No. _____

In The
Supreme Court of the United States

PATRICK HANLON and NICHOLAS FRENCH,

Petitioners,

v.

ERNEST JOSEPH ATENCIO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRAD HOLM
City Attorney
SHARON HAYNES
Assistant Chief Counsel
CITY OF PHOENIX
LAW DEPARTMENT
200 W. Washington St.,
Suite 1300
Phoenix, AZ 85003
602-262-6761
brad.holm@phoenix.gov
sharon.haynes@phoenix.gov

MARY R. O'GRADY
Counsel of Record
ERIC M. FRASER
HAYLEIGH S. CRAWFORD
OSBORN MALEDON, P.A.
2929 N. Central Ave.,
Suite 2100
Phoenix, AZ 85012
602-640-9000
mogrady@omlaw.com
efraser@omlaw.com
hcrawford@omlaw.com

Attorneys for Petitioners
Patrick Hanlon and Nicholas French

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QUESTIONS PRESENTED

Two unarmed City of Phoenix police officers tried to gain control of a pre-trial detainee. One placed him in a wristlock and, when that did not succeed, the other used "what might be perceived as a carotid hold." (App. 4.) Shortly thereafter, armed officers from the Maricopa County Sheriff's Office ("County") took over. The Phoenix officers had no further involvement. County officers subsequently tasered, punched, and used a "knee strike" on the detainee, who later died.

In a 42 U.S.C. § 1983 action, the court of appeals concluded that, under the "integral participant" doctrine, the Phoenix police officers could be liable for unanticipated acts of force the County officers used, even if the Phoenix officers' own conduct did not violate the Constitution. The questions presented are:

1. Whether the Ninth Circuit's "integral participant" doctrine improperly holds officials vicariously liable for unforeseeable acts of excessive force by other defendants, in contravention of 42 U.S.C. § 1983 and *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978).

2. Whether the Ninth Circuit erred by concluding that a single circuit court case involving the unprovoked beating of a compliant pre-trial detainee "clearly established" that officers could not use a wristlock and brief chokehold to regain control of a noncompliant pre-trial detainee.

PARTIES TO THE PROCEEDINGS

Petitioners (appellants below) are City of Phoenix police officers Patrick Hanlon and Nicholas French.

Respondents (appellees below) are Ernest Joseph Atencio, Rosemary Atencio, Joshua Atencio, Joseph Atencio, minor M.A., through his next friend Eric Atencio, and Michael Atencio, personal representative of the Estate of Ernest Marty Atencio.

Other parties to the Ninth Circuit proceedings are defendants/appellants the City of Phoenix, and Maricopa County Sheriff's Office ("County") officers Jaime Carrasco, Adrian Dominguez, Christopher Foster, Anthony Hatton, Craig Kiser, Anthony Scheffner, Jose Vasquez, and Jason Weiers.

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PETITION FOR A WRIT OF CERTIORARI

Patrick Hanlon and Nicholas French respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's December 30, 2016 opinion (App. 1-8) is unpublished. The district court's February 10, 2015 order denying the petitioners' motion for summary judgment (App. 9-61) is reported at 161 F. Supp. 3d 789.

JURISDICTION

The Ninth Circuit filed its decision on December 30, 2016 and denied timely petitions for rehearing and rehearing en banc on February 14, 2017. On April 20, 2017, Justice Kennedy granted a request by the City of Phoenix, Patrick Hanlon, and Nicholas French to extend the time for filing this petition to June 5, 2017. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents brought this action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Respondents allege that petitioners used excessive force against a pre-trial detainee in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

The Fourteenth Amendment states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV, § 1.

STATEMENT OF THE CASE

A. Background Facts.

In the early morning of December 16, 2011, Phoenix police officers brought Ernest Marty Atencio to the Maricopa County jail for booking on misdemeanor assault charges. (App. 10-11.) Phoenix officers Patrick Hanlon and Nicholas French were on booking duty when Atencio arrived.[1]

During the initial screening process, Atencio behaved strangely and reported having used methamphetamine a few hours earlier. (App. 11, 50.) Following

[1] The Maricopa County Sheriff's Office operates the jail, but the City of Phoenix stations unarmed "booking" officers there to help with intake so the Phoenix officers on patrol can quickly return to duty. (*See* Appellants' Joint Excerpts of Record ("JER") at JER824-25.)

a mental health evaluation, County medical staff approved Atencio for booking into one of the jail's "safe cells." (App. 12-13.)

Phoenix officer Hanlon escorted Atencio into the linescan room for fingerprinting and security screening. (App. 13.) They were followed by several officers, including Phoenix officer French. (*See* App. 13-14.)

Officer Hanlon fingerprinted Atencio, removed his handcuffs, and asked Atencio to remove his shoes to be placed in the x-ray machine. (*Id*.) Atencio took off one shoe, but refused to remove the other and eventually put the first shoe back on. (JER109; *see also* App. 14.) Officer Hanlon, who was unarmed, tried to talk Atencio into cooperating. Atencio responded by crossing his arms and telling Officer Hanlon that Hanlon could take the shoes off for him. (*See* App. 14.)[2]

Concerned that bending down to remove the shoes would put him in a vulnerable position, Officer Hanlon decided to secure Atencio with a behind-the-back wristlock and use his feet to slide Atencio's shoes off. (JER867-68, 891.) As Hanlon reached for Atencio's right wrist, Officer French and County officers standing nearby stepped in to help get control of Atencio's

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[2] The district court incorrectly described Atencio's statement as a question. (*See* App. 14 ("You can take my shoe off for me?").) The parties agreed that Atencio told Officer Hanlon, "You can take my shoe off for me." (*See* Appellees' Supplemental Excerpts of Record ("SER") at SER0088 ("Although Marty took off his right shoe, he did not immediately take off his left shoe and said to Ofc. Hanlon, '[y]ou can take my shoe off for me.'").)

other arm and turn him around. (*See* App. 14-15; JER818-20 (video).)

Atencio resisted the officers' efforts to restrain him. "A struggle ensued, with Atencio standing but bent over by the officers and passively resisting. After approximately thirty-five seconds, French used what appears to be a choke hold or carotid hold on Atencio, and took Atencio to the ground with the assistance of the other officers." (App. 14.) Atencio continued to resist the officers' attempts to handcuff him while on the ground. (JER818-20.) Less than a minute later, the Phoenix officers disengaged. (*Id.*) From then on, neither Officer Hanlon nor Officer French touched Atencio again. (*See id.*)

The County officers continued grappling with Atencio. "While Atencio was being held down, one of the officers – [County officer] Weiers – tased Atencio and another officer – [County officer] Hatton – administered numerous strikes to Atencio's facial region." (App. 14.)

The County officers eventually managed to re-handcuff Atencio and carry him to a safe cell.

> Once in the safe cell, Atencio was placed on the floor and numerous [County] officers held him down in a "dog pile" while his clothes were removed. While the [County] officers were removing Atencio's clothing, [County officer] Hatton delivered a knee strike by dropping his full weight with his knee onto Atencio's back. By the time the [County] officers finished removing his clothes, Atencio appeared to be unconscious.

(App. 15.) Approximately ten minutes later, County medical staff confirmed that Atencio was not breathing and did not have a pulse. (App. 15-16.) Atencio died shortly thereafter. (App. 16.)

B. District Court Opinion.

Atencio's family and estate (collectively, "respondents") sued the City of Phoenix, Officers Hanlon and French (collectively, "petitioners"), the Maricopa County Sheriff's Office, and various County officers and supervisors. Among others, respondents asserted a 42 U.S.C. § 1983 claim for use of excessive force in violation of Atencio's Fourth and Fourteenth Amendment rights. (JER1029-31.)

The district court denied summary judgment to the Phoenix officers on the excessive force claim. (App. 25-27.) When doing so, the district court relied on the Ninth Circuit's "integral participant" theory of liability. Under this doctrine, an official who is an "integral participant" in another's unlawful acts may be personally liable under § 1983, even if the official's own conduct does not "rise to the level of a constitutional violation." *Boyd v. Benton Cty.*, 374 F.3d 773, 780 (9th Cir. 2004).

Citing *Boyd* and the integral participant doctrine, the court concluded that if "*any* excessive force was used against Atencio," it could impose liability on "any of the other officers that were either personally involved in, or were integral participants in, the use of that excessive force, *even if that officer's conduct does not itself rise to the level of a constitutional violation*." (App. 18 (latter emphasis added).)

Applying this framework, the district court ruled that "even if Hanlon and French were no longer physically engaged when the facial strikes were delivered or the Taser were used," they could be found liable as integral participants in the County officers' excessive force. (App. 20-21.) The court also found factual disputes as to whether the Phoenix officers' use of a wristlock and attempted chokehold were excessive force. (App. 20.)

The district court denied summary judgment to both officers, reasoning:

> If Plaintiffs' version of the facts prevails at trial, there is a reasonable likelihood that neither Hanlon nor French would be entitled to qualified immunity. *See Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003); *Felix v. McCarthy*, 939 F.2d 699, 701-02 (9th Cir. 1991) (the law of this circuit as of 1985 put reasonable officers on notice that an "unprovoked and unjustified attack by a prison guard" violated clearly established constitutional rights).

(App. 26-27.)

C. Ninth Circuit Opinion.

The Ninth Circuit affirmed in part and reversed in part. (App. 8.) Although the court agreed that Officer French could be found liable for excessive force either as an individual or integral participant, it implicitly rejected that Officer Hanlon could be liable for

excessive force based on his individual conduct. (App. 4, 6.) The Ninth Circuit nonetheless ruled that, under the integral participant doctrine, Officer Hanlon could be liable for the unexpected excessive force used by the other officers *after* he disengaged:

> We cannot say that the district court erred in applying the integral participation doctrine to Officer Hanlon for his wrist lock of Atencio, because his wrist lock was instrumental in controlling Atencio, which allowed the other officers to commit the excessive force against him. *See Blankenhorn* [*v. City of Orange*], 485 F.3d [463] at 481 n.12 [(9th Cir. 2007)] (holding that officer was liable as an integral participant for his help in handcuffing plaintiff because it "was instrumental in the officers' gaining control of [him], which culminated in" excessive force).

(App. 6.)[3]

The Ninth Circuit also affirmed the denial of qualified immunity to Officers Hanlon and French, this time relying solely on *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003). (App. 4-5.) Even though neither Phoenix officer participated in tasering or striking Atencio, the court concluded that "*Lolli* should have

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[3] The Ninth Circuit did not separately explain why the integral participant doctrine should apply to Officer French. It simply affirmed without comment the district court's ruling that "there is a genuine factual dispute as to whether . . . [Officer French was an] integral participant[] in the use of excessive force." (App. 8, 20-21.)

put a reasonable official on notice that he was prohibited from the type and amount of force used on Atencio, including multiple strikes to the face, repeated tasering, and a knee strike, when Atencio was at most passively resisting, he posed no threat to officers, and he was already being physically restrained by several officers." (App. 5.)

REASONS TO GRANT THE PETITION

The court of appeals' interpretation of the "integral participant" doctrine exposes police officers who use only *reasonable* force to liability under 42 U.S.C. § 1983. The ruling conflicts with decisions of this Court and the courts of appeals, and defeats qualified immunity's fundamental purpose. This Court's review is warranted.

1. This case is worthy of this Court's review because the court of appeals' broad formulation of the integral participant doctrine deletes the culpability and proximate causation requirements from 42 U.S.C. § 1983 claims. Under the Ninth Circuit's integral participant doctrine, an officer may be liable as a participant in someone else's unconstitutional conduct *regardless of whether the officer knew or should have known the conduct would occur.* Further, like its "provocation rule" (recently reviewed by this Court in *County of Los Angeles v. Mendez*, No. 16-369 (decided May 30, 2017)), the Ninth Circuit's integral participant doctrine imposes liability on police officers for

reasonable uses of force without requiring proximate cause.

The Court has not addressed whether § 1983 liability can reach police officers who do not personally participate in wrongful conduct and who neither know nor reasonably should know that their conduct would cause someone else to subject a person to constitutional injury. Thus, the Ninth Circuit's expansion of § 1983 liability through its integral participant doctrine warrants the Court's review.

2. Review is also warranted because the Ninth Circuit continues to misapply the "clearly established" law analysis for qualified immunity. Less than three years ago, this Court in *Carroll v. Carman*, 135 S. Ct. 384 (2014), held that a lone, factually-distinguishable circuit case does not clearly establish federal law. Despite the Court's unequivocal ruling, the court of appeals repeated that exact mistake here. The Court should review the Ninth Circuit's denial of qualified immunity to maintain consistency in the law.

I. The Ninth Circuit's integral participant doctrine makes police officers vicariously liable for others' spontaneous acts of excessive force, in contravention of *Monell v. Department of Social Services*.

This Court should review the Ninth Circuit's integral participant doctrine because it allows an end-run around the prohibition against vicarious § 1983

liability, substitutes "but-for" causation for proximate causation, and undermines the purpose of qualified immunity.

Under 42 U.S.C. § 1983, a police officer who "subjects [a person], or causes [a person] to be subjected" to a deprivation of a constitutional right is liable for his or her conduct. This Court has repeatedly rejected the argument that the "causes to be subjected" phrase in § 1983 permits vicarious liability. *See, e.g.*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978) (holding that a municipality can be liable under § 1983 when executing a government policy or custom inflicts the injury, but not merely because the municipality's employees or agents inflict the injury). Thus, liability under § 1983 is personal – officials are liable only for their own actions. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.").

