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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

<p>RONDA MCGOWAN, Personal Representative for the Estate of Brian Babb, LEE BABB, CONNOR BABB, by and through his Guardian Ad Litem, STEPHANIE WOODCOCK, and KAYLEE BABB,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>WILL STUTESMAN, OFFICER GROSE OFFICER PIESKE Sgt. MCALPINE, CITY OF EUGENE, a municipal subdivision of the State of Oregon, JANE DOE CALL TAKER, John and Jane Does 1-10,</p> <p>Defendants.</p>	<p>Case No. 6:17-cv-00424-TC</p> <p>PLAINTIFFS' RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANTS' FRCP 56 MOTION FOR SUMMARY JUDGMENT</p>
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Table of Contents

INTRODUCTION 3

PLAINTIFFS’ STATEMENT OF UNDISPUTED FACTS AND RESPONSE TO
DEFENDANTS’ STATEMENT OF UNDISPUTED FACTS..... 3

ARGUMENT 16

I. Defendant Stutesman’s Use of Force Was Unreasonable and Clearly Violated the Fourth
Amendment..... 16

 A. The Shooting of Brian Babb Constituted Excessive Force 18

 B. The Defendants Are Not Entitled to Qualified Immunity 20

II. Due Process Claims 22

III. Wrongful Death Claim..... 23

IV. Plaintiffs’ Claim Against Sergeant McAlpine For Supervisory Liability 24

V. Plaintiffs’ Remaining Claims..... 25

CONCLUSION..... 25

Table of Authorities

Cases

<i>A.K.H. ex rel. Landeros v. City of Tustin</i> , 837 F.3d 1005 (9th Cir. 2016).....	18
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)	16
<i>Avina v. United States</i> , 681 F.3d 1127 (9th Cir. 2012).....	16
<i>Booke v. Cty. of Fresno</i> , 98 F. Supp. 3d 1103 (E.D. Cal. 2015).....	24
<i>Bryan v. MacPherson</i> , 630 F.3d 805 (9th Cir. 2010))	18, 19
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548 (1986)	16
<i>Cty. of Sacramento v. Lewis</i> , 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)).....	22
<i>Curnow By and Through Curnow v. Ridgecrest Police</i> , 952 F.2d 321 (9th Cir. 1991).....	22
<i>Deorle v. Rutherford</i> , 272 F.3d 1272 (9th Cir. 2001).....	19
<i>Dubner v. City & Cnty. of San Francisco</i> , 266 F.3d 959 (9th Cir. 2001).....	24
<i>Estate of Lopez by & through Lopez v. Gelhaus</i> , 871 F.3d 998 (9th Cir. 2017).....	16, 21, 22
<i>Ewolski v. City of Brunswick</i> , 287 F.3d 492 (6th Cir. 2002).....	23
<i>Farmer v. Brennan</i> , 511 U.S. 825, 114 S.Ct. 1970, 128 L. Ed. 2d 811 (1994)),.....	23
<i>Franklin v. Foxworth</i> , 31 F.3d 873 (9th Cir.1994).....	19
<i>George v. Morris</i> , 736 F.3d 829 (9th Cir. 2013).....	17, 18, 21, 22
<i>Glenn v. Washington Cnty.</i> , 673 F.3d 864 (9th Cir.2011).....	16, 19

<i>Gonzalez v. City of Anaheim</i> , 747 F.3d 789 (9th Cir. 2014).....	16, 17
<i>Graham v. Connor</i> , 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)	18, 19
<i>Harris v. Roderick</i> , 126 F.3d 1189 (9th Cir. 1997).....	22
<i>Kaur v. City of Lodi</i> , 263 F. Supp. 3d 947 (E.D. Cal. 2017).....	17
<i>Kisela v. Hughes</i> , 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018)	20
<i>Larez v. City of Los Angeles</i> , 946 F.2d 630 (9th Cir. 1991).....	24
<i>Liston v. County of Riverside</i> , 120 F.3d 965 (9th Cir. 1997).....	16
<i>Moreland v. Las Vegas Metro. Police Dep't</i> , 159 F.3d 365 (9th Cir.1998).....	22
<i>Porter v. Osborn</i> , 546 F.3d 1131 (9th Cir.2008).....	22, 23
<i>Reeves v. Sanderson Plumbing Prod., Inc.</i> , 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)	16
<i>Scott v. Henrich</i> , 39 F.3d 912 (9th Cir.1994).....	17, 18
<i>Starr v. Baca</i> , 652 F.3d 1202 (9th Cir. 2011).....	24
<i>Tennessee v. Garner</i> , 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)	18
<i>Watkins v. City of Oakland</i> , 145 F.3d 1087 (9th Cir. 1998).....	24
<i>Wilkinson v. Torres</i> , 610 F.3d 546 (9th Cir. 2010).....	22, 23
Statutes	
ORS 161.239.....	24
ORS 30.020.....	23, 24

Rules

Fed. R. Civ. P. 56(c) 16

Plaintiffs Ronda McGowan, Personal Representative for the Estate of Brian Babb, Lee Babb, Connor Babb, by and through his Guardian Ad Litem, Stephanie Woodcock, and Kaylee Babb¹, through their attorneys, submit the following response in opposition to Defendants' Motion for Summary Judgment. In support, Plaintiffs submit the following legal memorandum, the Declaration of Andrew M. Stroth, and the following Exhibits:

Exhibit #	Description
Plf. Ex. 1	Audio Radio Traffic Transmission
Plf. Ex. 2	Memorandum from Deadly Force Review Board to EPD Chief Kerns (Sept. 8. 2015)
Plf. Ex. 3	Malcolm McAlpine Deposition Transcript
Plf. Ex. 4	Matthew Grose Deposition Transcript
Plf. Ex. 5	Jjm Antonini Deposition Transcript
Plf. Ex. 6	Joseph Kidd Deposition Transcript
Plf. Ex. 7	Oregon State Police Report (Case Supplemental Report)
Plf. Ex. 8	Photograph of rifle on porch outside residence

¹ Ronda McGowan filed this action as the personal representative for the Estate of Brian Babb. She has since resigned and on October 17, 2017 the Circuit Court of the State of Oregon for Lane County appointed as her replacement Stephanie Woodcock and Lee Babb. Also, plaintiff Connor Babb, who was a minor at the time of filing and who appeared through his Guardian Ad Litem Stephanie Woodcock and Kaylee Babb, has reached the age of majority. Counsel for the plaintiffs intends to file a motion to substitute plaintiffs in order to reflect these changes in status.

