

1 ANDREW R. HADEN  
 Acting United States Attorney  
 2 DAVID B. WALLACE, CBN 172193  
 3 ERNEST CORDERO, JR., CBN 131865  
 COLIN M. MCDONALD, CBN 286561  
 4 Assistant U.S. Attorneys  
 United States Attorney’s Office  
 5 880 Front Street, Room 6293  
 6 San Diego, California 92101-8893  
 (619) 546-7669/7478/9144  
 7 Dave.Wallace@usdoj.gov  
 8 Ernest.Cordero@usdoj.gov  
 Colin.McDonald@usdoj.gov  
 9

10 Attorneys for Defendant  
 United States of America

11 UNITED STATES DISTRICT COURT  
 12 SOUTHERN DISTRICT OF CALIFORNIA  
 13

14 SILVESTRE ESTRADA, et al.,  
 15 Plaintiffs,  
 16 v.  
 17 UNITED STATES OF AMERICA,  
 18 Defendant.  
 19

Case No.: 22-cv-00373-AJB-BGS

**UNITED STATES OF AMERICA’S  
 MOTION FOR SUMMARY JUDGMENT  
 AND MEMORANDUM OF POINTS AND  
 AUTHORITIES**

**[Fed. R. Civ. P. 56(a)]**

Hearing Date To Be Determined  
 By The Court

The Hon. Anthony J. Battaglia

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<u>Page</u>
I. INTRODUCTION .....	1
II. FACTUAL BACKGROUND.....	2
A. Plaintiffs Francisco and Jaime Madariaga illegally cross into the United States; Silvestre Estrada picks them up alongside State Route 94.....	2
B. Estrada fails to yield and recklessly flees from Border Patrol .....	3
C. Estrada pulls into a parking lot—but continues driving recklessly.....	5
1. Estrada jumps a curb and nearly hits Agent Baker .....	6
2. Estrada crashes into a curb, then erratically reverses .....	7
3. Estrada stops the Nissan; the chase appears over .....	8
4. Estrada loudly revs the Nissan engine .....	9
5. Estrada accelerates forward towards Agent Godreau; agents fire to stop the threat .....	10
D. Plaintiffs admit Estrada drove recklessly, revved the engine, and accelerated forward before shots were fired, among other admissions...	12
E. The parties’ shooting reconstruction analysis .....	13
F. The parties’ use of force experts .....	14
III. SUMMARY JUDGMENT STANDARD .....	15
IV. ARGUMENT.....	16
A. Agents used reasonable force to stop the threat posed by Estrada’s revving and accelerating in close proximity to agents on foot.....	16
1. Governing legal principles .....	16
2. The agents’ use of force was reasonable.....	17
3. The raw opinions of Plaintiffs’ experts do not create a genuine issue of material fact .....	23
B. The use of force was also reasonable because of the threat Estrada posed to his passengers, agents, and other travelers on the road .....	26
C. All of Plaintiffs’ claims fail because the use of force was reasonable.....	28
V. CONCLUSION.....	30

TABLE OF AUTHORITIES

CASES

*Acri v. Varian Associates, Inc.*,  
114 F.3d 999 (9th Cir. 1997) ..... 23

*Allen v. City of Sacramento*,  
234 Cal. App. 4th 41 (2015) ..... 29

*Anderson v. Liberty Lobby, Inc.*,  
477 U.S. 242 (1986)..... 15

*Bay Area Rapid Transit Dist. v. Superior Ct.*,  
38 Cal. App. 4th 141 (1995) ..... 29

*Bethea v. Howser*,  
447 F. Supp. 3d 497 (E.D. Va. 2020) ..... 17, 21

*Billington v. Smith*,  
292 F.3d 1177 (9th Cir. 2002) ..... 2, 16

*Brown v. Ransweiler*,  
171 Cal. App. 4th (Cal. Ct. App. 2009)..... 16

*Celotex Corp. v. Catrett*,  
477 U.S. 317 (1986)..... 15

*City & Cnty. of San Francisco, Calif. v. Sheehan*,  
575 U.S. 600 (2015)..... 19

*County of Los Angeles, Calif. v. Mendez*,  
581 U.S. 420 (2017)..... 2, 16

*Dela Torre v. City of Salinas*,  
No. 09-cv-00626 RMW, 2010 WL 3743762  
(N.D. Cal. Sept. 17, 2010) ..... 29

*Earl v. Campbell*,  
859 F. App’x 73 (9th Cir. 2021) ..... 21

*Edson v. City of Anaheim*,  
63 Cal. App. 4th 1269 (1998) ..... 28

1 *Est. of Martin v. United States*,  
 2 No. 13-cv-1386-LAB-BGS, 2015 WL 5568049  
 3 (S.D. Cal. Sept. 22, 2015) ..... 28  
 4 *Est. of Risher v. City of Los Angeles*,  
 5 No. 17-cv-00995-MWF-KK, 2020 WL 5377306  
 6 (C.D. Cal. July 29, 2020) ..... 29  
 7 *Evers v. General Motors Corp.*,  
 8 770 F.2d 984 (11th Cir.1985) ..... 23  
 9 *Freedman v. MCI Telecommunications Corp.*,  
 10 255 F.3d 840 (D.C. Cir. 2001) ..... 16  
 11 *Garcia v. City of Merced*,  
 12 637 F. Supp. 2d 731 (E.D. Cal. 2008) ..... 29  
 13 *Gilmore v. Superior Court*,  
 14 230 Cal. App. 3d 416 (Cal. Ct. App. 1991) ..... 16, 28  
 15 *Godawa v. Byrd*,  
 16 798 F.3d 457 (6th Cir. 2015) ..... 21  
 17 *Graham v. Connor*,  
 18 490 U.S. 386 (1989) ..... passim  
 19 *Hayes v. Cnty. of San Diego*,  
 20 736 F.3d 1223 (9th Cir. 2013) ..... 16  
 21 *Koussaya v. City of Stockton*,  
 22 54 Cal. App. 5th 909 (2020) ..... 26, 28, 29  
 23 *Lal v. California*,  
 24 746 F.3d 1112 (9th Cir. 2014) ..... 2, 16, 23, 24, 25  
 25 *Lanningham v. U.S. Navy*,  
 26 813 F.2d 1236 (D.C. Cir. 1987) ..... 15  
 27 *Latits v. Phillips*,  
 28 878 F.3d 541 (7th Cir. 2017) ..... 27  
*Levin v. United States*,  
 568 U.S. 503 (2013) ..... 16

1 *Lopez v. City of Los Angeles*,  
 2 196 Cal. App. 4th 675 (2011) ..... 23, 29

3 *Martinez v. Cnty. of Los Angeles*,  
 4 47 Cal. App. 4th 334 (1996) ..... 16, 17

5 *Matsushita Elec. Indus. v. Zenith Radio Corp.*,  
 6 475 U.S. 574 (1986)..... 16

7 *McGrath v. Tavares*,  
 8 757 F.3d 20 (1st Cir. 2014)..... 21

9 *Monzon v. City of Murrieta*,  
 10 978 F.3d 1150 (9th Cir. 2020) ..... passim

11 *Mullenix v. Luna*,  
 12 577 U.S. 7 (2015)..... 26

13 *Orn v. City of Tacoma*,  
 14 949 F.3d 1167 (9th Cir. 2020) ..... 26

15 *Plakas v. Drinski*,  
 16 19 F.3d 1143 (7th Cir. 1994) ..... 25, 26

17 *Plumhoff v. Rickard*,  
 18 572 U.S. 765 (2014)..... 20, 26

19 *Reed v. Hoy*,  
 20 909 F.2d 324 (9th Cir. 1989) ..... 26

21 *Reese v. Cty. of Sacramento*,  
 22 888 F.3d 1030 (9th Cir. 2018) ..... 29

23 *Reynolds v. County of San Diego*,  
 24 84 F.3d 1162 (9th Cir. 1996) ..... 23

25 *Scott v. Harris*,  
 26 550 U.S. 372 (2007)..... 26

27 *Scott v. Henrich*,  
 28 39 F.3d 912 (9th Cir. 1994) ..... 25

*Tennessee v. Garner*,  
 471 U.S. 1 (1985)..... 17

1 *Tucker v. Las Vegas Metro. Police Dept.*,  
 2 470 F. App'x 627 (9th Cir. 2012) ..... 26

3 *Tuggle v. City of Tulare*,  
 4 No. 19-cv-01525-JLT-SAB, 2023 WL 4273900  
 (E.D. Cal. June 29, 2023)..... 27

5 *United States v. Alvarez*,  
 6 899 F.2d 833 (9th Cir. 1990) ..... 24

7 *United States v. Anchrum*,  
 8 590 F.3d 795 (9th Cir. 2009) ..... 1

9 *United States v. Various Slot Machines on Guam*,  
 10 658 F.2d 697 (9th Cir.1981) ..... 23

11 *Villanueva v. California*,  
 12 986 F.3d 1158 (9th Cir. 2021) ..... 21, 22

13 *Virginia v. Moore*,  
 14 553 U.S. 164 (2008)..... 26

15 *Waterman v. Batton*,  
 393 F.3d 471 (4th Cir. 2005) ..... 18, 22

16 *Wilkinson v. Torres*,  
 17 610 F.3d 546 (9th Cir. 2010) ..... 17, 21

18 STATUTES

19 8 U.S.C. § 1324(a)(1)(B)(i)-(iii) ..... 18

20 18 U.S.C. § 111(a)-(b) ..... 18

21 Cal. Veh. Code § 2800(a) ..... 18

22 Cal. Veh. Code § 23103 ..... 18

23 Cal. Civil Code § 52.1 ..... 2

24 RULES

25 Fed. R. Civ. P. 56 ..... 15

26

27

28

## I

## INTRODUCTION

1  
2  
3 In May 2021, with two undocumented aliens in his car, Silvestre Estrada failed to  
4 yield to Border Patrol and took agents on a high-speed chase, at night, down a windy,  
5 rural, two-lane road. Both passengers in Estrada’s car, now Plaintiffs in this case, were the  
6 most scared they had ever been, fearing Estrada would crash and kill them. Estrada finally  
7 pulled into a parking lot, as if to surrender. But that was a ruse: after agents followed him  
8 into the lot, Estrada jumped a curb onto a grassy shoulder of the lot and sped back towards  
9 the highway—almost running over an agent in the process. After crashing into another  
10 curb, Estrada erratically reversed in the grassy patch, still angling to escape. At this point,  
11 six agents were in close proximity around Estrada’s car, with multiple agents yelling  
12 commands to stop. Estrada reversed within two feet of a Border Patrol vehicle, then  
13 stopped. His attempt to flee appeared over. It was not. After several seconds, Estrada  
14 suddenly revved his engine—a “high-pitched whine,” as a third-party witness described—  
15 then surged forward towards an agent, Robert Godreau, only twelve feet in front of the  
16 car. Agent Godreau thought he was going to die. Faced with that imminent threat of harm,  
17 Agent Godreau, and two others, fired five total shots at Estrada. One shot hit Estrada,  
18 causing his death. Because agents had to act immediately to stop the threat, less than two  
19 seconds passed between Estrada’s forward acceleration and the first shot (and all five shots  
20 occurred within 1.10 seconds).

