CASE NUMBER **15-56451**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ESTATE OF ALEX MARTIN, by its authorized representative, Craig Martin; CRAIG MARTIN ; and KAREN MARTIN,
Plaintiffs & Appellants

v.

UNITED STATES OF AMERICA ; et al.,
Defendants & Appellees.

Appeal from an Order of the
United States District Court for the Southern District of California
Hon. Larry A. Burns
Case No. 3:13-cv-01386-LAB-BGS

OPENING BRIEF FOR PLAINTIFFS/APPELLANTS

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I.
STATEMENT OF JURISDICTION

The United States District Court for the Southern District of California had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 in this action, which alleged causes of action under the Federal Tort Claims Act and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the final judgment and order of the District Court. The Order granting summary judgment was entered on September 22, 2015. The Notice of Appeal was filed on the same day, which was timely under Federal Rules of Appellate Procedure, Rule 4(a)(1).

II.
ISSUE PRESENTED FOR REVIEW

Did the District Court err in granting summary judgment?

III.
STATEMENT OF THE CASE

The operative pleading was the Fourth Amended Complaint filed on December 17, 2014. [ER 649]. The complaint alleged causes of action under *Bivens* against four Border Patrol agents, Fishman, Salcedo, Galioto, and Smith. The *Bivens* causes of action were for excessive force, wrongful death, right of association, failure to properly supervise and discipline and failure to intercede. The complaint alleged the following causes of action against the United States under the Federal Tort Claims Act: wrongful death, assault and battery, negligence,

and excessive force. After all defendants filed motions for summary judgment, which plaintiffs opposed, the District Court granted defendant's motions in their entirety, dismissing the complaint and entering judgment against plaintiffs, the Estate of Alex Martin, and his surviving parents, Craig and Karen Martin.

IV.
STATEMENT OF THE FACTS [1]

Shortly after midnight on March 15, 2012, Alex Martin, only 24 years of age, burned to death. [ER 158]. The cause of death was "thermal injuries and inhalation of products of combustion" with "full-thickness burns with charring" covering his "near-total body surface area." [*Id.*]. Alex died as a result of an explosion and fire, which occurred when Border Patrol agents of the Smuggling Interdiction Group (SIG) approached Alex's car, smashed the front passenger window, and fired a Taser into the car. [ER 159]. Alex was approximately 5'11" and weighed 185 to 195 lbs. [ER 155]. At the time of his autopsy, Alex's body had been burned away to such an extent that he was reduced to 60 ½ inches of height and 134 lbs weight. [ER 162]. The intensity of the car fire amputated Alex's right foot, which was found on the passenger side of the floorboard. [ER 161]. During the removal of Alex's body from the car his "left foot became detached." [*Id.*]. Alex's body was so severely burned that there was "blackened

[1] Because Plaintiffs were the non-moving parties in the court below, they state the facts in the light most favorable to them.

charring of the skin with exposure of the underlying soft tissues and bones." [ER 162].

THE EVENTS BEFORE ALEX MARTIN'S DEATH

On March 14, 2012, at approximately 1:02 a.m., Alex Martin rented a blue 2010 Ford Focus from the Dollar Rent a Car at the Dallas/Fort Worth International Airport in Texas. [ER 546]. On March 14, 2012, at 12:36 p.m., Alex stopped at a Wal Mart Store in Las Cruces, New Mexico, to purchase an X-Box. [ER 153-154]. Surveillance video from the Border Patrol checkpoint on the Interstate 8 freeway, near the Border Patrol Campo station, shows Alex in a blue Ford Focus pulling into the checkpoint at 10:49 p.m. on March 14, 2012. [ER 86]. Alex had driven for nearly 21 consecutive hours, without any lengthy stops, from the Dallas/Fort Worth area to the Border Patrol checkpoint on I-8 near the Campo station. [ER 98 fn. 1].

Video from the Border Patrol checkpoint on Interstate 8 shows Alex coming to a complete stop in a well-lit area where marked Border Patrol vehicles and agents in uniform are present. [ER 86 at 00:04]. According to Border Patrol officials, Alex requested to be sent to secondary inspection so he could remove a traffic cone, which had become stuck underneath his car. [ER 78]. Alex was unable to get the cone out and "departed the Checkpoint without incident." [*Id*.]. The uniformed Border Patrol agents contact with Alex "was minimal and they did

not detect any suspicious behavior." [*Id.*].

Sometime between 11:30 p.m. and midnight on March 14, Stephanie Maximo encountered Alex Martin outside her home. [ER 175-177]. At that time, Maximo lived in a rural area, south of the I-8 East. [ER 172; ER 174]. The neighborhood is confusing with many twists and turns in the road. [ER 173-174]. Alex had been driving slowly past Maximo's home when she went to speak with him. [ER 178]. Maximo saw a bright light coming from inside of Alex's car, which appeared to be a light from a computer, tablet or some type of LED display. [ER 170 – ER 171]. Alex said words to Maxmio to the effect of, "Hey neighbor, you're the first one that's come out." [ER 178]. He appeared confused. [ER 180]. Alex informed Maximo that he was lost and that he was trying to find his way out of that area. [ER 178]. Maximo gave him directions to get back to the freeway. [ER 179].

DEFENDANTS' RECKLESS ACTIONS CREATE THE NEED FOR THE FORCE

Shortly after midnight on March 15, 2012, Defendant Alex Fishman was driving west on Interstate 8, west of the Sunrise Highway exit, in order to return to the El Cajon Border Patrol station. [ER 185 – ER 186; ER 194- ER 195]. Fishman worked for a Border Patrol unit called SIG (Smuggling Interdiction Group). [ER 187]. On the night of March 14, 2012, he was the most senior agent working in the field. [*Id.*]. Fishman was the officer in charge (or "OIC"). [ER 188; ER 193].

That evening, there were three Border Patrol agents in the SIG unit working with Fishman: Agents Salcedo, Galioto (who was riding along with Salcedo as a Border Patrol agent and a prospective SIG recruit), and Smith. [ER 189]. Salcedo and Galioto were driving together in a white Dodge Charger and Smith drove a Dodge Dakota. [ER 546]. Fishman drove a Pontiac G6. [ER 190]. Fishman and the other agents were in plain clothes. [ER 191- ER 192; ER 546]. None of the agents' vehicles had any insignia marking them as law enforcement. [ER 546]

1. Fishman Initiated a Traffic Stop on Alex Martin Based Only on the Appearance of a Taillight in the Dark.

While driving west on Interstate 8, Fishman saw a wrong-way vehicle on I-8 East that was traveling westbound. [ER 197]. Fishman suspected a smuggling vehicle or possibly a drunk driver. [ER 200]. When Fishman saw the wrong-way vehicle, it was approximately a mile or a mile and a half past the Pine Valley Bridge. [ER 198]. He could not see the make of the car, but only saw the headlight beams and the taillights of the car. [ER 199]. Fishman pulled over to the side of the road to call the members of his SIG team to report that he had seen a wrong-way driver. [ER 200].

The car did a U-turn to begin traveling eastbound on the I-8 East. [ER 201 201]. Fishman could not see the make of the car and could not see the license plate. [ER 201- ER 202]. Fishman did a U-turn at a point called "Horse Thief" on the median separating the I-8 West and I-8 East. [ER 248]. By the time he turned

around at the Horse Thief median, Fishman "had already lost visual of the suspect vehicle." [ER 80]. After he made his U-turn, Fishman encountered one or two other cars on the highway. [ER 248].

After Fishman's U-turn to begin traveling on I-8 East, Fishman saw a car he believed was the same wrong-way car[2]. [ER 203; ER 248]. He saw this car at the

[2] In opposition to summary judgment, Plaintiffs contended that Fishman could not recognize Alex's car as the wrong-way driver solely based on taillights and because Fishman did not know what the wrong-way car looked like. The district court criticized Plaintiffs' contention and determined that evidence cited by Plaintiffs did not support their contentions. [ER 11 at n.7].

Yet, Plaintiffs provided abundant factual support for their position. Fishman himself testified at his deposition that he could not broadcast the make of the wrong-way car he saw and saw only headlights and taillights:

> **Q.** Now, at that time, you were not able to broadcast the make of car that you saw?
>
> **A.** No. I just saw like just the headlights and taillights. I could make out it was a car of some sort.

[ER 199]. When Fishman first viewed the wrong-way driver, he could not tell his SIG team members the make of the car of the wrong-way driver or the license plate. [ER 201 – ER 202]. At his deposition, Fishman claimed that he "saw the same car the whole time. The whole time I didn't lose visual of it, going the wrong way . . . and then do a U-turn and start to go the right way in the eastbound lane." [ER 201]. But a "White Paper/Issue Brief" by Border Patrol, and provided by the U.S. government in discovery, stated "BPA Alex Fishman observed a vehicle driving the wrong way going west in the eastbound lanes. BPA Fishman turned around in the median of Interstate 8 at Horse Thief Overpass ***but had already lost visual of the suspect vehicle***." [ER 80] [emphasis added].