Plf. Ex. 9	Photograph of Mr. Babb inside residence
Plf. Ex. 10	Photograph of open gun safe
Plf. Ex. 11	David Clark Deposition Transcript
Plf. Ex. 12	Judson Warden Deposition Transcript
Plf. Ex. 13	EPD Use of Force Review Board Report
Plf. Ex. 14	Photograph of Bearcat
Plf. Ex. 15A	ICV Video Bearcat (part 1)
Plf. Ex. 15B	CV Video Bearcat (part 2)
Plf. Ex. 16	Oregon State Police Investigative File of Babb Shooting
Plf. Ex. 17	Will Stutesman Deposition Transcript
Plf. Ex. 18	Audio of Recorded Interview of Officer McAlpine
Plt. Ex. 19	Transcript of Becky Higgins 9-1-1 Call

**PLAINTIFFS' RESPONSE MEMORADUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This case revolves around the crucial moment in time just before Defendant Officer Stutesman fatally shot Brian Babb. Plaintiffs utterly dispute that Brian Babb was pointing a rifle at Officer Stutesman. This dispute is crucial to Plaintiff's claims and comprises the single most important factual issue as to whether Officer Stutesman's use of deadly force was reasonable and necessary. Thus, this highly disputed factual issue is determinative of the ultimate outcome of this case and must be determined by a jury, necessitating the denial of Defendants' motion for summary judgment.

Many of the facts surrounding the events leading up to Officer Stutesman's fatal shooting of Brian Babb are undisputed. However, questions about the reliability and significance of the Defendants' version of events and certain post-shooting evidence will allow a jury to reject Stutesman's claim that Mr. Babb pointed a gun at him justifying Stutesman's fatal shot. Plaintiffs contend that Brian Babb did not pose an imminent threat of serious bodily injury or death which is required to justify Officer Stutesman's use of deadly force. In examining the facts and the reasonable inferences derived from the facts, it is important to bear in mind Officer Stutesman's fatal use of force took the life of the only witness who could fully contradict Defendants' version of the events.

**PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS AND RESPONSE TO
DEFENDANTS' STATEMENT OF UNDISPUTED FACTS**

On March 30, 2015 at 5:52 p.m., Defendant Officer Stutesman shot Brian Babb as he was standing at the threshold of the front door of his home at 2244 West Devos Street. Mr. Babb fell backwards into the residence and landed face-up and dead, as depicted in the image below.



Photograph of Mr. Babb fatally shot inside residence, Plf. Ex. 9.

Earlier in the afternoon, prior to Mr. Babb's death, Eugene police officers responded to Mr. Babb's house because they received a 9-1-1 call from Mr. Babb's therapist, Becky Higgins. (Plf. Ex. 19, Transcript of Becky Higgins 9-1-1 Call.) From the first instance, the Defendants knew they were responding to a mental health crisis situation. "Brian Babb clearly fell under the department's Mental Health Crisis Response. He was under medical treatment and outpatient therapy for Post-Traumatic Stress Disorder. He also suffered from a traumatic brain injury and had a substance abuse problem. His roommate, Jim Antonini, said Babb was an alcoholic and could be non-compliant with taking his medication. At the time of the incident, he was on the phone with his therapist, indicating he had suicidal ideations. He also told her he had a gun to his head and he had previously fired a round inside his house." (Plf. Ex. 2, Memorandum from Deadly Force Review Board to EPD Chief Kerns, September 8, 2015, at COE 463.) Defendant Sergeant McAlpine, the commanding officer of the response team, received information from dispatch that Brian Babb was a suicidal male with a gun to his head who had possibly shot out a window. (Plf. Ex. 3, McAlpine Deposition Transcript, 27:21 to 28:7.) All officers received this

information over dispatch. (Plf. Ex. 3, McAlpine Deposition Transcript, 91:14 to 92:8; see also Defendant McAlpine's Declaration, p. 3.) The officers were also aware that Mr. Babb's therapist was in communication with Mr. Babb. (Plf. Ex. 4, Grose Deposition Transcript, 43:22 to 35:1.) Sergeant McAlpine's concern was that Mr. Babb would harm himself. (Plf. Ex. 3, McAlpine Deposition Transcript, 107:2.) McAlpine's Critical Incident Training (CIT) involved "speaking to folks that are both mentally ill and have had some sort of trauma in their lives, including veterans." (Plf. Ex. 3, McAlpine Deposition Transcript, 81:7 to 83:13.) Yet, McAlpine failed to establish any direct communication with Mr. Babb's therapist, despite his initial plan to do so. (Plf. Ex. 3, McAlpine Deposition Transcript, 46:19-47:23, 48:9-11.) Instead, Officer Grose hailed Mr. Babb with a loudspeaker from the armored Bearcat, escalating the situation and antagonizing Mr. Babb. (Plf. Ex. 3, McAlpine Deposition Transcript, 65:8-11; 70:2-3; Plf. Ex. 5, Antonini Deposition Transcript, 26:1-3.)

Mr. Babb's roommate had never before seen Mr. Babb "that agitated." (Plf. Ex. 5, Antonini Deposition Transcript, 26:12-14.) When Antonini came out of the house, the officers "were asking me questions about where Brian was in the residence, what his demeanor was ... I recall saying that he was upset, he was agitated. And then I kept asking the officer to contact him on the phone so I could speak to him. A few minutes went by — maybe not even minutes, maybe seconds. It seems like a long time. And then I heard a gunshot ..." (Plf. Ex. 5, Antonini Deposition Transcript, 21:21 to 22:10.)