21 The agents’ use of force was reasonable to stop the imminent threat posed by  
22 Estrada. “It is indisputable that an automobile can inflict deadly force on a person and that  
23 it can be used as a deadly weapon.” *United States v. Anchrum*, 590 F.3d 795, 801 (9th Cir.  
24 2009). That is how Estrada used his car here. Given the totality of the circumstances,  
25 Estrada’s reckless driving—climaxing when he unexpectedly revved and accelerated  
26 forward with agents surrounding him—presented a deadly threat permitting deadly force.  
27 *See Monzon v. City of Murrieta*, 978 F.3d 1150, 1154, 1160 (9th Cir. 2020) (firing at driver  
28 of vehicle was “objectively reasonable in this dynamic and urgent situation, where officers

1 were faced with the immediate threat of significant physical harm”). Indeed, although  
 2 questioning Agent Godreau’s positioning, even Plaintiffs’ use of force expert concedes  
 3 Agent Godreau had “no alternative to using deadly force.”

4 Plaintiffs will likely argue that *perhaps* the agents in harms way could have leaped  
 5 away in time to avoid getting hit, or *perhaps* Estrada—if he turned the car just right—  
 6 could have threaded the needle between agents. These speculative arguments are  
 7 unpersuasive. The law does not require officers to gamble with their lives. And it considers  
 8 the use of force “from the perspective of a reasonable officer on the scene, rather than with  
 9 the 20/20 vision of hindsight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989). Plaintiffs  
 10 may also claim that the agents should not have approached the car on foot while Estrada  
 11 was behind the wheel. That criticism similarly fails. A plaintiff alleging excessive force  
 12 cannot “avoid[] summary judgment by simply producing an expert opinion that an  
 13 officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or  
 14 even reckless”<sup>1</sup>—none of which describes the agents’ conduct here. The undisputed facts  
 15 establish that the use of force was reasonable. There are no material factual disputes that  
 16 disturb that conclusion. Accordingly, summary judgment should be granted to the United  
 17 States on all five of Plaintiffs’ causes of action.<sup>2</sup>

## 18 II

### 19 FACTUAL BACKGROUND

#### 20 A. Plaintiffs Francisco and Jaime Madariaga illegally cross into the 21 United States; Silvestre Estrada picks them up alongside State Route 94

22 Campo, California is located about an hour from downtown San Diego in “far East  
 23 County San Diego.” Summary Judgment Record (“MSJ\_”) 004, 051. It is within several  
 24

25 <sup>1</sup> *Lal v. California*, 746 F.3d 1112, 1118 (9th Cir. 2014) (quoting *Billington v. Smith*, 292  
 26 F.3d 1177, 1189 (9th Cir. 2002) (overruled on other grounds by *County of Los Angeles,  
 Calif. v. Mendez*, 581 U.S. 420 (2017)).

27 <sup>2</sup> Those claims are: (1) wrongful death, (2) assault, (3) assault and battery, (4) negligence,  
 28 and (5) a violation of the Bane Act, California Civil Code § 52.1. Under California law,  
 all of these claims fail because the use of force was reasonable.



1 miles of the boundary between the United States and Mexico. MSJ\_004. The main road  
2 running through Campo is SR-94, also called Campo Road. MSJ\_052, 056. In this area,  
3 SR-94 is a “windy” two-lane road, with “not much of a shoulder on either side” and “pretty  
4 narrow turns.” MSJ\_052. The speed limit is usually 55 mph, with caution signs  
5 periodically recommending lower speeds—“25 or 35 or 45” mph—ahead of sharp turns.  
6 MSJ\_053-54. As noted by a Campo resident, there are accidents on SR-94 “all the time.”  
7 MSJ\_005-06; *see also* MSJ\_053 (“[t]here’s a lot of traffic accidents out there”).

8 At around 5:00 a.m. on May 13, 2021, Plaintiffs Francisco and Jaime Madariaga<sup>3</sup>  
9 illegally crossed into the United States near Campo. MSJ\_156-57. After crossing, they  
10 walked close to SR-94 and stayed there for two days. MSJ\_158-59, 161. On May 14, 2021,  
11 around 7:00 p.m., a smuggler told them by phone that someone would pick them up that  
12 night. MSJ\_164. They waited several more hours before deciding in desperation—“we  
13 had no food, no water”—to walk to SR-94. MSJ\_165. Around 10:00 p.m., a car drove up,  
14 stopped near them, drove forward, stopped again, then backed up towards them. MSJ\_165-  
15 66. As later discovered, the driver was Silvestre Estrada. At that time, Estrada was on state  
16 parole. MSJ\_486 (Plfs’ Response to Requests for Admission, No. 2). Estrada told the  
17 Madariagas, “[g]et in, I’ll take you.” MSJ\_166. Despite not knowing Estrada, they got into  
18 his car. MSJ\_167, 172. Francisco soon overheard Estrada say over the phone, “I got two  
19 people. I’m gonna take them to a hotel, and we’ll see what we do there[.]” MSJ\_173.

#### 20 **B. Estrada fails to yield and recklessly flees from Border Patrol**

21 Border Patrol Agent Robert Godreau heard over dispatch that a vehicle had picked  
22 up two possible aliens and was headed eastbound on SR-94 towards Campo.<sup>4</sup> MSJ\_072-  
23 73, 260. After positioning his Border Patrol vehicle alongside SR-94, Agent Godreau  
24 spotted a vehicle matching the suspect vehicle—the Nissan driven by Estrada. MSJ\_073,  
25 260. Agent Godreau noticed that Estrada was driving around 30–35 mph, a “lower speed  
26 than most people and the locals from Campo[.]” MSJ\_074. Agent Godreau ran Estrada’s  
27

28 <sup>3</sup> For sake of clarity, we refer to the Madariagas at times by their first names.

<sup>4</sup> A scope had spotted the Madariagas entering Estrada’s car. *See* MSJ\_231-33.

1 plates and saw the Nissan had few, if any, crossings through local checkpoints, a fact  
2 consistent with an out-of-towner in the area to transport aliens. MSJ\_075, 260. Agent  
3 Godreau tried to stop the Nissan by turning on his vehicle’s emergency lights. MSJ\_075-  
4 76. Instead of pulling over, Estrada put on his hazard lights and kept driving. MSJ\_076.  
5 That struck Agent Godreau as “odd.” *Id.* According to Francisco, when the trailing Border  
6 Patrol vehicle turned on his “overhead lights,” Estrada just “kept on driving” and listening  
7 to “loud music.” MSJ\_174. Estrada drove for several miles without pulling over.  
8 MSJ\_175. After initially failing to yield, Estrada eventually pulled over to the side of SR-  
9 94. MSJ\_260. Agent Godreau parked behind Estrada and started walking towards  
10 Estrada’s window. MSJ\_177, 260. When Agent Godreau was about three feet away,  
11 Estrada “yell[ed] something out of the window and [took] off at a fast rate.” MSJ\_077-78,  
12 177. According to Francisco, when Estrada sped away, the Nissan’s tires sounded  
13 “something like” a “race car” taking off. MSJ\_181; *see also* MSJ\_180 (it sounded “like,  
14 when you speed away, when ... the tires make a noise on the road when you speed away”).

15 Agent Godreau retreated to his vehicle and started following Estrada. MSJ\_260.  
16 Estrada was “going really fast, and [Godreau] was having a hard time catching up to him.”  
17 MSJ\_079, 260. That was true even though Agent Godreau had been “working th[e] area  
18 for 19 years” and was “very comfortable” driving that stretch of SR-94. MSJ\_079. Agent  
19 Godreau estimated that Estrada reached speeds “probably close” to 100 mph. *Id.* Plaintiffs  
20 admit that Estrada drove faster than 80 mph. MSJ\_487-88. Estrada was also “brake  
21 checking” Agent Godreau—“I was getting close to him and he would step really hard on  
22 the brake to slow me down, and then he would take off again.” MSJ\_080.

23 There is no dispute that Estrada drove recklessly throughout the vehicle pursuit—  
24 the Madariagas admit that. MSJ\_489. In addition to driving well beyond the speed limit,  
25 Estrada would “get out of the road” during curves, and passed at least one car by crossing  
26 over into the wrong lane of traffic. MSJ\_182-83. Unsurprisingly, Francisco was scared:  
27 “Of course I was scared. Because at the speed [Estrada] was driving, I knew that at any  
28 time we could be in an accident and we could die. And I didn’t know what was going to

1 happen to us at the speed that he was driving.” MSJ\_185. Similarly, Jaime was worried  
2 “because at the speed that he was going, I had never ridden in a car at that speed. And I  
3 thought, he’s gonna, you know, get out of the road or something.” MSJ\_236. Francisco  
4 and Jaime stated that the chase carried on for approximately 15 to 20 minutes. MSJ\_182,  
5 238-39. Throughout that time, Border Patrol vehicles were “behind [Estrada] with their  
6 lights on and their sirens on.” MSJ\_189.