Absent vicarious liability, a plaintiff must demonstrate that each defendant acted with the requisite degree of culpability, and that the defendant's individual action proximately caused the constitutional injury. *See, e.g.*, *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997) ("a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights"). As this Court has

emphasized, culpability and causation guard against vicarious § 1983 liability:

> Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights.

Id. at 415.

The Ninth Circuit's integral participant doctrine contravenes *Monell*'s rule against vicarious liability because it allows a court to find an officer personally responsible for others' unconstitutional conduct under § 1983 without regard to whether the individual officer acted culpably, or whether the officer's acts proximately caused the injury.

A. The integral participant doctrine permits a court to impose § 1983 liability without regard to culpability.

In this case, the Ninth Circuit used the integral participant doctrine to hold Officers Hanlon and French personally responsible for the County officers' spontaneous acts of force without considering whether the Phoenix officers acted culpably.

In a § 1983 suit, a plaintiff must prove that the defendant acted with the state of mind required by the

underlying violation. *E.g.*, *Brown*, 520 U.S. at 405. Here, respondents alleged that Officers Hanlon and French violated Atencio's Fourth and Fourteenth Amendment rights by using excessive force against him. Accordingly, respondents must show that "with respect to the bringing about of certain physical consequences in the world," the Phoenix officers acted with "a purposeful, a knowing, or possibly a reckless state of mind." *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015) (accepting for purposes of Fourteenth Amendment excessive force claim that a defendant must act deliberately to bring about the physical events taking place).

The Ninth Circuit's integral participant analysis fails to meet the "purposeful, [] knowing, or possibly [] reckless" culpability standard for officers accused of using excessive force. *Cf. id*. Instead, the Ninth Circuit's approach to participatory liability eliminates *any* state-of-mind requirement with respect to allegedly unconstitutional physical acts.

The court of appeals concluded that even though Officer Hanlon did not personally use excessive force, he could be liable as an integral participant in the other officers' excessive force, "including multiple strikes to the face, repeated tasering, and a knee strike." (App. 5.) Although Officer Hanlon knowingly and purposefully applied a wristlock, there is *no* evidence suggesting he knew or intended that the County officers would strike or taser Atencio as a consequence. In fact, the court of appeals reversed the denial of qualified immunity to Officer Hanlon on respondents'

substantive due process claim for loss of familial association because Hanlon "*could not have reasonably foreseen* that his use of a wrist lock would cause or would trigger events ultimately leading to Atencio's death." (App. 7.) Likewise, there is no suggestion that Officer French attempted a chokehold on Atencio knowing or intending that his act would allow the County officers to strike and taser Atencio.

The Ninth Circuit's no-fault approach to integral participant liability cannot be reconciled with Supreme Court precedent. The Court has rejected attempts to extend § 1983 liability to negligent or unintentional acts. *See, e.g.*, *Brown*, 520 U.S. at 407 ("A showing of simple or even heightened negligence will not suffice."); *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding negligent acts are not actionable under the due process clause). The lowest culpability threshold for § 1983 liability allowed by the Court thus far is "deliberate indifference," i.e., "proof that a municipal actor disregarded *a known or obvious consequence of his action.*" *Brown*, 520 U.S. at 410 (emphasis added). The deliberate indifference standard applies to failure-to-train claims against a supervisor or municipality under the "causes to be subjected" prong of § 1983. *See id.*; *Connick v. Thompson*, 563 U.S. 51, 59, 70-71 (2011) (reversing judgment on failure-to-train claim where plaintiff did not prove that the district attorney "was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training" for prosecutors).

If under this Court's precedent a supervisor or municipality must, at a minimum, consciously disregard a constitutional violation to be liable under § 1983 for the conduct of others, *see Connick*, 563 U.S. at 61-62, then a police officer cannot be liable as an integral participant in conduct he neither directly participated in nor had reason to know about or anticipate. To conclude otherwise subjects officers to personal liability under § 1983 for mere negligent conduct, a culpability standard this Court has rejected. *See, e.g.*, *Brown*, 520 U.S. at 407. More than that, under the Ninth Circuit's reasoning, even a police officer who did *nothing* wrong is exposed to § 1983 liability.

The Ninth Circuit's expansive view of integral participation also conflicts with the Fifth Circuit cases that developed the integral participant theory in the first place. The Ninth Circuit drew its integral participant doctrine from the Fifth Circuit's decisions in *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989) and *James v. Sadler*, 909 F.2d 834 (5th Cir. 1990). *See Chuman v. Wright*, 76 F.3d 292, 294-95 (9th Cir. 1996). The question in both of those cases was whether an officer was exempt from liability for an unlawful Fourth Amendment search as a bystander, or was liable as "a full, active participant." *Melear*, 862 F.2d at 1186; *James*, 908 F.2d at 837. But even in those cases, the Fifth Circuit required *knowing* participation in the unconstitutional conduct of others.

For example, in *Melear* the Fifth Circuit held that an officer who (1) went to the door with other officers, (2) had knowledge of the plan to enter and search

apartments without a warrant or probable cause, and (3) stood armed outside while the other officers conducted the illegal searches, was liable as an integral participant and not a mere bystander. 862 F.2d at 1186; *cf. Creamer v. Porter*, 754 F.2d 1311, 1316-17 (5th Cir. 1985) (finding that a police officer's "limited participation and knowledge as to the extent of the search" made him a bystander rather than a participant); *see also Swagler v. Sheridan*, No. RDB-08-2289, 2011 WL 2635937, at *6 n.15 (D. Md. July 5, 2011) (noting that a careful reading of integral participant cases "suggests that the back-up officer must know of the violation before liability is established").

Other jurisdictions have rejected the integral participant theory outright, recognizing that the doctrine invites overextension. *See Aquisto v. Danbert*, 165 F.3d 26, 1998 WL 661145, at *4 (6th Cir. 1998) (unpublished) (rejecting *Melear* and *James* as not binding on courts in the Sixth Circuit); *Swagler*, 2011 WL 2635937, at *6 & n.15 (same, in Fourth Circuit); *Howard v. Schoberle*, 907 F. Supp. 671, 682 n.6 (S.D.N.Y. 1995) (same, in Second Circuit). Moreover, in the related contexts of § 1983 supervisory and bystander liability, a majority of circuit courts have adopted standards of fault in direct conflict with the Ninth Circuit's "no-knowledge" formulation of the integral participant doctrine.

For example, the Third, Sixth, and Tenth Circuits do not impose § 1983 liability without evidence that an individual supervisor knowingly caused, procured, or

allowed a subordinate's unconstitutional conduct. Specifically, the Third and Tenth Circuits require "allegations of personal direction or of *actual knowledge and acquiescence*" in the subordinate's unconstitutional acts. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) (emphasis added) (citation omitted); *accord Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992). The Sixth Circuit demands, at a minimum, a plaintiff to "show that a supervisory official at least implicitly authorized, approved or *knowingly acquiesced* in the unconstitutional conduct of the offending subordinate." *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984) (emphasis added).

Similarly, the Second and Fourth Circuits hold bystander officers responsible under § 1983 for others' unconstitutional conduct "when an officer observes or has reason to know that a 'constitutional violation [is being] committed' by other officers and possesses 'a realistic opportunity to intervene to prevent the harm from occurring.'" *Randall v. Prince George's Cty.*, 302 F.3d 188, 203-04 (4th Cir. 2002) (quoting *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994)). The bystander liability standards in the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits are in accord. *See, e.g.*, *Harris v. Chanclor*, 537 F.2d 203, 206 (5th Cir. 1976); *Bruner v. Dunaway*, 684 F.2d 422, 425-26 (6th Cir. 1982); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *Putman v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981); *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996); *Riley v. Newton*, 94 F.3d 632, 635 (11th Cir. 1996).

The Ninth Circuit itself requires *knowing* participation or failure to intervene to hold a supervisor or bystander liable for others' unconstitutional acts under § 1983. *See Cunningham v. Gates*, 229 F.3d 1271, 1289-92 (9th Cir. 2000). Indeed, in this case the Ninth Circuit reversed the district court's denial of qualified immunity to a County supervisor on supervisory and bystander liability under § 1983 "because, even though he may have seen Hatton deliver the knee strike, there is no evidence that Sergeant Scheffner *directed or otherwise knew* that the solitary knee strike would occur, physically participated in the knee strike, or had realistic opportunity to stop the knee strike from happening." (App. 6-7 (emphasis added).)[4]

Although this Court has addressed the culpability required for municipal and supervisory liability under § 1983, it has not considered the level of culpability required for police officers at the scene of an incident to be liable under § 1983 for the conduct of others. This is an important question of federal law that has significant practical consequences for police officers on the ground. (*See infra* Section I.C.) The Court's review is warranted.

[4] Respondents did not allege a failure-to-intervene theory against the Phoenix officers. (*See* App. 16-25.)

B. The integral participant doctrine improperly replaces proximate causation with "but-for" causation.

The Ninth Circuit's construction of the integral participant doctrine also improperly expands personal liability under § 1983 by replacing proximate causation with "but-for" causation.

Constitutional torts under § 1983 incorporate standard principles of tort liability, including proximate cause. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Section 1983 is "read against the background of tort liability that makes a man responsible for the natural consequences of his actions"), *overruled on other grounds by Monell*, 436 U.S. 658. Proximate cause is often described "in terms of foreseeability or the scope of the risk created by the predicate conduct." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014). Accordingly, an officer is personally liable under § 1983 only for those constitutional injuries that were within the scope of risk created by the officer's individual actions.

Rather than examining whether the County officers' punches, tasering, and knee strike were within the scope of risk created by Officer Hanlon and Officer French's individual conduct, the court of appeals equated "integral participation" with but-for cause. For example, the court reasoned that Officer Hanlon was an integral participant in the County officers' alleged excessive force because his use of a wristlock "allowed" the force to occur:

> We cannot say that the district court erred in applying the integral participation doctrine to Officer Hanlon for his wrist lock of Atencio, because his wrist lock was instrumental in controlling Atencio, which allowed the other officers to commit the excessive force against him.

(App. 6.)

Under the Ninth Circuit's reasoning, an officer is personally liable as an integral participant whenever the officer's individual action is a "but-for" cause of a constitutional injury. The integral participant doctrine thus writes proximate cause out of § 1983 liability entirely, in contravention of settled Supreme Court precedent. *See, e.g.*, *Monroe*, 365 U.S. at 187; *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976) (rejecting § 1983 claim against supervisory officers where the plaintiffs failed to show the supervisors were directly responsible for the unconstitutional acts of individual officers).

This is not the first time the Ninth Circuit has used the integral participant doctrine to circumvent § 1983's proximate cause requirement. In *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007), the Ninth Circuit ruled that "gang-tackling" and using hobble restraints on an arrestee constituted excessive force. *Id.* at 478-80. The court applied the integral participant doctrine to an officer who arrived after the gang-tackling and handcuffed the arrestee before someone else applied the hobbles, even though the handcuffing officer did not know or have reason to know that

the hobbles would be used. *Id.* at 469 & n.3. In a footnote, the court stated:

> Kayano's help in handcuffing the prone Blankenhorn was, of course, meaningful participation in the arrest. It is true that Blankenhorn does not claim Kayano used excessive force in handcuffing him, and Ross, not Kayano, placed the ripp-hobbles on Blankenhorn's wrists and ankles. But Kayano's own declaration indicates that his help in handcuffing Blankenhorn was instrumental in the officers' gaining control of Blankenhorn, which culminated in Ross's application of hobble restraints. Therefore, Kayano's participation was integral to the use of the hobble restraints.

Id. at 481 n.12. *Blankenhorn* thus applied a "but-for" theory of causation – but for the officer handcuffing the arrestee, the other officers would not have had control and been able to place the hobble restraints on him. The Ninth Circuit applied the same impermissible approach here, treating the Phoenix officers' wristlock and chokehold as the "but-for" cause of the other officers' punches, tasering, and knee strike.[5]

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[5] In fact, Officer Hanlon and Officer French's actions were not even the "but-for" cause of the constitutional injury here. The court concluded that the officers violated Atencio's rights by punching, tasering and using a knee strike on him *while he was being physically restrained by multiple officers*. Unlike the officer in *Blankenhorn*, however, Hanlon and French never managed to restrain Atencio, nor were they trying to restrain him at the time County officers used force. (JER818-20 (video).)

Whether an individual defendant can be liable as an integral participant under § 1983 without a separate showing of proximate cause is an important federal question. This term, the Court addressed similar § 1983 proximate cause issues before it in *County of Los Angeles v. Mendez*, No. 16-369, 581 U.S. ___ (May 30, 2017), a case involving the Ninth Circuit's provocation rule.

In *Mendez*, this Court rejected the Ninth Circuit's provocation rule as an improper expansion of § 1983 liability under the Fourth Amendment. Slip op. at 6 ("The provocation rule . . . is incompatible with our excessive force jurisprudence."). The Court highlighted that the provocation rule failed to "incorporate the familiar proximate cause standard." *Id.*, slip op. at 9. Instead, the Ninth Circuit used "a vague causal standard," leaving unclear what standard the court of appeals was actually applying. *Id.*

Like the provocation rule, the Ninth Circuit's integral participant doctrine "does not incorporate the familiar proximate cause standard" – indeed, it does not incorporate any causal standard at all. The Ninth Circuit's application of the integral participant doctrine warrants review for the same reasons the Court granted certiorari in *Mendez*.

C. The integral participant doctrine turns qualified immunity into a game of chance.

Police officers are entitled to qualified immunity from suit under § 1983 for alleged constitutional violations unless the officer's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "[Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citation omitted). It is meant to protect "all but the plainly incompetent or those who knowingly violate the law." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (citation omitted.) The integral participant doctrine, however, turns qualified immunity inside out.