Taking the evidence in the light most favorable to Plaintiffs, a reasonable jury could find that Alex Martin was not the wrong-way driver that Fishman observed: Fishman had only seen headlights and taillights; he could not identify the make of the car or the license plate of the car; and the government's own evidence showed Fishman had lost visual contact of the wrong-way driver at the time he turned around on Interstate 8.

Pine Valley Exit parked right in front of the sign. [ER 248]. The car was not impeding traffic or going the wrong way. [*Id*.]. Fishman pulled over to the shoulder of the Pine Valley Exit and turned off his headlights to watch the car. [*Id*.]. He observed a blue Ford Focus with a Texas license plate. [ER 581]. Fishman alerted the other members of the SIG team. [ER 206- ER 207]. Fishman claimed that he never thought that by pulling up behind the car stopped on the exit and turning off his lights, that he might frighten a person who did not know he was an agent. [ER 205].

Border Patrol Agent James Thompson and his partner, Agent Aaron Marcellus, observed Fishman and Alex Martin at a cul-de-sac near the Pine Valley exit. [ER 276]. Agent Thompson was in a marked Border Patrol Chevy Tahoe in uniform with Agent Marcellus, who was driving eastbound on I-8. [ER 275]. The cul-de-sac was a small, closed off circle of space, south of the I-8, near the Pine Valley exit. [ER 277 – ER 278]. When he first spotted Fishman and Alex, Thompson saw two dark colored cars that were stationary. [ER 278 – ER 279]. It was so dark in the cul-de-sac that Thompson could not see the color or the make of

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In opposing summary judgment, Plaintiffs were not required to give credit to Fishman's self-interested statements or argue that a reasonable jury could find Fishman's testimony to be true. Plaintiffs contend that whether Alex Martin was the wrong way driver is a material factual dispute because a reasonable jury could construe the evidence in two significantly different ways. Thus, a jury must weigh the evidence and determine Fishman's credibility in order to resolve the factual dispute.

either car. [ER 279]. Alex left the cul-de-sac. [*Id*.]. Fishman followed Alex. [*Id*.]. Thompson did not see any flashing lights or hear any siren while the two cars were in the cul-de-sac. [ER 280].

2. Fishman, Salcedo and Galioto Conducted a Traffic Stop in Violation of Border Patrol Rules, Screaming at Alex Martin to "Get Out of the Fucking Car."

The two cars belonging to Alex and Fishman proceeded to the on-ramp to the Interstate 8 east. [ER 280]. Fishman turned on flashing lights inside his unmarked car. [ER 281; ER 208]. Alex' car stopped half-way on the on-ramp to the freeway [ER 282]. Thompson and his partner Marcellus were parked in their marked Chevy Tahoe at the entrance to the I-8 where the on-ramp and the 8 freeway meet. [ER 283].

Salcedo, with Galioto riding as his passenger, arrived at the Pine Valley on-ramp to I-8 East in response to Fishman's call. [ER 301-302]. Salcedo had his lights on and pulled up next to Fishman's car. [ER 302]. He positioned his car behind Alex Martin's car and parallel to Fishman's car. [*Id*.]. Salcedo saw the marked Border Patrol unit and could have communicated with it, but did not. [ER 309].

Fishman stood behind the door of his car [ER 304]. Galioto opened his passenger door and stood at the passenger door of Salcedo's car. [*Id*.]. Fishman, Galioto, and Salcedo all had their guns drawn and pointed at Alex in his car. [ER

304-305]. Salcedo, Galioto, and Fishman were all in plain clothes. [ER 305-306]. Salcedo and Fishman had on flashing lights in their unmarked cars.[3] [ER 305]. Thompson heard no siren. [ER 281].

Salcedo heard Fishman yelling orders to the driver. [ER 302]. Salcedo heard Fishman say, "Get out of the fucking car." [ER 353]. Thompson heard Fishman, the driver of the second car, say "Get out of the car" three times. [ER 283]. Salcedo did not recall whether he, Fishman, or Galioto identified themselves as Border Patrol agents. [ER 306]. Salcedo did not remember whether Fishman or Galioto displayed a badge. [ER 308]. Galioto testified at his deposition that neither he, nor Fishman, nor Salcedo identified themselves as "Border Patrol." [ER 412].

The SIG members never contacted Thompson, a uniformed Border Patrol agent in a marked Border Patrol car, to request that he effect the stop of Alex's car (the first car). [ER 287].

3. Border Patrol Policy Dictated That A Marked Unit and Uniformed Officer Effect the Vehicle Stop of Alex Martin.

The Border Patrol policy, or "operational directive", in effect at the time of Alex Martin's death that governed the SIG agents in this case required the following:

[3] A review of the pursuit video shows that these "flashing lights" were radically different from the flashing lights normally located on the top of a police unit. These lights were small and located entirely within the passenger compartment.

> Unmarked service vehicles with emergency equipment, i.e., lights and sirens, **can be deployed and operated in the same manner as a marked service vehicle as long as the agent is in uniform and conducting their duties as assigned. All vehicle stops knock-and-talks, and other high risk contacts will be made initially by agents in uniform. Other agents, working in plain clothes, may assist following the initial contact by uniformed agent.**

[ER 483] [emphasis added].

The memorandum contains an exemption where, in exigent circumstances, a "plain clothes agent is authorized to initiate contact for reasons of safety and security." [*Id*.]. If this exemption is exercised, the agent must generate a memorandum through official channels to the Chief Patrol Agent articulating exigent circumstances." [*Id*.].

The agents' supervisor, Mark Hansen, testified at deposition that Fishman, Salcedo, Galioto, and Smith were aware that they were to summon marked unit to do vehicle stops. [ER 477]. The SIG agents had been directed to use marked units and uniformed personnel to do vehicle stops. [ER 478].

4. Defendants Further Escalate the Need for the Force.

Alex drove off and began traveling east on the I-8. [ER 310]. Fishman followed Alex and Salcedo followed behind Fishman. [*Id*.]. Thompson and Marcellus, in their marked SUV, followed behind these two unmarked cars. [ER 286]. The cars took the next exit off I-8 east. [ER 284]. At that exit, Alex made a

right turn onto Old Highway 80 (left of the exit the road is called Sunrise Highway, while right of the exit the road is called Old Highway 80). [ER 314-ER 315]. Thompson and Marcellus stopped on I-8 and ceased following. [ER 284 – ER 285].

Salcedo pulled in behind Alex as Fishman had to slow down to make the exit. [ER 313]. Salcedo drove behind Alex while Fishman now drove behind Salcedo. (*Id*.). Approximately one mile from the Sunrise Highway/Old Highway 80 exit is a Border Patrol checkpoint on Old Highway 80. [ER 317]. The agents at the Old Highway 80 checkpoint set out tire spikes and spiked Alex's car. [ER 317 – ER 318]. The agents then removed the spike strip to allow Salcedo and Fishman to proceed. [ER 318].

Alex slowed and moved his Ford Focus to the right shoulder of Old Highway 80. [ER 212]. The Ford Focus stopped and Fishman drove his car flush against the Ford Focus, blocking the left side of the Focus. [ER 213]. Fishman's car blocked the Focus' driver-side doors from opening. [ER 213 – ER 214]. Salcedo's car stopped behind the Focus. [ER 214]. Defendant Smith parked in front of the Focus, blocking it from the front. [*Id*.; ER 451]. To the right of the Focus was a hill. [*Id*.]. Fishman rushed the car. [ER 215]. Salcedo exited his car and pulled out his gun as Galioto followed. [ER 319]. Smith stood in front on the driver's side of Alex's car. [ER 451].

5. Alex Martin was Unarmed

Salcedo could not recall if he, Fishman, or the other agents present identified themselves as law enforcement officers. [ER 364]. Salcedo could see Alex's hands and saw that Alex did not have a gun. [ER 320]. He put his gun back in his holster. [ER 321]. Salcedo commanded Alex to keep his hands up. [ER 323].

Smith commanded Alex to show him his hands, which Alex did. [ER 427]. Smith saw that Alex did not have a weapon. [ER 430].

6. Defendants Order Alex Martin to Get Out of the Car; Alex Moves His Hands Toward the Center Console.

Once the agents surrounded Alex Martin, Defendants Smith, Fishman, and Salcedo all issued conflicting commands to Alex Martin at the same time. [ER 451; ER 218 – 220; ER 323]. Salcedo commanded Alex to keep his hands up. [ER 323]. Smith commanded Alex to get out of the car. [ER 451]. Smith was the only agent near the driver side while the other agents (Fishman, Salcedo, and Galioto) were on the passenger side of the car. [ER 451]. Smith saw Alex raise his hands to show that he was unarmed. [ER 430]. He heard the other agents giving commands, shouting and yelling. [ER 427].

Fishman told Alex to "Get out of the fucking car." [ER 364]. He commanded Alex to "show me your hands" multiple times, repeating the command in both English and Spanish. [ER 218]. Fishman told Alex to roll the windows down and unlock the car door. [ER 219 – ER 220].

