

No. 15-56451

United States Court of Appeals
FOR THE NINTH CIRCUIT

THE ESTATE OF ALEX MARTIN; ET AL.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA; ET AL.,
DEFENDANTS-APPELLEES

*On Appeal From the United States District Court
for the Southern District of California
13CV01386-LAB-BGS*

ANSWERING BRIEF FOR APPELLEES

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JURISDICTION

Plaintiffs' complaint contained claims for relief under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) and the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq. Excerpts of Record (ER) 649-63. The district court had jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights).

The district court entered final judgment on September 22, 2015. ER 1. Appellants timely noticed their appeal that same day. ER 674. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. After driving the wrong way on Interstate 8, Alex Martin failed to yield and led four United States Border Patrol agents on a reckless chase. When the agents finally forced him to the side of the road, Martin stayed in the driver's seat with his doors locked and with the agents standing outside and yelling commands at him to surrender. Martin ignored them and began reaching for something in or near the center console. Seeing this, one of the agents broke a window and fired a Taser at Martin. Did the district court err by ruling that the agents were entitled to qualified immunity from Plaintiffs' excessive force and related *Bivens* claims because using a Taser under these circumstances did not violate any clearly established Fourth Amendment right?

2. The encounter between Martin and the agents was captured on videotape. The video footage shows that three unmarked Border Patrol vehicles pursued Martin with their police lights flashing, that Martin drove within a few feet of a marked Border Patrol vehicle that approached him with its police lights flashing, and that Martin blew through a Border Patrol checkpoint where a uniformed agent placed spike strips in his path. Did the district court err in relying on this undisputed video footage and granting the United States summary judgment on

Plaintiffs' Federal Tort Claims Act claims, including the claim that the agents' use of unmarked vehicles and one agent's failure to display his badge caused Martin to mistake them for a robber or thug using commercially available police equipment?

STATEMENT

A. *Facts*

1. On June 4, 2011, Martin Fled Police in Texas and a Gun Was Found in His Truck

On June 4, 2011, Denton County, Texas, Police Officer Robert Mastropiero heard an automobile crash. ER 639. Officer Mastropiero turned and saw a pick-up truck leaking fluid and the driver, Alex Martin, "accelerating out of control; the vehicle's left tires went over the center median curb, onto the raised median grass where the vehicle struck several large bushes." *Id.*

Officer Mastropiero drove behind Martin and activated his lights and siren. Martin fled. *Id.* Martin's female passenger screamed at him to stop, but Martin refused, even after the air bags exploded when he hit a tree. ER 644. Martin kept driving and crashed again, this time into a light pole. ER 639. The female passenger ran from the truck and yelled for the officer's help to get away from Martin. *Id.*

Martin staggered out of the truck reeking of alcohol and bleeding from cuts to his arms and face. *Id.* Officers found a .38

special pistol, two speed loaders fully charged with .38 special ammunition, several rounds of loose ammunition, and marijuana shake and drug paraphernalia inside Martin's truck. ER 640, 645.

Still desperate to avoid arrest, Martin offered the officer \$350 to take him home and not to jail, which Martin raised to \$500 after the officer declined the initial offer. ER 640.

On January 9, 2012, Martin pled nolo contendere to driving while intoxicated and having an open alcohol container in his vehicle. ER 619. The Texas court sentenced him to 24 months of community supervision with a condition that Martin not operate a motor vehicle unless it was equipped with an alcohol detecting breathalyzer ignition interlock. ER 620.

2. On March 14, 2012, at 1:02 a.m., Martin Rented a Car at the Dallas/Ft. Worth Airport and Immediately Departed on an Unannounced and Unexplained Trip to Southern California

Nine months after that arrest, on March 14, 2012 at 1:02 a.m., Martin rented a Ford Focus at the Dallas/Ft. Worth Airport. ER 546, 618. There is no indication on the rental contract that the Ford was equipped with an alcohol breathalyzer ignition interlock, as the terms of Martin's supervision required. *Id.*

Although he rented the car for only two days, *id.*, Martin immediately departed for Southern California. He told no one

about the trip; not even his mother, ER 627, or his father, with whom Martin had dinner that same night. ER 623. Martin's father spoke to Martin while Martin was in route, but Martin did not disclose that he had left the state. *Id.*

Martin brought several unusual items and writings with him on his trip, including brass knuckles and notebooks with bizarre handwritten notations. ER 71, 630-34. Among the handwritten notes were, "The Mystical Destiny of the Aryan Man," ER 631, "Hitler/Nazi = (Homosexuality)," ER 632, "Satan loves blasphemy of Christ," ER 633, and "Am I the psycho." ER 634. The notebooks also contained anti-police rants accusing the police of, among other things, corruption, lying about cases to line their pockets, and cheating ordinary people. ER 630. The anti-police rants further claim that "each precinct is a [drug] dealer for its local area," and expresses "fucking hope they all have K nine bite them in the hole." *Id.*

Martin apparently had no luggage with him. ER 467.

3. Twenty-Two Hours After Renting a Car in Dallas, Martin Appeared at the I-8 Border Patrol Checkpoint in the Eastern Part of San Diego County

Martin drove for nearly 21 consecutive hours from the Dallas/Ft. Worth area to Southern California. Accord Appellant's Opening Brief (AOB) 3. Then, on March 14, 2012 at 10:49 p.m.,

Martin arrived at the Interstate 8 Border Patrol checkpoint near Campo, California. *Id.*; see also ER 78 and 87 (checkpoint video).

When he arrived at the checkpoint, Martin requested to pull over because he had a cone stuck under his car. ER 78. The surveillance video shows that Martin stopped near the entrance of the secondary inspection area, got out, and walked to the back of his car. ER 87 at 00:16 – 00:25. He glanced quickly under the rear bumper. *Id.* at 00:25. When a Border Patrol agent approached him, Martin retreated to the driver's side door and extended his right arm toward the agent, as if he wanted the agent to stay away. *Id.* at 00:31. When another agent approached from the front, Martin quickly retreated into the car and closed the door. *Id.* at 00:37. Martin backed up, pulled forward, briefly stopped while an agent looked under the car, and then sped away with the cone still stuck under his car. *Id.* at 00:40 – 01:10; see also ER 78. The cone came out on the interstate approximately 100-200 yards from the checkpoint. ER 78.

4. After Leaving the Checkpoint, Martin Drove to a Remote Residential Area; a Concerned Resident Called 9-1-1 After Confronting Him

Martin was next encountered between 11:30 p.m. and midnight on Old Ranch Road, a dark, winding, and remote residential street south of the Japatul Valley Road exit from

Interstate 8 in Alpine, California. ER 172, 175. According to Google Maps, Old Ranch Road is approximately 17 miles west of the Interstate 8 checkpoint.

Stephanie Maximo confronted Martin outside her home. Martin said, “Hey, neighbor ... You’re the first one to come out.” ER 178. When Ms. Maximo challenged Martin, he claimed that a friend was playing a prank on him, and that he was trapped and lost. ER 178-79. Ms. Maximo gave Martin directions out of the area and called 9-1-1. ER 170, 179-80.

5. Martin Is Next Spotted Driving the Wrong Way on Interstate 8

After leaving the Old Grove Road neighborhood, Martin backtracked on eastbound Interstate 8. At some point, Martin made a U-Turn and started driving westbound in the eastbound lanes. We know this because shortly after midnight United States Border Patrol Agent Alex Fishman observed Martin driving the wrong way (westbound) on the eastbound lanes of Interstate 8 approximately 1 to 1.5 miles west of the Pine Valley bridge. ER 198. According to Google Maps, the Pine Valley Road exit from Interstate 8 is approximately 7.5 miles east of the Old Grove Road neighborhood where Ms. Maximo called 9-1-1 after confronting Martin outside her home.

Agent Fishman was a member of the United States Border Patrol's Special Interdiction Group (SIG), whose mission is to disrupt drug and alien smuggling. ER 579-80. To avoid detection by smugglers, SIG agents typically patrol in plain clothes and drive unmarked vehicles equipped with police lights and sirens. ER 338, 580. It is common knowledge among SIG agents that smugglers drive the wrong way on that part of Interstate 8 to circumvent the Border Patrol checkpoints in the area. ER 374, 454, 587.

When Agent Fishman observed Martin driving the wrong way on Interstate 8, he notified his SIG colleagues, Agents Roy Salcedo and Matthew Smith. ER 580-81. (Although not part of the SIG, Agent Anthony Galioto was riding with Agent Salcedo that night. ER 580.)