Under the Ninth Circuit's reasoning, a police officer can be subjected to suit without notice, a showing of direct participation, or evidence of culpability or causation. Even a competent police officer who makes every effort to behave reasonably can be sued for acts the officer did not commit, anticipate, or control. In effect, the doctrine turns qualified immunity into a game of luck – no matter how reasonably an officer behaves, he may face suit if he is near or involved in a series of actions with other officers who cause a constitutional injury. *Cf. Mendez*, 581 U.S. ___, slip op. at 6 ("The [provocation] rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.").

The doctrine puts one officer's fate into the hands of other officers – including officers from a different law enforcement agency. A dose of common sense shows that a model officer who merely secures an arrestee (e.g., through handcuffs or a wristlock) and turns the arrestee over to a second officer should not be left to hope that the second officer is similarly well-behaved.

Moreover, although this Court has stressed the need to provide police with clear guidance, *see, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001), the integral participant doctrine creates enormous uncertainty. At best, this uncertainty will make police officers more hesitant to act. At worst, it will encourage otherwise reasonable officers to abandon reasonable behavior when they believe another officer's unreasonable behavior has exposed them to liability regardless.

Given the serious practical consequences of allowing the integral participant doctrine to stand and "the importance of qualified immunity to society as a whole," *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (citation omitted), this Court should grant review.

II. The Ninth Circuit's decision conflicts with this Court's directives about the meaning of clearly established law for purposes of qualified immunity.

The Ninth Circuit's opinion also should be set aside because it disregards this Court's explicit instructions on what amounts to "clearly established" law for purposes of qualified immunity.

To be "clearly established," the law must be so clear "that every reasonable official would [have understood] that what he is doing violates that right." *Riechle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (citation omitted). "When properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. [This Court does] not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Taylor*, 135 S. Ct. at 2044 (citations omitted).

The question cannot be framed as a broad proposition of law, however. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (reiterating "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" (citation omitted)). The correct inquiry is "whether the violative nature of *particular* conduct is clearly established." *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (emphasis added).

In this case, the court of appeals failed to tailor its analysis to the particular conduct to the Phoenix officers. As a result, the court improperly concluded that a

single, factually-distinguishable Ninth Circuit case placed the constitutional question beyond debate.

The court of appeals relied exclusively on *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003) to deny the Phoenix officers qualified immunity, reasoning that *Lolli* put "a reasonable official on notice that he was prohibited from the type and amount of force used against Atencio, including multiple strikes to the face, repeated tasering, and a knee strike, when Atencio was at most passively resisting, he posed no threat to the officers, and he was already being physically restrained by several officers." (App. 5.)

The Ninth Circuit's analysis does not meet this Court's clear standards for clearly established law. The Court has not explicitly decided whether controlling circuit precedent, standing alone, can constitute clearly established law for qualified immunity purposes. *See, e.g.*, *Riechle*, 132 S. Ct. at 2094 ("Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here."). But even if a lone circuit court decision were sufficient precedent under these circumstances, *Lolli* does not address the *particular* conduct of the Phoenix officers.

In *Lolli*, officers arrested the plaintiff for an unpaid parking ticket. 351 F.3d at 412. At the jail, Lolli informed the nurse that he was diabetic and needed to eat as soon as possible. *Id.* Four hours later, Lolli

respectfully asked a deputy who entered the holding cell to find out what had happened to the snack the nurse had promised. *Id.* "[T]he deputy thereupon grabbed [Lolli] and pulled him to the ground and then several deputies kicked him, punched him, hit him with batons or similar objects, twisted his arms and legs, poked his face, knuckled his ear and pepper sprayed him." *Id.* The deputies continued beating Lolli even after his hands were cuffed behind his back. *Id.* The abuse carried over into the medical observation cell, where "deputies bent his spine and pounded his head on the ground." *Id.*

The Ninth Circuit reasoned that *Lolli* put the officers on notice that they could not repeatedly taser, punch, and use a knee strike on Atencio when he was physically restrained by other officers, posed no threat, and was "passively resisting." (App. 5.) But *Officers Hanlon and French never tasered, punched, or used a knee strike on Atencio.* Rather, the Phoenix officers attempted to control Atencio with a wristlock and a brief chokehold *before* other officers had him physically restrained. And by the time the conduct described as violative by the court occurred, both Phoenix officers had already disengaged.

The Ninth Circuit nevertheless lumped the Phoenix officers in with the County officers by including a general reference to "the type and amount of force used" against Atencio. That catch-all category is not sufficiently specific to put the Phoenix officers on notice of the violative nature of their *particular* conduct,

however. This Court has emphasized the particular importance of specificity in the Fourth Amendment context, where "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted).

At best, *Lolli* clearly establishes a pre-trial detainee's right to be free from an "unprovoked and unjustified attack." (App. 26-27.) But nothing in *Lolli* puts a reasonable reader on notice that using a wristlock or carotid hold on a resisting pre-trial detainee violated the law.[6] Nor did *Lolli* put Officer Hanlon and French on notice that their conduct in helping to restrain Atencio would make them indirectly liable for the force County officers used *after* the Phoenix officers were no longer restraining him.

Just three years ago, this Court reversed the Third Circuit for denying qualified immunity to a police officer based on a single circuit case, just like the Ninth Circuit did here. *See Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam). In *Carroll*, the Court found that even relatively minor factual differences meant that the lone appellate decision relied on by the Third Circuit failed to place the constitutional issue "beyond debate." *Id.* at 350-52. Despite the Court's unequivocal ruling in *Carroll*, the Ninth Circuit used the same

[6] Indeed, no party or court in this case cited any decision addressing carotid holds.

flawed approach to assess qualified immunity in this case.

In short, the Ninth Circuit failed to identify a case, much less a robust consensus of cases, where an officer acting under similar circumstances violated the law. *Cf. White v. Pauly*, 137 S. Ct. 548, 552 (2017) (reversing where the court of appeals "failed to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment"). Without clear precedent, the Phoenix officers cannot fairly be said to "know" that their conduct was unlawful. Thus, even if the Phoenix officers' conduct violated the law, they are entitled to qualified immunity because they had no "fair and clear warning of what the Constitution require[d]" in these circumstances. *Sheehan*, 135 S. Ct. at 1778 (citation omitted).

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

MARY R. O'GRADY
Counsel of Record
ERIC M. FRASER
HAYLEIGH S. CRAWFORD
OSBORN MALEDON, P.A.
2929 N. Central Ave., Suite 2100
Phoenix, AZ 85012
602-640-9000
mogrady@omlaw.com
efraser@omlaw.com
hcrawford@omlaw.com

BRAD HOLM
SHARON HAYNES
CITY OF PHOENIX
LAW DEPARTMENT
200 W. Washington St., Suite 1300
Phoenix, AZ 85003
602-262-6761
brad.holm@phoenix.gov
sharon.haynes@phoenix.gov

Attorneys for Petitioners
Patrick Hanlon and
Nicholas French

June 5, 2017

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al., Plaintiffs-Appellees, v. JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al., Defendants-Appellants, and MARICOPA, COUNTY OF, a public entity; et al., Defendants.	No. 15-15451 D.C. No. 2:12-cv-02376-PGR MEMORANDUM* (Filed Dec. 30, 2016)

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al., Plaintiffs-Appellees, v. JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al., Defendants, and PHOENIX, CITY OF, a public entity; et al., Defendants-Appellants.	Nos. 15-15456 D.C. No. 2:12-cv-02376-PGR

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al., Plaintiffs-Appellees, v. JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al., Defendants, IAN CRANMER, husband; et al., Defendants, and ANTHONY HATTON, husband Defendant-Appellant.	Nos. 15-15459 D.C. No. 2:12-cv-02376-PGR

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted November 17, 2016
San Francisco, California

Before: MELLOY,** CLIFTON, and WATFORD, Circuit Judges.

Defendants-Appellants appeal from the district court's denial of summary judgment based on qualified immunity. We have jurisdiction under 28 U.S.C. § 1291.[1] We affirm in part, reverse in part, and remand.

We review de novo an order denying summary judgment based on qualified immunity. *Glenn v. Wash. Cty.*, 673 F.3d 864, 870 (9th Cir. 2011). A public official is entitled to qualified immunity if (1) the disputed facts taken in the light most favorable to the party asserting the injury do not show that the official's conduct violated a constitutional right, or (2) the constitutional right was not clearly established at the time the official acted. *See, e.g.*, *CarePartners, LLC v. Lashway*, 545 F.3d 867, 876 (9th Cir. 2008).

** The Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit, sitting by designation.

[1] Plaintiffs-Appellees' ("Atencio") motion to dismiss for lack of jurisdiction is denied because we have jurisdiction to consider "whether the defendant[s] would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff[s'] favor." *George v. Morris*, 736 F.3d 829, 836 (9th Cir. 2013) (brackets added) (quoting *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012)).

Viewing the evidence in the light most favorable to Atencio, including the available video evidence, several of Defendants' acts could be found by a jury to constitute excessive force. Officer French appeared to apply what might be perceived as a carotid hold on Atencio when he was already physically subdued by several officers and arguably posed no immediate threat. When Atencio was being held down by several officers in a "dog pile," there was evidence that Sergeant Weiers tasered Atencio three times and Officer Hatton struck Atencio repeatedly with a closed fist before Atencio was handcuffed and taken to a safe cell. There, Officer Hatton delivered a knee strike to Atencio's upper body, and possibly his head, even though Atencio was handcuffed and being held in a prone position on the ground by several officers. Under these circumstances, a reasonable jury could conclude that some or all of those actions were objectively unreasonable. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Assuming these facts for the purpose of the second part of the qualified immunity test, there was clearly established precedent that would have made it sufficiently clear to reasonable officials that the acts here constituted excessive force. The circumstances here are not meaningfully different from those in *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003), in which this court held that the defendants were not entitled to summary judgment on an excessive force claim alleging that a group of officers took a pre-trial detainee to the ground without warning, then began to strike and pepper spray him even though he posed no

threat and was neither aggressive nor violent to the officers. *Id.* at 417. *Lolli* should have put a reasonable official on notice that he was prohibited from the type and amount of force used against Atencio, including multiple strikes to the face, repeated tasering, and a knee strike, when Atencio was at most passively resisting, he posed no threat to the officers, and he was already being physically restrained by several officers.

We recognize that a jury could credit the testimony of the officers and find that their use of force was permissible. However, because Atencio has shown that there exists a genuine dispute of material fact as to the reasonableness of their conduct, and because under one version of the facts, their conduct violated clearly established law, Officer French, Sergeant Weiers, and Officer Hatton are not entitled to summary judgment based on qualified immunity on the excessive force claim.

The district court denied qualified immunity to several other Defendants because there were genuine issues of material fact as to whether they were "integral participants" in these acts of excessive force. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007). In analyzing the various Defendants' integral participation, the district court properly examined each officer's conduct rather than employing a "team effort" approach that simply "lump[s] all the defendants together." *Jones v. Williams*, 297 F.3d 930, 936 (9th Cir. 2002). Contrary to what Defendants claim, the district court properly found that Officer Kaiser had no

involvement in the safe cell, but that there were genuine issues of material fact as to whether he was an integral participant in the linescan room events. The district court also properly determined that Officer Vazquez may have been an integral participant in the linescan room. Neither the video evidence nor Officer Vazquez's own affidavit resolved whether he entered the linescan room with enough time to participate in the tasering or the strikes.

We cannot say that the district court erred in applying the integral participation doctrine to Officer Hanlon for his wrist lock of Atencio, because his wrist lock was instrumental in controlling Atencio, which allowed the other officers to commit the excessive force against him. *See Blankenhorn*, 485 F.3d at 481 n.12 (holding that officer was liable as an integral participant for his help in handcuffing plaintiff because it "was instrumental in the officers' gaining control of [him], which culminated in" excessive force).

However, the district court erred in denying qualified immunity to Sergeant Scheffner for his role in Officer Hatton's knee strike of Atencio in the safe cell.

The district court concluded that genuine issues of material fact regarding his integral participation, supervisory liability, and the duty to intervene precluded summary judgment in his favor based on qualified immunity. We disagree. Sergeant Scheffner could not be liable as a matter of law under any of these theories because, even though he may have seen Hatton deliver the knee strike, there is no evidence that Sergeant

Scheffner directed or otherwise knew that the solitary knee strike would occur, physically participated in the knee strike, or had a realistic opportunity to stop the knee strike from happening. *See, e.g.*, *Cunningham v. Gates*, 229 F.3d 1271, 1289-92 (9th Cir. 2000) (discussing standards for supervisory liability and duty to intervene).

The district court also erred in denying qualified immunity to Officer Hanlon on Atencio's substantive due process claim for loss of familial association. "Official conduct that 'shocks the conscience' in depriving [family members] of that interest is cognizable as a violation of [substantive] due process." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). "In determining whether excessive force shocks the conscience, the court must first ask 'whether the circumstances are such that actual deliberation [by the officer] is practical.' Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Id.* The "deliberate indifference" standard is applicable because the circumstances appeared to permit actual deliberation by Officer Hanlon before he applied the wrist lock. However, it cannot be said that his use of the wrist lock showed his deliberate indifference to Atencio's death. Hanlon could not have reasonably foreseen that his use of a wrist lock would cause or would trigger events ultimately leading to Atencio's death.[2]

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[2] None of the other Defendants, apart from Officers Hanlon and French, appealed the denial of qualified immunity as to the substantive due process claim. Although the Defendants

We decline to exercise pendent jurisdiction over the district court's denial of summary judgment in favor of the Defendants regarding Atencio's state law claims because these issues are not "inextricably intertwined" with the qualified immunity issues properly raised on interlocutory appeal. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 960 (9th Cir. 2004). Whereas "qualified immunity is an immunity from suit rather than a mere defense to liability," *Jones v. County of Los Angeles*, 802 F.3d 990, 999 (9th Cir. 2015), the Arizona justification statutes raised by Defendants in their motion for summary judgment on the state law claims merely provide a potential defense when the merits are adjudicated, A.R.S. §§ 13-413 and 13-403(2).