Alex looked frustrated, threw his hands up, and appeared to be reacting to the commands given to him by the other agents near the passenger side. [ER 451]. Alex put his hands down and began moving his hands near the center of the car. [*Id*.]. In order to manually unlock the car door, Alex would have had to reach over to his right side to unlock the right (passenger) door with his hand. [ER 222]. In order to roll down the window, Alex would have to move his hand down and move his hand to the left side. [ER 221]. Because Alex's driver side was blocked by Fishman's car, in order to get out of his car, Alex would need to slide over to the passenger seat and over the console. [*See* ER 88, video depicting tasing and fire, at 15:11:05[4]].

Salcedo then smashed the front passenger window of the Ford with a flashlight. [ER 451; ER 433; ER 88]. Salcedo claimed that he could not recall if he smelled gas after he broke the window. [ER 326]. Plaintiffs' fire and explosions expert, Stephen Peranteau, wrote that liquid gasoline had spilled or otherwise been released in the passenger compartment of Alex's car. [ER 490]. This gasoline vaporized in the passenger compartment. [*Id*.]. Airflow within the passenger compartment caused the gasoline vapor to diffuse through the compartment. [*Id*.]. The shattering of the right front door glass window caused the

[4] The references to the video evidence in the Opening Brief are to the time stamp embedded in the videos at the top left corner of the videos, which indicates the date, time, location, and speed of Defendant Salcedo's car. The District Court referred to the time elapsed which is indicated at the bottom of the video.

warm, gasoline infused air inside the vehicle to rush out when cold air rushed into the passenger compartment. [ER 491].

Salcedo had taken an eight hour course on use of the Taser. [ER 292]. Salcedo was given this warning: "Avoid explosive/flammable materials, liquids, and vapors." [ER 293]. He was instructed "[a] Taser device can ignite explosives and flammable materials, liquids, or vapors for example gasoline . . . [and] butane type lighters . . ." [ER 294]. Salcedo was further instructed not to use the Taser device in the presence of flammable substances without legal justification. [ER 294 – ER 295]. Taser International, the manufacturer of the Taser, provides these instructions in its product warning. [ER 533].

In the gasoline vapor laden environment described by Plaintiff's expert, Salcedo pointed the Taser at Alex and fired. [ER 325; ER 327]. Salcedo could not recall if he yelled, "Taser Taser Taser" before he shot his Taser. [*Id.*]. After he shot the Taser, there was an explosion. [ER 327].

Video of the Taser incident shows that a total of sixteen (16) seconds passed between the time Fishman rushed Alex Martin's car to the time Salcedo fired his Taser into Alex's car. [ER 88 at 15:11:017 – 15:11:35]. Within that 16-second time period, Smith, Fishman, and Salcedo all issued simultaneous and contradictory commands to Alex Martin. [ER 451; ER 218 – 220; ER 323]. Salcedo perceived Alex Martin to be ignoring Salcedo's command to keep his

hands up, which prompted him to fire his Taser at Alex, causing a fiery explosion. [ER 602]. But as Defendant Smith acknowledged at his deposition, a person cannot simultaneously comply with one command to keep his hands in the air and a separate command to get out of the car. [ER 429].

VIDEO EVIDENCE

Video of the incident was recovered from a camera mounted on the windshield of Defendant Salcedo's vehicle. [ER 540]. The video file "3D5F50000.MOV" (hereinafter "Taser Video") depicts the incident after the Border Patrol checkpoint at Old Highway 80 when Defendant Salcedo deploys the Taser. [ER 88; ER 540]. The video file "368F1800.MOV" (hereinafter "Pursuit Video") depicts the incident from the driver's viewpoint when Salcedo responds to Fishman's phone call regarding the wrong way driver. [ER 89; ER 540].

1. Video Evidence Raises Questions Regarding Fishman's Credibility and Shows That Neither Fishman Nor Galioto Displayed Law Enforcement Identification.

Fishman told Sheriff's homicide detectives that he had pulled out his badge and displayed it while yelling directives to Alex **before** the Tasing.[5] [ER 267]. Fishman claimed as follows during his interview:

Detective:	Did you ever display your badge once you were out?
Alex Fishman:	Yes.

[5] The homicide division of the San Diego County Sheriff's Department conducted an investigation of Alex Martin's death, including audio recorded interviews of all four Border Patrol Agents (Fishman, Salcedo, Smith, and Galioto).

Detective:	Okay. So when you get out, then after, you just…
Alex Fishman:	Yeah, I just I have on memory to pull it out.
Detective:	So you pulled out your badge, you had it clearly visible, you've identified yourself as the police, and the guy is still not complying with directions?
Alex Fishman:	No, he wouldn't listen to anything. That's why I went around to the other side.

[ER 0267 – ER 0268].

Fishman testified that he told Sheriff's detectives the truth when he agreed that he had his badge displayed. [ER 226 – ER 227]. Attached as an exhibit to Fishman's deposition was a photo of Fishman taken on March 15, 2012, the night of the incident, by San Diego County Sheriff's personnel which shows a badge hanging on a lanyard around Fishman's neck. [ER 196; photo at ER 469].

The Taser Video shows that Fishman never displayed his badge before the Tasing and explosion. From 15:14:23 to 15:14:26 of the Taser Video, Fishman is seen without a badge on his person. He is carrying a radio in his right hand. Fishman admitted that at 15:14:26, he is not wearing any badge on the outside of his person. [ER 227]. At 15:15:03, after the fire has been burning, Fishman goes to the emergency lane on the far left of the video screen, reaches furtively inside his sweater and pulls out the lanyard and badge. At 15:15:09, a shiny object is now seen dangling from Fishman's neck on the outside of his clothing. From 15:15:26 to 15:15:28, Fishman turns towards the camera on Salcedo's car and his badge can be seen hanging from his neck.

Galioto testified in his deposition that during his encounter with Alex Martin, he wore his badge on his body. [ER 387 – ER 388]. Attached as an exhibit to Galioto's deposition was a photo of him taken after the death of Alex Martin. [ER 391 – ER 392; photo at ER 471]. This photograph of Galioto shows a badge on Galioto's lapel. [ER 392].

From 15:16:52 to 15:16:54 of the Taser Video, after the fire has begun, Galioto is seen walking towards the camera. There is no badge shown on the lapel of his jacket. From 15:18:00 to 15:18:10, Galioto again stands close to the camera, at times directly facing the camera, and no badge can be seen on the lapel of his jacket. Galioto admitted that between the time the car exploded, causing Alex to burn to death, and before the Sheriff's photo of Galioto was taken, Galioto removed his badge from his belt and clipped on the lapel of the jacket that he wore. [ER 395]. He further admitted that he was trained to display his badge and identify himself as Border Patrol agent when approaching someone in the field. [ER 387].

2. Salcedo's Erratic Driving in an Unmarked Car Placed the Public's Safety at Risk.

The Pursuit Video depicts events after Salcedo receives the call from Fishman regarding the wrong-way driver and shows Salcedo rushing to meet Fishman. [ER 89]. At 15:06:20, Salcedo exits the freeway and blows through a stop sign at 62mph. [ER 89]. At 15:06:54, Salcedo is driving 98 mph with no indication that Salcedo has activated his emergency lights. *Id*. At 15:07:07,

Salcedo is seen driving 113 mph. *Id*. At 15:07:28, Salcedo exits the freeway and blows through another stop sign at 78 mph. *Id*. For the first time, at 15:07:30, flashing emergency lights are seen on the video. *Id*. shortly after this, Salcedo pulls beside Fishman behand Alex Martin's car. [*Id*. 15:07:54].

V.
THE DISTRICT COURT'S FINDINGS

In granting summary judgement, the District Court made the following findings. Defendants suspected Alex Martin of smuggling drugs or aliens. [ER 007]. After Salcedo arrived beside Fishman at the on-ramp of the I-8, Alex's driving posed a clear and immediate danger to the public, putting many people in danger of serious injury or death. [ER 016]. Alex had initiated and engaged in a lengthy chase. [ER 018]. When Alex's car came to its final stop after his tires had been punctured, with three cars hemming him in, Defendants had no assurance that Alex would not step on the gas pedal and ram his car into surrounding agents. [ER 016]. Defendant Salcedo had reason to fear Alex might be attempting to attack him. A reasonable officer in his position could have reasonably feared Alex was reaching for a weapon when Alex reached toward the center console area of the car. [ER 017]. Alex appeared to be defying the Defendants' commands to get out of the car and show his hands when he "reached or lunged" toward the center console. [ER 018]. Even if Alex were trying to obey commands by unlocking the door, there is no evidence that Salcedo knew this. *Id.* Alex was "more culpable"

because he initiated a reckless car chase and that Defendant's use of unmarked cars and failure to identify themselves "pales in comparison." [ER 019]. Defendants were acting quickly in a tense situation and that Defendants had good reason to fear Alex would harm them. [ER 017]. The use of the Taser was not deadly force because there is no evidence that Salcedo was standing where he could have smelled the gasoline fumes escaping Alex's car and Salcedo did not expect the Taser to cause an explosion. [ER 021]. Even if the jurors concluded that Defendants were lying about their conduct because Defendants were conscious of wrongdoing, that finding is "irrelevant" to this case. The Court found that even if Defendants violated Plaintiffs' Fourth Amendment rights, reasonable agents in Defendants' position would not have clearly known that they violated his rights. [ER 014-015].