Agent Fishman pulled to the shoulder of the interstate and continued to observe Martin. ER 580, 581. Agent Fishman saw Martin make a U-Turn and proceed east in the eastbound lanes. ER 581. Agent Fishman crossed over the freeway median to observe Martin and saw him stop near the Pine Valley Road exit sign. *Id.* This further raised Agent Fishman's suspicion because he thought Martin might be stopping to pick up aliens or drugs. *Id.*

Agent Fishman stopped behind Martin and turned off his headlights to conduct further surveillance. *Id.* Martin then drove to the Pine Valley exit ramp and ran through a stop sign. *Id.*

6. Martin Fled the Scene of the First Stop and Led Agents on a Reckless Chase

Agent Fishman activated his lights and siren to stop Martin. *Id.* But Martin kept driving to the Interstate 8 on-ramp. *Id.* Before reaching the end of the on-ramp, Martin pulled over to the shoulder. ER 581-82. Agent Fishman approached Martin's car and began yelling commands approximately 5 yards from Martin's window. ER 582.

From this point forward, the SIG agents' encounter with Martin was recorded on a video camera mounted on Agent Salcedo's windshield. ER 298. Agent Salcedo (who, along with his SIG colleagues, is being sued in his individual capacity) purchased the video camera with his own money so he could show exactly what happened while on patrol. ER 298-99.

The video shows Agent Salcedo arriving at the scene where Agent Fishman had stopped Martin on the Pine Valley on-ramp. ER 89 at 00:26:58 – 00:27:10. Agent Salcedo's red and blue police lights are visibly flashing as he approached and then stopped behind Martin's car. *Id.* Agent Fishman's car, with its police

lights also flashing, is visible behind Martin's car and to the left of Agent Salcedo. *Id.* at 00:27:06. Immediately after Agent Salcedo stopped behind Martin's car, Agent Aron Marcellus approached Martin from the front in a marked Border Patrol vehicle. *Id.* at 00:27:12 – 00:27:13; ER 604-05. Martin immediately fled the scene in his car and passed within a few yards of Agent Marcellus, who had activated his police lights while approaching Martin. *Id.* at 00:27:08 – 00:27:12. Martin also failed to yield to Agent Marcellus. *Id.*

7. The Ensuing Pursuit Led to the Highway 80 Border Patrol Checkpoint, Where Martin Swerved off the Road to Evade Spike Strips Placed in His Path by a Uniformed Border Patrol Agent and Sped Away

After fleeing the stop on the Pine Valley Road on-ramp, Martin led the agents on a chase on Interstate 8. Agent Marcellus followed the chase in his marked vehicle. ER 605. At one point, Martin came to a brief stop in the right lane of the Interstate. Agent Fishman pulled alongside Martin with his red and blue police lights flashing and attempted to block Martin from proceeding further. ER 89 at 00:27:58. But Martin countered Fishman's attempt to block him by swerving onto the right shoulder and driving away. *Id.* at 00:28:00. Fifteen seconds later, Martin ditched Agent Fishman by suddenly veering across two

solid white lines and taking the Sunrise Highway off-ramp. *Id.* at 00:28:15. Agent Salcedo followed Martin off the Sunrise Highway exit and became the primary pursuit vehicle. *Id.* at 00:28:21; see also ER 583.

At the bottom of the off-ramp, Martin ran through a stop sign and turned right onto Highway 80, a narrow and winding two-lane road. *Id.* at 00:28:38. Martin immediately swerved across the double yellow line and drove on the wrong side of the road. *Id.* at 00:28:41. Martin then accelerated away from Agent Salcedo (whose red and blue police lights are seen flashing in his windshield) at speeds that reached 70 miles per hour. At one point, Martin drove on the wrong side of the road for five seconds, and nearly collided head-on with an oncoming motorist. *Id.* at 00:29:02-07. Martin continued fleeing from Agent Salcedo at speeds in excess of 70 miles per hour and again crossed the double yellow line into the oncoming lane of traffic. *Id.* at 00:29:16 – 00:29:25.

Meanwhile, the SIG agents had notified agents at the Highway 80 checkpoint that a vehicle pursuit was headed their way. ER 358-59; 601. The SIG agents requested spike strips. *Id.*

Martin drove to the checkpoint, which was lighted, marked by orange and white reflective traffic cones, and had four marked

United States Border Patrol vehicles parked under the lights. ER 89 at 00:29:37 – 00:29:44. Two uniformed Border Patrol agents were standing in the westbound lane of traffic when Martin approached at speeds exceeding 70 miles per hour. *Id.* at 00:29:42 – 00:29:47; ER 601. One of the agents threw a spike strip in front of Martin’s car. *Id.* at 00:29:41. Martin immediately swerved off the road to avoid the spike strip and sped away. *Id.* at 00:29:41 – 00:29:46. Agent Salcedo briefly stopped his car while one of the uniformed agents kicked the spike strip out of his way. *Id.* at 00:29:44 – 00:29:47.

8. After Martin Fled the Checkpoint, Agents Forced Him off the Road and Approached His Car

Martin fled the checkpoint at such a high rate of speed that he had virtually disappeared over the horizon in the few seconds that Agent Salcedo paused while an agent kicked the spike strip out of the road. *Id.* at 00:29:47. United States Border Patrol Agent Matthew McCraven then joined the pursuit in a marked Border Patrol Vehicle with its police lights flashing. ER 590, 601-02.

His tires apparently deflated by the spike strips, Martin’s speed dropped significantly approximately a quarter mile from the checkpoint. ER 88 at 00:00:09. Agent Fishman approached

Martin's car from the left and, with his police lights flashing, guided Martin to the side of the road. *Id.* at 00:00:15 – 00:00:21; ER 214, 584. Agent Smith drove past Martin and, with his police lights flashing, stopped in front of Martin's car. ER 88 at 00:00:24; ER 214, 602, 608. Agent Salcedo parked behind and to the right of Martin's car with his police lights also flashing. ER 88 at 00:00:25. Agent McCraven parked his marked Border Patrol vehicle behind Agent Fishman and Agent Salcedo. ER 602.

The SIG agents immediately approached Martin's car. ER 88 at 00:00:36. This is a standard Border Patrol technique designed to immediately take control of a vehicle and prevent mass bailouts of undocumented immigrants from smuggling vehicles, which endanger the safety of both the immigrants and the public. ER 584, 595-96. It also allows Border Patrol agents to identify the driver/smuggler(s) before they have time to hide their role by blending in with the rest of the immigrants. *Id.*

9. Martin Ignored the Agents' Commands and Reached for the Center Console; Agent Salcedo Responded by Breaking a Window and Firing a Taser at Martin; Martin's Car Immediately Exploded

Agent Fishman was the first officer to reach Martin's car, and made several unsuccessful attempts to open the front passenger door. ER 88 at 00:00:32-42; ER 216, 262, 584-85. After

Agent Fishman's initial unsuccessful attempts to open Martin's passenger side door, he struck the passenger's side window with the butt of his gun. ER 585; ER 88 at 00:00:33-35. But the window did not break. *Id.* Agent Fishman then made several more attempts to open Martin's passenger side front door, but Martin still did not unlock the doors. *Id.* at 00:00:35-43. Agent Salcedo attempted to open Martin's back door, but Martin still did not unlock his car doors. ER 88 at 00:00:38. Agent Smith approached Martin's car from the front (ER 608) and is seen shining his flashlight at Martin. ER 88 at 00:00:40.

All the while, the SIG agents yelled at Martin to "Show me your hands," "Roll down the windows," and "Get out of the car." ER 216-19, 346, 364. But Martin ignored them. ER 223, 346, 364, 585. Instead, after he briefly raised his hands while looking around the interior of the car, Martin angrily flailed his arms. ER 608. He then began reaching for something near the center console or behind the front seat of the car. All of the agents saw this, and Plaintiffs do not dispute it. ER 252 (Fishman: "So he is hunched over like this, digging in the center console..."); ER 585 (Fishman: "I also could see him sitting in the driver's seat while hunched over looking for something in the center console area. I became concerned that he might be looking for a gun..."); ER 591

(Galioto: “I could see Martin’s head, right shoulder and his arms reaching around the center console area.”), ER 602 (Salcedo: “I noticed that Martin ... was moving his hands around the center console area ignoring my commands to put his hands up...”), ER 451 (Smith: “He’s putting his hands down. And he’s messing with something either in the center or right behind the center, I’m not sure which.”); ER 608 (Smith: “He then focused his visual attention on the center console area, turned away from me and reached for something in that location.”); ER 106 (Appellants’ District Court Opposition Brief: “Alex put his hands down and began moving his hands near the center of the car.”); AOB 13 (same). See also ER 17 (district court’s order: “There is no dispute that Martin reached for the car’s center console.”).