Prior to the shooting, the officers had established a perimeter around Mr. Babb's home, with officers, including Officer Kidd, stationed on adjacent rooftops, and other officers approaching the residence in an armored bearcat. Officer Kidd "had the best view of the front of the house to be able to report anything that would occur." (Plf. Ex. 6, Kidd Deposition Transcript, 91:11-13.) The bearcat is a military tank-like armored vehicle. (Plf. Ex. 3, McAlpine Deposition Transcript, 32:25 to 33:1; Plf. Ex. 14, Photo of Bearcat.) The bearcat was driven by Officer Pieske with Officer Grose seated next to him in the passenger seat. Sergeant McAlpine rode in the back of the bearcat and Officer Stutesman was stationed standing through the bearcat

turret, using the turret cover as a shield, and training his rifle at the front door of Mr. Babb's residence.

The undisputed facts establish that Mr. Babb came to the door multiple times, unarmed, prior to being shot and killed by Officer Stutesman. After Mr. Antonini, Mr. Babb's roommate, exits the home, he tells McAlpine that Mr. Babb was attempting to open his gun safe. The next time Mr. Babb comes to the door, Officer Stutesman shoots and kills Mr. Babb. Stutesman claims Mr. Babb had a rifle and was pointing it at Stutesman. However, the evidence contradicts this statement. Officer Kidd (the only other officer in a position to observe a rifle in Mr. Babb's possession or pointed at anyone prior to Stutesman shooting Mr. Babb) saw no rifle.

When Stutesman shot Mr. Babb, Officer Kidd — again, positioned optimally on an opposite rooftop to observe the front door — radioed that Mr. Babb is “Down at the front door.” (Plf. Ex. 1, Audio Radio Traffic Transmission, COE001032, Time Marker 45:13-45:15.) He does not mention a rifle because he did not see one in Mr. Babb's hand. Kidd reiterates later that he could only observe Mr. Babb in the doorway and did not see a rifle at that time:

I was reporting what I could see, and what I could see was — after he went down, I could see his legs, and I could see that he wasn't moving, and I could not see the rifle at that time.

(Plf. Ex. 6, Kidd Deposition Transcript, 69:14 to 18;71:8-14.)

I don't recall seeing the rifle at the time that he went down and that I was watching him, what I could see of his body to see if he moved. I just don't recall seeing a rifle at that time. I was reporting what I could see on the radio, so that would reflect some of what I could see. I haven't listened to the radio traffic to this incident.

(*Id.*, 75:4-10.)

Kidd's observation of Mr. Babb without any mention of a rifle is reiterated in his statement later that evening during a post-shooting investigation interview with Detective Croll. Kidd did not mention seeing Mr. Babb come out of the front door with a rifle, but did mention that he heard Stutesman yell the word “rifle.” (Plf. Ex. 7, Oregon State Police Report, Case Supplemental Report, at COE 739-740.) At the conclusion of the interview, “Kidd felt that he had relayed all the information he could.” (*Id.* at 740.)

The only statement by Kidd purporting to observe a rifle in Mr. Babb's possession is the one made over the radio *six minutes after* the shooting. Kidd claims to observe "a rifle in his (Mr. Babb's) right hand." (Plf. Ex. 1, Audio Radio Traffic Transmission, COE001032, Time Marker 51:11-51:19.)

Several key events took place between Kidd's initial statement that he saw Mr. Babb with no mention of a rifle and his statement *six minutes later* that Mr. Babb had a rifle in "his right hand:"

- There is confusion over who shot a gun. (Plf. Ex. 1, Audio Radio Traffic Transmission, COE001032, Time Marker 45:46-45:54.)
- Several officers, including Kidd, are communicating over dispatch as well as by yelling to each other at the scene. (Plf. Ex. 6, Kidd Deposition Transcript, 50:5-7.)
- Stutesman clarifies that he was the shooter. (Plf. Ex. 1, Audio Radio Traffic Transmission, COE001032, Time Marker 45:46-45:54.)
- Stutesman claims that Mr. Babb had a rifle in his hand and tells Kidd. Dispatch records contain this exchange: Officer Kidd: "Stutesman, could you see what he had in his hands. Stutesman: "It was a long gun pointed at me." (Plf. Ex. 1, Audio Radio Traffic Transmission, COE001032, Time Marker 45:46-45:54; Def. Ex. 103.)
- Post shooting, and prior to any photo or video being taken of the scene, including the existence of any rifle, officers, in particular Officer Warden, had access to Mr. Babb's residence, to Mr. Babb's gun safe which was open, to Mr. Babb who was lying dead on his back inside the house, and to the front porch of the residence, without being photographed or video recorded. ([Officer Warden's position at rear of the residence] Plf. Ex. 1, Radio Traffic Transmission, COE001032, Time Marker 46:37-46:50; Plf. Ex. 11, Clark Deposition Transcript, 54:9-25; 71:3-4; Plf. Ex. 12, Warden Deposition Transcript, 23:23-25; 34:1-6; Plf. Ex. 10, Picture of open gun safe, COE 000898.)

- Officer Warden says that he went over the fence into Mr. Babb's backyard in order to make his way to the front of the house because Officer Stutesman had specifically requested Warden's presence. (Plf. Ex. 12, Warden Deposition Transcript, 34:1-6, 51:6-7.) There was a pathway to the front of the residence through a neighboring yard,² which would *not* have put Warden in Mr. Babb's backyard or exposed to potential fire from someone still inside the "uncleared" residence; however, Officer Warden chose the path with direct access to Mr. Babb's residence. (Plf. Ex. 12, Warden Deposition Transcript, 34:1-6, 51:6-7.)

All physical evidence of the scene (including photos or video) is collected after the bearcat drove toward the residence and breached the fence -- just over six minutes after the shooting, when Sergeant McAlpine says, "We're moving out." (Plf. Ex. 1 Audio Radio Traffic Transmission, Time Marker 51:22-51:24.) Furthermore, the photo included below is taken hours later, depicting a long rifle, not in the right hand of Mr. Babb as dispatched by Officer Kidd, but lying on the front porch of the residence.

² In his deposition, Warden initially describes this safe pathway as the one he took. (Plf. Ex. 12, Warden Deposition Transcript, 45:18 to 48:4). Then under questioning he admits finally: "You know, actually, thinking about this here, there is a chance that I could have ended up in the backyard, because originally I might have thought about helping clear the house." (Id. 58:19-22)



Photograph of rifle on front porch of residence. Plf. Ex. 10.

