UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

L.F., a minor, by and through DANISHA BROWN, and K.F., a minor, by and through DANISHA BROWN,

Plaintiffs,

v.

CITY OF STOCKTON, STOCKTON POLICE DEPARTMENT, ERIC T. JONES, DAVID WELLS,

Defendants.

M.C.F., by and through his Guardian ad Litem ELIZABETH CASAS BAUTISTA, individually and as successor-in-interest to Decedent COLBY FRIDAY; K.S.F., by and through her Guardian ad Litem, ELIZABETH CASAS BAUTISTA, individually and as successor-in-interest to Decedent COLBY FRIDAY; THE ESTATE OF COLBY FRIDAY, by and through its personal representative DENISE FRIDAY HALL,

Plaintiffs,

v.

CITY OF STOCKTON, STOCKTON POLICE DEPARTMENT, ERIC T. JONES, DAVID WELLS,

Defendants.

Consolidated case 2:17-cv-01648-KJM-DB

ORDER

I. INTRODUCTION

On August 16, 2016, Stockton Police Officer David Wells observed Colby Friday walking down a street in Stockton, California. Mistaking Friday for another individual with similar physical characteristics who was subject to an outstanding warrant for domestic violence, Wells attempted to initiate contact. While Wells parked his patrol vehicle, Friday continued into a corner supermarket. Wells followed and attempted to speak with Friday, but Friday ignored him and hastily exited the market. A chase ensued, and Wells, saying he feared for his safety, fired thirteen shots from his service revolver, killing Friday.

Friday's minor children L.F. and K.F., by and through their guardian ad litem Danisha Brown, bring this civil rights action under 42 U.S.C. § 1983 for violation of their rights to familial association under the First and Fourteenth Amendments, and also assert various state law claims. Friday's estate, by and through its personal representative, Denise Friday Hall, and two other minor children M.C.F. and K.S.F., by and through their guardian ad litem Elizabeth Casas Bautista, sue under 42 U.S.C. § 1983 for excessive force and denial of medical care in violation of the Fourth Amendment, violation of the right to familial association under the Fourteenth Amendment, municipal liability based on an unconstitutional custom or policy, and also bring various state law claims. On March 23, 2018, the court consolidated the two sets of claims into a single action under the operative case number 2:17-cv-1648-KJM-DB. Defendants now move for summary judgment, or, in the alternative, for partial summary judgment on all claims. For the reasons provided below, defendants' motion for summary judgment is GRANTED in part and DENIED in part.

II. BACKGROUND

A. Disputed and Undisputed Facts

The following disputed ("DF") and undisputed ("UF") facts are derived from the responses and objections of plaintiffs M.C.F., K.S.F. and the Estate of Colby Friday to defendants' statement of undisputed facts, ECF No. 71-2 ("Estate's DF or UF"),[1] and defendants'

[1] Although plaintiffs L.F. and K.F. also filed separate responses and objections to defendants' statement of undisputed material facts, ECF No. 69-2, the court relies exclusively on

consolidated response and objections to both sets of plaintiffs' separate statements of disputed material facts in opposition to defendants' motion for summary judgment. ECF No. 74-2 ("Defs.' DF or UF"). The court notes whether a fact is disputed or undisputed but resolves evidentiary objections only to the extent needed for its analysis below.

1. The August 16, 2016 Incident

a) The Shooting

Officer David Wells is a police officer employed by the City of Stockton. Estate's UF 1. On August 16, 2016, while on patrol sometime before 2:00 p.m., Wells observed an African-American male, roughly 6 feet tall, approximately 200 pounds, with dreadlocks, walking near Pena's Meat Market on Jamestown Street in Stockton, California. Estate's UF 2, 8. The individual was Colby Friday. Estate's UF 9. Wells contends he mistook Friday for another individual with similar characteristics, Kyle Hamilton. Estate's DF 7, 10, 12. Wells never saw, nor requested to see, a photograph of Kyle Hamilton and recognized the possibility that he might be mistaken in believing the individual to be Kyle Hamilton. Defs.' UF 9, 11. Wells had information and believed that Hamilton had an outstanding felony arrest warrant, had been involved in a domestic violence incident while armed with a firearm the week prior to August 16, 2016, and resided at an apartment complex located at 4500 Shelley Court in Stockton. Estate's UF 4–6. When Wells spotted Friday, Friday was walking from a direction Wells believed was consistent with where Hamilton resided. UF 11.

Wells attempted to initiate contact with Friday to determine if he was in fact Kyle Hamilton, and if so, Wells intended to arrest him. Estate's UF 13. Wells parked his patrol vehicle in the parking lot near Pena's Market. Estate's UF 15. When Wells exited his vehicle to initiate contact, he observed that Friday had entered the market; Wells followed. Estate's UF 18, 19. Wells did not use his department-issued radio to advise dispatch that he observed a possible suspect or to request backup, nor did he activate his body-worn camera as required by Stockton

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Estates' responses because the two responses are identical, save for the responses unique to Estates' survival action for lack of medical care under 42 U.S.C. § 1983. *Compare* ECF No. 69-2 at 14 (noting material facts numbers 54 and 55 are inapplicable to L.F. and K.F.'s claims), *with* ECF No. 71-2 at 14–15 (providing specific responses to material facts numbers 54 and 55).

Police Department ("SPD") policy. Defs.' UF 12, 13. On that day Wells was equipped with the body-worn camera, as well as a taser, flashlight, firearm, department-issued radio, handcuffs, extra magazine, badge and police-issued vest. Estate's UF 17.

When Wells entered the market, he lost sight of Friday. Estate's UF 20. Wells then asked the woman tending the front counter if she had seen the man that had entered the store; she directed him to the back of the market. Estate's UF 21. When Wells located Friday near the back of the market, he told him, "I need to talk to you." Estate's UF 23. Friday ignored Wells, then began walking away in a northbound direction. Estate's UF 24, 25. Wells followed, continuing his attempt to contact Friday. Estate's UF 26. While in the market, after locating him Wells never lost sight of Friday; however, his view of Friday's entire body was partially obstructed by aisles and products displayed on shelves. Estate's UF 27. As Friday began walking toward the market's entrance, Wells said, "[Y]ou in the white shirt, stop right there." Estate's UF 28. Wells generally could not see Friday's hands while he was in the market; but, as Friday approached the entrance, Wells observed Friday's left hand inside the waistband of his pants. Estate's UF 29, 30. Defendants contend Wells believed the person he thought was Hamilton was possibly armed, based on his knowledge that Hamilton was known to possess a firearm. Estate's DF 31. As Friday exited the market, he flung the door open with his right hand and ran outside in a northbound direction. Estate's UF 32, 33. Wells gave chase, but before exiting the market in pursuit, he drew his firearm. Estate's UF 33, 34.

Fleeing northbound, Friday then turned into the parking lot and ran to the back side of the building. Estate's UF 35. Throughout the pursuit, Wells never saw Friday's left hand leave his waistband. Estate's UF 36. As Wells followed, he told Friday to stop or "I'm going to shoot you in your back." Estate's UF 37; Defs.' UF 15. Defendants contend Friday failed to comply with Wells's commands and continued to flee instead. Estate's DF 38. Friday eventually reached a locked gate at the back of the building, at which point his cellphone fell to the ground

and he reached down to retrieve it. Defs.' UF 16, 17.[2] As Friday reached toward the ground, Wells discharged his firearm, firing a volley of three or four shots. Estate's UF 40; Defs.' UF 19. Plaintiffs contend Wells provided no warning he would shoot Friday after Friday had stopped running; defendants claim Wells gave Friday multiple verbal warnings, including "stop running" and "don't move," before discharging his firearm. Estate's DF 41; Defs.' DF 20. Defendants contend that prior to Friday's reaching down to the ground, Wells heard the distinct sound of metal hitting the pavement, and at the point Wells discharged his firearm, he believed Friday was reaching down to retrieve a gun. Estate's DF 42, 44. Nonetheless, at the time Wells discharged his firearm, Wells had not actually seen Friday in possession of a weapon. Estate's UF 43.

After being struck by the first volley of shots, Friday fell to the ground, on his left side, facing away from Wells. Defs.' UF 21. Plaintiffs contend that while Friday was on the ground after being shot, Friday was not reaching toward anything. Defs.' DF 22. After a brief lapse in time after the first volley, less than two seconds, Wells then fired a second volley of shots, Defs.' UF 23, emptying his service weapon, which held a total of thirteen rounds, Defs.' UF 24. In all, Wells fired a total of thirteen rounds in less than eight seconds. Estate's UF 46. Friday was shot eight times, and one shot delivered a fatal blow to his head. Estate's UF 47, 50. None of the gunshot wounds were to his back. Estate's UF 49.

b) Post-Shooting Response and Investigation

After Wells emptied his service revolver, he activated his body-worn camera, reloaded his weapon and used his radio to make a "shots fired" announcement. Defs.' UF 25. As Wells approached Friday's body, he encountered Michael Chapman, a witness standing on the other side of the locked gate who was attempting to record the scene with his cellphone. Defs.' UF 26, 27. Wells commanded Chapman, "Hey! Put that camera down and come help me save his life! Come here! Get some towels!" Defs.' UF 28. Wells then rolled Friday's body from lying on his left side to lying on his back. Defs.' UF 29.

[2] There exists surveillance video of the incident from adjacent 4707 Kentfield Apartments. *See* Defs.' Not. of Lodging Ex., ECF No. 67. The parties have competing interpretations of the video. *See* Estate DF 41.

Next, Wells approached the locked gate and said to Chapman, "Is he—he's going to be gone, boss. Hey, somebody picked up that pistol that was right here. Man! Gosh dammit! He had a gun, man! He drew a gun on me and turned around and walked back towards the gun!" Defs.' UF 30. Wells continued, "It's right there. Don't—don't touch it," then he radioed dispatch, "The suspect's pistol is laying on the grass here." Defs' UF 32, 33. A loaded 45 Caliber semi-automatic pistol was located in a grassy area on the other side of the gate from where Friday was shot. Estate's UF 51. Defendants say Friday's DNA was detected on two of the bullets found in the pistol, Defs.' UF 38; however, plaintiffs contend the presence of Friday's DNA was due at least in part to the incompetence of investigative personnel, who contaminated the bullets by handling and unloading the gun at the scene of the shooting as opposed to in a sterile lab environment, Estate's DF 52. A black Kyocera cellphone was also located near the scene. Estate's UF 53.

