar, fire one more gunshot, which Whitney Duenez saw
25 strike Ernesto Duenez in the face, whereupon Mr. Duenez fell to
26 the ground. Id. No weapons were visible anywhere near the

1 vicinity of Mr. Duenez, except those possessed by the Manteca
2 police officers present. Id.

3 Whitney Duenez ran towards Ernesto Duenez, whose body lay
4 on the ground while his foot remained entangled in the seat belt
5 of Mr. Camarena's truck, and tried to hold Mr. Duenez's body as
6 he died. Id. at ¶ 16. Unidentified Manteca Police Department
7 officers ordered Whitney Duenez to put her hands up, at
8 gunpoint, spoke to her in a rude and derogatory manner, and
9 handcuffed her. Id.

10 Ernesto Duenez's body was handcuffed by unidentified
11 Manteca Police Department officers. Id. at ¶ 17. No officer at
12 the scene provided first aid to Mr. Duenez. Id. No weapons
13 appeared to be recovered from Mr. Duenez's person or from the
14 scene. Id. One unidentified Manteca Police Department officer
15 cut the seat belt that Mr. Duenez's foot was tangled in and
16 pulled Mr. Duenez's body away from the truck. Id.

17 Several unidentified officers from the Manteca Police
18 Department then detained Whitney Duenez, Rudy Camarena, and Mr.
19 Camarena's wife at gunpoint. Id. at ¶ 18. Without a search
20 warrant, several unidentified Manteca Police Department officers
21 (named as Defendants "Does") entered the Camarena residence,
22 searched it, and detained several people including Mr.
23 Camarena's son and Mr. Camarena's elderly mother, who is in poor
24 health. Id.

25 All of the people arrested and/or detained at the scene,
26 including Whitney Duenez, Rudy Camarena, Mr. Camarena's wife,

1 and Mr. Camarena's son, were transported to the Manteca Police
2 Department, where they were detained and interrogated before
3 being released hours later, without any charges. Id. at ¶ 19.
4 Each of these people were held against their will until their
5 release. Id.

6 Ernesto Duenez, Jr. was on parole, and was set to discharge
7 from parole one month after he died. Id. at ¶ 20. Mr. Duenez
8 believed that he may have tested positive on a drug test and
9 possibly had a warrant against him for violating parole due to
10 the drug test, which would have caused Mr. Duenez to serve
11 minimal time in custody. Id. Mr. Duenez's parole status and
12 two-strike history was likely known to the Manteca Police
13 Department officers, including Defendant Aguilar, but the
14 defendants had no information on which they could reasonably
15 believe that Mr. Duenez was armed at the time he was shot, or
16 that he posed anything more than a risk of unarmed flight. Id.
17 Mr. Duenez was, in fact, unarmed and unable to flee because his
18 leg was tangled in the truck's seat belt. Id.

19 Plaintiffs allege that defendants had a clear view of Mr.
20 Duenez, they did not see Mr. Duenez possess any weapon, they
21 should have known that Mr. Duenez's leg was tangled, and they
22 never saw Mr. Duenez move toward them or charge at them in a
23 threatening manner. Id. Plaintiffs seek: (1) the reasonable
24 value of funeral and burial expenses; (2) wrongful death
25 damages; (3) damages incurred by Mr. Duenez before he died as
26 the result of being assaulted and battered, for deprivation

1 without due process of his right to life, for penalties or
2 punitive damages to which he would have been entitled to recover
3 had he lived, and for pain, suffering, and disfigurement prior
4 to his death; (4) compensation for their loss of Mr. Duenez's
5 financial support; (5) an award of punitive damages; and (6)
6 attorneys' fees. Id. at ¶¶ 25-30.

7 **II. STANDARDS FOR MOTION TO DISMISS, TO STRIKE, AND FOR A MORE**
8 **DEFINITE STATEMENT**

9 **A. MOTION TO DISMISS**

10 A Fed. R. Civ. P. 12(b)(6) motion challenges a complaint's
11 compliance with the pleading requirements provided by the
12 Federal Rules. Under Federal Rule of Civil Procedure 8(a)(2), a
13 pleading must contain a "short and plain statement of the claim
14 showing that the pleader is entitled to relief." The complaint
15 must give defendant "fair notice of what the claim is and the
16 grounds upon which it rests." Bell Atlantic v. Twombly, 550
17 U.S. 544, 555 (2007) (internal quotation and modification
18 omitted).

19 To meet this requirement, the complaint must be supported
20 by factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, ___,
21 129 S. Ct. 1937, 1950 (2009). "While legal conclusions can
22 provide the framework of a complaint," neither legal conclusions
23 nor conclusory statements are themselves sufficient, and such
24 statements are not entitled to a presumption of truth. Id. at
25 1949-50. Iqbal and Twombly therefore prescribe a two step
26 process for evaluation of motions to dismiss. The court first

1 identifies the non-conclusory factual allegations, and the court
2 then determines whether these allegations, taken as true and
3 construed in the light most favorable to the plaintiff,
4 "plausibly give rise to an entitlement to relief." Id.;
5 Erickson v. Pardus, 551 U.S. 89 (2007).