What explains the discrepancy between Officer Kidd's announcement of a rifle in the right hand and a rifle on the front porch? A jury could infer that Officer Kidd's announcement was a signal to the other officers. Kidd's dispatch occurs after the six-minute window during which Officer Warden had access and opportunity to manipulate the scene of the shooting.

Officer Kidd's statements and the surrounding events support the inference that he did not observe a gun in Mr. Babb's possession and that Mr. Babb did not possess a gun or point a gun at Officer Stutesman. Officer Kidd only claimed to have seen a rifle based on Officer Stutesman's self-serving statement that Mr. Babb had a rifle and Kidd's dispatch also served as a message to the other officers (including Officer Warden) to place a "long rifle" on the scene. Officer Kidd has not stood by the dispatch announcement that Mr. Babb had a rifle in his right hand -- he did not repeat it in his post-incident interview (Plf. Ex. 7, Oregon State Police Report, Case Supplemental Report, at COE 000740); and he did not repeat it in the deposition he gave in this case (Plf. Ex. 6, Kidd Deposition Transcript, 50:5-7).

Post-shooting, Officer Pieske claims to have seen Mr. Babb pointing a rifle at the

officers. Again, Officer Pieske only makes this statement *after* Officer Stutesman claimed that Mr. Babb was armed in order to justify his shooting of Mr. Babb. Officer Pieske’s statement is false, as demonstrated by the evidence. Officer Pieske could not have seen what he claimed he saw. Officer Grose, seated next to Officer Pieske, could not see more than top of Mr. Babb's head due to the 6-foot tall fence blocking the view from their position in the bearcat:

Q. What were you doing when Officer Stutesman fired that shot?

A. I was sitting in the passenger -- front passenger of the BearCat. I was attempting to call Mr.Babb back.

Q. Were you looking towards the house?

A. Yes.

Q. Could you see Mr. Babb come to the door? It has been reported he came at least twice.

A. Yes, I saw him—I saw the door open and I saw the top of his head, yes.

(Plf. Ex. 4, Grose Deposition Transcript, 82:6-16. *See also*, Def. Ex. 106, ICV Video from Bearcat; Plf. Ex. 13, EPD Use of Force Review Board Report, COE 000104.)

The bearcat was equipped with a camera fixed in the middle of the windshield and “up high,” which is higher than the driver’s position would be and which was positioned *above* Officer Pieske’s line of vision when he was in the front seat of the bearcat. (Plf. Ex. 18, Recorded Interview of Malcom McAlpine, Time Marker 18:30 – 19:49; Plf. Ex. 14, Photograph of Bearcat interior, camera and lights.) Officer McAlpine observed that “... from my perspective I didn’t think anybody could see anything from the front seat, because there was that cedar fence, that’s why we put Will [Stutesman] up there [in the turret].” (Plf. Ex. 18, Recorded Interview of Malcom McAlpine, Time Marker 18:30 – 19:00) The bearcat camera footage shows that the view of the doorway was blocked by the fence. Furthermore, Mr. Antonini, who was at the bearcat and had the same plane of view as Officer Pieske, could not see the doorway due to the fence and Mr. Babb’s truck. Mr. Antonini describes the lack of view from the bearcat in the following answers.

Q. Could you see the front door?

A. No, ma'am, not over Brian's truck, I could not.

Q. So this is kind of a really critical Let's walk through it. ... You are sitting there sideways and Stutesman is standing, what, right behind you?

A. No. He is standing right here in my – legs are like right here.

Q. Okay. And you can see the two officers in front seat?

A. Correct.

Q. Were they looking at you?

A. No, ma'am.

Q. Where were they looking?

A. To the house. To the residence.

Q. Did they say anything?

A. I just remember them being really relaxed like -- I don't think they could see -- here I am speculating, but I don't think they could see the residence, because I could – I was on their same plane of view, and I believe they were looking at the Ford pickup like I was.

(Plf. Ex. 5, Antonini Deposition Transcript, 51:7 to 52:4.)

The physical evidence contradicts Officer Stutesman's statement that Mr. Babb had a gun in his hand or was pointing it at the officers. There are no photos of a gun in Mr. Babb's possession. There are no videos of a gun in Mr. Babb's possession. The only photo of a gun near Mr. Babb is one depicting a gun lying on the front stoop while Mr. Babb's fallen body lies completely back and inside the entryway of the home. (See Plf. Ex. 10, above)

Video footage captured by the bearcat does not show a gun in Mr. Babb's possession. The bearcat video footage captures multiple officers' entry in to the home and inspection of Mr. Babb and the scene – at no point does it show any officer removing a gun from Mr. Babb's possession. To the extent the bearcat video footage appears to show a shadow that may or may not be a rifle on the porch, the footage begins when the bearcat first breaches the fence, which is at least six minutes *after* the shooting, after officers, including Officer Warden, had access to

inside the residence, unseen and from the rear of the residence.

Immediately after Officer Stutesman shot Mr. Babb claiming that Mr. Babb had a rifle and before the bearcat breaches the fence about six minutes later, other Eugene police officers had access to the Mr. Babb's fallen body and the residence. Specifically, Officer Warden was stationed at the rear of the home. (Plf. Ex. 1, Radio Traffic Transmission, COE001032, Time Marker 46:37 to 46:50)

Officer Warden climbed over the backyard fence with the help of Officer Clark, who had been stationed with him at the rear of the residence. (Plf. Ex. 11, Clark Deposition Transcript, 54:9-25; 71:3-4; Plf. Ex. 12, Warden Deposition Transcript, 23:23-25; 34:1-6; 58:19-22.) Officer Warden had been "informed of how the situation was evolving" via radio. (*Id.*, 41:16-18.) According to Officer Clark, Officer Warden approached the back of Mr. Babb's house after the incident had stopped:

Q. Did you ever see any officer approach the back of Mr. Babb's house at anytime?

A. Officer Warden, after the incident had stopped.

Q. What did he -- what did you see Warden do?

A. I helped him over a back fence.

Q. And where did he go?

A. Somewhere in the yard. I did not follow him.

Q. Did you see him go inside the house?

A. I did not see him. I just helped him over the fence.

Q. Okay. And that was after the shot?

A. Yes.

(Plf. Ex. 11, Clark Deposition Transcript, 54:9 to 55:1.) Officer Clark did not follow Officer Warden over the fence into the backyard and did not know where he went after climbing over the fence. (*Id.*)

There are no pictures of the scene prior to Warden having access to the interior of the

residence from the rear, to the open gun safe, and to the shooting scene. At least six minutes go by before any video footage, taken by the bearcat, begins to document the area where Mr. Babb was shot. (Plf. Ex. 15A, ICV Video Bearcat, part 1 at Time Stamp 6:01 PM.) Photos taken of the fallen Mr. Babb with a rifle nearby on the porch are taken about two (2) hours later. (Plf. Ex. 15B, ICV Video Bearcat, part 2 at Time Stamp 8:06 PM.)