After speaking with Chapman, Wells returned to Friday's body, checked his vitals and began chest compressions until relieved by other personnel. Defs.' UF 34, 36. Emergency medical response arrived at the scene within ten minutes of Friday's being shot. Estate's UF 55.

c) Facts Specific to Municipal Liability

Since March 1, 2012, defendant Eric T. Jones has been the Chief of Police and a policymaking official for the City of Stockton and the Stockton Police Department ("SPD"). Defs.' UF 1. Jones receives all officer-involved shooting ("OIS") investigation reports involving SPD officers. Defs.' UF 2. Jones is unaware of any OIS protocol review with which he has disagreed during his entire tenure as Chief of Police. Defs.' UF 3. Under Jones's command, SPD's review of OIS investigations commonly remain unresolved for several years; in at least twenty OIS cases, the review was unresolved for up to five years. Defs.' UF 4. Under Jones's command, no SPD officer has ever been terminated for use of unreasonable or excessive force. Defs.' UF 5.

In August 2016, Officer Wells was a training officer for the City and SPD. Defs.' UF 8. Prior to the August 16, 2016 incident, Wells had never discharged his firearm in the line of duty. Estate's UF 56. Defendants contend there is no evidence to suggest SPD's use of force

policy, training policies or training specific to Officer Wells was constitutionally deficient. Estate's DF 57–59.

On September 1, 2017, plaintiffs L.F. and K.F. filed a citizen's complaint with the SPD regarding Wells's involvement in Friday's shooting as provided by California Penal Code section 832.5(a).[3] Defs.' UF 44. On July 17, 2018, the San Joaquin County District Attorney's Office issued a memo concluding that "the legal use of force by Wells on August 16, 2016, was justified, and no criminal charges [were] warranted." Defs.' UF 48. Following release of the memo, SPD spokesman Joe Silva stated: "This specific report confirmed that Colby Friday was armed with a firearm. We support the District Attorney's Office findings with this investigation." Defs.' UF 49. On June 17, 2019, the SPD rejected the complaint filed by L.F. and K.F. in September 2017 as "Unfounded" or "Exonerated." Defs.' UF 45.

B. Procedural Background

On August 8, 2017, Friday's minor children, L.F. and K.F. (collectively, "L.F. plaintiffs"), by and through their guardian ad litem Danisha Brown, filed suit under 42 U.S.C. § 1983, alleging various constitutional violations and violations of California law. ECF No. 1. On September 1, 2017, L.F. plaintiffs filed an amended complaint, which serves as their operative complaint here. L.F. Am. Compl., ECF No. 8. On September 29, 2017, in a separate action, Friday's estate, by and through its personal representative Denise Friday Hall, along with Friday's two other minor children, M.C.F. and K.S.F. (collectively, "Estate plaintiffs"), by and through their guardian ad litem Elizabeth Casas Bautista, also filed suit for various constitutional and state law violations they claim arise from the August 16, 2016 shooting. *See* Case No. 2:17-cv-02038-KJM-DB; Estate Compl., ECF No. 40.[4]

[3] As pertinent here, California Penal Code section 832.5(a) provides: "Each department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public." Cal. Pen. Code § 832.5(a)(1).

[4] As part of the case-consolidation process, the complaint filed in 2:17-cv-02038-KJM-DB was merged into the operative docket under case number 2:17-cv-01648-KJM-DB, thus when referencing Estate's complaint, the court cites to docket entry ECF No. 40 of the consolidated case number.

On March 23, 2018, the court consolidated the two cases into this action. ECF No. 44. Although many of the parties' claims overlap, the court for clarity here describes the two separate complaints and their respective claims. The L.F. and K.F. amended complaint brings the following five causes of action: (1) violation of plaintiffs' right to familial association under the Fourteenth Amendment; (2) violation of plaintiffs' right to familial association under the First Amendment; (3) violation of plaintiffs' right to familial association under Article I, section 7 of the California Constitution; (4) violation of the Bane Act, Cal. Civ. Code § 52.1(b); and (5) negligence (wrongful death), Cal. Code. Civ. P. § 377.60(a). L.F. Am. Compl. ¶¶ 55–87. The L.F. plaintiffs also allege municipal liability against the City, SPD and Eric Jones based on an "unchecked culture of police misconduct and abuse" caused by these defendants' policies and practices. *Id.* ¶¶ 44–54.

The Estate, M.C.F. and K.S.F. plaintiffs bring the following six causes of action: (1) survival action by Estate for excessive force in violation of the Fourth Amendment; (2) violation of M.C.F and K.S.F.'s Fourteenth Amendment rights to familial association; (3) a claim by all plaintiffs for municipal liability based on unconstitutional custom or policy against the City, SPD and Eric Jones; (4) negligence (wrongful death) action by M.C.F. and K.S.F.; (5) violation of the Bane Act, Cal. Civ. Code § 52.1, by all plaintiffs; and (6) survival action by Estate for denial of medical care in violation of the Fourth Amendment. Estate Compl. ¶¶ 47–90. All plaintiffs seek various compensatory, general, special and punitive damages, as well as declaratory or injunctive relief, statutory penalties and awards of attorneys' fees and costs. L.F. Am. Compl. at 18; Estate Compl. at 17.

On April 5, 2019, defendants moved for summary judgment, or in the alternative, for partial summary judgment, on all claims. Mot. Summ. J. ("MSJ"), ECF No. 62-1. Plaintiffs separately opposed the motion. L.F. Opp'n, ECF No. 69; Estate Opp'n, ECF No. 71. Defendants lodged a single, omnibus reply. Reply, ECF No. 74. On September 6, 2019, the court heard oral argument on the motion. *See* Hr'g Min., ECF No. 75. Counsel Mark Merin, Paul Masuhara, III, and Yolanda Huang appeared for plaintiffs L.F. and K.F. Counsel K. Chike Odiwe appeared for plaintiffs Estate, M.C.F. and K.S.F. Counsel Mark Berry appeared for defendants. At the

conclusion of the hearing, the court allowed each party to file supplemental briefing on the issue of qualified immunity, and each set of parties lodged a supplemental brief. *See* Defs.' Suppl. Br., ECF No. 78; Pls.' Suppl. Br., ECF No. 79. Thereafter the court submitted the matter for resolution by written order.

III. LEGAL STANDARD

A court will grant summary judgment "if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The "threshold inquiry" is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

As a general matter, the moving party bears the initial burden of showing the district court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. The burden then shifts to the nonmoving party, which "must establish that there is a genuine issue of material fact . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). In carrying their burdens, both parties must "cit[e] to particular parts of materials in the record . . . ; or show [] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1); *see also Matsushita*, 475 U.S. at 586 ("[The nonmoving party] must do more than simply show that there is some metaphysical doubt as to the material facts"). Moreover, "the requirement is that there be no genuine issue of material fact . . . . Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 247–48 (emphasis in original).

In deciding a motion for summary judgment, the court draws all inferences and views all evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587–88; *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Arizona v. Cities Serv.*

Co., 391 U.S. 253, 289 (1968)). Where a genuine dispute exists, the court draws inferences in plaintiffs' favor. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014). Parties may object to evidence cited to establish undisputed facts. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385–86 (9th Cir. 2010). A court may consider evidence that would be "admissible at trial." *Fraser*, 342 F.3d at 1036. But the evidentiary standard for admission at the summary judgment stage is lenient: A court may evaluate evidence in an inadmissible form if the evidentiary objections could be cured at trial. *See Burch*, 433 F. Supp. 2d at 1119–20. In other words, admissibility at trial depends not on the evidence's form, but on its content. *Block*, 253 F.3d at 418–19 (citing *Celotex Corp.*, 477 U.S. at 324). The party seeking admission of evidence "bears the burden of proof of admissibility." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002). If the opposing party objects to the proposed evidence, the party seeking admission must direct the district court to "authenticating documents, deposition testimony bearing on attribution, hearsay exceptions and exemptions, or other evidentiary principles under which the evidence in question could be deemed admissible . . . ." *In re Oracle Corp. Sec. Litig.*, 627 F.3d at 385–86. However, courts are sometimes "much more lenient" with the affidavits and documents of the party opposing summary judgment. *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979).

The Supreme Court has taken care to note that district courts should act "with caution in granting summary judgment," and have authority to "deny summary judgment in a case where there is reason to believe the better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 255. A trial may be necessary "if the judge has doubt as to the wisdom of terminating the case before trial." *Gen. Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1507 (9th Cir. 1995) (quoting *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994)). This may be the case "even in the absence of a factual dispute." *Rheumatology Diagnostics Lab., Inc v. Aetna, Inc.*, No. 12-05847, 2015 WL 3826713, at *4 (N.D. Cal. June 19, 2015) (quoting *Black*, 22 F.3d at 572); *accord Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001).

IV. DISCUSSION

A. Federal Claims

1. Fourth Amendment Claims by Friday's Estate[5]

The Estate brings a single cause of action, for violation of Friday's rights under the Fourth Amendment. Although the Estate's complaint characterizes the claim as one for excessive force, the parties' summary judgment briefing raises issues as to the reasonableness of the initial investigatory stop conducted by Wells, commonly known as a *Terry* stop. At the motion hearing, plaintiffs confirmed they assert Wells committed an unconstitutional *Terry* stop, in addition to using excessive force. The court, therefore, must evaluate each alleged Fourth Amendment violation in turn.

a) *Terry* Stop Violation

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). When evaluating the constitutionality of an investigatory stop, the threshold question is whether a stop has occurred at all. To determine whether a Fourth Amendment investigatory stop has occurred, a court asks: "[I]f, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave[?]" *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)); *see also Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions."). Under this standard, police officers possess a great deal of freedom in their ability to approach an individual without the encounter arising to the level of a seizure under the Fourth Amendment. For example, an officer may ask to examine an individual's identification, *Delgado*, 466 U.S. at 216, request consent to search an individual's luggage,

[5] Although only the Estate makes Fourth Amendment claims, much of the Fourth Amendment analysis informs the discussion related to other parties' claims given the detailed examination of Wells's conduct under the Constitution. Therefore, the court considers arguments made on behalf of all plaintiffs in conducting its Fourth Amendment analysis.