VI.
STANDARD OF REVIEW

A district court's granting of a summary judgment based upon qualified immunity is reviewed *de novo*. *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1103 (9th Cir. 1998). Under *de novo* review, this court views the case from the same position as the district court. *Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008). The appellate court must consider the matter anew, as if no decision previously had been rendered. *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006). No deference is given to the district court. *Barrientos v.*

Wells Fargo Bank, N.A., 633 F.3d 1186, 1188 (9th Cir. 2011); *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 971 (9th Cir. 2003) ("When de novo review is compelled, no form of appellate deference is acceptable.").

VII.
SUMMARY OF ARGUMENT

This court has "held repeatedly that the reasonableness of force used is ordinarily a question of fact for the jury." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (internal citations omitted). When the resolution of disputed issues of fact may substantially affect whether qualified immunity is available to Defendants, summary judgment on the grounds of qualified immunity is improper. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *Smith*, 394 F.3d at 704 n.7 (*en banc*)("Whether the officers are entitled to qualified immunity may depend in large part on factual determinations the jury will be required to make."); *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002)("Until the jury makes those decisions [regarding disputed facts], we cannot know, for example, how much force was used, and, thus, whether a reasonable officer could have mistakenly believed that the use of that degree of force.").

Plaintiffs Estate of Alex Martin and Craig and Karen Martin, Alex's parents, appeal the District Court's grant of summary judgment in favor of Defendants. The District Court erred in granting summary judgment for the following four reasons. First, the District Court failed to follow the mandate of *Anderson v.*

Liberty Lobby Inc., 477 U.S. 242, 255 (1986) by ignoring disputed material facts, accepting Defendants' subjective beliefs as true, and failing to analyze whether a jury could find that Defendants reasonably perceived a threat that justified the use of deadly force. The District Court failed to comply with controlling precedent set forth in *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.

Second, the District Court ignored facts showing that Defendants had themselves created the situation, which Defendants then claimed necessitated the use of lethal force. Summary judgment is improper when there is an issue of fact as to whether the police unlawfully created the very situation that resulted in their use of deadly force. Al*exander v. City and County of San Francisco*, 29 F.3d 1355, 1366-1367 (9th Cir. 1994).

Third, Defendants are not entitled to qualified immunity because it was clearly established in March 2012 that the use of the Taser under the circumstances of this case was unconstitutionally excessive. At the time Salcedo deployed the Taser, Alex Martin's car was disabled by tire spikes and blocked in on all sides. Viewing evidence in the light most favorable to Plaintiffs, a reasonable jury could find that Alex was attempting to comply with Defendants' multiple, contradictory commands at the time Salcedo Tased Alex. This material factual dispute regarding

Alex's compliance with Defendants' commands precludes the grant of qualified immunity.

Likewise, these same factual disputes form the basis of the District Court's error in dismissing Plaintiffs' state law causes of action for negligence and wrongful death. Ample factual evidence supported Plaintiffs' contention that Salcedo's use of the Taser was unreasonable based on the following: Defendants issued multiple conflicting commands; gave Alex only 16 seconds to comply with their contradictory commands; and then unleashed a Taser when evidence indicated that Alex sought to comply with the Defendants' commands.

A.
IT WAS ERROR TO GRANT SUMMARY JUDGMENT BASED ON FACTS TAKEN IN LIGHT MOST FAVORABLE TO THE DEFENDANTS.

On summary judgment, the evidence of the non-moving party is to be believed, and all reasonable inferences that may be drawn from the facts must be drawn in favor of the opposing party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). The trial court does not weigh the evidence or resolve disputed issues of fact. *Id*. at 249. Rather, the district court's role is to determine whether there is a genuine issue of material fact for trial. *Id.*

The District court in this case ignored disputed material facts and granted summary judgment based on what the Court determined was in the minds of the Defendants. In doing so, the District Court ignored the required analysis under

Anderson. The District Court failed to ask whether a jury could find that the agents in this case did not reasonably perceive a threat that justified the use of deadly force. *See Gonzalez v. City of Anaheim*, 747 F.3d 789, 791 (9th Cir. 2014) (summary judgment not warranted in Fourth Amendment deadly force case because reasonable jury could find following: officer did not reasonably perceive threat of death or serious bodily injury when he shot decedent; use of deadly force was unjustified; or failure to warn was not reasonable).

Having failed to inquire as to what a reasonable jury could find given the material facts in dispute, the District Court largely accepted the version of events given by the agent Defendants. The District Court credited Defendant Fishman's assertion that Alex Martin was the driver who had been driving on the wrong side of I-8, despite evidence to the contrary. It found that Fishman believed "the driver was transporting aliens or drugs" when he pulled up behind Alex Martin's car, simply because Fishman said so, even though there was nothing in Alex Martin's behavior that indicated he was transporting aliens or drugs. The only thing Fishman **may** have observed was, at most, a driver on the wrong side of the freeway. There was no evidence that any reasonable officer would have believed that Alex was transporting aliens or drugs because someone in a car with similar taillights as Alex Martin's car had been driving on the wrong side of the freeway.

The Court found that as to the initial stop, "the video makes clear that a

marked Border Patrol vehicle, as well as two other Border Patrol vehicles with flashing lights were stopped nearby, within Martin's view. (Video 19, 27:05.)"[6] In fact, the video in Salcedo's car shows that the marked unit was on the opposite side of the road and at a substantial distance from Alex. When it activated its lights as Alex began driving away, it drove in the **opposite direction** of Alex' car. At that point, Alex would not have seen the marked car following him with its lights on, because it was driving **away** from him. The District Court erred in assuming that Alex' view at the time was coextensive with Salcedo's video recording when Alex was located at a substantially different vantage point.

The District Court found that "even assuming that agents there drew their weapons, they were not close enough to Martin to even appear in the video, and in any event it would have been unclear to the Agents that Martin, with bright lights shining on his vehicle, could even see them." [ER 014]. The District Court found that Alex Martin **must have seen** a marked patrol car that was parked off to the side with the occupants remaining seated in their car, but the agents believed that Alex **might not have seen armed men, pointing three guns and screaming at him** to "get the fuck out of the car."

The likelihood that Defendants' violent and apparently irrational conduct – pointing their loaded weapons, using voices filled with menace and curses, and

[6] The Court's reference to video 19, 27:05 is the portion of video in ER 89 at 15:07:53.

failing to display badges or identify a legitimate purpose for their conduct – would create a reaction of panic in a young man in an isolated rural area in the dead of night, was never considered seriously by the District Court. Ignoring this information, the Court found that a reasonable officer could not believe that a citizen who had guns pointed at him in the dead of night was fleeing for an innocent reason. The Court found:

> But even supposing Martin was initially afraid of the Agents, and even accepting inconsistent accounts as evidence that they were conscious they had not followed department policy, there is no dispute that, from the Agents' point of view, Martin appeared to be fleeing to avoid lawful capture.

[ER 013]. The Court ignored the fact that this contention is very much in dispute. It is the contention of the Plaintiffs that these Defendants knew that they violated department policy and engaged in a dangerous, unlawful, and unconstitutional attempt to seize Alex Martin, and that they knew that they were engaging in unreasonable conduct, which caused Alex to flee in fear of their behavior.

The District Court wrote that "[f]rom their point of view, Martin realized they were law enforcement officers, and fled either in spite of or because of that fact." *Id.* The Court decided what the Defendants subjectively felt, not what a reasonable officer would have believed at the time of the incident and certainly not what a reasonable jury would find it reasonable for the Defendants to have believed. The District Court found that Alex Martin knew that he was engaged in a

chase in an effort to evade law enforcement. In doing so, he assumed what was in the heart and mind of a decedent who cannot speak for himself.

The Court accepted as reasonable Defendants' subjective belief that once Alex Martin pulled over, he would have accelerated his car to flee even though he was blocked on all four sides and his tires had been punctured. The District Court found that "the agents had good reason to fear Martin would harm them or others if not immediately stopped." *Id*. Other than the self-serving assertions of the Defendants, there is no evidence that Alex Martin intended or threatened to harm anyone once his car had come to a stop. The Court found "Here, a suspected smuggler displaying an objective determination to flee agents – even at the risk of seriously injuring or killing himself or others- could have reasonably led an agent to believe Martin might be resisting arrest by reaching for a weapon." [ER 018]. The court found this despite uncontradicted evidence that Alex Martin was unarmed and had held his empty hands up for the agents to see. Salcedo had holstered his gun because he knew that Alex Martin was unarmed. Nevertheless, the Court found that it was reasonable to believe that Alex was reaching for a nonexistent weapon.

The Court determined that "Alex Martin was not moving his hands into the console area in order to exit his car, or to comply with any order" despite testimony that Alex appeared to be reacting to the commands given to him.

The District Court ignored the fact that Alex Martin would have to reach into the center area of the car to unbuckle himself in order to get out of the car, and would have to reach over the console area to open the passenger side front door.

The District Court found that even if Alex were reaching toward the center console for some innocent reason, the agents "would not have known what it was." [ER 017]. The Court reached this finding despite the fact that the agents all admitted to shouting commands for Alex to get out of the car and the testimony that Alex **appeared to be reacting to those commands** when he reached toward the center console.