The Babb shooting investigation conducted by the Oregon State Police obtained and contained no explanation for the location of the rifle as shown in the photo (Plf. Ex. 10) taken over two hours after the shooting. (Plf. Ex. 16, Oregon State Police Investigative file Babb Shooting, COE 000583 – COE 000760.) Nor did the OSP investigation reconcile the location of the rifle on the front porch with Kidd’s statement that Mr. Babb was down with a rifle in his right hand, or with Officer Stutesman’s claim that Mr. Babb pointed a rifle at him. The investigation contains no record of fingerprinting or DNA testing of the rifle to determine who might have handled it — a police officer, Mr. Babb, or both. (*Id.*; see also, Plf. Ex. 2, Memorandum from Deadly Force Review Board to EPD Chief Kerns, COE 000462 - COE 000463.)

Prior to Officer Stutesman shooting Mr. Babb, after the roommate Mr. Antonini had exited the residence, Sergeant McAlpine had determined that they should pull back from their position, and at no time prior to the shooting did he consider a SWAT team deployment necessary. (Plf. Ex. 3, McAlpine Deposition Transcript, 63:2-12, 35:5 to 37:1.) No other officer, including Officer Kidd, who had the best vantage point to observe the doorway and Mr. Babb, deemed it necessary to shoot Mr. Babb. Officer Stutesman was shielded by the turret door and was also able to lower into the bearcat at any time. There was nothing preventing the officers from pulling back and using less intrusive means to get Mr. Babb to exit his residence. Nevertheless, Officer McAlpine did not command Officer Stutesman to lower himself or tell any officers to pull back. (See generally Plf. Ex. 3, McAlpine Deposition Transcript.)

In addition to the above recitation of facts that demonstrate material disputes with Defendants’ version of the events, the Plaintiffs specifically refute the following factual premises presented by Defendants in their memorandum:

- The allegation that the Bearcat video (Def Ex. 106) and DeWitt's in-car video and body microphone (Def. Ex. 108) depict what Officer Stutesman heard and saw. (Def. Memo., p. 10).
 - **Response:** At no time does the Bearcat video show Mr. Babb at the front door of his house with or without a rifle pointed at anything or anyone. The only audio evidence of Mr. Babb pointing a weapon at Officer Stutesman is Officer Stutesman's self-serving statement exclaiming "Rifle." Therefore, Defendants' Exhibit 106 and Defendants' Exhibit 108 does not provide evidence of what Officer Stutesman claims to have heard and seen. Plaintiff disputes that Mr. Babb possessed a rifle and that Mr. Babb pointed a rifle at Officer Stutesman.
- The factual assertion, based on Officer Stutesman's declaration that, because the roommate came out with his hands in the air, with nothing in his hands, and he was safely talked back to the Bearcat, if Mr. Babb had come out the front door with his hands up and empty, Mr. Babb would have been safely directed to the back of the Bearcat. (Decl. Stutesman at 10). (Def. Memo., p. 12).
 - **Response:** This is speculation on the part of Officer Stutesman and is not supported by the evidence. Plaintiff contends (as alleged above) that Mr. Babb came to the door with nothing in his hands and/or without a rifle pointed at Mr. Babb, and Officer Stutesman shot him anyway.
- The description of Officer Stutesman's alleged observations of the door opening and his observations of Mr. Babb with a rifle raised in the firing position, pointed right at Officer Stutesman, based on Officer Stutesman's declaration. (Def. Memo., p. 13-14).
 - **Response:** At time marker 15:37 of the bearcat video, it shows the front door opening. It does not show Mr. Babb, nor does it show a rifle pointing towards the Bearcat. That the video shows the door opening, does not

support the Officer Stutesman implied assertion that the video also shows “Babb standing in the doorway of the front door with a rifle already raised.” Furthermore, Officer Stutesman does not recall seeing the door open, so the video does not corroborate Officer Stutesman’s statement in that regard either. (Plf. Ex. 17, Officer Stutesman Deposition Transcript, 59:11) Furthermore, Officer Kidd, who was in the best vantage point does not see that Mr. Babb had a rifle in his hands, (Plf. Ex. 6, Kidd Deposition Transcript, 69:14 to 18, 71:8-14, 75:4-10), and only gets this information from Stutesman who needs to justify his shooting of Mr. Babb. (Plf. Ex. 1, Audio Radio Traffic Transmission, COE001032, Time Marker 45:46-45:54; Def. Ex. 103);

- The allegation, based on Officer Stutesman’s declaration, that the Bearcat video (Def. Ex. 106) depicts a rifle, at elapsed time 21:40, or that any object depicted is a rifle that Mr. Babb pointed at Officer Stutesman. (Def. Memo., p. 15).
 - **Response:** No rifle is visible in any frame of the bearcat video; furthermore, the video provides no evidence that Mr. Babb had a rifle in his hands or that he pointed it at Officer Stutesman.
- The allegation, based on Officer Stutesman’s declaration, that the photographs (Def. Ex. 110 and 111) show the rifle that Mr. Babb possessed and pointed at Officer Stutesman. (Def. Memo., p. 15).
 - **Response:** These photos, taken TIME PERIOD later, provide no evidence that Mr. Babb had a rifle in his hands or that he pointed it at Officer Stutesman, as alleged by Officer Stutesman. Lack of evidence and evidence to the contrary, as described above in Plaintiffs’ recitation of the facts, contradict Officer Stutesman’s allegations that Mr. Babb had a rifle in his hand or pointed at Officer Stutesman.