6 "Plausibility," as it is used in Twombly and Iqbal, does
7 not refer to the likelihood that a pleader will succeed in
8 proving the allegations. Instead, it refers to whether the
9 non-conclusory factual allegations, when assumed to be true,
10 "allow[] the court to draw the reasonable inference that the
11 defendant is liable for the misconduct alleged." Iqbal, 129
12 S.Ct. at 1949. "The plausibility standard is not akin to a
13 'probability requirement,' but it asks for more than a sheer
14 possibility that a defendant has acted unlawfully." Id.
15 (quoting Twombly, 550 U.S. at 557). A complaint may fail to
16 show a right to relief either by lacking a cognizable legal
17 theory or by lacking sufficient facts alleged under a cognizable
18 legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
19 699 (9th Cir. 1990).

20 **B. MOTION FOR A MORE DEFINITE STATEMENT**

21 "If a pleading to which a responsive pleading is permitted
22 is so vague or ambiguous that a party cannot reasonably be
23 required to frame a responsive pleading, the party may move for
24 a more definite statement before interposing a responsive
25 pleading." Fed. R. Civ. P. 12(e). "The situations in which a
26 Rule 12(e) motion is appropriate are very limited." 5A Wright

1 and Miller, Federal Practice and Procedure § 1377 (1990).

2 Furthermore, absent special circumstances, a Rule 12(e)
3 motion cannot be used to require the pleader to set forth "the
4 statutory or constitutional basis for his claim, only the facts
5 underlying it." McCalden v. California Library Ass'n, 955 F.2d
6 1214, 1223 (9th Cir. 1990). However, "even though a complaint
7 is not defective for failure to designate the statute or other
8 provision of law violated, the judge may in his discretion . . .
9 require such detail as may be appropriate in the particular
10 case." McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996).

11 **C. MOTION TO STRIKE**

12 Rule 12(f) authorizes the court to order stricken from any
13 pleading "any redundant, immaterial, impertinent, or scandalous
14 matter." A party may bring on a motion to strike within 21 days
15 after the filing of the pleading under attack. The court,
16 however, may make appropriate orders to strike under the rule at
17 any time on its own initiative. Thus, the court may consider
18 and grant an untimely motion to strike where it seems proper to
19 do so. See 5A Wright and Miller, Federal Practice and
20 Procedure: Civil 2d 1380.

21 A matter is immaterial if it "has no essential or important
22 relationship to the claim for relief or the defenses being
23 pleaded." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th
24 Cir. 1993), *rev'd on other grounds* by 510 U.S. 517 (1994). A
25 matter is impertinent if it consists of statements that do not
26 pertain to and are not necessary to the issues in question. Id.

1 Redundant matter is defined as allegations that "constitute a
2 needless repetition of other averments or are foreign to the
3 issue." Thornton v. Solutionone Cleaning Concepts, Inc., No.
4 06-1455, 2007 WL 210586 (E.D. Cal. Jan. 26, 2007), citing
5 Wilkerson v. Butler, 229 F.R.D. 166, 170 (E.D. Cal. 2005).

6 Motions to strike are generally viewed with disfavor, and
7 will usually be denied unless the allegations in the pleading
8 have no possible relation to the controversy, and may cause
9 prejudice to one of the parties. See 5A C. Wright & A. Miller,
10 Federal Practice and Procedure: Civil 2d 1380; see also Hanna v.
11 Lane, 610 F. Supp. 32, 34 (N.D. Ill. 1985). However, granting a
12 motion to strike may be proper if it will make trial less
13 complicated or eliminate serious risks of prejudice to the
14 moving party, delay, or confusion of the issues. Fantasy, 984
15 F.2d at 1527-28.

16 If the court is in doubt as to whether the challenged
17 matter may raise an issue of fact or law, the motion to strike
18 should be denied, leaving an assessment of the sufficiency of
19 the allegations for adjudication on the merits. See
20 Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970 (9th Cir.
21 2010); see also 5A Wright & Miller, supra, at 1380.
22 Whittlestone emphasized the distinction between Rule 12(f) and
23 Rule 12(b)(6) and held that Rule 12(f) does not authorize
24 district courts to strike claims for damages on the ground that
25 such claims are precluded as a matter of law. Id. at 976.

26 ////

1 "Were we to read Rule 12(f) in a manner that
2 allowed litigants to use it as a means to
3 dismiss some or all of a pleading . . . we
4 would be creating redundancies within the
5 Federal Rules of Civil Procedure."
6 Whittlestone, Inc. v. Handi-Craft Co., See
7 also Yamamoto v. Omiya, 564 F.2d 1319, 1327
8 (9th Cir. 1977) ("Rule 12(f) is neither an
9 authorized nor a proper way to procure the
10 dismissal of all or a part of a complaint."
11 (Citation omitted)).