Florida v. Royer, 460 U.S. 491, 501 (1983) (plurality opinion), or even ask general questions based on no suspicion at all, *Delgado*, 466 U.S. at 216, without implicating the Fourth Amendment.

Here, defendants focus not on whether an investigatory stop occurred, but whether Wells was justified in conducting the alleged stop. Reply at 3 ("Officer Wells was wholly justified in initiating a brief investigatory stop to confirm whether Decedent was outstanding domestic violence suspect Kyle Hamilton."). Justification for an investigatory stop, however, is only relevant to the second step of the *Terry* analysis, not the first. *See* 3A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 682 (4th ed. 2019) ("Assuming a seizure has occurred, the level of proof the police need to justify it is the next issue."). Plaintiffs' only argument is a puzzling one: they contend Friday was free to walk away from Wells because it was unreasonable for Wells to conclude Friday was Kyle Hamilton. L.F. Opp'n at 5 (citing *Royer*, 460 U.S. at 497–98; arguing "Friday had the right to refuse to engage with Defendant Wells,"); Estate Opp'n at 7 (same). Plaintiffs also point to the undisputed evidence that Wells said nothing more than, "I need to talk to you," before Friday ignored him and began walking away in a northbound direction. Estate's UF 23–25. Defendants respond that plaintiffs' reliance on *Florida v. Royer* is misplaced because a person's ability to refuse an officer's advance is premised on whether the officer had a reasonable suspicion to initiate the stop. Reply at 2–3 n.2. Defendants overlook the critical inquiry, which is whether a stop actually occurred; answering that question turns on the suspect's reasonable perception of his ability to freely leave the encounter. *United States v. Drayton*, 536 U.S. 194, 202 (2002) ("The proper inquiry 'is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" (quoting *Bostick*, 501 U.S. at 436)).

It is well-established that an officer may freely approach a suspect and question him without converting that encounter into a seizure under the Fourth Amendment. *See Delgado*, 466 U.S. at 216. Here, there is no evidence to suggest a reasonable person would have felt they were prohibited from ignoring Wells's initial advance. The court finds that based on the

undisputed evidence, there is no question of disputed fact regarding whether a *Terry* violation occurred in connection with Wells's initial entry into the market.

To the extent there is a question regarding a possible *Terry* violation at a later point during the sequence of events in Pena's market, the record discloses no such violation. Plaintiffs present no argument beyond their assertion that Friday was free to ignore Wells's initial advance. They do not contend Wells continued in his attempt to contact Friday by commanding, "[Y]ou in the white shirt, stop right there[,]" Estate's UF 28, or that after Friday quickened his pace toward the exit, Wells somehow committed an unjustified seizure. Suh a contention would be unfounded. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("Unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning."). Accordingly, on the record before the court, the point at which Friday's conduct is undisputed to have transitioned from apparent simple indifference to hasty avoidance provided legal justification for Wells to attempt a seizure.

There is no evidence from which a reasonable juror could conclude Officer Wells committed an initial seizure under the Fourth Amendment, or that any subsequent seizure within the market was unjustified. Defendants' motion is GRANTED with respect to the *Terry* violation portion of plaintiffs' Fourth Amendment claim.

b) Unreasonable Seizure—Excessive Force

The Estate brings a survival claim under § 1983 for excessive force in violation of Friday's Fourth Amendment rights. M.C.F. Compl. ¶¶ 47–52. Defendants move for summary judgment because, they say, the undisputed facts show "the use of lethal force was objectively reasonable" and therefore Estate's excessive force claim fails as a matter of law. MSJ at 4.

"'Reasonableness is always the touchstone of Fourth Amendment analysis,' and reasonableness is generally assessed by carefully weighing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental

interests alleged to justify the intrusion.'" *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (internal citations omitted).

The guarantees of the Fourth Amendment include protection from the use of excessive force by "law enforcement officials . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen . . . ." *Graham v. Connor*, 490 U.S. 386, 395 (1989). "All claims of excessive force, whether deadly or not, are analyzed under the objective reasonableness standard of the Fourth Amendment as enunciated in *Graham* and *Garner*." *Blanford v. Sacramento County*, 406 F.3d 1110, 1115 (9th Cir. 2005). This standard requires the court to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). In striking this balance here, the court "must consider the risk of bodily harm that [Officer Wells's] actions posed to [Friday] in light of the threat to the public that [Wells] was trying to eliminate." *Scott v. Harris*, 550 U.S. 372, 383 (2007). The court pays "careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "Because this inquiry is inherently fact specific, the 'determination whether the force used to effect an arrest was reasonable under the Fourth Amendment should only be taken from the jury in rare cases.'" *Green v. City and Cty. of San Francisco*, 751 F.3d 1039, 1049 (9th Cir. 2014) (reviewing case based on investigatory stop) (quoting *Headwaters Forest Def. v. Cty. of Humboldt*, 240 F.3d 1185, 1205–06 (9th Cir. 2000)).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Further, "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97. "Therefore, courts 'are free to consider issues outside the

three enumerated [in *Graham*] when additional facts are necessary to account for the totality of circumstances in a given case.'" *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1024 (9th Cir. 2015) (alteration in original) (quoting *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc)).

i. Nature and Quality of Intrusion

It is undisputed the intrusion here pertains to Officer Wells's use of lethal force. MSJ at 5 n.1; Estate Opp'n at 6; Estate Compl. ¶ 51. When an officer fires his service weapon at a person the officer considers a suspect, the nature and quality of the intrusion amounts to lethal force. *Blanford*, 406 F.3d at 1115 n.9 (citing *Smith v. City of Hemet*, 394 F.3d 689, 704–07 (9th Cir. 2005) (en banc)). And when lethal force is used, the highest level of Fourth Amendment scrutiny is implicated "because the suspect has a fundamental interest in his own life and because such force frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1031 (9th Cir. 2018) (citations and internal quotations omitted), *cert. denied sub nom. City of Newport Beach, Cal. v. Vos*, 139 S. Ct. 2613 (2019). Where the severity of the intrusion is undisputed, as here, "the issue is determining whether the governmental interests at stake were sufficient to justify it." *Id.*

ii. Governmental Interests

The court relies on the factors set out in *Graham* when examining the governmental interests at stake.

(a) Severity of the Crime

Defendants contend several factors contributed to the Wells's perception of the severity of Friday's actions. First, Wells mistook Friday for Kyle Hamilton, a felony domestic violence suspect with an outstanding warrant. MSJ at 7. And though domestic violence itself is "not considered particularly severe," defendants argue Wells's belief that Hamilton possessed a gun heightened the severity of the situation. *Id.* Additionally, defendants argue "Friday *himself* committed a number of public offenses during the course of the interaction," including unlawfully impeding a police officer in violation of California Penal Code section 148 and possessing a

concealed firearm in violation of Penal Code section 25400, "one misdemeanor offense and one 'wobbler.'"[6] *Id.* at 7–8 (emphasis in original).

Assuming that weight is given to the mistaken identity factor, the Estate argues any perceived threat arising from Hamilton's outstanding domestic violence warrant is unreasonable because "the alleged domestic dispute for which Kyle Hamilton was wanted ended seven (7) days earlier, before the police ever became involved with [Friday] on August 16, 2016." Estate Opp'n at 7. The Estate also contends defendants' argument that Friday violated Penal Code sections 148 and 25400 is meritless because Friday had a right to refuse Wells's attempt to engage him. *Id.* (citing *Royer*, 460 U.S. at 497–98 (1983)). In other words, Friday "had not committed any observable crimes." *Id.*

The Ninth Circuit recently described two scenarios in which this *Graham* factor, severity of the crime, is applicable. In the first "*Miller"* scenario, named for the case from which it derives, "a particular use of force would be more reasonable, all other things being equal, when applied against a felony suspect than when applied against a person suspected of only a misdemeanor." *S.R. Nehad v. Browder*, 929 F.3d 1125, 1136 (9th Cir. 2019) (citing *Miller v. Clark Cty*, 340 F.3d 959 (9th Cir. 2003)). Thus, "the government's interest in apprehending . . . felons . . . 'strongly' favor[s] the use of force." *Id.* (citing *Miller*, 340 F.3d at 964). In the second scenario, although a suspect's threat to safety is itself a distinct factor under *Graham*, the court will nonetheless "use[] the severity of the crime at issue as a proxy for the danger a suspect poses at the time force is applied." *Id.* Neither scenario favors summary judgment here.

Under the first *Miller* approach, although Wells mistook Friday for Hamilton, and thus believed him to be a felony domestic violence suspect, defendants themselves concede

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[6] Defendants provide no definition of the term "wobbler" with reference to section 25400. In *In re D.D.*, 234 Cal. App. 4th 824, 828–29 (2015), a family law matter, the appellate court provided the following explanation as part of its dissection of section 25400's statutory scheme: "[A] violation of section 25400 is a felony offense under subdivision (c)(4), a misdemeanor offense under subdivision (c)(7), and an alternate felony/misdemeanor, commonly known as a 'wobbler' offense under subdivision (c)(6)." *See also People v. Statum*, 28 Cal. 4th 682, 685 (2002) (wobbler offenses are deemed felonies unless charged as misdemeanors or reduced to misdemeanors in the court's sentencing discretion).