The District Court then found that Defendants' lies about their conduct had no relevance. This ignored Plaintiffs' submission: Defendants lied because of their consciousness of wrongdoing after they failed to call for a marked unit, failed to display their badges, failed to identify themselves as law enforcement and pointed their loaded weapons at Alex Martin, after which he drove from the scene.

In *Cruz v. City of Anaheim*, 765 F.3d at 1079, the Ninth Circuit reversed the district court's grant of summary judgment in a deadly force case because there was "circumstantial evidence that could give a reasonable jury pause" regarding whether officers saw Cruz reach for his waistband before they shot and killed him. *Cruz*, 765 F.3d at 1079. The officers had executed a traffic stop on Cruz, a discharged parolee whose prior convictions included a felony involving a firearm,

after a confidential informant reported that Cruz was a gang member who sold drugs, that he was carrying a gun in his waistband, and that he had made it clear that he was not going back to prison. *Id*. at 1077-78. After Cruz unsuccessfully tried to escape in his vehicle, the police drew their weapons and shouted at him to get on the ground as he was emerging from his vehicle. *Id*. at 1078. According to four of the five officers, Cruz ignored their commands and instead reached for the waistband of his pants. *Id*. Fearing that he was reaching for a gun, all five officers opened fire, killing Cruz. *Id*. Officers did not find a gun on Cruz, but did recover a loaded gun from the passenger seat. *Id*.

This Court explained that for the district court ruling on the officers' motion for summary judgment, the key question was "could any reasonable jury find it more likely than not that Cruz didn't reach for his waistband?" *Id*. at 1079. The Cruz Court concluded that, despite the officers' testimony, there was circumstantial evidence that could cause a jury to reasonably conclude that the officers lied. *Id*. at 1079-80. The "[m]ost obvious is the fact that Cruz didn't have a gun on him, so why would he have reached for his waistband? . . . [F]or him to make such a gesture when no gun is there makes no sense whatsoever." *Id*. at 1079. *Cruz* noted that there were other aspects of the officers' story which a jury might find troubling and implausible. *Id*. at 1080. Accordingly, *Cruz* held that the district court erred in granting summary judgment for the officers, and reversed.

Id.

Here, the *Cruz* analysis is compelling – why would Alex reach toward a console that contained no weapon? As this court noted in *Cruz*, "[b]ecause the person most likely to rebut the officers' version of events—the one killed—can't testify, [t]he judge must carefully examine all the evidence in the record . . . to determine whether the officer's story is internally consistent and consistent with other known facts." *Cruz*, 765 F.3d at 1079 . In response to commands, Alex had shown his hands to demonstrate that he had no weapon. Defendants saw he had no weapon. A reasonable jury could believe that instead of reaching for a nonexistent weapon in the center of the car, Alex Martin was moving his hands towards the passenger door to unlock the door and get out pursuant to Defendants' commands.

Despite the fact that the credibility of the officers is a critically important question under *Cruz*, the District Court dismissed Defendants' lies and misrepresentations as irrelevant. The District Court found that even if jurors concluded the agents were lying because they were conscious of wrongdoing, "their own opinions about their actions, or feelings of guilt are irrelevant to this case." [ER 014]. The District Court entirely missed the point. The credibility of a witness is always relevant; it is particularly relevant under *Cruz* because the officers are the only living eyewitnesses to the incident in which they killed the civilian who cannot testify. The credibility determination was not up to the

District Court to make: It is up to the jury to decide whether there is circumstantial evidence that could cause a jury to reasonably conclude that the officers lied about Alex Martin reaching for a nonexistent weapon. *See Cruz*, 765 F.3d at1080.

B.
IT WAS ERROR TO GRANT SUMMARY JUDGMENT TO DEFENDANTS WHO CREATED THE VERY SITUATION WHICH THEY CLAIMED REQUIRED THE USE OF FORCE.

The District Court ignored the analysis of Al*exander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), in which this Court considered whether an initial unlawful use of force, which directly precipitated the later use of deadly force by police, itself provides a basis for § 1983 liability for the subsequent use of the deadly force. *Alexander* held that when there is an issue of fact as to whether the police unlawfully created the very situation which resulted in their use of deadly force, summary judgment was improper. The District Court failed to apply the *Alexander* analysis despite clear evidence that Defendants violated their own policies and procedures, and more importantly, the Fourth Amendment requirement of reasonableness, and thus created the very need for the car chase in the first instance, and the subsequent "need" for the use of force. The District Court erred in failing to realize that Defendants' actions precipitated the lethal result in this case. Defendants confronted a lone driver on a dark highway; pointed their guns at him; failed to display badges or identify themselves; engaged in a pursuit which their actions caused; and concluded by issuing contradictory

commands and then firing a Taser into a gasoline suffused car, burning an unarmed man to death.

1. The Manner of the Initial Stop of Alex Martin Was Unreasonable.

On March 15, 2012, Alex Martin was driving from his home in Southlake, Texas to San Diego, California, where he was born and raised. Defendants Fishman, Galioto, and Salcedo were in plain clothes and in unmarked cars. Shortly after midnight, Fishman saw a wrong-way vehicle on I-8 East, which was traveling westbound. Fishman saw only the headlight beams and the taillights of the car. He pulled over to the side of the road to call the members of his team that he had seen a wrong-way driver. Fishman did not know the make of the car and did not know the license plate. The car made a U-turn to begin traveling eastbound on the I-8 East. By the time Fishman completed his U-turn to follow the vehicle on I-8 East, Fishman "had already lost visual of the suspect vehicle." At the time he made his U-turn, Fishman encountered one or two other cars on the highway. After he began traveling on I-8 East, Fishman saw a vehicle he believed was the same wrong-way car based only on his observation of the car's taillights. He saw this car at the Pine Valley Exit parked right in front of the sign. The car was not impeding traffic or going the wrong way. Fishman pulled his car over to the shoulder of the Pine Valley Exit and turned off his headlights to watch the car. He observed a blue Ford Focus with a Texas license plate and he alerted the other

members of the SIG team regarding the vehicle.

Viewing the facts in light most favorable to the Plaintiffs, a reasonable jury could conclude that Fishman, after losing sight of the car driving the wrong way and not knowing the make of the car or license plate number, pulled up behind Alex Martin, who had committed no traffic violation. Even assuming Fishman had a basis to attempt a *Terry* stop, the manner in which he did so was unreasonable. Fishman, in his unmarked car and in plain clothes, pulled up behind Alex Martin, turned off his headlights, lurked in darkness and watched a young man in the middle of the night in a remote area. It is reasonable to believe that these actions would frighten a motorist. A reasonable officer would have known that his actions would create such fear.

Border Patrol Agent James Thompson testified at his deposition that the cul-de-sac where Alex and Fishman remained was dark. He did not see any flashing lights or hear any sirens while the two car were in the cul-de-sac. Alex started to drive away from Fishman. As the two cars proceeded to the on-ramp to the Interstate 8 east, Fishman began displaying flashing lights (these were small lights, completely unlike a patrol car's external flashing lights and located only inside the car). Alex stopped his car half-way on the on-ramp to the freeway. Salcedo, with Galioto riding as his passenger, arrived at the Pine Valley on-ramp to I-8 East in response to Fishman's call. Salcedo had his lights on and pulled up next to

Fishman's car. Thompson and his partner Marcellus were parked in that marked Chevy Tahoe at the entrance to the I-8 where the on-ramp and the 8 freeway meet.

When Fishman first saw the wrong-way driver, he believed that the car was possibly a smuggling vehicle or a drunk driver, despite the fact that Fishman observed no other criminal activity other than a driving infraction. With this information, Fishman, Salcedo, and Galioto got out of their cars, pointed their loaded guns at Alex Martin, and screamed at him to get out of his car. At this point, there were two unmarked cars and three people in plain clothes, who were pointing guns at Alex. Galioto testified that neither he, Fishman, nor Salcedo identified themselves as "Border Patrol." Thompson did not hear anyone identify himself as law enforcement.

None of the Defendants requested the assistance of the uniformed officers. Neither of the uniformed officers, Thompson and Marcellus, was involved in the stop; they remained in their car and watched these events. When Alex began driving away from the screaming armed men, the uniformed officers turned on their flashing lights and drove in the exact opposite direction of Alex Martin and the Defendants.

The District Court decided that Alex Martin must have seen Thompson and Marcellus sitting in a car parked to the left of him on the on-ramp of the freeway. The District Court further decided that Alex Martin must have associated the

marked Tahoe with the unmarked cars which carried men in plain clothes screaming at him to get out of the car when Alex Martin had committed no crimes and despite the fact that the Tahoe took off in the opposite direction when Alex began driving away. The District Court decided that Alex Martin must have known, *ab initio*, that he was fleeing from law enforcement. The District Court erred in failing to consider the initial unlawful stop under *Alexander v. City and County of San Francisco*.

A traffic stop constitutes a "seizure" under the Fourth Amendment, and thus must be "reasonable." *Whren v. United States*, 517 U.S. 808, 809–10 (1996); *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 946 (9th Cir.2003). It is reasonable if based on a reasonable suspicion of illegal activity. *Delaware v. Prouse*, 440 U.S. 648, 663 (1977). In order to form a reasonable suspicion, an officer must have "specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity." *U.S. v. Lopez–Soto*, 205 F.3d 1101, 1105 (9th Cir.2000) (internal citation omitted).