12 Id. at 974.

13 Whittlestone reasoned that Rule 12(f) motions are reviewed
14 for abuse of discretion, whereas 12(b)(6) motions are reviewed
15 de novo. Id. Thus, if a party seeks dismissal of a pleading
16 under Rule 12(f), the district court's action would be subject
17 to a different standard of review than if the district court had
18 adjudicated the same substantive action under Rule 12(b)(6).

19 Id.

20 III. ANALYSIS

21 A. Claims Against Chief David Bricker and Individual Officers in 22 Their Official Capacity

23 Defendants seek to dismiss all claims against Chief Bricker
24 as well as claims against Officer Aguilar as sued in his
25 official capacity, given that the City of Manteca is a named
26 defendant, rendering the naming of Chief Bricker and Officer
Aguilar, in his official capacity, redundant. Defs' Mot., ECF
No. 9, at 7.

Official-capacity suits under Section 1983 "generally
represent only another way of pleading an action against an
entity of which an officer is an agent." Monell v. Dep't of

1 Soc. Servs., 436 U.S. 658, 690, n.55 (1978). As long as the
2 government entity receives notice and an opportunity to respond,
3 an official-capacity suit is, in all respects other than name,
4 to be treated as a suit against the entity. Kentucky v. Graham,
5 473 U.S. 159, 165 n.14 (1985) (holding that "[t]here is no
6 longer a need to bring official-capacity actions against local
7 government officials, [because] under Monell, . . . local
8 government units can be sued directly" (citations omitted); see
9 also Center for Bio-Ethical Reform, Inc. v. Los Angeles County
10 Sheriff, 533 F.3d 780, 799 (9th Cir. 2008) ("An official
11 capacity suit against a municipal officer is equivalent to a
12 suit against the entity.").

13 Although the Ninth Circuit has not decided this precise
14 issue, a number of district courts in the Ninth Circuit have
15 held that if individuals are being sued in their official
16 capacities as municipal officials and the municipal entity
17 itself is also being sued, then the official capacity claims
18 against the individuals are redundant and should be dismissed.
19 See, e.g., Vance v. County of Santa Clara, 928 F.Supp. 993, 996
20 (N.D. Cal. 1996); Carnell v. Grimm, 872 F.Supp. 746, 752 (D.Haw.
21 1994). In Luke v. Abbott, the court reasoned:

22 After the Monell holding, it is no longer
23 necessary or proper to name as a defendant a
24 particular local government officer acting in
25 a official capacity. To do so only leads to
26 a duplication of documents and pleadings, as
well as wasted public resources for increased
attorneys fees. A plaintiff cannot elect
which of the defendant formats to use. If
both are named, it is proper upon request for

1 the Court to dismiss the official-capacity
2 officer, leaving the local government entity
as the correct defendant.

3 954 F.Supp. 202, 203 (C.D. Cal. 1997); accord Arres v. City of
4 Fresno, 2011 WL 284971, at *5-6 (E.D. Cal. 2011).

5 The court here agrees with the reasoning of these district
6 courts. Because the City of Manteca is already named as a
7 defendant in this action, § 1983 claims against agents of the
8 City of Manteca, sued only in their official capacity, would be
9 duplicative in practice. Thus, Plaintiffs' § 1983 claims
10 against Chief David Bricker, sued only in his official capacity,
11 are DISMISSED as redundant. Plaintiffs' § 1983 claims against
12 Officer Aguilar in his official capacity are DISMISSED; claims
13 against Officer Aguilar in his individual capacity remain.

14 **B. Fourth Amendment Claims by Plaintiffs D.D., Rosemary Duenez,**
15 **and Ernesto Duenez, Sr.**

16 Defendants argue that, "[t]o the extent that the complaint
17 may be read to assert claims by D.D. (decedent's son), Rosemary
18 and Ernesto Duenez [Sr.] for violation of decedent's Fourth
19 Amendment rights, those claims should be dismissed." Defs'
20 Mot., ECF No. 9, at 8.

21 Fourth Amendment rights are personal rights which may not
22 be vicariously asserted. Alderman v. United States, 394 U.S.
23 165, 174, 89 S.Ct. 961 (1969). The general rule is that only
24 the person whose Fourth Amendment rights were violated can sue
25 to vindicate those rights. Moreland v. Las Vegas Metro. Police
26 Dep't, 159 F.3d 365, 369 (9th Cir. 1998). In Section 1983

1 actions, however, the survivors of an individual killed as a
2 result of an officer's excessive use of force may assert a
3 Fourth Amendment claim on that individual's behalf if the
4 relevant state's law authorizes a survival action. Id.

5 California's survival statute provides that "[a] cause of
6 action that survives the death of the person entitled to
7 commence an action or proceeding passes to the decedent's
8 successor in interest . . . and an action may be commenced by
9 the decedent's personal representative or, if none, by the
10 decedent's successor in interest." CAL. CIV. PROC. § 377.30;
11 Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944, 42 A.L.R.2d
12 1162 (1953).