"domestic violence offenses . . . are not considered particularly severe," MSJ at 7 (citing *Smith*, 394 F.3d at 702), whether rightly or wrongly. Domestic violence aside, the offenses defendants say Friday committed during the encounter, misdemeanor impeding of an officer in violation of Penal Code section 148 and a "wobbler" concealing a firearm in violation of Penal Code section 25400, also are not the most serious of crimes as defendants concede as well. *Id.* at 7–8. At best, even if he had been right about his target's identity, Wells encountered a suspect with an outstanding warrant for an offense that was not "particularly severe," who in the course of responding to Wells's approach committed a misdemeanor and a possible felony. Such dubious circumstances do not "'strongly' favor[] the use of force" envisioned by *Miller* such that summary judgment should be granted in defendant's favor. *S.R. Nehad*, 929 F.3d at 1136 (citing *Miller*, 340 F.3d at 964). Rather, whether these offenses justified the need for lethal force is a question for the finder of fact.

Applying the second "proxy-for-danger approach" renders the same conclusion. *Id.* Under this scenario, conduct committed prior to a suspect's encounter with police has little bearing on evaluating danger if the suspect's conduct at the scene is unrelated to the underlying felony. *See id.* (citing *Lowry v. City of San Diego*, 858 F.3d 1248, 1257 (9th Cir. 2017) (where officer reasonably concluded a burglary might be in progress, severity-of-crime factor weighed in favor of use of force because burglary is "dangerous" and "can end in confrontation leading to violence"), *cert. denied sub nom. Lowry v. City of San Diego, Cal.*, 138 S. Ct. 1283 (2018); *Smith*, 394 F.3d at 702–03 (where suspect had physically assaulted his wife but was standing alone on his porch when officers arrived, "nature of the crime at issue provid[ed] little, if any, basis" for use of force); *Conatser v. City of N. Las Vegas*, No. 2:06-CV-01236-PMP-LRL, 2009 WL 10679150, at *6 (D. Nev. Nov. 9, 2009) (finding severity of crime "very low" where no crime was in progress when police arrived, even though suspect might have threatened his mother before police arrived). Here, viewing Friday's conduct on August 16, 2016 after Wells approached, he ignored Officer Wells's advances, exited the store and walked briskly away and allegedly concealed a firearm in his waistband. Friday's actions at the scene cannot be said to

justify lethal force as a matter of law, particularly given the material disputes regarding Friday's possession of a weapon at the time.

No matter the mode of analysis, material questions of disputed fact regarding the severity of Friday's alleged criminal activity require resolution by a factfinder. This *Graham* factor weighs against summary judgment.

(b) Threat to Safety

"The most important *Graham* factor is whether the suspect posed an immediate threat to anyone's safety." *S.R. Nehad*, 929 F.3d at 1132 (citing *Mattos*, 661 F.3d at 441). "The use of deadly force is only reasonable if a suspect 'poses a *significant* threat of death or serious physical injury to the officer or others.'" *Id.* at 1132–33 (emphasis in original) (quoting *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir. 2014)). Here too factual questions regarding the significance of the threat Friday posed preclude entry of summary judgment.

Defendants contend the following facts unequivocally show that Friday posed an imminent threat to Wells's safety: Wells was aware of Hamilton's history of domestic violence and possession of a firearm; Friday resembled Hamilton's physical characteristics; Friday acted suspiciously and ultimately fled when Wells approached him in the market; Friday's left hand was positioned at or near his waistband throughout the pursuit; Wells warned Friday he would shoot, but Friday failed to comply with Wells's orders to stop; Friday was cornered by a locked gate in the parking lot, increasing his motivation to respond with force; Wells heard the sound of metal hitting the pavement when Friday turned toward Wells; Wells was pointing his gun at Friday when Friday turned; and Friday leaned toward the ground to retrieve an item he dropped immediately prior to Wells's discharging his firearm. MSJ at 8–9. Additionally, defendants argue it is relevant that a discarded firearm, bearing Friday's DNA, was found on the other side of the gate during the post-shooting investigation. *Id.* at 9. Arguing that Friday apparently discarded the weapon at some point during the pursuit, defendants contend Wells was unaware of that fact and believed Friday possessed a firearm for the duration of the incident. *Id.*

The Estate plaintiffs contend that deadly force is not per se reasonable simply because a weapon is perceived to be present, otherwise the presence of a firearm would always justify use of deadly force. Estate Opp'n at 7 (citing *Glenn v. Washington Cty.*, 673 F.3d 864, 871 (9th Cir. 2011); *Blanford*, 406 F.3d at 1115. The Estate plaintiffs evaluate the threat in light of the two volleys of shots fired by Wells. *Id.* at 8. They argue the first volley was unreasonable because Friday was not actually in possession of a weapon, and even where a weapon is suspected, there must have been a "furtive movement, harrowing gesture, or serious verbal threat" to justify use of deadly force. *Id.* (citing *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013)). Moreover, the second volley was equally unreasonable because, after the first volley, Friday had fallen to the ground, was lying on his side with his empty hand out, no longer posing an apparent threat. *Id.* The Estate plaintiffs also note that Friday did indeed stop when impeded by the locked gate in the parking lot; thus a jury could reasonably conclude that Friday heeded Wells's commands to stop when he reached the gate. *Id.* at 8–9. Finally, plaintiffs argue that because Wells is the sole surviving witness, assessment of Wells's credibility is a function best left for the jury. *Id.* at 6 (citing *Deorle v. Rutherford*, 272 F. 3d 1272, 1281 (9th Cir. 2001); Fed. R. Civ. P. 56 advisory committee note to 1963 amendment).

The disputed facts, when viewed in the Estate plaintiff's favor as required, undermine the reasonableness of Wells's belief that Friday posed a significant threat. Wells acknowledges that because "there[] [are] many black males with dreadlocks," there was "an equal chance [] that [Friday] [was] not Kyle Hamilton." Estate's DF 10; Gray Decl., Ex. 20, ECF No. 71-23, at 17. A jury could find that based on this "equal chance" of mistaken identity, it was unreasonable for Wells to presuppose certain characteristics about Friday, mainly that he was known to possess a firearm and subject to a felony warrant. Estate's DF 31. Second, the sequence of events in the parking lot behind the market informs the assessment of the reasonableness of the threat. The Estate plaintiffs contend Wells threatened to shoot Friday in the back after Friday was cornered by the locked gate; thus it was unreasonable for Wells to threaten Friday with deadly force when Friday had nowhere to go and constructively had heeded Wells's

commands. Estate's DF 38; Gray Decl., ECF No. Ex. 23 (Faulks Interview), ECF No. 71-26, at 14–15.

Additionally, there is a dispute as to when Wells issued his final warning in relation to when Friday ceased running. *See* Estate's DF 41; Gray Decl., Ex. 19 (Wells Depo.), ECF No. 71-22, at 74:8–22; Ex. 24 (Chapman Interview), ECF No. 71-27, at 17. A jury could reasonably find that during the rapid sequence of events, Friday stopped fleeing yet Wells either continued to threaten the use of deadly force or actually did administer deadly force without further warning; thus Wells's perception of danger compelling such a warning or use of force could be deemed unreasonable. *Cf. Blanford*, 406 F.3d at 1116 (finding deputies had cause to believe suspect posed a serious danger because he, among other things, failed to heed warnings or commands).

Moreover, importantly, the factual record raises questions regarding the reasonableness of Wells's belief that Friday was reaching down to retrieve a gun and Wells's actions based on that belief. *See, e.g.*, Estate's DF 42 (disputing sequence of events); UF 43 (undisputed that Wells never actually saw Friday in possession of weapon); DF 44 (disputed whether Wells heard sound of metal or sound of cellphone hitting the ground immediately before firing his weapon); Defs.' DF 20 (dispute regarding warning Wells gave immediately prior to firing his weapon), 41 (citing Chapman's statement that he did not visually see gun prior to shooting but did witness Friday's hands at his waistband while running).

All of the disputed facts relevant to whether Friday posed a threat to anyone's safety cannot be resolved on summary judgment in defendants' favor. They are for the factfinder to resolve.

(c) Other Factors

Because "the *Graham* factors are not exclusive," *Vos*, 892 F.3d at 1033–34, the court may consider other factors within the totality of the circumstances, *Velazquez*, 793 F.3d at 1024, including "[w]hat other tactics if any were available to effect the arrest," *Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010). Where "clear, reasonable, and less intrusive

alternatives," exist, the more uncertain the question of reasonableness becomes. *Bryan*, 630 F.3d at 831.

Here, as the Estate plaintiffs highlight, Wells did not send out a radio dispatch upon his initial observation of Friday or request backup during his pursuit of Friday. Estate Opp'n at 1; Defs.' UF 12. Nor did Wells activate his body-worn camera during the pursuit as required by SPD policy. Estate Opp'n at 1; Defs.' UF 13. Although some of these precautions may or may not have been required by department policy, they, nonetheless, provide examples of measures available to an officer to mitigate or account for a threat before resorting to deadly force. *See, e.g.*, *Wallisa v. City of Hesparia*, 369 F. Supp. 3d 990, 1009 (C.D. Cal. 2019) (noting officer "was, or should have been, aware that the arrival of [additional] officers would change the tactical calculus confronting him, likely opening up additional ways to resolve the situation without the need for an intermediate level of force." (quoting *Bryan*, 630 F.3d at 831)).

Furthermore, the court may also consider "whether the officer[] gave appropriate warnings before employing the force." *Wallisa*, 369 F. Supp. 3d at 1008. As noted above, a material dispute exists as to the scope, and thus appropriateness, of the warnings given by Wells immediately prior to his discharging his service weapon. *See* Estate's DF 37 (dispute regarding whether Wells stated "I know you have a gun. Stop now or I'll shoot you in the back," Wells Depo. at 72:8–13, or simply stated "I'm going to shoot you in your back," Faulks Interview at 6–7, 17–18, 24). When an officer deploys deadly force following a disputed warning, the reasonableness of that officer's actions are called into question. *See A. K. H by & through Landeros v. City of Tustin*, 837 F.3d 1005, 1009, 1012–13 (9th Cir. 2016) (use of excessive force violated decedent's Fourth Amendment right when, among other things, officer warned decedent, "Get your hand out of your pocket[,]" and although decedent complied with officer's command, and officer did not see anything in decedent's hand, he shot and killed decedent).