The agents were also concerned that, although Martin’s vehicle was mostly blocked in, he was a wrong-way driver who had already led the agents in a reckless chase (during which he stopped, fled, stopped, and fled again) and was still in control of an operational vehicle. ER 365-66, 373, 584, 602. The possibility that he could slam on the accelerator and again attempt to flee presented a continuing danger to the agents, the public, and any aliens hidden inside his car. *Id.* The agents therefore thought it necessary to remove Martin from the car as quickly as possible.

See, e.g., ER 365 (Salcedo: “I was thinking that the safest thing for everyone involved would be to take the guy out of the car.”).

Still unable to open Martin’s locked door, and with Martin reaching for the center console, Agent Salcedo stepped forward. ER 88 at 00:00:42-46. Agent Salcedo obtained a flashlight from Agent Galioto and broke the front passenger side window. *Id.* at 00:00:44-48. He then fired his Taser at Martin through the broken window. *Id.* at 49. He did so because “[he] was concerned that Martin might have a weapon, and [he] wanted to control the situation before it escalated further.” ER 602.

Martin’s car exploded immediately after Agent Salcedo fired his Taser. ER 88 at 00:00:49-50. The force of the explosion blew out the windows and blew the car doors off their hinges. *Id.* Agent Salcedo was blown into the hillside several feet from the car. *Id.*

Martin’s car was immediately and completely engulfed in flames. *Id.* The heat from the fire was so intense that the agents could not even attempt to rescue Martin. ER 263-64, 452, 462, 585, 591, and 608-09. The agents were afraid that Martin’s car might explode again so they moved their cars so they too would not become engulfed in the flames. ER 265, 452, 585, and 608-09.

Agent Fishman called Cal Fire and California Highway Patrol for assistance. ER 585.

Martin's car exploded a second time less than six minutes after the initial blast. ER 88 at 00:01:08-10; see also ER 264, 346, 463, 585, and 609 (numerous additional explosions came from Martin's car while it burned).

Martin died inside the car. ER 161. Agent Salcedo suffered burns to his hands, face, neck, and hair and was flown by Life Flight to the University of California, San Diego Medical Center. ER 369, 603.

10. Plaintiffs' Own Retained Expert Opined that the Explosion Was Caused by a Container of Gasoline That Spilled and Vaporized Inside Martin's Car

Plaintiffs' original Complaint alleged that the explosion was caused by "flammable liquids or fumes" inside Martin's car, "probably as a result of the spike strip's effect on the car, including the sudden stopping after the tires blew out." Clerk's Record (CR) 11, ¶ 33. Plaintiffs' own retained expert, however, concluded that this is not what happened. ER 490 ("The gasoline inside the Ford Focus did not come directly from the vehicle.").

Instead, Plaintiffs' expert concluded that Martin had a container of explosive gas in his car (likely in a sports bottle or other plastic container) that spilled and vaporized inside the

cabin. *Id.* (Forensic testing also found gasoline on Martin’s shirt. ER 489.) Lending support to this theory, at approximately 10:50 p.m. on March 14, 2012 (the exact time that Martin appeared at the Interstate 8 checkpoint with a cone stuck under his car), another United States Border Patrol agent discovered a construction sign and surrounding brush on fire in an area just east of the Interstate 8 and Highway 80 checkpoints. ER 80, 159. The agent put out the fire, smelled gasoline, and noticed a fresh footprint and a gasoline-soaked rag near the sign. *Id.*

B. *Procedural History*

1. Plaintiffs’ Complaints

Plaintiffs filed their original complaint on June 13, 2013. CR 1. The complaint alleged that “[u]pon information and belief, Doe Defendants were not equipped with the standard lights and siren in their unmarked cars.” *Id.*, ¶ 16. The complaint further alleged that “defendants acted jointly, in a common enterprise to inflict excessive and deadly force upon the decedent Alex Martin.” The complaint contained nine claims for relief, including (1) an excessive force *Bivens* claim against the individual SIG agents (sued as Doe defendants), alleging that the spike strips used to deflate Martin’s tires “probably” led to the presence of flammable

liquids or fumes in Martin's car; (2) a wrongful death *Bivens* claim against the SIG agents in their personal capacities; (3) a right of association *Bivens* action against the individual SIG agents; (4) a failure to properly train, supervise, and discipline *Bivens* action against unidentified "Officials of the Department of Homeland Security;" (5) a Federal Tort Claims Act (FTCA) wrongful death claim against 40 unidentified Doe defendants; (6) an FTCA assault and battery claim against "Doe 1"; (7) an FTCA intentional infliction of emotional distress claim against 40 unidentified Doe defendants; (8) an FTCA negligence claim against "All Defendants and Does 1-50;" and (9) an FTCA excessive force claim based on Cal. Civ. Code § 52.1. *Id.*, ¶¶ 28-99.

On October 8, 2013, Plaintiffs filed an Amended Complaint that added Agent Salcedo as an individually sued defendant in the *Bivens* and FTCA claims for relief, added another failure to properly train claim for relief against unnamed individuals (fifth claim for relief), added the United States as a defendant to the FTCA claims, and dropped the FTCA intentional infliction of emotional distress claim. CR 11.

On December 20, 2013, Plaintiffs filed a Second Amended Complaint (SAC). CR 21. The SAC is substantially similar to the

Amended Complaint, except that it adds an introduction and changed to the damages sought on certain claims for relief.

On July 10, 2014, Plaintiffs filed a Third Amended Complaint. CR 40. That complaint added Agent Fishman as a defendant to the “Failure to Properly Supervise and Discipline” claim for relief, alleging that he was the “deputized supervisor in charge of Defendant-officers Salcedo, Smith, and Galioto,” and that, among other things, he “knew and/or should have known that agents were violating constitutional rights by using excessive force.” *Id.*, ¶ 76. The Third Amended Complaint also added Agents Fishman, Smith, and Galioto as individual capacity defendants in a new “Failure to Intercede” *Bivens* claim for relief that alleged that they failed in their “duty to intercede to prevent the use of unreasonable force on Alex Martin.” CR ¶¶ 79-84.

On December 14, 2014, Plaintiffs filed a Fourth Amended Complaint, which added Agents Smith, Fishman, and Galioto as individually sued defendants to the *Bivens* excessive force, wrongful death, and right of association claims, and dropped Agent Salcedo as a defendant in the FTCA claims. CR ¶¶ 77-100.

2. Defendants’ Motion for Summary Judgment

On January 30, 2015, Defendants filed a motion for summary judgment. ER 549-648. Defendants’ motion cited

undisputed facts showing that on March 14, 2012 at 1:02 a.m., in violation of his conditions of supervision, Martin rented a car in Dallas, Texas, and immediately departed on an unannounced and unexplained trip to Southern California. ER 559. Defendants' motion further presented undisputed facts establishing that Martin arrived in the eastern part of San Diego less than 24 hours later, was spotted driving the wrong way on Interstate 8, and then led agents on a reckless chase that required spike strips and the agents' cars cutting him off to finally force him to the side of the road. Martin then ignored the agents' commands and then reached toward the center console, which led to the use of a Taser that triggered an unexpected explosion. ER 560-67.

Defendants' motion cited authority holding that, based on these undisputed facts, the individual Defendants were entitled to qualified immunity from the *Bivens* claims because their conduct did not violate any clearly established constitutional right. ER 568-74. Defendants' motion further demonstrated that Plaintiffs could not prevail on their failure to properly train and supervise claim against Agent Fishman (because the undisputed facts established that he was not a supervisor), and that Plaintiffs could not prevail on their FTCA claims against the United States

(because the undisputed facts established that the agents did not act wrongfully or negligently). ER 574-77.

Plaintiffs' opposition argued that the events that led to the deployment of the Taser were not caused by Martin's reckless flight from the agents, but instead were caused by the agents' own failures (i.e., to identify themselves as law enforcement officers, to give consistent commands, and to realize that the interior of Martin's car was "suffused with gasoline vapors"). See generally ER 95-97. Plaintiffs' opposition also argued that whether Martin was the wrong way driver is disputed, and, because Martin had flammable gases and liquids inside his car, Agent Salcedo should be deemed to have used deadly force. ER 114-15, 128-31.

3. The District Court's Order Granting Defendants' Motion for Summary Judgment

This district court granted Defendants' motion for summary judgment in a 22-page written order. ER 2. The district court first set out the undisputed facts (including the evidence from the videos) and then addressed the factual disputes raised in Plaintiffs' opposition. The district court found that Plaintiffs' contention that Martin was not the wrong-way driver was not supported by the cited evidence and missed the true issue: "whether the Agents reasonably thought he was." ER 11-12. For

this same reason, the district court also found that any disputes over “why Martin was there, how he came to be driving the wrong way on the interstate, or what his frame of mind was” were irrelevant. ER 13 (“what matters for purpose of this case is what the Agents knew or had reason to believe....”).