We reverse the district court's denial of denial of summary judgment as to Defendant Scheffner for Atencio's excessive force claim based on qualified immunity. We also reverse the district court's denial of qualified immunity to Defendant Hanlon on Atencio's familial association claim under the Fourteenth Amendment. We affirm in all other respects.

Each party to bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

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attempted to incorporate each other's arguments by reference, Officers Hanlon's and French's arguments regarding the substantive due process claim were limited to their own conduct, so they do not apply to the other Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ernest Joseph Atencio, et al., Plaintiffs, v. Joseph M. Arpaio, et al., Defendants.	No. CV-12-02376-PHX-PGR **ORDER**

The Court has before it City Defendants' Motion for Summary Judgment (Doc. 299); Defendants Arpaio, Carrasco, Dominguez, Foster, Kaiser, Scheffner, Vazquez, and Weiers' Motion for Summary Judgment (Doc. 347); Hatton Defendants' Motion for Summary Judgment (Doc. 350); Defendants William McLean, Monica Scarpati, and Ian Cranmer's Motion for Partial Summary Judgment (Doc. 355); Plaintiffs' Motion for Partial Summary Judgment against Maricopa County (Doc. 358); Defendant Maricopa County's Motion to Strike Plaintiffs' Statement of Facts Applicable to All Defendants (Doc. 384); and City Defendants' Motion for Leave to File Under Seal Reply in Support of Motion to Strike Portions of Plaintiffs' Response (Doc. 388).[1]

[1] The Court finds that oral argument would not assist in resolving these matters and accordingly finds the pending motions suitable for decision without oral argument. *See* LRCiv 7.2(f); Fed.R.Civ.P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

A. Background[2]

On December 15, 2011, Marty Atencio first came into contact with law enforcement at a 7-Eleven store. Phoenix police officers had been dispatched there based on a report of a suspicious person in the parking lot. That person turned out to be Atencio. Upon interacting with Atencio, the officers noted that Atencio was acting erratically, would easily become distracted, and would speak of random and odd things, but concluded that the cause of his behavior was mental illness, not drugs or alcohol. The officers concluded that Atencio did not show signs of being a danger to himself or others, but was simply acting "goofy" and appeared to be off his medication. The officers told Atencio to go home, which he did.

A short time later, a woman called dispatch, reporting that Atencio was kicking at her apartment door and had also approached her and yelled at her, which scared her. The same officers that responded to the 7-Eleven store responded to the apartment complex. Upon coming into contact with Atencio, the officers noted that Atencio's demeanor had remained the same as it was previously, and was consistent with

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[2] For purposes of addressing the pending motions, the Court "draw[s] all reasonable inferences in favor of the non-moving party and, where disputed issues of material fact exist, assume[s] the version of the material facts asserted by the non-moving party to be correct." *Aloe Vera of Am., Inc. v. United States*, 699 F.3d 1153, 1165 (9th Cir. 2012).

someone experiencing mental health issues. He was arrested on misdemeanor assault charges and taken to Phoenix's Cactus Precinct.

Atencio was then transported to Maricopa County's Fourth Avenue Jail to be booked into custody. Atencio had difficulty getting into the transport vehicle due to what the officers concluded was mental illness. After approximately ten minutes of talking with Marty, the officers successfully got him into the vehicle and transported him to the Maricopa County Fourth Avenue Jail for booking. By this point, Atencio had been searched by officers at least three times without incident, and he was searched again without incident upon arriving at the Fourth Avenue Jail, including removing his shoes.

Upon arrival at the Fourth Avenue Jail, Atencio was turned over to Defendant Hanlon, a Phoenix City police officer who was in charge of processing Phoenix City detainees through the booking process for admission into the jail. During the initial screening process, Hanlon observed Atencio acting strangely and babbling incoherently, making "bizarre statements," "talking to peanut butter" as if it was a person present in the room, and offering to give his jacket to "peanut butter." (Doc. 343-1 at 98-99, 100, 101; Doc. 343-2 at 6.) Defendant French, a Phoenix City police officer, and Defendant Weiers, a Maricopa County deputy, also observed some of Atencio's behavior. French overheard Atencio's conversation regarding "peanut butter." (Doc. 343-2 at 14.) Weiers noted that Atencio "said a bunch of ridiculous stuff." (Doc. 343-2 at 26.)

Hanlon believed that Atencio "was in an altered state of some kind emotionally or mentally." (*Id.* at 101, 103.) Hanlon noticed that Atencio appeared unable to focus on questions that were asked of him, and that when Atencio responded to questions, he did not appear to be giving much thought to his answers. Hanlon also noticed that Atencio appeared to be confused and "inconsistent." (*Id.* at 103, 104, 105.) Another officer that observed Atencio during the screening process noted that Atencio did not appear to intentionally disobey officers' orders, but instead appeared merely to be confused and to not understand what was going on. (Doc. 343-2 at 9-10.)

Atencio was eventually seen by Defendant McLean, a nurse, who conducted a cursory evaluation of Atencio. (Doc. 343-2 at 36.) McLean determined that Atencio was alert, but did not clarify his orientation, meaning that he did not ask Atencio questions to determine whether Atencio knew what day it was or what time it was. (*Id.* at 36-37.) Atencio denied being suicidal, but McLean noted on the intake sheet that Atencio may be suicidal based on his understanding that Atencio had indicated he was suicidal earlier in the screening process. McLean asked Defendant Scarpati, a Mental Health Professional, to evaluate Antencio.

Scarpati observed Atencio for a period of forty-two seconds while standing behind him. (Doc. 343-2 at 78, Ex. N.) Scarpati asked Atencio what was going on, and whether he was suicidal, and he did not respond appropriately, instead talking in "word salad," and yelling

words "spark plug" and "fire truck." (Doc. 343-2 at 55-56.) Scarpati did not ask Atencio any questions about his social, legal, or criminal history, or whether he was having hallucinations, or had a plan to commit suicide. However, she recognized that Atencio was psychotic and "in crisis at the time," and may not have had the ability to be cooperative with her or with the officers. (Doc. 343-2 at 56, 58, 82.) Despite these observations, Scarpati did not inform any law enforcement officers of Atencio's mental state or that Atencio might not have the ability to cooperate with them because of his psychosis. (*Id.* at 63-64.)

After Scarpati's evaluation of Atencio, she and McLean consulted, and McLean gave the okay to admit Atencio into the jail and set in motion the process to have him placed in a safe cell.

After Atencio had his mug shot taken, Hanlon escorted him from a holding cell into the linescan room, accompanied by numerous officers. Once Atencio reached the linescan room, he was fingerprinted and his handcuffs were removed by Hanlon. Atencio was described as humorous and jovial, and had not displayed any violent or aggressive behavior towards anyone. (Doc. 343-1 at 91, 109-110; Doc. 343-2 at 20; Doc. 353-5 at 4; City Defendant's Ex. 16.) Hanlon did not believe Atencio was a threat to himself or to the other officers or he would not have removed Atencio's handcuffs. (Doc. 343-1 at 108.) Hanlon also did not feel time pressured to complete the booking process. (Doc. 343-1 at 108, 111-12.)

After Hanlon removed Atencio's handcuffs, he had an approximately thirty second back and forth conversation with Atencio regarding Atencio taking off his shoes so that they could be put through an x-ray machine. (Doc. 343-1 at 109.) Atencio removed one shoe, but did not immediately remove his other shoe, instead pointing at Hanlon and stating, "You can take my shoe off for me?" Atencio, who had a wall at his back and was facing a semi-circle of officers, then merely crossed his arms over his chest. (Doc. 343-1 at 90, 109; City Defendants' Ex. 16.) In response, Hanlon immediately grabbed Atencio by the wrist, and twisted Atencio's arm behind his back as the other officers, including French, immediately engaged. A struggle ensued, with Atencio standing but bent over by the officers and passively resisting. After approximately thirty-five seconds, French used what appears to be a choke hold or carotid hold on Atencio, and took Atencio to the ground with the assistance of the other officers. Numerous officers then held Atencio down on the ground in what has been characterized as a "dog pile." (City Defendant's Ex. 16.) While Atencio was being held down, one of the officers – Defendant Weiers – tased Atencio and another officer – Defendant Hatton – administered numerous strikes to Atencio's facial region. At no point was Atencio actively aggressive towards the officers, nor did Atencio display any violent or aggressive behavior towards anyone. (*See* Doc. 343-1 at 91, 109-110; Doc. 343-2 at 20; Doc. 353-5 at 4; City Defendant's Ex. 16.)

After Atencio was tased, the officers were able to get handcuffs back on him. Defendant Cranmer, a Physician Assistant, had been called to the scene. Cranmer merely asked Atencio, "Are you okay?" and looked at Atencio's eyes, but did not take Atencio's pulse or check any other vital signs. (Doc. 343-4 at 43.)

Atencio was then carried by officers into a safe cell. Once in the safe cell, Atencio was placed on the floor and numerous officers held him down in a "dog pile" while his clothes were removed. While the officers were removing Atencio's clothing, Hatton delivered a knee strike by dropping his full weight with his knee onto Atencio's back. (*Id.*) By the time the officers finished removing his clothes, Atencio appeared to be unconscious. However, no medical assessment of Atencio was completed and all personnel exited the safe cell, closing the door and leaving Atencio on the floor of the safe cell, naked and apparently unconscious. (Doc. 343-4 at 50, 51.) Both Cranmer and McLean observed Atencio through the window of the safe cell door, but neither of them entered the safe cell at that time. (Doc. 343-4 at 51.)

Several minutes later, Cranmer and a nurse were in a room with video monitoring of the safe cell. The nurse, who was watching Atencio on a monitor, said to Cranmer, "Ian, I don't think he's breathing." Cranmer responded, "Yeah he is. He's just intoxicated. He's okay. They tased him. He's alright." The nurse responded, "Um no, I don't think so. He's not breathing." (Doc. 343-4 at 47-48.) Cranmer then walked back to the safe cell. (*Id.* at 48-49.) When Cranmer reentered the safe cell,

Atencio was not breathing and did not have a pulse, and life-saving efforts began. A total of nine minutes had elapsed between the time Atencio was left in the safe cell and life-saving efforts were started. (*See* Doc. 343-3 at 50-51 (noting that at 0243 hours all personnel left the safe cell; that between 0243 hours and 0252 hours, Atencio "remained in the same position and made no movements except for an unspecified abdominal movement"; and at 0252 hours, law enforcement personnel reentered the safe cell and noticed Atencio "to be unresponsive, apneic and without pulse" at which point chest compressions were started).) These efforts were unsuccessful and Atencio ultimately died.

B. City Defendants' Motion for Summary Judgment (Doc. 299)

City Defendants argue that Plaintiffs have failed to present any evidence that Officers Hanlon or French violated Atencio's constitutional rights and that they are therefore entitled to summary judgment. (Doc. 299 at 4-5.) The Court disagrees and will deny the City Defendants' motion for summary judgment.

1. Standard to Apply

City Defendants first argue that there is a split in the circuits as to whether the Fourth or Fourteenth Amendment governs the use of force by the officers. However, the Ninth Circuit has already decided the issue, holding "that the Fourth Amendment sets the

'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (quoting *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996)). Under this standard, determining whether an officer's use of force was "reasonable" "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989). In making this determination, the factfinder must pay "careful attention to the facts and circumstances" of the particular case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Finally, although officers are not required to use the least intrusive amount of force possible, "the existence of less forceful options to achieve the governmental purpose is relevant" in determining whether the force used was reasonable. *Marquez v. City of Phoenix*, 693 F.3d 1167, 1174 (9th Cir. 2012).

The reasonableness of the force used against a pretrial detainee is based on the totality of the circumstances. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). Where multiple officers are involved in an alleged use of excessive force, a "team effort" approach that simply lumps all defendants together, rather than examining each individual officer's own conduct, is prohibited. *See Jones v. Williams*, 297 F.3d 930, 936

(9th Cir. 2002). On the other hand, an individual officer's conduct cannot be viewed in isolation from the conduct of other officers involved in the incident. *See Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004). Rather, the relevant inquiry is (1) whether *any* excessive force was used against the detainee and, if so, (2) whether the individual officer was either personally involved in, or was an "integral participant in," the use of that excessive force. *See Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996); *see also Jones*, 297 F.3d at 936. Further, "integral participation" does not "require that each officer's actions themselves rise to the level of a constitutional violation." *Boyd*, 374 F.3d at 780.

In the present case, if *any* excessive force was used against Atencio, liability could be imposed on any of the other officers that were either personally involved in, or were integral participants in, the use of that excessive force, even if that officer's conduct does not itself rise to the level of a constitutional violation. *See id.*; *Chuman*, 76 F.3d at 294.

2. Officer Hanlon's Escort of Atencio from holding cell to linescan room

Hanlon escorted Atencio from a holding cell to the linescan room of the jail. Hanlon contends that he used minimal and reasonable force in doing so, and that he merely had his hands on Atencio's shoulder and back during the escort.