13 Plaintiffs have named only Whitney Duenez as the
14 successor-in-interest to the decedent Ernesto Duenez, Jr. See
15 Pls' Compl., ECF No. 1, at 2. Because California's survival
16 statute allows a successor in interest to enforce a cause of
17 action belonging to the decedent, but does not provide for the
18 survival action to be brought by heirs who are not acting as
19 successors in interest,³ only Whitney Duenez may assert a claim
20 for violation of the decedent's Fourth Amendment rights.

21 Thus, the court GRANTS Defendants' motion and DISMISSES any
22 Fourth Amendment claims brought by Plaintiffs D.D. (decedent's
23

24 ³ Note that a person purporting to act as a successor in
25 interest must satisfy the requirements under California Code of
26 Civil Procedure § 377.32, which requires a person seeking to
commence a survival action to execute and file an affidavit setting
forth specific information. See CAL. CIV. PROC. § 377.32.

1 son), Rosemary Duenez, and Ernesto Duenez, Sr., WITH LEAVE TO
2 AMEND.

3 Plaintiffs' complaint indicates that all of the plaintiffs
4 are bringing a wrongful death action against the defendants.
5 Pls' Compl., ECF No. 1, at 8. Although Defendants assert that
6 the standing requirements for bringing a wrongful death action
7 are not at issue in their motion, see Defs' Reply, ECF No. 16,
8 at 4, both parties intertwine arguments regarding the standing
9 required to bring a survival action and the standing required to
10 bring a wrongful death action in California. In California, a
11 survival action is distinguishable from an action for the
12 wrongful death of the decedent. Grimshaw v. Ford Motor Co., 119
13 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). California courts
14 have held that a wrongful death action can be maintained either
15 by the decedent's heirs or by the decedent's personal
16 representative on behalf of the heirs, but not both. See CAL.
17 CIV. PROC. § 377.60; Adams v. Superior Ct., 196 Cal. App. 4th 71,
18 77, 126 Cal. Rptr. 3d 186 (2011); Scott v. Thompson, 184 Cal.
19 App. 4th 1506, 1511, 109 Cal. Rptr. 3d 846 (2010); Gordon v.
20 Reynolds, 187 Cal. App. 2d 472, 474, 10 Cal. Rptr. 73 (1960).

21 Plaintiffs seek leave to amend the complaint to "include
22 any inadvertently omitted references," "correct any inartful
23 verbiage," and "remedy any other pleading deficiencies." Pls'
24 Opp'n, ECF No. 14, at 10. The court therefore GRANTS Plaintiffs
25 LEAVE TO AMEND the complaint to, inter alia, more specifically
26 plead the requirements set forth in California's wrongful death

1 statute. See CAL. CIV. PROC. § 377.60.

2 **C. Claims for Recovery for Decedent's Pain and Suffering**

3 Defendants' argue in their motion that Plaintiffs' claims
4 to recover for decedent's pain, suffering, and disfigurement
5 prior to death are not recoverable and should be "stricken."
6 Defs' Mot., ECF No. 9, at 10. In Defendants reply to
7 Plaintiffs' opposition, however, Defendants argue that these
8 claims should be "dismissed." Defs' Reply, ECF No. 16, at 3.
9 The court will therefore analyze Defendants motions under the
10 standards for both a motion to strike and a motion to dismiss.

11 Defendants assert that, as a matter of law in the Eastern
12 District of California, such damages are not recoverable.
13 However, under the Supreme Court's holding in Whittlestone, Inc.
14 v. Handi-Craft Co., district courts are not authorized to strike
15 claims for damages on the ground that such claims are precluded
16 as a matter of law. 618 F.3d 970, 976 (9th Cir. 2010). Thus,
17 insofar as Defendants motion is a motion to strike Plaintiffs'
18 claims for damages incurred by Ernesto Duenez, Jr. for his pain,
19 suffering, and disfigurement prior to death, that motion is
20 DENIED. The court now turns to its analysis construing
21 Defendants motion as a motion to dismiss.

22 Section 1983 does not address survivor claims or any
23 appropriate remedies. If a civil rights statute is "deficient
24 in the provisions necessary to furnish suitable remedies,"
25 courts must look to applicable state law. 42 U.S.C. § 1988(a).
26 However, state law may not be applied when it is "inconsistent

1 with the Constitution and laws of the United States." Id.; see
2 Robertson v. Wegmann, 436 U.S. 584, 594-95, 98 S.Ct. 1991, 56
3 L.Ed.2d 554 (1978). The Supreme Court has stated that the
4 purpose behind the Federal Civil Rights Act is to: (1) prevent
5 official illegality; and (2) compensate persons for injuries
6 caused by the deprivation of constitutional rights. See
7 Robertson, 436 U.S. at 592, 98 S.Ct. 1991; Carey v. Piphus, 435
8 U.S. 247, 254, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). In
9 survivor actions in California, "the damages recoverable are
10 limited to the loss or damage that the decedent sustained or
11 incurred before death, including any penalties or punitive or
12 exemplary damages that the decedent would have been entitled to
13 recover had the decedent lived, and *do not include damages for*
14 *pain, suffering, or disfigurement.*" CAL. CIV. PROC. § 377.34
15 (emphasis added).