Finally, as the Estate plaintiffs contend, Wells is not the "sole surviving witness" to the shooting, Estate Opp'n at 6, given Michael Chapman's presence at the scene, Defs.' UF 26. Wells is the key witness, however, and there is merit to the Estate plaintiffs' contention that Wells's credibility must be considered and determined by the trier of fact. *See Newmaker v. City*

of Fortuna, 842 F.3d 1108, 1116 (9th Cir. 2016) ("Summary judgment is not appropriate in § 1983 deadly force cases that turn on the officer's credibility that is genuinely in doubt.").

iii. Summary

In sum, questions remain as to the severity of the crime, the threat Friday posed to Wells and the community, the possibility of alternative measures to avoid use of deadly force and the adequacy of Wells's warning issued prior to the shooting. It is the sole province of a jury to resolve these questions, not that of the court. For these reasons, defendants' motion is DENIED as to the Estate plaintiffs' Fourth Amendment claim for excessive force.

2. Denial of Medical Care (Fourth Amendment) Claim by Friday's Estate

Defendants contend the Estate plaintiffs have conceded this claim given their failure to provide any argument or evidence in opposition to defendants' motion. Reply at 2. The Estate's counsel conceded as much when questioned at hearing. Given the Estate plaintiffs' abandonment of this claim, defendants' motion is GRANTED as to Estate's sixth cause of action for denial of medical care.

3. Deprivation of Right to Familial Relationship (Fourteenth Amendment) Claim by L.F., K.F., M.C.F. and K.S.F.

Defendants contend the substantive due process claims of L.F., K.F., M.C.F. and K.S.F. (collectively "minor plaintiffs") for deprivation of their Fourteenth Amendment right to familial association fail because there is no evidence to support a finding that Wells's conduct "shocks the conscience." Reply at 6–7. Minor plaintiffs contend the court should apply the lower "deliberate indifference" standard, rather than the heightened "purpose to harm" standard, because when considering the totality of events, rather than only the moments immediately preceding the shooting, Wells had ample time to consider the consequences of his actions. L.F. Opp'n at 7–8; Estate Opp'n at 10. Even if the court applies the purpose to harm standard, a jury could find Wells's conduct shocks the conscience because his acts of threatening to shoot Friday in the back and firing a second volley of shots after Friday was incapacitated provides sufficient evidence of an illegitimate purpose to harm. *See* L.F. Opp'n at 8; Estate Opp'n at 10–11. Plaintiffs are correct, as explained below.

A parent has a "fundamental liberty interest" in "the companionship and society of his or her child" and "[t]he state's interference with that liberty interest without due process of law is remediable under [§] 1983." *Kelson v. City of Springfield*, 767 F.2d 651, 655 (9th Cir. 1985). "[T]his constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents." *Lee v. City of Los Angeles*, 250 F.3d 668, 685 (9th Cir. 2001) (quoting *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers–Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999)). Thus, in the Ninth Circuit, "[t]his substantive due process claim may be asserted by both the parents and children of a person killed by law enforcement officers." *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir. 1998).

To establish a constitutional substantive due process violation as alleged here, plaintiffs must show an officer's conduct "shocks the conscience." *Porter*, 546 F.3d at 1137 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). In determining whether excessive force shocks the conscience, the first inquiry is "whether the circumstances are such that actual deliberation [by the officer] is practical." *Id.* (citing *Moreland*, 159 F.3d at 372) (internal quotation marks omitted)). "Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). "On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives." *Id.* Under the purpose to harm standard, the court looks at the totality of the circumstances to assess whether a jury could reasonably infer an officer was acting for purposes other than legitimate law enforcement. *Porter*, 546 F.3d at 1141.

Here, even under the heightened purpose to harm standard a jury could still reasonably find the totality of the circumstances reveal Wells harbored a purpose to harm distinct from his legitimate law enforcement objectives. A jury could reasonably infer Wells acted with ill intent based on his admitted uncertainty with respect to his identification of Friday as Hamilton, the abruptness of his threat to shoot Friday in the back as Friday was running away,

Wells's belief Friday had a gun even though Wells never saw the gun, and Wells's continued shooting of Friday as he lay motionless on the ground. A reasonable jury could find Wells's conduct shocks the conscience.

Defendants' motion is DENIED with respect to the minor plaintiffs' substantive due process claims against Officer Wells for deprivation of familial association.

4. Deprivation of Right to Familial Relationship (First Amendment) Claim by L.F. and K.F.

Minor plaintiffs L.F. and K.F. similarly bring a cause of action for deprivation of familial rights under the First Amendment.[7] L.F. Am. Compl. ¶¶ 61–66.

Like the Fourteenth Amendment, "[t]he First Amendment also protects family relationships[] that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018) (internal quotation marks and citation omitted). Claims for deprivation of familial rights under the First Amendment receive similar analytical treatment as claims under the Fourteenth Amendment. *See, e.g.*, *Estate of Osuna v. Cty. of Stanislaus*, No. 1:18-CV-01240-DAD-SAB, 2019 WL 2598694, at *9 (E.D. Cal. June 25, 2019) (denying motion to dismiss First Amendment claim for violation of familial association "[h]aving already found [plaintiffs] . . . sufficiently alleged violation of their familial association rights under the Fourteenth Amendment").

Having denied defendants' motion as to minor plaintiffs' Fourteenth Amendment claims for deprivation of familial association, the court also DENIES the motion with respect to L.F. and K.F.'s First Amendment claim, for the same reasons.

[7] M.C.F. and K.S.F. do not bring a cause of action for deprivation of familial rights under the First Amendment; they only allege violation of the Fourteenth Amendment. *See generally* Estate Compl.

5. Qualified Immunity

Defendants contend that even if Wells's conduct did offend the constitution, he is entitled to qualified immunity because plaintiffs have not demonstrated that any constitutional rights Wells allegedly violated were clearly established as of the date of Friday's death, August 16, 2016. MSJ at 12–15; Reply 8–9.

As this court previously has reviewed, "[q]ualified immunity is a judge-made doctrine designed to 'balance[ ] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Haley v. City of Boston*, 657 F.3d 39, 47 (1st Cir. 2011) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The doctrine is intended to "give[] government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

The two-pronged test currently used for assessing whether qualified immunity applies was first articulated in *Saucier v. Katz*, 533 U.S. 194 (2001). *Pearson*, 555 U.S. at 232 (citing *Saucier*, 533 U.S. at 201). Under that test, the court first "decide[d] whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right." *Id.* (citing *Saucier*, 533 U.S. at 201 and Fed. R. Civ. P. 12, 50, 56). Then, "if the plaintiff [] satisfied this first step, the court [] decide[d] whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* (citing *Saucier*, 533 U.S. at 201).

"[U]nder either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 572 U.S. at 656 (citations omitted) (per curiam). "This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson*, 477 U.S. at 249); *see also Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005) ("'[T]he ordinary framework for deciding motions for summary judgment' applies to motions for summary judgment based on official immunity.") (citation omitted) (alteration in original). In

particular, in determining the established law, the court must take care not to define either the right at issue, or the defendant's conduct for that matter, in a manner that impermissibly resolves factual disputes. *Tolan*, 572 U.S. at 657 ("[C]ourts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions.") (citing *Brosseau v. Haugen*, 543 U.S. 194, 195 (2004)).

Since *Pearson*, courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. at 236. Here, the court has exercised its discretion and analyzed the first merits prong above as to the excessive force and substantive due process claims against Wells, finding plaintiffs have satisfied their burden on the first prong of the qualified immunity analysis.

Turning to the second prong, the court notes that clearly established law must be defined with a "high 'degree of specificity.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)); *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019). This standard is "demanding." *Wesby*, 138 S. Ct. at 589. The "legal principle [at issue] must have a sufficiently clear foundation in then-existing precedent." *Id.* It "must be 'settled law,' . . . , which means it is dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority,'" rather than merely "suggested by then-existing precedent." *Id.* at 589−90 (citations, some internal quotation marks omitted).

"[A] court must ask whether it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted.'" *Ziglar*, 137 S. Ct. at 1867 (quoting *Saucier*, 533 U.S. at 202). While "a case directly on point" is not required "for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)), and must "'squarely govern[]' the specific facts at issue," *id.* at 1153 (citing *Mullenix*, 136 S. Ct. at 309). *See also Pike v. Hester*, 891 F.3d 1131, 1141 (9th Cir. 2018) ("An exact factual match is not required . . . ."). "The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he

confronted.'" *Wesby*, 138 S. Ct. at 590 (quoting *Saucier*, 533 U.S. at 202). Thus, "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Mullenix*, 136 S. Ct. at 308) (emphasis, alteration in original).

Where the existing cases are "too factually dissimilar to clearly establish a constitutional violation" by an officer's actions, the officer is entitled to qualified immunity. *Nicholson v. City of Los Angeles*, 935 F.3d 685, 695 (9th Cir. 2019). However, "[p]recedent involving similar facts can help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful." *Kisela*, 138 S. Ct. at 1153 (quoting *Mullenix*, 136 S. Ct. at 312). Although "general statements of the law are not inherently incapable of giving fair and clear warning to officers," [cite], in some circumstances "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Bonivert v. City of Clarkston*, 883 F.3d 865, 872 (9th Cir. 2018) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Because resolving whether the asserted federal right was clearly established presents a pure question of law, the court draws on its "full knowledge" of relevant precedent rather than restricting its review to cases identified by plaintiff. *See Elder v. Holloway*, 510 U.S. 510, 514−16 (1994) (citing *Davis*, 468 U.S. at 192 n.9). Ultimately, "the prior precedent must be 'controlling'—from the Ninth Circuit or Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." *Sharp v. Cty. Of Orange*, 871 F.3d 901, 911 (9th Cir. 2017) (citing *Wilson*, 526 U.S. at 617); *see also Carroll v. Carman*, 574 U.S. 13, 17 (2014) (assuming without deciding that controlling circuit precedent could constitute clearly established federal law).

a) Clearly Established Fourth Amendment Law Applicable to Estate's Excessive Force Claim

In this case, the general Fourth Amendment standards discussed above provide a "starting point," but "[t]he dispositive question is 'whether the violative nature of [Wells's] *particular* conduct [was] clearly established" on August 16, 2016. *Isayeva v. Sacramento Sheriff's Department*, 872 F.3d 938, 947 (9th Cir. 2017) (quoting *Mullenix*, 136 S. Ct. at 308) (emphasis in original). The Supreme Court has cautioned that "[s]pecificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Kisela*, 138 S. Ct. at 1152 (quoting *Mullenix*, 136 S. Ct. at 308). Thus, in excessive force claims, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Id.* at 1153 (quoting *Mullenix*, 136 S. Ct. at 309). Nonetheless, as noted generally above, "officials may 'still be on notice that their conduct violates established law even in novel factual circumstances,'" and courts should remain "particularly mindful of this principle in the Fourth Amendment context" to ensure the fact-intensive inquiry required by the Fourth Amendment does not shield officers from liability without "further[ing] the purpose of qualified immunity . . . ." *See Bonivert*, 883 F.3d at 872–73 (quoting *Mattos*, 661 F.3d at 442; *Pearson*, 555 U.S. at 23).