7 At the time of the chase, Border Patrol Agent Jordan Gerber was in a marked Border  
8 Patrol van equipped with emergency lights and sirens. Agent Gerber heard over the radio  
9 that Estrada had failed to yield and was heading eastbound on SR-94 towards Agent  
10 Gerber’s location. Anticipating Estrada would reach him shortly, Agent Gerber turned on  
11 his lights and sirens in an attempt to discourage Estrada from continuing the pursuit. Agent  
12 Gerber then stopped his van on a straightaway in the westbound lane of SR-94. He spotted  
13 the Nissan coming towards him eastbound at a high rate of speed. When the Nissan arrived  
14 at the straightaway, Agent Gerber saw Estrada make an abrupt turn across the center line  
15 into the westbound lane—heading directly at Agent Gerber and his Border Patrol vehicle.  
16 The Nissan appeared to be picking up speed, and Agent Gerber believed Estrada intended  
17 to collide with Agent Gerber’s vehicle. With only about ten feet to spare, Estrada swerved  
18 back into the eastbound lane and drove past Agent Gerber. MSJ\_256-58 (Gerber Decl.).

19 **C. Estrada pulls into a parking lot—but continues driving recklessly**

20 After driving recklessly for multiple miles, Estrada finally pulled off SR-94 into a  
21 gas station parking lot (the “Circle-K parking lot”), depicted here (with the sole  
22 entrance/exit marked with a blue X):



1 MSJ\_007-08, 047; *see also* MSJ\_514 (approx. first three seconds of video shows Estrada  
2 entering the Circle-K parking lot from SR-94, followed by Border Patrol vehicles). But  
3 Estrada did not stop. Instead, Estrada quickly drove to the far right corner of the lot (from  
4 the perspective of the image above). MSJ\_195-96; *see also* MSJ\_512 (video from Circle-  
5 K at approx. 0:17 to 0:30; displays Estrada enter lot, then drive towards corner). Campo  
6 resident, and off-duty SDPD officer, Brian Moreno was getting gas at the time. He spotted  
7 Estrada enter the lot. Estrada was driving “fast”; “it definitely looked like he was just  
8 trying to get out of there.” MSJ\_018. Given Estrada’s speed, Moreno “just wanted to get  
9 out of the way. I didn’t want to get hit[.]” *Id.* Moreno “figured if [he] did not get out of  
10 the way, then [he] would have been hit.” MSJ\_019. Moreno estimated Estrada was driving  
11 “probably about 25 to 30” miles per hour, well above the usual speed (“under five”) that  
12 drivers usually travel in the lot. *Id.*

13 **1. Estrada jumps a curb and nearly hits Agent Baker**

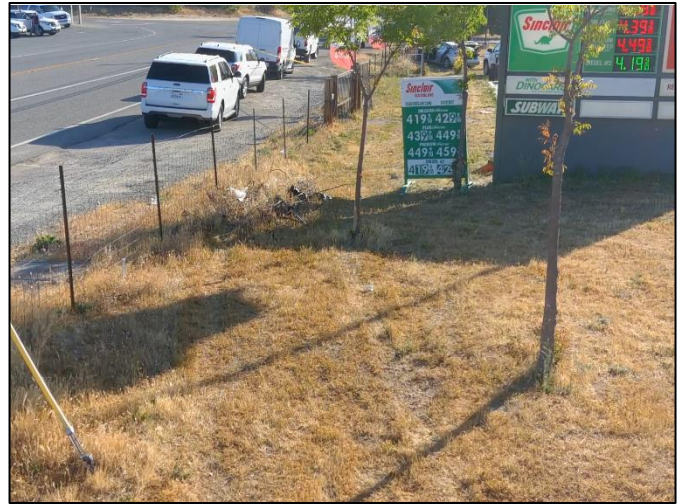
14 After driving to the far corner of the lot (where there is no exit), Estrada jumped  
15 over a curb onto a grassy shoulder of the lot, and then started driving back in the direction  
16 of the lone parking lot entrance. MSJ\_197, 261. According to Francisco Madariaga,  
17 Estrada drove over the curb at location marked with the “X” in the image below, then  
18 turned right as shown by the blue line:



25 MSJ\_198, 228. After driving over the curb, Estrada drove “right towards” Agent  
26 Christopher Baker, who was on foot trying to assist with apprehending Estrada. MSJ\_099-  
27 101. According to Agent Baker, the Nissan “was rapidly accelerating. . . . I would say 15  
28 to 20 miles per hour while – as it passed me.” MSJ\_099. Agent Baker had to “run and



1 jump out of the way of the vehicle.” MSJ\_100; *see also* MSJ\_107-08 (“If I wouldn’t have  
 2 moved, it would have hit me head on[.]”). Estrada continued past Agent Baker, alongside  
 3 the small wire fence that divides SR-94 and  
 4 the parking lot. Estrada was “hitting” and  
 5 “breaking” trees as he squeezed through  
 6 the grassy section of the lot, headed back  
 7 towards the sole exit leading to SR-94.  
 8 MSJ\_100-102. The image here shows the  
 9 path Estrada took on the grassy patch back  
 10 towards the single entrance/exit. *See*  
 11 MSJ\_132-33; MSJ\_509; McDonald Decl. ¶ 6. It appeared to Moreno that Estrada was  
 12 trying to “get back out of the . . . parking lot and get back onto [SR-]94.” MSJ\_022.



## 13 2. Estrada crashes into a curb, then erratically reverses

14 Estrada nearly escaped. However, right before the parking lot exit, he crashed into  
 15 a tall curb dividing the grass from the paved lot.<sup>5</sup> MSJ\_201; *see* MSJ\_153 (photo of curb).  
 16 Moreno heard a loud “pop” when Estrada hit the curb. MSJ\_023-24. At that point, Moreno  
 17 thought the chase was over: “Oh, absolutely. I thought it was done. . . . Because usually at  
 18 that point people give up. Once they realize they can’t go forward anymore, they stop.”  
 19 MSJ\_025. Francisco likewise thought Estrada was going to stop, given “police cars were  
 20 all around us.” MSJ\_201. Agent Godreau also thought the pursuit was over. MSJ\_261. He  
 21 parked his vehicle in front of the Nissan, intending to perform an arrest. MSJ60; *see*  
 22 MSJ\_512 (video at approx. 00:54-00:59); MSJ\_514 (video at approx. 00:40-00:46).

23 However, Estrada “was not done yet.” MSJ\_081; *see* MSJ\_202-03 (even though  
 24 Estrada “was already surrounded,” and “didn’t have any way out,” Estrada “kept going”).  
 25 Instead, Estrada reversed the Nissan within the grassy portion of the parking lot. MSJ\_081,  
 26 202, 494. According to Moreno, Estrada reversed “erratically”; “[h]e was just trying to get  
 27

28 <sup>5</sup> The image at MSJ\_290 shows the path Estrada drove from SR-94, into the lot, to the far corner, over the curb, back towards the exit, then crashing into the second curb.

1 out of there as fast as he could.” MSJ\_026. Estrada’s decision to reverse made Francisco  
2 even more scared. He did not know what Estrada was going to do next. MSJ\_203.

3 Agent Godreau exited his vehicle and started heading towards the Nissan on foot.  
4 MSJ\_082. From his perspective, the situation was “rapidly evolving; everything is  
5 changing at the same time.” *Id.* As Estrada reversed, from the front passenger seat,  
6 Francisco saw approximately five Border Patrol agents on their feet coming towards the  
7 Nissan, two outside the “screen fence.” MSJ\_204-05. Several agents were calling loudly  
8 for Estrada to stop. MSJ\_091-92, 209-210, 495-496. Agent Luis Perez saw Estrada  
9 reversing in the grassy area. In response, Agent Perez drove his Border Patrol vehicle over  
10 the curb “onto the grassy area where [Estrada] was and positioned [Perez’s] vehicle right  
11 behind [Estrada’s vehicle].” MSJ\_115. Estrada then stopped reversing approximately 1 or  
12 2 feet from Agent Perez’s vehicle. MSJ\_116.

### 13 **3. Estrada stops the Nissan; the chase appears over**

14 With the Nissan stopped, Francisco—sitting in the front passenger seat of the  
15 Nissan—saw an agent approximately three meters away from the front of the Nissan at  
16 the 11:00 o’clock position (with 12 o’clock being straight in front). MSJ216-17, 222, 224-  
17 25, 229. That was Agent Godreau, who estimated he was approximately ten feet from the  
18 front of the Nissan after it stopped reversing. MSJ\_086. Agent Alba was near the back  
19 passenger door of the Nissan; from his vantage point, he estimated that Agent Godreau  
20 was approximately six feet from the front of the Nissan. MSJ\_090. Beyond Agent  
21 Godreau, Francisco saw another agent—identified elsewhere as Agent Jose Patch—in the  
22 front of the car at approximately the 1:00 o’clock position approximately four meters from  
23 the car. MSJ\_225. Still other agents—Alba, Perez, Baker, and Mathews—were  
24 converging towards the stopped Nissan. *See* MSJ\_273-74.

25 In other words, as described by third party witness Trent Heimerdinger, Estrada was  
26 “[p]retty much surrounded by countless number of border patrol vehicles in the area.”  
27 MSJ\_059. Heimerdinger “just didn’t expect [Estrada] to keep going after that[.]” *Id.*  
28 Neither did off-duty SDPD Officer Brian Moreno—he thought the chase was over.

1 MSJ\_029, 032 (“[H]e was surrounded. Just it seems kind of like a – a moot point to try to  
2 get away at that point.”). Plaintiff Jaime Madariaga also thought the chase was over. That  
3 made him “happy” “[b]ecause the car was not gonna continue getting us in danger on the  
4 road.” MSJ\_242. Multiple agents continued to shout at Estrada to stop and “get out of the  
5 car.” MSJ\_028. Agent Godreau was also instructing Estrada to “show ... [his] hands.”  
6 MSJ\_083. He believed that Estrada was “done, that he’s stopped, that he’s ready to give  
7 himself up.” MSJ\_085; *see also* MSJ\_261 (Godreau Decl., ¶ 11: “Once again, I thought  
8 the driver was going to give up, at which point I planned to take the driver into custody.”).