16 Neither the Supreme Court nor the Ninth Circuit have
17 addressed whether or not a state's damage limitations for a
18 wrongful death claim are inconsistent with § 1983. See
19 Robertson, 436 U.S. at 594-95 ("We intimate no view . . . about
20 whether abatement based on state law could be allowed in a
21 situation in which deprivation of federal rights caused death");
22 Mahach-Watkins v. Depee, 593 F.3d 1054, 1060 (9th Cir. 2010)
23 (acknowledging that "The Ninth Circuit has not addressed the
24 question of what damages are available under a Section 1983
25 wrongful death claim"); Smith v. City of Fontana, 818 F.2d 1411,
26 1417 n.7 (9th Cir. 1987) (acknowledging but declining to decide

1 the issue).

2 Other circuits have concluded that when a violation of
3 federal civil rights results in death of the victim, state
4 statutes limiting the remedies of the victim's estate and family
5 members are not consistent with the purposes of § 1983. See,
6 e.g., Berry v. City of Muskogee, 900 F.2d 1489, 1499-1507 (10th
7 Cir. 1990); Bell v. Milwaukee, 746 F.2d 1205 (7th Cir. 1984),
8 *overruled on other grounds by* Russ v. Watts, 414 F.3d 783 (7th
9 Cir. 2005); Jaco v. Bloechle, 739 F.2d 239, 241-45 (6th Cir.
10 1984). In Bell, the Seventh Circuit explained that the
11 Wisconsin law precluding recovery to the victim's estate for
12 loss of life was inconsistent with the deterrent policy of §
13 1983 and the Fourteenth Amendment's protection of life:

14 [S]ince in the instant case the killing is the
15 unconstitutional act, there would result more
16 than a marginal loss of influence on
17 potentially unconstitutional actors and
18 therefore on the ability of Section 1983 to
deter official lawlessness if the victim's
estate could not bring suit to recover for
loss of life.

19 Bell, 746 F.2d at 1239. In Berry, the Tenth Circuit held that
20 the application of Oklahoma's survival statute, which arguably
21 limited recovery to property loss and loss of earnings by the
22 decedent between the time of injury and death, would be
23 inconsistent with Congress's intention to provide significant
24 recompense when a constitutional violation causes the death of a
25 victim and would result in deficient deterrence. Berry, 900
26 F.2d at 1506.

1 The district courts within the Ninth Circuit are split on
2 this issue. Courts in the Eastern District have consistently
3 held that § 377.34's limitation of damages for pain, suffering,
4 or disfigurement is not inconsistent with § 1983. In reviewing
5 the legislative history of California Civil Procedure Code §
6 377.34, the court in Venerable v. City of Sacramento, 185
7 F.Supp.2d 1128 (E.D. Cal. 2002) noted:

8 The legislature could well conclude that
9 recovery for the decedent's pain and suffering
10 is not the better rule given: (1) the
11 uncertainty of testimony about how someone,
12 now dead, suffered; (2) the provision for
13 compensation to family survivors under the
14 wrongful death statute for their own damages,
15 including loss of companionship, and a natural
reluctance to add as 'compensation' the injury
actually suffered by another; and (3) the
adequacy of deterrence already provided by the
possible array of damages for negligent
conduct leading to death whether those damages
are sought under the survival statute or by
way of a wrongful death action.

16 Id. at 1132. The court in Venerable declined to adopt the
17 "cynical proposition that law enforcement officers generally
18 prefer to run the risk of inflicting death than of merely
19 maiming a victim because death cuts off a claim for pain and
20 suffering by the decedent," id. at 1133, and held that the
21 damages provided by the California survival and wrongful death
22 statutes are not inconsistent with the Constitution and laws of
23 the United States, id. Following Venerable, courts in the
24 Eastern District have consistently held that damages for
25 decedent's pain and suffering are not recoverable in survival
26 actions under § 1983. See Estate of Contreras ex rel. Contreras

1 v. County of Glenn, 725 F.Supp.2d 1151, 1156 (E.D. Cal. 2010);
2 Provencio v. Vazquez, 2008 WL 3982063, at *12 (E.D.Cal. Aug. 18,
3 2008) (holding that pain and suffering claims are precluded
4 because "the statutory scheme for survivors in California still
5 provides compensatory damages for the remaining injured parties,
6 i.e., the survivors"); Rosales v. City of Bakersfield, 2007 WL
7 1847628, at *18 n.11 (E.D. Cal. June 27, 2007); Whitfield v.
8 State of California, 2007 WL 496342, at *2 (E.D. Cal. Feb. 13,
9 2007); Moore ex rel. Moore v. County of Kern, 2006 WL 2190753,
10 at *5-*6 (E.D. Cal. Aug. 1, 2006); Peacock v. Terhune, 2002 WL
11 459810, at *4-*5 (E.D. Cal. Jan. 23, 2002).⁴