Defendants concede that law enforcement officials may not resort to use of lethal force against an unarmed fleeing felon, but contend "that using deadly force against an armed suspect who reaches to retrieve a weapon is constitutionally sound conduct." MSJ at 14 (citing *Garner*, 417 U.S. at 11; *Cruz v. City of Anaheim*, 785 F.3d 1076, 1079 (9th Cir. 2014)). Defendants define the precise question here as whether "*every* reasonable officer would have understood that shooting at a fleeing suspect believed to be armed with a firearm, who drops something metal on the ground and bends to retrieve it while an officer has him at gunpoint and after ignoring commands to stop or be shot, offends the Constitution." MSJ at 14-15 (emphasis in original). Based on this definition, defendants argue the precedent and principles derived

therefrom leave the constitutionality of Wells's behavior "murky, at best." *Id.* Defendants further assert "[t]here appear to be no cases 'squarely governing' the situation Officer Wells was faced with[,]" therefore "it cannot be said that every reasonable Officer in Wells' position was on notice his August 16, 2016 conduct offended constitutional rights." MSJ at 15 (citing *Kisela*, 138 S. Ct. at 1153).

Plaintiffs argue defendants' argument fails because it is based on a disputed version of the facts. L.F. Opp'n at 9. Plaintiffs also underscore the two volleys of shots fired by Wells. As to the first volley, plaintiffs maintain that as of August 16, 2016, the law was clearly established that use of deadly force, even against an armed person or a person reasonably suspected of being armed, was unreasonable under the Fourth Amendment absent a "furtive movement, harrowing gesture, or serious verbal threat [that] might create an immediate threat." L.F. Opp'n at 10 (quoting *George*, 736 F.3d at 838); Estate Opp'n at 12–13. As to the second volley, they argue as of August 16, 2016, "it had been clearly established that use of deadly force against a person on the ground and who no longer posed an immediate threat was unreasonable under the Fourth Amendment." L.F. Opp'n at 10 (citing, e.g., *Drummond v. City of Anaheim*, 343 F.3d 1052, 1057–58 (9th Cir. 2003); Estate Opp'n at 12–13.

In reply, defendants contend Friday made a furtive movement or threatening gesture by reaching to retrieve his dropped cellphone, which Wells believed to be a gun; thus, they say, it is undisputed, as supported by surveillance video, that Friday's conduct precludes a finding that Wells's conduct violated the clearly established law at the time. Reply at 8. This argument, however, merely underscores the parties' diametrically opposed interpretations of the evidence, with one interpretation immunizing Wells's conduct in the face of the established law and the other not. *See, e.g.*, L.F. Opp'n at 6 (arguing Wells's belief Friday was armed and posed significant threat not constitute an "undisputed" fact); Defs.' DF 41 (objecting to plaintiffs' assertion Friday was unarmed based on Chapman's statement he did not visually see the gun prior to the shooting but did view his hands in his waistband). Here as well, where it is disputed whether Friday made a furtive or threatening movement, that dispute is for the jury to resolve. *See, e.g.*, *Nichols v. City of San Jose*, No. 14-CV-03383-BLF, 2017 WL 1398410, at *5 (N.D.

Cal. Apr. 19, 2017) ("Viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could find that [plaintiff] was not making furtive movements, but was instead reacting to [the officer's] request to see her ID."); *Mock v. City of Santa Ana*, No. 8:14-CV-00778-CAS (FFMx), 2016 WL 492741, at *4 (C.D. Cal. Feb. 8, 2016) (finding factual dispute where officer testified he perceived fleeing suspect make "furtive" movement and move his hand toward his waistband, despite plaintiffs' contention suspect's movement posed no objective threat); *Pelayo v. City of Pomona*, No. CV 17-7292 PSG (SKX), 2019 WL 994968, at *2 n.4 (C.D. Cal. Jan. 2, 2019) (noting "[o]n summary judgment, the Court must view the facts in the light most favorable to Plaintiffs, and therefore it cannot take into account Defendants' contention that [plaintiff's] exhibited furtive movements.").

"[T]ak[ing] care not to define [this] case's 'context' in a manner that imports genuinely disputed factual propositions" and without "resolv[ing] genuine disputes of fact in favor of the party seeking summary judgment," *Tolan*, 572 U.S. at 656-57 (citations omitted), the court may grant summary judgment "only if Defendants are entitled to qualified immunity on the facts as alleged by the non-moving party," *Blankenhorn*, 485 F.3d at 477 (citing *Barlow v. Ground*, 943 F.2d 1132, 1136 (9th Cir. 1991)). Given the factual narrative advanced by plaintiffs with sufficient evidentiary support to withstand summary judgment on the merits, the court cannot find as a matter of law that a reasonable officer in Wells's position would not have understood his conduct offended the constitution. Where resolution of a factual dispute is required, as here, to properly define the factual scenario to reference in determining whether Wells was on notice of Friday's clearly established rights as of August 2016, that resolution is best left to the factfinder in the first instance.

As a colleague explained in *Kaur v. City of Lodi*:

> [A] jury could conclude that the Officer Defendants shot to death a man who at most committed a misdemeanor, was not fleeing, had not armed himself with a weapon, was not threatening the Officer Defendants or anyone else, and asked them not to shoot him. As the Ninth Circuit has observed, "few things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, nondangerous suspect by shooting him dead' in the absence of 'probable cause to believe that the [fleeing] suspect poses a threat of serious physical harm, either to the officer or to others.'" *Torres v.*

> *City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011) (quoting *Garner*, 471 U.S. at 11, 105 S. Ct. 1694).

263 F. Supp. 3d 947, 970 (E.D. Cal. 2017). Here, a reasonable jury could find, given the totality of the circumstances, that Friday's actions were non-threatening in nature. If the jury so finds, the court would proceed to the legal determination that Wells applied deadly force contrary to clearly established law at the time. *See Garner*, 471 U.S. at 11 ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."); *A.K.H. by & through Landeros v. City of Tustin*, 837 F.3d 1005, 1011 (9th Cir. 2016) ("Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.'") (quoting *Garner*, 471 U.S. at 11); *see also Foster v. City of Indio*, 908 F.3d 1204 (9th Cir. 2018) (finding it was clearly established law applicable to Fourth Amendment excessive force claim that, "'[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so[,] . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.'" (citation omitted)).

As this court explained in *Brown v. Grinder*, No. 2:13-CV-01007-KJM-KJN, 2019 WL 280296, at *21 (E.D. Cal. Jan. 22, 2019), qualified immunity is inappropriate where the court must "construe[] the evidence in a light most favorable to defendants." For this reason, and the reasons articulated above, defendants are not entitled to qualified immunity with respect to the underlying excessive force claim, at this stage of the proceedings.

b) Right to Familial Association (First and Fourteenth Amendment)

As plaintiffs correctly note, defendants focus their qualified immunity argument solely on Wells's Fourth Amendment-related conduct, and do not address the First and Fourteenth Amendment claims. L.F. Opp'n at 10–11; *see generally* MSJ; *see also* Reply (providing no counter to plaintiffs' assertion defendants have waived their qualified immunity argument with respect to plaintiffs' Fourteenth Amendment claims). At hearing, defendants'

counsel drew a linkage between claims, arguing that if qualified immunity is granted on the excessive force claim, it automatically should be granted on the due process claims as well.

The court exercises its discretion, given the legal issues at stake, to consider whether qualified immunity is available in the face of plaintiffs' familial association claims under the First and Fourteenth Amendments. *See Easley v. City of Riverside*, 890 F.3d 851, 855 (9th Cir.), *rev'd on other grounds after reh'g en banc*, 765 F. App'x 282 (9th Cir. 2019) (finding district court did not err by raising qualified immunity sua sponte and addressing on summary judgment); *see also* Sec. Am Answers, ECF Nos. 19, 20 (raising qualified immunity affirmative defense).

As the appellate court in *Foster v. City of Indio* explained, "it has been clearly established since 1998 'that a police officer violates the Fourteenth Amendment due process clause if he kills a suspect when acting with the purpose to harm, unrelated to a legitimate law enforcement objective.'" 908 F.3d at 1211 (quoting *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 450 (9th Cir. 2013). For the same reasons discussed above in evaluating the merits of plaintiffs' claims, even if the more stringent purpose to harm standard were applied here, questions of fact remain based on the admitted uncertainty of Wells's identification of Friday as Hamilton, the abruptness of Wells's threat to shoot Friday in the back as Friday was moving away, Friday's alleged possession of a gun and Wells's continued shooting of Friday after he had fallen motionless to the ground. All of these questions require resolution by the factfinder, meaning defendants are not entitled to qualified immunity on plaintiffs' Fourteenth Amendment due process claims.

Given the similar requirements of the familial association claims under the First and Fourteenth Amendments, *Keates v. Koile*, 883 F.3d at 1236, qualified immunity also cannot be granted at this stage with respect to plaintiffs' First Amendment due process claim.