#### 9 **4. Estrada loudly revs the Nissan engine**

10 To everyone’s surprise, Estrada still was not done. Even while surrounded, Estrada  
11 suddenly and unexpectedly pressed down hard on the gas, causing a revving that sounded  
12 like he was “press[ing] the gas pedal all the way down.” MSJ\_246. The revving was  
13 unmistakable: it was heard by at least six witnesses, including a plaintiff and a third party.

14 Indeed, according to off-duty SDPD officer Brian Moreno, the Nissan’s engine let  
15 out a “high-pitched whine.” MSJ\_033. The noise “stood out” to Moreno, and he associated  
16 it with “trying to rapidly pick up speed[.]” *Id.* A “normal” acceleration sound “is a lot  
17 lower” than the revving Moreno heard. *Id.* “[T]he rpm’s [were] going higher on the engine  
18 like [Estrada] was just trying to get out of there.” *Id.* From about 75-100 feet away,  
19 MSJ\_044, Moreno could “clearly” hear revving. MSJ\_033. Based on the sound, Moreno  
20 believed Estrada was trying to rapidly accelerate to a high rate of speed. MSJ\_033, 041.

21 Multiple agents around the Nissan also heard the revving. Agent Mathews described  
22 the revving as “very high-pitched,” like Estrada “pressed the gas pedal all the way down.”  
23 MSJ\_246. Agent Alba heard a high-pitched whine, that made the “engine roar,” just before  
24 the Nissan moved. MSJ\_094, MSJ\_252 (Alba Decl. at ¶ 7). Still other agents heard the  
25 same. *See* MSJ\_085 (Agent Godreau: “He then revved up the engine, and the vehicle  
26 started moving rapidly towards me”); MSJ\_112 (Agent Patch: “I heard an engine rev  
27 loudly and then the vehicle moved, lunged from that position forward and . . . it was too  
28 close – coming too close to Agent Godreau and I, at that point, feared for his life.”).

1 Finally, even Francisco Madariaga admits that Estrada revved the Nissan after  
2 reversing to a stop. Initially, Francisco was asked whether the car was moving when agents  
3 fired. MSJ\_217. In response, Francisco (wrongly) testified that the car was not moving.<sup>6</sup>  
4 *Id.* However, he stated that Estrada “put his foot on the pedal, the accelerator . . . as though  
5 he wanted to start driving.” MSJ\_217. When asked how Francisco knew Estrada pushed  
6 the accelerator, Francisco said, “Because you could hear it.” *Id.*; *see also* MSJ\_498, 500.

7 When Estrada revved, the Nissan did not immediately move. MSJ\_118. This was  
8 likely because Estrada placed the Nissan in neutral—whether purposefully or  
9 accidentally—when shifting from reverse down past neutral to drive or low gear. *See*  
10 MSJ\_431 (Plaintiff’s expert Jonathan Smith stating, “[i]t is entirely possible that Decedent  
11 placed the vehicle in neutral when trying to start moving again . . .”).

12 **5. Estrada accelerates forward towards Agent Godreau; agents**  
13 **fire to stop the threat**

14 Suddenly, the Nissan kicked into gear, “lunged” forward, and “started heading  
15 rapidly towards [Agent Godreau].” MSJ\_085, 87; *see* MSJ\_510 at 00:10-00:13. At the  
16 time the Nissan started moving  
17 forward, Agent Godreau  
18 perceived he was about 10 feet  
19 from the front of the Nissan.  
20 MSJ\_261.<sup>7</sup> The image here  
21 depicts Agent Godreau’s  
22 location, along with  
23 surrounding agents, when  
24 Estrada started accelerating  
25 forward. MSJ\_292.



27 <sup>6</sup> Francisco later admitted the Nissan was moving when shots were fired. MSJ\_499-500.

28 <sup>7</sup> The United States’ expert places him 12.4 feet away. MSJ\_273.



1           Based on the short distance between him and the Nissan, Agent Godreau “did not  
2 believe [he] had time to get out of the way.” MSJ\_261 (Godreau Decl. ¶ 12). Furthermore,  
3 based on the driver’s behavior, even if Agent Godreau had tried to move out of the way,  
4 Agent Godreau “believed that the driver would have just turned towards [him].” *Id.* Agent  
5 Godreau “feared for his life and thought [he] was going to end up under that car [the  
6 Nissan].” *Id.* “Based on the revving of the Nissan, its sudden forward movement towards  
7 me, and the actions taken throughout the pursuit by the Nissan driver, I thought I was  
8 going to die.” *Id.* at ¶ 14. In response to “the vehicle . . . coming directly at [him],”  
9 MSJ\_087, Agent Godreau fired three shots at Estrada, the first approximately 1.67 seconds  
10 after Estrada accelerated forward. MSJ\_274, 286 (United States’ expert analysis);  
11 MSJ\_472-473 (Plaintiffs’ expert analysis). According to the United States’ expert, Agent  
12 Godreau was approximately 3.5 feet from the Nissan when he fired the first shot.  
13 MSJ\_274. Plaintiffs’ expert estimates Agent Godreau was 8-12 feet away (an insignificant  
14 distinction for summary judgment purposes, as outlined below). MSJ\_473. All of Agent  
15 Godreau’s shots went through the Nissan’s front windshield. MSJ\_254-255 (photographs  
16 of windshield), 286, 500-501. None of Agent Godreau’s shots hit anyone.

17           From his perspective next to the passenger-side back door, Agent Alba believed  
18 Estrada was going to hit Agent Godreau with the Nissan. MSJ\_093-94. From Agent Alba’s  
19 vantage point, Agent Godreau was “standing directly in front of the [Nissan],  
20 approximately six feet away.” MSJ\_252 (Alba Decl. ¶ 7). Fearing for Agent Godreau’s  
21 life, Agent Alba fired one shot at Estrada. *Id.* at ¶ 8. The bullet hit Estrada in the neck,  
22 causing his death. MSJ\_276. The United States’ expert places Agent Alba approximately  
23 three feet from the Nissan when he fired. MSJ\_274. Plaintiffs’ expert places him 5-8 feet  
24 away. MSJ\_473.

25           As Estrada surged the Nissan forward, he started veering left, towards the small  
26 wire fence separating the parking lot from SR-94. According to Moreno, it “looked like  
27 [Estrada] was trying to veer up towards Campo Road [SR-94].” MSJ\_037. Agent David  
28 Mathews was on the other side of the wire fence, exiting his vehicle then quickly coming

1 around the back of his vehicle towards the Nissan (see images at MSJ\_292-292). Agent  
2 Mathews heard Estrada rev the Nissan’s engine, as if the “gas pedal [was pressed] all the  
3 way down.” MSJ\_246. Then, after Agent Mathews turned the corner on his vehicle, he  
4 saw the Nissan move forward and then “face[] towards [him].” *Id.* The Nissan was  
5 “moving really fast and the time frame was really, really quick.” MSJ\_248. Agent  
6 Mathews saw that the driver “was looking forward” and the driver’s hands “remained on  
7 the steering wheel.” MSJ\_264 (Mathews Decl. ¶ 8). While there was a wire fence between  
8 Agent Mathews and the Nissan, Agent Mathews “did not believe [the fence] would stop  
9 the vehicle from hitting [him], as the fence was very thin, rusted, and old.” *Id.* at ¶ 9. Agent  
10 Mathews thought the Nissan was going to run him over. *Id.* Accordingly, when the Nissan  
11 turned towards him, Agent Mathews fired one shot at the driver. *Id.*; *see also* MSJ\_246,  
12 249, 293. The shot traveled through the front windshield of the Nissan. MSJ\_501. It did  
13 not hit anyone.

14 The events recounted by this subsection (from when Estrada first started  
15 accelerating the Nissan forward through the fifth shot) spanned only 2.77 seconds.  
16 MSJ\_273-74. In total, Border Patrol agents fired five shots at Estrada over the span of 1.10  
17 seconds. MSJ\_280-81 (United States’ expert analysis); MSJ\_472-73 (Plaintiffs’ expert  
18 analysis). The first shot was fired 1.6 seconds after Estrada started accelerating forward.  
19 MSJ\_274 (United States’ expert analysis); MSJ\_473 (Plaintiffs’ expert analysis). The  
20 image at MSJ\_292, created by the United States’ video forensic expert, depicts the  
21 locations of the Nissan and the agents throughout the course of the five shots. Additionally,  
22 several cameras in the area captured portions of the event. Those videos are attached as  
23 exhibits MSJ\_510, 511, 512, 513, and 514, and will be lodged with the Court.

24 **D. Plaintiffs admit Estrada drove recklessly, revved the engine, and**  
25 **accelerated forward before shots were fired, among other admissions**

26 For their part, Plaintiffs—one or more of them as to each request for admission—  
27 admit that Estrada (1) drove away from Border Patrol without permission after Agent  
28 Godreau attempted to pull him over; (2) drove at speeds greater than 80 mph; (3) at least

1 once crossed over into the opposing lane of traffic during the pursuit; (4) drove recklessly  
2 while being pursued by Border Patrol; (5) placed his passengers in danger of being  
3 involved in an accident; (6) drove over a curb onto a non-paved portion of the Circle-K  
4 parking lot; (7) struck a curb with his vehicle inside the Circle-K parking lot; (8) reversed  
5 the Nissan after striking the curb; (9) revved the engine of the Nissan shortly before shots  
6 were fired; (10) drove the Nissan forward before shots were fired; and (11) drove  
7 recklessly in the Circle-K parking lot. *See* MSJ\_486–502. Additionally, Plaintiffs admit  
8 that as Estrada reversed the Nissan to a stop in the Circle-K parking lot, Border Patrol  
9 personnel shouted commands to Estrada to stop, MSJ\_495-96; that when Estrada reversed  
10 to a stop, Francisco observed two Border Patrol agents on foot approximately three and  
11 four meters forward of the Nissan at 11:00 and 1:00 o’clock positions (nearly straight in  
12 front of the vehicle), MSJ\_496-97; and that Francisco heard an acceleration sound from  
13 the Nissan before shots were fired, MSJ\_499.