ARGUMENT

Summary judgment is appropriate in those situations where there are no genuine issues of material fact and the moving party is entitled to “judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986). Summary judgment should not be granted if the dispute about a material fact is “genuine,” that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The court must view the evidence in a light most favorable to the non-moving party; however, the court may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000). “[The Ninth Circuit has] held that ‘summary judgment should be granted sparingly in excessive force cases.’” *Estate of Lopez by & through Lopez v. Gelhaus*, 871 F.3d 998, 1006 (9th Cir. 2017) (quoting *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795 (9th Cir. 2014) (en banc)). “[T]he reasonableness of force used is ordinarily a question of fact for the jury.” *Liston v. County of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir. 1997). “Because the excessive force inquiry nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth Circuit has] held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.” *Avina v. United States*, 681 F.3d 1127, 1130 (9th Cir. 2012) (quoting *Glenn v. Washington Cnty.*, 673 F.3d 864, 871 (9th Cir. 2011)).

I. Defendant Stutesman’s Use of Force Was Unreasonable and Clearly Violated the Fourth Amendment

Defendants, as the party seeking summary judgment, have the burden of showing that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325 (1986). In deadly shooting cases in which the only witnesses are the officers involved in the shooting, the court should evaluate the facts and interpretation of those facts with caution. “In such a circumstance, we must carefully examine the evidence in the record to determine whether the officers’ testimony is internally consistent and consistent with other known facts.” *Gonzalez v. City of Anaheim*, 747 F.3d 789, 791 (9th Cir. 2014). In *Gonzalez*, the Ninth Circuit found “that

a significant inconsistency in the officers' testimony was sufficient to present a genuine dispute of material fact." *Id.* "In such cases, we must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify." *Id.* at 795 (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994) (internal quotation marks omitted). "Accordingly, we carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, ... to determine whether the officer's story is internally consistent and consistent with other known facts." *Id.* (quoting *Henrich*, 39 F.3d at 915) (internal quotation marks omitted). "We must also examine circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Id.* (quoting *Henrich*, 39 F.3d at 915) (internal quotation marks omitted).

In this case, Brian Babb was the only witness who could contradict the Defendants' and witness officers' claim that Mr. Babb pointed a gun at Officer Stutesman before Officer Stutesman fatally shot Mr. Babb. Plaintiffs challenge the credibility of the officers' allegation that Mr. Babb pointed a gun at Officer Stutesman based on inconsistencies in the officers' testimony and other evidence that undermines this self-serving testimony; therefore, a trial is necessary to resolve questions about the credibility of the officers' testimony, as well as the other material factual disputes identified. *See Kaur v. City of Lodi*, 263 F. Supp. 3d 947, 963 (E.D. Cal. 2017) ("Contrary to the Officer Defendants' assertions, whether [the decedent] was charging them, brandishing a knife, and threatening to kill them when they shot him to death is a disputed question of material fact that must be resolved by a jury. As discussed below, [other evidence] calls into question the Officer Defendants' accounts of these key moments."). In the context of a deadly shooting, Plaintiffs' version of events can rely on inferences from the physical evidence and inconsistencies in the officers' account. *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013) ("In cases where the best (and usually only) witness who could offer direct testimony for the plaintiff about what happened before a shooting has died, our precedent permits the decedent's version of events to be constructed circumstantially from competent expert and physical evidence, as well as from inconsistencies in the testimony of law enforcement.")

A. The Shooting of Brian Babb Constituted Excessive Force

When evaluating a Fourth Amendment claim of excessive force, courts ask “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them,” an inquiry that “requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.” *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L. Ed. 2d 443 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L. Ed. 2d 1 (1985)).

The strength of the government’s interest in the force used is evaluated by examining three primary factors: (1) “the severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) “whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 ((citing *Garner*, 471 U.S. at 8–9, 105 S.Ct. 1694). The “most important factor under *Graham* is [the second one, i.e.] whether the suspect posed an *immediate* threat to the safety of officers or third parties.” *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010)) (emphasis added).

Deadly force is the most severe intrusion on an individual’s Fourth Amendment rights; thus the governmental interests must be of the utmost weight to justify the intrusion under the balancing inquiry. *See Garner*, 471 U.S. 1, 9 105 S.Ct. 1694 (“The intrusiveness of a seizure by means of deadly force is unmatched.”); *A.K.H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1011 (9th Cir. 2016) (quoting *Garner*, 471 U.S. at 9) (“The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a ‘fundamental interest in his own life’ and because such force ‘frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.’”).

“An officer’s use of deadly force is reasonable only if ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.’” *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (quoting *Garner*, 471 U.S. at 3, 105 S.Ct. 1694.) “A simple statement by an officer that he fears for his safety or the safety others

is not enough; there must be objective factors to justify such a concern.” *Bryan*, 630 F.3d at 826 (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001)).

Furthermore, the factors identified in *Graham* are not exclusive. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010) Courts examine the totality of the circumstances and consider “whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.” *Id.* (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir.1994). “Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed.” *Glenn v. Washington Cty.*, 673 F.3d 864, 872 (9th Cir. 2011) (citing to, by example, *Bryan*, 630 F.3d at 831; *Deorle*, 272 F.3d at 1282–83).

In this case, there is evidence that undermines Defendants’ allegation that Mr. Babb had a rifle pointed at Officer Stutesman and there is evidence that Mr. Babb was unarmed. Officer Kidd, the officer with the best vantage point of Mr. Babb at the moment he came out of the house and was shot by Officer Stutesman has given multiple statements that he did not observe Mr. Babb with a rifle. Officer Kidd’s only statement that Mr. Babb had a rifle in his hand comes six minutes after the shooting and after getting this information from the shooter, Officer Stutesman. Furthermore, Officer Kidd clarified in his deposition that he did not see a rifle near Mr. Babb until he physically approached the scene after the other officers had entered the residence and inspected Mr. Babb and the area. He also does not claim to have seen a rifle in Mr. Babb’s possession when he was interviewed by a detective later on the night of the incident.