The district court next addressed Plaintiffs’ claim of inconsistencies “in the Agents’ accounts about whether the Agents displayed badges and whether they pointed guns when they stopped [Martin] at first” and found them irrelevant too because “there is no dispute that, from the Agents’ point of view, Martin appeared to be fleeing to avoid lawful capture.” ER 12-13. The district court found that the undisputed evidence contained in the video footage left no doubt that Martin knew that law enforcement was pursuing him, and further established that “in light of Martin’s extremely reckless driving as seen in the video, a reasonable person could have determined that Martin could not be allowed to drive on, but had to be removed from behind the wheel before he injured or killed someone.” ER 13-14.

The district court then turned to its legal analysis, analyzing first whether the individually sued agents were entitled to qualified immunity from the individual-capacity *Bivens* claims. The district court applied the three non-exclusive *Graham* factors

(*Graham v. Connor*, 490 U.S. 386 (1989)) to evaluate the government's interest in using force to stop Martin. ER 15-18. The district court found that all three factors weighed in favor of using force to stop Martin: (1) the suspected crimes (alien and/or drug smuggling, aggravated by "driving with extreme recklessness") are serious felonies; (2) "Martin's driving posed a clear and immediate danger"; and (3) Martin's active resistance "presented an objective threat, which Agents reasonably believed had to be neutralized." ER 14-18. The district court also considered the additional factors raised by Plaintiffs, and concluded that the agents' "use of some unmarked vehicles, and failure to display badges or identify themselves as clearly as they might does play a part in this analysis, but it pales in comparison to Martin's culpability" in initiating "a reckless car chase that Agents could hardly ignore." ER 18-19.

The district court next analyzed the "Nature and Quality of [the] Intrusion," starting with this Court's guidance that "firing a non-lethal taser in dart mode" is "an 'intermediate, significant level of force.'" ER 19 (*citing Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)). The district court rejected Plaintiffs' attempt to elevate the use of a Taser to deadly force (on the ground that Agent Salcedo must have smelled the fumes from the gasoline

vaporized inside Martin's car), finding that Plaintiffs' had presented no facts to put that issue in dispute, and further finding that the video shows that Agent Salcedo was not standing close enough to have smelled any gas fumes leaving the cabin of Martin's car. ER 19-20.

The district court then balanced the *Graham* factors against the intermediate level of force used against Martin, and concluded that "no rational juror could find that the use of a taser in dart mode was unreasonable, or that the resulting explosion and fire that killed Martin were intentional or even negligent." ER 20.

After concluding that Agent Salcedo's use of the Taser against Martin did not violate the Fourth Amendment, the district court turned to the second prong of the qualified immunity test and found that "[e]ven if Plaintiffs had shown a violation of Martin's Fourth Amendment rights, reasonable agents in Defendants' position would not have clearly known that they violated his rights." ER 21. The district court further found that the undisputed evidence established that "this was a classic example of a 'tense, uncertain, and rapidly evolving' situation, and officers had only a few seconds to decide how to respond." *Id.* (citing *Graham*).

For the same reasons that it granted summary judgment on the *Bivens* claims, the district court also granted summary judgment on Plaintiffs' FTCA assault, battery, and excessive force claims. *Id.*

Lastly, the district court granted summary judgment on Plaintiffs' FTCA negligence and wrongful death claims. Regarding Plaintiffs' claim that the agents negligently failed to identify themselves as law enforcement agents, the district court ruled that "no reasonable person in Martin's position would have doubted they were law enforcement agents." ER 22. The district court also found that Agent Salcedo's use of the Taser was reasonable under the circumstances, and that he had no reason to believe that a fire or explosion would result. *Id.*

Regarding Plaintiffs' claim that the agents breached their duty to render life-saving aid (by not attempting to rescue Martin from the burning car), the district court found that no competent evidence suggested that Martin could have survived, and that the agents would have risked their own lives by attempting to pull Martin from the inferno, which took professional firefighters six minutes to extinguish. ER 22-23.

Because Plaintiffs' wrongful death claim was predicated on the existence of a tort (*i.e.*, negligence or other wrongful act), the district court found that it also failed. ER 23.

SUMMARY OF ARGUMENT

The district court properly granted summary judgment on Plaintiffs' *Bivens* claims. The individually sued agents were entitled to qualified immunity because the undisputed facts demonstrated that they did not violate any clearly established constitutional right. All of the *Graham* factors weighed in favor of using force to stop Martin and the intermediate level of force used was reasonable under the circumstances. At a minimum, no case law clearly established that the use of a Taser under the tense, uncertain, and rapidly evolving situation that the agents faced violated the Fourth Amendment.

The district court also properly granted summary judgment on Appellant's FTCA claims. The events in question were captured on a video, the authenticity of which was not in dispute. Those undisputed facts establish that no reasonable juror could conclude that Martin mistook the agents attempting to pull him over for "a robber or thug using commercially available equipment to prey on the public." AOB 36. Thus, any negligence on the part

of the agents by using unmarked cars or not displaying their badges did not proximately cause the subsequent use of force against Martin.

The same is true of Plaintiffs' negligence claim predicated on the agents' alleged inconsistent commands (i.e., "Show me your hands; "Get out of the car."). There is no evidence (and no allegation) that any agent commanded Martin to reach for the center console, but it is undisputed that he was doing exactly that when Agent Salcedo fired his Taser.

In sum, the undisputed evidence, including that contained in the video footage, established that the individually sued agents cannot be found liable under *Bivens* and that the United States cannot be liable under the FTCA. The district court therefore properly granted summary judgment for Defendants.

ARGUMENT

A. Standard of Review

A district court's ruling on a motion for summary judgment is reviewed de novo. *Botosan v. Paul McNally Realty*, 216 F.3d 829, 830 (9th Cir. 2000). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material

facts. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1048 (9th Cir. 1995) (internal quotations and citations omitted).

B. The District Court Correctly Ruled That Qualified Immunity Bars Suit Against the Individual Agents Because the Undisputed Facts Established That They Did Not Violate Any Clearly Established Constitutional Right

The district court ruled that qualified immunity protected the agents’ conduct in this case. That ruling, which follows from the undisputed video footage, was correct.

1. The Law on Qualified Immunity

Federal law enforcement agents are immune from suit unless their conduct violates a clearly established statutory or constitutional right about which a reasonable person would have known. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982). Qualified immunity may protect a federal agent’s conduct even if a plaintiff’s rights were actually violated. See, e.g., *Mattos v. Agarano*, 661 F.3d 433, 443-48 (9th Cir. 2011) (en banc) (holding that using a Taser on a seven-month pregnant woman who refused to sign a traffic ticket violated the Fourth Amendment, but that the officers were entitled to qualified immunity because they did not violate any clearly established rights). Further,

qualified immunity provides “ample room for mistaken judgments” and protects all government officials except “the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Unlike the defenses available to non-governmental actors, qualified immunity protects not only against liability, but also against litigation itself, including discovery and trial. See *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (qualified immunity protects officials from “expensive and time consuming preparation to defend the suit on its merits” and from “not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.”). This is necessary because litigation against public officials imposes substantial societal costs, including “the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.” *Harlow*, 457 U.S. at 814. See also *Filarsky v. Delia*, 132 S. Ct. 1657, 1665-66 (2012) (qualified immunity helps “to avoid ‘unwarranted timidity’ in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can

often accompany damages suits”) (quoting *Richardson v. McNight*, 521 U.S. 399, 409-11 (1997)).

Because litigation against public officials exacts these societal costs whether or not liability is ultimately found, the Supreme Court “repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); see also *Scott v. Harris*, 550 U.S. 372, 376 n. 2 (2007) (because “[q]ualified immunity is an *immunity from suit* rather than a mere defense to liability, and ... is effectively lost if a case is erroneously permitted to go to trial....”) (emphasis in original) (internal quotations omitted).

Plaintiffs’ citation to *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) for the proposition that “the reasonableness of force used is ordinarily a question of fact for the jury” is inapposite here. *Smith* is not a qualified immunity case. *Id.* at 704, n.7 (“We choose, however, not to resolve the issue of qualified immunity on this appeal, preferring to allow the district court to consider the question initially.”). And applying the *Smith* language that Plaintiffs’ quote to a qualified immunity motion would conflict with the Supreme Court’s instruction that “[q]ualified immunity is an *immunity from suit* rather than a mere defense to liability, and

... is effectively lost if a case is erroneously permitted to go to trial.” *Scott*, 550 U.S. at 376 n. 2 (emphasis in original). Moreover, the reason behind *Smith’s* statement that the reasonableness of force is usually a jury question is that the excessive force inquiry “nearly always requires a jury to sift through disputed factual contentions.” But the events at issue here were captured on a video recording, the contents of which are undisputed. The video recording controls. See *Scott*, 550 U.S. at 380-81 (reversing denial of an officer’s summary judgment motion when the events were captured on video; “The Court of Appeals ... should have viewed the facts in the light depicted by the videotape.”).