14 **E. The parties’ shooting reconstruction analysis**

15 The raw facts and admissions described above are alone sufficient to grant summary  
16 judgment to the United States. Expert analysis, from both sides, further confirms the  
17 serious danger presented by Estrada both during his flight from Border Patrol and at the  
18 time of the shooting. Although each side’s factual reconstruction of the shooting incident  
19 varies in some respects, the minor differences do not create a material dispute concerning  
20 the justification for deadly force. The same conclusion—i.e., the use of force was  
21 reasonable—is warranted even under Plaintiffs’ largely similar version of the facts.

22 As set forth in the report of Plaintiffs’ accident reconstruction expert Stephen L.  
23 Plourd: (1) after crashing into the curb and reversing the Nissan within the grassy patch,  
24 Estrada stopped his vehicle for approximately 4 seconds as agents converge on the area in  
25 their vehicles and on foot; (2) during this 4-second period while Estrada’s vehicle was  
26 stationary, agents surrounded the car; (3) agents moved into the area and positioned  
27 themselves before Estrada began to move his vehicle; (4) agents had their weapons drawn;  
28 (5) Estrada turned his wheels left and moved forward; (6) the vehicle traveled five to six

1 feet before the first shot was fired; (7) the time between when the vehicle began to move  
2 and the first shot was 1.6 seconds; (8) a total of 5 shots were fired within 1.1 seconds; (9)  
3 Agent Godreau was only 8–12 feet away from front of the Nissan when he fired his first  
4 shot, which went into the “center of the windshield[.]” MSJ\_472-73.

5 This factual reconstruction of events is generally consistent with the analysis of the  
6 United States’ forensic animation expert, Jason Fries, who analyzed the scene using  
7 available video footage and by taking a laser-scan of the Nissan and the Circle-K parking  
8 lot. *See, e.g.*, MSJ\_273-76. Mr. Fries’ video reconstruction has been submitted as an  
9 exhibit and illustrates the danger to the agents in a manner consistent with the  
10 reconstruction of Plaintiffs’ expert as discussed above. *See* MSJ\_515.

#### 11 **F. The parties’ use of force experts**

12 The United States’ police practices expert, Scott DeFoe, concluded that Agents  
13 Godreau, Alba, and Mathews reasonably fired at Estrada to stop the imminent threat that  
14 Estrada posed. In Mr. DeFoe’s opinion, Estrada created a “dynamic and urgent situation”  
15 that posed an “immediate threat of physical harm or death” to the agents. *See* MSJ\_336,  
16 341. Mr. DeFoe found “[t]his was clearly an Immediate Defense of Life situation” facing  
17 both Agent Godreau and Agent Mathews. MSJ\_338, 344, 349. Mr. DeFoe also highlighted  
18 the perception-reaction reality associated with deciding to fire a gun, i.e., there is a  
19 momentary delay between perceiving a threat, deciding to fire in response to the threat,  
20 then firing. According to Mr. DeFoe, that perception-reaction process is around 1–1.5  
21 seconds. MSJ\_339, 345, 349. That corresponds exactly with the threat posed by Estrada’s  
22 forward acceleration of the Nissan, which came 1.66 seconds before the first shot.<sup>8</sup>  
23 MSJ\_274.

24  
25  
26 \_\_\_\_\_  
27 <sup>8</sup> In Plaintiffs’ view, Agent Alba fired the second shot (leading to Estrada’s death). *See*  
28 MSJ\_473. Lending an image to the perception-reaction concept, the exhibits at MSJ\_295  
and MSJ\_300 show the locations of the agents 1.0 and 1.5 seconds before the second shot.  
Those images show Agent Godreau in certain danger.

1 Plaintiffs’ use of force expert, Jonathan Smith, opines generally that the force used  
2 was unreasonable. As outlined below, his criticisms do not raise a material dispute of  
3 “fact” sufficient to thwart summary judgment and force a trial. But in any event, even Mr.  
4 Smith admits a significant reality. Specifically, he states that agents had “no alternative to  
5 using deadly force” given the proximity of the Nissan to Agent Godreau at the time shots  
6 were fired. MSJ\_463. That concession crystallizes the danger Agent Godreau faced—it  
7 was reasonable to perceive that at that moment, deadly force was necessary. Plaintiffs’  
8 experts try to avoid the legal consequences of that concession by claiming Agent Godreau  
9 unreasonably put himself in a position where he had no alternative to using deadly force.  
10 *See id.* However, as outlined below, this is factually contradicted by Plaintiffs’ own expert  
11 reconstructionist and is legally irrelevant in any event.

### 12 III

#### 13 SUMMARY JUDGMENT STANDARD

14 Under Rule 56, courts must grant summary judgment when the pleadings,  
15 depositions, answers to interrogatories, and admissions, together with affidavits or  
16 declarations, demonstrate there is no genuine issue as to any material fact and that the  
17 moving party is entitled to judgment as a matter of law. Material facts are those that “might  
18 affect the outcome of the suit under the governing law[.]” *Anderson v. Liberty Lobby, Inc.*,  
19 477 U.S. 242, 248 (1986). On summary judgment, “the evidence of the [plaintiff] is to be  
20 believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255.

21 However, an opposition to a summary judgment motion must consist of more than  
22 unsupported allegations or denials. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477  
23 U.S. 317, 324 (1986). It must be supported by affidavits or other competent evidence  
24 setting forth specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S.  
25 at 324. The plaintiff is “required to provide evidence that would permit a reasonable jury  
26 to find” in his favor. *Lanningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987). If  
27 the plaintiff’s evidence is “merely colorable” or “not significantly probative,” summary  
28 judgment may be granted. *Anderson*, 477 U.S. at 249–50. To defeat summary judgment,

1 the plaintiff must have more than “a scintilla of evidence to support his claims.” *Freedman*  
2 *v. MCI Telecommunications Corp.*, 255 F.3d 840, 845 (D.C. Cir. 2001). In other words,  
3 the plaintiff must do more than just argue “that there is some metaphysical doubt as to the  
4 material facts.” *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

5 Moreover, a plaintiff claiming wrongful use of force cannot “avoid[] summary  
6 judgment by simply producing an expert opinion that an officer’s conduct leading up to a  
7 deadly confrontation was imprudent, inappropriate, or even reckless.” *Lal v. California*,  
8 746 F.3d 1112, 1118 (9th Cir. 2014) (quoting *Billington v. Smith*, 292 F.3d 1177, 1189  
9 (9th Cir. 2002) (overruled on other grounds by *County of Los Angeles, Calif. v. Mendez*,  
10 581 U.S. 420 (2017)). Instead, the court decides “as a matter of law whether a reasonable  
11 officer could have believed that his conduct was justified.” *Id.* (quotation omitted).

## 12 IV

### 13 ARGUMENT

#### 14 A. Agents used reasonable force to stop the threat posed by Estrada’s 15 revving and accelerating in close proximity to agents on foot

##### 16 1. Governing legal principles

17 The FTCA makes the United States liable to the same extent as a private individual  
18 under like circumstances, under the law of the place where the tort occurred. *Levin v.*  
19 *United States*, 568 U.S. 503, 506-07 (2013). In California, a “justifiable homicide” by law  
20 enforcement is a privileged act for which no civil liability can be imposed. *Gilmore v.*  
21 *Superior Court*, 230 Cal. App. 3d 416, 420-22 (Cal. Ct. App. 1991); *see also Brown v.*  
22 *Ransweiler*, 171 Cal. App. 4th 616, 529 (Cal. Ct. App. 2009) (where reasonable force  
23 deployed, there is no breach of duty to use reasonable care). Claims involving use of force  
24 by law enforcement are analyzed under the objective reasonableness standard of *Graham*  
25 *v. Connor*, 490 U.S. 386 (1989). *See Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1232  
26 (9th Cir. 2013); *Martinez v. Cnty. of Los Angeles*, 47 Cal. App. 4th 334, 343 (1996) (“Such  
27 excessive force claims are analyzed under the Fourth Amendment and its ‘reasonableness’  
28



1 standard and the proper inquiry focuses upon whether the deputies acted reasonably in  
2 shooting Martinez.”).

3 The *Graham* standard is “highly deferential to the police officer’s need to protect  
4 himself and others[.]” *Martinez*, 47 Cal. App. 4th at 343. Under that standard, police may  
5 use force that is objectively reasonable under the circumstances. *Graham*, 490 U.S. at,  
6 397. Deadly force is reasonable if “the officer has probable cause to believe that the  
7 suspect poses a significant threat of death or serious physical injury to the officer or  
8 others.” *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). All determinations of force “must  
9 embody allowance for the fact that police officers are often forced to make split-second  
10 judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the  
11 amount of force that is necessary in a particular situation.” *Graham*, 490 U.S. at 396–97.  
12 To that end, courts are “required to view the facts as an officer would have encountered  
13 them on the night in question, not as an ex post facto critic dissecting every potential  
14 variance under a magnifying glass.” *Monzon*, 978 F.3d at 1157 (citing *Graham*, 490 U.S.  
15 at 396). For instance, courts are to consider the use of force “from the perspective of a  
16 reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*,  
17 490 at 396. Furthermore, an officer is not required to be *certain* that an individual will  
18 inflict serious bodily harm before deploying deadly force. “The question is one of the  
19 officer’s reasonable perception – not one of verified certainty.” *Bethea v. Howser*, 447 F.  
20 Supp. 3d 497, 513 (E.D. Va. 2020).

21 To assess reasonableness, in what are commonly referred to as the “*Graham*  
22 factors,” courts consider the “severity of the crime at issue, whether the suspect poses an  
23 immediate threat to the safety of the officers or others, and whether he is actively resisting  
24 arrest or attempting to evade arrest by flight.” *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th  
25 Cir. 2010) (quoting *Graham*, 490 U.S. at 396).