6. Supervisory Liability Claim Against Police Chief Eric Jones by L.F., K.F., M.C.F. and K.S.F.

Defendants move for summary judgment on the minor plaintiffs' claims that Chief Jones should be held liable for the actions of his subordinate Wells. Defendants contend "[t]here

is no evidence that [Chief Jones] *personally* committed any wrongdoing that is causally connected to the Incident[,]" MSJ at 18 (emphasis in original), because his "conduct consisted of *at most* reviewing Officer Wells' conduct and failing to discipline him[,]" Reply at 9 (emphasis in original). Plaintiffs argue Chief Jones is subject to personal liability because his role as Chief "means that his individual liability 'oftentimes overlaps' with that of his office." L.F. Opp'n at 15; Estate Opp'n at 17. In other words, plaintiffs assert, "Jones can [] be held liable 'if he knowingly turn[ed] a blind eye to the abuse.'" L.F. Opp'n at 15 (quoting *OSU Student All. v. Ray*, 699 F.3d 1053, 1071 (9th Cir. 2012)); Estate Opp'n at 17.

A police chief, as a superior officer, "can be held liable in his individual capacity if he participated in the deprivation of [plaintiff's] constitutional rights." *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087, 1093 (9th Cir. 1998) (citing *Larez v. City of Los Angeles*, 946 F.2d 630, 645 (9th Cir. 1991)). In an excessive force case, a police chief's liability is premised on a jury's finding that the subordinate officer used excessive force. *Id.* If a jury finds excessive force, then the police chief's "liability hinges on whether he 'set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury.'" *Id.* (quoting *Larez*, 946 F.2d at 646). "A supervisor can be liable in his individual capacity 'for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation . . . ; or for conduct that showed a reckless or callous indifference to the rights of others." *Id.* (alteration in original) (quoting *Larez*, 946 F.2d at 646).

Plaintiffs assert Chief Jones should be held personally liable for the same reasons *Monell* liability must attach to City and SPD. L.F. Opp'n at 15; Estate Opp'n at 17. Plaintiffs' *Monell* claims are discussed in greater detail below. For purposes of the analysis here, plaintiffs in essence contend Chief Jones, along with the City and SPD, nurtured a culture of allowing excessive force by their officers by failing to expeditiously resolve OIS investigations, failing to exact punishment for numerous excessive force incidents by department officers, failing to implement new or different training for officers and ratifying officers' offending behavior through his post-incident conduct. L.F. Opp'n at 11–15; Estate Opp'n 14–17.

Plaintiffs have presented sufficient evidence to support their position that Chief Jones, in his individual capacity, participated in a ratification process so as to raise a material question whether "he set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury." *Watkins*, 145 F.3d at 1093. The record as reviewed above supports a conclusion that Chief Jones oversaw a department that routinely left OIS investigations regarding excessive force complaints unresolved for years, ignored a clear need for additional training, as evidenced by the alleged constitutional violations stemming from the incident here, and established a pattern of ratifying behavior of his subordinate officers that violated constitutional principles. Viewing the facts in the light most favorable to plaintiffs, disputed questions of fact preclude entry of summary judgment.

Finally, defendants raise the issue of qualified immunity as to Chief Jones for the first time in their reply brief. Reply at 9. Under these circumstances, despite counsel's suggestion at hearing that defendants adequately brief the issue, this affirmative defense is deemed waived and the court need not address it here. *See Liberal v. Estrada*, 632 F.3d 1064, 1072 n.6 (9th Cir. 2011) (issues not raised in opening brief but raised for the first time in reply are deemed waived); *see also Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 269 (6th Cir. 2010) (declining to address qualified immunity on appeal because defendant failed to address at summary judgment, and thus waived the defense). Even if not waived, the applicability of qualified immunity to Chief Jones necessarily depends on resolving the factual questions related to the underlying constitutionality of Officer Wells's actions at the scene, and Chief Jones's connection thereto. *See* Reply at 1 ("To the extent any constitutional mistakes occurred, . . . Chief Jones [is] entitled to qualified immunity for such.").

Defendants' motion is DENIED with respect to minor plaintiffs' claim seeking to impose individual liability on Chief Jones.

7. *Monell* Claims – Municipal Liability

Plaintiffs also bring § 1983 claims against the City, SPD and Chief Jones in his official capacity under *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978), for allegedly

unconstitutional policies and practices. Plaintiffs may support their *Monell* claim through three possible theories by showing: (1) official policies or established customs inflicted the alleged constitutional injury; (2) omissions or failures to act reflected a local government policy of deliberate indifference to the constitutional rights at issue; or (3) a City employee with final policy-making authority ratified a subordinate's unconstitutional act. *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1249−50 (9th Cir. 2010), *overruled on other grounds by Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). Here, plaintiffs assert municipal liability under all three theories. *See* L.F. Opp'n at 11–15; Estate Opp'n at 14–17.

a) Custom or Policy

A custom or policy theory must be "founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996), *holding modified on other grounds by Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001). Here again, plaintiffs present evidence that defendants' review of OIS incidents has remained unresolved for several years and despite numerous incidents of alleged excessive force, no SPD officer has ever been terminated for use of unreasonable or excessive force. L.F. Opp'n at 11–12 (citing Merin Decl., ECF No. 69-3, Ex. 3 (OIS 2010-2014), Ex. 4 (article regarding SPD OIS), Ex. 5 (Pls.' RFP, Set One), Ex. 6 (Defs.' Resp. to RFP, Set One); *see also* Estate Opp'n at 14 (citing Gray Decl., ECF No. 71-3, referencing same evidence). Plaintiffs also reference "[n]umerous lawsuits [that] have been filed, settled, and remain pending against Defendants which relate to alleged improper uses of force" as part of their effort to show defendants' practice of allowing excessive force behavior to occur. L.F. Opp'n at 12 (citing Merin Decl., Ex. 7 (listing excessive force lawsuits where settlement reached); Estate Opp'n at 14 (same).

Defendants argue there is no evidence the City or SPD has employed any unconstitutional policies or that any longstanding custom or practice deviates from the constitutional policies they say are in place. MSJ at 17. Defendants also maintain that mere allegations from other cases are insufficient to support a municipal liability claim, and evidence of settlements from other excessive force cases is inadmissible for the purpose plaintiffs offer

them, under Federal Rule of Evidence 408. Reply at 10 (citing *Collins v. City of N.Y.*, 923 F.Supp.2d 462, 479, (E.D.N.Y. 2013); *Green v. Baca*, 226 F.R.D. 624, 640-641 (C.D. Cal. 2005)).

In this regard, defendants are correct. Most notably, defendants cite to *Velazquez v. City of Long Beach*, in which the court explained:

> [A] custom or practice can be inferred from . . . evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded. Evidence of identical incident[s] to that alleged by the plaintiff may establish that a municipality was put on notice of its agents' unconstitutional actions, while general evidence of departmental treatment of complaints and of the use of force can support[ ] the [plaintiff's] theory that . . . disciplinary and complaint processes . . . contributed to the police excesses complained of because the procedures made clear to [the] officer that . . . [he] could get away with anything[.]

793 F.3d 1010, 1027 (9th Cir. 2015). Here, plaintiffs provide sufficient evidence to raise a genuine question of disputed fact regarding whether Chief Jones and/or the SPD are employing a custom or policy that permits its officers to act without regard for the consequences. As noted, the undisputed evidence shows SPD's review of OIS investigations regularly takes several years to resolve, and up to five years in some cases, Estate's UF 4, and no officer has ever been terminated for use of unreasonable force under Chief Jones's command, Estate's UF 5. *See Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 803 (9th Cir. 2018) ("It is sufficient under our case law to prove a 'custom' of encouraging excessive force to provide evidence that personnel have been permitted to use force with impunity."). The delays in resolving investigations effectively deprive plaintiffs of the ability to point to factual details to support claims of prior excessive force. Whether the defendants' practice amounts to a custom or policy permitting unconstitutional behavior is for the jury to decide, given plaintiffs' evidence of "departmental treatment of complaints." *Velasquez*, 793 F.3d at 1027. Plaintiffs' custom or policy *Monell* claim survives summary judgment. Given this conclusion, the court need not reach plaintiffs' argument regarding defendants' history of settling cases as suggesting a practice of "avoiding verdicts" and the findings of excessive force or violative conduct on which such verdicts would be based. L.F. Opp'n at 12; Estate Opp'n at 15.

b) Inadequate Training

Plaintiffs also allege municipal liability under a failure to train theory. To succeed on such a theory, "the failure to train [must] amount[] to deliberate indifference to the rights of persons with whom the police come into contact." *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Defendants contend plaintiffs have identified no specific omission in the City's or SPD's training program that would cause officers to violate citizen's constitutional rights. Reply at 10 (citing *Smith v. City of Stockton*, No. 2:15-CV-00363-KJM-AC, 2018 WL 3831001, at *12 (E.D. Cal. Aug. 13, 2018) (quoting *Flores v. Cty. of Los Angeles*, 758 F.3d 1154, 1158 (9th Cir. 2014)).

Plaintiffs, on the other hand, contend that a failure to train theory may be maintained where "the need for more or different training [wa]s so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers . . . can reasonably be said to have been deliberately indifferent to the need." L.F. Opp'n at 13 (quoting *Rodriguez*, 891 F.3d at 802); Estate Opp'n at 15–16. Plaintiffs cite to Wells's own position as a field training officer as indicative of the inadequacy of SPD's training program; they argue that because the facts allow the conclusion Wells committed multiple constitutional violations within the short duration of the incident leading to Friday's death, they also support the conclusion SPD's training is deficient. L.F. Opp'n at 13; Estate Opp'n at 15–16.

Plaintiffs fail to identify, as defendants assert, which specific omission from the SPD's training program plaintiffs believe facilitates officers' unconstitutional behavior. Nor do they identify specific incidents of prior conduct similar to Wells's in August 2016 such that the City and/or the SPD was on notice of the obvious need for new or additional training.[8] To maintain their claim, plaintiffs must establish that the alleged "'injury would have been avoided' had the governmental entity properly trained its employees." *Lee*, 250 F.3d at 681 (quoting Oviatt v. Pearce, 954 F.2d 1470, 1473–74 (9th Cir. 1992)). Yet, plaintiffs' own expert opines that Wells "did not follow the training and standards that every POST (Peace Officers Standard and

[8] For the reasons discussed above, reliance on prior settlements by the City and/or SPD regarding use of excessive force are inadmissible to establish *Monell* liability.