The Supreme Court has set out a two-part test to evaluate whether public officials are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, courts must determine whether the officer’s conduct violated a constitutional right. *Id.* If no right was violated, then “there is no necessity for further inquiries concerning qualified immunity.” *Id.* But “if a violation could be made out on a favorable view of the parties’ submissions,” then “the next, sequential step is to ask whether the

right was clearly established.” *Id.*¹ “The plaintiff bears the burden of showing that the right was clearly established.” *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002).

Viewing the facts “in the light depicted by the videotape,” *Scott*, 550 U.S. at 381, the district court correctly found that qualified immunity protects the individually sued agents here.

2. Agent Salcedo’s Use of a Taser to Control Martin Did Not Violate the Fourth Amendment

Allegations of excessive force during an arrest or investigatory stop are evaluated under the Fourth Amendment’s objective reasonableness standard. *Graham v. Conner*, 490 U.S. 386, 394-96 (1989). In evaluating reasonableness, courts must “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Id.* at 396. In conducting this analysis, courts must evaluate the “reasonableness of a particular use of force ... from the perspective of a reasonable officer on the scene, rather than with the 20/20

¹ More recently, the Supreme Court has given courts permission “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.” *Pearson v. Callahan*, 555 U.S. 223, 227 (2009).

vision of hindsight. *Id.* Further, “[t]he 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.

A proper balancing of these factors overwhelmingly supports the district court’s conclusion that Agent Salcedo’s use of a Taser under the circumstances he faced did not violate the Fourth Amendment.

a. The Governmental Interests at Stake

In *Graham*, the Supreme Court set forth a three-part test to evaluate the government’s interests at stake: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of officers or others, and (3) whether the suspect was actively resisting or attempting to evade arrest by flight. 490 U.S. at 396. In addition, courts should “examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.” *Mattos*, 661 F.3d at 441 (internal quotation omitted). These other factors may include “relative culpability.” *Id.*

The district court properly applied the *Graham* factors and correctly ruled that each of them weighed in favor of the need to use force to apprehend Martin.

i. The Severity of the Crime

The SIG agents initially encountered Martin in the middle of the night driving the wrong way on Interstate 8 near United States Border Patrol checkpoints. They knew that driving the wrong way on that part of Interstate 8 is a tactic that drug and alien smugglers use to avoid inspection at the checkpoints. ER 374, 454, 587. Martin raised further suspicion that he might be picking up aliens or drugs when he stopped on the side of Interstate 8 near the Pine Valley exit. ER 581. Based on these facts, the agents reasonably suspected that Martin might be involved in drug or alien smuggling. ER 374, 454, 581, 588. Both are serious felonies. See 21 U.S.C. §§ 841, 952, 960 (drug smuggling); 8 U.S.C. § 1324 (alien smuggling).

Moreover, as the video reveals, Martin was driving with extreme recklessness in fleeing from the agents, again putting both the lives of other motorists and any aliens that Martin might have been transporting at risk. This is both an independently serious offense, see, e.g., *Scott*, 550 U.S. at 384-86, and an aggravating factor in alien smuggling cases. See 8 U.S.C.

§ 1324(a)(1)(B)(iii) and (iv); USSG § 2L1.1(6) and (7). It also further increased the agents' objectively reasonable suspicion that Martin was involved in serious criminal activity. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (defendant's unprovoked flight from officers in an area known for narcotics trafficking supported reasonable suspicion).

The district court therefore correctly concluded that the suspected crimes were serious and weighed in favor of the agents' use of force to apprehend Martin. ER 16.

ii. Martin's Threat to the Safety of the Agents and Others

The undisputed facts revealed that Martin presented a threat to both the officers and the public. Martin was a wrong-way driver on a major interstate highway and led the SIG agents on a reckless chase when they tried to stop him. Martin yielded once, but fled the scene of that stop despite multiple Border Patrol vehicles around him with their police lights flashing. Martin then stopped again in the right lane of Interstate 8, but fled again when Agent Fishman tried to pull in front of him to block his further progress. During the pursuit that followed, Martin crossed the double yellow line three times on a narrow, winding, two-lane road. He almost hit an oncoming motorist head on. And, with

uniformed agents standing nearby, Martin suddenly swerved off the road when he saw the spike strips placed in his path at the Highway 80 Border Patrol checkpoint and then sped away.

The threat that Martin posed did not dissipate when agents finally forced him off the road and boxed him in. See, e.g., *Scott*, 550 U.S. at 375 (“respondent pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with Scott’s police car, exiting the parking lot, and speeding off once again down a two-lane highway.”). Martin was still behind the wheel of an operational vehicle, which he could have used as a deadly weapon. See, e.g., *United States v. Webster*, 625 F.3d 439, 441 (8th Cir. 2010) (“the officers moved in and surrounded Webster with patrol cars. Webster put his truck in reverse and rammed into the police SUV behind him in an unsuccessful bid to escape.”); *United States v. Acevedo-Bruce*, 209 Fed. App’x 197, 199 (3d Cir. 2006) (unpublished) (“in an attempt to evade arrest, Acevedo-Bruce accelerated and drove his van into an unmarked police car that had red and blue lights flashing on its dashboard. He then reversed the van and drove wildly around the parking lot attempting to escape-hitting two more cars in the process.”); *Priah v. United States*, 590 F. Supp. 2d 920, 944 (N.D.

Ohio 2008) (“Special Agent Werth actually saw the Jimmy break containment created by clearly marked law enforcement vehicles by ramming one or more of those occupied vehicles without regard for the safety of their occupants as it, by all accounts, ‘surged’ forward in a sudden — and violent — attempt to resist arrest and flee.”). Indeed, given Martin’s conduct up to that point, the SIG agents had good reason to believe that Martin was desperate to avoid capture and would resort to any means to do so. Accord *Dunn v. Matatall*, 549 F.3d 348, 354 (6th Cir. 2008) (“Dunn’s conduct in fleeing gave the Officers reason to be especially suspicious of Dunn once he finally did pull over.”); *id.* at 355 (“at what point do we trust this resistant person to suddenly say, okay, I give up.”).

The district court considered all of these surrounding circumstances and correctly concluded that the danger that Martin posed to the agents and to the public – the most important *Graham* factor – supported Agent Salcedo’s use of a Taser. ER 17 (“The Agents had good reason to fear Martin would harm them or others if not immediately stopped.”); accord *Miller v. Clark County*, 340 F.3d 959, 964-65 (9th Cir. 2003) (“flee[ing] from police by driving a car with ‘a wanton or willful disregard for the lives ...

of others,’ ... evinces a willingness to threaten others’ safety in an attempt to escape responsibility for past crimes.”).

iii. Martin’s Active Resistance and Attempt to Evade Arrest by Flight

These same facts also establish the third *Graham* factor: Martin actively attempted to evade arrest by flight. As discussed, after endangering the public by driving the wrong way on a major interstate, Martin created even more danger by leading the agents on a reckless chase.

After the agents finally forced him off the road, Martin remained in the car with his doors locked and the agents standing outside, banging on his window, futilely attempting to open the locked car doors, and yelling commands that Martin ignored. The agents then saw him reach for something near the center console, a fact that Plaintiffs did not dispute in the district court and do not dispute here. ER 106 (Plaintiffs’ District Court Opposition Brief: “Alex put his hands down and began moving his hands near the center of the car.”); AOB 13 (same). See also ER 9 (district court’s order: “The evidence both parties cite shows that Martin then moved his hands around the car’s center console, as if looking for something there.”) and 19 (“there is no dispute that Martin made a reaching motion toward the center of the car.”).