## 26 **2. The agents’ use of force was reasonable**

27 Here, the agents’ use of deadly force was reasonable to stop the serious imminent  
28 threat that Estrada posed with his car. No factual disputes materially impact that

1 conclusion—any reasonable person would have feared for their safety when Estrada  
2 menacingly revved his engine then accelerated forward towards agents surrounding his  
3 vehicle. That is particularly true given Estrada’s demonstrated willingness to do whatever  
4 was necessary to avoid arrest on the night in question. Estrada created a tense, uncertain,  
5 and rapidly evolving scene—one that required agents to “make split-second judgments ...  
6 about the amount of force that is necessary in a particular situation.” *Graham*, 490 U.S. at  
7 396–97. Agent Godreau, Agent Alba, and Agent Mathews reasonably and appropriately  
8 fired at Estrada to stop the imminent threat he posed. Failing to do so would have been a  
9 deadly gamble—one the law does not require them to take. *See, e.g., Waterman v. Batton*,  
10 393 F.3d 471, 479 (4th Cir. 2005) (“[T]he Constitution simply does not require police to  
11 gamble with their lives in the face of a serious threat of harm.”).

12 The *Graham* factors leave no doubt that the agents’ split-second judgment to fire  
13 was reasonable. First, Estrada committed multiple serious crimes in the course of the  
14 encounter with Border Patrol. He was suspected of transporting aliens, a federal felony  
15 offense punishable by up to five years’ imprisonment (and potentially up to twenty years,  
16 for placing lives in “jeopardy”). *See* 8 U.S.C. § 1324(a)(1)(B)(i)-(iii). Then he failed to  
17 yield to Border Patrol and drove away at speeds far exceeding the speed limit. *See* Cal.  
18 Veh. Code § 23103 (reckless driving); Cal. Veh. Code § 2800(a) (criminalizing willful  
19 refusal to comply with lawful order of officer). Moreover, during the course of the chase,  
20 Estrada also nearly ran down Agents Gerber and Baker, arguably an assault with a deadly  
21 weapon. *See* 18 U.S.C. § 111(a)-(b) (setting maximum penalty for assault with deadly  
22 weapon at 20 years).

23 Second, the immediate threat posed by Estrada was palpable. When Estrada surged  
24 the Nissan forward—first towards Agent Godreau, then towards Agent Mathews—  
25 Estrada could have hit Agent Godreau in less than two seconds and Agent Mathews only  
26 moments later. *See* MSJ\_478 (Plaintiffs’ expert agreeing that the Nissan traveled up to 7.9  
27 feet per second before shots were fired). Moreover, four other agents were all within 15  
28 feet of the Nissan at the time the first shot was fired—two just 3.5 feet away. *See*



1 MSJ\_273-74. When Estrada suddenly revved and accelerated, no one knew what he was  
2 going to try next—but all possibilities involved immediate, serious risk to the surrounding  
3 agents. Immediate action was needed to protect against the immediate harm. *See City &*  
4 *Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 612 (2015) (“[I]t is reasonable  
5 for police to move quickly if delay would gravely endanger their lives or the lives of  
6 others.”). Even beyond the risk to the agents, Estrada’s own passenger—Jaime  
7 Madariaga—worried that Estrada was about to “overturn[]” the car by driving through the  
8 wire fence separating the Circle-K parking lot from SR-94. MSJ\_243.

9 Third, there is no question that Estrada was actively resisting arrest and attempting  
10 to evade arrest by flight at the time force was deployed.

11 In addition to the *Graham* factors, case law also confirms the use of force here was  
12 reasonable. The Ninth Circuit recently analyzed a similar case and affirmed summary  
13 judgment in favor of officers. In *Monzon*, 978 F.3d 1150, the facts were as follows:

14 After leading police officers on a high-speed chase, Junef Monzon turned down  
15 a dead-end street. He stopped at the end of the road, and the police officers  
16 parked and exited their cruisers behind him. Monzon turned the van around,  
17 pointing it generally toward the officers. As the van accelerated in an arc toward  
18 and eventually between the officers, they commanded Monzon to stop and fired  
19 on him when the van moved in their direction and in the direction of their fellow  
20 officers. Monzon crashed into a police cruiser, pushing that cruiser into one of  
21 the officers, and the officers continued to fire. Monzon sustained multiple  
22 gunshot wounds and was pronounced dead at the scene.

23 *Id.* at 1153. The decedent’s parents filed claims alleging excessive force, battery,  
24 negligence, and violations of the Bane Act. The Ninth Circuit affirmed summary judgment  
25 in favor of the City of Murrieta. The Court made clear which facts did not preclude  
26 summary judgment. For instance, the Court “assume[d] that [the officer nearest Monzon’s  
27 van] was up to 15 feet away from the van<sup>9</sup> and was not in its direct path at the time [the  
28 officer] opened fire.” *Id.* at 1157. Also, the Court accepted that “none of the officers gave  
a deadly force warning.” *Id.* Despite spotting the plaintiffs some of those facts, the Ninth

---

<sup>9</sup> Even further away than the agents in this case.

1 Circuit found no genuine issue of material fact precluding summary judgment in favor of  
2 the officers based on the danger posed by Monzon’s driving.

3 As for the *Graham* factors, the Ninth Circuit found, first, that the severity of the  
4 crime favored the use of force. “Monzon led officers on a dangerous high-speed chase at  
5 night, and he refused to stop the van at the behest of officers even after coming to the end  
6 of a street.” *Id.* at 1157. Second, the Ninth Circuit found that “Monzon posed an immediate  
7 threat to the safety of the officers when he ignored commands to stop the van and drove  
8 near, toward, and amongst the officers on foot. These actions also demonstrate that  
9 Monzon was actively resisting arrest and attempting to evade arrest by flight.” *Id.* And  
10 third, the Ninth Circuit found that “Monzon’s driving endangered the officers and left  
11 them with only seconds to consider less severe alternatives.” *Id.* The Court emphatically  
12 emphasized this point:

13 It all happened in less time than it took to type this sentence, before daylight,  
14 in a very dynamic and chaotic environment, where officers were forced to  
15 make split-second decisions about a driver who deliberately turned his car  
16 around and drove it toward and between them. The officers were faced with  
17 a reckless driver who had already endangered their lives and the lives of the  
18 public with a high-speed chase, had broken traffic laws, ignored commands  
to stop his vehicle, and steered and accelerated his van toward them in close  
quarters on an unlit street.

19 *Id.* at 1158. Given these facts, “[a] reasonable officer ... would have probable cause to  
20 believe that Monzon posed an immediate threat to the safety of one or more of the other  
21 officers or himself as Monzon drove his car toward and among the five officers.” *Id.*

22 The same analysis applies here. *Monzon* is controlling and confirms summary  
23 judgment is warranted. And *Monzon* is not alone. Indeed, other cases similarly hold that  
24 an accelerating vehicle, in a confined space, with agents in close proximity on foot,  
25 supports the use of deadly force. *See, e.g., Plumhoff v. Rickard*, 572 U.S. 765, 776 (2014)  
26 (use of deadly force reasonable where “the front bumper of [the driver’s] car was flush  
27 with that of one of the police cruisers, [the driver] was obviously pushing down on the  
28 accelerator because the car’s wheels were spinning, and then [the driver] threw the car

1 into reverse ‘in an attempt to escape’”; “at the moment when the shots were fired, all that  
2 a reasonable police officer could have concluded was that Rickard was intent on resuming  
3 his flight and that, if he was allowed to do so, he would once again pose a deadly threat  
4 for others on the road.”); *Wilkinson*, 610 F.3d at 551–53 (deadly force reasonable where  
5 officer “was standing in a slippery yard with a minivan accelerating around him”);  
6 *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014) (reasonable to fire at driver who “revved  
7 the [car’s] engine and accelerated forward towards” an officer on foot).<sup>10</sup> These cases  
8 confirm that the use of force here was reasonable. Estrada wielded the Nissan as a  
9 dangerous weapon and threatened the lives of the surrounding agents by accelerating  
10 towards and within them. The agents reasonably used force in response.

11 The United States expects that Plaintiffs will rely on *Villanueva v. California*, 986  
12 F.3d 1158 (9th Cir. 2021), to argue the use of force was unreasonable because the Nissan  
13 was—in their view—“slowly moving” at the time shots were fired. To begin, that is not  
14 the actual test. For instance, “even a slow-moving car not pointed directly at an officer can  
15 pose a threat justifying deadly force.” *Earl v. Campbell*, 859 F. App’x 73, 74 (9th Cir.  
16 2021) (unpublished). But in any event, unlike here, *Villanueva* did not involve the revving  
17 of an engine *or* acceleration. As the Ninth Circuit stated, “[t]aking the facts in the light  
18 most favorable to the plaintiffs, then, the three-point-turn was performed cautiously, the  
19 truck—which was 15 to 20 feet away from the Officers—was not aimed directly at  
20 Sergeant Cleveland and was moving very slowly and *not accelerating* when the Officers  
21 began shooting.” *Id.* at 1171 (emphasis added). The Court distinguished that circumstance  
22 from situations involving “attempted or actual acceleration” of a vehicle before a shooting:  
23 “we have found use of deadly force against a stopped or slow-moving vehicle reasonable  
24

25 <sup>10</sup> See also *Godawa v. Byrd*, 798 F.3d 457 (6th Cir. 2015) (where suspect attempts to flee  
26 in a car, “police officers are justified in using deadly force against a driver who objectively  
27 appears ready to drive into an officer or bystander”); *Bethea*, 447 F. Supp. 3d at 513 (firing  
28 at driver who quickly accelerated in direction of officer in parking lot was reasonable;  
although officer was not directly in vehicle’s path, he was in “close enough proximity  
where one turn of the wheel could have resulted in serious injury”).

1 only when the driver was trying to evade arrest in an aggressive manner involving  
2 attempted or actual acceleration of the vehicle.” *Id.* at 1170 (citing cases, including  
3 *Monzon*). *Villanueva* even framed the issue this way: “The key question, then, is whether  
4 Villanueva accelerated or attempted to accelerate toward the Officers before the Officers  
5 shot at the Silverado and its occupants.” *Id.* That describes this case exactly: it is  
6 undisputed that Estrada revved the engine to a “high-pitched whine,” an unmistakable  
7 proclamation of impending high-speed flight. It is also undisputed that Estrada then  
8 accelerated the Nissan forward. In this type of rapidly evolving situation, “the Constitution  
9 simply does not require police to gamble with their lives in the face of a serious threat of  
10 harm.” *Waterman*, 393 F.3d at 479.