If, as Plaintiffs allege, Fishman "lost visual" on the wrong-way driver and pulled up behind Alex Martin who had not committed a driving offense, without having observed any traffic violation committed by Alex, Fishman's conduct violated Alex Martin's constitutional rights. *See Price v. Kramer*, 200 F.3d 1237,

1248 (9th Cir.2000). Driving on the wrong side of a road is a routine traffic violation. Even were a *Terry* stop justified, the Defendants' conduct in effecting it was unreasonable.

"With regard to the force used, pointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force." *Espinosa v. City & Cnty. of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010). *Espinosa* found that the officers were not entitled to qualified immunity for violating Plaintiff's Fourth Amendment rights by intentionally or recklessly provoking a confrontation. *Espinosa* found that evidence strongly suggested that the initial entry into the apartment by officers violated plaintiff's Fourth Amendment rights which provoked the confrontation in which the plaintiff was shot. The Court found that there was evidence that the illegal entry created the very situation which led to the shooting and required the officers to use force that would have otherwise been reasonable. *Alexander*, 29 F.3d at 1366 (holding officers provoked a confrontation when they entered a man's house without a warrant, causing the man to shoot at officers).

The District Court found that under *Espinosa*, it was Alex Martin who created the dangerous situation. Having resolved all factual disputes in favor of Defendants, the District Court then found:

> Defendants' 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. He initiated a reckless car chase that Agents could hardly ignore, and bears primary responsibility for the escalation of this incident. *See Mattos*, 661 F.3d at 445. Neither of these factors weigh in Plaintiffs' favor.

[ER 18].

This finding mischaracterized the conduct of the Defendants. Defendants did not simply "fail to display badges or identify themselves as clearly as they might." Defendants displayed no badges; pointed loaded guns at Alex Martin in the middle of the night in a remote area; screamed at him to get out of the fucking car; and none of them identified himself as an agent. The only possible offense of which Defendants had any evidence was a driving offense. Defendants had witnessed no other offense and they had no probable cause to believe that Alex had committed any crime. By the time Defendants were screaming at Alex with their guns pointed, Fishman had already pulled up behind Alex without any lights or sirens; parked his car and turned off his lights to silently watch Alex. Any reasonable officer would have known that this situation would create fear in the mind of a citizen. A reasonable officer would have known that the legal and policy requirements that vehicle stops be conducted by uniformed officers in marked cars is to give fair notice to the citizen that the pursuing vehicle is a bona fide law enforcement agent, not a robber or thug using commercially available equipment to prey on the public. Taking the facts in the light most favorable to Alex Martin, as

the District Court was required to do, a reasonable jury could find that it was Defendants' own unreasonable conduct which caused a reckless car chase[7].

In *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir.1996), the Seventh Circuit held the officers were not entitled to qualified immunity when the officers broke into his home without announcing themselves and without wearing any police insignia. *Id.* at 285–86. The plaintiff, believing the officers to be unlawful intruders, grabbed his gun and was then shot by the police. *Id*. at 286. The court identified two "crucial" factual questions precluding summary judgment: whether the officers announced their presence and whether they were justified in shooting the plaintiff under the circumstances. *Id*. at 288. In a situation where a person has no reason to know that someone is a police officer, and the officer's identity is concealed, the normal rules governing use of deadly force and right to resist are modified. *Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir.1993).

The Sixth Circuit found that a police officer was not entitled to qualified

[7] At the point at which Alex drove through the Border Patrol checkpoint area on Old Highway 80, it is a reasonable inference that he should have suspected that the armed men in plain clothes and unmarked cars were possibly police officials of some kind. But the initiation of the brief chase (it lasted approximately three minutes), was due to the Defendants' unreasonable conduct. By the time Alex drove through the lighted area, after which he slowed and pulled to the side of the road, he was clearly submitting to the officers' authority. Defendants' conduct at this point is confusing, unreasonable, and constituted excessive force. The District Court, in order to find for the Defendants, focused on brief pursuit in the middle of the events. He ignored the causative significance of their unreasonable conduct at the inception of the contact and passed over their unreasonable excessive force at the end. This was error.

immunity when the officer had entered a dark hallway at 2:45 a.m. without identifying himself as a police officer, without shining a flashlight, and without wearing his police hat. *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir.1991). The court found it objectively unreasonable for the officer to enter the area in that manner. This was so notwithstanding the officer's argument that, at the time he shot the plaintiff, he reasonably believed that his life was in danger. The act of entering a private residence late at night with no indication of identity showed that the officer had unreasonably created the encounter that led to the use of force.

Following *Sledd*, the Ninth Circuit in an unpublished opinion in *Bryan v. Las Vegas Metro. Police Dept.*, 349 Fed. Appx. 132 (9th Cir. 2009) found that the district court erred in granting summary judgment on qualified immunity grounds because a key fact was disputed. The factual dispute was whether an officer identified himself as a police officer before ordering plaintiff to drop his gun and before shooting him. Had the officer failed to identify himself as a police officer, plaintiff would have had no duty to drop his gun (or else be shot) at the insistence of an unidentified intruder. *Id*. at 135. Defendants' failure to identify themselves as law enforcement before making an arrest or brandishing a loaded weapon at a citizen was unreasonable.

2. Defendants Created a Dangerous Situation, then Escalated the Need for the Use of Force.

After being terrorized by three men pointing weapons at him who attempted to force him out of his car, Alex Martin drove away. Despite the fact that Defendants created a situation in which Alex felt compelled to drive way, the District Court found that Defendants were justified in later using deadly force. It was only after the unreasonable use of force in pointing loaded weapons at Alex and screaming "Get out of the car," that Alex began driving away. After Alex came to the final stop where he pulled over to the side of the road, Defendants blocked Alex's car from three directions (the steep hill blocking any exit in the fourth). Instead of conducting a "hot stop" in which they remain behind their car doors and give orders from a distance, Defendants rushed the car, weapons drawn. Agents gave contradictory orders to Alex: "Hands up," "Show me your hands," "Roll down the window," "Open the door," and "Get out of the fucking car." In order for Alex to comply with one order, he was required by law of physics to violate another.

Where a police officer "intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir.2002). If an officer intentionally or recklessly violates a suspect's constitutional rights, and the violation is a provocation creating a situation in which force was necessary, such force would have been legal but for

the initial violation. *Id*.

Espinosa found that where officers shot the plaintiff whom they believed was armed, after their unlawful initial entry into a home, there were questions of fact regarding whether the use of force was reasonable. Where the decedent did not use or threaten to use a weapon and could not escape, defendants failed to show that there are no questions of fact regarding whether the use of deadly force was reasonable, simply because defendants asserted that the decedent was resisting arrest and posed a high risk to their safety. 598 F.3d 528, 538.

Once Alex Martin's car was disabled and came to a stop, Defendants rushed the car immediately. Having screamed contradictory commands and given Alex Martin approximately sixteen seconds to do the impossible, Defendants immediately resorted to the use of the Taser. The physical evidence suggests that Alex was attempting to comply with the orders to open the door and get out of the car. His burned body was found in the passenger side of the car. The District Court committed error by failing to adequately consider Defendants' own conduct in creating the need for the force.

C.
IT WAS CLEARLY ESTABLISHED THAT THE USE OF THE TASER UNDER THESE CIRCUMSTANCES WAS UNCONSTITUTIONALLY EXCESSIVE

It is beyond debate that "force is only justified when there is a need for force." *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 (9th Cir.2007). Here,

the intrusion on Alex Martin's Fourth Amendment interests—the discharge of a taser in dart mode upon him—involved an intermediate level of force with "physiological effects, high levels of pain, and foreseeable risk of physical injury." *Bryan*, *Bryan v. MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010). The law in the Ninth Circuit was clearly established in *Bryan v. MacPherson* and its progeny that the Taser may not be used against a suspect who was not actively resisting and who presented no immediate threat to the officers.

1. Alex Martin Posed No Immediate Threat

In *George v. Morris,* 736 F.3d 829 (9th Cir.2013) the Court found that while the deputies asserted feeling threatened before they shot the decedent, such a statement "is not enough; there must be objective factors to justify such a concern." *Id.* at 837. The Ninth Circuit refused to credit the deputies' testimony that the suspect turned and pointed his gun at them and refused to assume that the suspect took other actions that would have been objectively threatening. The Court found, "Today's holding should be unsurprising. If the deputies indeed shot the sixty-four-year-old decedent without objective provocation while he used his walker, with his gun trained on the ground, then a reasonable jury could determine that they violated the Fourth Amendment." *Id.* at 839.

The Court in *Glenn v. Washington County* 673 F.3d 864, 873-78 (9th Cir. 2011), explained that the fact that the "suspect was armed with a deadly weapon"

does not render the officers' response *per se* reasonable under the Fourth Amendment. *Id*. at 872-73; *see also Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed."). Alex Martin posed no threat to anyone, and his car was disabled and blocked in on all sides. There was no justification for any use of force under *Blankenhorn*, and in particular, the intermediate level of force of a Taser in probe mode without any warning given to Alex Martin that he would be Tasered.