Under these facts, the district court correctly found that this final *Graham* factor also weighed in favor of the use of force to apprehend Martin. ER 17; accord *Dunn*, 549 F.3d at 355 (“Overall, given the heightened suspicion and danger brought about by the car chase and the fact that an officer could not know what other dangers may have been in the car, forcibly removing Dunn from the car to contain those potential threats was objectively reasonable.”).²

² Unlike this case, there was no video evidence in *Coles v. Eagle*, 704 F.3d 624 (9th Cir. 2015). And the facts in *Coles* are distinguishable on many grounds from the undisputed facts here. In *Coles*, it was undisputed that an officer used a baton to smash the driver’s side window and then pulled the 5’9”, 200-pound plaintiff who “did not actively resist or evade arrest” through the broken window and kicked him in the upper torso while doing so. The officers then allegedly kicked Coles repeatedly, beat him with a baton while he was on the ground, and then tore off his blood spattered shirt and pants and left him in his underwear. *Id.* at 626-29. The court also found that a jury could find that, prior to pulling Coles through the broken window, Coles did not pose “an immediate threat” to the officers in light of evidence that he had turned the engine off, told the officers that he could not open the door, and had placed both hands on the steering wheel for the officers to see. *Id.* at 626, 629 (“On these facts, a reasonable jury could conclude that the officers did not face such an immediate threat”). Here, by contrast, the undisputed video evidence established that Martin actively and recklessly evaded arrest, was desperate to avoid capture, and posed a continuing threat.

iv. Relative Culpability and Other Factors

The district court also considered the parties' relative culpability, including Plaintiffs' argument that "the Agents' failure to identify themselves adequately makes them relatively more culpable." ER 19. The district court ruled that, although the agents' "use of some unmarked vehicles, and failure to display badges or identify themselves as clearly as they might does play a part in [the] analysis, ... it pales in comparison to Martin's culpability. He initiated a reckless car chase that Agents could hardly ignore, and bears primary responsibility for the escalation of this incident." *Id.*

The district court was correct. It was Martin who initiated a reckless chase after Agent Fishman spotted him driving the wrong way on Interstate 8. And it is not reasonable to believe that the SIG agents' use of unmarked cars or failure to display badges caused Martin to confuse them for "a robber or a thug using commercially available equipment to prey on the public." See AOB 36. There was not one, but three agents chasing Martin with their police lights activated, making it much less likely that Martin mistook them for a lone "robber or thug" posing as a police officer. Moreover, when he fled the first stop, Martin drove right by a marked Border Patrol vehicle approaching him with its police

lights flashing. Finally, any lingering doubt in Martin's mind about whether law enforcement was pursuing him would have been eliminated when he reached the lighted Border Patrol checkpoint with marked Border Patrol vehicles and uniformed agents clearly visible. But instead of seeking the protection of the uniformed officers there from any imagined robber or thug chasing him, Martin swerved off the road to avoid the spike strip placed in his path and then sped away. The district court's conclusion that, from the agents' point of view, "Martin realized they were law enforcement officers, and fled either in spite of or because of that fact," is amply supported by the undisputed video footage. ER 13.

b. Balancing the Governmental Interests at Stake With the Nature and Quality of the Intrusion Establishes That Agent Salcedo's use of a Taser Did Not Violate the Fourth Amendment

This Court has held that a Taser in dart-mode constitutes an intermediate, significant level of force. *Mattos*, 661 F.3d at 443. Balancing the *Graham* factors against this intermediate level of force supports the district court's conclusion that there was no Fourth Amendment violation. The agents were faced with a dangerous and quickly developing situation. When Agent Salcedo fired his Taser, Martin had already led the agents on a reckless chase, was in the driver's seat of a locked and operational vehicle,

and was reaching for something in or near the center console with the agents standing outside. Agent Salcedo had good reason to believe that Martin was desperate to avoid capture; he had already stopped and then sped away on two occasions, led the agents on a reckless chase, swerved off the road to avoid spike strips placed in front of him at the checkpoint, and ultimately had to be forced to the shoulder by an agent's vehicle. Under the circumstances, Agent Salcedo (who is entitled to the benefit of the doubt given the "tense, uncertain, and rapidly evolving circumstances," see *Graham*, 490 U.S. at 396-97), could reasonably believe that force was needed to address the danger posed by Martin.

But the intermediate level of force he used was meant only to stop Martin's resistance and get control of him; a Taser is not a deadly weapon. See *Mattos*, 661 F.3d at 454 (Kozinski, J., concurring in part and dissenting in part) ("99.7 percent of those Tased by police suffer no injuries or, at most, mild ones.... Taser deployment has a margin of safety as great or greater than most alternatives, and carries a significantly lower risk of injury than physical force.") (internal quotations and citations omitted). See also *Hagans v. Franklin County Sherriff's Office*, 695 F.3d 505 (6th Cir. 2012) ("Even as of a year ago...it could be said that tasers

carry a ‘significantly lower risk of injury than physical force’”) (citing *Mattos*). See generally *Miller*, 340 F.3d at 962-63 (“To be characterized as deadly, force must present more than a remote possibility of death in the circumstances under which it was used.... [M]ere possibilities and capabilities [to cause death] do not add up to a reasonable probability.”) (internal quotations omitted).

Plaintiffs’ attempt to alter the obvious outcome of the *Graham* balancing by arguing that this Court should treat Agent Salcedo’s use of a Taser as deadly force because (as Plaintiffs’ expert later concluded) Martin’s car contained volatile fumes. AOB 49-54. To support this argument, Plaintiffs cite the report of their retained expert, Stephen Peranteau, as proof that Agent Salcedo would have smelled gas fumes that “rushed from Martin’s car through the broken window.” AOB 50, 53. But Peranteau’s report says nothing about any “rushing” fumes. Instead, Peranteau (who is a “Certified Vehicle Fire Investigator,” not an atmospheric physicist or an olfactory neurologist, ER 491), opined only that outside air would have “spilled” into Martin’s passenger compartment allowing “warmer air from outside the compartment to exit out the upper part of the opening....” *Id.*

The video demonstrates that Agent Salcedo fired his Taser only two seconds after he broke the window, and that his nose was

several feet away. ER 88 at 00:00:49. Thus, assuming the gas had any odor at all, rather than the “spilling” that Peranteau hypothesized, the fumes would have had to leave the interior of Martin’s car with an explosive force for Agent Salcedo to have smelled them before firing his Taser. And there was no reason otherwise for Agent Salcedo (who was preoccupied with Martin and his actions) to be on alert to the possibility that Martin’s car contained explosive gases. As Peranteau’s report confirms, “[c]ombustible gases and liquids are not normally present inside an automobile passenger compartment in quantities sufficient to be ignited.” ER 490.

This case therefore is unlike *Brown v. Burghart*, Case No. 10-3374 2012 WL 1900603 (E.D. Pa., May 25, 2012), where the plaintiff’s scooter flipped over, the gas cap came off, and gasoline spilled from the gas tank and onto both the plaintiff (with whom the officers were wrestling) and the ground in plain view of the officers on the scene. *Id.* at *1. Under those facts, the district court denied summary judgment because, in light of that strong circumstantial evidence that the officers knew that gasoline had spilled, the jury could reasonably disbelieve their claims to the contrary. *Id.* at *8. Here, by contrast, there was no circumstantial evidence from which a jury could reasonably find

that Agent Salcedo knew that Martin had a container of gasoline that has spilled and vaporized inside his car.

Instead, this case is more similar to *Mohney v. Hageter*, Case No. 11-340, 2013 WL 391155 (W.D. Pa., Jan. 30, 2013). There, a subject who was holding a bottle filled with gasoline caught fire when an officer tased him. *Id.* at 2-3. Plaintiff claimed that “there was enough gasoline on the Decedent’s clothing and in a container he was holding that the Trooper Defendants should have been aware of its presence.” *Id.* at *5. The district court rejected this argument and granted summary judgment to the defendant officers because Plaintiff did not submit any expert opinion on “whether an odor should have been detectable.” *Id.* The district court further found that “the video does not contain any evidence whatsoever regarding the odor of gasoline...., and [t]he jury would be required to engage in pure speculation to fill in the many gaps.” *Id.* Accord *Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (the nonmoving party cannot defeat summary judgment by demonstrating “that there is some metaphysical doubt as to the material facts.”).

In sum, the district court properly regarded Agent Salcedo’s use of a Taser as an intermediate level of force, which was reasonable under the totality of the circumstances. ER 19-20.

c. No Material Factual Disputes Precluded Summary Judgment

Plaintiffs argue that the district court violated *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014) and *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) by “accepting the self-serving accounts of Defendant police officers who are the only surviving witnesses.” AOB 21, 27-30, 44. *Cruz* and *Scott* held that, before accepting “what may be a self-serving account by the police officer,” the district court “must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer’s story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.” *Scott*, 39 F.3d at 915; accord *Cruz*, 765 F.3d at 1080 (“In this case, there’s circumstantial evidence that could give a reasonable jury pause.”). The district court here was cognizant of the *Scott/Cruz* rule (ER 4-5) and did not base its ruling on agent testimony that a jury might reasonably disbelieve. Instead, the district court based its ruling on the undisputed video footage (which did not exist in *Cruz* or *Scott*) and the undisputed fact that Martin was reaching for the center console when Agent Salcedo fired his Taser. ER 5 (“The Court has the benefit of video footage of the events...”); ER 16 (“There is no dispute that Martin reached toward the car’s center console.”). Moreover, the video footage shows the agents

repeatedly attempting to open Martin's locked doors and banging on his window to no avail (ER 88 at 00:33 – 00:42), which circumstantially corroborates the agents' testimony that Martin was ignoring their commands. ER 585, 602. This undisputed evidence amply supports the district court's conclusion that the intermediate level of force used on Martin (as opposed to the deadly force used in *Cruz* and *Scott*) was reasonable under *Graham*.