11 The United States also anticipates Plaintiffs will scrutinize the frame-by-frame  
12 details of Estrada’s acceleration and turning, and the frame-by-frame locations of agents.  
13 The Ninth Circuit in *Monzon* rejected that hypertechnical level of analysis. “Plaintiffs here  
14 seem to be claiming that because no police officer was ever in the direct linear path of the  
15 van, no officer was ever ‘in the van’s path.’ While there may not have been an officer in  
16 the direct linear path of the van for the entire 4.5 seconds from when Monzon began  
17 accelerating to when he crashed into Mikowski’s police cruiser, plaintiffs ignore that from  
18 the time when the van started accelerating to when the first shots were fired the van was  
19 turning towards some of the officers, and possibly only seconds from running into them.”  
20 *Id.* at 1159. The Ninth Circuit also rejected the plaintiffs’ “repeated” claims that the “slow”  
21 speed of the van precluded summary judgment. The Court found that it was “obvious” that  
22 Monzon was “accelerating” the van, and “even a van traveling at only 10 mph moves  
23 approximately 15 feet every second, which is significant when a van that has been driven  
24 erratically is moving in close proximity to officers.” *Id.* at 1161; *see Waterman*, 393 F.3d  
25 at 479 (“Any reasonable factfinder considering all of the forecasted evidence in the record  
26 would determine that Waterman was accelerating in Appellants’ general direction and that  
27 Officers Batton and Heisey could have been run over in about one second if Waterman  
28 had turned slightly toward them.”). The same analysis applies here—particularly given

1 the revving of the engine, which loudly signaled Estrada’s dangerous intent to speed away  
2 *again*, no matter the human obstacles in his way.

3 **3. The raw opinions of Plaintiffs’ experts do not create a**  
4 **genuine issue of material fact**

5 Finally, Plaintiffs’ experts have criticized certain aspects of the agents’  
6 decisionmaking in the midst of responding to the chaotic situation caused by Estrada. To  
7 the extent Plaintiffs rely on those opinions, they have have no legal effect on the summary  
8 judgment question. “The fact that an expert disagrees with an officer’s actions does not  
9 render the officer’s actions unreasonable.” *Lopez v. City of Los Angeles*, 196 Cal. App.  
10 4th 675, 692 (2011) (citing *Reynolds v. County of San Diego*, 84 F.3d 1162, 1170 (9th Cir.  
11 1996) (finding expert testimony did not raise triable issue of material fact on excessive  
12 force claim) (overruled on other grounds by *Acri v. Varian Associates, Inc.*, 114 F.3d 999,  
13 1001 (9th Cir. 1997)); *see United States v. Various Slot Machines on Guam*, 658 F.2d 697,  
14 700 (9th Cir.1981) (“in the context of a motion for summary judgment, an expert must  
15 back up his opinion with specific facts”); *Evers v. General Motors Corp.*, 770 F.2d 984,  
16 986 (11th Cir.1985) (“a party may not avoid summary judgment solely on the basis of an  
17 expert’s opinion that fails to provide specific facts from the record to support its  
18 conclusory allegations”). Accordingly, a plaintiff alleging wrongful use of force cannot  
19 “avoi[d] summary judgment by simply producing an expert’s report that an officer’s  
20 conduct leading up to a deadly confrontation was imprudent, inappropriate, or even  
21 reckless.” *Lal*, 746 F.3d at 1118 (citation omitted). Rather, the Court decides, as a matter  
22 of law, whether a reasonable officer could have believed that, under the circumstances,  
23 his conduct was justified. *Id.*<sup>11</sup>

24  
25  
26 <sup>11</sup> For instance, in *Monzon*, the Ninth Circuit affirmed summary judgment in favor of the  
27 officers even though the plaintiffs had supplied an expert who opined that the use of force  
28 was unreasonable. *See Appellees’ Answering Brief, Monzon v. City of Murrieta*, 2019 WL  
4452939, at \*45 (Sept. 9, 2019).



1 Mr. Smith, for instance, states, “by running into the path of a moving vehicle, Agent  
2 Godreau intentionally and unreasonably placed himself in a position in which he had no  
3 alternative to using deadly force.” MSJ\_463. But that factual foundation—that Agent  
4 Godreau *ran* into the path of a moving vehicle—is not supported by the underlying facts.  
5 Moreover, it is inconsistent with Plaintiffs’ own reconstruction of the event. As set forth  
6 in his report, Mr. Plourd concluded that Estrada’s vehicle was *stationary* as agents  
7 surrounded the car.<sup>12</sup> For instance, his report states, “Mr. Estrada now stopped for  
8 approximately 4 seconds as agents are converging in on the area, in their vehicles and on  
9 foot[.]” MSJ\_472. And later, he states that the “agents actually moved into the area where  
10 Mr. Estrada’s vehicle was stopped before he starts to move.” MSJ\_473; *cf.* MSJ\_306  
11 (expert rebuttal report of United States’ expert Jason Fries; “the agents were largely  
12 already in place when Estrada suddenly accelerated forward”). Plaintiffs should not be  
13 permitted to make arguments that contradict their own factual assertions. In any event,  
14 this is irrelevant to whether the shooting was reasonable. “[T]here is no suggestion that  
15 the officers intentionally provoked [Estrada.]” *Lal*, 746 F.3d at 1118. “Instead, it was  
16 [Estrada] who forced the confrontation” by unexpectedly accelerating forward towards the  
17 agents. *Id.* It cannot be said that the agents wrongfully caused Estrada’s death by simply  
18 approaching the Nissan to apprehend Estrada and the suspects inside his car. That is a  
19 basic law enforcement function—one any reasonable person would expect law  
20 enforcement to undertake in light of Estrada’s spiraling conduct here. *See, e.g., United*  
21 *States v. Alvarez*, 899 F.2d 833, 838 (9th Cir. 1990) (approaching suspect vehicle with  
22 drawn weapons is a “reasonable means of neutralizing danger to police and innocent  
23 bystanders”).

24 Mr. Smith also contends the agents should have used lesser force or de-escalation  
25 techniques. He cites giving “verbal commands” to the driver as an example. MSJ\_432.

---

26  
27 <sup>12</sup> And, of course, that is what the undisputed *facts* show: Estrada reversed to a stop, sat  
28 still for several seconds (during which time everyone thought he was done), and then  
unexpectedly revved and sped forward.

1 But it is undisputed that agents gave verbal commands to Estrada to stop while in the  
2 Circle-K parking lot—Plaintiffs admit that. MSJ\_495-96.<sup>13</sup> Otherwise, Mr. Smith opines  
3 the agents should have used “non-lethal options” when Estrada revved and accelerated  
4 forward, such as a canine, pepper spray, or, somehow, a baton. It is hard to imagine how  
5 any of these options could have stopped the threat. *See, e.g.*, MSJ\_363 (DeFoe Rebuttal  
6 Report at 4 (“[T]he idea of deploying a K9 into a moving vehicle is non-sensical and quite  
7 honestly laughable.”)). And in any event, as a legal matter, officers are not required to use  
8 the least intrusive means of responding to an exigent situation. *Scott v. Henrich*, 39 F.3d  
9 912, 915 (9th Cir. 1994); *see Lal*, 746 F.3d at 1117 (rejecting argument that officers should  
10 have used methods to de-escalate when “Lal forced the issue by advancing on the officers”  
11 and threatened them with a rock from seven or eight feet away).

12 Mr. Smith also opines that agents “could have easily stepped out of the vehicle’s  
13 path to avoid danger.”<sup>14</sup> MSJ\_431. That is inconsistent with the facts and the law. For one,  
14 Mr. Smith’s own rebuttal report says the opposite—that Agent Godreau “had no  
15 alternative to using deadly force.” MSJ\_463. Moreover, as Mr. Plourd opines, the Nissan  
16 was traveling 7.9 feet per second, MSJ\_478, the Nissan traveled five to six feet before the  
17 first shot was fired, MSJ\_472, and Agent Godreau was only 8 to 12 feet away from the  
18 Nissan at that moment, MSJ\_473. Accordingly, Agent Godreau would have had less than  
19 two seconds to perceive the car moving, strategize about his next move and physically  
20 take sufficient action to jump out of the way – all in the dark, on an unfamiliar landscape.  
21 This type of second-guessing an officer is not permitted. *See Plakas v. Drinski*, 19 F.3d

---

22  
23 <sup>13</sup> Mr. Smith opines, without any underlying reference to what occurred here, that “issuing  
24 possibly conflicting commands” is problematic. MSJ\_433. But he does not identify any  
25 conflicting commands here. There were none—the agents told Estrada to stop.

26 <sup>14</sup> Mr. Smith bases this opinion, in part, on Agent Baker’s testimony that “he was able to  
27 safely move out of the way of the Nissan at an earlier point in time in the gas station when  
28 it was moving toward him at approximately ‘15 to 20’ mph.” MSJ\_431. Agent Baker’s  
29 feat of jumping out of the way of the Nissan at an earlier time has no bearing on whether  
30 Agent Godreau could have somehow gotten out of the way. *See MSJ\_100* (Agent Baker’s  
31 testimony that he had to “run and jump out of the way of the vehicle”).

1 1143, 1149 (7th Cir. 1994) (“As Plakas moved toward Drinski, was he supposed to think  
2 of an attack dog, of Perras’s CS gas, of how fast he could run backwards? Our answer is,  
3 and has been no, because there is too little time for the officer to do so and too much  
4 opportunity to second-guess that officer.”). Under the totality of the circumstances, a  
5 reasonable officer aware of the danger posed by the moving vehicle, and the need to stop  
6 the threat, could reasonably choose to use deadly force rather than risk trying to escape  
7 and fail. Furthermore, under California and Fourth Amendment law, police officers have  
8 no duty to retreat. *See, e.g., Reed v. Hoy*, 909 F.2d 324, 331 (9th Cir. 1989) (concluding  
9 duty to retreat would “be inconsistent with police officers’ duty to the public”) (overruled  
10 on other grounds by *Virginia v. Moore*, 553 U.S. 164, 175 (2008)); *Tucker v. Las Vegas*  
11 *Metro. Police Dept.*, 470 F. App’x 627, 630 (9th Cir. 2012) (Tallman, J. concurring)  
12 (citing *Reed*, 909 F.2d at 331) (noting “police officers have no duty to retreat when  
13 threatened with physical assault”); *Koussaya v. City of Stockton*, 54 Cal. App. 5th 909,  
14 942 (2020) (“[Officer Webb] was not required to retreat or desist from his efforts to  
15 apprehend them on account of their violent resistance.”).