The District Court found that the threat to the safety of Defendants or others favored the finding for Defendants. In doing so, the Court found that "the video makes absolutely clear Martin's driving put many people in danger of serious injury or death." [ER 016]. The videotape proves otherwise. The video shows Alex Martin passing a single car coming in the opposite direction during the chase that lasted approximately three minutes, from 15:07:58 to 15:11:06. The video clearly shows that Alex stayed in his lane as the other car passed him going in the opposite direction and did not cause any danger to the other driver. [ER 89, 15:09:54]

In contrast, before his arrival on the I-8 on-ramp to confront Alex, the video shows Defendant Salcedo driving with "extreme recklessness." Salcedo, in an unmarked car with no siren and no lights, blew through two stop signs at extremely

high speeds with no regard for other drivers or pedestrians. Salcedo drove on the freeway at speeds up to 113 miles per hour. [ER 89, 15:07:07]. He failed to stop and turned left after exiting the freeway at approximately 62 miles per hour. [*Id*. 15:06:20]. He then turned left without stopping at a stop sign traveling at between 73 and 78 miles per hour. [*Id*. 15:07:28]. It was only after he blew through the second stop sign that Salcedo turned on his lights. [*Id*. 15:07:30].

The District Court found that the use of the Taser was justified because Defendant Salcedo had reason to fear that Alex might be attempting to attack him. The Court found:

> There is no evidence Salcedo, the agent who fired the taser, thought the car's window or door controls were located in the console, or that by rummaging around there Martin was trying to cooperate by opening the door or window. In light of earlier events, a reasonable officer in Salcedo's position could have reasonably feared Martin was reaching for a pistol or other weapon and intermediate force was necessary to incapacitate him.

[ER 017]. The Court ignored the fact that Alex could not comply with the order to get out of the car without unbuckling himself from his seatbelt and that he would have to reach toward to console area in order to do so. A reasonable officer would not have feared that Alex was reaching for a weapon which did not exist. A reasonable jury could find that the alleged fear was unreasonable or fabricated, given that Salcedo holstered his handgun and no Defendant had his gun trained on

Alex after seeing that Alex was unarmed and posed no threat. Given the precedent of *Cruz*, the district court was required to ask, "why would Alex reach towards (as opposed to over) a console for a nonexistent weapon?" The District Court gave no consideration to the possibility that Defendants lied when they vaguely claimed that Alex moved his hands towards the console.

In *Coles v. Eagle*, 704 F.3d 624 (9th Cir. 2012), defendant officers broke the window of a car in which there was a suspected car thief. Officers dragged him out of the car. In *Coles*, the officers had reason to believe that Plaintiff had stolen a car, a felony. After the car came to a stop, one of the officers parked his car directly behind the plaintiff's car, sandwiching it in between the patrol car and a concrete barrier. "The officers then ordered Coles to do the impossible: they simultaneously instructed him to exit the vehicle and keep his hands on the wheel." *Id* at 626. When the plaintiff moved his hands to unlock the door, officers smashed the window of the plaintiff's car and dragged him out of it.

Coles found that there was a material factual dispute as to whether the plaintiff presented a threat at the moment the officers broke the window, which rested entirely on whose version of the story a fact-finder deems more credible. *Coles* found that the court must resolve disputed factual issue as to the circumstances that existed immediately before the officers broke the window in favor of the plaintiff. The plaintiff asserted that he kept his hands visible on the

steering wheel and looked straight ahead; and that one officer had a gun trained on him. "On these facts, a reasonable jury could conclude that the officers did not face such an immediate threat to their safety as to justify the extreme measure of smashing a car window and dragging Coles through it." *Id*. at 629.

Given the absence of any weapons, and the questionable credibility of Defendants, a reasonable jury could find Alex' actions consistent with an attempt to comply with multiple inconsistent commands, and that after showing that he had nothing in his hands, he was attempting to unbuckle his seat belt, and either open or exit the passenger front door, since Fishman had blocked the driver's side. It was error for the Court to speculate that it may have been **possible** for Alex to somehow ram Defendants or their cars, when there is no evidence to suggest that Alex had at any time attempted to move his car at that point. It was error for the District Court to make factual determinations that a reasonable officer would have found Alex Martin's actions objectively threatening simply because Defendants said so.

2. The District Court Committed Error by Ignoring Evidence that Alex Martin Was Attempting to Comply with Orders.

The Court in *Coles v. Eagle*, 704 F.3d 624, 630 found:

> As to the question of whether Coles actively resisted arrest by failing to comply with a lawful order to exit the vehicle, the answer is no. "[W]e have drawn a distinction between passive and active resistance," and failing to exit a vehicle is not "active resistance" and does not justify

> the officers' actions. *Bryan v. MacPherson*, 630 F.3d 805, 829-30 (9th Cir.2010)("Even if Bryan failed to comply with the command to remain in his vehicle, such noncompliance does not constitute 'active resistance' supporting a substantial use of force."); cf. *Mattos v. Agarano*, 661 F.3d 433, 445 (9th Cir.2011) (*en banc*)(suspect who "refused to get out of her car when requested to do so and later stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from the car" had "engaged in some resistance to arrest"). Moreover, given that the officers had ordered Coles to place his hands on the wheel, a jury could find that Coles was complying with the officers' order by staying in the car.

704 F.3d at 630.

The defendants in *Coles* justified their actions in smashing the window by characterizing the plaintiff's placing his hands off the steering wheel as "furtive" movements. The Court found, however, that the movements could have been the plaintiff's attempt to comply with simultaneous contradictory commands being given to the plaintiff at the time. *Coles* found:

> A jury could reasonably find that Coles's hand movements were attempts to comply with the officers' order to exit the vehicle. Rather than precipitating an exigency, the officers could simply have given Coles specific, non-contradictory instructions. Although not dispositive, the presence of this reasonable, less-intrusive alternative course of action figures into our *Graham* analysis. *See Bryan*, 630 F.3d at 831 & n. 15. Considering the totality of the circumstances, this factor weighs against the officers.

Id.

In *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir.2005) (*en banc*), the Ninth

Circuit addressed the nature of resistance exhibited by "an individual who continually ignored officer commands to remove his hands from his pockets and to not re-enter his home," and who "physically resisted" for a brief time. *Id*. at 702. Though the individual "was not perfectly passive," *City of Hemet* emphasized that his resistance was not "particularly bellicose" and as a result concluded that the third *Graham* factor offered little support for the use of significant force against him. *Id*. at 703. In *Gravelet-Blondin v. Shelton*, 728 F.3d 1086 (9th Cir. 2013), officers gave orders to "get back," simultaneously with a contradictory order to "stop." The plaintiff did not get back and the officer shot him with a Taser. The Court found that his failure to immediately comply with the commands to get back did not constitute resistance that was "particularly bellicose."

In this case, once Alex's tires were flattened and he was hemmed in on all sides, the situation became static. Alex was doing nothing to resist arrest. The situation became fast moving when Defendants rushed the car and began screaming contradictory commands. From the time of arrival of the Defendants around Alex's car until Salcedo began smashing in the windows, only 16 seconds had passed. In those 16 seconds, Defendants were yelling contradictory commands at Alex. Alex Martin's "resistance", if any, was complying with only one of the commands to get out of the car and defying the contradictory command to show his hands. The District Court, however, determined that "[Alex's] doors were

locked, and he appeared to be defying the Agents' commands to get out of the car and show his hands. His reach or lunge — under these circumstances — presented an objective threat, which Agents reasonably believed had to be neutralized." [ER 018]. The Court ignored the fact that Defendants failed to give Alex time to comply with a physically impossible maneuver, showing his hands and getting out of the car.

3. The District Court Committed Error When It Made a Factual Determination that Alex Martin Had Committed a Serious Crime

The District Court found that the severity of the crime weighed in favor of Defendants because Defendant suspected Martin of smuggling aliens or drugs or both and that Alex Martin drove with "extreme recklessness." [ER 015-016]. As argued above, the Court erred in making a factual determination that Defendants suspected Alex of a serious crime when there is no evidence to indicate to anyone that Alex had committed any crime other than a possible traffic infraction. The Court erred in failing to consider that Alex Martin drove with "extreme recklessness" only because Defendants caused him to.

4. The District Court Erred in Determining that No Warning Was Required and that Alex Martin was the "More Culpable" Party.

"A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. Cal.

2001). The Ninth Circuit found in *Mattos v. Agarano,* "[T]he fact that Aikala gave no warning to Jayzel before tasing her pushes this use of force far beyond the pale." 661 F.3d at 451. S*ee also Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir.2007) (denying qualified immunity for the use of a taser where the "absence of any warning—or of facts making clear that no warning was necessary—makes the circumstances of this case especially troubling"); *Gravelet-Blondin* 728 F.3d 1086, 1092 (9th Cir. 2013)(warning given as the officer fired his Taser leaving the citizen no time to react rendered the warning meaningless).

Given the totality of the circumstances, the use of the Taser after issuing contradictory commands; giving Alex Martin less than 16 seconds to comply with an impossible choice; and failing to give warning was unconstitutional under clearly established Ninth Circuit precedent.