Plaintiffs also contend that the district court should have denied summary judgment on their *Bivens* claims because of their disputes over policy violations and tactical errors by the agents. See AOB 8-9 (violation of Border Patrol policy by using unmarked cars); AOB 6 n.2, 15 and 23 (Agent Fishman lost sight of Martin); AOB 17 and 42-43 (Agent Salcedo drove recklessly to the scene of the chase); AOB 30 and 36 (the agents failed to display their badges, possibly causing Martin to mistake the agents for a "robber or thug using commercially available equipment to prey on the public"); AOB 31 ("The manner of the initial stop of Alex Martin was unreasonable."); AOB 21, 40 (the agents gave inconsistent commands). This Court has held, however, that policy violations and tactical errors leading up to the use of force are irrelevant to the Fourth Amendment analysis unless they

constitute an independent constitutional violation. See *Billington v. Smith*, 292 F.3d 1177, 1189-1191 (9th Cir. 2002); accord *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1360-64 (9th Cir. 1994) (officers violated Fourth Amendment and acted unreasonably by entering a home without a warrant, creating situation leading to use of deadly force); *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (“Evidence strongly suggests that the initial entry into the apartment by Officer Margado violated Sullivan’s Fourth Amendment rights.”).

The only arguable antecedent constitutional violation that Appellants raise concerns whether Agent Fishman violated Martin’s Fourth Amendment rights by attempting to stop him in the first place. AOB 5-7. But, contrary to Plaintiffs’ argument, any factual disputes over whether Martin was actually the wrong way driver are legally irrelevant. The relevant legal inquiry is whether Agent Fishman had reasonable suspicion to believe that Martin was the wrong way driver. See *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000) (“the Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops”); see also *United States v. Dorias*, 241 F.3d 1124, 1131 (9th Cir. 2001) (a “mistake of fact does not defeat

the officer's reasonable suspicion"). The undisputed facts described in the district court's order amply demonstrate that Agent Fishman had reasonable suspicion to believe that Martin was the wrong way driver and, possibly, an alien or drug smuggler. ER 11-12. Moreover, Martin himself bridged any arguable gap in the initial reasonable suspicion by (1) parking on the shoulder of Interstate 8 near the Pine Valley exit, ER 581, and then (2) refusing to yield and then leading the agents on a reckless chase. See *Illinois v. Wardlow*, 528 U.S. 119, 124 ("Headlong flight ... is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."); *Haynie v. City of Los Angeles*, 339 F.3d 1071, 1076 (9th Cir. 2003) (failure to immediately yield to law enforcement provided additional facts supporting reasonable suspicion for vehicle stop).

Further, even if the Court were to consider the alleged policy violations and tactical errors in evaluating the reasonableness of the subsequent use of the Taser, the result would not change. That is because the "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396; see also *id.* at 397 ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to

their underlying intent or motivation.”). As the district court found, “there is no dispute that, from the Agents’ point of view, Martin appeared to be fleeing to avoid lawful capture.” ER 13. This conclusion is compelled by the undisputed video evidence, which shows Martin: (1) being chased by multiple cars with police lights flashing; (2) driving within a few feet of a marked Border Patrol vehicle turning toward him with its lights flashing; and (3) attempting to evade spike strips placed in his path at a marked Border Patrol checkpoint and then speeding away.

Finally, Plaintiffs argue that their dispute over Agent Fishman’s credibility also should have caused the district court to deny summary judgment. AOB 15-17, 27, 29-30.³ But again, the

³ The transcripts do not support Plaintiffs’ contention that Agent Fishman lied about whether his badge was visible. Agent Fishman was asked whether he “ever” displayed his badge “once you were out.” ER 267-68. He responded “yes,” which was an accurate answer to that very broad question. Agent Fishman then volunteered a general observation in response to an incomplete question (“Yeah, I just have it on memory to pull it out.”) and responded to the fourth part of a compound question about whether Martin was complying with the agents’ commands (“No, he wouldn’t listen to anything.”). *Id.*

All Agent Galioto testified to was that he was wearing his badge somewhere on his body (but he didn’t know where) when he encountered Martin. ER 388. Agent Galioto further testified that he moved his badge to his lapel after the explosion. ER 395. That Agents Fishman and Galioto (who were wearing plain clothes) would more prominently display their badges after the explosion

district court's ruling was based on the events depicted in the undisputed video footage and the undisputed fact that Martin was reaching for the center console when Agent Salcedo fired his Taser.

In sum, the video of the incident contains all the undisputed evidence that the district court needed to grant summary judgment in favor of the individually sued agents on Plaintiffs' *Bivens* claims. Plaintiffs can demonstrate no antecedent constitutional violations that caused force to become necessary and their proffered factual disputes about policy violations and tactical errors are immaterial under *Billingham*. This Court therefore should affirm the district court's ruling that there was no Fourth Amendment violation. See *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) ("Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.").

is not surprising. As the video reflects, other agencies (e.g., the Highway Patrol, the Sherriff's Department, Cal Fire, and Paramedics) were arriving at the scene and the agents needed to make themselves easily identifiable to these other agencies inside the secure perimeter.

d. Agents Smith, Fishman, and Galioto Used No Force Against Martin

Plaintiffs' Fourth Amended Complaint added Agents Smith, Fishman, and Galioto as new defendants to their *Bivens*/excessive force claims for relief. ER 653-57. But, as the video reveals, Agents Smith, Fishman, and Galioto did not deploy the Taser and Plaintiffs presented no facts showing that they used any force against Martin. These agents are therefore entitled to summary judgment on Plaintiffs' Fourth Amendment excessive force claim. See *Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002) (merely present officers cannot be held liable for civil rights violation without evidence of "either integral participation or personal involvement").

Plaintiffs also cannot prevail on their Failure to Intercede claim against Agents Smith, Fishman, and Galioto. The undisputed facts reveal that (1) none of these agents had advance notice that Agent Salcedo planned to use his Taser (see ER 66, 265 (Fishman), ER 45-46, 459 (Smith), and ER 53, 591 (Galioto)), and (2) had no realistic opportunity to intervene given how rapidly the events unfolded. See *Cunningham v. Gates*, 229 F.3d 1271, 1289-90 (9th Cir. 2002) (granting summary judgment for defendants on failure to intercede claim where "the undisputed evidence shows

that the non-shooting officers [on the scene] had no ‘realistic opportunity’ to intercede.”).

This Court should therefore separately affirm the district court’s grant of summary judgment in favor of Agents Smith, Fishman, and Galioto.

3. Any Fourth Amendment Violation Was Not Clearly Established

Even if this Court were to conclude that Agent Salcedo’s use of a Taser violated Martin’s Fourth Amendment rights, Plaintiffs did not carry their burden to establish that this result was clearly established at the time by the case law from the Supreme Court or this Circuit. See *Sorreles v. McKee*, 290 F.3d 965, 969 (9th Cir. 2009) (“The plaintiff bears the burden of showing that the right at issue was clearly established under this second prong.”) The lack of any clearly established precedent therefore provides an additional basis for finding that the individually sued agents are entitled to qualified immunity. *Mattos*, 661 F.3d at 440 (officers are entitled to qualified immunity unless “the constitutional right was clearly established in light of the specific context of the case at the time of the events in question.”)

In evaluating whether a constitutional right was clearly established at the time of the conduct, the Supreme Court has

instructed that courts must determine whether “the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violated that right.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2083 (2011) (internal quotation omitted). Although there need not be “a case directly on point, ... existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* In applying the “clearly established” rule, courts must “faithfully guard[] ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’” *Mattos*, 661 F.3d at 442 (quoting *Harlow*, 457 U.S. at 807, 102 S. Ct. 2727).

At the time of the March 14, 2012 incident at issue here, no case clearly established that the Fourth Amendment prohibited using a Taser under the circumstances that the agents faced: Martin was a suspected felon who had led the agents in a reckless chase after driving the wrong way on an interstate highway and, when the Taser was deployed, was in the driver’s seat of a locked car that he still controlled and, with the agents standing outside futilely attempting to open the locked car doors, was ignoring their commands and reaching for something in or near the center console.