City Defendants have submitted videos, which the Court has viewed, of Hanlon's escort of Atencio to the linescan room. City Defendants also have submitted Hanlon's deposition testimony, during which Hanlon testified that he escorted Atencio only by placing his hand on Atencio's upper back by his shoulders, and denies that he led Atencio by his arms. (*See* City Defendants' Ex. 10; Doc. 300-2 at 46.) City Defendants contend that the video clips they have submitted "clearly show[] that Officer Hanlon's two hands were on Marty's back and shoulders to guide him without once manipulating Marty's hands" and that Atencio "voluntarily bent and freely moved his cuffed hands between his front waist and a position on his left shoulder," and that any pain or discomfort caused by the manner in which Hanlon escorted Atencio is not actionable.

The evidence shows that during the escort to the linescan room, Atencio never became aggressive, nor did he resist. (Doc. 343-1 at 40.) Matthew Layman, who was present during the escort, states in his affidavit that the "guards" were escorting Atencio "by leading him with his hands and arms bent in what looked to be a very painful position"; that Atencio stated "Your making Tony angry, your making Tony angry," which Layman interpreted to be Atencio telling the guards that they were hurting him; and that at that point, Atencio looked right at Layman, like he was asking for help. (Doc. 343-3 at 10.)

Viewing the evidence in the light most favorable to Atencio, there is a genuine factual dispute regarding whether the escort of Atencio from the holding cell to

the linescan room involved an unreasonable use of force against Atencio.

3. Use of force by Hanlon and French in the linescan room

Genuine factual disputes also remain as to whether Hanlon or French used excessive force against Atencio. First, it is far from clear that Atencio's conduct would be construed by a reasonable officer at the scene as an act of defiance or resistance justifying the immediate use of force, particularly in light of evidence that the officers knew Atencio was having trouble following directions, was in a state of psychosis – whether it was mental psychosis or drug-related psychosis – and did not appear to be intentionally disobeying commands but rather was just very confused.

Second, Plaintiffs' expert, Ron Bruno, opined that the use of force by Hanlon in the linescan room was unreasonable. (*See* Doc. 300-3 at 78.) Third, the video shows French using what appears to be a choke hold/carotid hold on Atencio, and both Hanlon and French actively engaged in taking Atencio down to the ground and holding him down. (*Id.*) While Atencio was being held down, Hatton delivered strikes to Atencio's facial region, and Weiers used the Taser on Atencio, both of which Bruno opined to be unreasonable uses of force. (Doc. 300-3 at 78.) Finally, even if Hanlon and French were no longer physically engaged when the facial strikes were delivered or the Taser was used, there is a genuine factual dispute as to whether one or both of them were integral participants in the use of excessive

force. *See Boyd*, 374 F.3d at 780; *Chuman*, 76 F.3d at 294.

City Defendants' reliance on *Gibson*, 290 F.3d 1175, is misplaced. In that case, the officers came across psych meds when searching Gibson's car and suspected that Gibson had not been taking his medication. *Gibson*, 290 F.3d at 1182. Gibson, who suffered from manic-depressive disorder, was verbally aggressive both before and after being placed under arrest, and became physically combative immediately after being placed into the patrol car, "kicking the partition between the car's front and back seats." *Id.* Once they arrived at the jail, Gibson refused to get out of the patrol car and four officers pulled Gibson from the car and carried him into the jail's sally port. *Id.* Gibson was restrained with a waist chain, wrist chains, and leg irons, and, after being processed, placed into a cell. Twice during the night, Gibson slipped out of his waist chain. The first time, officers were able to enter his cell and replace the chain without difficulty. The second time, Gibson was repeatedly using the chain to hit the window in his cell's door, and the officer in charge decided Gibson should be further restrained and, as several deputies got ready to enter the cell, Gibson assumed a "fighting stance with his fists up and shouted obscenities at them." *Id.* Gibson was pepper sprayed in the face, then three officers entered the cell and held Gibson down while more officers came in to help. The officers dragged Gibson to the special watch cell and placed him onto the bench. *Id.* at 1182-83. As

Gibson was laying face down on the bench, he continued to struggle, he was "kicking and screaming and fighting and everything and yelling at us," and two officers climbed onto his back and legs, while the other officers helped restrain his arms and legs. *Id.* at 1183. Suddenly, Gibson did not have a pulse, and efforts to revive him failed. *Id.*

The Ninth Circuit affirmed the grant of summary judgment in favor of the officers in that case, holding that the officers' conduct was reasonable. *Id.* at 1198. The Court noted that, "[f]rom the moment Gibson arrived at the jail, he was struggling against the deputies, hurling invective, and generally behaving very strangely and violently." *Id.* There was no proof the officers on duty at the jail were aware that Gibson's behavior was connected to his mental illness, and thus the officers could not be held "accountable for having treated Gibson as a dangerous prisoner rather than a sick one." *Id.* Further, the "decision to enter Gibson's cell and restrain him" was reasonable because the officer in charge was concerned Gibson might shatter the window in his cell door, thereby placing himself and any officers entering the cell at risk of harm. *Id.* Finally, once the officers "began to restrain Gibson and move him to the special watch cell, he fought back vigorously." *Id.* "[T]he deputies' decisions under these difficult circumstances resulted in restraining Gibson no more forcefully than was reasonably necessary." *Id.*

In contrast to the situation in *Gibson*, here, viewed in the light most favorable to Plaintiffs, Atencio was not being combative, violent, or threatening; he did not

display any violent or aggressive behavior towards anyone; and he did not punch, strike, bite, spit, or kick at anyone. Although he was acting oddly, for instance talking to "peanut butter" as if it was a person, and talking in "word salad," his overall demeanor was described as "humorous," "jovial," and non-aggressive. (Doc. 343-1 at 86-87; Doc. 343-2 at 8.) When he did not obey an officer's orders to do something, this disobedience did not appear to be intentional, but instead appeared to be because he was confused, and the officers were aware that Atencio was in some form of psychotic state. (Doc. 343-2 at 69.) Even when Atencio failed to take his second shoe off in the linescan room, he merely said to Hanlon, "You can take my shoe off for me?" and pointed at Hanlon, then merely crossed his arms over his chest.

City Defendant's reliance on *Forrest v. Prine*, 620 F.3d 739 is similarly misplaced. Forrest was uncooperative from the beginning of his encounter with law enforcement. He struck an officer in the face, and the officers deployed a taser several times. *Id.* at 741. After reaching the jail, he was escorted to a holding cell for a strip search. Forrest removed most of his clothing, but refused to remove his underwear. *Id.* An officer warned Forrest that if he did not comply with the strip search commands, the officer would use the taser on him. *Id.* Forrest called the officers "faggots" and used other expletives. He eventually removed his underwear but would not comply with the rest of the officer's strip search commands. *Id.* Forrest shouted obscenities and with fists clenched, began pacing back and forth

while facing the officer, but remained seven to ten feet away from the officer. The officer repeatedly told Forrest that if he did not comply with the strip search commands, the taser would be used on him. The officer did eventually deploy the taser, which, although aimed at either Forrest's upper back or torso area, ended up striking Forrest in the face and arm due to Forrest's sudden movement. *Id.* at 742.

The Seventh Circuit held that the use of force by the officer was reasonable as a matter of law. The officer knew that Forrest had attacked another officer earlier in the evening, and that the prior attack had necessitated the use of a taser. *Id.* at 745. In addition, Forrest was a relatively large man in an enclosed area that was relatively small, and was pacing the cell, clenching his fists, and yelling obscenities. *Id.* "Forrest was not merely 'slow to comply with an order'; his conduct created a situation where the officers were 'faced with aggression, disruption, [and] physical treat.'" *Id.* "Clearly Mr. Forrest posed an immediate threat to safety and order within the jail" and thus, the use of the taser "constituted a permissible use of force." *Id.*

In the present case, in contrast to the situation in *Forrest*, Atencio was not acting aggressively. Instead, Atencio's response to Hanlon could be reasonably seen as merely slow compliance, the result of confusion or, at most, passive resistance. A reasonable jury could conclude that the use of force under these circumstances was unreasonable.

Finally, *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), does not assist City Defendants because, in contrast to *Billington*, here there was no violent response to which the officers were responding. *See id.* at 1190 (holding that where officer's negligent act provokes a violent response, "that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation").

Because genuine factual disputes remain on whether Hanlon and French used excessive force in the linescan room, summary judgment on this issue will be denied.

4. Punitive Damages

City Defendants contend that there is no basis for Plaintiffs' claim for punitive damages because there is no evidence either officer acted with an evil motive or intent, or with reckless or callous indifference to Atencio's constitutional rights. In support of this argument, City Defendants focus on the individual conduct of each of the officers. As discussed above, there is a genuine factual dispute as to whether one or both of the City officers individually engaged in, or were integral participants in, the use of excessive force. *See Boyd*, 374 F.3d at 780; *Chuman*, 76 F.3d at 294. A "jury could certainly infer that there was 'reckless or callous indifference' " based upon evidence that excessive force was used against Atencio. *Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir. 1991), *overruled on other grounds, Davis v. City and County of San Francisco*,

976 F.2d 1536, 1556 (9th Cir. 1992). Moreover, it is the Court's policy, when a trial must be held, to resolve the issue of the propriety of punitive damages through the resolution of objections to jury instructions and/or through the resolution of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Therefore, the Court will deny summary judgment on the issue of punitive damages.

5. Qualified Immunity

City Defendants contend that Hanlon and French are entitled to qualified immunity because "virtually every case supported their limited use of force in attempting to coerce the defiant and resisting Atencio to complete the booking process by removing his shoes." However, as discussed above, there are genuine disputes of fact regarding whether Hanlon and French used excessive force against Atencio, either individually or as integral participants. The determination of whether Hanlon and French "may be said to have made a 'reasonable mistake' of fact or law [will] depend on the jury's resolution of these disputed facts and the inferences it draws therefrom." *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002). If Plaintiffs' version of the facts prevails at trial, there is a reasonable likelihood that neither Hanlon nor French would be entitled to qualified immunity. *See Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003); *Felix v. McCarthy*, 939 F.2d 699, 701-02 (9th Cir. 1991) (the law of this circuit as of 1985 put reasonable officers on notice that an "unprovoked and unjustified attack by a

prison guard" violated clearly established constitutional rights). Hanlon and French are not, therefore, entitled to summary judgment on the question of qualified immunity.

C. Defendants Arpaio, Carrasco, Dominguez, Foster, Kaiser, Scheffner, Vazquez, and Weiers' Motion for Summary Judgment (Doc. 347)

1. Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers

Defendants Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers (as to Weiers participation in the "dog pile" and use of "soft empty hands" techniques) contend that they did not use unreasonable force on Atencio, and that they are therefore entitled to summary judgment. In support of their argument, they point only to their individual conduct, contending that the conduct in which they individually engaged was not unreasonable.

Even assuming that their conduct, when looked at individually, was not unreasonable, these officers are not entitled to summary judgment. While these officers were holding Atencio down in the linescan room, Hatton delivered strikes to Atencio's facial region, and Weiers used the Taser on Atencio, both of which Plaintiffs' expert opined to be unreasonable uses of force. Further, while these officers (except Kaiser and Weiers) held Atencio down in the safe cell, Hatton delivered a knee strike to Atencio, which Plaintiffs' expert opined to be an unreasonable use of force. There is a genuine factual dispute as to whether these officers

were integral participants in the use of excessive force in the linescan room and/or the safe cell, as well as whether these officers violated a duty to intervene to prevent the use of excessive force. *See Estate of Booker v. Gomez*, 745 F.3d 405, 422 (10th Cir. 2014); *Boyd*, 374 F.3d at 780; *Chuman*, 76 F.3d at 294. Summary judgment will therefore be denied as to Defendants Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers.

2. Weiers

Weiers contends that his use of the taser was reasonable given the safety and security concerns that Atencio's continued resistance presented, and that he is therefore entitled to summary judgment.

Viewing the evidence in the light most favorable to Plaintiffs, Atencio was on the ground with numerous officers on top of him. The struggle on the ground had continued for less than a minute. Although Atencio was not yet handcuffed and was passively resisting, he was not being aggressive toward the officers. Weiers then deployed the taser a total of three times. The first was in probe mode, and Weiers deployed the probes into Atencio's chest area, near his heart. The second two deployments were in drive stun mode. Data downloaded from the taser used by Weiers indicates that the taser was used on Atencio for a period of 22 seconds. Plaintiffs' expert has opined that the use of the taser was unreasonable, and a reasonable juror could

conclude that Weiers' use of the taser under these circumstances was excessive. Accordingly, genuine factual disputes remain and summary judgment as to Weiers will be denied.

3. Defendant Scheffner

Scheffner argues that he is entitled to summary judgment because he did not participate in, or fail to intercede in, any use of excessive force. (Doc. 347 at 3-4.) Plaintiffs respond that Scheffner – a sergeant with the Maricopa County Sheriff's Department – "supervised the officers in both the LineScan room and Safe Cell 4" and is liable for both his own acts and for the acts of his subordinates. (Doc. 415 at 30-31.)

A supervisor can be liable "for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation . . . ; or for conduct that showed a reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). Thus, a supervisor can be liable if he or she "knowingly refused to terminate a series of acts by others, which he [or she] knew or reasonably should have known, would cause others to inflict the constitutional injury." *Id.* (citations and alterations omitted).