12 Courts in the Southern, Central, and Northern Districts,
13 however, have opted not to apply § 377.34's limitation on
14 damages for pain, suffering, or disfigurement, finding it
15 inconsistent with the purposes of § 1983. See, e.g.,
16 Hirschfield v. San Diego Unified Port Dist., 2009 WL 3248101, at
17 *4 (S.D.Cal. Oct. 8, 2009); Garcia v. Whitehead, 961 F. Supp.
18 230, 233 (C.D. Cal. 1997) (providing, in part, "The Court does
19 not find persuasive the notion that punitive damages provide an
20 adequate deterrent effect. Even where a constitutional
21 violation is found, punitive damages are never available against
22 the agency itself in a section 1983 action, and are not always
23 warranted against the individual defendant."); Williams v. City

24
25 ⁴ The California Court of Appeal has similarly held that §
26 377.34's limitation of damages is not inconsistent with § 1983.
Garcia v. Superior Court, 42 Cal.App.4th 177, 49 Cal.Rptr.2d 580
(1996).

1 of Oakland, 915 F.Supp. 1074 (N.D.Cal. 1996) (providing, in
2 part, "the amount of [punitive] damages will be governed by the
3 financial condition of the individual officer without regard to
4 the pain and suffering he may have inflicted on the decedent");
5 Guyton v. Phillips, 532 F.Supp. 1154, 1166 (C.D.Cal. 1981)
6 (noting that: "Federal decisional law leaves little doubt that
7 if there were no applicable state survival statute the action
8 would not be permitted to abate. Otherwise the purpose of the
9 Civil Rights Act of 1871 would be thwarted"; "pain and suffering
10 sustained prior to death is recoverable in a majority of
11 jurisdictions"; and "[t]he inescapable conclusion is that there
12 may be substantial deterrent effect to conduct that results in
13 the injury of an individual but virtually no deterrent to
14 conduct that kills its victim.").

15 The court finds the reasoning provided by the Southern,
16 Central, and Northern Districts of California, as well as other
17 circuit courts, more persuasive than that of Venerable and its
18 progeny in the Eastern District. While the opinion in Venerable
19 has some persuasive authority, it appears to this court that
20 Venerable denigrates the purposes of Section 1983.

21 However, because the courts in the Eastern District of
22 California have consistently held that § 377.34's limitation on
23 damages is consistent with the purposes of § 1983, and it would
24 be inappropriate to have the results of an issue turn upon
25 whichever judge happens to be assigned to a case, the court will
26 decline to permit a survival action for damages for the

1 decedent's pain, suffering, and disfigurement.

2 Thus, the court GRANTS Defendants' motion to dismiss
3 Plaintiffs' claims for damages incurred by decedent for his
4 pain, suffering, and disfigurement prior to death. The court
5 notes that the determination regarding whether or not § 377.34's
6 limitation on damages conflicts with the purposes of § 1983 is
7 one involving a controlling question of law, that there is
8 substantial ground for difference of opinion, and that an
9 immediate appeal from the order will materially advance the
10 ultimate termination of the litigation. Accordingly, the court
11 certifies this issue for interlocutory appeal pursuant to 28
12 U.S.C. § 1292(b).

13 **D. Allegations Mixing Fourth and Fourteenth Amendment Claims**

14 Defendants assert that, in Plaintiffs' complaint, "each
15 cause of action appears to allege a claim by every plaintiff
16 against every defendant under both the Fourth and Fourteenth
17 Amendments," and that "[a]ll of the causes of action, which mix
18 parties and legal theories, should be dismissed or ordered
19 clarified." Defs' Mot., ECF No. 9, at 10. The court will
20 construe Defendants' motion in this regard as both a motion to
21 dismiss and as a motion for a more definite statement.

22 In enumerating their causes of action, Plaintiffs have not
23 stated with particularity which plaintiffs are asserting which
24 claims against which defendants. See, e.g., Pls' Compl., ECF
25 No. 1, at 9 ("Defendants acted under color of law by killing
26 decedent without lawful justification by subjecting decedent to

1 excessive force thereby depriving Plaintiff and the decedent of
2 certain constitutionally protected rights, including . . . The
3 right to be free from unreasonable searches and seizures, as
4 guaranteed by the Fourth and Fourteenth Amendments.").

5 However, the Plaintiffs have alleged sufficient non-
6 conclusory factual allegations concerning Ernesto Duenez, Jr.'s
7 seizure which, if taken as true and construed in the light most
8 favorable to Plaintiffs, plausibly give rise to a finding that
9 the Manteca police officers' seizure and resulting shooting of
10 the decedent was "objectively unreasonable," and thus, that the
11 Defendants acted with excessive force in violation of the
12 decedent's Fourth Amendment rights. See Graham v. Connor, 490
13 U.S. 386 (1989) (holding that a free citizen's claim that law
14 enforcement officials used excessive force in the course of
15 making a seizure of his person is properly analyzed under the
16 Fourth Amendment's "objective reasonableness" standard).
17 Plaintiffs' complaint, therefore, provides Defendants with "fair
18 notice of what the claim is and the grounds upon which it
19 rests," Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007).
20 Insofar as Defendants' motion regarding the Plaintiffs' mixture
21 of their Fourth and Fourteenth Amendment claims is a motion to
22 dismiss, Defendants' motion is DENIED.