The physical evidence, in the form of scene photographs and video footage from the bearcat, does not depict a rifle in Mr. Babb’s possession. The only clear documentation of a rifle near Mr. Babb is in a photograph taken hours after the shooting and after the officers have had access to the shooting scene. The bearcat video also contradicts Officer Pieske’s post-shooting statement intended to corroborate Officer Stutesman’s, i.e. that Officer Pieske could see Mr. Babb with a rifle prior to Officer Stutesman’s fatal shot. The fence clearly blocks Officer

Pieske's view of the doorway in which Mr. Babb was shot. Officer Grose, seated right next to Officer Pieske, testified that he could not see Mr. Babb in the doorway. No forensic testing of the rifle was done. This leaves open the possibility that the rifle has fingerprints of individuals that may have manipulated the rifle at the scene of the shooting. This factual dispute regarding whether Mr. Babb possessed and pointed a rifle is clearly material as it is the justification for Officer Stutesman's deadly shooting of Mr. Babb and relates to the most important factor identified by the Supreme Court regarding the use of force, i.e. whether Mr. Babb posed an immediate deadly threat to the officers.

The jury could also consider whether less intrusive means were available to the officers, such as Officer Stutesman taking cover in the bearcat. Sergeant McAlpine was prepared to pull back from their position just prior to the shooting. The officers also had available to them but failed to utilize Mr. Babb's therapist's line of communication with Mr. Babb to safely resolve the situation. The jury could also consider this and the other information the officers' possessed regarding Mr. Babb's mental health status in evaluating the reasonableness of Officer Stutesman's force. From the beginning they knew Mr. Babb was suicidal. They also learned from Mr. Antonini (the roommate) prior to the shooting that Mr. Babb suffered from PTSD, a condition that was exacerbated by the officers' military-style tactics and loud speaker hailing.

B. The Defendants Are Not Entitled to Qualified Immunity

Defendants argue that the most analogous case is *Kisela v. Hughes*, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018) and that *Kisela* supports a finding the Officer Stutesman is entitled to qualified immunity in this case. In *Kisela*, the defendant officer shot and killed a woman who was wielding a knife near her roommate in a fenced in area that the officers could not immediately access. This argument rests on the assumption that Mr. Babb had a rifle (or weapon of any kind) in his hand and was pointing it at Officer Stutesman (or any other person), a factual premise that Defendants contend to be true and which Plaintiffs dispute. Rather, Plaintiffs contend that Officer Stutesman shot Mr. Babb even though Mr. Babb did not have a rifle nor did he point one at Officer Stutesman or any other person. Thus, the case is more analogous to

George v. Morris, 736 F.3d 829 (9th Cir. 2013) in which the Ninth Circuit held that a jury could find that the defendant officers used excessive force and thus the defendants were not entitled to qualified immunity.

In *George*, the officers, beckoned by a 911 call from the decedent's wife (Carol George) came upon the scene of a terminally ill man (the decedent, Donald George) who they were informed possessed a gun. *Id.* at 832. Upon arrival, Carol met the officers at the door warning them to be quiet and not scare her husband. *Id.* After arriving, the officers observed Donald come out onto his patio, armed with a pistol that he held in his left hand while also using a walker. *Id.* One of the officers shouted at the man to show his hands. *Id.* Within 12 seconds of dispatch reporting that the man had a gun, the log records shots fired; the shots were fatal. *Id.* at 833. The plaintiff presented evidence disputing that Donald manipulated the gun or pointed it directly at the officers. *Id.* The Ninth Circuit in *George*, in finding that this dispute was material to the most important second *Graham* factor, i.e. the threat of immediate death or serious injury that would justify deadly force, cited three Ninth Circuit cases and one Supreme Court case for the premise that the possession of a deadly weapon alone does not justify an officers' use of deadly force. *Id.* at 838.

The similarities between *George* and the shooting of Mr. Babb are numerous. According to Plaintiffs' version of facts, Mr. Babb did not have a rifle in his hand and thus Officer Stutesman's use of force was unjustified. Even if the officers had heard from the roommate that Mr. Babb was going for his guns, that information was not enough to justify shooting Mr. Babb. Moreover, even if a jury should find that Mr. Babb possessed a rifle, the jury could find that Mr. Babb did not point it directly at Officer Stutesman or another officer. In such a scenario, Officer Stutesman's use of deadly force was unreasonable or could be found to be unreasonable under clearly established law. The *George* case is directly on point and defeats qualified immunity.

Likewise, in *Estate of Lopez by & through Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017), the Ninth Circuit upheld that the district court's finding that disputed facts undermined the defendants' ability to establish that the decedent actually threatened the officers with the rifle

that he was holding or pointed the weapon at the officers. *Id.* at 1008. Although this case was decided after Officer Stutesman’s fatal shooting of Mr. Babb, the Ninth Circuit in *Lopez* relied on precedent pre-dating the incident in this case, finding that the right to be free from deadly force in similar contexts was clearly established. The Court repeatedly cited *George* as well as *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) (“Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed.”), and *Curnow By and Through Curnow v. Ridgecrest Police*, 952 F.2d 321, 324-25 (9th Cir. 1991) (rejecting summary judgment where the suspect had a gun, but where the suspect was not pointing it at the officers, and was not directly facing the officer who opened fire).

II. Due Process Claims

Plaintiffs Lee Babb, Brian’s father, and Connor and Kaylee Babb, Brian’s children, bring due process claims pursuant to the Fourteenth Amendment because Officer Stutesman’s fatal shooting of Mr. Babb deprived Plaintiffs of their familial relationship with their son and father. Depending on how much time the defendants have to consider their actions, this claim evaluates the officers’ conduct by different standards. The Ninth Circuit treats the “shocks the conscience” test as one involving a spectrum between a “deliberate indifference” standard and a “purpose to harm” standard. *See Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir.2008) (citing *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 836, 118 S. Ct. 1708, 1712, 140 L. Ed. 2d 1043 (1998)). “[T]he critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct.” *Moreland v. Las Vegas Metro. Police Dep’t*, 159 F.3d 365, 373 (9th Cir.1998) (citations omitted); *see also Lewis*, 523 U.S. at 850 (noting that “[d]eliberate indifference that shocks in one environment may not be so patently egregious in another”). “Where actual deliberation is practical, then an officer’s ‘deliberate indifference’ may suffice to shock the conscience.” *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010) (citing *Porter*, 546 F.3d at 1137). “On the other hand, where a law enforcement officer makes a snap judgment because of

an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.” *Id.* (citing *Porter*, 546 F.3d at 1137).