As to the linescan room, Scheffner contends, and the Court agrees, that he cannot be held liable conduct that occurred outside his presence and without his knowledge. A review of the video of the linescan room shows Scheffner arriving shortly after Weiser deployed

the taser and Hatton delivered the strikes to Atencio. (Plaintiffs' Ex. D.) Scheffner testified that shortly after he entered the linescan room, the officers had Atencio under control and handcuffed. Although Plaintiffs contend that, even after this point, several officers continued to keep their weight on Atencio and that Scheffner should therefore be liable for failing to intervene, a review of the video does not indicate any excessive force was used in Scheffner's presence in the linescan room, and Plaintiffs have pointed to no evidence indicating that, to the extent officers did continue to place some weight on Atencio, that amount of force was unreasonable or that Scheffner had sufficient information on which to determine that it was unreasonable. Summary judgment will therefore be granted in favor of Scheffner as to the linescan room.

As to what occurred in the safe cell, although Scheffner contends that he did not see what occurred, the video of the hall outside the safe cell shows that Scheffner was standing just outside of and looking into the safe cell twenty seconds before Hatton delivered a knee strike to Atencio. (Atencio Defendants' Ex. 11.) The video of the hall provided to the Court cuts off prior to the time of the knee strike which, according to the video of the safe cell, occurred at 2:41:52. (*See id.*) Scheffner states in his affidavit that he could not see into the safe cell, and still photos from the video of the hall outside the safe cell does show Scheffner had moved slightly from his position immediately in front of the cell door at 2:41:47. (Doc. 348-11 at 3, 7-8.) However, this still photo does not demonstrate that

Scheffner was not still observing the activities of the safe cell, nor does it demonstrate that before and at the time the knee strike was delivered, Scheffner could not see what was happening. Moreover, Scheffner stated in his affidavit that he could hear the officers telling Atencio to stop resisting. (Doc. 348-11 at 3.) It is reasonable to infer that he also heard Officer Blas Gabriel when he yelled out Hatton's name to get Hatton to stop using the knee strike on Atencio (*see* Doc. 343-4 at 11), and thus that Scheffner knew that the use of unreasonable force may have been in progress.

Viewing the evidence in the light most favorable to Atencio, the Court finds genuine factual disputes remain as to whether Scheffner knowingly refused to terminate or intervene to stop actions, or was an integral participant in actions, that he knew or reasonably should have known would cause others to inflict constitutional injury on Atencio after Atencio was placed into the safe cell. *See Estate of Booker*, 745 F.3d at 422; *Boyd*, 374 F.3d at 780; *Chuman*, 76 F.3d at 294; *Larez*, 946 F.2d at 630. Summary judgment will accordingly be denied as to the safe cell.

4. Qualified Immunity

Arpaio Defendants contend that they are entitled to qualified immunity because a reasonable officer could believe that their conduct was appropriate as a matter of law. The Court disagrees.

As discussed above, there are genuine factual disputes regarding whether Weiers used excessive force

on Atencio. There also are genuine factual disputes as to whether Carrasco, Dominguez, Foster, Kaiser, Vazquez, and Weiers were integral participants in the use of excessive force in the linescan room and/or the safe cell, as well as whether these officers violated a duty to intervene to prevent the use of excessive force. Further, there are genuine factual disputes as to whether Scheffner knowingly refused to terminate or intervene to stop actions, or was an integral participant in actions, occurring in the safe cell that he knew or reasonably should have known would cause others to inflict constitutional injury on Atencio. The determination of whether these Defendants "may be said to have made a 'reasonable mistake' of fact or law [will] depend on the jury's resolution of these disputed facts and the inferences it draws therefrom." *Santos*, 287 F.3d at 855. If Plaintiffs' version of the facts prevails at trial, there is a reasonable likelihood that none of these Defendants would be entitled to qualified immunity. *See Lolli*, 351 F.3d at 421; *Felix*, 939 F.2d at 701-02. Arpaio Defendants are not, therefore, entitled to summary judgment on the question of qualified immunity.[3]

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[3] Arpaio Defendants contend that Atencio had not yet been searched. However, the evidence viewed in the light most favorable to Plaintiffs shows that Atencio by this point had been searched at least four times, including removing his shoes. First, he was searched when he was arrested. (Doc. 343-1 at 28.) He was searched again, including having his shoes removed and any shoelaces removed, upon reaching the Cactus Park Precinct. (Doc. 343-1 at 29.) Prior to be transported to the Phoenix's Central Booking station, Atencio was searched yet again, including a search of his shoes and socks. (Doc. 343-1 at 31, 33.) When he arrived at Phoenix Central Booking, he was searched again, including having his

5. State Law Claims

Plaintiffs' state law claim against Arpaio Defendants is brought under Arizona Revised Statute § 12-611, which provides for liability for the death of a person caused "by wrongful act, neglect or default." A.R.S. § 12-611. Arpaio Defendants contend they are entitled to summary judgment on Plaintiffs' state law claims because their use of force was justified and reasonable under Arizona law, citing A.R.S. § 13-413 and A.R.S. § 13-403(2). The Court disagrees.

Section § 13-413 merely provides that no persons shall be "subject to civil liability for engaging in conduct otherwise justified pursuant to the provisions" of Chapter 14 of the Arizona Revised Statutes. Section 13-403(2) provides that a "superintendent or other entrusted official of a jail, prison or correctional institution may use physical force for the preservation of peace, to maintain order or discipline, or to prevent the commission of any felony or misdemeanor." A.R.S. § 13-403(2).

Although, contrary to Plaintiffs' contentions,[4] it appears that both § 13-403(2) and § 13-413 apply here,

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shoes removed. (Doc. 343-1 at 84-85.) All of these searches were without incident. Moreover, if there was any concern regarding Atencio having weapons, it is highly unlikely that his handcuffs would have been removed.

[4] Plaintiffs contend that § 13-413 applies only to criminal cases and thus does not apply to the present case. However, neither the language of the statute, nor the case law support their argument. *See* A.R.S. § 13-413; *Pefil v. Smith*, 900 P.2d 12, 14 (Ariz. Ct. App. 1995) (noting that § 13-413 does no more than establish justification as an affirmative defense in civil lawsuits).

this conclusion does not translate into a grant of summary judgment for the Arpaio Defendants. To the contrary, these provisions only entitle Defendants to use the amount of force necessary to maintain order, and merely shield Defendants from civil liability under state law for using such force. *See* A.R.S. §§ 13-403(2), 13-413; 13-403(2); *Bojorquez*, 675 P.2d at 1317 (noting if the amount of force used exceeds that needed to maintain order in prison, an inmate is justified in using physical force to defend himself). As discussed previously, there is a genuine factual dispute as to whether the force used by the Arpaio Defendants, individually or collectively as integral participants, was excessive and therefore unreasonable. Summary judgment will accordingly be denied as to the state law claim against Arpaio Defendants.

Further, § 13-414, relied on by Plaintiffs, is not applicable here because that section applies by its plain terms only to a "prisoner sentenced to the custody of the state department of corrections." A.R.S. § 13-414.

Plaintiffs also contend that § 13-403(2) does not apply to the present case because the Arpaio Defendants are neither the "superintendent of" the jail, nor "entrusted official" of the jail. Again, neither the plain language of the statute, nor the case law support their argument. *See* A.R.S. § 13-403(2); *State v. Bojorquez*, 675 P.2d 1314, 1317 (Ariz. 1984) ("prison officials have the statutory right to use that amount of physical force necessary to maintain order within the prison").

6. Causation

In both a § 1983 action, and a wrongful death action under Arizona state law, a plaintiff must "demonstrate that the defendant's conduct was the actionable cause of the claimed injury." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008); *see Grafitti-Valenzuela v. City of Phoenix*, 167 P.3d 711, 717 (Ariz. Ct. App. 2007).

Arpaio Defendants contend that Plaintiffs have not presented credible evidence that they caused Atencio's death and that they are therefore entitled to summary judgment on both the § 1983 claims and the state law wrongful death claims. In support of their contention, Defendants challenge the opinion of Plaintiffs' expert, Dr. Wilcox. The admissibility of Wilcox's expert testimony and opinions already have been extensively discussed by this Court in its Order denying the motions to exclude and/or limit Wilcox's testimony, and will not be readdressed here. (*See* Doc. 439.)

Wilcox's opinion regarding the cause of Atencio's death, set forth in his report and as explained and clarified during his deposition, is that a combination of pain and fear activated Atencio's "sympathetic system, which dumped epinephrine and norepinephrine into his system and caused sudden cardiac death." (Doc. 418-6 at 23.) He explained that it was "sort of a sum total of the uses of force that caused his sympathetic nervous system to go into overdrive, and that was ultimately the cause of his sudden cardiac death." (*Id.*) The

forces Wilcox referred to include the choke hold or carotid hold, the "dogpile" on top of Atencio, the "beating" (the facial strikes by Hatton), the use of the taser, the knee strike, and the resulting pain, decreased ability to breathe, and fear that the uses of force caused Atencio.

In addition to Wilcox, the medical examiner, Dr. Stano, opined in his report that Atencio "died of complications of a sudden cardiac arrest that occurred in the setting of acute psychosis, law enforcement subdual, and multiple medical problems." (Doc. 418-6 at 48.) Stano explained during his deposition that he did not believe it was merely Atencio's pre-existing condition of heart disease that caused his death, nor did he believe that Atencio's psychosis caused his heart to stop. (Doc. 418-6 at 26-29.) He further explained that the law enforcement subdual that he was referring to in his opinion included "the chokehold, the prone placement, the restraint, the use of the TASER and the use of handcuffs." (Doc. 418-6 at 37.)

This evidence raises genuine factual disputes regarding whether the acts of force used by the officers, including Arpaio Defendants, caused Atencio's death. Accordingly, summary judgment on the issue of causation will be denied.

7. Arpaio

a. Individual Capacity

Arpaio contends that he is entitled to summary judgment in his individual capacity because Plaintiffs cannot present evidence to satisfy the supervisory liability standard.

Arpaio can be held liable in his individual capacity if he "set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (alterations omitted). Supervisory liability can be imposed on Arpaio in his individual capacity for his "own culpable action or inaction in the training, supervision, or control of his subordinates"; for his "'acquiescence in the constitutional deprivations of which the complaint is made'"; or for his conduct that showed a "'reckless or callous indifference to the rights of others.'" *Id.* (citations and alterations omitted).

Plaintiffs have submitted evidence that includes articles, a report, video clips of Arpaio making public statements, and the testimony of Plaintiffs' expert witness, Ken Katsaris. (*See* Doc. 418-1 at 12-38; Doc. 418-2 at 1-45; Doc. 418-3 at 1-2 (Ex. J); Doc. 418-4 at 1-3; Doc. 418-5 at 1-13; 418-6 at 1-49.)

Katsaris examined the history of the policies, practices, and procedures of the MCSO, and the operation of MCSO under Arpaio's administration. He opined

that Arpaio's rhetoric and leadership over a period of time, including his statements regarding his desire that jails be places of punishment, have had an influence on MCSO personnel and the operation of the jail and have created a culture of punishment. Specifically, Katsaris opined that Arpaio's rhetoric was inconsistent with recognized and accepted jails practices and procedures, and that this rhetoric fostered a culture consistent therewith, causing employees to follow the rhetoric and disregard their training and official policies that are inconsistent with the rhetoric. Katsaris explained that the historical circumstances of the jail, including depositions of MCSO employees in other cases, the lack of change and continued bad outcomes at the jail despite having what appeared to be appropriate training and policies in place, demonstrated both that employees knew of Arpaio's public rhetoric and that employees were influenced by that rhetoric.

A review of the other evidence submitted by Plaintiffs – the articles, report, and video clips – demonstrate that Arpaio has made public statements which, when viewed in the light most favorable to Plaintiffs, are consistent with Katsaris's opinion. Some of the statements made by or attributed to Arpaio include that he makes jails places of punishment; that he "educate[s] through punishment"; that he tries to make conditions for inmates as unpleasant as possible; that the guard dogs should be and are treated better than the inmates; that the tent city for the inmates is like concentration camps used by the Germans in the

1930s and 1940s; that he believes he has the "best-run jail in the country . . . [n]o one's died"; dismissing complaints that his approach is inhumane with the statement, "See anyone dying?"; that he knows "just how far I can go"; and that he doesn't care what the law says. (*See, e.g.*, Doc. 418-1 at 17, 23, 25, 29, 31, 37; Doc. 418-3 (Ex. J); Doc. 418-4 at 2; Doc. 418-4 at 1-13; 418-5 at 5.)

Arpaio also argues that he cannot be held liable in his individual capacity for the medical care provided or not provided to Atencio because the individuals that provided or did not provide that care are not Arpaio's subordinate but are instead medical professionals that work for an independent entity, Correctional Health Services ("CHS"). Arpaio has made this argument previously without success. The Court agrees with the holdings in those previous cases and, consistent with those holdings, declines to dismiss Plaintiffs' claims against Arpaio "merely because they are predicated on inadequate medical care." *See Payne v. Arpaio*, 2009 WL 3756679, *5-*6 (D. Ariz. 2009) (holding that Arpaio, as sheriff, can be held liable for inadequate medical care in the county jails); *Grevan v. Arpaio*, 2013 WL 6670296, *2 (D. Ariz. 2013) (following the holding in *Payne*).