This case is nothing like *Mattos*, 661 F.3d at 436-37, where this Court held that officers violated the Fourth Amendment by using a Taser on a seven-month pregnant woman who had refused to sign a traffic citation. Unlike Martin, the plaintiff in *Mattos* was not suspected in any felony, had not led the officers in a reckless chase, and could not flee because an officer had removed her keys from the ignition. *Id.*

This Court's opinion in *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010) also provided no clear guidance that Agent Salcedo would violate the Fourth Amendment by using a Taser under the circumstances that he faced. The subject there also posed no threat to the officer; he was pulled over for "a mere traffic infraction – failing to wear a seatbelt." *Id.* at 828. Further, he "never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle." *Id.* at 832. Under those circumstances, this Court found that the subject "posed little to no safety threat." *Id.* at 829.

By contrast, and as the district court found, the situation here "was more than uncertain; it was potentially deadly." ER 21. This case therefore is closer to the facts of *Scott*, 550 U.S. at 386, where the Supreme Court held that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the

lives of innocent bystanders does not violate the Fourth Amendment even when it places the fleeing motorist at risk of serious injury or death.” But, unlike the officers in *Scott*, Agent Salcedo did not use deadly force against Martin. Instead, Agent Salcedo used a much lower, intermediate level of force which is designed to stun and temporarily incapacitate a subject, but not seriously injure him. Thus, in light of *Scott*, Agent Salcedo’s use of a Taser to take Martin into custody was not a clearly established Fourth Amendment violation.⁴

C. The District Court Correctly Ruled That the Undisputed Facts Established That Plaintiffs Could Not Prevail on Their FTCA Claims

Plaintiffs’ Fourth Amended Complaint contained Federal Tort Claims Act (FTCA) claims against the United States for wrongful death (sixth claim for relief), assault and battery (seventh claim for relief), negligence (eighth claim for relief), and excessive force under California Civil Code § 52.1 (ninth claim for

⁴ Although Plaintiffs rely heavily on *Coles*, 704 F.3d 624 (AOB 44-46), that opinion was issued on December 5, 2012, after the March 14, 2012 incident at issue here. It therefore cannot defeat the agents’ qualified immunity. *al-Kidd*, 131 S.Ct. at 2083. Further, *Coles* did not reach the issue of whether the defendants’ actions there violated clearly established law. 704 F.3d at 627 n.1.

relief). ER 659-62. The district court also properly granted summary judgment on these claims.

1. Assault and Battery and Excessive Force

The United States' liability under the FTCA is determined by reference to state law. *Molzof v. United States*, 502 U.S. 301, 305 (1992). Under California law, a "prima facie case for battery is not established ... unless the plaintiff proves that an officer used unreasonable force against him to make a lawful arrest or detention." *Saman v. Robbins*, 173 F.3d 1150, 1157 n.6 (9th Cir. 1999) (citing *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1273 (Cal. App. 4th Dist. 1998)).

As discussed, Agent Salcedo did not use unreasonable force against Martin. Thus, Plaintiffs' FTCA assault and battery and excessive force claims fail for the same reasons that their Fourth Amendment claim fails. *Id.* ("Alfaorr's battery claim must fail along with his [Fourth Amendment] claim because we hold that no reasonable jury could have found that Officer Kimball's actions were objectively unreasonable under the circumstances.")

2. Negligence/Wrongful Death

The district court granted summary judgment on Plaintiffs' negligence and wrongful death claims. ER 20-23. On appeal, Plaintiffs challenge summary judgment on two of their negligence

theories: (1) the agents' failure to identify themselves as law enforcement; and (2) the agents' giving of contradictory commands to Martin. AOB 54-55.

The California Supreme Court has instructed that, in evaluating negligence claims against police officers, courts must assess the reasonableness of an officer's conduct "as part of the totality of the circumstances," and may not "divide [a] plaintiff's cause of action artificially in a series of decisional moments." *Hayes v. County of San Diego*, 57 Cal. 4th 622, 637-38 (2013). The undisputed facts here reveal that, when viewed in context of the totality of the circumstances, any errors or omissions by the agents did not proximately cause the need to use of force against Martin. See *Minnesota Mutual Life Ins. Co. v. Ensley*, 174 F.3d 977, 981 (9th Cir. 1999) ("To prevail on a negligence claim, a plaintiff must prove that the defendant owed and breached a legal duty to the plaintiff and that the breach was a proximate cause of the damages sustained by the plaintiff.") (citing California law).⁵

Plaintiffs' "failure to identify" negligence theory hypothesizes that the agents' use of unmarked cars (and, in the case of Agent Fishman, failure to display a badge) might have caused Martin to

⁵ The same causation requirement applies to negligence claims against law enforcement officers in excessive force cases. *Hayes*, 57 Cal. 4th at 629.

flee because he might have thought the agents were a “robber or thug using commercially available equipment to prey on the public.” AOB 15-17, 36, 55. But see *Brinson*, 53 F.3d at 1048 (“metaphysical doubt” or “merely colorable” evidence is not sufficient to defeat summary judgment.). Again, this claim is refuted by the undisputed video evidence showing that: (1) three cars pursued Martin with their police lights flashing; (2) Martin drove right by a marked Border Patrol vehicle approaching him with its police lights flashing when he fled the scene of the first stop; and (3) Martin drove to a lighted and marked Border Patrol Checkpoint where, instead of requesting aid from the uniformed officers standing there, he blew through the checkpoint and sped away. In light of this evidence, no reasonable juror could find that Martin fled from the agents because he mistook them for a “robber or thug using commercially available equipment to prey on the public.” AOB 36. Accord *Scott*, 550 U.S. at 380-81 (“The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.”).

Plaintiffs’ “contradictory commands” negligence theory hypothesizes that, after leading the agents on a reckless car chase (during which he twice stopped and fled), Martin might have suddenly decided to surrender and might have been simply

unbuckling his seat belt in response to a command to get out of the car. AOB 55. But see *Brinson*, 53 F.3d at 1048 (“metaphysical doubt” or “merely colorable” evidence is not sufficient to defeat summary judgment.).⁶ But unbuckling a seatbelt does not involve any reaching at all; it is a simple thumb-push of a button that takes one second or less to accomplish. The undisputed evidence before the district court, however, was that Martin was moving his hands near the center console. Because Plaintiffs did not dispute this fact in the district court, see ER 106 (“Alex put his hands down and began moving his hands near the center of the car.”) they cannot dispute it here. See *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015) (issue may not be raised for first time on appeal absent exceptional circumstances, change in law, purely legal issue with no prejudice to opposing party, or to prevent injustice from plain error). See also *Roth v. G.D. Searle and Co.*, 27 F.3d 1303, 1307 (8th Cir. 1994) (facts may not be

⁶ In criticizing the district court for not specifically addressing this isolated argument (AOB 55), Plaintiffs ignore the rule that they may not “artificially [divide their negligence claim] into a series of decisional moments.” *Hayes*, 57 Cal. 4th at 637. Instead, any contradictory commands are considered “as part of the totality of the circumstances” leading up to Agent Salcedo’s use of a Taser to stop Martin. *Id.*

disputed for the first time on appeal).⁷ Given all of these undisputed facts (including the video footage showing the agents futilely attempting to open Martin's locked door for almost ten seconds), no reasonable juror could conclude that Martin had suddenly decided to surrender, no longer posed a threat, and was simply unbuckling his seatbelt when Agent Salcedo fired his Taser.⁸

⁷ Plaintiffs argue that the fact that the coroner found Martin's body lying prone in the front passenger's seat supports the conclusion that he was trying to comply with the agents' commands. AOB 40. It does not. By the time the coroner arrived, Martin's body had been subjected to (1) a violent explosion inside the car, (2) an inferno that had raged inside the car for 30 minutes, and (3) the force of a high pressure fire hose that the Fire Department had directed inside the cabin (including through the driver's side window). See, e.g., ER 88 at 15:33:30. With all of these major disturbances inside the cabin, there is no reason to believe that the coroner found Martin's body frozen in the same position it was before Agent Salcedo fired his Taser.

⁸ Plaintiffs argue that "[a] reasonable officer would not have feared that Alex was reaching for a weapon which did not exist." AOB 43. Plaintiffs also assert that a reasonable jury could disbelieve that Martin "was reaching for a nonexistent weapon in the center of the car..." AOB 29. But, not only is it undisputed that Martin was reaching for the center of the car, it is also undisputed that Martin had a weapon in his car -- brass knuckles. ER 71. And this was not the first time Martin drove while carrying a weapon in his vehicle. He had a gun in his truck when he fled from Texas police officers in June 2011. ER 640.

In sum, the material facts here are not in dispute. And they establish that any errors or omissions by the agents did not proximately cause the subsequent need to use force against Martin. This Court therefore should affirm the district court's order granting summary judgment on Plaintiffs' FTCA negligence claims.

CONCLUSION

For the reasons set forth above, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,436 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Century Schoolbook, using Microsoft Word 2010.

STATEMENT OF RELATED CASES

The United States of America is unaware of any related cases.

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