16 **B. The use of force was also reasonable because of the threat Estrada**  
17 **posed to his passengers, agents, and other travelers on the road**

18 Independently, the use of force was objectively reasonable to stop the significant  
19 threat that Estrada posed to the general public. That threat can “exist when the suspect has  
20 driven in a manner that puts the lives of pedestrians or other motorists at risk, as by leading  
21 officers on a high-speed chase.” *Orn v. City of Tacoma*, 949 F.3d 1167, 1176–77 (9th Cir.  
22 2020) (citing *Mullenix v. Luna*, 577 U.S. 7, 8, 13 (2015) (per curiam) (suspect drove at  
23 over 100 mph and threatened to shoot police officers unless they abandoned the pursuit),  
24 *Plumhoff*, 572 U.S. at 776 (suspect swerved between congested traffic lanes at speeds  
25 exceeding 100 mph), and *Scott v. Harris*, 550 U.S. 372, 380 (2007) (suspect engaged in  
26 “a Hollywood-style car chase of the most frightening sort”)). “In such cases, officers have  
27 an interest in terminating the suspect’s flight because the flight itself poses a threat of  
28 serious physical harm to others.” *Orn*, 949 F.3d at 1177. To warrant the use of deadly



1 force in this context, “a motorist’s prior interactions with police must have demonstrated  
2 that ‘he either was willing to injure an officer that got in the way of escape or was willing  
3 to persist in extremely reckless behavior that threatened the lives of all those around.’” *Id.*  
4 (quoting *Latits v. Phillips*, 878 F.3d 541, 548 (7th Cir. 2017)).

5 That is precisely what Estrada demonstrated during his high-speed flight. He drove  
6 over 80 mph on a rural two-lane highway, at night, brake-checking Agent Godreau, racing  
7 directly towards Agent Gerber’s stopped van, crossing into the wrong lane of traffic to  
8 pass a car, nearly running over Agent Baker, and more. Unsurprisingly, Estrada’s  
9 passengers were scared they might die. MSJ\_185 (Francisco: “Of course I was scared.  
10 Because at the speed that he was driving, I knew that at any time we could be in an accident  
11 and we could die.”); MSJ\_240 (Jaime was “really scared” by Estrada’s driving, believing  
12 he might be seriously hurt or die). Beyond his own passengers, Estrada also posed a  
13 serious risk to others on the roadway and in the gas station parking lot. For instance, off-  
14 duty SDPD Officer Moreno testified that Estrada was driving very fast in the lot, and that  
15 if Moreno “did not get out of the way, then [Moreno] would have been hit.” MSJ\_019.  
16 Finally, if agents did not shoot, it appears Estrada was intent on ramming through the small  
17 wire fence separating the lot from SR-94. Of course, Agent Mathews was in that location,  
18 seconds from being overrun. And it is not difficult to comprehend the other serious risks  
19 of such an action. For instance, as Plaintiff Jaime Madariaga states, “if [Estrada] would  
20 have tried to go across that fence, then probably we would have overturned. I don’t know.”  
21 MSJ\_243. In other words, the risk Estrada posed was high, especially since Estrada  
22 demonstrated an intent to avoid arrest at all costs. *See Tuggle v. City of Tulare*, No. 19-cv-  
23 01525-JLT-SAB, 2023 WL 4273900, at 8 (E.D. Cal. June 29, 2023) (“Even after the car  
24 became stuck, Castro continued his attempt to flee by revving the engine and spinning the  
25 tires. Though he stopped this action ... there is no indication that Castro ever turned the  
26 car’s engine off. Castro’s conduct was highly dangerous and constituted serious risks to  
27 public safety and would have led a reasonable officer to believe that he would not submit  
28 to peaceful arrest.”). Had Estrada not been stopped at the moment he was, it is highly

1 likely he would have seriously injured one of his passengers, another member of the  
2 public, or the agents.

3 **C. All of Plaintiffs’ claims fail because the use of force was reasonable**

4 With reasonableness established, each cause of action alleged—wrongful death,  
5 assault, assault and battery, negligence, and a Bane Act claim—fails as a matter of law.  
6 Under California law, excessive force-type claims, whether wrongful death, assault,  
7 battery, or the like, are analyzed using the same Fourth Amendment reasonableness  
8 standard. *See Est. of Martin v. United States*, No. 13-cv-1386-LAB-BGS, 2015 WL  
9 5568049, at \*13 (S.D. Cal. Sept. 22, 2015); *Edson v. City of Anaheim*, 63 Cal. App. 4th  
10 1269, 1273 (1998) (for claim against officer, “a prima facie battery is not established  
11 unless and until plaintiff proves unreasonable force was used”); *Koussaya*, 54 Cal. App.  
12 5th at 932 (“Although the causes of action asserted against the officer defendants (assault,  
13 battery, IIED, and negligence) have distinct elements, we need not address each cause of  
14 action individually. This is because the underlying basis of the officers’ alleged liability,  
15 whether for intentional tort or negligence, is the assertion that these officers unreasonably  
16 used deadly force in shooting at the Explorer with Koussaya in the vehicle, causing her to  
17 jump out of the Explorer and sustain serious injuries.”). In *Monzon*, for instance, the Ninth  
18 Circuit concluded that all of the plaintiffs’ claims—which included battery, negligence,  
19 and the Bane Act—failed “because Plaintiffs cannot show that the agents used  
20 unreasonable force.” 978 F.3d at 1164-65. That result flows naturally from the maxim that  
21 a “justifiable homicide” by law enforcement is a privileged act for which no civil liability  
22 can be imposed. *See Gilmore*, 230 Cal. App. 3d at 420–22. The same analysis applies here.

23 To be sure, the presence of third parties—the Madariagas—in the Nissan at the time  
24 of the use of force does not change this analysis. That is confirmed in *Koussaya*: “When  
25 Anderson and Webb fired at Martinez in an attempt to neutralize the imminent threat he  
26 posed to the lives of officers and innocent bystanders, they thereby endangered the lives  
27 of Koussaya and Holt-Singh inside the Explorer. That is not disputed. But no reasonable  
28 juror would conclude these actions were outside ‘the range of conduct that is reasonable

1 under the circumstances.” *Koussaya*, 54 Cal. App. 5th at 937; *see also Lopez*, 196 Cal.  
2 App. 4th at 689–691 (no unreasonable deadly force where officers shot and killed the  
3 infant daughter of an armed suspect who was firing at the officers while holding the child).

4 The reasonableness of the use of force, alone, resolves all claims in this case. But  
5 there are additional bases for summary judgment as well. First, while the Madariagas  
6 allege a claim for battery, that requires contact—which they did not suffer. *Garcia v. City*  
7 *of Merced*, 637 F. Supp. 2d 731, 747 (E.D. Cal. 2008). Second, “the Bane Act provides  
8 no derivative liability for persons who were not present and did not witness the violence  
9 or threats[.]”<sup>15</sup> *Dela Torre v. City of Salinas*, No. 09-cv-00626-RMW, 2010 WL 3743762,  
10 at \*6 (N.D. Cal. Sept. 17, 2010); *see also Bay Area Rapid Transit Dist. v. Superior Ct.*, 38  
11 Cal. App. 4th 141, 144 (1995) (explaining that the Bane Act “is simply not a wrongful  
12 death provision” because it only “provides for a personal cause of action for the victim of  
13 a hate crime.”). Accordingly, Plaintiff Olga Tovar—who was not present in the Nissan—  
14 cannot maintain a claim under the Bane Act as a matter of law. Third, the Bane Act  
15 requires Plaintiffs to demonstrate that the agents “intended not only the force, *but its*  
16 *unreasonableness[.]*” *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1045 (9th Cir. 2018)  
17 (emphasis added). There is no evidence that the agents here not only intended the force,  
18 but its unreasonableness as well. *See Est. of Risher v. City of Los Angeles*, Case No. 17-  
19 cv-00995-MWF-KK, 2020 WL 5377306, at \*18 (C.D. Cal. July 29, 2020) (“Plaintiffs  
20 provide no authority in support of the proposition that these acts, even if true, would be  
21 sufficient to demonstrate an intent to use unreasonable force, as distinct from an intent to  
22 use force that turned out to be objectively unreasonable.”). Accordingly, the Bane Act  
23 claim fails as a matter of law.

24 //

25  
26 <sup>15</sup> To succeed on a Bane Act claim, a “plaintiff must show (1) intentional interference or  
27 attempted interference with a state or federal constitutional or legal right, and (2) the  
28 interference or attempted interference was by threats, intimidation or coercion.” *Allen v.*  
*City of Sacramento*, 234 Cal. App. 4th 41, 67 (2015).

V

CONCLUSION

Border Patrol Agents Robert Godreau, Jason Alba, and David Mathews reasonably used deadly force to stop the deadly threat facing them. The Court should grant summary judgment for the United States on all claims.<sup>16</sup>

DATED: September 1, 2023

ANDREW R. HADEN  
Acting United States Attorney

*s/ Colin M. McDonald*  
DAVID B. WALLACE  
ERNEST CORDERO, JR.  
COLIN M. MCDONALD  
Assistant U.S. Attorneys  
Attorney for Defendant

---

<sup>16</sup> The United States recognizes this brief exceeds the 25-page limitation. On August 31, 2023, the parties filed a joint motion to enlarge the limitation to 30 pages for the parties’ principal briefs. ECF No. 44. Based on that joint motion, and the contents of this submission, the United States requests that the Court accept this filing.