Training) certified officer should know, and cannot be excused for his failures to comply with the training"; the expert also says that "SPD through its chain of command appears to have endorsed [Wells's] dangerous and *out-of-policy* tactics that are connected to this incident." Clark Rep., ECF No. 57-1, at 17–20. Thus, on this record, plaintiffs "effectively concede[] the training provided by the City and SPD was constitutionally sufficient . . . ." MSJ at 19. As this court explained in *Smith v. City of Stockton*, "[f]ailure-to-train claims cannot survive based on training deficiencies alone; the claim must identify a conscience or deliberate choice to ignore training deficiencies." 2018 WL 3831001, at *12 (citing *Lee*, 250 F.3d at 681). Here, plaintiffs provide insufficient evidence to sustain their *Monell* claim based on a failure to train theory.

c) Ratification

Finally, plaintiffs seek to have municipal liability attach based on a theory of ratification. A ratification theory may be established in two ways: (1) based on a "pattern" of ratification that constitutes a practice or custom, *Canton*, 489 U.S. at 389, or (2) based on a single act by an official with policy making authority, *Larez*, 946 F.2d at 645–46.

Plaintiffs rely on this court's decision in another case against the City of Stockton, *Smith v. City of Stockton*, in which the court found plaintiff's ratification theory sufficient to survive summary judgment under nearly identical circumstances. 2018 WL 3831001, at *13 (ratification theory survives summary judgment where plaintiff identified twenty shootings that remained unresolved up to five years, and Chief Jones's approval of investigative findings raised sufficient question as to his role as a policy making official). In this case, both the disputed and undisputed evidence leads to the same conclusion. *See* Defs.' UF 1–5, DF 50. Chief Jones reviews all OIS reports, Estate's UF 2 (citing Merin Decl., Ex. 2, Jones Depo. at 22:24–23:11), is unaware of a single time he has disagreed with the outcome of an OIS report, Estate's UF 3 (citing Jones Depo. at 117:21–118:20), at least 20 OIS reports have been unresolved for up to five years, Estate's UF 4 (citing Merin Decl., Ex. 3 (OIS 2010–2014), Ex. 4 (OIS article)), and no officer has ever been terminated as a result of these investigations, Estate's UF 5 (citing Merin Decl., Ex. 5 (Pls.' RFP, Set One at 6), Ex. 6 (Defs.' Resp. to RFP, Set One at 3)).

Although defendants challenge plaintiffs' reliance on the ratification theory in their moving papers, MSJ at 18–19, their reply brief does not respond to plaintiffs' ratification arguments in opposition to summary judgment. The court has no basis for reaching a different decision here. Plaintiffs ratification theory of *Monell* liability survives defendants' summary judgment challenge.

B. State Law Claims

1. Right of Familial Association (Article I, § 7 of the California Constitution)

Plaintiffs L.F. and K.F. bring a claim for violation of their right to familial association guaranteed by Article I, Section 7 of the California Constitution. "California courts have held that the due process provision of the California Constitution, Cal. Const. art I, § 7, is 'identical in scope and purpose' to the Due Process Clause of the federal Constitution." *Nozzi v. Hous. Auth. of City of Los Angeles*, 425 F. App'x 539, 542 (9th Cir. 2011) (citing *Gray v. Whitmore*, 17 Cal. App. 3d 1, 20 (1971)). Because the two are "substantially equivalent and [] analyzed in a similar fashion[,]" it appears that the survival of one claim as determined above necessitates survival of the other. *Tain v. State Bd. of Chiropractic Examiners*, 130 Cal. App. 4th 609, 629 (2005).

There may be questions, however, whether section 7 creates a private right of action for damages caused by a due process violation, given the California Supreme Court's holding in *Katzberg v. Regents of Univ. of Californi*a, 29 Cal. 4th 300 (2002). Neither party has briefed the applicability of *Katzberg* here, and the court thus declines to consider the question at this time. *See Estate of Osuna v. Cty. of Stanislaus*, No. 1:18-CV-01240-DAD-SAB, 2019 WL 2598694, at *11 (E.D. Cal. June 25, 2019) (declining to delve into *Katzberg* analysis where parties fail to brief issue); *Shen v. Albany Unified Sch. Dist.*, No. 3:17-CV-02478-JD, 2018 WL 4053482, at *4 (N.D. Cal. Aug. 24, 2018) ("Defendants have not done [*Katzberg*] justice by making what is effectively a passing reference to it in their briefs, and the Court declines to take it up in that underdeveloped form."). When questioned at hearing, defendants admitted they had not briefed the issue and effectively conceded on this claim.

Summary judgment is DENIED on L.F. and K.F.'s claim under Article I, Section 7 of the California Constitution.

2. Bane Act (Cal. Civ. Code § 52.1)

All minor plaintiffs bring claims under California's Bane Act, codified at California Civil Code section 52.1, which "protects individuals from conduct aimed at interfering with rights that are secured by federal or state law, where the interference is carried out 'by threats, intimidation or coercion.'" *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1040 (9th Cir. 2018) (quoting *Venegas v. County of Los Angeles*, 153 Cal. App. 4th 1230 (2007)). "Section 52.1 provides a cause of action for violations of a plaintiff's state or federal civil rights committed by threats, intimidation, or coercion." *Id.* (citation and internal quotations omitted).

Defendants maintain plaintiffs' Bane Act claims fail because plaintiffs cannot demonstrate Wells possessed the specific intent to deprive Friday of his rights. MSJ at 20. Plaintiffs counter that the Fourteenth Amendment's deliberate indifference or purpose to harm standards, if met, are equally sufficient to establish "specific intent" under the Bane Act. L.F. Opp'n at 19; Estate Opp'n at 19–20.

To establish specific intent, "[e]vidence simply showing that an officer's conduct amounts to a constitutional violation under an 'objectively reasonable' standard is insufficient . . . ." *Losee v. City of Chico*, 738 F. App'x 398, 401 (9th Cir. 2018) (citing *Reese*, 888 F.3d at 1045). Instead, plaintiffs "must show that [Wells] 'intended not only the force, but its unreasonableness, its character as more than necessary under the circumstances.'" *Id.* (quoting *Reese*, 888 F.3d at 1045). Here, for the same reasons discussed in the Fourteenth Amendment analysis above, plaintiffs have pointed to evidence sufficient to raise a genuine issue for trial regarding whether Wells's possessed the requisite "specific intent[9] to violate [Friday's] right to freedom from unreasonable seizure." *Reese*, 888 F.3d at 1043.

Defendants' motion is DENIED as to plaintiffs' Bane Act claims.

[9] As noted above, specific intent requires that plaintiff "show that [the officer] intended not only the force, but its unreasonableness, its character as more than necessary under the circumstances." *Smith v. Cty. of Santa Cruz*, No. 17-CV-05095-LHK, 2019 WL 2515841, at *14 (N.D. Cal. June 17, 2019) (alteration in original) (citation omitted).

3. Wrongful Death—Negligence (Cal. Code Civ. Proc. § 377.60)

Minor plaintiffs also bring claims for wrongful death under California Code of Civil Procedure sections 377.60(a) and 377.61. Defendants' only argument in response is that plaintiffs' claims fail for the same reasons as the federal excessive force claim: because Officer Wells's use of lethal force was objectively reasonable. MSJ at 19–20. Plaintiffs dispute summary judgment on these claims because their "federal claims do *not* fail," and because state negligence law affords broader protections than does federal Fourth Amendment law, wrongful death claims can survive even where federal claims fail. L.F. Opp'n at 20 (emphasis in original) (citing *Mulligan v. Nichols*, 835 F.3d 983, 991 (9th Cir. 2016)); Estate Opp'n at 18–19. Defendants do not reply. *See generally* Reply.

To prove negligence, "a plaintiff must show that [the] defendant had a duty to use due care, that he 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) (alteration in original) (citations omitted). "[D]uty is a critical element of negligence liability." *Id.* The California Supreme Court "ha[s] long recognized that peace officers have a duty to act reasonably when using deadly force." *Id.* (citations omitted). To determine reasonableness, state negligence law, like the Fourth Amendment reasonableness test, requires a consideration of the totality of the circumstances surrounding any use of deadly force. *See id.*

Given defendants' scant argument, and construing the evidence in the light most favorable to plaintiffs, a jury could reasonably conclude it was unreasonable for Wells to deploy deadly force against a fleeing, unarmed suspect, despite Wells's subjective belief Friday posed a significant threat.

Accordingly, summary judgment is DENIED on plaintiffs' wrongful death claims.

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V. CONCLUSION

Defendants' summary judgment motion is resolved as follows:

- Estate of Colby Friday's first cause of action for excessive force: DENIED;
- L.F. and K.F.'s first cause of action, and M.C.F. and K.S.F's second cause of action for violation of their Fourteenth Amendment right to familial association: DENIED;
- L.F. and K.F.'s second cause of action for violation of their First Amendment right to familial association: DENIED;
- L.F. and K.F.'s third cause of action for violation of their right to familial association under Article I, Section 7 of the California Constitution: DENIED;
- All plaintiffs' *Monell*, municipal liability claims: DENIED as to plaintiffs' ratification and custom and policy theories, and GRANTED as to the inadequate training theory;
- L.F. and K.F.'s fourth cause of action, and M.C.F. and K.S.F's fifth cause of action for violation of the Bane Act, California Civil Code § 52.1: DENIED;
- L.F. and K.F.'s fifth cause of action, and M.C.F. and K.S.F's fourth cause of action for wrongful death (negligence): DENIED;
- Estate of Colby Friday's sixth cause of action for violation of plaintiff's Fourth Amendment right to medical care: GRANTED.

IT IS SO ORDERED.

DATED: July 17, 2020.

CHIEF UNITED STATES DISTRICT JUDGE