D.
IT WAS ERROR TO FIND THAT THE USE OF THE TASER DID NOT CONSTITUTE DEADLY FORCE IN THESE CIRCUMSTANCES.

The District Court determined that the discharge of the Taser in the presence of flammable materials which were likely to cause fires was not use of deadly force. The Court based its ruling on the misreading of the Fourth Amendment requirements. The Court found:

> Clearly, none of them were expecting the taser to cause an explosion. The Fourth Amendment can only be violated by the intentional use of force. *Dimmig v. Cnty. of Pima*, 659 Fed. Appx. 540, 541 (9th Cir. 2014) (citing

> *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97 (1989); *Byars v. United States*, 273 U.S. 28, 33 (1927)). There is no evidence here that the fire and explosion were intentional, or even negligent.

[ER 020].

Under *Brower* and its progeny, it is the **seizure** or the application of force that must be intentional, not the harm or injury that results. The subjective intent of the officers has no relevance under the Fourth Amendment. The Court made a fundamental error is assuming that Defendants must intend to kill in order for the use of force to be considered deadly.

Alex Martin's car had gasoline in it, and a sufficient amount had spilled in his car to cause an explosion. According to Stephen Peranteau, Plaintiffs' expert, the fire was caused by the Taser's ignition of gasoline vapor present inside the car. [ER 489]. As the cold air rushed into the car after Salcedo smashed the window, the hot hair infused with gases escaped through the top of the broken window. The expert's opinion was that "The shattering of the right front door glass by the USCBP agent significantly changed airflow patterns within the passenger compartment. The sudden removal of the glass allowed warmer air from inside the compartment to exit out the upper part of the opening while colder outside air spilled into the compartment through the lower part." [ER 491]. Salcedo discharged the Taser despite the presence of flammable gases and liquids. Tasers ignite flammable materials. Taser International warns:

> Fire and Explosion Hazard. CEW use can result in a fire or explosion when flammable gases, fumes, vapors, liquids, or materials are present. Use of a CEW in presence of fire or explosion hazard could result in death or serious injury. When possible, avoid using a CEW in known flammable hazard conditions.
>
> A CEW can ignite explosive or flammable clothing or materials, liquids, fumes, gases, or vapors...

In *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1061 (9th Cir. 2003), the Ninth Circuit held that police training materials may give police officers sufficient notice that their conduct was proscribed. CBP policy on the use of Tasers, or electronic control devices, prohibits the deployment of Tasers near flammable materials. The Ninth Circuit in *City of Hemet*, 394 F.3d at 706, expanded what could be considered as deadly force. Deadly force is determined by evaluating "whether the force employed 'creates a substantial risk of causing death or serious bodily injury.'" *Id*. at 706. Firing a Taser into a car filled with gas fumes is deadly force.

Following *City of Hemet*, a number of district courts have found that the use of the Taser can be deadly force. *See LeBlanc v. City of Los Angeles*, No. CV 04-8250 SVW VBKX, 2006 WL 4752614, at *13 (C.D. Cal. Aug. 16, 2006)(finding that it would not be unreasonable for a jury to find that the use of the Taser on a suspect who was obese and either mentally ill or under narcotic influence to be deadly); *Snauer v. City of Springfield*, No. 09-CV-6277-TC, 2010 WL 4875784, at

*5-6 (D. Or. Oct. 1, 2010) report and recommendation adopted, No. CIV. 09-6277-TC, 2010 WL 4861135 (D. Or. Nov. 23, 2010)(taking into account the warning by the manufacturer that Taser may cause loss of control of psychomotor movements which may increase risks of serious injury or death).

The District Court in this case distinguished *Brown v. Burghart*, No. CIV.A. 10-3374, 2012 WL 1900603 (E.D. Pa. May 25, 2012), in which officers were involved in a car chase. When the plaintiff came to a stop, the scooter he was riding hit the ground. Gas leaked or spilled from the scooter, the ground, and the plaintiff. The plaintiff then resisted officers' attempts to handcuff him. Defendant officer Tasered the plaintiff near the scooter, and flames engulfed the plaintiff. Defendant argued that the plaintiff was fleeing the police, driving recklessly and endangering others, resisting the efforts to place him in handcuffs, and continuing to resist arrest after physical force and a taser were used and even after he had caught on fire. Defendant argued that the level of force used was justified, and the fire was merely an unfortunate and unforeseen accident. *Brown* found that a fire, while perhaps unforeseen by these officers, could well have been foreseeable by a reasonable officer. *Id*. at *8. *Brown* compared the case to the *Snauer*, in which a substantial risk of serious injury from Taser was, perhaps, unforeseen, but certainly foreseeable to an objectively reasonable officer at the scene. *Id*. Defendants asserted that neither of them knew about the gas leak. *Brown* found that a

reasonable jury would be entitled to make a credibility determination by weighing the Defendants' testimony against the other evidence in this case and to disbelieve that testimony in light of the officers' proximity to the overturned vehicle. *Id*. "Moreover, a reasonable jury could find that regardless of what Defendants subjectively observed, an objectively reasonable officer presented with the circumstances would have been cognizant of the risk of a gasoline spill or checked for a spill before using a taser." *Id*. "Just as a reasonable jury could find that Trooper Burghart did or should have recognized the risk associated with using a taser near an overturned vehicle leaking gasoline, the same jury could find that the Plaintiff's behavior did not warrant a use of force that created a risk of fire and serious injury." *Id*. at 9. *Brown* found that when the plaintiff was unarmed, did not directly attempt to harm or threaten the officers, and had only been observed committing traffic offenses and evading arrest, it was a jury question as to whether an objectively reasonable officer would have acted in the same way as the defendant.

The District Court, in distinguishing this case with *Brown v. Burghart*, found that "there's no evidence the Agents smelled gasoline fumes either before, or after breaking Martin's car's window." The expert testimony was that the fumes would have rushed from car through the broken window. The court ignored the circumstantial evidence that Salcedo would have smelled the gasoline fumes and

then deployed the Taser. Salcedo merely testified that he could not "remember" smelling the fumes. The District Court took that testimony and mutated into a determination that Salcedo did not smell gasoline fumes before shooting Alex Martin with the Taser. The District Court found that there was no evidence that Salcedo was "standing where he could have smelled the exiting fumes." [ER 020]. However, in the next paragraph, the Court found, "It is also worth noting that Agent Salcedo was standing very close the car, and the explosion knocked him to the ground." *Id*. Whether Salcedo was standing close enough to smell and actually smelled the gasoline is a question of fact for the jury.

E.
THE ISSUE OF NEGLIGENCE REQUIRES DETERMINATION OF CREDIBILITY, WHICH MUST GO TO THE JURY.

The District Court found that the initial failures to follow Border Patrol procedures and the use of the Taser were not negligent. The Court found that Defendants' initial conduct in stopping Alex Martin caused no injury independent of the Tasering itself. In doing so, the Court ignored Plaintiffs' contention and the video evidence that suggest that it was the conduct of the Defendants that caused the car chase, which led to the Tasering. The initial stop, which caused the chase, was the beginning of a continuous chain of events culminating in Alex Martin's death. There were no supervening events to break the chain.

The Court found:

> As noted, no reasonable person in Martin's position would have doubted they were law enforcement agents. Yet in order to recover on a negligence theory, Plaintiffs would need to show, not only that Martin thought this, but that the Agents unreasonably failed to realize that is what he thought. They have pointed to no evidence to support such a finding. Agent Salcedo reasonably feared Martin was reaching for a weapon when he tasered him, and that objective threat caused him to fire it. There is no evidence he had reason to believe a fire or explosion would result. Since there is no nexus between the Agents' pretasering actions and the reasonableness of Agent Salcedo's act, and because the Court has already found the tasering itself was reasonable, this claim fails too.

[ER 022].

Whether Alex Martin would have known under these circumstances that these men in the dark were law enforcement or criminals is a jury question. Credibility determinations must be made by a jury. The Court failed to address whether shouting contradictory commands before the Tasering was negligent. Whether it was reasonable for Defendants to shout at a citizen to get out of the fucking car, which requires him to unbuckle himself, requiring his hands to move toward the center console, and which requires him to move toward the center of the car in order to get out of the car, only to Taser him to death, is a question of fact for the jury.

F.
THE DISTRICT COURT COMMITTED ERROR WHEN IT DISMISSED THE WRONGFUL DEATH CAUSE OF ACTION.

The District Court found that because Plaintiffs failed to establish negligence, the claim for wrongful death must also fail. For the reasons argued above, the issue of whether Defendants caused the wrongful death should be determined by the jury.

VIII.
CONCLUSION

The Estate of Alex Martin, Craig Martin, and Karen Martin respectfully ask that the Court reverse the judgment of the District Court and remand this case for trial.

Respectfully submitted,

Dated: February 1, 2016

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, there are no known related cases pending in this Court. I certify that the information on this form is true and correct to the best of my knowledge.

Dated: February 1, 2016

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 13,599 words. I relied on my word processor program, Microsoft Word 2010, to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge.

Dated: February 1, 2016

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