Regardless of the standard, Defendants’ argument rests on the faulty factual premise that Officer Stutesman shot Mr. Babb while Mr. Babb was pointing a rifle at Officer Stutesman. Plaintiffs have demonstrated in the above sections that this factual premise is utterly disputed and contradicted by substantial evidence. If a jury should find that Officer Stutesman shot an unarmed Mr. Babb and then lied to justify the shooting, they could also conclude that Officer Stutesman conduct shocks the conscious under either standard. According to the evidence taken in the light most favorable to Plaintiffs, the situation was deescalating as the roommate was out of the house and Sergeant McAlpine was ready to pull back. *See, e.g., Ewolski v. City of Brunswick*, 287 F.3d 492, 511 (6th Cir. 2002) (applying “deliberate indifference” standard of review to a police stand-off, even though “police officers conducting the standoff undoubtedly faced competing obligations and intense pressures in making their decisions”). Officer Stutesman’s unjustified shooting of Mr. Babb at that moment, according to the facts alleged by Plaintiffs, would allow a jury to find that Officer Stutesman “‘consciously disregard[ed]’ a substantial risk of serious harm” to Mr. Babb (*see Farmer v. Brennan*, 511 U.S. 825, 839, 114 S.Ct. 1970, 128 L. Ed. 2d 811 (1994)), or acted with “a purpose to harm unrelated to legitimate law enforcement objectives” (*see Porter v. Osborn*, 546 F.3d 1131, 1137–40 (9th Cir. 2008)). As argued above, clearly established law prohibits the deadly shooting of unarmed subjects defeating a qualified immunity defense for Officer Stutesman. Thus, Plaintiffs’ due process claims survive summary judgment.

III. Wrongful Death Claim

Oregon statute 30.020 provides that the decedent’s representative may bring an action for the benefit of the next of kin when the decedent’s death is caused by the wrongful act of another. ORS 30.020. Accordingly, the wrongful death claim brought by the Plaintiffs is like any personal injury claim; however, in addition to compensation for the injury to the decedent, a wrongful

death claim also provides for compensation for the loss of society, companionship, and pecuniary losses to the next of kin as a result of the person's death. ORS 30.020(2).

Under Oregon law, the standard for authorized deadly force by a police officer aligns with the standard under the Fourth Amendment as articulated in *Garner*. According to the Oregon statute, a peace officer is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person. "A peace officer may use deadly physical force only when the peace officer reasonably believes that: ...the use of deadly physical force is necessary to defend the peace officer or another person from the use or threatened imminent use of deadly physical force; or...[t]he officer's life or personal safety is endangered in the particular circumstances involved." ORS 161.239. Therefore, Plaintiffs' state law claims survive summary judgment based on the same analysis of the facts regarding whether Brian Babb had a rifle pointed at Officer Stutesman and whether it was reasonable to believe that deadly force was necessary.

IV. Plaintiffs' Claim Against Sergeant McAlpine For Supervisory Liability

A sufficient causal connection between a supervisor's conduct and a constitutional violation can be shown by: (1) the supervisor sets in motion a series of acts by others, or knowingly refuses to terminate a series of acts by others, that the supervisor knew or reasonably should know will cause others to inflict a constitutional injury; (2) the supervisor's own culpable action or inaction in the training, supervision, or control of his subordinates; (3) the supervisor's acquiescence in or ratification/condoning of the constitutional deprivation; or (4) conduct by the supervisor that showed a reckless or callous indifference to the rights of others. *Booke v. Cty. of Fresno*, 98 F. Supp. 3d 1103, 1129 (E.D. Cal. 2015), citing *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011); *Dubner v. City & Cnty. of San Francisco*, 266 F.3d 959, 968–969 (9th Cir. 2001); *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998); *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).

Sergeant McAlpine knew from the beginning of the call to Mr. Babb's home that he was

encountering a suicidal subject. Sergeant McAlpine had Crisis Intervention Training, including dealing with veterans with PTSD. McAlpine knew that Mr. Babb's therapist was in contact with Mr. Babb and initially McAlpine intended to speak with her. McAlpine did not consider the situation to be one necessitating a SWAT response.

Despite this information and training, McAlpine did not contact Mr. Babb's therapist or use her open line of communication to resolve the situation. He did not give any specific instructions to the officers under his command related to CIT tactics and dealing with a potentially emotionally disturbed person. He developed and oversaw the plan of approach to Mr. Babb's residence utilizing an armored, tank-like vehicle, and officers positioned in sniper positions on neighboring rooftops. He also supervised Officer Grose as he hailed Mr. Babb, further agitating him. Furthermore, after getting Mr. Antonini out of the house and determining the officers should pull back, he did not communicate that decision to the rest of the officers, and did not have Officer Stutesman come down from his position in the turret with his rifle trained on Mr. Babb's doorway.

From this evidence, a jury could find that McAlpine set in motion a series of acts by officers under his control, or knowingly refused to terminate a series of acts by the officers under his supervision that culminated in Officer Stutesman's fatal, excessive use of deadly force against Mr. Babb. A jury could find that McAlpine's lack of proper supervision caused the situation in which Officer Stutesman shot and killed Mr. Babb, and that McAlpine recklessly failed to prevent Officer Stutesman from firing his gun at the unarmed Mr. Babb.

V. Plaintiffs' Remaining Claims

Plaintiffs do not oppose the Defendants' motion for summary judgment on their claims against Defendants Pieske and Grose or on their *Monell* claim.

CONCLUSION

For all of the above reasons, this Court should deny Defendants' motion for summary judgment as to Defendant Stutesman on Plaintiffs' Fourth Amendment excessive force claim and Fourteenth Amendment familial association claims, and as to Defendant McAlpine based on

supervisory liability on those same claims. This Court should also deny the motion as to the wrongful death claim against Defendants Stutesman and the City of Eugene.

Dated this 13th day of November, 2018.

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CERTIFICATE OF SERVICE

I certify that on November 13, 2018 the foregoing PLAINTIFFS' RESPONSE MEMORADUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was filed electronically with the Court. Notice of this filing will be accomplished pursuant to ECF as to Filing Users and complies with Local Rules as to any party who is not a Filing User or represented by a Filing User. Parties may access this filing through the Court's system.

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