The evidence, viewed in the light most favorable to Plaintiffs, raises a genuine factual dispute as to whether Arpaio promoted a culture of punishment and cruelty in the jail and thereby set in motion a series of acts by others that he knew or reasonably should have known would cause others to violate the constitutional

rights of inmates.[5] Summary judgment on individual capacity will therefore be denied.

b. Official Capacity

As Arpaio correctly points out, an action against a municipal officer in his or her official capacity generally is simply another way of pleading an action against the municipality. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 n.55 (1978). There is thus "no longer a need to bring official-capacity actions against local government officials" because, under *Monell*, "local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (citation omitted). Where, as here, "both a municipal officer and a local government entity are named, and the officer is named only in an official capacity, the court may dismiss the officer as a redundant defendant." *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept.*, 533 F.3d 780, 799 (9th Cir. 2008).

Plaintiffs have not objected to the dismissal of Arpaio in his official capacity. Accordingly, summary

[5] Additional challenges raised by Arpaio on this issue either have been previously considered by the Court in its Order addressing the admissibility of Katsaris's opinion (*see* Doc. 439), and will not be readdressed here, or have been considered and rejected by the Court as without merit.

judgment will be granted to Arpaio as a redundant defendant, but only to the extent claims are brought against him in his official capacity.

8. Fourteenth Amendment Claim

Plaintiffs' Fourteenth Amendment claim alleges that Arpaio Defendants violated their due process right to familial association. "[O]nly official conduct that 'shocks the conscience' is cognizable as a due process violation." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008).

> In determining whether excessive force shocks the conscience, the court must first ask "whether the circumstances are such that actual deliberation [by the officer] is practical." Where actual deliberation is practical, then an officer's "deliberate indifference" may suffice to shock the conscience. On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.

Wilkinson v. Torres, 610 F.3d 546, 554 (9th Cir. 2010) (citations omitted).

Although the situation in the present case was rapidly evolving, viewing the evidence in the light most favorable to Plaintiffs, a reasonable juror could conclude that some or all of the Defendants had the

opportunity to deliberate before they acted or failed to intervene, and that they acted or failed to intervene with deliberate indifference. Alternatively, a reasonable juror could conclude that although there was no time to deliberate, one or more of the Defendants acted or failed to intervene with a purpose to harm unrelated to legitimate law enforcement objectives. Summary judgment on this issue will therefore be denied.

9. Punitive Damages

Plaintiffs are seeking punitive damages against Arpaio Defendants only on their § 1983 claims; they are not seeking punitive damages based on their state law claims.

Arpaio Defendants contend that they are entitled to summary judgment on the issue of punitive damages for the § 1983 claims because the record lacks evidence of any evil motive or intent, or a reckless or callous indifference to Atencio's constitutional rights. As discussed above, there is a genuine factual dispute as to whether Arpaio Defendants individually engaged in and/or were integral participants in the use of excessive force, as well as whether these officers violated a duty to intervene to prevent the use of excessive force. The evidence, viewed in the light most favorable to Plaintiffs, shows multiple instances of unreasonable and excessive force, including the use of a choke hold or carotid hold, "dog piles" during which multiple officers held Atencio down by placing their full or partial weight on him while he was in a prone position, facial

strikes, taser, and knee strike. A "jury could certainly infer that there was 'reckless or callous indifference' " based upon the evidence. *Davis*, 927 F.2d at 1485. Moreover, it is the Court's policy, when a trial must be held, to resolve the issue of the propriety of punitive damages through the resolution of objections to jury instructions and/or through the resolution of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Therefore, the Court will deny summary judgment on the issue of punitive damages.

D. Hatton Defendants' Motion for Summary Judgment (Doc. 350)

1. Hatton's Uses of Force

Hatton contends that he is entitled to summary judgment because his uses of force were "reasonable and justified." As to the linescan room, he contends he delivered the strikes on Atencio because Atencio had grabbed Hatton's hand and was twisting it. However, the evidence, viewed in the light most favorable to Plaintiffs, shows that Hatton delivered the three to four strikes to Atencio at about seventy percent of his full strength, with two to three of those strikes to Atencio's facial region, after Atencio had been tased and at a time when Atencio was "defenseless," with his hands out in front of him in a "superman position." (Doc. 343-4 at 19-14; Doc. 416 at 11 (Ex. A); Doc 416 at 16.) According to Officer Salinas, who was on the scene and witnessed Hatton's actions, these strikes were unreasonable, unjustifiable, and excessive. (*Ibid.*) When

asked specifically about Hatton's assertion that he delivered the strikes because Atencio had grabbed and was twisting Hatton's hand, Salinas said that Hatton's assertion was not true and was a lie. (Doc. 416 at 11 (Ex. A); Doc 416 at 16.) Salinas also said that it would be a lie if Hatton said he delivered the strikes in self-defense. (*Id.*). Officer Blas also testified that he believed Hatton's use of the face strikes on Atencio was "inappropriate" and "unreasonable." (Doc. 343-4.) Plaintiffs' expert witness Bruno similarly opined the strikes by Hatton in the linescan room to be unreasonable uses of force.[6] (Doc. 300-3 at 78.)

As to the safe cell, there is evidence that Hatton delivered a knee strike, dropping his full weight on Atencio, while Atencio was on the ground and restrained by multiple officers. Officer Gabriel, who was present and witnessed the strike, reacted by yelling out Hatton's name to get him to stop. (Doc. 343-4 at 11.) Gabriel testified that he believed the knee strike to be unnecessary and unreasonable. (*Id.*) Maricopa County's expert, Tim Gravette, also testified that in his opinion, the knee strike by Hatton was unnecessary and unreasonable. (Doc. 343-4 at 56-57.)

There is, in sum, genuine factual disputes regarding whether Hatton's actions constituted excessive force. Summary judgment will therefore be denied.

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[6] The admissibility of Bruno's expert testimony and opinions already have been extensively discussed by this Court in its Order denying the motions to exclude Bruno's testimony, and will not be readdressed here. (*See* Doc. 439.)

2. Causation

Hatton contends that Plaintiffs cannot prove that his actions caused Atencio's death. As discussed above in relation to the Arpaio Defendants, there are genuine factual disputes regarding whether the acts of force used by the officers, including Hatton's use of the strikes, the knee drop, and participation in the subdual and restraint of Atencio, caused Atencio's death. Accordingly, summary judgment on the issue of causation will be denied.

3. Qualified Immunity

Hatton contends that he is entitled to qualified immunity because "it cannot be said that no reasonable officer would have acted as Hatton did in these circumstances." The Court disagrees.

As discussed above, there are genuine factual disputes regarding whether Hatton used excessive force on Atencio. The determination of whether Hatton "may be said to have made a 'reasonable mistake' of fact or law [will] depend on the jury's resolution of these disputed facts and the inferences it draws therefrom." *Santos*, 287 F.3d at 855 n.12. If Plaintiffs' version of the facts prevails at trial, there is a reasonable likelihood that Hatton would not be entitled to qualified immunity. *See Lolli*, 351 F.3d at 421; *Felix*, 939 F.2d at 701-02. Hatton is not, therefore, entitled to summary judgment on the question of qualified immunity.

4. State Law Claim

Hatton contends that his use of force was justified under Arizona law. As discussed in relation to the Arpaio Defendants, although it appears that both A.R.S. § 13-403(2) and A.R.S. § 13-413 apply here, this conclusion does not translate into a grant of summary judgment for Hatton. To the contrary, these provisions only entitle Hatton to use the amount of force necessary to maintain order, and shield Hatton from civil liability under state law for using such force. *See* A.R.S. §§ 13-403(2), 13-413; 13-403(2); *Bojorquez*, 675 P.2d at 1317. There are genuine factual disputes as to whether the force used by Hatton was excessive and therefore unreasonable. Summary judgment will accordingly be denied on the state law claim.

5. Fourteenth Amendment Claim

Hatton contends that there is no evidence that his uses of force were applied with an intent to harm Atencio, outside of the goal of forcing compliance. He argues that he is therefore entitled to summary judgment on Plaintiffs' Fourteenth Amendment familial association claim.

As discussed in relation to the Arpaio Defendants, although the situation in the present case was rapidly evolving, viewing the evidence in the light most favorable to Plaintiffs, a reasonable juror could conclude that Hatton had the opportunity to deliberate before he acted, and that he acted with deliberate indifference. *See Wilkinson*, 610 F.3d at 554. Alternatively, a

reasonable juror could conclude that although there was no time to deliberate, that Hatton acted with a purpose to harm Atencio unrelated to legitimate law enforcement objectives.[7] *See id.* Summary judgment on the Fourteenth Amendment claim will therefore be denied.

6. Punitive Damages

Hatton contends that Plaintiffs cannot recover punitive damages against him in his official capacity because government officials are immune from punitive damages under § 1983. However, Plaintiffs are not seeking punitive damages against the individual defendants in their official capacity.

Hatton also contends that Plaintiffs cannot meet their burden to support an award of punitive damages against him in his individual capacity under § 1983. He contends that Plaintiffs have not produced any evidence demonstrating he was motivated by an evil motive or intent, or acted with reckless or callous indifference to Atencio's constitutional rights. However, viewing the evidence in the light most favorable to Plaintiffs, Hatton used unreasonable and excessive force when he delivered the facial strikes and the knee strike on Atencio. A "jury could certainly infer that

[7] Hatton's self-serving statement that he had no ill will does not entitle him to summary judgment on this issue because a reasonable jury could choose to not believe him and conclude that his actions were instead motivated by something other than legitimate law enforcement objectives.

there was 'reckless or callous indifference' " based upon the evidence. *Davis*, 927 F.2d at 1485. Moreover, it is the Court's policy, when a trial must be held, to resolve the issue of the propriety of punitive damages through the resolution of objections to jury instructions and/or through the resolution of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Therefore, the Court will deny summary judgment on the issue of punitive damages.

E. Defendants William McLean, Monica Scarpatir, and Ian Cranmer's Motion for Partial Summary Judgment (Doc. 355)

Defendants McLean, Scarpati, and Cranmer (collectively, "CHS Defendants") move for summary judgment, contending that Plaintiffs' evidence at most supports nothing more than a medical malpractice claim and is insufficient to give rise to § 1983 liability or to support an award of punitive damages.[8] CHS Defendants make clear that they are not seeking, through

[8] The courtesy copy provided to Chambers of the exhibits to Defendants William McLean, Monica Scarpatir, and Ian Cranmer's Statement of Facts in Support of Their Motion for Partial Summary Judgment (Doc. 356) were untabbed and unbound. Not only does this make it extremely difficult for the Court to find the necessary exhibits, it also violates the Court's Electronic Case Filing Administrative Policies and Procedures Manual. *See* Elec. Case Filing Admin. Policies & Proc. Manual § II(D)(3) (requiring party to provide Chambers with a courtesy copy of any electronically filed document "exceeding 10 pages in length, including exhibits and attachments" and that such courtesy copy comply with LRCiv 7.1); LRCiv 7.1(b)(1) (requiring all paper documents must

this motion, summary judgment on Plaintiffs' malpractice claims.

1. Applicable Standard

Plaintiffs contend that because Atencio was merely an arrestee, his claims against medical personnel are governed by the Fourth Amendment. The Court disagrees.

"Although the Fourth Amendment provides the proper framework for [Atencio's] excessive force claim[s], it does not govern his medical needs claim." *Lolli*, 351 F.3d at 418. Instead, claims for "failure to provide care for serious medical needs, when brought by a detainee such as [Atencio] who has been neither charged nor convicted of a crime, are analyzed under the substantive due process clause of the Fourteenth Amendment." *Id.* (citation omitted). Thus, to defeat summary judgment on his medical needs claims, Atencio must show that the CHS Defendants knew of and disregarded an excessive risk to his health and safety. *Id.* "[I]t is not enough that the person merely 'be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, [he or she] must also draw that inference.'" *Id.* (citation omitted). However, "'if a person is aware of a substantial risk of serious harm, a person may be liable for neglecting a prisoner's serious medical needs on the basis of

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be either stapled or, if too large for stapling, bound with a metal clasp).

either his action or his inaction.'" *Id.* (citation omitted).

2. Initial Assessment

McLean and Scarpati contend that Atencio has failed to present evidence that they acted with deliberate indifference to his serious medical needs in relation to his initial intake and assessment and that they are therefore entitled to summary judgment on this issue.

In assessing Atencio, McLean did not follow the standard process that is to be used to determine whether Atencio was alert (meaning he was awake and talking) and oriented. Specifically, although McLean determined that Atencio was oriented as to "person," i.e., Atencio knew who he himself was, McLean did not ask the questions to determine whether Atencio was oriented to where he was, when it was, or his current situation. (Doc. 343-2 at 36.) Atencio denied to McLean any intention to hurt himself, but because Atencio had previously indicated that he did have such an intention, McLean formed the opinion that Atencio was a danger to himself. (Doc. 343-2 at 38.) McLean also formed the opinion that Atencio was under the influence of drugs based on Atencio's behavior and because Atencio had previously admitted that he had used methamphetamine at 5:00 p.m. the previous evening. McLean requested a drug recognition expert (DRE) to examine Atencio, and also requested that Scarpati, a mental health professional, evaluate Atencio. It does not appear that the DRE ever examined Atencio.

Scarpati's assessment of Atencio lasted only forty-five seconds, was conducted in McLean's presence, and apparently was conducted while she stood behind Atencio. (Doc. 343-2 at 78, Ex. N; Doc. 343-2 at 42, 64.) Scarpati testified that she approached where Atencio was seated, at a desk in front of the nursing station, and asked him what was going on. (Doc. 343-2 at 55.) Atencio did not answer "appropriately" and was instead "yelling word salad, spark plug, firetruck." (*Id.*) She then asked Atencio if he was suicidal, but he didn't respond. (*Id.*) Atencio also made the statement, "Tony goes to heaven," and "he's a spark plug." (*Id.* at 56; Doc. 414-2 at 3.) During this exchange, McLean also was present.