23 Insofar as Defendants' motion regarding the Plaintiffs'
24 mixture of their Fourth and Fourteenth Amendment claims is a
25 motion for a more definite statement, that motion is DENIED
26 because a Rule 12(e) motion cannot be used to require the

1 pleader to set forth "the statutory or constitutional basis for
2 his claim, only the facts underlying it." McCalden v.
3 California Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1990).
4 Plaintiffs have adequately set forth their alleged facts in this
5 regard.

6 However, "even though a complaint is not defective for
7 failure to designate the statute or other provision of law
8 violated," the court may "require such detail as may be
9 appropriate in the particular case." McHenry v. Renne, 84 F.3d
10 1172, 1179 (9th Cir. 1996).

11 As discussed above, not all of the Plaintiffs may assert
12 Fourth Amendment survival claims against the Defendants and,
13 similarly, not all of the Plaintiffs may assert wrongful death
14 claims against the Defendants. The court has, therefore, found
15 it appropriate to grant Plaintiffs leave to amend their
16 complaint to state which Plaintiffs are asserting each of these
17 claims.

18 Furthermore, Defendants are correct in arguing that
19 Plaintiffs' claims that the decedent was subject to excessive
20 force should be asserted under the Fourth Amendment of the
21 United States Constitution, and not the Fourteenth Amendment.
22 See Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871
23 (1989) ("all claims that law enforcement officers have used
24 excessive force—deadly or not—in the course of an arrest,
25 investigatory stop, or other 'seizure' of a free citizen should
26 be analyzed under the Fourth Amendment and its 'reasonableness'

1 standard, rather than under a 'substantive due process'
2 approach."). Thus, the court finds it appropriate to ORDER
3 Plaintiffs to amend their complaint accordingly.

4 Finally, under most enumerated causes of action in
5 Plaintiffs' complaint, Plaintiffs properly assert claims for
6 their loss of familial relationships with the decedent under the
7 Fourteenth Amendment alone. See, e.g., Pls' Compl., ECF No. 1,
8 at 11, 12; see also Curnow By and Through Curnow v. Ridgecrest
9 Police, 952 F.2d 321, 325 (9th Cir. 1991) ("While the person who
10 claims excessive force was directed at him or her can only raise
11 a [F]ourth [A]mendment claim, a parent who claims loss of the
12 companionship and society of his or her child, or vice versa,
13 raises a different constitutional claim. . . [based on] a
14 constitutionally protected liberty interest under the Fourteenth
15 Amendment"). However, Plaintiffs' second cause of action
16 states:

17 Defendants, acting under color of law, and
18 without due process of law deprived Plaintiffs
19 of their right to a familial relationship by
20 seizing decedent by use of unreasonable,
21 unjustified, cruel and unusual deadly force
22 and violence, causing injuries which resulted
23 in decedent's death, all without provocation
24 and did attempt to conceal their excessive use
25 of force and hide the true cause of decedent's
demise to deprive Plaintiffs of their right to
seek redress, all in violation of the rights,
privileges, and immunities secured by the
Fourth and Fourteenth Amendments to the United
States Constitution. Plaintiffs allege that
Defendants acted with an intent to harm
Decedent unrelated to legitimate law
enforcement purposes.

26 Pls' Compl., ECF No. 1, at 9. This allegation is unclear as to

1 whether Plaintiffs' claim is based on the deprivation of their
2 right to a familial relationship, the unlawful seizure of the
3 decedent, or the Defendants' alleged attempts to conceal their
4 excessive use of force. Thus, even though Plaintiffs have
5 sufficiently set forth the facts underlying their claims, the
6 court finds it appropriate to ORDER Plaintiffs to clarify this
7 second cause of action.

8 With regard to Defendants as named in the complaint,
9 Plaintiffs are GRANTED LEAVE TO AMEND their complaint in
10 accordance with the court's dismissal of redundant Defendants
11 named in their official capacity.

12 **E. Defendants' Request to Strike Allegations from the Complaint**
13 **as Irrelevant, Improper, and Impertinent**

14 Defendants argue that various allegations in the complaint
15 are irrelevant, improper, and impertinent and should, therefore,
16 be stricken. Defs' Mot., ECF No. 9, at 11. The court addresses
17 each of Plaintiffs' assertions in turn.

18 First, Defendants move to strike Plaintiffs' assertion
19 that:

20 Press accounts subsequently released falsely
21 claimed Mr. Duenez had approached the Manteca
22 police department officers armed, according to
23 the various press accounts, with neither
24 [sic], a knife, a gun, or a weapon. Some of
25 these false accounts were attributed by press
26 to Manteca Police Department sources. . . .
Press accounts have also reported that Manteca
Police Department patrol vehicles are equipped
with video camera recording devices designed
to capture events of police and suspect
activity on video.