Scarpati testified that Atencio appeared to be psychotic, and she formed the opinion that Atencio was in crisis. She noted that Atencio was uncooperative with her assessment, but also acknowledged Atencio may not have had the ability to be cooperative due to the mental state of psychosis he was in. (Doc. 343-2 at 58-59.) Scarpati further acknowledged that it is not unusual for mental health professionals to communicate with MCSO officers about a patient, but that she did not inform any of the officers that Atencio was in a state of psychosis, that he was in crisis, or that he might not have the ability to be cooperative or follow directions due to his mental state. (Doc. 343-2 at 64.) Instead, Scarpati merely determined that Atencio should be placed into a safe cell, and conferred with McLean regarding the same. McLean, then started the

process necessary for Atencio's placement into a safe cell.

Scarpati thus knew that Atencio was in a state of psychosis and in a crisis. She also knew that he was uncooperative, and may not have had the ability to cooperate due to his state of psychosis. Atencio's state of psychosis was so obvious that officers – who did not have medical training – were able to recognize it. Despite her knowledge, she neither recommended that Atencio be transferred to a facility for treatment of his psychosis, nor informed the officers who would take control of Atencio for placement into the safe cell of Atencio's state of psychosis.

Similarly McLean, who witnessed Atencio's behavior both during his own assessment and during Scarpati's assessment, did not recommend Atencio be transferred for treatment of his psychosis, nor did he inform the officers who would take control of Atencio for placement into the safe cell of Atencio's mental state

Based on this and other evidence in the record, a jury could find that Scarpati and McLean were deliberately indifferent to Atencio's serious medical needs. *See Gibson*, 290 F.3d at 1194. Specifically, viewed in the light most favorable to Plaintiffs, the evidence shows that Scarpati and McLean knew that Atencio was in the throes of a psychotic crisis; that, as a result, he did not have the ability to cooperate with them or the officers; that hospitalization could have relieved Atencio's condition; and that if Atencio remained in the

jail, he presented a danger to both himself and others. *See id.* Summary judgment will therefore be denied.

3. Post-Use-of-Force Treatment

Both McLean and Cranmer responded to the linescan room after a call was made for medical personnel. They both knew that Atencio had been subjected to the use of force that included being held down in a prone position by the weight of multiple officers and being tased. After Atencio was handcuffed and subdued, Cranmer knelt next to him, observed where the taser points had come into contact with him, and asked him if he was okay. Atencio, who was still being held down by officers, said, "Anybody that touches me, I'm going to fucking kill." Cranmer, concerned for his safety, backed away from Atencio, but continued to observe him. He determined Atencio to be well enough to be placed into a safe cell because Atencio verbally responded to his question of, "Are you okay?" with the threat. No vital signs were taken by Cranmer, nor was any other assessment of Atencio completed before Atencio was carried to and placed into the safe cell by the officers.

After the officers removed Atencio's clothes and handcuffs, Atencio was left alone, naked, and lying motionless on the floor of the safe cell and the cell door was closed. Again, no vital signs were taken, nor was any other assessment performed on Atencio. Instead, Cranmer and McLean merely observed Atencio briefly through the cell door window. Cranmer then went into

a room that allowed Atencio to be monitored via video camera. Although Cranmer testified at his deposition that while he was watching Atencio through the window, he thought he saw Atencio move and take a breath, a review of the video of the safe cell shows that after the officers left Atencio in the safe cell, Atencio never made any movement and, moreover, there is not any visible breathing by Atencio. (*See* Doc. 343-2 at 78, Ex. N, Clip 7.)

Based on this and other evidence in the record, a jury could find that Cranmer and McLean were deliberately indifferent to Atencio's serious medical needs. *See Estate of Booker*, 745 F.3d at 431-32. Specifically, viewed in the light most favorable to Plaintiffs, the evidence shows that McLean and Cranmer knew that Atencio had been tased multiple times as well as held down in a prone position by the weight of multiple officers, yet never took any vital signs nor completed any other assessment of Atencio (other than a quick observation of the taser puncture wounds); and that after Atencio was left naked on the floor of the safe cell, McLean and Cranmer knew that he was motionless and not visibly breathing. In light of McLean's and Cranmer's training, a reasonable jury could conclude that McLean and Cranmer inferred that Atencio was or may have been unconscious and in need of immediate medical attention. If a jury made that inference, it could further infer that McLean and Cranmer were deliberately indifferent in failing to respond sooner to

determine Atencio's condition.[9] *See id.* Summary judgment will therefore be denied.

4. Punitive Damages

As discussed above, a reasonable jury could find that McLean and Cranmer acted with deliberate indifference to Atencio's serious medical needs. Consequently, a reasonable jury could also find recklessness or callous indifference for the purpose of assessing punitive damages. *See Larez v. City of Los Angeles*, 946 F.2d 630, 648-49 (9th Cir. 1991) (noting that the standard for individual liability for compensatory damages for deliberate indifference under § 1983 "largely overlaps the standard for punitive damages" in that both look to a defendant's "reckless or callous disregard or indifference to" the plaintiff's constitutional rights); *see also Smith v. Wade*, 461 U.S. 30, 53 (1983) (approving overlapping standard for compensatory and punitive damages in § 1983 cases involving reckless or callous indifference and noting that common law has never required a higher threshold for punitive damages). Moreover, it is the Court's policy, when a trial must be held, to resolve the issue of the propriety of punitive damages through the resolution of objections

[9] McLean testified that he expected the clinic nurse to follow-up with Atencio and take his vital signs within the time required by CHS policy. This assertion does not, however, assist McLean because a reasonable jury could find that if Atencio was unconscious and/or not breathing, waiting for someone else to check on him at all, let alone within the fifteen minutes required under CHS policy, exhibited deliberate indifference.

to jury instructions and/or through the resolution of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. Therefore, the Court will deny summary judgment on the issue of punitive damages.

F. Plaintiffs' Motion for Partial Summary Judgment against Maricopa County (Doc. 358)

Plaintiffs contend that they are entitled to summary judgment on their *Monell* claims against Maricopa County on the issues of whether the County has a policy of deliberate indifference towards the medical care provided to incoming detainees in their jails, and whether the County knew its policy of deliberate indifference posed significant risks to those detainees.

In support of their contention, Plaintiffs cite to and rely on orders issued in *Graves v. Arpaio*, No. 77-CV-00479-NVW, as well as evidence submitted in that case. Plaintiffs argue that the County is collaterally estopped by *Graves* from denying that it was violating pretrial detainees' constitutional rights by depriving them of adequate receiving screenings and ready access to care for their serious mental health needs. (Doc. 342 at 7-11.) The Court disagrees and holds that the doctrine of collateral estoppel does not apply.

First, the *Graves* case was initially settled through a 1981 consent decree, and the 1995 first amended judgment in that case was entered through stipulation and explicitly provided that it did "not represent a judicial determination of any constitutionally mandated

standards applicable to the jails." *Graves v. Arpaio*, 2008 WL 4699770, *1 (D. Ariz. 2008).

Second, the *Graves* court's 2008 order denying in part and granting in part the defendants' motion to terminate judicial oversight was based on evidence of conditions at the jail presented at an August 2008 evidentiary hearing. *See id.* at *2, *27-*28, *52. The conditions at the jail as of August 2008 do not necessarily reflect conditions in December 2011. *See Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (to have preclusive effect, issue necessarily decided at previous proceeding must be identical to the one sought to be relitigated).

Third, the *Graves* court's statements in its April 7, 2010, order regarding the lack of progress as of that date regarding mental health treatment at the jail, also do not necessarily reflect the conditions that existed in December 2011, and, further, the statements are not a judgment on the merits. The April 2010 order thus does not provide a basis for estopping the County from contesting conditions in the jail in December 2011. *See id.* (to have preclusive effect, must not only have identical issue, but also the prior proceeding must have ended with a final judgment on the merits).

Fourth, the *Graves* third amended judgment entered in May 2012 simply restated the portions of the 2008 second amended judgment that remained in place and continued in effect. (*See* Case No. 77-CV-00479, Doc. 2093, 2094.) This order was entered in

response to the defendants' unopposed motion to terminate certain of the conditions set forth in the 2008 second amended judgment. Thus, the third amended judgment is not a determination on the merits, and does not provide a basis for estopping the County from contesting conditions in the jail in December 2011. *See id.*

Finally, prudential concerns also convince the Court that nonmutual collateral estoppel should not be applied against the County. *See United States v. Mendoza*, 464 U.S. 154, 161 (1984) (holding nonmutual collateral estoppel does not apply to the federal government). As the Court explained in *Mendoza*, the government's "litigation conduct in a case is apt to differ from that of a private litigant." *Id.* "Unlike a private litigant who generally does not forgo an appeal if he believes he can prevail," the government considers various prudential concerns in determining whether to authorize an appeal, such as the limited government resources and the courts' crowded docket. *Id.* Thus, although the County would be bound by principles of res judicata from relitigating the same issue with the same party, the Court declines to hold that the County is "further bound in a case involving a litigant who was not a party to the earlier litigation." *Id.* at 162.

Plaintiffs' remaining grounds for summary judgment rely, directly or indirectly, on orders issued in the *Graves* case. Accordingly, Plaintiffs' motion for partial summary judgment will be denied.

G. Defendant Maricopa County's Motion to Strike Plaintiffs' Statement of Facts Applicable to All Defendants (Doc. 384)

Defendant Maricopa County moves to strike Plaintiffs' Statement of Facts Applicable to all Defendants (PSOFAD), found at Doc. 359, on the ground that if fails to comply with the local rules. Assuming that the PSOFAD does violate the local rules, the Court declines to strike it. Plaintiffs could have filed the information contained in the PSOFAD with their various responses to Defendants' motions for summary judgment, and Plaintiffs' early filing of this information, and combining of the information, did not prejudice Defendants. Although the preferable approach would have been for Plaintiffs to permission from the Court prior to filing the PSOFAD, the Court will deny the motion to strike it.

H. City Defendants' Motion for Leave to File Under Seal Reply in Support of Motion to Strike Portions of Plaintiffs' Response (Doc. 388)

In this motion, City Defendants seek leave to file under seal their Reply in Support of Motion to Strike Portions of Plaintiffs' Response. The motion does not reference a docket number, and the only motion to strike portions of Plaintiffs' response that the Court has located is found at Docs. 329, 340, and 341. The Court has already ordered sealed the unredacted versions of the Motion to Strike Portions of Plaintiffs' Response (*see* Docs. 339, 340, 341), and Doc. 329 is the

redacted copy of 340/341. The Court will therefore deny the current motion as moot.

IT IS ORDERED that City Defendants' Motion for Summary Judgment (Doc. 299) is Denied.

IT IS FURTHER ORDERED that Defendants Arpaio, Carrasco, Dominguez, Foster, Kaiser Scheffner, Vazquez, and Weiers' Motion for Summary Judgment (Doc. 347) is Granted in part and Denied in part as follows:

Defendant Scheffner is granted summary judgment only as to conduct that occurred in the line scan room.

Defendant Arpaio is granted summary judgment only as to claims brought against him in his official capacity.

Summary judgment as to Arpaio, Carrasco, Dominguez, Foster, Kaiser Scheffner, Vazquez, and Weiers' is otherwise denied.

IT IS FURTHER ORDERED that Hatton Defendants' Motion for Summary Judgment (Doc. 350) is Denied.

IT IS FURTHER ORDERED that Defendants William McLean, Monica Scarpati, and Ian Cranmer's Motion for Partial Summary Judgment (Doc. 355) is Denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment against Maricopa County (Doc. 358) is Denied.

IT IS FURTHER ORDERED that Defendant Maricopa County's Motion to Strike Plaintiffs' Statement of Facts Applicable to All Defendants (Doc. 384) is Denied.

IT IS FURTHER ORDERED that City Defendants' Motion for Leave to File Under Seal Reply in Support of Motion to Strike Portions of Plaintiffs' Response (Doc. 388) is Denied as moot.

IT IS FURTHER ORDERED that the caption of all further documents filed in this action shall comply with the party name capitalization requirement of LRCiv 7.1(a)(3).

Dated this 10th day of February, 2015.

/s/ Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al., Plaintiffs-Appellees, v. JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al., Defendants-Appellants, and MARICOPA, COUNTY OF, a public entity; et al., Defendants.	No. 15-15451 D.C. No. 2:12-cv-02376-PGR ORDER

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al., Plaintiffs-Appellees, v. JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al., Defendants, and	Nos. 15-15456 D.C. No. 2:12-cv-02376-PGR

PHOENIX, CITY OF, a public entity; et al.,

Defendants-Appellants.

ERNEST JOSEPH ATENCIO, surviving father of Ernest Marty Atencio, et al.,

Plaintiffs-Appellees,

v.

JOSEPH M. ARPAIO, named as Sheriff Joseph Arpaio, husband; et al.,

Defendants,

IAN CRANMER, husband; et al.,

Defendants,

and

ANTHONY HATTON, husband

Defendant-Appellant.

Nos. 15-15459

D.C. No. 2:12-cv-02376-PGR

(Filed Feb. 14, 2017)

Before: MELLOY,* CLIFTON, and WATFORD, Circuit Judges.

The panel voted to deny the petitions for rehearing. Judge Watford voted to deny the petitions for rehearing en banc, and Judge Melloy and Judge Clifton so recommended.

* The Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit, sitting by designation.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35.

The petitions for rehearing and the petitions for rehearing en banc are DENIED.