1 Pls' Compl., ECF No. 1, at 1-2. This assertion bears an
2 important relationship to the question of whether or not Ernesto
3 Duenez, Jr. "pose[d] an immediate threat to the safety of the
4 officers" at the scene, which the factfinder must assess in
5 determining if the officers' actions were "objectively
6 reasonable," in satisfaction of the Fourth Amendment. See
7 Graham v. Connor, 490 U.S. 386, 396 (1989). That is, this
8 assertion being true makes it less likely that the decedent
9 "posed an immediate threat to the safety of the officers." Id.
10 Thus, Defendants' motion to strike is DENIED as to Plaintiff's
11 first assertion.

12 Second, Defendants move to strike Plaintiffs' assertion
13 that:

14 Plaintiffs' attorney has requested the police
15 reports and patrol vehicle video footage of
16 the incident from the Manteca Police
17 Department. Defendant Manteca Police
18 Department Police Chief David Bricker has
19 refused to provide any such responsive
20 information, invoking various California state
21 law statutory privileges. Chief Bricker's
22 correspondence refusing to disclose any
23 responsive information is attached to this
24 Complaint as Exhibit A.

20 Id. at 2. This assertion also pertains to Plaintiffs' ability
21 to prove whether or not Ernesto Duenez, Jr. posed an immediate
22 threat to the safety of the officers at the scene and the
23 objective reasonableness of the officers' actions. Defendants'
24 argument that Plaintiffs' assertion "attempt[s] to collaterally
25 attack the denial of the request" raises an issue of law as
26 opposed to an issue of factual pertinence or materiality and,

1 thus, Defendants' motion to strike is DENIED as to Plaintiff's
2 second assertion.

3 Third, Defendants move to strike Plaintiffs' assertion
4 that:

5 Several unidentified Manteca Police Department
6 Officers detained . . . [third parties] Rudy
7 Camarena, and Mr. Camarena's wife, all at
8 gunpoint. Then, without a search warrant,
9 probable cause, or exigency, several
10 unidentified Manteca Police Department officer
11 Does entered Mr. Camarena's residence,
12 searched it, and detained several people,
13 including, but not limited to, Mr. Camarena's
14 son, and Mr. Camarena's elder mother who is in
15 very poor health. . . . All of the people
16 arrested and/or detained at the scene were
17 transported to the Manteca Police Department,
18 including, but not limited to . . . Rudy
19 Camarena, and Mr. Camarena's wife and son,
20 where they were detained for an excessive
21 period of time and subjected to interrogations
22 before being released hours later without any
23 charges. Each was held against their will
24 until their release.

25 Id. at 6. In assessing whether or not a seizure is "objectively
26 reasonable" under the Fourth Amendment, a factfinder is required
to pay "careful attention to the facts and circumstances of each
particular case." Graham, 490 U.S. at 396. The officers'
conduct directly following the death of Ernesto Duenez, Jr.
pertains to a factfinder's understanding of the circumstances of
the case at hand and, thus, is not immaterial or impertinent to
the question of whether or not the officers' actions in this
case were reasonable. Thus, Defendants' motion to strike is
DENIED as to Plaintiff's third assertion.

IV. CONCLUSION

1 For the foregoing reasons, the court GRANTS Defendants'
2 motion, in part, and DENIES Defendants' motion, in part. The
3 court makes the following orders:


- 4 • Plaintiffs' § 1983 claims against Chief David Bricker, sued
5 only in his official capacity, are DISMISSED as redundant.
6 Plaintiffs' § 1983 claims against Officer Aguilar in his
7 official capacity are DISMISSED; claims against Officer
8 Aguilar in his individual capacity remain. Plaintiffs are
9 GRANTED LEAVE TO AMEND their complaint in accordance with
10 the court's dismissal of redundant Defendants named in
11 their official capacity.
- 12 • The court GRANTS Defendants' motion and DISMISSES any
13 Fourth Amendment claims brought by Plaintiffs D.D.
14 (decendent's son), Rosemary Duenez, and Ernesto Duenez, Sr.,
15 WITH LEAVE TO AMEND.
- 16 • The court GRANTS Plaintiffs LEAVE TO AMEND the complaint to
17 more specifically accord with the requirements set forth in
18 California's wrongful death statute, Cal. Civ. Proc. §
19 377.60.
- 20 • The court ORDERS Plaintiffs to clarify Plaintiffs' second
21 cause of action.
- 22 • The court GRANTS Defendants' motion to strike Plaintiffs'
23 claims for damages incurred by decedent for his pain,
24 suffering, and disfigurement prior to death. The court
25 CERTIFIES this issue for interlocutory appeal pursuant to
26 28 U.S.C. § 1292(b).

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- Insofar as Defendants' motion regarding the Plaintiffs' mixture of their Fourth and Fourteenth Amendment claims is a motion to dismiss, Defendants' motion is DENIED.
- Insofar as Defendants' motion regarding the Plaintiffs' mixture of their Fourth and Fourteenth Amendment claims is a motion for a more definite statement, that motion is DENIED.
- Defendants' motion to strike allegations they have identified as being "irrelevant, improper, and impertinent" is DENIED.

IT IS SO ORDERED.

DATED: October 26, 2011.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT